

26/84; [1984] HCA 38

HIGH COURT OF AUSTRALIA

R v APOSTILIDES

Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ

5 May, 19 June 1984

[1984] HCA 38; 154 CLR 563; [1984] 58 ALJR 371; [1984] 53 ALR 445; 15 A Crim R 88; discussed in article [1984] ACL 36080

CRIMINAL LAW – PROCEDURE AT TRIAL – WITNESS NAMED ON PRESENTMENT – PROPOSAL BY CROWN PROSECUTOR NOT TO CALL WITNESS AT TRIAL NOTWITHSTANDING EXPECTATION THAT WITNESS COULD GIVE MATERIAL EVIDENCE – WHETHER CROWN PROSECUTOR OBLIGED TO CALL WITNESS – RESPONSIBILITY OF CROWN PROSECUTOR DISCUSSED.

The High Court has made the following general propositions in respect of the conduct of criminal trials in Australia.

- 1. The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.**
 - 2. The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.**
 - 3. Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.**
 - 4. When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.**
 - 5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.**
 - 6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.**
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