IN THE HIGH COURT OF AUSTRALIA No. S135 of 2012
SYDNEY REGISTRY
BETWEEN:

BRADLEY DOUGLAS COOPER

Appellant

THE QUEEN

Respondent

10 **APPELLANT'S REPLY**

Respondent's submissions on the "alternative case"

1. The Respondent argues that the misdirection on joint criminal enterprise actually had the effect of "foreclosing" liability on this basis, because the direction entailed that joint criminal enterprise liability and Quinn's defence of the appellant were "mutually exclusive" possibilities. So long as the jury was satisfied of the reasonable possibility that C's account of the confession by Quinn was correct, so the argument goes, it was bound to acquit—even though C's evidence was the "only basis for joint criminal enterprise" left to the jury: RS [6.4]–[6.10].

20 2. This analysis is incorrect. The directions on the alternative case required the jury to determine whether C's account of the confession should be accepted in its "entirety" or only partially. The former possibility included accepting the representation concerning Quinn's defence of the appellant (the defence case); the latter meant acceptance of Quinn's admission to attacking the deceased, but rejection of her claim that she did so in defence of the appellant (the Crown's alternative case). This is how the competing cases were explained to the jury.[1] Joint criminal enterprise liability and 'defence of another' were only characterised as "mutually exclusive" scenarios to the extent that the prosecution and defence cases were incompatible with one another.

3. The directions left open the real possibility that the jury could accept aspects of C's
30 evidence about Quinn's confession and thereupon convict the appellant for his participation in a joint criminal enterprise with Quinn.[2] The written and oral directions spelled out for the jury that when there are only two participants in a joint criminal enterprise and the agreed crime "is committed by only one of them then the other is equally liable."[3] The directions left open the impermissible path to conviction based on a fatal act or acts perpetrated by Quinn.

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[1] "[The Crown] would also accept for this purpose, Ms Quinn's admission to C that she used the axe. It asks you however, to the reject the suggestion allegedly made by Ms Quinn in that admission that she did so in order to come to the defence of the accused. It simply submits that it is contrary to the remainder of the evidence in the case. [Defence counsel] on the other hand submits that you would have regard to the entirety of what Ms Quinn is alleged to have told C on the day after the incident." (SU 97; see also SU 39, 40 and 98)

[2] After retiring, the jury had asked for further directions on this subject: see AWS at [27], [36].

[3] Written directions at p. 3; SU 34 and 95

4. The directions on the alternative case and Quinn's alleged confession to C were inextricably connected with the misdirection on 'defence of another'. The passage from the summing up quoted at RS [6.5] and [6.9] flowed into the direction concerning the relevance of Quinn's state of mind to the 'defence' (and hence to the liability of the appellant).[4] It was argued at AWS [37] that this direction was erroneous. By diverting the inquiry to Quinn's subjective state of mind and the reasonableness of her conduct, the misdirection was apt to obscure and confuse[5] the issues at trial. This is a further reason why the respondent is disentitled from relying on the verdict as a reflection of the "simple fact" that the jury rejected C's account (RS [6.9]), or from submitting that the misdirection did not significantly impact on the defence case (RS [6.11]).

Respondent's submissions on "exclusion of the proviso"

5. The respondent has mischaracterised the appellant's submissions on the proviso to s 6(1) of the *Criminal Appeal Act*.[6] The appellant's submissions were based upon five propositions, which are summarised as follows:
   i. Section 6(1) requires an appellate court to consider the *nature* of an established error or defect in the trial and its *potential effect* on the outcome of the trial;
   ii. Some errors or defects may, by their very nature, preclude application of the proviso—put another way, consideration of the nature of the error or defect may inevitably lead the appellate court to a conclusion that the proviso cannot be applied to the case;
   iii. The first two propositions find support in both the language of s 6(1) and recent authority of this Court since the decision in *Weiss v The Queen*;[7]
   iv. The nature of the primary error established in the court below, which entailed the possibility of wrongful conviction and deprivation of the defence case's efficacy, was of a nature that effectively precluded application of the proviso;
   v. The approach taken to the proviso question in the court below was deficient in that: (a) inadequate or no consideration was given to the nature of the established errors; (b) inadequate or no consideration was given to the combined effect of the established errors in the context of the circumstances of the trial; (c) the Court did not satisfy itself, nor could it have been satisfied on the record of trial, of the guilt of the appellant beyond reasonable doubt, notwithstanding that it was obliged to do so;[8] and (d) in any event, the Court's own analysis of the evidence was inadequate and defective.

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[4] SU 98; see also SU 40
[5] The respondent appears to accept, at RS [6.11], that the directions were confusing and misleading.
[6] RS [6.16]–[6.21], particularly at [6.20]
[7] *Evans v The Queen* (2007) 235 CLR 521 especially at [37]–[51]; *AK v Western Australia* (2008) 232 CLR 438 at [42] and [59]; *Gassy v The Queen* (2008) 236 CLR 293 at [34]; *Cesan v The Queen* (2008) 236 CLR 358 at [124]; *Handlen v The Queen* at [43] and [47].
[8] *Weiss v The Queen* (2005) 224 CLR 300 at [44]

6. The second proposition does not proceed from a typology or categorisation of error, as the respondent asserts.[9] The first part of s 6(1) contains a catalogue of the grounds of appeal upon which a verdict or judgment of the court of trial may be set aside. The necessarily exhaustive quality of the catalogue, considered in combination with the level of satisfaction or finality on the part of the appellate court *before* it turns to consider the proviso, which is assumed in the language of the provision, allows for the situation in which an appellate court is bound to conclude that the proviso cannot be applied. This situation may arise in respect of each of the three broad grounds of appeal referred to in s 6(1).

10 7. An indication that this threshold position has been reached becomes plain when the appellate court may no longer give significance to the fact that the jury returned a guilty verdict,[10] or when it is no longer appropriate to assess the strength of evidence supporting the prosecution case as though that evidence is unaffected by the established error or defect in the trial.[11] The combination of errors and defects in the trial of the appellant placed the Court of Criminal Appeal in this position. The threshold was reached once it became apparent (or should have become apparent) that the misdirections left open a path to wrongful conviction and, in combination with the established failures of defence counsel to adduce material exculpatory evidence, operated so as to vitiate the defence case.

20 8. The respondent has not addressed the inadequacies in the Court of Criminal Appeal's approach to the proviso question. The assertion made at RS [6.22] that the Court gave due consideration to the established errors amounts to no more than an acknowledgement that the Court established that the errors in fact occurred. This was not a substitute for the analysis the Court was obliged to undertake before it could conclude that no substantial miscarriage of justice had actually occurred.

The respondent's submissions on Ground 3

9. It is true there was evidence in the trial which tended to prove that the deceased was intoxicated at the material time. The deceased consumed drugs and alcohol in the hours
30 leading up to his death: CCA [16]–[17]. Some evidence was adduced to the effect that the deceased became violent and aggressive when he was intoxicated. The evidence is summarised at CCA [91]–[94].

10. This aspect of the defence case is to be considered against the established failures or omissions by defence counsel to adduce evidence and to cross-examine on the issue. There was clearly real evidence available to the defence in the mental health notes which supported the case that the deceased suffered from a psychotic illness and was prone to bizarre and dangerous behaviour, particularly after consuming drugs and alcohol. The

[9] At RS [6.14]–[6.16]

[10] For example, see *Handlen v The Queen* at [46]–[47]; *Baiada Poultry Pty Ltd v The Queen* (2012) 86 ALJR 459 at [28]

[11] *Handlen v The Queen* at [43]

appellant's counsel was in a position to challenge the benign description of the deceased given by his grandmother, Mrs Muldoon, but did not do so. It was accepted in the court below that there was no reasonable explanation for these failures.

11. The respondent in effect contends that the established failures or omissions were immaterial, given the evidence which was adduced on the subject and the joinder of issue in the trial. On the contrary, the foregone evidence went to issues of critical importance in the case: Was the deceased behaving violently and irrationally towards the appellant? Did the deceased attack the appellant? Should Quinn's evidence be doubted on this account? Evidence that tended to support an affirmative answer to any of these questions had the capacity to materially advance the defence case. For this reason, the established failures or omissions caused a miscarriage of justice.

12. The respondent obscures this fact by suggesting that it was not really in dispute that the deceased "started the fight for no good reason": RS [6.31]–[6.32]. The appellant does not accept this characterisation of the evidence. While the Crown case may have accommodated the fact that the deceased was behaving strangely in the moments leading up to his death, it certainly did not concede any physical aggression on the part of the deceased. It was an important aspect of the Crown case that the appellant perpetrated a one-sided and relatively unprovoked attacked on the deceased, who was defenceless in the face of the appellant's aggression. In addition, the respondent's submissions on the failure to challenge the witness "J", notwithstanding that the pathology evidence did not sit comfortably with J's account,[12] only serves to emphasise the significance of defence counsel's failures or omissions. By tending to prove irrational violence on the part of deceased, the foregone evidence provided a basis to call into question J's evidence.

13. It is submitted that once it was established that the hospital notes were important for the appellant's case,[13] they should have been tendered and Mrs Muldoon should have been cross-examined on the subject, and that there was no reasonable explanation for the failure to do so,[14] there was a miscarriage of justice within the meaning of s 6(1) of *The Criminal Appeal Act*.

14. Further, the errors which occurred in this case arose (at least in part) because of a misunderstanding of the law by defence counsel.[15] In this respect there is a strong analogy with the rules relating to erroneous admission and exclusion of evidence. In that context the question has been framed in terms of whether, the error notwithstanding, the jury "would certainly have returned the same verdict".[16] In this case Beazley JA appears to have adopted as a test, whether or not the jury "would be *likely to entertain a reasonable doubt* if all the evidence had been before it".[17] This is taken from the

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[12] Although J claimed that the appellant punched the deceased's face repeatedly, there was no evidence of bruising to the deceased's face.
[13] CCA at [178]
[14] CCA at [202]
[15] CCA at [145]–[147]
[16] *Maric v The Queen* (1978) 52 ALJR 631 per Gibbs CJ at 635, Col 1, C-E
[17] CCA at [204], emphasis added

judgment of Hayne J in *TKWJ v The Queen* (2002) 212 CLR 124, although in that judgment his Honour observed that he was only using that phrase for ease of reference.[18] In *Nudd v R* (2006) 80 ALJR 614 at 622 Gummow and Hayne JJ summarised the legal position emerging from the various judgments in *TKWJ,* relevantly concluding:

> "That [i.e. whether there has been a miscarriage of justice] requires consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial, and whether there was a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial."[19]

15. The test that was applied by Beazley JA was too onerous. In addition, it is submitted that this ground was not to be resolved by doing as Beazley JA did, namely pointing to other evidence that undermined C's account.[20] The point of the evidence was that it advanced the defence case that the deceased had an established history of being psychotically violent when under the influence of drugs and alcohol. The evidence tended to undermine the account of Quinn.

The respondent's submissions on "the application of the proviso"

16. In the final part of its submissions, the respondent asserts that the issue at trial was a "narrow one" and then embarks on a lengthy analysis of aspects of the evidence that are said to derogate from C's account of the confession or to support the inculpatory account of Quinn. This is an example of an analysis of the evidentiary content of the Crown case which assumes that the evidence was unaffected by the established errors and defects in the trial.[21] To the extent that there may have been potential for a "narrow" joinder of issue at trial, the misdirections served to confuse the issues and to divert the jury away from its essential task. So long as an impermissible path to conviction was left open for the jury, particularly in circumstances in which it could not be said that the defence case was adequately placed before the jury, assertions about the strength of the prosecution case do not provide a basis for the application of the proviso.

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[18] *TKWJ v The Queen* at [104] p. 157 NB. Beazley JA refers to that passage at [162] of her judgment
[19] *Nudd v The Queen* at [24] p. 622
[20] CCA at [205]
[21] *Handlen v The Queen* at [43]