

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**CRI-2016-054-002492
[2018] NZDC 3278**

THE QUEEN

v

[EDWARD CAREY]

Date of Ruling: 21 February 2018

Appearances: T C Tran for the Crown
A C Graham for the Defendant

Judgment: 21 February 2018

RULING 1 OF JUDGE S B EDWARDS

[1] The defendant [Edward Carey] is on trial for two charges of theft. Charge 1 alleges that between 1 September 2015 and 25 September 2015 he stole 10 calves from [the complainant]. Charge 2 alleges that the defendant stole 20 cows from [the complainant] between 1 October and 26 November 2015.

[2] Ms Graham has advanced an application on Mr [Carey]'s behalf to dismiss charge 1 pursuant to s 147(4)(c) Criminal Procedure Act 2011.

[3] Before I can dismiss a charge being tried by a jury under this provision I must be satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant.

[4] The principles to be applied in determining an application to dismiss a charge being tried by a jury are well settled and set out in the leading cases of *R v Flyger*¹ and *Paris v Attorney General*². Those principles can be summarised as follows:

- (a) A judge must always be mindful of the different roles of a judge and jury and respect to the jury's responsibility to decide the facts.
- (b) Inferences or conclusions which can be drawn from the evidence are for the jury to decide and in all but the most unusual or extreme circumstances, questions of credibility and weight must be determined by the jury.
- (c) If the evidence is sufficient in law if accepted by the jury to prove the case, then it must be left to the jury to decide.
- (d) In examining the evidence in terms of adequacy of proof, the judge's function is to consider what the jury may properly do with it. Two examples are given in *R v Flyger* at [15] of where the interests of justice may require a charge to be dismissed. The first of those examples, which is the one relevant to this application, is where the evidence in support of a charge may be barely adequate and so tenuous as to lead a judge to the view that the jury could not properly convict.
- (e) In *Paris v Attorney-General* at [13] Court of Appeal said that a judge considering an application to dismiss a charge based on evidential sufficiency should bear in mind as useful guidance the factors the Court of Appeal takes into account when it determines an appeal against a jury's verdict on the grounds that it is unreasonable. If it is clear on the state of the evidence either that a properly directed jury could not reasonably convict or that any such conviction would not be supported by the evidence, then the charge should be dismissed.

¹ *R v Flyger* [2001] 2 NZLR 721 (CA).

² *Parris v Attorney-General* [2004] 1 NZLR 519 (CA).

[5] The application to dismiss charge 1 is advanced on the basis of counsel's submission that there was no evidence from the complainant specifically about calves being missing from his farm. The defendant submits there is nothing to link the calves sold to [name deleted – the purchaser] to [the complainant]'s farm. Ms Graham submits that the Crown is going beyond asking the jury to draw an inference and is, in effect, asking the jury to speculate about the origins of the calves Mr [Carey] sold on TradeMe to [the purchaser], in the absence of any evidence linking those calves to [the complainant]'s farm.

[6] In response, Mr Tran notes the entire Crown case in relation to both charge 1 and charge 2 relies on the jury drawing inferences. There is no direct evidence of the defendant taking calves or cows from the complainant's farm and [the complainant] and the other witnesses evidence about exact herd numbers varied.

[7] What the Crown is asking the jury to do is draw inferences from facts it says is established by the evidence. First, it was calving season at the relevant time. The defendant was employed as a farm manager and was responsible for the dairy herd. It is clear from the LIC group profile or LIC documents that there were calves due and born at the relevant time (August, September 2015). The calves themselves are not recorded as part of the herd but for the cows there are details of births and due dates. Ten Friesian calves were registered by the defendant under the NAIT system on 15 September 2015 and shortly thereafter sold to [the purchaser]. Her evidence was that she was told and believed from her own experience that they were in the region of three to four weeks old at the time.

[8] I consider that in the absence, at this point of the trial, of any explanation for how the defendant came to be in possession of the 10 Friesian calves the Crown is entitled to ask the jury to draw the inferences it intends to put to them.

[9] As I said, the principles to be applied include the principle that inferences or conclusions that can be drawn from the evidence are for the jury to decide. I am satisfied that the evidence in relation to the theft of the calves is sufficient in law, if accepted by the jury, to prove the case and therefore the charge must be left to the jury to decide.

[10] The application to dismiss charge 1 under s 147(4)(c) is declined.

S B Edwards
District Court Judge