

02/12; [2012] VSCA 7

SUPREME COURT OF VICTORIA — COURT OF APPEAL

**MURDOCH v THE QUEEN**

**Buchanan and Bongiorno JJA and Williams AJA**

**31 January 2012**

**CRIMINAL LAW – BLACKMAIL – ALLEGATION THAT ACCUSED WAS INVOLVED IN MAKING A DEMAND AND USED MENACES AS A MEANS OF REINFORCING THE DEMAND – AGREEMENT IS AN ESSENTIAL ELEMENT OF A JOINT CRIMINAL ENTERPRISE – TRIAL JUDGE INSTRUCTED THE JURY THAT TO ESTABLISH BLACKMAIL THE CROWN WAS OBLIGED TO PROVE THAT THE ACCUSED HAD NO REASONABLE GROUNDS FOR MAKING A DEMAND – WHETHER JUDGE IN ERROR – THE CROWN WAS REQUIRED TO PROVE THAT THE ACCUSED DID NOT BELIEVE HE HAD REASONABLE GROUNDS FOR MAKING THE DEMAND: CRIMES ACT 1958, S87.**

M. was alleged by the Crown to have been involved with others in a joint or common enterprise whereby M. served demands on various persons and used menaces. At the trial, the Judge directed the jury that M. would not be guilty of the offence if he honestly believed that he had reasonable grounds for serving the demands and that the use of menaces was proper. M. was convicted of the charge. Upon appeal—

**HELD: Appeal allowed and conviction quashed. Verdict of acquittal entered.**

1. The Crown was obliged to prove that M. did not have reasonable grounds for making the demand or did not believe that the use of menaces was a proper means of reinforcing the demand. Whilst the trial judge said at one point that the Crown was required to prove that M. did not believe he had reasonable grounds for making the demand, on two other occasions he said to the jury that it was sufficient for the Crown to prove that the accused did not have reasonable grounds for making the demand. The jury may well have taken the reiterated incorrect statement as being the law.

2. Accordingly, the trial judge erred in failing to direct the jury that M. would not be guilty of the offence if M. honestly believed that he had reasonable grounds for serving the demands which he did and that the use of menaces was proper.

**BUCHANAN JA:**

1. Stephen Douglas and James Douglas claim to be citizens of ‘Commonwealth of Caledonia Australis’ and that they are not subject to the laws enforced in Victoria.

2. On 31 January 2002 Senior Constable Stevenson and Senior Constable Granter intercepted a motor car driven by James Douglas and charged him with unlicensed driving and resisting arrest. On 23 June 2002 Senior Constable Stevenson received an envelope containing a notice entitled ‘Common Law Notice of Demand’ signed by James Douglas. On 24 June 2002 Senior Constable Granter also received a like notice.

3. On 15 October 2002, Senior Constable Campbell intercepted a motor car driven by Stephen Douglas bearing unofficial number plates with the number VIC 005 and the words ‘HM Government of Caledonia Australis’ and the motto, ‘Truth is Freedom’. Senior Constable Campbell subsequently issued a number of summonses.

4. On 14 January 2003 the summonses came on for hearing in the Magistrates’ Court at Ringwood. Before the hearing began, the magistrate received from a member of the court staff a document headed ‘Copyright Notice’ and outside the courtroom, Stephen Douglas approached Senior Constables Stevenson and Granter and handed them a document. When the case was called on for hearing, James Douglas refused to confirm that his name was James Douglas and so the magistrate heard the charges *ex parte*. The magistrate found the charges proven and passed sentence. After the hearing, Stephen and James Douglas approached Senior Constables Stevenson and Granter and held up a piece of paper inscribed ‘PERJURY’.

5. On 18 February 2003, Senior Constable Shenton intercepted an unregistered motor car

driven by Stephen Douglas bearing unofficial number plates with the number VIC 005, the words 'HM Government of Caledonia Australis' and the motto, 'Truth is Freedom'. Senior Constable Shenton issued two penalty notices.

6. On 18 March 2003, Senior Constable Shenton received by registered post a 'Notice by Written Communication/Security Agreement' dated 20 March 2003, which alleged that he was liable for \$1,500,000 for breach of copyright in Stephen Douglas' name and stated that, if it were not paid, the debt would be enforced by 'immediate non-judicial foreclosure' pursuant to the 'UCC'.

7. On 21 March 2003, Senior Constable Stevenson received by registered post an envelope containing a 'Notice by Written Communication/Security Agreement' dated 20 March 2003 claiming that \$3,000,000 was payable to James Andrew Douglas for breach of copyright in his name.

8. On 2 April 2003, Senior Constable Stevenson received by registered post an envelope containing an invoice which referred to 'court transcript, dated January 14 2003' and claiming the sum of \$1,500,000 payable to James Andrew Douglas for breach of copyright in his name.

9. The appellant was a licensed private enquiry agent, who specialised in process serving. According to what he later told police, he was hired by Douglas as a process server to serve documents on four police officers at their houses. He told police that Douglas provided him with the documents in envelopes and that he did not read them, but he believed that they had been prepared by Douglas in accordance with law.

10. On 5 May 2003 the appellant attended at Senior Constable Campbell's house. The door was opened by Senior Constable Campbell and he confirmed that he was 'Neil Campbell'. The appellant then handed to him an envelope bearing Campbell's name and address. The appellant said that he was a registered private agent and, according to Senior Constable Campbell, he repeatedly told Campbell that he was in a lot of trouble and would need to obtain legal advice. He said, 'You could lose all your assets and your home. The Universal Commercial Code is a very serious international law.' Senior Constable Campbell told the appellant that he was not the Neil Campbell concerned. According to Senior Constable Campbell the appellant then repeated his previous warnings and said, 'I know who you are, you're the one I'm after' and 'You'll probably lose your home.'

11. After hearing the appellant walk away, Senior Constable Campbell opened the door and found the envelope jammed under the front security screen door. The envelope contained a 'Copyright Notice' and 'Notice of Written Communication/Security Agreement' which alleged that Campbell had breached copyright by using Stephen Douglas' name in the charges issued by him. It sought payment of US\$500,000 for each use of Douglas' name.

12. On 5 May 2003, the appellant attended at the house of Senior Constable Shenton and left with Mr Shenton's teen-aged son a letter dated 22 April 2003, a 'Notice of Written Communication/Security Agreement' and two copies of the infringement notices issued on 18 February 2003. The notice claimed US\$500,000 for each use of James Douglas' name by Senior Constable Shenton. It provided for 'immediate non-judicial foreclosure'.

13. Later on 5 May 2003, the appellant attended at the house of Mr Thomas Kevin Hassard, a magistrate, and spoke to Mrs Hassard through the security screen door. Mrs Hassard said that her husband was not home and that she was not prepared to open the door. The appellant said that he was a private detective and produced a card. Mrs Hassard telephoned her husband in Mildura as she stood by the front door so that the appellant could hear her. Mr Hassard told her to call the police immediately. Mrs Hassard then telephoned the local police station and, as she did so, she heard a car leaving. She looked out and saw an envelope at the door. It contained a 'Notice of Written Communication/Security Agreement' claiming US\$500,000 for each breach by Thomas Kevin Hassard of James Douglas' copyright in his name. It also included the expression 'immediate non-judicial foreclosure'.

14. On 6 May 2003 the appellant attended at the house of Senior Constable Stevenson and left an envelope containing a 'Notice of Written Communication/Security Agreement'. When Mr

Stevenson arrived home, his wife was visibly distressed. She handed the document to him. It alleged a breach of copyright occasioned by Stevenson uttering the name James Andrew Douglas when he gave evidence in court. It claimed the sum of \$500,000 and asserted a right of 'non-judicial foreclosure' in respect of Stevenson's property.

15. On 15 May 2003 Senior Constable Shenton received by registered post a letter containing an invoice, which referred to the infringement notices issued against Douglas and claimed the sum of \$3,000,000 payable to James Andrew Douglas.

16. On 16 May 2003 Mr Hassard received by registered post an envelope containing an invoice, which claimed the sum of \$13,500,000 for nine uses of 'James Douglas' at Ringwood Magistrates' Court.

17. On 19 May 2003, Senior Constable Stevenson received by registered post an envelope containing an invoice which claimed the sum of \$1,500,000 for three uses of 'James Douglas' at Ringwood Magistrates' Court.

18. On 16 June 2003, Detective Sergeant Gaver executed a search warrant at the appellant's mother's house. The appellant was present. When asked his name, the appellant said, 'I must warn you it's copyrighted'. The police found two copyright notices claiming copyright to the names 'Gary Murdoch' and 'Les Bank' on the appellant's computer. They also found a satchel containing documents relating to 'Caledonia Australis' and the Douglasses and a copyright notice claiming copyright in the name 'Gary Murdoch' together with four pages of hand-written notes in the appellant's briefcase. In a record of interview the appellant stated his understanding of the claim of copyright in his name and enforcement in terms to the effect that he had a *bona fide* claim.

19. The appellant was charged with a number of counts of blackmail. After a trial in the County Court, the appellant was found guilty on four counts of blackmail and, after a plea, was sentenced to a community based order of 18 months' duration.

20. The application for leave to appeal against conviction was heard by Nettle JA. Sixteen grounds were advanced. His Honour granted leave to appeal on grounds 11, 12 and 13 and refused leave to appeal on all other grounds. The appellant, who was self represented, has exercised the right conferred upon him by s315(2) of the *Criminal Procedure Act 2009* to have the application determined by this Court.

21. I consider that grounds 1 to 10 and 14 to 16 should be rejected for the reasons stated by Nettle JA. I cannot usefully add anything.

22. Ground 11 is as follows:

The transcript is incorrect. The jury were present in the courtroom when Judge Duckett spoke to my barrister. Judge Duckett's comments to my barrister were direct. However, by making such comments in front of the jury, Judge Duckett effectively destroyed my defence. My barrister went bright red. The jury were gob smacked. Several looked at me with their mouths hanging open. I had no idea what to do. I just shrugged and looked stunned and confused. At no stage did anyone attempt to explain to the jury the difference between 'parties acting in concert' and 'common design' and how the prosecution using 'common design' meant that they had no real evidence of Douglas and I conspiring together to commit a criminal offence. The videotape will show the jury was present and their reactions. Judge Duckett's comments amounted to a misdirection of the jury compounded when my counsel failed to present evidence to the jury about 'acting in concert' versus 'common design', which contributed to the unfairness of the trial.

23. Setting aside the question whether the trial judge unfairly criticised the appellant's counsel and thereby prejudiced the jury against the appellant, buried in the ground is a good point. It was distilled by Nettle JA along the following lines. The trial judge was wrong to suggest that proof of an agreement is not an essential proof of a joint criminal enterprise to implement a common design. Proof of agreement is a critical element in any joint criminal enterprise and the judge should have directed the jury in those terms.

24. The Crown case against the appellant at trial was that the appellant and the Douglasses

were engaged in a joint or common venture or enterprise. In the course of his charge to the jury, the trial judge said:

[Defence counsel] in his submission to you and in particular in relation to many of the ten points that he made to you, submitted that there was an onus on the prosecution to establish that the three accused had met or had reached an agreement that they should act in this way that the prosecution alleges. That is not an element of the principle of common design and I shall now direct you as to what the elements of the common design are for the purpose of the counts that are before you and this direction applies to the counts or the charges that the accused men face in this trial. ... You will immediately see that in order to be guilty as a person engaged in a joint criminal enterprise, three things are necessary:

1. The crime must have been in fact committed by someone.
2. The accused must have known of the criminal purpose and agreed to play a part in carrying it out.
3. The accused must have performed an act or acts for the purpose of carrying it out.

It is well settled that the doctrine of common purpose rests upon an agreement, express or implied.

As the High Court said in *McAuliffe v The Queen*:<sup>[1]</sup>

The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms — common purpose, common design, concert, joint criminal enterprise — are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. ... Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.<sup>[2]</sup>

25. I do not think that his Honour's reference to agreeing to play a part in carrying out the common design nullified the effect of his earlier clear statement that an agreement was not an element of the doctrine of common design. In my opinion, there was a substantial risk that the jury were misled as to a critical element of the Crown case.

26. Ground 12 is effectively subsumed by ground 13, the gravamen of which is that the trial judge erred in failing to direct the jury that the appellant would not be guilty of the offence if the appellant honestly believed that he had reasonable grounds for serving the demands which he did and that the use of menaces was proper.

27. In the course of his charge, his Honour said:

A demand will be unwarranted unless the person making the demand does so in the belief (a) that he has reasonable grounds for making it and (b) that the use of menaces by him was a proper — meaning for these purposes a lawful and not criminal — in reinforcing the demand ... This element therefore is concerned with the accused's state of mind. Demand with menaces would be unwarranted unless the demander genuinely believes that person making the demand and that it is proper to reinforce it with menaces. 'Proper' is a word of wide meaning, but does not include an act which is unlawful. The test is, did the accused believe that it was proper in the sense of lawful, to employ menaces to reinforce his demand in all the circumstances. ... It's important when considering this element to remember that the question is whether the demander believed he had a reasonable and proper ground for his demand. It is his state of mind that is all important, not whether or not you, the jury, believe there are reasonable grounds for that belief. Remember there is no onus on the accused to establish their state of mind ...

So far, his Honour's directions were unimpeachable. Unfortunately, he continued:

The burden of proof is on the prosecution to establish beyond reasonable doubt that the accused had a guilty intent. It would do that by proving beyond reasonable doubt that the accused (a) did not have reasonable grounds of making the demand or (b) did not believe that the use of menaces by him was a proper means of reinforcing the demand.

His Honour reinforced his direction by saying at a later stage the element the Crown was obliged to prove was that the appellant 'accompanied his demand with menaces and ... that it was an unwarranted demand in that he either (a) did not have reasonable grounds for making it; or (b) did not believe that the use of menaces was a proper means of reinforcing it.'

28. The Crown was obliged to prove that the accused did not have reasonable grounds for making the demand or did not believe that the use of menaces was a proper means of reinforcing the demand. So much is apparent from s87 of the *Crimes Act* 1958. The trial judge did say at one point that the Crown was required to prove that the accused did not believe he had reasonable grounds for making the demand, but on two other occasions he said to the jury that it was sufficient for the Crown to prove that the accused did not have reasonable grounds for making the demand. The jury may well have taken the reiterated incorrect statement as being the law. Accordingly, I am of the opinion that the trial miscarried.

29. For the foregoing reasons I am of the opinion that the appeal should be allowed and the conviction sustained by the appellant in the court below should be quashed. As the appellant has served the sentence imposed upon him, there is no utility in ordering a retrial. Accordingly I would direct that a verdict of acquittal be entered.

30. The verdict is not to be taken as a vindication of the position adopted by the appellant. Rather, it is simply a reflection of an error in the charge combined with the fact that the sentence has been served.

**BONGIORNO JA:**

31. I agree with the disposition proposed by Buchanan JA for the reasons his Honour has given.

**WILLIAMS AJA:**

32. I too agree.

**BUCHANAN JA:**

33. The order of the Court will be that the appeal is allowed, the conviction sustained by the appellant in the Court below is quashed and it is ordered that a verdict of acquittal be entered.

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<sup>[1]</sup> [1995] HCA 37; (1995) 183 CLR 108, 113-4.

<sup>[2]</sup> See also *R v Clarke and Johnstone* [1986] VR 643, 653-4; *Gillard v R* [2003] HCA 64; (2003) 219 CLR 1, 35 (Hayne J).

**APPEARANCES:** The appellant Murdoch appeared in person. For the Crown: Mr GJC Silbert SC, counsel. Mr C Hyland, Solicitor for Public Prosecutions.

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