SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jobling* [2011] QCA 31
PARTIES:	**R** **v** **JOBLING, Scott Andrew** (appellant)
FILE NO/S:	CA No 139 of 2010 SC No 74 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	4 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2010
JUDGES:	Margaret McMurdo P and White JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – Where appellant and co-accused were charged together with murder – where separate trials – where co-accused was convicted of murder prior to the appellant's trial for murder – where appellant argued that the trial judge erred in permitting the prosecution to particularise criminal responsibility against him on the basis of s 7(1)(a), s 7(1)(c) or s 7(1)(d) *Criminal Code* 1899 (Qld) – whether prosecution case offended the doctrine of incontrovertibility – whether it was an abuse of process CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where co-accused's statement to police was admitted as evidence against the appellant – where the judge made a declaration under s 17 *Evidence Act* 1977 (Qld) – whether the trial judge erred in making that declaration – whether the trial judge erred in admitting the evidence *Criminal Code* 1899 (Qld), s 7(1)(a), s 7(1)(b), s 7(1)(c), s 7(1)(d), s 560, s 569

Evidence Act 1977 (Qld), s 17, s 101, s 102

Connelly v Director of Public Prosecutions [1964] AC 1254, cited
Garrett v The Queen (1977) 139 CLR 437; [1977] HCA 67, cited
Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57, cited
R v Carroll (2002) 213 CLR 635; [2002] HCA 55, considered
R v Gilham (2007) 73 NSWLR 308; [2007] NSWCCA 323, considered
R v Hinschen [2008] QCA 145, considered
Rogers v The Queen (1994) 181 CLR 251; [1994] HCA 42, considered

COUNSEL: A J Glynn SC for the appellant
M J Copley SC for the respondent

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

[1] **MARGARET McMURDO P:** Scott Andrew Jobling was originally charged jointly with Beau Ernest Hinschen with murdering Jobling's former partner, Suzanne Cheryl Standing, at Etna Creek near Rockhampton on or about 5 August 2005. Separate trials were ordered on 7 June 2007. The Crown endorsed the indictment jointly charging Jobling and Hinschen that it was not proceeding further against Hinschen on that indictment.

[2] The Crown proceeded first against Hinschen on another indictment charging him with the murder of the deceased. Evidence led at Hinschen's trial was capable of supporting his conviction of murder on the basis that he either actually, at Jobling's instigation, did the act of killing the deceased intending to kill her (s 7(1)(a) *Criminal Code* 1899 (Qld)); or that he aided Jobling to kill the deceased, knowing Jobling intended to kill her (s 7(1)(b) or (c) *Criminal Code*). The prosecution particularised its case against Hinschen, however, on the basis that Hinschen, acting at Jobling's instigation, was liable only by way of s 7(1)(a). The judge in Hinschen's trial directed the jury that if they did not find that the killing occurred in the circumstances particularised by the prosecution, namely, that Hinschen's confession to police was true and that he intentionally killed the deceased while alone with her at her home on 5 August 2005 at the urging of the absent Jobling, they must acquit.[1] It therefore followed that Hinschen was convicted of murdering the deceased solely on the basis that he intentionally and actually killed her, under s 7(1)(a), at the urging of Jobling.

[3] The Crown then proceeded against Jobling in a trial before a different judge and jury. The prosecution's particularised case against Jobling was broader than its particularised case against Hinschen. It included not only a case based on s 7(1)(d) *Criminal Code* (which sat entirely comfortably with the prosecution's particularised case against Hinschen in Hinschen's trial) but also alternative cases under s 7(1)(a)

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[1] See *R v Hinschen* extract of proceedings, Rockhampton Supreme Court, 30 August 2007, Dutney J and *R v Hinschen* [2008] QCA 145, [27]-[29], [45] and [46].

and (c). These alternatives were based on Hinschen's evidence at Jobling's trial which differed from Hinschen's earlier account to police. Jobling's counsel applied to the judge to either direct the jury that they could only convict Jobling on the basis of a prosecution case under s 7(1)(d) (that is, consistent with the way Hinschen's trial was particularised and prosecuted) or to stay the proceedings until the prosecution complied with that direction. The judge refused that application.[2]

[4] Jobling's grounds of appeal, as amended at the hearing, are that the learned trial judge erred in two ways. The first was in permitting the prosecution to particularise criminal responsibility against Jobling as being on the basis of s 7(1)(a), s 7(1)(c) or s 7(1)(d). The second was "in allowing the jury to consider both versions given by Hinschen as a basis for liability when one was a basis for a declaration that the witness was hostile."

Jobling's trial

[5] Before returning to Jobling's contentions, it is helpful to set out more details of Jobling's trial. The particulars relied on by the prosecution in its case against Jobling for murder were originally as follows:

> "1) That [Jobling] procured Beau Ernest Hinschen to murder Suzanne Cheryl Standing.
> Section 7 (1)(d) Criminal Code
>
> **Alternatively**
> 2) That [Jobling] aided Beau Ernest Hinschen, knowing that Beau Ernest Hinschen had the requisite intent under s 302 (1)(a), in the assault of Suzanne Cheryl Standing that caused or substantially contributed to the death of Suzanne Cheryl Standing. [Jobling] aided by his presence, encouragement, words and conduct of handing the knife to Beau Ernest Hinschen and participating in the assault.
> Section 7 (1)(c) Criminal Code
>
> **Alternatively**
> 3) That [Jobling], either alone, or in combination with Beau Ernest Hinschen, and with the requisite intent under s 302(1)(a), assaulted Suzanne Cheryl Standing that caused or substantially contributed to the death of Suzanne Cheryl Standing.
> Section 7 (1)(a) Criminal Code"

[6] Section 7(1) provides:

> "**7 Principal offenders**
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
> (a) every person who actually does the act or makes the omission which constitutes the offence;
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
> (c) every person who aids another person in committing the offence;

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2 Appeal record book, 74-76.

(d) any person who counsels or procures any other person to commit the offence."

[7] Hinschen gave evidence at Jobling's trial implicating Jobling in the murder of the deceased as particularised in alternative 3, and, at least arguably, alternative 2 above. His evidence was broadly consistent with the evidence he gave at his own trial and as contained in an earlier affidavit supporting his bail application.[3] But Hinschen had given an even earlier, different version to police, in which he implicated Jobling in the murder as particularised in alternative 1 above. When Hinschen gave evidence in Jobling's trial inconsistent with his previous account to police, the prosecutor applied under s 17 *Evidence Act* 1977 (Qld) to have Hinschen declared adverse. Jobling's counsel stated that he did not want to be heard in relation to the prosecutor's application. The judge, under s 17, found that Hinschen was an adverse witness, and gave the prosecutor leave to cross-examine Hinschen about his earlier inconsistent statement to police. The prosecutor proved Hinschen's statement to police, which then became evidence of the truth of its contents under s 101 *Evidence Act*.

[8] Prior to counsel's final jury addresses, the judge ruled that there was insufficient evidence to allow the jury to consider the prosecution case against Jobling as particularised in alternative 2 above (s 7(1)(c)).[4]

[9] Although the prosecutor in his final address made clear that he was principally relying on alternative 1 (based on Hinschen's evidence in his original statement to police making Jobling liable by way of s 7(1)(d)), the trial judge also left for the jury's consideration alternative 3 (based on Hinschen's evidence at trial that Jobling, not Hinschen, had actually fatally stabbed the deceased making Jobling liable by way of s 7(1)(a)).

The contentions on ground 1

[10] Counsel for Jobling in this appeal contends as follows. The primary judge erred in allowing the prosecution case to proceed to the jury on the basis of s 7(1)(a). This offended the principle that the verdict in Hinschen's trial was incontrovertible. The verdict in Hinschen's trial of guilty of murder on the basis that Hinschen killed the deceased at the urging of Jobling, meant that the prosecution could not in Jobling's trial controvert or challenge that basis of Hinschen's conviction for murder. To do so was an abuse of process and was contrary to the principles identified in *Rogers v The Queen*[5] and *R v Carroll*.[6] There are no closed categories when it comes to an abuse of process. The prosecution's conduct of Jobling's trial amounted to an abuse of process. The appeal must be allowed, the verdict of guilty set aside and a retrial ordered.

Conclusion on ground 1

[11] Jobling relies principally on *Rogers* and *Carroll* in support of his contentions in respect of ground 1 of his appeal. It is helpful to briefly discuss these cases.

[12] In *Rogers*, the High Court held that the prosecution was bound by rulings in an earlier trial against Rogers. In the earlier trial, Rogers' records of interview in which he made confessions to police were successfully challenged and ruled inadmissible and he was subsequently found not guilty on those charges. In the later trial, which

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3 See *R v Hinschen* [2008] QCA 145, [27]-[29].

4 Appeal book 615.

5 (1994) 181 CLR 251.

6 (2002) 213 CLR 635.

concerned different charges, the prosecution sought to rely on Rogers' confessions to police in the same series of records of interview excluded in the earlier trial. The plurality determined[7] that the issue of admissibility of the confessions had already been conclusively decided in Rogers' favour. The confessions sought to be tendered in the second trial, although relating to different alleged crimes, were made at the same time and in exactly the same circumstances as the confessions that were successfully excluded in the earlier trial. It is a fundamental principle, essential for the maintenance of public respect and confidence in the administration of justice, that decisions of courts, unless set aside or quashed, must be accepted as incontrovertibly correct.[8] The tender of the records of interview in the second trial constituted a direct challenge to the determination in the earlier trial which became a final determination once verdicts of not guilty were returned. The attempt by the prosecution to tender the record of interview in the second trial jeopardised public confidence in the administration of justice. It amounted to an abuse of process.

[13] In *R v Carroll*, Carroll was charged with and convicted of perjury. The perjury was said to be that he gave false exculpatory evidence at his trial for murder on which he was acquitted. The High Court held that the perjury indictment was an abuse of process and should have been stayed. It was an attempt to contravene Carroll's acquittal of murder as the perjury charge raised the same ultimate issue as that raised on the murder trial, that is, whether he in fact killed the deceased. Gleeson and Hayne JJ noted that, consistent with *Rogers*, the need to stay the perjury indictment was based on the requirement that decisions of courts, unless set aside or quashed, be accepted as incontrovertibly correct.[9] After referring to Barwick CJ's observations regarding this principle in *Garrett v The Queen*[10] and Lord Pearce's observations in *Connelly v Director of Public Prosecutions*,[11] their Honours observed that sometimes to charge someone with an offence can be manifestly inconsistent on the facts with a previous acquittal, even though no plea of *autrefois acquit* was available. Carroll's case was such an example. It demonstrated a manifest inconsistency between the charge of perjury and his acquittal of murder. Their Honours stated:

> "The need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct is a principle which requires that it is the verdict of acquittal which should be incontrovertible. It is not necessary in this case to attempt to decide what may be the limits of the principle about incontrovertibility and, in any event, it would be unwise to attempt to do so. It is a proposition which has not been held to preclude persons other than the prosecution asserting in later proceedings that the person committed the crime of which he or she was acquitted at trial."[12]

[14] Their Honours emphasised the need to compare the elements of the offences in the decision said to be controverted and the elements of the offence said to controvert the earlier court decision.[13] The finality of a verdict was a valued principle of personal liberty and limited government.[14] Their Honours continued:

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7 Above, 255-256, Mason CJ agreeing with Deane and Gaudron JJ, 273, 278, 280.
8 Above, 273.
9 (2002) 213 CLR 635, 647-648.
10 (1977) 139 CLR 437, 445.
11 [1964] AC 1254, 1364.
12 Above, 650 [45].
13 Above, 651, [47].
14 Above, 651 [49].

> "Finality of a verdict of acquittal does not necessarily prevent the institution of proceedings, or the tender of evidence, which might have the incidental effect of casting doubt upon, or even demonstrating the error of, an earlier decision. There may be cases where, at a later trial of other allegedly similar conduct of an accused, evidence of conduct may be adduced even though the accused had earlier been charged with, tried for, and acquitted of an offence said to be constituted by that conduct. *R v Z* [[2000] 2 AC 483], *R v Arp* [[1998] 23 SCR 339] and *R v Degnan* [[2001] 1 NZLR 280] are cases of that kind. In such cases, the earlier acquittal would not be controverted by a guilty verdict at the second trial."

[15] Gaudron and Gummow JJ, after referring to *Rogers* and *Pearce v The Queen*,[15] considered that the issues raised in *Carroll* touched:

> "upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power. First, there is the public interest in concluding litigation through judicial determinations which are final, binding and conclusive. Secondly, there is the need for orders and other solemn acts of the courts (unless set aside or quashed) to be treated as incontrovertibly correct. This reduces the scope for conflicting judicial decisions, which would tend to bring the administration of justice into disrepute. Thirdly, there is the interest of the individual in not being twice vexed for one and the same cause. Finally, there is the principle that a cause of action is changed by judgment recovered in a court of record into a matter of record, which is of a higher nature." (footnotes omitted)

[16] More recently, the New South Wales Court of Criminal Appeal sitting as a bench of five, considered the principle of incontrovertibility and related issues in *R v Gilham*.[16] Gilham pleaded guilty to manslaughter of his brother on the basis that he killed him under the provocation that his brother had murdered their parents. The prosecution subsequently brought an *ex officio* indictment charging Gilham with the murder of his parents. He unsuccessfully applied for a stay of that proceeding. The court unanimously dismissed his appeal. The court found that the Crown in charging him with the murder of his parents was not seeking to interfere with his conviction for the manslaughter of his brother. The prosecution of Gilham for the murder of his parents was not a contravention of his finding of guilt for manslaughter. Any such contravention was incidental and so did not infringe the principle of incontrovertibility: see *Carroll*.[17]

[17] In Queensland, charges are brought on indictment by the Crown against an individual person: see s 560 *Criminal Code*. A charge may be brought against more than one person where it is alleged they are accessories to an offence: see s 569 *Criminal Code*. As I have noted, however, the Crown did not ultimately pursue its case against Hinschen and Jobling in a joint trial.

[18] The authorities on which Jobling's counsel relies are not factually similar to the present case. Unlike the position here, *Rogers*, *Carroll* and *Gilham*, like *R v Z*, *R v Arp*, and *R v Degnan* which are referred to in *Carroll*, all concerned the doctrine

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15 (1998) 194 CLR 610, 621-624, [34]-[49]; 629-630, [69]; 649-650, [119]-[121].

16 (2007) 73 NSWLR 308; [2007] NSWCCA 323.

17 At 651.

of incontrovertibility in respect of decisions in cases brought by the Crown against the same person. I am unpersuaded that the means and path to conviction in the Crown's action against Hinschen has resulted in the means and path to conviction in the Crown's action against Jobling becoming an abuse of process. It is true that one of the particularised paths to conviction in Jobling's trial was inconsistent with the sole particularised path to conviction in Hinschen's trial. But it was not an element of the count of murder brought by the Crown in its action against Hinschen, that Hinschen killed the deceased because Jobling procured him to do so. Neither the verdict of guilty of murder in the Crown's action against Hinschen, nor the elements of the offence of murder of which Hinschen was convicted in that case, were controverted by the conduct of the prosecution case in the Crown's action against Jobling: see *Carroll*.[18]

[19] In case I am wrong on that conclusion, there seems to me to be another basis for rejecting the contentions of Jobling's counsel on ground 1. The prosecution case in the Crown's action against Jobling was primarily based on s 7(1)(d) so that the primary prosecution allegation was that Jobling's role was the same as the prosecution alleged it was in the Crown's action against Hinschen. The evidence led in Jobling's trial was to similar effect as that in Hinschen's trial. The fact that the jury may theoretically have concluded in Jobling's trial that Jobling was guilty of murder as a principal under s 7(1)(a) rather than under s 7(1)(d), does not seem to me to amount to an abuse of process. If there has been any contravention of the finality of the verdict in Hinschen's trial by the way the prosecution particularised its case in Jobling's trial, this has arisen only as an "incidental effect" as identified in *Carroll*[19] and *Gilham*.[20] It therefore is not an abuse of process and does not require the setting aside of the verdict of guilty against Jobling.

[20] As *Rogers*, *Carroll* and *Gilham* identify, whether a particular case offends the doctrine of incontrovertibility involves questions of the interests of justice and public policy considerations. Public policy considerations do not seem to me to favour the contentions of Jobling's counsel on ground 1. Both Jobling and Hinschen were charged with together murdering the deceased. Hinschen was the principal witness against Jobling. Sound administration of the criminal justice system and the interests of justice favoured the jury hearing Hinschen's complete evidence in Jobling's trial in order to assess its truth and accuracy. This included both his evidence in chief in which he alleged Jobling had committed murder by way of s 7(1)(a) and Hinschen's earlier inconsistent statement to police which was admitted as evidence under s 17 and s 101 *Evidence Act*. It was in the public interest for the jury to determine the Crown case against Jobling according to both bases raised by Hinschen's evidence.

[21] For these reasons, I do not consider that Jobling's first ground of appeal is made out.

Conclusion on ground 2

[22] Jobling did not make written or oral submissions in support of his second ground of appeal (set out at [4] of these reasons). Perhaps that is because, in so far as it is arguable, it is inextricably linked with the first ground of appeal which I have found has not been made out. It is necessary, however, to deal briefly with ground 2.

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18 At 648 [37] and 651, [47].

19 At 651, [50].

20 At 332, [112].

[23] Hinschen gave evidence in chief inculpating Jobling in the murder of the deceased by way of s 7(1)(a) and, arguably, s 7(1)(c) *Criminal Code*. The judge made a declaration under s 17 *Evidence Act* which was not opposed by defence counsel. The prosecution then proved Hinschen's statement to police in which he implicated Jobling in the murder by way of s 7(1)(d) *Criminal Code*. Jobling has not demonstrated that the judge erred in any way in making that declaration. Once that declaration was made and Hinschen's statement to police implicating Jobling in the murder of the deceased by way of s 7(1)(d) was proved, that statement became evidence in the case against Jobling. It was evidence of the truth of the contents of Hinschen's statement to police: s 101 *Evidence Act*. It was for the jury to determine what weight they gave to the statement: s 102 *Evidence Act*. The judge did not err in allowing the evidence to be given or in leaving to the jury the particularised bases of liability ultimately relied on by the prosecution under both s 7(1)(a) and s 7(1)(d) to establish that Jobling murdered the deceased. The second ground of appeal is not made out.

ORDER:

[24] It follows that the appeal against conviction must be dismissed.

[25] **WHITE JA:** I have read the reasons for judgment of the President and agree with her Honour that neither ground of appeal is made out and it follows that the appeal against conviction should be dismissed.

[26] **JONES J:** I respectfully agree with the reasons of the President and the order proposed.