

PERARA-CATHCART v THE QUEEN (A39/2016)

Court appealed from: Supreme Court of South Australia Court of Criminal Appeal [2015] SASFC 103

Date of judgment: 30 July 2015

Date special leave granted: 1 September 2016

The appellant was convicted, after a trial by jury in the District Court of South Australia, of rape and threatening to kill. The prosecution alleged the appellant was a drug dealer who approached the complainant, her boyfriend and a friend at a bus stop to sell them drugs. They went to the complainant's house and consumed methylamphetamine. The next day, the complainant and the appellant again consumed methylamphetamine at her home. The appellant propositioned the complainant, who refused his advances and went to the bathroom. He became angry and followed her to the bathroom, where he grabbed her by the throat, inserted his fingers into her vagina and threatened to kill her. Some time later, the complainant's boyfriend had an altercation with the appellant. The police were called and the rape was reported. The defence case was that the appellant was not a drug dealer and he had sought to purchase drugs from the complainant's boyfriend, who was a drug dealer: the allegations made against the appellant were an attempt to distract from the complainant's boyfriend's own criminal activity.

In his appeal to the Court of Criminal Appeal (Kourakis CJ, Gray and Stanley JJ) the appellant complained of the trial judge's refusal to exclude a passage from his police interview in which he admitted possessing amounts of cannabis that had been found at his home. It was further contended that the trial judge failed to properly direct the jury in respect of this evidence, once it had been admitted. All three judges held that the evidence of the appellant possessing and trafficking cannabis was relevant and admissible. They differed, however on the issue of the adequacy of the trial judge's directions in respect of that evidence, once admitted.

Stanley J considered that the direction given on this topic did not satisfy the requirements of the *Evidence Act 1929 (SA)*. The trial judge was obliged to identify and explain the purpose for which the evidence admitted could, and could not, be used. While the direction given adequately explained that the jury could not use the evidence of the appellant's drug use for propensity reasoning, his Honour was not persuaded that the direction adequately explained the permissible use of that evidence. The trial judge was required to direct the jury that the evidence explained the circumstances by which the appellant met the complainant and her boyfriend and further was evidence they could use to find he was providing drugs to the complainant and using the provision of those drugs to pressure her for sex.

However, in considering the application of the proviso, Stanley J was satisfied that no substantial miscarriage of justice had actually occurred. He considered that the absence of the requisite directions would have had no significance in determining the jury's verdict. The jury's verdict necessarily involved the acceptance of the evidence of the complainant and her boyfriend on the central allegations underpinning the charges the jury had to consider. His Honour's own independent assessment of the whole of the evidence coupled with the fact that the jury in returning guilty verdicts

must have accepted the evidence of the complainant and her boyfriend, satisfied him that no substantial miscarriage of justice had occurred in this case.

Gray J thought it was important that the summing up be considered in its entirety. He did not consider that the jury would have been under any misunderstanding as to the purpose of the evidence of discreditable conduct. In the circumstances of the trial, it was an item of circumstantial evidence to be considered by the jury with other evidence from which they would be entitled to reach the conclusion that the appellant was a dealer in drugs and made use of his supply of drugs to influence and put pressure on the complainant. His Honour did not consider that in the circumstances of the trial there was any inadequacy in the directions of the judge in explaining and identifying the purpose of the impugned evidence.

Kourakis CJ (dissenting) noted that the trial judge failed to give any directions on the proper use of the evidence of the appellant's possession of cannabis. The judge did not direct the jury that the evidence of the possession of, or even trading in, cannabis could not be used as a basis from which to reason that the defendant trafficked, or was more likely to trade, in methylamphetamine. The general direction, against reasoning that the appellant was guilty of the offences charged because he was a drug trafficker, was insufficient for these purposes. His Honour noted that the prosecution case depended on the acceptance of the testimony of the complainant and her boyfriend, and the Court was not in a position to evaluate their credibility on the face of the transcript. His Honour considered that the proviso could not be applied so that the appeal should be allowed and the matter remitted to the District Court for retrial.

The proposed grounds of appeal include:

- The Full Court (in the dispositive reasoning of Stanley J) erred in applying the proviso where the jury's verdict depended upon the assessment of the credibility of prosecution witnesses, and may have been affected by the failure of the trial judge to give the jury directions that were required by law to be given.