SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fullgrabe* [2002] QCA 366
PARTIES:	**R** v **FULLGRABE, Clint Alfred Dean** (appellant)
FILE NO/S:	CA No 174 of 2002 DC No 2362 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2002
JUDGES:	Davies and Jerrard JJA, Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction allowed.** **2. Conviction be set aside and a new trial ordered.** **3. Appellant be remanded in custody until otherwise ordered in an appropriate application in that regard.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – whether the trial judge gave no direction concerning reasonable hypotheses consistent with innocence - where sufficient directions given CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – GENERAL MATTERS – PRESENTATION OF DEFENCE AND CROWN CASE AND REVIEW OF EVIDENCE - GENERALLY – whether judicial comments in summing-up permissible – whether summing-up unbalanced – whether trial judge misstated the evidence of a witness – whether the misstatement when compounded with the trial judge's comments led to the appellant being denied a fair trial *Criminal Code* (Qld), s 620

Nominal Defendant v Clements (1960) 104 CLR 476, approved
RPS v The Queen (2000) 199 CLR 620, considered
R v Bolic and Judd [1969] Qd R 295, considered
R v Durham [2000] QCA 88, CA No 349 of 1999, 21 March 2000, cited
R v George [1980] Qd R 346, distinguished
R v Giffin [1971] Qd R 12, cited
R v Perera [1986] 1 Qd R 233, considered

COUNSEL: B G Devereaux for the appellant
S G Bain for the respondent

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

[1] **DAVIES JA:** I agree with the reasons for judgment of Mackenzie J and with the orders he proposes.

[2] **JERRARD JA**: I have read and respectfully agree with the reasons for judgment and orders proposed by Mackenzie J.

[3] **MACKENZIE J:** The appellant who was an employee of a security firm was convicted by a jury of stealing $20,000 the property of Redcliffe Leagues Club. The money had been contained in a wallet which was one of three containing moneys of the Club given to the appellant in his capacity as a security worker to deposit into the night-safe at the Commonwealth Bank at Margate. The Crown case was that he did not deposit the money but took it for his own use. The appellant gave evidence denying the offence. There was no evidence that he was in financial need at the time.

The evidence

[4] During the week before it went missing, Mr Weller, the appellant's employer, gave the appellant the night-safe key and verbal instructions about operating the night-safe. The appellant gave evidence that he deposited the missing wallet at about 3.25pm on a Sunday along with the other wallets from the Leagues Club. When the bank officers opened the safe the next day, the wallet was missing.

[5] At the time of the disappearance of the money there were two other customers of the bank who had keys to the safe, an hotel and a church. Money had been deposited on behalf of each of those organizations in the middle of the day on Sunday and the safe had operated normally. The appellant also said that he had deposited two other wallets into the safe on Saturday. Those wallets were there when the safe was opened on Monday. The two bank officers who opened the night-safe on Monday gave evidence that eliminated them as suspects.

[6] Notwithstanding that he had been given instructions by his employer to reopen the safe after depositing the last wallet to make sure it had fallen into the safe, the appellant gave evidence that he could not remember whether he had done this on the relevant occasion. Some evidence was elicited to suggest that people other than

those already mentioned may have had access to the safe because they had been issued with keys at an earlier time, that other authorised keys may have been available to a range of people associated with the organizations to whom they had been issued and that the possibility that keys may have been copied could not be eliminated.

[7] Mr Weller also said that about 6 months before the incident he had opened the safe and found a wallet sitting in it. He closed the door, opened it and found that the wallet had on that occasion fallen through into the safe. He said that he had spoken to the bank manager about it. The bank manager, Ms Murray, denied she had ever been told of such an occurrence. Mr Peters, who had been employed by a previous security organization run by Mr Weller for about 4 years ending in 1997, said on a few occasions he unlocked safes which seemed to be jammed. He managed to open them and saw wallets. He said that when he closed the safes again, the wallets fell through into the safe's interior. He said that that had occurred twice at the night-safe at the Commonwealth Bank at Margate. The witness had been in the army with the appellant and while they did not stay in contact they happened to meet again about 12 to 14 months before the trial. (The trial occurred a little over 12 months after the money went missing).

[8] Mr Briggs, a locksmith of long experience with the kind of night-safe involved examined it the following Wednesday and it worked properly. He explained the way in which the night-safe operated and gave evidence tending to eliminate the possibility that the wallet had been deposited as the appellant claimed but may have remained in a position where it could be retrieved by someone else who had access to the safe. He gave evidence that if a wallet did not fall into the interior of the safe when it was closed, the wallet would jam in the mechanism then, or, if not then, when the next person tried to open it, because of the way the mechanism operated. The jamming would prevent the safe from being opened from outside with a key.

Grounds of appeal

[9] The grounds argued were that the trial judge had erred in directing a jury that:

(i) it could have regard to the fact that Weller first made mention of facts helpful to the defence during cross-examination in considering his credit; and

(ii) the jury could have regard to the absence of evidence of reports by Weller and Peters of prior incidents, sworn to by each of them in evidence, in considering their credit.

These were, in effect, particulars relied on in support of a third ground that the summing-up was unfair and lacking in judicial balance. A separate ground, that the trial judge had failed to properly direct the jury as to the onus upon the Crown to exclude beyond reasonable doubt any reasonable hypothesis consistent with innocence was also argued. Two grounds relating to admissibility of evidence and the ground that the verdict was unsafe and unsatisfactory were not argued.

Exclusion of hypotheses consistent with innocence

[10] With regard to the ground relating to the direction as to the onus to exclude any reasonable hypothesis consistent with innocence beyond reasonable doubt, the case was circumstantial. It relied on drawing the conclusion beyond reasonable doubt that it was the appellant who was responsible for the disappearance of the money.

The learned trial judge did not give a direction in the terms in which the appellant argues for. However, he did tell the jury early in the summing-up that the Crown had the onus, if they were to convict, of satisfying them of guilt beyond reasonable doubt. In the course of directing as to what was evidence the learned trial judge reminded the jury that defence counsel has submitted that the evidence was not sufficient for them to conclude beyond reasonable doubt that there was not some malfunction of the night-safe which allowed someone else to steal the money, or something else happening other than the accused taking the money. Shortly afterwards he told the jury that the accused did not have to establish how it was that the bag went astray but the Crown had to prove that he was the one who relevantly dealt with it. Later in the summing-up the jury was told that the important thing for them to consider, and the ultimate question, was whether they were satisfied beyond reasonable doubt that the accused took the money to do with it what he wanted to, whatever that might have been.

[11] In the course of reminding the jury of the Crown's submissions the learned trial judge reminded the jury of a submission that, for the theory that someone else had taken the money to crystallise into a realistic possibility, on the assumption that it was not one of the other authorised key holders (both of whom had given evidence) who was responsible, it required "a number of circumstances to come together all at one time". Those circumstances were that there was another key, held by a dishonest person who came to the bank at Margate at some time after the money had been deposited by the appellant who was able to remove the money from the safe. He reminded them that the Crown submission was that they would reject the theory and conclude beyond reasonable doubt, by inference, that it was the accused who stole the money.

[12] Defence counsel drew attention to the absence of a direction concerning the exclusion of reasonable hypotheses consistent with innocence when requesting redirections. The learned trial judge said he did not always give that direction and none was given. I am satisfied that the directions given were sufficient for the jury to understand that they had to be satisfied beyond reasonable doubt that it was the appellant, to the exclusion of anyone else, who was responsible for stealing the money. This ground of appeal fails.

Were the judicial comments in the summing-up permissible?

[13] The remaining grounds of appeal are concerned with the issue whether the learned trial judge denied the appellant a fair trial by referring to the matters itemised in para [9] and/or because he failed to put the appellant's case fairly, failed to sum-up even-handedly and exceeded the limits of acceptable comment on the facts. It was a critical element of the defence case that there was evidence that on occasions wallets put into night-safes did not fall inside the safe and that sometimes a person subsequently opening a safe found a wallet in a position where it could be removed by that person if so minded. Mr Weller and Mr Peters gave evidence of personal experience of such occurrences. On the other hand Mr Briggs cast doubt on whether it was possible for a wallet to remain in a position where it could be retrieved in that way. Ms Murray denied that Mr Weller had reported to her an occasion which he said had happened at the Margate branch about 6 months before the offence. She was aware personally of two occasions where objects had jammed in night-safes rendering them inoperative.

[14] In his address the Crown Prosecutor had submitted that the evidence of Mr Weller and Mr Peters and the appellant should be approached with care. They all knew one another and had had connections in the past. Mr Weller had volunteered in cross-examination, without being asked, evidence helpful to the appellant that there had been an incident about 6 months before when he found a wallet in a night-safe drawer. The jury was invited to consider whether, in a case where a friend and employee had been charged, Mr Weller would have drawn attention to the incident earlier than that. The fact that the evidence was introduced only in cross-examination made it suspicious.

[15] Just before the part of the summing-up concerned in this ground, the learned trial judge gave a fairly conventional direction that the jury was not bound by any comments that he made, which were simply made in an attempt to be of assistance. If they disagreed with any view that they thought was expressed by him they were not to blindly follow it.

[16] Then the learned trial judge summarised the defence submissions in about 6 pages of transcript. He moved to the Crown submissions, referring first to a submission that the evidence of Mr Weller and Mr Peters that each had found wallets in the way described on previous occasions should be approached with caution. He then read passages from the evidence of Mr Weller, Ms Murray and Mr Peters concerning the issue. No objection could be taken to that course or to anything said to that point.

[17] The passage in the summing-up which was the subject of an unsuccessful application for a redirection and to which particular objection is taken covers about three pages of transcript and consists of references to aspects of the evidence of Mr Weller and Mr Peters and came immediately after the passage just referred to where reference to the Crown case began. The effect of the first part of the passage under attack was to emphasise that the evidence of the incident where Mr Weller found the wallet had not fallen into the safe had apparently been given for the first time in cross-examination. Jury members were entitled to ask themselves, keeping in mind that fact, whether, if true, it might have immediately sprung to mind when he found out that one was missing on the occasion to which the indictment relates.

[18] The learned trial judge then misstated when Weller's experience occurred, saying "It only happened, according to him, about a month before". The evidence was that it was about 6 months before the alleged offence. He then invited the jury to consider whether one would expect something to be made of it prior to Weller being cross-examined and to consider what he had done in respect of the malfunction of the safe. He drew the jury's attention to the question whether a person would promptly and formally let the bank know to guard against falling under suspicion if a wallet later went missing. He continued:

> "What would a person, not just a village idiot, if you like, but a person who is running a security firm do in a situation like that? Do you think he would have a casual conversation with the manager the next time he saw him or do you think he would do *(sic)* more positive about it than that? Well, ladies and gentlemen, it is a comment by me. You are in no way bound by it and you apply your own commonsense to this matter."

[19] He turned to the evidence of Mr Peters and raised the same issue whether he would have made sure that the malfunctions he had witnessed had been reported to protect himself from suspicion. He concluded by saying:

> "Well, that is all a matter for you to assess, ladies and gentlemen, whether you think people would operate that way or would they be lax enough to say, 'Oh, well, I won't worry about it any more than what I did.' You have Murray's evidence where she denies that any such conversation was had with her by Weller and so on. So, it is all a matter for you That is your job to assess all of that, ladies and gentlemen, and what you make of it.".

[20] With respect to the evidence of Mr Weller the learned trial judge explicitly told the jury that what he had said was comment by him, that they were in no way bound by what he had said and that they were to apply their own commonsense to the matter. He did not specifically say the same with respect to his comments concerning Mr Peters. However he finished by saying that it was the jury's job to assess the comments and what they made of the situation. In the whole context there is no reason to think that the jury would not have understood that assessment of Mr Peters' evidence was their function. It is also the case that the comments relating to Mr Peters are expressed in a less emotive way than those concerning Mr Weller.

[21] The appellant's argument is that the way in which the learned trial judge commented nevertheless rendered the summing up unbalanced. He had failed to put the appellant's case fairly and had exceeded the limits of acceptable comment on the facts. The appellant had therefore been denied a fair trial. Section 620 of the *Criminal Code* gives the court authority to make such observations on the evidence as the court thinks fit to make. There is a statutory discretion to be exercised by the trial judge in deciding whether and in what manner observations on the evidence are made. Whether the limits of a proper exercise of this discretion have been exceeded will depend on the circumstances of the particular case.

[22] Mr Devereaux relied on *obiter dicta* in the joint judgment of Gaudron A-CJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen* (2000) 199 CLR 620 in support of his submission that the appellant had been denied a fair trial by the learned trial judge's comments. The passage in *RPS* both concedes and demonstrates on its face that what are expressed are general comments. Relevantly for present purposes it states:

> "… it has long been held that a trial judge may comment (and comment strongly) on factual issues. But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

[23] This guarded statement is no more than a reminder to trial judges that there may be cases where comments on factual matters which go beyond arguments raised by counsel may affect the fair trial of an accused person. It is plain that comment, even strong comment, on factual issues may be made, as s 620 recognises in the context of the *Code*.

[24] Reminding the jury that questions of fact are for them may not always prevent a summing-up from being unbalanced. In *R v Bolic and Judd* [1969] Qd R 295, 304-305 it is said in the judgment of the Court:

> "There is no doubt that a trial judge is entitled to make such comments on the evidence as he thinks proper provided he makes it clear to the jury that the determination of the facts is for them, and that they are free to accept or reject his comments as they choose. The cases are conveniently collected in the judgment of the Full Court of Victoria in *R v Tikos (No 2)* [1963] VR 306. Nevertheless an appellate court may still intervene if it considers a trial judge's comments far stronger than the facts warrant (see *Broadhurst v The Queen* [1964] AC 441 at 464; *Reg v Mawson* [1967] VR 205).
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> …
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> In the instant case we think that, even though the jury were told frequently that the determination of the facts was a matter for them, the trial judge went too far in revealing his views, and did so to such an extent that the jury may well have been overawed."

[25] *R v Bolic and Judd* is an example of a case where a trial judge was held to have gone too far in revealing his views and to have done so to such an extent that the jury may well have been overawed despite being frequently told that determination of the facts was a matter for them. (See also *R v Perera* [1986] 1 Qd R 223 where the Full Court set aside a conviction because the summing up, read as a whole, was unfair, lacking in balance and so partaking of partiality as to render the trial a miscarriage of justice; see also *R v Durham* [2000] QCA 88, CA No 349 of 1999, 21 March 2002). In all of these cases the matters complained of were more sustained than in the present case.

[26] It has also been said that the concept of fairness requires due and proper consideration of the interests of the community as well as the interests of the accused person (*R v Giffin* [1971] Qd R 12, 16). Provided the defence is adequately explained to the jury, it is not incumbent on the trial judge to gloss over obvious weaknesses.

[27] Each case in which it is claimed that the trial judge has exceeded proper limits in commenting on the facts must be viewed in its own setting. The present case is not one, as in *R v George* [1980] Qd R 346, where the learned trial judge's direct expression of opinion that a particular witness seemed to be giving her evidence completely honestly and fairly was criticised. However, when the challenged passage in the present case is read as a whole, the impression is gained that, perhaps unconsciously, it conveys an assumption that since the bank manager had denied any conversation with Mr Weller concerning the malfunction of a night-safe on a previous occasion Mr Weller's evidence was less creditworthy.

[28] The Crown Prosecutor had touched upon some of the issues commented on by the learned trial judge, including the proposition that Mr Weller had not raised as a possible explanation his experience of finding a wallet in the safe after the wallet went missing on this occasion. However, what the learned trial judge said was put more forcefully than the Crown Prosecutor's submissions. It was not a case where there was something in the conduct of the defence case which called for a

responsive direction from the learned trial judge, as for example in *R v Giffin* where Stable J confronted the jury in forceful and colourful terms with what was implicit in the claim of an appellant, a burglar, that a woman in a sedative induced sleep after a medical procedure had consented to sexual intercourse or at least given him reasonable grounds to believe that she had.

[29] The effect of the passage complained of was that Mr Weller had never raised the issue of the night-safe malfunctioning during the investigation of the wallet's disappearance. He had not revealed it in evidence-in-chief but had withheld it until cross-examination. He had volunteered it then in an attempt to advantage the appellant's case.

[30] The misstated evidence that the incident involving Mr Weller had occurred only a month before the wallet disappeared was delivered in a way suggesting that, if it were true that he had mentioned the incident to Ms Murray, it was such a short time before that her evidence that he had not done so had an air of credibility. The factual error was never corrected.

[31] The fundamental difficulty with criticising Mr Weller's evidence on that basis is that there was no evidence that he had not mentioned the incident at some time after the disappearance of the wallet entrusted to the appellant. The evidence is silent on the question. Raising the issue in those terms was equivalent to giving evidence from the bar table that it was the case. It may also be observed that nothing asked of Mr Weller in examination-in-chief was calculated to cause him to give the evidence at that point.

[32] With regard to the earlier occasion when Weller's previous experience was said by him to have been mentioned to Mr Murray (which she denied) it is unfortunate that the misstatement that it had happened about 1 month before was emphasised in a way that suggested she was unlikely to have forgotten. Where credibility of the respective witnesses concerning possible malfunctions of night-safes was important the misstatement made in that way compounded the problem created by the submissions and comments suggesting that Mr Weller had belatedly referred to an incident which one would have expected to be mentioned earlier.

[33] Even if the Crown had evidence that Mr Weller had never mentioned the previous incident in the investigation phase of the present alleged offence, since Mr Weller was a prosecution witness, the Crown was in the difficult situation that it could not, short of a basis for arguing that he was adverse, impeach the credit of its own witness. If it had no such evidence, to assume that the matter had never been raised before in the absence of evidence was akin to suggesting recent invention when it had never been put to the witness that it was. Had it been put and denied, evidence refuting the imputation may have been led (*Nominal Defendant v Clements* (1960) 104 CLR 476). The problem created by the direction in light of the lack of any evidence as to whether or not Mr Weller had mentioned the previous incident in a timely way, and the absence of any opportunity to explain why he had not mentioned it in evidence-in-chief, was raised as an application for redirection which was refused by the learned trial judge.

[34] Having said that, there were clearly aspects of the defence case that required scrutiny by the jury. Had the appellant's complaint involved no more than comment on matters with a proper foundation in evidence, the case was close to the

borderline. The mere fact that judicial comment is strong is not necessarily fatal. However, because of the other aspect of the direction, the crucial issue of credibility was left to the jury in a way adverse to the defence case on an unsubstantiated premise. One cannot be confident that this did not affect the jury's consideration of that issue, notwithstanding that the learned trial judge identified the comments as his own and that it was for the jury to make up their own minds whether they accepted them.

[35] In my opinion the appellant is entitled to succeed on this ground. The appeal against conviction should be allowed. The conviction should be set aside and a new trial ordered. The appellant should be remanded in custody until otherwise ordered in an appropriate application in that regard.