SUPREME COURT OF QUEENSLAND

CITATION:	*R v Aylward* [2004] QCA 257
PARTIES:	**R** **v** **AYLWARD, Nigel Nunn** (appellant)
FILE NO/S:	CA No 84 of 2004 DC No 1433 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave to Appeal against Sentence Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	28 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2004
JUDGES:	de Jersey CJ, Williams JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence dismissed** **2. Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED - where the appellant was convicted by a jury in the District Court of an offence under s 24(2)(b) of the *Crimes Aviation Act* 1991 (Qld) – where the appellant appeals against conviction – whether the verdict was "inherently improbable" CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – OTHER MATTERS – whether counsel and the solicitor for the appellant failed to lead evidence – whether the appellant's case was not presented

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – CONDUCT OF LEGAL PRACTITIONERS – whether counsel and the solicitor for the appellant breached instructions in pursuing certain lines of defence – whether the trial counsel was incompetent

Gallagher v R (1986) 160 CLR 392, cited
Michelberg v R (1989) 167 CLR 259, cited
R v Nudd [2004] QCA 154; CA No 258 of 2003, 14 May 2004, considered
TKWJ v R (2002) 212 CLR 124, considered

COUNSEL: The appellant appeared on his own behalf
K M McGinness for the respondent

SOLICITORS: The appellant appeared on his own behalf
Commonwealth Director of Public Prosecutions for the respondent

THE CHIEF JUSTICE: The application for leave, the formal application for leave to appeal against sentence is dismissed. That leaves your appeal against conviction.

...

THE CHIEF JUSTICE: The appellant was convicted by a jury in the District Court of an offence under s 24(2)(b) of the *Crimes Aviation Act* 1991. The charge was in these terms:

> "On the 13th day of May 2002, at Brisbane International Airport in the State of Queensland, Nigel Nunn Aylward made a statement, namely, 'I am a terrorist' that he knew to be false, from which it could reasonably be inferred that there had been, was or was to be, a plan, proposal, attempt, conspiracy or threat to destroy, damage or endanger the safety of a division 3 aircraft being a foreign aircraft, namely, a Royal Brunei Airlines Boeing 767-300 aircraft, that was in Australia."

A conviction was recorded and he was sentenced to 240 hours community service. He appeals against his conviction.

The charge arose from events at Brisbane International Airport on 13 May 2002. The appellant, a 62-year old man, was boarding a Royal Brunei aircraft destined for Brunei. The events were of short compass and emerge from the following accounts given by Crown witnesses.

As he boarded the aircraft, the appellant approached a female flight attendant, Ms Sharin Yunus Yew who was standing by its entrance. Ms Yew said she greeted the appellant and asked to see his boarding pass. The appellant, with an expressionless face, stated: "I am a terrorist." The appellant then proceeded to his seat. Ms Yew said she was shocked by the appellant's statement. Counsel for the appellant at the trial, Mr Hutton, put to Ms Yew that the appellant had actually said to her: "Are you a terrorist?" Ms Yew denied that. She also rejected the suggestion that there were noise and distraction in the cabin at the time, and that she may have misunderstood or misheard what was said. Mr Hutton also explored with Ms Yew her knowledge of English: she said she had no problem speaking or understanding English and had been employed by the airline for nine years. After Ms Yew directed the appellant to his seat, she reported the incident to her supervisor, Mr Tengah.

At the time the appellant boarded the aircraft, Mr Tengah, who was the chief purser, said he was standing next to Ms Yew,

only about two feet away. He gave evidence that he saw the appellant step into the aircraft and heard him say to Ms Yew, "I am a terrorist." He said he felt scared as a result. He then reported the incident to Mr Sia, the station manager. Mr Sia went to the cockpit with Ms Yew to inform the flight captain. Mr Hutton put to Mr Tengah, as with Ms Yew, that the appellant had actually asked: "Are you a terrorist?" Mr Tengah denied that the appellant had said that.

Richard Clougher, the flight captain, spoke with the appellant after hearing the complaint. Although he initially determined to allow the appellant to continue as a passenger, after further discussions with staff, he and others decided the appellant should be removed from the aircraft and that was done.

The thrust of the defence approach at the trial was, first, to put to witnesses the question the appellant claimed he asked, and second, to explore circumstances which may have led the particularly relevant witnesses, Ms Yew and Mr Tengah, to mishear the appellant. Further, Mr Hutton laid the foundation for a submission that the jury could not reasonably infer the requisite plan, et cetera, referring during cross-examination to his client "with his sweepover hairstyle and his dumpy 60 year old appearance", and describing what was said as "ridiculous" and "tasteless" and not to be taken seriously.

It emerged during the Crown case that the Crown was not armed with evidence to establish the falsity of the statement

alleged, in other words, that the appellant was not a terrorist. Mr Hutton was not prepared to admit to that falsity. The Crown accordingly went on to lead evidence from police officers as to various security searches, sufficiently establishing the prima facie falsity of the statement.

The appellant elected to give evidence himself. His evidence in chief included the following passages:

> "What communication was there between you and the air hostess or was there any communication?-- She didn't look at me and she didn't speak to me, but she appeared very happy and welcoming. So, I thought I would drop an icebreaker and try and create some dialogue with her so I asked her, “Are you a terrorist?” Now, this is standard airline parlance.
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> …
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> What happened then?-- She give [sic] me a big smile. I was smiling too and she pointed me to my seat. I took my seat.
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> …
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> Well, to get your evidence in perspective, before you asked the woman, “Are you a terrorist?”, did she say anything to you?-- No. I was almost or possibly the last person on the flight. She'd not say [sic] anything to me and-----
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> Did she gesture at all to you? Did she gesture at all?-- Not initially, no. I had my boarding pass in my left hand. I was going to show it to her, and she - I had a contract. I paid for the services of an air hostess---- … She was there to greet me."

And then in cross-examination:

> "Why would you make the statement in the first place?-- I paid for the services of an air hostess. She was there to greet me. I was not brought up to cut people dead. She was there doing her job. I was going to acknowledge her.

> So, you then acknowledge people by asking them if they are terrorists?-- It was the only question I could ask her she could give a certain true answer to me …
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> …
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> Mr Aylward, did you state - did you make the statement as a joke?-- No, it was not a joke. I expected, as I have said, that she would reply, “No, you are quite safe with us.” This was a very scary time.
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> …
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> Mr Aylward, are you a terrorist?-- No, I'm not a terrorist.
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> …
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> Why, Mr Aylward, would you then make an opening to a strange person using the word “terrorist” when you are getting on an aircraft?-- It's not a strange person. That was her official duty, to look after me and be concerned about security. That was the only question regarding security that she could definitely and positively answer."

The appellant gave evidence that he believed that Mr Tengah had concocted his evidence given at the trial. He said: " … they (meaning the airline) drummed up this witness because they did not have any reason to put me off this plane."

The learned trial Judge appropriately instructed the jury. In relation to the critical question of fact, as to whether the Crown had established beyond reasonable doubt the alleged statement, the Judge said in his summing up:

> "The second element is that the accused made a statement, that statement being, “I am a terrorist.” Ms Yew and Mr Tengah both gave evidence that they heard the accused make that statement. The accused gave evidence that he didn't say that at all. What he said was, “Are you a terrorist?” Well, ladies and gentlemen, it is a matter for you using your commonsense and collective worldly experience to determine what was said.

> If you are not satisfied beyond a reasonable doubt that the accused said, “I am a terrorist.”, you would have to find the accused not guilty. That would be the end of the matter."

The grounds of appeal may be summarised as follows: the verdict is "inherently improbable"; the line of defence pushed at the trial that "Royal Brunei Airlines personnel could not speak English and misunderstood", was “highly implausible”, and in presenting it, Counsel and the solicitor for the appellant breached instructions; further, they failed to lead evidence the appellant expected would be led, comprising the psychological report concerning himself and his curriculum vitae, and communications from the appellant to his solicitors; his trial Counsel was incompetent; the appellant's case was never presented, namely that "a Muslim in the highest managerial authority, Mr. Sia, with a complete contempt for the infidel, was offended by a question regarding security, and was in a position to instigate a decision to have the passenger disembarked for no contractually valid reason". The final ground foreshadows that "[a] witness testimony is expected to be available to cast some doubt on the integrity of the entire Royal Brunei Airlines".

The verdict was plainly not improbable, having regard to the evidence given at the trial. The bizarre nature of the circumstances did not itself render the conviction improbable. The Crown evidence was compelling, even in the context of the irrationality of the statement made by the appellant. The contrary position advanced through his evidence was absurd:

why would a passenger boarding an aircraft seriously enquire of a flight attendant going about her normal duties whether she was a terrorist? The statement having been made with apparent seriousness, the jury was reasonably entitled to infer that there had been or would be a plan, for example, to at least endanger the safety of the aircraft in some way.

Upon the hearing of the appeal, the appellant represented himself. He provided a nine page written outline in which he reviewed the evidence, a number of affidavits and a document headed "rejoinder". By those affidavits, he sought to undermine the veracity of Crown witnesses in some respects (for example, as to whether Mr Tengah was standing near Ms Yew, as to the appellant's saying it was his first flight on a "Muslim airline", and other matters). He has also exhibited the psychologist's report, a report which could have been secured for the time of the trial, and his curriculum vitae.

The substantial complaint now advanced by the appellant is that he was subjected to incompetent representation at the trial, and as part of that, he contends that Counsel failed to follow his instructions, failed to consult with him adequately prior to the trial, and failed to tender the psychologist's report and his curriculum vitae.

To warrant quashing the conviction and ordering a new trial on that basis the incompetence of Counsel must be demonstrated and it must have concerned aspects relevant to the outcome, with a miscarriage of justice the consequence. Gleeson CJ put

the matter as follows in *TKWJ v R* (2002) 212 CLR 124 at 130 to 131:

> "But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness."

In *R v Nudd* [2004] QCA 154, having cited *TKWJ* and *R v Paddon* [1999] 2 Qd R 387, McMurdo J said at paras [51] to [52]:

> "The relevant inquiry in this context is whether the case has been conducted in a way which is incapable of any reasonable explanation; it is not an inquiry as to why counsel did conduct it in a certain way. In some cases, it is relevant to refer to the competence or otherwise of trial counsel where that enables a particular course that was taken at the trial to be explained reasonably or otherwise. But the focus must remain on what did and did not occur at the trial and whether in the light of the facts as disclosed to the appellate court, that it involved a miscarriage of justice."

Having read the transcript of the trial and the additional material presented now by the appellant, I am not satisfied that his representation was incompetent, or that any miscarriage of justice occurred. His Counsel was hamstrung by the oddity of the appellant's claims. Yet he put them in

apparently forthright fashion, and explored those aspects which might be suggested to bear on the accuracy of the Crown witnesses' recollection. He addressed the jury in a robust way, and appears to have said all that could reasonably be advanced on the appellant's behalf. As to the tendering of the psychological report and curriculum vitae, that was a forensic decision which this court should not gainsay. Presumably it was felt that the report, in confirming the appellant's being free of psychological disorder, would not help his case.

Obviously, the material being available at the time of trial (the report is dated 17 March 2002 and the trial took place on the 1, 2 March 2004), it could not independently justify the ordering of a retrial now, where the well established circumstances justifying the admission of fresh evidence have not been established. See *Gallagher v R* (1986) 160 CLR 392 at 399 and 402; and *Michelberg v R* (1989) 167 CLR 259 at 273.

As to the appellant's claim that he was prejudiced by the description of his appearance in reference to "tasteless" and "ridiculous" statements, Mr Hutton was thereby taking a legitimate forensic line designed to dissuade the jury from drawing the necessary inference as to a plan, et cetera.

As to the appellant's substantial complaint, that Mr Hutton failed to challenge the truthfulness of the airline's witnesses rather than concentrating on their reliability, that was no doubt rejected as a most unpromising approach. There

is not the faintest suggestion of any reason why Ms Yew and Mr Tengah would be even remotely interested in perjuring themselves in this matter.

In the end, Mr Hutton appears to have done the best he could with a weak and unappealing defence case.

I would dismiss the appeal.

WILLIAMS JA: It is critical, in my view, that the jury rejected the appellant's evidence that he asked the question of the flight attendant, "Are you a terrorist?" Clearly the jury was not prepared to accept the evidence given by the appellant. His credibility was not dependent upon the defence case as put in cross-examination.

I agree with all that's been said by the Chief Justice and would agree that the appeal must be dismissed.

MULLINS J: I also agree.

THE CHIEF JUSTICE: The appeal is dismissed.
