SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dunster* [2002] QCA 475
PARTIES:	**R** **v** **DUNSTER, George** (appellant)
FILE NO/S:	CA No 243 of 2002 DC No 263 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED EXTEMPORE ON:	5 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2002
JUDGES:	de Jersey CJ, McMurdo P and Davies JA Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**The appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTNACES INVOLVING MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where appellant charged with stealing or receiving three items of property but acquitted in respect of two charged – where appeals against conviction for receiving – where appellant contends a miscarriage of justice occurred because the learned trial Judge asked inappropriate questions of the appellant, failed to adequately direct the jury in respect of alleged lies, should have directed the jury in accordance with *R v McKinney* (1990) 171 CLR 468 and should have given a circumstantial evidence direction – where significant that no re-directions were sought at trial *R v Bruce* (1987) 74 ALR 219, followed *R v Chamberlain* (1984) 153 CLR 521, followed *R v Edwards* (1993) 171 CLR 193, considered *R v Foley* [2000] 1 Qd R 290, followed *R v McKinney* (1990) 171 CLR 468,
COUNSEL:	J J Thompson for the appellant B G Campbell for the respondent

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

THE CHIEF JUSTICE: The appellant was charged with stealing or receiving three items of property, two computers and one mini-disc recorder. He was acquitted in respect of the computers and convicted of receiving the mini-disc recorder. He appeals against that conviction.

There was undisputed evidence that the mini-disc recorder was stolen from the ABC offices in Townsville between the 1st and the 4th of August 2002 and that it was found in the appellant's possession on the 6th of November in the year 2000.

At the time of the stealing, the appellant worked as a security guard and his duties included the ABC offices. Sharon Warden worked under his supervision. The computers had been stolen from other premises also within the appellant's security responsibility. Warden gave evidence that the appellant gave her the computers and that he had lent her the recorder but that she had returned it to him.

On the other hand, the appellant gave evidence denying any involvement with the stolen computers or stealing or receiving the recorder. His evidence was that it was Warden who lent the recorder to him.

Two police officers gave evidence that when the recorder was found in the appellant's possession, the appellant claimed ownership of it although he could not recall where, when or for how much he purchased it. The appellant disputed that conversation at trial.

In view of their acquitting in respect of the computers and of stealing the recorder, the jury must not have accepted the evidence of Warden.

The ground of appeal is that a miscarriage of justice occurred because of a combination of these four circumstances,

(1) The learned trial judge asked inappropriate questions of the appellant;

(2) The Judge did not adequately direct the jury in respect of alleged lies;

(3) The Judge should have directed the jury in accordance with *McKinney* (1990) 171 Commonwealth Law Reports 468; and

(4) The Judge should have given a circumstantial evidence direction.

Questions by the trial Judge. During the Crown Prosecutor's cross-examination of the appellant, the learned Judge intervened asking whether the appellant was saying the conversation alleged by the two police officers did not take

place. When the appellant confirmed that he denied that conversation the Judge asked whether he was alleging that the police officers had fabricated their evidence. The appellant conceded that was a possible way of looking at it.

The question should not have been asked. See *R v. Foley* [2000] 1 Queensland Reports 290 at 297. But this isolated questioning should not reasonably be regarded as having produced a trial which was not fair to the appellant. The questions and answers simply pointed out the true factual position. While, as I say, the questions should not have been asked, in terms of the security of the conviction they are without consequence.

Direction about lies. This point relates particularly to the Judge's direction to the jury about the appellant's denial of the conversations given in evidence by the police officers. The Judge told the jury that if they accepted the police evidence, they would conclude that the appellant had lied in his evidence and that that could affect his credit although not establish that the appellant knew when receiving the recorder that it had previously been stolen.

The Judge also instructed the jury that,

> "A false explanation as to the obtaining of the property is something which can be taken into consideration on the question of guilty knowledge."

That is consistent with *The Queen v. Bruce* (1987) 74 Australian Law Reports 219 in that in the absence of any reasonable explanation, guilty knowledge may be inferred from the unexplained fact of possession of stolen property.

If, therefore, the jury were to reject the appellant's denial of the police conversation they could infer guilty knowledge from his unparticularised claim of ownership of the property which was stolen or more generally infer guilty knowledge from his failure to provide a reasonable explanation for his possession of it.

As to the truthfulness of the appellant's response to the police, the Judge pointed out to the jury that he may have been intent on protecting Warden.

This was not a consciousness of guilt case requiring the comprehensive direction provided for by *The Queen v. Edwards* (1993) 171 Commonwealth Law Reports 193. No such direction was sought. It was a case where any lie could have significance, first, in relation to the general credibility of the appellant and, second, to permit an inference of guilty knowledge in so far as the lie meant that no reasonable explanation had been provided for the possession. The jury were appropriately directed on both those aspects.

McKinney direction. The conversation took place at the appellant's home. In *McKinney*, the accused was in police custody. It was that circumstance which warranted the giving of the special direction. Although it is unfortunate that this conversation was not taped by the police officers there was, here, no special need for such a direction and it is significant that none was sought.

Circumstantial evidence direction. The case was circumstantial in so far as proof of knowledge that the recorder was stolen was concerned. While in accordance with *R v. Chamberlain* (1984) 153 Commonwealth Law Reports 521 the jury were not in terms instructed that an inference of that knowledge must be the only rational inference open, they were given comprehensive and correct instructions on the burden and standard of proof and that only rational inferences should be drawn without speculation, and that they may convict the appellant only if they disbelieved him.

The case was not entirely circumstantial. The appellant's possession of the stolen property was proved directly. The jury was, in my view, appropriately and sufficiently directed on the issue which depended on inference and consistently with Bruce.

It is again, significant that no redirection was sought. I would dismiss the appeal.

THE PRESIDENT: I agree. I wish to only make one further observation and that is in respect of the McKinney direction. As this Court observed in R v. Williams [2001] 1 QdR 212, if police continue to fail to take advantage of relatively inexpensive recorders when interviewing suspects in the field, Courts may find it necessary to exclude evidence of alleged oral statements or alternatively to give McKinney style directions in relation to such statements highlighting the failure of the police to act reasonably in a well-recognised problem area. Judges may well tell juries that where no reasonable reason is given for failing to record such conversation the jury should regard it with suspicion.

Such a direction was not essential here where the circumstances behind the failure to record the conversation with the appellant were not explored at the trial and it was not a significant part of the defence case.

I agree with the Chief Justice that the appeal should be dismissed.

DAVIES JA: I agree with the order and the reasons of the Chief Justice and also with the reasons of the President.

THE CHIEF JUSTICE: The appeal is dismissed.
