SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pyritz* [2020] QSCPR 27
PARTIES:	**R** **v** **PYRITZ, Dale Edward** (accused/defendant)
FILE NO/S:	Indictment No 722 of 2020
DIVISION:	Trial Division
PROCEEDING:	Trial (Judge alone)
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	20 November 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2020 to 6 November 2020 (ruling made 5 November 2020)
JUDGE:	Williams J
RULING:	Her Honour calls Ms McHarry to give evidence at the trial.
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – POWERS AND DUTIES OF PROSECUTION AS TO CALLING OF WITNESS AND PRESENTING EVIDENCE – GENERALLY – where the Crown did not call a witness – where the Court invited the Crown to reconsider – where the defence made an application for the Court to call the witness – whether the Court should take the rare step of calling a witness – whether such exceptional circumstances have been made out *Evidence Act* 1997, s 10, s 18, s 19, s 101 *Nguyen and The Queen* [2020] HCA 23, cited *R v Peros* [2018] 1 Qd R 1, followed *The Queen v Apostilides* (1984) 154 CLR 563, followed *Whitehorn v The Queen* (1983) 152 CLR 657, cited
COUNSEL:	S Cupina for the Crown S Macdonald for the defendant
SOLICITORS:	Office of the Director of Public Prosecutions for the Crown MacDonald Law for the defendant

[1] The accused pleaded not guilty before me on five counts on Indictment No. 722 of 2020, namely trafficking in methylamphetamine, trafficking in cannabis, possession of methylamphetamine, possession of cannabis and possessing a mobile phone used in connection with the commission of a crime of trafficking in a dangerous drug.

[2] On 31 March 2019 police stopped a Holden Colorado Ute in Kalowendha Avenue, Pelican Waters. There were two people in the car: Deanne McHarry was driving and the accused was a passenger, seated in the front passenger seat.

[3] Police searched the car and found various items including four clip seal bags (three containing methylamphetamine and 1 containing cannabis), scales and unused clip seal bags.

[4] Further, police seized the accused's Optus mobile telephone and downloaded the data from that telephone. The Crown allege that the text messages and Facebook messages from the accused's telephone prove the user of the mobile telephone engaged in acts constituting trafficking in cannabis and methylamphetamine. The accused did not contest that the text and Facebook messages proved those allegations.

[5] The real issue is who sent the relevant text messages and Facebook messages on the accused's mobile telephone. The Crown's case is that the accused sent the relevant messages based on an inference that it is his telephone. The Crown also points to other circumstantial evidence to support the conclusion that the accused sent the messages. The accused denies sending the relevant text messages and Facebook messages.

[6] The judge only trial commenced on Monday 2 November 2020 and the Crown closed its case on Wednesday 4 November 2020 following the Crown tendering admissions and documents referred to in those admissions and calling evidence from three police officers.

[7] Following the Crown closing its case, Counsel for the accused made an application that I call Deanne Catherine McHarry to give evidence on the basis that exceptional circumstances had been established to support the unusual step of the trial judge calling a witness.

[8] This application was made in the following circumstances:

(a) On day one of the trial, in the context of a contested issue in respect of the admissibility of three police recordings, an email was sent to the parties by my Associate requesting that the Crown explain whether it intended to call Ms McHarry as she appeared on the information available at least to be a relevant witness and, if the Crown did not intend to call Ms McHarry, then an explanation as to why may be requested.

(b) On day two of the trial:

(i) The Prosecutor indicated the Crown was not calling Ms McHarry to give evidence. The Prosecutor referred to the fact that Ms McHarry may claim the privilege against self-incrimination and referred to s 10 of the *Evidence Act* 1977 (Qld) whereby a witness may not answer any question tending to incriminate the person.

(ii) Counsel for the accused submitted that the Crown ought to call Ms McHarry as a relevant witness and relied on s 39 of the *Director's Guidelines*. In the event that the Crown did not call Ms McHarry, Counsel for the accused indicated that the accused would be forced into evidence to call her. The accused had subpoenaed Ms McHarry out of an abundance of caution.

(iii) I encouraged the Prosecutor to reconsider her position.

(iv) Consequently:

(A) The Prosecutor arranged for Legal Aid Queensland to meet with Ms McHarry and explain to her the privilege against self-incrimination.

(B) The Prosecutor met with Ms McHarry. Following this conference, the Prosecutor indicated to the Court that she had confirmed her view that she would not call Ms McHarry as a witness and had formed the view that she was unreliable.

(c) On day three of the trial, Counsel for the accused requested that I inquire of the Prosecution as to the reasons for declining to call Ms McHarry consistent with the step outlined at point 2 of the High Court reasons in *The Queen v Apostilides*[1] at page 575, which states:

> "The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons."

(d) The Prosecutor identified three bases for not calling Ms McHarry as a witness, namely that:

(i) The witness was not relevant.

(ii) The witness was not compellable.

(iii) The witness was not reliable.

(e) At that stage the indication to the Court was that Ms McHarry would give evidence that she sent the relevant messages on the accused's telephone. This was consistent with prior statements that she had made to police officers at the roadside following the search of the vehicle and also in an electronically recorded interview with police later that same evening.

(f) I indicated that my preliminary view was:

(i) The anticipated evidence of Ms McHarry directly related to the acts relied upon by the Crown as constituting the trafficking.

(ii) It was incorrect to say that Ms McHarry was not compellable by reason of the fact that she may claim the privilege against self-incrimination when asked a question following being sworn to give evidence. She could be subpoenaed, and had in fact been subpoenaed, to give evidence. If called, she would be required to take an oath and answer

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[1] (1984) 154 CLR 563.

questions unless she had some lawful right not to. The lawful right which she may have was a claim for self-incrimination privilege.

(g) In respect of the Prosecutor's view that the witness was unreliable, this was based on a number of inconsistencies between Ms McHarry's evidence and the messages in evidence identified in the conference over the luncheon adjournment. No statement had previously been taken from Ms McHarry. I proposed that the Crown arrange for a statement to be taken from Ms McHarry so this could be further considered.

(h) On Wednesday 4 November 2020 a statement of Ms McHarry was taken by police and provided to the Crown and the defence as well as to the Court.

(i) Following consideration of Ms McHarry's statement on Thursday 5 November 2020, I again asked the Prosecutor her position. The Prosecutor confirmed she would not call Ms McHarry as a witness. At that stage, Counsel for the accused formally requested that I inquire as to the Prosecutor's reasons for declining to call Ms McHarry as a witness and to give an intimation.

(j) Following inquiring of the Prosecutor as to the reasons (which remained consistent with the matters outlined above), I identified the implications as then appeared to me as trial judge at that stage of the proceedings.[2] I identified these implications as including:

(i) The interests of justice required the evidence of Ms McHarry in relation to the acts relied upon by the Crown as constituting the trafficking to be known by the finder of fact in the trial.

(ii) There was a risk that if the accused was required to call Ms McHarry Counsel for the accused would not have the opportunity to cross-examine her. It was not an answer to say the accused could call Ms McHarry as this would require the accused to go into evidence. It would also affect the defence's ability to make use of ss 18 and 19 of the *Evidence Act* in relation to prior inconsistent statements if that became necessary.

(iii) If the Crown had a right to cross-examine the witness only then her credibility could be attacked without any assurance that the credit of the witness would be properly tested by either side.

(k) I also noted that if the Crown did not wish to lead evidence from the witness in circumstances, in particular, where the defence wishes the witness to be called the Prosecutor may call the witness to be cross-examined and then if necessary, be re-examined.[3]

(l) I also noted:

(i) The comments of the High Court in *Nguyen and The Queen*[4] recognising a fundamental principle of a criminal trial is that the prosecution must put its case both fully and fairly before the jury. Further, while it is for the prosecutor to determine what evidence will

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2 Consistent with the third paragraph of *The Queen v Apostilides* (1984) 154 CLR 563 at 575.
3 As recognised in *The Queen v Apostilides* (1984) 154 CLR 563 at 576.
4 [2020] HCA 23.

be called and how the case for the Crown will be presented, the prosecution must also fulfil the responsibility of ensuring that the Crown case is presented with fairness to the accused.

(ii) In *Nguyen*, the High Court recognised:

> "It has been said that the concept of a fair trial cannot comprehensively or exhaustively be defined. But there can be no doubt that fairness encompasses the presentation of all available, cogent and admissible evidence. In *Ziems v The Prothonotary of the Supreme Court of New South Wales*, Fullagar J observed the rule in criminal cases to be that 'the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury'. This statement was quoted with approval by the Court in *Richardson*, where, as noted above, it was said that it was the responsibility of the prosecution to present the case for the Crown 'conformably with the dictates of fairness to the accused'. In *Whitehorn v The Queen*, Dawson J said that "[a]ll available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based."[5] (citations omitted)

(m) The statement of Ms McHarry outlined the evidence she was prepared to give to the Court if called as a witness. It was largely consistent with her previous admissions made in the roadside recording and the police interview.

(n) Further, from the statement it appeared that she did not intend to claim the privilege against self-incrimination. However, whether the privilege was ultimately claimed would not be known with certainty unless and until the witness was sworn and she was asked questions which tended to incriminate her.

(o) I also noted s 39 of the *Director's Guidelines* reflects a prosecutor's duty in relation to calling witnesses. Relevantly, that section states:

> "In deciding whether or not to call a particular witness the prosecutor must be fair to the accused. The general principle is that the Crown should call all witnesses capable of giving evidence relevant to the guilt or innocence of the accused.
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> The prosecutor should not call:-
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> - unchallenged evidence that is merely repetitious; or
> - a witness who the prosecutor believes on reasonable grounds to be unreliable. The mere fact that a witness contradicts the Crown case will not constitute reasonable grounds."

(p) In reaching the opinion that Ms McHarry was unreliable, the Prosecutor pointed out potential inconsistencies in her evidence. The fact that evidence may be inconsistent or contradicted by other evidence does not mean that there is sufficient reason for a prosecutor not to call the witness. In this

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5 [2020] HCA 23 at [36]. See *Whitehorn v The Queen* (1983) 152 CLR 657 at 674.

regard, I drew the Prosecutor's attention to paragraphs 82, 83, 86 and 88 of the reasons of Justice Henry in *R v Peros*.[6]

(q) In these circumstances, I formed the view that Ms McHarry was a highly relevant witness and it appeared she would give evidence that was critical to the very acts relied upon by the Crown to constitute the acts of undertaking the business of trafficking. Noting that I could not direct the Crown to call the witness, I encouraged the Crown in the strongest possible terms to reconsider the decision not to call Ms McHarry and gave a formal intimation.

(r) Following the giving of the formal intimation, the Prosecutor confirmed the position that she would not call Ms McHarry and the Crown proceeded to close its case.

[9] It was at that stage that the current application was made by Counsel for the accused.

[10] Following hearing submissions from both parties:

(a) It was discussed and agreed with the parties that if I was to call the witness the procedure would be:

(i) I would ask no questions other than the witness's full name.

(ii) Counsel for the accused would cross-examine the witness, followed by the Prosecutor cross-examining the witness and then Counsel for the accused would re-examine the witness, if appropriate.

(b) I ruled that exceptional circumstances had been made out and it was appropriate in the circumstances for me to call Ms McHarry to give evidence, with the above procedure to be followed.

[11] I reserved my reasons in respect of the ruling. Set out below are the reasons for my ruling.

Power of the Court to call a witness

[12] The High Court in *R v Apostilides* stated as follows:

> "5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.
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> 6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to miscarriage of justice."[7]

[13] Further, the High Court in *R v Apostilides* outlined the responsibility of the prosecutor as follows:

> "A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards

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6 [2018] 1 Qd R 1.

7 (1984) 154 CLR 563 at 575.

> an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined."[8]

[14] In submissions, Counsel for the parties agreed that the relevant test was identified by Justice Henry in *R v Peros* at paragraph 13 which states:

> "Turning, then, to the nature of the exceptional circumstances identified in *Apostilides*, under which the judge ought call the witness, the court observed, 576:
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> > 'In the formulation of the fifth proposition we have allowed for the possibility that circumstances may arise when the trial judge will be constrained to call a person to testify. The circumstances which would justify such a course would be rare. It is clear to us that more would be required to establish 'most exceptional circumstances' than the refusal of the prosecutor, for reasons which the judge thinks insufficient, to call a witness. Some of the reasons for the need for the extreme reluctance with which the trial judge should even consider usurping the responsibility of the parties with respect to the calling of witnesses appear in the following passage from the judgment of Dawson J in *Whitehorn* …'"[9]

[15] Justice Henry in *R v Peros* then goes on to summarise a number of the factors relevant to these considerations including:[10]

(a) There is a risk that the judge will have to call a witness in the dark, not knowing what the witness is going to say and whether the witness can be relied upon.

(b) The fact that the witness is being called by the judge may give the evidence an undesirable aspect of objectivity.

(c) There may be no assurance the credit the witness will be properly tested by either side.

(d) The risk of calling the witness may necessitate the calling of further evidence.

[16] In the circumstances of the current case, Counsel for the accused submitted that these risks either did not rise or were minimal. Here, a statement had been taken from Ms McHarry by police and the parties and the Court had the benefit of

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8 (1984) 154 CLR 563 at 576.
9 [2018] 1 Qd R 1 at 4 to 5.
10 [2018] 1 Qd R 1 at 5.

knowing what evidence she would give if called as a witness. Further, as it is a judge alone trial, the risk in relation to giving the evidence an aspect of objectivity was not relevant as would be the case in a trial by jury. Further, if both parties had the opportunity to cross-examine then it was likely that there would be a proper test of the witness's credit through the proposed process. Finally, while it was considered that there was some risk that further evidence may need to be called, this was likely to be minimal.

[17] In respect of the issue as to what are the exceptional circumstances in the current case, Counsel for the accused submitted that ultimately it was whether the accused would have a fair trial. The accused was facing two very serious charges of trafficking in dangerous drugs, carrying a 25 year maximum penalty. In these circumstances, the accused would be required to consider calling Ms McHarry as a defence witness and thereby go into evidence. This would mean that the accused would lose the right of last address, the opportunity to cross-examine the witness and to rely on some aspects of the *Evidence Act* in relation to prior inconsistent statements.

[18] Counsel for the accused ultimately submitted:

(a) "A cloud would hang over the trial" if the accused had no choice but to call Ms McHarry to give evidence.

(b) This could be cured by the Court calling the witness and the proposed process would provide for fairness of the trial.

[19] The Prosecutor referred to the statement in the authorities that there should be the "extreme reluctance" of the trial judge to call a witness. Further, the Prosecutor submitted that the Court "should be troubled to call a witness who is prepared to incriminate herself in relation to a core issue in this trial, the trafficking, and in circumstances where the Crown is submitting that she is lying".[11]

[20] However, the Prosecutor went on to submit:

> "But I don't, in fact, resist my learned friend's application, given the ruling – given the finding or the ruling your Honour made when urging the Crown to call the witness, which included that it was the Court's determination that the absence of Ms McHarry raises a real risk that highly relevant evidence consistent with innocence won't be before the trier of fact, your Honour's ruling that her evidence is critical and your Honour's ruling that there are concerns that Mr Pyritz may not have a fair trial if her evidence isn't ventilated. In those circumstances, your Honour, discretion could be exercised and I don't resist my learned friend's application for your Honour to exercise that discretion".[12]

[21] The parties agreed that core issue at the trial was the identity of the person sending the messages on the Optus mobile telephone. The Prosecutor indicated in submissions that the Crown considered that there was evidence that supported the identity of the author of the messages being the accused. The Crown further

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11 T 4-13 L 21-24.

12 T 4-13 L 26-34.

submitted that it was then a matter of whether there was reasonable doubt, given there was evidence that someone had said that they, in fact, sent the trafficking messages: that is, Ms McHarry.

[22] This submission appears to be based on an assumption that it was not necessary to further explore the evidence of Ms McHarry as to whether she had in fact sent the trafficking messages.

[23] However, this needs to be considered in the wider context that all the evidence needs to be frankly and fairly put before the trier of fact consistent with the principle identified in *Nguyen*.

[24] Further, the Prosecutor not calling Ms McHarry as a witness, and the Court not exercising its discretion to call the witness, may then mean that the defence is put into a position that it is forced to call evidence to ensure that the evidence in relation to who sent the messages is fully before the Court. That is, evidence consistent with a hypothesis of innocence is fully explored.

[25] Ultimately, it is a question of what the interests of justice require for a fair trial. This would encompass the evidence that is relevant to these issues to be put before the trier of fact in a way that enables the accused to properly explore the hypothesis of innocence in a way that does not do injustice.

[26] In forming a view in relation to the application for me to call Ms McHarry as a witness, I have taken into account the following considerations:

(a) A judge calling a witness is a rare step. It is rare as the adversarial system of justice is premised on the rival parties bearing the responsibility of calling and examining witnesses, not the judge.

(b) The prosecution has the obligation to call all relevant witnesses, excluding the accused.

(c) The prosecution's duty to call a relevant witness is regardless of whether the witness may give evidence that contradicts or undermines the prosecution's case.

(d) The prosecution is to fairly lay all relevant evidence before the jury (or in this case the judge) and leave it to the jury (or in this case the judge) to decide what evidence is accepted or rejected.

(e) Having full regard to:

(i) The prosecution's traditional role;

(ii) The reality that there may be considerations the prosecution has had regard to that are not considerations the court has regard to; and

(iii) The court's traditional reluctance to usurp the role of the parties.

[27] I find there are exceptional circumstances for me to call Ms McHarry as a witness as follows:

(a) She is clearly a relevant witness in that it is anticipated she will give evidence that:

(i) She was the person who sent the relevant messages on the Optus mobile telephone, which belonged to the accused.

(ii) While the accused knew that she used his mobile telephone, she did not tell him that she was supplying drugs, nor did he know that she was using his mobile telephone for sending text messages and Facebook messages to "do the deals", selling drugs.

(b) There are procedural disadvantages for the accused should he be forced into the position where it is necessary for the defence to call Ms McHarry as a witness.

(c) This is particularly so where admissions have been made in the roadside recording, the police interview on 31 March 2019 and further in the statement provided during the trial. If the defence was not able to cross-examine Ms McHarry, it may not be able to fully explore the hypothesis of innocence and further, would not have the procedural benefits of ss 18, 19 and 101 of the *Evidence Act* in relation to prior inconsistent statements, if that became necessary.

(d) Consistent with the comments of Justice Henry in *R v Peros*, the fact that a witness is in some respects unreliable is not of itself a basis for not calling the witness.

(e) In the particular circumstances in this case, and in particular, in the way that the Crown has run the case, the overriding interests of justice require the trier of fact to know the evidence in relation to who sent the relevant text messages and Facebook messages. This means that the overriding interests of justice require that the Court in this case hear from Ms McHarry her evidence in relation to sending the relevant messages.

[28] This is a matter where the Crown should have called Ms McHarry as she is clearly a relevant witness and her evidence is important to ensure that the Crown's case is fully and fairly put before the trier of fact. The unfairness of the accused's disadvantage in conducting his case should he have to call Ms McHarry as a witness is such that exceptional circumstances have been made out and I ought to call Ms McHarry and hear her testimony.

[29] The overall interests of a fair trial in the circumstances of this case outweigh the need for extreme reluctance for a trial judge to consider calling a witness.

[30] This conclusion says nothing about what view I may take of Ms McHarry's reliability.

[31] My action in calling Ms McHarry is solely concerned with the view I have reached that the interests of justice require her evidence to be known to me so that I may give such weight to her evidence as I see fit.

[32] The parties are at liberty to question the witness. Each party can ask questions that are leading or non-leading. This process is anticipated to inform me of the pros and cons of Ms McHarry's evidence so that I may evaluate it together with the other evidence at the trial and give it as much weight as I think fit.

[33] **Ruling**

I call Ms McHarry to give evidence at the trial.