30/86

SUPREME COURT OF VICTORIA — FULL COURT

R v SORBY

Kaye, O'Bryan and Tadgell JJ

14-18, 21-23 April 1986; 23 June 1986

[1986] VicRp 77; [1986] VR 753; 21 A Crim R 64; Noted 11 Crim LJ 357

CRIMINAL LAW – EVIDENCE – UNSWORN STATEMENT BY ACCUSED – REQUEST BY ACCUSED TO PRODUCE DOCUMENTS – REQUEST BY ACCUSED TO USE A BLACKBOARD TO SHOW HIS FINANCIAL AFFAIRS – REQUESTS REFUSED – WHETHER DISCRETION OF TRIAL JUDGE PROPERLY EXERCISED – CIRCUMSTANTIAL EVIDENCE – WHERE PROOF OF ELEMENT OF OFFENCE TO BE INFERRED – STANDARD OF PROOF: *EVIDENCE ACT* 1958, S25.

1. Where an accused person makes an unsworn statement, he is confined to speaking about relevant facts and has no legal right to introduce inadmissible evidence or use evidentiary material not properly proved and admitted in evidence.

***R v Wyatt* [1972] VicRp 105; (1972) VR 902, applied.**

2.(a) Where the evidence is circumstantial, each fact from which an inference of guilt is to be drawn must itself be proved beyond reasonable doubt. Accordingly, the circumstances relied upon for the inference must exclude every hypothesis consistent with innocence.

(b) However, the tribunal of fact need not disregard every piece of evidence which does not by itself establish a fact beyond reasonable doubt. It may consider what weight is to be given to the united force of all the circumstances together: one piece of evidence might resolve a doubt as to another.

THE COURT: *[After setting out the facts and considering grounds of appeal not relevant to this Report, their Honours continued]* … **[54]** Ground 23 – "His Honour erred in disallowing the tender of documents by the witness Barrie Cornelius O'Brien". Ground 28 – "His Honour erred in refusing to allow the accused during his statement from the dock, (a) to tender documents; (b) to use a blackboard."

Ground 41 – "The trial miscarried when the trial judge refused to admit photographs taken by the accused".

The background to these grounds arose when O'Brien gave evidence. During cross-examination counsel for the applicant sought to tender for identification certain documents relating to the financial affairs of the applicant, which had been seized by the witness pursuant to the search warrant to which reference was made earlier. Counsel indicated that the purpose of the tender was to facilitate the applicant using the documents in the course of an unsworn statement which he intended to make in due course. Objection was taken to the tender, firstly on the grounds of relevance and, secondly on the ground that the documents would not be admissible in evidence if referred to in the course of an unsworn statement and not otherwise proved by evidence. The learned Judge upheld the objection and the documents were not tendered for identification.

The grounds raise the question whether, in the course of an unsworn statement, an accused person may produce documents not proved by admissible evidence or admitted by consent. Before the applicant made his unsworn statement, counsel for the applicant applied for leave to have the applicant use and tender a number of documents, including **[55]** photographs, not yet admitted into evidence and to use a blackboard to demonstrate his financial affairs. Leave was refused.

These grounds concern s25 of the *Evidence Act* 1958 and the extent of the right conferred upon an accused person by the section to make an unsworn statement. Section 25 is in these terms:

> "It shall be lawful for any person who in any criminal proceeding is charged with the commission of any indictable offence ... to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf."

The section does not abrogate or relax for an accused person the rules of admissibility of documents. It is confined to permitting an accused person to speak about the facts without facing cross-examination. Irrelevant facts may not be included in an unsworn statement; cf. *R v Peacock* (1911) 33 ALT 120; *R v Wyatt* [1972] VicRp 105; [1972] VR 902. In our opinion, no legal right is conferred by the section to introduce inadmissible evidence in the course of an unsworn statement. The applicant's legal right to make an unsworn statement did not give him a right to use evidentiary material such as documents and photographs not properly proved and admitted in evidence. *R v Wyatt* [1972] VicRp 105; [1972] VR 902 is authority for this proposition. Smith J, delivering the judgment of the Full Court said at 909:-

> "An accused person who is making an unsworn statement cannot, merely by referring to and producing a document or recording which might possibly by appropriate sworn evidence be shown to be relevant and admissible in evidence, acquire the right to use that document or recording as evidentiary material supplementing and supporting what he has told the jury about the relevant facts; and such a document or recording so used could not properly be regarded as being merely a part of a statement of facts made by the accused, within the meaning of s25."

[56] Mr McLennan relied upon the next passage in the judgment (at 910):–

> "Although the right conferred by s25 does not entitle an accused person who is making an unsworn statement to support it by putting before the jury an unproved document or recording, he can, of course, always be permitted to do this by way of an indulgence. Moreover, cases may be expected to arise quite often in which there may be no ground of substance for refusing such permission, and cases can indeed be conceived in which a refusal of permission would be unreasonable."

This is *obiter* and not binding upon this Court. In the present case it was open to the accused's legal advisers to seek to prove the documents and photographs in the ordinary way through sworn evidence. They chose not do so, possibly because they apprehended that objection would be taken to the documents and photographs on the ground of relevancy. Be that as it may, the purpose of s25 is to allow an accused person an indulgence to place relevant facts before the jury and not be subject to cross-examination. Such an indulgence ought not to have been extended to documents of the nature the accused desired to use in the course of his unsworn statement.

The purpose of the blackboard was, apparently, for the accused to use in order to illustrate his financial dealings as he made his unsworn statement. The learned Judge in refusing the blackboard no doubt had in mind that the jury had been provided with pens and writing material. No error in the exercise of His Honour's discretion was shown. These grounds must all fail. *[Their Honours then dealt with other grounds and continued]*: **[90]** ... it is argued that His Honour should have told the jury that before any inferences could be drawn by them as to the applicant's guilt, they should be satisfied that the circumstances from which the inferences were to be drawn were established to their satisfaction beyond reasonable doubt; and that they should consider the circumstantial facts not in isolation, but on the whole of the evidence. The submission before us was that the recent decision of the High Court in *Chamberlain v R [No. 2]* [1984] HCA 7; (1984) 153 CLR 521; 51 ALR 225; (1984) 58 ALJR 133 required such a direction and that, without it, the trial was vitiated.

[91] The majority of the members of the High Court in *Chamberlain's Case* were not strictly concerned with the validity of the trial judge's charge. The essential question was whether the Full Court of the Federal Court should have set aside guilty verdicts on the ground that they were unsafe, unsatisfactory or dangerous. The High Court was therefore concerned to consider whether the evidence before the jury was capable of safely sustaining an inference of guilt. In that context Gibbs CJ and Mason J considered the question whether, in a case where the evidence is circumstantial, each fact on which an inference is sought to be based must itself be proved beyond a reasonable doubt. They decided that no inference of guilt can be drawn from facts not so proved. At p536 Their Honours said:

> "... the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and

> they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless, the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or a criminal case, are required to draw an inference from the circumstances of the case. In a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence ..."

The judgment of Brennan J, at p599, was similar in effect. He there said:

> "Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based on particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be **[92]** the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of the jury's critical judgment of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts. ... An inference of guilt may properly be drawn although any particular primary fact, or any concatenation of primary facts falling short of the whole, would be insufficient to exclude other inferences."

Deane J was more guarded. At pp626-627 he said that he found it impossible to give a general theoretical answer to the question whether a jury is precluded from taking account of, or drawing an inference from, a fact unless that fact is established beyond reasonable doubt. His Honour went on to say:

> "There is certainly no requirement of the law that the members of a jury must examine separately each item of evidence adduced by the prosecution and reject it unless they are satisfied beyond reasonable doubt that it is correct. Nor is it the law that a jury is in all circumstances precluded from drawing an inference from a primary fact unless that fact is proved beyond reasonable doubt. If a primary fact constitutes an essential element of the crime charged, a jury must be persuaded that that fact has been proved beyond reasonable doubt before he or she can properly join in a verdict of guilty. Whether or not a juror must be satisfied that a particular fact has been proved beyond reasonable doubt will, however, otherwise depend not only on the nature of the fact but on the process by which an individual juryman sees fit to reach his conclusion on the ultimate question of guilt or innocence."

Gibbs CJ and Mason J recognized that there is little direct authority for the proposition that primary facts from which an inference of guilt is to be drawn must themselves be proved beyond reasonable doubt. They referred to the statement of Burt J in *Moss v Baines* [1974] WAR 7, 11 that "every fact necessary to be proved to sustain proof beyond reasonable doubt of every element of the **[93]** offence charged must itself be proved beyond reasonable doubt", and gave their opinion that in principle that view is correct. Their Honours added:

> "In the United States there is a conflict of authority on the question, and we do not share Wigmore's apparent preference for the view that it is only the whole issue (or the elements of the offence) that must be proved beyond reasonable doubt (*Wigmore on Evidence*, 3rd ed. (1940) vol. IX at p324)."

It is at first sight not altogether easy to reconcile some of the statements of Gibbs CJ and Mason J with views that have been expressed from time to time in this Court as to what it is that the Crown must prove beyond reasonable doubt. Thus, in *R v Dickson* [1983] VicRp 19; [1983] 1 VR 227, 235 the Court, consisting of Starke ACJ, Crockett and McGarvie JJ said:

> "In a criminal trial it is only the elements (ingredients or ultimate facts) of the crime which must be established by evidence beyond reasonable doubt: *Thomas v R* [1972] NZLR 34 at pp37-9; *R v Van Beelen* (1973) 4 SASR 353, at pp371-5; *R v Power* (unreported, Full Court, 8 November 1976), per Young CJ, Newton J concurring; *R v Beble* [1979] Qd R 278 at pp289-90. Evidentiary facts do not have to be proved beyond reasonable doubt but it is common to direct juries that they must be clearly proved before they are treated as established. *R v Van Beelen* (1973) 4 SASR 353, at pp374-80."

Nevertheless, a careful reading of the excerpts from *Chamberlain's Case* to which we have referred, in the context in which they appear, suggests that there is no essential conflict between the view hitherto adopted in this Court and the views expressed in *Chamberlain's Case*. But to say that the Crown need prove only the elements of a crime beyond reasonable doubt is

perhaps unhelpful in a case where the means of proof involves circumstantial evidence. It does not necessarily give a guide as to how proof beyond reasonable doubt is to be established. However, that may be **[94]** (and it is a matter to which we shall return), there is nothing in *Chamberlain's Case* that justifies the submission founded on ground 36, as reformulated.

In *Grant v R* (1976) 11 ALR 503, the High Court, affirming a decision of this Court, held that there is neither a rule of practice nor a rule of law that, when the Crown relies on circumstantial evidence, the jury must be instructed that, before they can convict, the evidence must be not merely consistent with the guilt of the accused, but inconsistent with his innocence. The Court acknowledged that there will be some cases depending on circumstantial evidence when such an instruction will be proper and, indeed, necessary. In others, a direction of that kind will be unnecessary and might even confuse the jury rather than assist them. When the direction is given, either in terms of or along the lines of that given by Alderson B in *R v Hodge* (1838) 2 Lew CC 227; 168 ER 1136, it amounts to an amplification that the direction of the Crown must prove its case beyond reasonable doubt. The trial Judge must, in each case where circumstantial evidence is relied on by the Crown, "... consider whether or not the case calls for the assistance of the jury by the giving of a direction specifically directed to the application of the onus of proof to circumstantial evidence": *Grant v R* (1976) 11 ALR 503, 504.

The proposition that where the evidence is circumstantial each fact from which an inference of guilt is to be drawn must itself be proved beyond reasonable doubt is again no more than an aspect of the axiom that the Crown must prove its case beyond reasonable doubt. If in a **[95]** particular case the jury cannot be expected to understand and apply the axiom without an expanded definition of the rule, so far as it applies to circumstantial evidence, then an appropriately expanded explanation of the rule should be given. Otherwise it is unnecessary.

The following propositions seem to be warranted by the authorities:

> (1) It remains true that to succeed in a criminal trial the Crown need establish by evidence beyond reasonable doubt no more than the elements of the crime charged. So put, however, the proposition is apt to be misleading if it is understood to mean that facts proved otherwise than beyond reasonable doubt can ever establish the elements of a crime.
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> (2) The Crown will seek to establish each element of the crime either by direct and positive proof or by evidence from which guilt beyond reasonable doubt can be inferred, or by a combination of both.
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> (3) When proof of any element essential to guilt is left to be inferred, the primary facts from which the Crown would have the jury draw the inference must be established by evidence beyond reasonable doubt.
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> (4) This means that the circumstances relied on for the inference must exclude any hypothesis consistent with innocence. It does not mean, however, that the jury must disregard every piece of evidence which does not by itself establish a fact beyond reasonable doubt. They must consider what weight is to be given to the united force of all the circumstances together: one piece of evidence might resolve a doubt as to another.
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> **[96]** (5) A direction to the jury to give appropriate effect to these rules of law will necessarily vary according to the nature of the evidence that the Crown offers as proof. The direction will be constructed around the central principle that the Crown must establish guilt beyond reasonable doubt, and will be more or less elaborate according to the need to put the jury on guard against reaching any conclusion unfavourable to the accused which might not be inconsistent with innocence. The direction must therefore be designed to ensure that the jury do not infer guilt from facts about which they are left in doubt.

In the present case the inference that the Crown invited the jury to draw was, as we have said, that the applicant conspired to sell heroin. The invitation was to draw the inference from a series of sales of heroin that the jury might have found by evidence to have been directly and positively proved. Having regard to the way in which the Crown case was put, there was no evidence of conspiracy, or of the applicant's participation in it, except the circumstances of the various sales by the applicant or on his behalf. The evidence offered of the facts of the various sales was direct. The facts themselves, if accepted, constituted indirect and circumstantial evidence of conspiracy to sell and of the applicant's participation: cf. Wills on *Circumstantial Evidence*, 7th ed. 17-18. It was therefore necessary that the jury should be satisfied that the primary facts (i.e., the various

sales) were established beyond reasonable doubt before any inference could be drawn from them; and it was plainly necessary that **[97]** the jury should be under no misapprehension about that necessity. The circumstances of the case were such, however, that if in respect of any particular count the jury were satisfied to accept the direct evidence of the primary facts, or some of them, and to conclude beyond reasonable doubt that sales had been made, the inference of a conspiracy to sell heroin to which the applicant was a party was inescapable.

The judge did not, in his charge, use terms such as "primary facts", "direct evidence" and "circumstantial evidence", or say, for example, that the applicant's guilt was sought to be established by the Crown upon inferences based on a process of deductive reasoning. It was appropriate that the jury should not have been troubled by terms of that kind in a case such as this; and the judge was no doubt concerned to instruct the jury in language that was as untechnical and uncomplicated as possible. The approach His Honour took amounted to an instruction to the jury that made the following points:

> (1) That a criminal conspiracy consists of the agreement by two or more persons to do an unlawful act, or to do a lawful act by unlawful means.
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> (2) That the agreement may be expressed or implied, or partly expressed and partly implied; and that once there is an agreement the offence is complete.
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> (3) That the agreement may be inferred from words or actions or a combination of both, including acts done in furtherance of the conspiracy.
> (4) His Honour told the jury that "If there are facts led in evidence from which you can draw an inference to **[98]** satisfy yourself beyond reasonable doubt that that inference is suggested, then you may conclude the conspiracy just by actions or other things short of words and short of a written document. What the jury has to be satisfied about is that it appears from the evidence beyond reasonable doubt that there was the agreement of at least two people to do the illegal act."
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> (5) There were many other references in the charge to the criminal standard of proof and to the fact that the onus of sustaining it lay on the Crown.
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> (6) At the end of his charge His Honour, after having summarised the evidence in relation to each count, synthesized the Crown case count by count. Having done so, His Honour emphasized that each count was to be considered separately and said: "You may find that he had in respect of, say count 2, an agreement with each five of the other alleged accomplices, or your may find that there was an agreement with only three of them, or with only one of them, but even in respect of one of them, if you are satisfied beyond reasonable doubt, all twelve of you are satisfied beyond reasonable doubt of an agreement with at least one of them to sell heroin, then that particular count, whichever it is, has been established."

His Honour did not in terms tell the jury that they could not view a fact as a basis for an inference of guilt unless they were satisfied beyond reasonable doubt of the existence of that fact. In our opinion, however, such a direction was unnecessary: it was self-evident in view of **[99]** the fact that the jury had been repeatedly told that they could not bring in a verdict of guilty on any count unless the Crown case had been proved beyond reasonable doubt on the whole of the evidence relevant to it. To have told the jury that they could not infer an agreement to sell heroin unless they were satisfied beyond reasonable doubt that one or more of the sales referable to that count had occurred would have been superfluous. It might, indeed, also have been confusing; for even to hint that a verdict of guilty on any one count could be countenanced without proof beyond reasonable doubt of one or more of the sales of heroin that were referable to that count might have undermined the general warning to the jury that no verdict of guilty could be given unless the Crown had proved its case beyond reasonable doubt.

In truth, the Crown case depended on the jury's acceptance of the evidence of the accomplices as to sales of heroin and the rejection of the applicant's bald denials of the sales. The jury were made well aware of their obligation not to find a verdict of guilty on that evidence unless satisfied beyond reasonable doubt. We would therefore disallow the application to amend ground 36 and, since no argument was otherwise advanced in support of the ground as it stands, we treat it as abandoned. *[Their Honours then dealt with the remaining grounds and dismissed the application for leave to appeal.]*

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