SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gilbey* [2010] QCA 135
PARTIES:	**R** **v** **GILBEY, Colin Les** (appellant)
FILE NO/S:	CA No 294 of 2009 SC No 1242 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	4 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2010
JUDGES:	Fraser and White JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty of one count of possessing a dangerous drug after a trial by jury – where the appellant obtained an extension of time to appeal against conviction – where the appellant argued that the evidence did not support a conviction – where the appellant relied on the lack of scientific evidence to connect him with the container of drugs – whether there was sufficient evidence to enable the jury to be satisfied that the prosecution had discharged its burden of proving the appellant was guilty of possessing the container of drugs CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – GENERALLY – where the appellant made submissions that claimed his counsel at trial made an admission contrary to his instructions and did not act competently – where these submissions were unsupported by evidence and inconsistent with appellant's evidence at trial – where the appellant made further submissions that the trial judge did not adequately direct the jury as to the nature of the circumstantial evidence against the

appellant – where the trial judge directed the jury as to the nature of circumstantial evidence and there was no deficiency in that direction – where leave to amend notice of appeal to pursue these submissions was opposed by the respondent – whether leave should be granted

R v Gilbey [2010] QCA 4, cited

COUNSEL: The appellant appeared on his own behalf
T A Fuller for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Mullins J and the order proposed by her Honour.

[2] **WHITE JA:** I agree with the reasons of Mullins J and the order proposed by her Honour.

[3] **MULLINS J:** The appellant was found guilty after trial by jury of one count of possessing a dangerous drug, methylamphetamine, in excess of two grams. The appellant who is self-represented appeals against his conviction on the ground that the evidence did not support a conviction. The appellant relies particularly on the lack of scientific evidence to connect him with the container of the drugs. The appellant had obtained an extension of time within which to lodge his notice of appeal against conviction on this ground: *R v Gilbey* [2010] QCA 4. During the hearing of the appeal, the appellant made submissions that were directed at his claim that his counsel at trial had made an admission contrary to his instructions and did not act competently. These submissions were unsupported by evidence and the allegation that his counsel had made an admission contrary to his instructions was inconsistent with the evidence which the appellant himself had given at trial. Leave to amend the grounds of appeal to pursue these arguments was refused.

The prosecution evidence

[4] The appellant's girlfriend Ms Brennan lived at a guesthouse. Mr Bowen-Jones was the informal caretaker at the guesthouse and he knew both the appellant who was a frequent visitor to the guesthouse and Ms Brennan. Ms Brennan's room was next to Mr Bowen-Jones' room.

[5] At about 6.15pm on 19 September 2008 Mr Bowen-Jones arrived at the guesthouse and saw a white Holden Commodore sedan that he associated with the appellant parked with its bonnet facing towards the back driveway of the property with the driver's door open. The appellant was in the driver's seat and was bending down and turning around from the driver's seat out to his right. After a few minutes Mr Bowen-Jones saw the appellant close his car door, reverse the car out and drive past him. The appellant waved to Mr Bowen-Jones. Mr Bowen-Jones then walked over to the bush near where the appellant's car door had been opened and moved the bushes apart and found a container. He described the container as cylindrical, about four to five inches in diameter and sealed with a heavy duty grey duct tape, and there was some blue plastic sticking out from underneath the tape. Mr Bowen-Jones

took the container to the front of the property and put it under a pot plant, so that the vines on that pot plant covered the container. He then telephoned the owner of the property, Mr Dryden, and told him what he had seen and done and asked Mr Dryden to collect the container.

[6] At about 7am the next morning Mr Bowen-Jones was sitting on his balcony when the appellant approached and asked him if he had seen a container that had fallen off his car when he was backing out the previous night. Mr Bowen-Jones said he had not.

[7] Mr Bowen-Jones described the location of the drug rehabilitation centre that abuts the back side of the guesthouse property.

[8] Mr Dryden gave evidence of receiving the telephone call from Mr Bowen-Jones and attending at the guesthouse to locate the container at about 10pm on 19 September 2008. He did not find it on that evening. He had a further telephone conversation with Mr Bowen-Jones on the next day and then located the container on the front verandah of the guesthouse concealed beside a pot plant. Mr Dryden took the container home with him and put it on top of a cabinet. Later that day, he opened it. He saw a browny-yellow substance. He put the lid back on the container, returned it to the cabinet and that evening took it down to the police station.

[9] Ms Guy had lived at the guesthouse for about two weeks, as at 20 September 2008. She was in the communal kitchen around 7am, when she saw a wheelbarrow in the garden at the side of the guesthouse and there were two people standing next to the wheelbarrow, sifting through the weeds. She described one of the persons as a woman who lived at the guesthouse and the other as a man whom she had seen with the woman at the guesthouse. When Ms Guy returned to her room from the kitchen, she saw the man and the woman at the back of the guesthouse in the car park area talking to an Aboriginal man.

[10] The police then attended at the guesthouse and searched a Holden Rodeo utility vehicle that was registered in the appellant's name, but was used by Ms Brennan who had the keys. The police located a roll of silver grey coloured duct tape that was openly in the tray of the utility. The police also took possession of Ms Brennan's mobile telephone. There was a message on that telephone that was sent on 20 September 2008 and read "I will come back. I will do whatever you want if you get the container." That message had been sent from a mobile telephone number that was identified for the jury. The appellant's counsel made a formal admission that this text was sent at 4.31am to Ms Brennan's mobile telephone. The appellant's counsel also made a formal admission that a mobile telephone for the number from which the text had been sent was found in possession of the appellant on 26 October 2008. The prosecution admitted that the particular mobile telephone number was found to belong to one Tony Moran of a specified address at Hermit Park in Townsville and police inquiries revealed no person by that name lived at that specified address.

[11] A police scientific officer gave evidence that the fractured ends of the tape on the container and the roll of tape located in the utility were once one continuous piece of tape. An unidentified female hair was found on the tape located in the utility and a dark eyelash (which did not return a DNA profile) was discovered on one of the tapes. No viable or identifiable fingerprint impressions were found on the tape that had been on the container. The police scientific officer also identified receiving the container, including a green plastic bag that had been encased in grey tape.

[12] The substance in the container weighed 209.7 grams and was analysed as containing 6.7 grams of methamphetamine.

[13] The prosecution case against the appellant was circumstantial. There was no direct evidence that the appellant was physically in possession of the container, before it was found in the garden by Mr Bowen-Jones. The prosecution case was that the inference could be drawn that the appellant was in physical possession of the container immediately before placing it in the garden where it was found by Mr Bowen-Jones. The prosecution relied on Mr Bowen-Jones' observations of the appellant when his vehicle was stopped near the garden, the evidence that the appellant was looking for something on the morning of 20 September 2008, the text message sent on that date, the inquiry by the appellant of Mr Bowen-Jones about a container on 20 September 2008, and that the container was wrapped in grey duct tape that came from the roll of duct tape that was found in the appellant's girlfriend's vehicle.

The defence evidence

[14] The appellant gave evidence. He was leaving the guesthouse about 6pm on 19 September 2008. As he was going to his car, he saw two Aboriginal men who were in the car park, one of whom approached the appellant and said "I've lost something and it's worth a lot of money." The appellant was reversing his Commodore vehicle out, when he stopped and opened his car door and threw some rubbish into the dumpster. He did not remove himself from the car to do that. The appellant saw Mr Bowen-Jones, as he was driving out. He went to the shops to purchase some goods and returned to Ms Brennan's accommodation. He then overheard Mr Bowen-Jones on the telephone saying that he had found a container. The appellant then went home to his mother.

[15] The appellant returned to the guesthouse the next morning about 6.45am. When he parked the car, he saw one of the Aboriginal men again who asked him if he could look in the wheelbarrow inside the fence of the guesthouse and said that "he'd lost something in plastic." Ms Brennan let the appellant into the guesthouse property and they both went out to look in the wheelbarrow and told the Aboriginal man that they could not find anything.

[16] While the appellant was having his cereal on that morning, he went out and spoke to Mr Bowen-Jones and asked him if he'd seen a container, because of what he had overheard Mr Bowen-Jones say on the telephone and the inquiry that had been made of the appellant by the Aboriginal man. The appellant denied that he asked the question of Mr Bowen-Jones in the terms which had been attributed to him in Mr Bowen-Jones' evidence.

[17] The appellant could not say how the telephone that was the subject of the formal admission at the trial came to be in his possession. The appellant accepted in the course of giving his evidence that he had the telephone when the police found it in his possession, but he did not know where it came from or who owned it.

[18] The address of defence counsel to the jury focused on the juxtaposition of the appellant's car, the garden and the dumpster and the difficulty for the appellant in placing the container in the garden from the car, the delay between Mr Bowen-Jones collecting the container from the garden and it being found by Mr Dryden, the discrepancy in Mr Bowen-Jones' description that there was blue plastic under the

tape, when the items that were examined by the police scientific officer included a green plastic bag, the female hair and dark eyelash from the roll of duct tape did not belong to the appellant (as the appellant had fair hair), and the opportunity that someone from the drug rehabilitation centre had to place the container where it was found by Mr Bowen-Jones. Defence counsel addressed at considerable length on the nature of a circumstantial case and that the prosecution had not proved beyond reasonable doubt that the appellant had possession of the relevant drugs.

Submissions of the defendant on the appeal

[19] The appellant prepared handwritten submissions for the appeal which he addressed orally. The allegation is made in the written submissions that the appellant was advised by his counsel to admit to possession of the mobile telephone which the police located in his vehicle on 26 October 2008. The appellant alleges that this telephone was never shown to him or produced at the court. Those statements are irrelevant to this appeal, in view of the unequivocal admission that was made on the appellant's behalf at the trial about the relevant telephone being found in his possession on 26 October 2008. The appellant's evidence at the trial proceeded on the basis that the telephone was found in his possession and he endeavoured to explain that away.

[20] Although not directed to the ground of appeal, the appellant made a written submission that the learned trial judge's directions as to the task of the jury and the nature of the circumstantial case against the appellant insufficiently directed the jury's mind to the issue for determination by them. This submission was made, despite the appellant's proper acknowledgement that the directions given by the trial judge in relation to a circumstantial case were essentially to the same effect as the direction in the Benchbook, although different terms were used. The trial judge gave the usual direction as to the nature of circumstantial evidence and that the case against the appellant depended on the inferences they could draw from circumstantial evidence. The trial judge explained:

> "In a circumstantial case it comes down to this: the prosecution must satisfy you beyond a reasonable doubt that there is no reasonable hypothesis open on the evidence consistent with innocence, or to put it in the negative, they must exclude, beyond a reasonable doubt, all reasonable hypotheses consistent with innocence.
>
> Even if you were to reject the evidence of the accused entirely it would not follow that he must be found guilty. You would still have to be positively satisfied on the evidence placed before you by the prosecution of his guilt. The onus at all time rests upon the prosecution."

[21] The nature of the circumstantial evidence was emphasised by the trial judge in the summary of the respective cases for the prosecution and the defence.

[22] Although the appellant did not request leave to amend the grounds of appeal to raise the sufficiency of the directions of the trial judge on the nature of the circumstantial case against the appellant, the prosecution opposed any leave being given on the basis that it was futile. There was no deficiency in the summing up which warrants considering any such ground of appeal.

[23] The appellant makes the following points as to why the verdict of guilty was not supported by the evidence:

(a) the appellant gave evidence that provided an alternative explanation for his conduct in the driveway on the evening of 19 September 2008;

(b) the text message found on Ms Brennan's telephone suggested nothing of ownership, possession or control of the container containing the drugs at any point in time;

(c) the duct tape found in the tray of the utility was parked in a well used public area that was accessible by those attending the neighbouring drug rehabilitation centre, had DNA of an unknown female on it and could have been tossed or placed there by anyone who chose to do so;

(d) there was a lack of DNA evidence to connect the appellant to the container of drugs.

Whether the evidence did not support a conviction

[24] The verdict of guilty is consistent with the jury rejecting the appellant's explanation for what he was doing in the driveway on 19 September 2008 and his meeting with two Aboriginal men on that evening and assisting one of the Aboriginal men the next morning to search for something that man had lost.

[25] It was open to the jury to accept the evidence of Mr Bowen-Jones of his observations of the appellant in the driveway on the evening of 19 September 2008 and the conversation that Mr Bowen-Jones had with the appellant the next morning. The evidence of Ms Guy, the text sent to Ms Brennan on 20 September 2008, and the appellant's question on 20 September 2008 about whether Mr Bowen-Jones had found a container were supportive of Mr Bowen-Jones' evidence. Although there was a discrepancy in Mr Bowen-Jones' description of the plastic associated with the container as blue, when it appears to be green, Mr Bowen-Jones' description of the container he located in the garden following the appellant's departure from the driveway accords with Mr Dryden's description of the package he collected from the hiding-place to which he was directed by Mr Bowen-Jones and the package that was then handed by Mr Dryden to the police. The existence of scientific evidence that linked others or another to the duct tape in Ms Brennan's utility and the lack of DNA or other scientific evidence to connect the appellant to the container of drugs were part of the factual matrix, but had to be considered by the jury in conjunction with the other evidence that pointed to the appellant's possession of the container, before it was placed in the garden.

[26] Putting the appellant's evidence to one side, there was sufficient evidence to enable the jury to reach the conclusion that the prosecution had discharged its burden of proving the appellant was guilty of the possession of the container of drugs.

Order

[27] The appeal should be dismissed.