SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lock* [2001] QCA 84
PARTIES:	**R** **v** **LOCK, Peter Russell** (appellant)
FILE NO/S:	CA No 151 of 2000 SC No 479 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 March 2001
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2001
JUDGE:	Williams JA, Ambrose and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Appeal allowed** **2. Conviction quashed, retrial ordered.**
CATCHWORDS:	CRIMINAL LAW – LIABILITY AND CAPACITY – DEFENCE MATTERS – INSANITY – DISEASE OF THE MIND, MENTAL ILLNESS OR MENTAL INFIRMITY – DIRECTION TO THE JURY – whether the learned trial judge in his summing up failed to adequately identify the issues with respect to the nature of the defences raised by the appellant and the facts relevant to those defences. CRIMINAL LAW – COURSE OF EVIDENCE, STATEMENTS AND ADDRESSES – ADDRESSES – GENERALLY. CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE. CRIMINAL LAW – LIABILITY AND CAPACITY – DEFENCE MATTERS – DIMINISHED RESPONSIBILITY – PROOF AND EVIDENCE. CRIMINAL LAW – SUMMING UP. CRIMINAL LAW – APPEAL AND NEW TRIAL –

MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION.

Criminal Code ss 27 and 304A

Amado-Taylor v R [2000] 2 Cr App R 189, considered
Domican v The Queen (1992) 73 CLR 555, considered
Mogg v R (2000) 112 A Crim R 417, considered
R v Rolph [1962] QdR 262, considered
RPS v The Queen (2000) 199 CLR 620; [2000] 74 ALJR 449, considered
R v Terry [1961] 2 QB 314 considered

COUNSEL: A J Kimmins for the appellant
P M Ridgway for the respondent

SOLICITORS: Robertson O'Gorman Solicitors (Brisbane) town agents for Price & Roobottom (Southport) for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by Douglas J, and, though I agree with what he has said, the importance of the case demands that I state my own reasons for arriving at the conclusion that there should be a re-trial. Such a conclusion is unfortunate if only because it will result in a third trial; at the first trial the jury was unable to agree upon its verdict.

[2] There was no dispute at the trial that the appellant killed his wife on 18 June 1997. There was a formal admission to that effect at the outset. The appellant was called primarily to verify the statements he made to doctors who were called to give evidence as to his state of mind at the time of the killing. Under cross-examination he acknowledged that he had planned to kill his wife over some days leading up to her death; that plan included taking steps to make it appear that an intruder was responsible for what had happened.

[3] The defence put in issue the appellant's state of mind at the relevant time. Both s 27 and s 304A of the Criminal Code were relied upon. Two psychiatrists (Drs Curtis and Alcorn) and one psychologist (Dr Lynagh) were called as part of the defence case. The Crown responded by calling three psychiatrists (Drs Fama, Grant and Reddan).

[4] Dr Curtis was the first of those doctors to examine the appellant; he saw him on 25 November 1997 some five months after the killing. His second examination was on 23 April 1998. Dr Alcorn examined the appellant on two occasions in 1999, and Dr Lynagh saw him on three occasions between February 1998 and November 1999. Dr Fama saw the appellant on two occasions in September and October 1998, whilst the other two doctors called by the Crown only saw him once – in November 1998.

[5] Dr Curtis was of opinion that the appellant was suffering from "a brief psychotic episode" at the time of the killing. It followed in his opinion that the appellant had a complex mental disease which impacted, at least substantially, on each of the three capacities referred to in s 27 and s 304A. If his evidence was totally accepted at its highest that would constitute evidence that the appellant at the relevant time was of unsound mind within s 27. Upon my reading of the evidence only that of Dr Curtis would support such a conclusion.

[6] Dr Alcorn concluded that the appellant was suffering from an "obsessive compulsive personality disorder" and from an "adjustment disorder" at the time of the killing. He expressed the opinion that those conditions substantially deprived the appellant of the capacity to control his actions.

[7] Dr Curtis also diagnosed that the appellant was suffering from an obsessive compulsive personality disorder and an adjustment disorder. Again, he expressed the view that the three capacities referred to in s 304A were substantially impaired at the material time.

[8] Dr Lynagh's evidence was to the effect that the appellant was suffering a "significantly disturbed psychological state" at the relevant time; specifically he referred to depression and anxiety. He does not appear to have expressly given an opinion as to the effect that condition had on the capacities referred to in s 304A.

[9] Dr Fama also diagnosed obsessive compulsive personality disorder and adjustment disorder. Clearly Dr Fama did not consider that the appellant was of unsound mind pursuant to s 27. From a psychiatric point of view he considered that the application of s 304A was borderline. In his opinion, if a capacity was substantially diminished it would have been the capacity to know that what he was doing was wrong. Further, his evidence could be interpreted as expressing the view that there was a 60% chance there was no abnormality of mind, leaving a 40% chance that there was.

[10] In relation to s 304A, Dr Grant said that he could not make a diagnosis of any significant mental illness at the time of the offence but he did accept a diagnosis that the appellant was suffering obsessive compulsive personality disorder.

[11] Dr Reddan came to the conclusion that the appellant was not suffering a mental disease. She did express the view that he had "significant obsessional personality traits and as well as narcissistic and passive aggressive traits".

[12] Each of the doctors was directed to the evidence that the appellant planned the killing and covered up his role in it for a number of days and asked to express a view as to the significance of that evidence when considering whether the matters specified in s 304A had been established. Again the responses varied, but in general the weight of opinion indicated that such evidence was not decisive.

[13] That is an extremely brief summary of the medical evidence. It is by no means complete, but it does indicate the range of opinion evidence that the jury had to consider in determining whether or not the appellant had discharged the onus of establishing deprivation or substantial impairment of one of the relevant capacities.

[14] Douglas J has quoted the passage from the summing-up wherein the learned trial judge indicated he would not be "rehashing or reworking" the evidence which had been canvassed in counsels' addresses. In addition, there are two further passages in the summing-up which are relevant for present purposes:

> "The opinions of experts are as good as the extent to which you are satisfied of the facts on which they are founded has been made out. Differences between experts may rest on such considerations as different versions of crucial events having been provided to them, or to differences in the exercise of professional judgment, and we saw, I think, a number of examples of that in the course of this case. I cannot remember who they were, but there were a number of experts who adopted a position, but when a different position was put to them they did not dissent from that position, but they nevertheless adhered to their own professional judgment, so that the issue is an issue for you".
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> "In this case, I think, it is right to say that there is not much factual distinction in terms of the evidence between mental disease or natural mental infirmity. I think there was one opinion supporting natural mental infirmity, but the inferences arise to be drawn from essentially the same facts".

Whilst one can readily understand why the learned trial judge would not, in the circumstances, deal with all the medical evidence in detail in the summing-up it was incumbent upon the trial judge to assist the jury in their deliberations by relating the medical evidence to the specific questions which had to be considered in the light of s 27 and s 304A.

[15] The jury members were gives copies of those two sections of the Code, and the learned trial judge took them briefly through the critical aspects of those provisions. I am prepared to accept that the provisions were adequately explained to the jury. But there was no reference at all to the substance of the medical evidence and no explanation as to how that evidence could be relevant when considering the statutory provisions. The most significant passages for present purposes are those I have quoted. There was no attempt in the summing-up to explain the differences of opinion between the doctors, and no attempt to indicate how acceptance of one or another of those opinions could lead to a different conclusion as to whether the requirements of s 27 or s 304A had been established. The reference to "one opinion supporting natural mental infirmity" could be regarded as misleading because of its vagueness. What was the consequence of the jury accepting the evidence of the doctor who considered there was natural mental infirmity; the jury were not told where they could go from there.

[16] Dealing with the requirements of a summing-up where identification was in issue, the High Court in *Domican v The Queen* (1992) 173 CLR 555 at 562 said that reference by the judge to the arguments of counsel was "insufficient"; the jury were entitled to "the benefit of a direction which has the authority of the judge's office behind it". To my mind those remarks are apposite to a case such as this. Whether a person is of unsound mind or suffering from diminished responsibility can be a

difficult question to decide. As the evidence in this case establishes, eminent medical specialists may reach different conclusions on the case. The expressions used by the medical witnesses would not be familiar to many, if not most, of the jurors. The evidence is not of a type which an ordinary juror could readily evaluate. There is also the added problem, evident to some extent in this case, that the doctors' evidence does not always use the language of the Criminal Code. Because of that it is important in a case such as this for the jury to have the assistance of the trial judge; they should not be left to evaluate the evidence having regard only to the competing contentions of counsel.

[17] Such an approach conforms with what has been said in *RPS v The Queen* (2000) 199 CLR 620, *Amado-Taylor v R* (2000) 2 Cr App R 189, and *Mogg v R* (2000) 112 A Crim R 417. I also agree with the observations in *R v Terry* [1961] 2 QB 314 and *R v Rolph* [1962] Qd R 262 at 288-290 and 291-2 as to the particular obligation on the trial judge when summing-up in a case involving insanity or diminished responsibility.

[18] Because of the failure of the learned trial judge to give adequate directions to the jury on matters which were of critical importance for their consideration I cannot conclude that the appellant had a fair trial. It follows that a verdict of guilty of murder is unsafe and unsatisfactory. I am of the view that a jury, properly directed, could have accepted evidence which supported a conclusion that the appellant was of diminished responsibility at the time he killed his wife. But equally, on the evidence, a reasonable jury could have rejected that proposition and found the appellant guilty of murder. In those circumstances it is not possible for this Court to substitute a verdict of guilty of manslaughter based on diminished responsibility. The only course in those circumstances open to this Court is to quash the conviction and order a retrial.

[19] The orders of the Court will therefore be:

(a) appeal allowed.
(b) conviction quashed, retrial ordered.

[20] **AMBROSE J:** I have had the opportunity of reading the reasons for judgment and agree with Williams JA and Douglas J.

[21] **DOUGLAS J:** The appellant, Peter Russell Lock, was convicted of the murder of his wife. At the trial the only defences put forward were those of insanity (s 27 *Criminal Code*) and diminished responsibility (s 304A *Criminal Code*). The marriage between the appellant and his wife had mainly been a happy one, but the evidence reveals that the appellant was an obsessional person and in particular had become obsessed about the fact that he had not filed tax returns on behalf of his wife and daughter for some several years. He had taken out a post box where he had allowed mail from the Australian Taxation Office to accumulate.

[22] Somehow, and concerned about this obsession, he on the afternoon of 17 June 1997 disabled his car at his place of work. He called the RACQ and the vehicle was fixed. He then caught a taxi to his residence and ate a meal with his wife after which she retired to bed. Early the following morning he armed himself with a hammer and walked into his wife’s bedroom and struck her once in the head with

the hammer. She was not killed by the single blow and he held on to her until she stopped moving.

[23] He told his daughter (who had telephoned from overseas after the killing) that at the time she telephoned her mother was asleep. He informed his daughter that he would wake the deceased in time for her daughter to ring back a short time later. When she did ring back the appellant informed her that her mother had been killed by an intruder.

[24] He contacted the police. In interviews from Wednesday 18 to Friday 20 June 1997 he said that he had nothing to do with the killing and that it was the work of an intruder. Finally on 21 June 1997 he arrived at the police station where he indicated in writing to the police that he had killed his wife. At the time he was described as behaving very oddly, hyperventilating, and refusing to actually speak.

[25] Subsequent to his arrest he was seen by a number of psychiatrists and psychologists. Reports were prepared by both the defence and the prosecution and, as it seems, all of those practitioners were called at the trial. Some, like Dr Curtis, had seen him, first, not long after the incident and others, like Dr Redden, did not see him until more than 15 months after the incident. Some of the practitioners saw and interviewed him more often than others.

[26] It is fair to say that there was a divergence of opinion between the various psychiatrists and psychologists. It is not necessary to go through it in detail here, but suffice to say that there was a body of evidence which pointed to the occurrence of a brief psychotic episode which might, if accepted by a jury, have been sufficient to ground a defence under s 27 or s 304A of the *Criminal Code*.

[27] At the beginning of the hearing of the appeal counsel for the appellant was granted leave to add a further ground of appeal, namely "there has been a miscarriage of justice in that the learned trial judge failed to adequately direct the jury in his summing up." That ground was argued in addition to the ground that the verdict of the jury was "unsafe and unsatisfactory". In essence it was argued that if the fresh ground was made out that in itself meant that the verdict was "unsafe and unsatisfactory".

[28] In essence the only attack made by the appellant upon the learned judge's summing up was that he failed to:

(a) review the facts for the jury;
(b) relate the facts to the law or the terms of the sections of the *Criminal Code* namely s 27 and s 304A; and
(c) review the arguments for both sides.

[29] What his Honour did say was as follows:

> "I have an additional function in summing up. That is, to make such observations on the evidence as I see fit. I propose keeping that to a minimum. The evidence has been extensively canvassed in the course of the addresses, particularly counsel for the defence. I don't say that in any critical sense. It had to be done, but there is little

> purpose, I think, served by me by my simply rehashing or reworking or in a slightly different emphasis repeating that exercise. So I have certainly got no intention of canvassing every aspect of the evidence or indeed in the detail which was done in that address."

[30] The obligations of a trial judge in summing up to a jury in criminal cases have been discussed in three relevant recent cases. They are *RPS v The Queen* [2000] 74 ALJR 449 (judgment delivered 3 February 2000), (*RPS*); *Amado-Taylor v R* [2000] 2 Cr App R 189 (judgment delivered 27 March 2000, *(Amado-Taylor*); and *Mogg v R* (2000) 112 A Crim R 417 (judgment delivered 20 June 2000) (*Mogg*). Those judgements were respectively judgements of the High Court of Australia, the Court of Appeal (UK) and this Court of Appeal. It appears that *RPS* was not referred to in *Amado-Taylor* and nor was *Amado-Taylor* referred to in *Mogg*.

[31] It is necessary then to deal with the principles which can be extracted from those cases.

[32] In *RPS* the majority Gaudron ACJ, Gummow, Kirby and Hayne JJ said as follows:

> "[41] Before parting with the case, it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.
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> [42] But none of this must be permitted to obscure the division of functions between judge and jury. It is for the jury, and the jury alone, to decide the facts. As we have said, in some cases a judge must give the jury warnings about how they go about that task. And, of course, it has long been held that a trial judge may comment (and comment strongly) on factual issues. But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often that not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.
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> [43] To attempt to instruct the jury about how they may reason towards a verdict of guilt (as distinct from warning the jury about impermissible forms of reasoning) leads only to difficulties of the kind that have arisen in the present case. Had the judge's

> instructions about the significance of the appellant not giving evidence stopped at pointing out that he was not bound to do so, that there may have been many reasons why he did not do so (and the jury should not speculate about those reasons), that it was for the prosecution to prove its case beyond reasonable doubt, and that the jury should draw no inference from the appellant not having given evidence, no complaint could be made. Because the charge in this case went beyond these matters, the jury was misdirected."

[33] In *Amado-Taylor* however, at 191 Henry LJ speaking for the court said:

> "First, counsel's closing speeches are no substitute for a judicial and impartial review of the facts from the trial judge who is responsible for ensuring that the defendant has a fair trial. And the first step to such a trial is for the judge to focus the jury's attention on the issues he identifies. That responsibility should not be delegated (or more accurately here, abandoned) to counsel, doubly so when they do not know, when making their speeches, what the judge is expecting of them.
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> Second, the fact that members of the jury were taking notes does not relieve the judge of this responsibility. Evidence is not given sequentially, it comes out witness by witness and needs to be marshalled and arranged issue by issue. This is the judge's responsibility – it involves work out of court, which he cannot simply pass on to the jurors."

Further, at 192-193 his Lordship said:

> " Accordingly, in a trial lasting several days or more, it is generally of assistance to the jury if the judge summarises those factual issues which are not disputed, and where there is a significant dispute as to material facts, identifies succinctly those pieces of evidence which are in conflict. By so doing, the judge can focus the jury's attention on those factual issues which they must resolve. It is never appropriate, however, for a summing up to be a mere rehearsal of the evidence.
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> The Court later went on to consider an element lacking from that summary: "The necessity for a judge, when summing up, to place fairly before the jury such defence as to advanced." In this context it is pertinent to note Professor Birch's commentary on the case of *Brower* [1995], Crim L R 746 at 747:
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> "Putting the defence fairly and adequately to the jury has rightly been described as the 'over-riding rule' when summing up (*Spencer and Smails* [1986] 2 All E R 928 at 938, per Lord Ackner) and it is hard to see how this can be done without referring to the evidence when the defence has sought to exploit inconsistencies in the prosecution witnesses' accounts.""

[34] In *Mogg* McMurdo P at 427 said:

> "The onerous duties of a trial judge will ordinarily include identifying the issues, relating the issues to the relevant law and the facts of the case and outlining the main arguments of counsel. This should have been done in this case but was not; this too may have deprived the appellant of the chance of an acquittal and in itself also warrants a retrial."

[35] Further, in *Mogg* Thomas JA referring to authorities said:

> "[72] The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken."

His Honour went on to say:

> "I do not understand the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS* at 449 [41]-[43], which encourage reticence in making comments on the facts, to be contrary to that view." (Para 73)

[36] It follows that the obligations of judges' summing up to juries in the United Kingdom are somewhat more onerous than those which apply in this country. In any event this court should not depart from the reasoning in the decisions of *RPS* and *Mogg*, which are cases that have been decided so recently. The question then is to determine whether the learned judge's summing up in this particular case satisfied the tests in *RPS* and *Mogg*.

[37] True it is, in this case, that if the judge had directed the jury's mind to the intricacies of the medical evidence, it is more than likely that they would have gained an impression that the preponderance of evidence was against the proposition that the defence had made out a defence under s 27 or s 304A of the *Criminal Code*. However, that is not an answer to the question. The fact is that the learned judge did not direct the jury's attention to these complexities in any way whatsoever. In my respectful view the learned trial judge failed to sum up to the jury in a way which "put fairly before the jury the case which the accused makes"; *RPS* at para 41. Further, in my view, the summing up failed to "identify the issues, relating the issues to the relevant law and the facts of the case and outlining the main arguments of counsel"; *Mogg* at 427 per McMurdo P.

[38] I am fortified in my view taken above, particularly bearing in mind the nature of the defence which was raised in this case. At the trial the jury was provided with a copy of s 304A of the *Criminal Code*. Other than that no directions were given by the learned trial judge with respect to that defence. *R v Terry* [1961] 2 QB 314 is authority for the proposition that it is not enough merely to furnish the jury with the text of the diminished responsibility section and with copies of the transcript of evidence. (In the instant case copies of the transcript were not furnished to the jury). That case decided that the trial judge must explain the scope of the defence, review the evidence in detail, and relate it to the terms of the section. Such a

practice was approved by the majority in *R v Rolph* [1962] Qd R 262 per Hanger J (as he then was) at 288-290 and Brown J at 291-292. I believe that view is a correct one.

[39] In the circumstances, and notwithstanding the fact that the appellant clearly and concisely admitted that he did kill his wife and intended to kill her, I am of the view that the learned trial judge failed to adequately sum up to the jury with respect to the nature of the defences raised by the appellant and with respect to the facts relevant to those defences.

[40] I would allow the appeal; quash the conviction, and order that a new trial be held.