IN THE COURT OF APPEAL [1996] QCA 262

SUPREME COURT OF QUEENSLAND

C.A. No. 33 of 1996

Brisbane

BeforeMacrossan CJ
Davies JA
Byrne J

[R v. Holman]

THE QUEEN

v.

ROBERT JAMES HOLMAN

Appellant

Macrossan CJ
Davies JA
Byrne J

Judgment delivered 09/08/1996

Separate reasons for judgment of Macrossan CJ and Davies JA concurring as to the order. Byrne J dissenting.

APPEAL ALLOWED, VERDICT SET ASIDE, ORDER FOR A NEW TRIAL

CATCHWORDS: **CRIMINAL LAW - Conviction - whether trial judge misdirected jury as to onus and standard of proof - whether trial Judge misdirected jury as to the effect of conflicts in the evidence.**

Green v. R (1971) C.L.R. 28
La Fontaine v. R (1976) 136 C.L.R. 62
Peacock v. R (1911) 13 C.L.R. 619

Counsel: Mr J. Jerrard QC with Mr R. Cameron for the appellant.

Mr M. Byrne QC for the respondent.

Solicitors: Patrick Murphy & Co. for the appellant.
Director of Public Prosecutions for the respondent.

Hearing Date: 3 May 1996

REASONS FOR JUDGMENT - THE CHIEF JUSTICE

Judgment delivered 09/08/1996.

The appellant was convicted of attempted murder and now appeals on the basis that the learned trial judge erred in the way in which he directed the jury regarding the standard of proof and the onus of proof. It is said that this resulted from his repeated instructions to them to consider whether there was a reasonable possibility that the version of events given by the accused was correct.

The notice of appeal referred to a different ground which, although not abandoned, was not argued. In the circumstances it need not be considered further. The ground upon which argument proceeded resulted from leave to amend granted at the commencement of the appeal hearing.

The case was one where the accused himself gave evidence. Other witnesses were called for the defence and there were a number of Crown witnesses. A brief outline of the most relevant testimony will suffice for the purpose of explaining the issues. The jury had been invited to consider self defence in a situation where the Crown and defence versions were in marked conflict.

The complainant, Mr Page, was stabbed by the appellant with a knife in the carpark of a hotel at Coolum on 10 August 1994. The complainant had attended the hotel with a friend, Ms Corbett, on that day. The accused was also present in the hotel. There had been an extensive history of conflict between the complainant and the appellant and the evidence indicated that in the period prior to 10 August 1994, dire threats had been exchanged between them. On 10 August 1994 following a confrontation an altercation occurred between the complainant and the appellant in the

lounge bar of the hotel. In respect of this episode there was a dispute in the evidence about who had been the aggressor.

Evidence from the accused and the witnesses, Nesbitt and Farrelly, suggested that the complainant, who was a bigger man than the appellant, had seized the appellant in a headlock after they encountered one another near the entrance to the hotel's lounge bar. The complainant's version was that as he came through the doorway to the bar he encountered the accused who immediately grabbed his shirt and a scuffle then ensued resulting in the hotel staff intervening and restraining the accused. On either version, the two men, having separated, remained apart until the critical events took place in the area of the carpark.

The complainant's evidence, supported in material respects by Ms Corbett, was that they were walking across the carpark when the accused, without warning, came up from behind and stabbed him a number of times in the back before he was able to turn around and endeavour to defend himself by punching at the accused. Both men grappled and fell to the ground together.

The evidence of the appellant was that he was frightened of the complainant and after the altercation near the lounge bar remained inside the hotel for a time before eventually going outside intending to get into his car. While going to his vehicle he said he saw the complainant run towards him and then commence to attack him, knocking him to the ground, kicking him and punching him. The appellant claimed that he was in fear for his life and in an attempt to defend himself, stabbed the complainant with a penknife without, however, intending to wound him seriously. He said that the major wound which the complainant received came about when the complainant forced himself up against the knife.

The complainant, at the conclusion of the episode in the carpark, was treated by a Dr Bryant and spent three days in hospital. The medical evidence was that the complainant suffered five main wounds distributed over his shoulder, back and right arm, and varying in depth up to 10 centimetres. The deepest wound, at the rear of his left shoulder, would have required considerable force to inflict, Dr Bryant said.

No witnesses, other than the complainant, Ms Corbett, and the appellant, directly observed the incident in the carpark. However, Nesbitt gave an account of the movements in the vicinity of the hotel of a man and woman which might have been taken to refer to the complainant and Ms Corbett, and this account was in conflict with some aspects of their testimony. Another witness, Armstrong, said that he saw a couple lingering outside the hotel and then chasing after a man with a limp. The accused walked with a limp. There were features which might have caused the jury to treat the evidence of Armstrong with reserve because, although he claimed to have seen the rather unusual behaviour he described, he did not wait to see its outcome and delayed for a considerable period before coming forward with his version to the appellant's solicitors.

The issue involving self defence being raised at the trial, it was necessary for the trial judge to deal with it in his directions to the jury. In the course of doing this it is argued that the judge fell into error in dealing with the basic matters of onus of proof and standard of proof. It is said that by the emphasis which he gave to a suggestion that the jury should consider the possibility that the appellant's evidence was correct, he wrongly conveyed the position in respect of onus of proof and standard of proof. The jury, instead of retaining concentration upon the question whether on the whole of the evidence the Crown had proved its case to their satisfaction beyond reasonable doubt, were encouraged to concentrate upon a different question, namely whether they thought the appellant's evidence was possibly true. The jury were, it is said, led to act upon an impermissible standard substituted for reasonable doubt, look to the wrong quarter for relevant proof of the fundamental issue and ignore areas of the evidence which might have been productive of reasonable doubt in their minds.

The argument was that in the circumstances of this case acceptance of the existence of a reasonable possibility that the appellant's version was correct, was not the same as exclusion of a reasonable doubt that he was guilty. A particular, but by no means the principal objection raised, was that the approach suggested by the judge did not allow for the possibility that the jury might entertain doubts even though disposed

to reject the appellant's evidence. Other evidence gave some support to parts of his version of events and there was the possibility that the jury might entertain doubts about evidence on which the Crown wished to rely. No doubt the starkness of the conflict between the two versions of events advanced by the appellant on the one hand and the complainant (supported by Ms Corbett) on the other, inevitably attracted considerable attention to that area of the evidence.

The matters that were argued involve giving attention to the course of the summing up although it was accepted that the trial judge, in parts of it, gave directions on onus of proof and standard of proof that were unexceptionable.

The judge, in the earlier part of his summing up, in standard fashion, instructed the jury that there was no onus on the accused to prove his innocence and that the onus was on the Crown to prove his guilt. The judge also instructed the jury that the Crown had to negative the defence of self defence; that because the appellant gave evidence relevant to self defence, it did not mean that he had to prove that matter; that the evidence the appellant contributed was added to the rest of the evidence, all of which had to be regarded in answering the question whether the Crown had proved that self defence was not open and that the defence was not to be regarded as being open for consideration only if the jury believed the accused. If the matter had rested there the criticisms now levelled would not have been open.

The trial judge however moved to a different phase of his summing up and adopted a stance which, in a number of ways, was different. No doubt he acted out of a desire to simplify the issues for the jury in the circumstances of this particular case. He invited the jury to consider the question whether there was a "reasonable possibility" that self defence was open.

Thus, the trial judge said: "It is sufficient for the purpose of the accused if you think that there is a reasonable possibility that he stabbed Mr Page in self defence ..." Later he said:

"There are two factual situations for consideration. If you think it is reasonably possible that what the accused said is correct, you would give him the benefit of any doubt. That is the way the case stands at the moment. If, on the other hand, you were not persuaded that the evidence of the

> accused is reasonably possible, you are not persuaded that it is a reasonably possible explanation for the events that led to the stabbing of Mr Page and you were satisfied that Mr Page and Ms Corbett gave you an accurate account of what led up to the event, then the only question for you will be what the intention of the accused was."

In the reasons, an emphasis has been applied to the word "and" in the passage just quoted since it introduces a clause which has importance in retaining a proper balance.

Later again the judge said:

"But it may be on the facts of this case that you will be able to look at the whole matter broadly and ask yourself at the end of the day are you satisfied really of the version of events given by Mr Page and his lady friend or do you think there is a reasonable possibility that the version of events given by the accused man is correct."

In this quotation underlining has again been added this time to the word "or" as showing a shift from the sense pursued in the previous quotation. The dichotomy it introduces is too restrictive. The true alternative would have been - "or are you, on the whole of the evidence, left with a reasonable doubt." Just before this last quotation the judge had said:

"So they are the two factual situations that you will have to solve and it is not necessary for me to do more than simply direct your attention to the alternate versions ... "

Underlining has been added to the word "solve". It is, of course, not correct that it was necessary for the jury to "solve" the conflict between the two versions. The emphasis on the two contrasting versions which is emerging in these passages tends to leave no room for the possibility that the jury might entertain doubts about both versions.

Subsequently, referring to s.271 of the Code, the critical section dealing with self defence, the judge said:

"It is the accused's contention that s.271 applies. You must look at the whole of the evidence and his evidence in particular to determine whether you think there is a reasonable possibility that s.271 does apply. If you think there is a reasonable possibility that the version of events given by the accused is correct, not that it is probably correct, but if there is a

> reasonable possibility that it is correct, then you have got to address the question of what the accused believed on reasonable grounds."

This passage first broadens the scope of evidence to be considered and immediately after returns to a more restricted view which looks only to the possible correctness of the accused's evidence.

A little later the judge said:

> "If you think that there is a possibility that he did believe that on reasonable grounds, then you would say, well, the Crown have not satisfied us that the accused did not act reasonably in his self defence in stabbing the complainant, Mr Page."

A little later again the judge said:

> "(The accused) said he happened to be holding the knife up in the air above the shoulder of the complainant, Mr Page, when Mr Page apparently pushed himself up so hard that he pushed the knife into himself. If you think there is a reasonable possibility that that is so, well, it would not have been the act of the accused that caused that deep wound, it would have been the act of the complainant that brought it on himself..."

Further on in his summing up the judge said:

> "You do not have to be persuaded as to the reliability of the evidence of Mr Armstrong or the evidence of Mr Nesbitt. You simply look at it as part of all of the evidence and you ask yourself, keeping in mind that evidence, 'Are we satisfied beyond reasonable doubt that the version of events given by Mr Page and his lady friend is correct, or is there a reasonable possibility of what the accused was saying being correct?'."

This passage shares the characteristic remarked on before of both inviting attention broadly to the evidence and then returning to the contrast between the protagonists' versions and the "reasonable possibility" of the appellant's version being correct.

Finally, for present purposes a passage later again should be quoted:

> "So you look at all that evidence and it simply goes in the pot with the rest of the evidence and you look at the whole of the evidence and you ask yourself at the end of the day, 'Are we satisfied beyond reasonable doubt that the version of events given by Mr Page and his lady friend, Miss Corbett, is substantially correct, or is there a reasonable possibility that the version of events given by the accused is correct?'."

If this observation to the jury had ended immediately before the word "or" to which underlining has been added, it would have been unobjectionable.

The courts have found it necessary to say, from time to time, that objections to a summing up will usually require it to be examined as a whole without undue concentration upon isolated parts of it. Taken as a whole it might be adequate although some propositions, unacceptable if considered in isolation, might appear within it: see *La Fontaine v. The Queen* (1976) 136 C.L.R. 62 at 73 per Barwick CJ and at 81 per Gibbs J. In the present case it is the effect of the summing up overall which is the principal matter which must concern the court. Any possible error may then be regarded as removed or compensated for.

It seems that his Honour's references to "reasonable possibility" may be traceable to observations made in the Court of Criminal Appeal in New South Wales. In *R v. Reeves* (1992) 29 N.S.W.L.R. 109 especially at 117 and *R v. Jones* No. 60292 of 1994, unreported judgment 30 March 1995, Hunt CJ at CL with assent expressed in varying degrees by the other judges participating in the decisions, expressed views to which our attention was directed. However, passages appearing in these cases do not display any intention to displace as being generally appropriate, references to the time honoured formula of the need for proof "beyond reasonable doubt". The judge in the two cases referred to was adverting to special considerations which he saw as arising in a certain category of case where the Crown had to exclude particular defences, e.g. alibi, provocation, self defence, duress, and the like. Even there, Hunt CJ at CL saw the need to keep the emphasis on the Crown's obligation to prove beyond reasonable doubt. In *R v. Reeves* (supra) he said:

> "It will usually be necessary to repeat the direction [i.e. the need for proof beyond reasonable doubt] and to point out that the Crown must eliminate any reasonable possibility that the accused acted in self defence ... "

It seems he was prompted to make his suggestion because of concern with the problem which arises when the Crown has to prove a negative: see his observation in *R v. Jones* (supra).

"In relation to proof of a negative, it is, I believe, more appropriate to ask whether the Crown has eliminated any reasonable possibility that the accused acted in self defence (or as the case may be)."

Beyond any such particular considerations which may call to be dealt with, it is a fundamental requirement that the time honoured formula be preserved by a trial judge in his directions and all due prominence given to it: *Green v. The Queen* (1971) 126 C.L.R. 28, *La Fontaine v. The Queen* (supra). The formula should not be allowed to be displaced by other phrases which particular judges may consider to have equivalent meaning. Such tendencies have had to be corrected in the past. Thus, "rational doubt", or "doubt founded on reason" are phrases not sanctioned as acceptable alternatives to "reasonable doubt": see *Green* (supra) and especially the helpful observation at 32-33.

"A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances."

The limited occasions on which the *Peacock* direction [(1911) 13 C.L.R. 619 at 634] should be used have been authoritatively declared: see e.g. per Gibbs J. in *La Fontaine* (supra) at 80-81. A direction in that form should be restricted to circumstantial evidence cases.

With all due respect to the judge in New South Wales and the phrase which he suggests as suitable for use (although admittedly only in a limited category including self defence cases), a danger will intrude when the word "reasonable" is detached from the word "doubt" and attached to "possibility of innocence". It is better as a continuing reminder of the underlying onus to leave "reasonable" attached to "doubt" where it enshrines the fundamental concept to be applied by the jury. The firm objective of the law in this area is to preserve a standardised expression of the onus. Different phrases may strike different chords in people's minds and provide encouragement to a jury to follow an inappropriate path. Accordingly, however much a particular judge may, in addition, wish to suggest to a jury that they give attention to this or that part of the evidence as important in the consideration of the case, he must be careful to ensure that there is firmly fixed in their minds the fundamental overriding onus summed up in the

time honoured phrase. If the possibility of error is to be avoided even when dealing with "defences" which the Crown is obliged to exclude, it is suggested that it would be wiser to direct the jury to ask themselves, "Has the Crown to your satisfaction beyond reasonable doubt excluded the possibility that the accused acted in self defence?", rather than, "Do we think there is a reasonable possibility that the accused acted in self defence?".

The difficulty in the present case is that over a considerable part of his summing up and particularly in the part which lay closest to the time when the jury were asked to retire and consider their verdict, the judge has drifted into advocating that they should direct attention to the "reasonable possibility" of the acceptability of the appellant's account, doing this in a way that permitted displacement of the necessary emphasis on the Crown's obligation to prove all of its case, including matters to be excluded where the burden of proof in respect of self defence lay upon it.

It is true that counsel at the trial in this case did not object to the summing up and that is a most relevant consideration both generally and as a pointer to the way in which the judge's words may have been understood at the time, but it is not the only relevant factor. Here I consider that the course of the summing up taken as a whole is such that the proviso in s. 668E of the Code cannot be applied. The restricted view of the evidence which it encouraged and the unconventional formulation of the onus and standard of proof which it effectively substituted for the time honoured formula, permitted a basic distortion of the jury's approach to determination of guilt. It cannot, in this case, be said that if the correct conventional formulation had effectively been conveyed, the jury's verdict would have been the same: c.f. *R v. Wilde* (1988) 164 CLR 365 at 374, 377 and *Glennon v. R* (1994) 179 CLR 1 at 8-9.

The appeal should be allowed, the verdict set aside and there should be an order for a new trial.

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 09/08/1996

I have had the advantage of reading the reasons for judgment of the Chief Justice. I agree that the appeal must be allowed and a new trial ordered. Subject to what I am about to say I also agree substantially with the reasons of the Chief Justice.

I do not see anything wrong with a direction, in a case such as this, that the jury must be satisfied that the Crown has excluded any reasonable possibility that the accused acted in self-defence where that is accompanied by a general direction about the need for proof beyond reasonable doubt. In this case, however, some of the learned trial Judge's directions, as some of the passages quoted from them by the Chief Justice show, tended to equate the elimination by the Crown of any reasonable possibility that the accused acted in self-defence with the elimination of any reasonable possibility that the accused's evidence was truthful. However, as the Chief Justice has pointed out, even if the accused's evidence were disbelieved, the jury might have had a reasonable doubt based on the Crown evidence or, for that matter, of Mr. Armstrong. It was this equation, in my view, rather than a direction in the terms indicated above, which might have led the jury into error and which consequently justifies the allowance of this appeal and the granting of a new trial.

REASONS FOR JUDGMENT - BYRNE J

Judgment delivered 09/08/1996

The direction commonly given to Queensland juries in a substantially circumstantial case includes a statement that, if there is any reasonable hypothesis consistent with innocence, it is the duty of the jury to acquit.[1] In the interests of jury comprehension, some judges substitute

[1] R v. Perera [1986] 1 Qd R 211, 216 - 217, referring to Peacock v. The King (1911) 13 CLR 619, 630. The direction is usual in South Australia (Owen (1991) 56 A Crim R 279) but may be less elaborate elsewhere: see Shepherd v. The Queen (1990) 170 CLR 573, 578; La Fontaine v. The Queen (1976) 136 CLR 62, 71, describing as customary the different direction in R v. Hodge (1838) 2 Lewin CC 227; 168 ER 1136 - a direction which is usually added in this State.

"possibility" for "hypothesis" in making the point. Such a direction is invariably given in addition to the customary direction concerning the standard of proof. The additional direction is repetitious. It simply states in other, probably less readily understood, language that the jury must acquit unless satisfied of guilt beyond reasonable doubt. For if there is a reasonable possibility of innocence, the case is not proved beyond reasonable doubt; and if there is no reasonable possibility of innocence, the case is proved beyond reasonable doubt. As McPherson J said in R v. Summers[2]:

> "... the standard of proof in criminal proceedings is not proof beyond doubt but proof beyond 'reasonable' doubt. What is required of the prosecution in discharging the onus of proof of guilt is not that every possibility of innocence be excluded by the evidence but only that every reasonable possibility be excluded. It is only if the jury 'think there is that reasonable possibility' of innocence that 'it is one which to the jury would raise a reasonable doubt as to the guilt of the accused': R. v. McKenna (1964) 81 W.N. (Pt 1) (N.S.W) 330, 334 per McFarlane J."

I mention this because it was said for the appellant that the judge's references to a "reasonable possibility" that the applicant's testimony might be true involved an impermissible disregard of authoritative discouragement of "explanatory glosses" on the classical "formula" in which the standard of proof in a criminal case is expressed.[3] To contrast a matter to be proved beyond reasonable doubt with something arguably raising a reasonable possibility of innocence may appear to define the former expression. And attempts at elaborating upon "beyond reasonable doubt" are unwise, at least in the absence of a specific request from the jury for assistance concerning the meaning of the expression. But the usual elaboration upon "reasonable

---

[2][1990] 1 Qd R 92, 98, Derrington J concurring. The absence of a reasonable possibility of innocence has often been equated with proof of guilt beyond reasonable doubt. Recent examples include R v. Parker, C.A. 311 of 1993, 4 November 1993 ("We do not think that this submission succeeds in raising or bolstering to the level of reasonable possibility the hypothesis that some person other than the appellant inflicted the injuries": per Pincus JA and Thomas J; Fitzgerald P agreeing); R v. Smith, C.A. 280 of 1994, 21 September 1994 ("The jury ... had to address the issue whether it was a reasonable possibility that the applicant may not have known that ...", per Davies and McPherson JJA and Mackenzie J); and Powell v. Smith, C.A. 251 & 264 of 1995, 14 November 1995.

[3]La Fontaine at 71.

doubt" in circumstantial cases demonstrates that a jury is not misdirected if informed that the existence of a reasonable possibility consistent with innocence requires an acquittal.

Of course, a reference to reasonable possibilities consistent with innocence should not be substituted for the classical formula; in some circumstances such a direction might appear to misstate the burden of proof. So cases in which it will be helpful to invite a jury to consider such possibilities are unlikely to be common. However, in an appropriate case, the judge may assist a jury by adverting to a fact or matter as perhaps a reasonable possibility. And provided that a suitable direction concerning the burden and standard of proof beyond reasonable doubt is given, like Davies JA, in a case like the present I see no error in a direction that the jury must not convict unless satisfied that the prosecution has excluded any reasonable possibility of self-defence.

As the judge's references to reasonable possibilities did not misstate the standard of proof, two questions arise. Both are to be resolved by considering the summing-up as a whole. The first is whether the jury may, reasonably possibly, have been misdirected concerning the burden of proof. The second is whether the jury might have been mislead into supposing that an acquittal depended upon a willingness to act on the accused's evidence, as distinct from finding a basis for acquittal in hesitation about the reliability of the complainant and Ms Corbett, or in a concern founded on Mr Armstrong's testimony.

In my opinion, considered in its entirety, the summing-up did not involve an appreciable risk that the jury might not understand that the prosecution bore the burden of negativing self-defence beyond reasonable doubt. In the beginning, the judge, with due emphasis, told the jury that the onus was on the prosecution to prove guilt, and that if they did not believe the accused:

"in what he says or if you do not accept what his witnesses say, that does not end the matter ... You look at all the evidence and you determine, looking at all the evidence, whether the Crown can satisfy you upon the evidence you accept that the guilt of the accused man has been established. ... You ask yourselves at the end of the day has the Crown negatived or disproved the matter of self-defence which on the evidence given by the accused man is open.

Ultimately, it is not the question of it being open only if you believe the accused. The accused does not have to persuade you that the evidence he gave was correct. It is sufficient for the purpose of the accused if you think that there is a reasonable

> possibility that he stabbed Mr Page in self-defence ... You do not have to believe him. It is sufficient if you think that there is a reasonable possibility that he was acting in self-defence ...".

Shortly afterwards, this was said:

> "Now, what is the standard of proof? Well, I have touched on it already. The standard of proof of guilt is proof beyond reasonable doubt in the case that we have before us today, and every element of the offence must be proved beyond reasonable doubt. There is not much doubt, you might think, members of the jury, that the accused man stabbed Page in the back and caused the wounds. The issue is what the intent was and whether the wounds were inflicted in self-defence or not. The Crown must satisfy you beyond reasonable doubt of intent on the part of the accused man. It must also satisfy you beyond reasonable doubt that the accused man was not defending himself against an unprovoked assault in a reasonable way in inflicting those wounds."

Other pertinent directions are set out by the Chief Justice, including one that a conviction depended upon satisfaction that the complainant and Ms Corbett had accurately recounted events; and plainly their evidence excluded any possibility that the attack may have been in self-defence.

My impression is that the jury was appropriately directed as to the burden of proof.

The question then is whether the judge may have led the jury to suppose that they could not entertain a reasonable doubt except in reliance on the accused's evidence. A direction to that effect would have denied him a fair trial because a reasonable doubt might have arisen through reservations about the reliability of the prosecution witnesses or, perhaps, have been detected in the testimony of Mr Armstrong.

Unsurprisingly, given the nature of the contest, some passages in the summing-up emphasise the appellant's testimony as the likely source of doubt about his guilt. However, the summing-up does not seem to me to involve a risk that the jury will have ignored the possibility that reservations about the reliability of the complainant's account or the testimony of Ms Corbett could found a reasonable doubt. The emphatic, repeated directions concerning the burden and standard of proof make this unlikely. Moreover, as I have said, the judge instructed the jury that a conviction depended upon satisfaction that the complainant and Ms Corbett "gave you an accurate account of what led up to the event". And I consider that the jury was

adequately alerted to the possibility that Mr Armstrong's evidence could create a reasonable doubt. In a passage extracted in the reasons of the Chief Justice, the judge told the jury that an acquittal did not depend upon their being "persuaded as to the reliability of the evidence of Mr Armstrong or the evidence of Mr Nesbitt". His Honour pointed out that the testimony of those witnesses was "part of all the evidence" and that the jury should ask themselves, "keeping in mind that evidence", whether they were "satisfied beyond reasonable doubt that the version of events given by Mr Page and his lady friend is correct, or is there is a reasonable possibility of what the accused was saying being correct".

Overall, in my opinion, the summing-up would have left the jury with the impression that a reasonable doubt might be entertained about both versions, and that, depending upon the jury's assessment of it, other testimony afforded a basis for an acquittal.

I consider that the summing-up could not have diverted the jury from a proper evaluation of the facts or the law. The absence of a request for redirections is, I think, an understandable recognition of its adequacy.

I would dismiss the appeal.