Barr v The Queen [2004] NTCCA 1

PARTIES:	BARR, Stephen Michael
	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 1 of 2003 (20008991)
DELIVERED:	16 April 2004
HEARING DATES:	26 March 2004
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & MILDREN JJ

CATCHWORDS:

CRIMINAL LAW

Appeal – evidence – admissibility – evidence of prior insurance claim – whether schedule to insurance policy admissible – whether record of interview admissible – whether opinion evidence admissible – duty of counsel for the Crown and accused – duty of trial Judge to give proper directions and warnings to jury – burden and standard of proof – reasonable doubt – whether trial Judge misdirected jury – appeal allowed.

Criminal Code Act (NT), s 227(1).

The Queen v Ireland (1970) 126 CLR 321, at 331, applied.
Woon v The Queen (1964) 109 CLR 529, at 535 and 541, applied.
R v Wilson, Tchorz and Young (1986) 42 SASR 203, at 206 and 207, applied.
Smith v The Queen (2001) 206 CLR 650, at 653, considered.
R v Plevac (1995) 84 A Crim R 570, considered.
Green v The Queen (1971) 126 CLR 28, considered.

REPRESENTATION:

Counsel:

Appellant:	S Cox
Respondent:	M Carey & N Rogers

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

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

Barr v The Queen [2004] NTCCA 1
No. CA 1 of 2003 (20008991)

BETWEEN:

STEPHEN MICHAEL BARR
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 16 April 2004)

Martin (BR) CJ:

[1] The appellant was convicted by a jury of obtaining property by deception contrary to s 227(1) of the Criminal Code. In substance, it was the Crown case that the accused fraudulently pretended that his BMW motor vehicle had been stolen and damaged and fraudulently made a claim under his insurance policy. As a consequence of the claim, the Territory Insurance Office paid $16,545.10 to the appellant.

[2] The critical issue in dispute was whether the Crown had proved that the appellant damaged his own car and made a false claim. The Crown relied

upon circumstantial evidence together with the evidence of Mr Norman Whitfield of an admission made to him by the appellant.

[3] Ground 1 of the appeal as originally presented was abandoned. The remaining two grounds complained that the trial Judge erred in admitting evidence that the appellant had previously claimed an insurance payment in respect of a car which had been stolen and that his Honour erred in failing to direct the jury that the jury could not draw any inference adverse to the appellant by reason of that previous claim. Additional grounds added during the hearing of the appeal are discussed later in these reasons.

[4] Evidence of the previous claim came from two sources, namely, the appellant's insurance policy and a record of interview between a police officer and the appellant.

[5] A computer generated copy of the appellant's insurance policy with the Territory Insurance Office was tendered by the Crown without objection. It included a risk schedule which referred to two occasions on which the appellant's licence had been suspended. The schedule contained the following passage of relevance to the appellant's complaint:

> "CLIENT ALSO HAD A VEHICLE STOLEN SEPT 98 VEHICLE WAS A TOTAL LOSS (BURNT OUT) $7,000, CLIENT NOT AT FAULT. USED POINTS GUIDE, NIL LOADING."

[6] The appellant was represented by experienced counsel. Prior to the empanelment of the jury, counsel discussed a number of matters with the

trial Judge. His Honour observed that there were several references in the evidence led at the committal to a previous insurance claim for a burnt out vehicle. Counsel for the Crown indicated that evidence relating to that claim and "where the claim went" would not be led. The prosecutor commented that as far as the Crown was concerned, the previous claim was "not relevant to this matter".

[7] The following day, still prior to the empanelment of the jury, counsel for the Crown raised the matter of the previous insurance claim. She repeated her statement that the Crown was not leading any evidence about the claim, but indicated that she intended to tender the computer printout of the policy which included the schedule containing the reference to the previous claim to which I have referred. She indicated that she intended to tender the whole of the document and wanted to make sure she was not falling into error. The trial Judge asked counsel for the appellant what he had to say about that matter and whether he had any problem with it. Counsel responded: "Doesn't really worry us, I don't think, your Honour."

[8] A discussion followed between the Judge and counsel for the appellant about the previous claim. Counsel indicated that he would like evidence available that the police investigating the previous claim thought it was "perfectly kosher". His Honour made the observation that if the appellant made a claim "for a few thousand bucks in the ACT who cares?" and counsel responded "I agree with your Honour but I don't know if the twelve good men might have the same reaction to that." Counsel made the additional

observation that the Crown was leading evidence about it because it was in the record of interview and that it was obviously an area that was "lending to suspicion". He said he would like to be in a position to say to the police that they had investigated the matter with the appropriate insurance people, and they had confirmed that there had been no wrongdoing.

[9] The schedule to the insurance policy in which reference was made to the previous claim could easily have been edited from the policy document put before the jury. The content of the schedule was not relevant to any issue to be determined by the jury. The reference to the previous claim was irrelevant and inadmissible. However, counsel for the appellant did not object to the admission of that part of the document.

[10] As I mentioned, counsel for the appellant made reference to the passage in the record of interview in which the appellant was asked about the prior claim. That passage was as follows:

> "Q. Have you ever um been investigated at any other prior times in relation to um ah in insurance?
>
> A. No but I did have a car that was stolen in Canberra.
>
> Q. Did ya?
>
> A. Yeh.
>
> Q. Could you just explain it to me what happened in, in that situation?

A. Um what happened was I was up here in Alice Springs and um my car was (inaudible) in Canberra. It was at my brother's house um cause he was looking after it for me. He didn't never drove it he just instead of leaving my car over a vacant house um and it got stolen and burnt out and (inaudible). Yeh I've never actually talked to the police about that (inaudible).

Q. Okay did you receive any monetary?

A. Yeh. It was ….

Q. Gain from that?

A. It was insured by NRMA and yeh I did receive um cash payout. It was only a ah Holden Astra so it wasn't worth very much (inaudible)."

[11] As part of the investigation, it was perfectly proper for the investigating officers to ask the appellant about any prior history of insurance claims. However, the fact that it was proper for the officers to enquire about such matters does not mean that the evidence was admissible. As the Crown acknowledged at trial, the evidence was of no probative value to the issues to be determined by the jury. The questions and answers were irrelevant and inadmissible: *The Queen v Ireland* (1970) 126 CLR 321 per Barwick CJ at 331.

[12] Counsel for the appellant did not object to the admission of that part of the record of interview. Apart from the content of the interview itself, the Crown did not lead any evidence from the interviewing officers about the previous insurance claim. Counsel for the appellant cross-examined an interviewing officer to establish that the officer did not investigate any

aspect of the appellant's explanation. Counsel also pursued the matter with the other officer involved in the interview by asking whether any investigations were made. The officer responded:

> "I believe we followed that up at some stage and there was something, but I didn't follow it through any further".

[13] Neither counsel addressed the jury about the previous insurance claim. The appellant was not asked about the previous claim during his evidence. When reminding the jury of the content of the record of interview, the trial Judge made the following reference to that part that concerned the previous claim:

> "He talked about a car having been stolen and burnt in Canberra, for which he had claimed on insurance, but the police had not interviewed him about that."

[14] As to the evidence of the police concerning that previous claim, his Honour reminded the jury of that evidence in the following terms:

> "Sergeant Kelly also told us he followed up the accused's insurance claim for a stolen and burnt-out vehicle in Canberra, and he had received some response but had not felt it necessary to follow up the matter any further."

[15] The appellant submitted that this was a case centred on the theft of a motor vehicle, the trashing of that vehicle and a claim for insurance monies. The previous claim made by the appellant also involved the theft of the vehicle, the trashing of it and a claim for insurance monies. Notwithstanding the reference in the insurance policy to "client not at fault", counsel argued that there was a risk the jury would reason that the appellant got away with the

claim previously and tried his luck again. Counsel contended that the error of admission of the evidence was exacerbated by the absence of a direction from the trial Judge to the jury that evidence of the previous claim was irrelevant to their consideration and they should not speculate about the previous claim or engage in any impermissible line of reasoning.

[16] As I have said, in my opinion the evidence was irrelevant and inadmissible. It should not have been led. The schedule could have been removed from the insurance policy presented to the jury without adversely affecting the Crown evidence. The irrelevant part of the interview could easily have been excised. However, experienced counsel for the appellant did not object to the reception of the evidence and, bearing in mind the content of the schedule which plainly stated that the appellant was not at fault, the absence of objection and of a request for a direction tends to indicate that counsel did not entertain a concern that the jury would engage in unfair speculation adverse to the appellant. The trial Judge did not entertain any concern in that regard.

[17] In these circumstances, although in my opinion the evidence should not have been admitted and, having been admitted, the trial Judge should have warned the jury against any unfair speculation or impermissible line of reasoning, if this ground had stood alone I would not have allowed the appeal. In my opinion it is highly unlikely that the jury had any regard to the evidence of the previous claim or used it in a manner adverse to the appellant. However, the reception of this inadmissible evidence is not the only blemish in the

trial. It is to be considered in conjunction with other errors to which I now turn.

[18] There are other passages in the record of interview with the police that give cause for concern. The first relates to the failure of the appellant to answer a particular question and the use made of the failure to answer.

[19] Evidence of blood found on the damaged vehicle formed a significant part of the Crown evidence. It was the Crown case that the appellant's blood was found in localities on the outside of the vehicle for which the appellant had no innocent explanation. During the interview the appellant was questioned about the blood and whether he had any explanation for the finding of the blood. At the conclusion of a number of questions about the blood the following passage occurred:

> "Q. Alright then can you give me ah any explanation as to how that vehicle was damaged?
>
> A. No.
>
> Q. Do you know any persons who may have damaged that vehicle?
>
> A. No.
>
> Q. Did you at any time damage that vehicle?
>
> A. … "

[20] The appellant did not answer the last question. The interview was recorded and a playing of the audiotape established that there was a period of approximately thirteen seconds of silence before the next question was asked. Although the appellant was asked in examination about the interview and said that initially he thought he was helping the investigation, but halfway through realised he was the main suspect, the appellant was not specifically asked about the period of silence. Counsel for the Crown suggested the appellant lied during his interview, but did not ask him any questions about the period of silence.

[21] During her address to the jury, the Crown prosecutor referred to the passage which I have cited and to the thirteen second silence and absence of response by the appellant. She then said:

> "You can play the tape in the jury room and you can hear it for yourself and you might draw your own conclusions about the lack of response to this crucial question."

[22] The prosecutor was plainly inviting the jury to draw an inference adverse to the appellant by reason of his failure to answer the question "Did you at any time damage that vehicle?" Faced with that invitation, counsel for the appellant responded by inviting the jury to put themselves in the appellant's shoes when he was struck with the realisation that he was the main suspect. He suggested that the appellant was "gob-smacked".

[23] The trial Judge referred to this period of silence in the course of summarising the Crown submissions. Having referred to the prosecutor's

suggestion that the record of interview contained "three memorable items or three memorable areas", and having discussed two of those matters, his Honour said:

> "The third significant feature of his interview, in the Crown's submission, is a long silence when the accused is asked the question: "Did you at any time damage that vehicle?"
>
> Doctor Rogers suggests that is thirteen seconds. It is a matter for you, ladies and gentlemen. You can play the tape if you wish."

[24] In *Woon v The Queen* (1964) 109 CLR 529, the High Court had occasion to consider the use of two interviews in which the accused had answered some questions and refused to answer others. The interviews had been preceded by a clear statement to the accused that he was not obliged to say anything. The trial Judge reminded the jury of that fact and made it clear to the jury in connection with each refusal to answer that the accused was within his rights to say nothing and no adverse inference could properly be drawn from refusals to answer. The trial Judge directed the jury that such answers as the accused chose to give might be considered by the jury for the purposes of determining whether the answers revealed a consciousness of guilt.

[25] Having referred to that background, Kitto J said (535):

> "If the jury had been left under an impression that they were entitled to draw inferences against the applicant from mere refusals to answer, or from statements that amounted only to refusals to answer, there would have been serious fault to find with the charge … ".

[26] Windeyer J made the following observations (541):

> "A question asked of a person accused or suspected of a crime, or a statement made in his presence, is admissible if he is invited to, or might reasonably be expected to, respond in some way indicative of denial or of acceptance. It is not that what is said to the accused which can of itself be evidence against him. But his response or reaction may be; and that is why what is said to him is admitted. His words, silence or conduct may amount to an admission of the truth of what was said. *This is subject to the qualification that no inference adverse to a man can be drawn from his refusal to answer questions which he has been expressly told he is not bound to answer or from his silence after he has been told he need not speak at all*" (my emphasis).

[27] In *Ireland,* the respondent had been warned that he was not obliged to answer any questions. During an interview he either responded "I don't wish to answer" or "No comment". Barwick CJ with whom McTiernan, Windeyer, Owen and Walsh JJ agreed, made the following observations (331):

> "But in my opinion the account of the questioning was not relevant at all to the issue. The respondent had been warned that he need not answer any questions asked of him. His failure to answer questions thereafter could not be accounted as an admission. In those circumstances the fact that he was asked and made no answer was not relevant: it would not be probative of any relevant fact or circumstance. It was therefore not admissible."

[28] At the outset of the interview the appellant had been given a caution that he had "the right to remain silent". Asked to explain in his own words what he thought that meant, the appellant responded "that I don't have to answer any questions". After discussion about the later use of anything said as evidence in court, the interviewing officer repeated that he wanted the appellant to understand him that it was the appellant's choice whether to speak to him or not. In those circumstances, the fact that the appellant chose not to answer a

particular question had no probative value. The evidence of the question and of the thirteen second period of silence was irrelevant and inadmissible. The jury was impermissibly invited to draw an inference adverse to the appellant by reason of his failure to answer.

[29] In my opinion the admission of the evidence and the use to which the jury were invited to put the evidence constitute significant errors in the trial.

[30] Ground 7 concerns an assertion put to the appellant during the interview which was not supported by the evidence and which the appellant denied.

[31] The appellant and two Crown witnesses gave evidence that it was his habit to leave a spare key for his motor vehicle on the microwave oven. It was the appellant's case that he freely permitted his friends to use his car. During the interview the contrary suggestion was made:

> "Q. It's been suggested to me that um by a person that you in fact um didn't like your ah flat mates using your car and that you in fact hid that key fairly regularly.
>
> A. Can I ask you who that was?
>
> Q. Nuh.
>
> A. Well then that's wrong.
>
> Q. Okay.
>
> A. Very wrong."

[32] Far from acceding what was put to him, the appellant denied the suggestion. There was nothing inappropriate in the officer putting the suggestion to the appellant, but unless the appellant adopted it or acknowledged it as correct, that passage in the interview was inadmissible. The question put before the jury in an impermissible way a hearsay assertion that a person who was not a witness had given the police a version which contradicted the evidence of the appellant.

[33] In my opinion, the offending passage in the interview should not have been put before the jury. No directions were given by the trial Judge as to the use of that evidence. There was a risk that the jury might have used the evidence as reflecting adversely upon the version given by the appellant.

[34] The additional grounds of appeal do not complain about any other passages in the record of interview. However, there are further passages that have given me cause for concern.

[35] Assertions were put to the appellant that police found the scene unusual for a number of reasons. The relevant passage was as follows:

> "Q. Okay um the the ah police who attended at that scene also found it a very unusual um unusual for a number of reasons. Firstly well it's a very unusual location for cars to be dumped in Alice Springs. The ah damage to it is unusual in itself. The type of damage. Particularly to the outside.
>
> A. Yep.

Q. And the fact that um the stereo and CD stack were removed with causing abs almost no damage at all. Have you got any knowledge at all about how this vehicle was damaged?

A. No.

Q. Do you know who did it?

A. No.

Q. Okay have you got any idea where any of the property from the vehicle's currently located.

A. No."

[36] Evidence was led from investigators of what the investigators considered were unusual features associated with the location of the vehicle and the damage to it. Leaving aside the admissibility of that evidence which is discussed later in these reasons, whether or not the features were unusual was not a matter upon which the appellant could usefully comment. His answer "Yep" to the first question did not amount to an acknowledgement of the accuracy of the interviewing officer's assertion. The questions and answers were irrelevant and inadmissible.

[37] Immediately after the passage to which I have referred, a further assertion was put concerning a bottle of vodka that had been found with the vehicle. The interview was as follows:

"Q. Mmhm. Um in relation to the vodka bottle would you agree that it would be unusual that someone'd steal a car, take the vodka presumably to drink and ah not drink it straight out of the bottle?

A. No. Wouldn't know probably.

Q. Mmhm. The ah that bottle's also been forensically examined for DNA and there's no person's DNA on it at all.

A. Yep.

Q. Do you think that'd be unusual or not or you wouldn't like to wouldn't know.

A. I wouldn't know (inaudible)."

[38] Again, this passage in the interview was irrelevant and inadmissible. The appellant was unable to comment upon the assertions put to him. Even if the appellant had acknowledged the accuracy of what was put to him, his responses would have been incapable of any probative value. The appellant having indicated he did not know if these assertions were accurate or otherwise, the lack of relevance is thereby emphasised.

[39] The evidence at trial established the existence of a fingerprint on the vodka bottle which could not be identified. There was no attempt to lead evidence that it would be unusual for someone to steal a car, take a bottle of vodka and not drink straight out of the bottle. Similarly, there was no evidence that the absence of DNA on the bottle was unusual. By allowing these questions and answers to be admitted into evidence, the prosecution was permitted to put before the jury inadmissible assertions of opinion by the interviewing officer. The jury were not told to ignore these assertions.

[40] As I mentioned, during the interview the appellant was asked about blood found on outside surfaces of the motor vehicle. He was asked to look at a photograph of the boot of the vehicle in which could be seen spots of blood on the surface of the boot. The following passage then occurred:

> "Q. Um it appears to me that whoever was causing the damage to the vehicle um that happened at the same time. It appears to be a splatter from the hand.
>
> A. Yeh.
>
> Q. Do you agree with that?
>
> A. I would agree with that yeh."

[41] The Crown did not seek to lead evidence that the spots of blood on the boot came from a hand. Nor did the Crown seek to lead evidence that the damage to the vehicle was caused at the same time as the blood was deposited on the boot. Any attempt to lead "expert" evidence about these matters could have been successfully met with the objection that in the particular circumstances they were not capable of being the subject of expert evidence.

[42] The position of the appellant is even further removed. He was not qualified to comment on these matters and his answers were incapable of carrying any probative value. This passage in the interview was irrelevant and inadmissible.

[43] As a result of the admission of that passage, an inadmissible opinion of the interviewing officer was put before the jury. It was an inadmissible opinion

that accorded with the Crown case that the blood was left on the vehicle at the time that the damage was inflicted. The jury were not told to ignore the evidence and that opinion.

[44] Having indicated my view as to the inadmissible assertions contained in the passages to which I have referred, it is appropriate to emphasise the distinction between the issue as to what is permissible questioning of a suspect as part of an investigation and the issue as to whether particular questions and answers are admissible in evidence. It is not necessary to examine the ambit of permissible questioning for the purposes of an investigation except to observe that such ambit is not limited to questions that would be admissible at trial should a suspect be charged. There may be many matters about which an investigating officer might reasonably wish to question a suspect that would be irrelevant and inadmissible at trial.

[45] On the other hand, the fact that particular questions were not inappropriate as part of the investigation does not mean that the questions and answers are admissible at trial. Leaving aside the special rules relating to the admissibility of police records of interview and the exclusion of evidence in criminal trials, the touchstone of admissibility of any evidence, including a record of interview, is relevance: *Smith v The Queen* (2001) 206 CLR 650 at 653 [6]. In this context it should be remembered that it is not the questions that are admissible in themselves. It is the answers that are admissible if they are relevant.

[46] In making these observations I do not mean to imply that every record of interview should be dissected with a view to excluding every individual question and answer which has no immediate relevance. Many otherwise irrelevant questions and answers are admissible because they are part of the context of a record of interview in which relevant admissions are made. It is unnecessary to explore the limits of admissibility on this basis, but a helpful discussion of these issues, including the approach to be taken to questions containing inadmissible hearsay assertions, is found in the judgment of the New South Wales Court of Criminal Appeal in *R v Plevac* (1995) 84 A Crim R 570 at 579 – 581.

[47] There is a further matter concerned with the admission of the impugned passages in the interview which should be addressed. As I have said, counsel did not object to a number of passages in the interview that were inadmissible and potentially prejudicial to the appellant. Counsel for the appellant submitted that notwithstanding the absence of objection, in the exercise of the Crown duty to ensure that the appellant received a fair trial, the prosecutor should have excised those passages from the interview. Further, counsel contended that the trial Judge should have intervened to ensure the excision of those passages.

[48] There can be no inflexible rule governing these types of situations. At one extreme end of the spectrum an interview might contain reference to an accused's prior convictions. In that situation there could be no doubt that it is the duty of the Crown prosecutor to bring the matter to the attention of the

trial Judge and the accused with a view to excising such references unless the accused requests that the evidence be led or the Crown justifies admission of the evidence on the basis that it is relevant and admissible. At the other end of the spectrum are the harmless irrelevancies that often permeate records of interview and are merely part of the context in which relevant answers are given. It would be unreasonable to impose upon a prosecutor a duty to search every record of interview for such irrelevancies and to either excise those passages or bring them to the attention of both defence counsel and the Judge.

[49] In between those two extremes are an infinite variety of irrelevancies, only some of which would require that a prosecutor exercise the initiative either to excise the offending passages or raise them for consideration by the trial Judge and the accused. A prosecutor should, of course, be alert to ensure that irrelevant material prejudicial to an accused should not be led, but a prosecutor is also entitled to assume that counsel for an accused will also be alert to irrelevant and prejudicial material.

[50] A trial Judge is in a difficult position. Not infrequently the Judge will not be familiar with the contents of an interview before the evidence is led. In addition, often the trial Judge is not familiar with the forensic issues which might lead counsel for an accused to consent to the reception of inadmissible evidence. A Judge is entitled to rely upon both counsel for the Crown and counsel for an accused to bring controversial or prejudicial matters to the attention of the Judge.

[51] Once the evidence is admitted, if inadmissible evidence has been placed before the jury whether in the form of a record of interview or otherwise, the responsibility passes to the trial Judge to direct the jury as to how the evidence may or may not be used. It is the responsibility of a trial Judge to remove or minimise any prejudice to an accused that might flow from the admission of inadmissible material. Whether directions are necessary or desirable can only be determined according to the particular circumstances of each case. The Judge is entitled to expect assistance from counsel. Ultimately, however, responsibility for ensuring that the jury are given all necessary assistance and warnings must rest with the trial Judge.

[52] Ground 6 complains that the trial Judge erred by admitting opinion evidence that the nature and extent of the damage to the appellant's motor vehicle was "unusual". More than one witness gave opinion evidence.

[53] Senior Constable Towers has been attached to the forensic services area of the Northern Territory Police since January 1981. In July 1987 he joined the Crime Scene Examination Unit in Alice Springs. He gave evidence that he had attended many hundreds of scenes involving stolen and damaged motor vehicles. Without objection he gave evidence concerning the number of fingerprints found on the damaged vehicle:

> "Q. And are you able to comment on the number of fingerprints that you discovered on this particular vehicle?
>
> A. Yeah, I was surprised by the – if it – usually when vehicles are stolen and there're usually taken for the purpose of joy-riding

or something like that, you usually end up with a lot more fingerprints on the vehicle. The number of fingerprints on this vehicle was certainly less than what I would have expected."

[54] The Crown prosecutor then asked Constable Towers whether, given the extent of the damage to the vehicle, he reached any particular conclusion about the vandalisation of the vehicle. Counsel for the accused objected. The trial Judge invited the prosecutor to "narrow it down a bit". Having confirmed that each panel on the vehicle was damaged and that all of the windows except one were broken, the following evidence was elicited:

"Q. Now in the context of yourself having attended hundreds of recovered stolen motor vehicles, in your experience, is the extent of damage was that something usual or unusual?

A. It was more unusual in my opinion.

Q. And in what way?

A. It was restricted to deliberate damage rather than damage through the vehicle being driven. It also appeared to be systematic."

[55] During cross-examination, the following evidence was given:

"Q. Deliberately you would have used that?

A. Yes, there's no doubt in my mind that that damage was inflicted deliberately.

Q. Right, and I think that aspect of it you went on to say that you found a bit unusual having dealt with hundreds – would hundreds be fair?

A. Yes.

Q. Hundreds of trashed vehicles?

A. That's correct.

Q. That are found on the outskirts of Alice Springs?

A. And in Darwin.

Q. And in Darwin, which are prefaced by joy rides?

A. Yes, joy rides would be the most common ones that I've investigated as far as this sort of damage goes or so far as damage to vehicles go.

Q. They often end in damage as in the vandals or the joy riders become vandals by once they've finished with the car they cause damage to the car.

A. Yes that does happen.

Q. But what you're saying is the systematic nature of this, namely every panel from apparently every – from the same instrument or similar instrument – that makes it a bit unusual compared with those other ones?

A. Yes it does."

[56] Constable Towers went on to say that about 25 to 30% of stolen vehicles are "torched". He said he would not have any idea of the percentage of stolen vehicles that are damaged.

[57] Similar evidence about the damage to the vehicle was given by a loss assessor, Mr Haywood. He had been involved in the field of insurance assessor since 1971. He said he had worked in Alice Springs as an

insurance assessor for approximately eighteen and a half years and had dealt with thousands of claims. He estimated that he had been involved in somewhere between 100 and 200 investigations of theft of motor vehicles or vandalised vehicles. Against that background he gave the following evidence:

> "Q. And bearing on that experience are you able to comment on the type of damage done to this BMW?
>
> A. Yes, I suggested it was – it was damaged very deliberately and probably, as I said earlier, a little over the top the damage that I – that I saw."

[58] During cross-examination, Mr Haywood expressed the view that normally vehicles are stolen and then vandalised. He said around Alice Springs the vehicles are normally stolen and then taken out into the scrub, stripped and burnt. He said that did not always occur, but it was fairly common.

[59] The trial Judge referred to this evidence without comment. He reminded the jury of each of the opinions to which I have referred.

[60] The critical issue to be determined by the jury was whether the Crown had proved that, for insurance purposes, the appellant or someone at his instigation removed the vehicle from the appellant's home, drove it some distance from Alice Springs and extensively damaged it, or whether it was a reasonable possibility that without any involvement of the appellant the vehicle had been removed from his premises and vandalised. Evidence which alone or in conjunction with other evidence tended to point away

from mere joy riding or vandalism as the motive for taking the car and damaging it was admissible. Circumstantial evidence tending to negate the alternative hypothesis that it was not the accused who was responsible for the taking of the motor vehicle, but an unknown joy rider and vandal, was relevant and admissible. Like all circumstantial evidence, the weight of the evidence was a matter for the jury.

[61] Evidence by Mr Towers of his observations over the years as to the nature and extent of the damage to stolen motor vehicles in comparison with the damage to the appellant's motor vehicle was admissible. Evidence of observations and of the frequency of particular types of damage is not opinion evidence. It is circumstantial evidence. If such evidence is capable of tending to point away from mere vandalisation as the motive for taking the car and damaging it, it is admissible.

[62] In my opinion, the evidence of Mr Towers as to his observations of types of damage over the years and the frequency with which he has seen damage of the type caused to the appellant's motor vehicle is admissible. It is capable of relevance in the way I have described. However, it is a matter for the jury to draw its own conclusion as to whether the type of damage caused to the appellant's motor vehicle was "unusual" and therefore tends to support the view that the vehicle was not removed and damaged for the purposes of joy riding and vandalisation.

[63] Similarly, the evidence of Mr Towers that he found a number of fingerprints which was low in comparison with his observations of other vehicles over the years is admissible. It is a further piece of circumstantial evidence which, when taken in conjunction with other evidence, which is capable of some probative value by tending to point away from mere vandalism. The weight of the evidence was a matter for the jury, but the jury should have been given the assistance of directions by the trial Judge as to how the evidence might be used as part of the circumstantial evidence to be considered by the jury. Such assistance was not given.

[64] The evidence of Mr Towers went further than mere comparison of observations. He expressed the opinion that the damage was deliberate and systematic. Mr Haywood spoke of the damage being very deliberate.

[65] In my view, these opinions were inadmissible. Whether the damage caused to the appellant's vehicle was deliberately inflicted or otherwise was not a matter upon which opinion evidence was admissible. No field of special expertise was involved. The witnesses could do no more than draw commonsense conclusions from the nature and extent of the damage. They were in no better position to draw conclusions on this matter than the jury. The same observation applies to the opinion of Mr Haywood that the damage was "a little over the top".

[66] Opinion evidence was also given by an investigating officer that is not the subject of a ground of appeal. When questioned about the blood found on

the outer surfaces of the car, the appellant mentioned that he had sustained a blood nose when playing rugby. An investigating officer was asked whether he made enquiries as to whether the appellant had sustained a blood nose playing rugby at about the relevant time. The officer gave the following answer:

> "I did make some inquiries but I don't recall who with and it came to nothing. And I also thought it unlikely as some of the blood was on the roof".

[67] The addition of the officer's opinion that the blood nose was an unlikely explanation because some of the blood was on the roof was not responsive to the question and was an unnecessary addition. That opinion was plainly inadmissible. The jury should have been told to ignore that opinion. During his summing up the trial Judge reminded the jury of that evidence, but did not warn the jury to ignore it.

[68] I turn to ground 4 which is a complaint that the trial Judge erred in a particular direction as to the burden of proof.

[69] Appropriate directions were given in the standard form as to the presumption of innocence and the burden resting upon the Crown to prove the case beyond reasonable doubt. Throughout his summing up his Honour emphasised the requirement that the Crown prove guilt beyond a reasonable doubt and that if the jury was left with a reasonable doubt the appellant had to be acquitted. The directions also emphasised that each element of the offence had to be proven beyond reasonable doubt.

[70] The direction under consideration occurred in the context of the directions as to circumstantial evidence. The trial Judge compared circumstantial evidence with direct evidence and gave examples of circumstantial evidence. When giving examples, his Honour said:

> "You can only draw an inference which is reasonable. Because the Crown must prove its case beyond a reasonable doubt, you can only draw an inference of guilt where you are satisfied, beyond reasonable doubt, that it is the only rational and reasonable inference in all the circumstances.
>
> In other words, in the context of a criminal trial, the proof is required beyond reasonable doubt. You must not draw any inference adverse to the accused from the direct evidence unless it is the only reasonable and rational inference in all the circumstances."

[71] His Honour then gave another example of circumstantial evidence and of the danger of drawing inferences simply based upon appearances. He emphasised that the jury had to be very careful about drawing inferences in the context of a criminal trial. The directions then proceeded as follows:

> "I have said it a couple of times, but you must not draw an inference of guilty against the accused unless it is the only reasonable and rational inference in all the circumstances. If there is another conclusion which is reasonably open when you examine the whole of the evidence, and which is consistent with the innocence of Mr Barr, then it is your duty to find him not guilty.
>
> *That does not mean, however, that you must acquit Mr Barr simply because there is some bare possibility that some innocent complexion can be placed upon the evidence, which is consistent with his guilt. So you do not have to sit around dreaming up all sorts of wonderful possibilities. We are talking about reasonable doubt here.*
>
> *You have to use your common sense in these matters, but you must not allow yourself to be carried away by conjecture or guesswork.*

> I should stress it is never for the accused to persuade you that there is a conclusion other than his guilt, which is reasonably open on the evidence. Again it comes back to the question that the accused does not have to prove anything. He does not have to explain away the facts or the circumstances on which the Crown relies. As I say it is for the Crown to persuade you, beyond reasonable doubt, that the accused is guilty of obtaining by deception" (my emphasis).

[72] The trial Judge then gave directions about the strength of evidence and compared circumstantial evidence to links in a chain and strands in a cable. He gave standard directions concerned with considering the circumstantial evidence in its entirety. His Honour then said:

> "I do come back to the point though that before drawing an inference of guilt from circumstantial evidence, you must be satisfied that the inference of guilt is the only reasonable and rational inference which can be drawn against an accused from all the circumstances."

[73] At the end of the summing up, his Honour reminded the jury that they were not to draw an inference of guilt unless that inference was the only reasonable, rational inference in all the circumstances.

[74] The issue of concern centres upon the directions by the trial Judge that the jury should not acquit the appellant "simply because there is some bare possibility that some innocent complexion can be placed upon the evidence, which is consistent with his guilt". Although the passage reads "which is consistent with his guilt", it is likely that a typographical error exists in the transcript and that his Honour in fact said "which is inconsistent with his guilt".

[75] The High Court in *Green v The Queen* (1971) 126 CLR 28 forcefully reminded trial Judges of the dangers of straying from the classical direction concerning beyond reasonable doubt and in attempting to define or explain that expression. Those dangers have been illustrated in a number of authorities since *Green*, including *R v Wilson, Tchorz and Young* (1986) 42 SASR 203. In Wilson a direction by the trial Judge that the jury should convict if the doubt was merely a fanciful doubt was held to be a misdirection. Warning against any qualification to the standard direction, King CJ made the following observations (206-207):

> "Where the Judge considers such a qualification to be necessary, it is essential that he frame the qualification in terms which do not diminish the jury's sense of their obligation not to convict upon supposed proofs about which they, as reasonable persons, feel a doubt. The qualification, when made, should be in terms, such as those suggested by the passage cited above from *Green's* case which caution the jury against regarding possibilities which are in truth fantastic or completely unreal as affording a reason for doubt, or in terms, often used, which remind the jury of the capacity of the human mind to conjure up fanciful, nervous or unreasonable misgivings about matters which are not in reality in doubt. *It is permissible, if thought necessary, to warn a jury against unreasonable mental processes, but it is not permissible to suggest that they should disregard a doubt which, at the end of their deliberations, they think to exist, or that they are required to subject such a doubt to a process of analysis in order to determine its quality. If at the end of their deliberations, the jury have a doubt, that doubt is ipso facto, as Green's case establishes, a reasonable doubt.*
>
> … if amplification is desired it should go no further than to tell the jury that a reasonable doubt is one which they, as reasonable persons, are prepared to entertain. The judge may, in an appropriate case, warn the jury against resorting to fanciful or unreasonable possibilities as affording reasons for doubt, but if he does so, he should be careful, in my opinion to add that if the jurors at the end of their deliberations, as reasonable persons are in doubt about the guilt

> of the accused, the charge has not been proved beyond reasonable doubt" (my emphasis).

[76] As in *Wilson's* case, there is a danger attached to the direction that the jury should not acquit because there is "some bare possibility that some innocent explanation can be placed upon the evidence which is inconsistent with guilt". The danger is heightened by the inclusion of the observation "we are talking about reasonable doubt here". There is a danger that the jury understood the direction to mean that a "bare possibility" cannot amount to a reasonable doubt. As King CJ observed in *Wilson* (207):

> "When jurors are invited to consider whether a doubt which they actually think to exist is fanciful, they may well interpret the invitation as one, not merely to exclude aberrant mental processes, but to put aside real doubts unless those doubts possess in their minds a certain degree of strength. Proof beyond reasonable doubt requires that doubts, irrespective of degree of strength which they attain, be given effect to if the jurors, as reasonable persons, are prepared to entertain them."

[77] In my opinion the trial Judge misdirected the jury when he told them to ignore a "bare possibility" and in contrasting such a possibility with reasonable doubt by saying "we are talking about reasonable doubt here". Although there were repeated correct directions in general terms about the burden of proof, the critical question is whether the jury might have considered that those directions were qualified to the extent that they were not to regard a "bare possibility" as a reasonable doubt.

[78] If this misdirection had stood alone as the only error in the trial, I doubt that the proviso could have been applied. A misdirection as to the burden of

proof is a significant blemish, particularly in the context of a prosecution case heavily reliant on circumstantial evidence. However, as the trial was affected by other errors to which I have referred, it is unnecessary to determine this question.

[79] When the cumulative effect of the errors in combination is considered, in my opinion the trial miscarried. This is not an appropriate case in which to apply the proviso.

[80] For these reasons in my view the appeal should be allowed and the conviction should be set aside. There should be a new trial on the indictment.

Angel J:

[81] I agree that the trial miscarried and that the appeal should be allowed and a retrial ordered because of the errors identified in the course of the hearing of the appeal and referred to in the Chief Justice's reasons which I have had the advantage of reading in draft.

Mildren J:

[82] I have read the judgment of the Chief Justice in draft. I agree with it and with the orders which he proposes and I have nothing to add.
