IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A26 of 2016

BETWEEN

JASON LUKE BUCCA
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

PART I PUBLICATION

10 1. This submission is suitable for publication on the Internet.

PART II CONCISE REPLY TO THE RESPONDENT'S ARGUMENT

Out of court statement Pascoe overheard the appellant make to her father

Impact of the judge's misdirection: prejudicial effect ignored, exculpatory value overlooked

2. The respondent's submits (RS [75]-[79]) that there was no risk of misuse of the evidence as a result of the judge suggesting it was open to two meanings, because in considering how to treat the evidence, the jury could only reason in two ways:

   2.1 by confining attention to Pascoe's evidence on the topic - in which case they were bound to find the evidence was exculpatory and not inculpatory with the consequence that there was no risk of error; or

20 2.2 by resolving the asserted ambiguity by reference to the balance of the evidence, in which case, if the balance of the circumstantial case led them to think the statement must have been inculpatory, it would only be because that was the effect of the balance of the evidence.

3. With respect, this is artificial. Contrary to the respondent's assertion (in fn 128) the jury might have been inclined, as a result of the direction, to treat it the statement as inculpatory unless explained by other evidence and therefore as damaging when combined with other circumstantial evidence.

4. More fundamentally, by reason of the direction to the effect that the jury might treat the statement as inculpatory, the appellant may have been denied the benefit of evidence which
30 was in fact exculpatory. Contrary to the respondent's submission (fn 127), the admissibility of exculpatory evidence adduced by the prosecution does not turn on whether it was a mixed statement (partly inculpatory as distinct from purely self-serving). The extent of the prosecutor's obligation to tender exculpatory aspects may depend upon whether the statement is "mixed", but evidence **adduced by the prosecution** is evidence in the case even if purely self-serving.

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3 August 2016

5. In *R v Callaghan* [1994] 2 Qd R 300 at 304, Pincus JA and Thomas J said that if a prosecutor chooses to put in evidence a version which is in substance exculpatory, he makes it evidence in the case, and subject to matters of weight, it can be acted on as showing the truth of its contents. The passage was referred to with apparent approval by Hayne J in *Mahmood v State of Western Australia* (2008) 232 CLR 397 at [41].

6. The weight to be attributed to such a statement will vary according to the circumstances, but in the present case, properly directed, the jury might have considered it carried significant weight. The statement Pascoe said she overheard was part of a private conversation (quite unlike a formal denial to a police officer) and in circumstances in which frankness might be inferred; the appellant was crying and distraught (see AS [46]).

7. The potential effect of the misdirection was therefore not simply to potentially add to the prosecution case, but to remove from consideration material which supported the appellant's innocence and added to the other positive evidence in the case pointing to the guilt of another (Gange).

Miscarriage was substantial

8. Accordingly, even if (which is not accepted), the CCA could find the appellant guilty beyond reasonable doubt by reference to the other (admissible) evidence in the case, a misdirection and miscarriage of this kind can scarcely be characterised as other than "substantial". Nor does the modifier "actually", in the common form proviso, apply to a case of the present kind. Those expressions may have the consequence that a misdirection on a matter which was not a real issue at trial may result in the application of the proviso (eg, *Reeves v The Queen* (2013) 88 ALJR 215; [2013] HCA 57 at [52]-[58]). It cannot be said that Pascoe's evidence, and any direction regarding it, were other than central to the issues in the case.

9. Indeed, if the jury treated it as an admission, that in itself might have been sufficient to persuade them to convict the appellant, without considering or resolving the other circumstantial evidence.

10. Further, because there was no direction that the statement was not admissible in the case against Castle, the judge's treatment of the issue may have resulted in the jury rejecting her evidence and the appellant may thereby have been denied the benefit of the exculpatory effect of her evidence. The risk of the jury's verdict being affected by errors in the conduct of the trial of a co-accused is relevant to the exercise of the proviso: cf. the remarks in *Petty v The Queen* (1991) 173 CLR 95 at 113 (Brennan J) and 131 (Gaudron J).

11. One reason why the CCA's capacity to find guilt beyond reasonable doubt by reference to the admissible evidence in the case is necessary but not sufficient for proviso purposes is that where, as here, the appellant was entitled to proceed on the footing that evidence led in the prosecution case had a use different to that which the trial judge directed, the CCA cannot exclude that the conduct of the balance of the trial was not affected. Here the appellant was entitled to make forensic decisions regarding his case on the footing that the evidence was not inculpatory and would not be treated as such by the jury. An analysis of guilt by the CCA upon the balance of the record of the trial in such a case cannot be decisive of the question of substantial miscarriage.

The necessary but not sufficient criterion for the application of the proviso

12. The intricacy of the propositions the respondent seeks to advance by reference to the telephone records itself speaks against the application of the proviso.

13. Furthermore, and critically, the force of the propositions relied upon by the respondent depends upon premises and assumptions that the jury were not bound to adopt.

13.1 For example, the respondent submits that the phone records indicate that Gange had the relevant phone with him that morning (RS [15]).

(a) However, the evidence suggests Gange had another (prepaid) phone that he was using on the morning in question in the period between 2:31 am and 2:42 am (AS [34]). The records for that phone were not in evidence.

(b) That supports the reasonable hypothesis that during the critical period someone else had custody of the phone described as "Gange's phone" (but in fact not registered in his name).

(c) If Gange left "Gange's phone" behind, and if either Grace or Tammy (who were not called to give evidence) took the phone to Sapphire Crescent (the place Gange had been living), this would explain the connection of the phone to the Hope Valley tower at 3:30 am, and remaining in that catchment area until about 5:30 am (Exhibit P20 AB1781).

(d) Grace was a drug dealer for Gange (AS [35]) and may have been trying to locate him by calling the appellant's phone at 6:25 am, Castle's phone at 6:26 and 6:34 am, and McDonald at 6:33 am. On the evidence Gange would have been reunited with his phone again by the time of the 7:51 am phone call (Exhibit P20 AB1781).

(e) If Gange had no phone with him or did not want to be identified by the use of his phone he might have used the appellant's phone to telephone his own phone (at 5:49 am) either to find it or to support his position (Exhibit P15, entry 469 AB1774).

13.2 In so far as the respondent seeks to support the CCA's reasoning that there was no reason why the appellant would become separated from his phone (CCA [115]) (RS [56]), apart from the evidence of Castle that the appellant was separated from his phone, the jury were entitled to consider that the appellant was a drug addict, and that the appellant was moving into the home of Castle's parents at the time and could well have left his phone in Castle's mother's car.

13.3 The safety of any inferences from the phone records was also affected by the likelihood, on the evidence, that certain of the addresses were within common phone tower catchment areas (cf. Exhibit P3 AB1732). Thus the inference that Gange's phone was with him when Gange was seen on CCTV at the Cadell Court address (RS [11]) is vulnerable because if his phone had been at Sapphire Crescent at the time the phone tower evidence would be the same. The addresses were within 3 km (Exhibit P53, AB1950).

14. The conclusion of guilt reached by the CCA, and sought to be supported by the respondent, depended upon the drawing of inferences of a kind which, due to the natural limitations of a review of the record, rendered the case unsuitable for the application of the proviso: *Gassy v The Queen* (2008) 236 CLR 293 at [35]-[37] (Gummow and Hayne JJ), at [69] (Kirby J).

15. The respondent seeks to minimise the role and relevance of the assessment of the credibility of M, by submitting that, by the time the CCA relied upon her evidence, it had rejected

Castle's contrary evidence to the contrary beyond reasonable doubt without reliance upon M's evidence (RS [69]).

16. It is not entirely clear that this is correct (cf. CCA [108], where reference is made to M's evidence in relation to the meaning of a text message sent by Castle). But in any case, it begs the question whether it was appropriate to segregate the evidence in that way. More importantly, it was open to a jury hearing M's evidence to approach the matter differently. A jury properly directed on Pascoe's evidence might have taken the view that:

    16.1 the appellant's exculpatory statement had the ring of truth; and/or

    16.2 that M's evidence regarding the time of Gange's return was distinctly suspicious;

and, given the evidence: of Gange's hostility towards the deceased as evidenced by his text message; of Gange's character and unpredictable conduct; and that Gange had discussed Glocks and Berretas (T1392-1396 AB480-484), the jury might have considered that the critical aspect of Castle's evidence as it relates to the appellant (namely, that it was Gange and not the appellant in the car) could not be negatived beyond reasonable doubt.

17. Moreover, even if one were to start with a consideration of Castle's evidence and reject it beyond reasonable doubt:

    17.1 Castle's evidence was not the only evidence supporting the theory of Gange's involvement (and thus of the appellant's innocence); and

    17.2 critically, even if it were, the rejection of Castle's evidence did not prove the case against the appellant.

18. Fundamentally, the case remained circumstantial and inferential, and so the natural limitations remained significant. Indeed, on the face of it, the CCA **did rely** upon the evidence of M (CCA [128] in bullet points 3 and 5) yet did so without the benefit of observing her evidence so as to be in a position to assess the attack on her credit and reliability.

19. In short, there were two alibi witnesses: Castle was an in effect a (negative) alibi witness for the appellant, and M was an alibi witness for Gange. The treatment of their reliability and credibility, influenced as it would have been by questions of demeanour, was central. This was not a case where the necessary criterion for the engagement of the proviso could safely be discharged.

Firearms evidence

Relevance on basis of actual use in crime

20. The respondent submits that one of the other two handguns seen by Pascoe three to four months before the offence was relevant and admissible on the basis that it might have been the particular handgun used to kill McDonald (RS [89]) (which the respondent submits was probably a Glock 17 (RS [82])).

21. However, this possibility is inconsistent with Pascoe's evidence (T1895 AB930) that none of the 12 photos comprising Exhibit P43 AB1900 (which included a photo of a Glock 17 as pistol no. 2) had features that were similar to the guns she saw the appellant with.

22. The submission that the principle of completeness necessitated the admission of Pascoe's evidence of all three handguns, despite one having been excluded as the particular firearm used (RS [90]) is misconceived. The evidence sought to be rendered more complete on this hypothesis is inadmissible because it is accepted that the one gun Pascoe described in detail could not have been the handgun used to kill McDonald. The question is simply whether the evidence relating to the other two guns was inadmissible.

Relevance on basis of "access"

23. The respondent's submission that evidence of access to guns of the same character even if the guns were not used in the offence is relevant without relying on any propensity of the appellant is misconceived (RS [93]). "Access" to firearms is not a passive state. It implies the appellant is a person who would seek out such weapons, and that is plainly "discreditable conduct". Indeed, the respondent's next submission (RS [94]), that guns are not readily accessed and differ qualitatively from, eg, knives, makes the very point.

Relevance to credibility and reliability of M

24. The contention that there is some separate line of relevance, namely, supporting the credibility and reliability of the disputed evidence of M (RS [87]) is disputed. To corroborate or support the evidence of M, the evidence had to be admissible on its own terms; it could not be relevant merely to bolster M's credibility, and if it was only relevant on that basis its probative value would not outweigh its prejudicial effect.

Assertion of limited prejudice and significant probative value

25. The respondent asserts that any risk of impermissible reasoning was, in effect, of marginal significance, because the appellant suffered the same risk of prejudice "given the (unchallenged) admission of M's evidence" (RS [100]).

26. First, the admissibility of M's evidence was unchallenged, but its truth was challenged; it was the appellant's case that Gange owned the weapon not the appellant (CCA [83]).

27. Secondly, as a result, the scope for prejudice based on impermissible propensity reasoning was patent, because it might cause the jury to reason that because the appellant was disposed to "access" illegal firearms, he must have accessed the gun M saw (which, on the respondent's case, was likely the weapon used in the offence).

28. There is a risk that a jury would give the evidence of prior possession greater probative value than it deserved, and this is the form of prejudice with which s 34P is essentially concerned.

29. Evidence of "access" did not carry "strong probative value" and in this respect it may be noted that the CCA apparently had no regard to it in their conclusion as to the appellant's guilt (CCA [128]).

3 August 2016

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