SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thompson* [2003] QCA 328
PARTIES:	**R** v **THOMPSON, Bryan Edwin** (appellant)
FILE NO/S:	CA No 48 of 2003 DC No 1168 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	30 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2003
JUDGES:	Davies and Williams JJA and Mackenzie 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 - JURISDICTION, PRACTICE AND PROCEDURE - MATTERS CONNECTED WITH CONDUCT OF DEFENCE - LEGAL REPRESENTATION - where appellant convicted of dishonestly obtaining money from Suncorp-Metway - where counsel for appellant admitted at trial that money belonged to Suncorp-Metway - where conflicting evidence as to whether appellant gave instructions to admit this evidence - where counsel failed to have appellant's brother declared a hostile witness - where counsel did not challenge admissibility of unsigned statement of appellant's brother - whether conduct of trial by counsel was such as to deprive appellant of significant possibility of an acquittal CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - where appellant accepted that he made relevant transactions - where only question was whether he did so dishonestly - whether jury's verdict was unsafe and unsatisfactory
COUNSEL:	The appellant appeared on his own behalf M J Copley for respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: After a trial in the District Court occupying three days the appellant was convicted on 26 February 2003 of dishonestly obtaining sums of money from Suncorp Metway Limited exceeding $5,000 namely $136,648.82 between 17 January 2000 and 25 May 2000.

He appeals against that conviction and originally sought leave to appeal against his sentence which is one of four years cumulative on the balance of a sentence which he was then required to serve. However at the commencement of the hearing of this appeal the appellant informed the Court that he no longer wished to proceed with his application for leave to appeal against a sentence and that application was dismissed.

At all relevant times the appellant was the manager of Millennium Property Holdings (Qld) Pty Ltd which I will call Millennium. The sole director and shareholder of that company was his brother, John Dick. The company owned three hotels in different towns in Central Queensland.

On 20 October 1999 Millennium applied to Suncorp Metway Limited which I will call Suncorp for a bank account to include a cheque facility. The application was signed by John Dick who described himself as the director of Millennium and the appellant who was described as the manager. The application was approved and the account was opened. The signatures of Dick and the appellant were required for cheques

on the account. No overdraft was permitted on the account though in practice Suncorp tolerated overdrawing to the extent of $5,000.

On 26 November 1999 Millennium applied for the installation of an EFTPOS facility in each of the hotels, presumably for the benefit of the customers. The appellant was nominated on the application forms for two of the three hotels, the Anchor Hotel at North Rockhampton and the Leo Hotel Motel at Claremont as the relevant contact person. The applications were approved on 2 December 1999 and the EFTPOS facilities were installed in each hotel. The EFTPOS facilities were installed for the purpose of enabling purchases to be made by direct debit from a customer's account to Millennium's account and, where purchases later resulted in a refund of money, for refunds to be debited from Millennium's account to a customer's account.

During the period alleged in the indictment the appellant utilised the refund facility of the EFTPOS account by making 51 refund transactions, 46 of which resulted in a refund being credited to his personal account either with Suncorp or with Credit Union Australia. In none of these cases was there any previous transaction to which the refund related.

It was never disputed by the appellant thereby obtained was Suncorp's money. Moreover Mr Laidlaw, who had been at the relevant time the retail banking collections manager of Suncorp, and who was the first witness called in the trial,

swore that to be so. Despite that, curiously one of the appellant's grounds of appeal is that his counsel admitted that fact. I will return to that ground a little later.

Nor was it disputed that the appellant obtained this money. The only question in issue in the trial was whether he did so dishonestly. His contention was that he obtained this money for the purpose of enabling him to pay Millennium's debts as they accrued, it being difficult to do so by means of the cheque account because it required signatures from both him and Dick and they were, most of the time, living and working some distance apart. The appellant said that he did not know whether Millennium had an overdraft arrangement with Suncorp. His point at the trial and indeed on appeal seems to be that he did not act dishonestly because he was simply following the instructions of his brother to pay debts by this means.

The prosecution case, on the other hand, was that the appellant and his brother were jointly engaged in a dishonest enterprise to obtain unauthorised credit to pay business expenses and for other unrelated matters, principally the deposit on the Leo Hotel.

It is plain beyond doubt that the appellant knew that what he was doing was, at least, irregular. He knew that the EFTPOS transaction limit was $5,000. Yet, on 27 April 2000, in a 25 minute period, he transferred 14 amounts of $5,000 into his own account. His explanation for this was that his brother wanted $70,000 to pay the deposit on the Leo Hotel and asked

him to do this. It is unsurprising to me that the jury thought that the appellant was acting dishonestly in these transactions.

The appellant seeks to add to the original ground of appeal - there was only one - which was that the verdict was unreasonable on the following grounds:

1. the conduct of the trial by counsel for the appellant was flagrantly incompetent, depriving the appellant of a significant possibility of acquittal and thereby resulting in a miscarriage of justice. Particulars of the incompetent conduct were as follows:

   (i) the failure of counsel to follow instructions in admitting that the monies the subject of the offence, were the property of the complainant company, Suncorp;

   (ii) the failure of counsel in endeavouring to have the witness Dick declared a hostile witness pursuant to s 17 of the *Evidence Act* 1977, to raise in the absence of the jury, an affidavit of the witness sworn 5 December 2001;

   (iii) the decision of counsel not to challenge the admissibility of the unsigned statement made by Dick to Detective Howard goes beyond an error of judgment. This evidence prevented a fair trial, as

it was more prejudicial than probative and the jury was likely to be misled by it.

Passing then to a second ground of appeal sought to be added, it was that the learned trial judge erred in the exercise of his discretion by failing to grant an adjournment of the trial given the late granting of Legal Aid and lack of preparation of the appellant's legal representatives.

And the third ground sought to be added was that the learned trial judge erred in not exercising his discretion to exclude the evidence led of the unsworn and unsigned statement of Mr John Dick. The evidence, it was said, was highly prejudicial and was likely to mislead the jury.

The hearing of this appeal proceeded on the basis that the appellant was allowed to argue each of these grounds and, as I shall mention in a moment, a further ground which was not, in fact, amongst either the original or added grounds of appeal.

I will then deal with those in turn. Firstly, the failure of counsel to follow instructions by admitting that the monies the subject of the offence were the property of Suncorp. I have already adverted to this ground. The appellant says that, although the Crown could prove that the monies were Suncorp's monies, he did not want the jury to hear such admission coming from the defence because his defence was his belief that he was acting within the course of his authority in doing what he did.

There is a conflict of evidence between the appellant and his counsel at trial, Mr Rosser, as to whether or not, in the end, the appellant gave instructions to make this admission. I do not find it necessary to resolve that conflict. Even if, as the appellant asserts, counsel acting contrary to his instructions in making this admission, I cannot see how it could have prejudiced his case in circumstances in which the Crown had already proved this and had foreshadowed further compelling evidence on this question. On the contrary, it seems to me, to keep this question in issue, when it was plain that it could be convincingly proved and, indeed, already had been, would have invited the calling of further possibly damaging evidence and distracted the jury's attention from the central issue which the appellant wished the jury to consider, namely whether, as the prosecution contended, he had been dishonest or, as he contended, had rather naively relied on his brother's assurances. I do not think that there is any substance in this ground.

The second ground of appeal was, as I mentioned, the failure to seek to have the appellant's brother declared a hostile witness and to seek, in the absence of the jury, the admission of Dick's affidavit of 5 December 2001.

The appellant's counsel originally foreshadowed such an application, but did not pursue it, as he said, on instructions.

In any event, by this time, Dick had claimed privilege and he may well have been justified in doing so. The question which he declined to answer was whether he authorised anyone to put these refunds through the machine. If he knew the position of Millenium's account with Suncorp, which he almost certainly did, his answer may well have incriminated him.

In the circumstances, it is not surprising that the appellant's counsel did not seek to adduce from Dick evidence in terms of his prior affidavit. In it he had sworn that he authorised the appellant to use the EFTPOS facility to credit funds to his account to pay company debts and for his personal use. For the same reasons that his answer to the question I have just referred to may have incriminated him, so also may this evidence have done so. It is plain that he could have declined to answer any questions about what he said in his affidavit, whether in examination-in-chief or under cross-examination. Nor was his affidavit in any way inconsistent with his testimony so as to justify tender under s 17 or s 18 of the *Evidence Act*. He had given no evidence in Court on the matter to which he had deposed. There is no substance in this ground.

I then turn to the failure to challenge the admissibility of the unsigned statement of Dick and the failure of the trial judge to exclude it.

The unsigned statement of Dick was not admitted into evidence. The appellant's complaint appears to be to the questions and

answers with respect to that statement during the cross-examination of Dick by the Crown prosecutor. There can be no doubt that the prosecutor was entitled to ask Dick about statements he appeared to have made to Detective Howard because a number of them were inconsistent with the appellant's defence and with the evidence which the appellant was no doubt hoping Dick would give. These related to whether the appellant had effected the transactions on Dick's instructions or whether, at the time he did make these transactions, he had in his possession the Suncorp account of Millenium which showed it to be substantially in overdraft. It follows that there is no substance in this ground.

In one of the answers which Dick gave during his cross-examination, he appeared to admit telling Detective Howard that after picking up the statements, that is, the bank statements from Suncorp, he forwarded them by fax to the appellant at the Anchor Hotel. He usually sent them that day or the day after. This evidence was consistent with the evidence that 36 pages of Suncorp bank statements with respect to Millenium's account were found in a folder under the desk in an office at the Anchor Hotel which the appellant occupied. These covered the period from 1 November 1999 to 22 May 2000. They showed that on the latter of those dates the account was overdrawn to the extent of over $100,000.

Moreover, one of Millenium's statements of some time about May, and it is unclear what that statement was, was shown to have been faxed to "BT" from "JD" in May 2000.

During the course of his oral submissions today, Mr Thompson raised the doubt as to whether the statement identified in the appeal book was the statement which was faxed under cover of that fax and he may be right in that respect, but it is plain from the fax itself that what was sent was one of Millenium's bank statements. This was probative of the appellant's knowledge that the money he transferred to his account was Suncorp's money.

I turn then to the failure to grant an adjournment. No application for adjournment was made on 24 February, the first day of trial. It appears to be the failure, on 18 February, to grant an adjournment beyond 24 February which is the basis of the complaint. However, there is not the slightest indication that the failure to apply for or to grant a longer adjournment on 18 February in any way prejudiced the appellant in the conduct of his trial. The respondent in its written outline has detailed the extraordinarily large number of adjournments in this matter before that date, which explains the order made on 18 February that the trial would proceed on 24 February. There is, in my opinion, no substance in this ground.

During the course of his submissions to this Court the appellant sought to argue also another ground of alleged incompetence by his counsel, namely the failure to call as witnesses in his case Elizabeth Counsell and Ronald Richardson.

As to Ms Counsell, Mr Rosser has sworn that, in conversations with her, he was unimpressed by the quality of her evidence which was not precise as to place and date and that he formed the opinion that her evidence would appear to the jury to be of a contrived nature. It was in those circumstances, he said, that he decided not to call her. That was a matter within his discretion in the conduct of the defence and I cannot see, in the light of what he said, that he erred in the exercise of that discretion.

As to Mr Richardson, there is nothing before us to indicate that Mr Richardson could have given any evidence which would have assisted the appellant's case in denying his honesty and Mr Rosser has sworn that he could see no admissible evidence which Mr Richardson could have given. There was therefore no substance in this further ground.

This leaves for consideration only the original ground of appeal that the jury's verdict was unreasonable. It is plain that the Crown case was a simple one. The appellant accepted he made all the refund transactions. The question, as I have already said, was whether he did so dishonestly.

There was ample evidence, in my opinion, from which the jury could have concluded that he did; that the withdrawals from the EFTPOS machine were pursuant to a dishonest scheme arranged between the appellant and his brother. The appeal, in my opinion, should therefore be dismissed.

WILLIAMS JA: I agree and there is nothing I wish to add to what has been said by the presiding judge.

MACKENZIE J: I also agree.

DAVIES JA: The appeal is dismissed.
