SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cannon* [2004] QCA 440
PARTIES:	**R** **v** **CANNON, Charles Edward** (appellant)
FILE NO/S:	CA No 74 of 2004 DC No 62 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	19 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2004
JUDGES:	McPherson and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, McPherson JA and Helman J concurring to the orders made, Jerrard JA dissenting
ORDER:	**1. Appeal against convictions allowed** **2. Convictions set aside** **3. New trial ordered**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES INVOLVING MISCARRIAGE – UNSATISFACTORY NATURE OF TRIAL – where witnesses in trial either deceased, incapable of giving evidence, indemnified or hostile – where four Crown witnesses only could establish identity of intruder and all four compelled to give evidence – where accomplice witnesses compelled to give evidence before Australian Crime Commission – witness threatened and admitted wanting to wreak vengeance on appellant – witness gave statement only when found in possession of amphetamines – witness admitted lying to Commission – evidence against appellant not effectively tested – prejudicial evidence affected integrity of result of trial – unsafe conviction APPEAL AND NEW TRIAL – NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – DIRECTIONS AS TO PARTICULAR MATTERS – OTHER MATTERS – omissions in directions

on evidence of witnesses – no re-directions sought by defence counsel – misdirection as to admissibility of witness statements – directions absent as to witnesses being compelled to give evidence before the Australian Crime Commission – jury unaware that one Crown witness indemnified – failure by counsel and Crown prosecutor to raise that witness indemnified – no direction to jury that witness indemnified – jury given directions as to difficulties with the evidence of one witness but not another – whether jury would make connexion that directions applied to evidence of other witness

Criminal Code 1899 (Qld), s 320A, s 355, s 339, s 340, s 391, s 419
Criminal Law Amendment Act 2000 (Qld), s 50
Evidence Act 1977 (Qld), s 93B

Burns v The Queen (1975) 132 CLR 258
R v Parkinson [1990] 1 Qd R 382
Whitehorn v The Queen (1983) *152 CLR 657*

COUNSEL: M J Byrne QC for the appellant
M J Copley for the respondent

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

[1] **McPHERSON JA:** For the reasons given by Helman J, I agree that the appeal by the appellant against his convictions should be allowed and the convictions set aside. There should be an order for a new trial of the offences of which the appellant was convicted.

[2] **JERRARD JA:** In this appeal I have had the benefit of reading the reasons for judgment of Helman J, with which McPherson JA agrees, and while I respectfully agree with much of what His Honour has written, I differ as to the ultimate outcome of the appeal.

[3] I agree that it was relevant for the jury to understand that the witness Kellie Quarm was an indemnified witness. But the appellant's counsel knew that fact from a voir dire, and did not raise it before the jury. That makes it difficult to complain now about the fact that the trial judge made no reference to the indemnity; the judge could not refer to a matter of which there was no evidence. The learned judge did remind the jury that the witnesses Neil Hudson and Kellie Quarm were witnesses who had been declared hostile, and that for that reason the jurors had heard what those witnesses told the Australian Crime Commission. The learned judge explained to the jury that Mr Cannon had had no opportunity to examine those witnesses when they gave evidence before that commission, because there was nobody there who was concerned to look after Mr Cannon's interests at all. The judge also reminded the jurors that that observation also applied to the occasion when Wayne Boyd made his statement to the police; that is, there was nobody there to check details or to challenge or test statements Mr Boyd made to ensure that whatever he said was accurate and complete.

[4] The learned judge also explained to the jurors that the witnesses Neil Hudson and Kellie Quarm had identified themselves as accomplices in what they told the Australian Crime Commission, and the judge gave the jurors warnings about the need to be careful when considering the evidence of accomplices, because of the possibility of their evidence being influenced in an undesirable way by the accomplice hoping that there was something to be gained from the evidence that he or she gave. This could include lessening of their own punishment, minimising his or her involvement in an offence, and overstating or even totally inventing the participation of a defendant. The judge later reminded the jurors that Ms Quarm's evidence at the trial was that, on the occasion when she spoke to officers of the Australian Crime Commission, she was not "impressed with" Mr Cannon; and that there was a real possibility that Ms Quarm gave the Australian Crime Commission such statements as she did because she was hostile to Mr Cannon.

[5] Accordingly, I doubt whether further identifying Ms Quarm as an indemnified witness could have added much at all to the warnings the jurors were given about her evidence. Likewise I doubt whether clarifying, if clarification was needed, that Mr Hudson and Ms Quarm had been compelled to answer questions before the Australian Crime Commission would have added anything of weight to the warnings the learned judge had already given the jurors about the need to evaluate their evidence with care. In the case of Mr Hudson, in addition to describing him as an accomplice, the judge told the jurors on two occasions that in neither the commission hearings or in the court had the appellant's counsel had any opportunity to cross-examine Mr Hudson, who had simply refused to answer any questions at all at the trial.

[6] What I do consider disturbing about the trial process is simply the overwhelming number of witnesses whose significant evidence was primarily given before a different tribunal, and which was placed before the jury by virtue of the relevant witness being deceased (Mr Boyd); or ill, and incapable of giving evidence in chief (Rosemary Cannon); or hostile (Neil Hudson and Kellie Quarm).

[7] That evidence, received in that fashion, was accompanied by the described warnings, but, as Helman J has clarified, the statement to the police made by Wayne Boyd, and the statements to the Australian Crime Commission made by Rosemary Cannon, were not admissible at all on three of the six counts. Nothing was made of this on the appeal, or at the trial, where the learned judge misdirected himself that the evidence was inadmissible on two only of the six. Where a fundamental part of the normal process of a criminal trial involving adult witnesses is absent – namely that those witnesses give their evidence in chief in person before the jury and can then be cross-examined upon it – it is critical to the integrity of the result that such different processes as are followed comply with the statutory provisions allowing for proceedings so different from the norm. On that basis I would set aside the convictions on counts 1, 4, and 5, in accordance with ground 5 of Mr Cannon's grounds of appeal, namely that the convictions on those cannot be supported having regard to the evidence; this is because it included the inadmissible, and prejudicial, evidence of the out of court statements made by Wayne Boyd and Rosemary Cannon.

[8] I would allow the convictions to stand on counts 2 and 3, as the evidence properly admitted on those made a quite strong case against Mr Cannon. The record of the Australian Crime Commission questioning of the witnesses shows that careful and

probing questions were asked, the witnesses were not led, and no inducements were offered for answers incriminating Mr Cannon. There was a consistency in all the accounts of Mr Cannon's involvement which the jury heard, which made those accounts very persuasive evidence against him.

[9] I would also allow the sentences on counts 2 and 3 to stand; that would result in Mr Cannon continuing to serve a six year sentence, for the serious violent offence of torture.

[10] **HELMAN J:** On 26 February 2004, after a trial in the Southport District Court that began on 9 February and lasted thirteen days, the appellant was found guilty of five offences alleged to have been committed when he and others forcibly invaded the dwelling of Mrs Shelley Boyd at 576 Maudsland Road, Maudsland, Gold Coast on the night of Friday 9 April 1999 and stole money: burglary with circumstances of aggravation (count 1); assault occasioning bodily harm with circumstances of aggravation (count 2); torture (count 3); deprivation of liberty (count 4); and stealing (count 5). He was acquitted on a sixth count, of serious assault. The offences alleged in counts 2 and 3 were alleged to have been committed on Mrs Boyd's husband, and that alleged in count 4 upon her. The person alleged in count 6 to have been assaulted was a police officer, Constable Simon Buxton, and the person who assaulted him was on the Crown case the appellant alone. The appellant was sentenced to imprisonment for six years on each of counts 1 and 3, and the conviction in each case was declared to be that of a serious violent offence. He was sentenced to imprisonment for one year on each of counts 4 and 5. On count 2 a conviction was recorded and no other order made. He appeals against his convictions and seeks leave to appeal against his sentences.

[11] The offence of burglary is provided for in s 419 in chapter 39 of the *Criminal Code*, assault occasioning bodily harm in s 339 in chapter 30, torture in s 320A in chapter 29, deprivation of liberty in s 355 in chapter 33, stealing in s 391 in chapter 36, and serious assault in s 340 in chapter 30. The relevance of those details will appear later.

[12] The Crown case was that on the night in question four men wearing dark clothes and with balaclavas concealing their faces forced their way into Mrs Boyd's house by smashing the glass in the front door. Mr and Mrs Boyd were at home with their two young children. In the house Mr Boyd was repeatedly kicked and punched, and a gun was put in his mouth. He escaped from the house but was caught by the intruders, beaten again, and taken back inside. There he was hit with a shovel, tape was put over his eyes and a rag over his mouth and nose, and a sharp instrument applied to a finger. The intruders demanded money and took some after Mr Boyd told them where it was hidden. Mrs Boyd's hands were tied up, she had tape put across her mouth and wrapped around her head, and was forcibly confined in her car. She had, however, managed to telephone for emergency help before she was set upon.

[13] Two police officers, Constable Buxton and Constable Darren Parker, were the first of a number of police officers to come to the house in response to Mrs Boyd's telephone appeal. The two officers I have named arrived while the intruders were still at the house, and they detained and arrested a man called Wayne Poole. Another, Neil Hudson, was found near the Boyds' house and arrested. Constable Buxton detained a third man, who had short dark hair with grey patches in it and a

beard of dark stubble, and attached a handcuff to his left wrist, but the man escaped when Constable Buxton went to assist Constable Parker. Constable Buxton did not see the man's face, although he had pulled off the man's balaclava. He saw only the back of the man's head.

[14] Hudson and Poole pleaded guilty to offences relating to the attack on the Boyds and they were sentenced on 8 August 2000. On each, a head sentence of imprisonment for five years was passed. Declarations of time served in pre-sentence custody were made: 482 days for Hudson, 470 for Poole. In each case the sentencing judge recommended release on parole after imprisonment for twenty months. Hudson had one prior conviction which the judge observed did not 'play a big role' in the sentencing process, and Poole had no prior convictions.

[15] On 9 November 2001 in Victoria, Mr Boyd, an upholsterer by trade who also sold amphetamines, died as a result of a gunshot injury to his head – murdered, his Honour said in summing-up. A statement about the attack Mr Boyd gave at the Surfers' Paradise police station on 13 April 1999 to Detective Senior Constable Kurt Krebs was read to the jury by that officer. That evidence was put before the jury under s 93B of the *Evidence Act* 1977, inserted into that Act by s 50 of the *Criminal Law Amendment Act* 2000, which permits the reception of such evidence in certain 'prescribed' criminal proceedings if the person making the statement is unavailable to give the evidence because he or she is dead or mentally or physically incapable of giving the evidence.

[16] Mrs Boyd was a Crown witness at the trial, as were Constables Buxton and Parker, but the Crown witnesses of primary importance were Hudson, Kellie Quarm (Hudson's *de facto* wife), Rosemarie Cannon (the appellant's sister), and Sheree Bailey (the appellant's former neighbour and landlady). Poole could not be called to give evidence at the trial as he failed to appear in obedience to a subpoena and his whereabouts were then unknown. His Honour refused to admit 'his evidence' under s 93B of the *Evidence Act* on an application by the Crown based on the argument that since he was 'physically absent' from the precincts of the court 'on his own volition' he was physically incapable of giving evidence.

[17] When Hudson was called he refused to answer any questions both in examination-in-chief and under cross-examination. He was found to be hostile and a tape-recording of evidence he had given to the Australian Crime Commission when he was examined under compulsion – as revealed on the tape itself – on 4 February 2003 was played to the jury and received as an exhibit. In Hudson's evidence to the Commission he agreed he had been sentenced for his part in the home invasion and was at the time of the interrogation on parole. He gave the Commission an account of the home invasion to the effect that it had been carried out by the appellant, the appellant's brother Ray, Poole, and Hudson himself at the appellant's instigation, to recover a sum of money the appellant claimed Mr Boyd owed him. Quarm had driven the four to a place near the Boyds' house, Hudson said. Prior to his being compelled to speak about the incident he had not given a statement about it to the investigating authorities.

[18] Quarm too was found to be hostile, after she had given some evidence-in-chief. She was, on the Crown case, an accomplice of the intruders. She had received an indemnity from prosecution, although that fact was not revealed to the jury, having emerged only on one of the many *voire dire* examinations conducted in the course

of the trial. She was cross-examined about the evidence she had given to the Australian Crime Commission when she too was examined under compulsion – as was revealed on the tape itself – on 4 February 2003. A tape-recording of that evidence was received as an exhibit and played to the jury. Quarm had refused to provide a statement to the investigating police officers before she was interrogated before the Australian Crime Commission.

[19] Quarm's evidence-in-chief had been to the effect that she had driven the four intruders to an intersection near the Boyds' house, but that she had been ignorant of the purpose of their journey except that some money owing to the appellant was to be recovered; and she said she did not remember speaking to the appellant after the drive to the intersection. When questioned by the Crown prosecutor she admitted that she had told the Commission that the appellant had spoken to her on the telephone on the morning after the drive, told her that Hudson and Poole had been arrested and asked her to go to Poole's girlfriend's house to pick up his brother and get a hacksaw, and then to go to a certain address. The appellant admitted to her, she said, that he had been handcuffed. In the tape-recorded evidence she said in effect she had known the purpose of the visit by the four to the Boyd's house was not just a 'personal debt collect'. Cross-examined by counsel for the appellant, she said that when she had agreed with the Crown prosecutor that she had given certain answers to the Commission recorded in the transcript of her interrogation she agreed only because the answers were in the transcript, that she had 'a hopeless memory', and that at the Commission hearing she merely agreed to much of what was put to her even though she could not remember what had occurred. But when it was put to her that much of what she had said to the Commission was not correct she replied: 'To the best of - I wouldn't have lied overtime them [*sic*] because I would've been too scared but I don't ..'

[20] When Ms Cannon was called she claimed to be mentally and physically incapable of giving evidence because she had suffered a minor heart attack. His Honour had heard evidence on the *voire dire* from a doctor who had examined her at the Gold Coast Hospital and confirmed that she had had a minor heart attack. A tape-recording of her examination under compulsion before the Australian Crime Commission on 16 January 2003 was put before the jury under s 93B of the *Evidence Act*. Under that interrogation she recounted admissions by the appellant of his instigation of, and participation in, the home invasion. In giving that account Ms Cannon repeated allegations she had made to her brother Ray in a letter dated 24 October 2000, which was before the jury as an exhibit. At the trial, in spite of her claimed incapacity, Ms Cannon was questioned and she claimed that she had written the letter when she was angry with the appellant, that she had lied to the Commission, that she had been very angry with the appellant when she spoke to the Commission and she had lied to wreak vengeance upon him, and that she had been threatened by the officer of the Commission who questioned her.

[21] I should mention that although the tape-recording of Ms Cannon's interrogation and Mr Boyd's statement were put before the jury under s 93B of the *Evidence Act*, such a course was not authorized by that section in relation to counts 1, 4, and 5 since the offences charged on those counts were not offences defined in chapters 28 to 32 of the *Criminal Code*: see the definition of 'prescribed criminal proceeding' in s 93B(5). In his Honour's summing-up he referred to that matter, but failed, erroneously, to include count 4 in that list. No argument was, however, addressed to us on that subject, or on any other question of the admissibility of evidence.

After the evidence of Ms Cannon's interrogation was given, his Honour observed, in the absence of the jury, that it could have been put before the jury on 'the hostile witness' basis too.

[22] Bailey gave evidence of admissions she swore the appellant had made to her at her dining-room table in about April 1999 concerning his complicity in the home invasion. She agreed when cross-examined that she gave police officers a statement about the conversation only in January 2003 after they found her in possession of amphetamines. In the statement and again in her evidence in the committal proceedings in July 2003, she gave February 1999, not April 1999, as the month in which the conversation had occurred (i.e., before the home invasion had taken place) and the place as beside her pool and not her dining-room. She agreed that the media had reported the home invasion in considerable detail, and that she thought that a reason for the leniency of the sentence she received when she pleaded guilty to her drug offence could have been her promise to give evidence against the appellant.

[23] Although there was on the Crown case no doubt that the attack on the Boyds had taken place, there was not – as his Honour directed the jury in his summing-up – sufficient in the evidence other than that of Hudson, Quarm, Ms Cannon, and Bailey to establish a case against the appellant as one of the intruders. Although there was some evidence in Mr Boyd's statement of brawls between him and the appellant in January and February 1999, there was no evidence from either Mr or Mrs Boyd identifying the appellant as an intruder. In Mr Boyd's statement he said, 'During the entire incident I did not get a real look at any of the persons'. Mrs Boyd gave evidence that she could not identify 'anyone'. Evidence from witnesses other than Constable Buxton and the appellant's physical appearance in court suggested the man detained by the constable was not the appellant - as the jury appears to have accepted in its verdict on count 6.

[24] The appellant did not give or call evidence at the trial. As his Honour told the jury in summing-up, it was not disputed by the appellant that the home invasion happened, the issue was whether the appellant was there.

[25] The grounds argued on behalf of the appellant in support of his challenge to his convictions came down to two: first, that his convictions cannot be supported having regard to the evidence; and secondly, that his Honour's directions on the evidence of Hudson, Quarm, Ms Cannon, and Bailey were inadequate. It is worthy of note that the appellant's counsel at the trial did not seek any re-directions from his Honour, although of course that is not fatal to his appeal.

[26] As Mr Byrne QC, for the appellant, observed when beginning his submissions, the trial of the appellant was not 'your usual run-of-the-mill trial'. Mr Byrne thus echoed remarks to similar effect by his Honour in the course of the trial.

[27] It will be convenient to deal with the second ground first, as counsel did at the hearing of the appeal.

[28] The inadequacies inherent in the evidence of each of the four Crown witnesses of primary importance are obvious enough. The evidence of all but Bailey came to the court as a result of their being compelled to speak about the incident. Hudson and Quarm had not given statements to the authorities, so it may safely be concluded that had they not been compelled to speak about it they would not have done so,

although Hudson had of course pleaded guilty to his part in it. Ms Cannon was similarly placed although she had written a letter about the incident to her brother Ray. The pressure of compulsion to speak could result in the giving of a false account for a number of reasons, including of course a desire to curry favour with the investigating or parole authorities, or to evade their disfavour, by 'co-operating' by making a false accusation. Ms Cannon swore she had been threatened and had indeed made a false accusation. The circumstances of the reception of Hudson's evidence deprived the appellant's counsel of the ability effectively to cross-examine Hudson, so not only did Hudson's account come to the jury as a result of compulsion, it could not be effectively tested. Furthermore, Quarm was indemnified, although that was not revealed to the jury. Bailey's evidence was clearly enough open to the suggestion that it had been obtained as a result of the desire on her part for more favourable treatment on her drug charge than she might otherwise have expected. The tardiness of her coming forward, her prior inconsistent statement, and the possibility of a concoction from media reports cast further doubt on her veracity. The need for careful directions bringing home to the jury all of those questions is then obvious: not one of the four could have been regarded as being free from some pressure falsely to accuse the appellant.

[29] The complaint made on behalf of the appellant concerning his Honour's directions on Hudson's evidence was that no mention was made of his being compelled to answer questions before the Australian Crime Commission. His Honour mentioned that Hudson had been found to be hostile, and explained the significance of that finding, and referred to the inability of the applicant's counsel effectively to cross-examine Hudson, and the significance of that, but his Honour did not refer to Hudson's being compelled to speak about the incident, and the significance of that. The extraction of evidence under compulsion by a government agency with wide powers would usually call for some discussion by a trial judge in summing-up, particularly when the person interrogated is subject to the additional pressure of being on parole. It was not sufficient I think to rely on the jury's recalling the fact of compulsion from the evidence of the interrogation itself, the tape-recording, and to leave it at that – as was argued before us on behalf of the Crown. A clear statement with the authority of the judge was necessary to bring home to the jury not only the fact of compulsion but also its significance, and in particular the possibility of 'co-operation' by fabrication.

[30] The same complaint was made on behalf of the appellant concerning his Honour's directions on Quarm's evidence: there was no mention of her having been compelled to submit to interrogation before the Australian Crime Commission. To rely on the jury's recalling the fact of compulsion from the evidence of the interrogation itself is again not sufficient, in my view.

[31] The record reveals that Quarm was an indemnified witness but no directions were given to the jury on that subject. That omission was the subject of a further complaint on behalf of the appellant. The Crown responded by arguing that since there was no evidence before the jury of the indemnity his Honour was not obliged to direct upon it. A judge is of course not obliged to give directions on matters not in evidence. But in this case the record reveals that the fact of the indemnity, a matter of considerable relevance to those responsible for assessing Quarm's evidence and making findings of fact, was not put before them. While the judge cannot be criticized for failing to direct on a matter not in evidence before the jury, a review of the whole record of the trial, including what occurred on the *voire dire*

examinations, shows that a serious injustice occurred. The Crown's answer is artificial in the extreme, and I conclude that – as was argued for the appellant – the Crown prosecutor himself should have brought out the fact of Quarm's indemnity before the jury as he did before the judge in the absence of the jury. Such a course was in the circumstances necessary once it became clear that the appellant's counsel had failed to bring out the fact. Under our system of justice, in a criminal trial the Crown prosecutor has the duty, in presenting the case against an accused person, to act with fairness and detachment 'and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one': *Whitehorn v The Queen* (1983) 152 CLR 657 at pp 663-664 per Deane J.

[32] On behalf of the appellant the complaint was made that in summing-up his Honour did not refer to Ms Cannon and the jury were given no guidance as to the use they could make of her tape-recorded interrogation by the Australian Crime Commission 'in light of her sworn denials'. His Honour did mention Mr Boyd's and Ms Cannon's statements admitted under s 93B of the *Evidence Act* when he explained to the jury how that evidence came before them as a result of a 'fairly recent amendment to the Evidence Act of Queensland'. His Honour later referred to the difficulties inherent in the reception of Mr Boyd's statement: it was hearsay, it may not have been accurately conveyed to the court, it may not have been accurate, and there was no opportunity to cross-examine Mr Boyd. It was argued before us that the jury would have understood that the same considerations applied to Ms Cannon's evidence. Whether the jury would have made the connexion is questionable, as is whether all of the considerations his Honour mentioned concerning Mr Boyd's statement applied with equal force to Ms Cannon's. His Honour also referred to arguments advanced to the jury by the appellant's counsel to the effect that they should accept as accurate her claim that she had lied to the Commission, but what is lacking is a direction that Ms Cannon's statement alone would not be a basis for a safe conviction, i.e., if the jury found it did not accept the evidence of Hudson, Quarm and Bailey: see *R v Parkinson* [1990] 1 Qd R 382 at p 384 per Macrossan CJ.

[33] The omissions in the directions on the evidence of Hudson, Quarm, and Ms Cannon and the failure of the Crown to bring out before the jury the fact of Quarm's indemnity are sufficient to justify allowing the appeal against the appellant's convictions in my view. It is not then necessary to consider further the complaints concerning the directions on Bailey's evidence, but in any event I conclude his Honour's directions were adequate in dealing with the issues arising from her evidence. Those issues were covered in his Honour's own observations and in his summary of the appellant's counsel's submissions to the jury. On the hearing of the appeal it was pointed out by Mr Copley for the Crown that his Honour had failed to direct the jury that before it could act on the confession Bailey asserted had been made to her it must be satisfied not only that the confession was made but also that it was true: *Burns v The Queen* (1975) 132 CLR 258. But in this case the challenge was directed to the making of the confession rather than to its truth. That was made clear to the jury, so the failure to give a specific direction on the question of the truth of the confession is of less moment than it would have been had that not been the issue: *ibid* at p 261 per Barwick CJ, and Gibbs and Mason JJ.

[34] It is not necessary to consider further the appellant's first ground of appeal or his application for leave to appeal against his sentences.

[35] The appeal against the appellant's convictions should be allowed, the convictions set aside, and a new trial ordered since there is a sufficient case to warrant that.

[36] Since writing the foregoing I have had the advantage of reading the reasons prepared by Jerrard JA. With respect to his Honour, I maintain the views I had come to before reading his reasons. The Crown case, as it came to the jury in a way that must be regarded as – to say the least of it – unusual, required that in fairness every effort was required to expose and explain all relevant shortcomings in it. With the benefit of hindsight but recognizing the great difficulties under which the learned trial judge laboured, I conclude that the convictions must be set aside.