# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Bates* [2010] QCA 139 |
| PARTIES: | **R**<br>**v**<br>**BATES, Warren William**<br>(appellant) |
| FILE NO/S: | CA No 266 of 2009<br>DC No 2786 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 11 June 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 April 2010 |
| JUDGES: | Holmes and Chesterman JJA and Atkinson J<br>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 – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – REVIEW OF EVIDENCE – where appellant was the instigator and leader of a criminal enterprise the object of which was to steal copper cable, trucks and other heavy machinery – where appellant was charged with breaking, entering and stealing; stealing; receiving, and unlawful use of a motor vehicle – where accomplices testified against the appellant in order to receive reduced sentences – where appellant convicted – whether trial judge's instruction to jury as to the approach it should take with regard to that evidence was adequate<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – STRIKING OUT AND WARNING TO JURY TO DISREGARD EVIDENCE – where appellant was the instigator and leader of a criminal enterprise – where three accomplices involved in the operation testified against the appellant in order to receive reduced sentences – where one accomplice's evidence included hearsay testimony against the appellant to which the appellant objected – where the trial judge explained to the jury that the evidence was admissible |

but did not return to the topic in his summing-up – whether the evidence was admissible

*Criminal Code* 1899 (Qld), s 632, s 632(2), s 632(3)
*Penalties and Sentences Act* 1992 (Qld), s 13A

*R v Lowe* [2001] QCA 270, cited
*R v S* [1993] 2 Qd R 322; [1992] QCA 266, cited
*Robinson v The Queen* (1999) 197 CLR 162; [1999] HCA 42, cited
*Tripodi v The Queen* (1961) 104 CLR 1; [1961] HCA 22, cited

COUNSEL: D R Kent for the appellant
M B Lehane for the respondent

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

[1] **HOLMES JA**: I agree with the reasons of Chesterman JA and the order he proposes.

[2] **CHESTERMAN JA**: On 28 September 2009 in the District Court of Brisbane the appellant was, after a six day trial, convicted of one count of breaking, entering and stealing, two counts of stealing, one count of receiving and eight counts of unlawfully using a motor vehicle to facilitate the commission of an indictable offence. The next day, 29 September 2009, he was sentenced to eight terms of six years' imprisonment and four terms of four years' imprisonments, all to be served concurrently.

[3] There is an appeal against the convictions on two grounds added by leave to the notice of appeal in substitution for the original ground which was abandoned. The grounds of appeal are:

> "(1) There was a miscarriage of justice in that the trial Judge when summing up … failed to give any direction warning the jury against acting on the evidence of the witnesses, Borchardt, Carkeet and Clark on the basis that they were accomplices.
>
> (2) The trial Judge erred … by permitting hearsay evidence to be admitted from the witness, Clark, as to the appellant's alleged involvement in the offences".

[4] The prosecution case was that the appellant was involved with others in a criminal enterprise the object of which was to steal copper cable, trucks and other heavy machinery from the depots of electricity supply companies, truck hire companies and machinery operators. Each of the depots was surrounded by a high chain wire fence. The entrance gates were securely padlocked. One of them had as additional security two Alsatian dogs confined behind the fence. Borchardt, Carkeet, Clark and others broke into the depots by cutting through the padlocks and chains to open the gates or by cutting out segments of fence. Cables of copper wire wound onto large spools or drums, trucks, trailers and earthmoving equipment were stolen from the depots. The trucks which were stolen were themselves used to transport the

drums of copper cable and the machinery. At one premises where the gates were not, or could not be, opened the thieves drove a stolen truck through the gates, breaking them open.

[5] The stolen spools of copper cable were unloaded at secluded rural properties on the outskirts of Brisbane where the cables were cut into short lengths, then processed into granules and sold to a scrap metal dealer. The value of the stolen copper was about $300,000. $50,000 worth of it was recovered. The value of the stolen trucks was in the aggregate of $675,000 but all were eventually recovered. The loss to their owners from damage to the trucks and premises and deprivation of use was about $100,000.

[6] The prosecution case was that the appellant was the instigator and guiding intelligence of the criminal enterprise. He himself was not present when the breaking-in and stealing occurred though on the evidence he arranged the perpetrators to commit the offences. He was present on one or two occasions when stolen spools of copper wire were unloaded for cutting up. The prosecution case was also that the appellant's brother, Keith Blanch, was his lieutenant who carried out the raids on his behalf and at his request and relayed his instructions to the actual thieves.

[7] Particular evidence implicating the appellant in the criminal enterprise came from two of the witnesses mentioned, Borchardt and Carkeet, who were recruited by the appellant and could testify to his involvement. There was other evidence connecting the appellant with the criminal activity but the evidence of those two witnesses made clear the extent of the appellant's participation.

[8] Each of the witnesses Borchardt, Carkeet and Clark had been prosecuted and punished for their offending but each had promised to cooperate in the prosecution of the appellant pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld) thereby receiving a reduced sentenced. The trial judge instructed the jury about the approach it should take to their evidence. The complaint is that the direction was inadequate.

[9] Before turning to consider what his Honour said and what the appellant complains should have been said it is convenient to rehearse the evidence led against the appellant. He did not give, or call, evidence.

[10] Detective Constable Burkin went to the appellant's business premises at 2 Musgrave Road Coopers Plains in December 2005. She saw there a number of wooden spools of the type used for coiling electrical cabling. Evidence from an employee of Energex Limited proved that the spools had been stolen two or three days earlier from an Energex Depot at Rocklea. When stolen the spools had been wound with copper cabling. In January 2006 Constable Burkin went to 227 Goldmine Road Ormeau, to a property owned by Nikitas Tzouvelis, where she saw "a quantity of empty wooden spools that appeared to have had … electrical cable on them … ". The following month Constable Burkin went to a property at Leopardwood Road Cedar Grove, near Jimboomba, "a large acreage property". In a clearing at the back of the house she saw "Large red steel drums, and behind … a length of cable that had been already cut into sections. … Within (a) shed (nearby) there was tools that appeared to have been used to cut the cable … ". There were in all six spools, four empty of cable and two full. Another steel spool had been cut into pieces.

[11] Ernest Graveson gave evidence that he conducted a scrap metal business in the course of which he bought scrap metal from members of the public, processed the metal and sold it for a profit. He knew the appellant who telephoned him a "couple of months" before Christmas 2005 to ask what price Graveson would pay for copper. By arrangement the appellant and Graveson met at the appellant's premises at Coopers Plains. A week or so later the appellant "turned up at (Graveson's) yard to sell (him) some scrap metal." Thereafter he came "Every couple of days" and Graveson bought from him the scrap metal he brought.

[12] Later the appellant spoke to Mr Graveson and said he was buying copper cable "from up bush". Graveson agreed to buy the cable but had no room to store it in his yard. He told the appellant the cable could be stored at the property at Leopardwood Road at Cedar Grove which was owned by a friend, Mr Crank. The appellant was to make the arrangements to have the cable delivered to Cedar Grove. Once delivered Mr Graveson's employees would "cut it up and then we'd take it back". A little after this conversation Mr Graveson's brother Troy, who was employed in the business as a labourer, told him that he had received a telephone call from the appellant and that "there was rolls of cable out there". Mr Graveson went to Cedar Grove and saw "just rolls of cable laying there". His employees had "already started cutting some of them up."

[13] Mr Troy Graveson testified that in about November 2005 he was telephoned by the appellant who said that he had "the scrap" ready to deliver and that the trucks "were there ready with the scrap." Mr Crank was, in fact, Troy Graveson's friend and it was he who arranged for the Cedar Grove property to be used as a dump for the cable and for its processing. The telephone call from the appellant to say that the trucks were at the site came at "probably 1 or 2 in the morning". Notwithstanding the hour Mr Graveson drove out to Cedar Grove where he saw two trucks each of which other witnesses identify as having been stolen from one or other of the raided depots. Each truck was loaded with "Rolls of copper cable on red spools".

[14] About a month later a further delivery was made to the Crank property. Again the appellant rang Mr Troy Graveson "early in the morning" to say that "the trucks were out at … Crank's house and they're … 'waiting for you to tell them where to put the rolls' ". Mr Graveson again drove to Cedar Grove where he saw two trucks, one a semi-trailer, loaded with spools of copper cable. The truck drivers and those assisting them were the same as those present on the occasion of the first delivery.

[15] The evidence concerning the premises at 227 Goldmine Road Ormeau came from Nikitas Tzouvelis, Silvio Butturini and Barry Hellingar. Mr Tzouvelis testified that he lived on the property which was 10 acres in extent. He knew the appellant and his brother Keith Blanch. The appellant asked him if he could store scrap metal on part of the property. Mr Tzouvelis agreed in return for a fee but "there was always an excuse, they couldn't pay me". He was "happy to let them (store metal on his property), as long as they were paying, but … in the end they weren't paying". One day he went to the property where the metal had been stored and found empty wooden spools. He spoke to the appellant who said that he would "remove it sometime when the truck come … But it never happened".

[16] Mr Tzouvelis remembered an occasion in November 2005 when a truck became bogged on land adjacent to his property. It was "a big truck with a big crane on it, and … a big red … steel … spool." The appellant came to Mr Tzouvelis' house and

asked him to help pull the truck from the bog. Mr Tzouvelis had a small truck but it was not powerful enough for the task. He and the appellant then approached some neighbours who had "big tractors" and asked for their help. They obliged and the truck was towed from the bog. Mr Tzouvelis did not remain at the scene but noticed later that his fence had been pulled down and there were signs that cable had been cut up on his property.

[17] The witness Butturini was employed by Mr Hellingar at his construction business which operated from 246 Goldmine Road Ormeau. In January 2006 he and Mr Hellingar were approached by two men whom he did not know and asked to help move a bogged truck. They used Mr Hellingar's tractor for the purpose.

[18] Mr Hellingar confirmed the episode.

[19] Shawn Allen gave evidence that early in December 2005 the appellant, whom he knew, telephoned him. The appellant said that "there was some cable at the shed" in his premises at Musgrave Road Coopers Plains. The appellant told Allen to go to the shed and strip the cable. He did that and took the cut up copper to a scrap metal yard where it was sold.

[20] Some time later the appellant again spoke to Allen and told him that he had a drum of cable at Goldmine Road Ormeau. Allen knew the property was owned by a friend of the appellant's and that the appellant used it to stockpile scrap metal. Allen went with the appellant to the property where he saw "a large red metal drum" around which black cable was coiled. Allen "(knew) what to do" and set about the task of stripping and cutting.

[21] There was evidence from the owners of the spools and cables that the empty spools found at Cedar Grove and Ormeau had been stolen from the premises which were broken into.

[22] Borchardt's evidence was that he knew both the appellant and his brother Blanch "Through a friend … Scott Carkeet" who ran a tow trucking business. One day the appellant rang him and said "he had to organise some jobs, and asked (Borchardt) if (he) was interested". He promised $500 per job. He was to assist in "picking up cable drums". A day or so later he was telephoned by Keith Blanch who said that he had "a couple of jobs … lined up". Borchardt, Carkeet, Blanch and one other were "to go to pick up trucks and pick up cable drums". What they did was to go to the yards as I have described, force an entry by using bolt cutters to cut through the fences, padlocks and chains and steal trucks some of which were loaded with spools of copper cable. The men "hot-wired" the trucks to start them which were then driven away either through the open gates or, on one occasion by driving "straight through the fence". He identified Carkeet and Clark as co-offenders. They drove the stolen trucks "to the yard at Cedar Grove (where they) Unloaded all the cable drums and stuff there, and then went home". They knew to drive the trucks to Leopardwood Road because Blanch had given that instruction.

[23] Borchardt gave similar evidence about raids on other depots. Some days after one of the thefts he spoke to the appellant to ask him for some money but was told he could not be paid "yet" because the appellant had not been paid by the scrap dealers to whom he was selling.

[24] Borchardt also said that he was one of the men present when the truck bogged outside Mr Tzouvelis' property. On that occasion he had received a telephone call

from Blanch who asked him to go to Ormeau. When he arrived he was greeted by the appellant who directed him to the site where the truck was bogged. One of the men was using the crane on the truck to unload the copper spool. The truck was "a stolen truck with a stolen spool on the back." He confirmed Mr Tzouvelis' unsuccessful attempt to free the truck and then Mr Butturini's successful attempt with Mr Hellingar's tractor.

[25] Carkeet's evidence was that he had worked as a tow truck driver for about 10 years in a business owned by his father. He knew the appellant and the appellant's brother Keith Blanch. The appellant did "scrap metal" business with Carkeet's father. He met the appellant about Christmas time 2005 at a scrap metal dealer's yard. The appellant said that he was "onto some spools … (of) … Copper cable … (and) Had a few guys to line up to do it". A few days later the appellant again spoke to him, this time at a local hotel. He told Carkeet he had "some spools lined up (and) some guys to do it down the Gold Coast." The appellant rang Carkeet later that evening and "organised" him to drive to the coast to meet "the guys down there". More specifically he was told that the men he was to meet had trucks "ready to go", loaded with copper spools which would be driven to a house at Jimboomba, where the cable was to be unloaded.

[26] Carkeet went that night to Nerang where he joined others, including Borchardt, who had "two big white trucks with cranes." The trucks were driven to an Energex yard at Molendinar where spools of copper cabling were loaded onto the trucks which were then driven to Cedar Grove. Before making that part of the journey Carkeet rang the appellant to ask where the trucks were to be taken. The appellant told him that the others knew where to go and that Carkeet should "just follow them to Jimboomba".

[27] The next day Carkeet telephoned the appellant to ask for payment. The appellant said that he had not received payment from the metal dealer to whom he sold the copper and payment to Carkeet would have to wait.

[28] A week later the appellant again rang Carkeet and asked him to take part in another theft of cable spools. Borchardt and Clark were also engaged. They broke into a truck yard near Stapleton where they stole two trucks, one a semi-trailer. The trucks, both of which were equipped with cranes, were driven to an Energex depot which was broken into and spools of cable taken. Again the trucks went to Cedar Grove where the cable was unloaded. The trucks were then driven to Logan Village where they were abandoned.

[29] Louis Clark's evidence was that he was an employed tow truck driver who knew both the appellant and his brother. He was approached by Blanch who asked whether Clark "wanted to make some quick cash … To go and help collect some copper … rolls and stuff". Clark was already aware that others, some of whom he knew, had been involved in stealing "these copper rolls and stuff." Blanch confirmed that "they … had guys going out and stealing the copper and then taking it to scrap metal … to scrap … them in for cash". Clark was offered $500 for his help to "go and get some copper rolls".

[30] Clark was involved in the theft of the trucks from Stapleton and the breaking into the Energex depot at Molendinar. He was asked what he knew about how the copper cable was converted into cash. He explained that it was "easier" if the cable had been cut into short lengths and that it was sold by weight at scrap metal yards.

He said in a passage which is the subject of the second ground of appeal that the appellant "was the one that was cashing" the stolen copper. He knew that because Blanch had told him that the appellant would "cash it in" and that Clark would be paid his promised reward from the proceeds.

[31] The prosecution case easily proved the criminal combination alleged. Those involved included the appellant, his brother Blanch, Borchardt, Carkeet and Clark. The appellant's participation in the organisation of the criminal enterprise was proved by Ernest and Troy Graveson and by Allen, who were not said to be part of the combination. Their evidence establishes that the appellant knew that trucks loaded with cable, later proved to have been stolen, were at Cedar Grove and Ormeau and directed others, with the promise of payment, to attend at those premises and cut up the cable. The hour at which the appellant rang Troy Graveson to tell him of the trucks' arrival at Cedar Grove is strongly indicative that the transactions were not in the ordinary course of business.

[32] Tzouvelis places the appellant at Ormeau showing concern about a truck laden with copper cabling, later cut up and taken away, from a spool which was proved to have been stolen.

[33] The explicit evidence that it was the appellant who directed the thefts came from Borchardt and Carkeet. Clark had no personal dealings with the appellant. His instructions came from the appellant's brother.

[34] This is the context in which it is said that the trial judge's "accomplice" direction was inadequate.

[35] The appellant described the evidence of Borchardt, Carkeet and Clark as being "central" to his involvement "in a culpable way" in the systematic theft of large amounts of copper cabling. Their evidence was said to be the only testimony "directly explaining the appellant's alleged part in the enterprise." Although warning the jury about the need to scrutinise their evidence carefully the trial judge:

> "… did not give a direction along the lines … relevant to accomplices as outlined in the Bench Book. … such a direction was/ necessary in the present case".

[36] The direction actually given was:

> "… the prosecution relies on the evidence of three witnesses, … Borchardt, … Carkeet and … Clark, all of whom have given statements to the police which have had the effect of reducing their own sentence. … sentences may be reduced … where the offender undertakes to cooperate with law enforcement authorities by giving evidence against someone else. If an offender receives a reduced sentence because of that sort of cooperation and then does not cooperate in accordance with his undertaking, the sentencing proceedings may be reopened and a different sentence imposed.
>
> You can see, therefore, that there may be a strong incentive for a person in that position to implicate the defendant when giving evidence. You should therefore scrutinise each of those witnesses (sic) evidence carefully with great care. You should only act on it after considering it and all the other evidence in the case, you are

> convinced of the truth and accuracy of that particular witnesses (sic) evidence.
>
> Evidence was also given that … Carkeet and … Clark, who gave evidence for the prosecution, have previous convictions. … Carkeet … had previous convictions for entering premises and unlawful use of a motor vehicle and charges of fraud and a charge of stealing … . …
>
> With respect to … Clark, he … was placed on probation for an unlawful use of a motor vehicle, stealing and fraud and then later in 2002, he received a 15 month suspended sentence of which he had to serve three months in … gaol for unlawful possession of a motor vehicle … . …
>
> Now … those previous convictions are something you can take into account when considering the credibility of … Carkeet and … Clark, and the weight to be given to their evidence. The fact that someone has previous convictions does not necessarily mean their evidence has to be rejected out of hand. It is a matter for you, what weight you give to the fact that they have been previously convicted".

[37] As part of his summing-up the trial judge summarised the appellant's submissions to the jury. Relevantly his Honour said:

> "… you were also referred to differences in versions given by … Borchardt, Carkeet and Clark. Now, of course, you would turn your mind to those differences in evaluating their evidence and you would also ask yourself whether the differences … is such as to undermine your confidence in … their evidence, or … matters of peripheral detail only?
>
> … what the defendant says that these people, whose evidence you're asked to rely upon, are shown to have lied to police, they have an incentive to lie. They're inconsistent amongst themselves as to what happened with the various jobs and who went where and who did what; that they're unreliable; that the mere fact that the defendant may have been present at some place does not mean that he organised these jobs … . So those facts … would not persuade you to accept the evidence of the witnesses who have shown to have reasons that they would say things to suit themselves, implicate the defendant where it might suit themselves to obtain a lesser sentence … .
>
> … Borchardt, Carkeet and Clark, are people who are prepared to act dishonestly and act in the way they did. Carkeet and Clark had previous convictions. Borchardt's prepared to become involved in this type of criminal activity … .
>
> …
>
> … the defence says there's nothing independent or reliable … to support the credibility of the three principle (sic) witnesses … (and) you'd have serious reservations about their evidence … ".

[38] The trial judge did not similarly summarise the prosecutor's arguments, nor did his Honour refer in any detail to the evidence which, apart from the accomplices'

evidence, implicated the appellant in the criminal enterprise. Thus his Honour did not remind the jury of the content of Allen's evidence, or the testimony of either Graveson, or that of Tzouvelis, which together reveal the appellant's extensive knowledge of where and when trucks carrying stolen spools of copper cable would arrive, and where manpower had to be deployed to cut the cable into saleable lengths.

[39] The appellant's counsel did not seek any redirections, perhaps for the reason that in that aspect the summing-up was favourable to the appellant.

[40] The "accomplice" direction which the appellant submits should have been given is taken from the Benchbook:

> "You should approach your assessment of the evidence of (the accomplice) with caution. A person who has been involved in an offence may have reasons of self-interest to lie or to falsely implicate another in the commission of the offence. The evidence of such a person is of its nature potentially unreliable, and it is therefore necessary for you to scrutinise the evidence carefully before acting on it. (The accomplice), having been involved in the offence is likely to be a person of bad character. For this reason, his evidence may be unreliable and untrustworthy. Moreover (the accomplice) may have sought to justify his conduct, or at least to minimise his involvement, by shifting the blame … to others.
>
> Perhaps (the accomplice) has sought to implicate the (accused) and to give untruthful evidence because he apprehends that he has something to gain by doing so. He has pleaded guilty and indicated that he is prepared to give evidence against the (accused). …
>
> Whilst it is possible to identify some reasons why he may have for giving false evidence, there may be other reasons for giving false evidence which are known only to him.
>
> The accomplice's evidence, if not truthful, has an inherent danger. If it is false in implicating the (accused), it will nevertheless have a seeming plausibility about it, because he will have familiarity with at least some of the details of the crime.
>
> …
>
> In view of the matters I have touched upon, it would be dangerous to convict the accused on the evidence of (the accomplice) unless you find that his evidence is supported in a material way by independent evidence implicating the (accused) in the offence".

[41] The appellant complains there were several features of the accomplice direction not contained in what the trial judge said. They were:

(a) An accomplice may have reasons of self interest to lie or falsely implicate another in the offence;
(b) The evidence of an accomplice is of its nature potentially unreliable;
(c) Such a witness is likely to be a person of bad character and for that reason unreliable and untrustworthy;
(d) An accomplice may have sought to justify his conduct or minimise his involvement by shifting the blame to others;

(e) Though possible to identify some reasons why an accomplice may give false evidence there may be other reasons known only to him;

(f) The witness's evidence if untruthful has an inherent danger. If false in implicating the accused it will nevertheless have a seeming plausibility because the accomplice has familiarity with the details of the crime;

(g) Because of these matters it would be dangerous to convict on the evidence of the accomplice unless supported in a material way by independent testimony.

[42] It will be seen that much of the subject matter of the Benchbook warning was in fact contained in the trial judge's direction. The appellant in the end complained that two aspects of the "accomplice warning" were omitted. They were that an accomplice may have reasons to *falsely* implicate an accused and that an accomplice's evidence, if untruthful, has the inherent danger that it appears plausible because of the accomplice's familiarity with the details of the crime.

[43] The appellant's primary submission that the "entire" accomplice direction should have been given cannot be accepted. Section 632 of the *Criminal Code* 1899 (Qld) has altered the law with respect to the evidence of accomplices. It provides:

> "(2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection … (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses".

[44] Subsection 632(3) therefore precludes a direction that accomplices, as a class, are unreliable witnesses and the jury may not be told that they are. The subsection would also seem to preclude a direction that it will be dangerous to convict if the only basis for the danger is that the evidence in question was that of an accomplice.

[45] Section 632(3) forbids the direction the appellant sought summarised in paragraph [41](b) and (g) at least with regard to the latter, if the danger was said to arise only from the fact that the evidence was that of an accomplice.

[46] Speaking of s 632, then in a slightly different form, the High Court said in *Robinson v The Queen* (1999) 197 CLR 162 at 168:

> "The law requires a warning to be given 'whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case' … . …
>
> Once it is understood that s 632(2) is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence, its relationship to the concluding words of s 623(3) becomes clear … ". (footnotes omitted)

[47] In *R v Lowe* [2001] QCA 270, Williams JA (with whom McPherson and Thomas JJA agreed) referred to *R v Button* [1992] 1 Qd R 552 and quoted from *R v S* [1993] 2 Qd R 322 at 324:

> "These decisions underline the requirement that summings-up must be tailored to the needs of the particular case and that a slavish insistence upon a formula or a statement of reasons for the rule, is not necessary".

His Honour went on:

> "[21] That states the present law in this State. Given the variety of factual situations in which the warning may be called for, it is more important that the warning be tailored to meet the facts of the case rather than it slavishly follow a set formula".

[48] Faced with these propositions the appellant's complaint came down to the two matters I mentioned: that the jury was not told that the accomplices may have a reason to implicate the appellant falsely in the criminal enterprise, and their evidence may appear plausible because of their knowledge of the offences so that if their implication of the appellant were untruthful it would be falsely attractive.

[49] There was, in this case, a substantial body of evidence implicating the appellant in the activities of the criminal combination apart from the evidence of Borchardt and Carkeet which identified the appellant as the commander. There was other inferential evidence of his command. It was he who, on Graveson's testimony, arranged for the trucks to drive to Cedar Grove and, on Allen's evidence, to Ormeau. At both destinations the appellant directed others to cut up the cable. Graveson's evidence established that it was the appellant who arranged for the sale of the cable.

[50] The evidence of the accomplices was obviously important. It cogently and directly identified the appellant's control of the enterprise. The appellant's submissions however exaggerate its criticality. This observation does not diminish the need for the jury to have been directed to take care in the evaluation of their testimony. That warning should have been given, as it was. I make the observation to explain that the case is not one which depended entirely upon the accomplices' evidence.

[51] The jury was firmly told that the accomplices were men about whom there was reason to doubt their veracity. They were self-confessed thieves. They had willingly taken part in a series of brazen break and enters and stolen substantial and expensive items of property. They had done so without hesitation. Two of the men had previous convictions for dishonesty. They had a demonstrated incentive to give evidence incriminating the appellant.

[52] The trial judge pointed out all those facts to the jury. No more was, in fairness, required. It was not necessary to spell out to the jury that the need for careful scrutiny arose because accomplices might falsely implicate the appellant. That was the whole point of the warning. There was no danger of a wrongful conviction if the evidence of the accomplices rightly implicated the appellant. The only risk was a false implication and the warning to scrutinise evidence carefully was obviously addressed to that risk.

[53] Likewise it was not necessary to specifically warn the jury that false testimony from the accomplice may be attractive because of its plausibility. Such a warning may be

appropriate when an accomplice provides the only evidence against an accused. But in this case there is no room to doubt the appellant's involvement in the criminal activity. There was corroboration for the evidence of Borchardt and Carkeet that the appellant was the instigator. In the circumstances the general warning given was sufficient.

[54] There was, as well, the trial judge's repetition of the defence submissions that the witnesses had lied and had been shown to have lied on some occasions. The issue of the extent to which the jury could rely upon the accomplices' evidence was fairly put to the jury.

[55] The summing-up was adequate. The first ground of appeal is not made out.

[56] The second ground of appeal is curious. It takes objection to a small part of Clark's evidence on the basis that it was hearsay. The sentence objected to was that Blanch had told him it was the appellant who was cashing in the stolen copper cable.

[57] The curiosity is that the whole of Clark's testimony against the appellant was hearsay. He had no direct dealings with the appellant. He was recruited by Blanch and given instructions by Blanch. He dealt only with Blanch. Why one passage should be objected to on this basis and not others was not explained.

[58] The evidence was clearly admissible. There was overwhelming evidence of a criminal combination between the appellant, his brother Blanch, Borchardt, Carkeet, Clark and others all whom acted in concert performing differing roles to break, enter, steal and sell the proceeds of crime. In such a case as the High Court explained in *Tripodi v The Queen* (1961) 104 CLR 1 at 7:

> "When the case for the prosecution is that in the commission of the crime a number of men acted in preconcert, reasonable evidence of the preconcert must be adduced before evidence of acts or words of one of the parties in furtherance of the common purpose which constitutes or forms an element of the crime becomes admissible against the … others … . … the … reason for admitting the evidence of the … words of one against the other is that the combination or preconcert to commit the crime is considered as implying an authority to each to … speak in furtherance of the common purpose on behalf of the others".

[59] When confronted with this difficulty the appellant conceded the admissibility of the evidence but argued instead that the trial judge had not sufficiently instructed the jury as to its use. The trial judge explained:

> "… I mentioned the hearsay rule … one of the rules of evidence which can be relevant in trials. However, there is an exception to that rule and that exception is when you have a number of people engaged in a … criminal enterprise, one … of them can give evidence of instructions given by another out of the hearing of another person. So in this instance it's said that Mr … Blanch gave instructions to that witness about what (the appellant) said might happen. Well, that can be received, but I'll give you more instructions about that during the trial, about how … you can use that evidence and how you cannot use that evidence in that trial. At this stage you can receive it as being the instructions he was given by a person engaged in the enterprise".

[60] In fact the trial judge omitted to return to the topic in his summing-up. He was not reminded of the omission nor asked to give any further directions on the point.

[61] It would no doubt have been preferable for the judge to carry out his initial intention and give an explanation about the use to which the evidence could be put. The failure to do so did not make the summing-up inadequate or unbalanced. The evidence was admissible and its purpose was obvious. It duplicated evidence given by Ernest Graveson that the appellant was selling the stolen copper. Borchardt and Carkeet also gave direct evidence that the appellant said he was selling the cable. The jury was told, correctly, that they could regard the evidence as an instruction from Blanch to Clark. Blanch, who helped to organise the break-ins, explained to Clark that the appellant was to sell the stolen copper. It no doubt reassured Clark that money would be available to pay him for his participation, and explained to him what role the appellant played in the enterprise.

[62] The appellant was not able to identify any disadvantage which befell him by reason of the omitted explanation.

[63] There is no substance in the second ground of appeal.

[64] The appeal should be dismissed.

[65] **ATKINSON J**: I have had the advantage of reading the reasons for judgment of Chesterman JA and agree with his Honour's reasons and the order proposed. I wish however to add my own remarks with regard to appeal ground 1, which was that there was a miscarriage of justice in that the trial judge when summing up failed to give any direction warning the jury against acting on the evidence of the witnesses Borchardt, Carkeet and Clark on the basis that they were accomplices.

[66] The very way in which this ground of appeal is framed shows its inherent flaw.[1] Section 632(3) of the Criminal Code since its amendment which came into effect on 27 October 2000,[2] expressly forbids such a direction. Section 632 provides:

> "(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, **but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses.**" (emphasis added).

[67] Prior to the amendment made in 2000, s 632(3) of the Criminal Code referred to "any class of complainants" and so did not apply to the evidence of accomplices. This limitation was noted by the High Court in *Robinson v The Queen* (1999) 197 CLR 162 at [22]. The amendment changed "any class of complainants" to "any class of persons" so that s 632 now applies to all witnesses.

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1 See Queensland Law Commission "A Review of Jury Directions" Report No. 66 Vol 3 [16.22]-[16.29].

2 By the *Criminal Law Amendment Act* 2000.

[68] The statutory provision has therefore modified the common law requirement for the judge to warn the jury that it was dangerous to convict the defendant on the evidence of an accomplice unless it was corroborated.[3]

[69] The standard direction in the Bench Book with regard to accomplices suggests that a judge should direct a jury as follows:

> "In view of the matters I have touched upon, it would be dangerous to convict the defendant on the evidence of (the accomplice) unless you find his evidence is supported in a material way by independent evidence implicating the defendant in the offence."

[70] That direction should **not** be given as a standard direction with regard to accomplices who give evidence as such a direction would be in contravention of s 632. Such a direction may only be given where the particular and specific circumstances of the case, rather than a particular class of witness, warrant such a direction. To inform the jury it would be dangerous to convict on the uncorroborated testimony of an accomplice because the witness is an accomplice is to suggest that the law regards that class of persons as unreliable witnesses. Such a warning is expressly forbidden by s 632(3) of the Criminal Code.

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[3] *Bromley v The Queen* (1986) 161 CLR 315 at 323; *Davies v DPP* [1954] AC 378 at 399; *R v CBR* [1992] 1 Qd R 637 at 642; *R v Button* [1992] 1 Qd R 552; *Jenkins v The Queen* [2004] HCA 57 at [30].