

SUPREME COURT OF QUEENSLAND

CITATION: *R v Burling & Gill* [2010] QCA 367

PARTIES: **R**
v
BURLING, Dawn Andrea
GILL, Karen Leanne
(appellants)

FILE NO/S: CA No 80 of 2010
CA No 84 of 2010
SC No 354 of 2008

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 December 2010

DELIVERED AT: Brisbane

HEARING DATE: 25 November 2010

JUDGES: Margaret McMurdo P, Chesterman JA and Philippides J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. In each appeal against conviction, the appeal is dismissed.**

2. In each application for leave to appeal against sentence, the parties are given leave to make further brief written submissions in light of the prosecutor's submission at sentence and the recent decision of *Hili v The Queen; Jones v The Queen* [2010] HCA 45. Each applicant's submissions are to be filed and served by 4 pm Friday, 4 February 2011. The respondent's submissions are to be filed and served by 4 pm Friday, 12 February 2011.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – appellants convicted of one count of importing a commercial quantity of MDMA – appellant's de facto husband was the principal prosecution witness – witness changed evidence – originally exculpated one appellant then implicated her in second statement – prosecutor accepted that jury should only act on witness evidence where independently supported – whether, on the whole of the evidence, it was open to the jury to be

satisfied beyond reasonable doubt that appellants were guilty of importing a commercial quantity of the border-controlled drug – whether verdict unreasonable or insupportable having regard to the evidence

Criminal Code 1899 (Qld), s 668E(1)

Evidence Act 1977 (Qld), s 17, s 101

Hili v The Queen; Jones v The Queen [2010] HCA 45, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53,
cited

R v Deghani [2009] QCA 362, cited

COUNSEL: N V Weston for appellant Burling
D R MacKenzie for appellant Gill
C R Rice SC for respondent

SOLICITORS: Callaghan Lawyers for the appellants
Director of Public Prosecutions (Commonwealth) for the
respondent

- [1] **MARGARET McMURDO P:** The appellants, Dawn Andrea Burling and Karen Leanne Gill, were each convicted on 12 March 2010 after an eight day trial in the Supreme Court at Brisbane of one count of importing a commercial quantity of border-controlled drugs, namely, 3,4-methylenedioxymethamphetamine (MDMA) between 15 January and 8 February 2007. A co-accused, Robert Charles Simich, was found not guilty of attempting to possess a commercial quantity of a border-controlled drug, namely, 3,4-methylenedioxymethamphetamine which had been unlawfully imported. Another co-offender, David John Deghani, had earlier pleaded guilty to the charge of which Burling and Gill were convicted. He was sentenced to 10 years 10 months imprisonment with a non-parole period fixed at six years and six months.¹ Burling was sentenced to 12 years imprisonment with release on parole fixed at seven years and three months. Gill was sentenced to nine years imprisonment with release on parole fixed at five years and six months. They have each appealed against their conviction claiming it is unsafe and unreasonable or unsatisfactory. That ground of appeal is, effectively, that "the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence": s 668E(1) *Criminal Code* 1899 (Qld). In addition, each has applied for leave to appeal against her sentence contending it is manifestly excessive.

The appeals against conviction

The evidence at trial

- [2] A consideration of the appellants' sole ground of appeal requires a review of the evidence. The prosecution case was that Burling and Deghani (Burling's de facto partner) mailed about 80,000 ecstasy pills in four boxes weighing in total over 25 kg from two different post offices in the United Kingdom (UK) on 31 January 2007 to Gill in Ipswich in Queensland. Burling had been in the UK visiting her daughter. The boxes arrived in Australia on 6 February. Customs officers became suspicious

¹ His application for leave to appeal against sentence was refused: see *R v Deghani* [2009] QCA 362.

and found the drugs which they replaced with similar-looking pills. An undercover police officer posing as a postman delivered two of the four boxes to Gill's home on 8 February 2007. They contained a surveillance device. Gill's telephone was already subject to Australia Federal Police surveillance. At 11.12 am Gill made arrangements by telephone for Burling and Deghani to visit later that day. She telephoned Deghani two minutes after the delivery of the packages. She told Deghani that she had received two parcels and was expecting a further two, referring to "two cups of coffee". Shortly afterwards, she was recorded as saying to a family member, "The phones are tapped, I forgot, didn't I?" Gill and the co-accused Simich repositioned the boxes using a t-shirt to avoid leaving fingerprints and placed them so that the labels showing Gill's name as addressee were not immediately visible.

- [3] About 35 minutes later, Deghani, Burling and two small children arrived at Gill's house. Surveillance microphones detected the sounds of scratching and tearing at the boxes. Gill and Simich were recorded discussing the placing of the boxes into a cupboard and then scratching at labels on the boxes. Simich took the boxes from Gill's home. The boxes were later seized by police at Simich's home. About 30 minutes later at 1.28 pm, Deghani and Burling left.
- [4] At 1.45 pm, Australian Federal Police agents intercepted Deghani and Burling's vehicle. Burling threw some torn up pieces of paper on the roadside. More were found in her handbag. When reconstructed, the pieces comprised parts of the labels of the two boxes sent to Gill from the UK.
- [5] Burling's fingerprints were found on the outside of one of the boxes. No fingerprints were found on any other relevant exhibits.
- [6] Burling was not interviewed by police, but police later interviewed Gill, who stated the following. She sold items on eBay and had an arrangement with Burling and Deghani to accept packages sent by them from the UK "as long as it's nothing illegal". She was not to receive any payment. She simply thought she was assisting them when they were absent from Australia. Before they left for the UK, she thought Deghani had been in trouble with the police for counterfeiting or money laundering. She looked after some money for him whilst he was in the UK. She volunteered that she considered herself too caring and did not want friends any more. She did speak with Deghani once when he was overseas and again on the day of his return. She rang Burling and Deghani when the packages arrived. Her reference to "two cups of coffee" in that conversation was not code: it was a literal reference to her daughter bringing two cups of coffee. Burling and Deghani then came to her house. They did not take the packages with them but asked her to have them removed from her premises. They told her that she would then be contacted by a man who did not mean her any harm and she should not be scared. She arranged for Simich to take the packages; she had no-one else to ask for help.
- [7] Deghani was the principal prosecution witness. He gave evidence that he was the only person involved in sending the ecstasy pills to Australia. Burling was not involved. He packaged the drugs and sent them through the UK postal service. On the prosecution's application, the trial judge declared Deghani a hostile witness under s 17 *Evidence Act 1977* (Qld). He was cross-examined by the prosecutor and his statement to police dated 1 July 2009 was tendered under s 101 *Evidence Act*.²

² Ex 24.

- [8] That statement contained the following evidence. Burling was his de facto partner. He and Burling became friendly with Gill. Gill was seeking assistance for her pregnant daughter who needed money to buy baby items. Deghani was contacted by an associate who wanted a Queensland delivery address for pills that could be sent through the mail as a test run. This associate knew someone in the postal system who would ensure "all would be okay". Burling suggested asking Gill to let them use her address. Deghani and Burling approached Gill who agreed she needed money to pay debts. Gill expressed her suspicion that Deghani was involved in laundering money or drugs. Deghani asked Gill how much money she needed to pay her debts and be comfortable. Gill stated that she could lead a comfortable life with about \$220,000. Deghani asked Gill if she would accept overseas packages containing ecstasy pills which she would have to sign for. Gill said she had no problem with this and would accept as many packages as were sent. Deghani told her she would get about \$20,000 to \$30,000 for the first delivery if everything went well; there would then be more deliveries. Deghani made arrangements with his associate and Gill to send Gill packages when he and Burling travelled to the UK in January 2007.
- [9] During that visit Burling was involved in sorting out family problems with her oldest daughter. Burling contacted the wife of Deghani's associate and the associate then contacted Deghani. Deghani and Burling bought boxes, wrapping, vacuum packs and a vacuum machine. Deghani picked up the pills and returned to their hotel. They packed the pills into boxes. Burling suggested putting them in boxes previously used for children's toys and handheld video machines which they had purchased for their children. They packed all 80,000 pills into four boxes. The next morning, Deghani and Burling took two of the boxes to a post office in Croydon and sent them to Gill. They then went to a post office in Boscombe and sent the other two boxes to Gill. Burling wrote the details on the boxes using her maiden name; Deghani did not ask her to do this. They telephoned Gill to tell her the boxes would be delivered between 5 and 8 February 2007. Gill needed to borrow some money and Deghani told her where she could find \$500 at his home.
- [10] Deghani agreed that he and Burling travelled to the UK to assist Burling's daughter; that he kept things from Burling; that he told either Burling or a post office teller to fill in the details on the boxes; that he paid the £140 postage, and that he told Burling to tear up the items located by police on 8 February 2007.
- [11] Deghani conceded the following matters in cross-examination. He and Burling were originally represented by the same counsel, Mr Di Carlo, until late October 2008, six days before the trial was first listed to commence. On 8 October 2008, Mr Di Carlo and Deghani approached the authorities seeking an indemnity against prosecution for Deghani. Deghani provided a lengthy statement about the importation in which he exculpated Burling. Sometime later, Deghani was informed that the police considered his statement was of "low value". On 24 October, Mr Di Carlo and Deghani again spoke to the authorities who had requested further information. Deghani then changed his account to implicate Burling; he was still seeking an indemnity. When asked about his relationship with his former brother-in-law, Mozteka Kashani-Malaki, for whom Mr Di Carlo was also acting in respect of drug-related criminal charges, he declined to give any information "on the basis of safety and protection for my family". Deghani did not sign the statement he provided to the authorities until 1 July 2009. When Burling's counsel suggested that the parts of his statement implicating Burling were untrue, he

responded, "You have to talk to my barrister concerning that." When Burling's counsel suggested Burling had no knowledge of the drugs, he responded, "You'd have to talk to my barrister."

- [12] Deghani agreed that the only discussion he had with Gill "was about sending packages or sending things to her location, not as a specific thing, saying that I would have been sending drugs ... I used her place as a location." He had conversations with Gill. He added, under cross-examination by Gill's counsel, "as it states in my statement, must – I'm – I have a statement and I have to go by what the statement says." He was asked whether he was concerned that if he did not stick to the contents of his statement he might expose himself to more trouble. He responded:

"Oh yeah, they're probably already thinking of that, of more trouble, or whatever, and bringing me back to Court and – I expect that to come ... but the thing being as it's written there, does not necessarily go with what was happening."

- [13] Deghani agreed he had to stick to his statement "legally" and that his sentence was reduced because of his cooperation with the authorities.
- [14] The labelling on the four packages gave the consignor's name in each case as "D Campbell". The handwriting on the labels described the contents as children's toys and like items. This handwriting matched both a specimen signature "D Campbell" found by police during a search of Burling's premises, and the signature shown on receipts for the postage of boxes 3 and 4 found in Deghani's possession when he and Burling re-entered Australia from the UK. Burling's former family name was Campbell and she had children with the family name, Campbell. Deghani's palm print was found on the outside of one of the boxes. There were three other fingerprints but none was able to be identified. There were no fingerprints found on any of the plastic bags containing the ecstasy tablets.
- [15] Neither Burling nor Gill gave or called evidence.

The judge's directions to the jury

- [16] The trial judge directed the jury that it would be dangerous to convict any of the three accused on Deghani's evidence, unless the jury were satisfied it was supported in some material particular implicating that accused in the offence.
- [17] The judge identified the following matters as potentially supportive of Deghani's evidence in so far as it implicated Burling:
- The boxes were posted in two separate groups;
 - The handwriting on all of the boxes was consistent with Burling's;
 - The customs declaration was signed 'D Campbell' a name different from that by which Burling was now known but her former name;
 - The consignor address on boxes 1 and 2 was slightly different to that on boxes 3 and 4;

- The labels were attached to the boxes in a consistent way suggesting this was done by Burling, not postal officers at different post offices;
- The weight of the boxes (27 kilograms) was excessive for the stated contents;
- The total cost of freight was excessive for the declared contents and value; and
- Burling's conduct on the day of delivery, including her removal of the labels without being told to by Deghani and not in his presence.

[18] The judge identified the following matters as potentially supportive of Deghani's evidence in so far as it implicated Gill:

- Gill's conduct was said to reflect the existence of a prior arrangement to receive boxes containing drugs;
- Gill telephoned Deghani immediately after the two boxes arrived;
- That telephone call was made notwithstanding there had already been an arrangement at 11.12 am that day for Deghani and Burling to visit Gill;
- The 'two coffees' conversation was senseless unless it was in the context of a disguise or code;
- Recorded statements by Gill to a family member suggested that a code was used and she was concerned that her telephone had been 'tapped';
- The repositioning of the boxes in the toy room so that the labels addressing the boxes to Bill could not be read and by using a shirt to avoid fingerprints being left; and
- Burling and Gill's tearing off labels on the boxes in Deghani's absence; and
- Gill continued to tear off labels with Simich after both Burling and Deghani left and arranging for Simich to hide the boxes until collected by a third party.

[19] The appellants have no complaint about the trial judge's directions to the jury.

Burling's contentions

[20] Burling emphasises that the crux of the prosecution case is Deghani's evidence which was inconsistent and completely unreliable. Initially, Deghani expressly exculpated her from involvement in this offence. He did not inculcate her until the

authorities told him he needed to provide further information if he wanted an indemnity against prosecution. He changed his evidence and implicated her to obtain an indemnity or at least a reduction in sentence. He made a second statement implicating Burling after declining to give information about the associate, Kashani-Malaki, who supplied him with drugs. There was a significant lapse of time between Deghani providing his statement to police and signing it. His initial evidence at trial before being declared hostile exculpated Burling.

- [21] In cross-examination about the truthfulness of his statement implicating Burling, Deghani gave unresponsive answers. He was an unreliable witness prepared to say anything to aid his own cause.
- [22] The jury could not have accepted Deghani's evidence beyond reasonable doubt. The matters said to support it were of little or no weight. Any labelling of the boxes by Burling was done at his direction. He was overbearing and domineering towards her. The weight of the boxes and their postage costs do not demonstrate that Burling knew of their contents. Her actions on the day she was apprehended were at Deghani's direction, or were consistent with her knowledge being acquired after the completion of the importation of the boxes. Burling's fingerprints were not located on any of the plastic bags containing the drugs. This suggested that she was not engaged in their packaging. When Deghani and Burling were stopped at Brisbane airport on their return from the UK, Deghani become very agitated but Burling remained calm. This was consistent with Deghani, but not Burling, knowing that the boxes contained drugs. After reviewing the whole of the evidence, this Court should be satisfied that the guilty verdict was not open to the jury: *MFA v The Queen*.³

Conclusion on Burling's appeal against conviction

- [23] Burling's sole ground of appeal is that the jury's verdict of guilty in her case should be set aside on the ground that it is unreasonable and cannot be supported having regard to the evidence (s 668E(1) *Criminal Code*). This Court must determine whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that Burling was guilty of importing a commercial quantity of the border-controlled drug, MDMA.
- [24] The case against Burling depended in part on Deghani's evidence. There is no question, as the judge explained to the jury, that Deghani was not a creditworthy witness. The prosecutor accepted in his address to the jury that the jury should act on Deghani's evidence only where it was independently supported by other evidence. The trial judge warned the jury that it would be dangerous to convict any of the three accused on Deghani's evidence unless the jury found his evidence was supported in some material way by independent evidence implicating that accused in the offence. There is no complaint about the judge's directions or the matters identified by the judge as capable in law of supporting Deghani's evidence. Burling's contention is, however, that, while technically capable of amounting to corroboration, these matters were, individually and collectively, of such slight weight, that they could not be used by the jury to provide sufficient independent support of Deghani's account. They did not negate the inference, reasonably open, that Burling was not involved in the importing of the drugs and that Deghani acted alone.

³ (2002) 213 CLR 606.

- [25] I am unable to accept that contention. The jury were entitled to infer, from evidence independent of Deghani and which supported his account in his statement to police dated 1 July 2009, that Burling's conduct amounted to knowing participation in preparing and sending the boxes containing the drugs to Gill. Burling's palm print was on the outside of one package. She used the name "D Campbell" (the family name of some of her children, and the name by which she was formerly but no longer known) for the purpose of signing the customs declaration and posting receipts. The writing resembled the signature "D Campbell" found on a document at her home. She was involved in the despatching of the four boxes from two different post offices in the UK, apparently to spread the risk of detection. She knew that the postage cost for two boxes was £140 when the declared value of the contents of those boxes was £150. The boxes weighed more (about 27 kg) than if they contained the stated contents (toys, DVDs and the like). The labels had been attached to the boxes in an apparently consistent manner. These matters suggested that Burling, not two different postal officers at separate UK post offices, had attached the labels. Burling enthusiastically removed labels on the boxes at Gill's house and later, when intercepted by police tore them into pieces and disposed of them. Despite Deghani's varying accounts and his blatant self-interest in implicating Burling, the jury were well entitled to conclude from all this evidence the truthfulness and reliability of Deghani's account implicating Burling as a knowing and willing participant in the importation of the MDMA.
- [26] This conclusion was not undermined by the absence of Burling's fingerprints on the actual packages containing the drugs. No fingerprints were developed from those packages. Deghani gave evidence that he had handled them but his prints were not found. As the fingerprint examiner explained in his evidence, fingerprints may or may not be transferred from a hand to a surface. The absence of fingerprints on the plastic packages was neutral.
- [27] After reviewing the evidence in Burling's case, I am confident the jury were entitled to be satisfied beyond reasonable doubt of Burling's knowing participation in the importation and to reject beyond reasonable doubt the competing inference that she knew nothing of the drugs and was acting only on the direction of her overbearing and domineering partner, Deghani. Her conviction is both reasonable and supported by the evidence. It follows that Burling's appeal against conviction must be dismissed.

Gill's contentions

- [28] Gill's submissions as to her conviction appeal are similar in effect to Burling's. Deghani was an unreliable witness prepared to say anything to aid his cause and he substantially changed his account to get the best possible outcome for himself. Matters relied on as supporting Deghani's account in Gill's case are of little weight and are consistent with other innocent hypotheses. Gill may have been involved in some less serious or minor illegal act, such as the illegal importation of toys for commercial purposes and/or her becoming aware or suspecting the unlawful contents of the boxes after the act of importation was complete. The prosecution should not have involved itself in dubious or potentially unethical dealings with Deghani's lawyers. On the whole of the evidence, the guilty verdict was not open to the jury.

Conclusion on Gill's appeal against conviction

- [29] As for Burling's, the sole question for this Court in Gill's appeal against conviction is whether, on the whole of the evidence, it was open to the jury to be satisfied

beyond reasonable doubt that she was guilty of importing a commercial quantity of the border-controlled drug, MDMA. The evidence in Gill's case differs, of course, from that in Burling's.

- [30] Gill admitted in her interview with police that, not long before Burling and Deghani left for the UK, she agreed to Deghani's proposal that she would be available to receive something that they would send from England, although nothing illegal. She agreed Deghani telephoned her from the UK and told her the packages were coming. The boxes arrived and were labelled as containing toys. Had she been ignorant of their contents as she claimed, it is surprising that she did not open them. Instead, immediately upon the delivery of the boxes, she telephoned Deghani and Burling, even though she had arranged a few hours earlier for them to visit later that day. She spoke to them about "two cups of coffee" which was consistent with the use of a pre-arranged code for the two boxes having arrived. Shortly afterwards, she spoke to a family member about forgetting that the phones were tapped. This strongly suggested she was aware she had received illegal drugs and was involved with Deghani and Burling in serious criminal conduct. She and Burling tore labels off the boxes when Deghani was elsewhere. After Burling and Deghani left, she and Simich moved the boxes, using a t-shirt to avoid fingerprints, and placed them so that her address was not visible. She arranged for Simich to take the boxes from her property until collection by a third party.
- [31] In light of all these matters, the jury were entitled to find beyond reasonable doubt the truthfulness and reliability of Deghani's evidence that, prior to the importation of the MDMA, Gill agreed to allow Deghani to send illegal drugs to her premises in return for substantial payments, initially \$20,000 to \$30,000. Her conviction is both reasonable and supported by the evidence.
- [32] It follows that Gill's appeal against conviction must also be dismissed.

Burling and Gill's applications for leave to appeal against sentence

The applicants' contentions

- [33] Both Burling and Gill contend that their sentences were manifestly excessive and that the sentencing judge sentenced them on an incorrect basis. Since the hearing of this application, the High Court has handed down its decision in *Hili v The Queen; Jones v The Queen*.⁴ The Court was critical of an approach whereby offenders against Commonwealth legislation were sentenced by adopting a "norm" of setting a parole release date at between 60 and 66 per cent of the total sentence in the absence of special circumstances.
- [34] In this case, the prosecutor at sentence stated:
- "Accepting that, one does observe empirically that in the preponderance of federal offences involving the importation of drugs, that absent some particular mitigating, of which there wouldn't really appear to be one in this case, a nonparole period of 60 per cent, or sometimes more, is a very month [sic] outcome."⁵

...

⁴ [2010] HCA 45.

⁵ Appeal book 557 lines 10-17.

There wouldn't appear to be any reason to impose a nonparole period less than - at about the 60 percent proportion in her case."⁶

- [35] In view of the recent decision in *Hili*, I consider the parties should be given the opportunity to make submissions if they consider it relevant to each appellant's application for leave to appeal against sentence.

ORDERS:

1. In each appeal against conviction, the appeal is dismissed.
 2. In each application for leave to appeal against sentence, the parties are given leave to make further brief written submissions in light of the prosecutor's submission at sentence and the recent decision of *Hili v The Queen; Jones v The Queen* [2010] HCA 45. Each applicant's submissions are to be filed and served by 4 pm Friday, 4 February 2011. The respondent's submissions are to be filed and served by 4 pm Friday, 12 February 2011.
- [36] **CHESTERMAN JA:** I agree with the President.
- [37] **PHILIPPIDES J:** I agree with the reasons of McMurdo P and the orders proposed.

⁶ Appeal book, 559 lines 1-3.