SUPREME COURT OF QUEENSLAND

CITATION:	*R v McCoy* [2009] QCA 357
PARTIES:	**R** **v** **McCOY, Keith James** (appellant)
FILE NO/S:	CA No 150 of 2009 DC No 1854 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2009
JUDGES:	Keane and Fraser JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – FORGERY AND UTTERING – FORGERY – where appellant convicted by jury of five counts of forgery with intent to defraud – where appellant sentenced to concurrent terms of three years imprisonment with parole release fixed at 15 months – where appellant argued that trial judge misdirected the jury and denied him a fair trial – whether appeal should be allowed *Criminal Code* 1899 (Qld), s 488 *Doney v The Queen* (1990) 171 CLR 207; [1990] HCA 51, cited *Dyers v The Queen* (2002) 210 CLR 285; [2002] HCA 45, cited *The Queen v Apostilides* (1984) 154 CLR 563; [1984] HCA 38, cited
COUNSEL:	The appellant appeared on his own behalf D R Kent for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Commonwealth) for the respondent

[1] **KEANE JA:** On 18 May 2009 the appellant was convicted upon the verdict of a jury of five counts of forgery with intent to defraud in contravention of s 488(1)(a) of the *Criminal Code* 1899 (Qld).

[2] The appellant was sentenced to a concurrent term of three years imprisonment in respect of each offence with parole release fixed at 18 August 2010, ie 15 months from 18 May 2009.

[3] The appellant seeks to appeal against these convictions on grounds which are best discussed after a summary of the Crown case at trial.

The Crown case at trial

[4] The appellant and Ian McKeague Green were directors of a property development company, Blueprint Developments (Aust) Pty Ltd ("Blueprint Developments") from 14 November 2000 until 25 November 2003. On 15 May 2003 receivers and managers were appointed to Blueprint Developments. The appellant and Green were notified of the appointment that day by facsimile transmission and by post.

[5] Between 11 February 2003 and 23 May 2003 the appellant and Green signed two Information Memoranda whereby Blueprint Developments sought to raise capital, in each case $1 million. Five investors who received these Information Memoranda signed application forms. Between 19 May 2003 and 30 May 2003 each of these investors caused a cheque in the amount of $20,000 payable to Blueprint Developments to be delivered to the company's address; but the appellant intervened to have the cheques couriered to him.

[6] On 21 May 2003 an account was opened by the appellant and Green with the ANZ Bank in the name of Blueprint Developments No 1 (Aust) Pty Ltd ("the No 1 Account"). This bank account was outside the control of the receiver and manager of Blueprint Developments Pty Ltd.

[7] Each of the cheques drawn by the investors in favour of Blueprint Developments was deposited to the No 1 Account after it had been couriered to the appellant. Each cheque had been altered to change the payee from "Blueprint Developments (Aust) Pty Ltd" to "Blueprint Developments (Aust) No 1 Pty Ltd". Each cheque was altered in such a way as to appear to have been altered by the drawer of the cheque. The prosecution case was that the alteration was effected by the appellant.

The grounds of appeal

[8] The appellant seeks to appeal against his convictions on the following grounds:

> "1. The Judge erred in directing that the jury could speculate, in coming to a conclusion, in the absence of evidence.
>
> 2. The Judge misdirected the jury by stating the jury could conclude that a director with motive and opportunity to forge the said cheques was not called to give evidence because his evidence would not assist the prosecution.
>
> 3. Erred in not directing the jury to acquit when there was unchallenged evidence that a Co-director, with authority, motive and opportunity, had access to the cheques at the relevant times.

4. The Judge denied the Appellant a fair trial by interruption from the bench during the Appellants address to the jury."

[9] None of these grounds of appeal has any substance. That this is so can be demonstrated without the need for a discussion of the evidence in the case beyond what is necessary to address each ground directly. I shall discuss each ground in turn.

Ground 1

[10] The appellant contends that the learned trial judge erred in directing the jury that, in the absence of evidence, it could speculate in coming to its conclusions on the facts.

[11] At the conclusion of the DPP's case, the learned trial judge called upon the appellant to give or call evidence. He declined. In consequence, her Honour invited the appellant to present closing argument. The learned trial judge interrupted the appellant shortly after the commencement of his closing argument because the appellant was giving evidence from the Bar table. In this context, the learned trial judge explained the following, in the absence of the jury, to the appellant:

> "There are two types of evidence. Evidence falls into two different sorts and you'll hear me tell the jury this. There is the direct evidence which is the things that the witnesses have directly spoken about, what they've seen, what they've heard, what they did. The other kind of - the other - so they can use that direct evidence. They can also use the evidence circumstantially to draw conclusions. They can only do that if those conclusions are reasonably open from the proven facts, the facts that they accept from the evidence. So there must be a reasonable and logical connection between the evidence that's been presented, that which they accept from the evidence that they find to be proved, and the conclusions that they draw. They can't just speculate about things. And if there's - if there are two possible conclusions that could be drawn from the same set of circumstances they must always draw the inference most favourable to you because the burden of proof is on the prosecution to prove its case beyond reasonable doubt.
>
> So to prove its case the Crown must prove that the only conclusion from the circumstances was that you were the person who forged the cheque and that you, when you forged the cheque, had an intention to defraud somebody."

[12] The court adjourned to allow the appellant to reconsider his submissions in light of her Honour's statement. The court resumed half an hour later, and the appellant completed the presentation of his closing argument to the jury. The learned trial judge then summed up to the jury.

[13] During the course of her Honour's summing up, her Honour relevantly instructed the jury:

> "The direct evidence in this trial, the evidence that you've heard from the witnesses and the exhibits that have been tendered doesn't really seem to be in dispute. What does seem to have been - what clearly is in dispute are the conclusions that you can draw from that direct evidence. Your ability to find facts proved is not limited to that direct evidence, the direct evidence of what the witnesses said they saw or

> heard or did or the exhibits that have been tendered. In an appropriate case if you find that the direct evidence has proved some facts you can go further to draw inferences or conclusions from those proven facts. You know that from everyday life. You don't always have to see something happen to be able to work out that it, in fact, happened. You don't need someone to tell you that it happened without being able to know that it happened. …
>
> Circumstances give meaning and context to things that have already happened. It just comes down to whether there are enough circumstances that you know about, whether the facts that have been proved are of sufficient quality for you to be able to safely draw an inference."

[14] The appellant's complaint appears to be that the learned primary judge's instructions concerning the drawing of inferences from direct evidence amounted to directing the jury that they may engage in speculation. This is simply not correct. The learned trial judge informed the jury that they could not properly draw inferences unless "the facts that have been proved are of sufficient quality to safely draw an inference". This ground of appeal must fail.

Ground 2

[15] Under this ground, the appellant asserts that the learned trial judge erred in instructing the jury that it could conclude that "a director with motive and opportunity to forge the said cheques was not called to give evidence because his evidence would not assist the prosecution".

[16] In this regard, her Honour stated, in the context of summing up the appellant's closing argument, that:

> "[The appellant] pointed out that the prosecution did not call Mr Green and have given no explanation for why Mr Green was not called. You might conclude from that that Mr Green would not assist the prosecution. It is a question for you whether the circumstances considering all of those things exclude reasonable doubt in respect of any or all of the cheques."

[17] It may be said that this instruction is one which ought ordinarily not be given by a trial judge.[1] But it was an instruction entirely to the appellant's benefit and consistent with the submission put to the jury by the appellant. The appellant had submitted:

> "So, ladies and gentlemen, this is evidence that establishes another director and equal shareholder of [the company], that is, Ian Green, with the same responsibilities and privileges as myself, was in Brisbane during the time of those altered cheques and there is no evidence that he was every contacted, questioned or interviewed by ASIC."

[18] To the extent that this instruction should not have been given, it was unduly favourable to the appellant. This ground of appeal must fail.

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1 *Dyers v The Queen* (2002) 210 CLR 285 at 291 [6]; cf *The Queen v Apostilides* (1984) 154 CLR 563 at 575.

Ground 3

[19] Under this ground, the appellant asserts that the learned trial judge erred in failing to direct that verdicts of acquittal be entered as a consequence of "unchallenged evidence that a Co-director, with authority, motive and opportunity, had access to the cheques at the relevant times".

[20] At trial the appellant's former office assistant, Ms Lynne Hedemann, testified that the only people working in the appellant's office at the time the cheques were received were the appellant and herself. Mr Green was based in Sydney. She was instructed by the appellant to bank the cheques into the No 1 Account. When the cheques were placed in her in-tray for her attention, they had already been altered.

[21] The appellant misapprehends the grounds upon which directed verdicts of acquittal may be entered on a no case submission. As the High Court held in *Doney v The Queen*, "if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision."[2] In this case there was clearly evidence capable of supporting a verdict of guilty: indeed the Crown case was a very strong one. Her Honour was correct to leave the matter to the jury. The appellant put his argument to the jury, who rejected it. That was hardly surprising given that there was no evidence that Mr Green had actually had an opportunity to forge the cheques in question.

[22] In any event, at the beginning of the trial, the learned trial judge ensured that the appellant was given "the extract from the Bench[book] setting out the Court process for the benefit of an unrepresented person". Her Honour asked the appellant if he understood various rights, but in particular his right to make a no case submission:

> "HER HONOUR: The right to make a submission that there is no case to answer at the conclusion of the Crown case?
>
> [APPELLANT]: Yes, your Honour."

[23] Later during the trial, the learned trial judge stated to the appellant:

> "You understood at the beginning - or last week on that hand-out there was a summary of your rights to make a no case submission and you were considering making one at the start of the trial but elected not to do it. You still have that right at the conclusion of the trial, but whether you make that or not, it's still my obligation to ensure that the charges left to the jury are those charges on which there is some evidence that is capable of meeting all of the elements of the offence, and if I'm not satisfied that there is evidence capable of showing that the cheque was altered in a material particular, then that charge should not be left for the jury."

[24] The appellant made no submission that he had no case to answer and no application for a directed verdict of acquittal.

[25] This ground of appeal must fail.

Ground 4

[26] Under this ground, the appellant complains that the learned trial judge denied him a fair trial by virtue of her Honour's interruption during his closing address to the jury.

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[2] (1990) 171 CLR 207 at 214 – 215.

[27] Her Honour first interrupted the appellant to ask him to identify the evidence that supported the submissions he was making to the jury in his closing argument. The learned trial judge's questions were initiated by her Honour's concern, addressed in relation to the first ground of appeal, that the appellant was seeking to give evidence from the Bar table.

[28] Her Honour interrupted the appellant after he attempted twice to lead evidence from the Bar table:

> "[APPELLANT]: … Firstly, if I could tell you a little about myself. I am 60 years old.
>
> HER HONOUR: Mr McCoy, remember you are limited to the evidence that has been given in the trial.
>
> [APPELLANT]: Yes, your Honour.
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> HER HONOUR: You can't refer to things that are not in evidence.
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> [APPELLANT]: I don't know if my health issues are in evidence, your Honour.
>
> HER HONOUR: No. You can only rely on what the witnesses have said or the exhibits that are in evidence, and you can make arguments in respect of those things but you can't go outside of those parameters.
>
> [APPELLANT]: My background is I practised as an accountant in my own business for 17 years and previously I gained a Bachelor of Commerce degree.
>
> HER HONOUR: Mr - ladies and gentlemen, would you please go outside."

[29] Her Honour later interrupted the appellant in what was clearly an earnest endeavour to have him clarify his remarks:

> "[APPELLANT]: … The evidence is that all funds raised by Qplan or Blueprint Finance company were deposited into the one bank account chosen by Blueprint directors, that is, Ian Green or myself. As the directors of Blueprint, we decided on which project the money was spent under the existing trust arrangements.
>
> HER HONOUR: Sorry, Mister - I'm sorry to interrupt, Mr McCoy, but can you identify for me what part of the evidence disclosed that all of the money went into the one bank account?
>
> [APPELLANT]: It was Neville East's - I'll take a minute to find it now, your Honour. Both Neville East and Lyn Heddeman said that there was only one bank account used at any one time. I'll find that reference as well, your Honour.
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> HER HONOUR: For Blueprint Developments?
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> [APPELLANT]: Yes.

> HER HONOUR: Yes. So we're talking about the company Blueprint Developments Aust Pty-----
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> [APPELLANT]: Correct.
>
> HER HONOUR: -----Ltd. All right. Yes, thank you. I'm sorry I interrupted.
>
> [APPELLANT]: Can I continue or will I find the reference?
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> HER HONOUR: No, no, no, please continue. I just misunderstood. I thought you were saying that there was evidence that all of the Blueprint companies used the one account but you only meant that there was one account for that company, Blueprint Developments."

[30] It cannot be said that her Honour deprived the appellant of a fair trial by this intervention, particularly in light of her Honour's direction to the jury that:

> "The accused has argued his case on his own behalf. I'll remind you again that you can't draw any adverse inferences against him for that. Similarly, he has elected not to give evidence or call evidence. Again, that's his right. He's not bound to give evidence or call evidence. He's entitled to insist that the prosecution prove the case against him if it can. The prosecution bears the burden of proving his guilt and his silence is not evidence against him. It can't be used to fill any gaps in the prosecution case. It can't be used as a makeweight in assessing whether the prosecution has proved its case beyond reasonable doubt."

[31] There is no reason to doubt that the jury complied with her Honour's direction in this regard.

[32] This ground of appeal must fail.

Conclusion and order

[33] The grounds of appeal advanced by the appellant are without substance.

[34] The appeal should be dismissed.

[35] **FRASER JA:** I agree with the reasons for judgment of Keane JA and the order proposed by his Honour.

[36] **ATKINSON J:** I agree with the orders proposed by Keane JA and with his Honour’s reasons.