SUPREME COURT OF QUEENSLAND

CITATION:	*R v Martinez* [2015] QCA 169
PARTIES:	**R** **v** **MARTINEZ, Carlos Javier Mediero** (appellant)
FILE NO/S:	CA No 57 of 2015 DC No 111 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – Unreported, 5 March 2015
DELIVERED ON:	18 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2015
JUDGES:	Gotterson and Morrison JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Conviction set aside.** **3. The appellant be retried on the count in the indictment presented on 28 March 2013.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – IRREGULARITY AS REGARDS PROCEDURE – MATTERS RELATING TO JURIES – where the appellant was convicted of an offence against s 328A(1) of the *Criminal Code* (Qld) in circumstances to which s 328A(4) thereof applied, in that he dangerously operated a vehicle, namely a truck, and caused the death of another person – where the appellant was sentenced to two years' imprisonment, a parole release date at 5 March 2016 was set and the appellant was disqualified from holding or obtaining a driver's licence for a period of three years – where eyewitnesses stated that the appellant's vehicle veered to the left and, in what was described as an overcorrection, veered suddenly to the right and into the path of an oncoming sedan and a collision ensued – where the driver of the sedan died as a result of injuries sustained in the collision – where there was no evidence of excessive speed on the appellant's part or that his truck was overloaded – where there was evidence that the truck did not have any mechanical defects which could have contributed to the incident – where the appellant had

a zero blood alcohol level and he was not using a mobile phone at the time of the collision – where there was evidence that it had rained in the vicinity that morning – where when the vehicles collided, there was, at most, a light drizzle – where the appellant gave evidence at his trial – where the appellant explained that he was hit by a considerably strong gust of wind that forced the rear wheels on the passenger side of the truck off the bitumen – where the appellant tried to ease the truck back fully on to the bitumen surface – where the truck did not respond as he had intended and the truck was drawn back towards the right in a manner that he could not control and continued to travel to the right and into the path of oncoming traffic in the southbound lane – where the appellant's evidence in this regard was consistent with an explanation that he had given to a solicitor one year and one month after the incident, however, the appellant had not made mention of wind gusts when he was interviewed by police at the site about two hours after the collision – where the single ground of appeal is that a miscarriage of justice was occasioned by a material irregularity in the appellant's trial – where it is common ground that an irregularity occurred in the appellant's trial as towards the conclusion of the summing up, the learned trial judge arranged for a copy of the transcript of the trial to be given to the members of the jury and contrary to his Honour's expectation, the transcript given to the jury contained at least eight pages of transcript in which statements made by his Honour or counsel in the absence of the jury were transcribed – where these statements were made before addresses in discussions concerning the directions that his Honour might give during his summing up, and later after addresses concerning something that defence counsel had said during his address – whether the identified irregularity constituted a miscarriage of justice

Criminal Code (Qld), s 328A(1), s 328A(4), s 668E(1), s 668E(1A)

Folbigg v R [2007] NSWCCA 371, cited
R v Brown [2012] QCA 155, considered
R v DBG [2013] QCA 370, cited
R v Marsland, unreported, Court of Criminal Appeal, NSW, No 60263 of 1990, 17 July 1991, considered
R v Rudkowsky, unreported, Court of Criminal Appeal, NSW, No 60646 of 1992, 15 December 1992, considered

COUNSEL: R A East for the appellant
S Farnden for the respondent

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

[1] **GOTTERSON JA:** On 5 March 2015 and after a trial over four days in the District Court at Cairns, the appellant, Carlos Javier Mediero Martinez, was convicted of an

offence against s 328A(1) of the *Criminal Code* (Qld) in circumstances to which s 328A(4) thereof applied, in that on 20 October 2011 at Oak Beach, he dangerously operated a vehicle on the Captain Cook Highway and caused the death of Simon John Wilkinson.

[2] At a hearing later that day, the appellant was sentenced to two years' imprisonment. A parole release date at 5 March 2016 was set. The appellant was disqualified from holding or obtaining a driver's licence for a period of three years from the date of sentence.

[3] On 2 April 2015, the appellant filed a notice of appeal against conviction. At the hearing of the appeal on 3 August 2015, leave was granted for the filing of an amended notice of appeal.

Circumstances of the alleged offending

[4] The appellant was employed as a driver by Northern Freight Lines. For about 12 months he had made a return trip from Cairns to Port Douglas daily, five days a week. He drove a medium rigid Isuzu truck to transport freight. The truck had a capacity for a load of 11 to 12 tonnes. It had dual tyres on each side of the rear axle. The truck was fitted with air brakes. Freight loaded on the truck was secured with tarpaulins on either side.

[5] On 20 October 2011, the appellant loaded the truck in Cairns and set out northwards on the Captain Cook Highway for Port Douglas. A little before midday, the appellant was in the vicinity of Oak Beach. At that point, the highway was bitumen-surfaced, two lanes wide, and level. There was substantial tropical vegetation on either side of the roadway.

[6] The highway crossed a culvert which was concrete capped at road level. The base of the culvert and of the respective inflow and outflow channels was at least one metre below road level. Photographic exhibits indicate that the culvert was not clearly obvious to oncoming traffic and its length was little more than the width of the two lanes for travel. There were white marker posts on each side of the culvert in each direction of travel, four in all.

[7] In evidence, eyewitnesses stated that the appellant's vehicle veered to the left and, in what was described as an overcorrection, veered suddenly to the right and into the path of an oncoming Toyota sedan. A collision ensued. Mr Simon Wilkinson was travelling in the sedan. He died as a result of injuries sustained in the collision.

[8] After the collision, tyre marks were observed in the soil and stone shoulder on the western side of the highway. The marks were from a set of dual tyres on the passenger side of a vehicle. They tracked the edge of the bitumen surface. They were about 36 metres long and continued to a point where soil-coloured markings of tyre treads on the concrete capping of the culvert indicated a return to the sealed surface. Further tyre markings displayed a yawing of the truck in a clockwise direction and skidding to the north. These tyre markings were consistent with the descriptions given by the eyewitnesses of the movement of the appellant's truck.

[9] There was no evidence of excessive speed on the appellant's part or that his truck was overloaded. There was evidence that the truck did not have any mechanical defects which could have contributed to the incident. The appellant had a zero blood alcohol level and he was not using a mobile phone at the time of the collision. There was evidence that it had rained in the vicinity that morning. When the vehicles collided, there was, at most, a light drizzle.

The appellant's explanation

[10] The appellant gave evidence at his trial. In the course of his evidence-in-chief, he ventured an explanation for what had occurred. He said that he had overtaken a minibus and then a gust of wind pushed his truck to the left. He eased the truck back towards the middle of the northbound lane.

[11] A short time later, he was hit by a second gust of wind considerably stronger than the first. It forced the rear wheels on the passenger side of the truck off the bitumen. He tried to ease the truck back fully on to the bitumen surface. It did not respond as he had intended. The truck was drawn back towards the right in a manner that he could not control. It continued to travel to the right and into the path of oncoming traffic in the southbound lane.

[12] The appellant's evidence in this regard was consistent with an explanation that he had given to a solicitor on 20 November 2012, one year and one month after the incident.[1] However, the appellant had not made mention of wind gusts when he was interviewed by Constable Matthew Gray at the site about two hours after the collision.[2]

[13] The Crown called as eyewitnesses the driver and passengers in the minibus, occupants of another vehicle travelling in the same direction and a truck driver, Mr Michael Richmond, who knew the appellant and was travelling just ahead of him on the highway. Each of these witnesses was asked whether they had noticed the presence of wind in the vicinity of the collision as they were driving through it. None of them had. The appellant did not tell Mr Richmond about strong wind gusts when they spoke shortly after the collision. An expert witness, Mr Robert Woodham, studied meteorological recordings made at Low Isles and Cairns airport. Having regard to them and allowing for the vegetation at the sides of the highway, he estimated that the wind speed at the point where the truck and sedan collided would have been negligible.

The ground of appeal

[14] There is a single ground of appeal. It is that a miscarriage of justice was occasioned by a material irregularity in the appellant's trial.

The irregularity

[15] It is common ground that an irregularity occurred in the appellant's trial. Towards the conclusion of the summing up, the learned trial judge arranged for a copy of the transcript of the trial to be given to the members of the jury. He told the jury that:

> "… there are pages excluded. They're simply the pages when you weren't here when we were having discussions about matters to do with the law so – and I will mark that as exhibit F for identification".[3]

[16] Contrary to his Honour's expectation, the exhibit "F"[4] given to the jury did, in fact, contain at least eight pages of transcript in which statements made by him or counsel in the absence of the jury were transcribed. These statements were made before addresses in discussions concerning the directions that his Honour might give during his summing up, and later after addresses concerning something that defence counsel had said during his address.

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1 Exhibit 7; AB257-258.

2 Exhibit 5 (disc); Exhibit MFI"A" (Transcript), AB260-264.

3 AB205; Tr p9 143 – AB206; Tr p10 l2. See also at AB190; Tr4-53 ll30-33 where defence counsel expressed no objection to the jury being given a redacted transcript which excluded the sections where the jury was not present.

4 Exhibit MFI "F"; AB267-437.

The materiality of the irregularity

[17] The appellant submits that the irregularity was material because the content of some of the statements could have been interpreted by the jury, or by one or some of them, in a way that was highly prejudicial to him. Reliance was placed not only upon statements taken individually, but also upon their cumulative effect. The respondent submits that, to the contrary, the statements were not prejudicial to the appellant.

[18] Resolution of this difference as to prejudicial effect requires consideration of each of the statements on which the appellant relies.

[19] **Statement 1:** The prosecutor observed that the only evidence of wind gusts had come from the appellant. The learned trial judge responded saying:

> "I'm not going to say anything about the wind".[5]

The prosecutor then invited his Honour to consider making an *Edwards* direction in regard to the appellant's evidence about wind gusts or a *Zoneff* direction in regard to it and other issues. He declined to do so.

[20] The appellant concedes that the word "lies" was not used and that the jury would not have understood what references to an *Edwards* direction and a *Zoneff* direction might have implied. The appellant's concern is that his Honour's statement might have been taken by jury members to imply that he thought that there was nothing in the appellant's explanation which was worth talking about.

[21] **Statement 2:** His Honour followed his refusal to give an *Edwards* direction or a *Zoneff* direction with the following observation:

> "No. I mean, it's – I was going to say I don't know all the fuss about it. It's a traditional classical dangerous operation case."[6]

His Honour then said that he would give the jury a written direction extracted from what he described as the "convoluted" Benchbook direction on dangerous operation of a motor vehicle.

[22] The appellant accepts that both his Honour and counsel would have understood him to mean that the case was classical in the sense that it was for the jury to decide whether the appellant's manner of driving his truck was dangerous or not, and lacked any need for an *Edwards* or a *Zoneff* direction. Here, the appellant's concern is that a lay juror might have understood his Honour to mean that, notwithstanding the written direction, the appellant's driving was a classic example of the dangerous operation of a motor vehicle.

[23] **Statement 3:** A little later, a pagination error in the transcript had been detected. The first page of the transcript which the jury were to receive, which was the first page of the transcript of the trial in which they participated, had typed on it: "continued from 18.8.14 DAY 2".[7] The prosecutor ventured an explanation for the error in these terms: "Unless they were referring to the matter before Judge Harrison".[8]

[24] The prosecutor was speaking of the transcibers of an earlier trial of the appellant on this count in August 2014 which concluded with a hung jury. The learned trial judge

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5 AB430; Tr4-52 ll35-36.
6 AB431; Tr4-53 ll10-11.
7 AB9; Tr2-1.
8 AB432; Tr4-54 l3.

said that he would tell the jury that the reference to 18 August 2014 was "just a mistake". In fact, the copy of the transcript which the jury did in fact receive, excluded the first page. Understandably, his Honour did not refer to a mistake as he had proposed.

[25] The appellant's concern is that jury might have inferred from what the prosecutor said and the particulars of the error set out in the page of transcript that they did receive, that the appellant was being retried, or, that he had been before Judge Harrison in August 2014 for other offending. No warning was given to the jury to counteract either inference. Neither the learned trial judge nor counsel realised that the jury had been given a transcript of what had been said between them with regard to the matter before Judge Harrison. That being so, the giving of warnings of this kind did not occur to them.

[26] **Statement 4:** After the closing addresses by defence counsel and the prosecutor, and in the absence of the jury, the learned trial judge asked defence counsel whether in his address, he had told the jury that his client "told Constable Gray about the wind".[9] Defence counsel thought that he had not said that. The transcript received by the jury records him then saying: "I think I skirted around Constable Gray [indistinct]".[10]

[27] Here, the appellant's concern is that this statement might have been interpreted by the jury as a concession by defence counsel that Constable Gray's evidence was bad for his client and that he had deliberately avoided engagement with the police officer on what had become a very significant issue in the trial.

[28] **Discussion***:* It is true, as the respondent's submissions suggest, that, kept from the jury, each of these statements might well have been regarded by experienced trial lawyers as both explicable and innocuous. But that consideration has little, if any, relevance when the statements are made known to the jury. The issue then is whether they might have adversely influenced the jury against the appellant. That squarely raises for consideration how they may have been interpreted by the jury and what the jury may have inferred from them.

[29] In my view, each of these statements was capable of being understood in the way that has caused the appellant concern. Each was capable of prejudicing the jury against him. The degree of prejudice varied. In some instances, the potential extent of prejudice may have been modified by context. For example, his Honour's statement that he would not talk about the wind was to some extent clarified by his later statement that he was "really going to stay right out of the factual arena".[11]

[30] To my mind, however, each of the description of the matter as a "traditional classical dangerous operation case" and defence counsel's statement that he "skirted around" Constable Gray was capable of prejudicing the appellant in a significant way. The degree of prejudice capable of being generated by both of them together might fairly be described as seriously significant.

Whether there was a miscarriage of justice

[31] The question posed by this appeal is whether the identified irregularity constituted a miscarriage of justice. In *R v Brown*[12] in this Court, the following statement of principle was proposed:[13]

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9 AB434; Tr4-56 ll42-45. His Honour was correct. Defence counsel had said that: Tr17 l34.
10 AB435; Tr4-57 l35.
11 AB436; Tr4-58 l26.
12 [2012] QCA 155.
13 At [24] per Gotterson JA (Holmes JA and Philippides J agreeing).

> "What characterises an irregularity as material in this context is impact upon the trial process of such an order that it results in the accused being deprived of a fair trial. In *Folbigg v R*[14] McClellan CJ at CL (with whom Simpson and Bell JJ agreed) explained that determination of whether or not a particular irregularity is material or not '… requires consideration of the irregularity; the relevance of the irregularity to the issues before the jury; whether the material arising from the irregularity was prejudicial; and the extent of the prejudice'."[15]

[32] In the same case, this Court accepted that, for an irregularity discovered after a verdict, the test for determining whether it resulted in a miscarriage of justice is that stated by Gleeson CJ in *R v Marsland*,[16] and reiterated by his Honour in *R v Rudkowsky*,[17] namely:

> " … the question we must ask ourselves is whether we can be satisfied that the irregularity has not affected the verdicts, and that the jury would have returned the same verdicts if the irregularity had not occurred."[18]

[33] Both *Brown* and *R v DBG* concerned extraneous material discovered in a jury room after a trial. In the former case, the material was a computer printout which contained an answer in layman's terms to the question what is the difference between a summary and an indictable offence. In the latter case, it was a government publication titled "Stopping abuse and violence". In each of those cases, a conviction appeal based on the material was unsuccessful. There is a marked difference between those cases and the present one in that, unlike the generalised and non-case specific information in the material in those cases, here, the statements in question related to the very issues the jury were to determine.

[34] I have already expressed my view that the statements here have the capacity to prejudice significantly the appellant. Whether actual prejudice occurred is necessarily a matter for speculation. It is unknown whether any juror read the pages of transcript given to the jury in error. If they were read, it is not known by how many jurors they were read. Nor is it known what each juror who read them understood them to mean or what inferences, if any, the juror drew from them.

[35] In this case, the jury deliberated for just over four hours. The deliberations extended over the luncheon adjournment. It cannot safely be assumed that with this length of time, the pages were not read by a juror or jurors or that those who read them were not adversely prejudiced against the appellant by the statements in question.

[36] In terms of the question enunciated by Gleeson CJ, the respondent has submitted that this is a case in which it is clear that the jury would have returned a guilty verdict even if the irregularity had not occurred. This submission is substantially based upon the strength of the Crown case rebutting the appellant's explanation which attributed the movements of his truck immediately prior to the collision to a strong wind gust and his response to it.

[37] It may be accepted that the Crown called an impressive number of lay witnesses and an expert whose evidence together presented a strong case against the appellant's explanation. Had the only question for the jury been whether they accepted his

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14 [2007] NSWCCA 371.
15 *Folbigg* at [18] (footnotes omitted).
16 Unreported, Court of Criminal Appeal, NSW, No 60263 of 1990, 17 July 1991.
17 Unreported, Court of Criminal Appeal, NSW, No 60646 of 1992, 15 December 1992.
18 Adopted and applied in *R v DBG* [2013] QCA 370 at [27].

explanation or not, then it is highly probable that they would have rejected it in reliance upon the prosecution evidence.

[38] However, that was not the sole question for the jury. The learned trial judge had directed them that if they had a reasonable doubt about whether it was a wind gust that caused the veering to the left, whether it was sudden or slow, they must acquit. Their verdict indicates that they did not have such a doubt. His Honour also told them, as clearly was the case, that even if they rejected the appellant's explanation, it did not follow that they were to convict. They were then to consider the evidence which they did accept and to decide, according to what had been proved, whether the appellant had driven dangerously or not.[19]

[39] I accept the appellant's description of the Crown case, aside from the wind gust issue, as a relatively finely balanced one. A crucial question for the jury was whether allowing the truck's wheels to leave the bitumen and reacting as the appellant apparently did, was dangerous driving objectively assessed or driving without due care and attention, falling short of dangerous driving.

[40] The jury did not reach their verdict in haste. It is not at all improbable that one or more jurors may have been troubled by this question, unsure how to answer it. In the end, such a juror or jurors may have arrived at an answer unfavourable to the appellant, conscious or not of the influence of prejudice arising from the statements on which this appeal is based.

[41] In these circumstances, I cannot be satisfied that had the irregularity not occurred, the jury would have convicted the appellant. I conclude, therefore, that this irregularity has caused a miscarriage of justice.

Disposition

[42] A miscarriage of justice having been established, s 668E(1) of the *Criminal Code* requires that the appeal be allowed and the conviction set aside.[20] There must be an order for a retrial.

Orders

[43] I would propose the following orders:

1. Appeal allowed.
2. Conviction set aside.
3. The appellant be retried on the count in the indictment presented on 28 March 2013.

[44] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes.

[45] **McMEEKIN J:** I have had the advantage of reading the reasons of Gotterson JA. I agree with those reasons and the orders that his Honour proposes.

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19 AB200; Tr4 ll15-30.

20 The respondent did not seek to rely upon the proviso in s 668E(1A).