

SUPREME COURT OF QUEENSLAND

CITATION: *R v Kanaris* [2005] QCA 352

PARTIES: **R**
v
KANARIS, Peter
(appellant)

FILE NO/S: CA No 103 of 2005
DC No 613 of 2005

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 22 September 2005

DELIVERED AT: Brisbane

HEARING DATE: 22 September 2005

JUDGES: Jerrard JA, Cullinane and Jones JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal hearing adjourned to 24 November 2005**
2. Parties granted leave to file affidavit material in support or contradiction of the assertion that the appellant was unable to prepare properly for trial or present his defence by reason of the adjournment of the start of the trial from 7 to 14 February 2005 and by reason of the asserted unavailability of the witness Dimitris Koliass

CATCHWORDS: PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – ADJOURNMENT – appellant raised a new ground of appeal at the commencement of the appeal hearing – appellant asserted that he was denied natural justice as an adjournment of the trial for one week resulted in the unavailability of his Greek lawyer as a witness – appellant had no affidavit from his lawyer supporting this assertion – appellant offered to withdraw this ground of appeal as he did not wish the appeal to be adjourned – whether the appeal should be adjourned to allow the appellant time to obtain an affidavit from his lawyer regarding the alleged denial of natural justice

COUNSEL: The appellant appeared on his own behalf
 R Pointing for the respondent

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

JERRARD JA: This appeal is in respect of a number of convictions on charges of false pretences and fraud incurred by the appellant, Peter Kanaris, in a trial held in the District Court between 14 February 2005 and 18 March 2005.

On that latter date the jury acquitted Mr Kanaris of three counts on which he had stood trial and convicted him of 18 or so counts. Those counts were largely in respect of conduct of which he was accused in 1996 and 1997 and which conduct was alleged to have resulted in his obtaining money from other people by means of false representations and false promises made to them.

The Crown case was that those false representations and false promises were made with intent to defraud. In essence the false representation alleged was the same in many of the counts and was that Mr Kanaris stood to make a considerable amount of money from the sale of land on the island of Kos (part of Greece) and that the sale of that land was being delayed by matters, partly beyond his control but which could be resolved by money.

Mr Kanaris represented to the various alleged victims of the alleged frauds that he rather desperately was in need of immediately available cash to pay, for example, rates, taxes,

architect's fees and the like on the land in respect of the sale. Once those matters were cleared up the sale of the land was expected to settle very quickly.

The prosecution case was that relying on promises that moneys lent to him for that purpose would be expended on those purposes and would be repaid promptly from the proceeds of sale and repaid with or by an amount double the amount lent, the victims advanced quantities of cash to Mr Kanaris. The Crown also alleged that throughout the period in which Mr Kanaris was making those representations alleged to be false he was gambling money at casinos on the east coast of Australia at which he was registered as a substantial gambler whose gambling activities were recorded.

The trial lasted for a number of weeks and Mr Kanaris called three witnesses in his defence. He did not give evidence himself. The evidence of the various complainants was similar in that, in respect of the alleged fraud I have described, those complainants contended they believed that after advancing sums of money those would be expended on ensuring that the property settled. Mr Kanaris would then come into a very large amount of money and they would be repaid the money they lent plus the same amount again. Those complainants continued to advance amounts of money over time until each of them eventually stopped.

There were other varieties of fraud alleged against Mr Kanaris but the critical one for this appeal is the one I have described.

Mr Kanaris filed an appeal in which the sole ground of appeal was that the verdicts were unsafe and unsatisfactory. He was given leave without opposition this morning, the date set for hearing his appeal, to add four other grounds. The first was that the learned trial judge erred in the summing-up to the jury. The second was that comments made by the judge during the course of the trial prejudiced Mr Kanaris. The third was that the judge erred in allowing evidence to be admitted, the prejudicial value of which far outweighed its probative value. The fourth was that the verdicts were inconsistent and unsafe. He added those to the existing ground that the verdicts were unreasonable and could not be supported, having regard to the evidence.

This morning Mr Kanaris made a new complaint which was not reflected in any of the grounds of appeal which had been filed or in the written outline of argument filed by leave on 16 September. This was a complaint that he was denied natural justice because he could not prepare his trial properly. He wished to refer to the transcript of: hearings or applications before the learned judge who ultimately conducted the trial and which resulted in Mr Kanaris representing himself on the trial; and of the trial starting on 14 February.

In answer to questions from the Bench this morning Mr Kanaris has explained that the trial had originally been listed to start in November 2004 and had been listed for perhaps six weeks before that date to start then. Mr Kanaris was on bail at all times relevant prior to the start of the trial on 14 February of this year. The trial did not, in fact, start in November 2004 because in September 2004 it was adjourned on the order of the judge who ultimately heard the trial.

Mr Kanaris explained or submitted this morning that on 17 September 2004 he had asked that judge to adjourn the trial to January 2005 and not to fix a starting date for it but rather to list it for mention only. That request was made so that Mr Kanaris could contact witnesses whom he wanted to call. That request was denied and the trial was listed to commence on 7 February 2005. As has happened because of the illness of a Crown witness it actually started on 14 February 2005.

What lies behind Mr Kanaris's contention made from the Bar table that he had not received natural justice was the explanation advanced this morning that he had wished to call at the trial starting in November, and indeed had arranged to call at the trial starting in November, a witness Dimitris Koliass, a lawyer working in Athens and who had been representing Mr Kanaris's interests in Greece in the period 1996 and early 1997, which is coincidentally the period covered by a substantial number of the charges on which Mr Kanaris was convicted.

Mr Kanaris has explained that if called as a witness Mr Koliass, if telling the truth, would be able to say, and Mr Kanaris would expect him to say, that there was property in Greece which did exist, being land, and which was held on trust. That trust was intended or designed to protect the interests of Mr Kanaris while Mr Kanaris was in Australia and existed because a person resident elsewhere than in Greece could not be registered or recorded as the owner of land.

There was a contract for sale of that land but there were problems which delayed the sale. Mr Kanaris had written correspondence from Mr Koliass which described those problems. That document or that correspondence, consisting of at least one letter, is in the possession of either Mr Kanaris or his wife and could be available to him and indeed he had attempted to present it to the learned trial judge during the trial. He had been told that he could only produce it if he gave evidence himself.

Mr Kanaris has said that when the trial was delayed in its start for one week that caused him specific problems in his then intention to call the witness, Dimitris Koliass, and as Mr Kanaris told us this morning he had protested to the judge and asked the judge to place on record that Mr Kanaris had been considerably inconvenienced by the delay of one week in the start of the trial.

It is the fact that the transcript records Mr Kanaris telling the judge on 14 February 2005, at the start of the trial, that

he had a witness leaving, apparently Greece, on 25 February 2005, due to arrive in Brisbane on 27 February 2005.

I break off to explain that Mr Kanaris told us this morning that he had anticipated the Crown case would take three weeks and had accordingly arranged for his witnesses to be available at a stage about three weeks after the start of the trial on 7 February 2005.

Mr Kanaris told the trial judge on 14 February that his witness was supposed to go back, apparently to Greece, on 2 March 2005 and arrive in Athens on 3 March. This morning Mr Kanaris told the Court that that was because of a wedding in Greece. Mr Kanaris told the trial judge that he wanted to place on the record that he had been inconvenienced and very, very strongly inconvenienced.

Mr Kanaris has told this Court today that he did not again refer to the problem caused to him by the witness, that is refer at trial to the problem caused to him by the witness whom he had previously arranged to have arrive here on 27 February 2005 and at no stage did he tell the judge the name of that witness or the evidence that witness was expected by Mr Kanaris to give.

He did not ask at the end of the Crown case for an adjournment because of any difficulties caused to him by the non-availability of that witness, Mr Koliass, whom he did not name to the judge, and he agrees that he made no effort to have Mr

Kolias called by telephone. At no stage did he have any statement from Mr Kolias as to the evidence Mr Kolias could give.

I have already observed that the verdict of the jury was given on 18 March. It would seem to me that a witness who had to attend a wedding on 3 March and who had to return to Greece by that date for that purpose would logically have been available again as a witness in Australia from on or about 10 March onwards. But all we have heard from Mr Kanaris is the complaint, which he articulated, that because he was unable to call Mr Kolias because of the wedding Mr Kolias had to attend he could not put his defence before the jury.

Mr Kanaris did not give evidence and the position before the jury, at the end of the day, was that the Crown had not proved and have not attempted to prove that Mr Kanaris did not have some land in which he had an interest in Greece, and Mr Kanaris called no evidence from himself in support of that proposition. It would have been powerful evidence in his case if there did exist a lawyer in Greece who could attest to the existence in truth of land held in trust for Mr Kanaris, at the critical time, and which was under contract for sale at the critical time and which contract for sale was being held up for the very reasons that Mr Kanaris had advanced to the different complainants when he borrowed money from them. But that evidence was not called.

According to what Mr Kanaris has told us this morning that was solely because the trial at its start was adjourned for one week.

Mr Kanaris is very anxious that this appeal be heard today and not adjourned. That is understandable because he is in custody and is serving a sentence of five years imprisonment with post-prison community based release recommended after he has served two years of that sentence. He wishes to succeed on his appeal as quickly as possible and not to have it delayed. That desire is understandable and in support of that Mr Kanaris has said that he, in fact, wants to withdraw his complaints made this morning about being unable to prepare his trial and to present his defence because he does not want this matter to be adjourned.

But the point that Mr Kanaris overlooks is that this could be his critical argument and the only one he has with any substance if he fails on the other grounds of appeal. It seems to me that if Mr Kanaris does fail on the other grounds of appeal, that is the original ground and the ones he has been given leave to add, this point will once again be considered by him to be important.

For that reason this Court will adjourn the hearing of this appeal to 24 November 2005 when the appeal will start before a differently constituted bench, that is the Court will treat this present Court as constituted as not yet having embarked on a hearing of the appeal proper.

Mr Kanaris will have leave to file any affidavit material he wishes in support of his claim that he was unable to prepare his defence properly and unable to present it by reason of the delay in the start of the trial of one week and, although it is up to him, he would be well advised to obtain an affidavit from Mr Koliias and an English language translation. And in any event he should produce and annex to whatever affidavit material he does file the correspondence he has received from Mr Koliias. This is not a matter which Mr Kanaris is at liberty to raise and then withdraw because it is a complaint that he did not get justice and his defence was not put before the jury. He has the opportunity now to produce affidavit material in support of that claim and he can expect to be cross-examined on it.

The order of the Court is that the appeal is adjourned to 24 November 2005 and both parties have leave to file such affidavit material as they wish in support of the assertion or in contradiction of it that the appellant was unable to prepare himself properly for the trial or to present his defence by reason of the adjournment of the start of the trial from 7 to 14 February 2005 and by reason of the asserted unavailability of the witness, Dimitris Koliias.

CULLINANE J: Yes, I agree.

JERRARD JA: I understand that I referred to the desirability of an affidavit from Mr Kanaris when I was intending to refer to Mr Koliass.

Mr Kanaris, you of course have leave to file an affidavit and it would be in your interest to do so.

JONES J: Yes, I agree with the reasons expressed by the presiding Judge.
