S APCR 2017 0027

IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE No. 1 of 2017

DIRECTOR'S SUBMISSIONS

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Part A: Narrative of Proceedings

1. Indictment F12622673 filed in the Supreme Court at Melbourne charged that the acquitted person murdered John Reed (the "deceased") contrary to common law.

2. On 15 November 2016 the trial commenced before Lasry J.

3. On 15 November 2016 the acquitted person was arraigned and entered a plea of not guilty to the relevant charge.

4. A jury was empanelled to hear the trial.

5. On 22 November 2016, after calling a number of witnesses, the prosecutor closed the case for the Crown.

6. Immediately after the close of the Crown case, counsel for the acquitted person sought the administration of a *Prasad* direction to the jury.

7. On the morning of 23 November 2016 Lasry J informed the jury that as they had heard the whole of the Crown case they now had 3 choices:

- the right to deliver verdicts of “not guilty" to murder and manslaughter; or
- the right to deliver a verdict of “not guilty" to murder and an indication they wished to hear more evidence in respect of the charge of manslaughter; or
- they could indicate they wished to hear more evidence in respect of both charges.

8. The jury retired to consider its decision. The jury returned that afternoon and advised Lasry J that they would like to hear more evidence in respect of both charges.

9. The trial continued with the acquitted person calling and giving sworn evidence.

10. On 24 November 2016 defence counsel closed the case for the acquitted person.

11. Immediately after the close of the Defence case (and prior to closing addresses), the trial judge reminded the jury of the continuing operation of the *Prasad* direction and provided them with an opportunity to revisit their earlier decision.

12. On 24 November 2016 the jury returned a verdict of not guilty.

13. On 23 February 2017 the Victorian Director of Public Prosecutions filed a Notice of Reference pursuant to section 308, Criminal Procedure Act 2009 setting out a point of law which arose in this case.

14. The point of law is expressed in the relevant Notice as follows:

> *The direction commonly referred to as the “Prasad direction” is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an acquitted person.*

Part B: Summary of Relevant Facts

15. The following brief summary of facts is drawn from the ruling made by the trial judge in respect of the *Prasad* direction:[1]

> [The acquitted person] is charged with the murder of John Reed on 18 July 2015 at Seaford. The deceased man, John Reed, was the de facto partner of the acquitted person woman and on

[1] See *DPP v Dunlop*, Trial Transcript, 23/11/2016, at 690-692

that day the Crown case is that the pair engaged in a heated argument during which the acquitted person struck the deceased to the back of the head with a footstool which caused his death. The acquitted person then called '000' and reported having found the deceased on the floor, bleeding after a fall, which the Crown contend, and the acquitted person does not otherwise argue, was a lie told in several forms and on several occasions.

The acquitted person was given certain instructions during the '000' phone call, including the administration of cardiopulmonary resuscitation and could be heard saying certain things which the Crown had proposed to rely on as evidence of an implied admission in support of their case that the acquitted person murdered the deceased.

The acquitted person agrees that she struck the deceased with a timber footstool, although the number of blows and the physical location of she and the deceased at the time these blows were struck is in issue between the Crown and the acquitted person.

She has asserted through her counsel at the beginning of the trial in his response to the prosecution opening that at the time she struck the deceased she was acting in self-defence.

There will also be an issue as to whether or not the prosecution can prove beyond reasonable doubt that the acquitted person had a murderous intent.

There is no question that the acquitted person caused the death of the deceased and in all likelihood had murderous intent, despite the fact that counsel for the acquitted person has raised an issue with the jury about that in his defence response.

However, on the fourth element of murder which requires the Crown to prove beyond reasonable doubt that the killing occurred without lawful justification or excuse, and in a family violence context, the prosecution case is not a particularly strong one. Indeed, the family violence history appears not to be in dispute.

16. The prosecutor opened the Crown case in some considerable detail before the jury.[2] Defence counsel then made a reply.[3]

Part C: Director's Reference

17. The reference is brought pursuant to section 308, Criminal Procedure Act 2009 which reads as follows:

(1) If a person is acquitted in respect of all or any charges –

(a) in a trial on indictment before the Supreme Court or the County Court;

[2] See *DPP v Dunlop*, Trial Transcript, 15/11/2016, at 215-230
[3] See *DPP v Dunlop*, Trial Transcript, 15/11/2016, at 230-234

(b) on an appeal to the County Court from the Magistrates' Court or, if Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, to the Trial Division of the Supreme Court –

the DPP may refer to the Court of Appeal any point of law that has arisen in the proceeding.

(2) The Court of Appeal is to consider a point of law referred to it under subsection (1) and give its opinion on it.

(3) An acquitted person who appears in court in person or by a legal practitioner is entitled to reasonable costs as settled by the Costs Court.

(4) A reference under this section does not affect the trial or hearing in relation to which the reference is made or an acquittal in that trial or hearing.

18. Section 308 replicates in substance its predecessor – namely, section 450A, Crimes Act 1958.

19. This Court has accorded the relevant statutory provision a broad interpretation which is consistent with its underlying purpose. In short, "a point of law has arisen in a proceeding" within the meaning of the relevant section if it has been decided by the judge, whether or not it was in contest between the Crown and the defence or even the subject of an expressed or implied concession by the Crown.[4]

20. A point of law did arise in this proceeding – that is, the prosecutor raised the question of whether the *Prasad* direction remained a "viable" direction in light of recent High Court authority. However, given the stage of the proceedings and the firm view expressed by the trial judge that *Prasad* remained good law in Victoria, no further legal argument was developed (that was hardly surprising particularly in light of the decision of Lasry J in *R v Smart* which had already been cited by defence counsel).

21. The testing of the correctness of the decision in *Prasad* (or perhaps more aptly, the correctness of continuing the practice) has been brought under a reference rather than via an interlocutory appeal – given the general nature of the challenge, it is submitted that was the correct course to adopt.

[4] See *DPP Reference No. 2 of 1996* [1998] 3 VR 241, at 250-251

22. For avoidance of doubt, this reference is not concerned with the correctness or otherwise of giving a *Prasad* direction in this trial but rather the correctness of the practice itself.

Part D: Grounds of Reference

Trial proceeding

23. After the close of the prosecution case, defence counsel requested the trial judge to administer what is conventionally referred to as a *Prasad* direction (or invitation).[5] In short, such a direction involves the judge inviting the jury to consider whether the trial should be stopped after the jury has heard the prosecution case.

24. Counsel referred to a ruling by Lasry J in *R v Smart* as authority for the proposition that the *Prasad* direction was recognised in Victoria. The following is the relevant extract from the Judicial College of Victoria publication:[6]

> In exceptional cases, the judge may inform the jury that they are entitled to return a verdict of not guilty at any time after the close of the prosecution case (a "*Prasad* invitation"). The direction should be brief and may mention the relevant weaknesses in the prosecution case (*R v Prasad* (1979) 23 SASR 161; *R v Smart (Ruling No 5)* [2008] VSC 94).

25. The prosecutor resisted the giving of a *Prasad* direction. The following exchange occurs:[7]

> DR ROGERS: There's nothing before the jury about what precisely happened in the unit on the night of the 18th of July 2015.
> HIS HONOUR: I agree.
> DR ROGERS: And in my submission that's the short answer about why a *Prasad* direction should be resisted by Your Honour.

26. The prosecutor also separately raised the issue of whether the *Prasad* direction remained a viable direction after the recent decision of the High Court in *R v Baden-Clay*.[8] However, there was no amplification of argument on this topic.[9]

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[5] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 681
[6] See chapter 5.7.2, Victorian Criminal Proceedings Manual, published online by Judicial College of Victoria
[7] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 684
[8] (2016) 334 ALR 234
[9] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 685

27. In response, the trial judge indicated that he was of the view that the decision of King CJ in *R v Prasad* remained good law in Victoria.[10]

28. On the next day the trial judge ruled that he would administer a *Prasad* direction to the jury.[11] This was done notwithstanding there had been no ruling as to whether the prosecution could rely on various statements made by the acquitted person in a telephone call as incriminating conduct. In short, this is a simple illustration of the possible "unfairness" of such a direction to the Crown.

29. The trial judge then administered a conventional *Prasad* direction to the jury.[12]

30. The jury retired to consider its decision in light of the relevant direction. However, the jury were returned after the trial judge decided that only 12 jurors could return a verdict of not guilty (there having been 13 jurors empanelled). Interestingly, the judge determined that the balloted juror would be returned to the jury if a decision was made to hear more evidence.[13] This is yet another example of the difficulty associated with the *Prasad* direction as the balloting procedure adopted by the judge does not appear to have any legislative fiat.

31. After approximately 1 hour of consideration, the jury announced its decision to hear more evidence.

32. The acquitted person gave sworn evidence and called one other witness.

33. At the close of the defence case, the trial judge gave the jury an opportunity to reconsider its position. Again, an individual juror was balloted off the jury in respect of this determination.[14]

34. After approximately 20 minutes of consideration, the jury then delivered a verdict of "not guilty".[15]

[10] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 686
[11] See *DPP v Dunlop*, Trial Transcript, 23/11/2016, at 690-693
[12] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 695-717
[13] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 720-723
[14] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 857
[15] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 860

Prasad direction

35. The *Prasad* direction derives from the judgment of King CJ in the South Australian decision of *R v Prasad*.[16]

36. In this case, the applicant was convicted on 1 count of obtaining by false pretences. At the close of the prosecution case, defence counsel submitted that there was no case to answer, or alternatively, that the evidence was so unsatisfactory that it would be unsafe to allow the case to go to the jury. The trial judge rejected the submission. The applicant sought leave to appeal against conviction. On appeal, it was contended that that the evidence was so unsatisfactory that it was unsafe to leave the case to the jury notwithstanding that there was a case to answer. It was contended that there was discretion in the trial judge to direct the jury to return a verdict of not guilty.

37. The appeal was dismissed. The South Australian Court of Criminal Appeal held that when there is evidence capable in law of supporting a conviction there is no discretion vested in the trial judge to direct the jury to acquit (Mohr J dissenting on this point). However, after the close of the prosecution case, the trial judge may advise the jury to stop the case and return a verdict of not guilty.

38. King CJ delivered the lead judgment. His Honour summarised the relevant principle as follows:[17]

> It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more. It is within the discretion of the judge to inform the jury of this right, and if he decides to do so he usually tells them at the close of the case for the prosecution that they may do so then or at any later stage of the proceedings: *Archbold*, Criminal Pleading and Practice 39th ed. (1976) p. 332. He may undoubtedly, if he sees fit, advise them to stop the case and bring in a verdict of not guilty. But a verdict by direction is quite another matter. Where there is evidence which, if accepted, is capable in law of proving the charge, a direction to bring in a verdict of not guilty would be, in my view, a usurpation of the rights and the function of the jury.

[16] (1979) 23 SASR 161
[17] Ibid, at 163

39. White J agreed in a separate judgment. His Honour stated:[18]

> There still remains the duty to direct the jury to acquit, on a submission of no case, if there is no evidence on a particular element of the charge. But once there is some evidence on each element, its weight is for the jury. This also leaves to the trial judge the right to make suggestions to the jury or to ask the jury their views where the evidence appears to be so unreliable that it could not support a verdict of a jury properly directed. Such suggestions and advice should not, I think, ever take the form of directing the jury what to do within their own province.

40. Interestingly, Mohr J in a separate judgment, refers to English criticism of the practice inviting a jury to return a verdict of not guilty. His Honour stated:[19]

> That there is a practice, subject to some English criticism as will be seen, of inquiring of a jury whether they are prepared "at this stage" to bring in a verdict of "not guilty" is known to the Court. The correctness or otherwise of that practice is not here in question.

41. However, Mohr J was prepared to go further than other members of the Court, ultimately holding that a judge has a discretion to withdraw a case from a jury.[20] However, this particular legal proposition has not taken root in any Australian jurisdiction.

Confinement of Prasad direction in South Australia

42. The *Prasad* direction has the innate capacity to seriously erode conventional trial procedure, and more importantly, cut across the quintessential fact-finding function of the jury. So much so was recognised in a number of subsequent South Australian decisions – for the purposes of argument, it is only necessary to highlight observations drawn from two cases.

43. In *R v Pahuja*, King CJ made the following observations in relation to the giving of a *Prasad* direction:[21]

> The undoubted right of a trial judge to inform the jury of its power to bring in a verdict of not guilty at any time after the conclusion of the case for the prosecution, should be used sparingly and only when the judge is of opinion that the evidence for the prosecution, although capable in

[18] Ibid, at 172
[19] Ibid, at 175
[20] Ibid, at 176-177
[21] (1987) 49 SASR 191, at 201

law of supporting a conviction, is insufficiently cogent to justify a verdict of guilty. Even in such a case, the judge should bear in mind that the evidence called by the defence might strengthen the prosecution's case.… There should be nothing in the nature of a pretrial summing up. If the jury cannot properly reach a decision at that stage on the law as explained in the opening, perhaps clarified by a concise correction or explanation if necessary, it is better not to embark upon the course of action at all. A partial summing up at that stage of the trial is a serious departure from the due course of trial and is to be avoided.

44. The primary vice in the giving of a *Prasad* direction is clearly identifiable in the above passage – it is not the function of a judge to make an assessment of the cogency of the evidence adduced by the prosecution; if there is sufficient evidence to support a conviction at law, then the matter plainly falls within the province of the jury.

45. This thread of reasoning was picked up by Cox J in the decision of *R v Dean*. His Honour stated:[22]

> Before leaving this topic I should refer to the learned judge's *Prasad* direction (*R v Prasad* (1979) 23 SASR 161). There was nothing wrong with the way his Honour gave it; the question is whether it should have been given at all. This Court has previously expressed its concern about too free a use of the *Prasad* direction to bring a trial to a stop: see *R v Pahuja* (1987) 49 SASR 191 at 201 and 217–219 and 224. In the present case the learned judge found that there was a case for the appellant to answer. There was no suggestion of the police witnesses being patently unsatisfactory or of the appellant being put to a lengthy but inevitably successful defence. Practically everything turned on the appellant's state of mind and that was a subject on which the jury was likely in the circumstances to be very interested in hearing from the appellant himself, as indeed they showed by their answer. All the indicators, in short, pointed to a continuation of the trial in the normal way. A *Prasad* direction should not be given merely because the trial judge considers that the Crown case is not a very strong one. That would be to usurp the function of the jury. [emphasis added]

Prasad direction in Victoria

46. The practice of administering a *Prasad* direction has been adopted in Victoria. In recent times, the direction has been given both in this case and the unrelated case of *DPP v Siddique & Gant* (pending appeal to this Court).[23]

[22] (1995) 65 SASR 234, at 239
[23] See *DPP v Siddique & Gant*, Trial Transcript, 2/5/2016, at 1830

47. In the earlier decision of *R v Smart*, Lasry J ruled that a *Prasad* direction would be administered to the jury.[24] It is this case which is cited as authority for the practice in Victoria by the relevant Judicial College of Victoria publication.

48. In *Smart*, the acquitted person was charged with murder. The defence sought a *Prasad* direction. Lasry J ruled as follows:[25]

> In *Pahuja*, King CJ notes that in his opinion the decision whether to inform the jury of its power to bring back a verdict of not guilty must be made by the trial judge in light of his assessment of the case. It is my opinion that the evidence may not be sufficiently cogent to justify a verdict of guilty. I note that that is a test different from the test which would apply had a submission been made on behalf of the acquitted person that there was not a case for him to answer. [emphasis added]

49. The test identified by Lasry J for the giving of a *Prasad* direction involves a qualitative, rather than a quantitative, assessment of the evidence by the judge – a task that is entrusted to the jury.

Obvious tension between tests for "no case" submission and a Prasad direction

50. In *Doney v R*, the High Court laid down the test governing a no-case submission. As the Court observed:[26]

> It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty. [emphasis added]

51. In short, the above passage does not expressly support the practice of administering a *Prasad* direction in circumstances where the evidence supporting the prosecution case is determined by a judge to be weak. On the other hand, the Director accepts that the decision in *Doney* does not expressly prohibit the practice. However, there is plainly tension between the obligation of a judge to leave a matter to a jury for its consideration where the evidence is inherently weak and the right of a judge to advise the jury of its power to stop such a case.

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[24] [2008] VSC 94 (Ruling No. 5)
[25] Ibid, at [13]
[26] (1990) 171 CLR 207, at 214–5

52. In short, the decision in *Doney* was only concerned with the correctness of the principle relating to the discretion of a judge to direct a verdict of "not guilty" in circumstances where there is sufficient evidence justifying a conviction (or, in other words, settling the debate between the two different opinions expressed in *Prasad*).

53. However, the real nub of the Director's attack on the correctness of the practice stems from an analysis of modern English practice.

English practice – back then

54. In adopting the practice in *Prasad*, King CJ referred to *Archbold* as authority in support. The following is a reproduction of the relevant extract from the 39th edition (in 1976):[27]

> It is open to the jury, at any time after the close of the case for the prosecution, to inform the court that they are unanimously of opinion that the evidence which they have already heard is insufficient to justify a conviction. It is within the discretion of the judge to inform the jury of this right, and if he decides to do so he usually tells them at the close of the case for the prosecution that it is open to them to stop the case either immediately or at any later stage in the proceedings. However, in *R v Young* [1964] 1 WLR 717; 48 Cr App R 292, CCA, the court expressed the view that maybe the time had come, though the court did not desire to rule on it, when this practice should be only rarely, if ever, used, and that judges should more often take the responsibility themselves of saying to the jury that there is not satisfactory evidence upon which they could convict, and accordingly direct an acquittal. When a submission is made that a case should not be left to the jury it is a judge's duty not only to consider whether there is some scintilla of evidence which in law could go to the jury but also whether it would be safe for a jury to convict on the evidence as it stands: *R v Hipson* [1969] Crim LR 85, CA … These principles were re-affirmed in *R v Falconer-Atlee* (1974) 58 Cr App R 348, CA – "If the judge is not prepared to stop the case on his own responsibility, it is wrong of him to try and cast the responsibility of stopping it on to the jury"…

55. The Director accepts that the common law has traditionally recognised the right of a jury (of its own volition) to acquit an acquitted person at any time after the close of the prosecution case. However, it is altogether another thing for a trial judge to administer a direction in which invites the jury to consider an acquittal (as is the case with a *Prasad* direction).

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[27] See *Archbold*, Criminal Pleading Evidence & Practice in Criminal Cases, 39th edition, published by Sweet & Maxwell, London (1976) at p 332

English practice – now

56. Whatever be the historical position in England at the time *Prasad* was decided, it is now clear that there is strong disapproval of such a practice. It is perhaps illustrative to reproduce the corresponding extract from the 63rd edition (in 2015) of *Archbold*:[28]

> The right of the jury to acquit an acquitted person at any time after the close of the case for the Crown, either upon the whole indictment or upon one or more counts, is well established at common law. Judges may remind juries of their rights in this respect at or after the close of the case for the Crown, pointing out that they can acquit at that stage and must wait till the whole case is over before they can convict. The Court of Appeal in *R v Falconer-Atlee*, 58 Cr App R 348, at 357, discourage judges from issuing such a reminder, saying that if a judge was not prepared to take the responsibility upon himself, he should not seek to cast it upon the jury. This was reiterated in *R v Kemp* [1995] 1 Cr App R 151, CA, where it was said that a judge should not go beyond a mere intimation of the right of the jury to stop a case, in *R v Speechley*, The Times, December 1, 2004, CA, where it was said that in almost every case, in order to do justice, the jury needed to listen to all of the evidence, the submissions of counsel and the directions in law of the judge, and in *R v Collins* [2007] 5 Archbold News 3, in which the Court of Appeal described the practice of inviting the jury to exercise the right as having been comprehensively disapproved, listed the specific dangers involved in doing so, and found it difficult to envisage any circumstances when it would be appropriate for it to be adopted. See too *R v H (S)* [2011] 1 Cr App R 14, CA….

57. For the purposes of argument, it is necessary to highlight various observations made in some of the cases mentioned in the above extracted passage.

58. In *R v Kemp*,[29] the acquitted person had been convicted of assault occasioning actual bodily harm. After hearing the prosecution evidence and the calling of several witnesses for the defence, the trial judge enquired of the prosecutor as to whether he wished to continue. The prosecutor informed the judge he wished to continue. Thereafter the judge instructed the jury that they had a right to stop the case if they wished to do so and commented favourably upon the evidence given by one of the defence witnesses (who was independent to the acquitted person). The jury declined the invitation. The trial proceeded in the conventional manner and

[28] See *Archbold*, Criminal Pleading Evidence & Practice in Criminal Cases, 63rd edition, published by Sweet & Maxwell, London (2015) at p 511
[29] [1994] EWCA Crim J0415-6

the jury duly returned a verdict of guilty. The acquitted person appealed against the conviction to the English Court of Appeal.

59. The appeal was dismissed. However, the Court of Appeal (McCowan LJ, Morland and Buckley JJ) made the following observations as to the practice adopted at trial:[30]

> We were of the impression that this practice criticised by Roskill L.J., once quite prevalent, had died out, but it appears that it is still very occasionally done. The danger, as Mr Farley pointed out, is that if the jury do not accept the judge's invitation, something may go wrong with the verdict. He submits that juries are often keen to register their independence and do not like to feel that they are being pushed about by the judge. Indeed, if they feel leant upon by a judge in favour of the defence, the result may be positively counter to what the judge intended.
> …
>
> We have given this case very anxious consideration because we are not happy about the judge's well intentioned intervention. However, in the end we have come to the conclusion that it is not for us to decide upon the evidence. It was for the jury. They did decide, and we are not persuaded that the verdict is unsafe or unsatisfactory. Accordingly, it is necessary for us to dismiss the appeal.
>
> However, before parting from the case, we would make a few general remarks on the problem that has arisen. Our attention has been drawn to a passage in the 1993 edition of Archbold, Volume one, paragraph 4-312 under the heading "Right of jury to stop case". It reads:
> "The right of the jury to acquit an acquitted person at any time after the close of the case for the Crown, either upon the whole indictment or upon one or more counts, is well established at common law. Judges may remind juries of their rights in this respect at or after the close of the case for the Crown, pointing out that they can only acquit at that stage and must wait till the whole case is over before they can convict. If the observation of Lord Justice Roskill in *R. v.* Falconer-Atlee 58 Cr.App. R. 348 (at page 357), conflicts with this long established practice, it is submitted that it must have been per incuriam and should be ignored. It is submitted, however, that there is no conflict in view of the distinction between 'inviting a jury to acquit' and 'reminding them of their right to acquit'."
>
> We, for our part, do not agree with the suggestion that what Roskill L.J. had to say in *Falconer-Atlee* should perhaps be ignored. We do not think it will always be very easy to distinguish between an invitation to acquit and a mere intimation of a right to stop the case. In this particular case we have no difficulty in concluding on the words used by the judge that it was an invitation to acquit, but it may not always be so easy to differentiate between the two.
>
> Moreover, a jury may well use their common sense and read a mere intimation that they have a right to stop a case as an invitation to acquit, on the basis that a judge is not likely to be giving them the intimation unless he thinks that they should acquit. If a judge is going to do anything of this sort, and we do not encourage it, he should clearly, in our judgment, not go beyond a mere intimation of the right to stop, for fear that if he goes further and utters a clear invitation to

[30] Ibid, at p 8, 10-11

acquit, the result may be as in the present case, leaving a convicted defendant with a grievance, however unjustified.

60. Thus the danger spoke of in the above case relates to the ability of an acquitted person to receive a fair trial in circumstances where a *Prasad* direction is given. This particular danger was what Lasry J was referring to in his discussion with defence counsel after the request had been made ("there are pitfalls obviously in this").[31]

61. The next case is *R v Speechley*.[32] The acquitted person was convicted of misconduct in public office and he appealed against conviction and sentence. One of the grounds of appeal against conviction included a complaint that the trial judge was wrong to rule that counsel for the acquitted person could not, when opening the defence, remind the jury of its common law right to acquit the acquitted person at any time after the close of the prosecution case.

62. In dismissing the appeal, the Court of Appeal (Kennedy LJ, Bell and Hughes JJ) made the following observations:[33]

> Furthermore, we re-iterate what was said by Roskill LJ in *R v Falconer-Atlee* (1973) 58 Cr App R 348 at 357, that in practice a judge should not invite a jury to stop the case. He said:
>
> > "If a judge thinks that the case is tenuous, then, even though there is some evidence against the acquitted person, the judge, if he thinks it would be unsafe or unsatisfactory to allow the case to go to the jury even with a proper direction, should take upon himself the responsibility of stopping it there and then. If the judge is not prepared to stop the case on his own responsibility, it is wrong for him to try and cast the responsibility of stopping it on the jury."
>
> That was underlined by McCowan LJ in *R v* Kemp [1995] 1 Cr App R 151 …
>
> Plainly, as the facts of that case demonstrated, a prudent judge will say nothing at all.
>
> We accept that in some cases judicial silence may mean that a trial lasts longer than it need because, for example, the strengths or weaknesses of the prosecution evidence may depend upon the view to be taken of a witness's reliability, and the judge cannot therefore accede to a submission of no case to answer simply because he regards the key prosecution witness as unreliable (see *R v* Galbraith (1981) 73 Cr App R 124), but it is worth remembering that in an exceptional case a judge can consider a submission of no case to answer, or decide of his own motion that there is no case to answer, as late as the close of the defence case, as was pointed out in *R v* Brown [2002] 1 Cr App R 46. We therefore find it difficult to envisage any

[31] See *DPP v Dunlop*, Trial Transcript, 22/11/2016, at 681
[32] [2004] EWCA Crim 3067
[33] Ibid, at p 20-22

circumstance where in reality it will be appropriate in the interests of justice for a judge to invite the jury to acquit. Experience shows that when such invitations have been issued in the past they have all too often led to difficulties.

63. In *R v Collins & Ors*,[34] the Court of Appeal described the practice of inviting the jury to exercise a right to acquit as having been comprehensively disapproved and listed the specific dangers in doing so. In short, the Director adopts the reasoning of the Court in support of the contention advanced in this reference.

64. In delivering judgment of the Court, Gage LJ (Walker and Openshaw JJ agreeing) referred to the decisions in *R v Falconer-Atlee* , *R v Kemp* and *R v Speechley* before stating:[35]

> On the basis of these authorities we find it difficult to hold that the common law right of a jury to stop a case after the close of the prosecution case no longer exists. We think it strongly arguable that it cannot survive Article 6 but it is possible to envisage circumstances in which the jury could be reminded of this right in such a way as not to breach Article 6. However, in our judgment it is clear from the authorities that the practice of inviting a jury to exercise such a right has been comprehensively disapproved. At the very least it could only be exercised in the most exceptional circumstances and certainly not in a multi-handed case of some complexity. We have no doubt that Mr Davey was right to concede that in this case the course taken by the judge was quite unjustified.
>
> Although the three decisions, to which we have referred, do not spell out all the specific dangers involved in a judge telling a jury that it has a right to stop a case, it seems to us that they can be expressed as follows. First and foremost this practice involves the jury in making a decision which will affect the future conduct of the trial without, as happened in this case, the benefit of speeches from all counsel or any legal directions from the judge. Secondly, the nature of the decision which the jury is asked to make is to decide whether or not the prosecution witnesses may be capable of belief. In other words the jury must reach a provisional conclusion. However, there is a risk that they may go further and decide at that stage that the witnesses are not just capable of belief but they are indeed telling the truth. Such a provisional conclusion, once reached, maybe very difficult to displace. Thirdly, as was explained in *Kemp* , juries are often keen to register independence and may react against what might be perceived to be pressure from judge to acquit a defendant. Fourthly, even though a judge may strive to avoid inviting a jury to acquit, a practice which has always met with disapproval, it may be very difficult to avoid giving that impression rather than simply informing a jury of its right to acquit, the latter conforming with the old practice before it also was disapproved. As the court said in *Kemp* "It may not be always very easy to distinguish between an invitation to acquit and a mere intimation of a right to stop the case". Fifthly, this practice is inherently more dangerous when a number of defendants are involved and the factual evidence is complex. Sixthly, it is unfair to the prosecution when it is given no opportunity to address either the judge or the jury and correct a mistaken impression of its case. The same applies to defendants, albeit in all such

[34] [2007] EWCA Crim R 854
[35] Ibid, at p 12-13, 15-16

cases, the presumption will be that the judge has only adopted this procedure in order to obtain, more quickly, verdicts favourable to the defence. Seventhly, there may be particular dangers when as in this case the defence are contemplating not calling any evidence. Eighthly, since the coming into force of the provisions of s.58 of the Criminal Justice Act 2003 the prosecution has a right of appeal against a determinative ruling of a judge but will have no right of appeal against an acquittal by a jury following a judge informing them that they have a right to stop the case.

…

We wish to emphasise the disapproval expressed by this court in *Speechley* of the practice of informing a jury of its right to stop the case. We find it very difficult now to envisage any circumstances when it would be appropriate for this practice to be adopted. In this case, if the judge, instead of informing the jury that it could stop the case, had solicited submissions of no case to answer (as in our judgment he ought to have done) he may very well have been persuaded that, not only this course should not have been adopted by him, but the prosecution case was of sufficient strength for there to be no question of it being stopped by him. [emphasis added]

65. The final case is *R v SH*.[36] The Court of Appeal (Leveson LJ, Holroyde and Spencer JJ) reviewed the earlier authorities and observed:[37]

Although the common law recognised the right of a jury to acquit an acquitted person at any time after the close of the prosecution case, modern authorities disapprove of the practice. In *R v. Falconer-Atlee* (1973) 58 Cr. App. R. 348 , it was said by Roskill LJ to be wrong for a judge who was not prepared to stop the case himself to cast that responsibility on to the jury. Similar remarks were made in *R v. Kemp* [1995] 1 Cr. App. R. 151 rejecting criticisms of *Falconer-Atlee* articulated in the 1993 edition of Archbold. Kennedy LJ also expressed the court's disapproval of the practice in *R v. Speechley* [2004] EWCA Crim 3067 and all the authorities were reviewed in *R v. C & ors* [2007] EWCA Crim 854 in which the court (per Gage LJ) considered it strongly arguable that the practice could not survive Article 6.

66. After referring to the various criticisms of the practice expressed by the Court in *Collins*, the Court added another of its own:[38]

There is also another reason which bites if the jury should stop the case. Although arguments have always been articulated as on the basis that fairness must be visited both on the defence and the prosecution, fairness to the prosecution is now well recognised as requiring a proper focus upon the legitimate rights and interests of victims and witnesses. Once there is a case to answer, they are entitled to know that the jury has heard the case through to its conclusion culminating in a fair analysis of the issues from the judge. The few words offering the jury the opportunity to stop the case do not provide this and can only be approached by the jury on the basis of the broadest of broad brushes.

[36] [2013] EWCA Crim R 1931
[37] Ibid, at p 16
[38] Ibid, at p 16

Conclusion

67. The circumstances in which it is legitimate to administer a *Prasad* direction have been severely curtailed by subsequent South Australian decisions. The practice, which developed out of the 1979 South Australia decision in *R v Prasad*, relied upon English authority for its legitimacy. However, more recent decisions of the English Court of Appeal have widely disapproved of the practice.

68. In short, the practice should now cease as it has the capacity to deny both the prosecution and the defence the right to a fair trial.

69. Furthermore, it is difficult to clearly articulate the test governing the giving of a *Prasad* direction. Victorian authorities seem to suggest that the relevant test is where the trial judge forms the view that the evidence is so lacking in probative value or cogency as to preclude the returning of a guilty verdict – this task is of course inimical to the recent pronouncement of the High Court in *IMM v R* where it was held that in determining the issue of relevance of evidence, a trial judge does not take into consideration issues of credibility and reliability of evidence.[39] And, as the Supreme Court of Canada pointed out in *R v Monteleone*, such a task is not one entrusted to a trial judge:[40]

> Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. It is not the function of the trial judge to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury. [emphasis added]

70. A similar sentiment was recently expressed by the High Court in *R v Baden-Clay*[41] – thus, if the jury is to be viewed as "the constitutional tribunal for deciding issues of fact", every effort should be made to provide assistance to a jury in discharging their function – which of course includes the obvious benefit of listening to any defence evidence and having the benefit of

[39] (2016) 257 CLR 300
[40] [1987] 2 SCR 154, at 161
[41] (2016) 334 ALR 234, at 246 [65]

closing addresses by both parties (particularly in cases involving the allegation of a serious crime).

A way forward

71. If the practice was to cease, it is still open to a trial judge to express an "informal" view as to the sufficiency of the evidence (in the absence of the jury) and invite a prosecutor to reconsider his/her position. Further, if a judge feels quite strongly about the case, a request can also be made to the prosecutor to have the matter reconsidered by the Director. Of course, such circumstances will be rare and should only occur where the issue as to sufficiency of evidence is glaringly obvious.

DATED: 7 September 2017

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