ELLA v THE QUEEN

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Gallop and Angel JJ

16 November 1990 and 10 and 11 January 1991 at Darwin

APPEAL - Appeal against conviction - miscarriage of justice - alleged incompetence of counsel in conduct of defence - appellate court's intervention only in cases of "flagrant incompetence" - principles enunciated in R v Birks

APPEAL - Reliance on errors of detail in evidence of principal Crown witness - witness exhaustively cross-examined - his credibility a matter for the jury - verdict not shown to be unsafe and unsatisfactory

Case applied:

R v Birks (1990) 19 NSWLR 677

Cases referred to:

R v Ensor (1989) 2 All ER 586
R v Gautam (1987) Times, 4 March, CA
R v Swain (unreported 12/3/87)
See R v Ensor (supra) at 590

Counsel for Appellant:	P.A. Ella; J. Tippett
Solicitor for Appellant:	Australian Legal Aid Office
Counsel for Respondent:	W.J. Karczewski; T.I. Pauling QC and P. Murphy
Solicitor for Respondent:	Solicitor for the Northern Territory

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA13 of 1990

BETWEEN:

PHILLIP ANTHONY ELLA

Appellant

AND:

THE QUEEN

Respondent

CORAM: ASCHE CJ, GALLOP and ANGEL JJ

REASONS FOR JUDGMENT

(Delivered 11th January 1991)

ASCHE CJ: The appellant was found guilty after a lengthy trial of robbery with violence together with the circumstances of aggravation that, shortly before or at the time of the robbery, the appellant was in company with other persons and that he caused bodily harm to one, John Edward Kirk.

The learned trial Judge considered that, in finding him guilty, the jury must have been satisfied of certain facts and it is appropriate that I set out the remarks of his Honour in sentencing the appellant on 26 June 1990.

Those remarks are - and I quote from his Honour's judgment:

> "The circumstances, as I consider the jury must have found them to be, are as follows. You were at the Transit Centre at Darwin on the morning of Monday 19 December 1988. You stayed there most of the day and you met various people, including the later victim, Mr Kirk. You stayed overnight in the Transit Centre, sleeping on the floor of a room occupied by some of the people you had met. You spent most of the following day, Tuesday, at the Transit Centre. Some of those people you had met and you, yourself, organised a drinking session that evening in one of the trams at the centre. Various people came along, including you and one, Ron Dorey, whom you'd met earlier on the Tuesday. You invited Mr Kirk to attend. You were aware that Mr Kirk was carrying a large amount of cash in a wallet on his person. You considered, with the benefit of your considerable skills and attainments, that Mr Kirk was suffering from some mental disability. After several hours at this party, Mr Kirk went back to his room at the Transit Centre. He had not had much to drink. Precisely what had taken place between you and Dorey, in relation to what later happened in Kirk's room, can only be a matter of speculation. But clearly some arrangement had been made between you to rob Mr Kirk. You followed Mr Kirk to his room, carrying his cassette recorder and a blanket. You remained there for several minutes. The door was locked. There came a knocking on the door. You said words to this effect: 'I want to get out anyway', and also: 'They're waiting for you'. I consider that the jury must have concluded from the evidence that you had some knowledge of what was about to occur. Mr Kirk opened the door to let you out. When he did so he was immediately punched in the head by the man Dorey, for some time. Mr Kirk retreated to his bed, lay on his bed, and was then struck in the ribs by his own suitcase, which was wielded by Dorey. You stood outside the door. Another man, David Wilkinson, had also gone into the room with Dorey. Dorey called out to you, using words to this effect: 'Come in and do something, you'll be in this too.' You then came in and punched Mr Kirk as he lay on his bed. You punched him in the face. Meanwhile, Dorey had been saying words to Mr Kirk to the following effect: 'We're going to kill you.' In an endeavour to stop this assault

> on him, Mr Kirk at some time said: 'Take my money', and pulled out his wallet, which contained some $1700 in bank notes, and threw it towards the floor. Wilkinson got that wallet, and Dorey searched the room, then all 3 of you, you Dorey and Wilkinson, left the room. None of you ever had apparently registered into a room at the Transit Centre. The 3 of you took off in your car and you shared out the money from Mr Kirk's wallet. It doesn't clearly appear who got what amount of money. As a result of the assault by you and Dorey, consisting of this punching, Mr Kirk was left bleeding from the face, and was rendered groggy and stunned and put in pain. He locked his door when the 3 of you left and lay down to recuperate. The police were informed about this robbery the next day, 21 December. You had, by your own account, spent part of the night, 20 December, with Dorey at his room at the Hotel Darwin. On 21 December you registered into the YMCA. You'd been taking various pills for your back pain. That evening you were located by the police at the Beachcomber disco near the YMCA, and you were then interviewed by the police. You endeavoured to conceal the parts you played in the robbery of Mr Kirk, as found by the jury. Charges were eventually laid."

The appellant, by his amended Notice of Appeal, relies upon two grounds, the first of which I summarise in this way: that a miscarriage of justice occurred because the appellant's counsel at the trial failed properly to cross-examine Mr Kirk upon significant discrepancies between the evidence given by him at the committal proceedings and evidence given by him at the trial. It is claimed that these discrepancies were, "of critical importance to the appellant's defence". The second ground is that in all the circumstances the appellant's conviction was unsafe and unsatisfactory.

As can be readily seen, the first ground constitutes an attack upon counsel's competence in the conduct of the defence.

Now, it is trite to observe that no two counsel will conduct a case in precisely the same way. That does not mean that one way is necessarily superior to the other. It is merely a comment on the individual perceptions and methods of counsel. No Appeal Court will uphold an appeal merely because some, or all, of the individual Judges constituting it feel, usually with the benefit of hindsight, that the case for the accused could have been conducted differently or better. Individual judges differ as much as individual counsel, and to turn appeal hearings into examinations of techniques of advocacy would breed endless and pointless litigation.

Nevertheless, it is recognised that there are some cases, fortunately rare, where a client has been so badly represented, and such blatant errors have been made, that it becomes the plain duty of an appellate court to intervene to correct a miscarriage of justice.

The principles on which an appellate court will act when it is alleged that a miscarriage of justice has occurred through the incompetence of counsel have recently been considered by the New South Wales Court of Criminal Appeal in R v Birks (1990) 19 NSWLR 677.

In that case, counsel for an accused person had neglected to cross-examine on two vital matters on which he had instructions. Both the prosecutor and the judge had commented to the jury on the inferences which might be drawn from this. The jury convicted. On appeal the Court of Criminal Appeal held that there had been a serious miscarriage of justice warranting a new trial.

Gleeson CJ, with whom McInerney J agreed, made this comment at 683:

> "In our system of criminal justice a trial of an accused person is conducted in the manner of a contest between the Crown and the accused, and that trial has many, although not all, of the features which attend civil litigation conducted in accordance with what is sometimes described as the adversary system of justice. To a large extent the parties to such proceedings are bound by the manner in which they conduct them. It is the parties who decide, for example, what information will be put before a tribunal of fact and the tribunal bases its decision on that information. As a general rule a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to what witnesses to call, what questions to ask or points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment including judgment as to tactics. The authorities concerning the rights and duties of counsel are replete with emphatic statements which stress both the independent role of a barrister and the binding consequences for the client of decisions taken by a barrister in the course of running a case."

At 684 his Honour said:

"It sometimes happens that a person who has been convicted of a crime seeks to have the conviction set aside on the ground that counsel at the trial has acted incompetently or contrary to instructions. It is well settled that neither of these circumstances will, of itself, attract appellate intervention. At the same time the courts acknowledge the existence of a power and duty to quash a conviction in some cases. The difficulty is to find in the authorities a formula which adequately and accurately defines the class of case in which a Court of Criminal Appeal will intervene. A common theme running through the cases, however, is that such intervention is a matter about which the courts are extremely cautious."

His Honour then, at 685, summarised the relevant principles:

"1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.

2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions or involved errors of judgment or even negligence.

3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of "flagrant incompetence" of counsel or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible and undesirable to attempt to define such cases with precision. When they arrive they will attract appellate intervention."

His Honour then comments that, "In the present case the inexperience of trial counsel gave rise to an unusual and extreme situation".

Mr Tippett, for the appellant in this case, rather cavils at the use of the term "flagrant incompetence" and refers us to R v Ensor (1989) 2 All ER 586 at 590 and 591, where he submits Lane LCJ might have had in mind a lesser test when he said:

> "This ground of appeal accordingly fails because counsel's carefully considered decision not to apply to sever the charges, even if erroneous, cannot possibly be described as incompetent let alone flagrantly incompetent advocacy."

But it seems to me that his Lordship did, in fact, countenance the test as being "flagrant incompetence", for just before the passage referred to, his Lordship had said this at 590:

> "On 12 March 1987 another division of this court heard the appeal in R v Swain (unreported), where the appellant contended, with apparent justification, that his counsel, by incompetent cross- examination, had introduced evidence which was prejudicial to this case which was then amplified by the witness in answer to a question put to him by the judge. In an attempt to circumvent the difficulties which he faced arising out of what was said in R v Gautam, counsel at the hearing of the appeal sought to rely mainly on the intervention of the judge but the court found that what was said in answer to the judge added nothing to what had already been said by the witnesses to counsel. Various other points were considered with which we need not now be concerned, but O'Connor LJ said that if the court had any lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate then it would quash the convictions, but in that particular case it had no such doubt. We consider the correct approach to be that which was indicated by this court in R v Gautam subject only to the qualification to which O'Connor LJ referred in R v Swain."

I would therefore, with respect, adopt the principle stated by Gleeson CJ, using the term "flagrant incompetence" in the sense that the conduct of counsel was so far outside the standard of competency to be reasonably expected of counsel, as to have caused or appear plainly likely to have caused a miscarriage of justice.

In the present case however, I am satisfied that nothing of that nature has been established. Mr Tippett has said everything that could be said for the appellant, but I am not convinced that there was any miscarriage of justice brought about by counsel's conduct at the trial.

If there was to be any criticism of that conduct, I think it is the one which the learned Solicitor-General makes, that if anything, counsel was over-zealous for his client. And his excessive zeal made the case much longer than it should have been. But that is not what is relied upon by the appellant.

Mr Tippett has relied upon a number of particulars set out in the first ground of the Notice of Appeal, to establish a failure in counsel to properly represent the appellant. Basically these particulars contrast what was said by the witness, Kirk, at the committal proceedings, with what was said by him at the trial. It is claimed that counsel did not put, or did not sufficiently put to the witness, discrepancies between those two accounts.

For instance, Mr Tippett points to a passage in the depositions where Mr Kirk said he had invited the appellant to stay in his, Mr Kirk's room. And he contrasts that with two passages in evidence at the trial, where Mr Kirk denies that.

Now, it must be pointed out that Mr Kirk was subjected to a vast amount of cross-examination, and to some extent, gave confusing answers. The learned trial Judge himself described him as a 'garrulous witness'. Indeed one of the points made repeatedly by counsel was that Mr Kirk, who suffered from schizophrenia, could not be a reliable witness.

At the most the discrepancy mentioned by counsel would have established one further possible confusion in Mr Kirk's evidence. But we are not to know whether counsel preferred the answers as given by Mr Kirk at the trial.

Ultimately, and despite the confusion he appears to have been in at times, and despite his medical condition, the jury obviously found Mr Kirk worthy of belief. That was their function and they had ample time to observe him and make their judgment. I cannot accept for a moment, that to put this sort of discrepancy to Mr Kirk would have made any difference to the result.

The next particular refers to answers given by Mr Kirk at the committal, which are said to be contrary to what he said at trial, as to the presence or otherwise, of the appellant in Mr Kirk's room at the time the attack upon Mr Kirk commenced.

All that need be said about this is that Mr Kirk may not always have been clear as to the details, but he seems positive enough that the appellant was in his room immediately before the attack, left the room as the attack commenced and, at some time, came back and himself joined in the attack. Any confusion seems to be no more than as to precise times when the appellant came back into the attack.

In any event, no criticism of counsel could be sustained here, because he asked the witness to read the passages in the depositions where he suggested the witness was deviating from what he said at the trial. But, ultimately, he did not seek to tender them; for the very good reason that, so far as I could see, they would have made little difference to the substance of Mr Kirk's account.

The next particular relates to the extent of the assault upon Mr Kirk. It is submitted that Mr Kirk gave at the trial a far more serious picture of the assault than he had painted at the committal proceedings.

I am quite unimpressed by this. No doubt, he remembered further details or he was not examined to the same extent in the court below, as at the trial. Counsel may have put to the witness that his account differed from

what he had said in the court below. That may have been of some assistance on the question of credibility or it may not. It may have merely adduced further explanation from Mr Kirk which may have emphasised the matter further in the minds of the jury. One cannot possibly criticise counsel about this.

I think these were the particulars that Mr Tippett mainly relied on, but I will mention the others only to this extent; that they seem to me no more than pointing up some possible discrepancies, often somewhat tenuous, between accounts given at committal proceedings and accounts given at trial.

Those particulars are: the nature and degree of participation in the assault by the appellant; the presence of unidentified persons outside the victim's room during the assault; the search by Dorey of the victim's room after the assault had taken place; evidence of Kirk that, in fear, he offered to withdraw money from the bank to give to one of the participants in the assault; evidence of Kirk that he was belted over a long period by one, Dorey, and that the said belting included the use of a suitcase to the ribs; evidence of Kirk that he was punched a number of times by the appellant.

As I have remarked, Mr Kirk's evidence may have often been confused as to details, but he was cross-examined at such length that it is hard to imagine any further alleged instances of confusion making any more impression on the jury than had already been made.

I am quite satisfied that these so-called discrepancies between evidence on committal and on trial established no more confusion than the evidence already given. Despite that apparent confusion, the jury obviously felt that did not affect the substance of Mr Kirk's evidence, and they clearly accepted that he had been the victim of a robbery with violence to which the appellant was a party.

I cannot accept that counsel should have gone any further than he did and I cannot see that the decisions he took during the case could be castigated as incompetent. This ground must fail.

I should also mention one further matter to indicate that the appellant could hardly complain that he could not, or did not, instruct counsel. It appears that, by reason of his physical condition, the appellant was permitted to sit beside counsel during the course of his trial.

At one stage, his Honour received a communication from the jury and his Honour said this:

> "I've received a note from the jury which reads as follows: 'We are concerned that counsel apparently allowed Mr Ella to read Mr Kirk's file from the Tamarind Centre. We observed Mr Ella peering at the file while counsel was either asking questions or reading it himself. Surely, such a file should be confidential in the hands of a lawyer'. Signed by some 7 members of the jury."

One might comment that this is an incident which shows the perspicacity of the jury, but it also plainly indicates the extent of the interest the appellant was taking in the trial and the extent of the instructions he was able to give to counsel, and it does not seem to me that he can complain that counsel was not instructed by him.

As to the second ground, I think that it is only necessary to say these things:

1. Mr Tippett does not criticise the summing up of the learned trial Judge, and he is wise not to do so, because the summing up was conspicuously fair to the appellant.

2. Mr Kirk was cross-examined extensively, and was recalled twice on the application of

counsel for the appellant, the last occasion being after the Crown had closed its case, and as an interpolation into the evidence of the appellant himself; a most unusual situation. No complaint could possibly be made of lack of opportunity to test Mr Kirk's evidence.

3. Despite this, the jury accepted his evidence against that of the appellant, who himself gave evidence on oath and had every opportunity to put his case to the jury.

4. As previously set out, there are no discernible errors made by counsel. At most it could be said that he cross-examined at inordinate length, but it seems clear that he did this on instructions and with the encouragement of the appellant.

5. There is no reason shown to disturb the jury's verdict, and nothing to suggest that the verdict was unsafe or unsatisfactory.

In my view, therefore, the appeal should be dismissed.

GALLOP J: I agree the appeal must be dismissed for the reasons stated by the Chief Justice.

ANGEL J: I also agree.