IN THE COURT OF APPEAL [1994] QCA 281

SUPREME COURT OF QUEENSLAND

C.A. No. 178 of 1994

Brisbane

[R. v. Chinmaya]

BETWEEN

T H E Q U E E N

v.

MA PREM CHINMAYA
(Appellant)

Fitzgerald P.
Davies J.A.
McPherson J.A.

Judgment delivered 10/08/94

Reasons for judgment by the Court

APPEAL AGAINST CONVICTION DISMISSED.

CATCHWORDSCRIMINAL LAW - EVIDENCE - Cross-Examination under s.15(2)(c) *Evidence Act* 1979 - Whether discretion ought to be exercised to permit questioning of accused about prior convictions that disclose accused's propensity to commit offences of the kind charged.

Counsel:S.E. Herbert Q.C. for the appellant
B. Butler for the Crown

Solicitors:Legal Aid Office for the appellant

Director of Prosecutions for the Crown

Hearing Date:28 July 1994

REASONS FOR JUDGMENT BY THE COURT

Judgment delivered the Tenth day of August 1994

The appellant was found guilty at her trial in the Circuit Court at Cairns of one count of possession and one of supplying tetrahydrocannabinol, and also of a further two counts of possessing cannabis sativa. The evidence at trial disclosed that on 27 March 1993 police executed a search warrant at the address where the appellant lived. In the course of doing so a pillow case was discovered in a clothes basket in the residence. It contained packets of marijuana. In addition, the appellant was seen to be concealing a small gold-coloured box on her person. When produced it was found to contain small amounts of hashish and cannabis. Pipes or instruments for smoking the drug were also found there.

In relation to each item the Crown adduced evidence of oral admissions made by the appellant when she was asked about it at her home. The appellant, who gave evidence at the trial, denied having made any such admissions and, in the case of the small box, denied ever having seen it before. She claimed to have been bewildered by the arrival of the police and to have been quite unaware that what they were doing was carrying out a drug raid.

In the course of the cross-examination of the appellant, the trial judge, on the application of counsel for the Crown, ruled that in terms of s.15(2)(c) of the *Evidence Act* 1979 the

nature or conduct of the defence was such as to involve imputations on the character of prosecution witnesses, in the form of allegations that they had fabricated incriminating evidence against the appellant. For reasons he gave, his Honour exercised his discretion to permit cross-examination of the appellant concerning her criminal record.

Several different grounds are taken in the notice of appeal, but only one has been pursued before us. It is that the learned judge exercised his discretion wrongly in permitting cross-examination about the appellant's criminal record. She had, it emerged, a history of drug offences numbering some 13 or more dating back to 1972 and involving at least nine separate court appearances. In fact, apart from two infractions of the Traffic Regulations, all of her previous convictions appear to have involved the importation, possession, or use of cannabis.

In this Court it was submitted on behalf of the appellant that the number, character and frequency of those prior offences showed there was a propensity on her part to commit offences of the same kind as those for which she was being tried; that being so, evidence of convictions for those offences did not, it was contended, serve the proper purpose for which the discretion under s.15(2) of the *Evidence Act* may be exercised, which, as the appellant's written outline seeks to define it, is "informing the jury of the appellant's dishonesty".

It is not clear precisely what is to be understood by "dishonesty" in this context. It is obvious, however, that the purposes for which the discretion may be exercised under s.15(2) are not confined to dishonesty in its ordinary sense. Section

15(2), which is similar in terms and effect to provisions of the Criminal Evidence Act 1898 in England and comparable legislation in all Australian jurisdictions, is as follows:

> "(2) Where in a criminal proceeding a person charged gives evidence, he shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that with which he is there charged, or is of bad character, unless -
>
> (a) the question is directed to showing a matter of which the proof is admissible evidence to show that he is guilty of the offence with which he is there charged;
>
> (b) the question is directed to showing a matter of which the proof is admissible evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged;
>
> (c) he has by himself or his counsel asked questions of any witness with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceeding;
>
> Provided that the permission of the court to ask any such question (to be applied for in a trial by jury in the absence of the jury) must first be obtained; or
>
> (d) he has given evidence against any other person charged in that criminal proceeding."

In permitting a person charged with an offence to testify on his own behalf, the legislation of 1898 went out of its way to impose restrictions on the extent to which he or she might be questioned in cross-examination. A central aim of cross-examination is to impugn the credit of a witness by

showing him or her to be unreliable and not worthy of belief. Asking about previous convictions is a recognised method of impugning credit, but it is one that s.15(2) commences by generally prohibiting. The general prohibition it imposes is then qualified by exceptions identified in paras. (a) to (d) of s.15(2). They represent a compromise between the competing needs of protecting an accused person who testifies and of preventing abuse of the immunity conferred by the general prohibition. See *Maxwell v. Director of Public Prosecutions* [1935] A.C. 309, 316-318.

Credibility or reliability as a witness is not specifically mentioned in any of the paragraphs of s.15(2). Indeed, paras. (a) and (b) are not directed to credibility at all, but to proof of matters that are directly in issue. Paragraph (c) is concerned with credibility. However, it does not attempt to define the matters about which an accused person may be asked questions that go to credit; its function is simply to identify the circumstances in which, or the occasions on which, the court may permit such questions to be asked at all. Once para.(c) is satisfied, the court is, by the terms of the proviso to that paragraph, given a discretion to permit questioning about the accused witness's prior convictions and other matters falling within the general prohibition in s.15(2). The words "any such question" in the proviso to s.15(2)(c) plainly refer back to the phrase "any question tending to show that he has committed ... any offence" which appears in that general prohibition. Cf *Amoe v. Director of Prosecutions (Nauru)* (1991) 66 A.L.J.R. 29, 33, col.2 F-G.

There is nothing in the terms of s.15(2) that would confine the purpose of questioning about prior criminal convictions to informing the jury of the appellant's general reputation or character for dishonesty. It is settled that the discretion to permit cross-examination about prior convictions is not to be lightly exercised, but, as was said in *Phillips v. The Queen* (1985) 159 C.L.R. 45, 57, "sparingly and cautiously". The primary prohibition in s.15(2) against such questions "is a factor always relevant to its exercise" (159 C.L.R. 45, 54). At the same time there is, as Mason, Wilson, Brennan, and Dawson JJ. held in that case, no rule that the discretion must be exercised against the Crown unless the circumstances can be described as exceptional (159 C.L.R. 45, 54). In the end, their Honours said, "the sole criterion governing its exercise is what fairness requires in the circumstances of the case" (at 58).

It is not disputed by the appellant that in this case the nature or conduct of the defence was such as to satisfy s.15(2)(c), and so to enliven the discretion conferred by the proviso. However, what is said is that the discretion ought not to be exercised to permit questioning of an accused person about prior convictions that disclose a propensity on his or her part to commit offences of the kind charged. No authority was cited in support of any such proposition, and it would, if adopted, have some surprising consequences. By repeatedly committing offences of a particular kind, a person could in effect create a form of immunity from the exercise of the discretion under s.15(2)(c) to permit questioning about those offences. By comparison, someone with only one or a few convictions for a

particular kind of offence, or with many convictions for offences of a quite different kind, would be vulnerable to unfavourable exercises of the discretion. It hardly seems likely that, in enacting s.15(2)(c), results like that were intended, even if, as Mr Herbert Q.C. suggested, the opposite consequence may be, in a practical sense, to deny to an accused person with a record of convictions for the same offence any real opportunity of testifying on his own behalf.

The matter is the subject of a reported decision in England, to which reference was made by Mr Butler for the Crown. In *R. v. Powell* [1985] 1 W.L.R. 1364; 82 Cr.App.R. 165, the appellant was convicted of living on the earnings of prostitution. His case at trial was that he was a respectable citizen and that the police evidence based on visual observation of his activities was a complete fabrication. The trial judge permitted questions in cross-examination about the appellant's prior convictions for permitting premises to be used for purposes of prostitution. An appeal against conviction was dismissed by the Court of Appeal, which in the course of doing so departed from some earlier decisions or observations. In giving the Court's reasons, Lane L.C.J. said ([1985] 1 W.L.R. 1364, 1370):

> "the fact that the defendant's convictions are not for offences of dishonesty, the fact that they are for offences bearing a close resemblance to the offences charged, are matters for the judge to take into consideration when exercising his discretion, but they certainly do not oblige the judge to disallow the proposed cross-examination."

That case was one in which the appellant had, in terms of the equivalent of s.15(2)(c), not only given evidence of his own good character but also made imputations on the character of witnesses for the prosecution. There was therefore a combination of two of the circumstances mentioned in that paragraph; but the Court of Appeal went out of its way to add that it would not have interfered with the conviction even if the trial judge had exercised his discretion to permit cross-examination on either ground alone.

It is perhaps not completely clear from the report of *R. v. Powell* precisely how many earlier convictions there were, although it does appear that the appellant had previously sustained convictions in 1969 and again in May 1984 for permitting the use of premises for prostitution. In holding that questioning about convictions for offences that were "the same or kindred" was not precluded by the legislation, Lord Lane said ([1985] 1 W.L.R. 1364, 1370):

> "A defendant with previous convictions for similar offences may indeed have a very great incentive to make false allegations against prosecution witnesses for fear of greater punishment on conviction. It does, however, require careful directions from the judge to the effect that the previous convictions should not be taken as indications that the accused has committed the offence."

In the present case the convictions for like offences were more numerous; but the learned trial judge instructed the jury at length and in detail about the limited use that could be made of the evidence of the appellant's previous convictions. He directed them both affirmatively that those convictions could be used only as a measure of her creditworthiness; and also

negatively that they could not be used to suggest that she must on this occasion be guilty of the drug offences with which she was charged.

It was conceded that the summing up was adequate in this respect. We are not persuaded that, in permitting cross-examination of the appellant about her previous convictions, the learned trial judge exercised his decision incorrectly or that there was any ensuing miscarriage of justice that would justify this Court in intervening. In these circumstances the appeal against conviction should be dismissed.

ABBREVIATED CATCHWORDS:

[R. v. MA PREM CHINMAYA] CRIME -

Fitzgerald/Davies/McPherson

8 August 1994