*Vo v The Queen* [2013] NTCCA 04

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| PARTIES: | VO, Cindy |
| | v |
| | THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CCA 6 of 2012 |
| DELIVERED: | 18 March 2013 |
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| JUDGMENT OF: | Mildren ACJ, Kelly and Blokland JJ |
| APPEAL FROM: | Supreme Court (Barr J) |

**CATCHWORDS:**

Criminal Law - Evidence – reverse onus – can Crown rely on statutory presumption – accused's evidence not contradicted in cross-examination – whether conviction unsafe – rule in *Browne v Dunn*

Evidence – Witnesses – evidence of bad character – whether leave required to cross-examine on evidence as to character when good character raised by accused

*Criminal Code* (Cth), *Crimes Act 1958* (Vic), *Evidence Act* ss 9(2), 10, 14, 16, *Evidence Act 1977* (Qld)

*M v The Queen* (1994) 181 CLR 487, *R v Hamilton* (1993) 68 A Crim R 298, referred.

*Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* (1983) 1 NSWLR 1, *Browne v Dunn* (1893) 6 R 67, *Eastman v The Queen* (1997) 158 ALR 107, *Matusevich v The Queen* (1976 – 1977) 137 CLR 633, *Phillips v The Queen* (1985) 159 CLR 45, *R v Darby* (1993) 3 NTLR 74, followed.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | I Read SC |
| Respondent: | G R Rice SC |

*Solicitors:*

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| Appellant: | NT Legal Aid Commission |
| Respondent: | Director of Public Prosecutions (Commonwealth) |

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| Judgment category classification: | A |
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Vo v The Queen* [2013] NTCCA 04
No. CCA 6 of 2012

BETWEEN:

**CINDY VO**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: Mildren ACJ, Kelly and Blokland JJ

REASONS FOR JUDGMENT

(Delivered 18 March 2013)

**THE COURT:**

[1] This is an appeal against conviction after a trial by jury for importing a commercial quantity of a controlled precursor, contrary to s 307 of the *Criminal Code* (Cth).

**The facts**

[2] At the time of the offending, the appellant was 18 years of age and resided with her mother, Josie Ly, and her family in Cabramatta, New South Wales. The appellant's mother married John Huynh on or about 6 June 2011. The wedding cost $14,000, which was offset by only $4,000 in gifts of cash from guests. Mr Huynh's father operated a coffee shop. Prior to travelling to

Vietnam in 2011, the appellant worked in the coffee shop from time to time earning a small amount of money. The family members were all in financial difficulties and the coffee shop was forced to close. The appellant was required to give her mother virtually all of her income for rent. For some time, the appellant's only income had been Centrelink payments.

[3] Shortly after the wedding, the appellant's mother told her and her brother that they were going to Vietnam for a holiday and also to visit Mr Huynh's grandmother who was sick, as well as other family members. The appellant, her mother and brother stayed in a hotel in what was formerly called Saigon, now named Ho Chi Minh City.

[4] On the day before the appellant and her brother were due to fly back to Australia, they, together with their mother, were visiting a market place in the city. Whilst at the market, an old Vietnamese woman spoke to Josie Ly, but was not introduced to the appellant nor, apparently, her brother. She gave the appellant's mother a heavy box which was taken back to the hotel. At this time, the box was not inspected.

[5] Subsequently, the appellant was assisted in packing her and her brother's bags with packages of white powder, which were ostensibly commercially packaged as flour or a flour product. In fact, there were 15 one-kilogram bags placed in those suitcases. A similar quantity of flour bags remained with the appellant's mother with the intention of being brought back to Australia later.

[6] The appellant asked her mother what the product was for and who it was for, and the mother replied, “Don’t ask and just bring it back.” The appellant’s evidence was that she wondered what it was that she was bringing back and that she was suspicious about it and thought it very odd.

[7] The appellant, when she gave evidence, acknowledged that the product was the same as, or similar to, the bags of flour that were widely available in Asian grocery stores in Cabramatta.

[8] In addition to the flour bags, there were other food products, such as dried fish, dried shrimp and dried squid.

[9] The appellant and her brother arrived at Darwin airport in July 2011. She filled out an arrival card in which she disclosed the fact that she had food products in her bag. However, the passenger cards which she filled out for both herself and her brother contained false residential addresses. After the appellant and her brother collected their luggage, she was searched by custom officers who found the 15 sealed plastic bags. The bags were tested by customs officers at the airport using some preliminary or presumptive testing kits. The tests indicated the presence of ephedrine in each of the bags. Whilst the testing was going on, Ms Vo and her brother were required to wait in the customs hall, where they could see what was happening and they were also being kept updated by customs officers. Whilst sitting in the customs hall, the appellant sent a secret text message to Mr Huynh:

> "Me and Anthony are stuck at Darwin Airport! They tested positive for drugs. Don't call me. Tell Mum not to bring any of those flours back."

And then there was a second text immediately after:

> "In the bag."

[10] The appellant was arrested and samples from each of the bags were sent for further testing at a forensic laboratory. The testing found that the white powder in each bag was about 70 percent pure pseudoephedrine.

[11] The appellant was charged on indictment with the following offence:

> "On or about 20 July 2011 at Darwin in the Northern Territory of Australia imported a substance, believing that another person intended to use any of the substance to manufacture a controlled drug, the substance being a border controlled precursor, namely pseudoephedrine and the quantity imported was a commercial quantity.
>
> Contrary to section 307.11(1) of the *Criminal Code* (Cth)."

[12] The contentious issues at the trial related to two elements of the offence:

> (1) recklessness as to the substance imported being a border controlled precursor;
>
> (2) whether the appellant believed that another person intended to use any of the substance to manufacture a controlled drug.

[13] The appellant gave evidence denying having the relevant mental state in relation to both elements. In cross-examination, she said in summary that it

looked like normal flour so that she assumed that it was normal flour and that she did not think about it as being drugs of any sort or kind.

[14] The way the trial proceeded in relation to the mental elements was that the Crown intended to rely upon evidence to show that the accused was reckless as to whether she was importing a border controlled precursor. That was the way the Crown opened its case. However, although that remained the principal limb of the Crown's case, at the end of the trial the Crown also submitted that the jury could infer that she knew that the substance was a border controlled precursor. Indeed, his Honour left to the jury that the Crown had to establish either that the accused knew that she was importing a border controlled precursor, or that the accused was reckless as to whether she was importing a border controlled precursor.

[15] There was no specific evidence, such as an admission, or any specific evidence given by any of the witnesses, that the accused had any specific knowledge that the bags contained a border controlled precursor, or, for that matter any other border controlled substance. The Crown case was very strong, however, that the appellant was reckless in the sense that she was aware of the substantial risk that the substance she was importing was a border controlled precursor, and that having regard to the circumstances known to her, it was unjustifiable to import the substance. His Honour correctly instructed the jury that it was not necessary for the prosecution to prove that the accused knew or was reckless as to the particular identity of

the border controlled precursor and that it was sufficient if she was reckless about whether she was importing a border controlled precursor.

[16] So far as the second live element at the trial was concerned, the Crown case relied upon a presumption contained in subsection 307.14(3) of the *Criminal Code* (Cth) which provides, essentially, that a person who imports a border controlled precursor without authorisation is taken to have done so believing that another person intends to use some or all of the substance to manufacture a controlled drug. The presumption is rebuttable if the accused proved that she did not have that belief: see subsection 307.14(4). The effect of these provisions is to cast a reverse onus upon the accused to show that it was more probable than not that she did not have a belief that another person intended to use some or all of the substance to manufacture a controlled drug. There was no specific evidence led by the Crown that she, in fact, had had knowledge that whatever she was importing was intended to be used to manufacture a controlled drug.

**Ground 1**

[17] Ground 1 of the appeal was that the verdict of the jury was unreasonable and cannot be supported having regard to the evidence. Counsel for the appellant, Mr Read SC, conceded there was ample evidence to support the conclusion that the appellant was reckless as to the importation of a border controlled precursor. Counsel for the respondent pointed out that, in convicting the appellant, the jury drew the inference of recklessness beyond reasonable doubt and that, in doing so, the jury rejected the appellant's

evidence that she did not think that there was any illegal substance in her luggage.

[18] The appellant contends, however, that the jury should have been satisfied that the appellant did not have the belief or even the foundation for a belief that another person intended to use some or all of the substance to manufacture a border controlled drug.

[19] This submission depended upon an analysis of the appellant's sworn evidence. The appellant's evidence was to the effect that she believed that the substance in her bag was normal food products and, in particular, that the relevant substances were flour. She gave evidence that she did not think that there were any drugs or illegal substances in her suitcase when she came to Darwin and nor did she think that whatever was in her bag might be used to make another drug.

[20] It was submitted on behalf of the appellant that, despite her evidence as to a lack of knowledge as to the identity and purpose of the substance, there was no direct cross-examination or testing of her evidence on this issue.

[21] In his summing up to the jury, his Honour specifically reminded the jury of that part of the appellant's evidence and told the jury that, if they believed the appellant's answers, the jury could legitimately be satisfied that she did not believe that another person intended to use some or all of the drugs to make a controlled drug. But his Honour went on to say that there were other possibilities which the jury would need to consider. One was that the jury

may disbelieve the appellant's answer. His Honour went on to say that the appellant was not cross-examined specifically on that answer; but nevertheless, it was possible for the jury to disbelieve her answer to the question, in which case, the jury would not be satisfied that the appellant did not believe that another person intended to use some or all of the substance to make a controlled drug and, in that case, his Honour said that if the jury disbelieved the appellant's evidence, the presumption would apply. His Honour also instructed the jury that there was another possibility, which was that because the evidence was very brief in relation to that issue, the jury was simply unable to make up its mind and the jury may think that they were not persuaded on the balance of probabilities as to the appellant's belief.

[22] There is no challenge to his Honour's summing up.

[23] In short, the substance of the appellant's argument was that the Crown case was not predicated upon the basis that the appellant actually knew the identity of the powder, but rather that the appellant was reckless to the circumstances which suggested that the contents of the bags contained an illicit substance. It was put that the Crown did not choose to cross-examine with a view to putting to the appellant that she knew the identity of the substance and its ultimate purpose or, indeed, seek to cross-examine with the view to putting circumstances to the appellant from which such knowledge could be properly inferred. It was submitted that there was no evidence from which it could be inferred that the appellant, regardless of

recklessness, could have had or possibly could have had a state of mind to found the knowledge that the substance was to be used in the manufacture of a controlled drug. Consequently, it was put that the circumstances were entirely consistent with the lack of requisite knowledge necessary to discharge the burden which rested upon the appellant.

[24] In support of his submission, counsel for the appellant submitted that the test in *M v The Queen*[1] applied equally to the circumstances of this case despite the presence of the reverse onus. We agree with counsel for the respondent, Mr Rice SC that the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty, paying due regard to the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and that the jury has had the benefit of having seen and heard the witnesses,[2] and bearing in mind that in relation to one of the elements of the offence, the burden of proof rested with the appellant.

[25] Counsel for the appellant submitted, however, that in deciding whether the jury was right to reject the appellant's unchallenged evidence as to the nature of her belief, the jury was entitled to take into account that the prosecutor had failed to comply with the well-known rule in *Browne v*

[1] (1994) 181 CLR 487.
[2] *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at [8].

*Dunn*.[3] We were referred to a number of authorities which discuss the rule in *Browne v Dunn*. It is not necessary to refer to them all. It is sufficient to refer to the well-known judgment of Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*,[4] where his Honour referred to the fact that Lord Herschell LC conceded that there was no obligation to raise a matter in cross-examination in circumstances where it is perfectly clear that the witness has had full notice beforehand that there is an intention to impeach the credibility of the story which the witness is telling.

[26] At pages 22 to 23, his Honour went on to say:

> "A challenge made to the evidence of a witness in the course of a final address may take place in various ways. The opposing party may ask the tribunal of fact simply to disbelieve that evidence; if he has led evidence in direct contradiction of the evidence of that witness, he may then ask the tribunal of fact to accept the evidence of his own witnesses in preference to that of the witness in question; or he may point to other evidence in the case, led by either party, which tends either to contradict the evidence of that witness or to destroy his credit. There are many reasons why it should be made clear, prior to final addresses and by way of cross-examination or otherwise, not only that the evidence of the witness *is* to be challenged but also *how* it is to be challenged. Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based."

[3] (1893) 6 R 67.
[4] (1983) 1 NSWLR 1 at page 17.

[27] In this case, it was perfectly obvious right from the start that the Crown intended to rely upon the presumption contained in the *Criminal Code*. Although there was no direct challenge to the appellant's evidence concerning her state of knowledge, she was thoroughly cross-examined about the circumstances under which she became to be in possession of the drugs prior to the time that they were seized at Darwin airport, as well as her behaviour at the airport when she was spoken to by customs officers. The effect of the cross-examination was to undermine her credit as a witness. We think that, in these circumstances, the prosecutor did not breach the rule in *Browne v Dunn* and that she did all that was required of her.

[28] Upon the whole of the evidence, and bearing in mind that the onus was on the appellant to establish that she did not have a belief that someone might use the border controlled precursor to manufacture a controlled drug, we are of the view that it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

**Three Further Grounds**

[29] During the course of the hearing of the appeal, counsel for the appellant added by leave of the Court a further three grounds which are as follows:

(1) "that in the cross-examination of the appellant, objection ought to have been taken to the cross-examination as to the appellant's criminal conduct seeking that the learned trial

Judge in the exercise of his discretion not permit further cross-examination as to character and that, accordingly, that that failure caused the trial to miscarry;

(2) that the failure to seek leave to cross-examine the appellant as to character was an error of law and, without such leave, the evidence led at the trial in relation to the appellant's bad character was inadmissible;

(3) that the learned trial Judge ought to have warned the appellant about the privilege against self-incrimination and permitted the appellant to refuse to answer any question which may have tended to incriminate her."

**The evidence concerning the additional grounds of appeal**

[30] During the course of the evidence of the Australian Federal Police Officer Allen, he was asked in cross-examination by counsel for the accused at the trial whether or not the appellant had ever been in trouble with the police before. Officer Allen gave evidence in answer to that question, 'No, she has got no criminal history.' No other evidence as to good character was raised.

[31] In *Eastman v The Queen*,[5] the Full Federal Court regarded evidence elicited in cross-examination to show that an accused had no convictions as plainly raising good character as an issue, relying on *R v Hamilton*.[6]

[5] (1997) 76 FCR 9.
[6] (1993) 68 A Crim R 298.

[32] *Hamilton* was a decision of the Court of Criminal Appeal of New South Wales where it was accepted without any real discussion that asking a police officer in cross-examination whether the accused had any prior conviction did raise the accused's character. We accept also that the decision of the High Court in *Matusevich v The Queen*,[7] although it was concerned with the consequence of the prosecutor not having sought leave to adduce the accused's criminal history, proceeded on the footing that evidence elicited in cross-examination that the appellant had no prior convictions for crimes of violence were a sufficient trigger to prompt an application for leave. The only Judge to have commented on whether such a question, in fact, was sufficient to have put the accused's credibility in issue was Murphy J, who at page 647, commented that the decision whether the issue of good character being raised was borderline.

[33] There are no other Australian authorities on the point, which we have been able to find. Counsel for the appellant did not seek to persuade us otherwise. We therefore proceed on the basis that counsel for the appellant had put the appellant's good character in issue.

[34] As noted earlier, the appellant had incorrectly filled out the incoming passenger card with the wrong addresses for herself and her brother. Counsel for the prosecution cross-examined Ms Vo about that as follows:

> "You told us that the family lived at 41 Camira Avenue?---Yes, that's right.

[7] (1976 – 1977) 137 CLR 633.

All together?---Yes.

And then you moved to 8 Croker Avenue or Place, was it?---Place.

Place, Green Valley?---Yes, that's right.

You filled out both your incoming passenger card and your brother's incoming passenger card?---Yes.

You put 41 Camira Avenue on your card?---Yes.

And you put 8 Kaylee(?) Place on your brother's card?---Yes, that's right.

So was that a mistake, deliberate?---No, because I, on Centrelink I was supposed to be living with, I'd put family member.

Okay, so there were, was a decision, was it to put an incorrect address because of incorrect information that had been provided to Centrelink?---Yes, that's right.

And was it your address that was incorrect, or was it your brother's address that was incorrect?---The address that I put on my brother's is my cousin's address.

On your brother's one is your cousin's address?---Yes, that's right.

So he wasn't living at 8 Kaylee Place?---No, he wasn't.

Sorry?---He wasn't.

He wasn't. So you deliberately falsified the incoming passenger card in relation to your brother's address?---Yes, that's right.

Put false information on it?---Yes.

To protect Centrelink payments?---Yep.

> And can I show you, or can you turn to tab 13? You told us that your mum was living with you at 41 Camira Avenue?---Yes, that's right.
>
> And she moved back with you?---Yes.
>
> This is not your document, this is, appears to be a document that your mum's made?---Yes.
>
> And 8 Kaylee Place Cabramatta, would you agree, was not her address at the date of this document, 12 August 2011?---No, wasn't.
>
> Okay, so had you discussed and agreed with your mother that false or wrong addresses would be provided on documentation to protect Centrelink payments?---No.
>
> That was something that you just decided off your own bat?---Yes, that's right.
>
> And you can't explain by reason of any discussions why your mum might have done the same thing?---Because on her Centrelink it, she put down as 8, 8 Kaylee Place Cabramatta any my one was 41 Camira Avenue. The reason for it is because I needed money to help pay the rent and they wouldn't give the rent money to use if I was still living at home. So it would be easier for me to say that, I moved out and I have to pay rent money.
>
> All right, so this was a plan that you had discussed with your mother and your mother was aware of?---About the getting more money for the thing, yes.

[35] Section 9(2) of the *Evidence Act* (NT) provided, at the relevant time, that any person charged with an indictable offence shall not be liable without the leave of the Judge to be questioned on cross-examination as to his previous character or antecedents.

[36] Subsection 9(7)(b) provided:

> "An accused person who is called as a witness shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been found guilty of or been charged with any offence other than that with which he is then charged, or is of bad character, unless – (b) he has personally or by his counsel asked questions of the witnesses for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

[37] Section 10 of the *Evidence Act* provided:

> "Nothing in this Act shall render any witness compellable to answer any question tending to criminate himself."

[38] Section 14 of the *Evidence Act* provided a discretion in the Court to decide whether or not a witness shall be compelled to answer any question in cross-examination which relates to a matter not relevant to the proceeding, except in so far as it affects the credit of the witness by injuring his character. Section 15 set out certain factors which affect the exercise of the discretion granted by s 14. Section 16 provided a further discretion in the Court to disallow any question which the Court considered to be misleading, confusing, annoying, harassing, intimidating, offensive, repetitive or phrased in inappropriate language.

[39] On the face of it, s 10 (beginning as it does with the words "nothing in this Act") appears to be in conflict with s 9(7) which provided that a person shall not be asked, and if asked shall not be required to answer, any question tending to show that he has …. committed …. any offence other than that with which he is then charged unless the conditions set out in that

subsection have been complied with.[8] We think this conflict can be resolved by the fact that it is necessary for a person who seeks to take advantage of s 10 to claim the privilege and to identify its precise basis. This can generally be done in advance of the giving of evidence before a jury, though it may occur in the presence of the jury where the issue arises incidentally or unexpectedly.[9] Sub-section 9(7) covers a much wider field than s 10. It is not limited to questions the answer to which may tend to incriminate the witness; it applies also to questions about whether a person has been charged with or convicted of an offence.[10] Where the question is shown to be such that the answer may tend to incriminate the person, and the objection is properly taken, s 10 must prevail.

[40] Even if the objection is not taken, Judges often warn witnesses that there is no obligation to answer an incriminating question. However, there is no rule of law which requires this and the witness' ignorance of the right does not prevent the Court from utilising the witness' evidence.[11]

[41] The fact that in this case the witness initially volunteered information and did not claim the privilege does not of itself provide an answer to the question which we have to decide.

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[8] Those conditions include that the accused person has asked questions of a witness for the prosecution with a view to establishing his own good character. [s 9(7)(b)]
[9] See *Cross on Evidence*, para [25100] and the cases there cited.
[10] On the other hand, s 9(7) was limited in its operation to accused persons, whereas the protection in s 10 applied to all witnesses.
[11] *Cross on Evidence*, para [25105] and the cases there cited.

[42] The question is whether subsection 9(2) (referred to above) requires leave, even where one of the conditions referred to in subsection 9(7) has been established. In *R v Darby*,[12] Martin (BF) CJ ruled that leave to cross-examine the accused as to his criminal record was required under s 9(2)(b) and the fact that one of the circumstances referred to in s 9(7) had been fulfilled does not alter the fact that the prosecution was obliged to seek leave. His Honour noted that "this view emanates from the general common law discretion to exclude even relevant and admissible evidence on the basis that its probative effect is only slight and its prejudicial effect upon the accused's position is substantial".[13] In *Matusevich v The Queen*,[14] counsel who appeared for Matusevich at his trial obtained from Crown witnesses in cross-examination evidence that Matusevich had no prior convictions for crimes of violence. Matusevich gave evidence on oath and the Crown prosecutor, without seeking any permission from the trial Judge, cross-examined him with a view to showing that he had previously escaped from custody and that he had committed such crimes as breaking and entering and stealing. No immediate objection to this line of cross-examination was taken by counsel or by the trial Judge and, indeed, there was little opportunity to do so.

[43] The leading judgment was given by Aickin J, who after reciting the facts and referring to s 399(e) of the *Crimes Act 1958* (Vic), (which, with one

[12] (1993) 3 NTLR 74.
[13] (1993) 3 NTLR 74 at 75.
[14] (1976-1977) 137 CLR 633.

exception, is *in pari materia* to s 9(7) of the *Evidence Act* (NT)) said at page 652:

> "It will be observed that in Victoria the requirement that the prosecutor must apply to the judge for permission to cross-examine as to character or prior convictions is part of the statute itself and is not dependent upon the rule of practice which has developed elsewhere with respect to otherwise similar legislation. The position thus is that, without an application having been made by the prosecutor, evidence obtained by cross-examination of the accused as to his prior record is inadmissible. The evidence was none the less admitted. It must be seldom that one can properly describe the admission of inadmissible evidence as to prior convictions in a criminal trial as merely an "irregularity". In the present case it was particularly prejudicial to the prisoner and its probative value as to his reliability as a witness was far outweighed by its prejudicial effect."

[44] There was one difference between the provisions of the Victorian Act and the Northern Territory Act in that the Victorian equivalent of subsection 9(7)(b) contained a specific proviso that the permission of the Judge, which was to be applied for in the absence of the jury, had to be obtained. Whilst there was no such proviso in the Northern Territory Act, there was a specific provision requiring leave in the s 9(2)(b) and, in any event, as his Honour observed, there is a rule of practice to the same effect in those jurisdictions where there is no specific provision. The result in that case was that, despite the fact that no objection was taken until after the evidence had been given, the Court allowed the appeal and ordered a re-trial.

[45] In this regard, in *Phillips v The Queen*,[15] in the joint judgment of Mason Wilson, Brennan and Dawson JJ, their Honours said in respect of section 15(2)(c) of the *Evidence Act 1977* (Qld), which is identical in its form to the Victorian provision considered by the High Court in *Matusevich v The Queen*:

> "Section 15(2)(c) of the Act provides expressly that any questioning as contemplated by that provision shall be subject to the permission of the court. Not all statutes dealing with the subject in Australia contain such a proviso but undoubtedly it not only expresses a rule of practice which should always be observed in all jurisdictions (cf *Matusevich v The Queen*) but gives statutory recognition to the basic discretion inherent in all criminal trial judges to exclude evidence otherwise admissible if it would unfairly prejudice the accused person."

[46] In our opinion, once the appellant's counsel had elicited from a Crown witness that she had no prior convictions, leave to cross-examine on the issue of her character was required. In this case, no such leave was sought or given.

[47] We do not think that the prosecutor needed leave to explore the fact that the appellant deliberately falsified the addresses on the incoming passenger cards, although that in itself was an offence. Those questions would not appear to come within the general immunity granted by s 9(2) regarding "previous character or antecedents":[16] the purpose of that cross-examination appears to have been to explore the state of mind of the appellant at the time that she entered Darwin, rather than purely to undermine the appellant's

[15] (1985) 159 CLR 45 at 51.
[16] See also *Attwood v R* [1960] 102 CLR 353 at p 361-363.

credit. The cross-examination on that particular subject was therefore substantially relevant to the facts in issue as a significant question to be tried.

[48] The answer which the appellant gave as to her reason for placing the addresses to protect Centrelink payments was in itself insufficient to prove an offence. But the prosecutor did not leave the matter there. The further cross-examination plainly went to the appellant's credit and was designed to establish that the appellant had deliberately provided false information to Centrelink to receive Centrelink benefits which was another serious offence. In my view, before asking those questions, the prosecutor should have sought the leave of the Judge.

[49] It cannot be presumed that the leave of the Judge would have been given if it had been sought. Plainly, the appellant's evidence was very damaging and the prosecutor, in her address to the jury, was able to make a great deal of it. In her final address, the prosecutor said to the jury:

> "What Ms Vo told you just a little while ago was, in effect, that she had given up false information to the Centrelink, a Commonwealth government organisation, in order to secure for herself additional money to which she would otherwise not be entitled. She has fabricated and put into place a lie to a Commonwealth agency. Not only that, it was on mind the need to maintain this deception when she filled out the passenger cards as she came into Darwin. *So she is a person who is capable of creating a deceit, acting on a deceit and maintaining a deceit.* Not only that it is the deceit that she shared in common with her mother and you might think that that combination is a very important combination when you come to consider the evidence in this trial, because it is my ultimate submission to you that there was a deceit being perpetrated the day that Ms Vo entered Darwin with the white powder in her bag ..."

> "First of all, when she asks you to accept that answer beyond reasonable doubt,[17] you weigh it against her other answers. Her other answers that she has admitted, for example, to defrauding the Commonwealth ..."

[50] Where the Crown is given leave to admit evidence of bad character, the trial Judge is required to direct the jury of the limited use to which that evidence can be put. The jury must be directed that it can only be used to rebut the evidence of good character upon which the accused relies, and that they must not use it as showing that the accused was the kind of person who was likely to have committed the crime in question.[18] In the present case, no such direction was given, although the learned trial Judge did invite the jury to consider that she was very frank, and made admissions and concessions not in her own self-interest from which the jury might take the view that the appellant was genuinely seeking to tell the truth about relevant matters. Even where a proper instruction is given, no matter how conscientiously a jury might seek to comply with the direction, evidence of fraud is likely to be particularly damning to the accused.

[51] In the present case, we have no doubt that the evidence was highly prejudicial to the appellant and, once the initial reason for putting false addresses on the incoming passenger cards had been given, leave should have been sought before taking the matter any further. In our opinion, there

[17] The answer referred to related to the evidence of the appellant's belief. Proof was not required beyond reasonable doubt.
[18] *R v Hamilton* (1993) 68 A Crim R 298 at 299 – 300 per Hunt CJ at CL.

has been a significant miscarriage of justice which requires us to allow this appeal.

[52] Counsel for the appellant valiantly sought to argue that, in the circumstances of this case, we could take this into account in deciding whether or not the conviction was unsafe and unsatisfactory. We do not think that that is the correct approach. In our opinion, the correct remedy is to quash the conviction and order a re-trial.

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