Callander v The Queen [2004] NTCCA 5

PARTIES:	PETER LESLIE CALLANDER
	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:	CA 6 of 2003 (20010885)
DELIVERED:	16 July 2004
HEARING DATES:	19 & 20 May 2004
JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS

Right to silence – need for jury direction that no adverse inference be drawn from exercise of right to silence – not necessary where possibility of adverse inference being drawn was too remote

Criminal Code, s 411(2); Evidence Act, s 9(3)

Barr v The Queen [2004] NTCCA 1; *R v Coyne* (1996) 1 Qd R 512; *R v Reeves* (1992) 29 NSWLR 109; distinguished

Jones v Dunkel direction – not necessary where nothing to suggest material witnesses not called

Edwards direction – *Zoneoff* direction – need for *Edwards* direction or *Zoneoff* direction where Crown invited jury to infer guilt from behaviour –

sufficient that invitation of the Crown merely by implication – lies merely one type of guilty behaviour from which Crown may assert inference of guilt – failure to give direction did not result in a substantial miscarriage of justice in the circumstances

Dat Tuan Nguyen (2001) 118 A Crim R 479; applied

Dhanhoa v R (2003) 199 ALR 547; *Edwards v The Queen* (1993) 178 CLR 193; *Zoneoff v The Queen* (2000) 200 CLR 234; followed

Whether verdicts unreasonable – whether other hypotheses consistent with innocence – Crown case overwhelming

REPRESENTATION:

Counsel:

Appellant:	S J Odgers SC
Respondent:	P Elliott

Solicitors:

Appellant:	Dalrymple & Associates
Respondent:	Director of Public Prosecutions

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

Callander v The Queen [2004] NTCCA 5
No. CA 6 of 2003 (20010885)

BETWEEN:

PETER LESLIE CALLANDER
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 16 July 2004)

The Court:

[1] The appellant was convicted by a jury of 16 counts of stealing and of 14 counts of false accounting. The charges related to the period between July 1997 and January 1998.

[2] The appellant was employed between approximately 13 May 1997 until 11 January 1998 as the Manager of the Rum Jungle Recreation Club Inc. He was responsible to the club's committee. His duties included managing the club's accounts and financial records as well as attending to the club's banking. He maintained records of the club's takings from the sale of alcohol for consumption on and off the premises, soft drinks, souvenirs, bar

snacks and tobacco. The records also recorded income from membership fees, a coin operated telephone, jukebox, pool tables and the club's commission from a cigarette machine owned by a third party. A separate bank account was maintained in relation to income generated from Keno.

[3] The records maintained by the appellant comprised daily and weekly sales reports and a monthly sales report book. The daily sales reports were used by the appellant to keep a record of the club's total takings entered in two electronic cash registers, adjusted for known errors caused by the operator over or under-recording items sold. These were known as under and over-rings.

[4] The daily records distinguished between the revenue received as cash and cheques on the one hand and EFTPOS transactions on the other hand. The daily sales reports also noted any discrepancies between the value of cheques and actual cash in the cash registers and the value which should have been there according to the record kept by the electronic cash registers.

[5] The weekly sales reports maintained by the appellant provided a weekly summary of the club's takings and EFTPOS transactions. The monthly sales report book provided a daily breakdown of the sources of the club's revenue and the amount available for banking after taking into account EFTPOS transactions.

[6] Counts 3 to 30 of the indictment relate to 14 counts of stealing and 14 corresponding counts of false accounting – that is falsification of a

document made for an accounting purpose, namely the monthly sales report book. The case against the appellant was that the stealing of the 14 amounts specified in these offences was accomplished by the appellant under-reporting the club's revenue in the monthly sales book. In some cases it was submitted that this was evident from comparing the revenue figures recorded by the appellant in the daily sales reports with the figures recorded for the corresponding days in the monthly sale report book.

[7] In other cases, it was submitted that the under-reporting of revenue could be revealed only by comparing the printout of the transactions recorded on the electronic cash registers with the breakdown of revenues in the monthly sales report book.

[8] The 14 offences of stealing and the 14 corresponding offences of false accounting fell into four categories: the failure to record revenue received in the club's lounge; the under-reporting of the value of insurance cheques received; simple misstatement by the under-reporting of bar takings; and manipulation of the figures for bar takings to steal, in effect, part of the proceeds from the jukebox, pool table and public coin phone.

[9] The Crown case was that the appellant deliberately under-recorded the club's revenue and stole the difference between what the club actually received and what he recorded the club as having received in the monthly sales report book.

[10] Counts 1 and 2 of the indictment are stealings of what is generally referred to as a "general deficiency". Count 1 relates to the club's general revenue and count 2 relates to Keno monies received by or on behalf of the club.

[11] The jury was provided with extensive accounting evidence as to how much general revenue had been received by the club between 1 July 1997 and 12 January 1998 and how much had been deposited in the club's bank account. The jury received similarly detailed accounting evidence as to how much Keno money the club had received between 14 September 1997 and 12 January 1998, and how much of that money had been accounted for in the club's financial records.

[12] In the case of count 1 (general revenue), the deficiency was $17,450.89 and, in the case of count 2 (the Keno account), the general deficiency was $2511.65. It is clear from the jury's verdicts in counts 1 and 2 that the jury was satisfied beyond reasonable doubt that the appellant stole part or all of these monies. It does not necessarily follow that the jury found that the appellant stole the entire sums nominated in counts 1 and 2. The jury were directed that to convict the appellant on counts 1 and 2 respectively, it was sufficient if they were satisfied beyond reasonable doubt that he stole any part of the sums specified in those two counts during the relevant periods specified in the charges.

[13] There was a good deal of evidence in the case which, if it was accepted by the jury, suggested that a number of people at the club had an opportunity to

steal cash takings of the club after cash transactions were entered in the club's cash registers, or after it had been placed in the office safe. The evidence suggested that the appellant's control of the club's cash was lax; the financial records of the club fell far short of what was required in accordance with best accounting practice; and at least for the first few months of the appellant's management of the club, credit sales of the club's stock took place in a haphazard and casual manner under practices inherited from the former manager of the club.

[14] In short, it was put that there were a number of ways in which at least part of the sums making up the general discrepancies, which were the subject of counts 1 and 2, could have occurred, aside from the appellant having stolen the entire amount of those discrepancies.

[15] The appellant has been granted leave to appeal against his convictions on four grounds. Grounds 1 and 3 were formally abandoned at the hearing of the appeal. Leave was sought to add an additional ground, ground 5. It is convenient to deal with this ground first.

Ground 5

[16] This ground is as follows:

> His Honour erred in failing to direct the jury not to draw any inference adverse to the appellant from his refusal to answer further police questions after the second interview.

[17] The police spoke to the appellant on three occasions, the first being on 2 June 1998. At that time the police had little information. The appellant gave the police a lot of information of a general nature about the financial operations of the club. The second record of interview was conducted on 24 August 1998. By this time the police had more precise information about discrepancies in the records which they wished to speak to him about. When asked about these discrepancies the appellant repeatedly stated that he could not do so without access to other financial records, especially a book he called a "safe book". This was a record of the cash and cheques placed in the club's safe from time to time. That book was missing, and apart from one page therefrom has never been found. He also said on a number of occasions that he needed to check the mathematical calculations which were put to him. At the end of the second interview – which lasted several hours – there were still matters that the police wanted to speak to the appellant about, but the appellant said he had to leave at that time. He agreed to come back and finish the interview on another occasion.

[18] The Crown adduced evidence from a detective that he asked the appellant to re-attend for a further interview on 26 February 1999. He attended with a legal representative to inform the police that he did not want to take part in any further interviews. He handed over a document to the police, tendered by the Crown, in which he stated the following:

> I have voluntarily answered questions put to me by police on a number of occasions in regard to the financial circumstances of the

> Rum Jungle Recreation Club during the period in which I was employed as Manager.
>
> I have had the opportunity of reading the transcript of those interviews and confirm the statements made by me that the documents prepared by R V Lowry & Associates are unreliable as the Club records supplied to them were apparently incomplete and/or unreliable. For example the book described as the monthly sales book or the 'Janet to John' was created by me for my reference only and was intended to be a rough guide as to areas of sales.
>
> In the absence of all financial records prepared by me during the period of my employment at the Club and in particular the book I have described as the safe count book, I do not wish to answer further questions in regard to the financial transactions of the Rum Jungle Recreation Club Inc during my period of employment there.
>
> The safe count book and all other financial records remained on the Club's premises when I ceased employment.

[19] No application was made at trial for a direction to be given to the jury by the trial judge that no adverse inference could be drawn against the accused because he had exercised his right of silence. This ground can be relied upon now only if leave is granted. Counsel for the appellant, Mr Odgers SC, maintained that there was no plausible tactical explanation for the absence of a request for such a jury direction and that therefore, unless the "proviso" (i.e. the provisions of s 411(2) of the Code) applied, the appeal should be allowed and a retrial ordered.

[20] However, it emerged that the Crown had not intended to lead evidence relating to the 3rd interview, but did so (including the tendering of the document hereinbefore set out) solely at the behest of counsel for the accused at the trial. Clearly counsel for the accused thought it best to

provide a positive explanation as to why there was no follow up record of interview rather than to leave the jury without any explanation at all, and instead rely upon the jury heeding a direction from the judge not to draw an adverse inference. There was clear advantage to this course because it enabled the appellant to have placed before the jury the following matters:

(1) that his decision not to participate in a third record of interview was due to his inability to access all the relevant financial records he had prepared;

(2) that there were other records in existence not available to him but which he needed in order to provide an explanation;

(3) that the documents prepared by R V Lowry and Associates (a firm of accountants) were unreliable;

(4) that the monthly sales book was only a rough guide intended for the appellant's reference only; and

(5) that all the records he had prepared were left on the club's premises when he ceased his employment.

(It may be that most of these matters except (1) above could be found in the second record of interview, but the document set these matters out clearly and succinctly.)

[21] It was submitted that in the circumstances the learned trial judge should have directed the jury, both at the time this evidence was admitted and in his

address to the jury, that no adverse inference could be drawn against the accused for exercising his right of silence. In support of this contention, Mr Odgers SC, for the appellant, referred us to the decision of the Court of Criminal Appeal of New South Wales in *R v Reeves* (1992) 29 NSWLR 109 and to the decision of the Queensland Court of Appeal in *R v Coyne* (1996) 1 Qd R 512. This question is not the subject of any decision binding on this Court. In both of those cases it was held that evidence that a person had declined to answer questions could be lead in evidence (but not to prove that the accused had a guilty mind), so long as there was some other legitimate purpose to the evidence – for example, to forestall a suggestion that the investigation had been unfairly carried out: see *R v Reeves* (at 115); *R v Coyne* (at 519); if such evidence were to be led, it was held to be necessary to give the directions contended for by the appellant.

[22] In this jurisdiction, s 9(3) of the Evidence Act precludes the Crown or the trial judge from commenting upon the failure of the accused to give evidence. There is no such provision in New South Wales and Queensland, and in those jurisdictions it is open to the trial judge to give a direction in accordance with *Weissensteiner v The Queen* (1993) 178 CLR 217. Moreover, in this jurisdiction it has recently been held that evidence that an accused exercised his right of silence is inadmissible: see *Barr v The Queen* [2004] NTCCA 1 (at par [24] to par [28]). If that evidentiary rule had been observed in this case there might have been very considerable difficulties both for the Crown and for the accused. Whilst parts of the second record of

interview dealing with the arrangement made with the appellant for him to return for a third interview might have been excised, the jury would have been left wondering why the police did not follow up the investigation and give the accused an opportunity to answer the allegations which were being put to him after he had had an opportunity to consider the matters. In the unusual circumstances of this case, we think that the evidence was properly received particularly as it favoured the accused and did no harm to the Crown.

[23] Whether or not a direction of the kind suggested in *R v Reeves* was necessary is another matter. We do not think *R v Reeves* should be seen as laying down any hard and fast rule. In most cases where evidence of this kind is led it would be wise, if not necessary, to follow the practice suggested, but in this case we do not believe it was necessary. It was plain that the Crown was not relying on the appellant's lack of cooperation as any admission of guilt. Neither side mentioned the matter in final addresses. The possibility that the jury may have drawn an adverse inference against the accused is too remote. If we are wrong in that conclusion we would dismiss the appeal for the additional reason that the case against the appellant was so overwhelming that no substantial miscarriage of justice has actually occurred: see par [37] and following below.

Ground 2 - The Failure to Give a *Jones v Dunkel* Direction

[24] The basis for this ground is that the Crown had been requested by the accused's counsel to call two potential witnesses, a Ms Colleen Milstead and a Ms Sue Morley, and had declined to do so. Counsel for the accused at trial then sought a *Jones v Dunkel* direction. The learned trial judge refused to give such a direction essentially because there was no material to suggest that these witnesses could give any relevant evidence.

[25] Evidence was given by a witness, Ms Robyn Roberts, that Ms Milstead was employed by the club and "kept books and figures for the club …on the computer". Her evidence was that she thought Ms Milstead commenced her employment after the appellant left the club's employment. In cross-examination it was put to her that at the committal she had said that she was not sure whether Ms Milstead had begun her employment with the club at the time the accused was employed there. Ms Roberts said that she had no memory of saying so. No attempt was made to pursue the matter further. Clearly this falls short of evidence that Ms Milstead was employed at the club at any time the accused was so employed.

[26] The other potential witness, a Ms Sue Morley, was not employed until some time after 11 December 1997. The witness Roberts was unable to say when she started. She was employed to "assist in the implementation of the Club's internal accounting, stock take and bookkeeping computer system".

[27] The evidence was that the appellant had encouraged the club to introduce a computerised accounting system known as “MYOB”. There was no evidence that either Milstead or Morley had any physical contact with the club’s cash.

[28] At the highest, it was possible that Morley and Milstead entered figures into the MYOB accounting system from other records kept by the appellant at some time, possibly not until after he had left the club. The evidence was that the MYOB records for the 1997-1998 year did not reveal any discrepancies. The reason for this was that the MYOB figures were taken from the records kept by the appellant via the analysis book called “the green book”. The discrepancies only emerged when the green book was compared with the prime records which showed that the income recorded in that book had been understated. The evidence was that all the primary records including the banking records were kept solely by the appellant.

[29] In those circumstances we consider that there was nothing to suggest that either of these persons could be regarded as material witnesses. This ground of appeal must fail.

Ground 6 – Failure to Give an *Edwards* Direction

[30] This ground was raised for the first time by Mr Odgers SC after the luncheon interval on the first day of the hearing of the appeal. No such direction was sought by counsel for the appellant at trial. Leave is now required to raise this ground.

[31] At the trial, counsel for the Crown relied upon the difference in the manner in which, and confidence with which, the appellant answered questions put to him by the police in the second record of interview compared with the first. In his address to the jury, counsel for the Crown said:

> You might think to yourself, that first interview which was conducted in June – 2 June 1998, you might think to yourself, well the police didn't have that good a handle on what was going on at that stage. And the accused was able to tell that, and the interview was conducted accordingly. But did you notice in the second interview, it's pretty obvious the police have got a bit of a better idea what's going on by then. In the second interview it is confusion heaped upon confusion, heaped upon confusion. No straight answer – hardly a straight answer in the whole thing. Because the police have worked out what's going on by then, and the accused has recognised they've got it worked out.

[32] The decision of the High Court in *Edwards v The Queen* (1993) 178 CLR 193 concerned the need to give appropriate directions to the jury when it is submitted that the accused has told lies from which an inference of guilt may be drawn. That case was not a case about guilty behaviour from which an inference of guilt might be drawn. However, lies are merely one type of guilty behaviour amongst many, and a similar type of direction is needed whenever the Crown asserts that the behaviour is such that an inference of guilt might be inferred: see *Dat Tuan Nguyen* (2001) 118 A Crim R 479 (at pars 18-20; 88-99), Andrew Palmer, Guilt and the Consciousness of Guilt: The Use of Lies, Flight and other "Guilty Behaviour" in the Investigation and Prosecution of Crime, 1997, The Melbourne University Law Review, 95 at 101; see also Tilmouth, Australian Criminal Trial Directions, par 4-900-10 to par 4-900-45 concerning the need for similar directions where flight is

used as evidence of a consciousness of guilt. Subsequent authority has helped to further define the circumstances under which an *Edwards* direction should be given. In *Zoneff v The Queen* (2000) 200 CLR 234 it was held that where the Crown did not rely upon lies told as evidencing a consciousness of guilt, it is unnecessary and undesirable that an *Edwards*-type direction be given.

[33] In cases where there is a risk of doubt or confusion in the way in which the prosecution is putting its case, the trial judge should inquire of the prosecution if it is contended that there are lies which constitute evidence of guilt, and if so, what lies and how is it said that they constitute evidence of guilt: see *Zoneff* (at 244). If there is no suggestion that an inference of guilt is capable of being drawn from the alleged lies, a direction (now known as a *Zoneff* direction) may be required (*Zoneff* (at 245)), although only where the trial judge considers that there is a real risk that the jury may apply such a process of reasoning: *Dhanhoa v R* (2003) 199 ALR 547 at [34].

[34] However, as was recognised in *Zoneff* (at par 18) it is not necessary for the prosecution to say in so many words that the accused has lied and this shows a consciousness of his guilt. Such a suggestion can be made by implication. The same might be said about any behaviour evidencing a consciousness of guilt.

[35] Except in relation to the standard of proof, the authorities do not distinguish between those circumstances where evidence of a consciousness of guilt is

used as in itself being sufficient to draw an inference of guilt, and those cases where the evidence is merely a piece of circumstantial evidence which might, together with other evidence, enable a jury to infer guilt. That matter is touched upon in *Edwards* (at 210). In both cases, so it seems, an *Edwards*-type direction may be required even though the telling of the lie or the guilty behaviour might only form part of the body of evidence from which an inference of guilt is to be drawn.

[36] Counsel for the appellant submitted that this was a case where the prosecution invited the jury to infer guilt because the accused's not giving straight answers was due to the fact that he knew he was guilty and he knew that the police knew he was guilty. Counsel for the Crown submitted that no such invitation was made to the jury. We think there is a real risk that the jury would have so understood the prosecutor's remarks. In those circumstances the learned trial judge ought to have enquired of the prosecution how he was putting his case, and depending on the answer provided, considered whether he should give either an *Edwards* direction or a *Zoneff* direction. However, in the circumstances we do not consider that the failure to take this course has resulted in any substantial miscarriage of justice. In the first place, no such direction was sought from counsel and this is often a strong indicator that no miscarriage actually occurred. Secondly, the jury were well aware that the accused claimed not to be in a position to answer all of the questions put to him in the second record of interview and why this was so. Thirdly, counsel for the accused at trial having heard the

prosecutor's address, did not think it necessary to deal with the suggestion. Fourthly, even senior counsel for the appellant missed the point until the second day of the hearing of the appeal. In order to succeed on this ground, the appellant must show that it is a reasonable possibility that the failure to direct the jury may have affected the verdict: *Dhanhoa v R* (at [60]). We do not think this has been done. Finally, we consider that the case against the accused was so overwhelming that no substantial miscarriage of justice actually occurred. The reasons for this are discussed in relation to ground 4.

Ground 4 – The Verdicts are Unreasonable

[37] The argument of counsel for the appellant was that the verdicts were unreasonable as there were other hypotheses consistent with innocence which the Crown has not disproved. As to the stealing counts it was submitted that there were the following possibilities open on the evidence: (1) that honest mistakes had been made; (2) that it was reasonably possible that he might not have noticed the discrepancies in the records; (3) possibly some monies in the form of loans were made to club members but not recorded; and (4) that the appellant through incompetence left more money in the safe than he ought to have done and this money was stolen by others. As to the false accounting charges, it was put that the Crown had not shown that the "green book" (the monthly cash sales report book) was intended to be an accurate record of the club's income.

[38] The evidence was that the appellant was responsible for the banking of the club's receipts. He filled in the deposit books and he personally performed this task weekly. He personally introduced the method of recording details of the club's receipts in Daily Sales Reports, and explained to his successor how they were compiled. With only 2 or 3 exceptions, the entries in the Daily Sales Report were made by the appellant personally. The entries in the Daily Sales Reports were supposed to be transferred to the monthly sales report book (a cash analysis receipts ledger), however the appellant recorded lesser amounts in that book than was recorded in the Daily Sales Reports. The differences between these amounts formed the charges relating to counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27 and 29. In most cases, the difference represented an exact amount recorded as having been received in the Daily Sales Report as, for example, the revenue received from some identifiable source, e.g. the lounge. In respect of one count, the monthly sales report book under-recorded the value of cheques received for insurance claims by $1,000; yet the correct amount of the cheques was banked, but the cash was understated in the bank deposit book by $1,000. It was proved that the amounts under recorded were not banked in any subsequent weeks. As to count 1, there was, in addition to specific items which were able to be thus identified, a general deficiency proved of $17,450.89 for the period 1 July 1997 to 12 January 1998 which was reflected in count 1 and a general deficiency in the Keno account of $2,586 underbanked in respect of the Keno proceeds. The possibility of errors of these kinds being the result of

honest mistakes is palpably absurd. Unless the appellant was truly incompetent he could not have failed to have noticed the discrepancies in the records and in many cases to have identified the exact source of the discrepancy. His ability to create records indicated he was not incompetent. He made no complaint to management about the missing funds. Although others may have had access to the safe from time to time, had someone else stolen the money, there is no reason why (a) the appellant would create false entries in the monthly sales report book to hide the discrepancy; or (b) he would not have noticed the theft(s) and reported it or them. Moreover, a thief with access to the safe is hardly likely to steal an exact amount representing the whole proceeds of a source of cash such as the lounge receipts. The facts implicated only one person – the appellant. The missing "safe book" would not have assisted the appellant as that record was irrelevant to establish proof of the club's takings. The suggestion that the monthly sales report book was not kept for an accounting purpose is plainly fanciful. That book was originally kept by the appellant's predecessor (who was also the club's President), Ms Roberts, and her undisputed evidence was that it was used by the club's bookkeeper to compile monthly financial reports used by the club's committee.

[39] In our opinion, this was an overwhelming Crown case. There is no substance to the submission that the verdicts were unreasonable. On the contrary, to the extent that the appellant has established a ground of appeal, we would nevertheless dismiss the appeal by applying "the proviso".