



HIGH COURT OF AUSTRALIA

13 February 2019

McKELL v THE QUEEN
[2019] HCA 5

Today the High Court unanimously allowed an appeal from a decision of the Court of Criminal Appeal of the Supreme Court of New South Wales, quashed the appellant's conviction and ordered a new trial.

The appellant was tried with a co-accused before a judge and jury in the District Court of New South Wales on an indictment charging him with drug-related offences. The appellant was the movements manager of a company that transported freight under bond from cargo terminal operators at the airport to freight-forwarding agencies. The charges related to, amongst other things, three consignments of freight and \$400,150 in cash which was located in a tin box in the appellant's bedroom. The appellant gave evidence that the cash was the product of his success as a gambler. The appellant also held a number of online betting accounts, through which the appellant had made net losses, which the appellant's counsel erroneously relied upon as evidence of the appellant's success as a gambler.

During the trial judge's summing-up to the jury, he suggested that the first consignment may well have contained drugs, the importation of which was the responsibility of the appellant as part of "an organisation of great sophistication". No such suggestion had been made by the prosecution at trial. The trial judge also suggested that a text message sent by the appellant to his co-accused showed that the appellant was knowingly involved in the importation of drugs. The trial judge also commented on the evidence of the appellant's online betting accounts. In doing so, the trial judge went beyond correcting the erroneous reliance by the appellant's counsel on the accounts as proof of the appellant's success as a gambler, and belittled the appellant's counsel.

The appellant was convicted and subsequently sentenced to imprisonment for 18 years and nine months, with a non-parole period of 11 years and nine months. He appealed against his conviction to the Court of Criminal Appeal, alleging that the trial judge's summing-up to the jury occasioned a miscarriage of justice. A majority of the Court of Criminal Appeal held that the trial judge's comments did not occasion a miscarriage of justice.

By grant of special leave, the appellant appealed to the High Court. The Court unanimously held that the trial judge's comments were so lacking in balance as to be an exercise in persuading the jury of the appellant's guilt, were unfair to the appellant, and gave rise to a miscarriage of justice. As a result, the Court quashed the appellant's conviction and ordered a new trial. A majority of the Court also held that trial judges should refrain from making comments that convey their opinion as to the proper determination of a disputed issue of fact to be determined by the jury.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*