

AUSTRALIA / JUDGMENT

Hudd, P. v The Queen [1987] FCA 442

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FEDERAL COURT OF AUSTRALIA

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JUDGES' CHAMBERS

FEDERAL COURT OF AUSTRALIA

: GATCHWORDS

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CRIMINAL LAW ~ appeal from conviction - rejection of evidence — whether improper - whether evidence aliunde to support verdict.

EVIDENCE ~ out of court statement - evidence of statement by Crown witness that he had framed accused - denied in cross-examination - relevance - admissibility.

EVIDENCE - witness - cross-examination as to credit ~ denial of prior inconsistent statement relevant to facts in issue - evidence in contradiction - admissibility.

Evidence Ordinance 1971 (A.C.T.), S.61.

Cross on Evidence (3rd Australian ed., 1986)

R v. Daren (1971) 2 NSWLR 423

Titheradge v. The King (1917) 24 CLR 107

H.H. Glass, Seminars on Evidence (1970)

A.W. Bryant, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984) 62 Canadian Bar Review 43

Kern v. R (1985) 18 A. Crim. R. 191

Ready v. Brown (1968) 118 CLR 165

Rv. cassibo (1982) 39 O.R. (2d) 288 (C.A.)

Peacock v. The King (1911) 13 CLR 619
Driscoll v. The Queen (1977) 137 CLR 517
Maric v. R (1978) 20 ALR 513
Chamberlain v. The Queen (1984) 153 CLR 521
PATRICK HUDD v. THE QUEEN
No. A.C.T. G22 of 1987
CORAM: FOX, FORSTER AND MILES JJ.
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ENERAL DIVISION
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No. A.C.T. G22 of 1987
ON APPEAL from the Supreme
2 Tourt of the Australian Capital
Territory

BETWEEN: PATRICK HUDD
Appellant

AND: THE QUEEN
Respondent
MI FORDER
JUDGES MAKIING ORDER: FOX, FORSTER AND MILES JJ.
DATE OF ORDER: 18 AUGUST 1987
PLACE: CANBERRA

THE COURT ORDERS
THAT:

1. The appeal be allowed.
2. The conviction and sentence be set aside.
3. Unless the proceedings are determined earlier, the appellant be retried at a date to be fixed before the Supreme Court of the Australian Capital Territory.
4. The appellant be held in his present custody subject to such order as to bail or otherwise as may be made by the Supreme Court of the Australian Capital Territory.

Note: Settlement and entry or orders is dealt with in 0.36 of the Federal Court Rules.
Us! T 0 No. A.C.T. G22 of 1987
VISION
ON APPEAL from the Supreme
Court of the Australian Capital
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BETWEEN : PATRICK HUDD
 Appellant
 THE QUEEN
 Respondent
CORAM: FOX, FORSTER AND MILES JJ.
DATE
18 AUGUST 1987

REASONS FOR JUDGMENT FOX AND FORSTER JJ.:

We have been hearing an appeal against conviction and sentence on a charge that Patrick Hudd (the appellant) on 15 November 1980 "did take away Anthony Thomas Nomchong with intent to hold the said Anthony Thomas Nomchong for advantage to the said Patrick Hudd". The information was dated 10 February 1987. The trial commenced on 30 March 1987 and concluded the following day with a verdict of guilty. The sentence was imposed on 2 April 1987.

«

The appellant had lived with Mr Nomchong's mother for a

period of about 10 years which terminated in June 1980, some time

before the events in question. The case against the appellant was that he had waited for Mr Nomchong to come out of the Private Bin nightclub in Canberra at which the latter worked and had then threatened him with a sawn-off rifle, forced him into the rear of the appellant's car and had then chained him and forced him to lie down in the rear of the car. The appellant had then driven the car to Wollongong, where Mr Nomchong escaped the next morning

in the appellant's car.

At the time of the events in question, the appellant had been charged in New South Wales with the assault of Mr Nomchong's

mother in July 1980, and the case was to proceed in January 1981. The Crown case was that the appellant kidnapped Mr Nomchong to

discourage his mother from giving evidence in that proceeding.

For the appellant it was said that the Crown case had been fabricated by Mr Nomchong and his brother, a New South Wales police officer, as part of a scheme to get the appellant out of their mother's life. The defence version of events was that the appellant wanted to talk to Mrs Nomchong about the assault charge (which the defence alleged had also been fabricated) and so had approached Mr Nomchong in the Private Bin and asked where she was. Mr Nomchong had replied that if the appellant drove him to Sydney, they could find out from another of Mr Nomchong's brothers. The appellant had said that he had to feed the cattle on his property at Wollongong, so Mr Nomchong proposed that they spend the night there en route for Sydney. They had then driven to Wollongong, but the next day Mr Nomchong had made off with the

car, and used the appellant's chains and gun to make it appear to the police that he had been kidnapped.

The appellant was committed for trial on the present charge on 7 January 1981, and released to bail on 23 January, but subsequently committed several crimes in New South Wales, including the rape and kidnapping of Mrs Nomchong. He remained in custody in New South Wales from his arrest on 28 April 1981, and on 29 July 1982 he was sentenced to 18 years imprisonment with a non-parole period of 7 years. During the initial part of his imprisonment, he could not be extradited to the Australian Capital Territory to stand trial on the present charge. Legislation to enable this to be done came into effect in July 1984, but it was not until his release on parole on 21 November

1986 that he was brought to the Territory to stand trial.

The grounds of appeal are related mainly to the admissibility of evidence. The ground which appears to us to have substance concerns the refusal of the trial judge to allow a Mr Marc O'Shea to give evidence on relevant matters. The position was not made entirely clear to the learned judge at the trial but from a reading of the transcript it appears that it was sought to call Mr O'Shea to give evidence of an alleged conversation with Mr Nomchong in which Mr Nomchong had said that he and his brother had framed the appellant in relation to the kidnapping and had asked Mr O'Shea to give evidence to corroborate their story, giving him a photograph of the appellant so that Mr O'Shea could identify the appellant.

Relevant parts of what was put to Mr Nomchong by counsel for the appellant (Mr Purnell) in cross-examination appear in the transcript at pages 45 to 46 and 73 to 79, and include the following passages:-

CMR PURNELL:3

HIS HONOUR:

MR PURNELL:

HIS HONOUR: MR PURNELL:

Now do you know a Mark O'Shea?---No.

Pardon?---No. Never heard of Mark O'Shea?---No.

Your Honour, I wonder if Mark O'Shea could be called just outside the court?

No, no way. I am not going to have him give evidence from the back of the court, Mr Purnell, no fear. He has answered to the call.

May that person now leave the precincts of the court?

Yes, thank you for your attendance. Have you see that person before?---No. Are you serious?---~
Yes.

I suggest that you and he were good friends in 1979?---No.

And I suggest you had a conversation in the Private Bin with Mark O'Shea, the man that answered in response to that call?---No.

And that you told him about your brother being a New South Wales detective?---No.

And you said to him that your brother wanted to frame this man with an abduction charge?---No.

And you told him about leaving a place in Wollongong last Sunday morning?---No.

And you told him that you chained your wrists and went to the police?---No.

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And that you were given a photo - sorry, you gave a photo - this photo - to the man that came in response to the call - Ma

O' Shea?---No.

And, in essence, you gave him that photograph so that Mark O'Shea could identify Mr Hudd in court?---No.

And that you asked Mark O'Shea, in essence to perjure himself in relation to an alleged abduction?---No.

You asked him to come and give evidence that he had seen you being abducted outside the Private Bin?---No.""

Upon counsel for the appellant indicating that Mr O'Shea
would be called as a witness his Honour heard argument in the
absence of the

said but the

jury. It is unnecessary to set out all that was
following passage indicates the nature of the
evidence he was to give:

"MR PURNELL:

HIS HONOUR:

MR PURNELL: HIS HONOUR:

MR PURNELL:

...ne CMr O'SheaJ will give evidence that he was approached by Anthony Nomchong in relation to giving evidence in these proceedings.

Along the lines of the cross-examination of Anthony Nomchong?

Yes. How do you get that in, Mr Purnell? That is an exception, in my respectful submission, to the normal rules in relation to that matter in that this case is---

Unfortunately, there was not a clear coherent account of

what Mr O'Sh@a would say, nor was any evidence heard from him on

the voir dire. three questions

indicated, was

He was called, and was allowed to answer two or

only. Plainly, his evidence, so far as

capable of being of central importance. We are

satisfied his evidence was admissible. Mr Nomchong's alleged

statements go directly to the fact in issue in the case, namely whether the appellant kidnapped him, but Mr O'Shea's evidence of those statements would on what appears to be the preferable view of the law not be admissible for the purpose of proving their truth: See Crosson Evidence (3rd Australian ed., 1986) at

para.9.54 and the cases there cited, but see Wiqmore on Evidence (Chadbourn revision, 1970) at para. 1018.

However, Mr O'Shea's evidence would, at least, have been admissible as going to Mr Nomchong's credit, as an exception to the rule that evidence is not admissible to contradict answers given by witnesses in cross-examination as to credit. The exception, at common law and under statute, is that a previous inconsistent statement relevant to the facts in issue may be proved. Section 61 of the Evidence Ordinance 1971 (A.C.T.)

provides as follows:-

"61.(1) Subject to the next succeeding sub-section, where a witness, upon cross-examination . concerning a statement alleged to have been made by him relating to the subject-matter of the proceedings and inconsistent with his evidence, does not admit that he made the statement, evidence of the making of the statement is admissible.

(2) Evidence of the making by a witness of a statement referred to in the last preceding sub-section is not admissible unless the witness has been informed of sufficient of the circumstances of the making of the statement to identify the occasion on which the statement was made and has been asked whether he made the statement."

- His Honour expressed the view that sub-s.61(1) only applied to written statements. With respect to his Honour, there seems no warrant to restrict the sub-section in this way. So to do is contrary to the definition in 8.6 and in contrast with the phrase

"written statement" in s.62. At common law the exception applies

to inconsistent statements whether oral or written, and it is

unlikely that the statutory provision would limit it. (See, e.g.

R. v. Daren (19713 2 N.S.W.L.R. 423, a case on the similar New South Wales provisions).

As we have said, there is unfortunately no clear indication of what Mr O'Shea would have said. This might have been cured at the trial by hearing the whole of his evidence first on the voir dire, if that was thought necessary. Alternatively, the adducing of the evidence by counsel for the appellant could have been closely controlled. As it is, we only have the particular questions put in cross-examination and the broad statements of counsel for the appellant. He himself did not seek to tender an affidavit or document indicative of Mr O'Shea's evidence or to ask for a hearing on the voir dire. However, Mr O'Shea should have been allowed to give his evidence in light of the cross-examination and in the light of counsel's

statement as to its subject matter.

The failure to allow any evidence to be given beyond a few questions and answers by Mr O'Shea was in our view a fatal flaw in the trial. The fact that there was other evidence indicative of guilt including a short confession of guilt does not improve —the position. Mr O'Shea's evidence could have been very influential if it showed a fabrication of the case against the accused so that he was being "set-up" or "framed". One aspect of this is that, in general, it is very hard to tell if there was something in the nature of a framed case, and, if so,

how far that extended and what witnesses were involved. It seems

on

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to us that it is quite possible that a jury on the indicated evidence of Mr O'Shea could have found the appellant not guilty,

notwithstanding the body of evidence against him.

Having in mind all the circumstances, it appears to us

that the appropriate order is to allow the appeal and order a new

trial. I certify that this and the seven (7) preceding pages are a@ true copy of the Reasons for Judgment herein of their Honours Mr. Justi Fox and Mr. Justice inms f Associate Dated: 93-3. - Counsel for the Appellant: F.J. Purnell Solicitors for the Appellant: Legal Aid Office, A.C.T. Counsel for the Respondent: P. Shiels Q.C. and I. Glasgow Solicitors for the Respondent: Director of Public Prosecutions Date of hearing: 6 July 1987 Date judgment delivered: 18 August 1987

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IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY No. A.C.T. G22 of 1987

DISTRICT REGISTRY

))) GENERAL DIVISION)

ON APPEAL from the Supreme Court of the Australian

Capital Territory

BETWEEN: PATRICK HUDD

Appellant AND: THE QUEEN

Respondent

CORAM: FOX, FORSTER AND MILES JJ.

DATE: 18 August, 1987

REASONS FOR JUDGMENT

MILES J.

I have had the opportunity of reading in draft form a copy of the reasons for judgment of Fox J. The background to the appeal is set out in His Honour's reasons and I do not propose to repeat it in detail.

The main ground of the appeal against conviction was that the learned trial judge was in error in refusing to allow the defence to call evidence from a witness, Mark O'Shea. The circumstances in which His Honour was called upon to rule on this question were unusual. The prosecution case was that on the night of 15 November 1980 the appellant had forged the victim, Anthony Nomchong, into the

appellant's car and kidnapped him in order to dissuade

-2-

Mr. Nomchong's mother from giving evidence in other proceedings against the appellant. The prosecution further alleged that the appellant had secured Mr. Nomchong's hands with chains and padlocks and driven him to the Wollongong area where he escaped the following day. The defence case was that Mr. Nomchong had gone willingly with the appellant in order that the pending charges could be discussed with a brother of the victim, Greg Nomchong, a member of the New South Wales Police Force. There was unchallenged evidence in the prosecution case that on the morning of 16 November 1980 the victim presented himself to a police constable on the roadside at Dapto in New South Wales. His arms were observed to be bound together by chains' secured by padlocks. An important issue in the trial therefore was whether it was the appellant who had so bound and secured the victim, or whether this had occurred by reason of some other circumstance. The appellant suggested in his unsworn statement to the jury that Mr. Nomchong had tied himself up in order to fabricate a case against the appellant.

During the course of the cross-examination of Mr. Nomchong on behalf of the appellant, a person answering to the name of Mark O'Shea was called into Court. It was put to Mr. Nomchong that he was acquainted with Mark O'Shea, a proposition which Mr. Nomchong denied. It was further put to Mr. Nomchong that he had had a conversation with Mark

O'Shea in which Mr. Nomchong had made a number of

-3-

statements. All that too was denied by Mr. Nomchong in cross-examination.

At the close of the prosecution case, counsel for the appellant sought to make an opening address to the jury on the basis that, although the appellant himself intended to Make an unsworn statement and .not to give evidence, it was intended to call Mark O'Shea in the defence case to give evidence along the lines of what had been put to Mr. Nomchong during the course of cross-examination relating to the alleged conversation between Mr. Nomchong and Mark O'Shea. Counsel relied upon the practice in the Territory, recognized by His Honour that, where an accused person intends to give evidence, or to call witnesses as to the facts, the accused is entitled to an opening address by his counsel before the calling of such evidence. Unless the accused intends to give or call such evidence there is no entitlement to any opening address. His Honour ruled that the evidence proposed to be called from Mark O'Shea was inadmissible and that as a result, with no other evidence to be called, defence counsel had no right to make an opening address. Accordingly the defence case commenced with the appellant making a statement and without counsel making an opening address on his behalf. When the appellant had concluded his statement, Mark O'Shea was called into the

- witness box. Counsel for the appellant indicated that Mark

O'Shea would give evidence along the lines of the contents

-4-

of the conversation which had been put to Mr. Nomchong

during cross-examination. Consistent with his earlier ruling, His Honour declined to allow counsel to elicit such evidence.

It is necessary to examine the substance of the evidence that Mark O'Shea was expected to give. If Mark O'Shea had given evidence along the lines of what was anticipated by the cross-examination of Mr. Nomchong, it might have been expected that that evidence would have gone towards establishing the following propositions:

1. Mr. Nomchong and Mark O'Shea were well acquainted with each other.
2. Mr. Nomchong said that he had a brother who wanted to frame the appellant on an abduction charge.
3. Mr. Nomchong said that it was he who had chained his wrists before going to the police.
4. Mr. Nomchong, knowing that Mark O'Shea had not been Present at the scene of the alleged abduction, had asked Mark O'Shea to give false evidence that he had witnessed the alleged abduction.

The challenge on the part of the prosecution to the admissibility of evidence which went to support these four propositions was that it was simply not relevant, that it went in no way to prove or disprove the issue as to whether the appellant had kidnapped Mr. Nomchong on the night in

question. The contention of the prosecution was that the proposed evidence went only to impugn the credibility of

-5-

Mr. Nomchong by contradicting him on his denials that he knew Mr. O'Shea and that he had made the statements to Mark O'Shea which it was suggested he had made.

The first and second propositions are, in my view, clearly irrelevant but I shall return to say something about them in a moment.

The third proposition, namely that Mr. Nomchong had said that it was he, and by implication not the appellant, who had chained his wrists is, in my view, a prior statement which is inconsistent with his evidence-in-chief and is relevant to a fact in issue, namely whether it was the appellant who had secured Mr. Nomchong's wrists in chains. It was admissible under S.61 of the Evidence Ordinance 1971 which provides as follows:

"61.(1) Subject to the next succeeding sub- section, where a witness, upon cross-examination concerning a statement alleged to have been made by him relating to the subject matter of the proceedings and inconsistent with his evidence, does not admit that he made the statement, evidence of the making of the statement is admissible.

(2) Evidence of the making by a witness of a statement referred to in the last preceding sub-section is not admissible unless the witness has been informed of sufficient of the circumstances of the making of the statement to identify the occasion on which the statement was made and has been asked whether he made the statement."

His Honour apparently took the view that s.61 15S - restricted to prior statements in writing. A similar

section, which is said to reflect the common law, was first

enacted in England in 1854 and has been repeated in

-6-

substance in many places. We were not referred to any report of a previous authority in which it has been held that these provisions apply only to statements in writing. Equivalent provisions were regarded as applying to prior oral statements in *Rv. Daren* (1971) 2 NSWLR 423, relying on *Titheradge v. The King* (1917) 24 CLR 107. Mr. H.H. Glass, Q.C. as he then was, in *Seminars on Evidence* (1970) took the view that the New South Wales equivalent of s.61 was limited to previous oral statements. In Canada similar provisions

are regarded as including both oral and written statements,

see A.W. Bryant, *The Adversary's Witness: Cross—Examination*

and *Proof of Prior Inconsistent Statements* (1984) 62

Canadian Bar Review 43 at p.67. It may be observed that in contrast to s.61, s.62 is expressly directed to cross examination on and proof of prior statements in writing (or reduced to writing) or contained in a document recording evidence given on a previous occasion. S.61 is not expressed to be so directed. Whether s.61 includes proof of prior documentary statements is not necessary to decide for the purposes of this appeal. It does, in my opinion, apply to proof of a prior inconsistent oral statement relevant to a matter in issue,

As to the fourth proposition that Mr. Nomchong had asked Mark O'Shea to give evidence which he knew was false, I do not think that that is relevant to the issue as to whether an abduction in fact took place. I am unable to see

how it is that a request by X to Y that Y give evidence of a

-7-

supposed event at a time and place, when X knows that Y was absent from that place at that time, sheds any light on whether or not the supposed event in fact took place. Even

assuming that a request by Mr. Nomchong to Mark O'Shea to give a false account of his presence at the scene of the

alleged offence is a prior statement inconsistent with

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Mr. Nomchong's sworn evidence, It is not, in my view, a prior statement relating to the subject matter of the proceedings. Accordingly it does not qualify to be admitted pursuant to s.61(1). The section does not make admissible prior inconsistent statements which are not relevant to facts in issue: *Kern v. R* (1985) 18 A.Crim.R. 191 (Queensland Court of Criminal Appeal).

However, evidence that Mr. Nomchong attempted to procure a person to give evidence which he knew to be false 18, In my view, evidence of bias and is admissible for that reason. Evidence going to bias 18S admissible as an exception to the rule that evidence cannot 'be called to contradict a witness on matters going to credit upon which he has been cross-examined. According to Wigmore on Evidence (Chadbourn revision) at para. 1005, "particular circumstances and expressions indicating bias are provable by extrinsic testimony; they are therefore also provable in contradiction For the same reason as the preceding, a contradiction is permissible upon facts which tend to show

the witness' corrupt testimonial intent for the case in

hand."

-8-

In my view then, the evidence of Mark O'Shea that Mr. Nomchong attempted to procure him to give false evidence was admissible. Accepting that that evidence was

admissible, I return to the question of whether evidence tending to support the first and second propositions mentioned above should have been allowed. First, although it is obvious that the existence or absence of prior acquaintance between Mr. Nomchong and Mark O'Shea bears upon the collateral issue whether Mr. Nomchong took the extraordinary step of attempting to procure Mark O'Shea to give false evidence, I think that it is so remote from the issues in the trial that it remains inadmissible. To allow it would be to "set up a false issue with which the trial ought not to have been encumbered", see *Ready v. Brown*

(1968) 118 CLR 165 per Barwick C.J. at p.169. As to the second proposition, namely that Mr. Nomchong told Mark O'Shea that he had a brother in the New South Wales Police Force who wanted to frame the appellant, whilst I do not think that that evidence on its own would tend to show bias on the part of Mr. Nomchong, once the evidence was admitted of the attempt by Mr. Nomchong to suborn Mark O'Shea, then the statement by Mr. Nomchong about the brother could well be interpreted as an indication by Mr. Nomchong

that he and his brother were together attempting to fabricate a case against the appellant.
In other words it is further

evidence of bias.

-9-

In the event, evidence was excluded from the trial which was admissible, part of it being evidence of a prior inconsistent statement by the chief prosecution witness, and part of it being evidence which tended to show bias on the part of that witness. It must be observed that none of that excluded evidence went directly to any issue in the trial, and one might doubt whether its exclusion would have had any effect on the outcome of the trial. Evidence as to a prior inconsistent statement is no evidence of the truth of the substance contained in the prior statement. If Mr. Nomchong had told Mark O'Shea that he had tied himself with chains and gone to the police, that was no evidence that Mr. Nomchong had in fact done so, and it would have been necessary for the jury to have been instructed accordingly. No case was cited to us to the effect that rejection of the proof of a prior inconsistent statement necessarily involves the setting aside of a conviction. Bryant in his article in 62 Canadian Bar Review 43 at p.61 cites Canadian authority to the effect that to deny counsel the right in appropriate circumstances to prove a former statement may be reversible error. On the other hand, in one such case, R v. Cassibo

(1982) 39 O.R. (2d) 288 (C.A.) it was held, according to the author, that the denial of an opportunity to prove an inconsistent statement may be cured by a provision of the criminal code which enables a court of criminal appeal to

dismiss an appeal against conviction where no substantial
injustice has occurred.

-10-

Similarly, proof of bias on the part of Mr. Nomchong did not go to a fact in issue. It related only to the credit of the witness. The distinction between matters going to bias and matters going to credit but stopping short of bias is a question of degree. The trial judge was in a superior position to assess where the line was to be drawn. The American practice appears to be that the appellate courts will not interfere with the decision of a trial judge relating to alleged bias on the part of a witness, see

Wigmore on Evidence (Chadbourn revision) paras. 950 and
1003.

Nevertheless, the practice in Australia is that where evidence has been wrongly admitted or rejected to the prejudice of an accused person, a court of criminal appeal will set aside a conviction unless it is positively shown by the prosecution that the admission or rejection of the evidence would not have had any appreciable effect upon the decision of the jury; see Peacock v. The King (1911) 13 C.L.R. 619, Driscoll v. The Queen (1977) 137 C.L.R. 517, Maric v. R (1978) 20

A.L.R. 513. Further, this Court in hearing an appeal against conviction, although satisfied as to some error or irregularity at the trial, will not set aside a conviction if it is persuaded that no substantial miscarriage of justice has occurred, but it must be so positively persuaded:

Chamberlain ve. The Queen (1984) 153

C.L.R. 521 esp. at p.615 per Deane J.

-11-

In the present appeal nothing was put on behalf of the respondent to support a finding in this Court that the rejection of the evidence of Mark O'Shea would not have affected the jury's decision or that no- substantial miscarriage of justice occurred thereby. The prosecution at trial was apparently prepared to accept that Mark O'Shea would have said what had been put in cross-examination. For myself I find it impossible to say that the proposed evidence of Mark O'Shea, if before the jury, would have had no effect on the jury's determination. It follows therefore that the appeal must be allowed. It does not follow that the conviction should be quashed. It is essentially a jury question as to whether the alleged guilt of the accused has been proved, in the light of all the evidence including the evidence expected to be given by Mark O'Shea. If the jury disbelieved the evidence of Mark O'Shea, the prosecution case would be a very strong one. For that reason it is inappropriate to quash the conviction. A retrial should be ordered.

There were further grounds of appeal. It is necessary to deal with them only briefly. One was that His Honour was in error in permitting evidence to be given of admissions made by the accused at the Burwood Police Station in New South Wales. According to the prosecution case, these admissions were made after the appellant had been arrested

by a NewTMSouth Wales police officer on charges relating to events alleged to have occurred at Drummoyne, New South

-12-

Wales earlier on the day of arrest, namely 18 December

1980. After being cautioned in the usual way, the appellant was asked questions relating to those events. During the course of question and answer the appellant made statements which were direct admissions relating to the abduction of Mr. Nomchong on 15 November 1980. It was submitted that His

Honour in the exercise of his discretion should have excluded the admissions from consideration of the jury because the appellant was not warned that he did not have to say anything about the alleged abduction during the course of the questioning. Furthermore, there is a suggestion on one view of the evidence that the original arrest was not for the purpose of charging the appellant with offences arising out of the events at Drummoyne earlier on the day of the arrest but for the purpose of holding him for investigation into the kidnapping in Canberra. Arrest for that latter purpose would, of course, have been unlawful. Nevertheless, even if the original arrest was unlawful, it would appear that the New South Wales police were entitled to continue to detain the

accused for the purpose of charging him with offences in New South Wales, and he was given the appropriate warning before he answered _ the questions which were directed to those suspected offences. None of the questions were directed towards obtaining any admission from him relating to the Canberra kidnapping. His

Honour found that the appellant made the admissions freely

-13-

and voluntarily and that finding is not challenged. His Honour considered that there was no unfairness involved in the making of the admission and that there would be no unfairness to the appellant in allowing the evidence of the admission to be given. I agree.

There were other grounds of appeal against conviction which were argued but faintly. I do not think that there is any substance in any of them and it is unnecessary to discuss them.

Finally, it is desirable to deal with the appeal against sentence. Of course the ultimate sentence to be imposed in the event of the appellant being convicted on a new trial is entirely a matter for the discretion of the judge at the subsequent trial. The learned trial judge imposed a sentence of five years imprisonment and specified a period of three years during which the appellant would not be eligible for parole, both the head sentence and the non-parole period to date from 21 November 1986. The significance of that date is that it was then that the appellant was eligible to be released on parole in relation to prison sentences in New South Wales. However what happened was that he was returned in custody to the Australian Capital Territory to stand trial on the present Matter. The offences for which he was convicted and

- sentenced in New South Wales occurred whilst he was on bail

for the present matter. Those offences included charges of kidnapping, rape and causing grievous bodily harm with

intent. For those offences he was sentenced to eighteen

-14-

years penal servitude with a non-parole period of seven years to date from 29 July 1982. He was considered eligible for release on parole on 21 November 1986 because of the reduction of the non-parole period by reason of remissions. Prior to those offences the appellant had three prior convictions for false pretences some years ago. A further conviction was recorded in the District Court at Parramatta

on 21 November 1986 for being in possession of shortened

firearms for which a sentence of six months imprisonment was imposed. However, that sentence was ordered to be served concurrently with the sentences currently being served, with the result that it did not affect the eligibility for parole. The trial judge was perfectly correct in regarding the abduction of Mr. Nomchong as a Serious offence and in rejecting any suggestion that the appellant's prior record entitled him to any leniency. The trial judge correctly took into account'

the fact that the offence under consideration preceded the subsequent offences committed in New South Wales and for which the appellant had been sentenced. His Honour, again correctly, in my view, reached the conclusion that the offence under consideration nevertheless deserved a separate and independent sentence. It was submitted, however, that in view of the lengthy term imposed in New South Wales His Honour somehow fell into error by not reducing the head term and non-parole period in

respect of the abduction of Mr. Nomchong. It was submitted

-15-

that the appellant had made efforts to be brought to the Territory for the purpose of standing his trial in pursuance of legislation which had been brought into effect during his

term of imprisonment, but that instead of his request being

granted, the New South Wales authorities held him until he was due to be released on parole. However, His Honour took all those matters into consideration. In the circumstances, there was nothing in the case to attract the special leniency sometimes extended when sentencing for very old or "stale" offences. The offence was committed whilst on bail. There was no error in the sentencing process and

neither the head sentence nor the non-parole period were

manifestly excessive. I would set aside the conviction and

order a new trial.

I certify that this and the 4 preceding pages are a true copy of the , Reasons for Judgment herein of His Honour Mr. Justice MILES

R. Wheeler

Associate

Dates; [3-35-57].

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Prepared on 28 October 2026 · Esheria