SUPREME COURT OF QUEENSLAND

CITATION:	*R v Martin, Klinge & Sambo* [2002] QCA 443
PARTIES:	**R** **v** **MARTIN, Christopher Bradley** (appellant) **KLINGE, Darryl Allen** (appellant) **SAMBO, Phillip Peter Lawrence** (appellant)
FILE NO/S:	CA No 79 of 2002 CA No 93 of 2002 CA No 114 of 2002 SC No 399 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2002
JUDGES:	McPherson JA, Helman and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeals allowed.** **2. Verdicts and convictions against each of the appellants set aside.** **3. Appellants Martin and Sambo be retried on charges of murder and appellant Klinge be retried on charge of manslaughter.** **4. Each appellant to be remanded in custody until retrial, but without prejudice to any application that may be made to the Supreme Court for bail pending retrial.**
CATCHWORDS:	APPEAL - NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION - JUDGE'S SUMMING UP - multiple accused - criminal responsibility based on ss 7 and 8 Criminal Code (Qld) - variously - whether reference to s 8 prejudices one accused

APPEAL - NEW TRIAL - PARTICULAR GROUNDS - accused told multiple lies - whether failure to identify those relied upon to show consciousness of guilt made verdict unsafe - whether lies are equivalent to admissions

CRIMINAL LAW - EVIDENCE - CONFESSIONS AND ADMISSIONS - MISCELLANEOUS MATTERS - JOINT TRIAL - admission by one accused out of court - whether admissible in favour of one accused and against maker of statement

CRIMINAL LAW - PROCEDURES - WITNESSES - MATTERS - crown witness not asked to confirm statement of other witness - whether judge required to make direction that accused not required to raise issues that may hurt his defence

Criminal Code (Qld), s 7(1)(c), s 8, s 302(1)(a)

Bannon v The Queen (1996) 185 CLR 1, discussed
Edwards v The Queen (1993) 178 CLR 193, discussed
The Queen v Barlow (1997) 188 CLR 1, applied
R v Brennan [1999] 2 Qd R 529, mentioned
R v GEC [2001] 3 VR 334, discussed
R v Jeffrey (1997) CA No 154 1997; 19 Dec 1997, referred to
R v K [2001] QCA 551; 23 Nov 2001, applied
R v K, ex parte Attorney-General [2002] QCA 260; 30 Jul 2002, applied
R v Sherrington & Kuchler [2001] QCA 105; 6 Apr 2001, referred to
R v Solomon [1980] NSWLR 321, referred to
R v Zullo [1993] 2 Qd R 572, referred to
Zoneff v The Queen (2000) 200 CLR 234, discussed

COUNSEL: M J Byrne QC for the appellant, Martin
P J Davis for the appellant, Klinge
P J Callaghan for the appellant, Sambo
M J Copley for the respondent

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

[1] **McPHERSON JA:** Michael Needham was found dead in the grounds of the Central State School at Spring Hill in the inner city at about 11.21 pm on 3 January 2001. Examination of the body showed he had sustained a severe blow or blows to the rear of the head on the right hand side which caused a depressed fracture of the skull; together with other fractures underlying some lacerations to the eyebrows; fractures of the jaw on either side of the face; and nine small stab wounds on the neck close to the carotid artery, which appeared to have been caused by a pair of scissors that were found nearby. Medical evidence was that the stab wounds would

not have contributed significantly to the death, which had probably been caused by bruising of the brain and intracranial bleeding from the head injuries. More than one blow from a heavy object, such as the wooden post (ex 6) with the deceased's blood or DNA on it found at the scene, would have been needed to inflict the skull fractures. The deceased would have taken at least an hour to die and, his having last been seen alive at about 8.45 pm, suggests that the injuries were probably inflicted on him at some time between then and about 10.20 pm or perhaps earlier on the night of 3 January 2001.

[2] The three appellants Klinge, Martin and Sambo were, like the deceased himself, all residents or former residents of Pindari hostel, which is conducted by the Salvation Army. They were or had been addicted to alcohol or drugs. In his interview Klinge claimed that he was very intoxicated and had no recollection of events of that night. Martin, who admitted that he was present at the time the deceased was assaulted, denied having taken part in the assault and maintained this account in the evidence he gave at the trial. Sambo, who like Klinge did not testify, initially claimed not to have seen the deceased after about 2.00 pm on 3 January 2001, but, when later interviewed by police, admitted that he had gone with the deceased on that evening to drink with him in the school grounds, where a fight had ensued in which all three of the appellants had participated in assaulting the deceased. He ascribed to Klinge the first attack on the deceased, but attributed the final and probably fatal blows to Martin, who, he said, used a "block of wood" to hit the victim. Sambo admitted only to having kicked the deceased twice in the ribs and once in the backside. In his evidence at the trial, Martin said the assault with the post was carried out by Sambo, and also, in effect, that, although Klinge had assaulted the deceased, he had done so at an early juncture of the incident and had then left the scene before Sambo killed the deceased. Martin in his evidence in chief admitted having previously told lies to the police about the incident. He has an extensive criminal record and had only recently been released from prison in New South Wales after serving a five year sentence.

[3] It is evident from the verdicts that the jury did not form a favourable impression of Martin. Despite the exculpatory evidence he gave on his own behalf at the trial, the jury found him guilty of the murder. In finding Sambo also guilty of murdering the deceased and Klinge guilty only of manslaughter, they may nevertheless have acted on some of what Martin said in evidence, although it is not possible to do more than speculate about which parts of it were or were not accepted. All three of them now appeal against their convictions. Having been acquitted of murder, Klinge cannot be tried again for that offence, and he submits that he should now be acquitted of manslaughter. Both Martin and Sambo seek orders for their retrial on the charges of murder of which they were convicted.

[4] Unless the jury accepted Martin's evidence that it was Sambo who wielded the wooden post and so inferentially struck the fatal blows, the Crown was not in a position to show specifically which, if any, of the appellants had caused the death of the deceased. In these circumstances reliance was, against each of them, placed on s 7(1)(c) of the Criminal Code. Section 7(1) deems a person to have taken part in committing an offence and to be guilty of it if (c) he "aids another person in committing the offence". The offence in this context means the punishable act, which is the killing, taken in conjunction with the requisite accompanying state of mind (*The Queen v Barlow* (1997) 188 CLR 1, 10), which in the case of murder is causing death with intent to kill or do grievous bodily harm: Code s 302(1)(a). A

person is therefore criminally responsible as a "secondary" offender under s 7(1)(c) for murder if he "aids" another in committing that offence by assisting or helping to do an act or acts that cause or materially contribute to death knowing that the other person intends to cause death or grievous bodily harm: *R v Jeffrey* (1997) (CA no 154 of 1997). Reduced to essentials, the question for the jury in a murder case like this founded on s 7(1)(c) is whether the accused helped someone else to injure the victim knowing that that person intended to inflict life-threatening force: see *R v Sherrington & Kuchler* [2001] QCA 105 §13.

[5] This being the test, the question for the jury was whether the evidence for the prosecution at the trial satisfied this requirement in the case of each of the accused. From the verdict acquitting Klinge of murder, it is evident that in his case the jury were not satisfied that the evidence in his case was sufficient. He was found guilty only of manslaughter. There was evidence reasonably capable of placing him at the scene of the crime at or about the time of the killing. It consisted of some small spots of blood that were afterwards found on Klinge's shirt and sandals and of material matching the deceased's DNA under the fingernails of his right index finger and thumb. An impression of Klinge's thumb print was also located on a bar forming part of the structure of some children's play equipment (the fort) at or near the scene of the assault. It was not possible to date it to the night in question, and it might conceivably have been placed there on an earlier occasion. Residents of Pindari were in the habit of frequenting the school grounds.

[6] Considered on its own, this evidence against Klinge was capable of suggesting some possible form of participation by him in the events leading to the death of Michael Needham on the evening in question, but not of establishing either the nature or extent of that participation. He might have been no more than a spectator of the violent assaults by others, or, less plausibly, he might simply have helped to drag the body away. Apart from Martin's testimony at the trial, the only other evidence against Klinge was the lies that he told to the police, which were relied on by the Crown at trial as manifesting a consciousness of guilt on his part. In addition, there was a statement made by him to a man named Carl Wynn that was tendered as an admission by Klinge.

[7] The circumstances in which the statement was made are that, on the morning of 4 January 2001, Sambo was having a conversation with Wynn, who was also a resident of Pindari. Another resident named Harvey was also present at that time. In response to a question about what he had been "up to" on the previous night, Sambo said "terrible things". He was crying. None of this was admissible against Klinge, who arrived only part way through the conversation and, according to Wynn, said "we fucked up badly last night". This was capable of being regarded as an admission of having taken part in something wrong on the previous evening. It was sought to be used by the Crown as the foundation for a case against Klinge based on s 8 of the Criminal Code that the killing was the result of a joint assault against Needham carried out by Klinge together with Sambo and perhaps Martin. Wynn's recollection of the statement was challenged, but in his evidence at the trial he remained adamant that Klinge had used the first person plural "we" and that he had also said "last night".

[8] Against Sambo there was a good deal of evidence consisting of admissions made in the course of one or more interviews by the police on the day or days following the death. He gave an account of the sequence of events, which inculpated

the other two appellants in the assault on Needham, but which, because he did not testify at the trial, was not admissible against them but only against Sambo himself. He admitted himself having given the victim "two swift kicks in the ribs", and a further kick in the backside at a time (he said) when Needham was still breathing and crawling around. It was after this that one of the others had struck him with the wooden post and the stabbing had taken place. Whether with or without Martin's evidence at the trial, it would no doubt have been open to the jury, properly instructed on all the evidence, to convict Sambo of murder. There was blood on his cap, shirt, socks and shoes that matched the DNA of the accused, and he had taken steps to dispose of those items of clothing in various ways. He later showed the police where they were. In addition, there was evidence of a conversation between Sambo and a Mr Kingdom (who was a "street minister" for the Salvation Army) that took place at the 139 Club at about 11.30 pm on the night of 3 January, at what must have been shortly after the killing. Sambo, who was then in the company of Martin (who was described as "pretty drunk") confessed "We've just killed somebody", to which Kingdom responded: "What, you let Chris [Martin] kill somebody?". Sambo then said "I did it". It was put to Kingdom in cross-examination that Sambo had never said this, but the witness adhered to his testimony on this matter.

[9] Against Martin there was very little evidence of any kind. Martin's shirt (on which a couple of spots of blood were found), his jeans, belt and sandshoes all tested positive on a presumptive test for blood. He made no admissions to police other than that he was present when the killing took place and that he had seen what happened. His evidence at the trial, for what it was worth, was, as has already been mentioned, that Klinge had hit the victim first, but that it was Sambo who had used the timber post to kill him at the end of the assault.

[10] On appeal, several grounds were advanced on behalf of each of the appellants. In particular, it was a common complaint by all three appellants that the summing up was unduly lengthy and confusing. Having scrutinised the record, Mr Davis submitted that, omitting the discussions with counsel about the issues involved, summing up had occupied in all some nine hours spread over four days. In itself, the time taken in giving directions to the jury is rarely a sufficient basis for setting aside a conviction; but the summing up in the present case is fairly open to some criticism on the ground of its being confusing. In particular, the learned trial judge might, I consider, usefully have confined his instructions to the jury to those portions of Sambo's records of interview that incriminated him. As it is, however, his Honour made it clear on many occasions in the course of what he said that the contents of the records of interview were admissible only against the individual accused who gave or made them.

[11] The substantial complaints on appeal were directed at the way in which the learned judge summed up on the issue of lies and also on s 8 of the Criminal Code. Compendiously stated, s 8 is a provision that imposes criminal responsibility by deeming a person to have committed an offence that is the objectively foreseeable and probable consequence of carrying out a common intention formed by the accused with another or others to prosecute an unlawful common purpose. Mr Morgan of counsel, who appeared for the prosecution at the trial, made it clear from the outset that he was relying on s 8 to secure a conviction only against Klinge. Against the other two accused Martin and Sambo, the Crown case rested exclusively on the actions of each of those two in aiding the killer in terms of

s 7(1)(c). Despite this, his Honour summed up in a way that can only have left the jury with the impression that the provisions of s 8 were being presented to them as an avenue to criminal responsibility that was available against each of the accused including Martin and Sambo.

[12] When his Honour's attention was drawn to this oversight, he indicated that he would redirect on that issue. When he came to it, however, he never in fact did correct his previous direction with respect to either Martin or Sambo by telling the jury that s 8 had no application to the case against either of them. As regards Martin, there are one or more references to the subject in the summing up that are perhaps ambiguous or ambivalent; there is another in which Martin was mentioned in the context of an agreement with others that the deceased would be assaulted seriously; and a third in which the evidence of Martin, if the jury accepted it as truthful, was described as "bringing in" s 8. The latter might on one view possibly have been referable to Klinge, but it was not so confined and, in the absence of express correction, it must be acknowledged that the case was permitted to go to the jury with the undisturbed impression that s 8 was a live issue in determining the criminal responsibility of Martin for the killing.

[13] As regards the responsibility of Sambo, the effect of the summing up was much the same. He too was referred to indiscriminately in the earlier stages of summing up as if he were liable to conviction under s 8. And even after Mr Morgan's intervention on this subject, there were still some general, and at least one specific, reference to s 8 as a possible basis for a verdict of guilty against him, as to which his Honour said:

> "to the extent that Sambo's statement implicated him, from kicking and so on, under section 7 *or section 8*, well, you can convict on it."

The real burden of the complaint is not only that his Honour did not distinctly withdraw the references to responsibility under s 8, but that he may in fact have confirmed or added to them in his later directions given after Mr Morgan for the Crown had drawn his attention to the problem.

[14] On appeal counsel for the appellants Martin and Sambo pointed to the position of disadvantage in which they would have been placed at the trial by these directions. In particular, their counsel never had an opportunity of addressing the jury on the facts relating to s 8; and their conduct of the appellants' cases at trial, including questions asked in cross-examination, might well have been different if they had known that their clients were confronted by s 8, which they had good reason to believe they were not. The course taken by prosecuting counsel amounted to giving particulars of the Crown case against the accused, and it is right to stress that at no time did Mr Morgan seek to depart from it later at the trial.

[15] Relevant authorities, which were identified on appeal by Mr Copley for the Crown, consist of the judgments of Street CJ in *R v Solomon* [1980] NSWLR 321, 327-328; and *King* (1985) 17 A Crim R 184, 187-188; and that of Blow J in *Carr* (2000) 117 A Crim R 272, 205. They show that the question is ultimately whether the accused has in the circumstances had a fair trial. In a case of murder like this, in which the admissible evidence against the appellants, and especially against Martin, was not very strong, it would be wrong to say that an accused has not been treated unfairly by being deprived of the right to address the jury on an alternative basis of

criminal responsibility on which he may, for all we know, in fact have been convicted.

[16] Klinge was, of course not prejudiced by his Honour's references to s 8 in the course of the summing up. He had adequate notice from the Crown that the issue of his criminal responsibility under that section was being raised by the prosecution. The contrary was not suggested on appeal. Klinge's principal complaint is the inadequacy, as it was submitted on appeal, of the summing up with respect to lies. At the trial, Mr Morgan for the Crown made it clear that he was relying on lies told by Klinge to the police in the early stages of the investigation following the discovery of the body to demonstrate a consciousness of guilt on his part. In *Zoneff v The Queen* (2000) 200 CLR 234, 245, the High Court said it was "unnecessary, indeed undesirable" to give what has come to be known as the *Edwards* direction where the question whether or not the accused has lied goes only to his credit. Stated more accurately, it is necessary to give such a direction where it is evident that the prosecution is going further and suggesting that in the circumstances the alleged telling of lies is indicative of a consciousness of guilt on the part of the accused (ibid). See also *R v Brennan* [1999] 2 Qd R 529, 540-541. In such a case the evidence of lies, if cogent, is viewed as an admission by conduct which, as Mr Byrne QC for Martin submitted, serves as a form of circumstantial evidence from which the jury are being asked by the prosecution to infer guilt and, perhaps in conjunction with other material, to do so beyond doubt.

[17] The decision in *Edwards v The Queen* (1993) 178 CLR 193 establishes that where a direction of that kind must be given, it is incumbent on the trial judge to ensure that a number of specific requirements are complied with in summing up. Among them are that "the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest": *Edwards v The Queen* (1993) 178 CLR 193, 210-211. It was this requirement of identification which the appellants say was not fulfilled in the summing up in the present case. In the case against Klinge, counsel for the prosecution said at the trial that seven such lies were being relied on as being redolent of his guilt. They were identified by Mr Morgan in the course of meeting a submission by the defence that was directed to obtaining a ruling that some of them were not proper to be left to the jury either as lies at all or as indicative of guilt. The ruling was in the result not given, and in summing up the judge did not identify the lies being relied on to justify an inference of guilt, nor did his Honour explain to the jury how, if at all, each of those lies could be used to determine the guilt of the accused.

[18] Instead, his Honour said that the jury had been taken through those lies by counsel, and that the judge himself was not going to do so. He may have been intending to protect the accused from undue repetition of those lies; but the course he adopted is, in my respectful view, not a sufficient compliance with the requirements laid down in *Edwards v The Queen*. See *R v K* [2001] QCA 551 §37. Directions on the matter ought to receive the force of the judge's authority, more especially so in this case because of the sparsity of other evidence against Klinge and Martin. What was more, it was not always clear from what was said in summing up which of the accused and their lies were being spoken of at times. References to lies by Martin tended to become intermixed with others, as for example:

> "I am talking about lies out of court by both Mr Klinge and Mr Martin on the Crown case. No doubt, members of the jury, you might think Mr Martin certainly told some lies to the police outside court during the first day of questioning."

At the trial, Martin admitted in his evidence in chief that he had told various lies; but, again, the specific lies being relied on to demonstrate a consciousness of guilt on his part were not identified by his Honour, nor was their evidentiary significance explained to the jury.

[19] With respect to Sambo as well as the others, his Honour said it was the Crown case that "they all told lies", and that they told them "for the purpose of distancing themselves from the offence because they wanted to avoid being brought to justice for the offence of murder". This was in fact not correct in the case of Sambo. He had initially told a lie about not having seen the deceased after 2 pm on the afternoon of 3 January; but, when interviewed on the following day, he admitted that he had gone with Needham to the school grounds to drink, and that he had been present when the killing took place. At the trial, the prosecution did not in fact place any reliance on lies told by Sambo as part of its case against him. Despite this, his Honour told the jury:

> "these lies and admissions by Mr Sambo are matters really ancillary to the essential element in the Crown case."

Any lies that he may have told ought not to have been in effect equated in this way with his admissions, which were clearly quite cogent evidence against him.

[20] The result is that none of the verdicts and convictions against the appellants can properly be left to stand. In the case of Klinge, it is necessary to go further and consider two additional submissions made on appeal on his behalf. It will be recalled that at 11.30 pm on 3 January, Sambo told Kingdom at the 139 Club that they had just killed someone. Kingdom's response was "You let Chris [Martin] kill somebody?", whereupon Sambo said "I did it". Martin was there but said nothing. At the trial, counsel for Klinge submitted that his client was entitled to have Sambo's admission on that occasion left to the jury as a statement in favour of his client. As far as Klinge was concerned, it was an out of court statement that was hearsay, and it was on that ground that it was ruled inadmissible in favour of Klinge.

[21] Hearsay statements claiming responsibility for a killing have been held admissible in Queensland in favour of some other person who is charged with the offence in question despite some cogent authority to the contrary in other jurisdictions. Recently, in *R v K*, *ex p Attorney-General* [2002] QCA 260 §16, we held that courts in Queensland were bound by that line of authority, including *R v Zullo* [1993] 2 Qd R 572, 574, in this State. At the time of that decision, I was not aware of the judgment of the High Court in *Bannon v The Queen* (1996) 185 CLR 1. Having now read the report of that case, I am not persuaded that what their Honours said in their reasons is necessarily inconsistent with the Queensland line of authority referred to. It therefore follows that, until overruled by the High Court, that authority continues to be binding in Queensland. It may be added, however, that on this appeal Mr Byrne QC was able to inform the Court that the person making the confession (who was a man named Beard) did in fact give evidence at Zullo's trial that he was the one who had stabbed the victim in that case. In view of this

state of authority, the statement by Sambo that he had done it (that is, killed a man) ought therefore to have been admitted in favour of Klinge, as well as against Sambo himself, at the trial.

[22] The further point raised on behalf of Klinge on this appeal arose out of the statement by him in the conversation with Wynn, at which Harvey was present, on the morning following the killing. According to Wynn's evidence, Klinge said "We fucked up badly last night". Harvey also gave evidence at the trial, but neither counsel for the Crown nor counsel for the defence asked him for his version, if any, of Klinge's statement. In these circumstances, it was submitted by Mr Davis on behalf of Klinge that he was entitled to a direction to the jury that it was open to them to draw an inference that no evidence confirming Klinge's statement could have been led by the prosecution from Harvey when he was in the witness box because no such evidence was available from him. It was no answer to say that defence counsel could himself have asked Harvey about the matter in cross-examination because:

> "… in a criminal trial, an accused could hardly have expected or be required to raise, in cross-examination and possibly at his peril, matters about which it was reasonable to anticipate that any evidence likely to advance the prosecution case would have been adduced by the witness when giving evidence in chief."

The above passage is taken from the reasons (with which Charles and Batt JJA agreed) for the judgment of Vincent JA in the Court of Appeal of Victoria in *R v GEC* [2001] 3 VR 334, 345. Mr Copley sought to distinguish the decision on the ground that the case involved a charge of sexual misconduct, which are notoriously difficult to resolve when the complainant and the accused are the only two witnesses and their testimony is in direct conflict. However, although Klinge did not testify at the trial in this case, there was little enough evidence of participation by him in the assault as to make it, on the authority of *R v GEC*, incumbent on the trial judge to give a direction to the effect of that called for in that decision.

[23] This conclusion is also relevant to the question which remains to be considered on Klinge's appeal, which is whether a retrial should be ordered on the manslaughter charge against him. Mr Davis submitted that it was by no means certain that at any future trial Martin would testify as he did on this occasion or at all, and that, without his evidence, there was no material available to the prosecution on which to found a conclusion that Klinge had taken part in any assault on the victim. If the potential for a verdict to be returned against Klinge rested solely on the prospect of Martin giving evidence at the next trial, I would agree that an order for his retrial would not be justified. I am, however, in the end not persuaded that this is so. The admitted presence of Klinge when the assault took place, and the blood spots or DNA of the deceased that were later found on his clothing and person, coupled with his thumbprint on the bar of the fort go some way to providing a basis for inference that he took part in the assault. Little more is needed to justify the inference of his participation in the assault so as to support a verdict of manslaughter against him. That is why it was essential that the jury be properly and fully directed on the prosecution case that the lies he told proceeded from a consciousness of guilt on his part, and that Harvey's version, if any, of Klinge's statement to Wynn be placed before the jury or be made the subject of a direction of the kind envisaged in *R v GEC*.

[24] I would therefore: (1) allow the appeal; (2) set aside the verdicts and convictions against each of the appellants; and (3) order that Martin and Sambo be retried on the charges of murder against them, and that Klinge be retried on the charge of manslaughter. The appellants will be remanded in custody until retrial, but without prejudice to any application that may be made to the Supreme Court for bail pending retrial.

[25] **HELMAN J:** I agree with the orders proposed by McPherson JA and with his reasons.

[26] **PHILIPPIDES J**: I agree with the reasons of McPherson JA and with the orders proposed.