HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MICHAEL ROSS PENNEY APPELLANT

AND

THE QUEEN RESPONDENT

Penney v The Queen (A66-1997) [1998] HCA 51
13 August 1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation:

K V Borick with A J Redford for the appellant (instructed by Scales & Partners)

P J L Rofe QC with J McGrath for the respondent (instructed by Director of Public Prosecutions (South Australia))

CATCHWORDS

Penney v The Queen

Criminal law – Appellant convicted of attempted murder of his wife by setting fire to car – Whether verdict was unsafe or unsatisfactory or productive of a "miscarriage of justice" entitling the appellant to an acquittal or retrial – Significance of a defective police investigation – Whether misdirection on elements of offence and motive – Relevance in this context of marital discord.

Criminal Law Consolidation Act 1935 (SA) s 353.

1 McHUGH J. I agree that this appeal should be dismissed for the reasons given by Callinan J.

2 GUMMOW J. The appeal should be dismissed. I agree with the reasons of Callinan J.

3 KIRBY J. I agree with Callinan J.

4 HAYNE J. I agree with Callinan J.

5 CALLINAN J. This is an appeal from the Court of Criminal Appeal of South Australia against an order dismissing an appeal against a conviction (by a majority verdict) of attempted murder.

Facts

6 Mr Michael Penney (the appellant) and his wife were, on 30 October 1995, on the verge of estrangement. They owned two motor cars, a Magna and a Torana. Mrs Penney was a school teacher who usually drove the Magna to her work. On that date the appellant asked his wife to use the Torana, the car he usually drove. He said he wanted to have the indicators on the Magna checked. On her way to work in the Torana the appellant drove the Magna behind it and signalled his wife to stop by flashing the headlights of the Magna. When she stopped he told her that he had left his briefcase in the boot of the Torana. He then went to the rear of the Torana whilst his wife remained in the driving seat. She heard the boot being opened. There was a pause, and then the appellant indicated to his wife that she might drive away.

7 Another motorist driving behind Mrs Penney's car less than two minutes later noticed an ignited rag protruding from its petrol tank filler. That motorist managed to attract Mrs Penney's attention so that she could stop the car to enable him to extinguish the rag. He saw no cap on the filler to the petrol tank. Police officers found a plastic receptacle in the boot containing about 20 litres of unleaded petrol. There were also various tins and a bottle in the boot, two of which contained a small quantity of methylated spirits. A spent match was floating in one of the tins.

8 The appellant's evidence was that he had bought the 20 litres or so of petrol a few days earlier and had forgotten that he had left it in the boot of the Torana.

The Proceedings in the Supreme Court

9 Both the appellant and the respondent called experts at the trial who were unable to assign a definite cause for the ignition of the rag. Various possible causes were discussed, including innocent and accidental ones. These latter the appellant relied on in the Court of Criminal Appeal for a proposition that the respondent had failed to negative hypotheses consistent with innocence. With respect to this, Duggan J, with whom Doyle CJ and Perry J agreed, said[1]:

> "The principal proposition which Mr Borick [counsel for the appellant] put to the court in relation to the evidence of the expert witnesses was that, of itself, it gave rise to a reasonable possibility that the fire started accidentally. Accordingly, so it was said, the prosecution had failed to prove

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1 *R v Penney*, unreported, Court of Criminal Appeal of South Australia, 21 March 1997 at 8-9.

beyond reasonable doubt that the accused performed the acts which the prosecution relied upon as the actus reus of the offence. This submission seems to proceed on a basic misunderstanding as to the nature of circumstantial evidence and the way in which it is to be approached by a jury. The process of reasoning advanced by the appellant involves isolating the expert evidence and considering whether, on that evidence, a reasonable possibility exists that the incident was accidental.

The role of an expert witness is to express opinions on matters which are not, or are not wholly, within the knowledge and experience of ordinary persons[2]. Opinion evidence in a case such as the present is based on a restricted collection of facts relevant to the expression of the opinion. However, the jury's function when considering the issue to which the opinion evidence is relevant may well involve, as it did in the present case, consideration of a large number of proved circumstances which, for obvious reasons, were not put to the experts. The opinions of the experts are relevant in the ultimate assessment, but they cannot pre-empt the duty of the jury to consider the combined effect of all the circumstances which they find proved.

The prosecution case was that proof of the appellant's deliberate involvement was to be found in other evidence and the jury was entitled to act on that evidence if satisfied that the inference sought by the prosecution was established beyond reasonable doubt. Furthermore the finding for which the prosecution contended was not inconsistent with the views of the experts in the sense that they could not rule out the possibility of human intervention."

10 The appellant argued in the Court of Criminal Appeal that the trial was vitiated by an inadequate police investigation. The criticisms of the investigation and the answers that the respondent made to them are summarised in the reasons for judgment of Duggan J[3]:

"The criticisms of the police investigation are conveniently summarised in Mr Borick's [counsel for the appellant] final address to the jury. He referred to the investigation as 'hopelessly inadequate'. He pointed out that the match found in the methylated spirits had not been retained as an exhibit and that the contents of the methylated spirits bottle had been tipped out and thrown away. He said that the photographs of the scene and car were inadequate and that no tests had been done on the appellant's clothing. He

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2 *Clark v Ryan* (1960) 103 CLR 486; *R v Bonython* (1984) 38 SASR 45 at 46.

3 *R v Penney*, unreported, Court of Criminal Appeal of South Australia, 21 March 1997 at 10-11.

referred to inappropriate tests being done by the technical services officer and criticised the notes which the police made of their investigations.

At the trial the technical services officer was not asked for any opinion as to the cause of the fire so that if his tests were inadequate they could not have affected the outcome of the case. The criticism of the failure to retain the objects referred to and the failure to examine the appellant's clothing appear to be well based and it was appropriate for counsel to bring them to the attention of the jury. However the relevance of these matters is limited. If expert evidence called as part of the prosecution case had been controversial, as may have been the case if the technical services branch officer expressed opinions, then these shortcomings may have been relevant to the quality of that evidence and the extent to which the jury could rely on the investigations and opinions of someone who had performed such an investigation. However this was not the case. If further investigations had been carried out and the objects referred to retained there is a possibility, although it is not certain, that the experts who did give evidence could have provided further information to the court. But speculation on what the evidence might have been is unhelpful. The jury's function was to assess the evidence which was before it.

This was not a case in which the history of the investigation was such that the evidence actually given was clearly unreliable. Nor was the trial made unfair by reason of the investigation. Mr Borick's submissions to the jury are of some relevance to this court when considering all the evidence and circumstances to determine whether the verdict of the jury is unsafe and unsatisfactory. However the investigation cannot be accorded the weight contended for by the appellant's counsel in his submissions before us. As for the learned trial judge, he reminded the jury of Mr Borick's comprehensive submissions on this topic. In my view he was not required to go further and make the strong adverse comments contended for by the appellant.

In summary, therefore, I reject the submission that the appellant was entitled to an acquittal simply by reason of the fact that the experts conceded the possibility that the fire could have been started without human intervention. Furthermore it is of little or no value in the present case to speculate on what might have been revealed if the police investigation had been carried out more thoroughly and appropriately. The jury were required to consider the expert evidence, but the prosecution was entitled to rely on all the proved facts and to invite the jury to convict on the inferences which could be drawn from them."

11 There was no doubt, as the trial judge said, in the course of submissions to him in the absence of the jury, that it was abundantly clear that the prosecution case was that the accused started the fire by throwing a lit match into a tin of methylated spirits.

The Appellant's Grounds of Appeal

12 The appellant appealed to this Court on the grounds that the Court of Criminal Appeal erred in:

1. Failing to properly consider the issue of prejudice or risk of prejudice or the consequences which should follow as a result of an incompetent police investigation.

2. Holding that the learned trial judge properly and adequately instructed the jury on the issue of the incompetent investigation.

3. Treating motive as an item of circumstantial evidence.

4. Deciding that proof of an unhappy marital relationship is sufficient without more to prove a motive to kill.

5. Failing to properly distinguish between motive and intention.

6. Deciding that an evil intent can be inferred from a series of possibilities rather than proven facts.

7. Deciding that the trial judge properly directed the jury as to the order and as to the way in which they should consider the elements of the charge.

8. Deciding the trial judge had properly identified to the jury the overt acts from which the intent to kill could be proven.

9. Holding that "evidence from other sources cast considerable doubt on the explanations which the appellant offered for these occurrences".

10. Failing to find the trial judge had not properly directed the jury as to the manner and way they should take into account the good character of the accused.

11. Finding the majority verdict of the jury was not unsafe and unsatisfactory.

13 Grounds 6, 7, 8, 9 and 10 were not separately developed in argument before the Court. Grounds 3, 4 and 5 were supplemented by a further ground added by leave, that the trial judge failed to direct the jury that if motive were to be relied upon by the prosecution it had to be proved beyond reasonable doubt.

Significance of a Defective Police Investigation

14 The first two grounds were also linked by the appellant in argument with the last ground. It was put that unfairness and incompetence in the process of

investigation by the police, for those reasons alone, would render the verdict unsafe and unsatisfactory: or, to use the language of s 353 of the *Criminal Law Consolidation Act* 1935 (SA), would be productive of a miscarriage of justice entitling the appellant to an acquittal or a retrial[4].

15 In support of these contentions the appellant referred to a statement by Gaudron, McHugh and Gummow JJ in *Jones v The Queen*[5]:

> "In *M v The Queen*[6], the majority said that although the phrase 'unsafe or unsatisfactory' does not appear in s 6, it allows a verdict to be set aside when the verdict is unreasonable or not supportable on the evidence. In the same case, McHugh J said[7] that a 'miscarriage of justice' arises whenever the accused has not had a fair trial according to law or whenever the nature of the evidence, the directions to the jury or the procedures that were followed raise a real doubt as to whether the conviction can be regarded as a safe or just conviction. Having regard to the statements in *M*, there can be no doubt that 'a miscarriage of justice' also occurs when the findings or verdicts of the jury raise a real doubt as to whether a conviction is safe or just."

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4 Section 353 reads as follows:

> "(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
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> (2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.
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> …"

5 (1997) 72 ALJR 78 at 84-85; 149 ALR 598 at 606. See further discussion in *Gipp v The Queen* [1998] HCA 21 at 49 per McHugh and Hayne JJ; at 128 per Kirby J.

6 (1994) 181 CLR 487 at 492 per Mason CJ, Deane, Dawson and Toohey JJ.

7 (1994) 181 CLR 487 at 523.

16 It was put that there was, in effect, a trial process which began at the inception of the investigation leading to the bringing of a charge and that a defective police investigation had so infected that trial process that the trial was not a fair trial.

17 There is no doubt that the police investigation was unsatisfactory in some respects. However these defects were fully exposed to the jury in cross-examination and the address to the jury by the appellant's counsel. There was some reinforcement of the criticism of these defects by the accurate summary of the defence submissions to the jury by the trial judge.

18 The appellant's submissions on these contentions fail at the threshold. They fail because even though a better investigation may, and probably should have, been conducted, there is no general proposition of Australian law that a complete and unexceptionable investigation of an alleged crime is a necessary element of the trial process, or indeed of a fair trial. That is not to give any imprimatur to incomplete, unfair or insufficient police investigations. Indeed there may be cases in which deficiencies in the investigation might be of such significance to a particular case as a whole that the accused will be entitled to an acquittal or a retrial. But that will all depend on the facts of the particular case. Mason CJ in *Jago v District Court (NSW)*[8] may be taken to be alluding to precisely such a possibility in the following passage:

> "Moreover, objections to the discretion to prevent unfairness give insufficient weight to the right of an accused person to receive a fair trial. That right is one of several entrenched in our legal system in the interests of seeking to ensure that innocent people are not convicted of criminal offences. As such, it is more commonly manifested in rules of law and of practice designed to regulate the course of the trial[9]. But there is no reason why the right should not extend to the whole course of the criminal process and it is inconceivable that a trial which could not fairly proceed should be compelled to take place on the grounds that such a course did not constitute an abuse of process."

19 His Honour's remarks in relation to the desirability of a prompt trial apply with equal force to the concept of fairness generally[10]:

> "The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be

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8 (1989) 168 CLR 23 at 29.

9 See *Bunning v Cross* (1978) 141 CLR 54; *R v Sang* [1980] AC 402.

10 (1989) 168 CLR 23 at 33.

protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case."

and as Deane J said[11]:

"The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one."

20 The submission here fails for the further reason that there were numerous factual matters (apart from anything that may or may not have been learnt from a better investigation), which the jury were entitled to take into account to reach a guilty verdict. It could not be put by the appellant that had the investigation been conducted better there was a likelihood that evidence that might have exculpated the appellant would have been available.

21 The appellant referred the Court to several cases in which the concept of fairness was discussed. In *Wyatt v The Queen*[12], the Full Court of the Federal Court dealt with an argument similar to that advanced here with respect to a flawed investigative process. The Court's conclusion was the same as that of the South Australian Court of Criminal Appeal in this case. In *R v Williams*[13] the acquittal stood because the confession relied upon by the prosecution was, in effect, not a voluntary confession because of the accused's drunkenness when it was made. *Boyce v Nunn*[14], which was decided in favour of the accused, is explicable on the ground that there seems to have been a wilful abstention by the police officers in charge of the investigation from interviewing a witness likely to give evidence exculpatory of the accused. *Hallett v The Queen*[15] was decided adversely to the prosecution for a number of reasons, one only of which was that there appeared to have been a wilful abstention by the police investigators to interview and call eight witnesses who might well have given evidence establishing the accused's innocence. The only other case cited, *R v Birmingham*[16], was of a different kind and depended entirely upon its own

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11 (1989) 168 CLR 23 at 57.

12 (1991) 99 ALR 490.

13 (1992) 8 WAR 265.

14 Unreported, Supreme Court of the Northern Territory, 29 May 1997.

15 Unreported, Court of Criminal Appeal of the Northern Territory, 6 October 1995.

16 [1992] *Criminal Law Review* 117.

facts. Each of the cases resulting in an acquittal was so resolved because the deficiencies in the investigation were so important that they operated in fact to deprive the accused of a fair trial.

22 Nothing that was done or omitted to be done in this case constituted unfairness of the kind of which Deane J in *Jago v District Court (NSW)*[17] gave examples:

> "Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience. Thus, it can be said, as a general proposition, that default or impropriety on the part of the prosecution in pre-trial procedures can, depending on the circumstances, be so prejudicial to an accused that the trial itself is made an unfair one. One example is where particulars supplied to an accused have been so inadequate and misleading that an accused has been denied a proper opportunity of preparing his defence. Another is where impropriety on the part of the prosecution has concealed from an accused important evidence which would have assisted him in his defence. In each of those examples, the effect of the default or impropriety could ordinarily be dealt with by orders (eg adjournment, further particulars or new trial) which will avoid unfairness in a subsequent trial or retrial. It is, however, possible to formulate examples of cases in which the effect of default or impropriety on the part of the prosecution would necessarily be that any subsequent trial was unfair to the accused. Thus, one can envisage circumstances in which calculated and unreasonable delay on the part of the prosecution in bringing proceedings to trial had so unfairly and permanently prejudiced the ability of an accused to defend himself that no subsequent trial could be a fair one."

23 The factual matters which the jury were entitled to take into account to reach a verdict of guilty in this case included:

(a) the presence of highly flammable material which had been placed in the boot of the car by the appellant;

(b) the arrangements devised by the appellant for his wife to drive the car;

(c) the presence of the appellant at the boot of the car less than two minutes before the fire was noticed;

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17 (1989) 168 CLR 23 at 57.

(d) the inherent unlikelihood of the explanations given by the appellant for the above;

(e) the unhappy relationship between the appellant and his wife;

(f) the benefits (house, unrestricted custody of his children and insurance) to which the appellant would succeed on his wife's death;

(g) the opportunity of the appellant to ignite and place the rag in the petrol filler;

(h) the expert evidence that the cause of the fire could have been by human agency as well as a consequence of a mechanical or electrical defect.

Directions on the Elements of the Offence and Motive

24 The next argument advanced was in furtherance of grounds 3, 4 and 5 and was that the trial judge misdirected the jury with respect to the necessary elements of the offence, and the relevance of, and onus with respect to intention and motive. The appellant's criticism was particularly directed to this passage in the summing up:

> "If there was a happy marriage, it might be easier to conclude there was no intention on the part of the accused to attempt murder."

25 The appellant submitted that the passage confused intention with motive: if motive is to be relied on then it must be proved beyond reasonable doubt. The appellant argued that the trial judge, having referred to what was, in essence, motive, should have given a direction to that effect.

26 Taken in isolation the passage could have a tendency to confuse motive with intention. The appellant in this connexion relied upon a passage from the unanimous judgment of a New South Wales Court of Appeal of five judges (Street CJ, Hope, Glass, Samuels and Priestley JJA) in *R v Murphy*[18] in which that Court accurately summarised the relevant principle stated in *Chamberlain v The Queen [No 2]*[19], which applies if motive is to be used as a factual basis for an inference of guilt[20]:

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18 (1985) 4 NSWLR 42.

19 (1984) 153 CLR 521.

20 (1985) 4 NSWLR 42 at 59-60.

> "In our opinion it is incorrect to direct a jury that the accused's motive is a 'subsidiary fact' or a non-essential element in the case which does not require proof beyond reasonable doubt but may be proved to the jury's satisfaction or on the balance of probabilities. Motive is not merely a matter which may explain the accused's conduct. It is rather a fact directed to proof of the accused's guilt; as *Chamberlain* makes clear, before a jury can infer guilt from motive they must be satisfied that the motive asserted has been proved beyond reasonable doubt."

27 The difficulty for the appellant in this submission is that the passage in the trial judge's summing up, taken in context, shows that his Honour was not in fact dealing with intention or motive as such but was pointing to evidence with respect to the relationship between the appellant and his wife upon which they could rely for an ultimate conclusion of guilt beyond reasonable doubt. The evidence was cogent for the reasons analogous to those stated by Barwick CJ in *Wilson v The Queen*[21]:

> "It is quite apparent that the nature of the current relationship between the applicant and his wife was relevant to the question to be decided by the jury. Evidence of a close affectionate relationship could properly have been used by the jury to incline against the conclusion, which might otherwise have been drawn from the circumstances, that the applicant killed his wife. Equally, evidence that there had developed mutual enmity could be used to induce the conclusion that he had killed his wife and that his story of an accidental shooting lacked credibility."

28 Furthermore, the existence of marital discord was not disputed at the trial. The appellant himself gave evidence of it.

29 There is nothing in the next submission that the trial judge misdirected the jury with respect to the elements of the offence. The submission was not made out by reference to any alleged defective direction. An examination of the transcript of the summing up shows that the trial judge on more than one occasion identified the essential elements of the offence and stressed the need for proof of each of them. One example will suffice:

> "The crime of attempted murder consists of three elements; you must be satisfied that the prosecution has proved each of them. First, the prosecution

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21 (1970) 123 CLR 334 at 337. The appellant pointed out that *Wilson* concerned a case described as one of "mutual enmity" whereas in this case the evidence was of marital discord. It was for the jury, with the assistance of proper directions, to determine whether the strains in the parties' relationship was relevant to their ultimate conclusion.

must prove a voluntary intention on the part of the accused to kill his wife. Nothing less than a specific intention on his part to kill her is sufficient.

Secondly, the prosecution must prove an attempt to execute that intention to kill, that is to say, the prosecution must prove an act or a series of acts which are immediately directed towards fulfilling that intention.

The third element which the prosecution must prove is that the act was done without any lawful excuse. That is to say, the accused had no lawful reason for doing what he did."

Conclusion and Order

30 The only other submission that was developed was that the verdict was unsafe and unsatisfactory in the sense previously mentioned. The Court of Criminal Appeal carefully considered this ground in accordance with its obligation to do so as formulated in *M v The Queen*[22] and concluded that the verdict was not unsafe and unsatisfactory. In my opinion that conclusion was, on a consideration of the whole of the case, a correct one.

31 I would dismiss the appeal.

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22 (1994) 181 CLR 487.