SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bradley* [2013] QCA 163
PARTIES:	**R** **v** **BRADLEY, Laith Andrew** (appellant)
FILE NO/S:	CA No 287 of 2012 SC No 91 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	24 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 June 2013
JUDGES:	Chief Justice, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That in relation to the convictions on counts 2, 8, 9, 10 and 11, the appeal be dismissed;** **2. That the appeal against conviction in relation to counts 1, 3, 4, 5 and 6 be upheld and the convictions set aside, and that there be retrial of the appellant on those counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL COUNTS – the appellant was charged with various offences, including trafficking and possession of drugs, possession of a weapon and two counts of attempting to pervert the course of justice – the appellant was convicted of some offences by a jury and acquitted in respect of others – whether the charges of attempting to pervert the course of justice and possession of a machine gun were improperly joined with the drugs charges and thereby constituted a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – a prosecution witness was declared hostile

after giving different oral evidence to an earlier statement she had purportedly made to police – the witness denied having made the earlier statement – the statement was not directly admitted into evidence, but parts of it were disclosed in the evidence of a police officer – the Judge directed the jury in accordance with s 101(1) of the *Evidence Act* 1977 (Qld) (the Act) but failed to direct the jury as to the weight to be attached to the purported statement, which was a requirement of s 102 of the Act – whether the Judge's failure to direct the jury on the weight to be attached to the purported statement in light of other evidence constituted a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – VERDICT – INCONSISTENT, AMBIGUOUS AND MEANINGLESS VERDICTS – OTHER OFFENCES – the jury acquitted the appellant of attempting to pervert the course of justice where it was alleged by a witness that the appellant had pressured him to claim possession of certain drugs – the jury rejected this evidence and acquitted the applicant of that count of attempting to pervert the course of justice – the Judge instructed the jury that they could convict the appellant in respect of the related drug possession charge only if satisfied that the drugs did not belong to the witness – whether the jury's acquittal of the appellant on the charge of attempting to pervert the course of justice was inconsistent with its conviction of the appellant on the related drug possession charge – whether the jury's doubt as to the witness's reliability in relation to particular counts should have rationally attended its consideration of the counts on which it convicted the appellant where the witness gave substantial evidence

Criminal Code 1899 (Qld), s 567(2)
Drugs Misuse Act 1986 (Qld), s 129(1)(c)
Evidence Act 1977 (Qld), s 101(1), s 102

Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, applied
R v Parkinson [1990] 1 Qd R 382, cited
R v Perera [1986] 2 Qd R 431, cited
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited

COUNSEL: M C Chowdhury with P Wilson for the appellant
P J McCarthy for the respondent

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

[1] **CHIEF JUSTICE:** The appellant was convicted of trafficking in methylamphetamine between 1 December 2008 and 15 August 2009 (count 1), drug possession on 4 December 2008, 5 February 2009 and 6 March 2009 (counts 2, 4, 5,

6, 8), attempting to pervert the course of justice between 3 December 2008 and 29 April 2009 (count 3), possession of drugs in more than the prescribed amount on 27 July 2009 (count 9), possession of tainted property on 27 July 2009 (count 10) and possession on 27 July 2009 of things used in drug crime (count 11). He was acquitted on a second count of attempting to pervert the course of justice between 4 February 2009 and 2 July 2009 (count 7), and possession of a machine gun on 27 July 2009 (count 12).

[2] The appellant appeals against the convictions on these grounds:

1. that the convictions are unsafe;
2. that the learned trial Judge's failure to warn the jury of danger in acting on evidence of a statement of Madonna Main, admitted under the *Evidence Act* 1977, resulted in a miscarriage of justice;
3. that the Judge's direction on that evidence resulted in a miscarriage of justice;
4. that the convictions are inconsistent with the two acquittals; and
5. that counts 3, 7 and 12 were improperly joined, resulting in a miscarriage of justice.

Joinder (ground 5)

[3] Under s 567(2) of the *Criminal Code*, charges may be joined if they constitute "a series of offences committed in the prosecution of a single purpose".

[4] The charges of attempting to pervert the course of justice involved, for count 3, an attempt to have Ms Main accept responsibility for drugs discovered by police at the appellant's house on 4 December 2008 (being the drugs involved in count 2); and for count 7, an attempt to have Mr Janezic accept responsibility for drugs discovered at the appellant's residence on 5 February 2009 (being the drugs involved in counts 4, 5 and 6). Count 12 concerns possession of the appellant's weapon at an address where drugs, money and drug associated items were located, founding counts 9, 10 and 11.

[5] The joinder was justified because the alleged offences were committed in the prosecution of a single purpose, namely trafficking in dangerous drugs. It was open to inference that the attempts to pervert the course of justice were motivated by a wish on the part of the appellant to avoid detection, and the possession of the weapon by a perceived need for protection, both regular features of trafficking operations. (In fact the appellant was in any case acquitted on count 12.)

Direction on Ms Main's statement (grounds 2 and 3)

[6] The principal witness for the prosecution was Neil Janezic, who gave evidence of purchasing methylamphetamine from the appellant, and running the appellant's trafficking business for a short time. Janezic gave evidence of visiting Townsville Prison in January 2009 to see Ms Main, who was a prisoner there, to ask her would she be prepared to take responsibility for ownership of 17 grams of methylamphetamine found in a police search, and that she refused.

[7] In her oral evidence, Ms Main gave a different account, to the effect that a stranger called Neil visited her on behalf of Laith (the appellant's first name) to seek her telephone number so that Laith could contact her. The prosecution relied on

a statement Ms Main allegedly gave to the police dated 17 February 2010, the content of which was consistent with Mr Janezic's evidence. Ms Main was declared hostile and cross-examined on that statement. She denied giving the statement, claiming it was fabricated and that she did not sign it. She challenged the Prosecutor to produce video or audio recording of the taking of the statement.

[8] The statement was not admitted into evidence, but these parts of it emerged through the evidence of a police officer:

> "MR COWEN: Paragraph 7 of the statement she said, 'I was surprised because I didn't even know who this guy was and at first I thought he might have been an undercover cop. I said for starters John and I haven't done any armed robbery. He then asked me what date he was arrested. I told him the 1st of December because I figured if he was a cop he could find that out anyway. He said something like, 'Oh well, that is no good anyway.' I said, 'No good for what?' And he said 'Laith got done with half an ounce of speed under his pillow and he was going to ask you to take the fall for it and he would pay you five grand.' Paragraph 8, 'I started laughing at him and said, 'You've got to be kidding I'm not doing time for a-half an ounce of speed.' I told him I was applying for bail after my breach of parole time was served. He told me that Laith was waiting outside in the car, that they'd put a hundred dollars into my trust account at the prison for me as a show of good faith.' And is that what Madonna Main told you and then signed the statement as the truth?-- That's correct."

[9] The learned Judge's direction to the jury was confined to a statement that if the jury were satisfied that the statement was Ms Main's, then "that is proof of the truth of those matters as fact", which is consistent with s 101(1) of the *Evidence Act*. His Honour did not, and was not asked to, direct the jury on issues going to the weight to be attributed to the statement (as required by s 102).

[10] Especially because the content of the statement was more damaging to the appellant than Ms Main's oral testimony, it was necessary for the Judge "to give very careful and very precise instructions" to the jury as to the weight to be attributed to the evidence (*Morris v The Queen* (1987) 163 CLR 454, 468-9). See also *R v Perera* [1986] 2 Qd R 431, 437-8 and *R v Parkinson* [1990] 1 Qd R 382, 384. The failure of Counsel to seek further direction is regrettable, but cannot sustain the conviction on count 3 in circumstances such as these.

[11] It would have been appropriate had His Honour informed the jury that they could rely on the statement only if satisfied that it was given and adopted by Ms Main, and that its content was true, and that in assessing those questions, they should take into account her evidence denying having given the statement, her claim that she was offered an inducement and threatened by a police officer on the morning she gave evidence at court, that the taking of the statement was not tape-recorded or videoed, and that she denied on oath having had the conversation which Janezic alleged.

[12] Mr McCarthy, for the respondent, pointed to this part of the summing-up:

> "Now, if you are satisfied that the passages that were read to the witness Main, in Court, were her statement then that is proof of the truth of those matters of fact. So if you are satisfied that those words

> that I have just read out were a statement that she did give to the police, then they are proof of truth of the facts.
>
> Now Mr Cowen, in his address, referred to some other evidence that pointed to the circumstance of that meeting. You will recall Main's explanation or account of what was asked – that this man came and asked for a phone number. It's for you to consider the likelihood of that occurrence having occurred in connection with your assessment of Main and Janezic and what you accept did happen."

[13] Mr McCarthy submitted the second of those paragraphs sufficiently dealt with the matter. In my view it did not address the relevant matters, especially following the previous direction that if the jury were satisfied Ms Main gave the statement, then (ipso facto) it was true.

[14] While the jury convicted the appellant on that count of attempting to pervert the course of justice, it acquitted him on the other such count (count 7) which depended in large measure on the evidence of Janezic alone. One may reasonably infer that the jury relied against the appellant, in relation to count 3, on Ms Main's statement, while doubting Janezic's credibility in relation to count 7. The jury also inferentially doubted Janezic's credibility in relation to count 12, the possession of the weapon, which depended on his evidence. The jury acquitted the appellant on that count.

Inconsistency between acquittals and convictions

[15] Janezic gave substantial evidence on the charge of trafficking. He was the beneficiary of an indemnity from prosecution, and the learned Judge properly directed the jury as to the significance of that. Police officers gave evidence of locating drugs at the appellant's premises, and a forensic accountant gave evidence of his analysis of the appellant's financial affairs. But a substantial body of evidence in relation to the trafficking count rested, as I have said, in the evidence of Janezic. The question arising is whether the doubt as to Janezic's credibility in relation to counts 7 and 12 should rationally have attended the jury's consideration of the counts on which they convicted (cf. *R v Smillie* (2002) 134 A Crim R 100).

[16] Counsel for the respondent referred to evidence other than Janezic's in support of the conviction on the trafficking count: as to the financial analysis, as to mobile phone drug related messages, as to the locating of drugs and a "tick list" at the appellant's residence and drug related items, and as to the locating of cash on the appellant's person. That was potentially powerful evidence of trafficking.

[17] But the risk remains that the jury may have had regard to the content of Ms Main's written statement in convicting on the trafficking count. The jury was not directed to ignore the statement when considering that count. Even though the prosecution approached that count by reliance on the evidence of Janezic and the other circumstances to which I have referred, there is risk the jury may have relied on Ms Main's account of the appellant's pressuring her to accept responsibility for drugs found on his premises, as being supportive of a trafficking operation. I note the respondent now relies on such circumstances as incidents of trafficking in support of the joinder. Especially where the jury doubted Janezic's credit on other counts, the prospect of relying on the content of the statement arose in relation to count 1 in addition to count 3.

[18] Subject to the possible application of the proviso, to which I will come, the conviction on count 1 should therefore be set aside.

[19] Some of the convictions should be approached differently.

[20] For the possession charge in count 2, for example, where the drugs were found at the appellant's premises on 4 December 2008, the prosecution relied on the evidentiary deeming provision in s 129(1)(c) of the *Drugs Misuse Act* 1986, which the appellant did not seek to rebut.

[21] In relation to other counts, count 8 (possession on 6 March 2009), count 9 (possession on 27 July 2009), count 10 (possession of tainted property on 27 July 2009), and count 11 (possession of things on 27 July 2009), the charges were established through the evidence of police officers (other than the officer involved in taking the statement from Ms Main).

[22] The convictions on those counts were amply supported by evidence which the other successful grounds of appeal would not throw into question. The convictions on counts 2, 8, 9, 10 and 11 should therefore be sustained.

[23] The counts of possession on 5 February 2009 (counts 4, 5 and 6) warrant special consideration. The prosecution case was that the appellant, as occupier of the premises where the drugs were located, was, again, subject to the evidentiary deeming provision which he did not rebut. There is however a complicating feature not present in count 2. The jury were aware Janezic had pleaded guilty to possession of those drugs. He said he had taken responsibility at the request of the appellant, the allegation which founded count 7, on which the jury acquitted. That left open the possibility that Janezic was in truth the owner of the drugs, or that they were jointly owned. The learned Judge directed that the jury could convict on those counts, in light of Janezic's pleas, only if satisfied "that the drugs did not belong to Janezic". In these circumstances, the convictions on these counts should be set aside.

[24] Reverting to the convictions which I otherwise believe should be set aside, being those on counts 1, 3, 4, 5 and 6 I acknowledge the respondent's reliance on the proviso (s 668E(1A)). It suffices to say that I am not satisfied that had the jury been comprehensively instructed in relation to Ms Main's statement, they would inevitably still have convicted on those counts. It is conceivable the jury would have considered it unsafe to rely on that statement, and that in the face of Ms Main's oral evidence, their doubt as to Janezic's credibility would have been reinforced.

Orders

[25] I would order:

1. that in relation to the convictions on counts 2, 8, 9, 10 and 11, the appeal be dismissed;

2. that the appeal against conviction in relation to counts 1, 3, 4, 5 and 6 be upheld and the convictions set aside, and that there be retrial of the appellant on those counts.

[26] **MUIR JA**: I agree with the reasons of the Chief Justice and with the orders he proposes.

[27] **FRASER JA**: I agree with the reasons for judgment of the Chief Justice and the orders proposed by his Honour.