SUPREME COURT OF QUEENSLAND

CITATION:	*R v Zurek* [2006] QCA 543
PARTIES:	**R** **v** **ZUREK, Andrew Matthew** (applicant/appellant)
FILE NO/S:	CA No 24 of 2006 DC No 640 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	15 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2006
JUDGES:	McMurdo P, Holmes JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction is allowed** **2. Conviction is set aside and a new trial is ordered**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – MISCARRIAGE OF JUSTICE – where appellant convicted of one count of burglary, five counts of forgery and five counts of fraud – where charges related to appellant's ex-wife's property and bank account – where appellant unrepresented at trial and gave evidence in his own defence – whether intervention of trial judge produced unfairness APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – JUDGE'S SUMMING UP – where credibility of witnesses of considerable importance – where appellant unrepresented at trial and gave evidence in his own defence – whether summing up by trial judge unbalanced – emphasis on whether appellant's evidence was truthful – failure to summarise defence case – whether a miscarriage of justice occurred – whether the proviso should be applied

Edwards v The Queen (1993) 178 CLR 193, cited
R v Esposito (1998) 105 A Crim R 27, applied
Murray v The Queen (2002) 211 CLR 193; [2002] HCA 26, applied
Weiss v The Queen (2005) 158 A Crim R 133; [2005] HCA 81, applied

COUNSEL: The appellant appeared on his own behalf
M J Copley for the respondent

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

[1] **McMURDO P**: I agree with Holmes JA.

[2] **HOLMES JA:** The appellant was convicted after a trial of one count of burglary, five counts of forgery and five counts of fraud. He represented himself at trial, and once again represents himself on appeal. He appeals against all convictions on the grounds that the verdicts were unreasonable, that the trial judge unfairly intervened in the trial and that the summing up was not balanced. He also seeks leave to appeal against the sentences of imprisonment imposed on him on all counts: four years on the burglary count, two years on all but two of the fraud and forgery counts, and six month terms on the remaining two.

The Crown case

[3] The complainant, Afsaneh Zurek, was the appellant's ex-wife. They had been married for some 16 years before separating in February 2001. Eventually they reached a property settlement, and their divorce was finalised at the end of 2002. Mrs Zurek stayed in the family home while the appellant rented a house across the road. They had operated shops in the town of Kuranda; after the divorce each of them took and operated one. They separated their business affairs, with the exception of a joint account which had only about $40 in it. Mrs Zurek said she left it open in the hope that the appellant, who held the relevant cheque book, would use it to pay child support. For the purposes of her business, Mrs Zurek opened a line of credit with the ANZ Bank upon which she could draw by cheque, up to a limit of $232,000.

[4] In May 2003, Mrs Zurek travelled overseas, leaving the couple's three children to stay with the appellant. Over a two week period while she was away, the appellant drew five cheques on her ANZ line of credit and deposited the proceeds to the joint account. He then withdrew those funds in the form of three cash cheques and four cheques drawn in his own favour, which he deposited to his Westpac account. The appellant did not dispute making any of the deposits or withdrawals. The area of difference between the Crown and defence cases was as to how he had come by the cheques and on what basis he used the funds.

[5] Mrs Zurek's evidence was that when she went overseas she left the cheque book for the line of credit account with her jewellery box on a shelf in her home office. The house was secured with padlocks and deadlocks and she took the only keys with her. When she arrived back in the country in early June, the appellant picked her up

at the airport and took her to her home. When they arrived there, on her evidence, he told her that she was going to have a shock; that she would find $147,000 missing from her account. He explained that he had used her cheque book to draw on the line of credit, had deposited the money to the joint account and had withdrawn it. He had forged her signature using, as a template, her signature as it appeared on various documents. According to Mrs Zurek, the appellant said, in the course of that conversation, that if the marriage were resumed he might pay some of the money back.

[6] On Mrs Zurek's account, when asked how he had got into the house, the appellant said he had entered through the bathroom window, taking two panels out of the window and unscrewing the lock. After climbing through, he had gone to the laundry, taken off the cover on the skylight in that room to get through the ceiling via another skylight into a storeroom next door, and from there obtained access through a sliding window to her office. Photographs were tendered of the bathroom window. Mrs Zurek explained that the screws on the window had been painted white, but because of damage to them the underlying silver colour could be seen.

[7] Mrs Zurek said she found that the files in her office had been searched and that, while the chequebook was still there, a number of cheques were missing from it. The next day she discovered that $172,900 had been drawn from her account and also realised that her jewellery had gone. She attempted to contact the police but for various reasons was unsuccessful in arranging an immediate interview. In the evening she received a phone call from the appellant during which the appellant told her that they ought to get back together and he would pay the money back. He also cautioned her against reporting the matter to the police because, he said, if she did so, the bank would find out and would sell her house to replace the missing money.

[8] Some weeks later Mrs Zurek, wearing a covert recording device, met the appellant by arrangement in a coffee shop in Cairns. The tape of that conversation was put in evidence. In the course of it, the appellant suggests that they rejoin their business affairs to their mutual benefit, when he may give back what he can of the money. Mrs Zurek asks about the jewellery; the appellant says it is "quite safe", that it "hasn't gone anywhere" and that "if this matter stops the jewellery is there". Further questioned, he says that it is "under your nose" (which Mrs Zurek took to mean that it was still around the house somewhere, but she was unable to find it).

[9] Mrs Zurek tries to induce the appellant to explain how he got into the house. He responds that he is concerned that she will go to the police station and say "this is how he did it". He informs her that there is a way of taking the glass out of the window and he will tell her everything one day. When she asks why he broke into the house and forged her signature and took money, he says that he needed to get her attention in some way. Later, when she proposes that he put the money back, he says that he "can't do that at this point in time" because it will be used as proof that he has taken it. At one point he denies writing on the cheques, but at another, when Mrs Zurek asks how he forged her signature, tells her that she has poor handwriting.

[10] The appellant was interviewed by police on 14 July 2003. He said that on the day she left for overseas, his ex-wife gave him the cheques, already made out and signed, to deposit into the joint account, the details of which she gave him. They were to be deposited at different times. She had refused to explain why she wanted the cheques deposited, saying that she would tell him when she got back. He said

that he did not know why it took him almost three weeks to deposit the first of the cheques. He admitted withdrawing the funds and depositing them into his Westpac account. He took the money from the joint account because he was suspicious of what his ex-wife was planning to do; she had, he claimed, stolen from him in the past. He knew nothing of the missing jewellery.

[11] The appellant repeated this account in another police record of interview on 25 July 2003, except that in that interview he said that, at his ex-wife's request, he had entered the dates on the cheques when he deposited them. She gave him the details of the joint account on a piece of paper which he had since thrown away. He did not think that his wife owned the money because she had taken money from their joint business in the past; he regarded himself as having an interest in it. When she returned from overseas she asked him if he had put the money into the joint account and he said that he had. He asked her why she put the money in and her only response was that she had to send it overseas. It was then he told her that he had taken the funds out of the account.

[12] Police officers who had investigated the matter gave evidence. Senior Constable Richard South said that in the evening of 6 June he went to the complainant's house. While there, he looked at the rivets on the flyscreen of the bathroom window and observed that they were intact and had white paint over them matching the rest of the paint on the windows. He had also looked at the skylights in the house and saw no damage to them. One of them had dead bugs and moths in it. It did not appear to him that there had been any forced entry through those skylights.

[13] Sergeant Jason Hohns inspected the complainant's premises on the following day, 7 June. He noted on the toilet window on the exterior of the house that some rivets looked as if they had been tampered with, because their metallic backing was showing through the paint. He looked at the skylights; he recalled that one was cracked. He could not initially remember whether, when he had seen it, it was in place or on the ground, but after looking at the photographs he had taken was satisfied that it must have been, as they depicted, on the ground. In his examination of the house he found some fingerprints which he was unable to identify.

[14] A handwriting expert gave evidence that he had compared the cheque signatures with some sample signatures from Mrs Zurek. He gave a qualified opinion that the cheque signatures were not hers; the qualification arose because the specimen signatures dated from 1999, so that there was some prospect of change. There were some similarities between the limited sample he had of the appellant's handwriting and the cheque signatures, but there was not sufficient material for him to express any opinion.

The defence case

[15] The appellant gave evidence that before going overseas, Mrs Zurek gave him the five cheques and asked him to deposit them to the joint account, which he had not till then realised was still open. The cheques were already completed when he received them and he did not write anything on them. Mrs Zurek rang from overseas to check that he had made the deposits. On 21 May, there was a conversation in which he said that he would not deposit the cheques unless Mrs Zurek explained herself. She responded that the money was going to their joint account and would settle all the matters between them so that they could go their separate ways. He understood that she meant to give him a reimbursement of money he was owed, an

issue not equitably dealt with in their property settlement. That accorded with a proposal that he had made to her before the settlement.

[16] Consistently with his understanding that he was to have the money, he had drawn seven cheques on the joint account, three of which were taken as cash cheques and four of which were deposited to his Westpac account. When his ex-wife arrived home he told her that he had deposited the cheques and had withdrawn some of the funds on the basis of what she had said, but she became angry. At no time had he entered her house, although he had spent some time at the premises making a partition for use at her store. In the coffee shop conversation he had been wary and equivocal in answering his ex-wife so as not to attract any heated response from her. He had not raised the telephone conversation in which she had indicated her intention to settle matters as a justification for taking the money, because his real aim during the conversation was to get information from her.

[17] In cross-examination the appellant said that when he told the police officers he had put dates on the cheques, his state of surprise and shock at being questioned had affected his memory for the detail of events occurring some weeks earlier. He had not told the police officers that the complainant had intimated an intention to give him the money because they had not asked the appropriate questions.

[18] Three witnesses who knew the appellant in the Kuranda community gave character evidence in his favour.

The appellant's submissions about the evidence

[19] The appellant in his written submissions advanced a number of arguments about aspects of the evidence which went beyond the bounds of his grounds of appeal and, in any event, lacked substance. The first was that Mrs Zurek gave perjured evidence when the appellant cross-examined her about whether in their business she always entered cash sales in the cash register. She said that she did; he maintained that that was a lie and tendered some video footage which was said to show the contrary. The trial judge ought, he maintained, to have taken steps to deal with her for perjury. But in the first instance, it was by no means proved that the complainant had told a lie; in the second it was far from clear that this evidence was material as opposed to simply going to her credit, and in the third, the jury was well-placed to assess it. Its only possible relevance on this appeal, as it seems to me, is as a credit issue raised by the appellant which went unmentioned in the summing up.

[20] The appellant's second argument was that the police officers' testimony demonstrated that evidence had been fabricated, because South had seen no signs of forced entry or damage to skylights, all of which were in place, when he examined the premises on 6 June. In contrast, on 7 June, Hohns had found signs of tampering in the window rivets, and when he took photographs, there was a chair beneath one of the skylights, the cracked cover of which had been removed. Mrs Zurek's evidence was that she had not placed the chair below the skylight or taken off its cover; she thought the scenes of crime officer might have done so in order to photograph it. It followed, the appellant contended, that she had fabricated evidence and perjured herself.

[21] However, South's observation was of the rivets on a flyscreen, not on the window itself, so there was no necessary contradiction there. Who removed the skylight or put the chair under it does not seem to have been material, because the complainant

had never asserted that was the condition in which she found them, and it was entirely possible that either she or Hohns had simply forgotten how the chair and skylight got into the position in which they were photographed. The skylight cover, on any view, had a crack in it: the appellant put to Mrs Zurek that it had been damaged earlier, in a cyclone. In any case, those inconsistencies were before the jury, whose attention was drawn to them by the appellant's address; although, again, they were not the subject of any reference in the summing up.

[22] Next, the appellant asserted a belief that tapes and transcripts tendered and used at the trial were edited by the prosecution against his interests. His only basis for that assertion seems to have been that the prosecutor at the trial, with her instructing clerk present, had approached him outside the courtroom, and suggested some editing. The following day, she canvassed that question of editing with the trial judge in the absence of the jury; the appellant raised no complaint about her approach then. Plainly enough, there were matters in the various tapes capable of being prejudicial to the appellant, particularly in his conversation with his ex-wife, which contained a number of references to domestic violence. The approach of the prosecutor was entirely proper. The appellant, however, insisted on all tapes being played in their entirety, and that occurred. There is nothing at all in this ground.

[23] The handwriting expert's use of a non-current sample of Mrs Zurek's handwriting as a basis for comparison with the cheque signatures was criticised. The appellant suggested that it was probably done because her more recent handwriting would have tallied with the signatures on the cheques. On the other hand, of course, it is possible that the police officer who obtained the sample simply did not appreciate that contemporary handwriting was to be preferred. In any event, the qualified nature of the handwriting examiner's opinion and the age of the sample signatures were both matters before the jury, to whom, in his address, the appellant was able to put his preferred, more sinister interpretation. There is no basis for complaint here.

[24] The appellant advanced a number of arguments to the effect that the respective offences were not proved. The offence of burglary could not have been made out, he contended, because there was no clear evidence as to entry being gained into the complainant's premises. But, plainly enough, if the jury accepted that Mrs Zurek had left the premises locked and that her property had disappeared in her absence, it was entitled to infer the fact of a burglary. In similar vein, the appellant argued that the handwriting examiner had not expressed an opinion that he had written the signatures on the cheques so that there was no basis for a verdict of guilty on the forgery charges. That ignores the obvious: if the jury accepted Mrs Zurek's evidence that she had not signed the cheques, the only possible inference was that the appellant had forged them. And the appellant contended that there was no dishonest application of property for the purposes of the fraud counts, because he was simply doing as his wife asked. But that, of course, was a matter which the jury decided against him.

The trial judge's intervention

[25] More significant are the appellant's complaints of the trial judge's conduct during the trial and his summing up. The examples of unfairness in the course of the trial quoted in the appellant's written submissions are, in fact, uncompelling; but there are other instances which give cause for concern. The learned trial judge intervened repeatedly in the cross-examination of the appellant. On three occasions he challenged explanations the appellant gave of things he had said in the course of the

recorded coffee shop conversation. That then was taken up again in what was said to be the appellant's re-examination, when the judge questioned him at length. He asked the appellant to address why in the coffee shop conversation, understanding that he was being accused of breaking in, he had described the means of access through the bathroom window into the house. That questioning, very much in the nature of cross-examination, went on for some three pages of transcript. In a similar vein, the learned judge went on to ask why, when the appellant's ex-wife had accused him of stealing her jewellery, the appellant had not denied all knowledge of it.

[26] A powerful argument for the prosecution lay in the fact that the appellant had not, either in the coffee shop conversation or when interviewed by the police, mentioned his ex-wife's supposed offer of the money in order to settle the matters between them. Unfortunately, rather than leaving it to the prosecution to make the point, the judge took up the cudgels. In the course of the prosecutor's cross-examination about the coffee shop conversation, just before an adjournment and in the jury's presence, the learned judge said this to the appellant –

> "I might need my memory refreshed and perhaps the members of the jury might need their memory refreshed, but I'm sure we'd both be interested for you to be able to point out to us anywhere during that conversation where you said to your wife something along the lines of, 'Hang on, you gave me that money in honour of our – of the proposal I put to you in August'."

He then invited the appellant to check the transcript and direct the court, when it resumed after lunch, to any such statement in the conversation. After the adjournment, again in the jury's presence, the judge asked the appellant whether there was anything to which he wished to direct the court's attention in that regard. Inevitably, the appellant admitted that there was nothing in the transcript of the conversation to that effect.

[27] Similarly, at a later break that day, the learned trial judge suggested that the appellant would be able to look through the transcripts of his conversations with police and direct the court to anywhere he had told the police officers that his ex-wife had offered the money to him. Again, after the break, he asked the appellant to direct the court to any part of the interviews where he had given that information; and again, of course, the appellant was unable to find anything of the sort.

[28] In re-examination, the learned trial judge resumed the theme. He began by reprising the occasions on which the appellant might have, but did not, raise that explanation with the police officers or his ex-wife. Then he offered the appellant what he described as "a fair opportunity" to answer any suggestion that he had "made up this new story for the court". The appellant responded by reiterating the conversation he claimed to have had with Mrs Zurek.

[29] Mr Copley, for the Crown, very fairly conceded in supplementary submissions that the questions posed by the trial judge to the appellant during the latter's cross-examination and re-examination, in which he was asked, in effect, to deal with his failure to mention his ex-wife's alleged offer, had the real potential to leave the

jury with the impression that the judge was convinced of the appellant's guilt or had sided with the prosecution. He referred to *Esposito*,[1] in which Wood CJ at CL said:

> "… once the judge resorts to extensive questioning, particularly of the kind that amounts to cross-examination in a criminal trial before a jury, then he is treading on thin ice. The thinness of that ice will depend upon the identity of the witness being examined (here the person on trial), and on whether the questions appear to be directed towards elucidating an area of evidence that has been overlooked or left in an uncertain or equivocal state, or directed towards establishing a point that is favourable or adverse to the interests of one or other of the parties."

[30] Mr Copley's concession was, in my view, appropriate, and the passage cited entirely apposite. At the stage of the trial when the learned trial judge was inviting the appellant to search the transcripts for some hint of his ultimate defence, those transcripts had been in the possession of both judge and jury for a week. The obvious and incontrovertible fact was that they contained no reference by the appellant to any offer by his ex-wife. It seems, therefore, improbable that the questioning arose in any spirit of genuine enquiry, or indeed for any reason other than dramatic effect. The learned judge's challenges to the appellant made an unanswerable point for the prosecution, but one which should have been left to the prosecutor. This ice was thin, and the trial judge's tread heavy indeed.

The summing up

[31] One of the appellant's complaints was that the trial judge had failed to summarise the defence case. The submission of the Crown in response, that given its shifting nature, a detailed discussion of the appellant's case would not have been to his advantage, has some attraction. Nonetheless, the summing up did have the deficiency that while reminding the jury of the appellant's evidence, the learned trial judge did not mention any of the points the appellant had made in his closing address. Some of those merited the jury's consideration: there was a question about Mrs Zurek's credit in relation to the cash register video; there were inconsistencies in the prosecution case about the state of the skylights; and the absence of fingerprints or any marks or damage around the ceiling in the area of the rather small skylights, which the appellant highlighted in his address, did raise a real question as to whether he could have got in that way and thus whether, if he had made admissions to that effect, those admissions were true.

[32] But what is of real concern in the summing up is the presentation of the case as if it were a choice between versions, with a repeated proposition that if the jury were satisfied of various aspects of the prosecution case it would follow that it was also satisfied that the appellant had lied in his evidence. The latter might have been literally correct, but it was unhelpful and, worse, it introduced a double mischief: firstly, it carried the risk that the jury would assume that the converse was true: that if the appellant had lied, the prosecution case was made out; secondly, it underlined the tendency in the summing up to present the jury's task as a search for truth between competing versions.

[33] So, for example, in the course of discussing the charge of dishonest application, the learned trial judge made the uncontentious point that if the jury found that the

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1 (1998) 105 A Crim R 27 at 57.

appellant had burgled, forged and stolen as the prosecution alleged, it might have little difficulty in concluding that his behaviour did not conform to ordinary standards of honesty. But he went on to say this:

> "And, if you're satisfied beyond reasonable doubt that he did that, it follows you must be satisfied beyond reasonable doubt that he's told lies during the course of the trial. And you might think that you would very clearly come to the conclusion, although as I say it is a matter for you, that not only was it dishonest by the standards of honesty of ordinary, honest members of the community, but he knew it."

The allusion to a satisfaction that the appellant had told lies during the course of the trial is bewildering and superfluous, because it could not bear on the issue of whether, at the time the appellant applied the money for his own purposes, he did so dishonestly.

[34] Explaining that there was no reasonable possibility that a third person had broken into Mrs Zurek's house and taken the cheques, the learned trial judge said

> "Forget about that. You really have two versions if you like - two versions of the facts".

He went on to outline first the prosecution case and then the appellant's account, concluding the latter by saying:

> "If it happened the way Mr Zurek says he can't be found guilty of anything. He must be found not guilty. He is innocent, he had her consent.
>
> So, you might think in order to convict him you must be satisfied beyond reasonable doubt that he's told you lies. But that doesn't make him necessarily guilty, that simply means you can reject his account."

[35] The last statement is of some concern: it reintroduces the unhelpful notion of a satisfaction beyond reasonable doubt that the accused has lied, and while it cautions against a finding of guilt simply on that basis, it also invites the jury to reject the appellant's evidence in full should it make such a finding. The greater concern is this: this part of the summing up bears a strong similarity to what was criticised by the High Court in *Murray v The Queen*.[2] There the trial judge had, in the early part of her directions, correctly instructed the jury on the onus of proof but subsequently posed the question for the jury's determination as whether it accepted the prosecution's or the appellant's version of events. It was not, as the Court observed, the correct question for the jury. Such references were

> "… apt to mislead the jury about the decision they had to make. The choice for the jury was not to prefer one version of events over another. The question was whether the prosecution had proved the relevant elements of the offence beyond reasonable doubt. This required no comparison between alternatives other than being persuaded and not being persuaded beyond reasonable doubt of the guilt of the appellant."[3]

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2 (2002) 211 CLR 193.

3 Per Gummow and Hayne JJ at 213.

[36] The notion of a true or untrue version from the appellant was revisited when the judge alluded to the appellant's account of his ex-wife's offer to give him the money. He said of that account:

> "… if that's true he cannot be found guilty of these offences. If that's true, he didn't enter her dwelling house and take the cheques or the jewellery at all, if that's true he didn't forge the cheques and if that's true he didn't dishonestly apply the money to his own use, it wasn't dishonest."

and continued:

> "… in order to find him guilty, it must follow that you are satisfied beyond reasonable doubt that he's not telling the truth about that".

[37] The appellant's failure to raise the offer from his wife featured repeatedly in the summing up. At one point his Honour said this:

> "… one matter I need to give you a specific direction about is this; at no time during any of those interviews did Mr Zurek say to the officers: 'She gave me the cheques. She told me that they were mine, that they were for me, my benefit because of this proposal.'"

He went on to remind the jury that the appellant's explanation was that he had simply answered the questions the police officers asked, and continued:

> "Well, you've heard the conversation, what do you think? Do you think that if Mr Zurek was telling the truth here that she gave him the cheques for his own benefit for his use, do you think he would have said so at some time to the police officers during one of those conversations?".

Apart from the continued and unfortunate emphasis on whether the appellant's account was the truth, there was no justification for conferring the authority of a direction on what were, in reality, comments unfavourable to the appellant.

The proviso

[38] The summing up lacked balance. The jury was not reminded of the appellant's arguments; it was invited to choose between versions; and the repeated emphasis on whether the appellant had told lies at trial was inappropriate, where it was not suggested those lies were probative or that an *Edwards* direction was called for. More unfortunately, the learned trial judge entered the arena during the course of the trial. Mr Copley for the Crown argued that the Court ought, nonetheless, to consider dismissing the appeal on the ground that there had been no substantial miscarriage of justice.

[39] In *Weiss v The Queen*[4] the High Court said that an appellate court could not be satisfied that error at trial had produced no substantial miscarriage of justice unless it was persuaded that the properly admitted evidence proved beyond reasonable doubt the appellant's guilt. Applying that proposition to the present case, one might feel some comfort in the proviso's application; but the court continued –

> "… there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has

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4 (2005) 158 A Crim R 133.

> been a significant denial of procedural fairness at trial may provide examples of cases of that kind."[5]

[40] This, it seems to me, is a case of just that kind. The learned trial judge's assumption of a prosecutorial role, a situation which was not improved by the summing up, did amount to a denial of procedural fairness to the appellant on his trial. For that reason I would allow the appeal, set aside the conviction and order a new trial.

[41] **FRYBERG J:** Taking into account the Crown's concession described by Holmes JA and the difficulties in the summing up raised by reference to *Murray v The Queen*,[6] I have after some hesitation reached the conclusion that the trial process fell a little short of the high standard which the law requires in criminal trials.

[42] It does not seem to me that the shortfall produced a denial of procedural fairness of such significance as to exclude the operation of the proviso. The Crown case was a strong one. However to apply the proviso I must be satisfied of the appellant's guilt beyond reasonable doubt. In a case where credibility issues are of considerable importance, I do not feel that I can be so satisfied solely on the basis of a reading of the evidence and without having seen either the appellant or his ex-wife in the witness box.

[43] The Crown submitted that the court had the advantage of listening to the tape of the discussion at the shop. That tape contains several pieces of evidence which corroborate the evidence of Mrs Zurek and damage the appellant's case. However in his evidence the appellant essayed explanations of what he said in that discussion. Before one can be satisfied of his guilt to the requisite standard one must consider those explanations. That consideration is or might be affected by seeing and hearing the appellant give evidence.

[44] Whatever might be the position once the State Reporting Bureau has fully implemented the new digital video recording system for transcripts which is presently being introduced, that is not possible under the system presently in use. It follows that I do not think this is a case in which the proviso is to be applied.

[45] I agree with the orders proposed by Holmes JA.

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5 At 147.

6 [2002] HCA 26; (2002) 211 CLR 193.