R v EMES

[2019] SASCFC 75

Judgment of The Court of Criminal Appeal

1 July 2019

CRIMINAL LAW - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS OF APPEAL - MISDIRECTION AND NON-DIRECTION - EXPRESSION OF JUDGE'S OWN OPINION

CRIMINAL LAW - PROCEDURE - SUMMING UP

Appeal against conviction. The appellant was convicted after a trial by jury of one count of Maintaining an Unlawful Sexual Relationship with a Child contrary to s 50(1) of the Criminal Law Consolidation Act 1935 (SA). The issue on appeal was whether certain comments made by the trial Judge to the jury about the text message evidence were unnecessary and whether those comments deprived the appellant of a fair trial by failing to exhibit sufficient judicial balance.

Held, per Kelly J (Nicholson and Hinton JJ agreeing), allowing the appeal, quashing the conviction and remitting the matter for retrial:

1. The trial Judge's comments in favour of the prosecution case, made with the authority of the Judge, were apt to create a danger or a substantial risk that the jury might actually be persuaded of the appellant's guilt.

2. The Judge's focus upon the text messages improperly skewed the balance in favour of the prosecution.

Criminal Law Consolidation Act 1935 (SA), referred to.
McKell v The Queen (2019) 93 ALJR 309, applied.
R v EMES  
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Court of Criminal Appeal: Kelly, Nicholson and Hinton JJ

KELLY J.

Introduction

1 The appellant appeals to this Court by permission against a conviction for one count of Maintaining an Unlawful Sexual Relationship with a Child contrary to s 50(1) of the Criminal Law Consolidation Act 1935 (SA).

2 The primary issue on appeal is whether the trial of the appellant miscarried by reason of certain comments made by the trial Judge during the course of his summing up to the jury.

3 The appellant complains firstly that the Judge’s comments were unnecessary for performance of the Judge’s duty to direct the jury fairly and accurately, and secondly, that the comments did not exhibit sufficient judicial balance, thus depriving the appellant of a fair trial.

4 For the reasons which follow, I would allow the appeal and remit the matter to the District Court for retrial.

Background

5 The prosecution case against the appellant was that he sexually abused the grandson of his wife when the child was between the ages of approximately five to 14 years of age.

6 At the date of trial, the child, who I will refer to as J, was 21 years old. The appellant was 83 years of age at the time of trial.

7 Numerous types of sexual conduct were particularised on the Information and J gave evidence about them at the trial. They included allegations that the appellant touched J’s penis on more than one occasion, tongue kissed J on more than one occasion, performed an act of fellatio upon J on more than one occasion, touched J’s anus on more than one occasion, inserted his tongue and his finger into J’s anus on more than one occasion, inserted his penis into J’s anus, and caused J to perform an act of fellatio upon him.

8 Prior to the empanelment of the jury, the prosecution sought to tender evidence of a telephone text interchange between the appellant and the complainant in September 2014 on the basis that the texts were admissible and relevant as a voluntary statement by the appellant against interest, that is, an admission.
The appellant’s counsel objected to the tendering of the text messages on two grounds. Firstly, on the basis of the provenance of the material and secondly, on the basis of relevance. The appellant withdrew the objection based on the provenance of the material after the prosecution produced a statement confirming the phone number from which the relevant text messages were received belonged to the appellant.

The text messages sought to be tendered by the prosecution are set out in full below.

Hi mate didn’t know u had another phone how’s things
who’s this?
It’s papa
things are fine. yourself?
Ye good
How did you get my number?

From mum if u don’t want me to have it i’ll delete it what’s the problem

I don’t really care, but the thing is Chelsea has just given birth to our son and daughter today, and I don’t want you apart of their lives because of the disgusting things you did to me as a kid.

I think thats unfair when u started it congratulations any way

How would I learn that shit at the age I was? I remember when you still lived with Nanna and you would try and be a sly cunt about it. It’s disgusting how it continued for years and the only way it stopped was when I left home and didn’t see you. I don’t think you would understand how it has fucked with my head for years. How can someone that is meant to be a loved family member play with a child as young as 6? Watching porn with a 70+ year old man sucking you off when your barely even a teenager. I’ve always lied to everyone about things we used to get up to when I visited. I told people I wanted my children to have nothing to do with you in a nice manner, didn’t say anything about those things, but mum asked so I told her.

When did u tell ur mum because i really luv t all but i don’t think that caused u to do what u done it was other people

how the fuck could it be other people’s fault?

I’m talking about the People u mixed with

I had no friends when all this started.

Look can i ring u

I’m in the hospital
K text me when it’s a good time
I don’t want to talk.

The appellant’s counsel did not take issue with any of the messages down to the text which ends “congratulations any way”.

The appellant complained that the balance of the text messages were simply self-serving statements made by the complainant.

The Judge ruled that the prosecution would not be permitted to tender the balance of the texts. However, the Judge said at the time of ruling that, depending on the way counsel for the appellant cross-examined, he may permit re-examination.

The appellant gave evidence on oath denying that there was ever any sexual contact of any type between him and J.

He gave an explanation for the text message tendered by the prosecution, explaining that by the words “I think thats unfair when u started it congratulations any way”, he meant that it was unfair that J did not want to talk to him. He said the reference to “started it” was a reference to “the sexual things you have to do to have children” and he was referring to J ‘starting it’ with his partner which resulted in their having twins.

In cross-examination, the appellant agreed that the allegations made by J came as a shock to him. He said that he did not “know what [J] was on about” when J referred to “disgusting things” in the text but he agreed that he was curious about what J meant. When asked by the prosecution why he did not ask J what he meant by “disgusting things”, the appellant replied, “He wouldn’t talk to me. He didn’t want to talk to me. I couldn’t ask.”

As a consequence of that evidence given by the appellant in cross-examination, the prosecution applied, in the absence of the jury, for the Judge to revisit his earlier ruling, submitting that the excluded text material had become relevant as a consequence of the appellant’s evidence referring to some of the excluded material.

After hearing argument, the learned trial Judge considered that the balance of the text messages had become admissible to put into context the alleged admission which was the subject of the last line in the admitted texts. However, the trial Judge ultimately refused permission to the prosecution to re-open the issue. He considered it would be unfair in light of the fact that both parties were bound by his original ruling and the defence case had been conducted on the basis of that ruling. Nevertheless, even without the benefit of the whole text exchange before the jury, the admitted portion of the exchange assumed prominence at the trial.
The prosecutor, in his closing address, invited the jury to carefully consider the evidence of the appellant and then specifically referred to the evidence given by the appellant about the text message. Defence counsel, in his closing address, also made submissions about the text message and the appellant’s explanation in relatively brief terms. Counsel for the appellant suggested to the jury that they might accept the appellant’s explanation as rational and they might not be able to exclude beyond a reasonable doubt that it was an explanation that an 80 year old man might give in a text message.

Eventually the jury returned a unanimous verdict of guilty.

The impugned comments

The paragraphs of the Judge’s summing up which are the subject of the appellant’s primary complaint are set out below.

[64] Ladies and gentlemen, I emphasise yet again, and I emphasise as strongly as I can, that matters of fact are for you and not for me, but I invite you to concentrate on those three pages of text messages, to look at all of them and to take into account what the accused said by way of explanation.

[65] As part of that explanation, the accused said “I wasn’t referring to any disgusting thing because I don’t know what he’s talking about there”. So, the effect of the accused’s evidence seems to be – although it is a matter for you, not for me – that when he read the text, the words “because of the disgusting things you did to me as a kid” he did not know what [J] was referring to by “disgusting things”.

[66] Ladies and gentlemen [J’s] message about not wanting his twins to have anything to do with the accused was a message from a grandson, who had apparently got on well with his grandfather, telling his grandfather that he wanted that grandfather to have nothing to do with the newborn twins. The reason given for that, in [J’s] text, is “because of the disgusting things you did to me as a kid”. Now the accused’s position is that he did not know what [J] had meant by “disgusting things”.

[67] I emphasise again, the facts are for you, not for me, but it may help if you consider this: if the accused did not know what the disgusting things were in the circumstances of his relationship with his grandson, do you think that the natural reaction would have been “What are you talking about? What disgusting things?” Do you think, ladies and gentlemen, that he did not ask “what are you talking about what disgusting things?” because there was no need for him to ask because he already knew? I invite you to consider that but, as I have said before and I emphasise again, the facts of this matter are not for me. They are for you and you alone.

The prosecutor did not explicitly invite the jury to treat the appellant’s text as an admission. However, it seems apparent from the prosecutor’s address that he was relying on an implication that the text message amounted to an admission and that the appellant’s evidence explaining what he meant was an implausible attempt to explain away that admission.

The defence challenged that interpretation, suggesting that the jury were entitled to have regard to the appellant’s advanced age and physical condition in
assessing his explanation on that topic and were entitled to keep an open mind as to the explanation which he had advanced.

So, while the words in the text message were not disputed, the prosecution and defence joined issue as to the meaning and significance of those words. If the prosecution submission was accepted, then the jury were entitled to draw an inference that the appellant had, in effect, admitted the conduct with which he was charged.

The Judge’s comments were made in that context.

Discussion

In support of the complaint made on appeal, the appellant relied on what fell from the High Court in McKell v The Queen.\(^1\)

Although the facts in McKell are distinguishable from the facts here, it is the general observations of the plurality in McKell upon which the appellant relies to argue that the Judge’s comments have caused a miscarriage of justice.

**McKell v The Queen**

After disposing of the issue that arose on appeal, the plurality (Bell, Keane, Gordon and Edelman JJ) then moved to clarify the position with regard to the scope for comment by a trial judge in the course of summing up to a jury.

The Court relevantly observed:

[46] … It should be made clear that the risk of unfairness, to either side, involved in the exercise by a trial judge of a “right” to comment that goes so far as to suggest how a disputed question of fact should be resolved is such that that risk should not be courted by trial judges. Further, there may be cases where a trial judge’s comments suggest that questions of disputed fact should be resolved by the jury in favour of the defence. Because there is, generally speaking, no appeal from a verdict of acquittal by the jury, the unfairness to the prosecution in such a case could not be remedied. It is desirable to clarify the position with a view to ensuring that injustice of this kind does not occur. The appellant’s submission in this respect should be accepted.

[47] It is well settled that a trial judge’s discretion to comment on the facts should be exercised with circumspection. The need for circumspection is not merely a matter of prudence or politeness. Recently, in *Castle v The Queen*, Kiefel, Bell, Keane and Nettle JJ, with whom Gageler J relevantly agreed, said, referring to the passages from RPS with which these reasons commenced:

[U]nless there is a need for comment – as, for example, in dealing with an extravagant submission by counsel – the wise course will often be not to do so. Where the judge chooses to comment, the following statement of Brennan J in *B v The Queen* is to be kept in mind:

\(^1\) (2019) 93 ALJR 309.
[The comment] must exhibit a judicial balance so that the jury is not deprived “of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence.”

(Footnotes omitted.)

[48] In *RPS* and *Castle*, the discretion of the trial judge to comment on the facts was located squarely within the duty of a trial judge to assist the jury with a fair and accurate statement of the case presented by each party. That being so, little would be gained by a review of the practice of trial judges in earlier times, when the trial judge occupied a more dominant position in the conduct of criminal trials. The point made in the observations of the plurality in each of *RPS* and *Castle* is that there is a risk that comments that are unnecessary for the performance of the duty to give fair and accurate instructions to the jury may occasion a miscarriage of justice, and so a trial judge should be astute to avoid that risk by refraining from comment that is not so required. These points are most compelling in relation to expressions of opinion by a trial judge as to the determination of disputed issues of fact.

(Footnotes omitted)

30 Twice, in the course of their observations, the plurality referred to the so-called “right” of a trial judge to comment on the facts. The Court emphasised that there is no free-standing entitlement of a judge to comment on the facts free of the constraints imposed by the judge’s duty to give the jury accurate and fair instruction to enable them to arrive at a just determination of the matters of which they are the sole arbiters.

31 As to the practice in this State which has been followed from time to time since the late 1990s, after a series of cases where there seems to have been substantial judicial disagreement in this Court, the High Court in *McKell* relevantly observed:

[50] Secondly, there is no little tension between suggesting to the jury what they “might think” about an aspect of the facts of a case and then directing them that they should feel free to ignore the suggestion if they think differently. There is a risk that the jury may actually be swayed by the trial judge’s suggested determination. It would be to maintain an altogether hollow and unconvincing distinction to say that, while a trial judge may not go so far in his or her comments as to create a risk that the jury may be “overawed”, it is nevertheless permissible for a judge to use language that “makes him [or her] appear a decided partisan”.

[51] In any event, the jury are likely to be bemused by the tension between the suggestion and the direction. It is difficult to see what good purpose is served by confronting citizens doing jury service with this complication in the due performance of their duty. In *R v Pavlukoff*, in the British Columbia Court of Appeal, it was said that:

> It seems an absurdity for a Judge after telling the jury the facts are for them and not for him, then to volunteer his opinions of facts followed then or later by another

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caution to the jury that his own opinion cannot govern them and ought not to influence them. If his opinion ought not to govern or influence the jury then why give his opinion to the jury. To a person who is not a lawyer, but has some training in the science of correct thinking and some knowledge of the workings of the human mind, a Judge who expresses his own opinions to the jury is in effect unconsciously perhaps but nevertheless subtly and positively undermining the plain instruction he has given the jury that “the facts are for them and not for him”; in reality he is in true effect attempting to persuade the jury not to exercise their own minds freely (as in law he has told them they must do) but instead to be guided by the factual conclusions he volunteers to them.

[52] There is much force in these observations. They were referred to with approval by Olsson J, with whom Millhouse and Williams JJ relevantly agreed, in R v Machin, and by Simpson J in Taleb v The Queen.

(Footnotes omitted)

32 The plurality concluded:

[55] … But there should be little difficulty in a trial judge refraining from expressions of opinion on the determination of disputed issues of fact. Once it is accepted that the trial judge’s “right” to comment is best understood as a judicial power or discretion to be exercised judicially for the purpose of ensuring that the jury have a fair and accurate understanding of what they need to know to do justice in deciding the issues of fact that arise for their determination, any concern about the blurring of what is said to have been previously a “bright line” can be seen to be illusory. The provision by a trial judge of fair and accurate instruction to a jury is not always a matter of “bright lines”. It is, however, always concerned with practical fairness to both sides, as has been recognised in statements of high authority such as the passages from RPS with which these reasons commenced.

33 It is unfortunate that the authority of McKell was not brought to the attention of the Judge before the summing up was delivered. However, the issue for this Court is whether the trial Judge’s comments in favour of the prosecution case, made with the authority of the Judge, were apt to create a danger or a substantial risk that the jury might actually be persuaded of the appellant’s guilt.³

34 The texts between the appellant and J and the meaning to be attributed to them was a central issue in a short trial. Both counsel focused their respective addresses on that issue. In a relatively short summing up, the trial Judge also focused substantially on that issue. Whilst, in the course of his comments in the impugned paragraphs, the Judge did present both the prosecution and the defence submissions about those texts, nevertheless the purport of his comments was clear. He effectively presented a better address to the jury than the prosecutor had done. While it is understandable perhaps in light of the somewhat desultory presentation of the prosecution case that the Judge felt constrained to intervene in the way he did, in my view he went too far.

35 I would add however that I do not consider the Judge’s remarks in this case were as egregiously unbalanced as they were in McKell. Nevertheless, given the

³ McKell v The Queen (2019) 93 ALJR 309, 317 [42].
relatively short trial and the prominence of this issue, the Judge’s focus upon it improperly skewed the balance in favour of the prosecution.

36 The decision in *McKell* has removed any lack of clarity or confusion about the extent of a judge’s right to comment on the facts. It is important that trial judges understand and apply the principles clearly articulated in *McKell*.

37 For these reasons, I would allow the appeal, quash the conviction and remit the matter back to the District Court for retrial.

38 **NICHOLSON J:** I agree with Kelly J and with the additional remarks of Hinton J.

39 **HINTON J:** I agree with Kelly J that this appeal should be allowed. The rhetorical questions asked by the trial Judge at paragraph 67 of the summing up (set out by Kelly J above) was a particularly powerful way of persuading the jury that an admission had been made. Acceptance of the implied admission and related damage to the appellant’s credibility would have rendered a conviction virtually inevitable. This is not a case in which the proviso may be applied.