IN THE COURT OF APPEAL [1996] QCA 451

SUPREME COURT OF QUEENSLAND

Brisbane

C.A. No. 219 of 1996
C.A. No. 231 of 1996
C.A. No. 242 of 1996
C.A. No. 243 of 1996
C.A. No. 250 of 1996

[R v. Cook, Coleman, Kake, Innes & Le Blowitz]

THE QUEEN

v.

JASON COOK
LIONEL MERVYN COLEMAN
GILLIAN DAWN KAKE
SALLY ANNE INNES
and
JOANNE MARIE LE BLOWITZ

Applicants/Appellants

Pincus JA
Thomas J
Dowsett J

Judgment delivered 19 November 1996

Separate concurring reasons for judgment of each member of the Court.

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1. APPEAL AGAINST CONVICTION BY LE BLOWITZ DISMISSED.
2. APPEAL AGAINST CONVICTION BY COOK DISMISSED.
3.LEAVE TO APPEAL AGAINST SENTENCE BY COOK GRANTED AND APPEAL ALLOWED TO THE EXTEND OF ADDING TO EACH SENTENCE A RECOMMENDATION THAT THE APPLICANT BE CONSIDERED FOR PAROLE AFTER SERVING A PERIOD OF 12 MONTHS. DECLARE THAT THE APPLICANT HAS SERVED THE PERIOD OF ONE DAY IN CUSTODY FROM 1 MAY 1996 TO 2 MAY 1996 WHICH SHOULD COUNT AS IMPRISONMENT SERVED FOR THE PURPOSES OF THESE

SENTENCES PURSUANT TO S.161 OF THE PENALTIES AND SENTENCES ACT.

4.LEAVE TO APPEAL AGAINST SENTENCE BY COLEMAN REFUSED.

5. LEAVE TO APPEAL AGAINST SENTENCE BY KAKE GRANTED AND APPEAL ALLOWED TO THE EXTEND OF ADDING TO EACH SENTENCE A RECOMMENDATION THAT THE APPLICANT BE CONSIDERED FOR PAROLE AFTER SERVING A PERIOD OF 12 MONTHS.

6.LEAVE TO APPEAL AGAINST SENTENCE BY INNES GRANTED AND APPEAL ALLOWED. SET ASIDE THE SENTENCES IMPOSED AND IN LIEU THEREOF SENTENCE HER TO IMPRISONMENT FOR A PERIOD OF TWO YEARS ON EACH COUNT WITH RECOMMENDATIONS THAT THE APPLICANT BE CONSIDERED FOR PAROLE AFTER SERVING A PERIOD OF SIX MONTHS.

SENTENCES ARE TO BE CONCURRENT IN ALL CASES.

CATCHWORDS: **CRIMINAL LAW - trafficking in cannabis - producing cannabis - evidence from accomplices - corroboration - warning to jury**

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Hearing Date: 26 August 1996

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 19/11/1996

I have read the reasons of Dowsett J. with respect to the appeals against conviction of Le Blowitz and Cook; I agree that those appeals should be dismissed. I also agree with his Honour's reasons for reaching that conclusion, but wish to comment, in addition, upon an aspect of the submissions made on behalf of Le Blowitz. It was contended on her behalf that at least some of the pieces of evidence left to the jury as being capable of being corroborative did not point more strongly towards guilt than innocence and the jury should not, therefore, have considered them; in fact, counsel for Le Blowitz said some of these pieces of evidence were inadmissible. One possible answer to this contention is that the jury could properly treat the relevant evidence as corroborative, if, taken as a whole, it had that character and that the jury was not obliged to exclude any item from consideration merely because it would not, considered in isolation, necessarily support the Crown case against Le Blowitz; this proposition is I understand acceptable to Thomas J, whose reasons I have read. It has

the support of authorities to which his Honour refers, to which I would add Freeman [1980] V.R. 1.

The corroborative evidence in question here is in my view properly described as circumstantial. The treatment of circumstantial evidence has recently been considered, in a rather different context, in Pfennig (1995) 182 C.L.R. 461. In the principal judgment, that of Mason C.J., Deane and Dawson JJ., it was said that the evidence being considered was propensity evidence, being "a special class of circumstantial evidence" (482), and that the admissibility of the propensity evidence had to be considered on that basis (483). But the test for admissibility, it was pointed out, had to be applied "in the context of the prosecution case" (485); a similar view was taken by McHugh J. (536). In determining admissibility, circumstantial evidence is not considered in isolation; nor does each piece of circumstantial evidence, considered individually, have to pass the test approved in Pfennig, in order to be admissible. For example, in a robbery case the Crown might rely on the circumstances that the accused owned a car resembling that used in the robbery, that he was seen apparently observing the place where the robbery occurred on a number of occasions before it was effected, that he began to engage in an episode of extravagant living shortly after the robbery, and so on. Such circumstances may well, considered individually, be perfectly capable of innocent explanation, but nevertheless be admissible collectively:

> " . . . in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider "the weight which is to be given to the united force of all the circumstances put together . . . " (535) per Gibbs C.J. and Mason J. in Chamberlain (1983) 153 C.L.R. 521 at 535.

Just as, when considering the admissibility of circumstantial evidence the judge should consider its effect as a whole and in the context of the prosecution case, and the jury should look at it in the same way when determining whether the case is in the end proved, so the same approach is proper when considering the corroborative effect of circumstantial evidence. Treating the corroborative effect of circumstantial evidence in this way has two practical advantages. One is that it enables a judge confronted with a mass of evidence to deal with questions of its corroborative effect more broadly - ruling evidence to be capable, or incapable, of corroborating on the basis of categories of evidence, without being obliged to devote specific consideration to the effect of individual pieces of evidence within those categories, considered in isolation. Secondly, approaching the problem in this way will enable directions to be given to a

jury which may seem to that body more in accordance with commonsense, where there is evidence of a number of facts, each in itself perhaps not very significant, but which add up to significant support for the Crown case.

Two other points should be made. One is that I have considered a question about corroborative evidence with reference to the nature of the evidence in issue here, namely circumstantial evidence; but the principle is equally applicable to allegedly corroborative evidence of other kinds. Secondly, it appears that when considering the corroborative effect, if any, of what are said to be incriminating circumstances, the Court is not obliged to assume that evidence from the defence, seeking to explain the circumstances away, where circumstances "so obviously suggest a particular conclusion that they call for an explanation, if there is one consistent with innocence" (Weissensteiner (1993) 178 C.L.R. 217 at 243), will be given or, if given, found acceptable by the jury. To take the latter course would be to confuse the capability of evidence to support the Crown case with the question - a jury question - whether in the end it is found to support it. The jury should be told, and in practice are ordinarily told, that it is for them and not for the Court to decide whether evidence put forward by

the Crown and held capable of being corroborative, does in truth corroborate.

I agree, as I have said, that the appeals against conviction should be dismissed.

I also agree with the orders of Dowsett J. with respect to the applications for leave to appeal against sentence, and with the reasons his Honour has given for them.

REASONS FOR JUDGMENT - THOMAS J.

Judgment delivered 19 November 1996

1.The appeal by Le Blowitz

The main ground of appeal is that the learned trial judge erred in directing the jury that certain items of evidence were capable of amounting to corroboration of the evidence of accomplices. The accomplices (Drage, Bulgarelli and Goon) had been directly involved in the cultivation of the prohibited crops, and they gave evidence of Ms Le Blowitz's involvement in servicing the needs of those on the plantations. A background circumstance is that she was the de facto wife of one Heron, the main entrepreneur in these activities. Drage's evidence described occasions on which he collected groceries from the appellant (at the house where she lived with Heron) during which the appellant told him the drop-off points to which particular groceries were to go. The goods were already packed in colour-coded bags, with different colours for different crop sites. Bulgarelli gave evidence of being driven by the appellant (along with Heron) to a drop-off point. Goon gave evidence that the appellant packed groceries at places described as the safe houses, which groceries were subsequently taken to crop sites. He also

mentioned other occasions when the appellant drove a blue Valiant to deliver groceries "to us". The clear thrust of the above evidence is that she was knowingly aiding the enterprise of her de facto husband Heron.

In my view any evidence from an independent source tending to show that she provided physical assistance of the kind described by the accomplices would be capable of corroborating their evidence. It was submitted for the appellant that evidence could not be corroborative unless it tended to show that she "knowingly" helped the enterprise, but I do not accept this. In my view there are really two separate questions -

1.Is the evidence in question capable of corroborating the accomplices or one or other of them?

2.Does the evidence as a whole (i.e. the evidence of the accomplices plus the corroborative evidence) safely establish that her participation was a knowing one?

These questions were merged in argument into the single question whether the allegedly corroborative evidence was capable of showing that she knowingly aided the enterprise.

The available evidence has been described in the judgment of Dowsett J and it will not be necessary to repeat it. Most of the arguably corroborative evidence related to purchases at material times by the appellant of items that were obviously used at some of the camp-sites and many of which were found later by police at those camp-sites. The argument for the appellant is that each item is as capable of having been acquired by her for an innocent purpose as having been acquired for the purpose of the enterprise.

This brings into focus a disharmony in the decided cases on the question of evidence capable of amounting to corroboration (R v. Berrill [1982] Qd. R. 5080, 526-527; R v. McK [1986] 1 Qd. R. 476; R v. Kerim [1988] 1 Qd. R. 426, 433, 447, 455; R v. Stratford & McDonald [1985] 1 Qd.R. 361, 366; and R v. Bryce [1994] 1 Qd. R. 77). These cases show different views of whether particular items of evidence can be regarded as corroborative when, standing alone, they are equivocal or neutral. It may be that R. v. Bryce is a special case depending on its own facts, but I mention a difficulty in accepting all the observations made by

Macrossan CJ and Davies JA in that case. However it is not necessary to resolve those differences in deciding the present case.

Accepting for the moment that evidence needs to be more than intractably neutral before it can be called corroboration, it is in my view a mistake to apply that principle distributively to each item of evidence when collective consideration of that evidence would cause it to lose that neutrality. When corroboration of the evidence of an accomplice or complainant is considered necessary, there is no good reason why multiple individual facts may not fairly be put together as a circumstantial case capable of affording corroboration. "In the case of an accomplice's evidence, it is sufficient if it strengthens that evidence by confirming or tending to confirm the accused's involvement in the events as related by the accomplice" (Doney v. The Queen (1990) 171 CLR 207, 211, per Deane, Dawson, Toohey, Gauldron and McHugh JJ). If the circumstantial case as a whole does this, it does not matter that some of the items in that circumstantial case may, if they had stood alone, have looked forlorn and intractably neutral.

The table presented by Dowsett J (at p 11 of his reasons) illustrates the point. Items (a), (b), (c) and (d) might individually be argued as reasonably capable of relating to an innocent domestic purpose. As against this there was no evidence that they did have such a purpose, and it might be thought that the nature of the item or the regularity of the purchases might tend to make camp use a better choice than domestic use. Even so, there is an element of guesswork if each item had to stand alone. It is in my view absurd that they should have to stand alone. The appellant's acquisition of items (e), (f), (g), (h) and (i) are all in my view more consistent with guilt than innocence. Collectively all the items (a) to (i) make up a circumstantial case that is capable of corroborating the accomplice's story of apparently knowing involvement by Ms Le Blowitz in assisting the enterprise. Experience shows that an adequate circumstantial case (sometimes described as a "rope" circumstantial case) can be created by a series of factors, each of which is in itself equivocal.

This question has been discussed in a series of cases (Thomas v. Jones [1921] 1 KB 22, 48; R v. Lindsay (1977) 18 SASR 103, 113, 119-120; R v. Nanette [1982] VR 81, 84). None

of them binds this court, but the prevailing opinion in those cases, including the majority view in Lindsay, supports the validity of what might be called accumulative corroboration.

The present case is a good example of a multiplicity of items which may fairly be presented as cumulatively capable of corroborating the evidence of a witness whose evidence may be unsafe without corroboration. Questions may arise as to the appropriate cut-off point for such items, and the answer would seem to be at the point where such items no longer fairly contribute to the point that is intended to be made. In some cases a combination of circumstances may tend to verify a particular detail in the story of a complainant or accomplice, but that is not the situation here. In this case the point to be made is that these circumstances render an innocent interpretation of her activities less likely and they support generally her ongoing involvement in the stocking of the camps, from acquisition to delivery. The extent of correlation between purchases actually made by her and items that turned up at various plantations is too much of a coincidence to be explicable as the innocent purchase of domestic supplies.

I am satisfied that the evidence referred to in this case was capable of constituting corroboration and that the learned trial judge was not in error in letting it go to the jury as having the capacity to corroborate. I am also satisfied that the combined force of the evidence of the accomplices, the corroborative evidence, and the surrounding circumstances amounts to an adequate case to sustain the conviction.

I also agree with what Dowsett J has written on this question.

2.Applications for leave to appeal against sentences

In all these matters I agree with what Dowsett J has written and with the orders which he proposes.

REASONS FOR JUDGMENT - DOWSETT J.

Judgment delivered 19 November 1996

After a lengthy trial, each of the applicants/appellants other than Innes was convicted of drug-related offences. Cook was convicted on two counts of producing cannabis in quantities in excess of that specified in the Third Schedule. Coleman was convicted of carrying on the business of trafficking in cannabis and unlawfully producing cannabis in a quantity in excess of that specified in the Third Schedule. Kake was convicted on three such counts and Le Blowitz was convicted on four such counts. There were four other accused at the trial - Beer, Darryl Lammon, Odis Lammon and Robinson. Darryl Lammon was acquitted of the only count with which he was charged. Beer, Odis Lammon and Robinson were convicted on various counts. Innes pleaded guilty to three counts of production of cannabis in quantities in excess of that specified in the Third Schedule. The applications and appeals on behalf of Cook, Coleman, Kake and Le Blowitz were heard on the same day and on the same record. Innes's application was heard some days later by a similarly constituted court. As the charges against all five applicants/appellants arose out of their involvement in the same drug cultivation, it is appropriate to consider all matters together.

In the course of a police drug operation code-named "Broken Crop Two", five large marijuana plantations were located in the Burdekin area. At the trial the Crown alleged that two men, Rhodes and Heron had overall responsibility for the plantations and that each of the present applicants/appellants was engaged in the operation under the control of these two men. The sites had been cleared from bushland and fenced off with chicken wire. Each site was planted in cells containing up to several thousand plants and each site was irrigated by use of a pump and pipes, the water coming from the river. The pumping mechanism automatically added fertiliser to the water. There

was camp accommodation at the sites with showers, refrigeration, cooking facilities, shelving, drying racks and rubbish burial pits. Sealed drums of cannabis were found buried on nearby cane farms. There were also a number of "safe houses" where drugs were stored. The workers used these houses for personal needs such as showering. Drivers transported them between designated pick-up points and the safe houses.

Le Blowitz and Cook appeal against their convictions.

Le Blowitz

Le Blowitz was charged with five counts of production, each charge relating to one of the five sites. Crop one, in the case of Le Blowitz, was the subject of count 20 on the indictment, crop two was the subject of count 21, crop three was the subject of count 22, crop four was the subject of count 23 and crop five was the subject of count 24. This can be discerned by reference to the indictment where cross-references to the relevant crops are shown in the margin. In addition, she was charged with a sixth count of production said to arise out of her being seen packaging cannabis. This was count 25. She was acquitted of this charge. The jury disagreed on count 23 but convicted her on the other four counts. The production was alleged to have occurred between January, 1993 and June, 1994. Le Blowitz was Heron's de facto wife.

Anthony Royce Drage said that he had been involved in the cultivation, delivering groceries to two drop points about once a month between February 1994 and June or July the same year. He had only visited one of the crop sites. He also ferried personnel to the drop points and provided shower facilities for them at his home. He said that on occasions, he collected groceries from a house at McDowall Road where Heron and Le Blowitz were living. Le Blowitz would tell him to which of the drop points they were to go. The groceries were provided in colour-coded bags, the colour varying with the crop site. He said that on occasions, she referred to the crop sites by number. The transcript of his evidence is a little unclear on this point and I should set it out in full:

"I just want to be clear, did she refer to sites by number? -- By number, yes.

All right. And what range of numbers? -- There was only two, three - two, one and five, that I recall."

The way in which the evidence was recorded suggests that he initially said that there were two sites referred to by number and then amended it to three, which he particularised as sites two, one and five. Omitting the punctuation marks, on the other hand, the passage would suggest that he identified crop sites two, three, one and five, twice referring to crop site two. This might explain the fact that the jury were unable to agree in connection with count 23 (which concerned crop site four). It may be that they understood his evidence in a way different from that recorded by the court reporters. An alternative explanation offered by counsel for the Crown was that crop site four did not have a specific drop point associated with it. As it was alleged that Le Blowitz organised delivery of groceries to drop points, the jury may not have been satisfied that she had been aware of the existence of the site which was not associated with a particular drop point. Drage was unable to say on how many occasions he had been given instructions by Le Blowitz but said that it was more than twice. He also said that he did not remember Le Blowitz being at his home with Jason Bulgarelli on any occasion. This related to count 25, the packaging count. The incident was said to have occurred at Drage's home.

The witness Bulgarelli said that on one occasion, he visited crop site two with Le Blowitz and Heron. However he subsequently said that she only drove to the drop point and that Heron and the witness then went into the crop site. If it matters, it appears that the witness's reference to crop site two was a reference to crop site three as described in the rest of the evidence. The witness Goon said that he saw Le Blowitz packing groceries at the safe houses. These packages of groceries were subsequently taken to crop sites. Goon also said that on occasions she, "drove up in the blue Valiant and give 'em (groceries) to us."

All of this evidence came from accomplices, and so it was appropriate that the jury be directed as to the danger of acting upon such evidence unless it was corroborated. A substantial amount of apparently corroborative evidence was available. The witness Butler operated a service station at Home Hill. She said that once a week, between October 1993 and October 1994, Le Blowitz bought petrol in two jerry cans and gas in two 9 kilo gas cylinders. She also purchased batteries with about the same frequency. They were either 6 or 9 volt batteries suitable for use in big torches. The witness Gudge worked in another service station in Home Hill. She said that Heron and Le Blowitz regularly purchased Dolphin torches and batteries. She observed this when she was on the night shift every five weeks. She also saw them occasionally when she was on afternoon shifts. She also saw Le Blowitz purchase groceries a couple of times each week when she (Gudge) was working. There was evidence that LP gas and torches were used at the sites. It seems likely that the pump motors ran on petrol. The purchase of petrol in jerry cans might suggest involvement in some operation involving engines which could not be re-fuelled at service stations. Innocent explanations include use in outboard motors and motor mowers.

A witness called Oliveri worked at Farmers' Agencies in Home Hill, which sold rural supplies. He said that on two or three occasions Le Blowitz purchased three or four 50 kilogram bags of fertiliser. This was in late 1993 or early 1994. The witness Stockdale was a sales representative at Growforce in Ayr, also selling fertiliser. He said that Le Blowitz had bought a 50 kilo bag of fertiliser from him on one occasion. This occurred about two years before the trial which was in April 1996.

The witness Zabel was a shop assistant at Rennir's Hardware in Ayr. He remembered Le Blowitz purchasing four or six Arlec electronic kitchen scales from him at about $65 each. This was in October or November, 1993. She was in company with Heron at the time. All of the scales were bought on the one occasion. The witness identified the scales shown in ex. 10 (photograph 12) as being similar to those sold by him to Le Blowitz. This photograph was taken at crop three site. Exhibit 17

(photograph 6) shows a similar set of scales at crop one site. Exhibit 16 (photograph 38) shows a similar set at crop site five.

The witness Power was a clerk/salesman at Garry Erlong Agencies in Ayr, selling irrigation and agricultural equipment for farmers. He recalled Le Blowitz purchasing a roll of "2 inch blue sunny hose laid flat." He said that this occurred 12 to 18 months prior to September 1994. Hose of this kind was found at the sites. The witness Liessman said that she worked at Burdekin Gas Appliance Centre. She said that Le Blowitz purchased a second-hand refrigerator/freezer from her, although it may have been more accurate to say that Le Blowitz collected the refrigerator which Heron had previously arranged to purchase. This refrigerator was subsequently found at one of the sites.

The witness S. J. Kelley said that he worked as a salesman at C and M Agencies in Ayr. He said that from early 1994 until early 1995, Le Blowitz came to his place of employment every couple of weeks to purchase clipseal bags in quantities of 200 to 300, the bags measuring "11 by 15." The witness Schwab said that she was a clerk/typist at C and M Agencies in Ayr. She also remembered Le Blowitz purchasing clipseal bags. She would normally buy 200 at a time. She thought the size was probably "14 by 16." She recalled her coming in every couple of weeks, but sometimes at longer intervals. This was probably from the end of 1993 to the beginning of 1995. In cross-examination, she said that she had seen Le Blowitz in the store during 1996 and agreed with the proposition that, "... she buys clipseal bags off you doesn't she?" It was suggested that this showed that all of the purchases of clipseal bags may have been for purposes unrelated to the cultivation of cannabis in 1993 and 1994. There was evidence that clipseal bags were used to pack cannabis.

The basis of Le Blowitz's appeal was that her convictions were unsafe because they were based upon the evidence of accomplices, which evidence was uncorroborated. That assertion implies that none of the evidence to which I have referred was capable of being corroborative. It was submitted that this was so because

each item of potentially corroborative evidence was susceptible of an alternative innocent explanation, that is an explanation other than that the accused was guilty as charged. Mr Sofronoff Q.C. for the appellant put the case this way at p.11 of the transcript of argument:

"If in relation to any particular piece of corroborative evidence it was equivocal, it should not have been put before them as corroborative evidence, but that may be the piece of evidence that they relied upon."

There are two propositions inherent in this submission:

(a)That each "piece" of evidence must be, by itself, capable of being corroborative before it can be treated as such; and

(b)That corroborative evidence cannot be equivocal.

The second proposition is obviously inconsistent with the view taken by McPherson J (Andrews SPJ concurring) in R. v. Berrill [1982] Qd R 508 at pp. 526-7 where his Honour said:

"As a matter both of authority and principle it seems to me to be wrong to say that evidence is necessarily to be treated as without corroborative value simply because it is capable of giving rise to two or more inferences. Such evidence may, as was recognised by the Court in R. v. Baskerville, be and often is circumstantial in form, and the circumstance is rarely such as to point unequivocally in only one direction, particularly as regards a state of mind like consent. If the item of corroborative evidence were required to give rise to only one inference, and to do so unequivocally and without reference to or reliance upon the testimony of the complainant, it would mean that her testimony 'would not be essential for the case, it would be merely confirmatory of other and independent testimony': See R v. Baskerville [1916] 2 QB 658, 664."

Similarly in R. v. Stratford and McDonald [1985] 1 Qd R 361 at p. 366, Macrossan J (as his Honour then was) said:

"But this particular elaboration of the rule as it has become established in rape cases, does not support a contention that in all cases where corroboration is required, evidence, if it is to have that character, must be not only consistent with and supportive of the Crown case, but inconsistent with the defence case. As was pointed out by McPherson J. in Berrill's case (supra), matters of the inferences open from evidence and decisions as to the corroborative weight of evidence are for the jury. Evidence which is

correctly described as corroborative does not have to be so complete that it alone proves the whole of the offence charged and, further, it is firmly established that it may be wholly circumstantial (Baskerville at 667). Circumstantial evidence may readily give rise to competing inferences. ...

The present case illustrates that, although a particular piece of evidence may have a certain consistency with both the prosecution and defence cases, it is, nevertheless, capable of being regarded as possessing a higher degree of consistency with one case than with the other. ..."

The other members of the Court agreed.

In R. v. McK [1986] 1 Qd R 476 at p. 480 Thomas J said:

"It was also submitted that such evidence should not go to the jury as evidence capable of corroboration if such evidence is as consistent with the defence case as it is with the prosecution case. There is no such rule. This Court on previous occasions has rejected submissions that evidence should not go to a jury as potential corroboration if it is consistent with an 'innocent' explanation (R. v. Stratford and McDonald [1985] 1 Qld R 361) or that the jury should be told that evidence should not be regarded as corroborative if it is consistent with the defence case. ..."

Connolly and de Jersey JJ agreed.

In R. v. Kerim [1988] 1 Qd R 426 Andrew CJ said at p. 433:

"I stress that to be admitted as corroborative, evidence need not be such as will prove the Crown case; that it is not essential that it 'inculpate' or 'incriminate' the accused; that it is admissible although susceptible of competing inferences, ..."

At p. 447 Macrossan J (as his Honour then was) said:

"It is well understood that the corroborative evidence need not, by itself, have the effect of proving guilt but what will be expected of it and the area in which it must operate will depend on the issues at the trial and the respective versions contended for by the prosecution and defence: ... The corroborative evidence may have a certain consistency with both versions but it must be capable of being regarded as more consistent with guilt than with innocence and to be acted on by the jury as corroboration it must, in the end, be regarded by it as supportive of a conclusion of guilt: ... The evidence must not, however, be intractably neutral in its effect if it is to serve as corroboration: ..."

McPherson J, who dissented, said at p. 455:

"Nor, on the authorities as they stand, is it necessary that the supporting evidence be consistent only with the prosecution case. Circumstantial evidence may, and ordinarily does, give rise to competing inferences, yet such evidence can be corroboration: ..."

The present appellant relies substantially upon the majority view in R. v. Bryce [1994] 1 Qd R 77. In that case, the Court was concerned with an appeal against conviction of various offences of forgery. The primary evidence against the appellant had come from accomplices. As corroboration, the Crown sought to rely upon the fact that the appellant had access to a document which had apparently been used as the prototype for the forgery. The evidence indicated that not only the appellant, but also a number of alleged accomplices had access to that document at some relevant time. In those circumstances, Macrossan CJ said at p. 78:

"The evidence which the learned trial judge considered was capable of being corroborative was fully consistent with the possibility that Harris, Trimmer or White had carried out the actions which the accomplice's evidence and the Crown case sought to attribute to the appellant. It was just as consistent with this as it was with the view that the appellant had acted in the fashion alleged. In these circumstances, that evidence does not serve to implicate the appellant.

If evidence is to have effect in the relevant corroborative sense, it must tend to confirm the involvement of the appellant rather than that of others equally implicated by it: it must be capable of being regarded as more consistent with the appellant's guilt than that of those other persons. Where there are several alternative possibilities indicated by the evidence, then evidence which, as Davies J.A. points out, does no more than increase equally the likelihood of involvement of each person pointed to can be no more than neutral. ...

R. v. Baskerville [1916] 2 KB 658 demonstrates that evidence, if it is to be corroborative must tend to confirm not only that the crime has been committed but that the accused committed it. If evidence is to be regarded as capable of being corroborative it must tend to confirm in some respect that the accused, rather than others who are pointed to as possibly involved, committed the crime. It is stated in Doney v. The Queen ... that in the case of an accomplice's evidence it is sufficient if the corroborative evidence strengthens that of the accomplice 'by confirming or tending to confirm the accused's involvement in the events as related

by the accomplice'. It can be added that to be corroborative it is necessary that it should have that effect."

Davies JA said at p. 81:

"However, from the evidence it appears that at least four other persons also had access to the Jamville licence at the relevant time. ...

The evidence which her Honour thought was capable of being corroborative is thus of equal weight against the appellant, Harris, Trimmer and White. The sole question argued on appeal was whether the fact that the evidence is of equal weight against each of those other persons, and particularly against Harris himself, prevents it from being capable of corroborating Harris' testimony against the appellant. That question depends on whether, in order to be corroborative, the evidence must tend to show that it was more probably the appellant than any other person who took possession of and forged the Jamville licence; or whether it is sufficient that the evidence merely increased the likelihood that it was the appellant who did so.

In this case, the evidence which her Honour thought to be capable of being corroborative, though it increased the likelihood that it was the appellant, by raising the probability of his guilt to a level of one in four, remained nevertheless more consistent with his innocence than with his guilt. Moreover, that evidence was as consistent with the guilt of each of the suspects Harris, Trimmer and White as with that of the appellant.

... In my view, evidence of the above kind does not implicate the appellant. To do so, the evidence must tend to confirm that involvement of the appellant more than that of any other person; that is, it must be capable of being regarded as more consistent with his guilt than with that of any other person. This does not require that the evidence be such that, when it is considered together with the other evidence in the case, the accused's guilt appears (or is capable of appearing) to be more probable than not. Rather, all that is necessary is that such evidence, when considered together with the other evidence, be capable of increasing the probability of the accused's guilt without equally increasing the probability of the guilt of another suspect."

Mr Sofronoff submitted that these observations supported his argument, notwithstanding its apparent inconsistency with earlier decisions. As can be seen, the issue has received considerable attention over the years and little point will be served by my further canvassing the cases. I prefer to return to the section. It requires that the

jury be told to look for corroboration of the accomplice's evidence in some material particular by other evidence implicating the accused. Whether or not potentially corroborative evidence satisfies this test will depend upon the nature of the allegations made against the accused and the evidence to be corroborated. "Implicate" means "entangle ... involve .. bring into connection with ..." (Shorter Oxford Dictionary) The section does not require that the corroborative evidence prove guilt. In the present case, it was necessary that the potentially corroborative evidence implicate the appellant in the cultivation, thus corroborating the evidence of the accomplices that she was a participant in it.

The ambit of the accomplices' evidence against the appellant was actually quite limited. In fact, the evidence from the other witnesses to whom I have referred and the police evidence as to what they found at the crop sites established a strong case against the accused without the evidence of the accomplices. Nevertheless, a warning as to their evidence was necessary, and it was necessary that the potentially corroborative evidence be identified for the jury. The effect of that evidence can be seen from the following table:

Evidence	**Connection to Cultivation**
a.Le Blowitz purchased petrol in jerry cans.	It is likely that petrol was used at the sites for fuelling the pumps.
b.Le Blowitz purchased gas cylinders on a regular basis.	Gas cylinders were found at the sites.
c.Le Blowitz regularly purchased torches and batteries.	Battery-driven torches were used at the sites.
d.Le Blowitz regularly purchased groceries.	The Crown case was that she was packaging groceries for dispatch to the sites.
e.On a number of occasions Le Blowitz purchased fertiliser in large quantities.	Fertiliser was used at the sites, although the actual brands purchased were not found at the sites.

f.Le Blowitz purchased 4 to 6 sets of electronic scales.	Similar scales were found at 3 sites.
g.Le Blowitz purchased blue "sunny hose, laid flat."	Similar hose was used at the sites.
h.Le Blowitz purchased a second hand refrigerator/freezer.	This refrigerator was found at one of the sites.
i.Le Blowitz regularly purchased clipseal bags.	Clipseal bags were used in the packaging of cannabis.

I do not overlook the fact that some of the above activities were performed by the appellant in conjunction with her husband. It was for the jury to assess her involvement with that fact in mind. The allegedly corroborative evidence tied the appellant to the cultivation through the police evidence as to what they found there and at the other properties which they raided. It thus implicated her in the cultivation and therefore corroborated the evidence of the accomplices as to her active involvement. In the circumstances, the concerns expressed by Macrossan CJ and Davies JA in Bryce (supra) have no application in the present case.

The other proposition implicit in the appellant's argument is the assertion that individual "items" of evidence must be capable of "standing alone" as corroboration before they can fulfil that role for the purposes of s.632. This is also inconsistent with authority.

In Kerim at p. 454 McPherson J said:

> It is, in my view, not necessary, in order to warrant the description 'corroborative', that each and every item or category of evidence relied upon for that purpose must simultaneously perform the dual function of confirming that the crime was committed and also that the accused was implicated in it."

Although McPherson J dissented in that case, the proposition is also inherent in the observations by Macrossan J in Stratford (supra, at pp.366-7, D.M. Campbell and Ryan JJ concurring) and in Kerim (supra, at pp.446-8). Corroborative evidence in a

particular case may consist of evidence from more than one source. In order that the totality of that evidence may be capable of being corroborative, it must implicate the accused and confirm the accomplice's evidence in some material particular. It is conceivable that one item of evidence may be, by itself, "intractably neutral", but when taken with another piece of evidence (also, perhaps, by itself neutral), it may take on an implicative effect. To exclude either piece of evidence because it cannot, by itself, be corroborative, would not be consistent with principles or commonsense.

Although we often speak of aspects of evidence in a case as if they were discrete parcels, evidence does not always come in that way. All evidence acquires its relevance from the context in which it is placed. Its effect cannot be assessed apart from that context. In a criminal trial, the context is the charge and the other evidence led to prove it. For most practical purposes, the body of evidence in a trial must be seen as an integrated whole. The rule requiring corroboration creates an artificial distinction between the evidence of classes of witness, but there is no reason for taking the distinction further than is required by the section. Provided the evidence from non-accomplices offers support for some material aspect of the accomplice's evidence and implicates the accused, the evidence is capable of being corroborative.

In this case, the allegedly corroborative evidence was substantial and varied in nature, and its weight could only be assessed by reference to it as a whole. I am satisfied that the evidence was capable of being corroborative and that the matter was appropriately left to the jury upon that basis. I have no fears that the verdict is in any sense unsafe.

Despite the form of the notice of appeal, the corroboration point was the only one argued. As I consider that it should fail, I would dismiss the appeal against conviction by Le Blowitz.

Cook

Cook was convicted on two counts of producing cannabis in quantities exceeding that specified in the Third Schedule. Count 3 related to crop one and count 4

related to crop five. The appeal is upon the basis that the convictions are unsafe and unsatisfactory. The appellant alleges in his notice of appeal that there was only one witness implicating him, a man named Goon, who was an accomplice. However, this was not the case. There was also evidence from two other alleged accomplices, Honner and Drage. There was no evidence capable of corroborating the evidence of these accomplices, but an appropriate warning was given to the jury in accordance with s.632. All had been sentenced in connection with their respective involvements prior to giving evidence.

Goon was involved in the cultivation for about 18 months from the start of 1993 to the middle of 1994. He gave evidence that Cook became involved with the cultivation towards the end of 1993 and was there for about 6 months, leaving a couple of months before the death of another worker. This death appears to have marked the end of the operation. Goon said that Cook worked at crop site one, digging pens, planting, operating the pump and fertilising and at the drop points, carrying groceries and "dope". From time to time he saw Cook carrying a gun. He also saw Rhodes pay him on a number of occasions. The witness went with Cook to crop site five on a number of occasions to start the pump and to get food from the workers who were there. On one occasion, Cook, Goon, Coleman, Watts, Kissling and Heron drove to a point where "dope" was concealed in the sugar cane.

There was some criticism of Goon's evidence based upon the fact that Cook was apparently going out with his former de facto wife. However little was made of this at the trial. It was also said that in an interview with the police on 17 February 1995, when he had indicated a desire to make full disclosure to the police, Goon did not mention the appellant Cook. In cross-examination he said that it was "pretty hard to get every bit of info of out me when they are asking me so many different questions."

The witness Christopher James Honner said that he had seen Cook at the drop point associated with crops one and five. This occurred on one or two occasions. He also had a conversation with Cook in which Cook told him that he was working at

crop site one. In cross-examination Honner admitted that when first interviewed by the police he purported to implicate a fictitious person called Jason Rye. He asserted that at that interview he had told police a series of lies. It seems likely that he received credit in his sentence for the assistance which he had offered to the police in their investigation of the cultivation. He had also received an indemnity from prosecution in respect of a potential charge of being an accessory after the fact to murder.

The witness Drage said that Cook was at Drage's place on one occasion when "he got smacked in the mouth ... by Lenny Heron." He saw Cook at the house on other occasions. It is difficult to see that his evidence in any way directly implicated Cook in the offences charged.

The jury was warned as to the dangers of convicting on uncorroborated evidence. There is really no reason to doubt that they heeded that warning. The allegations made by the witnesses against Cook were quite limited. This might reflect an absence of any factual basis for their allegations against him. Alternatively, it might be argued that if they had decided dishonestly to implicate him in the plot, they would probably have been more elaborate in their fabrication. These factors were properly matters for consideration by the jury. There was nothing about the evidence of these witnesses (other than the fact that they were accessories) to give cause for concern as to their potential reliability. In the circumstances, Cook's appeal against conviction should also be dismissed.

Applications for leave to appeal against sentence

Cook, Coleman, Innes and Kake apply for leave to appeal against sentence.

Cook was convicted on two counts of unlawfully producing cannabis in quantities in excess of that specified in the Third Schedule. He was born on 24 January 1972 and so is now 24 years of age. He pleaded not guilty. He has previous convictions for offences of dishonesty and has previously served one period of imprisonment. He appears to have been employed as a labourer at the site for about six months and was paid money on a couple of occasions. It seems that he spent one

day in custody in the course of the trial as a result of arriving late. This was on 1 May 1996. The Crown concedes that he should be given credit for that day as time served pursuant to the sentences. It will therefore be appropriate in the case of Cook to declare that he was in custody for one day from 1 to 2 May 1996 for the purposes of s.161 of the Penalties and Sentences Act. This should count as time served pursuant to his sentence. He was sentenced to three years' imprisonment on each count, the sentences presumably to be concurrent. It is submitted that there should have been a recommendation for early parole or that the sentence should have been suspended after a fixed period - implicitly less than 18 months.

Coleman was convicted of one count of carrying on the business of unlawfully trafficking in cannabis and one count of unlawfully producing cannabis in a quantity in excess of that specified in the Third Schedule. Both offences were said to have occurred between 1 January 1993 and 30 June 1994. He was born on 16 August 1969 and is now 27. He has numerous prior convictions, including convictions for possession and production of a dangerous drug and breaking and entering. However, he has never been to jail. He has been fined, placed on probation and on one occasion, sentenced to perform community service. Coleman was something of an entrepreneur in this project. He had an interest in the proceeds of sale of part of the crop, the balance going to Heron and Rhodes. He was actively involved in the sale of cannabis. He was associated with the cultivation from March 1993 until June 1994. He had a good work record and at the time of sentence was in a stable family relationship. He was sentenced to imprisonment for three years and nine months. The only attack upon this is the assertion that there should have been a recommendation for early parole.

Kake was convicted on three counts of producing cannabis in quantities in excess of that specified in the Third Schedule. She was born on 16 March 1960 and is therefore 36 years of age. She has a substantial criminal history going back to 1975, including robbery, burglary, theft, receiving, cultivation and possession of cannabis. She seems to have kept out of trouble between 1977 and 1984. She was a "worker" at

the crop sites, attending there as directed and occasionally staying overnight. She was primarily involved in housekeeping activities and "stripping" plants. She was at the plantation from February 1994 until the middle of the year. She is the mother of three children aged 14, 12 and 8 months at the time of sentence. The older two now live with their father in New Zealand as a result of these proceedings. She was sentenced to three years' imprisonment. It is submitted that the appropriate range was one to three years, but if the present sentence is appropriate as a head sentence, then that there should have been a recommendation for parole after 12 months.

Innes was convicted of three counts of producing cannabis in a quantity in excess of that specified in the Third Schedule. She was born on 30 July 1961 and therefore is aged 35 years. She has a substantial criminal history going back to 1981, including conviction for cultivation, shoplifting, receiving and possession of drugs. She has not previously been sentenced to imprisonment. It is reasonable to infer that all of her previous offences were minor. She was treated as having been a worker rather than a principal in the cultivation. She is the mother of four children aged been 6 and 18 years. She apparently came to Australia to escape an unsatisfactory domestic situation. When she arrived, she was without funds and was not eligible for unemployment benefits. As a result she became involved in this operation. She now has some prospects of a settled life with her new fiance in New Zealand. She cooperated with the police and pleaded to an ex officio indictment. She was involved in the cultivation for about seven weeks and earned about $5,000. The learned sentencing judge took into account a further charge of possession of a small amount of cannabis. She was apprehended in New Zealand and extradited to face these proceedings. She was sentenced to three years' imprisonment with a recommendation for parole after one year. The sentence is attacked upon the basis that it is excessive.

The material indicates that many people have been convicted of offences arising out of this particular operation. Only four of them are presently before us. It is tempting to seek to ensure comparability amongst all offenders, but we cannot do that.

We can only deal with the appeals which are before us. As Coleman appears to have been the most heavily involved of the present applicants, it is convenient to start with his case. The learned sentencing judge dealt with him upon the basis that he was to be distinguished from the others for that reason. He was a man who had previous experience with drugs and with the law. He had previously been dealt with twice for drug-related offences and on each occasion was fined. In 1992 he was dealt with for breaking and entering and was given the benefit of a probation order. He was then aged 22 years. Notwithstanding these opportunities to reassess his conduct, in 1993 and 1994 he became involved in the present operation. Given his deep involvement in the undertaking and its persistence over a period of time, it would be very difficult to challenge the appropriateness of the head sentence.

As to a recommendation for early parole, the only possible justification for this would lie in his not having previously been in prison and in his stable family and employment history. Had he not had the benefit of a probation order relatively shortly before these offences, the applicant's argument may have found some favour with me. However, his probation period expired in February 1993 and according to the outline of argument presented on his behalf, he went onto the cultivation in March 1993. In those circumstances, I consider that Coleman had been given every opportunity to mend his ways. No recommendation for early parole can be justified.

As to Cook, he had no previous convictions for drug-related offences but had served a period of imprisonment in 1991 for theft of a motor vehicle. He was involved in the crop for a period in excess of six months, but his involvement was as a worker and for considerably less than the 15 months spent on the cultivation by Coleman. There was no suggestion that Cook had any proprietary interest in the operation. To distinguish him from Coleman, it was necessary to recognise these factors. He had been to prison but his record was not significantly worse than Coleman's and he was younger. In the circumstances, I consider that a greater degree of discrimination between Cook and Coleman was required. That can best be achieved in the

circumstances by adding a recommendation for consideration for parole after 12 months in respect of each count. As I have previously indicated, we should also certify that he was in custody for a period of one day from 1 to 2 May 1996 which should count as imprisonment served pursuant to s.161 of the Penalties and Sentences Act.

Kake is older than either Coleman or Cook and also has a significant criminal history, although she has not previously been sentenced to imprisonment. She was a worker on the plantation from February 1994 to mid 1994. The period of involvement was therefore shorter than was Cook's, although not by much. She seems not to have been quite so involved in the day to day cultivation of the plantations but rather provided domestic assistance. The learned trial judge did not see any basis for discriminating between her and Cook insofar as concerns sentence and neither can I. Consistent with what I have said in connection with Cook, I would therefore add to each sentence a recommendation for consideration for parole after 12 months.

As to Innes, I stress the need for differential treatment to recognise her plea to an ex officio indictment. She was older than either Cook or Coleman. She also had a not insignificant criminal history, but without any periods of imprisonment. She was a worker rather than a principal in the cultivation and accepting the assertion that she came to Australia for domestic reasons, it is a little easier to understand her becoming associated with this undertaking as a result of her financial difficulties. Her involvement lasted only for seven weeks. In view of what I have said concerning Cook and Kake, and having regard to these further comments, it is clear that her sentence is out of line and that she should have leave to appeal. In re-sentencing her I give great weight to her plea of guilty. I would sentence her on each count to imprisonment for a period of two years and recommend that she be considered for parole after serving a period of six months imprisonment.

The orders which I therefore propose are as follows:-

(a)In the case of Coleman, application refuse.

(b)In the case of Cook, grant leave to appeal and allow the appeal to the extent of adding to each sentence a recommendation that the applicant be considered for parole after serving a period of 12 months. I would declare that he has served the period of one day in custody from 1 May 1996 to 2 May 1996 which should count as imprisonment served for the purposes of these sentences pursuant to s.161 of the Penalties and Sentences Act.

(c)In the case of Kake, grant leave to appeal and allow the appeal to the extent of adding to each sentence a recommendation that she be considered for parole after serving a period of 12 months.

(d)In the case of Innes, grant leave to appeal and allow the appeal. Set aside the sentences imposed and in lieu thereof sentence her to imprisonment for a period of two years on each count with recommendations that she be considered for parole after serving a period of six months.

Sentences are to be concurrent in all cases.