Wise v The Queen [2019] NTCCA 10

PARTIES:	WISE, Nicholas 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 8 of 2018 (21651244)
DELIVERED:	15 May 2019
HEARING DATES:	7 and 8 March 2019
JUDGMENT OF:	Kelly and Barr JJ and Riley AJ

CATCHWORDS:

CRIMINAL LAW – Appeal – Evidence – Principle against splitting prosecution case – Prior inconsistent statement – Cross-examination of accused about prior inconsistent statement – Issue initially raised during accused's evidence in chief – No objection raised at time of cross-examination – Held not impermissible splitting

CRIMINAL LAW – Appeal – Evidence – Principle against splitting prosecution case – Contradictory evidence – Cross-examination of accused about contradictory evidence – Issue initially raised during accused's evidence in chief – No objection raised at time of cross-examination – Held not impermissible splitting

CRIMINAL LAW – Appeal – Summing up – Application of the law – Aiding – General direction adequate

CRIMINAL LAW – Appeal – Misdirection and non-direction – Suggestion in prosecution closing address that accused would lie to avoid gaol – No objection by defence counsel – Presumption of innocence – Judge's direction required to provide 'antidote' – Not given – Appeal allowed

CRIMINAL LAW – Appeal – Evidence – Permitted use – Guilty pleas of alleged principals or co-offenders as explanation for absence in current proceedings – Non-permitted use in prosecution summing up – Jury direction inadequate – Held no miscarriage of justice

Palmer v The Queen [1998] HCA 2, 193 CLR 1; *Shaw v The Queen* [1952] HCA 18, 85 CLR 365; *R v Soma* [2003] HCA 13, 212 CLR 299; *Ramey v The Queen* (1994) 68 ALJR 510; *Robinson v The Queen* [1991] HCA 38, 180 CLR 531; *Stafford v The Queen* (1993) 67 ALJR 510, applied

Fuller v The Queen [2013] NTCCA 10, followed

R v Parsons; R v Brady [2015] SASCFC 183, referred to

REPRESENTATION:

Counsel:

Appellant:	M Shaw QC, A Culshaw
Respondent:	D Morters SC, T Grealy

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	19

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

Wise v The Queen [2019] NTCCA 10
No. CA 8 of 2018 (21651244)

BETWEEN:

NICHOLAS WISE
Appellant

AND:

THE QUEEN
Respondent

CORAM: Kelly and Barr JJ and Riley AJ

REASONS FOR JUDGMENT

(Delivered 15 May 2019)

THE COURT:

[1] Following a trial before a jury, the appellant was convicted of the offence of unlawful entry of a building with intent to commit the offence of assault. The prosecution case was that on 5 October 2016 the appellant in the company of other men entered a house in Yarrawonga with the intention of assaulting a man named Tyrone Kerslake. Kerslake was not there and a man named Bradley Jewell was attacked instead. There was no dispute that the attack took place at the hands of one or more masked men armed with hatchets and a machete and that there were other masked men present.

[2] The prosecution case was that there had been a dispute between Kerslake and Shannon Althouse which culminated the week before the offending with Kerslake running over Althouse in a motor vehicle while another man, Andrew Summerfield, was present. It was alleged that on 5 October 2016 the appellant, Althouse and Summerfield went to Mitchells Camping where they purchased three balaclavas and two machetes, one of which was to be picked up from another store. They then went to Bunnings where they purchased two hatchets. The attack upon Jewell occurred later that night. Because of the disguises worn by the men involved in the attack Jewell was unable to identify them although he gave evidence that the man who attacked him with a hatchet had a gait and build which reminded him of Summerfield.

[3] Subsequent searches of the house where Summerfield and Althouse were living located a hatchet with blood on it. DNA testing suggested the blood belonged to Jewell. The searches also revealed the remnants of a fire which contained fibres consistent with the balaclavas and the personal effects of the appellant, including his mobile phone, which suggested he was living there. There was no dispute that the appellant was living there at the time of the offending.

[4] A 000 call relating to the incident was made on 5 October 2016 at 8:26 pm. Evidence presented to the Court revealed a gap in mobile phone communications by the appellant between 8:07 pm and 9:35 pm on that night. A search of that phone recorded a note with the name “Fraser” and a mobile phone number stored on the phone at 9:37 pm. Mr Kyle Fraser was

called to give evidence and said that he had visited the home of Summerfield and Althouse at about that time on 5 October 2016. It was put to him on behalf of the appellant, and it was the evidence of the appellant, that Fraser was one of the masked men who assaulted Jewell. This was denied by Fraser. Fraser's phone indicated that it had connected with a mobile phone tower in Bellamack at 8:22 pm and 8:46 pm. The significance of this information was that, on the prosecution case, it tended to suggest that Fraser was not in Yarrawonga when the assault on Jewell occurred.

[5] The appellant was interviewed by police and in his record of interview he stated that he went to sleep at 8:00 pm on 5 October 2016. It was the prosecution case that this was a lie and the fact that it was a lie was established by the timing of the "Fraser" note on his mobile phone.

[6] Shortly before the trial of the appellant commenced both Summerfield and Althouse pleaded guilty to offences on the basis that they were not directly involved in the attack upon Jewell but that they had arranged it. Those pleas, and the basis for them, were admitted into evidence in the trial of the appellant through the investigating police officer.

[7] The appellant gave evidence at his trial in which he acknowledged that he had been staying at the house of Summerfield and Althouse on 5 October 2016. He acknowledged that he had visited Bunnings and Mitchells Camping with Summerfield and Althouse on that day and that the purchases were made and paid for on his credit card. He said he was told Summerfield and

Althouse were obtaining those items to protect themselves in case Kerslake came to their house. He said Althouse was the one who had the balaclavas.

[8] The appellant said that on 5 October 2016 there was a barbecue at the house and he drank "upwards of 20 to 24" bottles of beer over the course of the afternoon and the night. He said that four men left the barbecue and each was wearing black. The four men who left the barbecue were identified by the appellant as Fraser, Summerfield, and two men named Taiku Pitt and Tim Fairman. The appellant said Althouse did not leave the house and was in bed and effectively incapacitated as a result of the injuries suffered at the hands of Kerslake. When the four men returned Summerfield cleaned a Tomahawk in a solution in a bucket and also threw a handful of black clothing on the fire. In relation to the use of his mobile phone the appellant said that it was not uncommon for him not to use his phone for a period and, although he could not remember, he thought he may not have used the phone because he was trying to calm the wife of Fairman in his absence. The Crown tendered the appellant's telephone records showing that he had been sending texts to a woman almost continually during the evening up to 8:07 pm and again after 9:35 pm.

[9] In relation to his subsequent interview with police officers the appellant said he did not tell the police what he had observed that night, instead telling police he went to bed at 8:00 pm, because he feared reprisals from the Rebels Outlaw Motorcycle Gang, of which both Althouse and Summerfield

were senior members. He said that he was now speaking about it because "I am on trial – fighting for my life, really".

[10] The case for the prosecution was that the appellant was either present at the time of the attack upon Jewell or otherwise aided the perpetrators to commit the offence.

Ground 1: Splitting the Crown case

[11] The first ground of appeal was that the fair trial of the appellant miscarried as a result of splitting the Crown case. Complaint was made that the Crown, through cross-examination of the appellant, sought to elicit evidence, not led by the prosecution in its case, suggesting that the appellant did not want to return to Darwin, and evidence suggesting he lied about the level of incapacity of Althouse on the night the assault took place.

[12] It was not disputed that there is a general principle that the prosecution should not split its case unless the circumstances are exceptional. The prosecution must offer all its proofs during the progress of the Crown case and before an accused, in this case the appellant, is called upon for his defence.[1] In the present case it was submitted that the effect of the questioning of the appellant by the prosecutor was to split the prosecution's case and, potentially, mislead the jury as to the state of the evidence.

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1 *Shaw v The Queen* [1952] HCA 18, 85 CLR 365 at 380; *R v Soma* [2003] HCA 13, 212 CLR 299 at 311[36]; *Fuller v The Queen* [2013] NTCCA 10 at [37]

[13] Two specific topics were identified to demonstrate the splitting of the Crown case. The first was a suggestion put to the appellant in cross-examination that, rather than being anxious to fly back to Darwin from his workplace to speak with police and to tell his story as he claimed in his evidence in chief, he had in fact asked his employer to fly him to Broome rather than Darwin. The appellant denied this. There was no objection to the cross-examination and the trial judge was not asked to rule on its fairness or admissibility. It was initially submitted on behalf of the appellant that the evidence was available for use as evidence of consciousness of guilt and that the prosecution should at least have given notice that it might be relied upon. However, it was subsequently acknowledged on behalf of the appellant that the information had been disclosed to the appellant in the course of a bail application prior to the proceedings commencing.

[14] We do not see any unfairness in the particular circumstances. It is to be noted that at trial it was the appellant who first raised the issue of his desire to return to Darwin in his evidence in chief, suggesting he was keen to give police his side of the story. It was not a new matter raised by the Crown in cross-examination but was raised to challenge the appellant's claim. Further, the matter was addressed by the trial judge when her Honour noted that the appellant had said the suggestion was "absolute rubbish" and her Honour pointed out that there was no evidence to support the suggestion. The jury was specifically directed to disregard the suggestion. In the circumstances there was no unfair prejudice to the appellant.

[15] The second identified topic involved cross-examination of the appellant to the effect that he "liked" a Facebook post of an image of Althouse showing him in hospital "flexing his muscles" and, apparently, not as seriously incapacitated by his injuries as the appellant claimed in his evidence. The evidence of the appellant had been that Althouse did not leave the house and that he was "in bed almost solely" and only "come out once, maybe twice". The appellant agreed he had "liked" the post, but observed that he would "like 100 things in a day" on Facebook. Again, there was no objection to the cross-examination and the trial judge was not asked to rule on its fairness or admissibility. Again, this was a matter which arose for the first time out of the evidence in chief of the appellant. The image would not have been relevant to any part of the prosecution case but for the claim by the appellant as to the extent of the incapacitation of Althouse at the time of the offending in support of his evidence that Althouse was not one of the four who left the house dressed in black. In addition to the Facebook image, there was other evidence of the capacity of Althouse on the day of the offending, namely the CCTV footage of him present at Bunnings purchasing the items mentioned above.

[16] In neither of the matters raised by the appellant was there a relevant splitting of the prosecution case. There was no objection to any of the cross-examination at the time of trial. Each matter arose in relation to claims first raised by the appellant in his evidence in chief. They were not relevant to the prosecution case before that time. Even if that were not so, in our view

the impact of the questions and answers was so minimal as to not give rise to a miscarriage of justice.

[17] This ground of appeal is dismissed.

Ground 4: Failure to adequately apply the law

[18] The appellant claimed the learned trial judge erred as a matter of law in her directions to the jury by failing to adequately apply the law to the facts and the defence case in respect of the separate counts and the separate routes to liability on each.

[19] This ground of appeal changed during the course of the hearing. Initially the appellant contended that the trial judge erred in directing the jury that common purpose under the *Criminal Code* was a "stand alone route to guilt". Following discussion it was then submitted that her Honour erred in failing to direct the jury in relation to common purpose, that it is necessary to prove that there was a common purpose between the appellant and the people who actually committed the offence, and the jury needed to consider that question.[2] Finally, it was submitted that her Honour provided legal directions but did not actually address the evidence in relation to those directions. In short, it was submitted that the trial judge did not relate the law to the evidence and the issues in the case.[3] Counsel for the appellant concluded:

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2 Appeal transcript 77
3 Appeal transcript 82 and 83

> We are not complaining about the directions and their instruction, but we say they don't go to the next step and identify the different scenarios that arose in terms of common purpose… If, in terms of a fair trial for the accused, this Court is not in a position to examine whether or not the jury may have taken one of the routes that is open, but about which they have had no directions on the defence case because her Honour simply did not apply those directions to the different scenarios.

[20] The ultimate submission of the appellant in relation to this ground of appeal seems to have been that there were three separate pathways to a finding of guilt namely:

a) the appellant was a direct participant in the attack upon Jewell;

b) the appellant aided Althouse and Summerfield who carried out the attack knowing that they were going to do so; or

c) the appellant aided Althouse and Summerfield in purchasing the weapons and balaclavas knowing those items were to be used by someone in the attack upon Jewell.

[21] In this regard the trial judge addressed the jury in relation to the concept of aiding and then said:

> So when you are considering aiding and whether the Crown has proved guilt by way of aiding, not only does the Crown have to prove that the aiding was by way of assisting with the purchase of weapons and the balaclavas, but that at the time that (the appellant), if you find him to be aiding in that way, at the time he did that, that he intended to aid the principal offenders to unlawfully enter the building at Yarrawonga while they possessed an intention to commit the offence of assault.

[22] The complaint of the appellant was that in directing the jury in such general terms, speaking of "the principal offenders", the trial judge did not allude to

the three possibilities mentioned above and therefore this Court could not know which path the jury took to come to a verdict of guilty.

[23] In our opinion the direction was adequate. In relation to aiding, it was necessary for the jury to be satisfied to the requisite standard that the appellant aided Althouse and Summerfield by purchasing the weapons and balaclavas knowing that Althouse and Summerfield intended them to be used by someone to attack the occupant of the Yarrawonga property. That is the effect of the direction provided by her Honour.

[24] In our opinion there is no substance to this ground of appeal. Leave to appeal had not been granted in relation to this ground. Leave to appeal is refused.

Grounds 2 and 3: Interest of the appellant in the outcome of the trial

[25] The appellant complains that the prosecutor improperly cross-examined the appellant and, further, the trial miscarried as a result of the prosecutor's closing address. In the course of cross-examination the appellant was challenged as to why he told one story to the police and a different story to the jury. He said that when he spoke to police he was scared of the Rebels (Rebels Motorcycle Gang – of which Althouse and Summerfield were senior members) and "what would happen if I did speak". He said he now spoke about the events because he was "on trial fighting – fighting for my life, really".

[26] In his closing address the prosecutor made the following submission:

> He tells a story which demonstrates his innocence. But unfortunately, you could have no confidence whatsoever in the evidence he gave to you from that witness box and I really just want to take you through those reasons why you couldn't be so satisfied with that evidence.
>
> He told you, and it was a very telling line that he used at one point in time. He said "I am fighting for my life" and he is fighting for his life. He does not want to go to gaol. There is no doubt about it. The fact that he might go to gaol is not a relevant consideration for you. What will happen will happen. Your duty is to decide whether the offence is proved beyond reasonable doubt. It is no more than that.
>
> When you do fight for your life you do anything you have to save yourself. He was determined, I would suggest, to provide an account to you that would convince you of his innocence. He had obviously studied in great detail the police brief of evidence which he conceded he had had access to for close to 12 months and he had rehearsed that evidence that he was going to give you at length.
>
> Who wouldn't? Of course that would be something that somebody would do if they knew they were coming along to face a trial where such serious allegations were being made against them. I'm not suggesting that I wouldn't do the same thing or any of you wouldn't do the same thing if you were in that situation. Of course you would.

[27] It was submitted on behalf of the appellant that the effect of the submission was that the appellant was "lying because he did not want to go to gaol".

[28] Reference to the interest of a defendant in the outcome of a criminal trial may amount to an error of law on the basis that it undermines the presumption of innocence.

[29] In *Robinson v The Queen*[4] the High Court dealt with a case in which the trial judge had informed the jury that they might think "the accused had the

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4 *Robinson v The Queen* [1991] HCA 38,180 CLR 531 at 535-536; A very helpful discussion of the principle in *Robinson v The Queen* is to be found in *R v Parsons; R v Brady* [2015] SASCFC 183.

greatest interest of all the witnesses… and that, therefore, you should scrutinise his evidence closely". Despite the judge having provided the usual directions as to the onus of proof and dealing with the evidence of an accused person the Court observed:

> Notwithstanding the correctness of his Honour's directions concerning the onus and standard of proof, however, it is impossible to escape the conclusion that the fairness of the trial was seriously impaired by the effect of his directions concerning the interest of a witness in the outcome of the case. The jury could hardly escape the conclusion that the appellant had "the greatest interest of all the witnesses" in the outcome of the case. Indeed, his Honour had suggested to the jury that they might think that the appellant had a greater interest than any other witness in the outcome of the case. If the jury accepted that suggestion, as they almost certainly would have, his Honour's directions had the effect that the evidence of the appellant had to be scrutinised more carefully than the evidence of any other witness, including the complainant, for no reason other than that he was the accused. The unfairness of such a direction is manifest, particularly when the outcome of the trial inevitably turned upon the jury's preference for the evidence of the complainant against that of the accused.
>
> …
>
> Furthermore, his Honour's directions on the point do not sit well with the presumption of innocence which is the consequence of a plea of not guilty. If the presumption is to have any real effect in a criminal trial, the jury must act on the basis that the accused is presumed innocent of the acts which are the subject of the indictment until they are satisfied beyond reasonable doubt that he or she is guilty of those acts. To hold that, despite the plea of not guilty, any evidence of the accused denying those acts is to be the subject of close scrutiny because of his or her interest in the outcome of the case is to undermine the benefit which the presumption gives to an accused person.

[30] The Court observed that such a direction constituted a serious misdirection which strikes at the notion of a fair trial for an accused person and, except

in exceptional cases, such a direction "inevitably disadvantages the evidence of the accused when it is in conflict with the evidence for the Crown".

[31] In *Stafford v The Queen*,[5] the High Court followed *Robinson v The Queen* observing that, if the circumstances of a particular case are exceptional and require some reference to the interest of the accused in the outcome of proceedings then, as a matter of fairness to the accused:

> It should suffice to inform the jury that they must approach the case on the basis that the accused is presumed innocent of the acts which are the subject of the indictment and that it would be wrong and unfair for the jury to discount the evidence of the accused simply for the reason that, as the accused, he or she has a particular interest in the outcome of the trial.

[32] In *Ramey v The Queen*,[6] the High Court again adopted the principle laid down in *Robinson v The Queen*, observing that:

> It is not to be eroded by Courts of Criminal Appeal nor, a fortiori, by trial judges by failing faithfully to apply the prohibition against the giving of a direction to evaluate the evidence of an accused on the basis of the accused's interest in the outcome of the case.

[33] In *Palmer v The Queen*,[7] Kirby J discussed the principle adopted in *Robinson v The Queen* and stated:

> But as I read the rule in *Robinson*, it is a simple one, easy to apply. Neither by questions nor submissions, nor by judicial directions may it be suggested that an accused's denial is undermined and an accuser's accusation strengthened, by the obvious fact that the accused has an interest in acquittal.

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5 *Stafford v The Queen* (1993) 67 ALJR 510 – a special leave application
6 *Ramey v The Queen* (1994) 68 ALJR 510 – a special leave application
7 *Palmer v The Queen* [1998] HCA 2, 193 CLR 1 at 42-43

[34] The authorities to which we have referred have generally addressed this issue in the context of directions by a trial judge to a jury. In the present case the invitation to test the evidence given by the appellant according to the interest he had in the outcome of the trial came from the Crown prosecutor. Once the matter was before the jury it was necessary for a direction to be provided by the trial judge to remedy the situation or, as it is expressed in some of the authorities, provide an antidote.

[35] A direction of the kind discussed in *Stafford*[8] to the effect that "it would be wrong and unfair to discount his evidence simply for the reason that he has a particular interest in the outcome of the trial" was required.

[36] The trial judge discussed the approach the jury should take to the evidence of the appellant in general terms consistent with directions commonly given in relation to such matters. Her Honour emphasised that the onus of proof rested upon the prosecution. No exception is taken in relation to those directions.

[37] In the summing up her Honour briefly reminded the jury of the Crown submission saying:

> However, it was submitted to you that you could not be satisfied with his testimony, with statements such as: "I am fighting for my life". It was submitted to you that (the appellant) would do anything to save himself.

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8 *Stafford v The Queen* (1993) 67 ALJR 508, see [27] above

[38] There was no direction of the kind referred to in *Stafford*. There was nothing to correct the invitation made to the jury by the prosecutor to test the evidence given by the appellant according to the interest he has in the outcome of the trial. There was a failure to address the unfairness going directly to matters relating to the presumption of innocence and the assessment of the evidence given by the appellant.

[39] Defence counsel at the trial did not protest, did not draw the trial judge's attention to these authorities and did not request that such a direction be given. Nevertheless, the authorities are clear. In these circumstances, the appropriate direction not having been given, the appeal must be allowed.

Grounds 2 and 3: Improper cross-examination and address

[40] The appellant contended there were other examples of lines of cross-examination and address which were not the subject of evidence in the prosecution case or which did not accurately reflect the evidence. In particular it was claimed that the prosecution made assertions without evidence regarding reasons for the appellant's phone being off at about the time of the offending; there being substantial publicity about the offending; that the appellant had "rehearsed and rehearsed" his evidence; and regarding the link between mobile phones and phone towers.

[41] The appellant submitted that the identified matters individually and in combination caused a miscarriage of justice. The suggestion that they individually caused a miscarriage was not the subject of detailed

submissions and the effect of the matters considered in combination was limited to a submission that this was something to be taken into account in conjunction with all of the grounds of appeal leading to a conclusion that there was a miscarriage of justice.

[42] In light of the conclusion we have reached that the appeal should be allowed it is not necessary to address these matters individually. However, we note in passing that, in our opinion, the appellant's complaints were not sustained by a fair consideration of the evidence led before the jury and the submissions made by the prosecutor to the jury.

Ground 5: **The guilty pleas**

[43] The appellant was originally charged along with Althouse and Summerfield. However, Althouse and Summerfield entered pleas of guilty prior to the commencement of the trial. Those pleas were based upon an acceptance by the Crown that neither Althouse nor Summerfield were present at the time of the attack but that they had arranged it. Those pleas and the bases for them were entered into evidence through a police officer.

[44] The evidence of the pleas was entered without objection.[9] However, it is not in dispute that the agreed and sole purpose for the receipt of the evidence was to explain to the jury the absence of Althouse and Summerfield from the proceedings.

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9 Section 190 of the ENULA permits such admission.

[45] The complaint of the appellant is that counsel for the Crown in his summing up went beyond the agreed limitation. Counsel made reference to the plea and to the qualification that it was on the basis "that they got others to carry out the assault rather than being present when the acts were committed". Counsel then said "that doesn't mean that we accept what they say about what happened is actually what happened". Reference was made to liability for criminal acts when the offender is not present and, in the circumstances of this matter, that "they are just as guilty no matter which way they do it".

[46] The appellant submitted that counsel then went beyond the agreed limitation in the following submission:

> Ladies and gentlemen, it is overwhelmingly clear it was the accused. He was hanging out with his gangster mates. He was buying weapons and disguises. He was heading out with two people who had the motive to engage in this conduct and have pleaded guilty in relation to it. He had the opportunity to commit the offence, his phone obviously having been switched off and not receiving messages and then lying about what happened both to the police and to you when he gave evidence. (*emphasis added*)

[47] Rather than using the evidence for the simple and confined purpose of explaining the absence of Althouse and Summerfield, the submission had the effect of using the pleas as direct evidence that Althouse and Summerfieldwere guilty of the offending as principals. This was an impermissible use of the otherwise inadmissible evidence. Counsel for the appellant emphasise that this was important because, apart from the guilty plea by Althouse, there was no direct evidence Althouse had been involved

in the attack. However, this ignores the evidence that Althouse was with the appellant and Summerfield buying the weapons and the balaclavas.

[48] In summing up the trial judge referred to the entry of pleas of guilty by Summerfield and Althouse and reminded the jury that "the pleas of guilty were entered on the basis that they did not participate in the attack upon Mr Jewell, but they engaged others to do so". Her Honour noted that this information was placed before the jury:

> … so that you know that Mr Summerfield and Mr Althouse are being dealt with, otherwise you might wonder why they are not on trial before you. Beyond explaining what proceedings have been brought against them, you are not to use that actual fact that they have pleaded guilty to two charges as evidence against (the appellant) so, that is not evidence against (the appellant) they have been dealt with in separate proceedings and I direct you that although it is perfectly permissible for you to know what the court record is in relation to them, you cannot use that as evidence against (the appellant).

[49] In light of this submission by the prosecutor, it would have been desirable for her Honour to direct the jury to disregard any reliance by the prosecution on the pleas of Althouse and Summerfield in order to bolster the prosecution case in any respect.

[50] In our opinion the submission made by counsel for the prosecution was inappropriate. It impermissibly breached the basis upon which the otherwise inadmissible evidence was received. However, whilst it would have been desirable for her Honour to provide a stronger and more direct warning to the jury, correcting what had been said by the prosecutor, we do not

consider that the circumstances of this ground, considered alone, would have led to a conclusion that a miscarriage of justice occurred.

[51] In light of our conclusion that the appeal should be allowed on other grounds, we do not need to consider this matter further.

[52] The appeal will be allowed and a new trial ordered.
