HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, GORDON AND EDELMAN JJ

JASON TROY McKELL APPELLANT

AND

THE QUEEN RESPONDENT

McKell v The Queen
[2019] HCA 5
13 February 2019
S223/2018

ORDER

1. *Appeal allowed.*

2. *Set aside the order made by the Court of Criminal Appeal of the Supreme Court of New South Wales on 8 December 2017 and, in its place, order that:*

   (a) the appellant's appeal to that Court be allowed;

   (b) the appellant's conviction be quashed; and

   (c) a new trial be had.

On appeal from the Supreme Court of New South Wales

Representation

D Jordan SC with A L Bonnor for the appellant (instructed by Elie Rahme & Associates Pty Ltd)

W J Abraham QC with L K Crowley QC for the respondent (instructed by Director of Public Prosecutions (Cth))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

McKell v The Queen

Criminal practice – Trial – Summing-up – Where appellant convicted of drug-related offences – Where trial judge made comments on evidence that went beyond arguments advanced by prosecution – Whether comments apt to create danger or substantial risk that jury might be persuaded of appellant's guilt – Whether comments so lacking in balance as to be exercise in persuading jury of appellant's guilt – Whether comments unfair to appellant – Whether comments resulted in miscarriage of justice.

Criminal practice – Trial – Summing-up – Whether trial judge may make comments which convey his or her opinion as to proper determination of disputed issue of fact to be determined by jury.

Words and phrases – "comment on the facts", "discretion to comment", "disputed issue of fact", "duty to give fair and accurate instructions", "fair trial", "fairness", "fundamental task of a trial judge", "lacking in balance", "miscarriage of justice", "overawing the jury", "right to comment", "strong Crown case", "summing-up".

1 BELL, KEANE, GORDON AND EDELMAN JJ. In *RPS v The Queen*[1], Gaudron A-CJ, Gummow, Kirby and Hayne JJ, while discussing "the difficult task trial judges have in giving juries proper instructions", adverted to the view that "has long been held that a trial judge may comment (and comment strongly) on factual issues"[2]. Their Honours went on to say that[3]:

> "although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel." (emphasis in original)

2 This statement in favour of judicial circumspection was made after their Honours had acknowledged that "[t]he fundamental task of a trial judge is ... to ensure a fair trial of the accused"[4]. This fundamental task falls to be performed within a framework in which it is "for the jury, and the jury alone, to decide the facts"[5].

3 A trial judge's "broad discretion"[6] to comment on the facts of the case in a criminal trial is an aspect of the power by which a trial judge discharges the fundamental task of ensuring a fair trial of the accused. The discretion is to be exercised judicially as part of ensuring that the facts of the case are put "accurately and fairly" to the jury[7]. It is not exercisable, at large, independently of the fundamental task described above. A fortiori, the trial judge's summing-up

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1 (2000) 199 CLR 620 at 637 [41]-[42]; [2000] HCA 3.

2 Their Honours cited, by way of example, *Tsigos v The Queen* (1965) 39 ALJR 76 (n).

3 (2000) 199 CLR 620 at 637 [42].

4 (2000) 199 CLR 620 at 637 [41]. See also *Pemble v The Queen* (1971) 124 CLR 107 at 117; [1971] HCA 20.

5 (2000) 199 CLR 620 at 637 [42].

6 *B v The Queen* (1992) 175 CLR 599 at 605; [1992] HCA 68.

7 *Domican v The Queen* (1992) 173 CLR 555 at 561; [1992] HCA 13. See also *Broadhurst v The Queen* [1964] AC 441 at 464.

is not an occasion to address the jury in terms apt to add to the force of the case for the prosecution or the accused so as to sway the jury to either view. For that reason, as the plurality in *RPS* stated, judicial circumspection is required in the exercise of the discretion to comment.

4 In the present case, statements by the trial judge during the course of his summing-up were so lacking in balance as to be seen as an exercise in persuading the jury of the appellant's guilt. The statements were unfair to the appellant and gave rise to a miscarriage of justice. As a result, the appeal must be allowed and the appellant's conviction quashed.

5 In addition, it should be clearly understood that the risk of such unfairness is such that a trial judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury.

The trial

6 The appellant was tried with a co-accused, Mr McGlone, in the District Court of New South Wales on an indictment charging him with: importing a commercial quantity of a border-controlled precursor intended or believed to be for manufacture of a border-controlled drug contrary to s 307.11(1) of the *Criminal Code* (Cth); conspiring to import a commercial quantity of a border-controlled drug contrary to ss 307.1(1) and 11.5(1) of the *Criminal Code*; and dealing with proceeds of crime contrary to s 400.4(1) of the *Criminal Code*[8].

7 The appellant was convicted upon the verdict of the jury and was subsequently sentenced to imprisonment for 18 years and nine months, with a non-parole period of 11 years and nine months[9].

8 The appellant appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of New South Wales ("the CCA"). The sole ground of appeal was that "[t]he Judge's summing up to the jury caused a miscarriage of justice"[10]. The CCA (Payne JA, Fagan J agreeing and Beech-Jones J dissenting) dismissed his appeal.

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8 *McKell v The Queen* [2017] NSWCCA 291 at [1].

9 *McKell v The Queen* [2017] NSWCCA 291 at [1]-[2].

10 *McKell v The Queen* [2017] NSWCCA 291 at [3].

9 The appellant now appeals to this Court, pursuant to a grant of special leave to appeal by Bell and Keane JJ, on the ground that "[t]he CCA erred in finding that the summing up to the jury by the trial judge did not give rise to a miscarriage of justice".

10 In order to appreciate the arguments agitated in this Court it is necessary to understand the evidence adduced by the parties at trial and the trial judge's summing-up to the jury in relation to important aspects of that evidence.

The evidence at trial

11 The appellant was the movements manager of Wymap Group Pty Ltd ("Wymap"), a company that transported freight under bond from cargo terminal operators at the airport to freight-forwarding agencies. On 16 May 2013, a consignment of five cardboard boxes labelled "pijamas" arrived in Sydney, from Chile, on an Emirates flight ("the first consignment"). The ultimate consignee was "Reach Limited", an entity which did not exist. The appellant instructed a Wymap truck driver to collect the consignment and keep it with him, and not to put it in an electronic run sheet. The appellant collected the boxes from him, then drove to meet Mr McGlone at a car park beneath the appellant's residence. The appellant returned with the boxes and told the driver there had been a mistake. The driver noticed that the shrink-wrap on the boxes had been opened and packing tape placed over their labels[11].

12 On 20 May 2013, a consignment of 22 boxes arrived in Sydney ("the second consignment"). Fifteen boxes, each containing five pails labelled "printing transfer adhesive", contained crystalline pseudoephedrine weighing 77,708.7 g in total. The ultimate consignee was "T-Shirt Printing Australia", an entity which had not ordered the consignment. Shortly after its arrival, the appellant and Mr McGlone met at a cafe to discuss the second consignment[12].

13 Mr McGlone left and purchased flat pack boxes and tape. The appellant then sent a text message to Mr McGlone saying, "Don't forget to tape trial" ("the tape trial text message"). Mr McGlone was observed taping the bases of boxes and loading them into a vehicle. After transferring them to a different vehicle, Mr McGlone drove to a car park beneath a shopping centre complex. He then

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11 *McKell v The Queen* [2017] NSWCCA 291 at [6], [9]-[13].

12 *McKell v The Queen* [2017] NSWCCA 291 at [14]-[16].

sent a text message to the appellant saying that he had spoken with a friend who said the "other one" was "close or here"[13].

14 The appellant phoned the Wymap truck driver and told him that the "one last week" was wrong, but that he now had the "real one". He told him to collect a consignment of 22 boxes and not to put it in his electronic run sheet. The appellant then met the driver and they transferred the boxes to the appellant's vehicle. A short time later police arrested the appellant[14].

15 On 21 May 2013, a third consignment, of two boxes of shampoo bottles, arrived in Sydney. The ultimate consignee was "Reach Limited". The bottles were found to contain 9,962.7 g of crystalline methylamphetamine[15].

16 Subsequently, in the course of a search of the appellant's home, police found $400,150 in cash in a tin box in the appellant's bedroom[16].

17 The appellant's case was that he was an "innocent dupe" in the importation of the prohibited substances by others. He gave evidence denying all knowledge of the contents of the consignments in question.

18 The appellant said he knew Mr McGlone as a former Wymap employee whom he had encountered from time to time at the races. He said that in March 2013, Mr McGlone had suggested to the appellant that Wymap collect clothing freight for Mr McGlone's business. The appellant said that he had previously delivered consignments for other clients on an ad hoc basis, and that his involvement with Mr McGlone was no different.

19 The appellant was cross-examined in relation to the tape trial text message. The appellant's evidence was that he had no idea why he sent that text message. He said that he was "talking horses".

20 The appellant gave evidence that the cash located in the tin box in his bedroom was the product of his success as a gambler. He also gave evidence that he won large amounts gambling in cash. Those winnings were said to be the

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13 *McKell v The Queen* [2017] NSWCCA 291 at [17]-[19].

14 *McKell v The Queen* [2017] NSWCCA 291 at [20]-[21].

15 *McKell v The Queen* [2017] NSWCCA 291 at [23]-[24].

16 *McKell v The Queen* [2017] NSWCCA 291 at [25].

cash in the tin box. The appellant also held a number of online betting accounts which recorded substantial wins and losses. His counsel, in addressing the jury, relied upon the online betting accounts as evidence of the appellant's success as a gambler. In this his counsel was plainly in error, in that the net effect of the wins and losses was that the appellant lost money in the course of his online gambling activities.

The summing-up

21 The trial judge commenced his summing-up with the conventional direction that "[i]f I happen to express any views upon questions of fact you must ignore those views". His Honour referred to his "entitle[ment] to express a view" but noted that he did not propose to try to persuade the jury one way or the other. The trial judge went on to make a number of statements that the appellant contends were distinctly apt to do just that.

22 The first controversial observation by the trial judge concerned the first consignment:

> "There is no evidence that any drug was contained in consignment 1 ... you do not know, in fact, whether anything was taken out of it unless you accept what Mr McKell said ...
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> You really have, depending on what you make of the evidence, *the possibility that there was something in it* which was taken out but, of course, never discovered because the police authorities at that stage were still playing catch-up ...
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> What you have is the *possibility in respect of that consignment that there was something in it that was removed. You would think there would be little point in arranging for this to happen unless there was something in it*, but, as I say, there is actually no evidence that there was anything in it. Nonetheless, what you have is an *organisation of great sophistication* ...
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> So *you might think that a sophisticated organisation* capable of doing that would want to ensure before it arranged to purchase the drugs overseas, presuming no one gives them away for free, to arrange a system whereby it may be able to get them into Australia without them being detected. So that *requires forethought and you would think you would at least want to know* it was all in place before you sourced the drugs". (emphasis added)

23 These comments suggested to the jury that the first consignment may well have contained drugs, the importation of which was the responsibility of the appellant as part of "an organisation of great sophistication". No such suggestion

had been made by the prosecution in its address, or, indeed, at any other point in the trial. The prosecution's reticence in this regard was consistent with a pre-trial ruling by a different judge that while the prosecution could use the evidence of the first consignment to establish context and relationship, to prove the fact of the appellant's agreement with Mr McGlone, and to rebut innocent explanations, the prosecution could not rely on this evidence as evidence of criminal disposition.

24 Further to the trial judge's reference to "an organisation of great sophistication", his Honour went on to say:

> "You would need to ensure that Mr McKell, since he was the man who took the consignments off the Wymap truck, you would need to know he was not going to be on holiday, he was not going to be in hospital, and that if he was available he would do it. You need to know in advance how you might do it: that is, *you might think you would need to know from someone intimately involved in the industry* how this might be accomplished. The object, *obviously, you might think, was to intercept the cargo* before it got to the in-bond warehouse ... so that when it got to the DHL warehouse, if it was checked, everything would be – to use Mr McKell's phrase – kosher: that is, nothing would be detected.
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> Of course, that does not necessarily mean that Mr McKell was the person who came up with the scheme for how it could be gotten in, but *certainly, the system needed to have someone like Mr McKell to actually intercept the cargo and do what did happen ...*
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> You *need to be fairly certain about how it is going to be done and who is going to do it.* You need certainty, because there is too much at risk ... As I have said, this was a *sophisticated operation*; it had to have some certainty about it, otherwise, you waste all the money you spend overseas, you do not make the profits here, and it fails." (emphasis added)

25 In relation to the tape trial text message, the trial judge said:

> "You have, of course, on Monday 20 May 2013 ... a message from Mr McKell using the 655 phone in the false name to Mr McGlone, using the 687 line in the false name, a message *you might think which is very revealing* in relation to what Mr McKell expected to happen. He says to him, 'Don't forget to tape trial'. What was that in relation to, ladies and gentlemen?
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> Mr McKell, when he was asked about this when he gave his evidence, said he had no idea; he did not know why ... *Is not that, I suggest to you,*

> *a very revealing text*, 'Don't forget to tape trial'? What is it that Mr McGlone did that day at Kennards? He bought cardboard boxes and, as you can see in the CCTV, he bought tape, *clear tape this time, not brown tape that might show up* or, perhaps, be more obvious, but clear tapes. What was the tape for? Why did he say, 'Don't forget to tape trial'? He is *obviously not talking about horses, you might think, despite the fact that that is what he said*. Why did he say he had no idea; he did not know why he had said that?
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> *Because it is so obvious*, ladies and gentlemen, you might think that it is a reference to making sure that Mr McGlone gets tape for the repackaging so that the substitution can be made and the cargo delivered back to the Wymap truck and onto [sic] the DHL warehouse under bond and so that no one will realise, in fact, the drugs have been removed." (emphasis added)

26 In relation to the large amounts of cash found in the appellant's possession, and the appellant's suggestion that they were the product of his success as a gambler, the trial judge said:

> "In respect of the William Hill gambling account, you were referred to the fact that he had deposited $131,280 odd for total wins of $539,939, apparently another indication that he was a successful gambler.
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> *The difficulty with that, you might find*, is that he had in fact lost and had to put into the account in order to do that gambling $136,177.73. So between [that and the other account he] ... had lost that money, the total being $254,112.61, a quarter of a million dollars. If *that is an indication, as put to you by* [the appellant's counsel] *that he was a successful gambler, having lost over a quarter of a million dollars, then, you certainly would not want to be an unsuccessful gambler, would you?*" (emphasis added)

27 Counsel for both the appellant and Mr McGlone applied (in the absence of the jury) for the discharge of the jury. In making his application, counsel for the appellant stressed that the prosecution case was a strong one, counsel's point being that, in such a case, fairness requires moderation on the part of the trial judge in summing-up to the jury. The trial judge refused the applications for the discharge of the jury. His Honour did, however, remind the jury of their role as the deciders of fact, and instructed them to disregard any particular view the judge had expressed with respect to the facts.

The Court of Criminal Appeal

28 In the CCA the appellant relied upon the cumulative effect of the trial judge's observations concerning the first consignment, the existence of a "sophisticated organisation", the tape trial text message and the evidence of the online gambling accounts in support of his argument that the summing-up had been so unbalanced as to deny the appellant a fair trial.

29 The majority in the CCA (Payne JA, with whom Fagan J agreed) held that the trial judge's observations did not occasion a miscarriage of justice. Beech-Jones J, dissenting, held that the summing-up did not exhibit "judicial balance", and that the instructions to the jury did not remedy the prejudice occasioned to the appellant.

The parties' submissions

30 It was common ground in this Court, as it was in the CCA, that, "in order to determine whether a summing up is unfairly balanced, it is necessary for it to be considered in its entirety and in the context of the issues and the evidence led in the trial"[17]. The appellant argued, in a number of ways, that the trial judge's summing-up was so unfair to the appellant in its lack of balance that it resulted in a miscarriage of justice.

31 In addition, the appellant invited the Court to state that, as a general rule, a trial judge should not indicate to the jury his or her opinion on the determination of a question of fact that is in dispute between the parties at trial. It was said that, in terms of the judicial function, an expression of the trial judge's opinion on the determination of a disputed question of fact is irrelevant, the determination of a dispute as to the facts being a matter exclusively for the jury. Further, it was said that the expression of a judicial opinion on a disputed question of fact is apt to create a risk that the jury's independent function as the tribunal of fact may be compromised.

32 The respondent argued that the decision of the CCA should be upheld because there is no reason to conclude that the jury were overawed by the trial judge's observations, having regard to the consideration that they may be taken to have acted in conformity with the trial judge's directions that it was their duty to come to their own independent view of the facts.

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17 *Majok v The Queen* [2015] NSWCCA 160 at [31]. See also *Green v The Queen* (1971) 126 CLR 28 at 34; [1971] HCA 55.

33 In addition, the respondent argued that a summing-up is not unbalanced or unfair simply because it reflects the relative strengths and weaknesses of the parties' respective cases.

34 As to the appellant's invitation to this Court to state that the scope for comment on the facts of a case by a trial judge does not include the expression of the judge's opinion on the determination of a disputed question of fact, the respondent argued that a justifiable confidence in the integrity of juries and in their ability to make their own independent assessment of the value of any such judicial comment means that there is no reason to qualify or limit the long-standing entitlement of a trial judge to comment on matters of fact.

Was the summing-up unfair?

35 A trial judge must sum up for the jury the case presented by each of the prosecution and the accused after each side has addressed the jury. In *Domican v The Queen*, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ observed that "the requirement of fairness means that ordinarily the respective cases for the prosecution and the accused must be accurately and fairly put to the jury"[18]. In carrying out this task, it is no part of the trial judge's role to "don[] the mantle of prosecution or defence counsel"[19]. As Gibbs CJ said in *Cleland v The Queen*, "[i]t is clear in principle that a trial judge, when directing a jury in a criminal trial, must hold an even balance between the cases of the prosecution and the accused"[20].

36 Payne JA concluded that "[i]t would have been far preferable if the trial judge did not make the remarks" suggesting the possible presence of illicit substances in the first consignment[21], and that it would "have been far preferable if the trial judge had not engaged in the rhetorical flourish about the [appellant's] gambling losses" given that it "could have been understood by the jury as belittling defence counsel's submissions"[22]. Although Payne JA did not articulate why it would have been "far preferable" for the trial judge to have maintained a

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18 (1992) 173 CLR 555 at 561.

19 *Whitehorn v The Queen* (1983) 152 CLR 657 at 682; [1983] HCA 42.

20 (1982) 151 CLR 1 at 10; [1982] HCA 67.

21 *McKell v The Queen* [2017] NSWCCA 291 at [76].

22 *McKell v The Queen* [2017] NSWCCA 291 at [92].

neutral reticence in relation to these matters, reticence would have been the better course because the remarks in question were quite unnecessary for a fair and accurate summary of the case presented by each of the parties. In addition, the remarks were distinctly apt to persuade the jury of the appellant's guilt.

37 The trial judge's comments with respect to the first consignment encouraged the use by the jury of impermissible reasoning in respect of the first consignment. This was at odds with the pre-trial ruling that evidence of the first consignment could not be used as evidence of tendency. While this error was corrected, the circumstance that it did occur cannot be ignored in gauging the persuasive thrust of the summing-up as a whole.

38 In relation to the trial judge's comments concerning the appellant's online gambling losses, Payne JA concluded that "[f]airness dictated that the trial judge correct" the impression left by the appellant's counsel in his address that the online accounts were evidence of successful gambling, and that this evidence had been presented to the jury in a way that was misleading[23]. If the trial judge had contented himself with an endorsement of the point made by the prosecutor that the online accounts did not show that the appellant was a successful gambler, there could have been no basis for the complaint by the appellant. But the trial judge's observations went beyond necessary correction and were such as gratuitously to belittle the appellant's counsel and, incidentally, to distract from the point that the appellant's evidence was that the cash in the tin box represented proceeds from gambling that did not take place online.

39 Payne JA also observed that "[o]ne unfortunate remark, in a [long and detailed] summing up such as this, did not give rise to a miscarriage of justice"[24]. There might have been some force in that observation had the summing-up not exhibited the other features of concern. But the summing-up must be read as a whole[25], and this was not one "unfortunate" remark.

40 Payne JA characterised the trial judge's comments in relation to the tape trial text message as a "typical and permissible comment by the trial judge about a finding of fact that he carefully explained was a matter for the jury"[26]. It is

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23 *McKell v The Queen* [2017] NSWCCA 291 at [86].

24 *McKell v The Queen* [2017] NSWCCA 291 at [98].

25 *Green v The Queen* (1971) 126 CLR 28 at 34; *B v The Queen* (1992) 175 CLR 599 at 606.

26 *McKell v The Queen* [2017] NSWCCA 291 at [99].

difficult to accept that characterisation. It would not be a cause for satisfaction if these remarks were "typical" of the daily work of trial judges. The content and tone of the trial judge's remarks in relation to the tape trial text message would not have been out of place in a powerful address by counsel for the prosecution. The circumstance that the trial judge had directed the jury that they were the "sole arbiters of the facts"[27] affords no answer to that concern. The vice of these remarks is not so much that the jury may have been confused as to their role as the sole arbiters of the facts, but that the prosecution was being given the advantage of a second address. As Beech-Jones J correctly observed[28]:

> "[A] recognition that the jury were the trier of facts does not address a complaint about an unbalanced summing up, specifically one that seeks to persuade a jury as to what facts they should find".

41 It may also be noted that Payne JA did not consider the trial judge's comments in the sequence in which they were made. By contrast, Beech-Jones J, who considered the three identified aspects of the summing-up sequentially, appreciated the cumulative rhetorical effect of the trial judge's remarks. The sequence of the summing-up rolled persuasively towards the remarks about the tape trial text message.

42 It was submitted for the respondent that there is nothing in the record on which to base a conclusion that the jury were overawed by the trial judge's comments to the extent that they must *necessarily* have disregarded their duty independently to consider the evidence and decide the facts. To put the issue in this way is to misstate it. The issue is not whether the appellant is able to demonstrate that the jury were, in fact, overawed by the trial judge's comments. Speculation as to how the jury reacted in fact to the trial judge's comments is idle. That cannot be known one way or the other. The issue is whether the trial judge's comments were apt to create a "danger" or a substantial risk that the jury might actually be persuaded of the appellant's guilt by comments in favour of the prosecution case made with the authority of the judge[29].

43 In *B v The Queen*[30], Brennan J, with whom Deane J agreed, confirmed the "broad discretion" of a trial judge to comment on the facts and to choose the

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27 *McKell v The Queen* [2017] NSWCCA 291 at [93].

28 *McKell v The Queen* [2017] NSWCCA 291 at [136].

29 *B v The Queen* (1992) 175 CLR 599 at 605-606.

30 (1992) 175 CLR 599 at 605.

language in which to do so, while emphasising that the "comment must stop short of overawing the jury"[31]. The risk identified by Brennan J is the risk that the jury might be overawed notwithstanding that they are told that the decision on the facts is for them because "the language of the judge is so forceful that they may be under the impression that there is really nothing for them to decide or that they would be fatuous or disrespectful if they disagreed with the judge's views"[32]. But there is a further risk, which is of particular concern in the present case, that the jury might be persuaded to convict by what was, functionally, a second address by the prosecution.

44 In concluding that the trial judge's summing-up did not give rise to a miscarriage of justice, Payne JA observed that "[t]his was a very strong Crown case"[33]. It may be accepted that the prosecution case here was indeed a strong one, but the lack of balance in the comments by the trial judge cannot be justified as no more than a reflection of the relative strengths of the arguments made by each side. In some cases where the prosecution case is strong even a neutral summary of that case by the trial judge may sound adverse to the accused, but there is a real and well-recognised difference between the statement of a case and the advocacy of that case[34]. The observations of which the appellant complains were couched in the forceful language of persuasion. Further, the circumstance that a case against an accused person appears a strong one in no way diminishes the obligation of those conducting the trial to ensure that it is a fair one[35].

45 What has sometimes been described as the "right" of the trial judge to comment on the facts of a case is not some form of entitlement standing free of constraints imposed by the judge's duty to give the jury accurate and fair instruction to enable them to arrive at a just determination of the matters of which they are the sole arbiters. Where a trial judge's summing-up so favours the

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31 Citing *Broadhurst v The Queen* [1964] AC 441 at 464.

32 *Broadhurst v The Queen* [1964] AC 441 at 464.

33 *McKell v The Queen* [2017] NSWCCA 291 at [101].

34 See *R v O'Neill* (1988) 48 SASR 51 at 62; *R v Machin* (1996) 68 SASR 526 at 541; *R v Webb* (1997) 68 SASR 545 at 552-553.

35 *Ali v The Queen* (2005) 79 ALJR 662 at 678 [100]; 214 ALR 1 at 22; [2005] HCA 8. See also *TKWJ v The Queen* (2002) 212 CLR 124 at 148 [76]; [2002] HCA 46; *Nudd v The Queen* (2006) 80 ALJR 614 at 645 [162]; 225 ALR 161 at 200; [2006] HCA 9. See also *R v Meher* [2004] NSWCCA 355 at [84].

prosecution as to deny the accused a fair trial, the miscarriage of justice that results cannot be justified or excused by invoking the judge's "right" to comment on the facts. Accordingly, in the present case, Beech-Jones J was right to conclude that the trial judge's summing-up was so unfair in its lack of balance that a miscarriage of justice occurred. In consequence, the appeal must be allowed, the conviction quashed and a new trial had.

The scope for comment

46 What has been said thus far is sufficient to dispose of the appeal. It is desirable, however, to deal with the appellant's further submission because the issue raised in that submission was fully argued, and it is timely to clarify the position. It should be made clear that the risk of unfairness, to either side, involved in the exercise by a trial judge of a "right" to comment that goes so far as to suggest how a disputed question of fact should be resolved is such that that risk should not be courted by trial judges. Further, there may be cases where a trial judge's comments suggest that questions of disputed fact should be resolved by the jury in favour of the defence. Because there is, generally speaking, no appeal from a verdict of acquittal by the jury, the unfairness to the prosecution in such a case could not be remedied. It is desirable to clarify the position with a view to ensuring that injustice of this kind does not occur. The appellant's submission in this respect should be accepted.

47 It is well settled that a trial judge's discretion to comment on the facts should be exercised with circumspection. The need for circumspection is not merely a matter of prudence or politeness[36]. Recently, in *Castle v The Queen*[37], Kiefel, Bell, Keane and Nettle JJ, with whom Gageler J relevantly agreed[38], said, referring to the passages from *RPS* with which these reasons commenced:

> "[U]nless there is a need for comment – as, for example, in dealing with an extravagant submission by counsel – the wise course will often be not to do so. Where the judge chooses to comment, the following statement of Brennan J in *B v The Queen* is to be kept in mind:
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> '[The comment] must exhibit a judicial balance so that the jury is not deprived "of an adequate opportunity of understanding

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36 cf *R v D* (1997) 68 SASR 571 at 581.

37 (2016) 259 CLR 449 at 470-471 [61]; [2016] HCA 46.

38 (2016) 259 CLR 449 at 477 [82].

> and giving effect to the defence and the matters relied upon in support of the defence."'' (footnotes omitted)

48 In *RPS* and *Castle*, the discretion of the trial judge to comment on the facts was located squarely within the duty of a trial judge to assist the jury with a fair and accurate statement of the case presented by each party. That being so, little would be gained by a review of the practice of trial judges in earlier times, when the trial judge occupied a more dominant position in the conduct of criminal trials[39]. The point made in the observations of the plurality in each of *RPS* and *Castle* is that there is a risk that comments that are unnecessary for the performance of the duty to give fair and accurate instructions to the jury may occasion a miscarriage of justice, and so a trial judge should be astute to avoid that risk by refraining from comment that is not so required. These points are most compelling in relation to expressions of opinion by a trial judge as to the determination of disputed issues of fact.

49 In the first place, given that the jury is the "constitutional tribunal for deciding issues of fact"[40], expressions of opinion by a trial judge as to the determination of a disputed issue of fact are hardly consistent with the function of the trial judge as it is now understood. It is difficult to conceive of a situation in which the performance of the trial judge's fundamental task of instructing the jury would be advanced, consistently with the role of the jury, by suggesting the determination of a disputed question of fact, the resolution of such questions being the exclusive province of the jury[41]. Once, perhaps because of disparities in educational opportunities and attainment within the community, it might have been thought that juries would welcome judicial guidance as to the performance of their function that included indications of the judge's view of disputed facts, but it cannot be assumed that today's juries welcome such gratuitous solicitude on the part of the judiciary[42]. Certainly, insofar as today's judiciary is concerned,

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39 See, eg, Langbein, "The Criminal Trial before the Lawyers" (1978) 45 *University of Chicago Law Review* 263 at 284, 295; *Mears v The Queen* [1993] 1 WLR 818.

40 *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16; *MFA v The Queen* (2002) 213 CLR 606 at 621 [48]; [2002] HCA 53; *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65]; [2016] HCA 35.

41 The position is different where there is no real issue raised on the evidence for determination by the jury. See, for example, *Tsigos v The Queen* (1965) 39 ALJR 76 (n).

42 *Kemp* [1995] 1 Cr App R 151 at 155; *R v Collins* [2007] EWCA Crim 854 at [49].

the respect due to juries as the constitutional tribunal of fact strongly supports judicial reticence as to the determination of questions of fact[43].

50 Secondly, there is no little tension between suggesting to the jury what they "might think" about an aspect of the facts of a case and then directing them that they should feel free to ignore the suggestion if they think differently. There is a risk that the jury may actually be swayed by the trial judge's suggested determination. It would be to maintain an altogether hollow and unconvincing distinction to say that, while a trial judge may not go so far in his or her comments as to create a risk that the jury may be "overawed", it is nevertheless permissible for a judge to use language that "makes him [or her] appear a decided partisan"[44].

51 In any event, the jury are likely to be bemused by the tension between the suggestion and the direction. It is difficult to see what good purpose is served by confronting citizens doing jury service with this complication in the due performance of their duty. In *R v Pavlukoff*[45], in the British Columbia Court of Appeal, it was said that:

> "It seems an absurdity for a Judge after telling the jury the facts are for them and not for him, then to volunteer his opinions of facts followed then or later by another caution to the jury that his own opinion cannot govern them and ought not to influence them. If his opinion ought not to govern or influence the jury then why give his opinion to the jury. To a person who is not a lawyer, but has some training in the science of correct thinking and some knowledge of the workings of the human mind, a Judge who expresses his own opinions to the jury is in effect unconsciously perhaps but nevertheless subtly and positively undermining the plain instruction he has given the jury that 'the facts are for them and not for him'; in reality he is in true effect attempting to persuade the jury not to exercise their own minds freely (as in law he has told them they must do) but instead to be guided by the factual conclusions he volunteers to them."

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43 *Director of Public Prosecutions v Rattigan* [2017] IESC 72 at [92].

44 *R v D* (1997) 68 SASR 571 at 581.

45 (1953) 106 CCC 249 at 266-267.

52 There is much force in these observations. They were referred to with approval by Olsson J, with whom Millhouse and Williams JJ relevantly agreed, in *R v Machin*[46], and by Simpson J in *Taleb v The Queen*[47].

53 To accept the appellant's submission on this point is to say nothing that detracts from the duty of a trial judge to direct the jury as to the issues which arise on the evidence for their determination. Further, to accept the appellant's submission on this point is not to deny that there remains scope for comment by a trial judge. It is not difficult to imagine cases where judicial comment, but not an expression of opinion on the determination of a matter of disputed fact, may be necessary to maintain the balance of fairness between the parties. In *Green v The Queen*[48], Barwick CJ, McTiernan and Owen JJ gave, as an example of a case where it would be "proper and indeed necessary" for a trial judge to "restore, but to do no more than restore, the balance", a case where:

> "during the course of a trial, particularly in his address to the jury, counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the minds of the jury that possibilities which are in truth fantastic or completely unreal ought by them to be regarded as affording a reason for doubt".

54 The present case affords another example of an appropriate occasion for judicial comment, in that fairness required that the trial judge correct the impression mistakenly left by the plainly untenable suggestion by the appellant's counsel to the jury that the appellant's online accounts were evidence that the appellant was a successful gambler. A correction of this kind, to correct errors of expression or errors that might otherwise adversely affect the jury's ability to decide the case fairly on the merits, is plainly not objectionable.

55 In the course of argument, it was said for the respondent that to accept the appellant's submission would tend to blur the "bright line" around the "right" of the trial judge to comment, and so introduce undesirable uncertainty in the conduct of criminal trials. In particular, it was said that there may be difficulties in identifying the point at which permissible comment crosses the line into impermissible expression of an opinion on the determination of a disputed question of fact. But there should be little difficulty in a trial judge refraining

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46 (1996) 68 SASR 526 at 540-541; but cf *R v D* (1997) 68 SASR 571 at 578-585.

47 [2006] NSWCCA 119 at [76].

48 (1971) 126 CLR 28 at 33.

from expressions of opinion on the determination of disputed issues of fact. Once it is accepted that the trial judge's "right" to comment is best understood as a judicial power or discretion to be exercised judicially for the purpose of ensuring that the jury have a fair and accurate understanding of what they need to know to do justice in deciding the issues of fact that arise for their determination, any concern about the blurring of what is said to have been previously a "bright line" can be seen to be illusory. The provision by a trial judge of fair and accurate instruction to a jury is not always a matter of "bright lines". It is, however, always concerned with practical fairness to both sides, as has been recognised in statements of high authority such as the passages from *RPS* with which these reasons commenced.

Orders

56 The appeal should be allowed.

57 The order of the CCA should be set aside. The conviction should be quashed. There should be an order for a new trial.

58 GAGELER J. I agree with Bell, Keane, Gordon and Edelman JJ that the tone and content of the trial judge's comments on summing up so much favoured the prosecution as to have given rise to a substantial risk of those comments having persuaded the jury of the appellant's guilt. That conclusion is sufficient to require that the appellant's conviction be set aside on the ground that there has been a miscarriage of justice[49].

59 It being unnecessary to do so in order to dispose of the appeal, I refrain from addressing the general question of when a trial judge may or may not express an opinion on a disputed question of fact consistently with the due administration of justice.

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49 Section 6(1) of the *Criminal Appeal Act 1912* (NSW).