

Callander v R

19, 20 May, 16 July 2004
Angel, Mildren & Riley JJ
[2004] NTCCA 5; 144 NTR 1

A Darwin Supreme Court jury found the appellant guilty of 16 counts of stealing and 14 counts of false accounting. The charges related to the period between July 1997 and January 1998. The appellant was employed as the manager of the Rum Jungle Recreation Club. His duties included managing the club's accounts and financial records as well as attending to the club's banking. The Crown case in respect of 14 counts of stealing and 14 corresponding counts of false accounting was that the appellant deliberately under-recorded the club's revenue and stole the difference between what the club actually received and what he recorded the club as having received in the monthly sales report book. The remaining two counts of stealing related to general deficiencies in the club's general revenue and Keno moneys.

Leave to appeal against conviction on four grounds was granted on 28 July 2003. At the hearing of the appeal two of these grounds were formally abandoned and leave was sought to add an additional ground.

Ground 2 complained of the fact that the trial judge refused to give a *Jones v Dunkel* direction after the Crown had refused to call two potential witnesses.

Ground 4 complained of the fact that the verdicts were unreasonable and could not be supported having regard to the evidence. The argument was that there were other hypotheses consistent with innocence.

The appellant spoke to police on three occasions. On the third occasion he attended with a legal representative and informed police that he did not wish to take part in any further interviews. He handed to police a document, tendered by the Crown, in which he stated his reasons for not wanting to participate in any further interviews. These reasons related to his inability to access necessary financial records and the unreliability of some of the existing records.

Ground 5 complained of the fact that at trial no direction was sought nor given to the jury that no adverse inference could be drawn against the accused because he had exercised his right to silence.

Ground 6 complained of the fact that the jury were not given appropriate directions in respect of the Crown's submission that the appellant had told lies from which an inference of guilt could be drawn (an *Edwards* direction).

The court unanimously dismissed the appeal.

As to ground 2, the court was of the view that as neither person could be regarded as a material witness, a direction as to the Crown's failure to call them was unnecessary. As to ground 4, the court examined the evidence and found the Crown case to be overwhelming. The court found errors of the kind associated with the underbankings being the result of honest mistakes as being "*palpably absurd*".

As to ground 5 the court noted that the Crown had not intended to lead evidence of the third interview nor of the document prepared by the appellant and had done so solely at the behest of counsel for the accused at trial. Its purpose was to secure for the appellant a tactical advantage; to provide a positive explanation as to why there was no follow-up record of interview rather than to leave the jury without any explanation at all. The court held that the evidence was properly received particularly as it favoured the accused and did no harm to the Crown. In the present case, the direction sought was not necessary as the Crown was not relying on the appellant's lack of co-operation as any admission of guilt. Neither side mentioned the matter in final addresses. The possibility that the jury may have drawn an adverse inference against the appellant was too remote.

As to ground 6, the court was of the view that there was a real risk that the jury would have understood that the prosecutor was inviting them to infer guilt because the accused's not giving straight answers was due to the fact that he knew he was guilty and he knew that the police knew he was guilty. In these circumstances the trial judge should have considered giving an *Edwards* direction. However, the failure to do so had not resulted in any substantial miscarriage of justice. The court noted that no such direction was sought by the appellant's trial counsel and that even senior counsel for the appellant on appeal had missed the point until the second day of the hearing of the appeal. The court concluded that the appellant could not show that there was a reasonable possibility that the failure to direct the jury may have affected the verdict.