SUPREME COURT OF QUEENSLAND

CITATION:	*R v Carlin* [2018] QCA 118
PARTIES:	**R** **v** **CARLIN, Thomas James** (appellant)
FILE NO/S:	CA No 134 of 2017 SC No 851 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Toowoomba – Date of Conviction: 15 June 2017 (Applegarth J)
DELIVERED ON:	12 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2018
JUDGES:	Sofronoff P and Fraser and Gotterson JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted of three counts of possession of a dangerous drug and one count of receiving a stolen firearm with reason to believe the firearm had been stolen – where the drugs and gun the subject of the four counts were found together in a black duffle bag at a motel at which the appellant was residing, albeit in a room not occupied by the appellant – where a number of items were found in the black duffle bag that inculpated the appellant – where the Crown case against the appellant was wholly circumstantial – where the appellant told a number of lies to police during the course of an emergent search and an interview – where the appellant did not give evidence at trial – where the appellant submits that where the prosecution relies on a defendant's interview containing exculpatory statements there is no difference between those statements and those made by a defendant giving evidence at trial – where the appellant submits that a direction of the kind described in *R v McBride* [2008] QCA 412 should have been given to the jury – where the present case was not one of 'word against word' – whether the jury could have fallen into the error of supposing that theirs was a binary choice of total acceptance

of the appellant's unsworn denials or total acceptance of the Crown case, such that a failure to give a *McBride* direction resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant told a number of lies in the course of an emergent search and police interview – where the appellant lied about the length of his stay at the motel and falsely denied that he had any large sums of cash in his room – where the prosecution did not seek to make use of these lies at trial as indicating a consciousness of guilt – where the issue in this case was whether the appellant owned the drugs and gun found in the black duffle bag – where proof of possession did not depend upon his lies – where the appellant submits that a direction of the kind described in *Zoneff v The Queen* (2000) 200 CLR 234 ought to have been given – where drawing attention to the issue of the appellant's lies would not have been to the appellant's advantage – whether a failure to direct the jury as to the use that they could make of the appellant's lies resulted in a miscarriage of justice

R v McBride [2008] QCA 412, distinguished
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL: B J Power for the appellant
D L Meredith for the respondent

SOLICITORS: Anderson Fredericks Turner for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant was convicted of one count of possession of 3, 4-methylenedioxymethamphetamine in a quantity exceeding 2 grams, one count of possession of testosterone and nandrolone in a quantity exceeding 50 grams, one count of possession of cannabis in a quantity exceeding 500 grams and one count of receiving a stolen firearm with reason to believe that it had been stolen. A jury convicted him on all four counts. The appellant now appeals upon two grounds concerning what is said to have been the learned trial judge's failure to give certain directions.

[2] The case on possession and receiving was a wholly circumstantial one. The facts proved by the evidence led by the Crown at the trial were not disputed by the defence but the inferences which the Crown invited the jury to draw from those facts were contentious.

[3] Early in September 2016 one Kahael Daryl McAvan-Cook was employed as a duty manager at a hotel in Toowoomba. He booked four rooms at the hotel under the name "Monique Ash". The daily rate for the rooms was not only discounted but was discounted beyond the scope of McAvan-Cook's authority. The rent was paid in cash. One of the rooms, Room 31, was occupied by the appellant. McAvan-

Cook told the owner of the hotel, Ms Lee, that the appellant was a friend of his who needed somewhere to stay.

[4] A witness, Ms Kramer, was employed at the hotel as a housekeeper. During the course of her duties on the morning of 16 September 2016, Ms Kramer entered one of the rented rooms, number 23, using a master key. The room was unoccupied. She had been instructed by Ms Lee to ensure that every room in the hotel, whether occupied or unoccupied, was opened and inspected every day. Her inspection of Room 23 revealed that there was a large black overnight bag in the closet. Ms Kramer found no identification on the outside of the bag. She opened it, saw some syringes inside and immediately closed it again. She continued her cleaning rounds and then delivered the bag to Ms Lee.

[5] Ms Lee inspected the contents of the bag and found a bag of marijuana inside. There were also a gun, some cash, syringes and bags of pills. She immediately called the police.

[6] While waiting for police to attend, Ms Lee checked video recordings made by security cameras. She saw a recording of McAvan-Cook and another person, who had occupied Room 4, another of the "Monique Ash" rooms, entering Room 23 just after 5 am on 16 September 2016. The occupant of Room 4 was carrying a bag which appeared to be identical to the one that Ms Kramer had found.

[7] The video recording showed that at a later time on the same day, McAvan-Cook entered the room again. He remained inside for some time. The recording showed that the next person to enter the room was Ms Kramer.

[8] Senior Constable Goodwin was one of the police officers who attended at the hotel in response to Ms Lee's call. Ms Lee and her husband showed Senior Constable Goodwin the bag. When the bag was opened Senior Constable Goodwin detected a strong smell of cannabis. There were bags of cannabis at the top of the bag. Three transparent clip seal bags with rubber bands around them contained pink pills. A smaller brown case within the bag contained vials. These were later found to contain the steroids which were the testosterone and nandrolone that were the subject of count 2. The bag contained a hand gun and ammunition. Investigations later showed that this firearm had been stolen in December 2015.

[9] One of the clip seal bags held 90 tablets which were discovered upon analysis to be 3, 4-methylenedioxymethamphetamine. Senior Constable Goodwin also found bundles of cash in the bag. At the bottom of the bag, he found a jacket and a pair of pants. The bag also contained a Samsung computer tablet. Upon examination it was found to contain photographs of the appellant's daughter and a video of her. The bag contained registration papers for a vehicle registered in the name of the appellant's partner. That car was observed to be at the appellant's house a week later.

[10] Police went to the appellant's room at the hotel and searched it in his presence. The conversation between police and the appellant during that search was recorded and tendered at the trial.

[11] The appellant falsely told Senior Constable Goodwin that he had only occupied the room since the night before. His wallet contained $825 in cash which the appellant said were earnings from his work as a tattooist. A small bag in his room contained a substance which the appellant refused to identify. Upon analysis it was found to

be methylamphetamine. Two mobile phones were found in the room, one of which contained images of cash bundled in a similar way to the cash contained in the black overnight bag found in Room 23, as well as a text message from the appellant's partner inquiring about payment of her car registration. An empty vial, of the same brand and colouring as the vials of steroids found in the black overnight bag, was also found in the appellant's room. The appellant falsely said that he had come to the hotel for a night away from his "missus". The appellant then declined to answer any further questions and was arrested. He was taken to the Toowoomba watch house where he was interviewed.

[12] During the course of the interview the appellant repeated that the $825 in cash found in his wallet were from his earnings as a tattooist. He repeated that he had only been in the room from the previous night. He denied that he had booked the room and said that he did not know who had. He was asked whether he ever visited Room 23 and answered, "Not that I'm aware of". He was asked whether he knew anything about the bag found in Room 23 which contained drugs and weapons. He denied any knowledge. He said he was unable to explain how the registration papers for the vehicle registered to his partner came to be in the bag. He denied knowledge of the money, drugs, the steroids and the pistol found in the bag.

[13] At the trial the Crown made nothing of the appellant's lies about the length of his stay at the hotel, his denial that there was any cash in his room and his claimed ignorance of the empty steroid vial found in his room. This is understandable because those lies are as referable to his own possible guilt as they are to a desire to distance himself from his associates at the hotel, who might be the guilty ones of the offences with which the appellant was later charged.

[14] This was not a case of "word against word". Consequently, there was no risk that the jury might reject the appellant's denial to police of any knowledge of the drugs, money and pistol and slip fallaciously into a conclusion that, as a result of that rejection, the Crown evidence must be "true". The rejection of his denials would still have required the jury, as a matter of reasonable logic, to consider whether it was satisfied that the case had been made out against him.

[15] Accordingly, Applegarth J directed the jury as follows:

> "Well, as I say, if you are satisfied certain things were said, you have to consider whether those parts that the prosecution relies upon as indicating guilt are true and accurate. It is for you to decide whether you are satisfied that those things said by the defendant, which would tend to indicate his guilt of the offence, were true because if they were not true, you just cannot rely on them.
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> Again, police asked the defendant a number of questions. The same principle, the same rule, the same reasoning applies here as I told you about in relation to the lawyer's questions of witnesses here in court. If the policeman says something, puts a proposition, makes an assertion of fact and asks a question, and if the defendant does not agree with it, well, the policeman's question is not evidence and cannot be evidence against him. The question only becomes evidence if it is accepted or adopted in some way. The prosecution relies on certain statements made to police as pointing to guilt. There is no suggestion there is any kind of confession, but certain

> things are said there which are relied upon as, effectively, admissions against interest. If you accept that they were made and you accept they are true, you decide what weight you give them, and you consider what you think they prove.
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> He also gave evidence which you might view as indicating his innocence. You are entitled to have regard to those answers if you accept them, and to give them whatever weight you think appropriate, bearing in mind that they have not been tested in cross-examination. By that, I mean under the rules that govern police questioning, police cannot conduct certain forms of cross-examination. They can ask questions and probing questions, but they cannot engage in the type of cross-examination that you see in court. So those answers were not given on oath and they were not tested by cross-examination. But you consider them. And in relation to both the answers which the prosecution relies upon as indicating guilt, and those which point to innocence, it is entirely up to you what use you make of them and what weight you give to them."

[16] The appellant does not complain about any of the evidence that was led, any of the directions that were made, nor that the circumstantial evidence led by the prosecution was insufficient to sustain the verdict. Instead the appellant submits, in ground 1, that a miscarriage of justice was occasioned because the learned trial judge did not give a direction of a kind referred to in *R v McBride*.[1] By ground 2 he contends that a direction of the kind referred to in *Zoneff v The Queen*[2] should have been given.

[17] It is convenient to deal with ground 2 first.

[18] The direction proposed in *Zoneff* was as follows:

> "You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told lies about something, that is evidence of guilt."

[19] *Zoneff* is directly on point but it is against the appellant. *Zoneff* was a case like this one in which, although the Crown argued that the appellant had told lies, no suggestion was made during cross-examination of the appellant that he had told those lies out of a consciousness of guilt. Nor did the prosecutor address the jury to that effect. In the High Court the respondent prosecutor repeated that no reliance had been made at trial or in the Court of Appeal and no reliance was being placed in the High Court upon any contention that the appellant had lied out of a consciousness of guilt. In those circumstances Gleeson CJ, Gaudron, Gummow and Callinan JJ said:

> "It follows in our opinion that it was unnecessary, indeed undesirable, that a direction of the kind with which *Edwards*[3] was concerned be given in the circumstances of this case. In order to

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1 [2008] QCA 412.
2 (2000) 200 CLR 234.
3 *Edwards v The Queen* (1993) 178 CLR 193.

> give it in this case the trial judge would have had to decide which of the appellant's answers were or were not capable of being regarded as lies indicative of a consciousness of guilt. Such a direction here could have had the effect of raising an issue or issues upon which the parties were not joined, and of highlighting issues of credibility so as to give them an undeserved prominence in the jury's mind to the prejudice of the appellant."[4]

[20] Their Honours proposed the form of direction that I have quoted and said that a direction in those terms might be appropriate where "there is a risk of a misunderstanding about the significance of possible lies even though the prosecution has not suggested that the accused told certain lies".[5]

[21] In this case there was no appreciable risk of that kind. That was because the issue in the case was whether, along with all the other things in the bag, which the appellant admittedly owned and possessed, he also possessed the gun and drugs. Proof of possession did not depend upon his lies. To have raised the issue of lies might well have prejudiced him. The *Zoneff* direction alone would have been insufficient. The judge would have been obliged to explain the potential relationship of each lie to the appellant's possible guilt in order to give useful guidance. This would not have been to the appellant's advantage.

[22] Accordingly, I would reject this ground of appeal.

[23] As to the second ground, it is necessary to recall that *McBride* was a case in which a complainant in a sexual offence case had given evidence alleging that the appellant had indecently assaulted her and raped her. The appellant gave evidence that the complainant had attacked him and that, afterwards, they had consensual sex. Medical evidence was consistent with both consensual and non-consensual intercourse having taken place.

[24] The trial judge had reminded the jury that the fact that the appellant had given evidence did not result in any shift in the onus of proof but went on to direct that the appellant's evidence "may convince you that he is not guilty" or "on the other hand his evidence may strengthen the case for the prosecution". The judge went on to say that "the trial comes down to word v. word, as the Crown says".

[25] On appeal, the appellant in that case contended successfully that there was a third alternative, namely that the jury was unable to decide who was telling the truth; in those circumstances they should acquit.

[26] Holmes JA (as her Honour then was), with whom the Chief Justice and White AJA agreed, said that such a direction might not be essential in every case where a defendant gives evidence.[6] It was necessary in *McBride* because the complainant's evidence and the appellant's evidence of the crucial events "were starkly opposed". It was not a circumstantial case like this one and therefore it was:

> "… important that the jury understood that their decision to convict or acquit was not a simple question of deciding which of the conflicting accounts of [the complainant] and the appellant they

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4 *Supra*, at [20].
5 *Supra* at [24].
6 *Supra* at [30].

> found more credible. The direction given failed to explain to the jury that it was possible for them to find the defence evidence unconvincing or, indeed, to reject it, but nevertheless, to acquit if they were not satisfied that the Crown had made out its case beyond reasonable doubt."[7]

[27] *McBride* is concerned with the danger that, in a word against word case, a jury might make the error of thinking that a rejection of an accused's evidence means that the prosecution evidence must be true. That is not this case. A rejection of the appellant's unsworn denials in this case would still leave the jury, and manifestly so, having to consider whether they were prepared to draw the inferences sought by the Crown from the proven facts. In a case in which the jury could not fall into the error of supposing that their choice was limited to accepting the appellant's evidence or the evidence of the Crown witnesses, there could be no occasion to give a *McBride* direction.

[28] I would reject this ground of appeal and, therefore, dismiss the appeal.

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

[30] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.

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[7] *Supra* at [30].