ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 223 of 2018

BETWEEN:

JASON TROY McKELL
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply – whether the summing up resulted in a miscarriage of justice

2. The facts in the respondent's submissions filed 2 November 2018 (**RS**) at [6]-[25] largely exceed the detail necessary for the purposes of this appeal. The appellant relies on facts set out in his submissions filed 5 October 2018 (**AS**) at [5]-[14].[1]
3. In asserting that the majority's conclusion was open (RS[27]), the respondent has not demonstrated how the majority's findings accommodate principles that the parties' cases be accurately and fairly put and that a summing up exhibits judicial balance (AS[25], [26]). The respondent denies that various aspects of the summing up were characterised by unfairness, lack of balance or partiality (RS[28], [45], [47], [48], [51], [55], [56], [58], [63]-[65], [68], [70]) and contends that the majority was correct in its conclusions and findings (RS[2], [5], [30], [31], [47], [50], [57], [58], [68], [72], [74]), however does not explain, or adequately explain, why these assertions should be accepted.
4. Sequence is important (RS[28]) because it exposes the building impression, created as the summing up proceeded, that the trial judge firmly held the view that the correct result was a finding of guilty. Before the "*tape trial*" remarks, the judge gave an imbalanced "*common sense overview*" of the Crown case (AS[33]-[35]); neutrally summarised arguments of the appellant's counsel (CAB200.30); and referred to the appellant's cooperation with disdain (identifiable on the transcript) (RS[60]; CAB59.10-45). The extreme remarks about the text message (AS[19]) were given additional force by the impression already created by preceding comments.

[1] Capitalised terms in these submissions have the same meaning as in AS.

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5. Examination of individual issues alone, and by simply "*putting these three matters together*", did not equate to a consideration of the summing up as a whole (RS[29], [32]). In contrast with the judgment of Beech-Jones J, the majority judgment does not adequately comprehend the overall cumulative effect, comments, language and style of the summing up (RS[29]; AS[28]-[30]).
6. If it is implied in RS[31] that it was not an error to take the strength of the Crown case into account in support of the majority's conclusions, that proposition is incorrect. A strong Crown case did not justify, even in part, the impugned expressions by the trial judge nor his sustained attempt to persuade the jury to accept his opinions, adverse to the appellant (AS[43], CAB206.38). Asserting that the summing up reflected the Crown case strength does not address the substantive imbalance arising from these endeavours (RS[59], [67]; CAB206.35). It was essential that the appellant's defence be put to the jury fairly, cogently and clearly (cf RS[73]).[2] Indeed, the weaker the defence, the more essential this is, so the defence can be considered in light of the Crown case and evaluated as part of the overall determination of whether the Crown discharged its onus of proof.[3] It was entirely unnecessary for the trial judge to undermine the defence case and bolster the Crown case by embellishment, persuasion and rhetorical flourish (AS[16]-[20]).
7. If, as it appears, the majority referred to the strength of the Crown case to explain the context and nature of the comments (RS[31]), this was an error which overlooked the partiality and unfairness exhibited by the trial judge. Lowering the threshold of fairness because a Crown case is strong is not in accordance with *Green v The Queen* (1971) 126 CLR 28 and *B v The Queen* (1992) 175 CLR 599 (AS[25], [26]). The threshold is an accused's right to a trial according to law, including having his or her defence put fairly.
8. Whether the appellant has established that the jury would have been overawed is not the issue (RS[31]). The issue is whether the trial miscarried because the summing up exhibited judicial imbalance contrary to principle. In any event, it is respectfully observed that the statement in *B v The Queen* at 605 derives from *Broadhurst v The Queen* (1964) AC 441 at 464, which referred to the *danger* of the jury being overawed.[4]
9. Disproportionate time or numbers of words are not what caused a miscarriage of justice in the appellant's trial and Beech-Jones J did not employ these concepts (RS[37]fn64).

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[2] *Maraache v Regina* [2013] NSWCCA 199 at [70], citing *R v Meher* [2004] NSWCCA 355 at [84], in turn citing *R v Tomazos* (unreported, NSWCCA, 6 August 1971); also *Cleland v The Queen* (1982) 151 CLR 1 at 10; *Aravena v R* [2015] NSWCCA 288 at [109].
[3] *Odisho v R* [2018] NSWCCA 19 at [98], cited in *A2 v R* [2018] NSWCCA 174 at [1169].
[4] See also *The Queen v Hulse* (1971) 1 SASR 327 at 335; *Nation v R* (1994) 78 A Crim R 125 at 131.

Beech-Jones J's analysis was directed to the language of persuasion employed, and emphatic reinforcement of the Crown case, by the trial judge.

10. Observations in RS[41]-[45] do not engage with the particular features of the summing up that created a serious miscarriage of justice. Posing rhetorical questions may or may not be appropriate in context (RS[46]; AS[56]). However, the problem with rhetoric here was using figure of speech to belittle the appellant's counsel's submissions (AS[20], [42]) and pointedly using expressions such as "*you might think*", *"I suggest to you, a very revealing text"* and "*so obvious*" (CAB205.1-35, 206.45-207.22). The unfair use of these techniques was exacerbated as they were employed in relation to issues of fact which were centrally in dispute (cf RS[47], [48], [56], [64]).
11. In the redirection, the trial judge directly acknowledged that "*I think I did refer to there being a possibility of it having had drugs*" in the first consignment (cf RS[51], [53]; CAB75.38). The earlier remarks included "*there is actually no evidence that there was anything in it*" and that "[y]*ou would think*" there would be little point in the arrangements unless there was "*something*" in it. In context, the jury would have readily understood the "*something*" and "*anything*" to refer to drugs (cf RS[52], [55], [57]). As such, contending that the trial judge's summary was consistent with the pre-trial ruling is not sustainable, particularly as regards the risk of tendency reasoning; that ruling was binding on the trial judge (RS[52], [55]; s 130A *Criminal Procedure Act 1986* (NSW)).
12. The trial judge was entitled to refer to the "*tape trial*" text (RS[61]), but was not entitled to use forceful, persuasive language to impress upon the jury his opinion that the message referred to making sure that the co-accused got tape to repackage the consignment because he was aware of the contents. This went to the heart of the defence case (CAB203.10; cf RS[48]). The prosecutor in closing submissions described the message as "*interesting*", "*quite telling*", "*consistent*" with and "*supportive*" of the appellant being involved (RFM272.5-42). The trial judge did not simply "*refer to*" it, but went further, to emphatically drive the Crown's point home without reminding the jury he was speaking to the Crown's argument (CAB203.24). The jury would have been left with no doubt that it was the trial judge's opinion that the appellant had the necessary *mens rea* (cf RS[62], [63]). By telling the jury "*Is not that, I suggest to you, a very revealing text*" the trial judge explicitly suggested that the jury should conclude the Crown's argument was correct (cf RS[64]; CAB206.50). Asking whether the jury appreciated that conclusions about the message were a matter for them (RS[64]) does not address the imbalance (CAB207.1-22). The appellant bore no onus, but there were alternative modes of thinking

(cf RS[65], [66]). In evidence he said he did not know why he sent the message, but "*I'm talking horses*" and it was "*very difficult*" to recall specific details (RFM100.6-14).

13. Characterising the trial judge's expressions on this point as legitimate "*highlight*" (RS[68]) overlooks the seriousness. Even if the Crown's position was "*obvious*", or the appellant's explanations weak (RS[63], [65]) it was essential that the defence case was put in a manner that the jury could fairly consider it in light of the Crown case. It was not. The majority's finding that the remarks were "*typical and permissible*" was a clear endorsement, recording unambiguously that they represented what is expected and allowable (cf RS[68]). Uncorrected endorsement by an intermediate appellate court of such forceful persuasion by a trial judge would set a disturbing precedent.
14. While the trial judge was not prohibited from correcting inaccuracy (RS[70]), it would more appropriately have been addressed by the prosecutor. The judge could have raised it with counsel. In that sense, it was not "*necessary*" for the trial judge to correct it (cf RS[72]). Unfairness arose not because a correction of fact occurred but because of the deriding of the defence submissions that accompanied it (cf RS[70]). In context, this further accumulated impressions of the trial judge's opinion that the appellant was guilty.

Reconsideration of principle

15. The entitlement of a trial judge to express an opinion on disputed fact is called into question in this case, with Beech-Jones J observing that it is not the function of a trial judge to convey their opinion to the jury that an accused's case is weak (CAB206.26-42). The respondent, in asserting that there is no reason for reconsideration, has not addressed the question of what purpose it serves (RS[75], [78]). Excesses in this case occurred despite the urging of restraint by this Court and intermediate appellate courts.[5]
16. Section 161 of the *Criminal Procedure Act 1986* (NSW) only operates to relieve a trial judge of summarising the evidence if of the opinion that a summary is not necessary. It leaves other summing up functions untouched (cf RS[76]fn115). Statutes in other Australian jurisdictions permit observations upon the evidence, which could include permissible modes of reasoning, warnings and directions, without extending to opinion. None expressly permit, in terms, expression of opinion on facts in dispute (cf RS[76]). Proper exercise of the power is subject to the authority of this Court.
17. The statement of the entitlement at *RPS* [42] cites *Tsigos v The Queen* (1965) 39 ALJR 76 (n). It is respectfully submitted that *Tsigos* is not reflective of subsequent advancement in

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[5] *RPS v The Queen* (2000) 190 CLR 620 at [42]; *Castle v The Queen* (2016) 259 CLR 449 at [61]; *Abdel-Hady v R* [2011] NSWCCA 196 at [141]; *Meher* at [87]-[88]; *Robinson v R* (2006) 162 A Crim R 88 at [140].

the delineation of functions in a criminal trial. In *Channel Seven Sydney Pty Ltd v Mohammed* (2008) 70 NSWLR 669, for example, Grove J questioned what part expression of the judge's view of the facts has in bringing about a fair trial "*let alone such a strong conclusory statement as that found in* Tsigos ... *I respectfully doubt that the robustness of* Tsigos v The Queen *should now be found acceptable*".[6] Such *obiter dicta* remarks are instructive of contemporary judicial thinking on the limits of judicial comment (RS[77]).

18. Earlier authorities include *Holford v The Melbourne Tramway and Omnibus Co Ltd* [1909] VLR 497 at 520 and *Hoger v Ellas* (1962) 80 WN (NSW) 869, both civil cases. *Hoger* was applied in *R v Zorad* (1990) 19 NSWLR 91 at 106-107, authority for the standard direction containing internal contradiction (cf RS[78]; AS[62]).[7] Since *Tsigos*, the characterisation of our criminal justice system as 'accusatorial' has emerged and strengthened, derived from recognition of the power imbalance between the State and an individual who stands accused in an adversarial contest.[8] The entitlement intersects uneasily with the balance sought to be achieved (cf RS[77]). It is also incongruent with the concept of a determination of facts by a panel of ordinary citizens, representative of the general community, uninfluenced by extraneous considerations, embodied in the democratic institution "*trial by jury*" in s 80 of the Constitution.[9] Clarification that a trial judge has no "entitlement" to indicate opinion on disputed facts would be consistent with the trend away from such intervention and would represent only incremental development, to reinforce fairness and integrity of the process and the institution of trial by jury.

Dated: 16 November 2018

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[6] At [49], [51]. See also *R v Webb* (1997) 68 SASR 545 at 562, Williams J; *Popovic* at [226], Adamson J (Beazley P and RA Hulme J agreeing).
[7] *R v Machin* (1996) 68 SASR 526 at 540, Olsson J, cited in *Taleb* at [76], [84] Simpson J; *Odisho* at [200]-[204], Hamill J (minority remarks).
[8] *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 at 127, Gleeson CJ; *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at [148], [155], Spigelman CJ; *Crampton v The Queen* (2000) 206 CLR 161 at [19], Gleeson CJ; *X7 v Australian Crime Commission* (2013) 248 CLR 92 particularly at [46], [97]-[102], [159]-[160]; *Lee v The Queen* (2014) 253 CLR 455 at [32].
[9] *Alqudsi v The Queen* (2016) 258 CLR 204 at [100], [115]-[116], [127]-[140], [168]-[174], [193]- [195].