OF

IN THE HIGH COURT OF AUSTRALIA
OF SYDNEY REGISTRY

No. S 223 of 2018

BETWEEN:

JASON TROY McKELL
Appellant

and

THE QUEEN
Respondent

HIGH COURT OF AUSTRALIA
FILED
- 5 OCT 2018
THE REGISTRY SYDNEY

APPELLANT'S SUBMISSIONS

Part I: Certification

1. It is certified that these are in a form suitable for publication on the internet.

Part II: Statement of the issues

2. The issues that arise in this appeal are:

    a. When, if at all, is it appropriate for a trial judge in a criminal trial to indicate to the jury the judge's opinion on a question of fact which is the subject of dispute?

    b. If a trial judge in a criminal trial does indicate his or her opinion on a fact which is the subject of dispute, what directions should be given to the jury in relation to such judicial expression of opinion?

    c. Did the trial judge's summing up result in a miscarriage of justice?

Part III: Notice

3. It is certified that the appellant considers that no notice need be given under s 78B of the *Judiciary Act 1903*.

Part IV: Citation

4. The internet citation of the reasons for judgment of the New South Wales Court of Criminal Appeal (**CCA**) is *McKell v R* [2017] NSWCCA 291.

Part V: Narrative statement

5. On 21 July 2016, in the District Court of New South Wales, a jury found the appellant guilty of a drug importation offence (s 307.11(1) *Criminal Code 1995* (Cth)); a related

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conspiracy offence (s 307.1(1), s 11.5(1) *Criminal Code*); and dealing with proceeds of crime (s 400.4(1) *Criminal Code*). The appellant was sentenced to imprisonment for 18 years and 9 months, with a non-parole period of 11 years and 9 months. The jurisdiction of the District Court to try the indictments, dealt with in the *District Court Act 1973* (NSW) and the *Criminal Procedure Act 1986* (NSW), was conferred by s 68(2) of the *Judiciary Act 1903* (Cth). By of s 68(2) of the *Judiciary Act 1903* (Cth), trial procedure was governed by the *Criminal Procedure Act 1986* (NSW).

6. The appellant was employed as a movements manager by Wymap Group Pty Ltd (**Wymap**), which conveyed freight under bond from cargo terminal operators to freight-forwarding agencies (CAB 167.50). His responsibilities included managing Wymap's truck drivers and ensuring their compliance with security procedures (CAB 167.58).

7. On 13 May 2013, the appellant instructed a Wymap employee to check three airway bills (**AWBs**) (CAB 168.4).

8. On 16 May 2013 a consignment of five cardboard boxes labelled "pijamas" arrived in Sydney, from Chile, on an Emirates flight (**first consignment**) (CAB 168.34). DHL Global Freight Forwarding Pty Ltd (**DHL**) was the nominal consignee as the freight-forwarding agency; the ultimate consignee was "Reach Limited", which did not exist (CAB 168.38). The appellant instructed a Wymap truck driver to collect it and keep it with him, and told him not to put it in an electronic run sheet (CAB 168.42). The appellant collected the boxes from him, then drove to meet the co-accused at the carpark beneath the apartment block where the appellant lived (CAB 168.54). The appellant then returned with the boxes and told the driver there had been a mistake (CAB 169.4). The boxes were transferred back onto the truck; later the driver noticed that shrink-wrap on the boxes had been opened and packing tape placed over their AWB labels (CAB 169.18).

9. On 20 May 2013 a consignment of 22 boxes, originating in Bangladesh, arrived in Sydney (**second consignment**) (CAB 169.32). Fifteen boxes, each containing five pails labelled "*printing transfer adhesive*", contained crystalline pseudoephedrine weighing 77,708.7 grams in total (CAB 169.42). DHL was the nominal consignee; the ultimate consignee was "T-Shirt Printing Australia", which existed but had not ordered the consignment (CAB 169.36).

10. Shortly after the second consignment arrived, the appellant and co-accused met at a café and discussed the second consignment. The appellant tracked that and a third consignment on his iPad (CAB 169.56). The co-accused left and purchased flat-packed boxes and tape (CAB 170.10). Shortly after, the appellant sent the co-accused a text message stating "*Dont forget to tape trial*" (CAB 170.14). The co-accused taped the bases of boxes, transferred them to a white utility vehicle and drove to a carpark beneath a shopping centre (CAB 170.20). He sent a text message to the appellant that he had spoken with a friend and the "*other one*" was close or here (CAB 170.30).

11. The appellant phoned the Wymap truck driver and told him that the one last week was wrong but he now had the real one, and told him to collect a consignment of 22 boxes and not to put it in his electronic run sheet (CAB 170.38). He then met the driver and they transferred the boxes to the appellant's utility (CAB 170.48). A short time later police arrested the appellant (CAB 170.52). Police substituted the boxes with empty boxes which were delivered to the co-accused, who was arrested (CAB 171.10).

12. On 21 May 2013 a consignment of two boxes of shampoo bottles, originating in Abidjan, arrived in Sydney on a British Airways flight (**third consignment**) (CAB 171.26). The consignee was "Rich Limited" [*sic*, Reach Ltd], the same consignee as for the first consignment (CAB 171.28). The bottles contained 9,962.7 grams of crystalline methylamphetamine (CAB 171.34). Subsequently, police found $400,150 in cash in a lock box in the appellant's bedroom (CAB 171.48).

13. The appellant gave evidence at trial. He denied knowledge of the contents of the consignments. He knew the co-accused as a former Wymap employee who he had encountered from time to time from 2003 until 2013 (AFM 14.14-15.16). At the horse races in January 2013 the co-accused said he imported clothing for a business (AFM 17.28-32). Subsequently, the co-accused suggested to the appellant that Wymap collect the clothing freight (AFM 19.34). The co-accused gave the appellant three AWBs and asked him to advise when they would arrive (AFM 20.26-21.36). The appellant had previously delivered consignments for other clients on an *ad hoc* basis (AFM 12.46-13). The $400,150 was gambling winnings, accumulated since the end of 2006 (CAB 182.14). He distrusted banks and was saving for a property (AFM 35.40-50). Family members and friends gave evidence of having observed him receive substantial cash winnings at horseraces; he had told his aunt that he kept a substantial sum of cash; and in 2012 his former girlfriend saw a substantial sum of cash at his

home (CAB 183.50; AFM 32.34-34.34). Between 2006 and 2013 he would place bets "[i]*f not daily, five times a week*" (AFM 22.10).

14. The Crown adduced evidence of the appellant's two online betting accounts (CAB 182; AFM 36-37). The appellant said his method of online betting involved "multi-betting" (such as on trifectas) to try for a big win, which was a different way of gambling from his cash betting on particular horses (AFM 24.56-26.48, 27.44). Between late 2006 and 2013 he deposited about $131,000 into a Sportingbet (William Hill) account, re-gambled amounts that he won and made "total bets" of $676.117.12 with "total wins" of $539,939.39. Over 2012 and 2013 he deposited $112,000 into a Tabcorp account and made "total bets" of $386,906.50 with "total dividends" of $268,970.62 (CAB 182.20; AFM 36-37). The appellant said in relation to those online accounts that they show "*in one there was over a half a million dollar in wins ... there's a fair bit of success. And in the other one there's a quarter of a million in wins*" (CAB 183.1).

Part VI: Statement of argument

15. The trial judge commenced the summing up with conventional remarks, including reminding the jury that they were the judges of the facts and that he had nothing to do with their decisions in relation to the facts, nor with what evidence was accepted as truthful, nor "*what weight you might give to any one particular part of the evidence ... or what inferences you draw*" (CAB 10.52-11.54). At that point, the trial judge said "[i]*f I happen to express any views upon questions of fact you must ignore those views ... I do not, however, propose to try to persuade you one way or the other*" (CAB 11.56-12.10).

16. After summarising the essential elements of the offences, the trial judge commenced to summarise the Crown case, saying he would do so in "*a common sense overview*" (CAB 44.40). His Honour told the jury that the three consignments were "*evidence of a very sophisticated, international organisation capable of sourcing drugs in various countries*", and then stated (CAB 45.36-47.24, emphasis added):

> "*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 ... 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...*
>
> *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**...*

*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 ...*"

17. These comments raised, for the first time, a suggestion that the first consignment may have contained drugs. Such a suggestion was contrary to a pre-trial ruling, by a different judge (Baly DCJ), that the evidence of the first consignment could be used for the limited purposes of context and relationship, for the fact of an agreement, and to rebut innocent explanations, and would not be relied upon by the Crown as evidence of tendency (AFM 8-9). Baly DCJ noted that, given its proposed use, there was no danger the jury would give the evidence more weight than it deserved or engage in impermissible reasoning or speculation (AFM 9-10). Baly DCJ's determination was treated as binding, and during the trial and in closing addresses, both the prosecutor and the appellant's counsel complied with it.

18. In the context of the reference to an "*organisation of great sophistication*", the trial judge went on to state (CAB 49.10-50.14, emphasis added):

> "*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.*
>
> *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**...*
>
> *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.*"

19. In relation to the second consignment, the appellant's counsel had submitted that there was nothing about the appearance of the boxes that would have indicated the contents to the appellant. On this the trial judge said (CAB 59.44-61.38),

> "... *did he appreciate that what was going to happen in the garage was the substitution of the pails...? ...* ***you might find some clue to that in relation to the calls and the very circumstances...*** *Was* [the co-accused] *somehow going to accomplish this with all those pails in the absence of Mr McKell, without Mr McKell being aware of it.* ***You might think that would be unlikely.*** *Why did he have a substitute? ...*
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> *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?*
>
> *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* [the co-accused] *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?*
>
> ***Because it is so obvious,*** *ladies and gentlemen, you might think that it is a reference to making sure that* [the co-accused] *gets tape for the repackaging so that the substitution can be made and the cargo delivered back to the Wymap truck and onto the DHL warehouse under bond and so that no one will realise, in fact, the drugs have been removed.*"

20. In relation to the submissions of the appellant's counsel concerning the $400,150, the trial judge stated (CAB 66.32-60, emphasis added):

> "... *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.*
>
> ***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?***"

21. In relation to how the gambling loss is explained, the appellant's counsel asked the trial judge to take the appellant's evidence, distinguishing between online gambling and cash betting, into account (CAB 69.10-11).

22. After a short adjournment, both defence counsel applied for the jury to be discharged, which the trial judge refused. The trial judge reminded the jury that it was their function to decide the facts and directed them that "[w]*hile I am entitled to express a view about the facts, that is a view that you should ignore unless it happens to accord*

with your own independently arrived-at view" (CAB 75.20-28). He said that he had not been endeavouring to express any particular view and directed the jury, if they thought otherwise, to "*ignore what you think I have expressed in relation to any facts*" (CAB 75.30-34).[1] In relation to the first consignment, the trial judge said, "... *I think I did refer to there being a possibility of it having had drugs in it*" but there was in fact no evidence of this and its relevance was as to system (CAB 75.38-60).

23. The appellant appealed to the CCA under s 5(1) of the *Criminal Appeal Act 1912* (NSW) (**CAA**). By s 6(1) of the CAA, the CCA was to allow the appeal if it was of opinion that, relevantly, there was a miscarriage of justice, subject to the proviso.

10 24. The appellant relied upon a single ground that the summing up caused a miscarriage of justice and raised, in support, the cumulative effect of the trial judge's comments concerning the first consignment, "*sophisticated organisation*", the "*tape trial*" text and gambling evidence. By majority (Payne JA, Fagan J agreeing with additional remarks), the CCA found that the summing up was not unfairly lacking balance (CAB 195.44, 208.14). Beech-Jones J, in dissent, found that the summing up did not exhibit a judicial balance and jury instructions did not remedy the prejudice occasioned, there being too great a contrast between what the trial judge asserted he was not doing (ie, not endeavouring to persuade the jury) and what he in fact did (CAB 207.26).

The summing up resulted in a miscarriage of justice

20 *Principles*

25. A judge's fundamental task is ensuring a fair trial of the accused. The overarching principle relating to the obligation of a trial judge in summing up is 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*": *Domican v The Queen* (1992) 173 CLR 555 at 560-561. Authority requires that any comment on the facts by the trial judge must stop short of overawing the jury; it must exhibit a judicial balance so that the jury is not deprived of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence: *B v The Queen* (1992) 175 CLR 599 at 605 (Brennan J, citations omitted). There is a danger of
30 the jury being overawed by the judge's views where, even though the jury are told that the decision on the facts is for them, the language of the judge is so forceful that they

[1] The trial judge later repeated statements to similar effect: CAB 90.60-91.6.

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 view: *B v The Queen* at 605-606 agreeing with observations in *Reg v Hulse* (1971) SASR 327 at 335.

26. It was necessary in this case that the whole summing up be considered, consistently with the approach described in *Green v The Queen* (1971) 126 CLR 28, which revealed that the trial judge in that case "*presented his own view which was frequently, though not always, unfavourable to the accused*". So too here, as Beech-Jones J's judgment exposes. While the trial judge, as occurred in *Green*, reminded the jury that the facts were for them, the qualities of unfairness, lack of judicial balance and partiality rendered the trial a miscarriage of justice because they pervaded the summing up, as a whole and in context. As in *B v The Queen* at 607, if the jury were going to acquit the appellant, they would have had to be impervious to the language of persuasion, in support of the Crown case, employed by the trial judge in the summing up.

27. The essence of the principle in *Green* was stated in *Majok v R* [2015] NSWCCA 160 at [31] and was referred to by Payne JA, namely, 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*" (CAB 176.36-40). The majority in this case failed to correctly apply these principles.

Summing up as a whole

28. Payne JA referred to the real complaint as being the cumulative effect of the particular comments identified by the appellant. A reading (and re-reading) of the whole of the summing up was required by *Green* and *B v The Queen* and was necessary to address the many overt *and* subtle qualities which attended the presentation by the trial judge. Payne JA found that "[p]*utting these three matters together*"[2] in the context of a "*long and detailed*" summing up, the trial judge did not "*don the mantle*" of prosecution counsel (CAB 195.24-40). His Honour's analysis, however, was considerably narrower than what was required and omitted consideration of highly relevant aspects of the summing up. Importantly, it failed to identify the extent of the qualities of unfairness, the overall lack of judicial balance and the robust language of persuasion which pervaded the summing up.

[2] Payne JA dealt with the comments concerning "*sophisticated organisation*" and first consignment together.

29. Payne JA also considered the trial judge's remarks out of the sequence in which they were made. Correct sequence was necessary to accurately assess the cumulative effect. Most notably, this had the effect of seriously underrepresenting the extent of prejudice to the appellant caused by the comments in relation to the text message (discussed further in [36]-[37] below).

30. Consistently with authority, Beech-Jones J traced through the summing up sequentially and more accurately captured the cumulative and damaging effect of the trial judge's remarks. His Honour considered the four aspects of the summing up which were specifically identified by the appellant, but maintained a focus on the overall complaint that the "*clear impression conveyed... was that* [the trial judge] *was firmly of the view that the correct result*" was a finding of guilty (CAB 196.30-36). Beech-Jones J concluded that the summing up did not exhibit a judicial balance such that it deprived the jury "*of an adequate opportunity of understanding and giving effect to the* [appellant's] *defence and the matters relied upon in support...*" (CAB 207.24-32).

31. Beech-Jones J considered the time spent by the trial judge on each aspect, his use of language and particular phrases (for instance, "*you would think*"), and in context and sequence the passages specifically identified by the appellant. His Honour found that the substantive parts of the trial judge's address "*were a sustained attempt to persuade* [the jury] *of the appellant's guilt*" (CAB 196.8-18), which rendered the trial unfair and occasioned a miscarriage of justice (CAB 196.18). His Honour noted that if the jury accepted the appellant's evidence he had to be acquitted, and that the credibility of his evidence was crucial (CAB 198.42-199.26).

First consignment and "sophistication" of organisation

32. On two occasions Payne JA stated that the erroneous remarks in relation to the first consignment were immediately corrected, which contributed to his Honour's finding that "[i]*t would have been far preferable if the trial judge did not make the remarks*" but that of themselves they did not cause a miscarriage of justice (CAB 188.56-189.16, 191.44, 194.48). The correction was not immediate. It was 29 pages of transcript after the remarks; after the trial judge made the other damaging comments; after an adjournment; and after defence counsel had applied for discharge of the jury. The harm occasioned by the first consignment comments was addressed by the subsequent direction "*to an extent*" (CAB 196.56-197.6) but by the time of these directions an impression had been created of such strength that the correction was incapable of

curing the prejudice. Importantly, the trial judge did not specifically address the prejudice caused by other remarks, in particular, the forceful, persuasive language concerning the "*tape trial*" text message.

33. The comments on the first consignment caused serious injustice to the defence case. Besides indicating strongly the opinion of the trial judge that drugs may have been in it, they introduced the possibility of the jury employing impermissible tendency (or coincidence) reasoning. The trial judge's assertion that he had not been endeavouring to express any particular view of the facts was incorrect; to the contrary, the trial judge had raised, for the first time in the trial, the possibility that the appellant had participated in successfully removing drugs from the first consignment, before this could be detected by the authorities.

34. Payne JA rejected the complaint in relation to "*sophisticated organisation*", because the Crown had relied on the evidence of the first consignment to establish a "*system*" (CAB 189.30, 191.38). Beech-Jones J agreed that the ultimate point largely reflected a prosecution argument, however, went on to consider the summing up as a whole (CAB 197.20-26, 198.1-36). In that context, during the "*common sense overview*" of the Crown case, in addition to raising the possibility of drugs in the first consignment and references to "*sophisticated organisation*", the trial judge only stated once that it was the Crown's argument (CAB 199.56). Otherwise it was conveyed in terms of an argument that the trial judge was himself putting, at five points using "*you would think*" or similar, each followed by a suggested conclusion that reinforced the Crown case (CAB 200.1). In contrast, in summarising the defence case, the trial judge made it clear that he was restating defence counsel's argument; "*you might think*" or similar was invoked three times, but not to reinforce the defence case (CAB 200.32).

35. In summarising the Crown case, the trial judge sought to heighten the prosecutor's submission as to "*system*" and to reinforce the Crown case, which undermined the defence case that the appellant was a "*dupe*" (CAB 50.38). The trial judge used "*sophisticated organisation*", or similar language, five times (CAB 49.18-24[3]), in circumstances where the prosecutor had not used this language. In relation to the third consignment (only), the prosecutor submitted that "*there was some sophistication involved in consignment 3. There was some planning in relation to how it was that the*

[3] Picking up from CAB 46.56.

drugs were concealed" (AFM 29.34, emphasis added) but added that she was not saying that the co-accused or the appellant were involved in Abidjan or in the packing.

The "tape trial" text message

36. The majority of the CCA endorsed the extreme language employed by the trial judge in relation to the "*tape trial*" text message, characterising it as comprising "*no more than typical and permissible comment by the trial judge about a finding of fact that he carefully explained was a matter for the jury*" (CAB 195.18). Payne JA found no error because the trial judge was entitled to comment on the evidence given in the trial and also, the use of "*you may think*" before the comments was "*a clear indication that the appropriate factual finding was one for the jury*" (CAB 194.1-16).

37. The comment was not typical, nor permissible, and was the antithesis of a trial judge putting the cases for the prosecution and the accused accurately and fairly. It disregarded the obligation not to overawe the jury and exhibited serious imbalance by emphatically seeking to persuade the jury to adopt the trial judge's view of the facts. As observed by Beech-Jones J, it "*reads like a Crown Prosecutor's address*" – clearly seeking, by using language of persuasion, to persuade the jury to adopt a particular view of the facts, and emphatically ("*I suggest*") (CAB 202.40). It put the summing-up beyond remedy.

38. "*You might think*" was used three times to invite the jury to draw the conclusion suggested by the trial judge, favourable to the Crown (CAB 202.54). The comments were strongly adverse to the appellant's credit, telling the jury in no uncertain terms that the trial judge thought the appellant was lying (CAB 203.20). It is respectfully submitted that the majority's endorsement of such language as "*typical*" and "*permissible*" should not be allowed to stand.

Submissions on gambling evidence

39. Payne JA found that "[f]*airness dictated that the trial judge correct*" the impression left by the appellant's counsel 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 (CAB 191.52-58, CAB 193.28).

40. The prosecutor had made strong closing submissions, urging the jury to rely upon the online gambling evidence as evidence of unsuccessful gambling and to reject the appellant's evidence that he had successes. These submissions were open to be made,

but they contained powerful phrases as to the online gambling losses: "*inherently implausible*", "*not believable*", "*very concrete evidence of losses*", "*at the end of the day lost*", "*irrefutable evidence*", "*did not come out on top*", "*reject* [the appellant's] *evidence*", "*clearly a pattern of loss*" (AFM 30.22-31.36). In this context, the appellant's counsel submitted that it was possible that the cash in his bedroom was accumulated gambling winnings (AFM 32.28-30). One reason was that "*there is evidence that he was a successful gambler*"; the appellant had deposited about $131,000 into the Sportingbet account and had returned just under $540,000 winnings, which were regambled, and similarly in relation to the Tabcorp account (AFM 32.44-56). In total, between 2006 and 2013 the appellant had won over $800,000, "... *rolling this money over and placing further bets*" (AFM 32.54-56). In support of a submission that there was evidence that the appellant also gambled in cash, counsel referred to a "*snapshot*" of evidence of cash winnings given by friends and family (AFM 33.12-34.34).

41. The evidence of the accounts, showing overall losses, weighed in favour of the Crown. However, the summaries recorded, in terms, "total wins" and "total dividends". While on one view the appellant's counsel could have acknowledged the overall losses in his submission, that point had strongly been made by the prosecutor.

42. It may have been appropriate, in those circumstances, for the trial judge to remind the jury of the evidence and the content of the prosecutor's address. However, the trial judge went further, employing unnecessary language which provided judicial endorsement of the prosecution arguments, while belittling those of the appellant's counsel. The majority in the CCA accepted that it would "*have been far preferable if the trial judge had not engaged in the rhetorical flourish*" and that "*it could have been understood by the jury as belittling defence counsel's submissions*" (CAB 193.44). However, the majority found that the trial judge was "*entitled to comment sceptically*", and "*in the context of a long and detailed summing up* [the remarks] *were of no real significance. One unfortunate remark, in a summing up such as this, did not give rise to a miscarriage...*" (CAB 193.38-50, CAB 195.1-12). Beech-Jones J observed that the trial judge devoted a paragraph solely to his opinion, which contained the rhetorical flourish, inviting the jury to make a particular finding. In relation to the trial judge's comment that *"you might find"* that the appellant had substantial gambling losses (CAB 203.40-204.10), Beech-Jones J noted:

> *"This was the fourteenth time during the summing of the case for and against the appellant that the trial judge utilised that phrase or a similar one. One of those invocations was neutral and two made it clear that it was a recitation of the appellant's Counsel's argument. The other eleven were strong suggestions by the trial judge to the jury to make adverse findings against the appellant."*

Strength of the Crown case

43. In concluding there was no unfair lack of balance in the summing up, the majority found reinforcement in "*a very strong Crown case*" (CAB 195.44-46). This was an error. Whatever shortcomings in the appellant's evidence were perceived by the trial judge, the appellant was entitled to have his case put fairly to the jury (see *Castle v The Queen* (2016) 259 CLR 449 at [58], [65]). The strength of the Crown case did not afford the trial judge permission to advocate for the prosecution. To the contrary, a potentially strong prosecution case, where there are critical issues for the jury to decide which go directly to proof of a count, underscores the importance of balance in the summing up and that the defence case be properly put to the jury (*R v Meher* [2004] NSWCCA 355 at [147]-[150]; *Taleb v R* [2006] NSWCCA 119 at [2]-[6]). This is particularly so where, as in this case, an accused has given evidence, and the credibility of the accused is central to the defence. Yet it was precisely on critical issues, including the appellant's credibility, that the trial judge's prejudicial remarks were most extreme.

44. Beech-Jones J's analysis, conducted in accordance with authority and principle, demonstrates that the summing up was unfair, and was characterised by a troubling lack of judicial balance in which the trial judge's partiality was evident. The comments by the trial judge occasioned a miscarriage of justice, which was not remedied by further instructions to the jury.

45. In the context of this trial, the nature and the effect of the summing up in this case was such as to give rise to a substantial miscarriage of justice (*Lane v The Queen* [2018] HCA 28; 92 ALJR 689 at [39], [40]). How the case is left to the jury is apt to have a critical bearing on the jury's performance of its task (*Lane* at [41]). The imbalance in the summing up occasioned a denial of procedural fairness to the appellant at trial, and amounted to a serious breach of the presuppositions of trial by jury (see CAB 207.52 (Beech-Jones J, applying *Weiss v The Queen* (2005) 224 CLR 300 at [41])). As such, the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) is not engaged.

Expression of opinion by a trial judge on a question of disputed fact

46. The summing up by a trial judge is a central mechanism for the judge to discharge his or her fundamental task of ensuring a fair trial of the accused. Elements of this task were described in *RPS v The Queen* (2000) 199 CLR 620 at [41] as including instructing the jury about the law; identifying the issues; relating the law to those issues; putting fairly the accused's case; if necessary, giving warnings.

47. The entitlement of a trial judge to express an opinion (or comment, and comment strongly) on factual issues in a criminal trial has "*long been held*" (*RPS* at [42], citing *Tsigos v The Queen* (1965) 39 ALJR 76 (n)). This scope of entitlement may reflect statements in English authorities dating over a century ago.[4] More recent English authorities recognise that the degree of adverse comment allowed today is substantially less than it was even 50 years ago.[5] Recently, in *Castle v The Queen* (2016) 259 CLR 449 at [61] the plurality stated that the wise course will often be not to comment unless the need arises.[6]

48. In a contemporary adversarial criminal trial, as a matter of principle and jurisdictional function, a trial judge's opinion on a question of fact, which is the subject of dispute at trial, is irrelevant. A trial judge's summing up should be confined to the matters identified in *RPS* at [41]. A jury should be directed that the trial judge will not provide any opinion as to the facts of the case unless it appears to be a matter about which there is no dispute.

49. The practice of a judge expressing to a jury his or her opinion on facts derives from historic felony trial procedure which was characterised by judicial dominance. The judge and jury both had active roles and there was indistinct division of responsibility,[7] but "[t]*he admission and presentation of evidence in court was organized by the trial judge, who examined witnesses and the prisoner and commented upon their testimony*

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[4] For instance, in *R v Cohen and Bateman* (1909) 2 Cr App R 197 at 208 the judge expressed himself "*very strongly*" but this was not held to be impermissible. In *R v O'Donnell* (1917) 12 Cr App R 219 at 221 the judge "*did express himself strongly*" but the point failed because the judge left the issues of fact to the jury.

[5] See *R v Wood* [1996] 1 Cr App R 207

[6] Further, that any comment must exhibit judicial balance and the judge is make clear the jury's province to determine facts, citing *RPS* at [42]; *B v The Queen* at 605.

[7] Langbein, John H., *The Criminal Trial before the Lawyers*, 45 University Chicago Law Review 263 (1978) pp284, 295; New South Wales Law Reform Commission Report 136, *Jury Directions*, Nov 2012, para 1.25

as it was being given";[8] the judge had no hesitation about telling the jury how it ought to decide; and the jury routinely complied.[9] The utility of judicial comment on evidentiary issues diminished once counsel could elicit facts and cross-examine on them and speak directly to the jury to advance opposing interpretations and suggest outcomes.[10] Jury directions were developed to manage risks of jury error and bias, and evidentiary laws developed to regulate the process.[11]

50. There is now a distinct division between the functions of judge and jury and the task of the trial judge, to give juries proper instructions, is not permitted to obscure that division (*RPS* at [41], [42]). It is for the jury, and the jury alone, to decide the facts (*RPS* at [42]). No purpose is served by expression of judicial opinion where determination of facts is preserved for the jury alone, and the role of the judge is to hold the balance between the contending parties (see *Robinson v R* (2006) 162 A Crim R 88, per Johnson J at [140]). A jury will naturally be inclined to defer to the judge's opinion, which can be far more powerful than that of counsel, and a trial judge should not risk prejudice by expressing an opinion which it the jury's duty to ignore.[12] Indeed, reinforcing this inclination, a jury is exhorted in multiple respects to comply with judicial directions, and that the judge is responsible for ensuring that the proceedings are fair and conducted according to law.[13]

51. This case demonstrates the tension between an 'entitlement', conferring as it does an inherent right to comment, and the now distinct functions of trial judge and jury. For instance, Payne JA relied upon the trial judge's entitlement to comment sceptically "*in the way that he did*" about gambling evidence, but the belittling rhetorical flourish was beyond permissible limits (CAB 193.38-50).

52. Intermediate appellate court statements include that it must be questioned what part expression of the judge's view of the facts has in bringing about a fair trial (*Channel*

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[8] Langbein, John H., *The Origins of Adversary Criminal Trial*, Oxford University Press, 2003, p 311, citing Cockburn, J.S., "Introduction", *Calendar of Assize Records: Home Circuit Indictments Elizabeth I and James I* (1985)

[9] *Ibid* fn7 (Langbein, *Before the Lawyers*) pp285, 295; *ibid* fn8 (Langbein, *Origins*) pp322, 323.

[10] *Ibid* fn8 (Langbein, *Origins*) p331

[11] New South Wales Law Reform Commission Report 136, *Jury Directions*, Nov 2012, para 1.26; *ibid* fn8 (Langbein, *Origins*) pp330-331

[12] *R v Pavlukoff* (1953) 106 CCC 249 at 267, cited in *R v Machin* (1996) 68 SASR 526 at 540-541, in turn noted in *R v Taleb* [2006] NSWCCA 119 at [76]-[77] with apparent approval; *DPP v Rattigan* [2017] IESC 72 at [82], [83] citing *DPP v McDonagh* [2010] IECCA 127

[13] https://jirs.judcom.nsw.gov.au/benchbks/criminal/the_jury.html#p1-480, and see standard written directions at https://jirs.judcom.nsw.gov.au/benchbks/criminal/written_directions_opening.pdf.

Seven Sydney Pty Ltd v Mohammed (2008) 70 NSWLR 669 at [49]); that a comment may be strong but should be for the purpose of fulfilling the judge's overall obligations (*Hermanus v R* [2015] VSCA 304 at [30]); and that it is clear law that a judge is entitled to comment strongly on factual issues, and how strongly is demonstrated by *Tsigos* (*Chen v R* [2010] NSWCCA 224 at [51]-[57]).[14] It was recently stated by the CCA that it is generally unadvisable for a trial judge to comment on the evidence, except in instances of which *Tsigos* is an example (*Popovic v R* [2016] NSWCCA 202 at [226]). It is respectfully submitted that *Tsigos*, to the extent that it states parameters of a general entitlement for expression of judicial opinion on facts in dispute, no longer reflects an appropriate entitlement of a trial judge in a contemporary criminal trial.

Overseas authorities

53. A trend away from any judicial opinion in relation to fact finding is identifiable in common law jurisdictions, with emphasis upon the distinct functions of the trial judge, as an authority on the law, and the jury as the tribunal of fact.

54. In the United Kingdom, there is an emphasis on a factual narrative by the trial judge being balanced and neutral.[15] In particular, highly rhetorical and strongly worded denunciation of a defence, using the language of an advocate, has been held to deny a fair trial.[16] Further, it has been held that repeated repetition of the phrase that it is a matter for the jury, or the giving of standard directions, will not excuse an unbalanced summing up.[17] Whereas in the early 20th century, judges were cautioned not to usurp the function of the jury but were otherwise entitled to give confident opinions, in *Mears v The Queen* (1993) 97 Cr App R 239, this test of usurpation was held to be too favourable to the prosecution by present day standards.[18] The trial judge must strike a fair balance and, particularly where the defence case is weak, the judge must be scrupulous to ensure that the defence case is presented to the jury in an even-handed and impartial manner and should not engage in inappropriate sarcasm or exaggeration.[19]

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[14] See also Taylor, G, *Judicial reflections on the defence case – An update*, (2016) 42 Aust Bar Review 189
[15] *R v MJ* [2018] EWCA Crim 1077 at [35]
[16] *R v Bentley (deceased)* [2001] 1 Cr App R 21 at [66]
[17] *Mears v The Queen* at citing *Gilbey* (unreported, 26 January 1990 Lloyd LJ)
[18] *R v West* (1910) 4 Cr App R 179; *Cohen and Bateman* (1909), *supra*. *Mears v The Queen* was applied in *R v Winn-Pope* [1996] Crim LR 521 and *R v Wood* [1996] 1 Cr App R 207.
[19] *Bentley (deceased)*, *supra* at 332, 333; *Marr* (1990) 90 Cr App R 154 at 156; *Berrada* (1990) 91 Cr App R 131

55. A summing up containing features reminiscent of the present case was examined in *DPP v Rattigan* [2017] IESC 72, a decision of the Supreme Court of Ireland, comprising five justices.[20] The majority in *Rattigan* stated that older authorities should be treated "*extremely cautiously*" – "[i]*t is, quite simply, no longer the case that a trial judge can tell a jury that they should disbelieve particular evidence, or make any other comment he wishes provided it falls short of actually directing or seeming to direct the jury what to do*" (at [64]). While a judge may comment on the evidence in order to assist the jury, "*current practice would suggest that comment going beyond that is done to a very limited extent*" (at [84]). The majority concluded that, because the part played by juries in our criminal justice system is vital, it is essential that the judge should fully respect the independence of their role and neither seek, nor seem to seek, to influence the jury's verdict by communicating, or seeming to communicate, personal views that appear to point to a particular verdict (at [92]).

56. Recent Canadian authority also emphasises that objectivity is an important cornerstone of the judge's summing up (a charge to a jury).[21] It has been held that a trial judge is entitled to express an opinion, but a summing up is unfair where the trial judge deliberately or inadvertently places his or her "*thumb on the Crown's side of the scales of justice*" and effectively ignores or underplays significant elements of the case for the defence.[22] Rhetorical questions admitting only of one answer should be avoided.[23] A judge must be "*extremely cautious*" not to demonstrate too strong a view and "*particularly when the entire case involved the issue of credibility*".[24]

57. In New Zealand, judges usually sum up on the facts briefly, sometimes only summarising key prosecution and defence contentions.[25] It has been held that any comment on the facts should be made in suitable terms without use of emotive terms or phrases which could lead to a perception of injustice.[26] It must be made clear that the jury remains the sole arbiter of fact.[27]

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[20] O'Malley Iseult J (Clarke CJ and McKechnie J concurring), Dunne J (Chartleton J concurring) in dissent.
[21] *R v McManus* 2017 ONCA 188 (Court of Appeal for Ontario) at [102], [103]
[22] *McManus, ibid*, at [102], [103], citing *R v Paredes* 2014 ONCA 910, 317 CCC (3d) 415 at [41]
[23] *McManus, ibid*, at [106] citing *R v Baltovich* (2004) 73 OR (3d) 481 at [115]
[24] *R v Rafters* 1991 CanLII 922 (BCCA); 7 CR (4th) 300; 6 BCAC 72
[25] Young William, *Summing up to juries in criminal cases – what jury research says about current rules and practice* (2003) Crim LR 665 at 688
[26] *R v Webb* [2007] NZCA 443 citing *R v Keremete* CA 247/03 23 October 2003
[27] *R v Hall* [1987] 1 NZLR 616 at 625 (CA); *R v Honey* [1973 1 NZLR 725 at 726-727 (CA)

58. For many years, a majority of States in the United States have barred judges from commenting on the evidence at all.[28] This is to safeguard the role of the jury as the sole judge of the facts on the issue of guilt or innocence and that the trial judge is not active in the development or presentation of evidence.[29] Federal courts, in recognition of the contemporary roles of counsel, may be reluctant to comment; inferences to be drawn from the evidence are seen as more appropriately communicated by counsel, and are matters of logic and experience, not of law.[30]

Conclusion

59. Procedurally, and to the contrary of ensuring a fair trial, expressions of opinion on disputed facts by the trial judge in summing up deny both parties the opportunity to either disavow, or to meet, the argument.[31] Constraint of judicial expression of opinion on disputed facts would not undermine the discharge of the function or duty of the trial judge to appropriately and fairly summarise the case in a way that assists the jury.[32] Nor would it prevent a judge from drawing to the jury's attention an alternative lesser count, an available defence,[33] or from reminding the jury of a matter of which jurors might ordinarily be expected to know (cf *Meher* at [87]-[88]) or within the evidence.[34]

60. The present case illustrates the risks that inhere in an entitlement upon a trial judge to express an opinion on a question of fact which is in dispute at trial. The prejudice to the appellant caused by the cumulative effect of the trial judge's comments, which employed forceful language of persuasion, was great. The appellant was deprived of a fair trial by lay peers, independent of external influence, to which he was entitled and which is the method selected in this country for trial for a serious offence. The interests of the administration of justice, to which the jury trial is central,[35] were seriously undermined because of the trial judge's abuse of what has been held to be an entitlement to comment on facts.

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[28] Marcus, P., *Judges Talking To Jurors in Criminal Cases: Why U. S. Judges Do It So Differently From Just About Everyone Else* (2013) 30 Arizona Journal of International and Comparative Law, 1 p15; *United States v Mundy* 539 F 3d 154, 158-159 (2dCir. 2008); *ibid* fn8 (Langbein, *Origins*) p323

[29] *State of Louisiana v James Williams* 375 So. 2d 1379 (1979) (Supreme Court of Louisiana) at [2-4], [5, 6]

[30] *Mundy* at [4]

[31] *Popovic* at [225] citing *R v Meher* [2004] NSWCCA 355 at [87]-[88]

[32] In New South Wales the Crown can also, with leave, correct any facts asserted in a defence closing address that are not supported by evidence: s 160(2) *Criminal Procedure Act 1986* (NSW)

[33] *Ibid* fn7 (NSWLRC Report 136) para 6.139

[34] See *Crampton v The Queen* (2000) 206 CLR 161 at [125]-[126]; *R v Stewart* (2001) 52 NSWLR 301 at [82]-[83]

[35] *R v Baden-Clay* (2016) 258 CLR 308 at [65] (citations omitted)

61. It is submitted that this Court should reconsider the entitlement. The appellant contends that there is no longer any justification for such an entitlement, having regard to progression in the common law to safeguard the independence of the jury as the arbiter of facts, and the now clear delineation of functions in a contemporary criminal trial. This Court has, in recent years, underlined that it is fundamental to our system of criminal justice that the jury is the constitutional tribunal for deciding issues of fact[36] and has emphasised that questions of reliability and credibility are for the jury, not a trial judge.[37] The entitlement of a trial judge to express an opinion on facts in dispute traverses the function of the jury and jeopardises exercise of the jury's special advantages, that give protection against laws which the ordinary person may regard as harsh, permit allowances for impalpabilities, provide for superior assessment of credibility, and secure that the law will not be applied in a way that affronts the conscience of common people.[38] Removal of the entitlement would represent a principled and incremental change, and would advance developments seen in authority in Australia and other common law jurisdictions.

62. If a trial judge in a criminal trial does make comment which indicates or expresses his or her opinion on a fact in dispute, clarification is required of the limits upon the scope of the judge's authority to do so and of related directions which should be given. In relation to directions, presently *R v Zorad* (1990) 19 NSWLR 91 at 106-107 is authority that the trial judge is to make it clear that it is the jury's duty to disregard the view which he or she has expressed (or may appear to hold) *if it does not agree with their own independent assessment of the facts.*[39] A good starting point of the judge's task has been said to be that a judge should never be compelled to give meaningless or absurd directions: *R v Aziz* [1996] 1 AC 41. However, no sensible purpose is served by a direction that the 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 clear delineation between the functions of judge and jury.

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[36] *R v Baden-Clay* (2016) 258 CLR 308 at [65] (citations omitted)
[37] *IMM v The Queen* (2016) 257 CLR 300
[38] *AK v Western Australia* (2008) 23 CLR 438 at [93], [94], [97] (Heydon J), citing Lord Devlin, *Trial by Jury* (rev ed) (1966), pp123, 140, 160; *Alqudsi v The Queen* (2016) 258 CLR 203 at [131] (Gageler J) citing Devlin, *The Judge* (1979), p 127
[39] See also *Standen v R* (2015) 253 A Crim R 301 at [450]; *Majok v R* [2015] NSWCCA 160 at [28]

63. The practice as referred to in *Zorad* is quoted in the NSW Criminal Trials Bench Book.[40] Model directions in other common law jurisdictions do not appear to sanction a direction in these terms. A Canadian jury is instructed that they do not have to agree if the judge comments on or expresses an opinion about the evidence.[41] A United Kingdom model direction is that, should the judge give the impression that he or she has formed a view about evidence or facts, the jury are not in any way bound by this and must form their own view.[42] New Zealand judges must say that jurors are free to disregard the judge's view.[43]

Part VII:

10 The appellant seeks the following orders:

1. That the appeal be allowed;
2. That the orders of the New South Wales Court of Criminal Appeal be set aside;
3. That the appeal against conviction be allowed and a new trial be held.

Part VIII:

It is estimated that the presentation of the appellant's oral argument will require 3 hours.

Dated: 5 October 2018

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A L Bonnor

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[40] The NSW Criminal Trials Bench Book quotes *Zorad* https://jirs.judcom.nsw.gov.au/benchbks/criminal/summing_ up_format.html, [7-040] para 6. The position is similar at least in Queensland (http://www.courts.qld.gov.au /data/assets/pdf_file/0004/517405/sd-bb-full-copy.pdf, at 23.1, but re the effect of statute see 38.2, 63.2, 68.2); and in Victoria (http://www.judicialcollege.vic.edu.au/eManuals/CCB/index .htm#19986.htm at [80]).

[41] Canadian Judicial Council, *Model Jury Instructions – Final Instructions*, rev June 2012, s 8.2 para [13].

[42] Judicial College, *The Crown Court Compendium – Part I: Jury and Trial Management and Summing Up*, June 2018, Ch 20; *ibid* fn8 (Langbein, *Origins*) p323.

[43] *Ibid* fn28 *Judges Talking* at p 9, citing *R v Honey* [1973] 1 NZLR 725 (CA).