

COURT OF APPEAL

**PHILIPPIDES JA
HENRY J
BROWN J**

**CA No 49 of 2019
DC No 384 of 2018**

THE QUEEN

v

APRILE, Laura

Appellant

BRISBANE

THURSDAY, 24 OCTOBER 2019

JUDGMENT

BROWN J: This is an appeal that was originally commenced by the appellant acting on her own behalf seeking to set aside her conviction on six counts of using forged documents, contrary to s 145.1(1) of the *Criminal Code Act 1995* (Cth), hereinafter referred to as the *Code*, and three counts of obtaining a financial advantage by deception, contrary to s 134.2(1) of the *Code*. The appellant was convicted on 8 February 2019 following a trial.

An original notice of appeal and submissions were filed by the appellant on her own behalf. Recently, however, Mr Mumford of counsel agreed to act on her behalf on a pro bono basis. The willingness of Mr Mumford, like a number of other members of the Bar, to act on behalf of self-represented persons who are otherwise unrepresented assists not only the person concerned, but also the administration of justice. The present appeal is an example of such

assistance. It should also be said that the counsel acting on behalf of the Commonwealth Director of Public Prosecutions have also shown great assistance to the administration of justice in their approach to the amended notice of appeal.

As a result of Mr Mumford's intervention, the notice of appeal was amended. The grounds of appeal set out in the original notice and the application to adduce further evidence were abandoned. The appellant now seeks leave to pursue only two grounds of appeal, namely that:

- (a) A substantial miscarriage of justice was occasioned, in that:
 - i. The learned trial judge failed to direct the jury as to the meaning of the word "dishonesty" as set out in s 130.3 of the *Code*;
 - ii. The "Elements of Offences" document did not include the element that the documents the subject of counts 1 to 6 on the indictment were, in fact, "false documents", as defined in s 143.2 of the *Code*.

"Dishonesty" is defined in s 130.3 of the *Code*.¹ It requires satisfaction of both an objective and subjective test. The element of dishonesty was common to all counts on the indictment and an essential element in the Crown proving its case against the appellant. The appellant contends that, in his summing up, the trial judge directed the jury that dishonesty was an element of which they were required to be satisfied in relation to the relevant offences, but did not give any direction as to the meaning of dishonesty pursuant to the *Code* or how to approach the task of determining beyond reasonable doubt whether the appellant's actions were dishonest. The test applied by the jury in determining dishonesty, or whether all members of the jury applied the same definition, cannot, in the circumstances, be known.

As to the second ground, the trial judge provided a document to the jury entitled "Elements of Offences" to assist them in their deliberations. However, the document did not include as an element that the documents the subject of counts 1 to 6 were, in fact, "false documents", as

¹ For the purposes of Chapter 7 of the *Code*, which contains both of the offences of which the appellant was convicted.

defined in s 143.2 of the *Code*. The document simply stated, “[i]n each case...1. The defendant knew the document was false”. In oral directions the jury were told the same thing.

On the basis of the “Elements of Offences” document, the first element of which the jury had to be satisfied to the requisite standard was that “[t]he defendant knew the document was false”. On that approach, the appellant contends that the path to conviction commenced on the assumption that the documents were false documents, an element that was required to be positively established by the Crown. The appellant contends that the learned trial judge ought to have directed the jury that the Crown was obliged to prove as one of the essential elements in trial that the documents were false documents and they would only be so if they met one or more of the definitions in s 143.2(1) of the *Code*.

Section 143.2(1) of the *Code* provides that, for the purposes of Part 7.7 (which includes the offence of using a forged document in s 145.1), “a document is a **false document** if, and only if” it meets one or more of the definitions set out in ss 143.2(1)(a), (b), (c), (d) or (e), which contain certain requirements as to the way in which the document, or part thereof, was made or altered. The jury was not instructed about any of those definitions.

Although the appellant admitted to “making the documents” that were the subjects of counts 1 to 6, she gave evidence as to how they came into existence which challenged the Crown's case. Further, it is accepted by the Crown that although the appellant may have conceded that some parts of the documents were not, in fact, signed by the person who apparently signed them, the jury was not directed to consider that evidence against the statutory definition.

The Crown has conceded that both grounds of the appeal are established and that there has been a substantial miscarriage of justice. It has invited the Court to accept the submissions of both the appellant and the respondent that the appeal should be allowed, the convictions quashed, and a new trial ordered on all nine counts. That concession is properly made.

In *RPS v The Queen* (2000) 199 CLR 620 at [41], it was said that “[t]he fundamental task of a trial judge is, of course, to ensure a fair trial of the accused” and that this task requires the trial judge to give the jury instructions about the elements of the offence or offences.

The element of dishonesty was essential to both categories of offences with which the appellant was charged. The appellant had denied dishonesty and it was an issue in relation to all counts at trial. The statutory definition of "dishonesty" in s 130.3 of the *Code* was the relevant definition which had to be applied and was a matter to be determined by the jury, pursuant to s 130.4 of the *Code*. The trial judge was, therefore, required to direct the jury as to the statutory definition of dishonesty in s 130.3 of the *Code* and that they had to determine whether or not it was satisfied in relation to each offence in deciding whether the Crown had established dishonesty to the requisite standard.

Further, as stated above, in relation to the offences against s 145.1 of the *Code*, the jury were required to be directed that, in order to establish an offence under that section of the *Code*, an element that the Crown had to establish was that the relevant document for each offence was a "false document" within one or more of the definitions set out in ss 143.2(1)(a), (b), (c), (d) or (e) of the *Code* and had to be informed of those definitions.

Although the Elements of Offences document had been settled with counsel, and no redirection was sought by the defence as to the directions given, that is of no significance either to the question of a miscarriage of justice or the application of the proviso when the failure was to direct about elements of the offences which were in issue, as was the case here.² As was conceded by the Crown, the present case is not one where the proviso pursuant to s 688E of the *Criminal Code Act 1899* (Qld) should be applied, given that the element in respect of which the directions was not given was fundamental to the Crown's case³ and that the case largely turned on the issue of "contested credibility".⁴

In the circumstances, in my view, the appropriate orders would be to allow the appeal, quash the convictions for counts 1 to 9, and order a retrial on all counts.

² *R v Lavin* [2019] QCA 109 at [49].

³ *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [31].

⁴ See *Kalbasi v Western Australia* (2018) 264 CLR 62 at [15], in which it was recognised that such cases are amongst those which are inapt for the application of the proviso.

A further application was made at the hearing of this appeal for the appellant to be granted bail pending a retrial. That was not opposed by the Crown. In the circumstances it is, in my view, appropriate that bail be granted to the appellant, Laura Aprile, on condition that she be released from custody of Corrective Services and that such bail is granted upon the conditions that applied to her bail prior to trial.

I consider that the order of the Court, therefore, should be as follows:

1. The appeal be allowed.
2. Set aside the convictions.
3. A retrial be ordered on all counts.
4. That bail be granted to Laura Aprile on condition that she be released from the custody of Corrective Services and such bail is granted upon the conditions that applied to her bail prior to trial.

I note that the terms of the order are agreed by both the appellant and the respondent.

PHILIPPIDES JA: I agree. I also wish to specifically endorse the remarks concerning Mr Mumford's commendable pro bono assistance and the quite proper cooperative stance taken by counsel for the respondent.

HENRY J: I also agree.

PHILIPPIDES JA: The orders of the Court will be as proposed by Justice Brown.