IN THE COURT OF APPEAL [1999] QCA 324

SUPREME COURT OF QUEENSLAND

CA No 154 of 1999

Brisbane

[R v Williams]

THE QUEEN

v

BRETT MICHAEL WILLIAMS
(Applicant) Appellant

McMurdo P
Pincus JA
Thomas JA

Judgment delivered 20 August 1999.

Judgment of the Court.

APPEAL AGAINST CONVICTION DISMISSED. APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED.

CATCHWORDS: **CRIMINAL LAW - CONFESSIONS AND ADMISSIONS - convictions of burglary - whether police investigation inadequate - failure of police to tape-record alleged admissions by accused near scene - undesirability of such practice where mechanical recording readily available - whether trial judge should have given general warning to jury on this point - whether accused deprived of fair trial.**

CRIMINAL LAW - EVIDENCE - MISCELLANEOUS MATTERS - use to be made of lies told by accused - role of trial judge where prosecution has addressed jury on the basis that alleged lies by accused have an incriminatory effect - whether overall the accused was deprived of a fair trial.

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - MISCELLANEOUS POWERS OF COURTS AND JUDGES - trial procedure - mode of address to accused

during trial - undesirability of addressing accused person by status rather than by name - risk of unfairness through direct address as "prisoner", "accused" or by surname alone.

CRIMINAL LAW - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSON - APPLICATION TO REDUCE SENTENCE - WHEN REFUSED - serious and audacious examples of burglary - risk of personal confrontation and conflict with occupants of units - application dismissed.

***Domican v R* (1992) 173 CLR 555 applied**
***Edwards v The Queen* (1993) 178 CLR 193 applied**
***McKinney & Judge v The Queen* (1991) 171 CLR 468 applied**
***Penney v The Queen* (1998) 155 ALR 605, (1998) 72 ALJR 1316 considered**

Counsel: Mr P Feeney for the applicant/appellant.
Mr M Byrne QC for the respondent.

Solicitors: Bennett & Associates for the applicant/appellant.
Director of Public Prosecutions (Queensland) for the respondent.

Hearing Date: 14 July 1999.

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 20 August 1999

1 This is an appeal against conviction upon three counts of burglary and two of stealing. It was alleged that the appellant committed these offences in the early hours of 11 November 1997 in a high-rise apartment building called Zenith in Surfers Paradise.

2 The only ground of appeal is in these terms - "The trial of the appellant was not fair, thereby occasioning a miscarriage of justice, in that the summing-up was not balanced and directions on issues of identification, disputed admissions to police, and lies were not adequate".

3 As we understand the argument of Mr Feeney who appeared for the appellant, it is not suggested that any particular point raised by him is of sufficient moment to carry the appeal to success. He submits however that upon the combination of all points raised by him this Court will reach the conclusion that the appellant did not have a fair trial. Mr Feeney's submissions encompass particular directions (or non-directions) on the question of admissions to the police, lies, and identification, an allegation that the summing-up was unbalanced, and complaints concerning what he referred to as a woeful police investigation.

4 The evidence given in the case includes the following -

(a) At about 5.00 a.m. an intruder disturbed the elderly occupants of Unit 2001 on the 20th floor of the Zenith building. He had apparently entered from the balcony. A struggle ensued.

(b) In the course of the struggle a piece of the intruder's red check shirt was torn off.

(c) The intruder exited from the balcony by climbing down towards the floors

below.

(d) The occupants of Unit 1801 heard a loud crash followed by a person running through their unit. They noticed fresh damage to a railing on their balcony.

(e) Property had been taken from three units in the building that night. The property included a silver and gold Rip Curl watch, a St Honore ladies watch, a silver and gold Seiko watch and New Zealand $10 and $20 notes.

(f) Police officers arrived quickly at the scene. They observed a man (the appellant) walking to his car which was parked between 50 and 150 metres from the Zenith building.

(g) The appellant was wearing only a pair of jeans and was carrying a red check shirt. The shirt had a piece of fabric missing which exactly matched that torn off in Unit 2001.

(h) When the police asked the appellant what property he had on him, he produced from his trouser pocket two cloth bags containing the three watches that have been described above, together with other jewellery. Further, New Zealand $10 and $20 notes were found in his wallet.

(i) The appellant had an injury described as bruising in the form of a welt on the right hand side of his back. The appellant's counsel, during the trial, put to those witnesses that at that time they had asked him why his finger was bleeding. However those witnesses denied asking that question and said that they had not noticed any injury to his hands. Later, the appellant, when giving evidence, said that he had a scratch on his finger at that time, but that he had suffered it a short time before when he had been ejected

from a nightclub.

(j) The police evidence of questions and answers at the time of the appellant's apprehension was that Constable Smith asked him "What happened to your shirt?" and that he replied "I don't know mate". Constable Smith then asked, "How did it get ripped?" to which the appellant replied, "From a nightclub". Further questions and answers included:

"At what time did you go out tonight?-- About 2.35.

This morning?-- Yeah.

Was your shirt ripped then?-- No."

The appellant further said that he had found the jewellery in a bin, and claimed to have had the New Zealand money "for years, since high school".

(k) The appellant was 37 years old. He did not seem affected by alcohol when apprehended.

(l) The police initially took him to the police station pursuant to an outstanding warrant of which they had been advised by telephone. At the station he declined to participate in any recorded interview.

(m) The New Zealand $20 note was proven to have been printed in 1996 and the $10 note in 1995.

(n) The appellant gave evidence at his trial that during the previous evening he had a "verbal argument" with his wife and had left home taking a pair of jeans and a hooded shirt with him and driven to Surfers Paradise. He changed into his hooded jacket and shirt, parked his vehicle on the Esplanade and eventually went to a nightclub known as Shooters. He had

quite a few drinks and many hours later, after midnight, he was asked to leave and escorted from the premises by two persons. He fell to the floor when they "dropped" him, and scratched the little finger of his right hand. It was almost daylight and he walked back to his car. He thought of going for a swim so he took off his shirt and shoes and left them in the car. He had a cheeseburger, lit a cigarette and eventually stubbed it out in a bin. That was when he noticed a red shirt crumpled up in the bin with money sticking out of the pockets. He picked it up, took the money and a string bag out of the pocket which contained jewellery. He put the money in his wallet and the string bag in his jeans pocket. The shirt didn't look "too bad of a shirt" so he took it with him and was going back to his car, still contemplating a swim, when he heard sirens and was approached by a police officer. He denied making any statement to the police that the red shirt had been ripped at the nightclub, and he further denied making any statement that he had the notes in his wallet for a long time. He claims to have told the police that he found the New Zealand dollars in the bin with the string bag.

(o) The manager of Shooters bar gave evidence by reference to the incident reports maintained by the business that no-one had been forcibly removed from the club on the night in question.

(p) There was evidence of blood on the balcony of Unit 1801 and in other places including the unit doorway and in the vicinity of the lifts. The police investigation included a limited fingerprint examination of possible entry points, but no fingerprints were located. None of the blood marks in

and around level 18 were sampled or tested. No photographs were taken of injuries observed on the appellant, nor was there any medical examination of him. There was also arguably a spot of blood on the shirt which he was carrying, but this was not tested either. There was no evidence of the size of the shirt or of its consistency with the size of the appellant. The statements given in evidence by the police concerning the questions and answers of the appellant before he was taken to the police station were not recorded, and were supported only by the unsigned notes of one of the policemen.

(q) The evidence of the occupants of Unit 2001 with whom the intruder had struggled contained a brief description of him, but there was no attempt to conduct an identification procedure by way of line-up, photo board or dock identification. The description given by these persons differs in the respect that one described him as a round faced man and the other as a very thin faced man, but on the whole it was suggested that their description of the offender was consistent with the appellant's appearance. One indicated that he had brown hair, was wearing jeans and had a youngish face. The other described him as having a darkish complexion with no facial (hair) growth. The learned trial judge noted that many other people might fit such descriptions too.

5 It may be noted that quite apart from the very telling uncontroverted circumstances proved in evidence, the doctrine of recent possession supports the conclusion that the appellant was the person who had stolen the property found in his possession. It would seem that the police treated the case as one of an offender virtually caught red-handed,

and considered it unnecessary to pursue further investigative procedures which might otherwise have been regarded as highly desirable.

6 We shall now consider the points raised by the appellant's counsel.

Inadequate police investigation

7 It was conceded that there is no general rule in Australia that a complete investigation is a necessary element of the trial process or of a fair trial[1]. As in *Penney*, in the present case failure to pursue a particular line of investigation gives no ground for thinking that the appellant has been deprived of a proper opportunity of exculpation. It is nearly always possible to make suggestions of further matters that might have been investigated in criminal matters, although it must be said that the present case is a very strong example of multiple failures to follow up obvious leads. In the end however the question is whether the evidence actually adduced was adequate and whether the trial was fair. The unsatisfactory nature of the investigation must therefore be kept in mind as a potential factor when this overall question is considered.

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1 *Penney v The Queen* (1998) 155 ALR 605, (1998) 72 ALJR 1316.

Identification

8 It was not part of the Crown case that identification of the appellant by eyewitnesses had been attempted or established. Counsel for the appellant was unable to submit that a traditional warning such as that in *Domican*[2] was required. The limited descriptions given by the two occupants of Unit 2001 was given as an additional piece of

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2 *Domican v R* (1992) 173 CLR 555.

circumstantial evidence and there was nothing objectionable in that. It was submitted that his Honour should have drawn attention to the extent to which those descriptions varied, but in the absence of objection from experienced counsel, or request that that particular point be made by the learned trial judge in his client's favour, this particular point does not warrant further consideration.

Admissions to police

9 It is astonishing that twenty-two years after the Lucas Commission of Inquiry[3], ten years after the Fitzgerald Report[4], and eight years after *McKinney*[5], police still fail from time to time to take advantage of relatively inexpensive recorders when interviewing suspects in the field.

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[3] Committee of Inquiry into the Enforcement of Criminal Law in Queensland, *Report to Hon. W.D. Lickiss,* 29 April 1977, Brisbane, Government Printer, 1977.

[4] Committee of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry pursuant to Orders in Council*, 3 July 1989 Brisbane, Government Printer, 1989.

[5] *McKinney & Judge v The Queen* (1991) 171 CLR 468.

10 As the appellant eventually declined to take part in an electronically recorded interview, there are disputed oral admissions to the effect that the shirt was his. This was not a case where the oral statement could be relied on as a sole basis of conviction. Indeed it was one item in a substantial circumstantial case. Further, the circumstances surrounding the field interview were not as stark as those at a police station where the special position of vulnerability and disadvantage of an accused is recognised. Even so, the undesirability of relying upon notes in a notebook in a day and age where mechanical recording is readily available is a matter of some concern. Whether this was the fault of a

system which failed to supply proper equipment to its members or of individual failure does not matter. If such practices continue, courts may find it necessary to exclude such alleged oral statements or alternatively to give *McKinney*-style directions in relation to such statements, highlighting the failure of the police to act reasonably in a well-known problem area. Judges might well tell juries that where no sensible reason is given for failing to record such a conversation, the jury should regard it with suspicion.

11 In the present case no *McKinney* direction was sought at trial and the police inadequacies were undoubtedly the subject of strong submissions by defence counsel. The submission on appeal is that although the circumstances did not require a *McKinney* direction the learned trial judge should have given a general warning to the jury pointing to the danger of using such evidence for the purpose of finding the appellant guilty, and to have warned the jury of the forensic difficulties faced by an accused who tries to respond to a confession that may be fabricated.

12 However in the absence of any request for such directions, and having regard to the limited part of the Crown case consisting of such conversations between the police and the appellant, we do not consider that any error occurred through the absence of such directions.

Lies

13 The learned trial judge gave only limited directions on the use that the jury might make of any lies that they might consider the appellant had told. His Honour initially stated that the jury could take this into account in considering the appellant's credibility, but added "bear in mind you must be satisfied that they were lies, that they are relevant to the charges before the Court, that he knew they were lies at the time, and there was no

other explanation for his telling those lies other than an attempt to conceal his guilt". That of course falls well short of a proper direction under *Edwards*[6], although it draws together some of its main components. However up to that point the only use that the jury had been directed that could be made with respect to any lies was to regard them as affecting the appellant's credibility. Later in the summing-up, in the course of summarising the Crown's submissions, his Honour referred to the inconsistency between the appellant's evidence and statements attributed to him by the police officers, and also to what would seem to be a lie concerning the time of his acquisition of New Zealand currency, if the jury accepted that he had made such statements to the police officers. His Honour then continued:

> "The Crown says really, if you are satisfied that he was telling lies to the police officer, that those lies related to a relevant matter - a matter relevant to the charges before you - that he knew he was telling lies, and there is no other explanation for his telling those lies, then you could well draw the conclusion that the only reason he had for telling those lies was because if he disclosed the truth, it would implicate him in the commission of the offences".

No further directions were given on this subject.

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[6] *Edwards v The Queen* (1993) 178 CLR 193.

14 In a trial where the prosecution has addressed the jury on the basis that alleged lies by the accused have an incriminatory effect, and the trial judge refers to such submissions, it is incumbent upon the trial judge to direct the jury as to whether the evidence is capable of such a use or not[7]. Where the judge thinks that such a suggestion is not fairly open or is a flimsy one, the judge should simply instruct the jury to use such evidence on the question of credibility and nothing else. If however potential incriminatory effect is to be

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[7] *R v Renzella* [1997] 2 VR 88; cf *R v Brennan* [1999] 2 QdR 529.

left open from such submissions, further directions along the lines mentioned in *Edwards* are necessary. In the present case then, the main omission relied on by counsel for the appellant was his Honour's failure to advise the jury that there may well be other explanations than guilt for a person telling lies, that an innocent person may lie, and failure to mention examples such as protection of someone else, panic or avoidance of a consequence extraneous to the offence.

15 Although this non-direction constitutes a defect, it does not in the overall context of the case amount to a defect of serious proportions, particularly as the appellant had given evidence. The real damage to his case, if the jury thought that he had made such statements to the police and was now telling lies, lay in the damage to his credibility rather than in some non-specific incriminatory effect.

Whether summing-up unbalanced

16 Having read this particular summing-up we do not consider that it could fairly be described as unbalanced or that it was unfairly adverse to the defence. It is true that the summary of the Crown's submissions occupies ten pages while the summary of the defence submissions occupies five. That is hardly surprising when the Crown needs to establish considerably more than the defence and when, as here, the Crown had a relatively strong case. There is no duty on a trial judge to make a weak defence any stronger than it really is, or to structure a summing-up so as to ensure that the accused person has a 50/50 chance of acquittal. There is nothing inappropriate in a summing-up which fairly reflects the relative strengths or weaknesses of the respective cases. Whilst some criticism may be made of some parts of the summing-up we do not consider that there is any merit in this particular submission.

Overall submission of unfair trial

17 It was submitted that when all the above factors are taken into account a general picture of unfairness emerges leading to the view that the appellant was deprived of a fair trial.

18 Before dealing with that submission we would add one other, albeit minor, factor into the balance. It involves the manner in which the appellant was addressed during the trial in the presence of the jury. We are informed that in the early stages of the trial the Crown prosecutor referred to the appellant as "the prisoner". Subsequently, the learned trial judge addressed the accused, not by name, but by his status. For example, when the Crown case closed his Honour said, "[s]tand up, accused" and proceeded to advise him of his right to adduce evidence. Having been advised that the appellant would call and give evidence his Honour again addressed him as "accused". Subsequently when the appellant was cross-examined, the Crown prosecutor likewise addressed him as "accused". We are concerned only with occasions when it is necessary to communicate directly with an accused person during the course of a trial. There is in our view no good reason why an accused person should not be addressed in the same way during a trial as any other participant in the trial - in this case as "Mr Williams". Experience suggests that many judges extend to persons who are on trial the courtesy of the prefix title (Mr, Ms, Mrs or Miss as the case may be) followed by their name. Some judges however continue to refer to accused persons as "prisoner" or "accused" or simply by surname. This may be perceived by some as derogatory. Although there is no logical reason for "accused" to bear an unfavourable connotation, there is a risk that it does, and in our view it is generally undesirable to direct attention to it in this way by addressing accused persons

differently from others participating in the trial.

19 Trial judges have a necessary degree of control in the procedures that take place in their own courts. It is unfortunate that on this particular point different practices prevail. Juries in the course of a sittings move through many courts and may wonder if there is some significance in the different practices that are observed. We do not suggest that there is any mandatory requirement as to the mode of address when dealing with accused persons in the presence of a jury. But it should be understood that practices such as those that have been mentioned may adversely affect the quality of a trial, and the perception whether overall it has been fair. Simple courtesy would suggest that a person who is presumed by the law to be innocent until shown to be otherwise should be given the same courtesy as counsel, witnesses and other participants in the court process.

20 When all the above matters are considered in the present case, we do not think that it can properly be said that the trial was unfair or that the conviction was unsafe and unsatisfactory. Indeed, although it is disappointing that other obvious lines of evidence were not gathered, the evidence actually presented was quite overwhelming, and the excuse offered by the appellant absolutely unconvincing. To the extent that an error occurred through non-direction in relation to lies, this is a plain case in which the proviso should be applied. A jury having been fully and appropriately instructed and acting reasonably on the evidence would inevitably have convicted this accused.

21 The appeal should therefore be dismissed.

Sentence

22 There is also an application for leave to appeal against the sentence of four years which was imposed upon the burglary counts. These were serious and audacious

examples of burglary. They involved multiple units in the same complex with theft of selected property and are an example of professional crime. They also involved a risk of personal confrontation and conflict with occupants who would be expected to be in the units, and indeed that risk became a reality when a struggle ensued between a 69 year old occupant and the applicant. Having regard to the conduct of the trial, no submission of remorse is possible. The applicant is a 37 year old man with previous convictions for breaking and entering and stealing, breaking and entering with intent, malicious injury, assault, assaulting police, resisting arrest, entering a closed land and malicious damage. The only factors urged in his favour are that he has a successful marriage and has been employed for some years as an insurance salesman. In our view the sentence was by no means excessive. We would refuse the application.