SUPREME COURT OF QUEENSLAND

CITATION:	*R v Zagata* [2004] QCA 349
PARTIES:	**R** v **ZAGATA, Erik William** (appellant/applicant)
FILE NO/S:	CA No 397 of 2003 CA No 143 of 2004 SC No 509 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	6 July 2004, 7 July 2004
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Set aside the convictions on counts 3 and 4 of the indictment and enter a verdict of acquittal** **2. Set aside the order requiring the appellant to serve the whole of the suspended sentence imposed on 18 May 2000**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE EVIDENCE CIRCUMSTANTIAL - where the appellant was found guilty of two counts of unlawfully producing the drug methylamphetamine - where it was alleged the appellant supplied pseudoephedrine to another, knowing it was to be used in producing methylamphetamine - where the jury must have found as the only rational inference reasonably open to them on the evidence that the appellant supplied the pseudoephedrine knowing that it was likely to be used in the production of methylamphetamine - whether the verdicts of guilty on each of the counts were unreasonable *Criminal Code* 1899 (Qld), s 7

Giorgianni v The Queen (1985) 156 CLR 473, cited
Pereira v Director of Public Prosecutions (1989) 82 ALR 217, cited

COUNSEL: J Cremin for appellant
P F Rutledge, with T A Fuller, for respondent

SOLICITORS: Gilshenan & Luton for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **DAVIES JA:** After a trial lasting 27 days the appellant was convicted on two counts of unlawfully producing the dangerous drug methylamphetamine in a quantity exceeding two grams, each between 6 May 1999 and 30 November 2000. He appeals against those convictions. He was sentenced to five years imprisonment on each of those counts, those terms to be served concurrently with each other but cumulatively upon a term of two years imprisonment which had been imposed on 18 May 2000 but suspended and which was ordered to be served. The appellant also seeks leave to appeal against that sentence.

[2] The appellant was tried jointly with Dennis James Lowe who was also convicted of the above and other offences. His appeal was also heard jointly with that of Lowe who also appealed against those and other convictions and sought leave to appeal against his sentence.

[3] The appellant did not give evidence at his trial. The case against him was wholly circumstantial. It was not contended that he was actually involved in the manufacture of the drugs in either count. Rather it was alleged that, in each case, he supplied pseudoephedrine to a Mr Greenup to be supplied in turn to Lowe, knowing that it was to be used in producing methylamphetamine. Thus the case against the appellant was based on s 7(1)(b) or (c) of the *Criminal Code*.

[4] Notwithstanding the coincidence in dates in the two charges of which the appellant was convicted, the difference between them, as explained by the Crown Prosecutor in his opening, by way of particulars, was that the first of them alleged supply by the appellant between 9 September 1999, the date of his first purchase of pseudoephedrine, and 23 May 2000; and the second alleged supply between 23 May 2000, the date of the appellant's second purchase of pseudoephedrine and 30 November 2000.

[5] It was not seriously disputed by the appellant's counsel in this appeal that the jury were entitled to accept Greenup's evidence that during both of the periods which I have described the appellant supplied pseudoephedrine to Greenup knowing or at least strongly suspecting that it was to be used by Lowe for some illegal purpose. The main question in this appeal is whether, when he so supplied it, the appellant actually knew that it was likely that it would be used in the production of the dangerous drug methylamphetamine.[1] Put more accurately in terms of a jury trial

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[1] *Giorgianni v The Queen* (1985) 156 CLR 473 at 504 - 505; *Pereira v Director of Public Prosecutions* (1989) 82 ALR 217 at 219 - 220. However as the latter judgment explains "the fact remains that a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter".

the question was whether the only rational inference reasonably open to the jury was that the appellant in each case supplied pseudoephedrine knowing of the likelihood that it was to be so used.[2]

[6] The appellant had also been charged, together with Lowe, with unlawfully producing the dangerous drug amphetamine in a quantity exceeding two grams during the same period, between 6 May 1999 and 30 November 2000, but was acquitted of that offence. However in order to understand the facts relevant to the offences of which the appellant was convicted it is necessary to say something about the facts relevant to the charge of which he was acquitted. It is in the context of those facts, which were antecedent to the facts relevant to the subject charges, that the facts relevant to the subject charges must be viewed. The elements of that charge were that from 13 May 1999 until some time shortly prior to 9 September 1999 the appellant supplied phenylpropanolamine to Greenup, to be supplied in turn to Lowe, knowing that it was to be used in the manufacture of amphetamine.

[7] The main witness in respect of all of these charges was Greenup. Greenup had pleaded guilty to one count of producing dangerous drugs arising out of the facts which I am about to relate. He was sentenced to four years and nine months imprisonment to be suspended after one year for an operational period of five years. That sentence took into account his co-operation with the police and his giving evidence against the appellant and Lowe in this trial. His evidence in this trial was the subject of an "accomplice" direction by the learned trial judge about which there is no complaint.

[8] From, at the latest, April 1999 Greenup was the general manager and the appellant production manager of a company called Denlin Pharmaceuticals the shares in which were owned by Linda Currie, Lowe's de facto wife. However Lowe made all commercial decisions in respect of the company. Denlin acquired a factory at Chetwynd Street, Loganholme in that month and moved there. The express purpose of the company was to produce ranitidine, a cure for stomach ulcers in horses; a little later, vitamins, hoof oil, stable spray and iron tonic; and, later again, equine cough and cold mixture. The active ingredient of equine cough and cold mixture was to be phenylpropanolamine.

[9] On 27 April 1999 the appellant made application to the Department of Health to manufacture cough and cold mixture using phenylpropanolamine. A licence to manufacture restricted drugs was granted to Denlin by that Department pursuant to the *Health (Drugs and Poisons) Regulation* 1996 on 18 May 1999[3] and on 27 May the appellant's secure log[4] showed the receipt by purchase of 25 kilograms of phenylpropanolamine. The authorised person, who was the appellant, was required to keep the drug in a secure place.[5]

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2 *Pereira* at 220.

3 The licence did not identify the drugs of which the licence permitted manufacture or state any conditions of its grant. Contrast the authority granted 7 September 1999 and the licence granted 19 May 2000.

4 Section 208 of the *Health (Drugs and Poisons) Regulation* 1996 together with the terms of an approval, required the keeping of a record of incoming and outgoing stock.

5 Section 211 together with the terms of the authorities granted 7 May and 7 September 1999.

[10] Soon after the phenylpropanolamine was acquired, Greenup swore, he was asked by Lowe to supply it to him. He discussed this with the appellant and they agreed that it was to be used by Lowe for the manufacture of illicit drugs. Nevertheless Zagata supplied it to Greenup knowing that Greenup, in turn would supply it to Lowe. Zagata falsified his log so that it showed that the phenylpropanolamine supplied by him to Greenup and by Greenup, to his knowledge, to Lowe, was being used by him, the appellant, in the manufacture of the cough and cold mixture.

[11] It was substantially on this evidence that the appellant was charged with unlawfully producing amphetamine, the charge upon which he was acquitted.

[12] After this had continued for a week or two, Greenup said, Lowe said that the phenylpropanolamine was not satisfactory. According to Greenup, Lowe did not say why it was unsatisfactory or what it was unsatisfactory for. However shortly after this, according to Greenup, Lowe said that they should be using pseudoephedrine and that the cough and cold syrup had caused an adverse reaction in horses.

[13] Greenup said that he discussed with the appellant Lowe's request to obtain pseudoephedrine. It was either about then, or about the time that pseudoephedrine was first supplied to Lowe (it does not appear clearly which of these times Greenup is referring to), that there was a conversation between the appellant and Greenup "along … [the following] lines"; namely one in which the appellant asked Greenup:

> "Do you think he … is giving it to his horses to make them go faster?"

[14] On 7 July 1999 the appellant wrote to a Mr Healey in the Queensland Department of Health asking for an extension of his authority to include, amongst other drugs, pseudoephedrine hydrochloride. Apparently in response to this, an authority to obtain, possess and use those drugs was issued to the appellant on 7 September 1999 and the appellant took delivery of 25 kilograms of pseudoephedrine on 13 September 1999.

[15] When that pseudoephedrine was delivered by its supplier, Trans Chem Pty Ltd on 13 September 1999 it was delivered under armed guard. There was no legal requirement for this but it was the practice of Trans Chem to do so. Detective Massingham, who gave evidence, was at the airport when it was delivered there and picked up by armed guard to be delivered to Denlin's premises at Chetwynd Street.

[16] Later that day, Detective Massingham having had his suspicions aroused that this might be used in the production of methylamphetamine, visited Chetwynd Street and spoke to the appellant. Amongst other things he told the appellant that pseudoephedrine was the primary ingredient in methylamphetamine and that, for that reason, people would kill for 25 kilograms of pseudoephedrine. Because of the lack of clarity in Greenup's evidence as to when he had the conversation with the appellant in which the appellant inquired whether Greenup thought that Lowe intended to use the pseudoephedrine to make his horses go faster, it is not clear whether Detective Massingham's conversation with the appellant was before or after that conversation.

[17] As with the phenylpropanolamine, Lowe requested Greenup to deliver the pseudoephedrine to him. This occurred on four or five occasions. On each, Lowe would nominate the amount he required and say "Get Erik [referring to the

appellant] to bag it up". Lowe also gave Greenup instructions on where to leave it. Greenup said that on each of these occasions he passed the request on to Zagata who packaged the pseudoephedrine, usually in six kilogram packs and gave it to Greenup. Zagata accordingly adjusted the batch sheets recording manufacture of the cough and cold mixture to make it appear that the pseudoephedrine had been used in the manufacture of the cough and cold mixture and he falsified his secure log accordingly. This course was followed each time Lowe requested pseudoephedrine until the quantity purchased was exhausted.

[18] It appears from the appellant's log that the 25 kilograms of pseudoephedrine acquired on 13 September 1999 had been expended by 23 May 2000. Of course the log showed it to have been used in the production of the equine cough and cold mixture but it had in fact, according to Greenup, been passed on, with the appellant's knowledge, to Lowe. Accordingly on 23 May 2000 the appellant signed an order for a further 25 kilograms of pseudoephedrine from Trans Chem and that amount was delivered on 24 May. It will be recalled that it was the supply by the appellant from this delivery that was the subject of the second count on which he was convicted.

[19] According to Greenup the procedure which I have outlined earlier continued. The appellant from time to time handed the pseudoephedrine to Greenup who, in turn, at Lowe's request, delivered it to him. As before, the appellant knew it was being passed on to Lowe. The appellant falsified the secure log book to make it appear that the pseudoephedrine was being used in the equine cough and cold mixture which he was manufacturing and falsified his batch records for the production of that product so as to be consistent with the quantity of pseudoephedrine being passed on to Greenup on each occasion. The log accordingly falsely showed the use by the appellant of eight kilograms on 26 May, two kilograms on 1 June and two kilograms on 3 June leaving a little over 13 kilograms in stock.

[20] It was substantially from the evidence which I have so far described that the jury were asked to infer that between 9 September 1999 and 23 May 2000 and between 23 May 2000 and 30 November 2000 the appellant supplied pseudoephedrine to Greenup knowing that it was to be supplied by Greenup to Lowe for the likely purpose of manufacturing the dangerous drug methylamphetamine. There was some further evidence which, on one view, might have tended to show knowledge by the appellant of the likelihood that Lowe was manufacturing methylamphetamine. However, as I shall show, that evidence was, at best, equivocal on this question.

[21] The first piece of such evidence was that, according to Greenup, Lowe had the appellant pack up such chemical glassware as was required by Lowe to be delivered to him at Linden Park, Beaudesert. It is arguable that, in order to do this, the appellant must have known what the glassware was to be used for. Greenup could not recall when this was.

[22] However there was a conversation between Lowe, the appellant, Greenup and a man called Vic Sawyer on 23 May 2000, the substance of which was the subject of a recorded telephone conversation between Lowe and Currie on that day. Sawyer was, according to Greenup, the principal of a company, Complete Vet and Pet, which was a large seller of bird food and other products for horses and pets. The recorded conversation showed that Sawyer had in mind placing a large order with

Denlin for the manufacture of products for sale by his company. It seems that Denlin had already manufactured some products for sale by Sawyer's company.

[23] Shortly after that, according to Greenup, a large number of items were moved from Canungra to Telemon Street, Beaudesert for the purpose of manufacturing goods for sale to Sawyer. So it may be that the glassware selected by the appellant was for that, apparently innocent, purpose.

[24] On the other hand there was some evidence from Lowe, whom the jury must generally have disbelieved, that the appellant said to him something like "It will look bad if the glassware's here, us trying to get our approvals and licences". If the jury accepted this evidence they would have been entitled to infer from it that at some stage the appellant at least suspected that Lowe was manufacturing something unlawful with one or other of the drugs, phenylpropanolamine or pseudoephedrine, which the appellant passed on to him. But even if Lowe's evidence was accepted in this respect it did not establish that the appellant knew that it was probably methylamphetamine which Lowe was manufacturing.

[25] The second piece of such evidence is the discussion between the appellant and Lowe on 28 March 2000 about "stuff" that was supposed to have been sent to Sydney the previous week. This refers back to a conversation between Lowe and someone, apparently in Sydney, that "stuff" that was supposed to have been sent had not turned up. However I cannot see why it is any more likely that this "stuff" was illegal drugs being produced by Lowe or Greenup than that it was legal product being produced by the appellant at Chetwynd Street. Unsurprisingly, it was Lowe's evidence that it was the latter.

[26] And the third, at best, equivocal piece of evidence concerns Greenup's evidence that he told the appellant that he had purchased caustic soda and acetone (components of methylamphetamine) for Lowe. In his examination-in-chief Greenup was asked whether he discussed with the appellant requests which Lowe had made to him to purchase caustic soda and acetone and he answered yes. In the context of the questions, but not by inference from anything which Greenup said, the jury might have inferred that this conversation occurred at an early stage, perhaps shortly after the first purchase of pseudoephedrine. But he said in his cross-examination that this occurred in about November 2000, that is, at the very end of the operation.

[27] Greenup was asked by the Crown Prosecutor whether there was a request from Lowe to purchase any other raw materials, that is presumably other than pseudoephedrine, "towards the end of Denlin's life". Greenup answered that there was a request to purchase iodine (also a component of methylamphetamine) and that that was towards the latter part of 2000. He also indicated that the appellant was very concerned about that because it could be used as a precursor for methylamphetamine. In cross-examination he repeated this evidence about the purchase of iodine and the appellant's concern. And he agreed that it was at that time that he also told the appellant about the prior purchase of caustic soda and that the appellant was also not happy about the caustic soda and acetone, presumably for the same reason. He said that the appellant would not sign the iodine order.

[28] No doubt it would have been possible to infer from this last piece of evidence that the appellant's expressed concern was not because he realized for the first time that Lowe was manufacturing methylamphetamine but rather because he realized that

this would make the case against him of being knowingly involved in that manufacture a very strong one. But it was, in my opinion, open to the jury to infer from this evidence that when, for the first time, Greenup told the appellant that he had already supplied caustic soda and acetone to Lowe and that Lowe had asked for iodine, the appellant realized, for the first time, that Lowe was in fact manufacturing methylamphetamine. This was about the point in time at which the operation was closed down.

[29] Relevant to the question whether, on the totality of the evidence I have described, the only rational inference reasonably open to the jury was that the appellant, in each case, supplied pseudoephedrine to Greenup knowing of the likelihood that it was to be used in the production of methylamphetamine, were the appellant's relevant expertize, either theoretical or practical, about the manufacture of methylamphetamine and the opportunity which he had to learn of what Lowe was actually manufacturing with the pseudoephedrine which he knowingly provided. As to the former of these there was no evidence that the appellant had any chemical expertize or any such practical knowledge. He was a very young man who had been employed as a tablet maker. When asked if he had any qualifications Greenup said that he believed not; that he just believed he was naturally adept at it.

[30] As to the latter, the appellant's opportunity to learn of what Lowe was actually manufacturing with the pseudoephedrine, there was no evidence that the appellant ever went to Canungra where, on the Crown case, Lowe was manufacturing methylamphetamine. Indeed to the knowledge of both Greenup and Lowe the appellant did not ever go there. Nor was there any other evidence of anything which either Lowe or Greenup said to the appellant from which it might reasonably have been inferred that he thereby acquired knowledge that the pseudoephedrine was being used to manufacture methylamphetamine.

[31] Although it was no doubt possible for the jury to infer, from the totality of the evidence I have described, that when the appellant supplied pseudoephedrine to Greenup, knowing that it was to be passed on to Lowe he thought it likely that it would be used in the production of methylamphetamine, I cannot be satisfied that that was the only rational inference reasonably open to the jury. On the contrary, it seems to me that a jury could reasonably have inferred from this evidence that whilst the appellant suspected that Lowe would use the pseudoephedrine in the manufacture of some illegal drug, possibly even methylamphetamine, he did not actually know it was likely that it would be used in the manufacture of methylamphetamine, at least before November 2000.

[32] There was a discussion during the course of the trial as to whether the Crown had to prove actual knowledge in the appellant or whether constructive knowledge was sufficient. In the end the Crown accepted the burden of proving actual knowledge, in my opinion correctly.[6] But in my opinion, for the reasons already given, it did not discharge the burden of proving that actual knowledge by the appellant.

[33] For that reason, in my opinion, the verdicts of guilty on each of the counts of unlawfully producing the dangerous drug methylamphetamine were unreasonable and should be set aside. It was not suggested that, for any reason, there should be a retrial.

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[6] See footnotes 1 and 2.

Orders

1. Set aside the convictions on counts 3 and 4 of the indictment and enter a verdict of acquittal.
2. Set aside the order requiring the appellant to serve the whole of the suspended sentence imposed on 18 May 2000.

[34] **WILLIAMS JA:** I agree with all that's been said by Davies JA in his reasons which I have had the advantage of reading. There is, however, one additional matter which I have taken into account in concluding that the convictions of the appellant cannot stand.

[35] The evidence at the joint trial was lengthy, occupying well over 1000 pages of transcript. In addition there were some hundreds of pages of transcript of recorded telephone conversations. The learned trial judge did direct the jury that they were concerned with separate trials involving this appellant and his co-accused Lowe. No criticism can be levelled at the directions so given.

[36] The matter which concerns me arose because the learned trial judge in dealing subsequently with the voluminous evidence did so primarily on a chronological basis. Events were dealt with on a day to day basis.

[37] Critically the learned trial judge detailed to the jury a trip by Greenup to Melbourne on 27-28 March 2000 which resulted in him obtaining a significant amount of money; it was of the order of $200,000 in cash. That incident related solely to the case against Lowe and the jury was asked to conclude that the money was payment for illicit drugs supplied by Lowe. There were a number of telephone calls relating to Greenup's difficulty in making contact with the person Bonser who was to give him that money. Ultimately Greenup and Bonser met at about 9.15 am on 28 March 2000 and the money was handed over.

[38] Immediately after dealing with that transaction in Melbourne the summing-up went on:

> "So on 28 March 2000, WHICH IS THE DATE WHEN MR GREENUP SAYS HE RECEIVED THE MONEY, at 8.28 in the morning Lowe calls an unidentified man and says, "Yeah, just listen, did you get that stuff that was supposed to be sent to you, the stuff from the factory? The unidentified man says, "No, it hasn't turned up yet then". Lowe says, "That's what I'm just going to get on the fucking phone now and find out." The unidentified man says, "But um, um, Bernie got onto Erik yesterday about it … 'cause the Tooth Fairy told him it was still there on Friday."
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> At 8.29 a.m. Lowe rings Denlin Laboratories and speaks to Erik Zagata. He says, "I've just been on to them down in Sydney, what's happened with their stuff that was supposed to be sent last week?" Erik Zagata said, "Yeah, it was sent on Friday. I rang them last night, the um truck company to see exactly where it was and they said they would get back to me in the morning." Lowe says, "I don't know exactly – I don't know – exactly know the time to Sydney, but I know that Jim was a bit worried what you know – that, you know, that someone wouldn't be there because of delivering to a unit – the truck company would turn up, and if no one's there they'd just go

> again, they wouldn't leave it just leave it sitting out the front." That was the only conversation with Mr Zagata that was played in evidence, and Mr Wilson submitted to you that that just shows Mr Zagata talking about the product from the company." (My emphasis: and Mr Wilson was counsel at trial for Zagata.)

[39] The summing-up then goes on to deal with what happened when Greenup returned to Brisbane on 28 March 2000 with the money. It is sufficient to say that, as noted, at that part of the summing-up, some of that money was given to Mr Zagata.

[40] When I initially read the summing-up the impression I gained was that the "stuff" referred to in the phone call between Lowe and Zagata was related to product which had been sent to Melbourne and for which Greenup was collecting money from Bonser; and further, that it was because of that consideration that Zagata was given some money from the cash Greenup brought back to Brisbane and gave to Lowe. It was only after I had perused the details of the phone conversations and placed them in context with evidence given by Greenup and Lowe that it became obvious that the two incidents were entirely unrelated. When all the evidence is looked at carefully, even disregarding Lowe's evidence to which I will refer in a moment, the "stuff" being delivered to Sydney was not the product for which Greenup received the cash in Melbourne. That is confirmed if credence is given to Lowe's evidence that the Sydney "stuff" was "all the vitamins, all the products for the horses" which had been taken to Sydney for the Golden Slipper meeting.

[41] By dealing with the evidence in the chronological way, and specifically by relating the phone calls about the Sydney "stuff" to the "date when Mr Greenup says he received the money" a false impression could have been created in the mind of the jury, as it was in mine, that there was some connection between the Sydney and Melbourne incidents. It was incumbent on the learned trial judge to ensure throughout the summing-up that the jury appreciated the limit on evidence admissible in the trial of this appellant. That was not done in this specific instance and the jury could well have unjustifiably linked this appellant with the obtaining of the large sum of money in Melbourne which they might have thought was payment for the supply of some illicit drug.

[42] I agree with the orders proposed by Davies JA.

[43] **JERRARD JA:** In the appeal by Mr Zagata I have had the advantage of reading the reasons for judgment of Davies JA and Williams JA, and respectfully agree with those and the orders proposed by Davies JA.