SUPREME COURT OF QUEENSLAND

CITATION:	*R v Perry* [2011] QCA 236
PARTIES:	**R** **v** **PERRY, David Samuel** (appellant/applicant)
FILE NO/S:	CA No 128 of 2011 DC No 2028 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2011
JUDGE:	Margaret McMurdo P and Muir JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction in respect of count 1 be allowed.** **2. The conviction in respect of count 1 be set aside and a verdict of acquittal be entered.** **3. The appeal against conviction in respect of count 2 be dismissed.** **4. Leave to appeal against sentence be granted and allowed.** **5. The appellant be sentenced, in respect of count 2, to 12 months imprisonment.** **6. The appellant be released immediately under s 20(1)(b) of the *Crimes Act* 1914 (Cth), upon giving security by recognizance in the sum of $1,000 conditional that he be of good behaviour for a period of three years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of two counts of giving false evidence to an Australian Crime Commission examiner under s 33(1) of the *Australian Crime Commission Act* 2002 (Cth) – where the appellant submits the jury's verdict was unsafe and unsatisfactory – whether the jury's verdict in respect of count one is unreasonable and not supported by the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant submits that telephone intercept evidence should be excluded as inadmissible hearsay – where the falsity of the appellant's evidence before the examiner and his knowledge of that falsity was at issue – whether the evidence was properly admissible at trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant submits the jury was not properly directed as to how it could use the telephone intercept evidence – whether the jury was properly directed

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERING – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant submitted the sentence imposed was manifestly excessive – where the appellant had no involvement with the primary criminal activity – whether the sentence imposed was appropriate in all the circumstances

Australian Crime Commission Act 2002 (Cth), s 33(1)
Crimes Act 1914 (Cth), s 20(1)(b)

R v Abell [2007] QCA 448, cited
R v Hytch (2000) 114 A Crim R 573, [2000] QCA 315, considered
Ratten v The Queen (1972] AC 378, cited
Walton v The Queen (1989) 166 CLR 283; [1989] HCA 9, considered

COUNSEL: P Flanaghan SC, with A Stoker, for the appellant
S Ryan for the respondent

SOLICITORS: Patrick Murphy Solicitor for the appellant
Commonwealth Director of Public Prosecutions for the respondent

[1] **MARGARET McMURDO P:** I agree with Boddice J's reasons and proposed orders.

[2] **MUIR JA:** I agree with the reasons of Boddice J and with the orders he proposes.

[3] **BODDICE J:** On 18 May 2011, the appellant was convicted in the District Court of Queensland of two counts of giving false evidence to an Australian Crime Commission examiner under s 33(1) of the *Australian Crime Commission Act* 2002 (Cth) ("the Act"). He was sentenced to 12 months imprisonment on each count. It

was further ordered that he be released under s 20(1)(b) of the *Crimes Act* 1914 (Cth) after serving five months, on condition that he be of good behaviour for a period of three years.

[4] The appellant appeals his convictions and sentence. The grounds of appeal, amended pursuant to leave granted at the appeal, are:

1. The jury's verdict on count one was unsafe and unsatisfactory because the case presented by the respondent was so fundamentally inconsistent with the evidence when considered in this context.

2. A substantial miscarriage of justice arose in counts one and two from:

   (a) the admission of the telephone intercepts into evidence; or alternatively

   (b) the failure of the trial judge to properly direct the jury as to the purposes for which the telephone intercept evidence could be used.

3. The sentence was manifestly excessive in all the circumstances.

Background

[5] In September 2006, Australian Federal Police received information a shipping container that had recently arrived in Brisbane from Canada contained a large shipment of drugs. An investigation was commenced into the activities of a group of Canadians present in Australia at the time. One member of that group was Dale Handlen ("Handlen"). The investigation included conducting surveillance on Handlen and others.

[6] At the time of the commencement of the investigation, the appellant was a Maritime Union of Australia official. Surveillance undertaken as part of the investigation revealed the appellant met Handlen twice during September 2006.

[7] On 20 September 2006, Handlen and others were arrested by Australian Federal Police. Some weeks later, the Australian Crime Commission issued a summons to the appellant to attend an examination. That examination, which took place on 30 November 2006, involved questions and answers which were recorded. The offences of which the appellant was convicted arose out of answers given by him during that examination. The respondent's case was that the appellant intentionally gave false evidence to the examiner.

Indictment

[8] The indictment contained two counts. Count one alleged:

> "On 30 November 2006 at Brisbane in the State of Queensland, at an examination before an examiner, David Samuel Perry gave evidence that was to his knowledge false in a material particular, namely, the answer 'Nothing with Dale' in response to the question 'What did you discuss with Dale that day when you met him at the Colmslie Hotel?'."

Count two alleged:

> "On 30 November 2006 at Brisbane in the State of Queensland, at an examination before an examiner, David Samuel Perry gave evidence

> that was to his knowledge false in a material particular, namely, the answer 'Well not unless he asked me something' in response to the question 'There's no discussion about containers other than that?' and the answer 'I, no I can't remember I don't know' in response to the ensuing question 'Well, did he?'."

[9] No formal particulars were given of either charge. However, the respondent provided written details of its case in response to a s 590AA application heard by Noud DCJ on 13 April 2011.[1] The respondent alleged that the evidence given by the appellant at the examination was objectively false, and false to his knowledge.

[10] Insofar as count one was concerned, the objective falsity of the appellant's answer was said to be proven by direct evidence. A surveillance officer who had observed Handlen, his co-accused Michael Taylor and the appellant sitting together at a table at the hotel swore that they "appeared to be ... having a conversation", and photographed them doing so. The respondent asserted the photograph clearly depicted discussion between Handlen and the appellant. The respondent submitted that the appellant's knowledge of the falsity could only be proved circumstantially, and relied upon the circumstances of the meeting, its nature and context to show that the meeting was sufficiently memorable to the appellant to justify the conclusion that his evidence was knowingly false.

[11] The respondent also relied on telephone intercept evidence of communications between Handlen and others to establish that Handlen's sole purpose in attending the Colmslie Hotel meeting was to obtain information from the appellant about whether there was cause for concern over the time it had taken for the container to be delivered to him and his co-offenders following its arrival in Australia. None of this telephone intercept evidence involved communications with the appellant.

[12] Insofar as count two was concerned, the respondent alleged that the falsity in the appellant's answers was that the appellant could not remember whether Handlen had asked any questions about shipping containers. The respondent asserted the appellant had sufficient recall of the meeting with Handlen to answer directly. The respondent accepted that the objective falsity of the appellant's claimed lack of recall, and his consciousness of that falsity, were matters of inference. The respondent contended the relevant inferences could be drawn from a number of matters which rendered the meeting sufficiently memorable to the appellant to justify the conclusion that his evidence was knowingly false.

Trial

[13] Consistently with that position, the respondent opened count one thus:

> "The Crown case is that when [the appellant] was asked to give the detail of what discussion he'd had with Handlen at the Colmslie Hotel, he opted not to tell the truth but instead stonewalled by saying that he'd discussed nothing with Dale Handlen. [The appellant's] evidence to the examiner that he'd discussed nothing with Dale Handlen was demonstrably false because you will see photographs of them clearly depicting them together in conversation.
>
> The Crown needs to satisfy you not only that [the appellant's] evidence on that point was false but also that it was deliberately

[1] Supplementary outline of submissions.

> false, not just an innocent mistake or a lapse of memory. The Crown will suggest to you that that meeting was sufficiently memorable to [the appellant], that you'll be satisfied that the answer he gave was deliberately false. There are a number of reasons for that. The Colmslie Hotel was the first time that Handlen and [the appellant] had met. A meeting occurred a couple of days after Handlen – correction – after [the appellant] had returned from Singapore. They were introduced by [the appellant's] long time friend Taylor who was there also. Mr Handlen is Canadian remember, so he speaks with an accent. The meeting took place by prior arrangement. It wasn't some inconsequential hotel meeting.
>
> You'll be satisfied from the telephone conversations that you'll hear that Handlen's sole purpose in attending was to obtain information from [the appellant] about whether there was cause for concern over the time that it had taken for the container to be delivered to him. I've already mentioned that Handlen took an email with him to the meeting setting out specific information concerning the shipping container of interest. And I have already also made mention that [the appellant's] fingerprint was found on that email.
>
> The inference of the Crown will be asking you to draw is that there were discussions between Handlen and [the appellant] and indeed that the subject of discussion was the container in accordance with Handlen's declared intention.
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> The Crown will be asking you to accept that the fact that they had such discussion in all those circumstances was not something that the defendant would have failed to recall at his examination in November that year." [*Sic*]

[14] In closing submissions, the respondent submitted, in relation to count one:

> "And then we come to the part that the first charge focuses on and it's at page 30. 'The day you met with this Dale', it commences at about line 8, 'what did you discuss that day?' [The appellant] asked, 'With Michael?' 'No', Mr McDougall says to focus the questions further, 'with Dale?' And you can look at this again on the video if you wish. You'll have the opportunity to do that and I'm just inviting you to observe the body language of Mr Perry at and around the time of giving these answers. I suggest to you, his body language is that he was being evasive.
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> But he said, 'Nothing, we just basically spoke about Canada. I asked - well, it was like talking - what did I say to him?' And he's actually talking - thinking aloud really, trying to clarify in his own mind what he's going to say. And the question becomes as specific as it could be in all of the context that I've described, at line 22, 'What did you discuss with Dale that day when you met him at the Colmslie Hotel?' Answer, 'Nothing with Dale' and a bit more about having spoken only to Michael it seems, about the branch thing. Something to do with Labour Party politics.

> So the effect of the answer that he gave there is to exclude Dale from any discussions that [the appellant] had had with him at the Colmslie Hotel meeting. Hence that becomes the focus of the first charge.
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> Now that answer is false. There can't be any doubt that the answer that he gave is objectively false because you have the photographs that the police officer, Mr Rowe, took of the three of them in discussion at the Colmslie Hotel. Now Mr Rowe didn't know apart from Handlen, who the others were but Mr Matejic did and he gave you the names. You now know who they are and you've seen photographs of them in conversation. So the answer that there was nothing discussed is false."

[15] The respondent opened count two in the following terms:

> "The falsity alleged is that [the appellant] could not remember whether Handlen had asked any question about shipping containers whereas the true position, the Crown says, is that the defendant had sufficient recall of the meeting with Handlen to answer directly, and the circumstances that the Crown would rely on to show that that meeting was sufficiently memorable to justify that conclusion includes that the Jubilee Hotel meeting was the second of only two occasions on which the two had met. They were only a couple of days apart. Once again, Mr Handlen is Canadian. The meeting occurred by arrangement, and, as with the first meeting, Taylor effected the arrangements and also attended. Context of the meeting was the same as for the first in that Handlen had a continuing interest in any information the defendant could provide concerning the shipping container and he attended at the meeting for that purpose."

[16] In its closing address, the respondent said, of count two:

> "What the Crown suggests to you is that in all of the circumstances, [the appellant] well and truly had a sufficient recall about whether on either of the occasions he'd met with Dale Handlen, he'd been asked something about shipping containers. He knew the correct answer to that. Whether the correct answer was yes or no, he didn't give it. He said falsely that he couldn't remember. And he knew at the time that he was simply avoiding – avoiding giving any detail really, apart from acknowledging presence with Handlen, he wouldn't acknowledge anything of the true content of their conversations, which was – which was a very material part of this whole examination."

Appeal against convictions: Ground 1

Appellant's submissions

[17] The appellant submits that the jury's verdict in respect of count one was unsafe and unsatisfactory as the case presented by the respondent in relation to that count was fundamentally inconsistent with the appellant's evidence before the examiner, when considered in its context.

[18] In support of that submission, the appellant relies on this extended portion of the appellant's evidence before the examiner to place, in context, the appellant's answer the subject of count one.

"Mr McDougall	The day you met with this Dale,
Mr Perry	Yeah well,
Mr McDougall	What did you discuss that day?
Mr Perry	With Michael?
Mr McDougall	No with Dale?
Mr Perry	Oh nothing ah um we basically just spoke about Canada. I asked well it was just like talking um um what did I say to him.
Mr McDougall	Mr Perry, what did you discuss with Dale that day when you met him at the Colmslie Hotel?
Mr Perry	Nothing with Dale …"

[19] The appellant submits the appellant's answers reveal he never contended he had no conversation at all with Handlen. The appellant admitted there had been a conversation with Handlen but asserted the subject of the conversation was Canada, not shipping containers. Once that context is understood, the respondent's case, as presented to the jury, involved a fundamental misconception. The respondent could never prove objective falsity of the appellant's answer by reference to photographic evidence of Handlen and the appellant speaking at the hotel.

Respondent's submissions

[20] The respondent submitted that whilst the prosecutor, in his opening and closing address to the jury, had made statements suggestive of the respondent's case being that the appellant in his answer, the subject of count one, was saying there had been no conversation whatsoever between Handlen and the appellant, those statements did not encapsulate the case presented by the respondent on count one. When that case was considered in its entirety, it was plain to all participants at the trial that the appellant's answer, the subject of count one, was understood to convey there may have been discussions between Handlen and himself at the Colmslie Hotel, but "he was involved in no *discussion* with Handlen in the sense that Handlen did not engage him directly about anything during that meeting".[2] The prosecutor's comments about the unlikelihood of there being no discussion between two of three people who were together at a hotel was "an overstatement" designed to make the point that the appellant's position that he had discussed nothing with Dale was absurd.[3] The essence of the respondent's case was that the appellant gave false evidence when he said he had discussed "nothing with Dale" when the whole point of the meeting was for Handlen to discuss with the appellant the progress of his shipping at the wharf. The trial judge's repetition of the prosecutor's reliance on the unlikelihood that in a 30 minute meeting between three people you don't discuss anything with one of them, did not distract from a full understanding of the prosecution case.

[21] The respondent further submitted that the defence address to the jury was consistent with the defence understanding that the respondent was treating the answer "nothing with Dale" as meaning "nothing of significance with Dale" or perhaps "nothing

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2 Respondent's outline of submissions, para 3.

3 Respondent's outline of submissions, para 11.

about containers with Dale".[4] In support thereof, the respondent relied on the following submission by defence counsel in address:

> "You know that he meets with Michael on the 18th and 20th of September and on those days that Taylor had with him, Dale Handlen. He told the examiner that the reason that he was at those meetings was to speak with Taylor and he gave some details as to why that was correct. As he told the examiner, this was the first time, that is the 18th was the first time, he'd met Dale Handlen. And the answer that's complained of in count 1, that he didn't have a conversation with him or didn't speak to him. It's clear that there was some discussion amongst the three men but the purpose of his being there, as he told the examiner, was to speak to Taylor. Taylor just happened to have someone with him. That contact and you also know that there was the following contact on the 20th."

Is the conviction on count one unsafe and unsatisfactory?

[22] Count one relied on one answer given by the appellant. In order to prove the objective falsity of that answer, the respondent tendered into evidence, and relied upon in its closing address, photographs depicting the appellant, Handlen and Taylor in discussion at the Colmslie Hotel. The prosecutor specifically submitted to the jury, in his closing address, that the appellant's answer, the subject of count one, was demonstrably false because of the contents of those photographs.

[23] Whilst the respondent contends that that reference, properly understood, was a reference to the answer being understood by the jury to be a denial of any discussion about containers, and the unlikelihood that in a meeting that lasted for approximately 30 minutes, the very subject of the meeting would not have been discussed between Handlen and the appellant, that contention was not the basis upon which the respondent's case was placed before the jury.

[24] The respondent, both in its opening and in its closing submissions, specifically directed the jury's attention to the demonstrable falsehood in the appellant's answer by reason of the existence of photographs depicting him in conversation with Handlen. That submission invited the jury to conclude that the appellant's answer was objectively false because there was photographic evidence showing him speaking to Handlen. That submission was only consistent with a contention that the objective falsity of the appellant's answer was his denial of having had <u>any</u> conversation with Handlen. However, a consideration of the appellant's evidence before the examiner clearly indicates the appellant conceded there was discussion between Handlen and himself at the meeting at the Colmslie Hotel. The appellant contended that discussion was in relation to Canada.

[25] The likelihood that the jury convicted the appellant on the basis that it was satisfied that his answer, the subject of count one, was false by reason of the photograph depicting Handlen and himself in conversation was increased by the nature of the summing up given by the trial judge. Having regard to the relative simplicity of the evidence placed before the jury, the trial judge, quite properly, summed up by briefly summarising the submissions of the Crown and the defence. However, in doing so, the trial judge specifically referred to the prosecutor's submissions in the

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[4] Respondent's outline of submissions, para 18.

following terms: "How likely is it that in a 30 minute meeting between three people that you don't discuss anything with one of them?" The trial judge did not, when dealing with defence counsel's submissions, remind the jury of defence counsel's submissions to the effect that no reasonable person could come to the conclusion that the appellant was denying having any conversation with Dale Handlen when the answer in count one was considered in the context of the questions and answers before and after that answer. The failure to do so highlighted the Crown's contention that the answer was false as there had been some conversation between the appellant and Handlen.

[26] There is the real risk the jury convicted the appellant in respect of count one on the basis that the objective falsity in the appellant's answer was a denial that there was any conversation between Handlen and himself whereas he had, in evidence before the examiner, expressly conceded there was some conversation between Handlen and himself at the meeting held at the Colmslie Hotel.

[27] The jury's verdict in respect of count one is unreasonable and not supported by the evidence. The conviction on count one should be quashed. Having regard to the way count one was framed, and presented to the jury, I would direct a verdict of acquittal be entered on count one.

Appeal against conviction: Ground 2(a)

Appellant's submissions

[28] The appellant submits the telephone intercept evidence should have been excluded as inadmissible hearsay. The evidence was used, not merely to show that Handlen intended to meet the appellant at a particular time and place, but to prove what the content of the discussion was to be when that meeting was held on the basis that Handlen could have been expected to carry through that purpose. Whilst *Walton v The Queen*[5] supports a proposition that when a person's state of mind is relevant, evidence tending to prove that fact is admissible, the telephone intercept evidence could not be used to establish that Handlen did in fact talk about containers at the meeting. For the respondent to prove the falsity in the appellant's answer, the respondent had to prove what was actually said at the meeting.

Respondent's submissions

[29] The respondent submitted that the telephone intercept evidence was original, circumstantial evidence properly admitted at the trial. The critical fact in issue at trial was whether the shipping container was discussed at the meetings held on 18 and 20 September 2006. The respondent was entitled to rely upon circumstantial evidence to prove the subject of those discussions. The use of evidence to prove circumstantially the content of the appellant's discussion with Handlen was similar to the circumstantial use of the deceased's statements of intention in *R v Hytch*.[6]

Was the telephone intercept evidence admissible?

[30] The rule against hearsay does not prevent evidence being given as to words spoken by another when the speaking of those words is relevant to the facts in issue. The question of hearsay only arises where the words spoken are relied on

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5 (1989) 166 CLR 283.

6 (2000) 114 A Crim R 573.

"testimonially", that is, to establish the truth of some fact narrated by the words.[7] Even if there be an element of hearsay, that does not necessarily preclude evidence of that kind being treated as conduct from which an inference can be drawn rather than as an assertion which is put forward to prove the truth of the facts asserted.[8]

[31] In *Walton*, the majority judgment of Wilson, Dawson and Toohey JJ set out the principle of admissibility:[9]

> "Whilst it may be well established that statements will found an inference concerning a state of mind, there are relatively few reported cases on the subject and its limits have not been fully explored: see generally *Cross on Evidence*, 6th ed (Cross and Tapper, 1985), pp. 465-475. It may be true in some cases to say that statements made by a person indicating his state of mind involve no element of hearsay.
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> …
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> But in other cases a person's statements about his state of mind will only have probative value if they are truthful and accurate and to rely upon them is to rely to some extent upon the truth of any assertion or implied assertion contained in them. To that extent an element of hearsay may be said to be present. This case is an example. But the element of hearsay need not necessarily preclude evidence of that kind being treated as conduct from which an inference can be drawn rather than as an assertion which is put forward to prove the truth of the facts asserted. The distinction between the two approaches is one which can be fine, but it is one which in principle ought to be drawn."

[32] The distinction referred to in the majority judgment explains differing findings as to the admissibility of statements made by a person other than a witness for the purpose of founding an inference concerning that person's state of mind.[10] If the words spoken purely amount to an assertion put forward for the sole reason of proving the truth of what was said, the evidence is inadmissible. However, if those words are put forward otherwise to found a relevant inference, they are admissible.[11]

[33] That the rule against hearsay did not exclude evidence of out of court statements relied on for another purpose was accepted by Mason CJ in *Walton*:

> "The hearsay rule applies only to out-of-court statements tendered for the purpose of directly proving that the facts are as asserted in the statement. Generally speaking, evidence of out-of-court statements relied on for another purpose is not excluded by the rule. Thus, evidence of a relevant out-of-court statement is admissible evidence of the maker's knowledge or state of mind when he made the

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7 *Ratten v The Queen* [1972] AC 378 at 387.
8 *Walton* at 302.
9 *Walton* at 302.
10 See, for example, *R v Hytch* (2000) 114 A Crim R 573; *Bull v The Queen* (2000) 201 CLR 443; *Pinkstone v The Queen* [2003] WASCA 66.
11 *Walton* at 305.

> statement in a case where such knowledge or state of mind is a fact in issue or a fact relevant to a fact in issue."[12]

[34] Whilst evidence as to a person's statement of intention can have a hearsay aspect to it, such evidence is not excluded by that circumstance if the evidence is properly to be treated as conduct from which a relevant inference is to be drawn. The admissibility of such out of court statements, notwithstanding an element of hearsay, was accepted by this Court in *Hytch*.[13] There, statements made by the deceased that she intended to meet the appellant at or about the time she disappeared, and that at the meeting she intended to falsely tell him that she was pregnant in order to extort money from him, were admitted as circumstantial evidence of conduct on the part of the deceased from which her state of mind at the relevant time could be inferred.[14] It was accepted that the truth of the deceased's stated intention was relevant in order for the stated intention to have real probative value. However, this did not preclude its admissibility as evidence of facts from which inferences could be drawn.[15] The statements were not in themselves any evidence that the appellant met the deceased and discussed the false pregnancy as they were not admitted as evidence of their truth.[16]

[35] The appellant accepts that *Walton* is authority for the proposition that statements made by another may be admissible to prove a person's state of mind where that state of mind is relevant. However, the appellant contends that such evidence is inadmissible in the present case as the evidence was being used not merely to show that Handlen intended to meet the appellant at a particular time and place, but to prove the content of the discussion when that meeting was held. The appellant submits it was impermissible to seek to prove what Handlen intended to say at the meeting as constituting proof of his state of mind for the purposes of proving what he did in fact say at the meeting.

[36] Whether the evidence of the telephone intercept was properly admissible requires a consideration of the basis upon which that evidence was admitted at trial. In addressing the jury, the prosecutor summarised the use of the telephone intercept evidence as follows:[17]

> "Overall what these recorded conversations do is show that Mr Handlen was a determined man. He had a large quantity of drugs at stake sitting in a container not yet having taken delivery of it, at least up until the 18th of September, and he was interested in what was happening to it. He had, the Crown would suggest, a mission or agenda in relation to each of the meetings that he arranged to take place with Mr Perry to try to find out from [the appellant] if there was any reason he should be concerned with the steps that were being taken with respect to clearance of the container through Customs and any perceived delays in taking delivery of that container. The implication of that, the Crown says, is that he went to each of these meetings with a firm agenda to try to gather information of that kind. That was his purpose and indeed his sole

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12 *Walton* at 288.
13 (2000) 114 A Crim R 573.
14 *Hytch* at 574.
15 *Hytch* at 574.
16 *Hytch* at 574.
17 SRB 11/50 – 12/1.

> purpose. And from that, given the quantity of drugs that was at stake and the degree of interest that generated no doubt in Mr Handlen, it is virtually certain that there was discussion on that subject that Mr Handlen was so interested in at each of these meetings. That only makes commonsense. Well, that's really the purpose behind these recorded phone calls. I just want to spend a little time going through and pointing out to you perhaps some of the more significant features of them."

[37] That the Crown was using the telephone intercept evidence as a basis for the jury to draw inferences was accepted by defence counsel in his address:[18]

> "Could I move to the telephone intercepts, because it seems to me, although I may be wrong, that the prosecution case is based principally on those, somehow the idea that they show that Handlen has some anxiousness to meet with my client, some agenda that makes meeting with my client desirable. And that's said to come from these telephone intercepts. In my submission, they're simply too dangerous to rely upon in this trial, in making such an important determination. They're had between people by enlarge who are hiding their criminal activities behind a veneer of respectability and you've heard that – you know that clearly from common sense for a start, but also from the admissions made by Mr Reed in his evidence this morning." [*Sic*]

[38] A fact in issue was the falsity of the appellant's evidence before the examiner, and his knowledge of that falsity. Evidence of the telephone intercepts was led as circumstantial evidence relevant to that fact in issue. Whilst not containing any conversations involving the appellant, those intercepts contained telephone conversations between Handlen and others in relation to the proposed meetings, subsequently held at the hotels the subject of counts one and two, and the intended purpose of that meeting. Proof of Handlen's intention at that meeting was a relevant matter for the jury to consider, not for the purpose of establishing the truth of those intentions, but as a matter from which inferences were to be drawn in respect of a fact in issue. That evidence was properly admitted as part of the circumstantial evidence from which the jury may draw inferences as to whether the appellant's denial as to there having been any discussion about shipping containers at the relevant meetings between the appellant and Handlen was false.

[39] The telephone intercept evidence was properly admitted into evidence.

Appeal against conviction: Ground 2(b) - Directions to jury

Appellant's submissions

[40] Alternatively, the appellant contended that if the telephone intercept evidence was admissible, the convictions could not stand as the jury was not properly directed as to how it could use that evidence. The appellant submitted that it was necessary for the jury to be specifically instructed that the telephone intercept evidence was not evidence of what was in fact said at the meetings. The trial judge had this obligation regardless of the approach adopted by defence counsel.

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18 SRB 32/20

Respondent's submissions

[41] The respondent submitted the trial judge's directions made it plain the telephone intercept evidence was only relevant circumstantially, and there was no requirement for the trial judge to give further directions. The way in which the telephone intercept evidence was presented at trial, and the way in which defence counsel responded to it, meant there was no real risk the jury would use that evidence as proof of what was in fact said at the meeting between Handlen and the appellant. No redirections were sought at trial.

Was the jury properly directed?

[42] During the summing up, the trial judge specifically directed the jury that the case was "by and large" a circumstantial case.[19] His Honour directed the jury:

> "The sole use of the evidence of Handlen's activities and conversations is to properly contextualise, so it is said by the Crown, the two meetings that took place involving the accused being on the 18th and 20th of September 2006 and the evidence given by the accused at the examination that took place on the 30th of November 2006."[20]

[43] Later, his Honour directed, in respect of the evidence of the intercept phone calls:

> "Now, you have evidence before you in this trial of intercepted phone calls. As you have heard, those phone conversations did not involve the accused. They were placed before you merely to provide evidence which the Crown says would enable you to infer the reasons why Handlen wished to meet with the accused on the two occasions that they met, and the likelihood that Handlen and the accused would have discussed the issue of the container.
>
> Remember the directions I gave you about how you treat circumstantial evidence. Also remember that it is not evidence, that is these conversations that do not involve the accused, that the accused participated in. It is not that the accused can be inferred to have the intention arising from your consideration of those conversations. He was not a party to those conversations. You cannot infer an intention on his part, that is Mr Perry's part, arising from those conversations. All that's occurring with that evidence is that you are being placed into the picture, as it were, of what Handlen was doing, thinking and saying and placing into a context the meetings that subsequently occurred."[21]

[44] Whilst those directions did not specifically direct the jury that it would be impermissible for them to use those intercepts as direct evidence of the falsity of the appellant's answers, there was no requirement for the trial judge to give such a direction in the present case. Neither the prosecutor nor defence counsel had contended the evidence could be used in this way, and the trial judge directed the jury specifically as to the uses to which this evidence could be put in their

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19 AB 146/10.
20 AB 147/50 – AB 148/1.
21 AB 154/50 – AB 155/35.

deliberations. Unlike *Hytch*, the trial judge's direction did not give an impression the evidence could be used impermissibly. There was no suggestion this evidence could be used to prove what was said at the meeting.[22]

[45] The trial judge adequately directed the jury as to the use of the telephone intercept evidence. This ground also fails.

Leave to appeal against sentence

Appellant's submissions

[46] The appellant submitted the sentence imposed was manifestly excessive because he was sentenced on the basis of his potential involvement in a drug importation operation; when the Crown case at trial was that the appellant was not a co-conspirator and had no knowledge of, or involvement in, the drug importation. Whilst a period of five months actual imprisonment was in range for an individual sentence after trial with involvement in the crime the subject of the examination, the appellant's non-involvement with the primary criminal activity meant such a sentence was manifestly excessive. It was submitted the appropriate range in a case such as the appellant's was two to four months actual imprisonment.

Respondent's submissions

[47] The respondent submitted the appellant was not sentenced on the basis of his potential involvement in a drug importation operation, and the sentence imposed was within range and was not manifestly excessive.

Was the sentence manifestly excessive?

[48] In sentencing the appellant, the trial judge said:[23]

> "It was submitted on your behalf that I can distinguish your case from the others contained in the schedule that has been tendered in that the majority of the entries in the schedule show offenders who were criminal offenders in some substantive way and that it is said, places you in a somewhat different category.
>
> Contrary to that submission, the Crown Prosecutor has submitted that the reason that we do not know of the degree of your involvement with Handlen is because of the false answers that you gave to the examiner and that I should not draw any distinction between the two types of cases and that there is no reason for additional leniency for you for that reason.
>
> I accept Mr Rice's submission in that regard. It is not the case, Mr Perry, that you're being sentenced for drug related offences. But, nevertheless, the position is that the Australian Crime Commission was not able to obtain the true picture of the relationship, or at least of the information that passed between yourself and Mr Handlen at those meetings back in September 2006. The reason it was unable to obtain that true picture was because of your false answers. In those

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22 Cf *Hytch* at 582 [50].

23 AB 184/30 – 185/20.

> circumstances, there is, in my opinion, no reason to distinguish your case from that of the others that are contained in the schedule."

[49] It is clear from those paragraphs, that the trial judge specifically did not sentence the appellant on the basis he was a participant in the drug importation. The reference to the Australian Crime Commission not being able to obtain the true picture of the relationship, or the information that passed between the appellant and Handlen, merely stated the obvious, namely, that the refusal to give truthful evidence before the examiner prevented the Australian Crime Commission from being fully informed as to what had transpired between Handlen and the appellant.

[50] The prosecutor submitted the appropriate head sentence was 12 months imprisonment. That range was not challenged by the appellant's counsel at the sentence hearing. That range was plainly supported by the authorities. However, the sentence was imposed after the appellant had been convicted of two counts of giving false evidence. The appellant has succeeded in an appeal against his conviction in respect of one of those offences. In those circumstances, it is necessary to sentence the appellant afresh in respect of count two.

[51] The gravaman of the offence the subject of count two is the giving of false evidence on oath. The authorities recognise that deterrent penalties need to be imposed for offences of this type.[24] The authorities establish the appropriate head sentence is in the order of 12 months. Such a sentence is applicable whether there is one or more offences of giving false evidence.[25] A head sentence of 12 months imprisonment in respect of count two is appropriate.

[52] The appellant had no previous convictions. He has now served almost four months in custody. The period served to date is within the range of actual time to be served for offences of this nature. It is appropriate, in all the circumstances, that the appellant be released immediately on a good behaviour bond for a period of three years.

Orders

[53] I would order:

1. The appeal against conviction in respect of count 1 be allowed.
2. The conviction in respect of count 1 be set aside and a verdict of acquittal be entered.
3. The appeal against conviction in respect of count 2 be dismissed.
4. Leave to appeal against sentence be granted and allowed.
5. The appellant be sentenced, in respect of count 2, to 12 months imprisonment.
6. The appellant be released immediately under s 20(1)(b) of the *Crimes Act* 1914 (Cth), upon giving security by recognizance in the sum of $1,000 conditional that he be of good behaviour for a period of three years.

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[24] *R v Abell* [2007] QCA 448.

[25] *R v Abell* [2007] QCA 448; *R v Bazzo* (Unreported, District Court, Brisbane, 31 May 2010, Jones DCJ); *R v Cleave* (Unreported, District Court, Southport, 14 February 2010, Dick SC DCJ); *R v D'Alessandro* (Unreported, District Court of New South Wales, 30 January 2007, Andrew DCJ); *R v Hughes* (Unreported, District Court, Brisbane, 22 April 2004, Trafford-Walker SJDC); *R v Keating* (Unreported, DC Southport, 1 September 2009, Clare SC DCJ).