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HIGH COURT

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by

BUTTERWORTHS

WELLINGTON

R v McDonald

Court of Appeal Wellington
8, 9 October 1980
Richmond P, Woodhouse and Quilliam JJ

Criminal law — Murder — Evidence — Offers of immunity — Accomplices gave evidence for the Crown after they had been granted immunity from prosecution — Whether Solicitor-General's undertaking was ultra vires — Whether evidence that immunity had been granted was properly before the jury — Whether police offer of immunity was an abuse of the procedure of the High Court.

McDonald was charged with murder. Two of his friends gave evidence at his trial that McDonald had fired the rifle which discharged the fatal shot. Both men had earlier made statements to the police on the basis of undertakings which the police elected to give to them promising immunity from prosecution provided that any evidence they gave was the truth and that neither of them was the man who had actually fired the rifle. Later, but before depositions were taken, the Solicitor-General gave an undertaking in writing that he would direct a stay of proceedings in the event of any prosecution being commenced against either man either as a party, or as a party to any conspiracy, or as an accessory after the fact, in respect of any offence involving the killing; on condition that they gave evidence at McDonald's trial and when giving evidence did not refuse to answer any questions on the ground of self-incrimination. The document signed by the Solicitor-General was shown to the jury. McDonald appealed against conviction.

Held: 1 The giving of the undertaking to enter a stay of proceedings was within the proper scope of the office of the Solicitor-General. The Solicitor-General's undertaking covered any situation in which either man was charged as being a party to the homicide, whether as a principal offender or an aider or abettor, or in like manner, as being a party to a conspiracy involving the homicide. Even if it were possible for the Court to review the exercise by the Solicitor-General of the discretion to give an undertaking, there were no grounds on which the Court could or should interfere with what had been done by the Solicitor-General (see p 105 line 34, p 105 line 54, p 106 line 21).

2 Evidence that both men had been granted immunity from prosecution by the Solicitor-General had been properly admitted to enable the jury to assess the weight to be given to the men's evidence (see p 106 line 31).

3 The police's actions in offering immunity to both men was not an abuse of the procedure of the High Court. The Judge in summing up had not directly dealt with the point that the two men might have still been under the influence of the limited immunity granted by the police. But this omission was not a reason for interfering with the verdict on appeal as the Judge had clearly pointed out to the jury that the danger of acting on the evidence of the two men lay in the possibility of their putting blame on to McDonald for something which one of them had done. The Judge had stressed that the grant of immunity did not entirely remove this danger and he had also forcefully reminded them of the risk that an accomplice, having given a certain statement to the police, might thereafter feel compelled to adhere to it (see p 106 line 11, p 109 line 46). Appeal dismissed.

Cases mentioned in judgment

Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508.
Cane v The Queen [1968] NZLR 787.
Moevao v Department of Labour [1980] 1 NZLR 464.
R v Turner (1975) 61 Cr App R 67.
R v Windsor [1953] NZLR 83.

Note

Refer 2 Abridgement 576; 4 Abridgement 215.

Appeal

This was an appeal against conviction for murder.

B J Hart and *M I Koya* for the appellant.
D S Morris and *S B W Grieve* for the Crown.

The judgment of the Court was delivered by

RICHMOND P. Brian Ronald McDonald stood trial in the High Court on a charge that on 1 July 1979 at Auckland he did murder Margaret Hinurewa Ngahiwi Bell. The trial commenced on 21 April and continued till 6 May when the jury returned a verdict of guilty.

It is not necessary to refer at any greath length to the facts of the case. Certain matters were not in serious dispute. McDonald with two friends called Gary Keith O'Connor and Bruce Graham Speck had been together during the evening of 30 June. They had been drinking and eventually they went to the Main Street Cabaret in Upper Queen Street. There was there a degree of disturbance arising from a refusal by the cabaret staff to admit Speck because of the way he was dressed. The three men left and from then onwards their movements were described in evidence by O'Connor and Speck who were called as witnesses for the Crown and also by McDonald himself when he gave evidence at his trial.

The Crown case, apart from the evidence of O'Connor and Speck, established that in the early hours of the morning of 1 July the girl Margaret Bell was shot while standing in the entrance to the cabaret, the shot having been discharged from a rifle fired from across the road. The Crown case also established the finding of the rifle which fired the fatal bullet but, as we have said, the movements of the three men were dealt with in evidence only by those three men themselves.

The case was an unusual one so far as this country is concerned in that the two men, O'Connor and Speck, gave evidence after the Solicitor-General had undertaken in writing to direct a stay of proceedings in the event of any prosecution being commenced against either Speck or O'Connor either —

(a) as a party to any offence involving the culpable homicide of Margaret Bell on or about the 1st day of July 1979 at Auckland; or
(b) as a party to any conspiracy involving the culpable homicide of the said Margaret Bell; or
(c) as an accessory after the fact in respect of any offence involving the culpable homicide of the said Margaret Bell.

The document signed by the Solicitor-General concluded by stating that the only condition of the undertaking was that the witness in question "gives evidence in proceedings against Brian Ronald McDonald of Auckland on a charge of murdering the said Margaret Bell, and that when giving evidence he does not refuse to answer any questions on the ground of self-incrimination in respect of the above-recited

matters". This document was dated 12 December 1979 which was prior to the taking of depositions. However at an earlier stage both O'Connor and Speck had made statements to the police on the basis of undertakings which the police elected to give to them and promising them immunity from prosecution provided that any evidence they gave was the truth and also provided that neither of them was the man who had actually fired the rifle which discharged the fatal shot.

The evidence given by O'Connor and Speck at the trial was to the effect that after the three men left the Main Street Cabaret they went in a car driven by McDonald to a house at Harris Road where O'Connor on the instructions of McDonald collected the rifle wrapped up in a blanket with some ammunition. They then returned to town and stopped for a while in a street in the general vicinity of the cabaret, then moved to a position by Myers Park. O'Connor said that although requested by McDonald to take up watch for any police in the vicinity he made off to Symonds Street and thence on foot back to the house where he was living in Glen Innes. Speck said that he went ahead of McDonald but took no part in the firing of the shot. It followed that if the evidence of these two men were accepted then the Crown case as it was primarily presented would be established, namely that McDonald was the man who actually fired the rifle.

McDonald's version of events was quite a different one. He maintained that he had nothing to do actively with the obtaining of the rifle and that although he drove the car back into town he was ignorant of any intention on the part of the others to use the rifle for the purposes of the homicide. He maintained that he took the magazine out of the rifle and remained in the car while the others went off and so was in no way criminally implicated in this tragic shooting. It seems very likely that Miss Bell was shot in mistake for the cashier at the cabaret who had played some part in the refusal of the staff to allow the three men into the cabaret.

It is desirable at this point to mention that the rifle when recovered by the police had its telescopic sight set in a particular position which was most favourable for use by a short-sighted rather than a long-sighted person. There was evidence that Speck was somewhat short-sighted and that McDonald tended to be long-sighted.

Against that brief background description of the salient features of the case we now turn to discuss the various submissions which were made in support of the appeal by Mr Hart and Mr Koya in lengthy written submissions which they presented to us and used as the basis of their arguments.

The first point made in support of the appeal was this: Mr Hart referred us to various authorities which show that in England the admitted power of the Attorney-General to enter a nolle prosequi in criminal proceedings is one well recognised at common law and one which can properly be described as a prerogative power in the sense that it does not depend on a statute but stems from the authority of the Sovereign. It also appears that this power at common law did not extend to summary proceedings and could only be exercised after an indictment had been found. By way of contrast with that situation Mr Hart directed our attention to the fact that in New Zealand the power of the Attorney-General to enter a stay of proceedings, which is the same thing as lodging a nolle prosequi, is governed by statute. So far as proceedings in the High Court are concerned the position is governed by s 378 of the Crimes Act 1961 and in relation to summary proceedings and preliminary proceedings in indictable cases there are powers to be found in ss 77A and 173 of the Summary Proceedings Act 1957. Mr Hart developed an argument, based in particular on what was said by their Lordships in the case of *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, to the effect that the ground which was covered in England by the prerogative is now covered in New Zealand entirely by the provisions of the Crimes Act to which we have referred and furthermore that in New Zealand certain statutory powers exist in relation to summary proceedings which have no counterpart at common law. He then pointed out that the powers conferred by the Crimes Act and by the Summary Proceedings Act are powers to

stay proceedings which have been commenced. They do not in terms relate to the giving of an undertaking or promise concerning the entry of a stay of proceedings in certain future events. In the result, said Mr Hart, the Solicitor-General, had no power to give the undertaking which he did give in the present case. That undertaking, says, Mr Hart, was invalid.

There is no authority to which counsel was able to refer us which deals with the legal effect, as opposed to the practical effect, of an Attorney-General's undertaking by one means or another to see that an accomplice who turns Queen's evidence will not be prosecuted for his part in the particular crime. The only help that we have been able to get on this point in the time available is from the judgment of the Court of Appeal in England delivered by Lawton LJ in the case of *Turner* (1975) 61 Cr App R 67. In the course of that judgment at pp 77-78 reference is made to a statement regarding the practice in England as far back as the year 1775. This statement had been made by Lord Mansfield CJ. It indicates that the procedure then adopted was to give an undertaking to accomplices who gave evidence for the Crown that they would, subject to certain conditions, receive a pardon. This form of promise as described by Lord Mansfield was one which did not give a legal right. It may be that the effect of an undertaking such as was given in the present case is similar. The practice of giving immunity in this way has long been accepted in England and has been adopted from time to time in New Zealand. We see no reason to think that it is any the less effective in New Zealand simply because in this country it relates to the exercise of the powers vested in the Attorney-General by statute rather than to the exercise of prerogative powers as in England. It is in our view immaterial whether such an undertaking is one which is as a matter of law strictly binding on the Crown. We say that because it is quite unthinkable that such an undertaking would not be honoured and in reality the importance of such an undertaking in relation to the evidence given by an accomplice lies in the practical effect which it will have both in protecting that accomplice and in bringing about a state of mind on his part wherein as far as possible he is removed from the fear of consequences of giving evidence incriminating himself and knows that he has nothing to gain by giving false evidence.

On this branch of the case the final submission made by Mr Hart was that the undertaking of the Solicitor-General was ultra vires, invalid and not binding on the Crown. We do not find it necessary, as we have said, to indicate whether or not such an undertaking is as a matter of law strictly binding on the Crown. Most certainly however we do not accept the view that the giving of such a promise could be in any way outside the proper scope of the office of the Attorney-General or Solicitor-General. We are therefore not prepared to accept the first submission as made to us in support of this appeal.

We turn now to the second submission which was that the Judge ought to have excluded the evidence of O'Connor and Speck in the exercise of his discretion. That he had such a discretion is accepted by the Crown but it was Mr Morris's submission to us, after a careful examination of the ruling which was given by the trial Judge on this point, that the Judge did not err in principle or give too much weight or too little weight to relevant matters nor can it be said that for any reason he clearly exercised his discretion wrongly. We do not propose to canvass this particular point in great detail because we agree with Mr Morris. Indeed if anything it seems to us the Judge approached his task in a way which was somewhat more favourable to McDonald than was strictly necessary. It is sufficient to say that we see no ground on which we could properly interfere with the exercise of the Judge's discretion in this matter. In particular we repeat the view, which we expressed during the course of argument, that the document signed by the Solicitor-General quite clearly would cover the situation even if evidence were given by Speck or O'Connor to the effect that one of them was the principal offender. Having regard to the language of s 66 of the Crimes Act we are left in no doubt that the undertaking covered any situation in which

either of these two men were charged as being a party to the homicide, whether as a principal offender or an aider or abettor, or in like manner, as being a party to a conspiracy involving the homicide. In this same context, and subsequently repeated in other contexts, Mr Hart made the point that because of the form of the undertaking originally given by the police to Speck and O'Connor they might at the time of the trial still have had in mind that their right to immunity depended on their doing what the police had required rather than upon the terms of the undertaking from the Solicitor-General. For present purposes all we need say is that in our view that possibility was not one which required the Judge to rule that this evidence was inadmissible. It is a matter to which we shall refer again in a different context.

The next submission was that the actions of the police in offering immunity in the way we have described to Speck and O'Connor should be regarded as being an abuse of the procedure of the High Court. Reference was made to the discussion of this difficult topic in the case of *Moevao v Department of Labour* [1980] 1 NZLR 464. As will be apparent in the judgments delivered in that case it is an elusive problem to decide whether some particular action on the part of the prosecuting authorities can or cannot be regarded as being an abuse of the procedure of the Court. We are in no doubt however that what was done by the police in the present case cannot possibly be so described. We are not prepared to accept this particular submission.

The next submission was that this Court has power to review the decision of the Solicitor-General to give the undertaking which he gave and to quash that undertaking. As to this suggestion we would say in the first place, although without finally determining the point, that it seems highly unlikely that this exercise of discretion in the course of his office by the Solicitor-General is capable of review by the Courts even in appropriate proceedings. If it is so capable then these present proceedings are not appropriate. Finally, if it were possible in the present proceedings to review the exercise by the Solicitor-General of the discretion to give an undertaking then we can see no grounds at all on which we could or should interfere with what was done by the Solicitor-General.

Next it was said that evidence was wrongly admitted at the trial to the effect that O'Connor and Speck had been granted immunity from prosecution by the Solicitor-General. The document signed by the Solicitor-General was indeed shown to the jury. Reliance was placed by Mr Hart on the decisions of this Court in *Windsor* [1953] NZLR 83, and *Cane* [1968] NZLR 787. In both those cases however the question which arose concerned the admissibility in a trial for conspiracy of evidence by an accomplice, who was called by the Crown, to the effect that he had pleaded guilty to the same charge on a separate occasion. It was pointed out that such evidence could not properly be admitted to support the consistency of what the accomplice witness was saying at the trial. In our view those decisions in no way cut across the long accepted practice whereby the Crown can lead evidence from an accomplice witness that he has been dealt with for his part in an offence. That evidence is necessarily placed before the jury so that they will know, at any rate to that extent, that the accomplice is no longer dependent on the favour of the Crown or the Court for the treatment which he is to receive for his part in the offence. In our view the evidence which was led in the present case was led for a similar purpose and was properly admissible for that purpose, namely to enable the jury to assess the weight of the evidence given by Speck and O'Connor with adequate knowledge of the circumstances under which they had come to give evidence against McDonald.

The next complaint was as to the Judge's direction to the jury as to the terms and effect of the Solicitor-General's undertaking. We have already indicated that in our view the terms of the undertaking covered the possibility of the accomplices being principal parties as well as accessories. However there is included in this particular submission the suggestion that notwithstanding the terms of the undertaking Speck and O'Connor might still have been under an apprehension that they could be

prosecuted if they were principal offenders in the murder. We can see no basis for this submission arising from the terms of the Solicitor-General's undertaking. The only basis for any such suggestion must lie in the form of the immunity originally offered by the police. We shall come back to that point.

The next submission relates to the direction given by the Judge as to the weight which the jury could give to the evidence of Speck and O'Connor. Without repeating the relevant passage in the summing up it may be said that the Judge here was dealing with the question of discrepancies between the evidence of Speck and the evidence of O'Connor. He mentioned that Mr Hart had very properly and very forcefully drawn attention to a number of discrepancies and the Judge then mentioned some of them, as he said, as examples. He told the jury that it would be a matter for them whether the discrepancies indicated that these witnesses were lying. Mr Koya presented this aspect of the appellant's case and he drew our attention to a number of authorities which deal with the situations in which a Judge ought to take steps to obtain a directed verdict of acquittal or, in New Zealand, should order a discharge under s 347 of the Crimes Act. When pressed Mr Koya accepted that the present case was not one where he could successfully argue that the trial Judge ought to have discharged McDonald on the grounds that the evidence of the accomplices was too unsafe and unsatisfactory for the jury to rely on. We think that that concession was properly made by Mr Koya. However he argued what to us was a novel proposition, namely that the Judge ought to have told the jury that if they were satisfied that O'Connor and Speck were lying on some matter then they should reject their evidence completely. We cannot accept that suggestion. We are quite satisfied that when the summing up is read as a whole the jury could have been left in no doubt whatsoever as to the dangers with which they were concerned in relation to the evidence of Speck and O'Connor. We are quite satisfied also that the Judge dealt with the matter in such a way that the jury would have realised that if they once thought that Speck and O'Connor were lying in a substantial way then that would be a basis upon which they might well feel left in reasonable doubt and accordingly acquit McDonald. We might add at this stage that in our view this summing up was a very fair one indeed. We think it was very clearly expressed and was a very balanced summing up which could not possibly be said to unfairly favour either the Crown or the defence.

Next there was a complaint that a direction given by the Judge in relation to the possibility of McDonald being merely an accessory after the fact as opposed to a party to the homicide itself was expressed in a way which could have misled the jury into the belief that if they found McDonald to be an accessory after the fact they could then find him guilty of murder. This submission depends entirely on the effect of the directions given by the Judge. We have read those directions with care and in our view the jury could not possibly have been misled in the way suggested by Mr Koya. On the contrary they would have understood quite clearly that what the Judge was telling them was said for the purpose of making sure that they did not find McDonald guilty of murder simply because after the firing of the fatal shot he may then have assisted Speck and O'Connor in some way or other.

The next complaint relates to the cross-examination by Mr Morris at the trial of a defence witness by the name of Teresa Skelly. She was a young woman who was associated with O'Connor and McDonald during the month of July and early August immediately after the homicide. She was asked various questions directed to establish the interest being displayed by McDonald in firearms during the period to which we have just referred. The complaint made by Mr Koya was that this questioning was irrelevant and was highly prejudicial as tending to show a mere propensity to make use of firearms on the part of McDonald. In explanation of the purpose of this cross-examination Mr Morris referred us to various passages in the evidence which make it clear that one matter relied on by the defence was an alleged disinterest in firearms so far as McDonald was concerned. In those circumstances we

have no doubt that the cross-examination was perfectly proper as this matter had been put in issue by the defence. The period of time to which these questions related was sufficiently close to the homicide to make the questions proper ones.

The next submission related to the Judge's direction on the question of a possible verdict of manslaughter. It was said that the effect of this direction was to take away from the jury any possibility of giving a verdict of manslaughter rather than murder. All we need say on this particular point is that in our view the way in which the Judge suggested to the jury the possibility of a verdict of manslaughter was indeed the only basis on which such a verdict could be contemplated. It is true that the Judge (who had, of course, warned the jury that they and not he were responsible for all decisions on questions of fact) expressed the view that there really was not any evidence to support a verdict of manslaughter on the basis which he had been discussing. But in our view he did not take this question away from the jury. He clearly left it to them to form their own assessment in the light of the evidence as they saw it.

The next question relates to reports which had been obtained either by the police or under the instructions of the Crown Solicitor from an optometrist called Mr Hogsden and from an eye specialist called Dr Coop. These reports were obtained in November 1979 and March 1980 respectively. They dealt with certain defects of vision suffered by the witness Speck. They also expressed opinions as to the effect of a person with Speck's eyesight looking through the telescopic sight of the rifle which fired the fatal shot with that sight set in the position in which it was found when the rifle was recovered by the police. Although Crown counsel were in possession of these reports they were not supplied to the defence until the stage when Mr Hart was cross-examining Speck at the trial. It is the recollection of Crown counsel that a copy of the report by Mr Hogsden was supplied to junior counsel for the defence at a stage when Mr Hart first asked a question of the witness Speck regarding his eyesight. This was before the morning adjournment and it is Mr Grieve's memory that about that time a copy of Dr Coop's report was also made available to the defence. We shall proceed with this particular topic on the basis that Mr Grieve's memory is correct. Mr Grieve also told us that for some reason it had not registered on his mind or on Mr Morris's mind that there was a link between the setting of the telescopic sight on the rifle and the vision of the witness Speck which might be helpful to the defence. Mr Hart subsequently relied on that link to found an argument that it was very likely Speck who had used the rifle and not McDonald particularly as the defence was able to show that McDonald tended to be long-sighted rather than short-sighted.

We do not find it necessary to give any ruling as to whether this report ought to have been made available to the defence at an earlier stage. For present purposes we shall simply assume that Mr Hart was correct when he argued that it should have been made available to him before the trial. On that assumption the question is whether the failure of the Crown to supply this report has led to a miscarriage of justice. Mr Hart argued that that indeed was the position and he based that submission on four points. The first three of them relate to lack of time to prepare cross-examination of Speck and Dr Coop and also lack of time for the defence to carry out tests themselves. We should say that the defence did in fact instruct an eye specialist called Dr Morris who carried out tests in the course of which he did his best to ensure that the conditions of lighting at the Main Street Cabaret were similar to those which prevailed at the time of the homicide. It would be tedious for us to go into detail as regards the contentions concerning lack of sufficient time. All in all we find no substance in them. It seems to us that Mr Hart did in fact manage to carry out an adequate cross-examination of the witnesses Speck and Coop and that the evidence of Dr Morris was obtained and available and indeed he was called as a witness for the defence.

The fourth point relied on by Mr Hart in this context relates to the election by the defence to call McDonald to give evidence. He indicated that had Mr Hogsden's report been available to the defence before the trial it might well have been that McDonald would not have given evidence. He said that the defence was run in a way which really left no choice but to put McDonald in the witness box. In other words, that the cross-examination of the Crown witnesses was of a nature which committed the defence to that course. We do not accept that contention. Certainly the cross-examination was conducted in a way which left the defence with its options open either to call McDonald or not. We are not impressed with the suggestion that the Judge would have inevitably criticised the defence if McDonald had not been called. We have no doubt that if counsel had seen the Judge and explained what had happened the Judge would certainly not have made any adverse comments on this matter. Perhaps more importantly we are not impressed by the suggestion that this evidence as to a link between the setting of the telescopic sight and Speck's vision was of such assistance to the defence that it might well have made all the difference between a decision to call McDonald and a decision not to call him. We say that because even on the most favourable view of this evidence from McDonald's point of view, and we take that to be the evidence of Dr Morris, it does not exclude a very real possibility that McDonald could have used the rifle with the sight set in the way it was. Indeed this evidence is in the nature of a two-edged sword because of the strong possibility that Miss Bell was shot in mistake for the cashier. That possibility suggests that the person who fired the shot was someone for whom the setting of the telescopic sight was unsuitable and accordingly resulted in a somewhat blurred image of the features of the victim. For those reasons we are not satisfied that the late receipt by the defence of these reports resulted in a miscarriage of justice.

There remains one final submission, namely that the verdict was against the weight of evidence. This submission in this particular case is put forward on the basis that the verdict of the jury must have meant that they found McDonald guilty not as the person who actually fired the rifle but as a secondary party. That argument is founded on the fact that after the foreman had given the verdict of the jury he then added the following statement: "The jury have asked me to inform the Court that we have found this man guilty as a participant with others". We cannot be sure that Mr Hart is correct in his interpretation of this statement, which may have been intended by the jury as indicating that they believed Speck and O'Connor to be much more deeply involved in the matter with McDonald than they had been prepared to say in evidence. However that may be we are of opinion that the evidence before the jury was such as to justify them in taking the view that McDonald must have been at least a secondary party, even if he was not the principal offender. In other words, we think that it would have been open to the jury to regard the evidence of Speck and O'Connor as not sufficiently reliable in itself to satisfy them beyond reasonable doubt that McDonald fired the rifle but at the same time to conclude from the evidence of those two men along with the evidence of McDonald himself that McDonald must have been involved at least to the degree which we have just stated. We are not prepared to hold, on the assumption that the verdict of the jury meant that McDonald was only a secondary party, that it was against the weight of evidence.

Finally we must deal with a point which we had intended to discuss earlier in this judgment. It relates to the submission that the Judge did not adequately direct the jury as to the danger of Speck and O'Connor still being under the influence of the original undertaking as to immunity given to them by the police. It is true that the Judge did not specifically deal with this point in the sense that he did not refer to those passages in the evidence of Speck and O'Connor and particularly in their cross-examination which suggested that they were somewhat vague as to the exact effect of the Solicitor-General's undertaking. This matter had however been prominent in the course of the evidence being given. No doubt it was referred to specifically by Mr Hart in his closing address. The Judge made it quite clear to the jury that the danger

of acting on the evidence of Speck and O'Connor lay in the possibility of their putting the blame on to McDonald for something which one or other of them had done, namely the firing of the rifle. He stressed that the grant of immunity did not entirely remove this danger and he also forcefully reminded them of the risk that an accomplice, having once given a certain statement to the police, might thereafter feel compelled to adhere to it. Having in mind those directions from the Judge and also that this is an area of fact and not of law, in which the jury themselves were highly competent to form a judgment, we are not satisfied that the omission by the Judge to give more detailed directions to the jury in this particular area should lead us to interfere with the verdict.

For all those reasons, and notwithstanding the careful argument that was submitted to us in support of the appeal, the appeal must be dismissed and is dismissed accordingly.

Appeal dismissed.

Solicitor for the appellant: *B J Hart* (Auckland).
Solicitor for the Crown: *Crown Solicitor* (Auckland).

13/83

L.S.

At the Court at Buckingham Palace

The 23rd day of June 1982

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 26th day of May 1982 in the words following viz:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Brian Ronald McDonald in the matter of an Appeal from the Court of Appeal of New Zealand between the Petitioner and Your Majesty Respondent setting forth that the Petitioner prays for special leave to appeal from a Judgment of the Court of Appeal of New Zealand delivered on 9th October 1980 which dismissed an Appeal by the Petitioner against his conviction in the Supreme Court of New Zealand at Auckland of murder: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the Court of Appeal of New Zealand dated 9th October 1980:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Appeal of New Zealand dated 9th October 1980:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of New Zealand and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N. E. LEIGH

[3]

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