HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No B28/2011

ADAM JOHN HARGRAVES — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No B24/2011

DANIEL ARAN STOTEN — APPELLANT

AND

THE QUEEN — RESPONDENT

Hargraves v The Queen
Stoten v The Queen
[2011] HCA 44
26 October 2011
B28/2011 & B24/2011

ORDER

In each matter, appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

J T Gleeson SC with P Kulevski for the appellant in B28/2011 (instructed by Robinson Legal)

B W Walker SC with J R Hunter SC for the appellant in B24/2011 (instructed by Peter Shields Lawyers)

W J Abraham QC with A J MacSporran SC and J G Renwick for the respondent in both matters (instructed by Commonwealth Director of Public Prosecutions)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with G A Hill and R J Orr intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J K Kirk intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with A D Scott and A D Anderson intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

M K Moshinsky SC with C J Horan intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Hargraves v The Queen
Stoten v The Queen

Criminal law – Trial – Directions to jury – Appellants convicted of charges arising from tax avoidance scheme – Appellants' dishonesty only issue at trial – Appellants gave evidence – Prosecution called appellants' accountant as witness – Appellants' counsel cross-examined accountant suggesting he tailored evidence to avoid own prosecution – Trial judge told jury they could evaluate credibility by considering a witness's "interest in the subject matter of the evidence" including "self-protection" – Whether misdirection causing miscarriage of justice – Whether direction deflected jury from need to be persuaded beyond reasonable doubt of appellants' guilt – Whether direction invited jury to test appellants' evidence according to appellants' interest in outcome of trial – Principles applicable to directions about evaluation of evidence.

Criminal Code (Q), s 668E.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. Phone Directories Company Pty Ltd ("PDC") produced local telephone directories. Until July 2001, the appellant Adam John Hargraves and his brother Glenn Luke Hargraves held all the shares in PDC. In July 2001, the appellant Daniel Aran Stoten and his wife, as trustees of a family trust, acquired a 10 per cent shareholding in PDC.

2 In January 2010, the two appellants and Mr Glenn Hargraves were presented in the Supreme Court of Queensland on an indictment charging each with one count of conspiracy to defraud the Commonwealth, contrary to s 29D and s 86(1) of the *Crimes Act* 1914 (Cth), between 18 June 1999 and 23 May 2001 and one count of conspiracy to dishonestly cause a loss to the Commonwealth, contrary to s 135.4(3) of the *Criminal Code* (Cth), between 24 May 2001 and 9 June 2005.

3 It was alleged that each of the appellants and others (including the other accused, Mr Glenn Hargraves) had conspired to defraud the Commonwealth by making false representations about the amount of allowable deductions that were to be made from the assessable income of PDC. That two counts were laid against each accused, one alleging an offence against the *Crimes Act* and the other alleging an offence against the *Criminal Code*, reflected the coming into operation of the relevant provisions of the *Criminal Code*[1] on 24 May 2001 and repeal of s 29D of the *Crimes Act*[2]. It is not necessary to explore the differences between the two offences. It is enough to observe that both required[3] proof of dishonesty. It was the prosecution case that the appellants engaged in a dishonest scheme of tax evasion by which they knowingly claimed as deductions from the assessable income of PDC amounts that were greater than the amount of outgoings incurred by PDC in gaining or producing its assessable income.

4 After a trial before Fryberg J and a jury, at which the appellants gave evidence, each appellant was convicted of the offence charged in the second

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1 Inserted by Sched 1, item 15 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000 (Cth) ("the 2000 Amendment Act").

2 Repealed by Sched 2, item 149 of the 2000 Amendment Act.

3 See *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7; *Criminal Code* (Cth), s 135.4(3)(a).

count but acquitted on the other count. Glenn Hargraves was acquitted on both counts.

5 Each appellant appealed to the Court of Appeal of the Supreme Court of Queensland against his conviction. The Court of Appeal (Muir and Fraser JJA and Atkinson J) dismissed[4] each appellant's appeal against conviction. The Court of Appeal held that the trial judge had misdirected the jury about how to assess the appellants' evidence but held that the appeals should be dismissed because there had been no substantial miscarriage of justice[5].

6 By special leave, each appellant now appeals to this Court alleging that the Court of Appeal was wrong to conclude that there had been no substantial miscarriage of justice and further alleging that application of the proviso[6], at least in the circumstance of these cases, contravened the requirement of s 80 of the Constitution that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury".

7 The respondent submitted that both grounds of appeal advanced by the appellants should be rejected. The respondent further contended that the Court of Appeal was wrong to conclude that the trial judge had misdirected the jury about how to assess the appellants' evidence.

8 These reasons will show that the respondent's contention that the Court of Appeal was wrong to hold that the trial judge had misdirected the jury should be accepted. There is no occasion in these matters to consider whether the proviso was correctly applied. The constitutional issue which the appellants sought to raise is thus not reached.

9 Before identifying that part of the trial judge's charge to the jury that was impugned, it is necessary to say something about some aspects of the trial and the evidence that was given.

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4 *R v Hargraves and Stoten* [2010] QCA 328.

5 *Criminal Code* (Q), s 668E(1A).

6 *Criminal Code* (Q), s 668E(1A).

Trial

10 At trial the appellants did not dispute that they had participated in a scheme which reduced the amount of income taxation that PDC paid. They contended that they believed that it was a legitimate tax minimisation scheme.

11 The scheme was said to have been devised by a Swiss accounting firm, Strachans. There was evidence that, in 1999, Mr Adam Hargraves was put in touch with Mr Philip Egglishaw, a representative of Strachans, by Mr John Feddema. Mr Feddema was an accountant who had done accounting work for PDC and both Mr Adam Hargraves and his brother, Glenn. The scheme that was proposed, and was implemented, was one in which QH Data, a Chinese company that PDC used to compile data for incorporation into PDC's products, rendered its invoices to Amber Rock Ltd, a company established in the British Virgin Islands by Strachans. Amber Rock would inflate the amount specified in QH Data's invoice by an amount fixed by one of the appellants, and would send an invoice issued by Amber Rock to PDC for payment of the inflated amount. PDC would pay Amber Rock's invoice and claim the full amount of the invoice as a deduction. From the amount paid by PDC, Amber Rock would pay QH Data its invoice and pay the balance to certain trusts administered by Strachans, which were trusts established under and governed by Jersey law. Distributions would then be made from the trusts to overseas bank accounts to which the appellants (and Glenn Hargraves) had access by withdrawing amounts from automatic teller machines. In this way, the appellants could and did withdraw substantial sums from the overseas accounts. In his evidence at trial, Mr Adam Hargraves said that he had withdrawn about $1.6 million over a period of "four or so years". The appellants did not themselves declare the sums they withdrew from the overseas accounts as income.

12 The prosecution called Mr Feddema to give evidence at the appellants' trial. He gave evidence of his introducing Mr Adam Hargraves to Strachans and of what he knew about the scheme that was implemented for PDC. He gave evidence of various events and conversations that occurred at and after the time he first became aware of authorities investigating the matters that culminated in the charging of the appellants. In particular, Mr Feddema gave evidence of the execution of a search warrant at his home: a warrant in which it was alleged that there were reasonable grounds for suspecting that Mr Feddema had "aided and abetted Daniel Stoten, Glenn Hargraves, Adam Hargraves, Phone Directories Group or PDC Group" to commit an offence against s 29D of the *Crimes Act* and an offence against s 134.2(1) of the *Criminal Code*.

13 Trial counsel for the appellants and Mr Glenn Hargraves cross-examined Mr Feddema at some length. In the course of cross-examination it was suggested to Mr Feddema that he knew more about the scheme that was implemented by and for PDC than he had revealed in his evidence, and that his evidence was tailored to avoid him being charged with an offence. The evident thrust of much of the cross-examination was to provide a basis for the appellants and Mr Glenn Hargraves to argue that their conduct in relation to the scheme was not dishonest because they were acting upon the advice of the company's accountant, Mr Feddema, about a structure that, so far as they knew, was to be lawfully established and operated overseas by expert specialists in whom they could have confidence: Mr Egglishaw and Strachans.

14 The prosecution called Mr Dirk Smibert to give evidence. He had been involved in PDC's business for many years, first as an independent contractor and later as an employee. Mr Smibert had first become acquainted with the Hargraves brothers when they, with their parents, attended the church of which Mr Smibert was a part-time lay minister.

15 Mr Smibert gave evidence that in 1999 either Mr Adam Hargraves or both Mr Adam Hargraves and Mr Stoten had told him that "there had been a tax program presented to them [by the company's then accountant, Mr Feddema] that would help reduce the amount of tax that they needed to pay". Mr Smibert's understanding of the "program", as revealed in his evidence-in-chief, was less than certain. But it was consistent with the proposal being that what he called the "listing company" for PDC (QH Data) would invoice "the broker in Jersey", which would in turn invoice PDC for an inflated amount, the balance of which after payment of the "listing company" "would come back into Australia … through an ATM machine".

16 At about the time that Mr Stoten and his wife took up a 10 per cent interest in PDC, it was suggested that Mr Smibert should acquire a 4 per cent interest. Mr Smibert said that he was told that he would receive dividends on his shares in PDC "through this ATM process". Who told Mr Smibert this was not made clear. He said that he was told (by whom was again not made clear) that, if that was done, tax would not be paid on the amount he would receive. Mr Smibert said that he did not agree with that course of action and that "it was agreed upon that [he] could receive [his dividend] in the usual way".

17 Mr Smibert gave evidence that, in April 2002, Mr Stoten again explained the scheme to him and accepted that he told Mr Stoten that he did not "feel comfortable" about receiving dividends in cash. Mr Smibert recorded his

concerns in a letter he wrote to both Glenn and Adam Hargraves and Mr Stoten. In his letter Mr Smibert said, among other things:

> "You will recall, that upon learning of company monies being sent to Jersey, that I expressed my concern. Admittedly, financial management is not among my talents. Despite the assurances given about the propriety of such an arrangement, I elected not to utilise the 'Jersey' facility personally. This was not a criticism of any of you. When described as 'ignorant' on the subject, I accept that, but nevertheless I question the ethics and legitimacy of such an arrangement.
>
> At the time that the share agreement was established, it was verbally agreed that I would not use the 'Jersey facility' as I elected to pay tax on all my dividend. This week however, I learned that my declaring the full amount of my dividend to the A.T.O. would jeopardise my fellow share holders standing with the Taxation dept. It is surely your business how and when you pay your tax but I am now left in a regrettable position."

Mr Smibert sent with the letter a letter of resignation as a director of PDC.

18 Later, on 14 February 2004, Mr Egglishaw was detained by Australian authorities. Mr Feddema gave evidence that on the day Mr Egglishaw was detained, Mr Adam Hargraves and Mr Stoten contacted him and told him that Mr Egglishaw had been "apprehended" in Melbourne.

19 The trial judge sentenced the appellants on the basis that the verdict returned by the jury (convicting the appellants of the second count but acquitting them of the first count) was consistent with the jury regarding Mr Smibert's dealings with the appellants in April 2002 as pointing out to them that what they were doing was dishonest. The Court of Appeal was later to hold that the apprehending of Mr Egglishaw was the proper explanation of the different verdicts. For present purposes, nothing turns on which event was treated as the watershed.

The impugned direction

20 The trial judge told the jury that his summing-up would fall into four parts: first, some general matters; second, "something about the process of assessing evidence and assessing credibility"; third, directions on the law to be applied; and, fourth, a conclusion.

21 As earlier noted, the appellants alleged, in the Court of Appeal, that the trial judge erred in the instructions he gave in the second area: "the process of assessing evidence and assessing credibility". The appellants submitted, successfully, that the trial judge's directions on these matters had contravened a rule said to be established by this Court's decision in *Robinson v The Queen*[7].

22 What the trial judge told the jury on these matters and some other subjects dealt with in the charge were summarised in Powerpoint slides shown to the jury during the judge's charge. Copies of the slides were given to the jury to take with them into the jury room when they retired to consider their verdict.

23 Two slides dealt with a subject described as "Credibility". The slides, taken together, set out a list of subjects to which attention could be given in assessing evidence and assessing credibility. The slides read:

"
- Demeanour and presentation
  - Nervousness
  - Evasiveness
  - Care and attentiveness
  - Memorising
- Sources of knowledge
  - Opportunity to observe
  - Reliance on statements of others
- Likelihood
- *Interest*
  - Friendship
  - *Self protection*

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7 (1991) 180 CLR 531; [1991] HCA 38.

- Comparison with known facts
- Comparison with documents
- Accept in whole or in part
- Lies". (emphasis added)

24 In his oral instructions the trial judge introduced the subject by telling the jury that "[t]here are a number of techniques that you can use in assessing truthfulness and reliability; that is in assessing credibility". He invited the jury to take notes of the techniques and said that "[i]n using these techniques remember that any one of them can be misleading as well as helpful". The trial judge then developed each of the particular subjects indicated on the slides. Of the subject described as "Interest" he said:

> "Does the witness have an interest in the subject matter of the evidence? For example, friendship, *self-protection*, protection of the witness's own ego. There are any number of personal interests which people have and which they sometimes try to protect in giving evidence." (emphasis added)

25 The trial judge completed the part of his charge that dealt with the assessment of witnesses, first, by telling the jury in unexceptionable terms that they could "accept the evidence of a witness in whole, in part or not at all" and, second, by giving the jury some directions about lies. In that context the trial judge said that the jury should remember that "a lie does not prove the opposite of what was said in the lie", that "[a] lie by an accused person does not prove guilt" and that "[t]he Crown always carries the onus of proving the case even against a liar".

26 At the next available opportunity, trial counsel for Mr Stoten, with the support of trial counsel for Mr Adam Hargraves, took exception to what the trial judge had said to the jury about a witness's interest in the case and "self-protection". Trial counsel submitted that what the trial judge had said was contrary to a rule or principle established by this Court in *Robinson* forbidding a trial judge from inviting the jury to assess the credibility of evidence given by the accused by reference to the accused's interest in the outcome of the trial. They submitted that the jury should be discharged. The trial judge rejected the application saying, among other things, that the direction did not refer to any interest in the outcome of the case and that it was a direction about Mr Feddema's evidence.

Court of Appeal

27 On appeal to the Court of Appeal, Muir JA (with whose reasons the other members of the Court agreed) concluded[8] that what the trial judge had told the jury "would not have been understood by the jury 'as meaning that the evidence of [each] appellant had to be scrutinised more carefully [than] that of any other witness'" (as had the direction which was the subject of consideration by this Court in *Robinson*). Rather, Muir JA concluded[9] that taken in the context in which it was given (as "the seventh point in a nine point treatise on the assessment of credibility") "the direction was unlikely to have been given much prominence by jurors". Yet being of the opinion that "recent authority favours a rigorous application of the *Robinson* principle", Muir JA concluded[10] that what the trial judge had said "breached the prohibition against the giving of a direction, directly or indirectly, to evaluate the reliability of the evidence of an accused on the basis of the accused's interest in the outcome of the trial".

28 Having thus concluded[11] that, in the words of the Queensland form of the criminal appeal statute[12], "on any ground whatsoever there was a miscarriage of justice", Muir JA went on to consider[13] the application of the proviso[14]: whether, notwithstanding the conclusion that the point raised by the appeals might be decided in favour of the appellants, no substantial miscarriage of justice had actually occurred. As already noted, his Honour concluded[15] that no substantial miscarriage had occurred.

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8 [2010] QCA 328 at [128], quoting from *Robinson v The Queen* (1991) 180 CLR 531 at 536.

9 [2010] QCA 328 at [128].

10 [2010] QCA 328 at [129].

11 [2010] QCA 328 at [130].

12 *Criminal Code* (Q), s 668E(1).

13 [2010] QCA 328 at [150]-[159].

14 *Criminal Code* (Q), s 668E(1A).

15 [2010] QCA 328 at [130], [159].

29 It is convenient to begin examination of whether the third of the grounds identified in the criminal appeal statute ("on any ground whatsoever there was a miscarriage of justice") was established by considering what was decided in *Robinson*.

The decision in *Robinson*: a rule?

30 The appellant in *Robinson* was tried for rape. The complainant gave evidence that she "consented" to intercourse after a struggle and as a result of threats. The appellant gave evidence that the complainant's consent had been freely given.

31 The trial judge directed[16] the jury about the assessment of the credibility of witnesses. Twice he suggested to the jury that the appellant had a greater interest in the outcome of the case than anyone else and that, as a result, the jury might say that they should look at his evidence "closely". Early in his charge the trial judge suggested that the jury might say that they should look at the appellant's evidence "more closely than perhaps we would look at [the evidence of] others". Later, in the charge, the trial judge said:

> "Another test [by which to assess the credibility of witnesses] was what interest does a witness have in the outcome of a case? If you thought a witness had a large interest in the outcome you, as the judges of the facts, might well conclude that you should scrutinise that witness's evidence closely. You might think – it is a matter solely for you – that the accused had the greatest interest of all the witnesses you saw and heard and that, therefore, you should scrutinise his evidence closely."

Trial counsel for the appellant in *Robinson* did not ask for either of these directions to be withdrawn but did ask the trial judge to direct the jury "that the complainant also had an interest in the outcome of the case". In the course of giving a further direction along the lines that trial counsel had sought, the trial judge reminded the jury that he had suggested that "you might well conclude that the accused has the greatest interest of all the witnesses" and that the jury "might think that the greater the interest the more carefully you should scrutinise a witness's evidence". The trial judge told the jury that they might conclude that

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16 The relevant parts of the directions are set out at (1991) 180 CLR 531 at 533-534.

the complainant also had an interest in the outcome of the case and that "the interest in the outcome of the case test" was to be applied "to all the witnesses if you believe that test is applicable".

32 On appeal to this Court, the Court concluded[17] that the directions the trial judge had given "had the effect that the evidence of the appellant had to be scrutinised more carefully than the evidence of any other witness, including the complainant, for no reason other than that he was the accused". That is, the Court concluded[18], that

> "the directions virtually had the effect that the appellant was to be treated as a 'suspect witness' in the same way as an accomplice, a complainant in a sexual case and a young child have been treated as 'suspect witnesses', that is, as witnesses whose evidence is to be accepted only after most careful scrutiny[19]".

33 Counsel for the respondent in *Robinson* had accepted[20] in this Court that an express direction to the effect identified "would have been a clear misdirection". This being so, it followed that the appeal was allowed.

34 The relevant legal point having been accepted in *Robinson*, without argument except as to its application to the particular directions given at trial, there are evident difficulties in treating the case as having established some new rule or principle. And that *Robinson* was not intended to establish some new rule or principle is suggested by the caveat which was entered[21] in the reasons of the Court:

> "Nothing in the above is intended to suggest that the evidence of an accused person is not subject to the tests which are generally applicable to

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17 (1991) 180 CLR 531 at 535.

18 (1991) 180 CLR 531 at 535.

19 See *R v Hester* [1973] AC 296 at 324-325; *Longman v The Queen* (1989) 168 CLR 79 at 85, 104-105; [1989] HCA 60.

20 (1991) 180 CLR 531 at 535.

21 (1991) 180 CLR 531 at 536.

> witnesses in a criminal trial. Thus, in examining the evidence of a witness in a criminal trial – including the evidence of the accused – the jury is entitled to consider whether some particular interest or purpose of the witness will be served or promoted in giving evidence in the proceedings. But to direct a jury that they should evaluate evidence on the basis of the interest of witnesses in the outcome of the case is to strike at the notion of a fair trial for an accused person. Except in the most exceptional case, such a direction inevitably disadvantages the evidence of the accused when it is in conflict with the evidence for the Crown."

35 Whether *Robinson* did establish some new rule or principle is not unimportant. Understanding the content of the principle that was applied is assisted by identifying whether the Court sought to establish some new principle or, as counsel for the respondent submitted, did no more than apply pre-existing principle to the facts and circumstances of the particular case.

36 Subsequent decisions of the Court refusing special leave to appeal in *Stafford v The Queen*[22] and *Ramey v The Queen*[23] emphasised that trial judges should not give a direction to evaluate the evidence of an accused on the basis of the accused's interest in the outcome of the case. And while there was reference in *Ramey*[24] to "the principle laid down by this Court in *Robinson*", there was not in either *Stafford* or *Ramey* any occasion to explore the principle that was engaged.

37 Later decisions of intermediate courts generally treated[25] *Robinson* as standing "for a rigorous principle to be faithfully applied"[26]. But the "principle" for which *Robinson* was treated as standing was usually stated negatively: a trial judge should not direct a jury to evaluate an accused's evidence on the basis of

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22 (1993) 67 ALJR 510.

23 (1994) 68 ALJR 917.

24 (1994) 68 ALJR 917 at 917.

25 See, for example, *R v Brotherton* (1992) 29 NSWLR 95; *Asquith* (1994) 72 A Crim R 250; *R v Brown* [1995] 1 Qd R 287; *Haggag* (1998) 101 A Crim R 593; *Morris v The Queen* (2006) 201 FLR 325; cf *R v McMahon* (2004) 8 VR 101.

26 *Haggag* (1998) 101 A Crim R 593 at 598 per Callaway JA.

the accused's interest in the outcome of the case. Such a negative statement does not identify the content or source of the relevant principle in a way that permits its application except by some mechanical comparison between those forms of words that have passed muster and those that have not.

38 This is not a satisfactory form of "rule" or "principle". And *Robinson* did not establish or apply any new or distinct rule or principle that is to be expressed in the negative terms identified. Rather, the decision in *Robinson* depended upon a more basic principle which, examination will show, stems from the fundamental features of a criminal trial. Examination will also show that this more basic principle is the foundation for several decisions which are sometimes treated as if they establish separate and distinct rules governing what may or may not be said in instructing a jury. To identify that principle it is necessary to begin by recognising what was the question at issue in *Robinson* and what is the question at issue in these matters.

39 In both *Robinson* and the present case the immediate question was and is whether on any ground whatsoever there was a miscarriage of justice at the trial. The appellants' allegation in this case that there was a misdirection was not an allegation of any of the other grounds of appeal identified in the common form criminal appeal statute. It was not an allegation that the verdict of the jury should be set aside on the ground that it was unreasonable or cannot be supported having regard to the evidence; it was not an allegation of the wrong decision, at trial, of any question of law.

40 The governing principle applied by the Court in *Robinson* was not identified as being new. Rather, the Court directed[27] attention to whether the directions that were given at trial constituted a miscarriage of justice because they affected the fairness of the trial and, in particular, did so by undermining "the benefit" which the "presumption [of innocence] gives to an accused person". That is, the Court determined whether there was on any other ground whatsoever a miscarriage of justice by applying a principle which, when stripped of the rhetorical overtones that may be sounded by reference to "the presumption of innocence", directed attention to the fundamental features of a criminal trial.

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27 (1991) 180 CLR 531 at 536.

41 The plurality in *RPS v The Queen*[28] described those features as being that "a criminal trial is an *accusatorial* process in which the prosecution bears the *onus* of proving the guilt of the accused *beyond reasonable doubt*" (emphasis added). Or, as the Court put the same point in *Robinson*[29], "the jury must act on the basis that the accused is presumed innocent of the acts which are the subject of the indictment *until they are satisfied beyond reasonable doubt that he or she is guilty of those acts*" (emphasis added). These being the fundamental features of a criminal trial, it follows that the judge's instructions to the jury must accord with them and departure from them would be a miscarriage of justice.

42 As has been repeatedly pointed out[30], the judge in a criminal trial must accept the responsibility of deciding what are the real issues in the case, must tell the jury what those issues are, and must instruct the jury on so much of the law as the jury needs to know to decide those issues. The trial judge may, but need not, comment on the facts of the case[31]. The trial judge may, but need not, suggest how the jury might evaluate the credibility of evidence that has been given. In

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28 (2000) 199 CLR 620 at 630 [22]; [2000] HCA 3.

29 (1991) 180 CLR 531 at 535-536.

30 *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3. See also, for example, *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [143]; [1999] HCA 32; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; *Zoneff v The Queen* (2000) 200 CLR 234 at 256-257 [56]; [2000] HCA 28; *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49]; [2001] HCA 25; *KRM v The Queen* (2001) 206 CLR 221 at 259 [114]; [2001] HCA 11; *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115]; [2001] HCA 46; *Jenkins v The Queen* (2004) 79 ALJR 252 at 257 [28]; 211 ALR 116 at 122-123; [2004] HCA 57; *De Gruchy v The Queen* (2002) 211 CLR 85 at 96 [44]; [2002] HCA 33; *Nicholls v The Queen* (2005) 219 CLR 196 at 321-322 [372]; [2005] HCA 1; *Stevens v The Queen* (2005) 227 CLR 319 at 326-327 [18]; [2005] HCA 65; *Clayton v The Queen* (2006) 81 ALJR 439 at 444 [24]; 231 ALR 500 at 506; [2006] HCA 58; *Tully v The Queen* (2006) 230 CLR 234 at 248-249 [44], 256-257 [75]-[77]; [2006] HCA 56; *Libke v The Queen* (2007) 230 CLR 559 at 590 [86]; [2007] HCA 30; *HML v The Queen* (2008) 235 CLR 334 at 386-387 [121]; [2008] HCA 16; *R v Keenan* (2009) 236 CLR 397 at 425 [91], 436-437 [133]; [2009] HCA 1; *Pollock v The Queen* (2010) 242 CLR 233 at 251-252 [67]; [2010] HCA 35.

31 *RPS* (2000) 199 CLR 620 at 637 [42].

some circumstances the common law[32] or statute[33] may require the trial judge to give a particular warning to the jury about factual issues. But informing and underpinning all of these requirements is that the judge's instructions to the jury, whether by way of legal direction or judicial commentary on the facts, must not deflect the jury's attention from the need to be persuaded beyond reasonable doubt of the accused's guilt before returning a verdict of guilty.

43 The cases demonstrate that a jury's attention can be deflected from its fundamental task in different ways. *RPS* concerned distraction of a jury from its task by the trial judge's commenting on the failure of an accused to give evidence. The plurality held[34] in *RPS* that in an accusatorial process in which the prosecution has the onus of proving the guilt of the accused beyond reasonable doubt, it will seldom[35] be reasonable to expect that the accused will give evidence and that it therefore follows that it will seldom be right to draw any inference (of the kind dealt with in *Jones v Dunkel*[36]) from the accused's failure to do so. Thus a direction to the jury that it may have been reasonable to expect some denial or contradiction from the accused, if such a denial or contradiction were available, was held[37] to be contrary to fundamental features of a criminal trial: that the prosecution must prove its case beyond reasonable doubt. Those features of a criminal trial entail[38] that the accused is not bound to give evidence.

44 In *Palmer v The Queen*[39], the plurality held that to ask a person accused of sexual offences, in cross-examination, whether that person could offer any reason

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32 See, for example, *Longman v The Queen* (1989) 168 CLR 79; *Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13; *Jenkins v The Queen* (2004) 79 ALJR 252; 211 ALR 116.

33 See, for example, *Evidence Act* 1995 (Cth), s 165.

34 (2000) 199 CLR 620 at 630-636 [22]-[39].

35 cf *Weissensteiner v The Queen* (1993) 178 CLR 217; [1993] HCA 65.

36 (1959) 101 CLR 298; [1959] HCA 8.

37 *RPS* (2000) 199 CLR 620 at 634 [32].

38 *RPS* (2000) 199 CLR 620 at 633 [28].

39 (1998) 193 CLR 1 at 9 [9]; [1998] HCA 2.

or motive for the complainant to lie diminished the standard of proof by strengthening the complainant's credibility. As the plurality in *Palmer* pointed out, absence of proof of a motive for the complainant to lie about the incident in issue "is entirely neutral"[40] and, as a result, the fact that the accused can point to no reason for the complainant to lie is "generally irrelevant"[41]. To introduce an inquiry into why would the complainant lie would focus the jury's attention on irrelevancies by inviting the jury to accept the complainant's evidence unless there were some demonstrated motive to lie. That would deny that the trial is an accusatorial process in which the prosecution bears the onus of proving the offence beyond reasonable doubt.

45 *Robinson*, too, is to be seen as a particular application of this more general principle. Inviting a jury to test the evidence given by an accused according to the interest that the accused has in the outcome of the trial, or suggesting that the accused's evidence should be scrutinised more carefully than the evidence of other witnesses, deflects the jury from recognising and applying the requisite onus and standard of proof. It is for the prosecution to prove its case, not for the accused to establish any contrary proposition. The instructions which a trial judge gives to a jury must not, whether by way of legal direction or judicial comment on the facts, deflect the jury from its fundamental task of deciding whether the prosecution has proved the elements of the charged offence beyond reasonable doubt.

46 The principle that is identified is expressed at a high level of abstraction: did the judge's instructions deflect the jury from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt? Directions given by a trial judge can often be assessed against that principle by observing no more than that the judge has so instructed the jury that it would be open to the jury to evaluate an accused's evidence on the basis of the accused's interest in the outcome of the trial. It is to be emphasised that trial judges must not instruct juries in that way: whether as a direction of law or as a judicial comment on the facts of the case. And it should also be emphasised that nothing that is said in these reasons should be understood as diminishing the need for intermediate courts of appeal to insist upon the observance of this requirement. Whether there has been on any other ground whatsoever a

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40 (1998) 193 CLR 1 at 9 [9].

41 (1998) 193 CLR 1 at 7 [7].

miscarriage of justice must always require consideration of the whole of the judge's charge to the jury. In every case, the ultimate question must be whether, taken as a whole, the judge's instructions to the jury deflected the jury from its proper task.

Misdirection?

47 In this matter there was a real and lively issue about whether Mr Feddema's evidence of what he knew about the scheme and what he had told the appellants about the scheme was full and frank. As noted earlier, it was suggested to Mr Feddema, in cross-examination, that his evidence was neither full nor frank and that he had a distinct and pressing interest not to give evidence that would show that he had known how the scheme would work or that he had given a truthful explanation to either of the appellants or to Mr Glenn Hargraves of how the scheme would work. And in their closing addresses trial counsel for each appellant laid emphasis on these matters.

48 Taken in the context of the whole of the instructions from the trial judge, both the oral directions given about using the possible interest of witnesses in assessing their credibility, and the Powerpoint slides on that subject that were given to the jury, would have been understood by the jury as directed to the evidence of Mr Feddema. It may be accepted that those directions *could* have been understood as capable of application to the evidence given by the appellants. But the trial judge referred to two kinds of interest: friendship and self-protection. At no point did the trial judge refer to the outcome of the case as a matter in which a witness could have an interest. As Muir JA rightly concluded[42], the direction was unlikely to have been given much prominence by jurors and "would not have been understood by the jury 'as meaning that the evidence of [each] appellant had to be scrutinised more carefully [than] that of any other witness'". The impugned direction differed in both its form and its effect from that considered in *Robinson*. Almost immediately after giving the impugned direction the trial judge told the jury that "[a] lie by an accused person does not prove guilt" and that "[t]he Crown always carries the onus of proving the case even against a liar".

49 Read as a whole, the instructions which the judge gave were not such as would deflect the jury from its task of deciding whether the prosecution had

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42 [2010] QCA 328 at [128] (footnote omitted).

proved its case beyond reasonable doubt. There was not, therefore, a miscarriage of justice occasioned by the trial judge giving the impugned directions.

50 It follows that the Court of Appeal was right to dismiss the appellants' appeals against conviction but should have done so on the footing that the appellants had not established that on any ground whatsoever there was a miscarriage of justice. Each appeal to this Court should be dismissed.

51 HEYDON J. The appellants took as their starting point the opinion of the Court of Appeal of the Supreme Court of Queensland that the trial judge had "breached the prohibition against the giving of a direction, directly or indirectly, to evaluate the reliability of the evidence of an accused on the basis of the accused's interest in the outcome of the trial."[43] The appellants described this as a breach of "the prohibition in *Robinson v The Queen*"[44]. The appellants focussed their attention on the Court of Appeal's decision to "apply the proviso", ie s 668E(1A) of the *Criminal Code* (Q). They contended that it was wrong to apply the proviso for two main reasons. The first was that s 668E(1A) was in substance inconsistent with s 80 of the Constitution, requiring that trials on indictment of offences against laws of the Commonwealth be by jury. Secondly, it was said that a breach of "the prohibition in *Robinson v The Queen*" was a significant breach of the presuppositions of a procedurally fair trial by jury and hence not curable by an application of the proviso. The terrain to which each of these reasons relates is largely unexplored. Each was thus of great interest to the appellants and the numerous intervenors. The appellants came fully prepared to argue these two points.

52 However, the respondent in each appeal challenged the starting point of the appellants, and contended that the Court of Appeal was wrong to criticise the summing up in the way that it did. The appellants defended the Court of Appeal by submitting that the trial judge's summing up is to be interpreted as containing a direction to the jury that in assessing their credibility it was relevant to take into account their interest in protecting themselves from conviction. A consideration of the summing up as a whole reveals that it will not bear that interpretation. Hence there was no misdirection about the burden or standard of proof. It follows that there was no miscarriage of justice, that the question of applying the proviso does not arise, that the contentions of the appellants that, if the question of applying the proviso arose, it should not be applied for the reasons they advanced do not need to be dealt with, and that the appeals to this Court should be dismissed.

53 It is therefore not necessary to examine closely various issues which either were raised in argument by members of the Court but were far from fully dealt with in argument, or were not raised in argument at all. One question which was raised was: to what extent can *Robinson v The Queen* be regarded as an authority in view of the scanty nature of the argument in that case, its non-examination of authority, the somewhat extreme character of the judge's direction, and the

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43 *R v Hargraves & Stoten* [2010] QCA 328 at [129].

44 (1991) 180 CLR 531; [1991] HCA 38.

concession which prosecution counsel made in this Court? Another group of questions less explicitly raised relate to the following two sentences[45]:

> "in examining the evidence of a witness in a criminal trial – including the evidence of the accused – the jury is entitled to consider whether some particular interest or purpose of the witness will be served or promoted in giving evidence in the proceedings. But to direct a jury that they should evaluate evidence on the basis of the interest of witnesses in the outcome of the case is to strike at the notion of a fair trial for an accused person."

The second sentence forbids a certain type of "direction". Does the first permit directions? Or does it merely leave it open to the jury to reason by reference to the interest of the accused, unassisted by any directions at all about the dangers in that course, or at least any directions of the kind forbidden in the second sentence?

54 A question not raised at all in argument before this Court was: does *Robinson v The Queen* rest on ideas so obscure or unconvincing as to lead to diversity and bewilderment among trial judges?

55 All the questions so far identified are related to the type of issue associated with *Palmer v The Queen*[46] – a case not discussed in argument, save in its references to *Robinson v The Queen*. The difficulty is illustrated by the facts of *Robinson v The Queen*. That was a rape case in which the accused admitted intercourse but denied non-consent. A jury would inevitably be struck by the circumstance that someone on trial for rape who puts in issue only non-consent has a great deal to lose by not presenting the strongest possible testimony supporting consent. The jury would also be likely to think that a witness complaining of rape may have a lot to lose if a jury experiences a reasonable doubt about the correctness of her testimony. And the jurors might well ask themselves: "She has suffered many disadvantages in going to the police and now in coming to the court: why should she lie?" *Palmer v The Queen* forbids the questioning of the accused about whether he could suggest any motive in a complainant to lie, and also forbids the prosecution asking rhetorical questions along those lines in address[47]. But the law does not require that the jury be directed not to ask themselves why a complainant would lie.

56 The issues raised by *Robinson v The Queen* and *Palmer v The Queen*, so far as they relate to the burden and standard of proof, are, as the plurality point

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45 *Robinson v The Queen* (1991) 180 CLR 531 at 536.

46 (1998) 193 CLR 1; [1998] HCA 2.

47 *Palmer v The Queen* (1998) 193 CLR 1 at 7-10 [8]-[11].

out[48], with respect correctly, also related to the role of silence on the part of the accused. That topic was not discussed at all in argument. Authorities in this Court like *RPS v The Queen*[49] and *Azzopardi v The Queen*[50] have settled the law, but only over the type of dissenting judgment which is usually described as "strong" – by McHugh J in the first case and by Gleeson CJ and McHugh J in the second. The present case is not a satisfactory occasion on which to consider the connections between these authorities and between the large and difficult questions each of them throws up, or their relationship with the burden and standard of proof. A detailed examination of those issues must await another case in which their centrality to the outcome ensures that the attention of the litigants will be riveted on them and that the litigants will therefore be fully prepared to deal with them. In short, it is not necessary to deal with the wide issues related to *Robinson v The Queen*, *Palmer v The Queen* and *Azzopardi v The Queen*. Since it is not necessary to do so, it is not desirable to do so.

57 The appeals should be dismissed.

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48 See above at [43].

49 (2000) 199 CLR 620; [2000] HCA 3.

50 (2001) 205 CLR 50; [2001] HCA 25.