Cant v The Queen [2002] NTCCA 8

PARTIES:	CRAIG CANT
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 14 of 2000
DELIVERED:	17 SEPTEMBER 2002
HEARING DATES:	16 SEPTEMBER 2002
JUDGMENT OF:	ANGEL and MILDREN JJ; PRIESTLEY AJ

CATCHWORDS:

CRIMINAL LAW – JURY – indifference of juror – juror made reference to Appellant's criminal history and other pending charges in jury room – dissension amongst jurors - whether trial judge should question jurors – whether juror or jury ought to be discharged – real suspicion as to bias raised

CRIMINAL LAW – APPEAL – appeal on conviction - trial judge failed to ascertain whether juror biased – whether Crown case was so overwhelming that 'proviso' should be applied – irregularity more than having mere prejudicial or inadmissible material before the jury – failure by trial judge amounted to a fundamental error which departed from requirement of fair trial – no room for proviso – conviction quashed and retrial ordered

Criminal Code NT s 373, s 411(2)
Customs Act 1901 Cth s 233B

R v McKeon [1961] NSWR 249, *R v Orgles* [1994] 1 WLR 108, considered
Webb v The Queen (1993-1994) 181 CLR 41, followed
Wilde v The Queen (1998) 164 CLR 365, approved

REPRESENTATION:

Counsel:

Appellant:	P Boulten
Respondent:	R Hanson QC, G Fisher

Solicitors:

Appellant:	Dalrymple & Associates
Respondent:	Commonwealth Director of Public Prosecutions

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IN COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Cant v The Queen [2002] NTCCA 8
No. CA 14 of 2000

BETWEEN:

CRAIG CANT

Appellant

AND:

THE QUEEN

Respondent

CORAM: ANGEL and MILDREN JJ; PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 17 September 2002)

THE COURT:

[1] On 5 April 2000 the appellant was convicted following a unanimous verdict of guilty of one count of being knowingly concerned in the importation of a commercial quantity of cannabis resin, contrary to s 233B of the *Customs Act 1901* (Cth).

[2] The appellant has appealed against his conviction on a number of grounds. After hearing argument on the first ground the Court was unanimously of the opinion that the appeal must succeed. Accordingly the Court ordered that the appeal be allowed, that the conviction be quashed, and that there be a new trial. We said that we would publish our reasons for doing so at a later time. These are our reasons.

[3] The first ground of appeal concerned the failure of the learned trial judge to question a juror about whether, in the circumstances, that juror remained indifferent as between the prosecution and the accused, and the subsequent failure of the learned trial judge to discharge that juror.

[4] The circumstances which arose were that towards the end of the prosecution case, a note was handed to the learned trial judge from one of the jurors which read as follows:

> "I believe I should inform you of certain discussions amongst jurors concerning Craig Cant's criminal history. Last week a juror commented that he is facing two other charges in addition to the current charge before the court. A heated exchange followed where several jurors stressed that this is no concern to us and our decision should be based upon the facts presented as evidence. While I am unable to comment upon the extent to which those discussions may have influenced jurors if at all, I believe the matter should be brought to your attention."

[5] At the commencement of the trial, the learned trial judge had instructed the jurors that it was vital that they decide the case only on the basis of the evidence presented in court, that they were to put out of their minds anything they may have heard or read about the case, or any vague recollections they may have of anything they had read in the press. In fact the appellant had other charges involving drugs pending against him in the

Northern Territory, New South Wales and Queensland. The other matter pending in this Court involved a charge of being knowingly concerned in the importation of a prohibited drug (ecstasy), about which there had already been some considerable media publicity of which his Honour was well aware.

[6] Counsel for the appellant initially requested his Honour to enquire into the extent and nature of the jury's discussion about this topic. His Honour rejected this course because this would require enquiry from the juror who wrote the note as to the identity of the juror concerned, "and that no doubt would lead to further enquiries of probably each individual juror's knowledge and attitude to what they have been told." His Honour indicated that he proposed to give to the jury very firm directions to disregard whatever they may have heard concerning other charges against the appellant.

[7] Counsel for the appellant then applied to have the unknown juror excused. His Honour rejected that application on the ground that there was no point to it – either the whole jury should be discharged or the matter dealt with by directions, and his Honour considered that the matter could be dealt with by direction. There was no application made to discharge the whole jury.

[8] The learned trial judge immediately directed the jury about the necessity to decide the case on the evidence; that there was no evidence that the accused was facing any other charges; that whether or not the accused was facing

other charges is irrelevant; about the presumption of innocence; and the solemn oath or affirmation to faithfully try the issues and a true verdict given upon the evidence. The direction given was full and in strong terms. However, this was not a case where his Honour could have said that the information about other charges was wrong – so to that extent the direction given carried the implication that the appellant was indeed facing other charges.

[9] The difficulty that faced his Honour was that, notwithstanding the direction given at the beginning of the trial, it was alleged by a juror that another juror had ignored this direction and raised with other jurors the fact that the appellant was facing other charges. Obviously if a witness had sought to give evidence about such a matter there would be a real risk that the trial would have miscarried: c.f. *R v McKeon* [1961] NSWR 249. However, in this case, the matter of the other charges came from one of the jurors, so not only had other jurors become possessed of inadmissible and highly prejudicial information, but because it came from one of the jurors, it gave rise to a question about that juror's impartiality as a juror. The inference of apprehension of bias on the part of the unknown juror was strong given that the trial judge had already directed the jury in the terms mentioned above at the beginning of the trial, a direction which apparently one juror had decided to ignore. Moreover, according to the note, this gave rise to "a heated discussion" which implies that the unknown juror, and perhaps others

as well, were not prepared to act according to their oaths or affirmations as jurors.

[10] It is fundamental that jurors, like judges, must be impartial and appear to be so. The test to be applied to jurors is whether the incident is such that, notwithstanding any warning or direction given by the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair–minded member of the public that the juror or the jury has not discharged or will not discharge his, her or their task impartially: *Webb v The Queen* (1993–1994) 181 CLR 41.

[11] We consider that his Honour erred in not making enquiries so as to ascertain the true facts, and whether or not, once those facts had been ascertained, the juror in question, and possibly some other jurors or perhaps even the whole jury, should have been discharged: see s 373 of the Code. Senior counsel for the Commonwealth Crown, Mr Hanson QC submitted that the proposed course of identifying the individual juror concerned was inappropriate and referred us to the decision of the Court of Criminal Appeal in *R v Orgles* [1994] 1 WLR 108 at 112–113 where the Court expressed the view that such a course is inappropriate where the problem is internal to the jury, and that in those circumstances the whole jury should be questioned in open court. We do not think that there is any hard and fast rule about how this should have been done in the circumstances of this case. Be that as it may, as their Lordships recognized at pp 112–113, in circumstances like this, it is the

duty of the trial judge to enquire into and deal with the situation so as to ensure a fair trial, and no enquiry of any kind was made.

[12] We are left not knowing what in fact were the circumstances, but with an allegation made by a juror which raised serious doubts about the impartiality of at least one other juror, in circumstances where there are also serious doubts about whether any direction given by the learned trial judge would have been acted upon.

[13] Mr Hanson QC submitted that the Crown case was so overwhelming that the "proviso" should be applied : see s411(2) of the Code. However, the irregularity in this case goes further than the mere fact that prejudicial and inadmissible material was before the jury. It raises a real suspicion as to whether or not at least one of the jurors was biased, or not indifferent, a matter which cannot now be resolved. The accused was convicted by a jury at least one of the members of which cannot be demonstrated was indifferent between the appellant and the Crown. In *Wilde v The Queen* (1998) 164 CLR 365, the High Court held that where an error is so fundamental as to depart from the essential requirements of a fair trial, there is no room for the proviso. It was submitted by counsel for the appellant that the error goes to the root of the proceedings because it is fundamental that a conviction arrived at by a jury one of the members of which is infected with apparent bias cannot stand: *Webb v The Queen*, supra, at 62, per Brennan J. We do not think that the respondent is entitled to rely on the "proviso" in this case.

[14] Accordingly, the appeal must be allowed, the conviction quashed and a new trial ordered.