SUPREME COURT OF QUEENSLAND

Supreme and Federal Courts Judges' Conference Canberra

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"Appellate Court – civil – rehearing and role and use of audio-visual records of witnesses at trial"

The Hon Paul de Jersey AC
Chief Justice

1. Perceptions of the extent of appellate intervention wax and wane. Concern reflects understandably a degree of possessive pride in trial judges in their work, as demonstrated in civil judgments and summings up to juries.

   My own view is that two cases, *Warren v Coombes* (1979) 142 CLR 531 and *Morris v R* (1987) 163 CLR 454, mandated a more intrusive appellate judiciary in Australia, and our subsequent history tends to bear that out. (I wish to refer to *Morris* notwithstanding the focus of the subject is civil proceedings.)

2. *Warren v Coombes*, in 1978, concerned the role of an appellate court in the drawing of inferences from established facts. Some appellate judges had taken the view that a trial judge's factual judgment was akin to the verdict of a jury, memorably described by Lord Denning as being "as inscrutable as the sphinx" (*Ward v James* (1966) 1 QB 273, 301). Some appeal courts took the view that because different minds might ordinarily come to different conclusions as to inferences to be drawn from established facts, appeal courts should defer to the primary judge's conclusion if within range.

   In *Warren v Coombes*, the High Court laid out what was really a new charter for intervention, concluding that

   > "…in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are

> established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it." (p 551)

Adherence to this mandate has fed a perception at trial level that in many cases, trial judgments in civil cases are effectively provisional, subject to review on appeal.

In relation to findings of fact based on the credibility of witnesses, subsequent authorities, including *Fox v Percy* (2003) 214 CLR 118, have affirmed that such a finding is to be regarded as prima facie unassailable, absent incontrovertible evidence to the contrary, or glaring improbability, or conflict with compelling inferences to the contrary. But significantly, in their joint judgment in *Fox v Percy* (2003) 214 CLR 118, Gleeson CJ, Gummow and Kirby JJ said this (p 129):

> "…in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of (the appearance of witnesses). Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."

Their Honours had earlier discussed the nature of an appeal by way of rehearing – with the court proceeding on the basis of the record and any fresh evidence it may exceptionally admit (p 125) – and then observed (pp 126-7):

> "Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing (their) own inferences and conclusions, though (they)

> should always bear in mind that (they have) neither seen nor heard the witnesses, and should make due allowance in this respect." (*Dearman v Dearman* (1908) 7 CLR 549, 564)

3. *Morris v R* established, in 1987, the means by which appeal courts determine whether a verdict of guilty is unsafe or unsatisfactory. I would suggest, again anecdotally, that previously, particular respect was accorded to a jury's verdict, with a focus on whether there was evidence which, if accepted, could justify the conviction, without any particular attention to the quality of the evidence: the traditional view had been that that was very much a matter for the jury.

In *Morris*, explaining really what the court had meant to convey in *Chamberlain v R* (1984) 153 CLR 521, 531, three years earlier, Mason CJ said that "a verdict may be set aside as unsafe and unsatisfactory notwithstanding that there was, as a matter of law, evidence upon which the accused could have been convicted" (p 461). The Chief Justice said that the proper test was whether, notwithstanding the availability of the evidence, a jury, in convicting, should nevertheless have entertained a reasonable doubt. As said in *Chamberlain*:

> "To say that the court of criminal appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the court of criminal appeal thinks that a reasonable jury should have entertained such a doubt." (p 534)

The Chief Justice referred to the need for the appeal court to make a careful independent assessment of the evidence, extending to its weight, quality and questions of credibility. As he said:

> "The making of a careful independent assessment was essential to the making of an informed judgment on the question whether the jury could reasonably convict on the materials before them. The court's duty was to satisfy itself that there was 'a sufficiency of legal evidence to satisfy reasonable men to the exclusion of any

> reasonable doubt', in the words of Dixon J in *McKay v The King*. The performance of that duty extends to an examination of the probative value of a confession, notwithstanding that there is sufficient confessional evidence to be submitted to the jury." (pp 463-4)

The dissenting justice, Dawson J, also acknowledged the need for an appellate assessment independently of that of the jury (p 481).

The other majority justices referred to "an independent assessment of the evidence, both as to its sufficiency and its quality" (p 473). It was not appropriate to treat the reliability of the critical admission as just one of credibility reserved to the jury and not warranting appellate re-examination.

4. No doubt developing technology has greatly facilitated and streamlined the work of the courts. Electronically conducted trials provide an excellent example. The courts are gearing towards full electronic filing, some already available.

Embracing some new technology raises particular challenges: with electronic filing, for example, protecting those without computer access; and with the digital recording of proceedings, protecting the confidentiality of communications within courtrooms which come to be recorded because of the acute sensitivity of the electronic mechanisms.

I turn to the recording of evidence, because of its impact on rehearings at appellate level.

5. Recording techniques have developed substantially over the last four decades.

When I came to the bar in 1971, the recording was accomplished in the Supreme and District Courts in Queensland by stenographers armed with Parker fountain pens, the so-called "pen writers". In the Magistrates Court, depositions clerks used

Olivetti typewriters, mostly of considerable vintage and volume. As a result, appellate courts in Queensland – then called the Full Court and the Court of Criminal Appeal – were confined to a paper transcript, although rarely the courts might receive affidavit or oral evidence as to the course of the proceedings.

Then, too, confessional evidence led in criminal trials was largely confined to paper based records of interview. In Queensland for many years this accounted for considerable prolongation of criminal trials because not infrequently, indeed with predictable frequency, there was challenge to the legitimacy of the records of interview.

6. In time, the courts adopted audio based recording. This meant that if necessary, the appellate court could listen to the tape, most often to check the accuracy of the challenged piece of paper transcript. Also, a litigant sometimes procured a copy of the tape, to make an independent check of the transcript, with allegations of State conspiracy sometimes levelled.

The advent of CAT machine reporting had also occurred, producing a paper transcript in due course, and sometimes, later in the piece, we came to see so-called "real time" reporting, although not frequently because of the expense of that process.

7. And now hail the age of digital recording, where the proceedings are recorded by digital technology which operates continuously, without any human recording presence in the courtroom. While the rolling out of the Queensland system has not been without hitch, its advantages in Queensland, because of the vast spread of the State, have been substantial. For example, an otherwise under-utilized officer of the State Reporting Bureau located in, say, Townsville, may be used to type up the transcript of a proceeding running concurrently in Brisbane.

What may not be generally known is that the recording produced digitally nets not only the audio record, but a visual record as well: akin to a video recording.

8. It remains to acknowledge, in this review, that a record of court proceedings may be produced independently of the court.

In Queensland, for example, we allow media representatives to make an audio recording, not for broadcast, but for checking for accuracy for reporting purposes. No other private audio or videoed recording of the proceeding is permitted, although there would be no reason why a party could not commission a private reporting service to produce a separate transcript, for example by the CAT mechanism.

In New Zealand, the media is permitted to film proceedings, subject to specified conditions, so that a video tape will result, and that I understand may be telecast and broadcast.

None of this will however comprise an official record of the court proceeding.

An appeal court may nevertheless find it difficult to reject out of hand a contention that the official record was flawed, because inconsistent with another privately produced recording. No doubt its being an official record with statutory backing would almost certainly win the day. But the very existence of an independent recording of that character would leave open the possibility of challenge to the official recording.

I perceive a growing tendency on the part of parties to proceedings who are not legally represented to challenge the authenticity of the official record.

9. The end point of this excursus is the prospect that modern appeal courts may be invited to rehear proceedings in a much more comprehensive way, that is by

recourse to a digitally produced full audio and visual record of the trial. Depending on the range of the visual record, the scope for examination of nuances in the delivery of the summing up, for example, will be larger.

When the availability of the full audio and visual digital recording is more broadly known, then again subject to its range and quality, we may expect an unrepresented litigant especially to contend that a conviction in unsafe because of a perceived overbearing attitude in the judge, to the defence and perhaps the jury, evident from the judge's demeanour during the trial.

We may increasingly expect lawyers for represented parties to invite appellate courts to watch and listen to the record of at least selected parts of trials.

The availability of a full audio and visual recording also means that appellate courts have a much enhanced capacity to test findings of fact based on the credibility of a witness. While the cases are replete with admonitions that appellate courts should respect any advantage enjoyed by a trial judge in seeing and hearing the witness, the question arises whether that advantage is minimized in circumstances where the appeal judges may themselves re-watch the giving of the evidence. Should they do that, in order conscientiously to discharge their duty, reaffirmed in *Fox v Percy*, to conduct "a real review of the trial", performing the task of "weighing conflicting evidence and drawing (their) own inferences and conclusions…" (pp 126-7)? Allowing for the scepticism expressed in the joint judgment in *Fox v Percy*, as to judicial capacity to determine the truthfulness of evidence where the basis is the credibility of the witness, is the prospect of securing the "right" and "just" result enhanced if three judges make the effort rather than just one?

10. If borne out, these prospects would have important implications for the resourcing of courts.

It may also necessitate some contemporary elucidation of the approach to be adopted by appellate courts, in the context of *Morris* especially.

I am not sure that the application of *Morris* where a full record is available, audio and visual, might not on one extremely unappealing view require an appellate court to rehear the proceeding in the sense of listening to and watching the tape of the entire proceedings. On one view, that is what an independent and thorough review would require. The more pragmatic and, I respectfully suggest, sensible approach, would be to confine that by reference to the points taken by the parties. But there would I think remain a question mark whether that more limited approach would be consistent with the thorough going requirements of *Morris* and the cases which have subsequently endorsed it.

Morris of course preceded the digital age, and may have to be reconsidered in the light of contemporary conditions.

11. In an interesting paper entitled "Appellate review of video recorded trials: more justice or just a headache?", delivered in November 2008, Mark Ritter, former Acting President of the West Australian Industrial Relations Commission surveyed the impact of video-recorded proceedings in various jurisdictions. Mr Ritter looks at the appellate use of trial recordings from a Scottish perspective, and also examines the situation in Kentucky, California, Washington, Tennessee and Maryland, whose appeal courts have apparently shown a general disinclination to resort to the video tape.

The Scottish case is *Clark v Her Majesty's Advocate* [2000] ScotHC 79 (*Appellate review of video recorded trials*, pp 14-16). Clark was convicted of assault and robbery in the Sheriff Court, and "appealed against the conviction on the ground of misdirection" (*Clark*, [1]). Her primary submission was that, when comparing and contrasting the various statements of the appellant and the complainant, the Sheriff,

through intonations of voice, gave a "clear indication to the jury that they should give greater weight to the similarities in the evidence rather than the discrepancies." (*Clark*[1] [3]). To assess the contention the court listened to the audio recording of the relevant part of the proceeding (*Clark*[1] [3]). The passage in question was a series of rhetorical questions, and on hearing the audio the court expressed the view that, "the Sheriff did indeed raise the register which he used and place[d] the emphasis on certain words in such a manner as to suggest that the answers to the questions would be unfavourable to the appellant. We stress that this was a clear impression which we all formed and that the phenomenon occurred repeatedly. We consider that any attentive juror would have formed the same impression." (*Clark*, [6]).

In Kentucky, "the videotaped record of trial proceedings is '*the record*' and there is no requirement for an additional written transcript." Mr Ritter refers to a scientific study from the Journal of Appellate Practice and Process entitled *Thawing out the "Cold Record": some thoughts on how videotaped records may affect traditional standards of deference on direct and colateral review* by Professor Robert Owen and Ms Melissa Marther. That study showed that "appeals decided by the courts in Kentucky on the basis of videotaped records had no higher success rate than those decided on written records and in fact may have higher dismissal rates." (*Appellate review of video recorded trials,* p16). This may suggest that on that study, deference to the trial judge's superior ability to interpret demeanour and witness credibility was indeed the correct approach, or at the very least, that there was no significant advantage in appellate courts being provided with video-recordings of primary proceedings.

12. Nevertheless, in Australia, if an appellant challenges a finding of credibility, present authority may necessitate appellate recourse to any available video tape. The question remains: to what extent?

13. Mr Ritter offers some interesting commentary on appellate review, in criminal cases, on the "unsafe and unsatisfactory" ground (at p11). He cites the observations of McHugh J in *Festa v The Queen* (2001) 208 CLR 593 at [122] and the Full Federal Court in *McNeill v The Queen* (2008) 168 FCR 198 at [342] as to the enhanced appellate role in reviewing trial evidence on the ground of 'miscarriage of justice'. He asks (at p 12):

    (a) "[i]s the appellate court required to analyse all of the evidence by looking at the video-record of the trial?"; and

    (b) "[i]s there to be less deference to the 'jury's advantage' in deciding there ought to be reasonable doubt?"

    I would, on current authority, answer 'probably yes' to both those questions.

14. Mr Ritter suugests that a video-record of trial proceedings is the "best record" (p12). If of good quality and comprehensive, that is true. As to quality and comprehensiveness, should there be one record of the entire proceedings from a single camera, or multiple recordings from different angles in the court so as to capture witnesses in detail, jury, judge and counsel? Such a multi-faceted recording could no doubt be accomplished with the aid of modern digital video technology. What advantage this may give an appellate court in a rehearing is debatable and must be weighed against the limitations and delay inherent in conducting a review in that way.

15. Some of us who do not favour television reporting of court proceedings are concerned about the natural human tendency to play to the camera, however discreetly the camera may be sited within the courtroom. If it is known that a media organisation is televising the proceedings, there will inevitably be distraction for some from the serious business really at hand.

    There is perhaps a similar risk, should the fact of continuous full audio and visual digital recording become broadly known, although I think that risk would be much

less, probably miniscule. It is the desire for 60 seconds of fame, or infamy, on the six o'clock television news, which more realistically could distract some players from proper attention to the serious issue at hand.

16. I make one final point.

Fingleton v R (2005) 227 CLR 166 was unusual, maybe even unique, for the way the point which succeeded arose. It was not raised at the trial, or on the first appeal, by the parties, or by the parties in setting the case before the High Court. It was the High Court itself which independently identified and promoted the point. There is speculation which justice identified the point, or indeed whether it was a justice at all.

The availability of a full audio and visual recording will carry a greater facility for those whose bent is investigative. While I cannot see appellate courts embracing that role with any great enthusiasm, parties and their representatives will have an enhanced capacity to trawl through proceedings to uncover any arguable mistake. This may increase defence costs in criminal proceedings.

Subject to any redefinition of the appellate approach mandated by *Morris*, I expect the obligation to conduct the careful independent assessment of the evidence will, in a practical sense, continue to be informed substantially by the points advanced by the parties.