CASE NOTES

KOZUL v. R.[1]

Point of Procedure in Criminal trial — Appeal against malicious shooting conviction — Accused claims accidental discharge of firearm in question — Objection to trial judges' invitation to jury that they test accused's claim by experimenting with firearm — Extent to which jury may use trial exhibits in jury room.

The applicant was the operator of a cabaret in Wollongong, in which the incident (the subject of the appeal) took place. In the early hours of 8 July 1978 one Rajcinoski tried to enter the premises and was asked to leave by Kozul. The resulting verbal argument was followed by a physical tussle in which both men fell down the flight of stairs leading to the nightclub. Upon regaining their feet the two men entered a stand-off pose about a metre from each other. According to Kozul, R. then said 'I'll kill you' and made a movement which suggested that he was reaching for a knife. The applicant drew a pistol, which he denied ever intending to use, which subsequently discharged through a window and struck a taxi parked in the street outside.

At the initial trial[2] Kozul was convicted on two out of three counts, receiving a four years sentence for maliciously shooting at R. with intent to cause R. grievous bodily harm and a three month concurrent term for discharging a firearm to the great danger of the public. His unsuccessful defence had been that the fiream had accidentally discharged when his right hand (holding the revolver) was struck by R. in the course of the struggle. There had been a number of disputed facts in respect of this defence. K. had testified that the gun was not cocked when he drew it but he could not say whether or not his finger was on the trigger at the relevant time. Some evidence refuting the fact that K.'s hand had ever been struck went to the jury, and it was proven that R. did not have a knife on his person at the time of the incident. The revolver was admitted as real evidence in the trial and was the exhibit which formed the focal point for the applicant's appeal.

The exhibit gun could be fired either by manually cocking the hammer and applying light pressure to the trigger ('single action') or both cocked and fired by one much firmer depression of the trigger ('double action'). A police ballistics specialist was called by the Crown to explain the working of the gun to the Court. He explained that a pressure of four pounds 8 ozs. on the trigger was necessary for a 'single action' discharge and a pressure of twelve pounds was needed to cause a 'double action' discharge. The expert's evidence revealed that such weapons would not discharge by accident if handled in the normal way, nor would dropping or subjecting them to moderate blows cause a discharge. The impossibility of discharge unless there was a finger on the trigger must have been demonstrated to the jury's satisfaction as their finding of fact implied that the applicant had his finger on the trigger during the incident.

The expert added that it was his experience that unexpected blows or tugging on a handgun caused the person holding the gun to clutch the butt more tightly rather than

[1] (1981) 55 A.L.J.R. 377. High Court of Australia; Gibbs C.J., Mason, Murphy, Stephen, Wilson JJ. Case heard 5 December 1980 and 5 May 1981 in Canberra.

[2] Heard before Knoblanche D.C.J. in the New South Wales District Court.

depress the trigger.[3] He based this claim on experiments he had conducted using policewomen and civil servants as subjects and upon observations made over many years at shooting ranges where people holding weapons had been unexpectedly bumped. The trial judge was careful to test the weight of this testimony by questioning the detective as to whether any of the people he had observed had been acting under stress or in fear for their safety at the time. The reply was in the negative. The following question followed:

> Q: 'Are there any tests anywhere of what the reaction might be of somebody who is afraid and frightened on the defensive when the opponent, the aggressor bumps him or tries to sieze the gun?'
>
> A: 'I can't imagine how one could carry out those tests, your Honour.'[4]

Such a question was intended to be in the nature of a warning to the jury about the inexactitude of any possible reconstruction of the incident because all the heat and potential violence would be missing.[5]

However, having given such a warning, the judge went on to conduct a demonstration of his own and also to invite the jury to make similar investigations in the jury room. The appeal against conviction was largely centred on the alleged impropriety of giving such an invitation to the jury. It appears that the trial judge had, in summing up, handled the gun at length and conducted a test whereby he used his free hand to strike the hand holding the gun. In one instance the gun was manually cocked and in another it was not: only in the former case was the trigger released. This suggested the sort of experiment the jury might themselves conduct, but the judges' summing up in no way confined the jury as to the form their tests might take.

Typical of the passages in the trial judges' summing up which counsel for the applicant objected to, both during the original trial and in subsequent appeal hearings were the following:

> This pistol, you may look at in the jury room, you may feel it, test it, examine it, indeed you should. . . .[6]
>
> When you look at this pistol, in the jury room uncocked, as it is now, you may find it very difficult to see how a blow to that, if you have got it in your hand, without your finger on the trigger, how a blow to your hand, hit it as hard as you like, could make that explode. . . .[7]
>
> [in relation to the 'double action' mechanism of the gun] You have heard the expert opinion, you look at this Exhibit, you test it for yourselves. You use your commonsense, in determining whether or not, while it is uncocked some blow to the hand can cause the finger to move that distance back, and the gun to go off. . . .[8]
>
> [in reference to his own demonstration in court] I am not offering you evidence, and whether I subconsciously pulled the trigger when I struck my hand or not, I cannot tell you, it will be in the jury room with you and that is a legitimate exercise in reasoning for you to use to determine some of the questions of fact and the very important ones.[9]

Objections to the way in which the direction was framed by the trial judge were first raised during the luncheon adjournment which interrupted the summing up.

[3] This evidence is summarised in Wilson J.'s judgment — see (1981) 55 A.L.J.R. 377, 385.

[4] *Ibid.*

[5] He reiterated this point in his summing up when he said that a demonstration using a person 'who is comfortable and at ease and has been assured that nothing possibly adverse can happen' is of 'little assistance at all'. Extracted in the judgment of Gibbs C.J. — see (1981) 55 A.L.J.R. 377, 381.

[6] Extracted in the judgment of Stephen J.; (1981) 55 A.L.J.R. 377, 382.

[7] Extracted in the judgment of Street C.J. in *R. v. Kozul* [1980] 2 N.S.W.L.R. 299, 301.

[8] Extracted in the judgment of Gibbs C.J.; (1981) 55 A.L.J.R. 377, 379.

[9] Extracted in the judgment of Wilson J.; (1981) 55 A.L.J.R. 377, 385.

Counsel for Kozul requested that the jury be discharged because the direction to conduct tests on the gun in the jury room was an improper one. Alternatively counsel desired that the trial judge specifically withdraw his remarks in respect of experimentation from the jury. The application was refused by the trial judge who commented that the jury were fully entitled to ascertain for themselves the degree of force needed to move the trigger in both the uncocked and cocked positions.[10] Upon resuming his direction after lunch, his Honour went to some pains to stress to the jury that they should not lose sight of the expert evidence that had already been put to the court while they were conducting their own tests.

The chief ground of appeal to the New South Wales Court of Criminal Appeal[11] was that the trial judge had given a direction which was unsafe and highly prejudicial to the accused because it gave the jury carte blanche to create evidence of their own, or at least flesh out the evidence of experts. In delivering the judgment of the court, Street C. J. concluded:

> It does not seem to me that his Honour . . . in any way invited the jury to do anything which was improper; and I can see no basis for finding that his Honour erred in the comments that he made to the jury regarding the propensities of this revolver, and his exhortations to the jury to examine it for themselves and form their own conclusions. . .[12]

From this decision special leave to appeal was made to the High Court of Australia. The appeal incorporated a submission for the applicant that the invitation to the jury by the trial judge to conduct the experiments described in his address was objectionable. Three areas of contention were raised in relation to the experiment:

(i) The jury were being encouraged to manufacture new evidence;

(ii) The conducting of such tests within the secret confines of the jury room prevented the applicant from being able to defend his position and correct any misconceptions the jury might have; and

(iii) Any tests the jury might conduct were falsely based, as the person holding the revolver would not only be expecting the blow but he would not be under the same emotional stress which the applicant faced at the time.

The issues broached by this submission produced three different approaches by the various justices hearing the proceedings.

Stephen J. (with whom Murphy J. concurred) said that the trial judges' direction had been wholly proper under the circumstances. As the issue before the jury was simply one of whether or not Kozul had intentionally discharged the weapon they had to be satisfied beyond a reasonable doubt that the version of the incident given by the applicant was not true before they could convict. Given that it was not clearly demonstrable that a given blow would or would not cause discharge, a process of weighing up a range of evidence including testimony regarding the weapon involved and reconstructions of the incident had to be carried out by the jury. Their difficulties were compounded by the contradictory nature of Kozul's testimony. On the one hand he claimed the gun was not cocked, on the other his defence was that the gun had fired accidentally (meaning that the weapon had to pass through the entire 'double action' to discharge). His Honour felt that the lack of any conclusive expert evidence made it:

> both permissible and prudent to tell the jury not only to handle the revolver and experience the respective trigger pressures but to experience for themselves the

[10] *Ibid.*

[11] See [1980] 2 N.S.W.L.R. 299. Court comprised Street C.J., Glass J.A. and O'Brien (C.J. of Criminal Division).

[12] [1980] 2 N.S.W.L.R. 299, 302.

> sensation of a blow to the hand holding the revolver. Without all this the jury would be largely left to decide the matter by mere speculation. With it they could at least apply their fund of common sense and common experience. The explicit warning that no accurate re-enactment was possible provided the necessary safeguard.[13]

Gibbs C.J. (with whom Mason J. concurred) disagreed that the direction by the trial judge had been correct in its entirety. His Honour said that:

> In so far as the learned trial judge suggested that the jury should conduct an experiment designed in part to discover the extent to which a blow to the hand might cause a finger to move, whether by reflex action or in spontaneous response to emotion, he fell into error.[14]

It was an erroneous suggestion because:

> [i]n the circumstances of this case an experiment conducted by the jury for such a purpose would have gone beyond an examination and evaluation of the evidence provided by the revolver, and would have had the purpose of gathering additional evidence. . . .[15]

His Honour clearly did not feel that this defect was enough to cause the entire trial to miscarry for the case was one 'in which it has been possible to select from a long summing up one or two sentences which taken by themselves are erroneous . . .'[16] and blow them up out of all proportion relative to the totality of the judgment. Furthermore, the trial judge had largely ameliorated his error by carefully warning the jury about the inadequacy of any reconstruction they might encounter and by his probing questioning of the ballistics expert. From the applicants' viewpoint, personal credibility was the key issue and the trial judge had painstakingly told the jury that they must acquit Kozul unless they believed beyond a reasonable doubt that he had deliberately pulled the trigger. The learned Chief Justice did not believe the misdirection concerning the use the jury might make of the revolver had been so prejudicial to the applicant that it would be unsafe to allow his conviction. Accordingly he agreed with the other majority judges that the appeal should be dismissed.

In stark contrast to his brother judges, Wilson J. presented a lone (albeit strong) dissenting voice. Upon a consideration of the available case law in relation to the limitations upon 'views'[17] his Honour decided that the jury had been wrongly invited to create new material evidence. Two objections were cited by him to such a state of affairs. Firstly he agreed with the applicant's counsel that such material should not be considered by the jury without being subjected to the probing of the parties themselves. Secondly he said:

> [s]uch experimentation is totally irrelevant, unless for the purpose of the experiment the precise circumstances to which the applicant testified are re-created. And that is simply impossible. . . .[18]

He continued:

> [t]here can be no reconstruction of such an incident, whether in the jury room or on the bench, that would bear any correspondence to reality. An attempt at such a reconstruction could be fraught with prejudice to both the parties, a prejudice which in the case of the jury room is never likely to be revealed or recognised as such. . . .[19]

[13] See (1981) 55 A.L.J.R. 377, 383-4.
[14] (1981) 55 A.L.J.R. 377, 380-1.
[15] (1981) 55 A.L.J.R. 377, 381.
[16] *Ibid.*
[17] Key cases being *Hodge v. Williams* (1947) 47 S.R. (N.S.W.) 489, *Scott v. Numurkah Corporation* (1954) 91 C.L.R. 300, *R. v. Alexander* [1979] V.R. 615 and *Reg. v. Hamitov* (1979) 21 S.A.S.R. 596.
[18] (1981) 55 A.L.J.R. 377, 386.
[19] (1981) 55 A.L.J.R. 377, 387.

The other danger attendant on allowing the jury to experiment with the firearm was that it distracted the jury from the crucial factor of Kozuls' intention as well as obscuring the evidence already heard in the court. The latter shortcoming is important because ultimately:

> . . . the jury's decision as to whether the crown proved beyond a reasonable doubt that the applicant deliberately discharged the firearm . . . must rest wholly and solely on their consideration of the testimony of those who had given evidence in the trial.[20]

Unlike Gibbs C.J., Wilson J. did not believe that the warning issued by the trial judge about the ballistics expert's evidence and his general deprecation of reconstruction of the incident provided sufficient mitigation to save a trial that had otherwise 'miscarried in a serious respect'.[21] His reasoning here was that it could not be assumed that the jurors would apply an equivalent degree of caution to the tests which they themselves may have conducted at the invitation of the trial judge. He concluded that the appeal must be allowed and a new trial ordered.

All of the judgements, majority and minority, give some general discussion of the problems relating to the use which juries may make of real evidence tendered at any given trial as exhibits. There is no disputing that juries may examine any exhibits in reaching their decision. As Zelling J. observed in *R. v. Bradshaw*,[22] it is the normal practice that all exhibits shall accompany the jury into the jury room. In addition exhibits may be handled if necessary.[23] Just where the limitations lie beyond the mere handling of exhibits is far less clear, but it seems the jury may:

> within limits that are readily understood in practice if difficult to define with precision, engage in a limited amount of simple experimentation with them.[24]

Different judges will obviously define 'simple experimentation' in differing terms. For Gibbs C.J., 'simple experimentation' in the instant case properly allowed for:

> the members of the jury to pull the trigger of the revolver, both when it was cocked and when it was not, so that they might judge for themselves how much pressure was necessary to cause it to discharge. In experimenting in this way the jury are doing no more than using their own senses to assess the weight and value of the evidence.[25]

Most judges in tackling a problem to do with a view of the *locus in quo* (or by analogy an exhibit) begin with a test like that put forward by Davidson J. in *Hodge v. Williams*,[26] where his Honour speaks of the fine line which divides what is 'proper and improper in the conduct of a view by a jury or by a Judge' when fulfilling the fact finding function.[27] An improper exercise of the power of inspection occurs if the Judge allows himself or the jury:

> in the absence of the parties, to gather by extraneous evidence or experiments of their own, anything in the nature of additional evidence, and apply it in the determination of the issue, unless the facts so obtained are ventilated and submitted to the comments of the parties or their counsel.[28]

A good example of such a impropriety in practice occurred when a trial judge mistakenly made use of his own observations of a fireplace in deciding whether a

[20] *Ibid.*
[21] *Ibid.*
[22] (1978) 18 S.A.S.R. 83, 93-4.
[23] See G. D. Nokes 'Real Evidence' (1949) 65 *Law Quarterly Review* 57, 64 where weapons as exhibits are specifically referred to.
[24] The words of Gibbs C.J. see (1981) 55 A.L.J.R. 377, 380.
[25] *Ibid.*
[26] (1947) 47 S.R. (N.S.W.) 489.
[27] (1947) 47 S.R. (N.S.W.) 489, 492.
[28] (1947) 47 S.R. (N.S.W.) 489, 493.

party was lying as to the lighting of a fire in the fireplace on the night an alleged adultery took place.[29] Similar sorts of issues were considered by the High Court in *Scott v. Numurkah Corporation*,[30] a case involving a dispute over excessive noise in a municipal hall. Inspections of the hall coupled with demonstrations of the acoustics in question were the subject of dispute between the parties. In reaching its decision, the High Court cited with approval the formulations of Davidson J.[31] regarding 'views' and demonstrations.[32]

It is one thing to be able to correctly cite the law, but, as this case illustrates so well, quite another thing to apply it. On exactly the same facts different judges came down on opposing sides of the dividing line of *Hodge v. Williams*. In the New South Wales Court of Criminal Appeal Glass J.A., in dismissing Kozul's appeal, had this to say:

> The experiment which he [the trial judge] proposed they might carry out in the jury room fell on the authorised side of the use which the jury might make of the exhibits which they took with them having regard to the exposition of that topic in *Hodge v. Williams*. In other words, what they were recommended to do was to use their own powers of observation with respect to the pistol to estimate the value of the testimony before them, and not to carry out experiments of their own for the purpose of gathering additional evidence.[33]

Reviewing this same passage in the High Court, Wilson J. plainly disagreed with Glass J.A. and also with Street C.J.'s more lengthy judgment:

> [w]ith great respect to their Honours, it seems to me that the invitation to the jury fell on the wrong side of the line expounded in *Hodge v. Williams*. . . .[34]

The basic difference lay in their respective viewpoints as to the scope encompassed by the invitation issued by the trial judge to the jury. Was it simply urging the jury to add a gloss to the evidence they had already heard in court or did it go further into the forbidden field of asking them to manufacture new evidence?

How should a trial judge go about charging a jury so as to minimise the likelihood of his entire judgment being overturned on appeal because of a difference of opinion in a superior court as to the propriety of his instructions? He would be well advised to exercise the caution urged by Stephen J.[35] in drawing analogies between cases involving 'views' out of court[36] and those dealing with exhibits in court, but there will be numerous instances when the purposes for which they are undertaken correspond very closely.[37] Hence it is that *Hodge v. Williams* and *Scott v. Numurkah Corporation* provide a useful starting point for directing the jury as to any exhibit tendered as real evidence. In using the instant case, with respect, it seems to me that the approach of Stephen and Murphy JJ. is the most pragmatic of the three possible viewpoints. It is just not realistic to withhold from the jury any comment at all as to the use they may make of exhibits in the jury room, for, as the South Australian Supreme Court[38] said in *R. v. Hamitov*:[39]

[29] See *Unsted v. Unsted* (1947) 47 S.R. (N.S.W.) 495.
[30] (1954) 91 C.L.R. 300.
[31] Given in *Unsted v. Unsted* (1947) 47 S.R. (N.S.W.) 495 and *Hodge v. Williams* (1947) 47 S.R. (N.S.W.) 489.
[32] See (1954) 91 C.L.R. 300, 313 *per* Dixon C.J., Webb, Kitto and Taylor JJ.
[33] [1980] 2 N.S.W.L.R. 299, 303.
[34] (1981) 55 A.L.J.R. 377, 386.
[35] (1981) 55 A.L.J.R. 377, 384.
[36] The best definition of what is meant by a 'view' is to be found in the judgment of McInerney and Murphy JJ. in *R. v. Alexander* [1979] V.R. 615, 632.
[37] See also paras. 1.18 and 1.21 in *Cross on Evidence* (2nd Australian Edition) 9, 11.
[38] Bench comprised Hogarth, White and Mohr JJ.
[39] (1979) 21 S.A.S.R. 596.

> When exhibits are sent into the jury room it is understood that the jury are at liberty to inspect and experiment with them in any reasonable manner which occurs to them.[40]

If it is not carefully explained to the jury just what 'reasonable' experimentation might consist of and a warning issued to them of the shortcomings of any experiment they might perform (as the trial judge did here) the injustice to the defendant becomes more (not less) likely.

It is inevitable that juries will experiment with exhibits taken with them into the jury room, be it a comparison of handwriting samples,[41] a house-breaking implement or a weapon. The risk of evidence being manufactured is ever present, even if jurors are expressly warned to confine their deliberations to the evidence put to them in court. Only by as full and careful summing up by the trial judge as is possible, including detailed instructions as to possible tests on exhibits, can haphazard experimentation and confusion be avoided. Jurors certainly have the common-sense to devise their own tests in the jury room but they cannot know what status such tests have at law (and what weight to accord them in reaching a decision) unless given much needed assistance by the presiding judge.

MARK DARIAN-SMITH*

JE MAINTIENDRAI v. QUAGLIA[1] — PROMISSORY ESTOPPEL IN AUSTRALIA

Action by landlord for arrears of rent — Defence of promissory estoppel raised — Whether doctrine of promissory estoppel recognized in Australia — Whether the promisee must show detriment incurred.

In 1972 Lord Hailsham made the prediction that a time would come when the courts would need systematically to explore the doctrine of promissory estoppel and to reduce it to a 'coherent body of doctrine'.[2] Despite the contribution made by the Privy Council in *Ajayi v. Briscoe*[3] significant uncertainties have continued to plague those who seek to determine the ambit of the doctrine in England. In *Je Maintiendrai v. Quaglia*[4] the necessity for systematic exploration and coherent statement of principles arose in the Supreme Court of South Australia. In three strong and carefully reasoned judgments the Court seized this opportunity.

THE FACTS

The respondent was the tenant of a shop. The appellant was the lessor. The original written lease which commenced in March 1973 was for a three year term at a rent of $197 per month. A new three year lease was executed in July 1976. The rent was increased to $278 per month and provision was made for quarterly rises commensurate

[40] (1979) 21 S.A.S.R. 596, 598. This passage was expressly approved by Street C.J. in *R. v. Kozul* [1980] 2 N.S.W.L.R. 299, 302.

[41] For example see *R. v. Tilley* [1961] 1 W.L.R. 1309 and *R. v. O'Sullivan* [1969] 1 W.L.R. 497 (C.A.).

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[1] (1981) 26 S.A.S.R. 101.

[2] *Woodhouse A.C. Israel Cocoa Ltd S.A. v. Nigerian Produce Marketing Co. Ltd* [1972] A.C. 741, 758.

[3] [1964] 1 W.L.R. 1326.

[4] (1981) 26 S.A.S.R. 101.