

Annex D.16

R v E

Court of Criminal Appeal for New South Wales | September 27, 1995 | CCA, 27
September 1995 | (1995) 89 A Crim R 325

Document Details

All Citations: (1995) 89 A Crim R 325, 1995 WL 1916359

Search Details

Jurisdiction: Australia

Delivery Details

Date: January 14, 2020 at 6:57 AM

Delivered By:

Client ID: THEHAGUE

(1995) 89 A Crim R 325
 Court of Criminal Appeal for New South Wales

R v E

Hunt CJ, Kirby P, Dunford J

HEADNOTE

Trial — Jury direction — Word of principal Crown witness against that of accused — Essential that jury be directed that it is not a question of making a choice between evidence of witness and that of accused — Jury must accept evidence of Crown witness as being true beyond reasonable doubt — Not necessary that jury believe accused is telling the truth before they are entitled to acquit

Trial — Role of trial judge — Not for judge to restore credit of Crown witness or to destroy credit of accused or his witnesses — Nor is it correct for trial judge in course of the evidence to draw to jury's attention breaches by counsel of rule in Browne v Dunn (1893) 6 R 67

The appellant was found guilty of committing six sexual offences upon a young girl. There was some peripheral evidence to support the complainant's evidence, but no corroborative evidence that she had been sexually assaulted. Essentially it was a case of the complainant's word against that of the appellant, who gave evidence. No objection was taken at the trial, but it was now argued *inter alia* that the trial judge misdirected the jury when he suggested to them that when considering their verdict, they had to make a choice between the evidence of the complainant and that of the accused. It was also argued that the verdict was unsafe and unsatisfactory, and that the judge displayed bias towards the complainant and against the appellant during the course of the trial.

Held (allowing the appeal and ordering a new trial): (1) (per curiam) Having independently assessed all the evidence, the court was not persuaded that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty, nor was any basis shown upon which the jury *ought* to have experienced such a doubt, accordingly the verdicts were not unsafe and unsatisfactory.

M (1994) 181 CLR 487; 76 A Crim R 213; *Chidiac* (1991) 171 CLR 432; 52 A Crim R 119, *applied*.

(2) The trial judge fell into error when he suggested to the jury that they had to make a choice between accepting the evidence of the complainant and that of the accused, just as a judge should not tell a jury that they have to decide whether the accused is guilty or innocent, so a judge should

not tell the jury that they must make a choice between the evidence led by the Crown and that given by the accused.

DPP v Shannon [1975] AC 717; (1974) 59 Cr App R 250; *Bartho* (1978) 52 ALJR 520; *Liberato* (1985) 159 CLR 507; *Beserick* (1993) 30 NSWLR 510; 66 A Crim R 419, *followed*.

(3) In a case where it is word against word, the jury should be directed that the Crown case depends upon them accepting that the evidence of its principal witness is true beyond reasonable doubt notwithstanding the (sworn) denial by the accused, and that they do not have to believe that the accused is telling the truth before he is entitled to be acquitted.

(4) The misdirection resulted in considerable prejudice to the accused and leave should be granted to the appellant to rely upon this ground of appeal.

Abusafiah (1991) 24 NSWLR 531; 56 A Crim R 424, *referred to*.

(5) It was unnecessary to consider the ground concerning the complaint that the trial judge displayed bias. However, as the court has said on many occasions, it is the task of the Crown Prosecutor, and not the trial judge, to restore the credit of a Crown witness or to destroy the credit of an accused or his witnesses, nor is it the duty of the judge to draw the jury's attention to breaches by counsel for the accused of his obligations under the rule in *Browne v Dunn* (1893) 6 R 67 during the course of the evidence. The breach may be drawn to the attention of counsel at that time (in the absence of the jury) but otherwise it is a task to be undertaken in the summing up.

Browne v Dunn (1893) 6 R 67; *Wilson* (unreported, Court of Criminal Appeal, NSW, 31 March 1995), *considered*

Appeal against conviction

M A Green QC, for the appellant.

A M Blackmore, for the respondent.

Legal Representatives

M A Green QC, for the appellant.; *A M Blackmore*, for the respondent.

Opinion

27 September 1995

Hunt CJ at CL.

The appellant (E) was found guilty by a District Court jury upon *three* charges of *sexual intercourse with a girl under 10* years of age and *three* charges of *indecent assault*. He was found not guilty by direction of a fourth charge of sexual intercourse with such a girl. Judge Christie QC imposed concurrent total sentences of imprisonment of seven and a half years upon the sexual intercourse charges, consisting of minimum terms of five and a half years and additional terms of two years, and concurrent fixed terms of imprisonment of one year on the indecent assault charges, to be served concurrently with the minimum terms. The nature of the custody for the sexual intercourse charges, which are felonies, should have been penal servitude not imprisonment.

The Crown case was that the complainant, the daughter of the appellant's de facto wife, visited the premises in which her mother lived with the appellant each second weekend in order to comply with arrangements made in Family Court proceedings for access. Each of the offences occurred during such access visits. She was aged eight and nine years during the period over which they occurred. The complainant gave evidence that the offences took place in a particular bedroom at the appellant's premises, and that, following two of the three incidents of sexual intercourse, she had bled from her vagina. Upon her return to the home of her father and stepmother (with whom she lived), she complained of stomach cramps and soreness at the top of her legs. Her clothing was often wet when she brought it home.

The complainant said that she had made a complaint to a school counsellor, a Mrs Brown, some three years after the last of the offences had taken place. Mrs Brown gave evidence of such complaint, but recalled that the complainant had told her that the offences had taken place in a park to which she had been taken. The complainant's stepmother gave evidence of her complaints of stomach cramps, but she also said that the complainant's sister similarly made such complaints upon her return from visits to her mother and the appellant. Both children had brought back wet and unwashed clothing with them after such visits.

The appellant gave evidence denying the allegations made. He said that he had never been alone with the complainant at any time. He suggested that the soreness of which the girl complained had been caused through horse-riding which she had done with them on a number of occasions. He said that the bedroom in which the complainant alleged that the offences had taken place had in fact been occupied by his late wife, Dulcie, who had been ill and was living with him and the complainant's mother during that period. The clothing had been sent home wet only when it had not dried after being washed.

The complainant denied knowing anyone called Dulcie Edwards. She said that she had been horse-riding only the once when staying with the appellant and her mother. She denied having told Mrs Brown about being taken to a park where the offences took place. The doctor who examined the complainant three years after the offences were alleged to have been committed said that the results of the examination were neither consistent nor inconsistent with the version which she gave. The complainant's mother gave evidence for the appellant. She denied that wet clothing had ever been sent back with the girls. She said that the complainant frequently went horse-riding with a friend when she stayed with them. The friend was not called to confirm that fact.

It is clear from the evidence, and it is conceded by the Crown, that there was some enmity between the complainant's mother and her stepmother, in particular about access. But it was never put to the complainant in cross-examination that she had been encouraged by her stepmother (or by anyone else) to tell a false story against her mother's de facto husband. It is a pity that the judge did not insist upon the complainant being recalled for that to be done once this issue had been raised during the cross-examination of the appellant. But the fact is that this was not done and little weight can therefore be given to the existence of such enmity: see *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 370-371; *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at 237. It is perhaps strange that, if the enmity had in fact led the complainant to make up such a story, she took so long to complain.

It is convenient to deal first with the appellant's ground of appeal that the verdicts were unsafe and unsatisfactory because, if the appellant's argument is successful upon that ground, there must be a judgment of acquittal and it will be unnecessary to consider the other matters. The ultimate question which must be answered by this Court in relation to such a ground is whether — notwithstanding that as a matter of law there is evidence to sustain those verdicts — this Court thinks that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty: see *M* (1994) 181 CLR 487 at 492-95; 76 A Crim R 213 at 215-217; *McKnoulty* (1995) 77 A Crim R 333.

There was no direct corroboration of the complainant's evidence that she had been sexually assaulted. The only support available in relation to her evidence was of her complaints that she had stomach cramps and soreness at the top of her legs when she returned home, and the wet clothes sent back with the complainant when she returned home gave some support to her allegation that she had bled from her vagina. The support for the complainant's evidence was thus somewhat peripheral in nature. It could not be said that it was corroboration of her evidence of having been sexually assaulted, even circumstantial corroboration, as it could not be said that the two matters upon which reliance was placed usually existed in combination only because of the existence also of some other particular fact which tended to show that the appellant was involved in the offences with which he was charged: see *Small* (1994) 33 NSWLR 575 at 594; 72 A Crim R 462 at 479-480. The evidence of the complainant as to those assaults was thus marginally supported by the other

evidence, but strictly it was uncorroborated. The very late complaint did little, if anything, to support her claim, particularly in the light of what appears to be the inconsistent version which she gave as to where the sexual assaults took place, but the evidence of Mrs Brown (the school counsellor) was a result of being asked to recall what had been said nearly 12 months after the event and without any contemporaneous record of what had been said being available to her.

Although the evidence of the appellant and of the complainant's mother was inconsistent with that of the appellant, the circumstances of their relationship weakens the strength of their evidence, which was in any event mutually inconsistent upon a number of issues. Reliance is placed upon what is said to have been the unlikelihood that the complainant's version of the events occurred without someone else having been aware of what was going on. With respect, that is hardly of great significance in cases of this type, which necessarily involve secrecy. There is nothing else in the transcript which suggests that the complainant was not giving truthful evidence, and acceptance of that evidence must therefore have depended principally upon the impression which she made upon the jury as a witness. This Court does not have that advantage, and the loss of that advantage necessarily imposes a restriction upon its ability to assess the quality of her evidence: *Chidiac* (1991) 171 CLR 432 at 443-444, 453, 459; 52 A Crim R 119 at 125-126, 133, 137.

I am not persuaded that it was not open to the jury (in the relevant sense of that term) to be satisfied beyond reasonable doubt that the appellant was guilty. Having made my own independent assessment of both the sufficiency and the quality of all of the evidence, I experience for myself no reasonable doubt based upon the quality of the evidence as to the safety of the verdicts of guilty which the jury gave; nor do I see any basis upon which the jury *ought* to have experienced such a doubt for themselves. The matters to which attention has been drawn do not lead me to the conclusion that there is any significant possibility that an innocent person has been convicted. (I have here adopted the various phrases used in *M* (at 494; 216).)

The next ground of appeal which it is convenient to deal with is that the directions upon the issue of corroboration were erroneous and confusing. Certainly those which the judge gave at first were both erroneous and confusing but, upon the application of both the Crown Prosecutor and counsel then appearing for the appellant, the judge reformulated those directions to leave that issue in the way I have already outlined the evidence upon that issue. To a lawyer, the description of that evidence as being capable of being considered as corroboration remained erroneous because of the technical significance which that term has for lawyers, or perhaps which it used to have when there were legal requirements that there be such corroboration. But the jury were not to know of that requirement. They no doubt would have understood the references to corroboration as meaning no more than support for the complainant's truthfulness as a witness. It would have been better had no reference been made to the word "corroboration" at all in the circumstances of this case. The further directions could certainly have been better expressed, but there was no objection taken

to them, a fact which suggests that their general effect was regarded at the time as having been satisfactory. I would reject this ground of appeal as well.

The next ground of appeal which it is convenient to deal with is that the directions on the burden of proof were erroneous. This ground of appeal has been considered upon the basis that it encompasses the onus as well as the burden of proof. There was no objection taken to these directions and it is necessary, therefore, for the appellant to show that the directions, insofar as they may be shown to be erroneous, led to a miscarriage of justice: see Criminal Appeal Rules 1952(NSW), r 4; *Abusafiah* (1991) 24 NSWLR 531 at 536; 56 A Crim R 424 at 429-430.

At the commencement of the summing up, the judge said that he wished to “make it quite clear from the start ... that the Crown throughout this case carries the onus or burden of proof”. He then went on to discuss how people in general should be assessed as to whether they are telling the truth, referring to the quality of their recollection and to their credit. He said that the only person who could receive the benefit of the doubt was the accused and no one else. He directed the jury to ignore sympathy and to avoid prejudice. He pointed out that they could consider whether there was any reason for somebody to tell a truth or an untruth, but he did not do so in any way which infringed what is prohibited by *Robinson (No 2)* (1991) 180 CLR 531; 55 A Crim R 318; see also *Asquith* (1994) 72 A Crim R 250 at 255 et seq.

Then the judge said that there was no room in this case for faulty recollections, it was (he said) “a black and white”, and that (although it was a matter entirely for the jury to evaluate) it seemed to him that “somebody here is telling you a pack of lies”. That statement is the subject of complaint in this Court, as is the passage which followed shortly thereafter:

“I stress and I will stress it more than once that all of these matters are matters for you but, in this particular instance, it would seem to me that it is for you to decide whether [the complainant] is telling the truth or lying or whether the accused is telling you the truth or lying.

Now, in coming to that conclusion, which is as I would see it your principal task in this trial, you are entitled to look at the surrounding circumstances. You are entitled to look at all their evidence to decide beyond reasonable doubt whether you accept [the complainant], beyond reasonable doubt whether you accept the accused or reject the accused. It is entirely a matter for you.

Now, both counsel have drawn your attention to various matters in the evidence and I shall not reinforce either view by referring to any of them specifically, but they have both drawn your attention to the various aspects of the matter which they would stress would tend to support either a belief in [the complainant] or a

reasonable doubt as to whether [the complainant] is telling you the truth. And I might touch on one or two of them as I go through the evidence very briefly.

It is important for me to say at the beginning as I am sure I would have said at the commencement of this trial that it is for the accused to prove nothing.”

The judge directed the jury that they could draw no inference adverse to the accused by reason of his refusal to be interviewed. He drew attention to the presumption of innocence and to the right to silence. He told them that, by giving evidence, the accused did not in any way alter the fundamental principle that the Crown carried the onus or burden of proof.

After dealing with the evidence, the judge turned to the elements of the offences with which the accused had been charged. In the course of doing so, the judge said this:

“The real issue here is whether it happened or it did not, whether you believe the girl or whether you do not, whether you believe the accused or the [[sic]] you do not. That is your real function here as I perceive it. But it is a matter for you to decide.”

He then dealt with some arguments and, at the conclusion of his summing up, the judge said this:

“May I say in closing that you must clearly understand that the Crown must establish these matters beyond reasonable doubt and that the only person entitled to any doubt that might arise as to who is telling the truth or not is the accused and not [the complainant] or anybody else.”

The error made by the judge throughout those directions was the suggestion that the jury had to make a choice between accepting the evidence of the complainant and accepting that of the accused. Just as a judge should not tell the jury that they have to decide whether the accused is guilty or innocent (*DPP v Shannon* [1975] AC 717 at 764; (1974) 59 Cr App R 250 at 269; *Bartho* (1978) 52 ALJR 520 at 521-522), so a judge should not tell the jury that they must make a choice between the evidence led by the Crown and that given by the accused: see *Liberato* (1985) 159 CLR 507 at 515, 519; *Beserick* (1993) 30 NSWLR 510 at 528; 66 A Crim R 419 at 435.

It is commonplace for the issue in cases such as the present to be described as one of word against word. Sometimes it is unavoidable. But it is essential that, when such a description is given, the judge ensures that the jury understands that it is *not* a question of making a choice between the evidence of the Crown's principal witness and that of the accused. The best approach, in addition to saying just that, is to tell the jury that the Crown case depends upon them accepting that the evidence of its principal witness was true beyond reasonable doubt notwithstanding the (sworn) denial by the accused, and that they do not have to believe that the accused is telling the truth before he is entitled to be acquitted.

Nothing like that was said in the present case. Quite the contrary was said. The repetition at other places in the summing up of the direction that the Crown bore the onus of proof did not cure the omission in the circumstances of this case. Indeed, the error of inviting the jury to make such a choice between the evidence of the complainant and that of the accused was accentuated by the stress placed upon it by the judge as being the "real" issue and by its repetition, and it was made considerably worse by the direction on one occasion that, as part of that choice, the jury had to decide beyond reasonable doubt whether they accepted or rejected the evidence of the accused. To say that the jury had to be satisfied beyond reasonable doubt that the appellant's evidence was true is to subvert the onus of proof completely.

I regard this error as one producing considerable prejudice. Although I do not regard the verdicts as being unsafe and unsatisfactory, this was a case in which verdicts of not guilty were at least on the cards. Misdirections as to the onus and burden of proof are more than likely to have a vital effect upon which way the jury may give their verdict in such a situation. To suggest that they had to make a choice between the evidence of the complainant and that of the accused, and that they had to accept the appellant's evidence beyond reasonable doubt, clearly, to my mind, produced a miscarriage of justice by denying to the appellant a real chance (or a chance which was fairly open to him) of being acquitted.

Leave to rely upon this ground of appeal should therefore be granted, and I would uphold it. The appellant is accordingly entitled, in my view, to have his conviction quashed. I am satisfied that a new trial should be ordered, notwithstanding the unfortunate consequences to the complainant having to give evidence again and the fact that the appellant has already spent some 14 months in custody. The offences, if they occurred, were very serious ones: cf *Honeysett* (1987) 10 NSWLR 638 at 646-647; 34 A Crim R 277 at 284-285. We were informed that, before a decision is made by the Crown to proceed with any new trial, the views of the complainant are sought and considered. In my view, it should be left to the Director of Public Prosecutions to decide whether the new trial ordered should take place.

In those circumstances, it is unnecessary to consider the remaining ground of appeal, that the judge displayed bias towards the complainant and against the appellant in his conduct of the trial. Having

said that, however, it is worth repeating what has been said by this Court on many other occasions. The task of restoring the credit of a Crown witness or of destroying the credit of the accused or his witness should always be left by the judge to the Crown prosecutor. Nor is it the duty of the judge to draw the jury's attention to breaches by counsel for the accused of his obligations under the rule in *Browne v Dunn* (1893) 6 R 67 at 70-71, 76-77 during the course of the evidence itself: see *Wilson* (unreported, Court of Criminal Appeal, NSW, 31 March 1995) at p 14. The breach may be drawn to the attention of counsel at that time (in the absence of the jury), but otherwise it is a task to be undertaken in the summing up.

It is true that no complaint was made at the trial in relation to the many interventions by the judge, but this is not a matter to which r 4 applies requiring leave to rely upon the bias now alleged against the judge. What silence at the trial may establish is a waiver of the appellant's right to complain of such bias in this Court: *Vakauta v Kelly* (1989) 167 CLR 568 at 572, 577, 587-588. It is, as I have said, unnecessary in the circumstances of this case to consider that matter further.

Proposed orders

1. The appeal is upheld and the conviction is quashed.
2. A new trial is ordered of those counts upon which the appellant was found guilty.

Kirby P.

I agree.

Dunford J.

I also agree.

Kirby P.

The orders of the court are therefore that the appeal is upheld, the conviction of the appellant is quashed and a new trial is ordered upon those counts of the indictment upon which the jury convicted the appellant.

Appeal allowed

New trial ordered

Reported by KJM

At his retrial the appellant was acquitted on 24 June 1996 of all charges.

All Citations

CCA, 27 September 1995, (1995) 89 A Crim R 325, 1995 WL 1916359