

Barr v R

**26 March, 16 April 2004
(BR) Martin CJ, Angel & Mildren JJ
[2004] NTCCA 1**

The appellant was convicted by a jury of obtaining property by deception. It was the Crown case that he had fraudulently pretended that his BMW motor vehicle had been stolen and damaged and that he fraudulently made a claim under his policy of insurance. As a consequence TIO paid \$16,545.00 to the appellant.

The appellant appealed on two grounds, firstly that the trial judge erred in admitting evidence that the appellant had previously claimed an insurance payment in respect of a car that had been stolen and secondly, that the trial judge erred in failing to direct the jury that it could not draw any inference adverse to the appellant by reason of that claim. The court decided that notwithstanding its finding that the evidence should not have been admitted, and having been admitted, the trial judge should have warned the jury against any impermissible line of reasoning, the appeal would not have been allowed on those grounds alone.

Further grounds were added in the course of the hearing.

The court identified parts of the record of interview which, in its opinion, should not have been admitted without judicial comment, including opinion evidence of the police investigators and another witness.

Finally the court turned its attention to the ground that the trial judge erred in a particular direction as to the burden of proof. Although the trial judge had directed the jury that the Crown must prove each element of the offence beyond reasonable doubt, when directing the jury in relation to circumstantial evidence he commented that *(T)hat does not mean, however, that you must acquit Mr. Barr simply because there is some bare possibility that some innocent complexion can be placed upon the evidence, which is inconsistent with his guilt. So you do not have to sit around dreaming up all sorts of wonderful possibilities. We are talking about reasonable doubt here. You have to use your common sense in these matters, but you must not allow yourself to be carried away by conjecture or guesswork.*

In its consideration of this complaint, the court referred to the decision of the High Court in *Green v The Queen* (1971) 126 CLR 28 and that of the South Australian Court of Appeal in *R v Wilson, Tchorz and Young* (1986) 42 SASR 203 reminding judges of the danger of straying from the classical direction concerning “beyond reasonable doubt” and in attempting to define or explain that expression. The court held that the trial judge had misdirected the jury when he told them to ignore a “bare possibility”. The cases to which the court referred establish the principle that it is not permissible to suggest to the jury that they should disregard a doubt which, at the end of their deliberations, they think to exist, or that they are required to subject such a doubt to a process of analysis in order to determine its quality. In the present case there was a danger that the jury misunderstood the direction to mean that a “bare possibility” cannot amount to a reasonable doubt.

The court held that a misdirection as to the burden of proof was by itself a significant blemish, particularly in the context of a prosecution case heavily reliant on

circumstantial evidence. The cumulative effect of the errors when considered in combination was to cause the trial to miscarry. The court allowed the appeal, quashed the conviction and ordered a re-trial.