# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Bauwa Deng Narru* [2012] QCA 364 |
| PARTIES: | **R**<br>**v**<br>**BAUWA DENG NARRU, Sampara**<br>(appellant) |
| FILE NO/S: | CA No 102 of 2012<br>DC No 1796 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 21 December 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 26 November 2012 |
| JUDGES: | Holmes and Fraser JJA and Boddice J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal against conviction dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – where the appellant was found guilty of an offence of people smuggling and sentenced to imprisonment for five and a half years, with a non-parole period of three and a half years – where the prosecution opened that it would call five of 23 passengers to give evidence – where the prosecution failed to call the fifth passenger as opened – where the appellant contends that, notwithstanding a direction from the trial judge, there was a miscarriage of justice because the case was left to the jury on a different basis to that opened by the prosecution and as litigated at trial – whether there was a miscarriage of justice<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant contends there was a miscarriage of justice because the directions given to the jury in relation to the failure to call the five witnesses as opened by the prosecution were insufficient to satisfy an element of the offence – whether there was a miscarriage of justice |

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – where the appellant contends the trial judge erred in finding there was a case to answer – whether there was a miscarriage of justice – whether the trial judge erred

*Migration Act* 1958 (Cth), s 232A(1)

*Dyers v The Queen* (2002) 210 CLR 285; [2002] HCA 45, cited
*Mahmood v Western Australia* (2008) 232 CLR 397; [2008] HCA 1, cited
*R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38, cited
*R v Heinze* (2005) 153 A Crim R 380; [2005] VSCA 124, cited

COUNSEL: C L Morgan for the appellant
W J Abraham QC, with M J Woodford, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Boddice J and the order he proposes.

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

[3] **BODDICE J:** On 3 April 2012, a jury found the appellant guilty of an offence of people smuggling. The appellant was sentenced to imprisonment for five and a half years, with a non-parole period of three and a half years.

[4] The appellant appeals against his conviction. He relies on three grounds of appeal. First, that the trial judge erred in finding there was a case to answer. Second, that there was a miscarriage of justice because the directions given to the jury were insufficient to satisfy an element of the offence. Third, that there has been a miscarriage of justice because the case was left to the jury on a different basis to that opened by the prosecution, and as litigated at trial.

**Background**

[5] On 28 April 2010, the Royal Australian Navy intercepted a vessel inside Australian territorial waters west of Ashmore West Island. The vessel was boarded and found to contain 23 passengers and three crew.

[6] The appellant was located in the wheelhouse when the vessel was boarded by Navy personnel. He was observed to throw clothing which landed on top of a GPS. The Navy discovered navigation equipment on board the vessel in the wheelhouse, including rolled up charts, compasses, the GPS unit and an aerial for the GPS. The Navy also located food which would have been sufficient for some further days, together with enough fuel to travel back to Indonesia. There was no fishing equipment on board the vessel.

**Charge**

[7] By an indictment presented on 3 October 2011, the Commonwealth Director of Public Prosecutions charged the appellant, and his two fellow crew members, with the following offence:

> "On and between about the twenty-third day of April 2010 and the twenty-eighth day of April 2010 at Indonesia and on the seas between Indonesia and Ashmore Island, Australia, Sampara BAUWA DENG NARRU, Sikki SAWAL DENG NGALEH and JAMALUDDIN facilitated the bringing or coming to Australia of a group of five or more people, namely a group of twenty six people, who were non-citizens and who travelled to Australia without visas that were in effect, and did so reckless as to whether those people had a lawful right to come to Australia."

[8] The offence pleaded in the indictment was alleged to be a breach of s 232A(1) of the *Migration Act* 1958 (Cth). That section, which is now repealed, provided:

> "(1) A person who:
>
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
>
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;
>
> is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.
>
> (2) For the purposes of subsection (1), the defendant bears an evidential burden in relation to establishing that subsection 42(1) does not apply to a person because of subsection 42(2) or (2A) or regulations made under subsection 42(3)."

**Trial**

[9] The prosecution opened that it would call five of the 23 passengers to give evidence that each had no lawful right to come into Australia. Ultimately, however, only four of those passengers were called at trial. The fifth passenger opened was not called following a voir dire during the trial.

[10] Each of the four passengers called gave evidence describing the journey to Australia. Whilst the detail of that journey varied, the essential elements were described in similar terms. Those essential elements were that each undertook the journey after paying a considerable sum of money, and being flown from their country of origin to Indonesia. Each came to Australia to seek asylum.

[11] After arriving in Indonesia, each was taken to a beach, arriving in darkness, before wading out to the vessel through chest deep water. Each was placed into the hold of the vessel. That hold had a cover over it, which remained in place for the whole journey, except for the last day of the voyage. Each said no-one asked for a passport, visa or other travel documents when boarding the vessel, or at all throughout the voyage. Each passenger had limited luggage.

[12] During the voyage, each said passengers were allowed to leave the hold to toilet, but otherwise remained in the hold. The voyage lasted five days and five nights. After two days passengers were able to use the deck at night, but were not allowed onto the deck during the daytime. There were three crew on the vessel. The appellant was described as mainly in control of steering the vessel.

[13] The appellant gave evidence in his defence. He said that he and his co-offenders were subject to the direction of a man identified as "Herman", who left the vessel before it was intercepted by the Navy. The appellant said he took charge of the vessel thereafter because he was threatened by Herman.

[14] After deliberating for some time, the jury found the appellant guilty of the offence. His co-accused were found not guilty.

**Appeal**

*Ground 1*

[15] At the end of the prosecution case, counsel for the appellant submitted that the appellant had no case to answer, as the prosecution had failed to establish beyond reasonable doubt an essential element of the offence, namely, that the appellant had facilitated the bringing or coming to Australia of a group of five or more people to whom s 42(1) of the Act applied. This submission was made on the basis that the prosecution had only called four of the 23 passengers on the vessel, and it was not open for the jury to be satisfied beyond reasonable doubt in those circumstances of the requirement of five or more people.

[16] This submission of no case was rejected by the trial judge. In so doing, the trial judge accepted a submission for the prosecution that the element of five or more people to whom s 42(1) of the Act applied did not need to be established by direct evidence. It could be established, beyond reasonable doubt, by inference having regard to all of the circumstances of the case.

[17] The appellant contends there was no case to answer as this element of the offence would only be established by direct evidence. The appellant relies on no authority to support that proposition.

[18] It is well recognised that criminal offences, generally, can be proven either by direct evidence, by circumstantial evidence, or by a combination of both. A consideration of the terms of the legislative provision, and of the nature of the offence, does not support a conclusion that the elements of this offence, unlike other criminal offences, may not be proven circumstantially. There is nothing in the legislation which requires an essential element of the offence to be proven by direct evidence.

[19] The trial judge correctly held that it was open to the jury to find this element was proven beyond reasonable doubt by drawing the necessary inferences from the circumstances of the journey, as described by the prosecution witnesses.

[20] The jury did so, after being given the usual directions as to the drawing of inferences in circumstances where there may be other inferences consistent with innocence. The trial judge appropriately directed the jury in respect of the drawing of inferences in the present circumstances.

[21] This ground of appeal must fail.

*Ground 2*

[22] After the rejection of the appellant's submission of no case to answer, the trial judge accepted a submission from the appellant that a direction ought to be given to the jury in respect of the prosecution's failure to call the fifth passenger, opened by the prosecution.

[23] The trial judge gave a direction in respect of that failure in the following terms:

> "You have heard from four passengers, not five. Mr Woodford opened that five passengers would give evidence. You would be entitled to infer from the failure to call the fifth-named passenger that his evidence would not have assisted the prosecution."[1]

It is not submitted that that direction was inadequate.

[24] The appellant submits that as the remaining 18 passengers on board the vessel were not called, and no reasons were offered by the prosecution for failing to call these passengers, the jury should have been directed that it was entitled to infer that none of those potential witnesses would have assisted the prosecution case, and, further, that they ought not speculate about the evidence any of the remaining 18 passengers might have given.

[25] Generally, it is for the prosecution to decide what evidence it will adduce at trial.[2] It would ordinarily be assumed the Crown is calling witnesses in accordance with its prosecutorial obligations.[3] It is usually not appropriate to invite a jury to draw an adverse inference from the prosecution's failure to call a witness.[4]

[26] If a judge is satisfied there was no good reason not to call the witness, a direction may be given. Such directions are only to be given in rare cases where it is shown that the prosecution's failure to call the witness is in breach of the prosecutor's duty.[5]

[27] The prosecution opened that it would call five passengers. Ultimately, only four were called at trial. Against that background, it was entirely appropriate for the trial judge to give a direction in respect of the failure to call the fifth witness. The trial judge gave an appropriate direction, namely, that the jury was entitled to infer from the failure to call the fifth-named passenger that his evidence would not have assisted the prosecution.

[28] The position of the remaining 18 passengers was very different. There was never any suggestion the prosecution would call any of the remaining 18 passengers. No evidence was led as to their availability, and no request was made by the appellant for these passengers to be called at the trial. Against that background, it would have been entirely speculative for the jury to be invited to consider that the failure on the part of the prosecution to call those witnesses was because this evidence would not assist the prosecution.

[29] The jury were appropriately directed not to speculate in relation to such matters. There was nothing exceptional about the case which would justify the trial judge

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1 AB 759.
2 *R v Apostilides* (1984) 154 CLR 563.
3 *Dyers v The Queen* (2002) 210 CLR 285.
4 *R v Heinze* (2005) 153 A Crim R 380 at [77].
5 Dyers at [6]; *Mahmood v Western Australia* (2008) 232 CLR 397 at [26].

departing from the general rule that a specific direction not be given in relation to the failure of the prosecution to call these 18 passengers as witnesses in the trial.

[30] The second ground of appeal must fail.

*Third ground*

[31] The third ground of appeal was an additional ground added by leave at the hearing of the appeal. It relies on a contention that the appellant conducted his case on the basis that the element of five or more people would be proven by direct evidence, namely, by calling the five passengers opened by the prosecution. The appellant contends that the prosecution's failure to do so resulted in a miscarriage of justice, in that the case considered by the jury was different to that opened by the prosecution, and litigated by the appellant.

[32] In support of this ground, the appellant submits that had he been aware that this element would be proven by circumstantial evidence, rather than direct evidence, the case would have been conducted differently at trial. For example, questions may have been asked of the four passengers who were called in relation to their knowledge of the remaining passengers. The appellant submits he was denied this opportunity by the way the prosecution opened its case.

[33] The appellant's submissions on this aspect do not point to any specific forensic decisions which were made by his legal representatives, having regard to the way in which the prosecution case was opened. The appellant does not rely upon any affidavit material from his then legal representatives in relation to the conduct of the trial. These matters count against a submission that there was, in all the circumstances, a denial of a fair trial with a resultant miscarriage of justice.

[34] Significantly, after the refusal of the no case submission, there was no application by the appellant's legal representatives for the jury to be discharged on the ground that the change in the prosecution's evidence had resulted in the appellant being denied a fair trial, or had resulted in a miscarriage of justice. If, in truth, the appellant's legal representatives had conducted the case differently based on the way in which it had been opened by the prosecution, it is to be expected that such an application would have been made at that time.

[35] The appellant's case was that he understood the vessel was transporting these passengers from one Indonesian port to another Indonesian port. The appellant did not want to come to Australia. The appellant only steered the vessel and took control of the vessel due to threats from Herman.

[36] The jury's verdict indicates the jury rejected that version of events. Against that background, it is fanciful to contend the prosecution's failure to call the fifth passenger led to the appellant being denied a fair trial, or to the appellant suffering a miscarriage of justice.

[37] This ground of appeal must also fail.

**Conclusion**

[38] The appellant has failed to establish any ground which would support his conviction being set aside.

[39] I would dismiss the appeal against conviction.