

'You might very well think that...

I couldn't possibly comment.'¹

Judicial comments on the jury's determination of facts at trial

Dean Jordan SC and Ann Bonnor report on *McKell v The Queen* [2019] HCA 5

The fundamental task of a trial judge is to ensure the fair trial of the accused. In *McKell v The Queen* [2019] HCA 5, the High Court visited an aspect of this task: the judicial discretion to comment on the facts of the case in a criminal trial. The Court made clear that a trial judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury.

The facts

The appellant was tried before a jury, and convicted, in the District Court of NSW for offences of importing a border-controlled



precursor, conspiracy, and dealing with proceeds of crime.

The appellant worked for a company which transported freight from cargo terminal operators at the airport to freight-forwarding agencies. On 16 May 2013, a consignment

of five cardboard boxes labelled 'pajamas' arrived in Sydney from Chile (the first consignment). He collected the boxes then drove to meet a co-accused.

On 20 May 2013, a second consignment arrived in Sydney containing crystalline pseudoephedrine. Soon after it arrived, the appellant texted his co-accused stating 'dont [sic] forget to tape trial'. The appellant collected the second consignment. He was then intercepted and arrested. Subsequently, a third consignment arrived, which contained crystal methylamphetamine. Police found \$400,150 in cash in a tin box in the appellant's bedroom.

The trial and the summing up

The appellant gave evidence at trial. His case was that he was an 'innocent dupe'. He said the cash was the product of cash gambling. When addressing the jury, defence counsel submitted that separate online betting accounts showed evidence of the appellant's gambling success. However, the net position in those accounts was in fact overall loss.

In summing-up to the jury, the trial judge observed 'the possibility that there was something in [the first consignment] which was taken out', which suggested to the jury for the first time, and at odds with a pre-trial ruling, that the first consignment may well have contained drugs. The trial judge also observed that 'you may think' a sophisticated organisation was involved.

The trial judge remarked that it was 'so obvious' that in the 'tape trial' message, contrary to his evidence, the appellant was not talking about horses. The judge suggested it referred to repackaging the second consignment after a substitution. If the online accounts were an indication of success, the trial judge said, 'you certainly would not want to be an unsuccessful gambler, would you?'

Court of Criminal Appeal

The appellant appealed on the sole ground that the summing-up had occasioned a miscarriage of justice. The majority of the CCA held that it had not. Beech-Jones J, dissenting, found that the summing-up did not exhibit 'judicial balance' and a miscarriage of justice resulted.

The High Court

The Court (Bell, Keane, Gordon and Edelman JJ, Gageler J agreeing on this point) was unanimous in holding that the summing-up in the appellant's trial was so unfair in its lack of balance as to cause a miscarriage of justice (at [45], [58]).

A trial judge's 'broad discretion' to comment on the facts is an aspect of the power by which the judge discharges the fundamental task of ensuring a fair trial. It is not exercisable, at large, independently of that task (at [3]). It is to be exercised judicially as part of ensuring that facts are put 'accurately and fairly' to the jury (at [3]). Where

a summing-up so favours the prosecution as to deny the accused a fair trial, the resulting miscarriage of justice cannot be justified or excused by invoking the judge's 'right' to comment on the facts (at [45]).

On the first consignment and 'sophisticated organisation', the trial judge's remarks were unnecessary and distinctly apt to persuade the jury of the appellant's guilt (at [36]). The trial judge was permitted to correct the defence submission on gambling success, but the trial judge's remarks went further, such as to gratuitously belittle counsel and distract from the point that the cash was not online gambling proceeds (at [38]). The summing-up must be read as a whole, and this was not one 'unfortunate' remark, as characterised by the majority of the CCA (at [39]).

The Court did not accept that the judge's comments were 'typical and permissible', as found by the CCA majority (at [40]):

It would not be a cause for satisfaction if these remarks were 'typical' of the daily work of trial judges. The content and tone... would not have been out of place in a powerful address by counsel for the prosecution.

The forceful language of the trial judge was such as to cause a risk that the jury might be overawed such that there was 'really nothing for them to decide' or that they would be 'fatuous or disrespectful if they disagreed with the judge's views' (at [43], citing *B v The Queen* (1992) 175 CLR 599 at 605 606). But there is a further risk, of particular concern in this case, that the jury might be persuaded to convict 'by what was, functionally, a second address by the prosecution' (at [43]).

A strong Crown case did not justify the lack of balance (at [44]). There is a real and well-recognised difference between the statement of a case and advocacy of that case (at [44]). The trial judge's remarks were couched in the forceful language of persuasion (at [44]). A strong Crown case in no way diminishes the obligation of those conducting the trial to ensure that it is a fair one (at [44]).

Clarification of principle and implications

The majority (Gageler J finding it unnecessary to address) stated it should be clearly understood that a trial judge should refrain

from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury so as to avoid the risk of unfairness to either party (at [5], [46]).

The jury is the constitutional tribunal for deciding issues of fact (at [49]). Expressions of opinion by a trial judge as to the determination of a disputed issue of fact are not consistent with the trial judge's function as it is now understood (at [49]). There is a tension between suggesting to the jury what they 'might think' about an aspect of the facts and then directing them that they should feel free to ignore the suggestion if they think differently (at [50]). There is a risk that the jury may be swayed by the trial judge's suggestions.

None of this detracts from the duty of a trial judge to direct the jury as to the issues which arise on the evidence for their determination (at [53]). There remains scope for proper comment. The correction of errors that might adversely affect the jury's ability to decide the case fairly on the merits, is plainly not objectionable (at [54]). It is not difficult to imagine cases where judicial comment – but not an expression of opinion on the determination of a matter of disputed fact – may be necessary to maintain the balance of fairness (at [53]).

ENDNOTE

- 1 Quote taken from the BBC Television trilogy 'House of Cards' © (1990) BBC