SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nielsen* [2003] QCA 33
PARTIES:	**R** **v** **NIELSEN, Glynn Robin** (appellant)
FILE NO/S:	CA No 405 of 2002 DC No 47 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	14 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 January 2003
JUDGES:	McPherson and Davies JJA and Mullins J Separate reasons for judgment of each member of the Court; each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – trial judge singled out one issue for jury - whether appropriate to do so - whether direction required on each misrepresentation required CRIMINAL LAW – PARTICULAR OFFENCES - FALSE PRETENCES AND OTHER FRAUDS - FALSE PRETENCES - CAUSATION – INDUCING PARTING WITH PROPERTY - whether jury direction on question of representations "still operating" on the mind of victim sufficient *Criminal Code* (Qld) s 229B, s 408C, s 668E *Alford v Magee* (1952) 85 CLR 437, applied *KBT v The Queen* (1997) 191 CLR 417, distinguished
COUNSEL:	S J Hamlyn-Harris for the appellant C W Heaton for the respondent

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

[1] **McPHERSON JA.** This is an appeal against conviction following a trial of the appellant in the District Court at Maryborough on one count of dishonestly obtaining a sum of $2,300 on 3 July 1997 (count 1) and another of obtaining a further sum of $20,700 on 6 July 1998 (count 2) contrary to s 408C of the Criminal Code. The charges arose out of a contract made in 1997 for the purchase by the complainant Nadir Karimi from the appellant of a Crown lease of land in the Chinchilla district. The two sums represented the deposit and balance of purchase moneys paid by the complainant under the contract, which was not completed by the appellant. He never repaid the money he received from the complainant.

[2] The substance of the prosecution case at the trial was that the appellant had induced the complainant to enter into the contract and to part with the payments made under it by representations concerning the character of the lease and the land that were false, and known by the appellant to be false at the time he made them and when the payments were received. The representations in question, of which three were alleged, were identified in written particulars from the Crown. They were that the lease agreed to be purchased was for a term of 99 years; and that there were no conditions preventing the building of a house or the cutting down of trees on the property.

[3] At the trial the evidence of the complainant was that he had seen the property advertised in a newspaper in Queensland and became interested in it. He is a medical scientist who lived and worked in Sydney, but he was training to be a doctor and planned to use the land to build a residence at or from which, when qualified, he would conduct a medical practice in a rural environment. At the beginning of July 1997, he went to Chinchilla where he met the appellant and inspected the property. In the course of that day he explained to the appellant what his plan for the property was. Recalling that conversation, his evidence at the trial was that:

> "… after my graduation, being a doctor, I would be able to build a house - build a practice and medical centre-type on a property and practise in a rural-land, and told him what my requirements are and what's my needs. He said 'Oh yeah absolutely. This is the best property for you. You can cut the trees and sell the trees and make a profit out of it and you can build your own house', as in a brick house, 'on the property and you can do whatever you like because it is your property and you own it and it is a 99 year lease'."

He also testified that he paid the two amounts of the purchase money, which was not disputed, and that he had done so in reliance on the representations made by the appellant.

[4] The representations were in fact false. The original lease was put in evidence at the trial, where it was produced by a Mr Courtney, who is a senior lands officer with

the Department of Natural Resources at Maryborough. It was a special lease issued under the *Land Act* and the *Forestry Acts*. Far from being a lease for 99 years, it was for a term of only 20 years expiring on 19 November 2016, the area of which formed part of a State forest in which building and felling trees was permissible only with ministerial approval. The lease was issued by the Crown for grazing purposes and made no provision for the erection of a residential dwelling on the land.

[5] If the jury at the trial accepted that the representations had been made by the appellant as claimed, the evidence of Mr Courtney and the terms of the lease showed that the representations were false. That left the prosecution with the task of proving that they were dishonest; that is, that at the time they were made and at the time the payments were received, the appellant knew them to be false. As to that element, the appellant through his counsel at the trial made formal admissions that, on 3 July 1997 and 6 July 1998, the appellant knew the conditions of the lease; he knew the term was only 20 years; that a person could not build on the land without Departmental approval; and that timber could not be harvested from it without such approval.

[6] That completed the Crown case against the appellant, who did not himself give or call any evidence. Counsel then addressed the jury; his Honour summed up; and they retired at 5.45 pm, returning at 8.22 pm with verdicts of guilty on each count. The whole trial from beginning to end was completed within the day. Before directing the jury, and in their absence, the learned trial judge discussed with counsel the nature and extent of the directions he proposed to give. In the course of the discussion he said he was thinking of saying that the jury must be satisfied beyond reasonable doubt that one or more of the representations was made. The suggestion that he should say "any one or more of those three representations had in fact been made" came from counsel for the defence, who, when it was repeated to him, confirmed that it was "the appropriate direction".

[7] It was the first and principal ground of appeal before us that on each of the two counts the trial judge ought also to have directed the jury that, before they could convict on that count, they must all be in agreement that the appellant had made the same false representation. His Honour gave no direction to that effect. Instead, he said:

> "So it would come down to this at the end of the day, it seems to me, ladies and gentlemen, so far as count 1 is concerned: if you think the representations were not made, of course you would find the accused not guilty. If you have a doubt in your mind as to whether the representations were made, you would find the accused not guilty. You could only convict the accused if you were satisfied beyond a reasonable doubt that one or more of those representations was made."

He gave a similar direction in respect of count 2, which related to the payment on 6 July 1998 of the balance of the purchase moneys.

[8] The first ground of the appeal seeks to invoke the decision of the High Court in *KBT v The Queen* (1997) 191 CLR 417. In that case the appellant had been convicted of maintaining a sexual relationship with his adolescent stepdaughter contrary to s 229B(1) of the Criminal Code, which required proof of a minimum of three instances of offending sexual acts in order to constitute the offence of maintaining such a relationship. In the way in which their Honours interpreted the Code provision (191 CLR 417, 422), it was the doing of such an act on three or more occasions that constituted the *actus reus* of the offence under s 229B(1). It was therefore critical to a conviction under the provision that the jury be unanimous with respect to each of the three (or more) occasions on which they found that such acts had been carried out. In fact, the evidence at the trial in *KBT* was that the appellant had committed many acts of sexual abuse on different dates and of different kinds over a period of some two years. In allowing the appeal and setting aside the convictions, their Honours observed (191 CLR 417, 424) that the strength of the evidence in the defence case varied according to differences in the categories of incidents to which the complainant deposed. Their Honours went on:

> "Having regard to the evidence, it is possible that individual jurors reasoned that certain categories of incidents did not occur at all but that one or two did, and more than once, thus concluding that the accused did an act constituting an offence of sexual nature on three or more occasions without directing attention to any specific act. It is, thus, impossible to say that the jurors must have been agreed as to the appellant having committed the same three acts. Indeed, it may be that, had the jury been properly instructed, they would have concluded that the nature of the evidence made it impossible to identify precise acts on which they could agree. It follows that the accused was deprived of a chance of acquittal that was fairly open".

[9] It is necessary only to state those matters to show how different this case is from *KBT v The Queen*. Here the evidence of the representations on which the prosecution relied was encapsulated in the passage from the testimony of Mr Karimi at the trial recalling what he had been told by the appellant on the day the property was inspected. It is true that, as the transcript discloses, discussions may have extended over much of that day; but at the trial the critical evidence about the representation was contained in that passage in Mr Karimi's testimony, where the appellant's representations are recorded in the transcript in direct speech and as a single statement. It is, of course, possible it was in fact a contraction of a number of separate statements made by the appellant on that day; but that is not how it appears in the record of the evidence. If the appellant had wished to challenge that aspect of the complainant's evidence in question, it would have been a proper matter for cross-examination. In fact, cross-examination was directed to eliciting an admission from the complainant that none of the three representations had been made, a proposition with which he emphatically disagreed.

[10] In essence, therefore, the issue of the representations was one that in the end turned on whether or not the jury accepted beyond reasonable doubt that the complainant's evidence on that matter was truthful and reliable. It was not a case in which his credibility was somehow divisible by reference to each of the three representations that were made. It follows that, in the form in which the evidence

was given, it would have been irrational, if not perverse, for the jury to have accepted his word on, say, the representation concerning the duration of the lease but not that concerning the building of the house.

[11] This no doubt means that the direction given by the judge, which was that, in order to convict, the jury needed to be satisfied that "one or more of the representations" was made was not, as defence counsel had urged, in fact appropriate in the circumstances. Having regard to the way in which the evidence about the representations was given at the trial it was, as to that matter, an "all or nothing" case. The jury had available to them the alternatives of accepting the complainant's account in that passage of his evidence or of rejecting it outright, but not of accepting it as to one of the representation but not another or others. In so far as it is necessary to make use of it, the proviso in s 668E of the Code sufficiently covers that blemish in the summing up.

[12] It is convenient here to consider ground 3 before returning to ground 2 of the appeal. It is that there is no basis in the evidence on which the jury could have been satisfied that the appellant represented that the complainant could unconditionally build a house or could unconditionally remove trees. What is meant by this is that there was nothing to show that he could or might not have been able to do so if he had obtained a permit from the Department. Consequently, the representation on that subject was not false.

[13] Considered in that way, it is a good example of misrepresentation by stating something incompletely; that is, where the representor says something which may be literally true but suppresses something else that falsifies it. The question in those circumstances always is not whether what is said is literally true, but whether, in the context in which it is said, it is misleading. In the light of what the complainant told the appellant he wished to do with the property, and the assurance he received in response, it is plain that he was not looking to purchase a dispute with the Department but a place on which to build a house for the purpose of his residence and the proposed medical practice. Nothing was said about the need for a Departmental permit, and in the context the statement that the complainant could do whatever he liked with the land was positively misleading. It may be added that nothing of the kind now suggested was put to the complainant for his comment in the course of cross-examination.

[14] The second ground of appeal is that, in order to establish fraud, the Crown had to prove not merely that a false representation was made, but that the appellant obtained the sums paid to him by means of that representation. There was in fact a wealth of evidence that, in paying the money to the appellant, the complainant was acting in reliance on the appellant's representations. The point being made in this Court is, however, that the trial judge did not adequately direct the jury on that issue. In fact, in instructing the jury on count 2 with respect to the sum of $20,700 his Honour did refer the jury to the question whether at the time of that payment the representations were "still operating on Mr Karimi's mind". As a matter of form, the direction on this issue ought perhaps to have been more specific or distinct than it was. But as the learned judge told the jury immediately after the sentence quoted, it seemed to him that both counts at the trial came down to the same issue; which

was whether the jury had a reasonable doubt about whether one or more of the representations was made before the money was handed over in the case of each count. That his Honour was correct in the assumption he made about the real issue in the case is shown by what was said by counsel in the course of the discussions before the summing up already alluded to, and also in the response to his Honour's subsequent invitation to counsel for redirections after the summing up had taken place. Both counsel confirmed that there was nothing on which any redirection was sought or required.

[15] This led the appellant to advance a fourth ground of appeal, which was that the learned judge failed to put the defence case to the jury in summing up. There is, of course, no doubt about the duty of a judge presiding at a criminal trial to sum up to the jury on the defence, if he can identify it, as well as the prosecution case; but the extent to which he or she is required to do so is necessarily circumscribed by the nature of the defence presented. It is a mistake, and one that may be fatal to the summing up, for a judge to credit the accused with defences that have not been advanced on his behalf; and, where the "defence" relied on consists of no more than an assertion that the prosecution has failed to prove its case beyond reasonable doubt, there is ordinarily little that the judge can effectively do in summing up than to identify for the jury the particular issues to which that submission relates and remind them of what the evidence about them has been. In *Alford v Magee* (1952) 85 CLR 437, 466, the High Court referred approvingly to a statement by Sir Leo Cussen that "the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are".

[16] That is the course that was followed by the trial judge in the present case. It was not suggested at the trial or on appeal that his Honour was wrong in the view he expressed to the jury that "the short issue", as he called it, was whether they were satisfied beyond doubt that the representations were made to Mr Karimi. He said he would not repeat to the jury defence counsel's address on the evidence, which they had heard just before the summing up commenced. He reminded the jury that counsel had highlighted parts of the evidence to be considered and he was confident that what they had said was fresh in the minds of the jury. He offered to read over any parts of the evidence which they wished to hear. No request for that to be done was made by anyone. The trial was, I have said, a short one, occupying only a day, and the judge was plainly justified in concluding that the making of the representations was the only real issue at the trial. The fact that defence counsel asked for no redirection on the summing up is a compelling indication that none was called for.

[17] In the result, I am satisfied that there was no miscarriage of justice at the trial of this indictment and that the appellant was rightly convicted on both counts. Independently of that, any doubts that might otherwise have been entertained about the justice of the verdicts or convictions are disposed of by other evidence given at the trial by the complainant and another witness John Certe. It was to the effect that in July 1999 the appellant had given the complainant a cheque for $23,000 (which on presentation was dishonoured) representing the amount of money he had received from him on account of the purchase price of the property. It was conduct

capable of amounting to admission on the part of the appellant that the jury would have been entitled to take into account in assessing the credibility of the complainant's evidence that the representations he alleged had been made to him; and that, in giving the cheque, the appellant was acknowledging that he was obliged to repay the purchase moneys.

[18] The appeal against conviction should be dismissed.

[19] **DAVIES JA:** I agree with the reasons for judgment of McPherson JA and with the order he proposes.

[20] **MULLINS J:** I agree with the reasons of McPherson JA and the order proposed.