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SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v RYAN

Street CJ, Cantor and Roden JJ

28 July 1984 — [1984] 55 ALR 408; (1984) 14 A Crim R 97

CRIMINAL LAW – CONSPIRACY – EVIDENCE – ADMISSIBILITY OF TELEPHONE CALL WHERE CALLER GAVE NAME OF DEFENDANT – WHETHER INTRINSIC INDICIA SUFFICIENT TO IDENTIFY CALLER – WHETHER SHOULD BE LEFT TO JURY.

R., a solicitor, was convicted for conspiring with two others to use forged documents to assist Koreans to obtain permanent resident status in Australia. The Crown case was that R. had telephoned the employer of a number of the Koreans, soliciting from that employer false assertions that the Koreans had trade skills. The trial judge admitted that the evidence of the telephone calls was probative that it was in truth R. who had telephoned, reliance being placed on intrinsic indicia in what the telephone caller had said. R. was released on a 5-year good behaviour bond and fined the sum of $400. On appeal—

HELD: Appeal allowed, conviction quashed and new trial directed.
(1) The evidence of the telephone call was admissible as an objective fact in proving the conspiracy as it was the means by which some of the false documents were obtained.

(2) However, the intrinsic indicia in what the telephone caller had said were not adequate to permit the jury to identify R. as the caller.

(3) Accordingly, the trial judge was in error in admitting it and in leaving it to the jury as evidence which, in itself, would support the conviction that R. was the caller.

(4) Observations by Roden J on the charging, presentation and proof of charges of conspiracy such as the present.

STREET CJ: [1] This is an appeal against a conviction on an indictment charging the appellant with a conspiracy said to have been carried out by him, together with two other men, Choy and Mason, between June 1976 and June 1980. The nature of the conspiracy as alleged in the indictment was that the appellant and the other two co-conspirators conspired to effect a lawful purpose, namely the procurement of Permanent Resident Status for persons of Korean origin by means that are unlawful under a law of the Commonwealth, namely:

> (a) the forgery of documents deliverable to the Commonwealth contrary to s67(b) of the *Crimes Act* 1914;
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> (b) the uttering, knowing them to be forged of documents deliverable to the Commonwealth contrary to s67(b) of the *Crimes Act*, 1914;
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> (c) the misleading of officers of the Department of Immigration and Ethnic Affairs in the performance of their duties under the *Migration Act* 1958 contrary to s65 of the said *Migration Act*.

Having been convicted, the appellant was released on a five-year good behaviour bond and fined the sum of $400. **[2]** It was the Crown case that the three conspirators, during the period identified in the indictment, arranged for the obtaining of Permanent Resident Status for some 22 Koreans who wished to come to live in this country. Those arrangements included obtaining forged or deliberately misleading documents in connection with the personal circumstances of the would-be Australian residents. Some of the documents that were used for this purpose contained erroneous assertions of the trade skills and employment capabilities of the Koreans concerned. The Crown case included proving that the false documents were lodged with the immigration authorities during the period covered by the conspiracy charged in the indictment. Such documents were used in relation to 20 of the 22 Koreans to whom reference was made in the course of the Crown case.

It is this particular facet of the Crown case that has particular relevance to the conclusion which has been reached upon the fate of the present appeal. The appellant was alleged to be a party to the conspiracy in that his role included the deliberate and knowing obtaining and lodging of the false documents in order to mislead the immigration authorities.

It was a strong Crown case against the appellant. One aspect of it was directed to showing that the appellant had telephoned the employer of a number of Koreans, soliciting from **[3]** that employer false assertions that the Koreans had trade skills. The evidence of a Mr Parkinson, the relevant officer of the employer in this connection, was proffered by the Crown. It was objected to. Evidence was taken on the *voir dire*. Ultimately the trial judge, Judge Flannery, decided, for reasons that his Honour then stated, that the evidence was admissible as probative that it was the appellant who made the calls. The evidence is of such importance and brevity as to render it appropriate to quote it in full:

> Q. Are you the personnel manager of a company known as GKN Sankey-Benson Pty Limited?
> A. Yes.
> Q. You have been personnel manager of that company for about 13 years? A. Yes.
> Q. And thus in the year 1977 you were personnel manager of that company? A. Correct.
> Q. GKN Sankey-Benson Pty Limited is a manufacturer of automobile wheels? A. Correct.
> Q. Your company, in the years 1976 and 1977 did, in fact, employ a number of Korean nationals?
> A. Yes.
> Q. I want to ask you, some time in early 1977, that is in the first part of the year, did you receive a phone call from somebody relating to Korean employees? A. Yes.
> Q. Did the person who rang you identify himself when he rang? A. Yes.
> Q. Did he ring you once, twice, a hundred times; how many times? A. There was a total of two or three, more than two, approximately three phone calls. I am not exactly sure of the number.
> Q. When this gentleman first rang you about the Korean employees did he identify himself to you?
> A. Yes.
> Q. What did he say his name and occupation was? A. He said he was the solicitor representing the Koreans, Mr Kang particularly, and said he was Morgan Ryan.
> **[4]** Q. When he rang what did he ask you to do, if anything? (Question withdrawn). Q. When he rang you on the first occasion what did he say to you? A. He was representing the Koreans and wanted to help them to obtain permanent residence in Australia and wanted me to write supporting letters.
> Q. When he asked you to write supporting letters what did he ask you to do? A. He wanted me to state they were employed with our company in tradesmen capacities.
> Q. What did you have to say to that? A. I said to him I could not possibly do that because they were not engaged as tradesmen; they were working as either process workers or second class machinists or similar.
> Q. When was that said? In the first discussion or a subsequent discussion.
> A. It would have been the initial discussion.
> Q. And it was that discussion when you told him you could not do that? A. Yes, that is correct.
> Q. You received at least a subsequent phone call if not phone calls? A. Yes.
> Q. Do you remember what was said by him on those occasions? A. No. I can't be specific about it. I eventually agreed to write the letters under compromise circumstances. I said I wanted to help these people as much as possible because they were very good employees. I said I could not state that they were working in a capacity in which they were not engaged so that was framed around the way I have written the letters."

Mr Parkinson was not cross-examined. The learned judge took the view that this evidence was admissible and available for the jury to found a conclusion that the appellant was in truth the man who telephoned Mr Parkinson. He dealt with the matter in his summing-up:

> "The Crown says that you will be satisfied beyond reasonable doubt it was Mr Ryan who rang because of the contents of the conversation. It referred to Koreans for whom Mr Ryan was acting. It referred to Koreans who were employed by Sankey-Benson, approximately six of them. It referred to employment, it referred to letters which were to be forwarded, hopefully, as references for the purpose of them remaining in Australia. **[5]** It referred to Morgan Ryan being a solicitor and we know Mr Ryan was the solicitor. That is why the Crown says even though the voice was unknown by Mr Parkinson, it was Mr Ryan.

After quoting part of Mr Parkinson's evidence, his Honour continued:

> "Then the Crown says, notwithstanding the refusal by Mr Parkinson, there was at least one other, if not two other, telephone conversations. The Crown also says that the letter, although literally true, was misleading because if you did not read it as if you were doing the Herald crossword puzzle, you

> would think he was employed as a tradesman by GKN Sankey-Benson. I think that fairly summarises the Crown position. Mr Ryan himself said he could not remember whether he spoke to Mr Parkinson or not and Mr Miles says to you, 'Well that shows an element of honesty because he could have said, "I completely deny it"'. Mr Ryan said he did ring people about work for the Korean gentlemen but he never asked those people to say or write anything that was not true. Mr Miles says on his behalf that Mr Parkinson had never heard the voices of Mr Ryan so could not identify it, therefore Mr Miles says how could you be satisfied beyond reasonable doubt it was Mr Ryan who rang? So, Mr Parkinson's version of what happened was not challenged, and the Crown says Parkinson would not have written those letters unless he was asked by Mr Ryan. It is a matter for you. On the other hand, Mr Miles says how can be you satisfied beyond reasonable doubt after all this time that what was said by Mr Ryan to Mr Parkinson when Mr Parkinson said 'No, I cannot be specific about it', how can you be specific beyond reasonable doubt that it was Mr Ryan? The Crown says, on the other hand, who else, having regard to the contents of the conversation. That is your problem, but I am just trying to tell you what I perceive to be the issues about that conversation. I will not go into detail about the Sankey-Benson letters, there are four others, I will just mention the Sankey-Benson letters but they are an important part of the case from both sides."

This passage of the summing-up is to be considered in the context that the appellant had made an unsworn statement **[6]** at the trial in which he asserted that his role throughout all of the transactions covered by the Crown case was not more than that of a solicitor. Reference was made during the trial, and has been made during this appeal, to the delicacy of the position in which a solicitor can be placed when acting for a person whose probity is, to say the least, questionable.

Mr Burchett QC, who appears with Mr Hastings for the appellant, has referred the Court in particular in this regard to *R v Tighe and Maher* (1926) 26 SR (NSW) 94 at 108; 43 WN (NSW) 24. It was the implications involved in the appellant acting as solicitor for the 22 Koreans concerned that were so critically in issue at the trial. The crown case was that the appellant far exceeded an ordinary solicitor's role, and participated expressly and intentionally in this criminal conspiracy. The appellant's defence was that he had done no more than was appropriate for a solicitor retained by and acting for clients who were seeking to gain residential status in this country.

As I have said, the trial judge took the view that the evidence of Mr Parkinson was admissible and available to the jury to support a conclusion that the caller was indeed Mr Ryan. In doing so His Honour stated carefully considered and formulated reasons, making reference to a number of authorities which establish the proposition that, where the identity of a caller over the telephone is in issue, it may be permissible, in appropriate cases, to determine that question of identity from the intrinsic contents of the telephone conversations itself.

[7] It is of course a well-established principle of evidence that either extrinsic or intrinsic indicia may authenticate a document not otherwise susceptible of direct proof, or may authenticate the authorship of a document not otherwise susceptible of direct proof. I have no difficulty in recognising that an analogous principle applies to a telephone conversation.

What is asserted here is that the contents of the conversation between Mr Parkinson and the telephone caller contained sufficient intrinsic indicia to identify the caller as the present appellant. Those intrinsic indicia were identified by His Honour in his judgment in which he ruled that this conversation was admissible as evidence that it was the appellant who made the call. They are mentioned again in the passage which has been quoted from the summing-up.

After carefully weighing those indicia, both individually and in their entirety, I am not able to reach a conclusion that there was sufficient in this telephone conversation to entitle the Crown to place it before a jury as material from which the jury, if they accepted Mr Parkinson's evidence, could conclude that the caller was the appellant. What was said in the conversation does not, to my mind, reach the point of amounting to evidence which, in the absence of any other material identifying the appellant as the caller, would of itself support a conclusion to that effect. The terms of the conversation were not available to the Crown to be used in the way in which they were left to the jury in the summing-up.

The foregoing conclusion does not rule out the admissibility of the telephone conversation as an objective event within the overall web of circumstances tending to establish the conspiracy. It is the particular reliance placed upon it which **[8]** is unwarranted, that is to say reliance on the conversation as evidence in itself that the caller was in fact the appellant.

In this conspiracy the procuring from Mr Parkinson of letters falsely suggesting or implying that trade skills were held by these employees was a relevant and material part of the conspiracy the Crown set out to prove. In my view, the telephone conversation with Mr Parkinson was admissible as an objective fact within the overall conspiratorial web. The circumstance, however, that the conversation was available as an objective fact does not permit the further step to be taken, as His Honour held, and as His Honour put it to the jury, of concluding on the strength of its terms that the appellant was the caller.

Recognising the admissibility of the conversation in an objective sense undoubtedly imports a significant risk of unfair prejudice to the appellant even if nothing more had been said about it during the trial. The prejudice is, of course, far greater where, as happened, it was expressly relied upon for an impermissible purpose. The jury ought at least to have been given a very careful and forceful warning that the fact that the caller said he was Morgan Ryan was not to be taken as evidence that he was in truth Ryan. Alternatively the trial judge might have chosen to deal with it by omitting some portion of the telephone conversation with perhaps some explanation being permitted to overcome any distortions or false impressions that might otherwise arise from the editing. Just how the matter should be handled in according to the conversation, admissibility as an objective circumstance, will be a matter for evaluation by the trial judge in a new trial. **[9]** I do not think it expedient to attempt to state specifically how the conversation should be handled in a new trial as the course of proceedings may well not follow the course that was followed in the present trial, either on the part of the Crown or on the part of the present appellant.

The conclusion which I have reached is that this evidence was wrongly admitted as material upon which the jury could find that the caller was, as he stated himself to be, the appellant. This was an erroneous basis upon which to leave it to the jury, and it follows that, in my view, the challenge in this regard is made good. The question then arises whether this error in the manner in which it was left to the jury should result in the appellant succeeding, or whether on the other hand the case falls within the proviso to s6 of the *Criminal Appeal Act*. The law in regard to the application of the proviso in a case such as the present was authoritatively stated by Gibbs CJ in *Maric v R* [1978] 52 ALJR 631 at 635; [1978] 20 ALR 513 at 520:

> "The test to be applied in determining whether the wrongful admission of evidence has caused a miscarriage of justice has been stated in a variety of ways. *Stirland v DPP* [1944] AC 315, at p321; [1944] 2 All ER 13; (1944) 30 Cr App R 40 is authority for the proposition that there will have been no substantial miscarriage of justice 'where a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict'. In Archbold's *Pleading, Evidence and Practice in Criminal Cases*, 39th ed., par 914, the principle is stated as follows:
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> > 'Where it is established that evidence has been wrongfully admitted, the court will quash the conviction unless it holds that the evidence so admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict, and that they would or must inevitably have arrived at the same verdict if the **[10]** evidence had not been admitted. In considering this question, the nature of the evidence so admitted and the direction with regard to it in the summing-up are the most material matters'.
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> At basis the question is whether the Court of Criminal Appeal can be satisfied that the irregularity has not affected the verdict and that the jury would certainly have returned the same verdict if the errors had not occurred ... "

Applying that test in the case, I am quite unable to conclude that the jury would certainly have returned the same verdict if this evidence had been left to the jury merely as an objective circumstance, rather than being left to the jury, as it was, as an available basis for the jury to conclude that the caller was, as he stated, the present appellant. For those reasons, I am of the view that the appeal should be allowed; and I propose an order to that effect, together with an order quashing the conviction and directing that there be a new trial.

CANTOR J: I agree that the appeal should be upheld, the conviction quashed and a new trial ordered, for the reasons advanced by the learned Chief Justice.

RODEN J: I also agree with the orders proposed. I believe that the conviction cannot properly stand, and that because of the manner in which the evidence of the telephone calls to the witness Parkinson was left to the jury. Difficulties frequently arise in dealing in a summing-up with the

evidence in a conspiracy trial dependent wholly or largely upon the circumstantial evidence, *a fortiori* when not all the alleged conspirators are before the jury. Submissions heard on other grounds which were argued in this appeal, and a consideration of the summing-up, suggest that such difficulties were present in this case; and it may be useful to make some remarks with regard to them.

[11] In any conspiracy trial the evidence is likely to be wide-ranging. It may, as it did here, go to the alleged commission of a number of substantive offences, and the alleged participation in those offences of persons other than the accused. Some of the evidence is likely to be directed towards showing that there was a conspiracy of the nature alleged; some towards establishing that the accused participated in it. Where possible, the two categories of evidence should be clearly identified and separated for the jury. In the present case the conspiracy alleged was, in real terms, a conspiracy to mislead Immigration officers contrary to s65 of the *Migration Act* 1958, and, it seems, might well have been more simply so expressed, without reference in the indictment to the forgery and uttering which, on the Crown case, were part of the means employed, or the procurement of Permanent Resident Status which, on the Crown case, was the purpose sought to be achieved.

Much of the evidence directed towards showing that there was such a conspiracy (and indeed that there were a number of offences committed pursuant to it), was unchallenged. It was also common ground that the appellant, as solicitor for the applicants for Permanent Residence Status, was – and I use this word in a neutral sense – "involved" in the relevant transactions. The live issue in the trial surrounded the nature of his involvement, and was whether he was a party to the conspiracy. Evidence tending to show the existence of the conspiracy, the commission of substantive offences pursuant to it, and the involvement (again in a neutral sense) of the appellant, included evidence that in the case of many of the applicants, the appellant was informed of the Immigration **[12]** Department's requirements, and shortly thereafter false or misleading documents purporting to meet those requirements were delivered to the Department. That evidence, being consistent with either guilt or innocence, was incapable of going to what I have described as the live issue in the trial. The fact that it was repeated many times in respect of a number of applicants, takes the matter no further. When, in a conspiracy trial, there is a considerable body of such evidence, and when, as here, it receives a considerable amount of attention in the summing-up, I believe that it is highly desirable, if not necessary, to explain to the jury the limited use to which it may properly be put.

The evidence relating to the telephone calls to Mr Parkinson is, in my view, in the same category. The fact that someone made such calls, had relevance to the proposition that there was a conspiracy to mislead in the manner alleged. For the reasons outlined by the Chief Justice, I am of the view that neither the caller's use of the appellant's name, nor what he is alleged to have said, was capable of establishing that the appellant was the caller. In consequence of the direction to the contrary, and the importance attached to that evidence in the summing-up, the conviction cannot stand.

In a case such as this, where there is little or no contest that the offence alleged was committed, and the real issue is whether the accused was a party to it, it seems to me that that fact should be reflected in the summing-up. In this case, on that issue, the Crown relied on such matters as the appellant's alleged association with the other persons named, his handwriting on a document and his alleged participation in the disposal of certain material. To assist the jury **[13]** in such a case, such matters should be isolated, together with matters relied on by the defence, as the issue is presented to them.

Any possibility that other evidence in the trial will be wrongly regarded as lending support to the Crown case on that issue should be carefully guarded against. "Guilt by association", and "conviction on suspicion", are concepts which of course have no place in trials under our system. The nature of the evidence frequently led in conspiracy trials makes it necessary to take great care to avoid risk of their intrusion.

The charging of conspiracy in this case is itself a matter upon which some observations may be appropriate. The Crown alleged the commission of a considerable number of substantive offences pursuant to that conspiracy, and relied upon proof of those offences in order to establish the conspiracy. The use of conspiracy charges in such circumstances has been the subject of

much judicial comment. Early instances are to be found in *R v Rowlands and Ors* [1851] 5 Cox CC 466 at 497; (1851) 2 Den CC 364 and *R v Boulton* [1871] 12 Cox CC 87. In the latter Cockburn CJ said, at p93:

> "We are trying the defendant for conspiring to commit a felonious crime, and the proof of it, if it amounts to anything, amounts to proof of the actual commission of crime. Now I must say that this is not a course which commends itself to my approval. I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it for that course operates, it is manifest, unfairly and unjustly against the parties accused: ..."

The more recent include *R v Hoar* [1981] HCA 67; [1981] 148 CLR 32; [1981] 37 ALR 357; 56 ALJR 43. In a joint judgment, Gibbs CJ, Mason J, Aickin J, and Brennan J said at p38 (ALR at p361);

> **[14]** "Generally speaking, it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed.'

Murphy J at p41, expressed similar views in somewhat stronger terms. A new trial is being ordered. The course of any such trial is in the hands of others, and I make no comment on the manner in which they may exercise a discretion which is properly theirs.

I am reminded, however, that after commenting on the practice of charging a conspiracy which it is proposed to prove by establishing substantive offences committed pursuant to it, Street CJ in *R v Gunn and Howden* (1930) 30 SR (NSW) 336 at 345; 47 WN (NSW) 157, said:

> "In ordering a new trial I think that we should make it plain that our intention is that the applicants should not necessarily be put upon their trial again for conspiracy, if the Attorney-General thinks the case one in which there should be separate trials for separate offences."

If consideration is given to the possibility of charging substantive offences rather than conspiracy, regard will doubtless be had to the provisions of secs5 and 7 of the Commonwealth *Crimes Act* 1914.

STREET CJ: The order of the Court accordingly is: the appeal is allowed; the conviction is quashed; we direct that there be a new trial.
