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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S223 of 2018

BETWEEN:

JASON TROY McKELL
Appellant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

1. It is certified that this outline is in a form suitable for publication on the internet.

Part II: Propositions that the appellant intends to advance in oral argument

The summing up was unfair because it did not exhibit a judicial balance, such that it deprived the jury of an adequate opportunity to understand and give effect to the appellant's defence and the matters relied upon in support of the defence

2. Following conventional remarks concerning the role of the jury in fact finding, the judge went on to identify himself with the jury by providing a "*common sense overview*" of the Crown case (CAB44). In that context, the judge then proceeded upon a sustained effort to persuade the jury of the appellant's guilt.

3. First, the judge raised, for the first time, a suggestion that the first consignment may have contained drugs (CAB45-46). This caused serious injustice to the defence case because it was inconsistent with a pre-trial ruling, by another judge, which allowed evidence of the first consignment to be admitted, on the understanding that the Crown case would not assert that the first consignment contained drugs. Both parties had conducted the trial on this understanding, in accordance with the pre-trial ruling.

4. Secondly, the judge observed that the importation was arranged by "*an organisation of great sophistication*" which would not have proceeded without involvement of "*someone intimately involved in the* [freight] *industry*", and then commented, "*certainly the system needed to have someone like* [the appellant]" (CAB46-49).

5. Thirdly, the judge used forceful language of persuasion to suggest that the text message, "*Dont forget to tape trial*", was "*very revealing*" "*because it is so obvious*" that it referred to repackaging the second consignment after substitution of drugs (CAB60-61). By these comments, the judge conveyed to the jury his opinion that the appellant's evidence on the message could not be believed because it was obviously concerned with the substitution of drugs. This opinion went directly to the appellant's credit and to his defence that he did not know that the consignment contained drugs.

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6. Fourthly, the judge employed a rhetorical flourish to belittle defence counsel and his submissions in relation to the $400,150 seized from the appellant's home (CAB65-67).

7. After refusing to discharge the jury, the judge gave further directions on the jury's role in fact finding (CAB76, 90-91). However, these directions were incapable of curing the prejudice caused by the judge's earlier comments. In particular, the judge's statement "*I have not been endeavouring to express any particular view of the facts*" was inconsistent with the forceful persuasive message already conveyed to the jury.

The summing up resulted in a miscarriage of justice which, on established principles, requires that the appellant's convictions be set aside

8. The sustained endeavours by the trial judge to persuade the jury of his views resulted in a summing up that was unfair, lacking in judicial balance and so partaking of partiality that, on established principles, it rendered the trial a miscarriage of justice (*Green v The Queen*; *B v The Queen*; *RPS v The Queen*; *Castle v The Queen*).

The majority of the Court of Criminal Appeal erred in failing to find that the summing up resulted in a miscarriage of justice

9. First, the majority failed properly to comprehend the cumulative, sequential and overall effect of the trial judge's comments, which was to impart an intensifying impression, adverse to the appellant, of the opinions of the trial judge. For example, Payne JA stated that the first error by the trial judge (as to the possibility of drugs being in the first consignment) was "*immediately corrected*" (CAB191). But the correction was not immediate, and was also after the first error had been exacerbated by subsequent adverse comments, which were not corrected. Moreover, the correction could not be reconciled with the forceful persuasive message already conveyed to the jury.

10. Secondly, the extreme comments by the trial judge about the text message were wrongly characterised by the majority as "*no more than typical and permissible comment*" (CAB99). Uncorrected, this endorsement by a court of intermediate appeal of such forceful persuasion by a trial judge would set a disturbing precedent.

11. Thirdly, the majority was influenced by what the majority described as "*a very strong Crown case*". If anything, the strength of the Crown case made it more important that the defence case be put fairly to the jury (*Meher*). Further, any such proviso type reasoning had no application because the effect of the summing up was to deny a fair trial, constituting a significant denial of procedural fairness (*Taleb, Popovic*).

It should be made clear that, as a general rule, a judge should not indicate to the jury any opinion on the determination of a question of fact that is in dispute

12. The summing up, and the refusal to discharge the jury, proceeded upon the judge's understanding that he was "*entitled to express a view about the facts*" (CAB11, 75).

13. The *obiter* statement in *RPS* that a judge "*may comment (and comment strongly) on factual issues*" requires clarification. If this is taken to confer an entitlement upon a judge to indicate to the jury his or her opinion on the determination of facts in dispute, then it should be reconsidered.

14. The expression of such judicial opinion to the jury serves no purpose in furtherance of a judge's fundamental task of ensuring a fair trial. As a matter of principle and jurisdictional function, such expression of judicial opinion on the determination of disputed facts is irrelevant and, at least, creates a risk that the jury's independent function will be compromised and undermined.

15. This is not cured by standard directions that acknowledge such entitlement, while exhorting the jury to maintain independence. No sensible purpose is served by a direction that a judge is entitled to express an opinion, coupled with a requirement to then neutralise that opinion (if the jury disagrees) or reinforce it (if it accords with the jury's opinion). Such directions are at least confusing and are apt to undermine the delineation between the functions of judge and jury (*Taleb, Odisho*).

Such clarification by this Court would be confined and incremental, as it would only limit the expression of a judge's opinion on the determination of disputed facts, and would be consistent with developments in recent authority

16. The suggested clarification would only limit the expression of a judge's opinion on the determination of disputed facts. So confined, it would not impinge upon more general comment on factual issues, as may otherwise be required as part of a judge's function in assisting the jury in its own independent determination of the facts in issue.

17. Historic felony trials were characterised by judicial dominance. Once counsel could elicit facts, cross-examine and address the jury on those facts, utility of judicial comment on evidentiary issues diminished. In the early 1900s a judge could express an opinion, however strong, provided it fell short of a direction (*O'Donnell*). By mid-century, it was still acceptable for a judge to employ persuasive advocacy on central issues of disputed fact (*Clewer*, *Hoger*, *Tsigos*). By the turn of the 21st century, and since, obsolescence of the entitlement has become increasingly apparent. *RPS* cited *Tsigos*, but urged caution. *Taleb* and *Channel Seven* raised doubt about whether the entitlement is consistent with the modern judicial function; evolution elsewhere was reflected in *Bentley*. Recently, this Court has emphasised restraint (*Hargraves*, *Castle*). Recent observations have gone further – that judges should not communicate personal views that appear to point to a particular verdict (*Popovic, Rattigan*).

18. Clarification that a trial judge should not indicate his or her opinion on the determination of disputed facts would be consistent with the accusatorial system of criminal justice and the jury's central place in its administration (*Baden-Clay, X7*). It would be cognate with the institution of "*trial by jury*" in s 80 of the *Constitution* and its guarantee of democratic participation in the administration of criminal law, itself reflecting a decision that in the exercise of official power, guilt or innocence of a serious offence should be determined by a panel of ordinary citizens (*Alqudsi*).

Dated: 7 December 2018

Dean Jordan **A L Bonnor**