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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 223 of 2018

BETWEEN:

JASON TROY McKELL
Appellant

and

10 **THE QUEEN**
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I – INTERNET PUBLICATION

1. The Respondent certifies that the submission in this form is suitable for publication on the internet.

Part II – OUTLINE OF PROPOSITIONS

20 2. The relevant principles to be applied in deciding this ground are well established: RS [34]-[40]. The question was whether, in light of the accepted principles, the summing up as a whole gave rise to a miscarriage of justice. The conclusion of the majority was open and in accordance with the application of those established principles. The majority was correct to conclude that no miscarriage of justice occurred. No error has been established.

3. The jury was not deprived of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence. It is not suggested that the Appellant's case was not put to the jury and no further directions were sought: RS [73]. There is no proper basis to conclude the jury might have been
30 overawed by the judge's comments to the extent that they must necessarily have disregarded their duty to independently consider the evidence and decide the facts: CAB [100]; *B v The Queen* at 605.

4. The judge repeatedly instructed the jury (at the beginning, after the complaint and before retiring) in clear, appropriate and plain terms that they were solely responsible for determining the facts and were to disregard any opinions that he may have expressed: RS [42]. The directions were in accordance with accepted authority. It is

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to be assumed that juries follow the directions which they are given and there is no basis to suggest otherwise here.

5. The capacity of a jury to retain its independence and not simply defer to comments or expressions of opinion by a judge should not be underestimated.

6. This Court has identified the limits of expression by a judge of his or her opinion about factual matters. Whether those limits have been exceeded involves an evaluation of the exercise of the trial judge's broad discretion in the context of the trial issues and the summing up as a whole.

7. A summing up is not unbalanced or unfair simply because it reflects the relative strengths and weakness of the respective cases: RS [39]; the structure adopted was such that aspects of the Crown argument/evidence are referred to juxtaposed with the defence case: RS [36]; a judge has made observations favourable to one party, or observations as to the strength or weakness of certain evidence: RS [39]; the observations revealed that there was a strong case for one party and an implausible case for the other: RS [39]; or because a judge has expressed a personal opinion about the evidence or an aspect thereof favourable to one party: RS [39].

8. Posing rhetorical questions is not an inappropriate method to test submissions made by defence counsel: RS [46]; *R v Bachra* at [63]. The use of the phrase "*you might think*" was a permissible way to draw pertinent issues to the jury's attention, whilst making plain that the questions of fact were for the jury: CAB 194 [93].

9. A consideration of this summing up is in the context of the structure adopted by the judge, which was open to him. The jury were aware of that structure. The impugned comments (and how they might be understood) and the impression gained from the summing up must be considered in that light: RS [43]-[45].

10. The majority had regard to the individual matters of specific complaint but also the overall cumulative effect of the directions given, comments made and language and style used by the trial judge: CAB [33], [74], [100]-[101].

11. First consignment: The impugned remarks were the judge summarising the Crown's case. That was made plain at the start, during and at the end of the summary: RS [56]. The jury could not reasonably have understood otherwise. The comments as to the first consignment and the "*sophisticated organisation*" were consistent with the pre-trial ruling and the way the Crown case was presented throughout: RS [52], [58].

The judge corrected his remarks in relation to the first consignment and there was an emphatic withdrawal of any inappropriate implication: RS [53]-[54], [57].

12. Tape trial text: The judge did not refer to any of the Crown's arguments concerning the text messages in summarising the Crown case: RS [62]. The text was an important piece of evidence which the judge was entitled to refer to. In so doing the judge reminded the jury of the Appellant's evidence, other relevant evidence and matters put by the Prosecutor in cross-examination: RS [63]. That the text was "*revealing*" conveyed no more than it was an important piece of evidence that the jury should consider in context. It was "*obvious*" that the message was not about horses or racing (given the timing and content of text). It was permissible to prompt the jury to consider what the message might refer to. That the Appellant did not have an explanation does not make it inappropriate to refer to the text, nor does it make the comments unfair or inappropriate: RS [63]-[65].

13. Gambling: His Honour corrected an inaccuracy in the defence closing address. The comment was necessary to correct an erroneous and potentially misleading argument. The direction accurately described the evidence. Although it would have been preferable if the judge had not engaged in the rhetorical flourish used, their Honours correctly concluded that the remarks did not give rise to a miscarriage of justice.

14. The majority did not err in concluding that there was a very strong Crown case. This explained the context and nature of the comments and why a balanced summing up nevertheless revealed a very strong case for the Crown and a weak and implausible case for the Appellant: RS [31].

15. If the summing up was adverse to the Appellant, it is a reflection of the relative strengths of the cases. That does not render the summing up unbalanced or unfair.

Reconsideration of the law

16. The practices and procedures in other jurisdictions, including the UK and NZ are not inconsistent with the approach in Australia, and do not support a conclusion that the principles recently endorsed in *Castle*, should be discarded. There is no reason to modify or depart from established principle to prevent a trial judge from commenting on disputed facts.

Wendy Abraham QC

Lincoln Crowley QC