

SUPREME COURT OF QUEENSLAND

CITATION: *R v Pearl* [2005] QCA 237

PARTIES: **R**
v
PEARL, Antony Mark
(appellant)

FILE NO/S: CA No 67 of 2005
SC No 561 of 2004

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 June 2005

DELIVERED AT: Brisbane

HEARING DATE: 16 June 2005

JUDGES: de Jersey CJ, White and McMurdo JJ
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 – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – CORROBORATION – WARNING REQUIRED OR ADVISABLE – ACCOMPLICES – FUNCTIONS OF JUDGE AND JURY – where appellant convicted of importing commercial quantity of dangerous drug – where appellant and co-accused gave evidence implicating the other – where trial Judge gave orthodox directions as to evidence and need to separate consideration of respective cases against accused – where no complaint was made about these directions at trial – where appellant’s counsel did not seek redirection – whether trial Judge erred in failing to properly direct the jury as to how to assess the co-accused’s evidence in determining case against appellant – whether trial Judge should have directed the jury to approach co-accused’s evidence with caution, conscious that self-interest may have caused him to lie

Criminal Code 1899 (Qld), s 632

Bromley v R (1986) 161 CLR 315, cited
Henning v R, unreported, NSWCCA, No 406 of 1988, No 426 of 1988, No 436 of 1988, No 425 of 1988, No 437 of

1988, 11 May 1990
R v Johnston [2004] NSWCCA 58; CA No 60250 of 2002, 18
 March 2004, cited
R v Lowe [2004] QCA 398; CA No 389 of 2003, 29 October
 2004, cited
Robinson v R (No 2) (1991) 180 CLR 531, cited
Webb & Hay v R (1994) 181 CLR 41, cited

COUNSEL: P R Boulton SC for the appellant
 M C Chowdhury for the respondent

SOLICITORS: Boe Lawyers for the appellant
 Commonwealth Director of Public Prosecutions for the
 respondent

- [1] **de JERSEY CJ:** At the trial, each accused gave evidence implicating the other. The jury's conviction of both presupposed a view they were accomplices, and that was the Crown case. The issue on appeal is whether, in respect of the evidence of the prisoner who has not appealed, the trial Judge should have directed the jury in the manner discussed in *Webb & Hay v R* (1994) 181 CLR 41. Counsel for the appellant submitted that it was the "damning" impact of the other prisoner's evidence, upon the case against the appellant, which necessitated such a direction.
- [2] After a four day joint trial, the appellant was convicted of importing a commercial quantity of the dangerous drug "MDMA", commonly known as ecstasy; and his co-accused D J Vermillion was convicted of the attempted possession, without reasonable excuse, of that quantity of the drug.
- [3] On 17 December 2002, customs officers intercepted and examined a cardboard carton apparently sent by "J Sweeney" of Middlesex, United Kingdom to "David Baker" of 10 Jib Court, Mermaid Waters on the Gold Coast. It contained carry bags and a false bottom which concealed the drugs the subject of the charges. The prisoner Vermillion lived at 10 Jib Court. A federal police officer, posing as a courier, delivered the parcel on 3 January 2003. The officer told Vermillion he was after David Baker, to which Vermillion replied: "That's the bloke, yeah." Referring to the carton, the agent then asked: "That's for you is it?", and Vermillion replied "yes".
- [4] Over the preceding 10 days, five telephone calls between the appellant and Vermillion, incriminating both of them, were intercepted by the police. The content of those calls demonstrated both parties were awaiting the arrival of a parcel by means of post at Vermillion's house. On 23 December, Vermillion called the appellant and said: "Nothing in the mail." In a call 40 minutes later, the appellant advised Vermillion that it would not be a postman delivering, but a courier. During a call the following day, the appellant asked Vermillion: "No action mate? Nothing happening?", to which Vermillion replied: "No, the mail's been this morning."
- [5] Similarly incriminating telephone conversations occurred after the delivery on 3 January. There were three during the ensuing 40 minutes. About 15 minutes after the delivery, Vermillion telephoned the appellant and said: "We're in", to which the appellant responded: "Alright. I'll ring you back mate two secs." The appellant telephoned Vermillion two minutes later, and said, in relation to the carton: "Just

put that where we said right, don't touch, just leave it there till Monday." Vermillion replied: "I've done it, I've done all that." The appellant then said: "Good as gold mate. I'll speak to you later on. I owe you dinner." About 18 minutes later the appellant again called Vermillion. The appellant commenced by saying: "I'm at a public phone so we're alright." The appellant then explained that he had just finished contacting a person who with others were "on the way". The appellant said: "We'll work them first." Both parties arranged to meet later that day, but that meeting was frustrated by the earlier execution of a search warrant at Vermillion's address.

- [6] Federal police officers located the parcel unopened in the garage. When interviewed at the house, Vermillion claimed he had taken delivery of the parcel for a neighbour across the road called "Fowler". He said he had attempted to telephone that person on a number he had been given, unsuccessfully. There were not enough digits in the number for it to be a workable telephone number. In fact, the Telstra evidence at the trial was that no outgoing call from Vermillion's premises was attempted in the relevant period.
- [7] At the time the parcel was sent from the United Kingdom (6 December 2002), the appellant was in London. He had left Australia on 1 December 2002, to return leaving London on 9 December. The appellant gave evidence at the trial, and called a witness P Osmond. The appellant denied any involvement in the importation of the carton – which obviously did not sit comfortably with the content of the telephone conversations, and his instructions to Vermillion as to the disposition of the carton after its arrival.
- [8] The essence of the appellant's position was that Vermillion had mentioned obtaining some cheap bags from a friend in Bali. At that time the appellant was selling fake "Louis Vuitton" bags. The appellant said that he believed the carton which was delivered contained fake Louis Vuitton bags and purses. Under cross-examination, the appellant said he did not trust Vermillion, and was emphatic that it was Vermillion's carton, that he (the appellant) and Osmond had no property in it: "It was his box...it's his box, not ours", which again sits discordantly with the appellant's giving directions to Vermillion as to how it should be dealt with. The appellant said that he had travelled to London in order to secure a device to be used to place false prints on sunglasses to be sold in England, although in cross-examination he referred also to a purpose of enquiring about the sale of World Cup tickets in South Africa the following January.
- [9] Vermillion gave evidence that the appellant told him he was travelling to London, and might send a parcel over. He asked whether, as he (the appellant) would not be at home, he could send the parcel to Vermillion. The appellant said he did not want his wife "to handle anything". There was discussion about the addressee, with agreement that it be sent to a "David Fowler". Vermillion said the appellant did not say anything as to the contents of the parcel, and Vermillion's assumption was that it would contain fake goods of some kind. He regarded the parcel as solely the appellant's matter in which he had no interest, and from which he would derive no profit. When the appellant returned from overseas, he mentioned the name of the addressee had been changed from Fowler to "Baker". Vermillion's position was that he accepted a parcel on behalf of the appellant as a favour, aware that it may be

coming from the United Kingdom: he had no knowledge the parcel contained dangerous drugs.

- [10] The ground of appeal which is pursued is that “the learned trial Judge erred in failing to properly direct the jury as to how to assess the evidence of the witness Vermillion in determining the case against the appellant”.
- [11] Section 632 of the *Criminal Code* provides:
 “(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
 (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
 (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses.”
- [12] Counsel for the appellant submitted that the trial Judge should, “in the interests of justice” in this particular case, have directed the jury to scrutinize the evidence of Vermillion, and to approach it with caution, conscious that Vermillion’s self-interest may have caused him to lie; that Vermillion’s evidence was “potentially unreliable, and may have been untrustworthy”; that he “may have sought to justify his conduct, or at least to minimize his involvement, by shifting the blame, wholly or partly, to Mr Pearl”; that Vermillion may have “sought to implicate Mr Pearl and to give untruthful evidence because he apprehends that he has something to gain by doing so”; and that the jury should not be distracted by the “seeming plausibility” of Vermillion’s evidence. The proposed direction would conclude with the warning that it was “restricted to those parts of the evidence of Mr Vermillion which inculpate Mr Pearl in the offence: it does not apply to the evidence as it relates to Mr Vermillion’s own case.”
- [13] The learned Judge gave orthodox directions as to the role of the evidence given by the accused persons and Osmond, and as to the need for separate consideration of the respective cases against the accused. In summarizing the respective positions of the accused, His Honour said this:
 “[E]ach accused’s case is that he believed that the package contained fake designer goods which the other accused had organised to be sent to Mr Vermillion’s address. In the case of Mr Vermillion (sic) it was Mr Pearl’s belief that Vermillion had arranged to send it to Mr Vermillion’s address. According to Mr Pearl he believed the contents of the package were the samples from Bali that we have heard about. Mr Vermillion believed that the contents were fake items sent by Mr Pearl from overseas to his address in accordance with their arrangement that Mr Pearl would or may do so when he was overseas.”

In the course of reminding the jury of the contentions of Counsel in their addresses, His Honour mentioned the prosecutor’s contention “that Mr Vermillion’s evidence that Mr Pearl arranged the sending of a box at least was consistent with the Crown

case”, and “that the evidence of Mr Vermillion was supported by the phone conversations”.

- [14] No complaint was made at the trial, or could now reasonably be made, about any of those directions. Further, at the trial, Counsel for the appellant did not seek any redirection along the lines now advanced. That is a relevant, though not determinate, consideration. (The solicitor who appeared at the trial for the appellant has sworn it was through oversight he did not, at the trial, consider whether such a direction should be sought.)
- [15] Whether a direction of the character now advanced should be given falls quintessentially within the discretion of the trial Judge (*R v Lowe* [2004] QCA 398, para 14), and a judge must be allowed “considerable latitude” in his or her approach to that issue (*Webb & Hay v R*, p 81). While the question was not expressly addressed at the trial, it must be taken that this Judge, extensively experienced in the criminal jurisdiction, considered he should go no further in his direction to the jury on the issue of the assessment of the witnesses’ credibility.
- [16] A particular difficulty where the alleged accomplices are both on trial, is to avoid unfairly prejudicing the jury’s assessment of the case against the accomplice whose evidence the jury is invited to scrutinize so far as it bears on the case against the co-accused (*Webb & Hay*, p 81). Further, where co-accused give evidence blaming one another, the potential operation of self-interest will often be so “blindingly obvious to the jury” (*R v Johnston* [2004] NSWCCA 58, referred to in *Lowe*, para 19), that a specific direction is otiose – and especially undesirable given its potential to prejudice the jury’s assessment of the case against the accused the subject of the specific direction.
- [17] Counsel for the appellant submitted that the direction should have been given because of the cumulative effect of the following considerations: Vermillion’s evidence about the appellant’s possibly sending a parcel was “damning” so far as the appellant was concerned; it lent the Crown’s otherwise circumstantial case “a false sense of consistency”; and the appellant in his own evidence “did not seek to implicate Mr Vermillion at all”.
- [18] The last contention plainly cannot stand. The appellant’s evidence was emphatic that it was Vermillion’s carton: neither the appellant nor Osmond had any property in it. Each accused effectively blamed the other, and notwithstanding Vermillion’s implicating of the appellant may have been stronger than the appellant’s of Vermillion, it is difficult to see why such a direction could have been justified in relation to one accused but not the other.
- [19] Giving the direction, whether in relation to one or both, would likely have simply led to confusion (*Webb & Hay*, p 65). The jury would have been left bemused as to why they were being told something so obvious, and as to how to apply the caution in relation to some evidence only. In relation to the disparate application of the caution (see the last sentence in para [12] above), it is very difficult in this case to say that critically important evidence from Vermillion inculcating the appellant, was not simultaneously exculpatory of himself (cf. *Webb & Hay*, pp 81, 65). Had the direction been given, the prospect of what Brennan J called confusion and

bewilderment would have been great, ample to warrant avoiding a direction as to what would be considered obvious anyway.

- [20] As observed in the Supreme and District Courts Benchbook,
 “there are difficulties in formulating a direction where an accomplice testifies in the defence case. It is contrary to *Robinson v R (No 2)* (1991) 180 CLR 531 to direct that a defendant’s evidence may be subjected to particular scrutiny because of his interest in the outcome. To do so is to undermine the presumption of innocence. Accordingly, when a defendant who gives evidence implicates a co-defendant, the nature and extent of an accomplice warning, *if any*, cannot be answered without reference to the circumstances of the particular case...”

Here, they militated against the giving of any such direction.

- [21] It has not been demonstrated that the learned Judge should have given such a direction, in “the unique circumstances of the case” (*Webb & Hay*, p 65), and it is to my mind unsurprising that the experienced Counsel who appeared at the trial for the appellant apparently did not then advert to the need for such a direction.
- [22] I would order that the appeal be dismissed.
- [23] **WHITE J:** I have read the reasons for judgment of the Chief Justice and agree with his Honour that the appeal must be dismissed.
- [24] **McMURDO J:** I agree that the appeal should be dismissed for the reasons given by the Chief Justice.
- [25] For the appellant, it was submitted that his evidence did not inculcate his co-accused, so that a warning could and should have been given about the co-accused’s evidence without a corresponding warning about the appellant’s evidence, and the failure by the appellant’s trial representative to seek a warning was not objectively explicable as a forensic choice to avoid the prejudice of a warning about his client’s evidence.
- [26] The appellant’s version did tend to inculcate his co-accused. If the appellant had not caused the parcel to be sent to Mr Vermillion’s residence, the possibilities were that Mr Vermillion had done so, or that someone else had done so in an enterprise with which neither accused was associated or familiar. That last possibility was unrealistic in the light of the other evidence, and particularly the telephone conversations between the accused. Had the jury excluded that possibility and accepted the appellant’s version, they were likely to have concluded that Mr Vermillion was involved in the parcel being sent to his residence, and that he knew what was in it. Had a direction been sought and given about Mr Vermillion’s evidence, it is likely that a similar direction would have been given in relation to the appellant’s evidence. Objectively viewed, there is then a good explanation for why the appellant’s representative did not seek this direction.
- [27] Further, assuming that the appellant’s evidence could not have inculpated Mr Vermillion, it was both unnecessary and undesirable that the jury be warned about

Mr Vermillion's evidence. It was unnecessary because the risk that Mr Vermillion was lying about the appellant to save himself was obvious to the jury. It was not a risk for which the jury needed the benefit of the experience of the courts.¹ It was undesirable to give the warning because it was likely to confuse the jury and to unfairly prejudice Mr Vermillion's defence. As the appellant's submissions accepted, any warning had to adequately explain the difference between the use of any part of Mr Vermillion's evidence against the appellant and the use of any part of it in the case against Mr Vermillion. In *Henning v R* (Unreported, NSWCCA, 11 May 1990) Gleeson CJ, Campbell and Mathews JJ said:

“It is essential in the interest of the accused who gives the evidence that the warning should be restricted in terms to those parts of the evidence which inculpate any co-accused. It must be made clear to the jury that the warning is to be applied only when they are considering the case against the co-accused. It must not be left open to them to believe that the warning might attach to the accused's evidence in his own case.”

The difficulty in this case was that the evidence which inculpated the appellant was evidence which exculpated Mr Vermillion. As the trial judge told the jury when summing up the case against Mr Vermillion:

“What this case is about is whether Mr Vermillion was a man who was, in effect, duped by Mr Pearl to take delivery of a package that he thought contained fake merchandise sent from overseas or whether he is a person who received the package sent from London knowing that it contained the drugs.”

Faced with that difficulty the appellant's counsel submitted that the jury could and should have been told that, in effect, they were to assess Mr Vermillion's evidence twice – once with particularly close scrutiny (as against the appellant) and once without it. In *Webb & Hay v R* (1994) 181 CLR 41, Brennan J described a direction to that effect as making confusion “especially likely”.²

[28] There was no miscarriage of justice and the appeal should be dismissed.

¹ *Bromley v R* (1986) 161 CLR 315, 324.

² At 65.