The Prasad Direction

The Queen v Prasad (1979) 23 SASR 161
DPP Reference No. 1 of 2017 [2019] HCA 9

On 20 March 2019 the High Court decided in *DPP Reference No.1 of 2017* that the Prasad direction was contrary to law. As a result, the direction can no longer be given – not even in a summary hearing or a judge alone trial.

I recently appeared at Parramatta Local Court to represent a client charged with two counts of Goods in Custody. Partway into the Defence Case, the magistrate gave herself a Prasad direction and dismissed one of the charges. Every criminal lawyer in NSW should understand the basis and effect of a Prasad direction. This article seeks to explain the procedure in simple terms.

The Facts of The Queen v Prasad

Mr Prasad was found guilty by a jury of obtaining property by deception. He had represented that he owned all the shares in a restaurant business when in truth he owned only half the shares. Nevertheless, he accepted a cheque for $7,000 in exchange for a document purporting to transfer all the shares.

The rest of the shares were in fact owned by a Ms Penley who denied transferring her shares to Mr Prasad. The defence case was that Ms Penley had signed a document transferring her shares to Mr Prasad and then forgot that she had done so. Ms Penley initially denied this but under cross-examination conceded that it was 'a possibility'.

At the close of the prosecution case, counsel for Mr Prasad applied for a directed verdict of not guilty. Prasad's counsel did not contend that there was no case to answer. Instead he contended that the judge had a discretion to stop the case because of the unsatisfactory character of Ms Penley's evidence. He contended on appeal that the judge's failure to stop the case was an error of law and should result in the conviction being quashed.

Difference from a 'No Case' Submission

The prosecution carry the burden of proving every element of the offence charged. At the close of the case for the prosecution, the Defence can make a submission that the prosecution have failed to provide any evidence to prove one of those elements. The test is:

> '. . . *whether there is evidence with respect to every element of the offence charged which, if accepted, would prove that element*. *It is a question of law and, if a submission is made, it must be ruled upon by the trial judge.'* [1]

However, counsel for Mr Prasad did not make this submission. Instead, he conceded that there was a case to answer because Ms Penley had given evidence that she had not transferred her shares to Mr Prasad. Counsel was applying for a directed verdict of not guilty on the basis that Ms Penley's evidence was unsatisfactory and could not support a finding of guilt. This assertion was firmly rejected by the Supreme Court of South Australia.

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[1] The Queen v Prasad 23 SASR 161 at 162 per King CJ

They held that this was a question of fact and must be left to the jury.

So, what can the judge do?

It is 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.

The judge can go even further and, if he sees fit, actually advise the jury to stop the case and bring in a verdict of not guilty. But a judge cannot direct a jury to return a not guilty verdict in circumstances 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 usurp the rights and function of the jury.

How does this apply to a Summary Hearing?

King CJ held in The Queen v Prasad at 162:

> '*I have no doubt that a tribunal which is the judge of both law and fact may dismiss a charge at any time after the close of the case for the prosecution, nothwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal considers that the evidence is so lacking in weight and reliability that no reasonable tribunal could safely convict on it. This power is analogous to the power of the jury, as judges of the facts, to bring in a verdict of not guilty at any time after the close of the prosecution's case. It is part of the tribunal's function as a judge of the facts.*'

So why don't lawyers apply for a Prasad direction in every summary hearing? The reason is that some magistrate's take the view that if the Defence applies for a Prasad direction, they are, in effect, closing the Defence Case. So the Defence is unable to lead further evidence.

So counsel should always enquire as to the magistrate's view on this before making the application. In my case at Parramatta LC, only one of the charges was dismissed pursuant to the Prasad direction. I enquired of Her Honour as to her view on the second limb of May v O'Sullivan [2] and Her Honour responded:

> '*That's it. That's the end of your case*.'

Needless to say, I didn't make the application and instead called my client to give evidence so he could explain how he came to be in possession of the goods.

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[2] May v O'Sullivan [1955] HCA 38