SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chilnicean* [2016] QCA 26
PARTIES:	**R** **v** **CHILNICEAN, Ilie** (appellant)
FILE NO/S:	CA No 41 of 2015 SC No 426 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 13 March 2015
DELIVERED ON:	16 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2015
JUDGES:	Fraser and Gotterson JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was found guilty of unlawfully trafficking in the dangerous drug heroin, an offence against s 5(a) of the *Drugs Misuse Act* 1986 (Qld), in the Supreme Court at Brisbane on 13 March 2015 – where, at the commencement of the trial, the appellant pleaded guilty to unlawful possession of the dangerous drug methylamphetamine – where the appellant filed a notice of appeal against conviction and an application for leave to appeal against sentence on 18 March 2015, subsequently abandoning the application for leave to appeal against sentence on 23 October 2015 – where the appellant alleged the learned trial judge erred by admitting evidence of transcripts of conversations captured by a listening device thereby resulting in a miscarriage of justice – where the appellant submitted the learned trial judge erred by admitting evidence of the appellant's interest in a media article about a drug dealer – where the appellant alleged the guilty verdict of the jury was unreasonable and cannot be supported by the evidence – whether the transcripts of the conversations were inadmissible and therefor a miscarriage of justice ensued – whether the learned trial judge was obliged to exclude the

	evidence of the appellant's interest in a media article about a drug dealer – whether an inference beyond reasonable doubt can be drawn that the appellant was a trafficker in heroin
	Drugs Misuse Act 1986 (Qld), s 5(a)
	R v BCU [2014] QCA 292, cited *R v Gallagher* [1998] 2 VR 671, cited
COUNSEL:	S C Holt QC for the appellant V A Loury for the respondent
SOLICITORS:	Fisher Dore Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA**: I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA**: At a trial over seven days in the Supreme Court in Brisbane, the appellant, Ilie Chilnicean, was found guilty on 13 March 2015 of an offence against s 5(a) of the *Drugs Misuse Act* 1986 (Qld) in that between 23 September 2011 and 26 August 2012 at Parkinson or elsewhere in Queensland, he carried on the business of unlawfully trafficking in the dangerous drug, heroin, (Count 1). At the commencement of the trial, the appellant pleaded guilty to a second count on the indictment of unlawful possession of the dangerous drug, methylamphetamine.

[3] On 16 March 2015, the appellant was sentenced on Count 1 to 10 years' imprisonment. A serious violent offence declaration was made in respect of the conviction on that count. A sentence of nine months' imprisonment was imposed on Count 2. A period of two days was declared as time served under the sentences.

[4] The appellant filed a notice of appeal against conviction and an application for leave to appeal against sentence on 18 March 2015.[1] At the hearing of the appeal on 23 October 2015, the application for leave to appeal against sentence was abandoned.[2]

Circumstances of the alleged offending

[5] The prosecution case against the appellant on Count 1 alleged that between the mentioned dates, he sold heroin, both on payment and promise of payment, to a small group of male customers who attended at, or near, his home in Parkinson. The evidence against the appellant consisted primarily of recorded conversations between him and his alleged customers, Popovici, Arjoc, Baffi, Sas and Mocanu; and between the appellant and his supplier, Baias.

[6] The conversations were accessed by interception of telephone calls made on the appellant's mobile phone and by listening devices installed on the patio of his residence and inside Popovici's car. Frequently, the conversations, or significant parts of them, were conducted in Romanian, a language common to all of the participants.

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1 AB571-3.
2 Appeal Transcript 1-2 ll37-44.

[7] This evidence was supplemented by extracts from video recordings made during the course of police surveillance. Those recordings were made by means of two external cameras which had been located across the street from the appellant's residence. The extracts tendered were contemporaneous with meetings during which recorded conversations took place, and other events which featured in the evidence, occurred.

[8] The recorded conversations and surveillance video footage were alleged by the prosecution to evidence conduct on the part of the appellant in discussing availability, pricing, payment, and delivery arrangements for heroin with his customers. During the conversations, terms and expressions were used which, on the prosecution evidence, have coded meanings in the drug culture. The conversations were also alleged to reveal that a number of customers owed money to the appellant for heroin supplied to them on credit by him.

[9] The use of code, as exemplified in the following communications, was also alleged. On 19 April 2012, Baias asked the appellant to prepare one "rum, brown, home-made" which he wanted to give to someone to taste. On the following day, the appellant spoke to Baias about the rum saying that from "half a bottle they can get drunk 10 times, each". In cross-examination, the appellant accepted that "brown" is a common term for heroin.[3]

[10] Something "brown" was discussed again on 26 May 2012, Baias saying "the man you give it untouched to, you give him half of this, let him try it, to make a compare between that brown and this one", and adding "this one is untouched and that is how we get it and that it is how we give it. I [don't] add a gram to it". In a later communication that morning, the appellant said that it would cost him "21" and that he would make "6000" and Baias agreed that it would come out at "2000" a piece. In cross-examination, the appellant conceded that this conversation might have been about heroin.[4]

[11] On 14 July 2012, the appellant asked Baias how much he had to give him and the latter responded "six". The appellant said that he had "five" in 100 dollar notes.

[12] The prosecution case also included evidence from police witnesses who conducted targeted physical interceptions and searches of the appellant and some of his alleged customers. The appellant was intercepted by police on 9 October 2011 outside his residence. He had on his person, a clear canister with a black lid which contained 13.7 grams of a crystalline substance,[5] later identified as containing 1.849 grams of pure methylamphetamine.[6] This substance formed the basis of Count 2 to which the appellant pleaded guilty. Surveillance evidence established that a Mark Jacobs, who wore his hair in a ponytail,[7] had supplied the crystalline substance to the appellant that day and that Baias had organised the supply transaction.

[13] On 5 August 2012, Popovici was intercepted by police after he was observed attending at the appellant's residence. Popovici was known to police as a suspected heroin dealer, he having been convicted of trafficking in the drug in the Supreme Court of Queensland in 1998.[8] A search of his vehicle discovered a freezer bag in the

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3 AB216; Tr5-15 ll12-13.
4 AB217; Tr5-15 ll30-36.
5 AB70; Tr2-10 l25 – AB71; Tr2-11 l5.
6 AB527.
7 There are numerous references to the "pony tail" throughout the recorded conversations. It was alleged that these were references to Mark Jacobs.
8 AB104; Tr3-17 ll15-21.

boot with a golf-sized package of white powder in it. A second and similar package was found in the cabin of the vehicle. Upon analysis, the powder in the two packages was found to contain 15.135 grams of powder of which 3.337 grams were heroin.[9]

[14] Evidence led at the trial disclosed a pattern of behaviour in the 11 month period of alleged trafficking in which Popovici and the appellant would speak by telephone and in which the former would indicate that he would call at the latter's residence at a nominated time "to take (the appellant) to work". The appellant was, in fact, in receipt of a disability support pension between January 2009 and December 2012. The prosecution case was that the quoted expression used was a code.

[15] The appellant was observed on video footage getting into Popovici's car at the arranged times. They would drive away together, the appellant returning to his residence on foot about five minutes later. The interception to which I have referred occurred after the last of these filmed meetings. On an earlier occasion, the police who had followed Popovici's car, observed the appellant alight from it and then walk along the street with his hand down the inside front of his tracksuit pants.[10]

[16] The prosecution case was a circumstantial one. Reliance was placed upon the persuasive force of the prosecution evidence in its entirety.

The respondent's version of events

[17] In summary, the defence case was that the appellant was a user of heroin, but not a trafficker in it. He testified to the effect that he was a regular user of heroin during the relevant period on account of his deteriorating health. He had become depressed because a diagnosed degenerative eye disease had deprived him of the capacity to work and to drive a car. He would take heroin at a rate of between one gram per day and one gram per week, depending upon what he could afford.[11]

[18] The appellant described Popovici as a friend who gave him heroin to smoke, but never for money. He would smoke small amounts of the drug in Popovici's car in order to avoid detection by his wife. The code was a mask for this purpose. He said that he did give Popovici heroin "at one stage" when the latter expressed a craving for it.[12]

[19] According to the appellant, Arjok was a person from whom he purchased heroin sometimes and whom he attempted to engage to carry out work on his garden. The appellant accepted that he would purchase heroin from Baias to whom, he said, he was significantly indebted. He gave an account of Baias suggesting to him that he sell heroin. He said he tried to deceive Biais into thinking that he would repay him that way but that his real intention was to persuade Baias to supply him with more heroin.[13]

[20] In respect of Sas, the appellant's evidence was that he had lent him $2,000 towards travel to Romania. Sas was a member of the local Romanian Church.[14] His godfather is Mocanu. The appellant maintained that his conversations with Mocanu were about repayment of Sas' debt.[15]

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9 AB521 – 2.
10 AB78; Tr2-11 ll1-10.
11 AB113; Tr3-26 ll44-46.
12 AB121; Tr3-34 ll20-24.
13 AB134; Tr3-47 l 29 – AB135; Tr3-48 l28.
14 AB125; Tr3-38 ll20-28.
15 AB140; Tr3-53 ll9-21.

[21] To illustrate the circumstantial nature of the prosecution case, counsel for the appellant drew attention to the absence of direct evidence of the appellant's participation in any heroin transaction, of heroin having been found on the appellant's person, of cash or tick lists in his possession, and of unexplained wealth on his part.[16]

The grounds of appeal

[22] Leave was granted to the appellant to amend his grounds of appeal.[17] The grounds on which the appellant relied at the hearing are as follows:

1. The learned trial judge erred by admitting evidence of transcripts of conversations captured by a listening device thereby resulting in a miscarriage of justice.

2. The learned trial judge erred by admitting evidence of the appellant's interest in a media article about a drug dealer.

3. The verdict of the jury on Count 1 was unreasonable and cannot be supported by the evidence.

Ground 1

[23] At the commencement of the prosecution case, the learned trial judge received a folder of the transcripts of conversations which, in the case of those by telephone had been intercepted and in the case of those not by telephone had been captured by the listening devices. Where the conversation had been in Romanian, the transcript was in English, the conversation having been translated by an interpreter who gave evidence at trial.

[24] Defence counsel objected to the tender of certain of the transcripts. Some of them concerned the media article, the subject of ground 2. Others were unrelated to the article. His Honour heard submissions on the admissibility of each of the conversations to which objection was taken. He ruled in favour of admitting them. All transcripts in the folder were then admitted into evidence.[18]

[25] In written submissions, the appellant has defined that this ground of appeal as based upon the admission of the transcript evidence of eight conversations.[19] These are conversations to which objection had been taken at trial.[20] These were all conversations which had been recorded by listening device and in which the participants spoke in Romanian. Three of them were with Baias;[21] three with Arjok;[22] and one with each of Popovici[23]and Sas.[24] None of them related to the media article.

[26] At the trial, the objection to these conversations was that to admit them would be unfair[25]and that the discretion ought to be exercised against admission on that basis.[26]

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16 Appeal transcript 1-4 ll20-25.
17 Appeal transcript 1-2; 35.
18 Exhibit 6: AB50; Tr1-13 l30.
19 Written Submissions para 18.
20 Defence written submissions para 3: AB541-543.
21 17.3.12 at 18.13; AB420-421, 26.5.12 at 08.08; AB509-510, 14.7.12 at 13.32; AB5.7-518.
22 3.5.12 at 17.00; AB472-473, 9.6.12 at 17.03; AB478-479, 28.6.12 at 16.00; AB489-490.
23 31.7.12 at 07.47; AB314-315.
24 17.12.12 at 07.00; AB326.
25 For example, at AB19; Tr1-5 l30, AB31; Tr1-17 l45.
26 Defence written submissions para 7: AB543.

The unfairness submission referred to significant incompleteness in the transcripts: that much of the conversation could not be heard by the translator such that that which was heard and translated lacked context.

[27] However, in the course of submissions on appeal, counsel for the appellant explained that this ground did not seek a re-exercise of the discretion;[27] rather, the proposition advanced was that the transcripts of the eight conversations were inadmissible as a matter of law. It was summarised by counsel as follows:

> "… The quality of this – the nature and quality of this evidence, and I use both those terms advisedly, the nature and quality of this evidence was such that the risk of improper reasoning, the risk essentially here of over-reliance was such that the evidence was plainly inadmissible … ."[28]

[28] In developing this proposition, counsel relied upon the characteristics of these transcripts which had been identified in the objection submission at trial, observing:

> " … The translator agreed … many of the tapes were of a very bad quality, that she had difficulty hearing most of the conversations. When she couldn't understand she skipped that part and while she did her best and listened to the recordings multiple times she did not record parts of conversations she did not consider to be relevant."[29]

[29] Counsel submitted that it would have been impossible for a properly directed jury to take these matters into account in deciding how to act upon the parts of the conversations that were comprehensible and were translated.[30]

[30] The submissions for the appellant on this ground were expressed at a general level. The court was not taken to any of the transcripts in question in the course of argument in order to illustrate or elaborate the proposition sought to be put. Whilst it was submitted that, in essence, "it was impossible to give meaning to at least a number of these transcripts",[31] none of them was identified for the purpose of demonstrating such a deficiency in it. It was accepted that at the trial, the translator had not been cross-examined in order to establish this submission. Further, it was clarified by counsel that no instance of mistranslation had been, or is now, alleged.[32]

[31] I have read and considered each of the transcripts, the subject of this ground of appeal. Despite the numerous passages in the conversations which the interpreter designated as unintelligible, the intelligible text which was translated is, in each case, comprehensible.[33] In my view, the translated text of each conversation is not so fragmented as to render it impossible to understand or inherently liable to be misconstrued.

[32] I am quite unable to accept the submission that the transcript of these eight conversations were inadmissible for the reason proposed by the appellant. In rejecting this ground of appeal, I note that the following direction, which is also of some relevance to ground 3, was given to the jury:

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27 Appeal Transcript 1-5 ll18-21.
28 *Ibid* 1-5 ll42-46.
29 *Ibid* 1-6 ll26-31.
30 *Ibid* 1-6 l33 – 1-7 l2.
31 *Ibid* 1-7 ll1-2.
32 *Ibid* 1-7 ll5-7; 1-8 ll1-2.
33 The comprehensibility of the first conversation between the appellant and Baias on 26 May 2012, to which I have referred in the discussion of the use of code, is enhanced when the code meanings are given to it.

> "The second class of telephone and other conversations consists of those spoken in Romanian. You have transcripts of them which involve interpretation by accredited interpreters.
>
> For this material to be useful, it is necessary not only that the interpreter hear accurately what was said in Romanian, but also that the interpreter interprets it correctly. There is potential for error in both these steps. The words might not be heard correctly. As you know, many of the recordings are of poor quality with unintelligible sections interspersed throughout them. But apart from the danger that what is said in Romanian might not have been heard correctly by the interpreter, there is the additional danger that it might not have been interpreted from Romanian into English correctly, especially because of the unintelligible passages or because of distortion with dogs barking, radios in the background and so on.
>
> Moreover, in any language, meaning is very likely to be influenced by context. The context might include gestures, facial expressions, and the physical setting in which the conversation occurs, whether the conversation is between close family members or friends on the one hand or between relative strangers on the other, and so on. Of particular importance to context are other words used at about the same time.
>
> Now, I mention this rather obvious fact because in many transcripts of conversations in Romanian there are, as you know, gaps. Words were spoken but the interpreter could not hear them clearly and, therefore, could not even attempt to interpret them.
>
> Missing words, phrases and sentences create a danger to which you must be alert. It is that the meaning the interpreter has given to a word or expression may not be correct, not only because she may have misheard the word, but also because the surrounding unintelligible gaps inevitably mean that she did not have the whole context available to assist in assigning an English meaning to the Romanian words."[34]

Ground 2

[33] The prosecution case included evidence of the appellant's apparent interest in the arrest of a Romanian man on the Gold Coast for drug related offences. The arrest was reported in the Gold Coast Bulletin on 14 December 2011. The prosecution tendered the article reporting the arrest. It was headed "Heroin boss arrested".[35]

[34] The file of transcripts contained transcripts of five conversations in which the appellant participated and in which the Gold Coast arrest incident was discussed. The conversations were with Popovicic (on 14 December 2011 by telephone[36]), Baffi (on 16 December 2011 in person[37]), Sas (on 17 December 2011 in person[38]), an unidentified male (on 20 December 2011 by telephone[39]), and Baias (on 29 December 2011 in

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34 AB239 l43 – 240 l22.

35 Exhibit 11: AB59; 1-22 l32. The tender was made without objection but after the learned trial judge had ruled against objection to the admission of a conversation concerning it.

36 AB320-323.

37 AB324-325.

38 AB326.

39 AB327-343.

person[40]). In the conversation with Baffi, the appellant referred to the arrested person as "Frank". The name of the arrested person was Frank Onea.

[35] Defence counsel sought the exclusion of the conversation with Baffi on the basis of both irrelevance and unreliability of the recording. This conversation was in English and did not need to be translated.

[36] The learned trial judge ruled against the objection in these terms:

> "… [It] only assumes relevance in the context of other conversations which took place before and after it. It is open to the jury to conclude that the conversation on the 16th reflects a surprising level of interest by the accused in apparently illegal drug activities of someone that at least Mr Baffe (sic), the other participant to the conversation, appears to believe is a dealer in heroin, cocaine and cannabis, or at least he's apparently alleged to be so.
>
> It forms an item of evidence in a circumstantial case. It is for the jury to form a view about what, if any, weight ought to be given to it in the context of the prosecution case as a whole. It has some potential to tend to prove the prosecution case. It is therefore relevant and prima facie admissible. I do not consider that its exclusion is required in the interests of a fair trial. …"[41]

[37] I understand his Honour's reference to an interest in the arrested person's illegal drug activities to include an interest in detection of them, given the appellant's statements in the conversation with the unidentified person that the arrested person has "got previous" and that "[t]hey have eight months of surveillance and they've listened to their trams."[42]

[38] A like objection was made to the conversation with Sas which was also overruled for similar reasons.

[39] The ground of appeal, as formulated, extends beyond the evidence to which specific objection was taken. Thus, the question for this court is whether the learned trial judge would have been obliged to exclude the conversations concerning the media article.[43]

[40] In oral submissions, the appellant sought to characterise the conversation evidence on this topic as evidence which was admitted as propensity evidence.[44] It was said that the purpose of the evidence was to invite a course of reasoning on the part of the jury that because the appellant had a demonstrated interest in a drug dealer, it was more likely that he himself was a drug dealer.[45]

[41] In my view, this is a mischaracterisation of the evidence. The conversations were circumstantial evidence. Their relevance as evidence from which, with other evidence, inferences might be drawn about the appellant's involvement in drug dealing, arises from the fact they reveal a high level of interest in the surveillance of drug dealing

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40 AB344-348.
41 AB31; Tr1-17 ll19-30.
42 AB331.
43 *R v Gallagher* [1998] 2 VR 671 at 686-689; *R v BCU* [2014] QCA 292 at [24].
44 Appeal Transcript 1-9 ll18-20.
45 *Ibid* ll35-39.

activities of the arrested person. This interest was shared by the appellant and by those from whom he purchased drugs and those to whom he supplied them. The relevance is heightened by the additional fact that, on a number occasions, the specific discussions concerning the arrested person occurred within conversations about drug dealing in which codes were used.[46]

[42] Aside from its relevance, this evidence was not inherently prejudicial to the appellant. Nor was there a danger that it might have been misused by the jury. In the circumstances, I am quite unpersuaded that the learned trial judge would have been obliged to exclude it. This ground of appeal is not established.

Ground 3

[43] Underlying this ground of appeal is the proposition that, apart from the conversations, there was "really nothing else" in the prosecution case.[47] It was put this way by counsel for the appellant:

> "There may well have been sufficient for a suspicion that he was at times at least talking about dealing in heroin, but to conclude beyond reasonable doubt that he was carrying on the business of trafficking in heroin in these intercepted communications in the absence of any other evidence in our submission was unreasonable."[48]

[44] That description of the prosecution case is inaccurate. The case did depend primarily upon the conversations but it was supplemented significantly by other evidence, including the video recordings and the physical interceptions and searches.

[45] In oral submissions, it was suggested that the discovery of heroin on Popovici after his meeting with the appellant was as consistent with Popovici being a supplier who had attended the meeting with heroin, as it was with Popovici being a person who was supplied the heroin at the meeting.

[46] Taken on its own, that may be so. However, that evidence fell to be considered with the transcript of a conversation between the appellant and Popovici several days earlier in which the appellant spoke of a "guy" who "was supposed to come this week to bring me", who did not come, but who was definitely coming. The appellant then said:

> "I live from this; I make some money, but I do it very rare … ."[49]

[47] Plainly, this statement was capable of supporting the prosecution case of trafficking.

[48] In his evidence-in-chief, the appellant was asked whether he recalled making the statement. Through an interpreter, his first response was to say that the statement did not make sense. He then denied ever mentioning wanting to make some money. He said that he had told Popovici that he lived on drugs, meaning that he used them.[50]

[49] It was for the jury to assess whether they accepted this explanation and other explanations which the appellant gave in evidence for statements made by him in

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46 For example, the appellant twice referred in the conversations to the "soda water factory" or "plant", a term which he was unable to explain in cross-examination.

47 Appeal Transcript 1-13 l25.

48 *Ibid* ll41-44.

49 AB314.

50 AB120; Tr3-33 l47 – AB121; Tr3-34 l3.

conversations from which it might be inferred that he participated in trafficking in heroin. There was good reason for the jury to have regarded this explanation as dubious. In cross-examination, the appellant tended to describe implicating statements made by him as misinterpretations or to avoid them as ones that he could not remember.

[50] The rejection of these explanations leaves scant scope for a persuasive argument in favour of the existence of other reasonable hypotheses for the appellant's statements and conduct consistent with innocence.

[51] Taken as a whole, the evidence in this case was clearly capable of allowing an inference beyond reasonable doubt to be drawn that the appellant was a trafficker in heroin. That evidence includes the appellant's own statement about how he made money; his regular short meetings with Popovici from which it could be inferred that a supply of a significant amount of heroin to the latter took place; a debt of $15,000 owed by Mocanu to the appellant which resulted in the former giving the latter a $40,000 diamond to sell; other significant sums of money given by Mocanu to the appellant; the debt owed by Sas to the appellant; the giving by Baffi to the appellant of significant sums of money in return for the supply of something; and the use of expressions in conversations which are used as codes in the drug culture.

[52] This ground, too, has not been established.

Disposition

[53] As none of the grounds of appeal has succeeded, this appeal must be dismissed.

Order

[54] I would propose the following order:

1. Appeal dismissed.

[55] **HENRY J:** I agree with the reasons of Gotterson JA and the order proposed.