HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND HEYDON JJ

PELLEGRINO PAUL MULE APPELLANT

AND

THE QUEEN RESPONDENT

Mule v The Queen
[2005] HCA 49
8 September 2005
P81/2004

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

D Grace QC with M E Marich for the appellant (instructed by Laurie Levy & Associates)

R E Cock QC for the respondent (instructed by Director of Public Prosecutions for Western Australia)

CATCHWORDS

Mule v The Queen

Criminal law – Evidence – Directions to jury – Appellant convicted of having in his possession a prohibited drug with intent to sell or supply it to another – Videotape of police interview with appellant admitted in evidence in which certain admissions were made – Trial judge directed that exculpatory statements were not supported by evidence on oath and did not have the same weight as admissions – Whether the trial judge's direction to the jury as to the weight to be accorded to the statements was correct.

Criminal law and procedure – Right to silence – Appellant did not give evidence at trial – Whether summing-up of the trial judge undermined the appellant's right to remain silent at trial.

Words and phrases – "admissions", "right to silence".

The Criminal Code (WA), Pt VIII, s 638.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. Following a trial in the District Court of Western Australia before Judge Fenbury and a jury, the appellant was convicted of having in his possession a prohibited drug with intent to sell or supply it to another. The common name of the drug is ecstasy. The drug was in the form of 27 tablets, with a total weight of 5.5 grams. The appellant, described by the judge on sentencing as a 40 year old man with an extensive criminal history, was sentenced to a term of imprisonment.

2 The evidence at the trial was brief. The prosecution called a police officer, who gave substantially unchallenged evidence about a videotaped search of the appellant's home during which the ecstasy tablets and other items were found, about certain intercepted telephone conversations to which the appellant was a party during and just after that search, and about an interview with the appellant and his solicitor. The interview, which took place four days after the search, was conducted and recorded pursuant to Pt VIII of the Schedule to the *Criminal Code Act Compilation Act* 1913 (WA) ("the Criminal Code"). The videotape of the search and the transcripts of the intercepted telephone conversations were received in evidence without objection. The videotape of the interview was also admitted without objection but, with the agreement of counsel, certain parts of it were excised. In the interview, the appellant, and his solicitor, admitted that the tablets were ecstasy tablets and that they belonged to the appellant, but asserted that they were for the appellant's use. The appellant gave no evidence at his trial.

3 In his summing-up to the jury, the trial judge referred to the use that the jury could make of the evidence of what was said in the interview. In the course of doing so, he contrasted the admissions made by the appellant with the exculpatory assertions of the appellant and his solicitor. What he said in that respect did not lead to any complaint, or request for re-direction, by senior counsel for the appellant at trial. Nevertheless, it became the subject of the sole ground of an appeal against conviction. The Court of Criminal Appeal (Templeman, Wheeler and McLure JJ) dismissed the appeal[1]. The appellant now appeals to this Court.

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1 *Mule v The Queen* [2004] WASCA 7.

The relevant legislation

4 Section 6 of the *Misuse of Drugs Act* 1981 (WA) creates the offence of having in possession a prohibited drug with intent to supply it to another, except pursuant to authority. The exception is presently irrelevant. Section 11 provides that, for the purposes of s 6, a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to supply it to another if he has in his possession more than a specified quantity of the drug. That provision applied in the present case. In *Singh v The Queen*[2], the Court of Criminal Appeal of Western Australia held that the effect of that section is not to cast an onus of proof upon an accused person, but, rather, that proof of possession of the specified quantity is adequate proof of intention to supply unless the jury concludes upon the whole of the evidence that it is more probable than not that the accused did not have that intention. The jury in the present case was directed accordingly, and there is no issue as about that matter.

5 Reference has already been made to Pt VIII of the Criminal Code, relating to videotaped interviews. It was common ground that, subject to the excision of matter which was irrelevant (which happened here), matter the prejudicial effect of which outweighed its probative value, or matter that on some other sufficient ground should have been excluded, if the prosecution wished to tender the videotape it was obliged to tender the whole videotape. (That was argued to be the effect of s 570D(2) of the Criminal Code, and the argument was not controverted.) If there were further exceptions or qualifications to that proposition, there was no suggestion that they applied in the circumstances of this case, and they were not explored. The same practical result may have followed from what was said by Griffith CJ in *Jack v Smail*[3]. In any event, there was no attempt by the prosecution at trial to tender only those portions of the videotape that recorded the appellant's admissions of possession, and to refrain from tendering those portions which recorded the appellant's assertions as to his purpose of personal use. No question of severance arose and, subject to the agreed excisions, the whole videotape was tendered. It recorded, amongst much else, both the inculpatory statements acknowledging possession, and the exculpatory statements about personal use. At the time of the tender of the videotape, the trial judge and the prosecution would not have known what course the appellant intended to take with respect to calling, or giving, evidence. It is

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2 Unreported, Court of Criminal Appeal of Western Australia, 18 September 1985.

3 (1905) 2 CLR 684 at 695.

possible that, at that stage, no final decision on that matter had been made. The line taken in cross-examination of the police officer who conducted the search, and who also conducted the interview, suggested that there was no challenge to his evidence, but it would not then have been clear that the defence intended to add nothing to what was said in the interview. By the time the trial judge came to sum up to the jury, however, it was apparent that there was no issue as to the appellant's possession of the tablets, and that the appellant was relying on what was said in the interview, and on the surrounding circumstances, together with the arguments of his counsel at trial, as his answer to the deeming effect of s 11 of the *Misuse of Drugs Act*.

6 Section 638 of the Criminal Code provided:

> "After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.
>
> After the court has instructed the jury they are to consider their verdict."

That provision distinguished between instructions as to the law applicable to the case, which were mandatory, and observations upon the evidence, which were discretionary. The discretion, of course, was to be exercised in accordance with established principles. One of those principles is that observations upon the evidence must be fair and balanced, but a judge is not prohibited from making an observation which is favourable to one side or the other if it is made clear that it is for the jury, and the jury alone, to decide the facts. Trial judges commonly make observations, sometimes forcefully, about the strength or weakness of particular aspects of the evidence in a case, but they should also make it clear that those observations are not intended to bind the jury, that the jury may or may not agree with them, and that the jurors are the sole judges of all factual issues bearing upon the ultimate verdict.

The videotaped interview

7 The background to the interview was as follows. The appellant was married. He and his wife had a number of children. There was a side issue as to whether they were living together on a permanent basis, but that has no bearing on this appeal. On 9 August 2001, the police searched the family home at Ballajura. At the time, the appellant was absent in Broome. The police dealt with the appellant's wife. She telephoned the appellant while the police were there. The telephone conversations, partly in English and partly in Italian, were

intercepted. There was material in those and certain other intercepted conversations which took place just after the search which tended to inculpate the appellant. In particular, those conversations suggested strongly that the ecstasy found by the police belonged to the appellant. Two safes were opened by the police. In one safe there were the 27 ecstasy tablets, a loaded pistol, a stun gun, and $27,000 in cash. In another safe there was $5,750 in cash. The prosecution invited the jury to infer that the weapons and the cash indicated the commercial nature of the possession of drugs. In one of the telephone conversations, the appellant said (in Italian) that he had a particular reason for not wanting to be arrested in Broome, and that he would come back to Ballajura.

8 The evidence does not show what went on between 9 August and 13 August. On 13 August 2001, the appellant and his solicitor arrived at a police station at or near Ballajura for the purpose of a formal interview. The appellant's solicitor did most of the talking. At times, the interview took the form of an examination-in-chief by the solicitor of his client, mainly by way of leading questions. From time to time, there was a pause in the proceedings to enable the solicitor to consult with the appellant. Such statements as the appellant had the opportunity to make were brief. For example, when the matter of the 27 tablets was raised, the appellant at first said he had no comment. Then he said: "That's that personal use." The solicitor intervened and sought a suspension of the interview to talk to his client. When the interview resumed, the solicitor said: "The ... instructions I received earlier are confirmed, that they are ecstasy tablets for his own personal use." The police officer repeated that statement, and the appellant said: "Yep." The police officer then attempted to press the question of ownership. The solicitor said to the appellant: "Well, for your own personal use they'd be yours, yeah." The appellant said: "That's right, personal use." When asked about the weapons, the appellant said: "No comment." Much of the interview was taken up with an explanation of the presence of the cash, mainly in the form of statements by the solicitor followed by brief indications of assent by the appellant. A later garbled answer by the appellant to an unrecorded question was "Because – because I take steroids I like to make ... (indistinct) ... with ecstasy, that's ... ." It can be seen that, apart from the last answer, all the exculpatory statements about the ecstasy were closely bound up with inculpatory statements.

The summing-up

9 Before the commencement of the evidence, the trial judge made an introductory statement to the jurors about the respective functions of judge and jury. In the course of doing so, he said:

"Then at the end of the case it's my job to sum up the law to you, to tell you what the law is that you must apply, and my task there is to try and do that in as intelligible a way as possible and what I tell you about the law you must accept. You also as a group are judges, but of an entirely different issue. It's for you to judge the facts. It's for you to decide what the facts are and you listen to the evidence and you will be required to do that. It is important to realise your power in that regard. It's entirely up to you what you make of the facts and what facts you decide exist in the case, so we are each judges but in different areas. We each have exclusive power, in a sense, in the area of our involvement."

10 It could scarcely have been made more clear that the jurors were the sole judges of the facts, to the exclusion of the trial judge. In his introductory statement, the trial judge also stressed that the onus of proof lay on the prosecution. He repeated, and elaborated upon, that when he came to sum up at the end of the trial.

11 In his summing-up, the trial judge reminded the jury of the evidence called by the prosecution, and then went on to deal with the circumstance that the appellant did not give evidence, and with the use that could be made of the evidence of the videotaped interview. He said:

"It is important that I tell you that his silence in this case is not evidence against him and does not amount to an admission by him and it cannot be used to fill in any gaps in the evidence tendered by the prosecution if you feel there are some. It may not be used as a makeweight in assessing whether the prosecution has proved its case beyond reasonable doubt. The exercise of a right to silence cannot be held against a person and if you think about it it would be bizarre if the law gave a person a right and then permitted the exercise of the right to be held against the person.

However, you also know that the accused did not totally exercise his right to remain silent when he was interviewed by the police. He could have, if he had wished, not said a word during that process and he did say some things. He had a lawyer there and on occasions he said, 'No comment,' but on other occasions either personally or through his lawyer he said things to police and you have the video of the interview. He chose to, in a sense, speak to the police on the occasions that he did and that interview has been put before you as evidence by the prosecution as part of the prosecution case.

In a nutshell that evidence was put before you to prove possession, that is, to prove what occurred, basically, to prove the finding of things, to prove – basically to prove possession because in relation to that you will be aware the accused person admits that the drugs were his so it proves that because the accused admitted it. He admits it. He made what the lawyers called admissions and they are obviously against his interests, in other words he confessed. An admission is a confession. He confessed that he was in possession and as is, I think, pointed out by one of the counsel that was an admission against interest and it is given weight in the system. It is not disputed, of course, that he did possess those drugs.

Now, the video cassette of the interview, given that it has been tendered by the prosecution for the purpose I have just explained, it also, however, becomes material, evidence, for the accused as well as against him; in other words, once it goes in, it can be used for all purposes, legitimate purposes.

Those parts of the interview that are relied on by the prosecution you can accept as being not disputed by the accused and they are, as I have said, admissions, concessions, if you like, made by the accused person, in the sense that I have just explained, against his interests.

But the video also contains other matters that the accused person relies on in his case and he relies on his denials of police allegations and also his assertions, for example, his assertion that he intended only personal use. He relies on those statements in the video. Of course, his denials of police allegations and his assertions, such as his assertion of intending personal use, are disputed by the prosecution.

The denial – his denials and the assertions that he makes, are not supported by evidence from him on oath in the witness box and therefore those matters do not have the same weight as evidence, as his admissions or confession, if you like, of possession, for example, against interest, doesn't have the same evidential weight, but the accused's denials and his assertions are still matters for you to consider. They are before you and you give them what weight you see fit." (emphasis added)

12 It is the italicised sentence of which the appellant complains in this appeal. In order to put it into context, however, it should be mentioned that, further on in the summing-up, before reminding the jury of the arguments of opposing counsel, the judge said:

> "As I mentioned at the beginning of the trial, ladies and gentlemen, and I just realised I didn't emphasise perhaps again as I should have at the beginning of this address, it's entirely up to you what you make of the facts. It's entirely up to you how you view the evidence. The findings that you make about the facts are entirely your business and each of the counsel has put a point of view to you that you can either accept or not.
>
> It's up to you what you make of the facts and what you decide the facts to be, so if you get any impression from me that I'm subtly suggesting you go one way or the other, put it out of your mind. It has nothing to do with me. It's your business entirely and I will be doing my best to be right down the middle. If I leave out bits of what the counsel said, that doesn't mean they are not important. What's important is what you think is important."

13 One further part of the context should be noted. As has been mentioned already, by the end of the evidence and the addresses of counsel, it was plain that there was no issue as to the possession by the appellant of the ecstasy tablets. They were found in a safe at his home. What he said on the telephone when his wife rang him at Broome made it clear that the drugs were his. In his interview, he did not suggest that they belonged to anybody else. Strictly speaking, there was no question of the jury having to decide the weight to be given to the admissions, at the interview, that the tablets were ecstasy or that they were his. By the time of the summing-up, as the trial judge pointed out, those questions were not a matter of contest. The only live issue concerned what the jury might make of the out of court assertions of the appellant, mainly through his solicitor, that the tablets were for his personal use. This is not a case where the exculpatory statements cast doubt upon, or qualified the meaning of, the admissions. The admissions were of possession and, at trial, that fact was not disputed.

14 As appears from what is set out above, the trial judge instructed the jury, as a matter of law, that the video cassette, having been tendered by the prosecution and admitted into evidence, became evidence "for the [appellant] as well as against him" and could be used for all legitimate purposes. The trial judge said that the appellant relied upon the assertions about intended use recorded in the videotape and it was made clear to the jury that, as a matter of law, he was entitled to do so. Again, the proposition that the whole of the recorded matter was available as evidence for the consideration of the jury was

not in contest in this appeal. It reflects the accepted view of the law in this country, and it accords with the current state of the law in the United Kingdom[4].

15 Where evidence is given of out of court statements made by an accused person, there may be no clear distinction between matter that is inculpatory and matter that is exculpatory. A dividing line between incriminating admissions and self-serving assertions may sometimes be difficult, or impossible, to draw. There was, however, no such problem in the present case. The appellant's solicitor made certain that the record of the police interview with his client would show that his client maintained that the ecstasy tablets were for his personal use. By the end of the trial, it was clear that this was the defence case. Possession was not disputed. There was no testimony from the appellant. The defence case was that, having regard to the whole of the evidence, including the evidence tendered by the prosecution showing what was said in the interview, and even allowing for the effect of s 11 of the *Misuse of Drugs Act*, the prosecution had not established the alleged purpose of supply.

The decision of the Court of Criminal Appeal

16 The ground of appeal to the Court of Criminal Appeal was that the passage identified above, of which complaint is now made, involved error which undermined the appellant's right to remain silent at trial, and caused a substantial miscarriage of justice.

17 Templeman J, with whom Wheeler J agreed, found no error in what the trial judge said. He considered it "appropriate to direct the jury that any exculpatory statements made by an accused person in the same interview do not have the same weight as admissions ... [because] ... the exculpatory statements have not been made on oath and have not been tested by cross-examination". He supported this conclusion by reference to the judgment of Cox J, with which White and Perry JJ agreed, in the South Australian case of *Spence v Demasi*[5]. Cox J, in turn, had referred to the decision of the English Court of Appeal in *Duncan*[6], which was approved by the House of Lords in *R v Sharp*[7].

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4 *Lopes v Taylor* (1970) 44 ALJR 412; *R v Cox* [1986] 2 Qd R 55; *Spence v Demasi* (1988) 48 SASR 536; *R v Aziz* [1996] AC 41.

5 (1988) 48 SASR 536 at 540.

6 (1981) 73 Cr App R 359 at 365.

18 McLure J also referred to *R v Sharp*, and pointed out that it was later followed by the House of Lords in *R v Aziz*[8]. She distinguished between directions on law and comments on the facts. She said the English authorities established that, in the case of what is sometimes called a "mixed" out of court statement which is tendered by the prosecution, while the whole statement should be left to the jury as evidence of the facts, the judge may draw attention, where appropriate, to the different weight they might see fit to give to the exculpatory statements as compared to the admissions. McLure J considered, however, that if the passage complained of were considered in isolation it may have created an erroneous understanding on the part of the jury that, as a matter of law, they were bound to give less weight to the assertions than the admissions. However, she also considered that any such false impression was immediately corrected by the next sentence, and would also have been inconsistent with the wider context of the summing-up. She was satisfied that the jury would not have been left with any impression that they were bound to accord less weight to the self-serving out of court exculpatory statements.

The arguments in this Court

19 In this Court, senior counsel for the appellant argued that it was impermissible for the trial judge to make any observations to the jury about the weight they might attach to the exculpatory assertions in the videotaped interview or to refer, in that connection, to the fact that they were not supported by the appellant's oath. In the alternative to that primary argument, he argued that any observations made should have been, and were not, qualified by a statement that it was ultimately a matter for the decision of the jury, and that what was actually said, particularly the words "these matters do not have the same weight", amounted to an erroneous instruction of law about how the jury was obliged to reason towards a conclusion of guilt.

Was it impermissible to make any observations at all?

20 The primary argument must be rejected. The Criminal Code, in s 638, empowered the trial judge to make such observations on the evidence as he might think fit to make. The prosecution tendered (relevantly) the whole of the

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7 [1988] 1 WLR 7; [1988] 1 All ER 65.

8 [1996] AC 41.

videotape of the police interview. On it, the jurors saw and heard the appellant's solicitor, with occasional support from the appellant himself, assert that the drugs were for personal use. They heard no sworn testimony from the appellant. What were they to make of that? The judge was bound to instruct them (as he did, in orthodox fashion) about the appellant's right to silence. He also instructed them that the whole of the contents of the interview amounted to evidence to which they could pay regard. It was legally correct for him to tell them that they were not obliged to give the same weight to everything that was said in the interview. Indeed, if he had not told them that, it is possible that they might have assumed the contrary, or at least they might have been left uncertain as to their capacity to discriminate between different parts of the evidence.

21 Jurors are commonly told that they may approach the evidence selectively and in a discriminating fashion, that it is for them to decide what evidence they accept and what evidence they reject, and that the law does not require them to give all evidence the same weight. An instruction of that kind, put as an abstract proposition, is an instruction of law. When related to the facts of a particular case, it may have the character both of an instruction of law and of an observation upon the facts. It is the duty of a trial judge to relate instructions of law to the facts, and, in the result, what is said to a jury may involve both instruction and observation. An observation by the trial judge that the appellant's out of court assertions, although disclosed in evidence by the prosecution's tender of the videotape, were not sworn testimony, that, unlike the admissions, they were not against the appellant's interests, and that the jury could give them less weight than the admissions, was proper. To a lawyer, it might seem to be a statement of the obvious, but it is understandable that a trial judge might make it. Some jurors could have been puzzled about the consequences of the prosecution having, in effect, put the defence case before the jury. In the circumstances of this trial, if the judge had not explained to the jurors that they were entitled to attach different weight to different things that were said during the interview, they might have felt obliged to give everything that was said in the interview equal value.

22 It was not a derogation from the appellant's right to silence for the trial judge to point out that the statements made in the course of the interview were not on oath. The expression "right to silence" is used to refer to a number of distinct legal rules. It is a useful shorthand expression but it is a general description which does not always provide a safe basis for reasoning to a

conclusion[9]. In the present case what is important is that the appellant did not give evidence at his trial. In the days when, in most Australian jurisdictions, accused persons were entitled to make unsworn statements in court, it was not regarded as a derogation from their rights for judges to direct juries that what an accused said in these circumstances was to be regarded as "a possible version of the facts" and that jurors should "consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence"[10]. Nor was it regarded as such a derogation for a judge to comment that a statement was not on oath, and was not tested in cross-examination, and might not be considered as weighty as the evidence of witnesses under oath[11]. The trial judge had already, uncontroversially, referred to the fact that the appellant had elected not to give evidence in court. It is difficult to explain the right to silence without drawing attention to the silence. Furthermore, as the judge pointed out, the appellant's silence was not complete. Having referred to the fact that the appellant did not testify on oath in court, having explained that it was his right to remain silent in court, and having warned the jury against inappropriate reasoning, the judge, when he came to deal with the out of court statements made by or on behalf of the appellant, could well have thought it proper to tell the jurors that it was open to them to evaluate those statements in that light. They could also evaluate those statements in the light of the fact that they were self-serving. As a matter of law, it was correct to tell the members of the jury that they were not obliged to attach the same weight to all the statements made in the interview, and that it was for them to decide the weight to be given to particular statements. As an observation on the facts, in the circumstances of this case, it was not inappropriate to point out that, while the admissions of possession were accepted by both sides at the trial to be true, the assertions about purpose were in dispute, that they were not supported by any sworn testimony and that they were self-serving. It would also not have been inappropriate to point out that the jury might think them to be of less weight than the admissions.

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9 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30.

10 *Peacock v The King* (1911) 13 CLR 619 at 641.

11 *Bataillard v The King* (1907) 4 CLR 1282 at 1291; *Jackson v The King* (1918) 25 CLR 113; *Bridge v The Queen* (1964) 118 CLR 600 at 605.

23 As has been noted, many cases involving evidence of out of court "mixed" statements by an accused person are more complex than the present. In *R v Cox*[12], Thomas J rightly cautioned against inappropriate generalisations concerning the difference between inculpatory and exculpatory parts of a statement: a difference that in some cases (not including the present) might be difficult to discern. He said, in a passage quoted by McLure J in her reasons:

> "With respect, it seems to me to be undesirable that juries be given general *a priori* directions as to what sorts of evidence are likely to be true, or as to the weight which should be accorded to different parts of the one statement. The matter of weight is for them, and the weight of each part of the statement should be determined in the light of the whole of the evidence. There is, of course, no reason why the trial judge should not point out that such statements have not been made on oath and (where appropriate) that they have not been tested by cross-examination. He may *explain the traditional reasons why admissions against interest are commonly regarded as reliable evidence, and* make any appropriate comments about particular parts of the evidence. The weight which may fairly be accorded to a self-serving statement varies so much from case to case that it is unwise to lay down any general disparaging directions concerning such statements, although of course, critical comments may be made in appropriate cases." (emphasis added)

Apart from the words emphasised in that passage, it is a sound guide to jury direction. In view of the long-standing controversies about why admissions are received, and in view of the fact that an admission need not have been against interest at the time it was made, it is undesirable to direct juries along the lines suggested by the words emphasised.

Were the observations an erroneous instruction of law?

24 The appellant's alternative submission to this Court is that, in the present case, what the trial judge said in the paragraph in question amounted to an erroneous instruction of law. The paragraph contains some obvious hesitations, and some internal corrections. It is wrong to read it by overemphasising one fragment of it. It is necessary to read it as a whole and in context. If so read, it had conveyed to the jurors that, as a matter of law, they were bound to give less weight to some parts of what was said to the police than to others, then it would

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12 [1986] 2 Qd R 55 at 65.

have been a misdirection. (Whether it would have involved a miscarriage of justice is another matter. In this case no jury, acting reasonably, could have failed to discriminate, in terms of weight, between the admissions as to the identity of the tablets and as to possession and the assertions as to purpose.) As the judge said in the same paragraph, as he told the jury at the commencement of the trial, and as he said again later in his summing-up, it was for the jury, and the jury alone, to decide what weight to give particular parts of the evidence. There is some internal inconsistency in the paragraph, but it is impossible to accept that the jury would have been left with the erroneous impression claimed by the appellant. This conclusion is reinforced by the consideration that experienced trial counsel made no complaint at the end of the summing-up.

25 In the circumstances of this case, it was appropriate for the trial judge to tell the jury that they were entitled to give less weight to the assertions of purpose than to the admissions of possession, and to explain why that was so. The summing-up, considered as a whole, made it sufficiently clear that ultimately, this was a question for the jury, and the jury alone.

26 The appeal should be dismissed.