PARTIES:	ROBERT ALEXANDER DRUETT
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA8 of 1993
DELIVERED:	Darwin 29 July 1994
HEARING DATES:	1 and 2 March 1994
JUDGMENT OF:	KEARNEY AND PRIESTLEY JJ, GRAY AJ

CATCHWORDS:

CRIMINAL LAW AND PROCEDURE - summing up - confessional statement - when *McKinney* warning required and its nature - whether required in "any case" involving a disputed uncorroborated confessional statement allegedly made while in police custody - whether further warning required of danger of convicting where the confession is found to be the "only, or substantially the only, evidence against an accused" - practical consequences of this distinction and warnings that must be given.

Shepherd v The Queen (1990) 179 CLR 573, applied
McKinney and Judge v The Queen [1990-91] 171 CLR 468, applied
Carr v The Queen (1988) 165 CLR 314, applied (Deane J)
R v Tarantino (1993) 67 A Crim R 31, referred to
Lau v The Queen (1991) 6 WAR 30, referred to
Faure v The Queen (1993) 67 A Crim R 172, referred to
Black v The Queen (1993) 68 ALJR 91, applied

CRIMINAL LAW AND PROCEDURE - summing up - confessional statement - *McKinney* rule of practice - rationale for prohibition on suggesting to jury that they decide whether police perjured themselves

Towner v The Queen (1991) 57 A Crim R 221, referred to
R v Collins (1975-76) 12 SASR 501, considered
R v White (1976) 13 SASR 276, considered

CRIMINAL LAW AND PROCEDURE - whether summing up infringed the accused's "right to silence" - whether error curable by redirection - contents of an adequate redirection

Petty and Maiden v The Queen (1991) 173 CLR 95, applied
R v Holden (1990) 52 A Crim R 32, referred to
R v Moon [1969] 1 WLR 1705, followed
R v Reeves (1992) 29 NSWLR 109, followed

CRIMINAL LAW AND PROCEDURE - whether summing up adequate as to applicable burden and standard of proof of guilt, and the fact finding process

R v Beserick (1992-93) 30 NSWLR 510, referred to
R v Egan (1985) 15 A Crim R 20, referred to
R v Calides (1983) 34 SASR 355, referred to
R v Lapuse [1964] VR 43, referred to
Liberato v The Queen (1985) 159 CLR 507, referred to

CRIMINAL LAW AND PROCEDURE - confessional statement - standard of proof - whether jury must be satisfied beyond reasonable doubt that confession was made and was truthful

McKinney and Judge v The Queen [1990-91] 171 CLR 468, applied
Shepherd v The Queen (1990) 179 CLR 573, applied
Dominguez v The Queen (1985) 63 ALR 181, referred to
Burns v the Queen (1975) 132 CLR 258, applied
R v Batty [1963] VR 451, followed

CRIMINAL LAW AND PROCEDURE - accomplice evidence - whether "corroborating" evidence is the same as "supporting" evidence

R v Matthews and Ford [1972] VR 3, followed
R v Apostilides (1983) 11 A Crim R 381, followed
R v Kehagias [1985] VR 107, followed
DPP v Kilbourne [1973] AC 729, referred to
McGookin v The Queen (1986) 20 A Crim R 438, referred to
Doney v The Queen (1990) 171 CLR 207, referred to

CRIMINAL LAW AND PROCEDURE - accomplice warning - rationale - whether rationale must be explained to jury

Davies v DPP [1954] AC 378, followed
Doney v The Queen (1990) 171 CLR 207, applied
Lewis v The Queen (1992) 63 A Crim R 18, followed
R v Button (1991) 54 A Crim R 1, followed
R v Turnsek [1967] VR 610, followed
R v Checconi (1988) 34 A Crim R 160, followed
McNee v Kay [1953] VR 520, considered
R v Mullins (1848) 3 Cox C.C. 526, followed

CRIMINAL LAW AND PROCEDURE - when evidence is capable of amounting to corroboration of accomplice evidence - need for corroborating evidence to have an independent capacity to implicate the appellant

R v Zorad (1990) 19 NSWLR 91, followed

CRIMINAL LAW AND PROCEDURE - whether evidence which itself requires a *McKinney* warning can corroborate evidence which requires an accomplice warning, without a further special warning

McKinney and Judge v The Queen [1990-91] 171 CLR 468, applied
Pollitt v The Queen (1991-92) 174 CLR 558, applied

CRIMINAL LAW AND PROCEDURE - directions to jury - nature of directions required on approach to witness who has made a previous inconsistent statement

R v Schmahl (1965) VR 745, followed
Driscoll v The Queen (1977) 137 CLR 517, distinguished
R v Zorad (1979) 2 NSWLR 764, followed

CRIMINAL LAW AND PROCEDURE - whether defence counsel may suggest innocent hypothesis not supported by but consistent with the evidence

Browne v Dunn (1893) 6 R 67 (HL), considered
R v Manunta (1989) 54 SASR 17, followed
R v Costi (1987) 48 SASR 269, followed
Barca v The Queen [1975] 133 CLR 82, applied

CRIMINAL LAW AND PROCEDURE - circumstances in which 'proviso' should be applied on appeal

Criminal Code (NT), s411(2)

Simic v The Queen (1980) 144 CLR 319, applied
Wilde v The Queen (1987-88) 164 CLR 365, applied
R v Cohen (1909) 2 Cr App R 197, followed
Mraz v The Queen (1955) 93 C.L.R. 493, applied

CRIMINAL LAW AND PROCEDURE - court's discretion to order a re-trial - relevant principles

Criminal Code (NT), ss411(3), 413

Peacock v The King (1912) 13 CLR 619, applied
Raby v The Queen (1980) WAR 84, followed
King v The Queen (1986) 161 CLR 423, applied

REPRESENTATION:

Counsel:

Appellant:	W.H. Morgan-Payler
Respondent:	R. Wild

Solicitor:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of Director of Public Prosecutions

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
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AT DARWIN

No. CA 8 of 1993

BETWEEN:

ROBERT ALEXANDER DRUETT
Appellant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, PRIESTLEY AND GRAY JJ

REASONS FOR JUDGMENT

(Delivered 29 July 1994)

KEARNEY J:

The appellant appeals against his conviction on a charge of being "knowingly concerned" in the importation of a prohibited import, a trafficable quantity of heroin, contrary to s233B of the *Customs Act* 1901 (C'th).

The trial

Pursuant to Code s379 it was admitted at trial that on 27 March 1989 a Mr Campbell imported into Australia 6 condoms containing a white powder in which the available pure heroin was 104.5 grams. The trafficable quantity is 2 grams. The Crown case was that this importation resulted from a pre-arrangement, a common purpose, between Mr Campbell and the appellant; see p34. The only real question for the jury was whether the appellant was "knowingly concerned" in that undisputed importation. To establish he was "knowingly concerned" the Crown sought to prove that the appellant knew that the heroin would be imported by Mr Campbell and so conducted himself before and during its

importation as to be "concerned" therein - by financing and arranging the purchase of the heroin and its importation, and arranging to receive it when imported and to pay Mr Campbell for importing it, or by some of those activities. This approach to the proof of "knowingly concerned" was not challenged, and is manifestly correct; see generally *R v Tannous* (1987) 32 A Crim R 301 at 304-6, per Lee J.

The Crown contended that Mr Campbell was a casual acquaintance of the appellant, a heroin user, a person of respectable appearance with no prior convictions who had been procured by the appellant to import the heroin. Its case rested on four pieces of evidence: the testimony of Mr Campbell, inculpating the appellant as his accomplice; what was said between Mr Campbell and the appellant on 27 March 1989 in a police-monitored telephone conversation in which they made arrangements to meet at the Atrium Hotel; the fact that one Cathy Suringa and not the appellant then met Mr Campbell at that hotel; and the evidence of Detectives Matheson and Cook that in two conversations they had with the appellant early on 28 March 1989 he made incriminating admissions.

I turn to those four pieces of evidence. No evidence was adduced by the appellant.

a) Mr Campbell's evidence at trial

Mr Campbell, who had already been convicted and sentenced for importing the heroin, testified as follows.

He first met the appellant in January 1989 through his (Mr Campbell's) then girlfriend Cathy Suringa; thereafter, the appellant came to his house on some five to seven occasions. These were social visits. Early in March 1989 the appellant

proposed to him that he go to Thailand to purchase heroin; he expressed interest. He admitted in cross-examination that by March he had become a heavy user of heroin, paying about $1000 a week for it, and was "running out of money". The appellant then checked that Mr Campbell had no criminal record, and put him in funds to enable him to travel to Thailand and purchase the heroin, instructing him to purchase it at the Gold Riverside Guest House in Chiang Mai from a man called Bwan. Mr Campbell had been to Thailand before, but never to Chiang Mai. The appellant instructed Mr Campbell to conceal the heroin in condoms in his body and return to Australia whereupon they would meet at Humpty Doo where the heroin would be handed over. Mr Campbell testified that as payment he envisaged he was to receive $2,000 worth of the heroin, some 2-3 grams, for his own use. He admitted he had told the Police initially that he was to receive $10,000 - that is, that he was simply a courier for a money reward - in an endeavour to conceal from them that he was a drug user.

Mr Campbell described how he carried out his instructions. He flew to Thailand on 23 March, having spent the night of 22 March with Ms Suringa. He purchased the heroin at Chiang Mai as arranged and concealed it in condoms in his body, only to be apprehended by Federal Police on his return to Darwin 4 days later, at about 6.00 am on 27 March. He was taken to hospital where the heroin was located and removed from his body. At about 11.40 am he arrived at Berrimah Police Centre. He was formally interviewed from 3.45 pm until the interview was suspended at 6.02 pm. Prior to the interview he spoke to his solicitor, and then decided to cooperate with the Police. He was cross-examined to the effect that his account insofar as it

inculpated the appellant was a lie designed to implicate an innocent man in his own crime, and thereby to gain a lighter sentence for himself by purporting to assist the Police.

(b) The telephone conversation Campbell/appellant

While in the hands of the police after the interview, Mr Campbell telephoned the appellant; the Police listened in. He made it clear he was telephoning from the Police Station. A tape of part of that conversation was in evidence. In the course of that call Mr Campbell informed the appellant that he was just leaving the Police station, and arranged to meet him at the Atrium Hotel in about an hour. The Crown contended that the very fact that Mr Campbell made the telephone call to the appellant "supported" his account of the appellant's criminal involvement; rightly, it did not contend that the fact Mr Campbell made the call amounted to corroboration of his testimony in the legal sense, since it was not evidence independent of him. The Crown also contended that the content of the conversation, set out at pp61-62, was of great significance.

(c) Ms Suringa's attendance at the hotel

Under Police surveillance Mr Campbell then went to the Atrium Hotel to meet the appellant; he did not turn up. However, Ms Suringa approached him at the main bar, and spoke briefly to him. The Crown contended that this was a "follow-up" from the telephone conversation, in that the appellant had sent her to "sus it out". This indicated that the appellant was conscious he was guilty; and this was the reason he failed to keep his appointment to meet the appellant and sent Ms Suringa in his place.

(d) The detectives' evidence of admissions by the appellant

Police had Mr Campbell under surveillance at the Atrium Hotel from about 7.35 pm on 27 March. From there they went to the appellant's home. They searched the premises and the appellant; this was after 8.00 pm. At about 10.50 pm the appellant accompanied Detectives Matheson and Cook to the Berrimah Police Centre. There Detective Matheson formally interviewed him, commencing at 11.58 pm; basically, he exercised his legal right to decline to answer the Police questions.

The relevant evidence of Detectives Matheson and Cook was to the following effect. Shortly after the formal interview, which ended at 2.32 am on 28 March, they had a short conversation with the appellant, which he initiated after Detective Matheson gave him a glass of water. They made a note of this conversation, some 4-4½ hours later; it was along the following lines:-

"DRUETT: What's the point? You obviously know about Cathy, you know about everything.

MATHESON: Who's Cathy?

DRUETT: Look, as I said, I didn't want her brought into it.

MATHESON: Are you talking about Cathy Suringa?

DRUETT: As I said, you obviously know about her. He's getting back at me for screwing around with Cathy.

MATHESON: Who's getting back at you?

DRUETT: Craig.

MATHESON: Do you mean Craig Campbell? Do you want to make a handwritten statement?

DRUETT: No, no, I'll leave it as it is, I don't want it on paper.

MATHESON: How is Cathy involved in this?

DRUETT: Well, I dragged her into it when I asked her to go to the Atrium, didn't I?

MATHESON: Why did you ask her to go to the Atrium?

DRUETT: I got those phone calls from Craig and it didn't take much to work out that something was wrong, so I asked Cathy to go to the Atrium to sus it out.

MATHESON: What did Craig say to you when he called you?

DRUETT: Look, you already know about what he said. Why go over it now?

MATHESON: What was Craig supposed to do when he flew back into Darwin?

DRUETT: He was just going to come round to my place and give me the gear.

MATHESON: What do you mean by "gear"?"

The appellant did not reply.

Detectives Matheson and Cook then drove to the hospital with the appellant. In the Police car they had a further short conversation with the appellant, this time initiated by the Police. According to the detectives' later note, this was along the following lines:-

"MATHESON: Do you still understand, Rob, that the caution I gave you earlier still applies?

DRUETT: Yeah.

MATHESON: It's been alleged, Rob, that you were going to pay Craig Campbell $10,000 once he'd given you the heroin, what do you say to that?

DRUETT: That's crap. We were going to split the smack straight down the middle, half for me and half for him.

MATHESON: What were you going to do with your share?

DRUETT: Use it. I'd use the lot.

MATHESON: Did you know if Craig was a user.

DRUETT: Yeah, he wasn't a heavy user, but he had the potential to be a real bad user."

Detectives Matheson and Cook said that they made a written note of these two conversations at about 7.00 am on 28 March, a few hours

after they took place. What they wrote down was not shown to the appellant, then in custody. I observe in passing that a copy of their note should have been given to him, whether or not he was prepared to sign it, for the reasons noted by Manning JA and Taylor J in *R v Dugan* (1970) 92 WN (NSW) 767.

Mr Tippett of counsel for the appellant at his trial cross-examined the detectives to the effect that they had fabricated their evidence of the two conversations; that is, that those conversations had never taken place. He put to them that since evidence against the appellant was lacking at the time, they therefore required a confession; and so they had made up the story of the two conversations, perjuring themselves. To use the argot, they had "verballed" the appellant. Mr Tippett suggested that their note was not made at 7.00 am on 28 March, but at some time during that afternoon after the Police had heard from Mr Campbell for the first time that he was to receive $10,000 for importing the heroin.

The Crown case was that the contents of these two alleged conversations were significant, in two ways. First, the appellant's admissions supported Mr Campbell's testimony that the appellant was concerned in his heroin importation; see the references to Mr Campbell giving him "the gear", and to their arrangement "to split the smack straight down the middle". Second, the appellant's admissions directly incriminated him. The Crown contended that the reliability of the detectives' evidence that the appellant admitted to them (p6) he had sent Ms Suringa to the Atrium Hotel was supported by the evidence that Mr Campbell had earlier made a (recorded) telephone call (pp61-62) to the appellant making an appointment to see him at the Atrium,

and that in fact Ms Suringa had then turned up at that hotel and spoken to Mr Campbell.

So much for the issues and the evidence at trial; I turn to the grounds of appeal.

The first ground of appeal: error in not discharging the jury

The appellant's first ground of appeal is that the learned trial Judge erred in refusing an application by Mr Tippett, after the summing up had concluded, that the jury be discharged. Broadly, the submissions were along the same lines as those advanced by Mr Tippett when applying to have the jury discharged; accordingly, I turn to that application.

(a) The application at trial for the discharge of the jury

When the jury retired Mr Tippett took exception to two passages in his Honour's summing up, now set out at Appeal Book pp207 (pp15-16) and 215 (pp17-18).

It is desirable to place these passages in their context. His Honour's charge to the jury occupied some 26 pages. He commenced summing up some 15 minutes before adjourning on 8 June, explaining the role of the various participants in the trial. At p192 he directed the jury, inter alia:-

> "You - - - are the judges of the facts. - - - The facts are exclusively in your domain. - - -
> - - -
>
> - - - You're experienced in listening to what people say to you and deciding how much of what they say to you will accept. - - -
> - - -
> They are your fact finding faculties. - - - this is very much a credibility case, a veracity case. You've got to make a judgment about each one of these Crown witnesses and decide how much of their evidence you will accept. - - -

> As I say, you may accept every word of [the Crown case], you may reject every word of it, or you may accept some parts but not others. We'll see just how you would go about your task tomorrow, if you reject some of the evidence. If you accepted all of evidence of course, your task is easy."

It will be recalled that no evidence had been adduced by the defence; hence the reference to these "Crown witnesses". After directing the jury at p193 (p33) that the burden of proving guilt lay on the Crown and as to the standard of that proof, his Honour explained the meaning of the "evidence" on which alone the jury had to decide the case, referred briefly to some of that evidence, and said at p195:-

> "- - - I'm just going to leave you with this last thought - you've got to find the facts in this case before you can apply the law. What's a fact? A fact is something which answers the question: 'What did happen? What did happen?' If you can find out what happened, then it's easy to go on and apply the law - which I'll tell you about - but you should be focusing now on thinking: 'What did happen is what I've got to find out in this case'.
>
> If you think about that and you can find out what did happen, bearing in mind the evidence, the submissions that have been made to you from the Bar Table, then your task is not so difficult."
>
> His Honour continued next day in the same vein at p196:
>
> "- - - when we adjourned last night I was telling you that, of course, your role is to decide what did happen and to decide what did happen on the evidence that you've heard in this court - - -"

Two observations may be made on this direction, which the appellant attacked (pp35-6) in his second ground of appeal. First, to direct a jury to find the facts by asking and answering the question "what did happen, on the evidence?" is impeccable, as far as it goes. However, since those answers may be expressed with differing degrees of certitude - for example, "certainly this happened" or "probably this happened" or "possibly this happened"

and so on - it is necessary that the jury also be directed on the burden of proof (and standard of proof, where necessary) applicable to the finding of relevant facts. This need is highlighted, when the only evidence is that adduced by the Crown. Second, the reasonable doubt standard does not apply to the individual items of evidence which constitute the Crown case, but only to the inference to be drawn from the totality of the evidence on which the Crown relies to prove guilt; it applies to the determination of ultimate issues, the proof of the elements of the offence. However, where it is necessary for the jury to reach a conclusion of fact as an indispensable intermediate step in the reasoning process towards an inference of guilt, it must be satisfied beyond reasonable doubt about that conclusion of fact; see *Shepherd v The Queen* (1990) 179 CLR 573.

His Honour then discussed the elements of the offence charged, directed the jury on the burden and standard of proof of those elements, outlined the Crown case, discussed Mr Campbell's evidence, and at p201 directed the jury as to their approach to the exercise by the appellant of his right to remain silent when questioned by Detective Matheson, viz:

> "- - - let me make it perfectly clear that you should not draw any adverse inference against the accused from the fact that he exercised his right not to answer questions in the record of interview. After all, it would be a farce, wouldn't it, if police are obliged to caution a person that they're not obliged to answer questions and when the person accepts the caution and declines to answer questions, that could be used against him later on in his trial. I mean, it wouldn't be a real choice at all."

This direction is impeccable; see *R v Reeves* (1992) 29 NSWLR 109 at p115, per Hunt CJ at CL.

His Honour then directed the jury as to the danger of convicting the appellant on the evidence of Mr Campbell, an accomplice by his own account, unless his evidence was corroborated. He explained what "corroboration" meant, at p202, viz:-

> "- - - Corroboration is evidence which implicates the accused. That is, evidence that confirms in some material particular not only that the crime was committed - and we know that - but that it was the accused who committed it. That is, in this case, the accused was knowingly concerned in what Campbell did."

I observe that while this direction accords with the "usual practice" described in *R v Chrimes* (1959) 43 Cr App R 149 at p153, it does not mention the *Baskerville* requirement that the corroborative evidence must be evidence independent of the accomplice. This omission is significant, as his Honour instructed the jury that the fact that Mr Campbell made a telephone call to the appellant was evidence capable of corroborating Mr Campbell's evidence inculpating the appellant; see p60.

His Honour then identified three pieces of evidence as capable, if believed by the jury, of corroborating Mr Campbell's evidence: his telephone call to the appellant after his Police interview on 27 March (p60); the content of the appellant's admissions in the two alleged conversations between the appellant and Detectives Matheson and Cook in the early hours of 28 March, if the jury found those conversations took place (p65); and the arrival of Ms Suringa, not the appellant, at the Atrium Hotel where the appellant and Mr Campbell had agreed to meet (p63). I note that before summing up his Honour had not sought the assistance of counsel in identifying evidence capable of amounting

to corroboration of Mr Campbell. The Crown Prosecutor, we were told, had deliberately refrained in his address from identifying any such evidence, referring only to evidence capable of "supporting" Mr Campbell; the orthodox view seems to be that "corroborating" and "supporting" are not necessarily the same thing - see *R v Matthews and Ford* [1972] VR 3 at p20, *R v Apostilides* (1983) 11 A Crim R 381 at p401, and *R v Kehagias* [1985] VR 107 at 112; but cf. *DPP v Kilbourne* [1973] AC 729 at pp750 (per Lord Reid) and 758 (per Lord Simon of Glaisdale), *McGookin v The Queen* (1986) 20 A Crim R 438 at pp446-7, and *Doney v The Queen* (1990) 171 CLR 207 at p211.

His Honour next discussed the Police evidence of the two alleged incriminating conversations, noting Mr Tippett's submission that they were a complete fabrication by the Police. He commented at pp203-4:-

> "The evidence of the police officers Matheson and Cook about the oral conversations which were not recorded and which the accused was not given an opportunity to verify and, indeed, accept as accurate, is something that you have to look at very closely - - -
> - - - Suffice it to say that [the first alleged conversation] is very inculpatory, you may think. It's a matter for you, but you may think it's very inculpatory if the accused said those things to the police.
>
> I mean, he actually mentions Campbell. Well, when the name "Craig" is mentioned to him he actually says: 'He was going to come round to my place and give me the gear'. I mean, it's very, very inculpatory if you think it took place. - - -
>
> Then there was further discussion in which the accused was alleged to have denied that Campbell was to get $10,000. The accused said: 'That's crap. We were going to split the smack straight down the middle; half for me and half for him'. And he said: 'What were you going to do with your share?' and he said: 'Use it. I'd use the lot'. 'Do you know if Craig was a user?' and he said: 'Yeah, he wasn't a heavy user but he had the potential to be a real bad user'.

Obviously those conversations are very important on the issue of guilt or otherwise of the accused, him being knowingly concerned in the commission of the offence by Campbell. If they took place, they amount to admissions by the accused of his complicity in the offence committed by Campbell and his involvement of Cathy Suringa, you may think, in an effort to distance himself from that offence. The last thing he was going to do was go and meet Campbell at the Atrium Hotel, so he sent Cathy. An effort to distance himself, if you believe the conversations took place.

They demonstrate, you may think, the truth of Campbell's evidence and in that sense - it's a matter for you, but they are strongly corroborative of Campbell's evidence."

His Honour then at p204 gave a *McKinney* type warning in relation to the detectives' evidence about these conversations, part of which is as follows:-

"- - - It is quite right that you should scrutinise the police evidence about those conversation (sic) with special care because they took place in the police station and in the police car whilst the accused had been in the custody of police for some time and the accused is put in the position of those conversations being alleged against him when they're very hard to refute.

Counsel for the accused asserts to you by way of submission that they amount to a complete fabrication by these two police officers. I'll come to counsels arguments. So there's the fundamental question about whether those conversations took place or not. They were not recorded on a tape recorder, neither of them was reduced to writing immediately after the conversations took place. They were reduced to writing at about 7 am, which is a few hours after the police had finished with the accused, and a few hours after the conversations had taken place.

But what was reduced to writing was not shown to the accused so that he could sign the written record of the conversations or in some other way [acknowledge] that they'd taken place and that the record made was an accurate record.

I'm required, as a matter of law, to draw your attention to what may appear to be fairly obvious. Where police give evidence of inculpatory admissions made in conversations, the accused faces a heavy practical burden in raising a reasonable doubt as to the truthfulness of the police evidence that the statements were made. In the circumstances which invariably attend that sort of evidence, a reasonable doubt entails that

there be a reasonable possibility that police witnesses perjured themselves and conspired to that end.

I'm required to remind you that it's comparatively more difficult for an accused person, held in police custody - which the accused in this case believed he was [in] - without access to legal advisers or other means of corroborating, to have evidence available to support a challenge to the evidence of confessional statements than it is for the evidence to be fabricated. There's an inequality about the positions of such a person and police and that is obvious." (emphasis mine)

His Honour then adverted at pp204-5 to the defence submissions on the evidence of these conversations, and commented on them, viz:-

"It's been put to these police officers that they took advantage of the position of inequality and that they made these stories up. Well, you saw them; you saw them extensively cross-examined. What do you think of that? What did happen? Do you think that they did make these stories up? Because if they did it's a very evil thing to do to secure a conviction of this accused. What did happen?

You have to make a judgment about those police officers. You have to make up your mind whether you accept them or you reject them." (emphasis mine)

I observe that the sentence last emphasized was his Honour's comment on the defence submission that the detectives "made these stories up". I also observe that since the jury was directed to decide "what did happen?" - that is, whether the conversations took place - it was vital at some point to direct them that they had to be satisfied that the conversations took place, before finding that that was "what did happen". In practice the jury had to be directed that they had to be satisfied that the detectives' accounts were truthful, before they could find that the conversations took place; as they were, at p205 (p50) and p227 (p19). To satisfy themselves in that regard, the question they had to address was not whether they thought "that [the Police] did make these stories up", but whether they were satisfied that the Police had not made them up; to frame the question in terms of

whether they thought the stories had been made up was to place a heavier burden on the defence than the law allows. Earlier, however, in his *McKinney* directions (pp48), his Honour had indicated that the accused's challenge on the basis that the statements had been fabricated, meant that all he had to do was to raise "a reasonable doubt as to the truthfulness of the police evidence that the statements were made". This reference to the reasonable doubt standard was oblique, as the focus of the warning was on the difficulties encountered by an accused in rebutting Police evidence in the circumstances. His Honour then discussed the Crown submissions concerning proof by the accomplice evidence of Mr Campbell, and turned at p207 to the Crown submissions that the detectives' evidence established that the two alleged incriminating conversations had taken place. He said:

> "- - - [The Crown Prosecutor] said that you should accept the evidence of these police officers about the conversations.
>
> As to the first conversation, you were reminded that it's only a short conversation. It was initiated by the accused. It's inherently probable. You're entitled to look at the probabilities, so the Crown put it to you it's inherently probable that the conversation took place and that you should reject any suggestion that the conversation was made up by police.
>
> As to the second conversation, that's inherently probable, so the Crown put it to you, and they put the allegation correctly because at that stage Campbell was asserting that his return from the enterprise was $10,000. That was Campbell's story at that time. That's the way the police put it to the accused. They didn't put a false premise to him, they put what Campbell had told them up to that stage." (emphasis mine)

The Crown Prosecutor had not used the words "inherently probable" when addressing the jury about the alleged conversations. He had not addressed in terms of the probabilities or the burden and standard of proof that the conversations took place, but in terms

that the Police were "obviously telling the truth about those conversations." The references to it being "inherently probable" that the conversations took place, and to the jury being "entitled to look at the probabilities", are clearly his Honour's paraphrase of the Crown Prosecutor's submissions as to the significance of the circumstances in which the conversations allegedly occurred.

The passage at p207 to which Mr Tippett took exception follows immediately, viz:-

> "Now, you should really think why would police make those conversations up, why would they as the Crown put to you, put their careers at stake, indeed submit themselves to the possibility of being dealt with in the criminal area for giving false evidence in a court on a material matter? They're career policemen and to go into the witness box and tell a false story, to make something up, puts those careers in jeopardy; indeed, their whole lives in jeopardy if they are making them up." (emphasis mine)

Mr Tippett took exception to this passage on the ground that this form of direction had been specifically disapproved of by the High Court in *McKinney and Judge v The Queen* [1990-91] 171 CLR 468 at pp476-7 (p21) in that it suggested that it was necessary for the jury to decide whether the police had perjured themselves. He applied to have the jury discharged on the basis that the passage raised for the jury's consideration questions which "significantly taint the real question which the jury must consider", and no redirection could remove that taint.

The Crown Prosecutor submitted in reply that the relevant part of his address to the jury, summarised by his Honour in the passage in question, was directed at drawing to the jury's attention matters relevant to their consideration of the defence case as disclosed in the cross-examination of Detectives Matheson and Cook, that it was a reasonable possibility that the detectives had fabricated the conversations and perjured themselves. He had

put those matters to the jury as commonsense considerations relevant to their assessment of the vital issue of the two officers' credit, which had been attacked by Mr Tippett. He submitted that since he had raised those considerations for that purpose, the prohibition in *McKinney* (supra) at pp476-7 (p21) had not been breached.

The other passage, at p215 near the end of the summing up, to which Mr Tippett also took exception was as follows:

> "In all his dealings with the police, the accused has never said that he didn't do it. There's just no evidence of him ever saying such a thing to the police. He was in the company of the police, Matheson and Cook, from the time they arrived to execute the search warrant - which seems to have been some time about 8 pm or after on 27 March - until after the record of interview and after the two conversations in the early hours of the 28th. It must've been between 3 and 4 am. Upwards of seven hours or more. Nowhere did the police give any evidence of any denial by the accused of Campbell's story."

Mr Tippett submitted that this comment by his Honour was "utterly prejudicial"; his Honour was in effect directing the jury that it could "take into account [in deciding whether the accused was guilty] the fact that [the accused] 'never said [that] he didn't do it'", and the prejudice thereby occasioned to the appellant could not be cured by any redirection. I observe that the Crown Prosecutor had never suggested in his address to the jury that the appellant could be criticised for not answering the Police questions, or for not denying his guilt. He submitted in reply that this comment could be rectified by a redirection which reiterated the thrust of the earlier and correct direction at p201 (p11).

His Honour declined to discharge the jury. He indicated to counsel at p221 how he proposed to deal with Mr Tippett's exceptions:

> "What I propose to do is to redirect the jury because I think what counsel for the accused has raised might justify the course. I propose to make it clear that insofar as I was bringing to the jury's attention [in the passage at p207 (p16)] what untruthfulness by the police involves, I was merely reciting the Crown arguments put to the jury, but return them to the central question: whether they are satisfied as to the truthfulness of the police evidence that these conversations took place, that the Crown put a number of arguments to demonstrate the likelihood, the probability, that the conversations would not have been manufactured and I propose to say no more than that.
>
> As to the second matter [that is, the passage at p215 (p17)], I should've married the bit [at p201 (p11)] about the accused not being obliged to answer questions and the fact that he had never denied, in a period of some 8 hours, that he was guilty of some complicity in the offence by Campbell. I think I should redirect about that, basically in the terms just announced by the Crown, that there's no obligation, no requirement, on the accused to protest his innocence and no adverse inference should be drawn [from his not doing so]."

His Honour then redirected the jury in the following terms at p227, in relation to the passage at p207 (p16):

> "You'll remember that in the course of my summing up to you, I invited you to examine the police evidence with special care. I pointed out to you the vulnerability of the accused in circumstances where the police have got him under their control, as it were, and the difficulty for an accused person in denying that confessions were made, the relative inequality of the police on the one hand, and the accused on the other. I was trying to bring to your mind, your task is to decide whether the police have told you the truth about those two conversations.
>
> That's the issue, about those two conversations. The truthfulness of the police officers. <u>In the course of doing that I referred to some arguments that senior Crown counsel put to you when he asked you to consider whether the police would make up that evidence about the conversations; whether they would put their careers at stake or possibly invoke the criminal law against themselves and put their lives in the hands of Campbell</u>.

> They were arguments put to you by the Crown. So what I have to stress is you're not embarked on an inquiry as to whether the police have perjured themselves or not. The central issue is what did happen? Did those conversations take place or didn't they take place? The Crown has addressed you along the lines that the conversations must've taken place, police wouldn't make this sort of thing up.
>
> So the central issue is the truthfulness or otherwise of the police in telling you that the conversations took place." (emphasis mine)

I note that the "central issue", in practical terms, was whether the jury was satisfied that the detectives were truthful in their evidence, as his Honour had said to counsel at p221 (p18), and earlier in his summing-up at p205 (p50).

In relation to the passage at p215 (pp17-18), his Honour redirected the jury in the following terms at pp227-8:-

> "- - - remember that I said to you that in the course of the record of interview it's common ground that the accused was cautioned at the start that he wasn't obliged to answer any questions and he exercised his right not to answer any questions. The police say that he exercised that right and no useful answers came from him in that record of interview.
>
> The police further say that he did say some other things in the first conversation. He initiated things which implicated him, and I won't go over the conversations again. In the second conversation he was cautioned and he said some things which implicated him. That's the police evidence.
>
> Insofar as I may have said anything to the contrary, I direct you, as plainly as I can, that there was - especially as he'd been cautioned - no requirement on the accused to protest his innocence. If he's cautioned and he's not obliged to answer any questions and he exercises his right not to answer any questions, then he's not required to protest his innocence."

I note in passing, in view of the linking in this passage of a suspect's right to silence with his being cautioned, that the right to silence applies not only when a caution is administered; see *Petty and Maiden v The Queen* (1991) 173 CLR 95 at pp106-7, per Brennan J (p24). I also note that the passage at

p215 (pp17-18) is expressed in general terms, referring to the appellant's failure to deny his guilt at any time during the seven hours or so he was in the company of Detectives Matheson and Cook; that is, it was not limited to the fact that he declined to answer their questions during the 2½ hour interview. His Honour had indicated (p18) that the two aspects should be "married", but the redirection did not do so.

(b) The submissions by the appellant

In support of this ground Mr Morgan-Payler of counsel for the appellant relied on the combined effect of the two passages at pp207 and 215 to which Mr Tippett had taken exception.

(i) The passage at p207 (p16)

He submitted that even if in the passage at p207 his Honour was merely reminding the jury of what the Crown admittedly had put, and not making his own comment, it was open to attack on 2 grounds. First, it left the jury "with the impression that that comment came with curial approval", whereas his Honour should have criticised it. Mr Morgan-Payler linked the passage with the last sentence of a passage at the conclusion of the summing up, when his Honour was putting the appellant's case on the alleged conversations:-

> "Furthermore, the police, in imputing to him these oral admissions which are damaging to him, are being dishonest. They're complete fabrications, they made them up and they made them up so as to ensure that their case against the accused is improved to the point that he will be convicted by you, ladies and gentlemen. The very worst of motives for police officers." (emphasis mine)

He stressed that the last sentence was his Honour's own comment on the thrust of the defence submission.

Second, the passage involved an error of law likely to produce a miscarriage of justice, for the reasons stated by the majority of the High Court in *McKinney* (supra) at pp476-7, viz:-

> "The question which is inevitably raised by a challenge to police evidence of confessional statements is - - - whether it is a reasonable possibility that the police evidence is untruthful, which, in the circumstances, entails the possibility that police witnesses have perjured themselves and conspired to that end. That is a different question from the question whether the police have, in fact, perjured themselves and conspired to that end. It cannot be sufficiently emphasized that a jury should never be directed in terms which suggest that it is necessary to decide that latter question. It is even more important that a jury not be directed in terms which suggest that it is necessary to form a judgment about the conduct of police witnesses which although bearing on their credit, is not directly brought into issue by a challenge to their evidence as to the making of a confessional statement." (emphasis mine)

Earlier, at pp475-6 their Honours had said:-

> "A heavy practical burden is involved in raising a reasonable doubt as to the truthfulness of police evidence of confessional statements, for, in the circumstances which invariably attend that evidence, a reasonable doubt entails that there be a reasonable possibility that police witnesses perjured themselves and conspired to that end."

Mr Morgan-Payler referred to *R v Collins* (1975-76) 12 SASR 501, where King J (as he then was) dealt with stronger comment by a trial judge, at pp519-520:-

> "The comment in a summing up that the denial by an accused person of the statement attributed to him by the police involves a charge of conspiracy against the police officers, although often enough made, does not, in my view, assist a jury to an unprejudiced consideration of the issues before it. It can easily divert the attention of a jury to a consideration of whether a charge of conspiracy has been made out against the police and away from the true issue for its consideration, namely, whether the charge against the accused has been established beyond reasonable doubt. Nevertheless, I cannot say that either comment is beyond the proper limits of judicial comment on the facts of the particular case and I think that this ground of appeal fails."

In *R v White* (1976) 13 SASR 276 the Full Court agreed with this criticism; so did Brennan J in *Duke v The Queen* (1988-89) 63 ALJR 139 at 143. In *R v White* (supra), the trial Judge had commented with rhetorical flourish on police evidence, along somewhat similar lines to the passage at p207 but at much greater length and strength. The Full Court said of this comment at p283:-

> "Its overwhelming tendency is to influence the jury to approach the case on the basis that the issue is whether the Police have been guilty of monstrous conduct instead of whether the accused has been proved guilty of the crime charged. The passage is not only cast in the rhetorical form deprecated by Gowans J in *Reg v Donnini* [1973] V.R. 67 at p77, but the reference to the detectives putting their careers on the line might carry with it in the minds of the jurors the implication that a verdict of "not guilty" would jeopardise their careers; see *Reg v Culbertson* (1970) 54 Cr. App. R. 310."

Mr Morgan-Payler submitted that the redirection at p227 (p19) did not cure the error in the passage at p207 because his Honour had not expressed curial disapproval of that comment, and did not redirect the jury that its task in assessing the evidence of the alleged conversations was not to decide whether the Police had perjured themselves but rather, in accordance with *McKinney* (supra) at p476 (p21), whether there was a reasonable possibility that they had done so. He submitted that the question for this Court in relation to the comment at p207 was, in the words of Brennan J in *Duke v The Queen* (supra) at p143:-

> "- - - whether in context those comments were likely to mislead the jury as to the issue for their determination."

(ii) <u>The passage at p215</u> (pp17-18)

The second passage on which Mr Morgan-Payler relied to establish the first ground of appeal was that at p215 (pp17-18), a comment by his Honour very near the end of his directions, and the

subject of his redirection at pp227-8 (pp19-20). Earlier in his directions, at p201 (p11), his Honour had correctly directed the jury as to its approach to the exercise by the appellant of his right of silence.

Mr Morgan-Payler submitted that his Honour's comment at p215 (pp17-18) indicated to the jury that he had himself drawn that "adverse inference against the accused", against the drawing of which he had earlier warned them at p201 (p11). In effect, he had introduced inadmissible evidence. Mr Morgan-Payler did not complain about the actual terms of the redirection at pp227-8, but submitted that the error in making the comment at p215 was so grave and fundamental - it had occurred almost at the end of the summing up, was a "very forceful comment" by the trial judge, and the jury had then retired for about an hour before they were redirected on the point - that it was not capable of being cured by any redirection, and the jury should have been discharged.

He relied on *Petty* (supra); in that case a suspect's right to remain silent when questioned was described by the majority of the High Court (Mason CJ, Deane, Toohey and McHugh JJ) at p99 as:-

> "- - - a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless.
> - - -
> That incident of the right of silence means that, in a criminal trial, it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown Prosecutor, that an accused's exercise of the right of silence may provide a basis for inferring a consciousness of guilt." (emphasis mine)

On the point of drawing an adverse inference from silence when questioned Brennan J said at pp106-7:-

> "A suspect has a right to maintain silence when questioned by persons in authority about the occurrence or authorship of an offence. It is a "right" which attracts an immunity from any adverse inference which might otherwise arise from its exercise. - - - The right must not be infringed by any invitation to the jury to take his silence into account against him at his trial. [His Honour then cited various authorities, and continued:] This rule applies not only when a caution has been administered
> - - -
> - - - it is only by a firm adherence to the rule as so stated that effect is given to the policy of the common law that a suspect's "fault [is] not to be wrung out of himself, but rather to be discovered by other means, and other men" (*Blackstone's Commentaries* vol IV p296, cited by Windeyer J in *Rees v Kratzmann* (1965), 114 C.L.R. at p80.)" (emphasis mine)

(c) Conclusions on the first ground of appeal

(i) The effect of *McKinney* (supra)

Underlying what his Honour said at p204 (p14) about the reasonable doubt standard as applied to the detectives' evidence, Mr Tippett's exception to the passage at p207 (p16), and Mr Morgan-Payler's submission (pp21-23), is a view of what the *McKinney* rule of practice requires. It is desirable to examine that in some detail.

The prosecution case in *McKinney* was substantially based on a signed Police record of interview, linking McKinney to a crime. Apart from his signature there was no independent evidence corroborating the making of the record or its contents. McKinney contended that the record of interview was fabricated by the Police and he had signed it only because his will was overborne. He appealed against his conviction on the basis that the jury should have been warned as to the danger of convicting on the

basis of the record of interview. The majority of the High Court considered at p474 that there should be a rule of practice "for the future along the lines suggested by Deane J in [*Carr v The Queen* (1988) 165 CLR 314]", on the basis that a lack of reliable corroboration in the circumstances attracts such a warning. It is desirable therefore first to set out what Deane J suggested in *Carr* (supra).

In *Carr* (supra) the sole substantial evidence against the applicant was also a disputed uncorroborated oral confession allegedly made while he was in Police custody. Deane J said at pp335:-

> "- - - Neasey J concluded that the particular circumstances of the case were such that the jury should have been given a specific warning about the need to scrutinise the police evidence of the applicant's alleged oral confession with great care before accepting it as the basis of proof of guilt beyond reasonable doubt. His Honour was also of the view that it would have been appropriate, in the particular circumstances of the case, for the learned trial judge to warn the jury of the difficulty which even experienced judicial officers often have in being able to make with confidence a subjective judgment about whether a practised witness is telling the truth or not. For my part, I would go further and recognize a prima facie requirement that such specific directions be given in any case where the prosecution relies upon police evidence of disputed oral admissions allegedly made while the accused was under interrogation while in police custody and where the actual making of the admissions is unsupported by video or audio tapes, by some written verification by the accused, or by the evidence of some non-police witness. In addition, I consider that, as a prima facie rule, those specific directions should, in a case where uncorroborated police evidence of the making of a disputed oral confession is the only, or substantially the only, evidence against an accused, include a further warning to the jury pointing to the danger involved in convicting upon the basis of that evidence alone. That further warning should be to the effect that, while it is ultimately a matter for them, the members of the jury should give careful consideration to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for a finding that his guilt has been established beyond reasonable doubt is

> uncorroborated and disputed police evidence of oral admissions allegedly made by him while he was held in custody by the police. It should be pointed out to the jury that, in such a case, the detention in police custody and the failure of the relevant authorities to institute an appropriate system for the mechanical recording of what is said in the course of police interrogation combine to render an accused peculiarly vulnerable to fabrication of evidence of oral admissions allegedly made while in such custody by effectively precluding any corroboration of his denial that he has made them." (emphasis mine)

It can be seen that his Honour distinguished between 2 situations, both of which required "specific directions". The first was "any case" involving a disputed uncorroborated confessional statement allegedly made while in Police custody; that would include a case such as this, where the Crown has adduced other substantial incriminating evidence. The other situation was that in *Carr* (and *McKinney*), where such a statement was the "only, or substantially the only, evidence against an accused." In the latter situation, the directions had to include a "further warning", stressing the dangers in convicting on such evidence alone.

In *McKinney* at p475-6, the majority continued:-

> "- - - what is appropriate is a rule of practice of general application whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated." (emphasis mine)

I consider that this corresponds to the "any case" situation distinguished by Deane J in *Carr* (supra) (p26). Shortly afterwards, it seems to me, in the passage at pp475-6 set out below, their Honours ran together both situations, and intermingled the directions required in those situations. In that passage at pp475-6 their Honours said:-

> "The contest established by a challenge to police evidence of confessional statements allegedly made by an accused while in police custody is not one that is evenly balanced. A heavy practical burden is involved in raising a reasonable doubt as to the truthfulness of police evidence of confessional statements, for, in the circumstances which invariably attend that evidence, a reasonable doubt entails that there be a reasonable possibility that police witnesses perjured themselves and conspired to that end. And, as is made clear in *Wright* (1977) 15 A.L.R., at p317, and *Carr* (1988) 165 C.L.R., at pp337-338, the contest is one which may entail other forensic constraints or disadvantages. Thus, the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and, accordingly, it is necessary that they be instructed, as indicated by Deane J in *Carr* (1988) 165 C.L.R., at p335, that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated. Within the context of this warning it will ordinarily be necessary to emphasize the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth. And, of course, the trial judge's duty to ensure that the defence case is fairly and accurately put will require that, within the same context, attention be drawn to those matters which bring the reliability of the confessional evidence into question. Equally, in the context of and as part of the warning, it will be proper for the trial judge to remind the jury, with appropriate comment, that persons who make confessions sometimes repudiate them."

I consider that the two situations identified by Deane J in *Carr* (supra) (p26) still have to be distinguished, when the Crown adduces, as in this case, substantial incriminating evidence in addition to an uncorroborated disputed confessional statement. At the time of summing up it cannot be known whether the jury will accept or reject the other incriminating evidence. I consider that the jury should first be directed as to the use of the

confessional statement, in terms of a general warning: of the need to scrutinize it with great care before accepting it as a basis of proof of guilt; of the difficulty of assessing with confidence whether practised witnesses such as Police officers are telling the truth or not; of the heavy practical burden on a person of the fact he is in Police custody, in raising a reasonable doubt as to the truthfulness of the Police evidence that he made the statement, because in that custody he has access neither to legal advice nor to means of corroborating his account of what transpired. The jury should then be directed that if in the end it considers that the confessional statement is the sole substantial evidence against the accused, it must give careful consideration as to the dangers of convicting him solely on the basis of that evidence, in the light of the matters about which it was warned, and that it can only do so if satisfied beyond reasonable doubt that the statement was made and is true. I note that the headnote to *McKinney* (supra) takes a more limited view of the scope of the general rule of practice there enunciated, as do Smart J in *R v Tarantino* (1993) 67 A Crim R 31 at 38 and Owen J in *Lau v The Queen* (1991) 6 WAR 30 at 65; cf *Faure v The Queen* (1993) 67 A Crim R 172 at 177.

When their Honours continued in *McKinney* at pp476-7, in the passage relied on by Mr Morgan-Payler and set out at p21, they had clearly turned from consideration of the question of a future rule of practice, to the question whether in the specific case before them a warning should have been given. The remarks at pp476-7 (p21), I think, have to be read and understood against that background; that is, of a case where substantially the only evidence upon which McKinney could have been convicted was his

confessional statement. This also appears to be the view of Seaman J in *Lau* (supra) at 38. That was not the present case, unless the jury rejected the evidence of Mr Campbell.

(ii) The passage at p207 (p16)

I consider that in the passage at p207 (p16) his Honour was clearly reminding the jury of a commonsense consideration put by the Crown as relevant to their assessment of the credibility of the detectives' evidence of their two conversations with the appellant. There was no need for his Honour to have criticised that consideration, which was directly relevant to the jury's fact-finding task. Where an accused denies making a confessional statement, the vital question usually becomes one of credit; and so it was here. As Mr David Q.C. of senior counsel for the Crown rightly said, in those circumstances the "resolution of that question is squarely before the jury". Nor was his Honour's later comment (p21) on the defence submission in any way improper.

I consider that the passage at p207 did not suggest to the jury that it was necessary for them to decide whether the Police had perjured themselves, and conspired to that end. Compare, for example, the direction in *Towner v The Queen* (1991) 57 A Crim R 221. Such a direction is prohibited because, apart from the fact that it diverts concentration from the vital question whether the confessional statement was made, it imposes a heavier burden on the defence than the law allows. The reasonable doubt standard applies to proof of the making and the truth of a confessional statement. To reject uncorroborated Police evidence of a disputed confessional statement allegedly made while in Police custody, a jury need only be satisfied there is a reasonable possibility that that evidence is untruthful; if they

are so satisfied, there is a concomitant reasonable possibility, in the circumstances, that the Police witnesses have perjured themselves.

The thrust of Mr Tippett's address to the jury rightly had been that if "there is a reasonable possibility that these statements were made up", they should be rejected. Mr Tippett's cross-examination of the detectives had put squarely in issue the credibility of their evidence of these conversations; he suggested they were motivated to fabricate that evidence because hitherto they had lacked evidence inculpating the appellant. The commonsense considerations put by the Crown to the jury and summarised by his Honour at p207 (p16) were clearly relevant to the vital issue of the detectives' credibility raised by Mr Tippett, and thus to the major issue he had raised that it was reasonably possible that the detectives had fabricated the conversations. I should say that I consider that the comments in *R v Collins* (supra) and *R v White* (supra) were quite different in their thrust.

The criticism by Mr Morgan-Payler (pp21-23) of the redirection is in my opinion without substance. I consider that the submissions put in reply by the Crown Prosecutor at trial (p17) were correct. I note that his Honour had stated, albeit obliquely, in the passage emphasized in his *McKinney* directions (p14), that the question for the jury was whether the appellant had raised a reasonable doubt of the truthfulness of the detectives' evidence of the two conversations.

(ii) <u>The passage at p215 (pp17-18)</u>

I consider that the passage at p215 (pp17-18) can fairly be read as an express invitation to the jury to take into account

against the appellant the fact that at no time during his seven hours or so with the Police had he protested his innocence. The tacit invitation to the jury was that they could infer from this that the appellant was conscious that he was guilty. This amounted to a very serious misdirection on the burden of proof; see *Petty* (supra) at pp99 and 106-7 (p24). However, I do not consider, in the circumstances, that it was so fundamental an error that it was not possible to cure it by a suitable redirection. *R v Holden* (1990) 52 A Crim R 32 at pp46-7 is a good illustration of how a vital error in a direction can be cured by a proper redirection; the Court of Criminal Appeal there had regard to the summing up as a whole and "the terms upon which the retraction was expressed."

The question then is whether the redirection at pp227-228 (pp19-20) sufficiently overcame the effect of the misdirection at p215 (pp17-18). I consider that the misdirection at p215, expressed in clear and general language, would have made a powerful impression on the jury, bearing in mind it was near the end of the summing up and probably accorded very well with their own commonsense expectation that an innocent person would have protested his innocence in those circumstances. To overcome that impression, the misdirection had to be specifically identified in the redirection, and stated to be erroneous. In my opinion, the proper course to adopt in these circumstances is set out in *R v Moon* [1969] 1 WLR 1705. In that case there had been a misdirection on the burden of proof of an issue which the Court had sought to correct by redirection; the Court of Appeal said at p1707:-

> "The fault can be put right, although it may be difficult to do so. - - - it can only be put right in the plainest possible terms. It would be necessary for the [trial judge] to repeat the direction which he had given, to acknowledge that that direction was quite wrong, to tell the jury to put out of their minds all that they had heard from him relating to [the point in question] up to that moment about the burden of proof, and then in clear terms, which would be incapable of being misunderstood, tell them very plainly and simply what the law is."

Here the redirection (p20) was expressed in conditional terms of "insofar as I may have said - - -" and directed to the context of Police questioning and cautions; the general misdirection at p215 (pp17-18), which dealt with the appellant's failure to protest his innocence over 7 hours, was not specifically identified and retracted. I do not think on the whole that the redirection was sufficient to overcome the effect of the general misdirection at p215.

As appears from the foregoing, however, I do not consider that the first ground of appeal - that his Honour erred in not discharging the jury on Mr Tippett's application - has been established.

The second ground of appeal

In this ground the appellant contends that the learned trial Judge when summing up failed to direct the jury adequately as to the applicable burden and standard of proof of guilt, and as to how they should proceed in the fact-finding process in which they were now required to engage.

Mr Morgan-Payler submitted that all that his Honour had said about the burden and standard of proof appeared early in his charge on 8 June at p193, viz:-

> "The Crown brings the charge, the Crown must prove it. The accused has put them to proof simply by pleading "not guilty". "Not guilty" means: 'You prove it'. So

> the Crown, having been faced with a plea of "not guilty", sets about to prove it.
>
> The Crown will succeed only if you, ladies and gentlemen, are satisfied of the guilt of the accused beyond reasonable doubt. That's the standard: beyond reasonable doubt. If you're not satisfied beyond reasonable doubt, the accused is entitled to be acquitted and your verdict will be not guilty. If you are satisfied beyond reasonable doubt, it's your duty to find the accused guilty."

Mr Morgan-Payler conceded that this direction was correct, but submitted that the cumulative effect of six later passages in the summing up and redirection, dealing with the fact-finding process with particular reference to the two alleged conversations, was such that there was the gravest danger that the jury had nevertheless not correctly applied the proper burden and standard of proof when reaching their verdict.

Before coming to those six passages, I note that in fact his Honour adverted several times to the burden and standard of proof of guilt later in his summing up, on 9 June. At pp196-198 his Honour said:

> 196. "- - - as I told you yesterday, you have to be satisfied beyond reasonable doubt of the elements of that offence before you can convict the accused, and I'm going to tell you what the elements are.
> - - -
> 197. - - - those admissions [at p1, under Code s379] and the evidence of Mr Campbell as to how he brought the heroin into the country, which is not disputed, - - - should satisfy you beyond reasonable doubt about those second and third elements of the charge, the importation and that they were prohibited imports to which section 233B applied.
> - - -
> - - - the matter upon which you have to be satisfied beyond reasonable doubt before you can convict the accused is that he was knowingly concerned in the importation by Campbell of that quantity of heroin.
>
> If you are not satisfied beyond reasonable doubt, of course, you will find him not guilty. If you are satisfied beyond reasonable doubt, then you find him guilty. "Knowingly concerned" simply means, as the Crown opened to you last week, connected with or

associated with. The Crown case here is the importation of the heroin by Campbell was a result of a pre-arrangement with the accused. A common purpose with the accused.

Now, however you describe it, if you are satisfied beyond reasonable doubt that what happened was as a result of a pre-arrangement, or a common purpose, describe it any way you like, - - - all the three elements of the offence are made out and you must find the accused guilty. If you're not satisfied beyond reasonable doubt that what Campbell did was the result of a pre-arrangement with the accused, a common purpose with the accused, in association with the accused, use any words you like, then you must find him not guilty.

198. Remember it's the elements of the offence of which you have to be satisfied beyond reasonable doubt. You don't have to be satisfied beyond reasonable doubt about every tiny fact which the Crown has put before you. You only have to be satisfied beyond reasonable doubt about the elements of the offence. There may be some trivia, some minor matter of fact which you're not satisfied beyond reasonable doubt. That is, perhaps whether the arrangement was that the accused and Campbell would meet at the Humpty Doo Store, or out on the road at Humpty Doo. What's it matter? If the arrangement was there, you don't have to worry about being satisfied beyond reasonable doubt that the arrangement was in the store or out on the road, or in the vicinity, or whatever it is. The substance of the allegation would still be made out if you're satisfied that that was the arrangement.

So, if I just take that as an example of a little piece of factual material which you may or may not accept. But bear in mind you have to be satisfied beyond reasonable doubt that the accused was "knowingly concerned" before you can convict him." (emphasis mine)

I note that in these passages his Honour did not deal specifically with the question of the standard of proof of the existence of the two alleged conversations, with which four of the six passages relied on by the appellant are concerned. I have already indicated that later, in an oblique way, in his *McKinney* directions (p14), his Honour indicated that the reasonable doubt standard of proof applied

to the question whether the conversations took place.

(a) <u>The six passages relied on by the appellant</u>

Those passages, in context, are as follows:-

[1]. Pages 195-6. Just before adjourning on 8 June 1993, his Honour dealt with the jury's fact-finding function at p195:-

> "- - - you've got to find the facts in this case before you can apply the law. What's a fact? A fact is something which answers the question: 'What did happen? What did happen?' If you can find out what happened, then it's easy to go on and apply the law - which I'll tell you about - but you should be focusing now on thinking: 'What did happen is what I've got to find out in this case.'
>
> If you think about that and you can find out what did happen, bearing in mind the evidence, the submissions that have been made to you from the Bar Table, then your task is not so difficult."

His Honour continued to direct on the same fact-finding function the following morning, at p196:-

> "- - - when we adjourned last night I was telling you that, of course, your role is to decide what did happen and to decide what did happen on the evidence that you've heard in this court and not on prejudices or speculation about matters which are not covered by the evidence."

See the observations on this direction at p10.

[2]. Pages 204-5. At p204 his Honour commented on Mr Tippett's submission that the two detectives had fabricated their evidence of the two incriminating conversations. He reminded the jury in *McKinney* terms of the "heavy practical burden" a person has, in challenging Police evidence that he made a confession in a Police Station or a Police car while in Police custody; see the passage at pp13-14. He continued at pp204-5:-

> "- - - There's an inequality about the positions of such a person and police and that is obvious.
>
> It's been put to these police officers that they took advantage of the position of inequality and that they made these stories up. Well, you saw them; you saw them extensively cross-examined. What do you think of that? What did happen? Do you think that they did make these stories up? Because if they did it's a very evil thing

> to do to secure a conviction of this accused. What did happen?
>
> You have to make a judgment about those police officers. You have to make up your mind whether you accept them or you reject them. - - -"

See the observations on these passages at pp14-15. As noted there, insofar as the question for the jury to answer is posed as: "Do you think that they [that is, the detectives] did make these stories up?" a heavier burden that the law allows is thereby placed on the appellant, who had only to raise a reasonable doubt as to the detectives' truthfulness. However this passage occurs after his Honour's *McKinney* warning in which he had stressed the "heavy practical burden" on an accused "in raising a reasonable doubt as to the truthfulness of the police evidence", and before his later stress at pp205-6 (p50) on the jury's need to be "satisfied of the truth of the police evidence that these conversations took place", and at p227 (p19) that "your task is to decide whether the police have told you the truth about those two conversations." Individual passages in a summing-up must be considered in the light of the whole summing-up.

[3]. Page 206. His Honour continued to stress the need for the jury to give "careful scrutiny" to the Police evidence, and the need "to make a judgment about [Detectives Matheson and Cook]" in deciding whether they were "satisfied of the truth of the police evidence that those conversations took place"; he continued at p206:-

> "Remember your function is: what did happen. Remember the fundamental contest about those conversations is whether they took place at all. It's for you to decide whether they took place. If they did, they are strongly corroborative of Campbell's story."

[4]. Page 215. From p208 his Honour was putting the defence case to the jury. He pointed out frequently that there was no evidence to support particular submissions made by Mr Tippett, or that factual propositions which Mr Tippett was now advancing had never been put in cross-examination to any Crown witness; this aspect is raised in the sixth ground of appeal at p68. His Honour concluded this part of his summing up by dealing with miscellaneous defence submissions, pointing out that there was "no evidence" to support them. Drawing to the conclusion of his summing up he then said at p215:-

> "So I can only stress, ladies and gentlemen, look at the evidence in the case, don't speculate. Decide what did happen and then see whether you are satisfied beyond reasonable doubt. In this case there is no real evidence of any scenario other than the one that the Crown relies on: the arrangement between the accused and Campbell. There's no evidence of an arrangement between the accused and Mick, there's no evidence of an arrangement between the accused and Ian Lord. No evidence of an arrangement between the accused and anyone else." (emphasis mine)

Mr Morgan-Payler submitted that the significance of this passage came from its context: the jury had earlier been repeatedly directed by his Honour (see, for example, pp9, 14 and 19) that their task was to decide on the evidence "what did happen?"; then, leading up to this passage, and within it, his Honour had directed the jury that on many matters there was no evidence to support the defence submissions. The thrust of the submission is really that there was no concomitant explanation of the effect on this situation of the burden of proof being on the Crown.

[5]. Page 227. As noted at p19, when redirecting the jury at p227 his Honour said:-

> "You'll remember that in the course of my summing up to you, I invited you to examine the police evidence with special care. I pointed out to you the vulnerability of

> the accused in circumstances where the police have got him under their control, as it were, and the difficulty for an accused person in denying that confessions were made, the relative inequality of the police on the one hand, and the accused on the other. I was trying to bring to your mind, your task is to decide whether the police have told you the truth about those two conversations.
>
> That's the issue, about those two conversations. The truthfulness of the police officers. In the course of doing that I referred to some arguments that senior Crown counsel put to you when he asked you to consider whether the police would make up that evidence about the conversations; whether they would put their careers at stake or possibly invoke the criminal law against themselves and put their lives in the hands of Campbell.
>
> They were arguments put to you by the Crown. So what I have to stress is, you're not embarked on an inquiry as to whether the police have perjured themselves or not. The central issue is what did happen? Did those conversations take place or didn't they take place? The Crown has addressed you along the lines that the conversations must've taken place, police wouldn't make this sort of thing up.
>
> So the central issue is the truthfulness or otherwise of the police in telling you that the conversations took place." (emphasis mine)

See the earlier observation on this passage at p19.

[6]. Page 207. In the course of putting the Crown case to the jury when summing up, his Honour had dealt at p207 with the two alleged conversations, and said:-

> "As to the first conversation, you were reminded that it's only a short conversation. It was initiated by the accused. It's inherently probable. You're entitled to look at the probabilities, so the Crown put it to you it's inherently probable that the conversation took place and that you should reject any suggestion that the conversation was made up by police.
>
> As to the second conversation, that's inherently probable, so the Crown put it to you, and they put the allegation correctly because at that stage Campbell was asserting that his return from the enterprise was $10,000 - - -" (emphasis mine)

See the earlier observations on this passage at p16.

It does not clearly appear from the materials placed before this Court that "at that stage" Mr Campbell was asserting that he was to be paid $10,000; he appears to have agreed in cross-examination that he thought he did not give that (false) account to the Police about being paid $10,000 until a further interview by the Police on the afternoon of 28 March, after the alleged second conversation between the appellant and the Police, and after its alleged noting by the detectives at 7am that day. The matter was not raised in cross-examination with any of the Police witnesses. The Crown Prosecutor in his address stated that by the time of the alleged second conversation in the early hours of 28 March, Mr Campbell had already told the Police he was to receive $10,000. His Honour may have been misled by this when stating the effect of Mr Campbell's evidence, at p207 (above). However, Mr Morgan-Payler informed us that the evidence disclosed that when Mr Campbell was "first apprehended" by the Police he "initially" told them he was to be paid $10,000. Accordingly, the matter is of no significance.

(b) The appellant's submissions

Mr Morgan-Payler's submissions, some of which I have referred to already in relation to some of the six passages, were along the following lines. A central issue in the trial was whether the Crown had proved that the two alleged conversations took place. The Crown submission (in fact his Honour's paraphrase of that submission) referred to at p207 (see [6] at p39), that it was "inherently probable" that those conversations had taken place, read with his Honour's directions in passages [1]-[4] (pp35-38) that the jury had to decide "what did happen", meant that the jury had not been properly instructed that they had to be

satisfied beyond reasonable doubt before finding against the appellant the facts which constituted the elements of the crime charged. Bearing in mind the initial correct general direction at p193 (p33), passages [1]-[6] taken together, dealing with the fact-finding process by the jury, amounted to a fundamental misdirection likely to have caused a miscarriage of justice in that, in effect, his Honour had there invited the jury to embark on an inquisitorial process of searching for the truth - "what did happen?" - and passage [6] directed them that in doing so they could "look at the probabilities"; the result was a grave danger that in that search on that basis they incorrectly applied the proper burden and standard of proof when deciding whether they found the facts which constituted the elements of the crime to be established.

In support, Mr Morgan-Payler relied on observations by Hunt CJ at CL in *R v Beserick* (1992-93) 30 NSWLR 510. There, unlike this case, the accused appellant had testified at his trial. His Honour said pp528-9:-

> "This additional ground of appeal complains of the directions given by the judge in relation to the onus of proof. When discussing the general approach which the jury should take to their fact finding function, the judge said:
>
> > "It will be a matter for you to analyse and determine what you find the facts to be. Of course, it is quite clear that someone is not telling the truth in this case. There is a diametrically opposite set of accounts given, on the one hand on the part of the Crown, and on the other hand on the part of the accused. That is not unique in this trial, you may understand. It is for you then in analysing the evidence to determine, in accordance with the principles of law that I will explain to you, what facts emerge from the conflicting material which has been presented to you in the course of this trial."

> At the conclusion of the summing-up, counsel for the appellant objected to this passage as stating the wrong question for determination. It should be said that the judge was not at that stage dealing with the onus of proof. A more complete direction may well have included a statement that it was not a question as to which side was telling the truth, the question was whether the Crown had established that the evidence of the complainant upon which its case depended was the truth: *Liberato v The Queen* (1985) 159 CLR 507 at 515, 519. But the judge was careful to make it clear to the jury that they should analyse the evidence in accordance with the principles of law which he was yet to explain to them. He went on, after dealing with a number of the factual issues which had arisen, to give clear and accurate directions of law as to the onus and the burden of proof- - -" (emphasis mine)

Mr Morgan-Payler submitted that since here the defence had not adduced any evidence at the trial - it was not a case of two differing bodies of evidence - it was even more imperative than in *Beserick* (supra) that the jury be directed that they had to be satisfied beyond reasonable doubt that the alleged conversations had taken place, rather than being directed, in terms of probabilities as in passage [6], to decide "what did happen?". I note that his Honour had directed in passage [5] (p38) that the jury's "task is to decide whether the police have told you the truth about those two conversations". I have already noted that there was an oblique reference to applying the reasonable doubt standard to the truthfulness of the detectives, at p204 (p14).

Mr Morgan-Payler also relied on *Liberato v The Queen* (1985) 159 CLR 507. In that case the jury had been correctly directed that they had to be satisfied beyond reasonable doubt that the accused was guilty, before returning a verdict of guilty. However, they were then directed that they would have to decide whether to accept the evidence of a prosecution witness (the complainant in a rape case) or the contrary evidence of the accused. The case turned on the conflict between those two pieces

of evidence. That situation - opposing bodies of evidence - did not arise in this case. At pp514-5 Brennan J referred to various passages in the summing up where there had been a failure to distinguish between satisfaction beyond reasonable doubt and choosing between the contradictory stories. His Honour said at p515:-

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

I consider that his Honour's reference in this passage to "issue" and "issues" is a reference to the ultimate issues in the case, and the reference to "evidence" about the truth of which the jury must be "satisfied beyond reasonable doubt" is a reference to evidence indispensable to establishing an element of the crime. See *Shepherd* (supra). At p517, dealing with the consequences of the lack of such a "suitable direction", Brennan J said:-

> "- - - If proper directions on the onus and standard of proof, the assessment of [the alleged victim's] credibility and the resolution of conflicts in the evidence might have left the jury with a reasonable doubt about [the alleged victim's] version of what happened, it could not be said that the misdirections identified by White J. occasioned no substantial miscarriage of justice. The accused may have lost a reasonable opportunity of acquittal: *Mraz v. The Queen* (1955) 93 C.L.R. 493, at p.514. It was fundamental to the prosecution case that the jury should believe beyond reasonable doubt the truth of [the alleged victim's]

> evidence on the issues - - -. But they were misdirected as to how they should decide those issues and those misdirections went to the heart of the case. - - -" (emphasis mine)

I observe that although in the present case there was no question of conflicting bodies of evidence, the jury still had to be directed that if on their assessment of the evidence, they considered that the only substantial basis for a finding of guilt lay in the appellant's admissions in the alleged conversations, they could not find that those conversations had taken place, unless they were satisfied beyond reasonable doubt of the truth of the detectives' evidence to that effect (and of the truth and accuracy of the admissions), having taken into account the *McKinney* warning of the danger of making that finding and convicting on that basis alone.

(c) The respondent's submissions

Mr David submitted that it was at the end of the day that the jury had to be satisfied of guilt beyond reasonable doubt; and it was at that time that it had to decide that question, on the basis of the evidence of the two alleged conversations if they accepted it, together with the other evidence they accepted. Clearly, if the jury considered that the appellant had made the alleged inculpatory admissions, those admissions would have been an important factor in reaching their ultimate conclusion that he was guilty of the crime charged; and the nature of the evidence of those admissions was such as to require a *McKinney* direction. I consider that *Shepherd* (supra) and *McKinney* (supra) showed that the jury had to be directed that they had to be satisfied beyond reasonable doubt that the statements were made, and the admissions were true; and they had

to bear in mind the dangers of doing so, should they find that that evidence was the sole substantial basis for conviction.

Mr David submitted that in using the words "inherently probable" in passage [6] at p207 (p39) his Honour was paraphrasing the effect of the Crown Prosecutor's address as to the significance to be attributed by the jury to the circumstances in which the alleged conversations took place, when assessing the truthfulness of the detectives' evidence. The Crown Prosecutor had referred to the spontaneous nature of the first conversation, its brevity, and that it was supported by the evidence of the telephone call (pp60-63) and Ms Suringa's later attendance at the hotel. He had referred to the consistency of the second conversation with Mr Campbell's initial account to the Police that he was to receive $10,000 cash. Mr David submitted that these surrounding circumstances pointed to the admissions being "inherently probable", and his Honour meant no more than that, by those words. I accept that. The question, however, is what the jury understood them to mean.

He rightly conceded the difficulty raised by paraphrasing those circumstances in terms that the fact the conversations occurred was thereby rendered "inherently probable", when the jury had not been directed that those circumstances constituted merely one factor to be taken into account when deciding that question. I note that the jury ultimately had to be satisfied beyond reasonable doubt that the conversations had taken place before they could act on them, but had never been expressly directed to that effect. In his *McKinney* directions (p14) his Honour had referred to the "heavy practical burden" on the accused of "raising a reasonable doubt as to the truthfulness of the

police evidence that the statements were made", so to some extent it was dealt with at that point.

(d) Conclusions on the second ground of appeal

There is nothing wrong in directing a jury that when finding the facts they have to decide "what did happen". In this case there was nothing wrong in directing the jury in passage [5] (p38) that in deciding whether the two alleged conversations had taken place, they had to decide whether the two detectives "have told the truth". That is exactly what they had to decide. In the circumstances in which the conversations were alleged to have taken place - the appellant being then in police custody and in circumstances where reliable corroboration was lacking - it was common ground that a *McKinney* direction was required. A *McKinney* direction was given (pp13-14), the jury being directed, inter alia:-

> "Where police give evidence of inculpatory admissions made in conversations, the accused faces a heavy practical burden in raising a reasonable doubt as to the truthfulness of the police evidence that the statements were made. In the circumstances which invariably attend that sort of evidence, a reasonable doubt entails that there be a reasonable possibility that police witnesses perjured themselves and conspired to that end."

In conjunction with the direction in passage [5] (p38) that the jury had to decide whether the two detectives "have told the truth", they had to be directed that if they did not accept the evidence of Mr Campbell inculpating the appellant, and considered that the conversations were the sole substantial basis for a finding of guilt, they could only so find if they were satisfied beyond reasonable doubt of the detectives' truthfulness, and that what the appellant said in the conversations was true, and having borne in mind the danger involved in convicting in

those circumstances. The *McKinney* direction at pp13-14 dealt only obliquely with the reasonable doubt standard.

A proper direction on the issue of the conversations would have been along the following lines. The jury had to decide in the light of the evidence and the *McKinney* warnings in relation thereto, whether they were satisfied beyond reasonable doubt that the conversations about which the detectives had testified, had taken place; they could not consider the contents of those conversations unless they were satisfied beyond reasonable doubt that what the detectives alleged was said, had in fact been said; if they were not so satisfied that those conversations took place, they must ignore everything alleged to have been said in them; if they were not so satisfied that some part of those conversations took place, they must ignore that part; if they were so satisfied that the conversations took place, they had then to decide in the light of all the evidence whether they were satisfied beyond reasonable doubt that the appellant had thereby truthfully and accurately implicated himself in the crime charged; and finally, if they decided those matters against the appellant - the making and truth of his admissions - they had to decide the weight or importance to attach to those admissions, with the other evidence, in deciding whether they were satisfied beyond reasonable doubt of his guilt. In addition, they should have been directed that if they rejected the inculpating evidence of Mr Campbell, and were left with the content of the conversations as the sole substantial evidence of guilt, they had to be satisfied beyond reasonable doubt of the making and truth of the admissions, before assessing their weight, and warned in *McKinney* terms of the danger of convicting on that evidence alone.

In the passages [2], [3] and [5] (pp36-38) in which the jury were directed on their approach to finding whether the two conversations took place, they not directed in this way.

Nevertheless, I do not consider that this ground of appeal, in terms of the appellant's submissions at pp39-41, is established. The directions as to burden and standard of proof of guilt (pp33-35) were adequate. As to the process of finding facts, I mentioned at pp46-7 how the jury should have been directed in their approach to the two conversations. Reading the summing up as a whole I consider that the jury was adequately instructed that the prosecution had to satisfy them beyond reasonable doubt of the truth of the detectives' evidence about the conversations, before they could find they took place, and the directions on fact-finding did not raise a risk that they incorrectly applied the proper burden and standard of proof to the elements when arriving at their verdict.

The third ground of appeal

The third ground was that his Honour failed adequately to direct the jury in respect of the admissions alleged to have been made to the Police by the appellant. This ground challenges the adequacy of his Honour's *McKinney* directions in relation to the two alleged conversations with Detective Matheson and Cook in the early hours of 28 March, set out at pp5-6. Mr Morgan-Payler referred again to the passages at pp204-207 already set out at pp13-16.

I noted earlier (pp25-29) that I consider *McKinney* (supra) lays down a rule of practice of general application along the lines suggested by Deane J in *Carr* (supra) at p335 (p26) whenever Police evidence of a confessional statement allegedly

made by an accused while in Police custody is disputed, and its making is not reliably corroborated. In addition, where the jury considers the statement to be the only substantial basis for a finding of guilt, *McKinney* requires that the trial Judge direct the jury to consider carefully the dangers involved in convicting on the basis of that evidence alone. As there was no question here of corroborative evidence of the making of the alleged statements in Police custody, clearly *McKinney* directions had to be given.

(a) The *McKinney* directions at trial

At pp13-14 I noted that his Honour's *McKinney*-type directions were contained in a passage commencing at p204, viz:-

> "- - - It is quite right that you should scrutinise the police evidence about those conversation (sic) with special care because they took place in the police station and in the police car whilst the accused had been in the custody of police for some time and the accused is put in the position of those conversations being alleged against him when they're very hard to refute.
>
> Counsel for the accused asserts to you by way of submission that they amount to a complete fabrication by these two police officers. - - - So there's the fundamental question about whether those conversations took place or not. They were not recorded on a tape recorder, neither of them was reduced to writing immediately after the conversations took place. They were reduced to writing at about 7 am, which is a few hours after the police had finished with the accused, and a few hours after the conversations had taken place.
>
> But what was reduced to writing was not shown to the accused so that he could sign the written record of the conversations or in some other way that they'd taken place and that the record made was an accurate record. I'm required, as a matter of law, to draw your attention to what may appear to be fairly obvious."

His Honour then proceeded to cite almost word-for-word from the passage in *McKinney* at pp475-6 (pp27-28), viz:-

> "Where police give evidence of inculpatory admissions made in conversations, the accused faces a heavy

> practical burden in raising a reasonable doubt as to the truthfulness of the police evidence that the statements were made. In the circumstances which invariably attend that sort of evidence, a reasonable doubt entails that there be a reasonable possibility that police witnesses perjured themselves and conspired to that end."

His Honour continued to cite almost word-for-word from the passage in *McKinney* at p476 (pp27-28) where, in my opinion, the High Court was dealing with the contents of the warning in any case involving uncorroborated evidence of the making of a confessional statement while in Police custody, viz:-

> "I'm required to remind you that it's comparatively more difficult for an accused person, held in police custody - which the accused in this case believed he was - without access to legal advisers or other means of corroborating, to have evidence available to support a challenge to the evidence of confessional statements than it is for the evidence to be fabricated." (emphasis mine)

His Honour added his own comment, viz:-

> "There's an inequality about the positions of such a person and police and that is obvious."

His Honour continued:-

> "It's been put to these police officers that they took advantage of the position of inequality and that they made these stories up. Well, you saw them; you saw them extensively cross-examined. What do you think of that? What did happen? Do you think that they did make these stories up? Because if they did it's a very evil thing to do to secure a conviction of this accused. What did happen?
>
> You have to make a judgment about those police officers. You have to make up your mind whether you accept them or you reject them. If you accept them, then you'll find that the conversations took place. They say that although the first conversation took place in an interview room at the conclusion of the record of interview in which the accused basically exercised his right not to answer questions, whether the door was shut or locked or both, the accused was free to leave and there was no way that they could stop him. If you accept that evidence, he wasn't really in police custody because there was no form of compulsion for him to remain but he was without legal advice and he was without any other means of corroborating a challenge to the truth of the police evidence." (emphasis mine)

I observe that the last four lines substantially repeat the words emphasized above as a matter about which *McKinney* said the jury "should be informed". His Honour continued:

> "So you've got to give careful consideration, careful scrutiny of the police evidence. Bear in mind that police are often practised witnesses and it's not an easy matter to determine whether a practised witness is telling the truth."

I observe that these five lines follow closely the wording in *McKinney* (supra) at p476 (p28), on matters it will ordinarily be necessary "to emphasize" to the jury, and "to direct [their] attention" to. His Honour continued:-

> "These are classic jury exercises. They're for you. I'm not telling you one way or the other whether you should accept the police evidence. Your ability as people of maturity and commonsense, used to making judgments about what people tell you, about their veracity, are the very facilities (sic, faculties) that you must employ here and, indeed, they're the very reason that you're here: because you're used to making a judgment about people.
>
> What did you think about Matheson and Cook? You must make a judgment about them. At the same time, the accused, through his counsel, has put to the police that they made everything up. I'm obliged to remind you that people who say inculpatory things to police often withdraw them, repudiate them, on their trial."

I observe that the last sentence accords generally with what was said in *McKinney* at p476 (p28) to be a matter "proper for the trial judge to remind the jury" about, though "often" is substituted for "sometimes". His Honour continued at p205:

> "It really comes down to making a judgment about these two police officers.
>
> They are not the only evidence against the accused, these two conversations. They're not the only basis or substantially the only basis for finding that the accused committed the offence of being knowingly concerned in the importation of heroin by Campbell. There are cases, you appreciate, where the only evidence against the accused person is an alleged admission made to police officers. This is not one of those cases, but

> it's been put to you the police endeavoured to improve its case by putting forward two false conversations - conversations that never took place - and they've done that in order to make a case where otherwise they wouldn't have one, so the submission goes.
>
> So if, having given the evidence of the police careful scrutiny, you're satisfied of the truth of the police evidence that those conversations took place, and you've done that bearing in mind the special position of vulnerability of the accused - vulnerability to fabrication when he believes himself to be held involuntarily - you may regard the evidence of those conversations as strongly corroborative of Campbell's evidence.
>
> Remember your function is: what did happen. Remember the fundamental contest about those conversations is whether they took place at all. - - -" (emphasis mine)

It may be noted that here his Honour was proceeding on the basis that the jury would examine the evidence of the two conversations, and if "satisfied of the truth of the police evidence that those conversations took place" consider the value of the conversations as evidence corroborative of Mr Campbell's accomplice evidence. However, since the conversations contained confessional material, it was necessary that the jury be "satisfied" beyond reasonable doubt of the truth of the police evidence, and of the appellant's admissions.

Later, at pp213-4, dealing with the two alleged conversations and the defence case in relation thereto, his Honour said:-

> "The two conversations that the Crown relies upon were, as you know, oral conversations; verbal conversations. Mr Tippett called them 'verbals' and said I'd be giving you some directions about those matters. I've done that. You remember the argument that the police gave the explanation for not writing down the conversations there and then, that they were tired and had other things to do, whereas it was submitted to you that the real reason is that the police didn't have sufficient information to arrest the accused so they manufacture these conversations which give them the justification to arrest him.

> You were addressed about the fact that the accused was not free to leave and things of that nature. Well, all the police took a position, did they not, that the accused was free to leave. But what's that mean? It doesn't mean that if he'd attempted to leave they would've said: 'Well, on your way. Good luck and see you again', or something to that effect. Clearly the evidence is that if they were confronted with a situation where the accused was indicating a desire to leave, then a decision would have to have been made about whether he went or not.
> - - -
> It was put to you that the conversations which the police gave evidence about were supposed to have included admissions made by the accused, springing from some remorse. Well, there was just no evidence about what might've caused him to do it, remorse or otherwise."

I observe that the last 6 lines referred to Mr Tippett's address in which he suggested that the Crown was suggesting that the reason the incriminating admissions (pp5-6) had been made by the appellant in the first conversation was his remorse that Cathy Suringa had been "brought into it"; the Crown had not in fact suggested any motivation for his alleged admissions. The comment was unexceptionable.

(b) The submissions

Mr Morgan-Payler submitted that the *McKinney* directions which his Honour had given (pp48-50) in relation to the alleged conversations, did not go far enough; his Honour should have directed the jury to look for evidence which corroborated the Police evidence that the conversations had taken place. In support, he relied on what the majority said in *McKinney* (supra) at p475:-

> "- - - it is the want of reliable corroboration that should attract a warning, - - - a confessional statement may be reliably corroborated by independent material which, in terms used by Deane J. in *Carr* [(1988) 165 CLR 314] unmistakably confirms its making." (emphasis mine)

It is however common ground that here there was no corroboration of that evidence. Why then should the jury be directed to look for it? The submission in effect was that the content of the directions given was deficient. I set out at pp27-28 the contents of the directions required by *McKinney* (supra) at pp475-6.

Mr David submitted that in the light of what *McKinney* required his Honour's directions on the alleged admissions were unexceptionable.

(c) Conclusions

I may perhaps repeat what I said earlier at pp28-29. A *McKinney* warning of the danger of convicting must be given in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is an uncorroborated confessional statement allegedly made whilst the accused was in Police custody.

That was not necessarily the case here; if the jury accepted that the accomplice evidence of Mr Campbell was reliable, the alleged confessional statements were not "substantially the only basis" for finding the appellant guilty. The jury could have found the appellant guilty if they were satisfied beyond reasonable doubt of the truth of the accomplice evidence of Mr Campbell alone, bearing in mind his Honour's accomplice warning (pp56-57), even if they found that that evidence was not corroborated. They could have found Mr Campbell's evidence intrinsically credible, and corroborated by the appellant's admissions, and found the appellant guilty on that basis. They could have found Mr Campbell's evidence inculpating the appellant unreliable, but accepted the evidence of the appellant's admissions, and their truth and accuracy, as established beyond

reasonable doubt, and found him guilty on the basis of those admissions and the other evidence which they accepted.

However, a full *McKinney* warning had to be given, on the basis that the jury might not accept Mr Campbell's evidence incriminating the appellant, and might consider that the only substantial basis for a finding of guilt lay in his uncorroborated admissions while in Police custody. It is explicit in both *McKinney* (supra) and *Shepherd* (supra) that in that event - where the jury's inference of guilt is based substantially only on its acceptance of the evidence of admissions - the jury had to be satisfied beyond reasonable doubt that the admissions were made and were true before relying on them, in the light of the danger of convicting in those circumstances.

I note what was said in *Dominguez v The Queen* (1985) 63 ALR 181 at 192, pre-*Shepherd* decision:-

> "It is trite law that the prosecution is not required to prove every fact about which evidence is given beyond a reasonable doubt. It is, in the end, a jury question as to which of the facts alleged are "primary", "crucial" or "basic" for the purposes of inferring guilt. In *Chamberlain*, Gibbs CJ and Mason J at p239 accepted as correct in principle a submission put in *Moss v Baines* [1947] WAR 7 at 11 that "every fact necessary to be proved to sustain proof beyond reasonable doubt of every element of the offence charged must itself be proved beyond reasonable doubt". Ultimately it is for the jury to decide which are the facts which are necessary to be proved to sustain proof to the requisite degree of every element of the offence charged. In certain situations no doubt the trial judge can give the jury assistance in this respect. If, for instance, the only evidence against an accused person is his confession then it would follow that unless the confession was proved beyond a reasonable doubt guilt may not be inferred. It is, however, not correct to say that the jury must be instructed that every item of evidence that goes to prove the confession must itself be proved beyond reasonable doubt. Further, if there is evidence apart from the confession which inculpates such an accused, it is for the jury to decide whether in the light of all the evidence they consider the confession, or indeed any fact which the

> evidence tends to prove, as so crucial or basic that guilt cannot be inferred without proof of that crucial or basic fact to the degree of proof beyond reasonable doubt."

The evidence of the admissions could not in any event be taken into account unless the jury was satisfied they had been made and were truthful: see *Burns v the Queen* (1975) 132 CLR 258. The jury was never expressly directed that they had to be satisfied that the admissions were truthful and accurate.

I consider that his Honour gave a full *McKinney* warning; there was no point in directing the jury to look for corroborative evidence that the confessions had been made, since manifestly there was none. I accept Mr David's submission that his Honour's directions were not exceptionable, and that this ground of appeal is not established.

The fourth ground of appeal: inadequacy of the accomplice warning

The fourth ground was that his Honour failed adequately to direct the jury as to the law in respect of the evidence of the accomplice. The Crown accepted, rightly in my view, that Mr Campbell was an accomplice of the appellant, though he had been charged and sentenced for the different crime of importing a prohibited import.

The law requires that the jury be warned that it is dangerous to convict on the uncorroborated evidence of an accomplice alone, though it may do so if it is satisfied beyond reasonable doubt, having taken exceptional care, that his inculpatory evidence is reliable; see *Davies v DPP* [1954] AC 378, and, generally, J.D. Heydon 'The corroboration of accomplices' (1973) Crim. L.R. 264. If there is independent evidence which is

capable of constituting corroboration of the accomplice's testimony, the trial Judge, having explained to the jury what "corroboration" is for that purpose, is required to point out which items of the evidence are so capable, and which are not. The corroborative evidence must tend to show the truthfulness of the accomplice's testimony implicating the accused. It may take the form of circumstantial evidence, and it is not necessary that, standing alone, it should establish any proposition beyond reasonable doubt; it is sufficient if it strengthens the accomplice's testimony by confirming or tending to confirm the accused's involvement in the events as related by his accomplice. See generally *Doney v The Queen* (1990) 171 CLR 207 at p211, and *Lewis v The Queen* (1992) 63 A Crim R 18 at pp31-33, per Macrossan CJ.

(a) The summing-up: the accomplice warning

Mr Morgan-Payler referred to the passages in the summing up at pp201-2 in which his Honour directed the jury as to how they should approach Mr Campbell's evidence, viz:-

> "Now the Crown frankly says to you certainly Campbell is an accomplice. I mean, it's the very core of the Crown case against the accused that Campbell is an accomplice of the accused. That being so, there are some special rules that apply to the evidence of accomplices. Mr Tippett said something about it to you yesterday, but he didn't give you the law correctly. I'm going to give you the law correctly and you must take it from me that what I say is the law.
>
> - - - The law is that a jury should be particularly careful in convicting an accused person on the evidence of an accomplice unless it is corroborated.
>
> What Mr Tippett put to you yesterday was all of that except the last bit - "unless it is corroborated." That's not to say that a jury cannot convict on the evidence of an accomplice, but it's my duty to warn you that although you may convict upon that evidence it's dangerous to do so unless it is corroborated. I'll tell you in a minute what "corroboration" is."

His Honour then proceeded to deal with the situation where the accomplice's evidence was found to be uncorroborated, viz:-

> "What that means then, when you have an accomplice giving evidence, is that you have to examine the accomplice's evidence with special care. It would be terribly wrong, would it not, for a person who has admittedly committed a crime and got caught to be able to go into the witness box and put someone else in as having been a participant in some way in the crime in which the convicted person has been involved without the jury having a very close look at him.
>
> So, so far as Campbell is concerned, you shouldn't regard his evidence as sufficient to justify a conviction unless you're fully convinced beyond reasonable doubt that his evidence is totally reliable. That is, you shouldn't regard his evidence alone as being sufficient to justify a conviction unless you find the evidence totally reliable. That doesn't mean that you have to be satisfied about the accuracy of every word he said in the witness box. There might be some inaccuracies, there might be some - and you often strike it with accomplices, I'm not saying it is so in this case, but some reluctance to answer questions.
>
> There might be some lapse of memory, some gap. After all, it's all four years ago. There might be some other human failings which you were able to perceive from the evidence of Campbell. You've got to make allowances for all those things. If, after giving his evidence careful scrutiny, and having looked at all the circumstances, you're satisfied about the basic truthfulness of his evidence, then you can accept it and in this case that would be sufficient to justify a finding of guilty against the accused, although - - - the evidence isn't corroborated.
>
> So you can convict on the uncorroborated evidence of an accomplice, but the law is, as I've told you, it's dangerous to do so. Corroboration is evidence which implicates the accused. That is, evidence that confirms in some material particular not only that the crime was committed - and we know that - but that it was the accused who committed it. That is, in this case, the accused was knowingly concerned in what Campbell did." (emphasis mine)

Mr Morgan-Payler also referred to a passage at p206. Dealing there with the significance of the lower sentence imposed on Mr Campbell as a consequence of his cooperating with the Police, his Honour said:-

"Obviously a person who co-operates with the police and ensures that the criminal law and the sanctions that apply to the criminal law are brought into play should get a lighter sentence. That's what the ordinary man in the street would think is right and proper. That's why courts give lighter sentences. It wasn't all that light, the sentence that Campbell got. After all, it was a four year sentence with a non-parole period of 12 months.

You might think 12 months at Berrimah Gaol - or wherever it was served, it may be at Alice Springs - 12 months out there is a pretty long stretch and he had to earn parole. He got a licence, he was released on licence, and he's still on licence. He's still, in effect, serving the sentence that he got although he's out in the community, but he's got to keep his nose clean or he'll have his licence revoked. It's not all that light, you might think."

(b) The appellant's submissions

Mr Morgan-Payler submitted that while there was no misdirection in these passages as to the general approach which the jury should take to Mr Campbell's evidence, his Honour's comment in the passage last emphasised at pp56-7 combined with the passage at p206 (above), tended to bolster and support the evidence of Mr Campbell. At trial Mr Tippett had attacked Mr Campbell's evidence on the basis that he had sought to gain benefits for himself by falsely incriminating the appellant. Mr Morgan-Payler submitted that since his Honour had made comments which tended to bolster Mr Campbell's evidence, he was duty bound to balance that comment by informing the jury of the general rationale for giving them an accomplice warning: that is, presumably, to inform them that the danger of acting on the evidence of an accomplice is that it is often unreliable because it is in the accomplice's interest to play down his own part in a criminal enterprise at the expense of the person he names as his accomplice; and further, as Maule J pointed out in *R v Mullins* (1848) 3 Cox C.C. 526 at p531, that he might well be protecting a

true accomplice by falsely incriminating the accused. See generally Heydon (op.cit.) at pp265-67.

(c) Conclusions on the fourth ground of appeal

I consider that his Honour gave a full accomplice warning, emphasizing to the jury that if they found Mr Campbell's evidence was uncorroborated, they should not convict on it "unless you're fully convinced beyond reasonable doubt that his evidence is totally reliable." The trend of modern authority is that because the inherent unreliability of accomplice evidence is not necessarily apparent to the jury, the warning should explain why it is dangerous to act on that evidence when uncorroborated, so that the jury may understand the significance of the warning; see *R v Button* (1991) 54 A Crim R 1 at pp8-9, per Ryan J. His Honour did not explain the reasons there is a risk that an accomplice's evidence is unreliable; he touched on them obliquely in the passage emphasized at p56. However, in the light of what he said at pp201-2 (pp56-57) there could be no possibility that the jury may have overlooked the significant risk that Mr Campbell was an unreliable witness. The direction dealt with the essence of the matter, as described by Smith J in *R v Turnsek* [1967] VR 610 at p616, viz:-

> "- - - the jurors need to have their minds drawn to the difficulties of their own task in the particular case which they are deciding."

At p206 (p57) his Honour had drawn to the jury's attention the status and position of Mr Campbell as a convicted criminal who by co-operation had gained a lighter sentence; this was also relevant to its assessment of the weight to give his evidence. See generally *R v Checconi* (1988) 34 A Crim R 160 at pp170-2, per

Roden J. I do not consider that the passage emphasised at pp56-7 required some counterbalance by way of an explanation of the rationale for the warning. Accordingly, I consider the fourth ground of appeal is not established.

The fifth ground of appeal

The fifth ground is that his Honour misdirected the jury when identifying three separate pieces of evidence as evidence capable of amounting to corroboration of the accomplice evidence of Mr Campbell.

Mr Morgan-Payler submitted that if any of these three pieces of evidence were not capable of corroborating Mr Campbell there was a real possibility that his Honour's misdirection had occasioned a substantial miscarriage of justice and, applying s411(2) of the Code in the light of *Mraz v The Queen* (1955) 93 CLR 493 at p514 per Fullagar J, the appeal should be allowed and a new trial ordered. I turn to the three pieces of evidence identified by his Honour, as capable of amounting to corroboration.

(a) Mr Campbell's telephone call to the appellant

The first, Mr Morgan-Payler submitted, was the fact that Mr Campbell had made a telephone call to the appellant from the Police Station. His Honour had turned to the topic of corroboration at p202:-

> "Now what evidence in this case is capable of corroborating Campbell? It's a matter for you but I tell you that, as a matter of law, there are three pieces of evidence which are capable of corroborating Campbell. First, there's the telephone call. If you're satisfied that that telephone call took place, then what's the point in ringing the accused - what's the point in Campbell ringing the accused from the police station with the police sitting around a loudspeaker on the telephone, except in pursuance of this common purpose between them.

That's the first thing that's capable of corroborating Campbell's story." (emphasis mine)

Mr Morgan-Payler submitted that this put to the jury as evidence capable of corroborating, the fact that the call was made - not the contents of the call - and that fact was not capable of constituting corroboration in the legal sense because it was not evidence which was independent of Mr Campbell. It was self-serving evidence he had generated, in that he made the call.

Mr David conceded, rightly in my opinion, that since the telephone call had been made by Mr Campbell, the fact that it was made could not corroborate his evidence, since it was not evidence independent of him, but his own act. However, he submitted that in reality his Honour was putting to the jury as evidence capable of corroborating Mr Campbell, not the fact of the telephone call, but what was said during it, its contents. He relied in support, on a brief passage at p203 where his Honour said:-

"I'm not going to say any more about the telephone call. You've got the tape, you've got the transcript as an aide-memoire. I leave that entirely to you."

Part only of the contents of the call was before the jury, as follows:-

"DRUETT "Ok."

CAMPBELL Gooday, mate, how are you?"

DRUETT "Not bad, how are you?"

CAMPBELL "Oh, shithouse, had a cunt of a day."

DRUETT "Have you?"

CAMPBELL "Yeah, um, listen, I'm just leaving the Police Station, I can't talk too much but they've let me make a call, I'm out on bail."

DRUETT "Oh, yeah."

CAMPBELL "I'm going to go and book into the Atrium Hotel, um, do you want to meet me there?"

DRUETT "I'll come over and have a yarn to you mate."

CAMPBELL "Ok, what sort of time or?"

DRUETT "Well why don't you drop over and see Kath and then we can both have a yarn to you together, eh?"

CAMPBELL "Well I'd rather not do that mate, I'd rather stay um, um, you know out in the sort of public eye, I've got tummy here, you know?"

DRUETT "Righto."

CAMPBELL "Ok?"

DRUETT "Well what time would you be there?"

CAMPBELL "I don't know I'm just going to make a booking now, so just check the room and I'll be in there in an hour."

DRUETT "Ok, my man."

CAMPBELL "Ok."

DRUETT "See you round about then."

CAMPBELL "Right, bye."

DRUETT "Bye bye."

Mr David submitted that the contents of the telephone call were capable of corroborating the evidence of Mr Campbell in that the jury could infer from the "very guarded reticence" of the appellant in the tape that he knew of Mr Campbell's importation of the heroin.

I observe that the Crown Prosecutor in his address to the jury had stressed that what was said in the telephone call was "of great significance"; this was in the context that it was one of four pieces of evidence - the others being Mr Campbell's evidence, the evidence of the two detectives and Ms Suringa's appearance at the Atrium - which taken together established the guilt of the appellant. However, in the present context of evidence corroborative of the accomplice evidence, he

had put to the jury that Mr Campbell's evidence identifying the appellant to the Police as his accomplice was supported, as a matter of commonsense, "by the very fact" he had then made a telephone call to the appellant on loudspeaker with the Police sitting around; the "very fact that he made it is significant".

I consider that his Honour clearly had this latter aspect of the Crown Prosecutor's address in mind, when characterizing the telephone call as evidence capable of corroborating Mr Campbell; and that he put to the jury at p202 (p60) the fact of the telephone conversation as evidence capable of corroborating Mr Campbell. In dealing with the Crown submissions, his Honour also said at p207:-

> "[The Crown Prosecutor] addressed you about the telephone call and suggested to you that Campbell wouldn't have telephoned the accused with the police standing around him unless in fact the accused was involved. Well, your make of that what you think is appropriate."

It was admittedly erroneous to put the fact of the call as potentially corroborative, since it was not evidence independent of Mr Campbell. Assuming, however, that his Honour had intended to put to the jury the contents of the call as evidence capable of corroborating Mr Campbell, I do not think that what the appellant said in that call was capable of confirming in a material particular Mr Campbell's evidence inculpating the appellant; in any event, it was not adequately put to the jury on that basis at p203 (p61).

(b) The arrival of Ms Suringa at the Atrium Hotel

The second piece of evidence was the arrival of Ms Suringa at the Atrium Hotel, and not the appellant. His Honour said of this at p202:-

> "- - - you might think that this is not as significant as the other two - but the arrival of Cathy Suringa at the Atrium Hotel, rather than the accused, could amount to corroboration. How much weight you would give it is a matter for you - - -"

Sergeant Taylor's evidence had been that Mr Campbell was at the bar in the Atrium Hotel when he was joined there by Ms Suringa. Mr Campbell went to the toilet after a "very short time - - no more than two or three minutes", according to Sergeant Taylor, and after only "seconds" according to Mr Campbell. Sergeant Taylor joined Mr Campbell in the toilets and said that when he came out Ms Suringa had gone. Mr Campbell's evidence had been that Ms Suringa was his girlfriend from December 1988, and that he had spent the night before he left for Thailand, 22 March, with her. The evidence was that when Mr Campbell telephoned the appellant from the Police Station on 27 March he spoke first to an unnamed female; there was no evidence before the jury as to the identity of that person, that is, no evidence she was Ms Suringa. Ms Suringa did not testify. The only reference to "Kath" in the telephone conversation was by the appellant (p61).

Mr David submitted that Ms Suringa's arrival at the hotel was a piece of circumstantial evidence capable of corroborating Mr Campbell. His submission was: the contents of the telephone call (pp61-2) showed that Ms Suringa was then with the appellant and that the appellant then arranged with Mr Campbell to meet at the Atrium Hotel; the evidence was clear that the appellant did not keep the appointment, and that Ms Suringa turned up at the appointed meeting place. The jury could infer from this sequence that the appellant had sent Ms Suringa to the Atrium Hotel in his place, because he was conscious he was knowingly concerned in the importation of the heroin and therefore

wary of attending at the hotel himself; and thus her presence at the hotel corroborated Mr Campbell. Later, he relied in support on the appellant's alleged admission that he had sent Ms Suringa, and why he had done so; see pp5-6, 92.

Mr Morgan-Payler submitted that in light of the background of the personal relationship Campbell/Suringa (pp88-9) the fact that Ms Suringa had arrived at the Atrium Hotel shortly after the telephone call and had spoken to Mr Campbell was incapable of reasonably sustaining the inference suggested by Mr David.

To be capable of being corroborative, evidence need not be consistent only with the inference the Crown seeks to have the jury draw. It must, however, be capable of being regarded as more consistent with that inference than with an innocent explanation for her presence. It must not be intractably neutral in its effect, but must have an independent capacity to implicate the appellant in the way the Crown suggests. See *R v Zorad* (1990) 19 NSWLR 91 at 103, and the authorities there cited.

Applying that test I consider that the arrival of Ms Suringa at the Atrium Hotel was capable of sustaining as a reasonable inference the inference sought by Mr David (p64). However, the jury needed to be directed carefully that they could draw that inculpatory inference - that Cathy Suringa was sent by the appellant as his agent, and sent because he was conscious of his guilt - only if they were satisfied that the obvious hypothesis that she was there on her own behalf to meet her lover, Mr Campbell should be excluded. No such direction was given; see pp92-94.

(c) The two alleged conversations with Detectives Matheson and Cook

The third piece of evidence identified by his Honour as capable of corroborating Mr Campbell was the evidence by Detectives Matheson and Cook of the two conversations with the appellant (pp5-6). At p202 his Honour said of these conversations:-

> "If you think they took place, they corroborate Campbell - or they're capable of corroborating Campbell. Whether they do or not is a matter for you. I tell you, as a matter of law, if you found that those things took place, then they amount to corroboration."

Mr Morgan-Payler first submitted in effect that the last four words were wrong and should have been expressed as "they are capable of amounting to corroboration". I accept that, but consider that in their context there can be no doubt that the jury was not misled by the verbal slip.

He next submitted that his Honour should have directed the jury to be particularly cautious in using the admissions in the conversations as corroborative evidence of Mr Campbell, if they found those admissions had been made. This was linked to his earlier submission (p52) that his Honour, in his *McKinney* directions as to these two conversations, should have directed the jury to look for corroborative or supporting evidence that the conversations had taken place and the admissions therein were made. He submitted that since his Honour had not given that direction in relation to the admissions, he should have directed the jury to be particularly cautious in using the uncorroborated admissions as corroboration of Mr Campbell, because of the danger of doing so; he should have stressed to the jury that

the absence of corroboration of the admissions increased the danger of using them to corroborate Mr Campbell.

Mr Morgan-Payler submitted that this direction was necessary because both the detectives' evidence of the admissions, and the accomplice evidence of Mr Campbell, separately required to be corroborated. This 'requirement' must be understood in the sense that corroboration of both items of evidence is required as a matter of practice; the legal requirement is that the jury must be warned of the danger of accepting such evidence in the absence of reliable corroboration. However, the jury must also be instructed in each case that even if they decide there is no corroboration, it is open to them to act upon such possibly suspect evidence alone to find a verdict of guilty, but only if, paying heed to the warnings, they are satisfied about that evidence beyond reasonable doubt. Mr Morgan-Payler's submission came to this: that since there was no evidence to corroborate the making of the admissions, it was dangerous for those admissions to be placed before the jury as evidence capable of amounting to corroboration of Mr Campbell, and a special warning of that danger was required. Although he was unable to cite any authority for this proposition he relied, by way of analogy, on the rule that one accomplice is unable to corroborate another.

In the alternative, he submitted that his Honour should have again given a *McKinney* warning to the jury in relation to the admissions, when informing them that if they were satisfied that the admissions had been made those admissions were capable of corroborating Mr Campbell.

I do not consider that his Honour's direction was erroneous. His Honour had properly directed the jury in

accordance with *McKinney* (supra) as to the care with which they should approach the detectives' evidence of those conversations, absent corroboration, before they accepted their evidence that the conversations had taken place. There was no need for further directions that they take further care before they used those admissions as evidence corroborative of Mr Campbell; the jury, ex hypothesi, would already have been satisfied before doing so that the admissions had in fact been made, although the detectives' evidence was not corroborated. In view of that conclusion, reached in light of the *McKinney* directions, the fact that there had been no evidence corroborative of the detectives' evidence that the conversations had taken place did not mean that there was some further danger in treating those admissions as evidence capable of corroborating Mr Campbell, such as to require a further warning.

The special rule that accomplices cannot mutually corroborate each other is not analogous to this situation. The basis of that rule lies in the high risk of fellow accomplices conspiring to blame the accused. That basis does not exist here. There is no rule which prevents evidence which itself requires a corroboration warning, such as the evidence of the alleged admissions, from corroborating other evidence which also requires such a warning; see *Pollitt v The Queen* (1991-92) 174 CLR 558 at 600 and the authorities there cited.

In my opinion, there was no need in the circumstances for a second *McKinney* type warning to be given to the jury when they were considering whether the admissions which, ex hypothesi, they had already found to have been made, in fact corroborated Mr Campbell; it would have served no useful purpose.

(d) Conclusions

For the reasons indicated, I consider that his Honour erred in directing the jury that evidence of the fact that Mr Campbell had telephoned the appellant on 27 March constituted evidence capable of corroborating Mr Campbell. Indeed, his Honour should have warned the jury, in light of the assertion by the Crown Prosecutor in his address that that fact "supported" Mr Campbell's evidence, that it was not potential corroborative evidence, in the legal sense.

The sixth ground of appeal

This ground attacks the manner in which his Honour dealt with most of Mr Tippett's submissions to the jury; the submission was that his Honour erred when directing the jury as to how they should approach those submissions. Mr Morgan-Payler referred to nine passages in the summing-up; I deal with them seriatim.

(1) At pp209-210. His Honour said:

> "Mr Tippett submitted to you that Campbell would've been introduced to the accused by name, Rob Druett, and hence, that Campbell knew, at all times, that the accused's surname was Druett. Was there one question directed to Campbell to that effect? He was just never asked. 'Weren't you introduced to him by name, didn't Cathy Suringa introduce him?' 'Didn't you know his name was Druett at all times?'
>
> It's not appropriate for counsel to say Campbell would've known because he would've been introduced. Counsel had a full opportunity to cross-examine Campbell about that and didn't ask that question. So, how can you, ladies and gentlemen, be asked to deduce that Campbell would've been introduced to Druett by name and hence, he would've known Druett's name. There's simply no evidence. No evidence one way or the other, and you mustn't speculate. You must decide the case on the evidence."

I note that Mr Campbell testified that he knew the appellant only as "Rob". In cross-examination by Mr Tippett at p32 he said:-

> "And on the occasions Mr Druett would drop in you would talk about work and all the other incidentals that people discuss?---Yes.
>
> In ordinary conversation?---Yes.
>
> And over that period of time you didn't get to know Mr Druett's last name, you say?---That's correct.
>
> Miss Suringa never introduced you to Mr Druett?---I don't remember but I did not know his last name."

Mr Tippett had submitted to the jury that the police had put various names to Mr Campbell, amongst them the name "Druett", which he knew was the appellant's name, seeking to have him incriminate someone as his accomplice in the heroin importation, and thereby gain some leniency in sentencing. The Crown case had been that this was not so, the Police had not put names to Mr Campbell, Mr Campbell had not known the appellant's surname, and had early on identified his accomplice to the Police only as "Rob".

Mr Morgan-Payler submitted that in light of the cross-examination at p32 (above) his Honour had wrongly directed the jury that Mr Campbell had not been cross-examined on his knowledge of the appellant's surname. He submitted that from that cross-examination the jury could rightly be invited by Mr Tippett not to accept Mr Campbell's evidence that he never knew the appellant's surname.

I accept this submission. The subject matter had been fairly raised in cross-examination. What his Honour said was erroneous and his direction (p69) excluded from consideration by the jury a defence submission on a matter going to Mr Campbell's credit.

(2) At p210, immediately following (1). His Honour said:-

> "It was submitted to you [by Mr Tippett] that Campbell would go to Ian Lord at Berry Springs and that would be a good place to excrete the drugs. Well, likewise, there's simply no evidence to that effect."

His Honour then read out a passage from the cross-examination of Mr Campbell at transcript p40:-

> "- - - at the time that you made arrangements to hire the car from Intercontinental in Bangkok, you thought you might use that vehicle to go to Berry Springs, did you not?---Yes, possibly.
>
> And that was because you had a friend in Berry Springs?---That's correct.
> And that friend's name was Mr Ian Lord?---That's correct.
>
> You were going to go to Mr Ian Lord's residence with the proceeds of the importation?---That's not correct.
>
> You were going to go to Mr Ian Lord's place, were you, after you'd been to Humpty Doo?---It was a thought I had. There was nothing arranged at all.
>
> It was a thought that you had?---That's correct.
>
> The thought was that you might visit Mr Ian Lord on 27 March 1989 after you had brought drugs into the country?---That I might.
>
> And that you would be travelling from Darwin to Berry Springs for that purpose; you thought you might be doing that?---I'm sorry, I'm not sure what you're implying.
>
> Did you think that you might be travelling from Darwin to Berry Springs for that purpose; to see Mr Lord?---Not at all, no.
>
> You thought that you might just go there though; to see him that day at some time?---That's correct."

His Honour then continued in his summing up at p210:-

> "And note these next two questions and answers, ladies and gentlemen. You might think Campbell was fairly careful. Question:
>
> > "And you intended when you went to see Mr Lord, if indeed you did go to see him, that you would have in your possession the proceeds of the importation?---No, that's not correct.

> That you would have in your possession your proceeds of the importation?---That might be right."
>
> No question about it's a good place to excrete the drugs."

The evidence was that Mr Campbell telephoned from Thailand to rent a car, informing the Darwin rental company that he was going to Berry Springs; and that Mr Lord was a friend of Mr Campbell's.

Mr Morgan-Payler submitted that the state of the evidence as set out above was such as to warrant Mr Tippett's submission to the jury that they might doubt Mr Campbell's evidence that he intended to meet the appellant at Humpty Doo and there excrete the heroin and transfer it to him.

I accept that submission. The real thrust of the cross-examination was that Mr Campbell intended to go to Berry Springs to see his friend Mr Lord, while he still had all the heroin in his possession, Mr Tippett's submission being that it was possible that it was Mr Lord and not the appellant, who was Mr Campbell's accomplice. The reference to Ian Lord's place as being "a good place to excrete the drugs" was quite subsidiary to the real thrust of the cross-examination. His Honour's emphasis on that aspect, which had been mentioned in passing by Mr Tippett in his address, tended to divert the jury's attention from the real thrust of Mr Tippett's argument, that it was possible on the evidence that Mr Campbell's accomplice was Mr Lord and not the appellant.

(3) At pp210-211, immediately following (2). His Honour said:-

> "What counsel [Mr Tippett] put to you at this stage of his address to you yesterday was that Campbell needed someone to share the blame, that names arise that are

convenient, and so a person like Campbell needing to make some sort of a sacrifice makes the sacrifice by putting some name forward and that that helps him in some way in his dealings with the police.

It was further put to you [by Mr Tippett] that Mick, the heroin dealer - - - that Campbell had been using might've had $6,000. The evidence was that Campbell didn't have it himself but Mick might have $6,000. Ian Lord might have $6,000 and so, it's easy to transfer some of the detail to another person.

Well, let's get back to the evidence. There is no evidence that the money came from Mick or from Lord. Indeed, it wasn't even put to the accused [sic, Mr Campbell] that the money had come from Mick or from Lord. It went like this: [His Honour then read the following passages from the cross-examination of Mr Campbell at p47:]

> "- - - you agree I think that you arrived at the Berrimah Police Complex at about 12 in the afternoon of the 27th. It was middle to later on in the afternoon that they began interrogating you?---Yes, or some (inaudible).
>
> But in between that time I imagine you had a number of discussions with police officers?---Yes, I suppose so, yes.
>
> And in those discussions they were suggesting names to you as the people who might have been involved with you?---No.
>
> Because co-operating with them meant, as far as you were concerned, providing them with the information that they were satisfied with, wasn't it?---Yes.
>
> And it was clear to you that the police in that afternoon did not believe that you were acting alone?---Yes.
>
> That they wanted the other person, didn't they, or persons?---Yes.
> - - -
> - - - you gave names to police during the period of time that you were at the police station on the 27th?---No, I did not. I gave one name, I believe, only one name.
>
> But the police had put a number of names to you?---I don't recall that at all."

His Honour's comment was:-

> "So, there's certainly no evidence from Campbell that he plucked a sacrifice from names which the police gave him."

Mr Morgan-Payler submitted that this passage gave rise to two matters.

a) First, his Honour had erred in telling the jury "it wasn't even put to the accused [sic, Mr Campbell] that the money had come from Mick or from Lord." He referred to the cross-examination of Mr Campbell by Mr Tippett at p59, to which his Honour did not on this topic refer the jury (though he did so later on another topic (see p82)), viz:-

> "HIS HONOUR: Did you have $6000 cash before you got it from the accused?---No - no, Your Honour.
>
> MR TIPPETT: Did Mick have $6000 cash, do you think? Did Mick have $6000 cash in March 1989? Do you think Mick might've had $6000 cash in March 1989, Mr Campbell?---I don't know.
>
> Do you think that Mr Ian Lord might've had $6000 in March 1989?---I don't know.
>
> Possible, is it not?---Yes, it's possible.
>
> Possible that Mick had $6000 in March 1989, is it not? Possible that Mick had $6000 in 1989, is it not?---Yes, possible.
>
> Is it possible he gave it to you?---Well, he didn't.
> - - -
> MR TIPPETT: Is it possible that Mick gave $6000 to you in March 1989?---Well, no he didn't, Your Honour.
>
> Now, Mr Campbell, at the time this offence was committed, your friend Mick was a trafficker in heroin, wasn't he?---Yes, he was.
>
> And your friend Ian Lord was a trafficker in heroin, wasn't he?---He most certainly wasn't.
>
> The truth is, Mr Campbell, that when police were talking to you on 27 March 1989, they raised Mr Druett's name with you, did they not?---No, they did not.
>
> And like Debbie, he was a convenient replacement in your explanation to police, wasn't he?---No, that is not true."

Mr Morgan-Payler submitted that it had been clearly established through Mr Campbell that the man Mick was involved in the heroin

trade and through Sergeant Taylor that Mr Lord was suspected by the Police of being in that trade. I note that the latter point may not be correct. In the light of that evidence, he submitted, there was sufficient cross-examination at p59 (p73) to found Mr Tippett's submission that the jury might doubt Mr Campbell's account that it was the appellant who had financed the importation of the heroin. Mr David's submission on the point is set out at p91, and dealt with there.

I accept Mr Morgan-Payler's submission. It seems when that his Honour said "It went like this" (p72) he then correctly read from p47 which related to the first paragraph in the passage (p72) concerning names, but had overlooked the passage at p59 (p73); this led to the factual error that "it wasn't even put to [Mr Campbell] that the money had come from Mick or from Lord." Clearly, it was.

b) Second, Mr Morgan-Payler referred to his Honour's comment at p211 (p73) that:-

> "So, there's certainly no evidence from Campbell that he plucked a sacrifice from names which the police gave him."

He submitted that while it was quite correct that there was "no evidence from Campbell" on the point (see p73), there was positive evidence from the Police that they had put certain names to Mr Campbell when they were questioning him, to which his Honour had not here referred. That is correct; his Honour referred to it later on (see p83). As will be seen (p83) there was evidentiary material which warranted Mr Tippett's submission (p72); his Honour's comment at p211 (p73) was accurate in its terms, but the failure to refer on this point to the Police evidence (p83) involved a material non-direction.

(4) At p211, immediately following (3). His Honour said:-

> "It was next put to you by counsel for the accused that Campbell had lied about his reward of $10,000, he lied to the police, then he sees a lawyer, and he changes his story to one that he's to be given two to three grams, namely, $2,000 worth and counsel [Mr Tippett] said to you, 'That's a ridiculous story, that anybody would take this whole trip for what would for that person be no more than a week's supply.' Well, we have to go to the evidence, ladies and gentlemen."

His Honour then read to the jury the cross-examination of Mr Campbell at transcript p52:-

> "The reason why you told them that your payment was to be in cash was because you were concerned that the penalty might be more severe if you told them you were to receive the proceeds in drugs?---Well, no, not - not exactly, no. The - at the time that I told the police that I was going to receive $10,000, I had not admitted to being a user of heroin and I thought if I admit to being a user of heroin as well, I will also attract further penalties.
>
> Look, you wanted to present the image at that time to police that you were merely a courier, didn't you?---That's what I was.
> - - -
> - - - you told them you were a courier for money because you thought it might go better for you, is that right?---No, it's not right. I told them I was a courier for money because I thought if - - - I was additionally a heroin user or addict or whatever that would be yet another charge."

His Honour commented on this passage as follows, at p211:-

> "What do you think of that? Do you think that that sounds right? <u>That just might be</u> what was going on in Campbell's head as to why he told them he was going to get money rather than drugs and he hadn't told them he was a user?" (emphasis mine)

His Honour then continued to read from the cross-examination of Mr Campbell at transcript pp52-54:-

> "So you're saying that you told them about $10,000 because you thought you'd be better off telling them that?---Yes. Well, yes.
>
> And you wanted to stay away from an association or connection with the drugs themselves because you didn't

want police to find out, you say, that you were additionally taking heroin?---That's right.

And further, it must've been in your mind, I suggest, Mr Campbell, that you presented the view, you wanted to present the view to police officers that you were merely a courier for money, did you not?---Yes.

That really, this importation as far as you were concerned had nothing to do with you personally with drugs?---Yes.

But it soon became clear to you that you had to alter that position, didn't it?---Yeah - well, yes.

Because after that conversation with police that took place on 28 March, you went to see your solicitor?---Yes.

And the first thing he said - and I suppose you took a copy of your record of interview with you, did you?---I don't remember. I would say yes, I'm sure I did.

And you and he went through that, didn't you?---Yes.

And he was horrified at the fact that you'd told police that you were a courier for money, wasn't he?---I don't recall him being horrified.

All right, I remove the word 'horrified', he was concerned that you had told police that you had been a courier for money, wasn't he?---I honestly don't recall. I just don't recall how his reaction was but I told him the truth.

Mr Campbell, after that meeting, it was decided - sorry, after that meeting with your solicitor, you then explained to police that you were really doing it for the drugs?---Yes.

And the reason why there was a change of heart was because you were advised by your solicitor that a courier for money would cop it in a court of law?---Well, it's not exactly like that but - - -

But pretty much like that?---Well, I told him that I was a user and why I'd done it and I changed my statement.

You changed your statement, you changed your statement because you realised that if you maintained the position you had had, that is, you had presented to police, then things were bad indeed, weren't they?---I suppose so, yes.

So, what you did was you went to police and told them that the reward was not for $10,000, but it was for

delivering - the reward for delivering the substance rather was to be free drugs while they lasted?---Yes.

And you did that on about 4 April, didn't you?---I don't know the day but it was afterwards, it was during the week afterwards.

Then the police said after that, 'Well, we want to talk to you some more' didn't they?---Yes.

And they found yourself being questioned again?---Yes.

And the first thing you had to tell them was that the $10,000 was not true?---That's right.

But, in fact, when you told police about the $10,000 you wanted to make sure - that is, when you told them about it on 28 March, you wanted to make sure that the reason for your going to Thailand was absolutely clear, did you not?---Yes.

And the police asked you whether you wanted to say anything about the matter on that occasion and you said, 'I would like to make a clear statement to the Federal Police that my actions that resulted in these charges were solely for a fee of Australian dollars, $10,000. I was not to participate any further in the matter in any way. I regret my actions not specifically because I was caught but because I realise the seriousness of the illegality now.'?---I think that was - - -

That's what you said, did you not, to police?---I think that was my first statement, was it?

That was on 28 March, was it not?---I think so, yes.
- - -
Were you aware, Mr Campbell, of how serious things might be if you were caught in Thailand?---Well, I didn't think about it before I went but certainly afterwards, after returning I thought about it."

His Honour commented on this passage at p212:-

> "Well, do you think that's a ridiculous story? He told the police $10,000; changed it later on after he'd seen the lawyer." (emphasis mine)

In addressing the jury Mr Tippett had suggested that this 'change of story' by Mr Campbell illustrated how he had calculatedly lied to the Police to lessen his culpability; he relied on this lying by Mr Campbell to attack his general credibility as a reliable witness.

Mr Morgan-Payler submitted that his Honour did not on this occasion, or on any other occasion during his summing up, properly direct the jury as to how they should deal with Mr Campbell's previous inconsistent statement. Instead, his Honour's comments at pp211 and 212 (pp75 and 77) in their context were "strong comment", to the effect that the jury might think that Mr Campbell's explanation for his 'change of story' was reasonable and plausible; it carried an inference that Mr Tippett's attack on his credibility based on his lie, should be disregarded. He conceded that his Honour's comment may have been unexceptionable, had he also properly directed the jury as to the significance of Mr Campbell's previous inconsistent statement as to the $10,000.

In support, Mr Morgan-Payler referred to *R v Schmahl* (1965) VR 745, which involved a charge of obtaining a cheque by false pretences. In that case the trial Judge in summing up referred to admitted inconsistencies between the alleged victim's very pertinent evidence at a retrial and his earlier evidence, but said nothing as to the legal relevance of the prior inconsistent statements, and did not give the usual direction regarding the use to which the jury might put that evidence. Winneke CJ considered at p748 that it was essential, for a proper consideration of the defence, that the jury be so directed because:-

> "- - - An important part of the defence was derived from inconsistencies in the Crown case, and - - so much depended on the reliability of [the victim].
>
> - - -
>
> - - - the failure - - - to instruct the jury how to relate the evidence [of inconsistencies] to the precise issues for their determination resulted in an important part of the defence not being adequately put before them."

Sholl J said at p749:-

> "I am satisfied that there were important inconsistencies of the kind suggested, at any rate in the evidence of [the alleged victim] and that it was not adequately brought to the attention of the jury that these were really the main basis of the defence, nor were the jury instructed how they might use such prior inconsistent statements as the evidence disclosed."

Mr Morgan-Payler submitted that here it was a very important part of the defence case that Mr Campbell was not a witness of truth or credit; and the major way in which this was sought to be established was by drawing the jury's attention to his prior inconsistent statements, particularly as to his reward for importing the heroin. Against that background, he submitted that it was essential that his Honour properly direct the jury as to their approach to Mr Campbell's previous inconsistent statement. Instead, his Honour had commented (pp75, 77) on the prior inconsistent statement, not in a manner which pointed to its proper effect in reducing the credibility of Mr Campbell, but in a manner which tended to minimize that reducing effect and bolster Mr Campbell's credibility.

As the learned trial Judge said at p192 (p9) this case was "very much a credibility case, a veracity case- - -". In his address the Crown Prosecutor had described the evidence of Mr Campbell as "the gravamen of the whole charge;" clearly, this was correct. The fact that Mr Campbell made a previous inconsistent statement (pp75-77) could impugn his testimony and his credit. In *Driscoll v The Queen* (1977) 137 CLR 517 a witness gave evidence inconsistent with her previous statement to the Police. The trial judge warned the jury that the contents of the previous statement were not evidence at trial, but did not tell them that they should regard the witness' evidence as unreliable.

The High Court held that there is no inflexible rule which required the jury to be warned that her testimony was unreliable, and the particular circumstances did not require it. Gibbs J said at pp536-7:-

> "- - - the whole purpose of contradicting the witness by proof of the inconsistent statement is to show that the witness is unreliable. In some cases the circumstances might be such that it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make a warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he had made an earlier statement inconsistent with his testimony. For these reasons I cannot accept that it is always necessary or even appropriate to direct a jury that the evidence of a witness who has made a previous inconsistent statement should be treated as unreliable.
>
> - - -
>
> - - - it cannot be accepted that in cases where a witness has made a previous inconsistent statement there is an inflexible rule of law or practice that the jury should be directed that the evidence should be regarded as unreliable. I agree with the observations made on this point by Stanley J and Lucas AJ in *Reg v Jackson* [1964] Qd. R. 26 at pp29, 40."

Driscoll (supra) makes it clear that the jury need not necessarily be warned in these circumstances that the testimony of the witness is not reliable, but that is a different question to whether they should be informed that they can take into account the fact that he made an earlier inconsistent statement, when considering his credibility. The nature of the inconsistency is one circumstance to be taken into account. On the question how the jury should be so informed, Street CJ said in *R v Zorad* (1979) 2 NSWLR 764 at 770.

> "- - - the manner in which the jury on a fact-finding approach should deal with evidence of a previously inconsistent statement would depend on a great number of factors".

In this case the jury should have been directed that they could use the fact that Mr Campbell had given a different out-of-court account as to how he was to be paid, in assessing whether they considered he was a witness of truth. The desirability of directing the jury on this point is highlighted by his Honour's comments (pp75, 77) which in context clearly tended to minimize any adverse effect the inconsistency might have on Mr Campbell's credibility. The jury should have been directed that unless they were satisfied by Mr Campbell's explanation (pp75-77), or they considered his inconsistency of no material significance, they could use the fact of his previous inconsistent account against him, when deciding whether he was a witness of truth.

(5) At p212, immediately following (4). His Honour said:-

> "Then there was a lot of submissions put to you about the fact that the police must've suggested the accused's name, amongst others, to Campbell and the suggestion was that Campbell just fastened upon one of these suggested names and that the accused's name was amongst them, and the police would've got the names because they would've noted who had visited Campbell's residence in the month before the importation took place.
>
> 'Do you think for one minute', counsel put it to you, 'the police didn't know who visited Campbell in the month before the trip? Taylor would've run through the names: 'Lord, Suringa, Druett'. Absolutely no evidence of that, ladies and gentlemen. Absolutely no evidence - and not even put to the witnesses."

To illustrate this, his Honour then referred to a passage at p59 in the cross-examination of Mr Campbell, viz:-

> "The truth, Mr Campbell, is Mr Druett did not arrange with you to import this heroin, did he?---He did.

> HIS HONOUR: Did you have $6000 cash before you got it from the accused?---No - no, Your Honour.
>
> MR TIPPETT: Did Mick have $6000 cash, do you think? Did Mick have $6000 cash in March 1989? Do you think Mick might've had $6000 cash in March 1989, Mr Campbell?---I don't know.
> Do you think that Mr Ian Lord might've had $6000 in March 1989?---I don't know.
>
> Possible, is it not?---Yes, it's possible.
>
> Possible that Mick had $6000 in March 1989, is it not? Possible that Mick had $6000 in 1989, is it not?---Yes, possible.
>
> Is it possible he gave it to you?---Well, he didn't."

His Honour rightly commented on this at p212:-

> "End of story so far as Campbell is concerned."

The extract thus far was irrelevant to the present topic -whether names had been suggested by the Police - though relevant to the earlier topic of the source of finance; see p73. His Honour continued to the relevant part, viz:-

> "MR TIPPETT: Is it possible that Mick gave $6000 to you in March 1989?---Well, no he didn't, Your Honour.
>
> Now, Mr Campbell, at the time this offence was committed, your friend Mick was a trafficker in heroin, wasn't he?---Yes, he was.
>
> And your friend Ian Lord was a trafficker in heroin, wasn't he?---He most certainly wasn't.
>
> The truth is, Mr Campbell, that when police were talking to you on 27 March 1989, they raised Mr Druett's name with you, did they no?---No, they did not.
>
> And like Debbie, he was a convenient replacement in your explanation to police, wasn't he?---No, that is not true."

His Honour rightly tied in this passage with a passage at transcript p86 in the cross-examination of Sergeant Taylor, viz:-

> "On 27 March, did you have information to the effect that a number of people, including Mr Druett, had visited Mr Campbell's house in the month before his trip to Thailand?---At some time during the 27th I did, yes.

> Could that time have been in the early afternoon of the 27th?---Before 6 o'clock, yes.
> Could that have been before 3 o'clock?---I couldn't be sure.
>
> Could it be that you raised with Mr Campbell the names of persons who had visited his residence in the month prior to 27 March in the early afternoon?---During the interview or prior to the interview?
>
> Prior to the interview?---Quite likely, because I would've run through with Mr Campbell what we intended to speak about in the formal record of interview. I did not raise the name of Mr Druett, or to my - - - recollection anybody else[s] prior to the record of interview.
> - - -
> Prior to the record of interview commencing at 3.45, could you have discussed with Mr Campbell the fact that he was facing a long term of imprisonment?---I could have.
>
> And could that have occurred in order to encourage Mr Campbell to provide you with names?---No." (emphasis mine)

His Honour then commented at p213:-

> "So there is simply no evidence that names were suggested to Campbell before he nominated Rob, put the finger on the accused. Simply no evidence of it."

Mr Morgan-Payler submitted that his Honour's comment at p212 (p81) on Mr Tippett's submission that the Police may have suggested the appellant's surname to Mr Campbell, viz:-

> "Absolutely no evidence of that, ladies and gentlemen. Absolutely no evidence - and not even put to the witnesses"

was in error in that Mr Tippett had elicited from Sergeant Taylor at p86 (above) that the Police were aware on 27 March of the names of people including the appellant who had visited Mr Campbell in the previous month and had put those names to Mr Campbell; and Sergeant Taylor in the somewhat self-contradictory passage emphasized on p83, appeared initially to think it "quite likely" that this was done prior to the interview on 27 March. Mr Morgan-

Payler submitted that the topic had been sufficiently raised with Sergeant Taylor in cross-examination (p83) and there was evidence (the passage emphasized, p83) to support Mr Tippett's submission.

I accept this submission. The matter had been clearly put to Sergeant Taylor, and his somewhat self-contradictory answer emphasized at p83 could be relied on by Mr Tippett as evidence in support - he stressed to the jury that that answer was "one of the most important pieces of evidence in this case".

Mr Morgan-Payler submitted that his Honour's comment at p213 (p83) was 'harsh', since Mr Tippett had elicited some evidence from Sergeant Taylor that the appellant's name may have been suggested to Mr Campbell before he nominated the appellant as his accomplice. I consider that the comment was factually inaccurate; the evidence lay in Sergeant Taylor's self-contradictory answer (p83).

(6) At p213, immediately following (5). His Honour paraphrased a passage in Mr Tippett's address to the jury, in which he had postulated a scenario at the Police Station in which the Police were putting pressure on Mr Campbell to name the person involved with him in the importation. Mr Tippett had said:-

> "- - - you see, ladies and gentlemen, if it was the case that you had before you a police officer saying, 'Yeah, look, what we were doing with Campbell - he was sitting there and we said, "Now look, come on, come on Craig. You know, you're not in it by yourself, are you. I mean, if you're in it by yourself it's a tough break for you because it's going to be a pretty tough sentence, you're going to wear it all yourself. We know who's been to your premises. We know they've been to your premises over the last month or thereabouts. Look, it was Druett, Lord, Suringa"' - others might have been mentioned, you might think."

His Honour commented at p213:-

> "Such a conversation was never put to the police officers as having taken place. Never put."

Mr Morgan-Payler conceded that the existence of any such conversation had never been put to the Police witnesses. I observe that that is clearly correct, and that Mr Tippett prefaced what he said by "if it was the case - -". Mr Morgan-Payler submitted that it had nevertheless been elicited from Sergeant Taylor that he had raised with Mr Campbell the names of his visitors, and Sergeant Taylor had not definitely denied that those names had not been put to Mr Campbell before he was interviewed on 27 March; see the passage emphasized at p83.

That is correct, but I consider his Honour's comment above was accurate and unexceptionable.

(7) At p213, immediately after (6). His Honour continued to deal with the question of the evidence as to whether the names of Mr Campbell's visitors had been put to him by the Police (see p83), and turned to Mr Tippett's duty as counsel in relation thereto, as follows:-

> "As I've already read to you, [see p47, (p72)] Campbell denied that names were put to him. Counsel's duty is clear of course. If a witness is to be confronted with a set of facts and if the jury is going to be asked to find that set of facts, that set of facts has to be put to the witness because otherwise you don't know what the witness would say about it if it was put to him.
>
> If it's not put to the witness, then you can't take any notice of the argument that that set of facts exists because there's no evidence to support that set of facts. Indeed, the witness hasn't even been given an opportunity to say what he said about that set of facts."

Mr Morgan-Payler submitted that in this passage, read in conjunction with the immediately preceding passage and comment in (6) (pp84-85), and in (5) (p81), his Honour was directing the jury that if Mr Tippett had not put to Sergeant Taylor that he had raised names with Mr Campbell, the jury should ignore his

submissions (p81) on that topic. He submitted first that the question of the Police putting to Mr Campbell the names of visitors had been adequately raised with Sergeant Taylor (p83). That is correct (see p83); his Honour's direction (pp85-86) proceeded on a factually incorrect basis.

Mr Morgan-Payler's alternative submission was that if Mr Tippett had not adequately raised the subject with Sergeant Taylor, it was simply incorrect for the jury to be directed in effect to reject a defence argument because a relevant witness had been given no opportunity to deal with the subject matter of the argument. The language used at p213 (pp85-6) in effect withdrew from the jury the defence submission that the Police put names to Mr Campbell.

I accept that submission. The defence did not bear a burden of satisfying the jury that Sergeant Taylor had put names to Mr Campbell; that is, of satisfying the jury that that "set of facts exists". Mr Tippett's submission was that it was reasonably possible that Sergeant Taylor had done so.

The passage at p213 (pp85-6) on counsel's duty stems from the rule of practice in *Browne v Dunn* (1893) 6 R 67 (HL), one aspect of which is the weight or cogency of the evidence of a relevant witness who has not been cross-examined on a subject which the cross-examiner raises in his address to the jury. Its application to criminal trials requires care; see the cautionary observations in *R v Manunta* (1989) 54 SASR 17 at 23-4, per King CJ and at 27-8 per Legoe J; and in *R v Costi* (1987) 48 SASR 269 at 270-1, per King CJ and at 275 per Matheson J. Here the words used (pp85-6) directed the jury in effect that they could not "take any notice" of Mr Tippett's submission because there was "no evidence

to support that set of facts". A failure to raise with Sergeant Taylor the question whether he had put names to Mr Campbell prior to the interview would have seriously affected the weight of Mr Tippett's submission that possibly he had done so, and rightly drawn strong comment that his failure to cross-examine should adversely affect the jury's consideration of that submission. However, in directing that no notice could be taken of Mr Tippett's submission the passage at p213 (pp85-6) wrongly proceeds on the basis that the appellant bore an onus of proving that the names had been put by the Police. As King CJ said in *R v Costi* (supra) at p271:-

> "Failure to comply with [the rule in *Browne v Dunn* (supra)] cannot compel a jury to any particular conclusion on an issue of fact."

I consider that his Honour was saying in part at p213 (pp85-6) explicitly and correctly, as far as it went, that where there is no evidence that certain facts existed, an argument that those facts should be found to exist must be rejected. This is distinct from an argument that a set of facts <u>might</u> exist, which defence counsel is always free to put, and which accords with the basic rule that the Crown bears the onus of proof. It was in fact the latter proposition which constituted the thrust of Mr Tippett's argument: his submission was on the basis that "you might think" that the Police had put names to Mr Campbell. The underlying objection to his Honour's direction at p213 (pp85-6) was that he was there directing the jury on the effect of Mr Tippett's not cross-examining Sergeant Taylor to the effect that he had put names to Mr Campbell (which was factually incorrect), on the basis that the question for the jury was whether Mr Tippett had established that the names had been put,

when the issue raised by the defence, and which the jury had to address, was that it was reasonably possible that the Police had put names to Mr Campbell. The jury was thus diverted from its proper approach to the defence submission.

(8) The eighth matter raised Mr Morgan-Payler arose from a passage at p214, viz:-

> "A couple of other submissions were put to you [by Mr Tippett] about Cathy Suringa's appearance at the Atrium Hotel and not the accused. It was explained by the relationship between Campbell and Cathy Suringa, that that relationship - which was obviously an intimate and continuing one - explained her presence at the Atrium. Well, there was no question to Campbell to that effect." (emphasis mine)

With reference to the last sentence, which he construed as a comment that Mr Campbell had not been questioned as to why Ms Suringa had decided to come to the Atrium, Mr Morgan-Payler referred to passages in the cross-examination of Mr Campbell at pp31-33, viz:-

> "You developed a relationship with Ms Suringa in late - - -?---Yes, I did.
>
> Your relationship was a close and intimate one?--- Yes, it was.
>
> She would stay at your home overnight?---Yes, she would.
>
> That became a regular event?---Yes.
>
> You regarded her as your girlfriend or lover?---Yes, I did."
>
> "The night before leaving Darwin, you spent with Catherine?---Yes, I did."

He submitted that those questions were as far as Mr Tippett could go; he could not properly raise with Mr Campbell the state of mind of Ms Suringa in deciding to come to the Atrium Hotel. Ms Suringa had not testified.

I consider that whether or not Mr Tippett could have taken the matter of Ms Suringa's arrival at the hotel further with Mr Campbell, he had taken it far enough to warrant his putting to the jury that her presence at the hotel could be innocently explained by their relationship. His Honour's comment tended to divert the jury's attention from their consideration of the significance of Mr Campbell's evidence (pp88-9) relevant to that issue.

(9) The ninth matter raised by Mr Morgan-Payler arose from a passage commencing at p215, viz:-

> "Before I finally conclude I should just make some comment about counsel's [Mr Tippett's] submission that no effort was made [by the Police] to establish where the $6000 came from."

Mr Campbell had been cross-examined at transcript p59 (p73) as to the possibility that in March 1989 his friend Mr Lord or the heroin dealer Mick had $6000 in cash, the amount which he testified he was given by the appellant to purchase the heroin. His Honour at p215 accurately summarised Mr Tippett's submission on the lack of Police investigation, viz:-

> "There was no examination [by the Police] of the accused's bank account or inquiry from his employer at Pine Creek and it was put to you that there were two other possible sources, namely Mick or Ian Lord down at Berry Springs."

His Honour then commented:-

> "There's simply no evidence of the money coming from any source except the accused. That's the evidence in the case if you accept Campbell. That's the evidence in the case.
>
> I mean, the money might've come from the Bank of England, Commonwealth Bank in Australia, or whatever. That's possible. They're possible sources. But to merely suggest 'other possible sources' is going outside the evidence. True, the evidence is that they [that is, Ian Lord or Mick] might possibly have had $6000, but

> it's awfully speculative. If you accept Campbell, it came from one source; it came from the accused.
>
> So I can only stress, ladies and gentlemen, look at the evidence in the case, don't speculate."

Mr Morgan-Payler submitted that the question of Police investigations of the source of the $6000 had been fairly raised by Mr Tippett with Sergeant Taylor at p88, viz:-

> "He [Mr Campbell] has told the ladies and gentlemen of the jury that he was given $6000 by the accused?---He told me that too, sir.
> - - -
> So did you make any inquiries of Mr Druett's bank accounts?---We did - sorry, a bank book of Mr Druett's was seized, but not by me. I didn't myself, at that time make any inquiries in relation to Mr Druett's bank accounts.
>
> Did you make any enquiries of Mr Druett's employer at Pine Creek in relation to his income?---I didn't."

Mr Morgan-Payler submitted that in the direction above to "look at the evidence" his Honour, in effect, was reversing the onus of proof; he was directing the jury that since the defence had not provided positive evidence that the source of the $6000 was someone other than the appellant, they should reject Mr Tippett's criticism (p89) of the Police investigation, a criticism which he submitted was legitimate and which supported Mr Tippett's general submission that the charge had not been proved beyond reasonable doubt.

Mr David submitted in general that Mr Tippett could not properly found submissions to the jury simply on the basis of assertions to Crown witnesses which they had denied. As an example, on the question of the source of the $6000, he submitted that his Honour was perfectly correct in telling the jury (at p72) that "there is no evidence that the money came from Mick or from Lord." That statement is correct. Mr David submitted that the

fact that Mr Campbell had denied (p82) receiving the $6000 from either of them, provided no basis for Mr Tippett's submission that Mr Campbell might be disbelieved on the point, and that the source of the money in the circumstances, could have been Mick or Mr Lord. I disagree. It was quite open to Mr Tippett to make that submission. In effect, Mr Tippett was asking the jury not to accept the evidence of the Crown witness Mr Campbell on the matter of the source of the $6000 which he had raised with him, and he was entitled to do so; as indeed his Honour recognized at p90 in saying "that's the evidence in the case if you accept Campbell."

I consider that his Honour was entitled to make the comment at p90. However, it should have been balanced by pointing out that the appellant did not bear an onus of establishing the source of the $6000.

Conclusions on the sixth ground of appeal

I have sufficiently indicated Mr Morgan-Payler's individual submissions on the alleged errors in these 9 passages, and my conclusions thereon. Overall, his submission was that the errors resulted, in effect, in the jury wrongly being invited to disregard very considerable parts of the defence case. I consider that that general submission has been established, even though not all of the individual submissions are accepted.

The seventh ground of appeal: failure to direct as to drawing an inference

In this ground it was contended that his Honour had failed to direct the jury properly as to the drawing of an inference necessary to establish one of the grounds on which the Crown relied to establish guilt, with the result that it was likely a miscarriage of justice had occurred. This involved the

significance of Ms Suringa's attendance at the hotel. This fact was earlier discussed (pp63-5) in the context of its suggested significance as evidence corroborating Mr Campbell, but the Crown also relied on it as evidence going directly to guilt; see pp4-5.

Mr Morgan-Payler's submissions were as follows. The Crown had invited the jury to infer that Ms Suringa was sent to the Atrium Hotel by the appellant on his behalf since he was aware he was concerned in the importation of the heroin, when that inference was not open to be drawn; see p63. He conceded that there was direct evidence as to why she was there, from the contents of the telephone call Campbell/appellant (pp61-2) read with the reference by the appellant to Ms Suringa in his first conversation with the detectives (pp5-6), if the jury accepted that that conversation took place. There was however also the evidence of Mr Campbell (pp88-9) which pointed to the possibility of an innocent explanation for Ms Suringa's presence at the hotel.

An inference from the whole of that evidence was open to be drawn, other than that her presence showed a consciousness of guilt by the appellant; and the jury needed to be directed accordingly. His Honour had not directed the jury in any way as to the drawing of inferences; if he had, they would not have drawn the inference sought by the Crown. Before it could be inferred that Ms Suringa had attended at the hotel as the appellant's agent, and that he had sent her there because he was conscious of his guilt, it was necessary that the jury consider the whole of the evidence and conclude that those inferences could satisfactorily and positively be drawn, as a reasonable conclusion; they had not been so directed.

Mr David submitted that it was not a matter of an inference having to be drawn, since there was ample direct evidence (p92) on the point to warrant the finding sought by the Crown as to the significance of Ms Suringa's presence at the hotel.

I consider that an inference had to be drawn, before the jury could be satisfied that Ms Suringa's presence indicated a consciousness of guilt by the appellant. It was necessary for his Honour to refer the jury to the relevant evidence, and explain that before an inference that the appellant was conscious of his guilt could be drawn from Ms Suringa's arrival at the Atrium, the jury had to be satisfied that the appellant had said what the detectives alleged he said at pp5-6, and that what he said was truthful and accurate. The significance in that connection of the fact that the detectives were aware before the conversation at pp5-6 allegedly took place, both of the contents of the telephone conversation Campbell/appellant and that Ms Suringa had attended at the hotel, should have been drawn to their attention. They had to be directed to consider the evidence in the light of Mr Campbell's evidence of his relationship with Ms Suringa (pp88-9). The jury was not directed in this way, or cautioned that an inference is a much stronger kind of belief than conjecture or speculation, and that they had to be most careful in drawing the inference sought by the Crown, and could only do so if they were satisfied that facts had been proved from which that inference could be drawn. The only references in the summing up to drawing inferences were at p192, viz:-

> "You've got to decide the case on the evidence. You may draw proper inferences from an answer, perhaps - or a

> number of inferences - that a witness has given, but it's evidence in the case which dominates"

and at p201 (p11).

The eighth and ninth grounds of appeal

Ground 8 is that his Honour failed adequately to put the defence case to the jury; ground 9 is that the charge to the jury was fundamentally unbalanced, by reason of his Honour's "strong and highly critical" comments on the defence case (see pp68-91), while making no critical comment about any part of the Crown case some parts of which required such comment.

Mr Morgan-Payler submitted that the jury may well have formed the view from those adverse comments set out at pp68-91 that his Honour was lending the weight of his judicial authority to the Crown's submissions.

Mr David rightly pointed out that the "defence case" in fact amounted to submissions on the evidence; he submitted that that case had been adequately put to the jury.

I deal inter alia with these general grounds in the general conclusions which follow.

General conclusions on the appeal

I consider that the following errors occurred in the summing up.

(1) The redirection at pp227-8 (pp19-20) arising from the misdirection at p215 (pp17-18) on the appellant's exercise of his right to silence, was inadequate to overcome the effect of that misdirection; see pp31-33.

(2) The references to it being "inherently probable" that the two conversations containing admissions in fact took place (p39), without pointing out that this comment was limited to

the significance of the circumstances in which the conversations were alleged to have occurred, and that the jury was not limited to considering that factor when deciding on the credibility of the detectives' evidence, involved a material non-direction; see pp45-55.

(3) The jury was not directed that they could not rely on the admissions in the alleged conversations unless satisfied that they were truthful and accurate.

(4) The identification of the fact of the telephone call Campbell/appellant (p60) as evidence capable of corroborating the evidence of Mr Campbell was a misdirection. See pp60-63.

(5) In his Honour's comments on the defence submissions, the jury was misinformed:-

(a) that Mr Campbell had not been cross-examined as to whether he knew at all relevant times that the appellant's surname was "Druett" (pp68-70);

(b) that it had not been put to Mr Campbell that he had received the $6000 from Mick or from Mr Lord (pp72-74); and

(c) that it had not been put to Sergeant Taylor that he had raised with Mr Campbell prior to the interview the names of Mr Campbell's visitors in the previous month, and there was no evidence on the point (pp81-84).

The effect of the comments based on these factual errors was to exclude defence submissions attacking Mr Campbell's credibility, from the jury's consideration.

(6) It was factually erroneous to suggest that Mr Tippett had failed in his duty to put to Sergeant Taylor the

proposition that he had suggested names to Mr Campbell prior to the interview, (pp85-86), and the direction (pp85-86) placed on the defence a burden of proof it was not required to bear.

(7) The reference to excreting the heroin at Mr Lord's place at Berry Springs (pp70-71) tended to divert the jury's attention from the real issue raised by the defence which they were required to consider in relation to Mr Lord: was it possible that he was the appellant's accomplice? See p71.

(8) There was no balanced direction to the jury as to their approach to the significance of Mr Campbell's prior inconsistent statement that he was to receive $10,000 for the importation, when assessing his general credibility (pp75-81); and as to the significance of the onus of proof in evaluating the evidence as to the source of the $6000 (pp89-91).

(9) The direction to the jury (pp85-6) in effect that it could take no account of the defence submission that it was possible that Sergeant Taylor had put names to Mr Campbell before the interview "because there's no evidence to support that set of facts" involved factual error (p86) and a misdirection as to the burden of proof (pp86-88).

(10) The statement of fact that Mr Campbell had not been questioned as to Ms Suringa's presence at the hotel tended to divert the jury from the significance of the available evidence relevant to that issue (pp88-9).

(11) There was a failure to direct the jury as to how it should approach the drawing of inferences from Ms Suringa's presence at the hotel; pp64, 92-94.

I now relate these errors to the grounds of appeal. I consider that while the first ground of appeal does not succeed,

the serious error at (1) above (pp31-33) is established. The fifth ground of appeal (p60) succeeds in relation to the fact of the telephone call (pp60-63). The sixth ground of appeal (p68) succeeds (p91) in relation to 8 of the 9 passages relied on (pp68-91). The seventh ground of appeal succeeds (pp93-4). The cumulative effect of the errors nos (1)-(11) (p95-97) establishes the eighth and ninth grounds of appeal.

Various grounds of appeal having succeeded as indicated, the next question is as to the disposition of the appeal.

Should Code s411(2) be applied?

Code s411(2) provides:-

> "The Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

Mr David's submission in this regard was on the basis that any error in the summing up arose from the directions as to corroboration. On that basis he submitted that Code s411(2) should be applied, and the appeal dismissed, in that there was clear, unequivocal and uncontradicted evidence of the appellant's guilt from Mr Campbell's testimony and by way of the appellant's own admissions, while the defence case of a "giant conspiracy by Police witnesses" was wholly unsupported by evidence. He submitted that the Crown case was "overwhelming" in its strength and any deficiencies in the directions as to corroboration "pale into insignificance."

I bear in mind that a summing up must be viewed as a whole; no figurative magnifying glass should be applied to it. The critical question is the likely effect on the jury of the summing-up as a whole, read and understood reasonably. Further, a trial

Judge may properly express his opinion on the facts of a case, provided the issues of fact are left to the jury to decide. At the same time, an accused is entitled to have his defence accurately placed before the jury, irrespective of how unlikely it may be that any ordinary person would pay the least attention to it.

The deficiencies in the summing up were not limited to the question of corroboration. There were factual errors in placing the defence submissions before the jury, the significance of which lies in the accompanying directions that there was no evidence on these matters, they had not been raised with the witness, and the jury were to decide the case only on the evidence. The cumulative effect of his Honour's comments was to exclude defence submissions as to reasonable possibilities and reasonable doubt, from proper consideration by the jury. For mis-statements of evidence and misdirections to amount to a substantial miscarriage of justice, it must be reasonably possible that the jury would not otherwise have returned a verdict of guilty; see *Simic v The Queen* (1980) 144 CLR 319 at pp330-2. I consider that that is the case here, bearing in mind the cumulative weight of the mis-statements, and also the strength of the Crown case against the appellant. In all the circumstances, I consider that the cumulative effect of the errors set out in nos. (1) - (11) at pp95-97 is that the appellant was thereby deprived of a chance of acquittal that was fairly open. Putting it the other way, I do not consider that a reasonable jury would inevitably have convicted had these errors not been made; see *Wilde v The Queen* (1987-88) 164 CLR 365 at pp371-2. A substantial miscarriage of justice occurred, and accordingly Code s411(2) does

not apply; see *R v Cohen* (1909) 2 Cr App R 197 at pp207-8. It follows that the appeal against conviction should be allowed.

Should a new trial be ordered?

The final question is whether there should be a disposition under Code s411(3), or an order for a new trial under Code s413.

The principles upon which the discretion to order a new trial is exercised are set out in *Peacock v The King* (1912) 13 CLR 619 at p674, per O'Connor J; *Raby v The Queen* (1980) WAR 84 at p95, per Wickham J; and *King v The Queen* (1986) 161 CLR 423 at p426, per Murphy J. The history of these proceedings is set out by Gray J (p123), and I need not repeat it. I consider that the Crown has a strong case on this serious charge. However, the major consideration for present purposes, in my opinion, is that the appellant has
already stood his trial on this charge on 4 occasions, over the last 3½ years. To order a retrial in these circumstances, would
result in an injustice to the appellant and a blot on the administration of criminal justice which completely outweighs any public interest in his standing trial for the fifth time. For that reason I consider that the appropriate disposition is under Code s411(3). I would order as follows: that the appeal be allowed, the conviction quashed, and judgment and verdict of acquittal directed to be entered.

PRIESTLEY J:

In view of the comprehensive discussion of this case by the other members of the Bench, I do not think it useful for me to do more than state my own views briefly.

On two aspects of the grounds of appeal argued I have formed firm opinions sufficient for me to arrive at a conclusion.

The first concerns the direction given in the trial judge's summing up in which he said that "In all his dealings with the police, the accused has never said he didn't do it". There can be no doubt that this direction infringed "the right of silence" reaffirmed by the High Court in *Petty v The Queen* [1991] 173 CLR 95 at 99 and passim. The trial judge himself recognised a mistake was involved in this direction, and later gave a further direction aimed at putting the matter right. In this he said:

> "Insofar as I may have said anything to the contrary, I direct you, as plainly as I can, that there was - especially as he'd been cautioned - no requirement on the accused to protest his innocence. If he's cautioned and he's not obliged to answer any questions and he exercises his right not to answer any questions, then he's not required to protest his innocence."

Although for most purposes this direction stated the position clearly so far as an accused person is concerned, it was not in my opinion likely to bring back to the minds of the jury at this trial the words spoken earlier by the judge which contained the misdirection (and which were in their context very forceful) nor did it even directly acknowledge that anything he had said before was legally mistaken. In the circumstances of the trial I do not think that the later direction can be safely assumed to have removed from the minds of the jurors the potentially very powerful effect of the earlier one.

The other aspect of the grounds of appeal on which I have formed a firm opinion is that dealing with what the judge said to the jury concerning the submissions by counsel for the accused in his final address. In regard to these grounds both

Kearney J and Gray AJ demonstrate, in my opinion, that the trial judge made errors of two kinds. One was to criticise what counsel had said on the basis he had not laid any foundation for the particular argument he was putting, when in fact he had. The other was to tell the jury not to speculate about possible explanations of the evidence suggested by counsel when there was no evidence to support the possibilities. In doing this, the judge was preventing any use by the accused of a well established rule, that it is legitimate for an argument to be put to the jury, in final address, that the evidence before them is susceptible of a reasonable explanation other than that the accused committed the crime. This argument may be put whether or not the jury could conclude that the reasonable explanation was in fact the explanation. It is not necessary that the accused *establish* the explanation; what is necessary is that the explanation is, as a matter of reason, *consistent* with a version of the facts which it is open to the jury to find, upon the whole of the evidence: see *Barca v The Queen* [1975] 133 CLR 82 esp at 105.

In my opinion the defects in the summing-up that I have summarised are, taken together, more than enough to require that the verdict and conviction be set aside and the appeal upheld. On this footing I do not think I need consider some further and more difficult matters dealt with by the other members of the court.

On the question whether a further trial should be ordered I agree with what has been said both by Kearney J and Gray AJ.

I agree with the orders proposed by Kearney J and Gray AJ.

GRAY AJ

On 9 June 1993, the appellant was found guilty of being knowingly concerned in the importation of a traffickable quantity of heroin contrary to s233B (1)(d) of the Commonwealth Customs Act. He was sentenced to eleven years imprisonment with a non-parole period of four years. He appeals against that conviction upon a number of grounds.

On 27 March 1989 at about five o'clock in the morning, Craig Grant Campbell was arrested by officers of the Federal Police soon after his arrival in Darwin by air from Thailand. Campbell was taken to a hospital in Casuarina where X-Rays revealed five capsules in his stomach. The capsules were discharged under the supervision of a doctor and were found to contain heroin.

When interviewed by the police, Campbell stated that it had been arranged with the appellant that he should travel to Thailand and purchase heroin. Campbell said that the appellant had provided him with money for the airfare and the purchase of about one hundred and fifty grams of heroin.

Whilst in police custody, Campbell telephoned the appellant and arranged to meet him at the Atrium Hotel. The conversation was taped. In the event, the appellant did not keep the appointment but Catherine Suringa, a woman known to both the appellant and Campbell, attended the Hotel.

At about eleven o'clock in the evening of 27 March, the appellant was taken to the Berrimah Police Station. He was cautioned and asked a number of questions but chose to remain silent. After the interview the police officers had a further conversation with the appellant in which he made incriminating

statements. The appellant was then taken to the Royal Darwin Hospital. On the way the appellant made further incriminating statements. Neither of these conversations was recorded.

At the trial, Campbell gave evidence of the matters he had revealed to the police. His evidence, if accepted, thoroughly implicated the appellant. The police officers Matheson and Cook, gave evidence of the incriminating conversations with the appellant. It was suggested to each in cross examination that neither conversation had occurred. The tape of the telephone conversations was played to the jurors, who were provided with a transcript of the conversation. The appellant did not give evidence and no other evidence was called upon his behalf.

There are two separate Notices of Appeal before the Court, one dated 25 June 1993 and the other dated 24 December 1993. The first ground argued was ground two of the first Notice which alleges,

> "The learned trial judge erred in declining to discharge thejury on the application of counsel for the accused after the learned trial judge's summing up".

This ground is based upon two passages in the learned trial judge's charge to the jury. The first passage occurred while his Honour was discussing the Crown case with the jury. It reads:-

> "Now, you should really think why would police make those conversations up, why would they as the Crown put to you, put their careers at stake, indeed submit themselves to the possibility of being dealt with in the criminal area for giving false evidence in a court on material matter? They're career policemen and to go into the witness box and tell a false story, to make something up, puts those careers in jeopardy; indeed, their whole lives in jeopardy if they are making them up."

The second passage reads,

> "In all his dealings with the police, the accused has never said that he didn't do it. There's just no

> evidence of him ever saying such a thing to the police. He was in the company of the police, Matheson and Cook, from the time they arrived to execute the search warrant - which seems to have been some time about 8 pm or after on 27 March - until after the record of interview and after the two conversations in the early hours of the 28th. It must've been between 3 and 4 am. Upwards of seven hours or more. Nowhere did the police give any evidence of any denial by the accused of Campbell's story."

At the conclusion of the charge, counsel for the accused submitted that the first passage was expressed in a way which had been disapproved by the High Court in *McKinney v The Queen* (1991) 171 CLR 468 and that the second passage violated the accused's privilege against self-incrimination and was grossly prejudicial. Counsel submitted that neither error was capable of being cured by redirection and applied for an order that the jury be discharged without verdict.

The learned trial judge refused the application but agreed to redirect. In the redirection his Honour stated that the jury's task was to decide whether the police had told the truth about the two conversations. his Honour continued,

> "That's the issue, about those two conversations. The truthfulness of the police officers. In the course of doing that I referred to some arguments that senior Crown counsel put to you when he asked you to consider whether the police would make up that evidence about the conversations; whether they would put their careers at stake or possibly invoke the criminal law against themselves and put their lives in the hands of Campbell.
>
> They were arguments put to you by the Crown. So what I have to stress is, you're not embarked on an inquiry as to whether the police perjured themselves or not. The central issue is what did happen? Did those conversations take place or didn't they take place? The Crown has addressed you along the lines that those conversations must've taken place, police wouldn't make this sort of thing up."
>
> As to the second matter, his Honour said,
>
> "Insofar as I may have said anything to the contrary, I direct you, as plainly as I can, that there was -

> especially as he'd been cautioned - no requirement on the accused to protest his innocence. If he's cautioned and he's not obliged to answer any questions and he exercises his right not to answer any questions, then he's not required to protest his innocence."

Upon this appeal, Mr Morgan-Payler, leading counsel for the appellant, submitted that each of the two passages in the charge was a serious misdirection and was so prejudicial that it was not capable of being neutralised by redirection. Alternatively, it was submitted that the redirection in relation to the first passage was itself a misdirection because it failed to express any disapproval of the Crown argument and that it was expressed in terms which disregarded the onus of proof.

In relation to the first matter reliance was placed upon the joint judgment of Mason CJ, Deane, Gaudron and McHugh JJ in *McKinney v The Queen* (1991) 171 CLR 468 at pp476-7. After stating that when a challenge is made to police evidence of a confession the question inevitably arises whether it is a reasonable possibility that police witnesses have perjured themselves and conspired to that end, the judgment continues,

> "That is a different question from the question whether the police have, in fact, perjured themselves and conspired to that end. It cannot be sufficiently emphasized that a jury should never be directed in terms which suggest that it is necessary to decide that latter question. It is even more important that a jury not be directed in terms which suggest that it is necessary to form a judgment about the conduct of police witnesses which, although bearing on their credit, is not directly brought into issue by a challenge to their evidence as to the making of a confessional statement."

The passage in the learned trial judge's charge to which I first referred left to the jury an issue which the majority of the High Court said should never be left to it. It was a clear invitation to the the jury to consider whether it was likely that the police conspired to commit perjury. The fact that it was the

reiteration of a Crown argument does not eliminate the vice in the direction. If the Crown did put such an argument, the jury should have been instructed as to the real issue and directed to disregard the Crown argument.

The redirections on this point went some distance towards correcting the problem but the question remains whether the difficulty was capable of being cured by redirection and, if so, did the actual redirection achieve that end. Leaving aside the first question for the moment, the principal deficiency in the redirection is the absence of any specific criticism of the Crown argument. It is true that his Honour directed the jury that the truthfulness of the police witnesses was the central issue. But his Honour did not say that the Crown argument left to the jury was misconceived and should be put aside. The redirection was further criticised by Mr Morgan-Payler on the ground that it tended to misstate the issue by using the expression, "Did those conversations take place or didn't they take place?" Mr Morgan-Payler submitted that the real issue was "Are you satisfied beyond reasonable doubt that those conversations occurred?" He drew attention to a number of cases in which criticism had been made ofjudicial directions which conveyed to the jury that it was a matter of preferring one view of the facts to another. These cases will be referred to in discussing the next ground of appeal.

Before expressing any view about the adequacy of the redirection concerning the evidence of the confession, I turn to the second matter which is said to have required the discharge of the jury.

The passage in the charge in which his Honour drew attention to the fact that the appellant had never denied his

guilt was, in my opinion, a definite misdirection. See *Petty v The Queen* (1991) 173 CLR 95. This was accepted by the learned trial judge and he gave a redirection intended to put the matter right. The method adopted was, in my view, not entirely satisfactory. His Honour did not say "I made a mistake which I now wish to correct". He said "Insofar as I may have said anything to the contrary" and then gave a correct direction. It is said on behalf of the appellant that this form of redirection was inadequate to neutralise the highly prejudicial effect of the original direction.

Looking at this ground of appeal broadly, I am not persuaded that the learned trial judge's errors were such that they were incurable by redirection. Accordingly, I reject the view that the discharge of the jury was the only course open. As to the redirections, I consider that, for the reasons I have given, they were not adequate to remove the prejudicial effect of the original directions. Nevertheless, I do not consider that this ground of appeal, alleging as it does a failure on the part of the learned trial judge to discharge the jury, has been made out. However, the matters raised under this ground are relevant to the broader question of whether the trial miscarried.

Ground 1 of the Notice of Appeal dated 24 December 1993 alleges "That the learned trial judge failed adequately to direct the jury as to the burden and standard of proof and as to the fact finding process".

The appellant's argument under this ground was based upon the repeated use by his Honour of expressions such as "your role is to decide what happened?" when discussing issues upon

which the jury had to be satisfied beyond reasonable doubt. It was said that the use of such expressions invited the jury to embark on a search for the truth rather than considering whether the particular matter had been established to the required degree.

There are a number of cases where the use of expressions such as "your task is to determine where the truth lies" by a trial judge has been held to amount to a misdirection. *R v Egan* (1985) 15 A Crim R 20, *R v Calides* (1983) 34 SASR 355, *R v Lapuse* [1964] VR 43. See also the discussion of this matter in *Liberato v The Queen* (1985) 159 CLR 507 by Brennan J, at p515 and Deane J, at p519.

Most of the cases to which I have referred are cases in which there has been defence evidence in conflict with prosecution evidence, but even in a case where the accused stands mute, it is necessary to make clear to the jury that its task is not one to decide "what happened" but to ask whether it is satisfied beyond reasonable doubt of the accused's guilt.

In this case his Honour did, of course, give a direction that the Crown must prove the accused's guilt beyond reasonable doubt. His Honour did not say that any references by him to matters being proved or established meant proved or established beyond reasonable doubt. Nor did his Honour contrast the civil and criminal standard of proof.

Mr Morgan-Payler submitted that each is a commonly given and desirable direction and that his Honour's omission to do so fortified his argument under this ground.

Although I think there is some substance in Mr Morgan-Payler's submissions, I do not think there is any real likelihood that the jury was misled as to the burden or standard of proof.

The expressions about which Mr Morgan-Payler complained are less likely to lead to misunderstanding in a case where there is no actual conflict of evidence. In my opinion, this ground has not been established.

It is convenient to deal next with Ground 4 which alleges inadequacy in the directions of the learned trial judge in relation to the evidence of the confessions. There is some overlap with Ground 1 because Mr Morgan-Payler argued that the burden of proof issue intruded into this area. In the course of his charge, the learned trial judge said,

> "Do you think that they did make these stories up? Because if they did it's a very evil thing to do to secure a conviction of this accused. What did happen?"

A little later his Honour said,

> "You have to make a judgment about these police officers. You have to make up your minds whether you accept them or you reject them."

It was argued on behalf of the appellant that it was wrong to present the jury with a stark choice of acceptance or rejection of the police officers. It was obviously open to the jury to entertain a reasonable doubt about the police evidence without rejecting it as untrue. This, so it was said, should have been pointed out to the jury. Nor did the learned trial judge warn the jury of the danger of convicting on the basis of that evidence unless it was reliably corroborated. In my opinion, the way in which the learned trial judge dealt with the evidence of the confessions amounted to a misdirection. His Honour did not adequately direct the jury that it had to consider two questions, first, was it satisfied beyond reasonable doubt that the appellant made the statements attributed to him by the police and, secondly, what weight should be attached to the answers in

all the circumstances. *R v Batty* [1963] VR 451. The learned trial judge's directions were likely to mislead the jury that it had to either accept the police evidence or reject it as untrue. This was not the true issue. Furthermore, there was no reliable corroboration of the making of the confession and a *McKinney* warning was called for.

The police officers went to the appellant's unit at Parap at 9.40 pm on 27 March. The appellant was body searched and asked to accompany the police to the Berrimah Police Station. The appellant was taken to the police station in a police car and placed in an interview room. The formal interview was conducted between 11.58 pm on 27 March and 2.32 am on 28 March. Then followed the first alleged incriminating conversation. The appellant was then taken by car to Darwin Hospital. On the way, the second conversation is said to have occurred. Neither conversation was recorded. No note was made of either conversation until about 7 am on 28 March when Messrs Matheson and Cook jointly made a note of their recollection. The appellant was not invited to read or sign the note. The appellant was not charged until 4.25 am on 28 March. At the time of the two conversations he had been in what amounted to police custody for about five hours. He was without access to a lawyer or other independent person.

My reading of the majority judgment in *McKinney* is, that in circumstances such as the present, the jury should be warned of the dangers of convicting upon the evidence of the confession unless it is reliably corroborated. The judgment makes it clear that what is required is corroboration of the evidence of the confession, not merely other evidence of guilt. In this case there was no such corroboration. There remains a

question whether the warning is only required when, upon the Crown case, the confession represents the only or only substantial evidence of the accused's guilt. The passage in the majority judgment which raises this question is at p476 where the judgment, after speaking of the disadvantaged position of a person being questioned whilst in police custody, proceeds:

> "Thus the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and accordingly, it is necessary that they be instructed, as indicated by Deane J in *Carr v. The Queen* (1988) 165 CLR 314 that they should give careful consideration as to the dangers involved in convicting an accused person in the circumstances where the only (or substantially only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated."

In the present case, there was substantial evidence of guilt apart from the evidence of the confession. There was the evidence of the accomplice Campbell which, if accepted, thoroughly implicated the appellant. Does this mean that a *McKinney* warning was not required?

In my view, what *McKinney* requires is that the jury should be instructed that the warning must be heeded if the jury finds itself in a position where the only or only substantial evidence of guilt left for consideration is the evidence of the confession. In the present case, if the jury rejected Campbell's evidence and were not prepared to draw a guilty inference from the circumstance surrounding the telephone call, it would be in a position in which the warning should be heeded.

If the *McKinney* warning was to be given or withheld depending upon the state of the Crown case as it appears on paper, the giving or withholding would depend upon an unknown factor, namely, how much, if any, of the Crown evidence will ultimately be acceptable to the jury.

In my opinion, the *McKinney* warning should be given in all cases where uncorroborated police evidence of a confession is led, regardless of the existence of other Crown evidence of guilt. See also *Black v The Queen* (1993) 68 ALJR 91. In that case the High Court held, in circumstances not unlike the present, that the trial judge's failure to give a *McKinney* warning vitiated the trial.

In this case, I cannot accept that the accomplice's evidence eliminated the need for a warning in the terms I have indicated. For all the above reasons I consider that Ground 4 has been made out.

Grounds 2 and 3 complain of the learned trial judge's directions regarding corroboration. It was said that the directions regarding the evidence of an accomplice were incomplete and that his Honour wrongly identified evidence which was capable of providing corroboration.

The learned trial judge correctly directed the jury that Campbell was an accomplice and that it was dangerous to convict upon his evidence unless his evidence was corroborated. His Honour correctly directed the jury that it was open to it to convict upon the uncorroborated testimony of Campbell if they found it entirely reliable. Mr Morgan-Payler referred to passages in the charge which he contended put Campbell in too favourable a light. He also submitted that the learned trial

judge should have instructed the jury upon the rationale of the rule requiring a warning. I cannot accept that there is any substance in the first criticism and, as to the second, there are very real difficulties in identifying what is the rationale of the rule. See *McNee v Kay* [1953] VR 520 at pp524-6 and the passages from Wigmore on Evidence there cited.

In dealing with the evidence which was capable of amounting to corroborration, his Honour identified three matters. He directed the jury as follows,

> "First, there's the telephone call. If you're satisfied that the telephone call took place, then what's the point in ringing the accused - what's the point in Campbell ringing the accused from the police station with the police sitting around a loudspeaker on the telephone, except in pursuance of this common purpose between them.
>
> That's the first thing that's capable of corroborating Campbell's story. The second thing is those two conversations in which the accused made some verbal admissions to the police. If you think they took place, they corroborate Campbell - or they're capable of corroborating Campbell. Whether they do or not is a matter for you. I tell you, as a matter of law, if you found that those things took place, then they amount to corroboration.
>
> Thirdly - and you might think that this is not as significant as the other two - but the arrival of Cathy Suringa at the Atrium Hotel, rather than the accused, could amount to corroboration. How much weight you would give it is a matter for you, but those things I tell you as a matter of law are capable of running to corroboration of Campbell."

The learned trial judge's directions regarding the telephone call are somewhat difficult to follow. The jury was directed that the mere fact of the telephone call being made was capable of corroborating Campbell's evidence because it could only be explained as a step in the common plan between Campbell and the appellant. It was clear on the evidence that the telephone call was made not pursuant to any common plan but

because the police asked Campbell to make the call. It was submitted by Mr David QC that the bare fact of the call could amount to corroboration because it was unlikely that Campbell would make such a call to a man that he had falsely implicated.

Further Mr. David contended, with some force, that the terms of the telephone conversation were capable of supporting Campbell's testimony. The telephone conversation went as follows:

"DRUETT: "Gooday."

CAMPBELL: "Gooday, mate, how are you?"

DRUETT: "Not bad, how are you?"

CAMPBELL: "Oh, shithouse, had a cunt of a day."

DRUETT: "Have you?"

CAMPBELL: "Yeah, um, listen, I'm just leaving the Police Station, I can't talk too much but they've let me make a call, I'm out on bail."

DRUETT: "Oh, yeah."

CAMPBELL: "I'm going to go and book into the Atrium Hotel, um, do you want to meet me there?"

DRUETT: "I'll come over and have a yarn to you mate."

CAMPBELL:"Ok, what sort of time or?"

DRUETT: "Well why don't you drop over and see Kath and then we can both have a yarn to you together, eh?"

CAMPBELL: "Well I'd rather not do that mate, I'd rather stay um, um, you know out in the sort of the public eye, I've got tummy here, you know?"

DRUETT: "Righto."

CAMPBELL: "Ok?"

DRUETT: "Well what time would you be there?"

CAMPBELL: "I don't know I'm just going to make a booking now, so just check the room and I'll be in there in an hour."

DRUETT: "Ok, my man."

CAMPBELL: "Ok."

DRUETT: "See you round about then."

CAMPBELL: "Right, bye."

DRUETT: "Bye bye."

I accept Mr David's argument that the jury might infer that the appellant's replies were inconsistent with those of a man who was quite unconnected with the drug importation. This view had been pressed upon the jury by Mr David in his final address. Counsel for the appellant had replied by contending for an innocent interpretation of the conversation.

Mr David's submission on the appeal was that the jury would have understood his Honour's direction in the light of the arguments presented to it.

As to Miss Suringa's arrival at the Atrium Hotel, Mr David submitted that it was open to the jury to infer that her arrival was explainable upon the basis that she had been sent to the Hotel by the appellant to see how the land lay. This inference, so it was said, supported Campbell's evidence implicating the appellant. There was no dispute before this Court that the confession evidence could amount to corroboration.

Although Mr Morgan-Payler submitted to the contrary, I accept Mr David's submission that the terms of the telephone call and Miss Suringa's arrival at the Hotel were pieces of potentially corroborative evidence.

But the learned trial judge gave the jury no assistance as to how those pieces of evidence should be analysed and examined

by the jury in the context of corroboration. I consider that such assistance should have been given to the jury and that failure to do so amounted to a non-direction. The significance of the non-direction is linked to the complaint made under Ground 6 that the learned trial judge failed to direct the jury upon the process of drawing inferences.

This was a case in which the Crown relied to a substantial extent upon circumstantial evidence. The telephone call and the arrival at the Hotel of Catherine Suringa were put forward as important pieces of corroborative evidence. Each depended upon the jury drawing a guilty inference from the circumstances proved. In each case there was an obvious innocent hypothesis which would have to be excluded before the inference of guilt could be drawn. For example, in the case of Catherine Suringa's arrival at the Hotel there was evidence that she had a close relationship with Campbell. Her arrival at the Hotel might have been quite unconnected with the appellant. This possibility had to be excluded by the jury before any inference could be drawn against the appellant. In such circumstances, the jury should have been instructed as to the reasoning process involved in drawing an inference of guilt and the necessity to exclude any innocent hypothesis. Upon the learned trial judge's directions the jury was entitled to believe that corroboration might be provided by the mere fact of the telephone call or the arrival at the Hotel of Catherine Suringa.

Except in a case which is based entirely upon direct evidence, a direction upon the process of drawing inferences should, in my opinion, always be included in a trial judge's directions to the jury. Such a direction was clearly called for

in this instance. In my opinion, Ground 6 has been established.

Grounds 5, 7 and 8 each allege errors on the part of the learned trial judge in the way he directed the jury in relation to arguments put forward by the appellants counsel in his final address.

In discussing the defence case with the jury, the learned trial judge adopted a method of taking the defence submissions one by one and making judicial comment, almost invariably adverse, upon each submission. In the course of this exercise the learned trial judge made some factual mistakes and, in my opinion, errors of law.

At pp209-10 of the Appeal Book, his Honour said, "Mr Tippett submitted to you that Campbell would've been introduced to the accused by name, Rob Druett, and hence, that Campbell knew, at all times, that the accused's surname was Druett. Was there one question directed to Campbell to that effect? He was just never asked. "Weren't you introduced to him by name, didn't Cathy Suringer introduce him?" "Didn't you know his name was Druett at all times?"

> It's not appropriate for counsel to say Campbell would've known because he would've been introduced. Counsel had a full opportunity to cross-examine Campbell about that and didn't ask that question. So, how can you, ladies and gentlemen, be asked to deduce that Campbell would've been introduced to Druett by name and hence, he would've known Druett's name. There's simply no evidence. No evidence one way or the other, and you mustn't speculate. You must decide the case on the evidence."

In fact, Mr Tippett had put to Campbell that Miss Suringa must have introduced him to the appellant. Campbell said he could not remember. Mr Tippett also obtained answers from Campbell, which showed a significant degree of social contact

between the appellant and Campbell through their mutual friend Miss Suringa. It was, in my view, open to Mr Tippett to invite the jury to infer that Campbell must have known the appellant's last name. It was an obvious and legitimate argument. Furthermore his Honour was mistaken in saying that the matter had not been put to the witness.

At p212 of the Appeal Book, his Honour said,

> ""Do you think for one minute", counsel put to you, "the police didn't know who visited Campbell in the month before the trip? Taylor would've run through the names: Lord, Suringa, Druett". Absolutely no evidence of that, ladies and gentlemen. Absolutely no evidence - and not even put to the witnesses."

A reference to the evidence shows that Mr. Tippett did put to the police witness Taylor that Taylor had information that a number of people, including the appellant, visited Campbell's house in the month before his trip to Thailand and that he discussed the names of such people with Campbell prior to the record of interview with him.

In my opinion, it was open to Mr Tippett to make the submission which his Honour criticised. It is also clear that his Honour was wrong in saying that the matter was not put to the witness.

At p214 of the Appeal Book, his Honour said,

> "A couple of other submissions were put to you about Cathy Suringa's appearance at the Atrium Hotel and not the accused. It was explained by the relationship between Campbell and Cathy Suringa, that the relationship - which was obviously an intimate and continuing one - explained her presence at the Atrium. Well, there was no question to Campbell to that effect."

The transcript shows (pp31-2) that Campbell was cross examined by Mr Tippett about his relationship with Miss Suringa. Campbell

admitted that, at the relevant time, his relationship with her was "a close and intimate one."

At p215 of the Appeal Book the learned trial judge said,

> "Before I finally conclude I should just make some comment about counsel's submission that no effort was made to establish where the $6000 came from. There was no examination of the accused's bank account or inquiry from his employer at Pine Creek and it was put to you that there were two other possible sources, namely Mick or Ian Lord down at Berry Springs. There's simply no evidence of the money coming from any source except the accused. That's the evidence in the case if you accept Campbell. That's the evidence in the case.
> I mean, the money might've come from the Bank of England, Commonwealth Bank in Australia, or whatever. That's possible. They're possible sources. But to merely suggest "other possible sources" is going outside the evidence. True, the evidence is that they might possibly have had $6000, but it's awfully speculative. If you accept Campbell, it came from one source; it came from the accused.
>
> So I can only stress, ladies and gentlemen, look at the evidence in the case, don't speculate. Decide what did happen and then see whether you are satisfied beyond reasonable doubt. In this case there is no real evidence of any scenario other than the one the Crown relies on: the arrangement between the accused and Campbell. There's no evidence of an arrangement between the accused and Mick, there's no evidence of an arrangement between the accused and Ian Lord. No evidence of an arrangement between the accused and anyone else."

Mr Tippett had extracted from Campbell an admission that he had a friend named Mick who was a trafficker in heroin. Campbell also conceded that he had a friend, Ian Lord, who Campbell thought he might visit at Berry Springs with part of the proceeds of the importation on the day of his arrival. In my opinion, it was a legitimate argument to suggest to the jury that Lord or Mick was a reasonably possible source of the $6,000. The effect of the learned trial judge's comments in this regard was to withdraw that argument from the jury's consideration.

After the completion of his Honour's directions, Mr Tippett took exception to the way the defence arguments had been dealt with. Mr Tippett submitted it was wrong to tell the jury that merely because there was no evidence in support of a particular hypothesis it could not be considered by the jury. Mr Tippett sought a redirection but the learned trial judge declined to do so.

It is well settled that, in a criminal trial, counsel may suggest an innocent hypothesis to the jury which is not supported by evidence. The only requirement is that the suggested hypothesis is consistent with the evidence. In *Barca v. The Queen* (1975) 133 CLR 82 the High Court was concerned with a case in which counsel for a man charged with murdering his sister's husband suggested to the jury that the crime may have been committed by the accused's father. There was no evidence implicating the father but he had a family connection with the transaction. The trial judge directed the jury that there was no evidence implicating the father and commented that the suggestion was nothing more than a theory of counsel to which the jury should pay no attention. In the joint judgment of Gibbs, Stephen and Mason JJ at p105 the following passage appears,

> "The remarks made by the learned trial judge when he intervened at the conclusion of the address by defence counsel could only have been understood as meaning that it would be wrong for the jury to accept that the evidence was consistent with the hypothesis that the murder had been committed by Carmello Barca. In other words, the jury were in effect directed to reject one of the main arguments put forward on behalf of the defence, and to decide one issue of fact in favour of the prosecution. This was a misdirection. It was for the jury to decide for themselves whether they were satisfied that the evidence as a whole was inconsistent with the hypothesis that Carmello Barca and not the applicant had murdered the deceased. Of course it was not proved that Carmello Barca had committed the murder.

> Moreover, the learned trial judge was perfectly correct in saying that there was no evidence that the applicant took the deceased to Carmello Barca's house or that Carmello Barca fired the shots that killed the deceased. However, although a jury cannot be asked to engage in groundless speculation it is not incumbent on the defence either to establish that some inference other than that of guilt should reasonably be drawn from the evidence or to prove particular facts that would tend to support such an inference. If the jury think that the evidence as a whole is susceptible of a reasonable explanation other than that the accused committed the crime charged the accused is entitled to be acquitted."

In this case the suggestions made to the jury by Mr Tippett were, in my opinion, each consistent with the evidence in the sense that the evidence provided a foundation for the suggestion. If one takes, for example, the suggestion that Campbell obtained $6,000, not from the appellant but from Mick or Ian Lord. The evidence that each of these men, one of them a drug dealer, were friends of Campbell at the relevant time means that the jury was obliged to consider the suggested hypothesis because it had to be excluded as a reasonable possibility before a conclusion of guilt could be reached.

Each of the suggestions put by counsel was an important defence argument and, in my opinion, was effectively withdrawn from the jury's consideration by the erroneous directions.

The combined effect of the errors I have identified under particular grounds persuades me that a miscarriage of justice occurred. Every accused person "is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of

justice. Justice has miscarried in such cases, because the appellant has not had what the law says he shall have, and justice is justice according to the law" : *Mraz v. The Queen* (1955) 93 CLR 493 per Fullagar J at p514.

The appellant was first tried in August 1990 before Rice J. Due to the illness of the judge the trial was not completed. He was next tried by Martin J (as he was then). That trial was aborted. He was tried again by Martin J in July 1991. The appellant was found guilty and was sentenced on 18 August 1991. On 9 October 1992 the Court of Criminal Appeal set the conviction aside and ordered a new trial. The present trial started on 31 May 1993. The appellant was convicted and sentenced on 10 June 1993. Since 18 August 1991, the appellant has spent 432 days in prison. Since April 1989, when not in prison, the appellant has been required to report twice weekly to the police.

In my opinion, it would be oppressive in the extreme to order a new trial and no such order should be made. I would quash the conviction and direct an acquittal.
