

PARTIES: ROY BERNARD MELBOURNE

v

THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF
THE NORTHERN TERRITORY

JURISDICTION: APPEAL FROM SUPREME COURT
EXERCISING TERRITORY
JURISDICTION

FILE NO: CCA 10 of 1996

DELIVERED: 20 June 1997

HEARING DATES: 14 May 1997

JUDGMENT OF: MARTIN CJ, GALLOP AND ANGEL JJ

CATCHWORDS:

CRIMINAL LAW - Evidence of good character - Direction to the jury -
Whether a proper direction- No miscarriage of justice.

EVIDENCE - Good character - Relevance - Trial Judge's direction re proof
of guilt - No direction re credibility - Whether direction adequate - No
miscarriage of justice.

Crimes Act 1900 (NSW), s412.

R v Murphy [1985] 4 NSWLR 42.

R v Zecevic (1986) VR 797.

R v Trimboli (1979) 21 SASR 577.

Jackson and Hakim (1988) 33 A Crim R 413.

Stalder [1981] 2 NSWLR 9.

R v Roslyn Gillard , unreported, NSWCCA, 15 July 1991, Gleeson CJ.

Ramsay v Watson (1961) 108 CLR 642.

Paric v John Holland (Constructions) Pty Ltd (1985) 59 ALJR 844 at 846.

Turner [1975] 1 QB 834 at 840; (1974) 60 Cr App R 80 at 82.

Harmony Shipping Co SA v Saudi Europe Line Ltd [1979] 1 WLR 1380; [1979] 3
All ER 177.

Trade Practices Commission v Arnotts Ltd (1990) 21 FCR 324.
R v Schafferius [1977] Qd R 213.
R v Wasow [1985] 18 A Crim R 348.
Lawrence [1984] 3 NSWLR 674.
Simic v R (1980) 144 CLR 319

REPRESENTATION:

Counsel:

Appellant:	Mr S Odgers
Respondent:	Mr R Wild QC with Ms A Fraser

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. CCA 10 of 1996

ON APPEAL FROM THOMAS J
in proceedings SCC No. 208 of 1995

BETWEEN:

ROY BERNARD MELBOURNE
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, GALLOP AND ANGEL JJ

REASONS FOR JUDGMENT
(Delivered 20 June 1997)

MARTIN CJ: I have had the advantage of reading the reasons of Gallop J.
I agree with them and with the order proposed by his Honour.

GALLOP J: This is an appeal by the accused against his conviction for murder
in the Supreme Court of the Northern Territory of Australia at Darwin on 13 June
1996.

A number of grounds were set out in the notice of appeal but ultimately
the appeal was confined to only one ground namely, that the learned trial Judge
erred in her direction to the jury on the good character of the accused.

The trial commenced on 3 June 1996 and did not conclude until 13 June 1996.

Pursuant to a ruling made by the trial Judge, counsel for the accused addressed the jury first. It is not without significance that at the very beginning of his address to the jury, counsel for the accused urged the jury to note the previous good character of the accused.

Counsel for the Crown then addressed the jury and her Honour commenced her summing up to the jury on 12 June 1996. When she had almost concluded her summing up, the jury retired for a short period. In their absence, her Honour indicated to counsel that she proposed only to give a few further formal directions before asking the jury to retire and she asked whether counsel wished to raise any other matters. The following exchange then took place:

MR VAN DE WIEL: - - - throughout the trial with just about every witness we had presented, who was a lay witness, if I can use that term, and also with Mr Newman. On that basis it would be my submission that the aspect of the improbability of committing the instant offence, having a history of good character for 60-odd years, is of considerable significance.

The aspect of his credibility is probably of lesser significance, having regard to the nature of the interview itself that has been severely criticised by me as showing a lack of credibility, but, in any event, it is the primary aspect of the evidence, in my submission, that should be brought to the jury's attention and one which, in our submission, as a matter of law, he is entitled to.

I thought the most convenient repository of the law in relation to this is a decision of R v Murphy, 63 CLR (1985/86) 53, and the significant section that relates to that ground of appeal, in terms of its consideration, starts at page 61 but more conveniently for Your Honour on page 64 to 65 of the judgment seems to be where the gravamen of the view is expressed.

The situation in Murphy's case, obviously, was that it's the aspect of credibility which was the most significant. In my submission, in this case it's the reverse; it's the aspect of probability or inherent probability of the commission of the offence.

I say that despite the fact that while I have submitted to the jury that it's quite appropriate for them to convict him of murder because, in my submission, what the jury are involved in trying here is culpability for murder and that that, as a matter of law, Mr Melbourne can rely on his character as showing that it is less probable that he would have committed that crime.

The aspect of the conviction of 1975 of exceeding .08, in my submission, does not really affect the issue of character because it was a statutory offence, it's character neutral in that sense and particularly in the history of Mr Melbourne.

HER HONOUR: Yes, thank you, Mr Van de Wiel.

Yes, do you want to say anything on that, Mr Wild?

MR WILD: Yes, I do, Your Honour.

My submission is that character is not an issue in the way that my learned suggested is in this case (sic). Control is the issue in this case. My learned friend ran the case on this basis, that Mr Melbourne did behave himself in the past, he was then controlled - and this is the medical evidence he relies upon - and he's not - and was not then diminished. He now is diminished and that's the issue the jury's to be concerned with, not whether or not he was of good character at other times, because the point is that, as my learned has just said himself, it's admitted that he did it; the only issue is what his state of mind was when he did do it. If he's out of control it doesn't matter what his character was 10 years ago or 20 years ago or 30 years ago. So, to the primary basis on which the issue goes, as my learned friend would argue it, it's not applicable.

If it's said to be applicable to credibility, that will only be of relevance, Your Honour, if he gave evidence. If my learned friend wants to have credibility an issue in what he says in his record of interview, in my submission, it's not relevant to credibility unless there is evidence given. I hear my learned friend murmuring about that, but that's as I understand it.

HER HONOUR: Yes, all right. Thank you.

MR WILD: I'm just surprised also it's arisen at this stage too, Your Honour, with respect.

HER HONOUR: Do you want to say anything in reply to that, Mr Van de Wiel?

MR VAN DE WIEL: Yes, I do.

Whilst we raised the issue of lack of control as being more probable, the case mounted against Mr Melbourne is that he, indeed, was in control. That begs the question, of course, of his character. Is he a person in circumstances who will make a deliberate choice to kill in a rational state? Which is, I suppose, what our learned friends contend. Therefore, in my submission, his history of good character, blemished as it may well be by the 1975 conviction, is of the greatest of significance, and the aspect of credibility, while I say is not the primary consideration, nonetheless, is also significant, in terms of considering his explanation, not just to Mr Newman but to the others.

The fact that he does not give evidence in this case is not the concluding issue. The concluding issue is: is he entitled to a direction on character? And, if, indeed, we had called character evidence, he plainly would be entitled to such a direction. By having cross-examined it out other people, in my submission, we are no less entitled to it.

Having taken a short break, her Honour, on resumption of the hearing, stated her intention to give the direction as sought by the accused. She then directed the jury in the following terms:

HER HONOUR: Mr Foreman, ladies and gentlemen, you will be pleased to hear I have almost concluded. There are just one or two other matters that I want to give you a direction on.

The first matter is a direction I propose to give you in respect of what use you make of the evidence you heard during the course of these proceedings, of the good character of the accused, Roy Melbourne.

I do not propose to go back and remind you again of that evidence, but there has been evidence of course from witnesses relating to his not being a violent or aggressive person, and references to the fact that he was a quiet and amiable man.

I will specifically remind you of the evidence that was given by Sergeant Newman. Sergeant Newman gave evidence to the effect that he had, after Mr Melbourne was arrested, done a check of his record, his criminal record, and that there were no matters on that record other than a conviction for an offence of exceed .08 with a reading of .23 in 1975. Sergeant Newman had gone on to say that from his investigations there were no other convictions for any other matters in the Northern Territory or anywhere, and that Mr Melbourne was not adversely known to police.

The direction I am giving you is this: that when you consider that evidence as to good character, that you are entitled to consider the improbability of Roy Melbourne committing the instant offence, having a history of good character of some 61 years, and that this is of considerable significance.

Her Honour then gave the jury certain directions about the exhibits being available in the jury room and a few sundry matters whereupon the jury retired to consider their verdict. Counsel for the accused did not seek any further direction whether in relation to previous good character or otherwise.

On the hearing of the appeal to this Court the accused tendered in evidence affidavits from the two counsel who had appeared for him at the trial. In his affidavit, senior counsel for the accused deposed that having read the evidence as to character set out above, he,

... misheard her Honour's direction as to character and believed that the full direction sought had been given. [He] did not make a tactical decision to accept her Honour's direction on character evidence as sufficient.

In her affidavit, junior counsel for the accused deposed that having read the above direction she had "no recollection of hearing that direction".

She said that she believed that she was not present in court when that direction was given.

In support of the ground of appeal that the trial Judge erred in her direction to the jury on the good character of the accused, it was submitted that the direction did not direct the jury that evidence of good character can be used with reference to the credibility of assertions made by the accused which had been admitted into evidence. It was further submitted that defence counsel had sought such a direction and the trial Judge had agreed to give the direction sought. Counsel referred to the well-established rule that evidence of good character can be used with reference to the credibility of the accused in his denial of the charge as well as directly towards the unlikelihood of guilt, see *R v Murphy* [1985] 4 NSWLR 42 at 54.5; *R v Zecevic* (1986) VR 797 at 810.8; *R v Trimboli* (1979) 21 SASR 577; *Jackson and Hakim* (1988) 33 A Crim R 413 at 417.2.

It was submitted that evidence of good character can be used with reference to the credibility of assertions made by the accused which had been admitted into evidence. Further, it was submitted that it does not matter that the accused did not give evidence in the trial - evidence of his assertions made out of court was admitted into evidence and the credibility of those assertions was plainly a matter of importance in the trial.

Counsel for the accused then referred to the evidence of the assertions made by the accused before trial to the investigating police and to the histories given to various medical experts as the foundations of expert opinions about whether or not the accused was suffering from diminished responsibility at the relevant time. The thrust of the accused's case was that, given the fact that the

accused bore the onus of proof in relation to the defence of diminished responsibility, he needed and was entitled to a full direction to the jury on the permissible use of evidence of good character as bearing on those factual assertions relevant to the defence. Given that the accused was entitled to the direction, it was contended that the trial Judge erred in failing to give it.

There is no rule of law that in every case in which evidence of good character is given the judge must give a direction as to the manner in which it can be used. No doubt, speaking generally, it is right to add that if such a direction is asked for it would be wise to give it, see *Simic v R* (1980) 144 CLR 319 at 333; *Schmahl* (1965) VR 745 at 750.

The direction was given in the present case. The complaint is that the trial Judge did not direct the jury as to its use on credibility. Yet, it is clear law that the failure to give a direction on the credibility aspect may not necessarily constitute a miscarriage of justice.

In *R v Murphy* (supra), a Full Court of the Supreme Court of New South Wales (Street CJ, Hope, Glass, Samuels and Priestley JJA), considered the significance of the evidence of good character adduced pursuant to s412 of the Crimes Act 1900 (NSW). In that case, matters involving the appellant's credibility were of primary importance. There were two critical questions which required consideration and decision by the jury. One was what exactly the appellant said on the occasions relied upon by the Crown as constituting the perversion of justice, the other was what intention accompanied what the appellant said in those conversations. The appellant gave lengthy evidence contradicting critical parts of

the conversations relied upon by the Crown. In addition, the appellant categorically denied having had any intention to pervert the course of justice.

In both of these matters the jury was required to weigh carefully the evidence given by the appellant and his credibility. There was, of course, no onus resting on the appellant on those matters. It was incumbent on the Crown to prove the prosecution case beyond reasonable doubt.

The relevance of good character in *Murphy* is clearly distinguishable from the circumstances of the present case. The burden of proof of the assertions made by the accused both to the police and by way of history to the medical experts was upon the accused on the balance of probabilities in order to establish diminished responsibility.

At common law, evidence of good character is regarded as bearing to some extent on the credibility of the accused person. The Full Court in *R v Murphy* referred to the following passage in *Stalder* [1981] 2 NSWLR 9 by Street CJ at 17,

It is clear from these authorities that evidence of good character is admissible as material establishing that it is unlikely that the accused committed the offence ... It is unlikely that most accurately describes the proposition in aid of which evidence of good character can be used.

There is a corollary which has likewise long been recognized as within the legitimate use which may be made of evidence of good character. Evidence of good character can be used as establishing the credibility of the accused in his denial of the charge and hence the unlikelihood of his guilt.

The Full Court reviewed certain other authorities on the subject and concluded as follows,

This line of authority shows that, whilst the primary significance of evidence of good character is upon the unlikelihood of guilt, there is a corollary to the effect that evidence of good character can be used with reference to credibility of the accused in his denial of the charge, and hence the unlikelihood of his guilt. The omission to give a specific direction on the credibility aspect may or may not be regarded as resulting in a miscarriage, according to the particular circumstances of the case in hand.

Because of the importance of the accused's credibility in *Murphy*, the Full Court found a specific direction that "Evidence of good character is introduced on the question of his guilt on these charges, not on his credit" to be erroneous, and directed a new trial.

Unlike *R v Murphy*, the present case is not a case where the possibility of using the character evidence as to credibility was withdrawn from the jury by way of direction. Nor is it a case where counsel sought redirection on the use of the character evidence on trial from the trial Judge.

The present case is more akin to *R v Roslyn Gillard*, unreported decision, 15 July 1991. In that case it was held by the NSW Court of Criminal Appeal that an obligation on the trial judge to give a specific direction on the relevance of character evidence to the credibility of the accused may arise in particular circumstances. As in the present case, there was some challenge by the Crown to some of the expert evidence led by the appellant to establish diminished responsibility. The challenge suggested that the value of some of the medical

evidence was diminished by the source of the information upon which the experts relied, namely the accused person.

In the present case, there were similar suggestions by the Crown that some of the assertions by the accused, for instance, that he had no memory of the stabbing, were untrue. Other assertions that were challenged by the Crown were that the accused believed that the deceased was banging on the walls in order to upset him and make him leave his flat; assertions by the accused regarding his alcoholism; assertions by the accused that he was using large quantities of valium and normison; assertions by the accused of a history of insomnia, poor appetite, social withdrawal, a despondency; and evidence of the accused answering the "Lezak" test.

The appellant in *R v Gillard* (supra) contended that similar circumstances imposed an obligation on the trial judge positively to direct a jury (even in the absence of a request to do so) that character evidence is relevant not only to the issue of guilt but also to the credibility of the appellant's case. The source of such an obligation, it was submitted, is to be found in what was said in *Trimboli* (supra), at 578, to which further reference will be made later

The judge may add, if he thinks it appropriate in the particular case, that the jury should consider the accused's previous good character in assessing the credibility of any explanations given by him and, when he has given evidence, his credibility as a witness.

Gleeson CJ could find no miscarriage in the failure to give the credibility direction. He said that there is no fixed formula to be applied in forming a direction of character evidence. He pointed out that no application for a fuller direction than that given by the trial judge had been made, as in

this case. Gleeson CJ was of the opinion that whether or not a fuller direction may have been desirable, a failure to give such a direction had not led to a miscarriage.

That reasoning is very persuasive in the circumstances of the present case. Since opinion evidence involves the drawing of inferences and conclusions from facts, the admissibility of such evidence depends upon proof or admission of the facts upon which the opinion is based, see *Ramsay v Watson* (1961) 108 CLR 642; *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844 at 846; *Turner* [1975] 1 QB 834 at 840; (1974) 60 Cr App R 80 at 82; *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380; [1979] 3 All ER 177. There is a detailed discussion of this subject in the judgment of Beaumont J in *Trade Practices Commission v Arnotts Ltd* (1990) 21 FCR 324.

There is a *useful* statement about the relevance of a history given to a medical expert in *R v Schafferius* [1977] Qd R 213 at 217 per Wanstall ACJ,

The principle on which such hearsay may be received in evidence is discussed in Ramsay v Watson (supra) at 648-649; and in R v Tonkin & Montgomery [1975] Qd R 1. Statements made to an expert witness are admissible if they are the foundation, or part of the foundation, of the expert opinion to which he testifies, but they are not evidence of the existence in fact of past sensations, experiences and symptoms of the patient. Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician. If the man whom he examined refuses to confirm in the witness box what he said in the consulting room the expert opinion may have little or no value, for part of the basis of it has gone.

In *R v Trimboli* , at 578, King CJ formulated a useful set of propositions concerning directions as to character,

No particular form of words is necessary, but the direction should convey to the jury that they should bear in mind the accused's previous good character when considering whether they are prepared to draw from the evidence the conclusion of the accused's guilt. They should bear it in mind as a factor affecting the likelihood of the accused committing the crime charged. The judge may add, if he thinks it appropriate in the particular case, that the jury should consider the accused's previous good character in assessing the credibility of any explanations given by him and, when he has given evidence, his credibility as a witness.

In my opinion, there is much force in the submission on behalf of the Crown that the accused did not seek a direction that his good character could be used by the jury as being relevant to his credibility because there was no issue before the jury regarding the facts of the killing. The issue was whether or not the accused was of diminished capacity at the time of the infliction of the three stab wounds. The various experts called on behalf of the Crown and the accused sought to rely on the records of interview conducted by the police as evidencing the accused's state of mind soon after the event. It was his state of mind which was being examined by the experts and thus by the jury, not the extraneous question of whether the accused should be believed in terms of factual dissertations because he was of previous good character.

Counsel for the accused was unable to refer the court to any authority for the proposition that evidence of good character can be used to support the credibility of the accused in interrogation by police or the truthfulness of the history given to experts as a foundation of their respective opinions.

Finally, in *R v Wasow* [1985] 18 A Crim R 348, the Court of Criminal Appeal (NSW), reiterated what it had said previously in *Lawrence* [1984] 3 NSWLR 674 and *Stalder* (supra) that the primary significance of the evidence of good character is that it touches upon the likelihood of guilt. Its possible effect upon the credibility of the accused person occupies a subsidiary role. In that case, the trial Judge had directed the jury to take the good character into consideration on the question of whether the accused person was guilty or not of the offence charged. He did not give a direction about its use on credibility. The Court of Criminal Appeal held that it was open to his Honour to have given directions on "this subsidiary or peripheral element" of the operation of good character but it was not obligatory for his Honour to do so.

Counsel for the appellant sought to distinguish *Wasow* (supra) from the present case on the basis that the direction on character actually given in *Wasow* was stronger, clearer and more comprehensive than in the present case; the trial judge made a deliberate decision not to give a credibility direction in *Wasow* whereas in the present case the trial Judge simply failed to exercise her discretion rather than deciding to exercise it in a particular manner and that the prosecution case in *Wasow* was overwhelming and given the substantial nature of the character direction actually given, and the opinion of the trial Judge that nothing further was needed, it was hardly surprising that the Court of Criminal Appeal had concluded that no miscarriage of justice could have arisen to the failure to give the credibility direction.

In my opinion, whether the credibility direction should have been given in *Wasow* depended entirely upon the exercise of the trial Judge's discretion in all

the circumstances of the case and no error had been demonstrated. Nevertheless, *Wasow* is clear authority for the proposition that the credibility direction is subsidiary or peripheral in the directions as to good character and it is not obligatory for the trial Judge to give the credibility direction.

In any event, in the present case, the direction given was substantially given in the terms sought by counsel for the accused at the trial and fuller direction was not sought by way of redirection at the end of the summing up. Notwithstanding that counsel for the accused put the good character of the accused at the forefront of his address to the jury, the inadequacy of the direction given was not so patently obvious in the context of the trial to counsel who had sought it. Otherwise, he presumably would not have misheard the direction given at his request.

No miscarriage of justice has been demonstrated.

I would dismiss the appeal.

ANGEL J: I agree with Gallop J. and would dismiss the appeal.
