SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hall* [2003] QCA 253
PARTIES:	**R** **v** **HALL, Sidney Reeves** (appellant)
FILE NO/S:	CA No 277 of 2002 SC No 109 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	20 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2003
JUDGES:	Jerrard JA, White and Wilson JJ 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 – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – EFFECT OF OPINION OF TRIAL JUDGE – where appellant complains that learned trial judge improperly revealed his personal opinion on the merits of the appellant's case – where appellant argues that this expression of opinion overawed the jury in judging the facts – where learned trial judge stressed to the jury that it must exercise independent judgment – whether learned trial judge's comment posed the risk of overawing the jury CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE EVIDENCE CIRCUMSTANTIAL – where appellant convicted at trial of four serious offences involving methylamphetamine – where appellant argues verdict was unreasonable and insupportable on the evidence – where appellant neither gave nor called evidence – where appellant's premises contained paraphernalia of drug dealing and usage throughout and in plain view – whether surveillance evidence in combination with other evidence

entitled the jury to conclude that amphetamines were being trafficked from the appellant's premises

Drugs Misuse Act 1986 (Qld), s 129(1)(c)

B v R (1992) 175 CLR 599, referred to
R v Perera (1985) 16 A Crim R 292, followed

COUNSEL: H Walters for the appellant
M J Copley for the respondent

SOLICITORS: John Weller & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA**: On 8 August 2002 Sidney Hall was found guilty by a jury of four serious offences, all committed in Mackay, involving the dangerous drug methylamphetamine ("speed"). These were the offence of carrying on the business of trafficking in that drug between 25 October 2000, and 1 November 2000 (Count 1), unlawfully supplying that drug to one Donald Woods on 31 October 2000 (Count 2), unlawfully having possession of that drug in a quantity exceeding two grams on 31 October 2000 (Count 3), and having in his possession on 31 October 2000 a quantity of clip-seal plastic bags and two sets of electronic scales for use in connection with the commission of a crime, namely trafficking (Count 4). He was sentenced on 8 August 2002 to six years imprisonment, and now appeals against the convictions on all counts, but limits his arguments to three specified grounds of appeal. He abandoned an application for leave to appeal against his sentence.

[2] The first ground of appeal, a complaint that the learned trial judge expressed a personal view about the defence case and that as a result the appellant had been wrongly deprived of a fair and valid trial, was argued to affect all four counts, although it complained of comments by the learned judge which apply only to Count 3. The second ground of appeal was specific to Count 2, complaining that the verdict of the jury was unreasonable and could not be supported having regard to the evidence. The third ground also complains that the appellant was deprived of a fair trial although the complaint, namely that the learned trial judge had put to the jury "an alternative basis of liability or explanation of the facts not relied on by the parties in the trial", was a complaint about remarks of the learned trial judge which would really apply only to Count 1.

[3] To appreciate the grounds of appeal and the judge's remarks complained of in the first and third grounds, it is necessary to understand the evidence. This was all led by the Crown since the appellant neither gave nor called evidence. He did make a formal admission, namely that for some years prior to and "embracing the time of these alleged transactions" he was an occupier of premises at 38 Malcomson Street, Mackay. All four offences were alleged to have been committed in and about those premises.

[4] Evidence was given by a Donald Francis McBrown, (the "Donald Woods" named in the indictment) who described himself as using that name as an alias. Mr McBrown swore he had been a "mate" of the appellant's for a couple of years, and that he was known to the appellant as "Woodsy". Mr McBrown's evidence was that on 31 October 2000 he had travelled to "Sid's place" with two other people, Brad and

Karen. Brad and Karen live in Proserpine, and had travelled from there to Mackay that day, and had given Mr McBrown $600.00. They had driven to the appellant's residence, parking "down the road" (AR 165), with Mr McBrown then going to that residence by himself and leaving Brad and Karen in the car. This was because "Brad and that didn't know them", namely "Sid" (AR 165).

[5] Mr McBrown explained that the point of going to "Sid's place" (166) was "to find some speed" for himself, Brad and Karen and that he wanted "two g's" for Brad and Karen, and "a point" for himself. There was evidence that a point is around one tenth of a gram (AR 138) and a "g" was probably a gram.

[6] Mr McBrown's evidence was that on that day he went to the back entrance of 38 Malcomson Street, which opens onto a dirt laneway. He had visited that house before but had never used the front entrance on Malcomson Street. He swore he had gone to that house on about eight or nine occasions over the prior two months to buy drugs, which were "normally a g for Brad and Karen, and a couple points (sic) for me self" (AR 170). It was the "same price all the time $600.00" (AR 171), which would be for two grams, since "well they normally charge $300.00 a g" (AR 168). That was how he had known to arrive with $650.00 that day, that being the $600.00 from Brad and $50.00 of his own.

[7] Mr McBrown said that on those eight or nine prior occasions he would "normally only see Sid" (AR 171), and normally "don't see" a Leah Headford, whom he described as "Sid's girlfriend" (AR 171). On those prior occasions:

> "Sid sometimes or another bloke would pull me up and say 'what do you want'?";

and on the occasions he spoke to Sid:

> "I just asked can he get me anything? He'll say, 'come back'";

and Mr McBrown would then go away for:

> "As long as he told me, ten, fifteen minutes, a hour";

and when he returned:

> "There is always someone else there with him when I get there, so I just tell him – put my money on that table and its always sitting on the table waiting for me".

"Its" was obviously "speed".

[8] On 31 October 2000, on Mr McBrown's account, there was "a whole heap of people inside" when he arrived at the appellant's residence, and the appellant was the only person he knew there. Mr McBrown described the appellant, who suffers from permanent damage to his kidneys and requires self administered dialysis up to four times a day, as present and "hooking up his bag or bag that he had to have on his stand" (AR 167). Mr McBrown asked could he get "two g's and a point", and "someone" answered him, telling him to wait downstairs. He left the money on the table went downstairs for about five minutes, and then "someone yells out to me upstairs 'Woodsy, you can come up now'". He did that and "a bloke" met him at the door and handed him "what I wanted", and he left (AR 169). He returned to Brad and Karen, gave them the drugs purchased on their behalf, and Brad drove the vehicle to a nearby street where police arrested all three, as Brad (Deeves) was in the process of mixing up the substance purchased for him.

[9] Mr McBrown was found to be in possession of .076 grams of white crystallin powder, with a 25.9% content of methylamphetamine, and with a calculated weight of the pure drug of .019 grams. Mr McBrown's evidence made it clear that he had no drugs in his possession before going to the appellant's residence (AR 165), and the powder seized from him was the "point" he had obtained for himself at that residence. The evidence of Brad Deeves, also called by the prosecution, was that the substance with which he was about to inject himself when the police intervened (AR 209) had been given to Mr Deeves by Mr McBrown, when McBrown returned that day from the appellant's residence. That substance was analysed as 21% pure methylamphetamine by weight (AR 290).

[10] Mr McBrown did not see Leah Headford at the premises on 31 October 2000. Officers of the Queensland Police Service were conducting surveillance that day of persons leaving and entering the laneway and the rear of those premises. There were some deficiencies in the surveillance, in that the appellant was observed at 1.47 p.m. to be the driver of a white Toyota Troop Carrier in Malcomson Street itself, that vehicle having been seen departing from that laneway at 1.29 p.m. The appellant was not recorded as returning to the premises but was seen again leaving them at 3.27 p.m., riding a motor cycle. Various observations of him on that motor cycle were then made, and as soon as the appellant returned to the premises the police entered and conducted an extensive search.

[11] The surveilling police had seen Mr McBrown arrive in Brad Deeves' vehicle at 2.12 p.m. and seen McBrown go to the rear of the premises, enter them, leave, return at 2.23 p.m., and finally depart at 2.24 p.m. That is, McBrown's visit fell precisely between the observation of the appellant driving that white Toyota vehicle at 1.47 p.m., and the observation of the appellant leaving again at 3.27 p.m. There were no suggestions made in the cross examination of either the surveilling police officers, or Mr McBrown, which challenged the description by McBrown of the appellant being present in the residence when McBrown visited there between 2.13 p.m. and 2.24 p.m. that day, or the evidence that the appellant had both been seen elsewhere at 1.47 p.m. and also seen leave the premises at 3.27 p.m. In the absence of any such challenge, the only available inference is that the police officers failed to record the appellant's return to the premises between 1.47 p.m. and 2.13 p.m. that afternoon.

[12] When the police entered the premises very shortly after 4.08 p.m. that afternoon the appellant was the only person present. Since no other males were recorded as leaving the premises after Mr McBrown had departed, it is possible that the latter was being somewhat generous to the appellant in his description of other unknown persons being there at the time of McBrown's purchase of methylamphetamine that afternoon. However, that would be a risky inference to draw in light of the described deficiency in the surveillance records. Those records had been read verbatim into the record between AR 37 - AR 49, AR 51 - AR 58, and AR 60 - AR 67. They contain observations recorded seriatim, which each officer read and signed at the conclusion of each day. The mass of detail contained is confusing, and accordingly the learned trial judge caused the prosecution to present the equivalent of a schedule analysing what was otherwise an amorphous mass of information.

[13] Surveillance had been conducted from the 26 until 31 October 2000. On the first and last days the rear of the premises at 38 Malcomson Street were under observation. On the intervening days the laneway was, although on those

intervening days the watching police could not see persons actually enter or leave number 38. On 26 October 2000, 11 people were seen to enter and leave that house over a period of one hour and 13 minutes, and on 31 October three people were seen to enter and exit the house over two hours and 58 minutes (AR 119 and 120). Presumably on 31 October one person was Mr McBrown and another was Mr Hall. The significant observations were those on 26 October which, apart from the sheer number of people coming and going, included the observations that male number 9 left the premises at 2.02 p.m. that afternoon and went to a public toilet nearby in a park at 2.05 p.m., from which he exited at 2.14 p.m. Likewise, male number 11 left the premises at 2.27 p.m. and after leaving went to that same public toilet, from which he exited at 2.32 p.m. The prosecution case was that the jury could infer those males used that public toilet to administer drugs purchased at number 38.

[14] The search on 31 October 2000 revealed two clip seal plastic bags each with a powder residue (amphetamine) in the bedroom, as well as used and unused syringes and a saline water solution. There were a further three clip seal bags under a television set in that room, each with a residue of powder in it. In a rear lounge room alcohol swabs, a set of black scales capable of being used to weigh minute amounts, a set of clip seal plastic bags, and a knife scraper, were all found on a small wooden table. The Crown led evidence that swabs of that sort are used to sterilise skin prior to injection. In the kitchen itself several hundred clip seal plastic bags were located of the same size and nature as those on that wooden table, as well as a larger set of scales. In a room with a bar, $6,100.00 was located in cash between some books or magazines on the bottom shelf of that bar.

[15] A wooden balustrade separated the main lounge room from the area where that bar was, and that balustrade had a square post with a square flat top on it. That top was removable, and a hole had been bored into the square post. In that hole was a glass jar with a yellow top containing a crystal like substance, which upon analysis contained 32.2 grams of that substance, it being 38.2% methylamphetamine by weight. Likewise a light truck battery in the garage was found to be hollowed out, and jars containing wet paste like substance were found in it, with a methylamphetamine percentage of 55.2% in one, and 41.6% in the other. The contents of the car battery and the post was of substances containing a calculated weight of 33.511 grams of pure methylamphetamine.

[16] Mr Hall's counsel established in cross examination that Ms Headford was definitely a user of unprescribed dangerous drugs, and who had had in her possession when apprehended that day a jar containing a brown crystal substance, which in turn contained methylamphetamine. She had also been charged with the possession of the amphetamine found on the premises. A predominant feature of the defence advanced on Mr Hall's behalf was that the jury could conclude that it was Ms Headford alone, and not Mr Hall, who was in possession of all of the drugs found during the search and who was carrying on the business of trafficking in them.

[17] That defence explains the third ground of appeal. The first ground complains of directions the learned judge gave the jury on the charge alleged against Mr Hall of possession of the methylamphetamine found at the premises. On that count, since the appellant was an admitted occupier of the premises, then by reason of s 129(1)(c) of the *Drugs Misuse Act* 1986 (Qld) proof that methylamphetamine was in those premises was conclusive evidence that he possessed it, unless he showed that

he neither knew nor had reason to suspect the drug was there. In the course of the summing up the learned trial judge directed the jury:

> "Defence counsel submitted that he had shown that simply because the drugs were in a concealed condition. Does that of itself persuade you that it was more likely than not that he neither knew the drugs were there, nor had reason to suspect they were there? It is a matter for you but I doubt that it would, in view, especially, of the presence of the clip seal bags in the hundreds, the scales in plain view within the house, the syringes and swabs and so on. You might think that those circumstances would alone give the accused, as occupier at least, reason to suspect the drugs were somewhere on the premises".

[18] The appellant complains that by use of the words "but I doubt that it would", the learned judge had improperly revealed his personal opinion of the merits of the argument for the appellant, and that revealed opinion was capable of overawing the jurors in their task of judging the facts. The appellant necessarily concedes that the learned judge had specifically told the jurors that it was a matter for them; and immediately after the remark just quoted, had directed them that:

> "Well there you are, I have commented on the evidence, and it is entirely up to you whether you will agree with me or not. That is a matter of fact on which you must form your independent judgment".

[19] To the extent that the judge revealed a view held on the merits of the matter, he did so only when he had immediately before and immediately after correctly directed the jury that the matter was for them. Further, and as counsel for the appellant rightly conceded, the matters of fact to which the judge directed the jury in those comments were all matters directly relevant to whether the appellant could possibly lack reason to suspect drugs were somewhere on the premises. They were the matters the prosecution had relied on in argument in the jury's absence (AR 221). In no sense could those comments be thought "far stronger than the facts warrant", that being the expression in *R v Perera* (1985) 16 A Crim R 292 which the Court of Criminal Appeal used to describe the circumstances in which an appellate court might intervene when a trial judge made comment on the evidence. As the appellant's submissions demonstrated, appellate intervention will occur when such comment creates a danger that the jury was overawed by the judge's expressed view[1].

[20] There were other matters to which the learned trial judge might also have referred. One was the fact that no challenge was made in cross examination to McBrown's evidence that the appellant was there on 31 October 2000 when McBrown's "order" for drugs was placed and money handed over, and no clear challenge was made to McBrown's evidence that on other occasions the appellant had taken the order for the methylamphetamine supplied on those occasions. The challenge that was made consisted of these questions:

> "Mr Woods, on no occasion has Mr Hall ever sold you drugs, has he? -- no.
> On the 31st October of 2000 Mr Hall did not sell you any drugs did he? -- no. Well, he didn't pass it to me".

---

1 *B v R* (1992) 175 CLR 599 at 605, and see the discussion in *Barca v R* (1974-75) 133 CLR 82 at 105-106

Those questions and answers reveal that Mr McBrown (Wood) was carefully distinguishing in his answers between Mr Hall physically passing drugs purchased to the purchaser, and Mr Hall taking the order on occasions, as earlier described by Mr McBrown. The evidence of that prior conduct was neither challenged nor qualified, and not retracted in any way. The learned judge would have been entitled to make that observation, which would put an end to all argument about an absence of reason to suspect drugs were at the premises. There is no merit in this ground of appeal.

[21] The next ground argued was that the conviction for supplying drugs to (Mr Woods) on 31 October 2000 could not be supported by the evidence and was unreasonable. That ground should be considered with the last, which complained about directions the judge gave the jury when considering the count of carrying on the business of unlawfully trafficking in methylamphetamine. As described, the appellant's counsel had contended that the evidence might well satisfy the jury that Ms Headford was the person guilty of that offence. That submission was made in light of counsel's knowledge that the Crown was not asking the learned judge to direct the jury, in terms of s 7 and 8 of the *Criminal Code* of Queensland, that the appellant was a party to any offence of trafficking in drugs or possession of them committed by Ms Headford in and about those premises.

[22] The directions the judge gave, and about which the appellant complains, are at AR 249. I will set them out in full:

> "There was mention in the evidence of the accused's girlfriend, Leah Headford, also an occupant of the premises, and her arrest on 31 October in possession of methylamphetamine.
>
> Now I should tell you, and you'll pardon me because it is rather stating the obvious, but that doesn't necessarily exclude guilt in the accused man, although defence counsel presented Leah Headford at some length as being the more likely offender.
>
> Complicity of Headford in criminal activity from the house in relation to methylamphetamine would not necessarily exclude the accused also being complicitous. We don't know much about Headford's involvement beyond that possession on the 31st October and what is said to be her addiction.
>
> You need to focus on the accused. What has he (been) shown beyond reasonable doubt to have done? You see a theoretical position, ladies and gentlemen, is that two of them could jointly have been involved in this alleged enterprise. Another is that they could have been assisting each other in carrying on as a business of trafficking. We don't know. Generally speaking, in cases like that, each would be liable for the crimes committed but we know, as I've said, little of Headford's involvement and it is, therefore, important that you focus on what is established against the accused".

[23] The appellant's counsel complains that those remarks **did** invite the jury to find the appellant guilty on the basis of complicity with Ms Headford in trafficking; and the complaint really is that this was done by means of a subliminal message conveyed in the remarks quoted. Counsel contends that this was unfair to the appellant, since

the particulars the Crown provided focused on the appellant's own conduct and did not assert liability as a party.

[24] The direction given actually shows the learned trial judge was taking care to explain that the matter which undoubtedly was self evident to the jury, namely the possibility of joint participation by the two occupants in carrying on that business, was only a theoretical matter in the appellant's trial, and it was therefore very important that the jury focus on the appellant and what **he** was shown beyond reasonable doubt to have done. In the circumstances of that trial the directions quoted were almost unavoidable and were appropriate. They did not invite the jury to convict the appellant as a party to criminal activity by Ms Headford and really directed the opposite, which was a result quite favourable to the appellant.

[25] Overall the evidence was more than capable of satisfying the jury beyond reasonable doubt that amphetamine had been supplied from those premises to others over at least the past two months at standard prices, and that the appellant was directly involved in that activity. This much is all established on the (unchallenged) evidence of the witness McBrown.

[26] The evidence led was also capable of establishing to the jury's satisfaction beyond reasonable doubt that the appellant was present on 31 October 2000 when McBrown was supplied with methylamphetamine, and the jury could specifically conclude from the use of the name "Woodsy" that the appellant was a party to that particular transaction as well. It would have been perverse for them to conclude anything other than that he clearly knew drugs were present on the premises, both by reason of his own involvement in supplying that same drug to McBrown on occasions, and from the obvious paraphernalia of drug dealing and usage scattered throughout the premises and in plain view. When the surveillance evidence is added to the rest, the jury was entitled to conclude that amphetamine was being trafficked from those premises and that the appellant was directly involved as a principal offender in the offence of carrying on that business of so trafficking. The evidence certainly left open the possibility that Leah Headford was also a participant in carrying on that business, but that was neither here nor there.

[27] It follows that the grounds of appeal complaining about the conviction on Count 2, and about the directions containing remarks about complicity, have no merit; and that the appeal against conviction should be dismissed.

[28] **WHITE J:** I have read the reasons for judgment of Jerrard JA and agree with his Honour for the reasons which he gives that the appeal against conviction should be dismissed.

[29] **WILSON J:** I agree with the reasons for judgment of Jerrard JA and with the orders he proposes.