SUPREME COURT OF QUEENSLAND

CITATION:	*R v Taylor* [2017] QCA 169
PARTIES:	**R** **v** **TAYLOR, Tyson John** (appellant)
FILE NO/S:	CA No 168 of 2016 SC No 511 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 24 May 2016
DELIVERED ON:	11 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2017
JUDGES:	Fraser and Morrison JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – MATTERS AVAILABLE TO JURY IN JURY ROOM – MISDIRECTION AND NON-DIRECTION – where three prosecution witnesses gave evidence that the appellant confessed to them that he committed the offences – where the jury requested that the three witnesses' evidence be replayed to them or the transcripts be provided to them – where the prosecution and defence counsel agreed that the transcripts be provided to the jury – where the trial judge did not provide the jury with directions or warnings as to the use of the transcripts – where no transcript of the appellant's evidence in relation to the three witnesses or reminder of that evidence was given to the jury – whether these circumstances resulted in a miscarriage of justice *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180; [1987] HCA 58, cited *Driscoll v The Queen* (1977) 137 CLR 517; [1977] HCA 43, cited *R v Rawlings; R v Broadbent* [1995] 1 All ER 580, cited *R v Tichowitsch* [2007] 2 Qd R 462; [2006] QCA 569, cited

COUNSEL: S C Holt QC for the appellant
V A Loury QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Dalton J. I agree with those reasons and with the order proposed by her Honour.

[2] **MORRISON JA:** I have read the reasons of Dalton J and agree with those reasons and the order her Honour proposes.

[3] **DALTON J:** The appellant appeals against his conviction on 24 May 2016 of attempting to kill Anthony John McGrath on 8 October 2012, and of murdering him on 21 May 2013. An appeal against sentence was abandoned.

[4] Both the appellant and his victim were in thrall to a woman named Susan Stewart. The Crown case was that the appellant killed Mr McGrath because Susan Stewart wanted him dead. The evidence was that Mr McGrath gave Susan Stewart large amounts of money before his death, believing her to be pregnant with his child. She believed he had changed his will in her favour, and indeed he had visited a solicitor and given instructions to make her a beneficiary.

[5] The Crown case was that the appellant first attempted to murder Mr McGrath by visiting him and putting the drug Fantasy into Mr McGrath's wine, thus rendering him unconscious. Its case was that the appellant then put Mr McGrath onto his own bed and injected poison into his feet. It was alleged that the appellant believed this would kill Mr McGrath, but it did not, although it caused parts of his feet to turn black. The Crown case was that the appellant then set Mr McGrath's home alight. The attempt to kill Mr McGrath this way was foiled because a neighbour noticed the fire, and Mr McGrath was rescued.

[6] At the hospital, after the fire, Mr McGrath was found to be deeply unconscious, with physical signs consistent with sedation. He had black (necrotic) tissue on both his feet and suffered surgical amputation of some toes. This was considered at the time to be a result of the fire. However, there was no evidence that Mr McGrath was close enough to the fire to have been burnt by it; in fact to the contrary. The occurrence of the fire itself was suspicious. It occurred in October. Mr McGrath, dressed only in shorts, and with the windows to his bedroom open, was found in a bedroom with a heater on. It appeared that curtains above the heater had caught alight. He had, that evening, received a visit from the appellant and Ms Stewart. However, the fire was not investigated at the time.

[7] On 21 May 2013 Mr McGrath returned to his home with some takeaway food after helping at a rugby league event. He had spent five months at his sister's home, recuperating from injuries he received in the fire. He had been back in his own home around one month. He was shot in his garage, soon after alighting from his car, at about 9 o'clock at night.

[8] The Crown case was that the appellant confessed to having committed both the attempted murder and the murder to two separate sets of people: first, his friends or

acquaintances (witnesses Wessling, King and Studeman),[1] and second, undercover police officers who tricked him into thinking they were an outlaw gang with links to a corrupt police officer who could save both him and Susan Stewart from prosecution, if only they knew the full details of his crimes. The Crown case was that the details which all these witnesses knew were so specific that they could only have been provided by the person who attempted to, and then did, kill Mr McGrath.

[9] At the commencement of the hearing of the appeal counsel for the appellant was given leave to amend the notice of appeal to rely only upon one ground of appeal:

> "That a miscarriage of justice occurred as a result of the provision to the jury of transcript of the trial evidence of three prosecution witnesses:
>
> (a) without any directions or warnings as to its use; and/or
>
> (b) without also providing transcript of the evidence of the appellant or reminding the jury of the appellant's evidence in respect of those witnesses."[2]

[10] The trial ran for 11 days. Wessling gave evidence towards the end of day three; King gave evidence at the end of day three and into day four, and Studeman gave evidence on day four. The undercover police officers gave evidence at the end of day four and during day five. There was a weekend break between the end of day four and the beginning of day five. The appellant gave evidence on day eight (a Thursday). The appellant's evidence finished at about noon. Both counsel addressed the jury, and the trial judge began summing up. The judge summed-up for the entirety of the next day. A weekend again intervened. On Monday morning the trial judge continued summing-up to the jury until 11.00 am, when the jury retired to consider their verdict. Just before lunch-time, at 12.55 pm, the trial judge took a note from the jury which requested the written statements of the witnesses Wessling, King and Studeman. After discussion with counsel, the trial judge informed the jury that those three statements were not part of the evidence. The judge explained to them that the usual rule is that witnesses give evidence orally and that they should not speculate about why they did not have written statements from the witnesses, notwithstanding they had been mentioned in cross-examination.

[11] After lunch, the jury sent another note asking to be reminded of the evidence given by Studeman, King and Wessling. The note said, "We're unsure as to whether this would be listening to a recording or reading a transcript". Again the matter was discussed with counsel. The prosecutor informed the Court that the transcript had been corrected and that she had no difficulty with it being provided to the jury. The trial judge indicated he would only do that if defence consented. Counsel for the appellant said that he did consent; that he and the prosecutor had anticipated this request from the jury; that they had worked together on editing the transcript so it could be provided to the jury, and that he joined with the prosecutor in suggesting that the transcript be given to the jury. The relevant transcripts were given to the jury; the judge enquired whether each had a copy, and then said, "All right. Well, I'll let you retire again if you don't mind and you can read those as you see fit. Thank you."

---

1 Of these three, Wessling's evidence was not significant.

2 Contained in a document marked A on the hearing of the appeal.

[12] Counsel, including experienced counsel for the defence, did not suggest that any directions accompany the transcript and none were given. Nor was there any discussion between the bench and counsel as to whether or not the jury should receive any transcript of the evidence other than that of the three non-police witnesses who had given evidence of confessional statements by the appellant.

[13] Counsel for the appellant did not contend that it was wrong for the trial judge to have given the transcript to the jury. It acknowledged that this Court has ruled that to be within the discretionary power of a trial judge.[3]

[14] The appellant's first point was that the jury ought to have been reminded that the transcript itself was not the evidence; what they had heard from, and seen of, the witnesses in the witness box was the evidence. In this case, an unusual number of transcripts had already been provided to the jury and they had been warned on several occasions of this very thing. The judge reminded them of the rule again in his summing-up, and I note the prosecutor reminded the jury of the same rule in her address. When the transcripts were given to them they were told that unfortunately a technological failure meant that they could not listen to the evidence again but, in the absence of that facility, they were being provided the transcripts. In my view the jury were well aware of the relevant status of the transcripts; there was no need to give them this warning again. The parties had agreed that the edited transcript was an accurate record of what was said by the witnesses in their evidence. And the jury had seen the witnesses give evidence. I do not think that the fact that the trial judge did not warn the jury again about the difference between the oral evidence they had heard and the transcript of it produced a miscarriage of justice in this case.

[15] The second point raised by the appellant is that giving the transcript of only some of the witnesses to the jury produced an unfair imbalance. It was submitted that it served to emphasise part of the evidence, which favoured the Crown, by giving it to the jury in permanent form.[4] It was submitted that having the evidence in writing meant that that part of the evidence had a credibility which was divorced from the jury's assessment of a witness giving evidence orally.[5] It also meant that the jury had that evidence in a very detailed way, in contrast to what one assumes was a less detailed recollection of the oral evidence in the trial. Overall there was a risk that having this evidence would be an influence upon their deliberations which was out of all proportion to the real weight of the evidence.[6] The appellant relied upon dicta of Williams JA in *Tichowitsch* (above) to the effect that if part of a transcript is supplied to a jury, all the evidence on a particular point should be supplied.[7]

[16] In general, there are good reasons for refraining from giving a jury the transcript of evidence, or the transcript of part of the evidence, unless it is absolutely necessary. These are discussed by the High Court in *Butera* (above), and in *Gately v The Queen.*[8] Evidence at a criminal trial is oral for the most part, and during the oral evidence of a witness the jury has a chance to form views about their credibility and about the reliability of the evidence they are giving. Further, the jury must consider the whole of the evidence in reaching its verdict, and reading or replaying part of

---

3 *R v Tichowitsch* [2007] 2 Qd R 462, [9].
4 *R v Rawlings; R v Broadbent* [1995] 1 All ER 580.
5 *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 189.
6 Paraphrasing the words of Gibbs J in *Driscoll v The Queen* (1977) 137 CLR 517, 542.
7 Above, [11].
8 (2007) 232 CLR 208, [95]-[96].

the evidence carries a risk of disproportionately emphasising that part. If part of the evidence is replayed, read to, or given to the jury in written form, it is generally appropriate that all the evidence on the particular topic be given to them again. Those principles are undoubted, and in my view very important to the conduct of a fair trial. Nonetheless, the application of all principle must be fitting to the particular circumstances before the Court. In this regard I refer to the dicta of Williams JA in *Tichowitsch* (above), "… the overriding requirement is that what is done be fair and balanced so that the trial of the accused person is in no way prejudiced while affording the jury the best opportunity of arriving at a true verdict." – [16].

[17] Counsel for the appellant submitted that the jury ought to have been reminded of the appellant's evidence in respect of the witnesses Wessling, King and Studeman, or have been given a transcript of the appellant's evidence in relation to them.[9] It was submitted that the jury ought to have been warned not to over-emphasise what was in the transcript because they had it in writing, rather than just having listened to the evidence.

[18] Here, an experienced and fair prosecutor did not ask for what the appellant's counsel now contends was necessary. An experienced defence counsel did not ask for it, and seemingly the judge did not think it necessary. That of course is not conclusive of the matter. All three may have overlooked it, and the appellant is not strictly bound by the conduct of his trial counsel. On the other hand, when the situation at the time of the jury's request is considered, the conduct of counsel and the trial judge can, in my view, be understood as reflecting that, in the circumstances of this case, there was no need for the jury to be provided with the whole or part of the transcript of the appellant's evidence, or reminded of what the appellant said about the evidence of King and Studeman.

[19] The appellant did not fare well in cross-examination. I cannot see that it would have been in the interests of the defence case to ask the trial judge to give the whole of the transcript of his evidence to the jury. To the contrary, it would have been against the appellant's interests in my view.[10] One alternative then, was for the parts of the appellant's evidence which dealt with Studeman and King to be given to the jury. Once again, my view is that this would not have been in the appellant's interests.

[20] In his evidence-in-chief the appellant denied that he had told either Studeman or King that he was involved in, or committed, the crimes of which he was accused; he said he had merely told them he had been investigated. He said Studeman and King had been his friends but that they had fallen out over a drug deal in which drugs went missing; Studeman and King suspected he had taken them. His evidence about this was contained in less than two pages of transcript.

[21] His evidence in cross-examination on this topic was similarly limited, recorded in just under two pages of transcript. The appellant denied telling specific matters to Studeman and King, although he admitted telling the undercover police officers that he thought it was King who had provided information to the police. He said that he suspected King because of the falling out.

---

9 Cf. *R v DAJ* [2005] QCA 40 and *R v H* [1999] 2 Qd R 283.

10 The appellant's counsel conceded this – Appeal Transcript 1-14.

[22] Most of the cross-examination of the appellant focussed upon the detail of matters he had confessed to the undercover police – the point sought to be made (repeatedly and, so far as one can tell from the transcript, successfully) was that no-one but the killer could have known such detail. The cross-examination as to whether or not the appellant had made admissions to Studeman and King was essentially a reprise of this, albeit less dramatically. In my view, it was not in the appellant's interest for the jury to have the four or so pages of transcript dealing particularly with this matter.

[23] The question then becomes whether or not, short of providing them with the part of the transcript of the appellant's evidence about Mr Studeman and Mr King, the trial judge ought to have reminded the jury what the appellant said about their evidence. The appellant's evidence had been given before the jury on day eight of the trial – 19 May 2016. They had later that day been reminded of it in the defence address, and then again in the prosecutor's address.

[24] That afternoon the trial judge began his summing-up and made general comments in the course of which he adverted to the fact that defence counsel, in particular, had focused upon questions of reliability of evidence. He remarked that whether a witness had said something different at an earlier time was a matter to be considered in assessing a witness's evidence and reliability. The trial judge did not name King and Studeman at this part of his summing-up, but these comments were apt to refer to their evidence because they had given statements to police which did not contain the admissions from the appellant they gave evidence of. The trial judge told the jury that such different versions called into question a witness's reliability and that the weight of the evidence would have to be considered, as would reasons for such inconsistencies or discrepancies. He urged the jury to carefully evaluate such evidence in light of the other evidence in the case.

[25] The next day the trial judge reminded the jury that the appellant disputed the statements attributed to him by King, Studeman and Wessling, and told the jury it was up to them to assess the evidence and the arguments about it. He adverted to the fact that each of King and Studeman had earlier provided statements to police which did not contain the alleged confessions, and he reminded the jury of the appellant's pointing to a reason why King and Studeman might try to falsely implicate him.

[26] After these preliminary points as to assessment of evidence, the trial judge canvassed the evidence which the jury had heard during the trial in quite some detail. Starting at about 2.35 on Friday afternoon the primary judge summarised the evidence of Wessling, King and Studeman as part of that. He dealt with King and Studeman having changed the information they provided to police and canvassed examination and cross-examination of these witnesses in some unusual detail, reading quite extensively from the trial transcript to the jury. Altogether, this part of the summing-up fills about 17 pages of transcript.

[27] After the weekend, on Monday morning, 23 May 2016, almost the first thing the trial judge said to the jury was that they would need to consider the evidence given by Messrs King and Studeman, and to a lesser extent Mr Wessling. He summarised defence counsel's address as to why the jury would entertain a reasonable doubt about the truthfulness of versions offered by these three witnesses. He returned to that subject some four transcript pages later, reminding the jury about the

appellant's evidence of the falling-out over drugs. He reminded them that defence counsel had addressed them about the fact that both witnesses King and Studeman changed their stories and that even then their stories were not consistent; that they were involved in illegal drug activity, and under pressure from police. The judge read from the transcript of defence counsel's address in relation to these witnesses. In summarising the address of the prosecutor, the trial judge returned several times to the evidence of Mr King and Mr Studeman and the detail they knew about factual matters intimately involved with the offending. As I have already said, the jury retired at 11.00 am after hearing this and made their first request in relation to the statements of King and Studeman just before 1.00 pm.

[28] To summarise then, the jury had heard the evidence of the appellant, and two addresses on 19 May 2016. The appellant's evidence that he did not confess to King and Studeman, and that they had a motive to implicate him, was a significant part of both his evidence and the addresses of both counsel. There was an allusion to matters relating to King and Studeman's reliability in that part of the summing-up given on 19 May 2016. There was a detailed and lengthy analysis of matters going to King and Studeman's evidence and defence counsel's arguments against it in the summing-up on 20 May 2016 and at least three substantial reminders of it on the morning of 23 May 2016 in the summing-up.

[29] As well, the transcripts which the jury were given contained defence counsel's cross-examination of King and Studeman in which the appellant's case about King and Studeman having a motive to falsely implicate the appellant in the offending was put, and indeed put in a more detailed way, and more assertively, than it was put in the appellant's own evidence.

[30] In my view, in this case, there was no need for the trial judge to remind the jury about the appellant's case so far as it related to Studeman and King at the time they received the transcripts of evidence of Studeman and King.

[31] It is true that the jury could have been warned not to put undue emphasis on the evidence of King and Studeman at the time they were given the transcripts. They could have been alerted to the fact that they were receiving only part of the evidence in written form and that there was a danger they might accord it more weight than evidence they had only heard orally. In my opinion, in the circumstances of this case, for all the reasons just discussed, the fact that this was not done has not resulted in a miscarriage of justice. The appellant has not been deprived of a chance of acquittal that was otherwise fairly open to him. I would dismiss the appeal.