IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

C.A. NO. 67 of 2005

THE QUEEN

v

ANTONY MARK PEARL
(Appellant)

Appellant's Outline of Submissions

Course of Proceedings

1. On 1-4 March 2005, the appellant stood trial before Mackenzie J on one count of importation of a commercial quantity of the dangerous drug 3,4 Methylenedioxymethamphetamine ("MDMA") contrary to section 233B(1)(b) of the *Customs Act* 1901 (Cth) ("the Act"). It was a joint trial at which David John Vermillion faced the related charge of attempting to possess this MDMA, without reasonable excuse, contrary to section 233B(1)(c) of the Act.

2. On 4 March 2005, the appellant was convicted and sentenced to 11 years imprisonment.

The relevant facts

3. The crown case was that the appellant arranged the importation by mail/courier of a parcel containing MDMA tablets which arrived from London in Brisbane on 17 December 2002. There was undisputed evidence that the appellant was in London at the time the parcel was sent (Exhibit 2; R337; R10-14): the appellant's trip was booked from Broadbeach, Qld on 29 November 2002; it involved departure from Sydney on 1 December 2002 with a brief stopover in Bangkok and arriving in London the next day; it was a first class return Thai Airways flight which cost $6,500.00; it scheduled a departure from London on 9 December 2002; and the booking was made with a $1000.00 deposit in cash with the balance paid on the credit card of the appellant's wife.

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4. It was also uncontested that on 17 December 2002, a customs officer intercepted a parcel at Brisbane Airport labelled: “David Baker, 10 Jib Court, Mermaid Waters, Queensland, Australia, 4218” (R17-19; R26 L23-25). It was also labelled, underneath the word “Sender”, viz. “‘Headstone Lane, Harrow, Middlesex’ and some numbers” (R26, L40-45). Upon being opened there were two vinyl bags located in the parcel, each of which had a false bottom which contained packages which held 8,735 and 9,320 MDMA tablets respectively (R18, L45 – R19, L1, 20-30; R27-29, L2). It was an admitted fact that the total weight of the tablets was 4482.8 grams and the pure 3,4 Methylenedioxymethamphetamine was 1454.3 grams (Exhibit 1; R334). Neither bag appeared to be new (R27, L8, 51). The brand name on each bag was “GIMMY” (R19, L12). There were no identifiable fingerprints on either bag or on the parcel (R29, L5-20). The Australian Federal Police (“the AFP”) then repacked the parcel by removing the MDMA tablets and replacing them with substitute tablets which were similar in appearance (R29, L29-38). The parcel was reconstructed so that it looked like it had not been tampered with and it was then delivered by an AFP officer posing as a courier driver to 10 Jib Court, Mermaid Waters at 12.19 p.m. on 3 January 2003 (R35-36).

5. David Vermillion took delivery of it following an exchange with the ‘courier’ which included the following (R40, L1-7)[1]:

AFP officer: “David, David Baker?.
Vermillion: “That’s the bloke, yeah.”
AFP: “That’s for you is it?”,
Vermillion: “Yeah.”

6. At about 1.46pm that day the AFP returned to this address with a search warrant (R48 L4, 36). Mr Vermillion and his wife were home. The parcel was located by police in clear view, unopened on the pool table in their garage (R24, L20-35; R51, L15-20; R52, L17-20; R56, L50-56). Vermillion was interviewed and he gave an account suggesting that he took delivery of it for a neighbour from across the road called Fowler who had asked him to collect something that might be sent to the house at either number 10 or 12 in the street; and that he had called this person but that the number he had been given was wrong (R50,

[1] Tape recording is Exhibit 7; Transcript appears at R340.

L50 – R51, L10).[2] Subsequent investigations revealed that no person by the name Fowler lived in the Street or had a person by that name stay with them (R53 L28-40).

7. A number of telephone calls between the appellant and Mr Vermillion were monitored and recorded by the AFP.[3] Some of these conversations were played to the jury.

8. Both the appellant (R67-155) and Vermillion (R184-232) gave evidence and amongst other things, each sought to explain the telephone conversations. A person Paul Osmond was also called by the appellant (R156-183).

The appellant's evidence

9. Of the defence witnesses, the appellant gave evidence first. He acknowledged that he was in London in December 2002 and that he went there to purchase a "pad printer" which could be used to place false printing on sunglasses (R77, L20-35). He flatly denied any involvement in the importation of the parcel in question (R77, L53, R124, L15-30).

10. However he accepted that he knew Vermillion through working together; they were good friends and that he regarded him "as family"; that they had been in business together "selling CDs" in 2000 (R68; R70, L18-35) and that in or about October 2002 they both had stalls at Carrara on the Gold Coast where they each sold fake imported merchandise (R76, L42-45).

11. The appellant's defence was premised on the basis that his communications with Vermillion which had been played to the jury were about the illegal importation of a sample of fake Louis Vuitton bags from Bali in an arrangement involving Vermillion, Osmond and him (R78, L45, etc).

12. The appellant's account was largely supported by evidence elicited from Osmond.

Evidence from David John Vermillion

13. Mr Vermillion disputed a number of matters stated by the appellant in his evidence and made some positive assertions that implicated the appellant in the offence. For example, he

[2] Exhibit 9; Transcript at R342-343.

[3] Exhibit 13; Transcripts at R345-370.

denied any specific arrangement with the appellant (or with Osmond) concerning the importation of fake Louis Vuitton handbags (R228 L40-45), although he conceded a loose discussion with the appellant that he had no intention of fulfilling (R188, L30-60; R222 L35 – R223 L10;); he said that the appellant told him in late November 2002 that he was going to England for a couple of weeks just to "go home" (R206, L30-50); that the appellant said that he "might" send him (Vermillion) a parcel from London because he did not want his wife "to handle anything"; and that he told the appellant that that was "okay" because that he thought it was purses that would be sent (R189, L25-35, R206, L50 – R207). He added that he appellant did not tell him what would be in the parcel and that he did not ask as he assumed it would be fake goods of some kind; and that regarded this parcel as solely the appellant's matter in which he had no interest nor would he profit from it at all (R207, L18-20; L45-55; R208, L1-2). He explained that he suggested the name "Fowler" as the addressee, it being the name of his dog; and that they settled on the name "David Fowler" (R189, 42-46, R209, L25).

14. Vermillion also told the jury that he met the appellant on the day that he returned from his London trip; he believes that this was on 9 December; that he wrote the note which became exhibit 10 on that date; that the appellant then told him that it had been addressed to "David Baker" instead of "David Fowler". (R190, L48, R210, L25-55, R211, L10-12) c.f. the note still used the name Fowler.

15. He said that he took delivery of the parcel from the courier on 17 December thinking it was the purses that the appellant had said he might send (R191, L10-40). This was following a call in which the appellant informed him that the parcel would be coming by courier (R193 to R194).

16. Vermillion's defence was that he disavowed any involvement in arranging for a parcel to come from Bali or in the importation of the parcel from London other than his preparedness for the latter to be sent to his address under a false name under his belief that it would contain some purses. He denied any knowledge, awareness or even suspicion of there being MDMA tablets in the parcel that he took possession of (R203, L25-40, R211, L45-55).

The issues on appeal

Ground 1

17. Ground 1 is abandoned.

Ground 2

18. Leave is sought to amend Ground 2 to read:

> "The learned trial judge erred in failing to properly direct the jury as to how to assess the evidence of the witness Vermillion in determining the case against the appellant."

19. Vermillion was alleged by the crown to be an accomplice of the appellant. He gave evidence as a co-defendant in a joint trial and significantly implicated the appellant of the offence faced by him. In these circumstances, the trial judge was under a duty to give all directions which arose from these circumstances - *R. v. Hytch* [2000] QCA 315. The directions that were necessary in the appellant's trial were those discussed in *Nessel* (1980) 5 A Crim R 374, 383; *Webb & Hay* (1994) 181 CLR 41, 65-66, 92-95 and even though there is a some degree of overlap, the "accomplice direction" identified in *Longman* (1989) 168 CLR 79, 86. These directions still required some protection of Vermillion in his case – *Robinson* (1999) 180 CLR 531; *Webb & Hay,* 165. The content of such directions should be ascertained by reference to the particular circumstances of the case – *Webb & Hay,* 65-66, 92-95.

20. His Honour's directions on this issue were limited to the following:
    - That "(t)he result of each accused giving evidence is that there are other bodies of evidence in addition to that evidence called by the prosecution", and that "(y)ou treat evidence given by the defence in exactly the same way as you treat that called by the prosecution; in the end where accused persons have given evidence, the question is whether taking all of the evidence into account you're satisfied beyond reasonable doubt that the prosecution has proven guilt" (R277, L18-32).
    - That there were two separate trials and that each accused is entitled to have the case against them considered separately and only on the evidence against each of them (R280, L1-5; R283, L15-25).
    - That "all of the evidence except what Mr Vermillion said to the police is admissible against both accused" (R280 L25-35; R283, L30-34)

- That the crown submission was that "Mr Vermillion's evidence that Mr Pearl arranged the sending of a box at least was consistent with the Crown case" (R291, L12-18) and "that the evidence of Mr Vermillion was supported by the phone conversations." (T291, L20-22; T292, L30-40)

21. It is accepted that s.632 of the *Criminal Code* applies.[4] The evidence of Mr Vermillion was not corroborated in relevant respects. It was necessary, "in the interests of justice", for the jury to have been given some directions about Mr Vermillion's evidence insofar as it related to the case as against the appellant. Such was its content that it became the primary forensic attack upon the appellant and contained quite damning allegations implicating him of the offence he faced. It added considerably to what was otherwise a circumstantial case with some gaps which involved some speculation. The submission that Mr Vermillion's evidence was consistent with the crown allegations would otherwise have had undue specious appeal, particularly give his Honour's apparent endorsement of it.

22. Prior to the reception of Mr Vermillion's account the crown case as against the appellant was that the appellant was in London at the time the parcel was posted; he knew Mr Vermillion who lived at the address to which the parcel was sent and was in telephone contact with him making statements that suggested some knowledge on the part of both of the pending arrival of a parcel by mail or courier. Mr Vermillion's account filled in several gaps and rejected the basis for the appellant's own defence to the charges. Conversely and importantly, it should be noted that although the appellant also gave evidence, he made no statement against the interests of Mr Vermillion in his trial.

23. Thus the need for directions as to how the evidence of an accomplice should be viewed became critical in all the circumstances of this case; yet probably unnecessary in Mr Vermillion's case.

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[4] "(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
(2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
(3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

Form of directions that should have been given

24. This Court in *R v Keevers; R v Filewood* [2004] QCA 207, para 37, encouraged trial judges to rely upon the Bench Book in formulating trial directions. The Bench Book[5] suggests the form of direction when a co-defendant gives evidence of this kind.

25. An attempt has been made to draft the directions that should have been made:

> "I should now discuss an important matter - the question of the evidence of David Vermillion. The crown suggests that Mr Vermillion was involved with Mr Pearl in the offence.
>
> "What the defendant Mr Vermillion has said while giving evidence may be used not only for or against him but also for or against the other defendant.
>
> Mr Vermillion has stated that Mr Pearl told him that he might send a parcel whilst he was in London to Mr Vermillion's address under a false name and that when they spoke after Mr Pearl's return the latter confirmed that he had, using the name "David Baker". Mr Pearl of course denies this. He said other things which tend to incriminate Mr Pearl, all of which Mr Pearl denies.
>
> You should approach your assessment of the evidence of Mr Vermillion, in deciding Mr Pearl's case, with caution. A person who has been involved in an offence may have reasons of self-interest to lie or to falsely implicate another in the commission of the offence. The evidence of such a person is of its nature potentially unreliable, and it is therefore necessary for you to scrutinise the evidence carefully before acting on it. If Mr Vermillion was involved in the importation he is likely to be a person of bad character. For this reason, his evidence may be unreliable and untrustworthy. Moreover, Mr Vermillion may have sought to justify his conduct, or at least to minimise his involvement, by shifting the blame, wholly or partly, to Mr Pearl.
>
> Perhaps Mr Vermillion has sought to implicate Mr Pearl and to give untruthful evidence because he apprehends that he has something to gain by doing so.
>
> Whilst it is possible to identify some reasons why he may have for giving false evidence, there may be other reasons for giving false evidence which are known only to him. Mr Vermillion's evidence, if not truthful, has an inherent danger. If it is false in implicating the defendant Mr Pearl, it will nevertheless have a seeming plausibility about it, because he will have familiarity with at least some of the details of the crime.
>
> This warning is restricted to those parts of the evidence of Mr Vermillion which inculpates Mr Pearl in the offence: it does not apply to the evidence as it relates to Mr Vermillion's own case."

26. The need for these directions is evident when one has full regard to the cumulative effect of the following features: the evidence of Mr Vermillion became a most damning aspect of

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[5] No.s 26 and 37.

the prosecution case brought against the appellant yet it in fact did no more than adopt and enlarge upon what was alleged against the appellant, giving it a false sense of consistency that was highlighted by the prosecution; the additional evidence itself, in so far as it materially differed from the evidence of the appellant, was not corroborated by any independent evidence; the case against the appellant without Mr Vermillion's evidence was wholly circumstantial; and finally the appellant in his own evidence did not seek to implicate Mr Vermillion at all.

27. A re-direction was not sought by the appellant's lawyer. This failure does not lessen or remove a trial judge's duty to give directions necessary to ensure a trial according to law – *BRS v The Queen* (1996-1997)191 CLR 275, 295, 302, 306-307 & 330; *R v Corry* [2005] QCA 87. Moreover, given the last point mentioned in the previous paragraph it is difficult to see how it was a tactical decision not to seek such a direction, rather than it merely being an oversight. It is unlikely that these directions were due in respect of the appellant's own evidence in Mr Vermillion's case thus there was little danger that similar directions in respect of the appellant's evidence would have been made.

28. In any event, it seems somewhat obvious in all the circumstances of the present case that the trial judge's failure to give these directions has meant that there has been a miscarriage of justice, viz., that the appellant was, in truth, denied a fair chance of acquittal – *R v Corry* [2005] QCA 87, para 20 per Keane JA.

29. The appeal ought to be allowed, the conviction set aside and a new trial ordered.

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