

*R v McCormick* [2011] NTSC 35

PARTIES: The Queen

v

McCormick, John Reece

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: 20923110

DELIVERED: 5 May 2011

HEARING DATES: 21-25 March 2011

JUDGMENT OF: KELLY J

**CATCHWORDS:**

*Webb v The Queen* (1994) 181 CLR 41

**REPRESENTATION:**

*Counsel:*

Plaintiff: P Usher  
Defendant: T Berkley

*Solicitors:*

Plaintiff: Director of Public Prosecutions  
Defendant: Robert Welfare

Judgment category classification: C

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*R v McCormick* [2011] NTSC 35  
No. 20923110

BETWEEN:

**THE QUEEN**  
Plaintiff

AND:

**JOHN REECE MCCORMICK**  
Defendant

CORAM: KELLY J

REASONS FOR DECISION

(Delivered 5 May 2011)

- [1] This case concerns (*inter alia*) about 6.5 kg of cannabis found by police in three buried containers in the bush near Darwin River (“the Darwin River site”). The Crown alleges that this cannabis was in the possession of the accused, John McCormick, and that McCormick supplied cannabis from those (and/or other) containers to Watt and Perry and attempted to supply cannabis from those containers to JJ, Sinclair and Chester.

**First Application to Discharge Jury**

- [2] During the trial, the defence made application to discharge the jury on the basis that certain allegedly inadmissible evidence was inadvertently placed before the jury by the Crown. I heard argument from counsel and dismissed that application on the ground that the evidence was admissible, and not such that I should exercise my discretion to exclude it. I gave brief oral

reasons at the time and indicated that I would provide detailed written reasons at a future date. These are those reasons.

- [3] McCormick was arrested at the Darwin River site on 10 July 2009. He has pleaded guilty to one count of unlawful possession of a commercial quantity of cannabis [count 8 on the indictment] which was in his possession at the time of his arrest. Count 3 on the indictment alleges an attempted unlawful supply of that cannabis to Leon Chester, who was waiting at the Darwin River site near McCormick's parked car at the time of the arrest.
- [4] In addition McCormick has been charged with two counts of supplying cannabis, two other counts of attempted supply of cannabis (in addition to the attempted supply to Chester) and five counts of possession of cannabis.
- [5] The counts are inter-related. Count 1 alleges supply of a quantity of cannabis to Gregory Perry; count 6 alleges possession of the amount of the drug supplied to Perry. Count 2 alleges supply to Alan Watt; count 7 alleges possession of the amount of the drug supplied to Watt.
- [6] Counts 3 and 8 are explained above.
- [7] Counts 4 and 5 allege attempted supply of cannabis to JJ and Natalie Sinclair respectively. The quantities to be supplied are not specified. JJ and Sinclair arrived at the Darwin River site while McCormick was in the bush collecting the cannabis which he pleaded guilty to possessing. They were detained by police who had McCormick and the Darwin River site under surveillance at the time. The Crown case is that McCormick was planning to supply JJ and Sinclair with cannabis taken from the containers (or one or more of the containers) which are the subject of counts 9, 10 and 11.

- [8] Counts 9, 10 and 11 charge Mr McCormick with possession of quantities of cannabis found by police in an ammunition box and two lengths of poly pipe buried in the ground at the Darwin River site.
- [9] The Crown adduced video surveillance evidence which showed McCormick meeting Watt at the Darwin River site on 9 July 2009, walking into the bush, and returning with something which he placed in Watt's car. The Crown also called evidence from police that they stopped Watt's car, searched it, and located 3 lbs of cannabis in the back.
- [10] Watt was called to give evidence. He described phoning a man he referred to as "Johnno" and arranging to meet him at the Darwin River site to buy cannabis. He said that he did meet Johnno there and did buy the cannabis which was found in his car from Johnno. He also said that he had heard the Darwin River site referred to as "an office". Watt was cross examined, but it was not suggested to him in cross examination that he had any innocent purpose for meeting McCormick at the Darwin River site, presumably because of the video surveillance evidence.
- [11] The Crown called further video surveillance evidence which showed Chester arriving at the Darwin River site on 10 July 2009, followed by McCormick. McCormick was then seen disappearing into the bush with an empty bag and returning with a bag containing what turned out to be 4 one pound bags of cannabis, following which he was arrested and charged.
- [12] Evidence was called that police searched the area on 9 July 2009 and located an ammunition box containing cannabis which is the subject of count 9. On 10 July 2009 they performed another search and found the two poly pipes nearby, both of which contained cannabis and which are the subject of counts 10 and 11.

[13] Police had intercepted and recorded telephone conversations on McCormick's home phone number pursuant to a warrant, and the Crown also called Officer Beecham to give evidence about the content of telephone conversations between McCormick and the people to whom McCormick was accused of supplying (or attempting to supply) cannabis, namely Watt, JJ, Sinclair, Perry and Chester.

[14] JJ, Sinclair, Perry and Chester were not called to give evidence, and so were unavailable for cross examination in relation to any innocent purpose they may have had for arranging to meet McCormick at the Darwin River site. The defence did not object to Beecham giving evidence about the content of McCormick's telephone conversations with those individuals.

[15] During his evidence Beecham said he had monitored about 800 intercepts from McCormick's phone and listened to them all – some more than once. During the playing of a taped conversation between McCormick and Chester, the Crown prosecutor drew attention to a reference in the conversation to the remark, "See you at the office," and asked the following question:

"After listening to the 800 calls more than once are you able to reach any conclusions with respect to what is being referred to (*ie by "the office"?*)"

[16] That question was objected to, and the objection was allowed on the ground that it was opinion evidence and the officer had not been qualified as having any special expertise by reason of training or experience. (Moreover, no basis for the opinion was sought to be led, and no process of reasoning was offered, simply a bald opinion.)

[17] After that objection was allowed, the Crown prosecutor asked Beecham the following questions without objection from the defence:

“Officer, in relation to ‘the office’, after listening to 800 telephone calls, had you come across such a reference during the course of that listening? - - Yes, I did.

“Can you recall on how many occasions you came across this reference? - - I can’t recall a specific amount but I can say through those 800 calls there was a consistent and frequent reference to ‘an office’.”

[18] During examination in chief of Beecham, the Crown prosecutor played six conversations on two CDs said to be conversations between McCormick and Perry. Those two CDs were tendered as Exhibit P25.

[19] The first conversation on the tendered CDs (referred to as Session 64) was a conversation on 23 June 2009 at 11:15 am in which Perry and McCormick agreed to arrange a time for a meeting in a further telephone call.

[20] The second conversation (referred to as Session 507) took place on 3 July 2009 at 3.53pm. In it, Greg Perry and McCormick arrange to meet at 5.30 pm that day.

[21] The next conversation in time was Session 515 which occurred on 3 July 2009 at 5:21 pm. At that time, McCormick and a person who identified himself as “Greg” had a brief conversation in which the following exchange occurred:

“GREG:                    Was that the Blackmore River or Darwin River?

MCCORMICK:          Darwin River.

GREG:                    Okay, mate, look I’m on my way back. I’m at Blackmore but I’ll be ‘bout 5 minutes, okay?

MCCORMICK: Um, I'm nowhere near there yet.

GREG: No worries, I'll be there when you get there then, mate."

[22] The next in time was Session 520, on 3 July 2009 at 5:33 pm, in which "Greg" again asked McCormick for directions. McCormick directed him to a little track "on the right hand side before you get to the bridge" (which is consistent with the Darwin River site where the video surveillance of McCormick was undertaken and the buried containers of cannabis were found). Then the following exchange occurred:

"GREG: Allright, what, are you in there now or are you still coming?

MCCORMICK: I'm still coming.

GREG: Yeah, it's just that when I drove in there before there's a white ute parked up in there.

MCCORMICK: Yeah, that's right, just go in there.

GREG: No worries. No worries mate. I'll just go in and park up and wait. "

[23] The next in time was at 5.42pm (Session 525) in which Greg Perry phoned McCormick and the following exchange occurred:

"PERRY: Oh, yeah. It's like Bourke Street at the office.

MCCORMICK: What's that?

PERRY: It's like Bourke Street at the office.

MCCORMICK: Yeah, I know. Fuckin' (inaudible) got fucked around by (inaudible). I'll be there shortly, eh?"

- [24] The next conversation (Session 776) took place on 8 July 2009 and was between Perry's "missus" and McCormick.
- [25] These conversations were on two CDs, Sessions 64, 507, 525, and 776 were on one CD, and Sessions 515 and 520 were on the other. They were tendered as "two CDs containing telephone conversations between Greg Perry, Trudy<sup>1</sup> and John McCormick" and marked EXHIBIT P25.
- [26] After the morning break, Officer Beecham gave evidence that he considered that conversations 515 and 525 were not in fact between McCormick and Greg Perry but between McCormick and someone else called Greg. The Crown prosecutor sought leave to withdraw the tender of the second CD and defence counsel announced that there were no objections. I then gave a new description to Exhibit P25.
- [27] After the jury broke for lunch, I raised with counsel concerns I had about what had occurred. My first concern was why the second CD had been withdrawn simply because Officer Beecham had expressed the opinion that the second voice was not that of Greg Perry. Following some discussion, it was agreed that the Crown prosecutor would make enquiries to ascertain whether the voice was definitely not that of Greg Perry.
- [28] My second concern was that, if the person on the second CD turned out not to be Greg Perry, the result of the withdrawal of the tender would be that the jury had just heard potentially prejudicial material which was not in evidence.

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<sup>1</sup> She identified herself as Greg Perry's (aka Angry's) "missus".

- [29] The next day, the Crown prosecutor advised that the voice on the second CD did not belong to Greg Perry (the subject of count 1), but to a person named Greg Alchin. (None of the charges on the indictment concerned Greg Alchin.)
- [30] Defence counsel then made application to vacate the trial on the ground that the jury had heard potentially prejudicial material that was not in evidence. The Crown prosecutor contended that the conversations between McCormick and Greg Alchin were relevant to matters in issue at the trial and indicated an intention to re-tender the second CD.
- [31] Defence counsel contended that the Alchin conversations were not relevant to any issue in the trial and were therefore inadmissible. The defence also contended that even if the conversations were peripherally relevant, nevertheless their prejudicial effect outweighed their probative value and I should therefore exclude them on discretionary grounds. It followed from that, that the trial should be abandoned.
- [32] Ultimately the Crown's position was that the conversations between McCormick and Alchin were relevant to counts 9, 10 and 11 – ie the charges of possessing the cannabis found in the buried containers at the Darwin River site.
- [33] The Crown contended that it had evidence that McCormick had gone to the Darwin River site on 3 July 2009 to sell cannabis to Perry – ie the charge in count 1. That evidence was:
- (a) the telephone conversation between McCormick and Perry at about 4.00 pm on 3 July 2009 arranging to meet at 5.30pm followed by the conversation between them at 5:42 in which Perry told McCormick,

“It’s like Bourke Street at the office,” and McCormick said he’d be there shortly;

- (b) Watt’s evidence that the Darwin River site was referred to as ‘an office’;
- (c) the cannabis actually found at the Darwin River site;
- (d) the video surveillance evidence taken on 9<sup>th</sup> and 10<sup>th</sup> July showing McCormick collecting cannabis from the bush at the Darwin River site; and
- (e) police evidence that when they searched Perry’s house on 7 July 2009 they located three 1 ounce bags and a 1 lb block of cannabis.

[34] It is apparent from the directions given to Greg Alchin by McCormick in Session 515 (at 5.21 pm) that McCormick was arranging to meet Alchin at the Darwin River site. It would be open for the jury to conclude from the timing and content of the conversations in Sessions 520 (between Greg Alchin and McCormick at 5.33 pm in which Alchin says there was someone already parked at the site when he got there) and 525 (between Perry and McCormick at 5.42 pm in which Perry says, “It’s like Bourke Street at the office”), that when Alchin got to the Darwin River site, Perry’s vehicle was already parked there, that Alchin drove away and then drove back again, and that both Alchin and Perry were at the Darwin River site at the same time waiting for McCormick to arrive. If the jury accepted, on the basis of the evidence set out in paragraph [33] above, that McCormick was meeting Perry at the Darwin River site for a drug deal, they could also infer that that was the purpose of meeting Greg Alchin there at the same time.

[35] It seems to me that the conversations between Greg Alchin and McCormick are relevant to counts 9, 10 and 11. It is one more piece of evidence from which the jury could infer that McCormick used the Darwin River site as a location to meet customers to supply them with cannabis. It is evidence which adds to the picture painted by the video surveillance evidence of McCormick meeting Watts at the Darwin River site on 9 July 2009 and supplying him with 3 lbs of cannabis, and meeting with Chester at the Darwin River site on 10 July 2009 and collecting 4 lbs of cannabis from a place in the bush nearby. They might also weigh in the balance the evidence that JJ and Sinclair (both of whom had had telephone discussions with McCormick) turned up at the Darwin River site shortly after Chester. From all of these pieces of evidence put together, the jury may infer that McCormick had a quantity of cannabis in vicinity of the Darwin River site and that the containers of cannabis actually found at that site by police were his. For that reason, I think the evidence of the conversations between Alchin and McCormick has probative value and is *prima facie* admissible.

[36] I accept that the evidence of the conversations between Alchin and McCormick has some prejudicial effect. I agree with defence counsel's submission that that prejudicial effect consists largely of the danger that it might be used for propensity reasoning in relation, not to charges 9, 10 and 11 for which I think it can properly be used, but to the other charges of supplying and attempting to supply cannabis to named individuals. I consider that in the circumstances that danger can be overcome by the use of a properly detailed direction in relation to the uses that can and cannot be made of that evidence. Moreover, I consider the potential prejudicial effect to be relatively minor: I do not think it outweighs the probative nature of the evidence.

[37] Defence counsel also submitted that it would be unfair to allow the conversations between Greg Alchin and McCormick into evidence because

Greg Alchin was not called as a witness and defence counsel did not have an opportunity to cross examine him with a view to establishing an innocent purpose to the meeting between Alchin and McCormick at the Darwin River site. Moreover, defence counsel pointed out that the defence had no prior notice that conversations between McCormick and Alchin would be put in evidence.

[38] However, I see no qualitative difference between the conversations between Greg Alchin and McCormick and the conversations between McCormick and JJ, Sinclair, Perry and Chester that were admitted without objection and without the opportunity to cross-examine the other parties to the phone calls to try and establish an innocent purpose. (This is particularly so in relation to Perry who appears to have met McCormick at the Darwin River site at exactly the same time as Alchin.) Defence counsel did not submit that he would have conducted his client's case any differently had he been given advance notice that the Crown would be tendering the CD of the conversations between Alchin and McCormick.

[39] Also, in my view, the evidence that McCormick spoke to Alchin and directed him to the Darwin River site at the same time that he was meeting Perry there, does not have any greater prejudicial value than the evidence of Officer Beecham that was allowed in without objection to the effect that he listened to about 800 telephone conversations between McCormick and a number of other people and that the term 'the office' was used "consistently and frequently" in those conversations. The conversations McCormick had with Watt, JJ, Sinclair, Perry and Chester contained the odd reference to "the office", but not "consistent and frequent" references; nor were there 800 of them. Therefore Beecham's evidence that there were consistent and frequent references to "the office" in the 800 calls is evidence from which (if they accept it) the jury might infer that McCormick arranged to meet many other people at the Darwin River site for the purpose of supplying

them with cannabis. That evidence, which went in without objection, seems to me to be potentially far more prejudicial than the evidence of two telephone conversations with Greg Alchin on the same day.

[40] I am therefore of the opinion that the evidence of the Alchin conversations is admissible and I would decline to exercise my discretion to exclude it. For that reason I decline to discharge the jury.

### **Second Application to Discharge Jury**

[41] The defence made a further application to abandon the trial after several members of the jury expressed concern at the fact that McCormick appeared to be sketching them, and one sent a note asking, “Is this allowed? It makes me uncomfortable.” I communicated those concerns to counsel and defence counsel informed me that McCormick had in fact been making sketches of things in the court room. It was explained by defence counsel that McCormick was “a talented man”. I was handed the sketch book which contained a number of sketches – one of which looked a bit like defence counsel, and others of which looked a bit like a number of jury members.

[42] Defence counsel made an application to discharge the jury and vacate the trial on the ground that the jury were “worried about” the defendant or saw him as a threat. My initial reaction was that it would be inappropriate to accede to an application by the defendant to discharge the jury based on the defendant’s own action in sketching them.

[43] Defence counsel then submitted that in the circumstances that had arisen, the jury might not be able to look at the evidence dispassionately as they are required to do. For example, if they saw the defendant as a threat, they may be motivated to convict him to remove the threat, or acquit him out of fear. After further discussion with both counsel, I brought the jury back in, read

out the questions I had received and told them the following with the concurrence of both counsel.

“I’m told that Mr McCormick was in fact doing some sketches. He’s a sign writer, as you heard, by profession and I’m told he has some artistic talent. And I’ve been given the sketches. And they appear to be simply an artistic endeavour. However, as I’ve been given them, I will destroy the sketches. And as I told you, I think, at the beginning of the opening, it is in any event an offence to identify any person as having been a member of any particular jury and that is there for the protection of jury members.

So hopefully that will allay any of your concerns. But I should ask you, is there anyone on the jury who believes that he or she cannot bring an objective and impartial mind to assessing the evidence and deciding on a verdict?”

[44] No member of the jury indicated that they would be unable to bring an objective and impartial mind to assessing the evidence and deciding on a verdict. Rather, there was a fairly general, mostly non-verbal indication that they had no such problems – head shaking and so forth.

[45] Having received that indication, I did not discharge the jury and allowed the trial to continue.

“The test to be applied in this country for determining whether an irregular incident involving a juror warrants or warranted the discharge of the juror or, in some cases, the jury is whether the incident is such that, notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially.”<sup>2</sup>

[46] I am satisfied, on the basis of the question I asked the jury, and the response I received, that the initial concerns expressed by the jury about

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<sup>2</sup> Webb v The Queen (1994) 181 CLR 41 per Mason CJ and McHugh J at p 53.

McCormick's sketching had been allayed and, ultimately, were not such as to give rise to a reasonable apprehension or suspicion on the part of a fair minded member of the public that the jury would not discharge its duty impartially in the circumstances.