Seriban v The Queen [2014] NTCCA 12

PARTIES:	SERIBAN, Mehmet 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 26 of 2013 (20802676)
DELIVERED:	14 August 2014
HEARING DATES:	13 June 2014
JUDGMENT OF:	RILEY CJ, SOUTHWOOD AND HILEY JJ
APPEALED FROM:	BR Martin CJ

CATCHWORDS:

CRIMINAL LAW –Application for extension of time to appeal against conviction – No satisfactory reason given for substantial delay – Application dismissed.

CRIMINAL LAW – Appeal against conviction – Jury directions – No breach of *Liberato* principles – No miscarriage of justice.

CRIMINAL LAW – Appeal against conviction – conspiracy to import border controlled precursor – jury directions – intention and knowledge regarding substance to be imported.

CRIMINAL LAW – Appeal against conviction – Application to discharge jury – tender of prejudicial material – Tender inadvertent rather than deliberate – Possible prejudice relatively minor.

Criminal Code Act 1995 (Cth) sch 1 s 307.11(1).

R v Green (1989) 95 FLR 301 – applied.

Darkan v The Queen (2006) 227 CLR 373; *Krakouer v The Queen* (1998) 194 CLR 202; *Liberato v The Queen* (1985) 159 CLR 507; *Lo Castro v The Queen* (2013) NTCCA 15; *Papadimitriou v The Queen* [2011] WASCA 140; *Quaid v The Queen* [2011] WASCA 141; *R v Crofts* (1996) 186 CLR 427; *The Queen v RK & LK* (2009-2010) 241 CLR 177 – referred to.

REPRESENTATION:

Counsel:

Applicant:	J C A Tippett QC
Respondent:	J N Hanna

Solicitors:

Applicant:	Maley & Burrows
Respondent:	Commonwealth Director of Public Prosecutions

Judgment category classification:	C
Number of pages:	17

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

Seriban v The Queen [2014] NTCCA 12
No. CCA 26 of 2013 (20802676)

BETWEEN:

MEHMET SERIBAN
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 14 August 2014)

THE COURT:

[1] Following a trial by jury held between 9 and 25 February 2009, Mehmet Seriban (the applicant) was found guilty of conspiring with others to commit an offence against s 307.11(1) of the *Criminal Code* (Cth),[1] to import into Australia a commercial quantity of a border controlled precursor. The offence was said to have been committed between 1 September 2007 and about 7 January 2008, and involved activities in and near Darwin and also in Indonesia.

[1] *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

[2] On 8 November 2013, the applicant filed documents seeking leave to appeal from the verdict given on 25 February 2009 and an extension of time within which to appeal, and an affidavit in support of the application by Michael Burrows, legal practitioner.

[3] The applicant claims that his trial resulted in a miscarriage of justice. He relies on the following grounds:

1. The trial judge erred in not properly directing the jury in accordance with requirements established by *Liberato v The Queen,*[2] with the result that a miscarriage of justice arose.

2. The trial judge erred in directing the jury that the Crown need only prove that the applicant was reckless as to whether the subject matter of the conspiracy was a border controlled substance when a finding of actual knowledge was required in accordance with the decision of *The Queen v LK & RK,*[3] with the result that a miscarriage of justice arose.

3. The trial judge erred in failing to discharge the jury once prejudicial material was introduced into the trial to the effect that the applicant had spent time in prison.

[2] (1985) 159 CLR 507 (‘*Liberato*’).
[3] (2009-2010) 241 CLR 177 (‘*LK*’).

Background facts

[4] The Crown alleged that the applicant conspired with one or more of, Petr Petras, Graydon Wood and David Barry, to import a commercial quantity of pseudoephedrine, a border controlled precursor, into Australia by boat. The Crown alleged that between August and December 2007 the applicant, living in Indonesia, received about $43,900 by way of bank transfers and ATM withdrawals. That money was to be used by the applicant to purchase the pseudoephedrine and a boat and to pay a skipper to transport the drug from Indonesia to a particular location at Aurori Bay, north of Oenpelli. It was to be placed into a solid plastic drum that had been buried at the mouth of Marligur Creek.

[5] The Crown alleged that the applicant was in constant communication with Petras to effect the arrangement, including by means of telephone calls and an email account specifically set up for the purpose by Petras and Barry.

[6] Petras flew from Darwin to Bali on 26 December 2007 and met up with the applicant. Between then and 6 January 2008, the applicant and Petras were under the surveillance of the Indonesian National Police. Police executed a search warrant at their hotel in Surabaya and found a backpack containing two pieces of paper each containing handwritten coordinates, distances and locations of a particular place one of which

was the location at Aurori Bay where the plastic drum was buried. They also found maps showing coastal areas of the Northern Territory. The coordinates were the same as those which had previously been provided to the applicant by means of the special email account.

[7] Petras accompanied the applicant on a number of trips, including to the fishing village of Probolinggo, where Mr Saputra lived. Mr Saputra was a fisherman, who the applicant had known since April 2005. Mr Saputra was away when the applicant and Petras went there together, but the applicant spoke to Mr Habib who lived in the house where Mr Saputra lived. Mr Habib testified that the applicant asked him if there was a boat for sale in Probolinggo. However the applicant denied asking Mr Habib about this.

[8] Petras was arrested on 7 January 2008 when he arrived back in Darwin, and the applicant was arrested on 25 January when he entered Australia in Perth.

[9] The Crown relied upon a considerable body of material which had been obtained by means of telephone and internet intercepts, and also by tracking the movements of a particular Nissan patrol utility which was owned by Mr Wood's partner. The Nissan had been used to travel to the mouth of Marligur Creek, Aurori Bay, where police found the buried plastic drum. It had also been used by Petras and Barry to travel to Katherine when the special email account was set up.

[10] The applicant for the most part admitted that he had engaged in the various conversations introduced into evidence that were the subject of intercepted material. He gave evidence on his own behalf. He said that the purpose of his behaviour was to scam money from those other people who mistakenly thought he was assisting them to source and import the pseudoephedrine but that he had no intention of being involved in that activity. He denied any conversations about purchasing a boat, but he admitted that Petras and he had travelled together in Indonesia. He said that the purpose of that trip was in effect a holiday. He said that he had never been part of a conspiracy to import a border controlled substance into Australia. He gave evidence of receiving amounts of money from his alleged co-conspirators which he dissipated one way or another on good living and on his girlfriend.

Extension of time within which to appeal

[11] Mr Burrows deposed that following his conviction the applicant instructed his then legal advisers, the Northern Territory Legal Aid Commission, to institute an appeal on his behalf. He was advised that the Commission would not institute and fund an appeal as it fell outside its guidelines. The applicant subsequently sought pro bono assistance, but was unsuccessful in that regard.

[12] In May 2013 the applicant sought further advice concerning the bringing of an appeal, and he was advised that there were arguable

grounds of appeal open to him. He subsequently instructed Mr Burrows that he wished to proceed with his appeal.

[13] No other explanation has been given for the delay between February 2009 and May 2013, or for the further six-month delay before the filing of the applications and affidavit. At the hearing of the appeal counsel was not able to provide any additional reason for the delay.

[14] In *Lo Castro v The Queen*,[4] this Court referred to the following observations of Asche CJ in *R v Green*:[5]

> "Public policy balances the right of the applicant to appeal with the requirement that that right be exercised within a fixed time. That time may be extended in exceptional circumstances. In deciding whether the circumstances are exceptional the court will take into account the likelihood of an appeal succeeding. But the longer the delay the more exceptional the circumstances must be and the clearer it must become that an appeal would succeed. Where there has been extreme delay the point may be reached where only a manifest miscarriage of justice will justify the extension of time."

[15] The respondent contended, and we agree, that the delay would cause significant prejudice to the prosecution if there were to be a re-trial. A number of exhibits have been destroyed or returned to the owners, including the applicant. In particular all telephone intercept recordings have been destroyed. The whereabouts of some witnesses, including a number of Indonesian nationals, are also presently unknown.

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[4] (2013) NTCCA 15 at [8].
[5] (1989) 95 FLR 301 at 304.

Proposed grounds of appeal

[16] The main issue in the trial was whether the applicant was part of a conspiracy to import anything into Australia. There was no challenge to most of the Crown evidence, in particular regarding the involvement of the applicant in the various telephone and internet communications and in receiving the money that was sent to him by the other conspirators for the purpose of sourcing and purchasing 5 to 25 kilograms of pseudoephedrine for importation into Australia. Although he had dealings with Petras and Woods and persuaded them to send or arrange for the sending of the money to him under the belief that he would procure the "asthma powder" for them he said that he intended to keep the money for himself and the precursor would not be procured or imported into Australia. In other words he did not intend that the agreement would be completed.

Ground 1. Liberato direction.

[17] In *Liberato* Brennan J (with whose reasons Deane J agreed) said, at p 515:

> "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of

> the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make that clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification"."

[18] The applicant contends that "the trial judge was bound to tell the jury that they could not convict unless they were satisfied beyond reasonable doubt of the truth of the Crown case, and that even if they did not positively believe the evidence for the defence they cannot convict if that evidence gives rise to a reasonable doubt (in this instance whether the applicant was part of the agreement)."

[19] The applicant refers to the following part of the trial judge's instructions to the jury:

> "On the other hand, the accused says right, I was never a party to any agreement, never had any intention, nothing I did was to further that agreement. Well ladies and gentlemen, if the accused's version is a reasonable possibility then the Crown will not have proven its case and you would acquit the accused.
>
> *A critical question for you is: Are you satisfied to reject the accused's version?* Are you satisfied he was genuinely party to that agreement? Or, is it reasonably possible that he was not party to it and that he was just running a scam? Because if it is a reasonable possibility he was just running a scam, then the Crown would not have proved its case and you would acquit the accused."
>
> (emphasis added)

[20] The applicant contends that the "critical question" referred to by the trial judge is not correctly phrased and has the effect of reversing the onus of proof.

[21] Immediately before the trial judge provided the instructions quoted above, he told the jury that the applicant did not challenge the existence of an agreement involving Petras, Woods and Barry, nor the various acts committed by them for the purpose of carrying out the agreement. He said:

> "The accused's defence is that he was never truly part of an agreement to import anything. He pretended to be part of the agreement. So he did not really enter into an agreement. He went along with Petras, led him on in order to get money to set himself up in Indonesia. Everything that he did was nothing to do with any agreement to import pseudoephedrine. It was all aimed at pretence, his scam, and it was aimed at setting himself up.
>
> So, ladies and gentlemen, it really comes down to this. Has the Crown proved that the accused was part of the agreement? That really is the essential question at the end of the day. I repeat, the Crown must prove all of these elements but the way this case has been presented to you, it comes down to: Has the Crown proved that the accused was genuinely part of the agreement to import pseudoephedrine? Because if the answer to that is yes, you might have little difficulty in finding that everything the accused was doing in Indonesia, accessing emails, talking with Petras, getting the money in, if he was genuinely part of the agreement, then you might have little difficulty in concluding that everything he did up there was aimed at furthering that agreement, and that they were all overt acts. You might have little difficulty in concluding that he intended to carry this through and to commit the offence, and that he well knew that when the material came into Australia it would be sold and those who bought it would use it to make an illegal drug."

[22] Then followed the passages quoted above. His Honour was reminding the jury of what the applicant contended, namely that he was never a party to an agreement to import anything into Australia, and that although he participated in much of the conduct alleged he was "running a scam" by keeping the money for himself.

[23] Standing alone, the "critical question" might imply that if the jury rejected this version it should find him guilty.

[24] However, in our view, the instructions that preceded that sentence, and those which followed it, made it plain that such an implication could not be drawn. The sentence immediately preceding the passage made the point that if the applicant's version was a "reasonable possibility" the Crown would not have proved its case and the jury would acquit the applicant. So too did the references to reasonable possibilities in two of the three sentences which followed the passage. The sentence immediately following the passage also made it clear that the jury would need to be satisfied that he was genuinely a party to the agreement.

[25] Rather than suggesting that the applicant had to satisfy the jury of his version, we consider that a juror would understand those words as being intended to draw attention to the applicant's version and to make the point that the jury should acquit the applicant if there was a reasonable possibility that version was correct. The context and effect

of those instructions was the need for the Crown to satisfy the jury beyond reasonable doubt that the applicant was genuinely part of the agreement to import the drugs.

[26] Moreover, his Honour had previously provided detailed instructions concerning the onus and burden of proof. For example, after referring to the evidence of Mr Habib which was challenged by the applicant and telling the jury that they need to carefully consider whether they were satisfied that Mr Habib was telling the truth, his Honour said:

> "Of course, the Crown challenges the evidence of the accused and you will be required to assess his credibility and determine whether you are satisfied to reject his evidence or whether his version is a reasonable possibility."

[27] In the course of referring to the presumption of innocence and burden of proof and pointing out that the applicant does not have to prove anything his Honour said:

> "The accused has put forward a defence, but I emphasise that the accused does not have to prove that defence. It is for the Crown to disprove the defence, otherwise the Crown will not have proven its case. … It is the Crown that must do all the proving in this court. Please do not be misled by any possible inadequacy of expression on my part that might seem to detract from that fundamental and constant burden that the Crown carries throughout this case."

[28] When read as a whole, the trial judge's summing up was consistent with the principles in *Liberato* and did not deprive the applicant of a reasonable opportunity of acquittal.

Ground 2. Intention

[29] Both in the aide memoire provided to the jury and in his summing up the trial judge identified four matters for the Crown to prove in order to establish that the applicant intended that the offence of importing a commercial quantity of a border controlled precursor into Australia would be committed.

[30] Of relevance to this appeal, in paragraph 3.3(ii) of the Aide Memoire his Honour stated:

> "That the accused knew that the substance to be imported was a border controlled precursor in the sense that he knew it was a substance of the type that it was illegal to import;
>
> **or** that the accused was aware of a substantial risk that the material to be imported was that type of substance and, in all the circumstances known to the accused, it was unjustifiable to take the risk."

[31] His Honour told the jury that it was not necessary for the applicant to have known that pseudoephedrine was what is called in the law, a border controlled precursor. All that was necessary was that the accused knew that the substance to be imported, whether he knew it by the name pseudoephedrine or some other name, was a substance of the type that it was illegal to import.

[32] His Honour then referred to the second part of paragraph 3.3(ii) of the Aide Memoire, and said:

> "… at this step, the second step of what the accused's knowledge was, there is an alternative. Either he knew it was a substance of the type illegal to import or he was aware of a substantial risk that the material to be imported was a type of substance … that is illegal to import; and in all the circumstances known to the accused it was unjustifiable to take the risk.
>
> What we are talking about here at this step of the accused's knowledge is either actual knowledge that it was the substance of a type and was illegal to import, or a realisation that it was likely to be, it is a substantial risk that it was that type of substance and that it was unjustifiable to go on and take the risk.
>
> Now, quite frankly, ladies and gentlemen, in this case nobody has suggested to you that the accused was agreeing to import something that he did not really know it was illegal. That is when this idea of being aware of a substantial risk really comes into play. If there is some suggestion, look, I thought I was bringing a quite lawful substance into the country, then this question of being aware, that it might be or there is a substantial risk that it was illegal, comes into play. There is no suggestion of that in this case.
>
> The reality is that on the Crown case the accused knew this was an illegal substance. It was the whole tenor of everything that was happening. So on the Crown case this question really is not a question that would cause you any difficulty. Similarly, on the Crown case it will not cause you any difficulty that it was to be 1.2 kilograms or more. I mean, the reality is on the Crown case there was talk of at least 5 kilograms or more.
>
> The defence, of course, is that the accused, yes, all of this was happening. There was this plan by the others to bring in this substance. The plan was to bring in at least 5 kilograms. Everybody knew they were talking about an illegal substance, but I was not part of it. So this element really should not cause you any difficulty. But the Crown must prove this state of knowledge or realisation of substantial risk."

[33] The applicant complains that the trial judge told the jury that the prosecution need only prove that the applicant knew there was a substantial risk that the substance was of the type that was illegal to

import and "… in all the circumstances known to the accused was unjustifiable to take the risk". The applicant contended that the effect of that direction was that it was enough for conviction if the applicant was reckless as to whether a border controlled precursor was to be imported, and that such a direction was wrong and substantially misleading.

[34] The applicant submitted that the High Court has determined that parties to an agreement that is alleged to be a conspiracy must intend the result (namely, in this case, the importation of the illegal substance the subject of the agreement) and not merely be reckless as to whether the result will take place.[6] Counsel argued that the error was critical to the verdict as it permitted the jury to apply a lesser standard in circumstances where the prosecution sought to prove the precursor was pseudoephedrine. If the jury had to find that as a matter of fact the state of knowledge of the applicant was that the substance was pseudoephedrine the evidence was far less strong. It would have involved him deducing the nature of the substance by inference from references to it in telephone conversations.

[35] While the current weight of authority in Australia is that the Crown must prove that an accused had "knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence (as distinct from having knowledge of, or belief

[6] *LK* at [77], cf [117] and [122].

in, the legal characterisation of the conduct)",[7] we do not think that the jury could possibly have been misled in this case by the comments his Honour made about recklessness being an alternative state of mind. As the trial judge observed in the passage quoted above it was not suggested that the applicant was agreeing to import something that he did not believe and know was illegal. Accordingly any question of substantial risk was irrelevant. Hence his Honour's comment: "There is no suggestion of that in this case."

[36] The only matter in issue was whether the applicant intended that the agreement to import the substance which he had been paid to procure, which substance he knew was a substance of the type that it was illegal to import, be carried out. It was not in dispute that the applicant knew that the substance to be imported was an illegal substance, or that it was a precursor, namely something that had to be cooked before being provided to others.

[37] Not every misdirection relating to the elements of an offence will necessarily amount to a fundamental flaw in the trial.[8] There has been no actual miscarriage of justice in this case.

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[7] *LK* at [117] and [122]; *Papadimitriou v The Queen* [2011] WASCA 140 at [90], [94] – [95]; *Quaid v The Queen* [2011] WASCA 141 at [95] – [97].
[8] *Krakouer v The Queen* (1998) 194 CLR 202; *Darkan v The Queen* (2006) 227 CLR 373.

Ground 3. Failure to discharge jury

[38] The prejudicial material consisted of an intercepted telephone conversation in which a co-conspirator referred to the applicant having been in gaol for three years.

[39] Although the transcript provided to the jury as an aide memoire during the playing of the intercepted telephone conversations contained no reference to the applicant having been in gaol, through oversight, the audio recording was not edited.

[40] After the telephone conversation was played to the jury, the applicant requested that the jury be discharged. The trial judge declined to discharge the jury and ruled that a direction would be adequate to ensure the applicant received a fair trial. His Honour relied on the principles outlined in *R v Crofts*,[9] including the seriousness of the prejudice, the stage the trial had reached, the other evidence that had been adduced, the issues in contest, and the adequacy of the proposed directions.

[41] His Honour immediately directed the jury to disregard the prejudicial material. His Honour carefully explained why the jury should have no regard to information about an accused's previous trouble with the law, told them that his previous trouble had nothing to do with drugs and that they should not speculate about the matter, and reminded them of

[9] (1996) 186 CLR 427 at 440-441.

the presumption of innocence. His Honour repeated the direction in the early stages of his summing up at the end of the trial. The directions were firm and thorough and the jury can be assumed to have followed them.

[42] The tender of the prejudicial material was inadvertent, not deliberate. The tender occurred on the seventh day of the trial after 12 witnesses had been called in the Crown case, including five from Indonesia.

[43] Further, we consider that the possible prejudice was relatively minor in any event. Apart from the applicant's denial that he was a party to the agreement to import the drugs, there was no dispute about his willing participation with others who were planning to commit this serious criminal offence. That he may have previously been convicted of some other unknown criminal offence would have been unsurprising and unlikely to have caused the jury to infer that he must have been guilty of this offence, particularly following his Honour's clear directions.

[44] We do not consider that this ground of appeal would succeed.

Conclusions

We have concluded that none of the proposed grounds of appeal could be made out and that no miscarriage of justice has occurred. The Court refuses the applications for an extension of time within which to appeal and for leave to appeal.