THE RULE IN *BROWNE V DUNN* IN AUSTRALIAN CRIMINAL LAW: *MWJ V R* AND *R V MAP*

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Abstract

The common law rule in Browne v Dunn essentially is a rule of fairness. It ensures that witnesses have the opportunity to explain if the opposing party intends to later contradict or discredit them. Recently in Australia, doubt has been cast as to whether the rule applies in criminal proceedings. However, in MWJ v R, the High Court confirmed that the rule, with significant qualifications, applied to criminal cases. Possibly the most important qualifications are that the court must consider the nature and course of proceedings in evaluating the consequences of a failure to cross-examine on a point on which the party relies and that application of the rule must not displace the prosecution's burden of proof. This paper examines the High Court's interpretation of Browne v Dunn in MWJ v R and outlines some of the reasoning behind the doubt as to the rule's application. To demonstrate the manner in which MWJ v R has been followed in Queensland, the recent decision of R v MAP is examined.

I. INTRODUCTION

The rule in *Browne v Dunn*[1] is an important rule of professional practice.[2] It requires that unless notice has been clearly given, 'it is

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** This paper is dedicated to the memory of Alistair McEwan, 1927 - 2007.

*** The author gratefully acknowledges the advice provided by Dr Chris Davies, Senior Lecturer, School of Law, James Cook University, and the assistance of Ms Kate Elder, Manager, James Cook University Library, Cairns.

[1](1893) 6 R 67 (HL). In this paper the rule in *Browne v Dunn* is also referred to as '*Browne v Dunn*'.

[2] (2005) 222 ALR 436, 440.

necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his/her evidence, especially where the case relies upon inferences to be drawn from other evidence in the proceedings'.[3] The underlying principle is one of fairness.[4] In light of the rule against case splitting[5] it is unfair to the witness and the party calling the witness, to deny an opportunity for an explanation if the opposing party, at a later point, intends to invite disbelief or criticise the witness.[6]

The established position in Australia is that *Browne v Dunn* applies to civil and criminal proceedings,[7] however, its application may differ in criminal cases.[8] There is some uncertainty as to precisely when the rule is breached and the penalties that apply to a party in breach.[9] Recently, doubt has been raised as to whether *Browne v Dunn* applies to criminal proceedings at all.[10] The following case note examines *MWJ v R*[11] and other relevant case law to clarify the fundamental issue of the rule's application in Australian criminal law. *MWJ v R*[12] was recently followed by the Queensland Court of Appeal in *R v MAP*.[13] *R v MAP*[14] elaborates upon particular aspects of the principle of *Browne v Dunn* articulated in *MWJ v R*.[15]

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[3] *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 1 NSWLR 1, 16.
[4] Queensland Law Reform Commission. *A Review of the Uniform Evidence Acts* (2005) 37.
[5] The case splitting rule prohibits a party from calling fresh evidence after that party's case is closed. J. D. Heydon, *Cross on Evidence* (7th Australian ed, 2004) 538.
[6] Ibid.
[7] *R v Birks* (1990) 19 NSWLR 677, 688–9 in Heydon, above n 5, 537. There has been some doubt recently as to whether the rule applies to criminal proceedings. See Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) [5.142].
[8] Heydon, above n 5, 537.
[9] Peter Waight and Charles R. Williams, *Evidence: Commentary and Materials* (7th ed, 2006) 303.
[10] Australian Law Reform Commission, above n 7, [5.142].
[11] (2005) 222 ALR 436.
[12] Ibid.
[13] [2006] QCA 220 (Unreported, Supreme Court of Queensland, McMurdo P, Keane JA and Jones J, 21 June 2006).
[14] Ibid.
[15] (2005) 222 ALR 436.

II. *MWJ v R*

A. *Background*

MWJ v R[16] came to the High Court of Australia on appeal from the South Australian Court of Criminal Appeal. The appellant (MWJ) was charged with four counts of sexual offences against a child, M. At the time of the trial, the complainant was 25 years old.[17] The alleged offences occurred more than a decade earlier, during a period in which MWJ cohabited with M and D (M's mother). The first offence occurred between 1986 and 1987. Three later offences occurred in a different house in 1990 or 1991. MWJ was acquitted of the earlier charge and convicted of the latter three.

Three people gave evidence at the trial: M, D and MWJ.[18] Inconsistencies arose in the evidence given by M and D in relation to statements made between M and D. The inconsistencies raised uncertainty as to whether MWJ's misconduct at one of the houses constituted a single incident or a course of conduct. The defence submitted that M's evidence could not be accepted on the basis of inconsistencies between M and D's statements. The trial judge concluded that in truth there was no inconsistency and the possible consequences of an inconsistency did not require further judicial consideration. The trial judge made two comments alluding to the rule in *Browne v Dunn*. Firstly, that it would have been unfair to treat D's evidence as 'prior inconsistent statements' because they had not been put to the complainant for her response[19] and secondly, had there been an inconsistency, the defence counsel would have been obligated to have put this to M.

B. *Court of Criminal Appeal Decision*

In the Court of Criminal Appeal, Doyle CJ (with whom Besanko and White JJ agreed) held that the defence counsel was entitled to rely on the inconsistencies and that the defence's lack of cross-examination was an issue to consider in assessing the weight of that evidence. In addition, it was open to the defence counsel to have the complainant

[16] Ibid.
[17] Ibid 441.
[18] Ibid 437.
[19] *R v MWJ* [2004] SASC 345 (Unreported, Supreme Court of South Australia, Doyle CJ, Besanko and White JJ, 3 November 2004) [57].

recalled for further cross-examination.[20] The Court of Appeal held that, although the trial judge erred in treating the failure to cross-examine as precluding the use of the inconsistencies to impugn the complainant's evidence, there had been no miscarriage of justice.[21]

C. *High Court Decision*

While neither the trial judge nor Doyle CJ specifically referred to the rule in *Browne v Dunn*, the application of *Browne v Dunn* in criminal cases became one of the founding arguments of the High Court appeal.[22] The appellant submitted that the Court of Criminal Appeal erred in the application of *Browne v Dunn* and that the inconsistency of a prior statement invalidated the convictions.[23] The High Court concluded that the former proposition was correct, though the latter was not.[24] The appeal was dismissed. Although the two grounds of appeal are related, the following discussion focuses on the application of *Browne v Dunn*. Despite some differences in judicial reasoning, *MWJ v R*[25] confirmed that *Browne v Dunn* applied to criminal proceedings in Australia.[26] Gleeson CJ and Heydon J noted that 'the requirement is accepted and applied day by day in criminal trials'.[27] Gummow, Kirby and Callinan JJ's reasoning rests upon an acceptance of the rule's applicability.

The High Court articulated several principles in relation to the application of the rule in *Browne v Dunn*. Firstly, it must be applied cautiously when considering the conduct of the defence at a criminal trial.[28] Gleeson CJ and Heydon J pointed to *R v Birks* (*Birks*)[29] and *R v Manunta*[30] as explaining the need for caution. In *Birks*,[31] Gleeson J stated that ordinarily, it would be inappropriate to expect an unrepresented accused to be bound by the rule,[32] though added that it

[20] (2005) 222 ALR 436, 446.
[21] Ibid 447.
[22] Ibid 440.
[23] Ibid 447.
[24] Ibid.
[25] Ibid.
[26] Ibid 440.
[27] Ibid.
[28] Ibid.
[29] (1990) 19 NSWLR 677.
[30] (1989) 54 SASR 17.
[31] (1990) 19 NSWLR 677.
[32] Ibid 688.

may apply to the cross-examination of one co-accused by another.[33] His Honour followed *R v Manunta*[34] in explaining that where an apparent non-compliance with *Browne v Dunn* is followed by judicial comment to the jury, it is important to consider the substance of the comment.[35] The purpose of the comment may differ depending on the circumstances. *Inter alia* it may indicate that a witness was not treated fairly, or carry an inference that the unchallenged evidence of a witness should be disbelieved, or, that the evidence is a recent invention.

It is against this background that the High Court in *MWJ v R*[36] concluded that the consequences of a failure to cross-examine need to be considered 'in light of the nature and course of the proceedings'.[37] There can be many explanations for a failure to cross-examine which do not reflect on a witness' credibility.[38] Generally a breach of *Browne v Dunn* occurs where 'the cross examining party seeks to tender contradictory evidence in its own case without having first raised the matter in cross-examination'.[39] However, a failure to cross-examine may not constitute a breach of the rule.

Applying this reasoning, the High Court found that there was no obligation on the defence counsel to question the complainant on the inconsistency or to have the complainant recalled for that purpose.[40] The failure to cross-examine was a forensic matter and thus for the defence counsel to decide. Consequently, the trial judge and the Court of Criminal Appeal's criticisms in relation to this point were a misapprehension of *Browne v Dunn.*[41] Gleeson CJ and Heydon J however agreed with Doyle CJ that the failure to cross examine was a matter to be considered in assessing the weight of the evidence.[42]

The rule in *Browne v Dunn* must be applied cognisant of the 'unavoidable burden of proof carried by the prosecution in a criminal trial'.[43] This consideration underpins the High Court's view of the

[33] Ibid 689.
[34] (1989) 54 SASR 17.
[35] (1990) 19 NSWLR 677, 689.
[36] (2005) 222 ALR 436.
[37] Ibid 448 (Gleeson CJ and Heydon J in argument).
[38] *R v Manunta* (1990) 54 SASR 17, 23.
[39] Queensland Law Reform Commission, above n 4, 37.
[40] (2005) 222 ALR 436, 449 (Gummow, Kirby and Callinan JJ), 441 (Gleeson CJ and Heydon J).
[41] Ibid.
[42] Ibid 441.
[43] Ibid 449 (Gummow, Kirby and Callinan JJ in argument).

appellant's lack of obligation to cross-examine the complainant on the issue of inconsistency. In the Court of Criminal Appeal Doyle CJ was critical of the appellant for not putting the inconsistency between the complainant and her mother. However, the High Court concluded that this criticism did not give due weight to the obligations of the prosecution to present its whole case in chief, nor the prosecution's burden of proof.[44]

In addition to setting out broad principles, the High Court provided guidelines regarding the operation of the rule in *Browne v Dunn* in criminal proceedings:

1. Judges in general should abstain from making adverse findings about parties and witnesses in respect of whom there has been non compliance.
2. Cross-examination of any witness who can speak to the relevant issue will usually constitute notice and any witness whose conduct is to be impugned should be given the opportunity in cross-examination to deal with the imputation intended to be made against him or her.
3. An offer to tender a witness for cross-examination will in many cases be sufficient to meet a complaint of prejudice resulting from a failure to put a matter in earlier cross-examination.
4. A party genuinely taken by surprise by reason of failure on the part of the opponent to put a relevant matter in cross-examination can cure any difficulties by recalling the witness. In order to accommodate this possibility the salutary practice is to excuse witnesses only temporarily on the understanding that they may be recalled if necessary.[45]

III. THE APPLICATION OF *MWJ V R* IN QUEENSLAND: *R V MAP*

MWJ v R[46] was followed recently by the Full Supreme Court of Queensland (McMurdo P, Keane JA and Jones J) in *R v MAP*.[47] *R v MAP*[48] concerned two charges of rape. At first instance, the appellant was convicted on one charge against Ms S, though acquitted on the

[44] Ibid.
[45] Ibid 448 (Gummow, Kirby and Callinan JJ).
[46] (2005) 222 ALR 436.
[47] [2006] QCA 220 (Unreported, Supreme Court of Queensland, McMurdo P, Keane JA and Jones J, 21 June 2006) [56] (Keane JA).
[48] Ibid.

other charge, against Ms W.[49] The grounds of appeal included that the trial judge should have ordered separate trials in relation to the two charges[50] and that 'the judge erred in referring to the failure of the appellant's defence counsel at trial to put to the complainant, Ms S, the proposition that the appellant had not digitally penetrated her vagina'.[51]

Under section 349 of the *Criminal Code 1899* (Qld), the offence of rape covers various forms of non-consensual sexual penetration.[52] In *R v MAP*[53] the act of penetration was therefore a fact in issue. The Court found that the trial judge's comment could have been understood as an invitation to the jury to draw an inference that the appellant in his instructions to counsel had accepted the fact of digital penetration of Ms S.[54] However, Keane JA noted that although the defence counsel failed to cross-examine in relation to an element of the offence, the rule in *Browne v Dunn* did not afford a basis for the judge's comment.[55] Prima facie, this seems inconsistent with the Queensland Court of Appeal's unanimous judgment in *R v Foley*,[56] where, in relation to the rule in *Browne v Dunn,* the Court stated 'if the essential elements of the eventual case are not put to witnesses who might have the capacity to cast doubt upon the case, a fair trial (i.e. a trial fair to both sides) has been jeopardised'.[57]

In *R v MAP*[58] the Court's consideration of whether *Browne v Dunn* applied to the defence counsel's failure to cross-examine is consistent with the principles outlined in *MWJ v R.*[59] Keane JA (with whom McMurdo P and Jones J agreed) highlighted that strict adherence to the rule in *Browne v Dunn* is especially inappropriate where the defence counsel has failed to cross-examine and 'it is otherwise apparent that the proposition which was not put *is* in issue'[60] (my emphasis). To

[49] Ibid [2].
[50] Ibid [3].
[51] Ibid [54] (Keane JA).
[52] Eric Colvin, Suzie Linden and John McKechnie, *Criminal Law in Queensland and Western Australia* (3rd ed, 2001) 105.
[53] [2006] QCA 220, (Unreported, Supreme Court of Queensland, Keane JA, McMurdo P and Jones J, 21 June 2006) [56].
[54] Ibid [56] (Keane JA).
[55] Ibid.
[56] [2000] 1 Qd R 290.
[57] Ibid 291.
[58] [2006] QCA 220 (Unreported, Supreme Court of Queensland, Keane JA, McMurdo and Jones JJ, 21June 2006).
[59] (2005) 222 ALR 436.
[60] Ibid [55] (Keane JA).

explain this view Keane JA referred to *R v Robinson*[61] and to the nature of what might amount to notice to the opposing party within the context of trial proceedings.

In *R v Robinson*[62] Dunn J (with whom Wanstall CJ and Douglas J agreed) outlined that during cross-examination counsel is under an obligation to put occurrences in accordance with his or her instructions. By corollary, a party's instructions may be inferred from its counsel's questions. Where there is a discrepancy on a significant particular between questions and the evidence of the person from whom the instructions have come, the judge may ask the jury to consider this in evaluating the evidence[63] and may also ask the jury to draw an inference on the basis of the questions asked and/or omitted by counsel.[64] In *R v MAP*[65] Keane JA cautioned that this practice should not be applied strictly and where an inference that counsel's questions reflect the client's instructions would be unsafe or unfair, a direction of this type would be inappropriate.[66] Circumstances in which such a direction would be inappropriate include where counsel has simply overlooked the point or made an error.[67] Another possibility, discussed by the High Court in relation to the defence counsel's submission in *MWJ v R*,[68] is that the failure to cross examine may reflect a 'conscious tactical decision on the part of counsel'.[69]

Keane JA's reasoning expanded on Gleeson J's comment in *Birks*[70] and referred to by Gleeson CJ in *MWJ v R*,[71] that where apparent non-compliance with *Browne v Dunn* is followed by judicial comment to the jury, it is important to consider the substance of the comment.[72] In *R v MAP*,[73] despite the appellant's denial of penetration not being put to the complainant in cross examination, Keane JA noted that during the trial

[61] [1977] Qd R 387.
[62] Ibid.
[63] Ibid 394.
[64] Ibid.
[65] [2006] QCA 220 (Unreported, Supreme Court of Queensland, McMurdo P, Keane JA and Jones J, 21June 2006) [58].
[66] Ibid [58].
[67] Ibid.
[68] (2005) 222 ALR 436, 448.
[69] Heydon, above n 5, 545.
[70] (1990) 19 NSWLR 677.
[71] (2005) 222 ALR 436
[72] (1990) 19 NSWLR 677, 689 - 690.
[73] [2006] QCA 220 (Unreported, Supreme Court of Queensland, McMurdo P, Keane JA and Jones J, 21 June 2006).

the Crown had tendered a record of interview containing a denial by the appellant and none of the lawyers involved could have held any real doubt regarding the appellant's denial of this fact.[74] In addition, on a number of occasions, the trial judge critiqued the defence counsel's conduct of the trial.[75] In light of these factors His Honour criticised the trial judge's failure to warn the jury that the defence counsel's failure to cross examine may have been the result of an oversight. The accused should not bear the burden of negative inferences that arise as a result of errors made by counsel.

In summary, the reasoning of the Court in *R v MAP*[76] indicates that 'the nature and course of proceedings'[77] to which Gleeson CJ and Heydon J referred to in *MWJ v R*[78] include a consideration of the ways in which *Browne v Dunn* interacts with other rules of cross examination. Further, recognition of these inter-relationships should be reflected in directions or comments to the jury.

IV. CHALLENGES TO THE APPLICATION OF THE RULE IN *BROWNE V DUNN* IN CRIMINAL PROCEEDINGS

Section 46 of the *Evidence Act 1995* (Cth) provides that the court may give leave for a party to recall a witness to give evidence. It therefore covers some of the common law rule in *Browne v Dunn*. The Australian Law Reform Commission's (ALRC) recent review of Uniform Evidence Law includes recommendations in relation to possible amendments to s 46.[79] The ALRC refers to a comment that 'recent doubt as to whether the rule [in *Browne v Dunn*] applied in criminal proceedings means that it would be unfortunate for the Acts to include the entirety of the rule.'[80] It is noted that these doubts were raised in *R v Liristis* [81] *(Liristis)* in relation to the right to silence.

In *Liristis*[82] part of the defence counsel's submission relied on judicial comment in *Azzopardi v R*[83] *(Azzopardi)* and *Dyers v R*[84] *(Dyers)*.

[74] Ibid [58].
[75] Ibid.
[76] Ibid.
[77] (2005) 222 ALR 436, 440.
[78] Ibid.
[79] *Evidence Act 1995* (Cth).
[80] Australian Law Reform Commission, above n 7, [5.142].
[81] [2004] 146 A Crim R 547.
[82] Ibid.
[83] (2001) 205 CLR 50.

Azzopardi[85] and *Dyers*[86] concerned the application of the principle in *Jones v Dunkel*[87] to the accused in criminal proceedings. The principle in *Jones v Dunkel*[88] allows the trial judge to make a specific direction to the jury that, where there is an unexplained failure to call material evidence, an inference may be drawn that the evidence, if called, would not have assisted the party's case.[89]

In *Azzopardi*[90] the High Court considered whether the trial judge could make such a direction in criminal cases if the accused elected to remain silent at trial. The Court concluded that ordinarily it is inappropriate to comment to the jury that a negative inference can be drawn on the basis that the accused has not given evidence. Later, in *Dyers*,[91] the High Court outlined that the reasoning in *RPS v R*[92] *(RPS)* and *Azzopardi*[93] included the accused personally and any person called to give evidence by the accused.[94] In summary, in criminal proceedings where an accused either fails to give evidence or to call a witness a *Jones and Dunkel*[95] direction will only apply in exceptional cases.[96]

Returning to the argument in *Liristis,*[97] the defence submitted that by 'natural extension' of the reasoning in *Azzopardi*,[98] *RPS*[99] and *Dyers*[100] there was no obligation for an accused to put his [or her] case to a Crown witness.[101] The implication of this argument is that *Browne v*

[84] (2002) 210 CLR 285.
[85] (2001) 205 CLR 50.
[86] (2002) 210 CLR 285.
[87] (1959) 101 CLR 298.
[88] Ibid.
[89] Jill Hunter., Camille Cameron and Terese Henning, *Litigation II: Evidence and Criminal Proceedings* (7th ed, 2005) 1293.
[90] (2001) 205 CLR 50.
[91] (2002) 210 CLR 285.
[92] (2000) 199 CLR 620
[93] (2001) 205 CLR 50.
[94] (2002) 210 CLR 285, 292 (Gaudron and Hayne JJ) in *R v Liristis* [2004] 146 A Crim R 547. In *RPS v R* (2000) 199 CLR 620, the defendant was charged with sexual offences against his daughter and refrained from giving evidence at his trial. This raised the accused's right to silence.
[95] (1959) 101 CLR 298.
[96] Waight and Williams, above n 9, 133.
[97] [2004] 146 A Crim R 547.
[98] (2001) 205 CLR 50.
[99] (2000) 199 CLR 620.
[100] (2002) 210 CLR 285.
[101] Ibid 561.

Dunn is incompatible with the presumption of innocence and the right of the accused not to give or call evidence at trial.[102]

In response to this submission Kirby J (with whom Studdert and Hislop JJ agreed) stated that 'the rule in *Browne v Dunn* in criminal trials has been affirmed and reaffirmed'.[103] His Honour also noted that the principle in *Browne v Dunn* presupposes that the accused puts his case. *Browne v Dunn* therefore applies in somewhat different circumstances to those considered in *Azzopardi*.[104] By placing severe limitations on the application of the rule in *Jones v Dunkel*[105] to the accused in criminal trials, *Azzopardi*[106] and *Dyers*[107] protect the right to silence. However, where the accused has waived the right to silence by putting forward a case, *Browne v Dunn* may apply.

Kirby J noted that where an accused has put forward a case and it has not been put in cross-examination, the Crown may recall a witness under s 46 of the *Evidence Act 1995* (NSW). In addition, the Crown in its closing address, or the judge in summing up, may comment.[108] These consequences fall within the ambit of the principles of *Browne v Dunn* as articulated by the High Court in *MWJ v R*.[109] They demonstrate that 'with serious qualification',[110] *Browne v Dunn* can operate concurrently with the presumption of innocence and the accused's right to silence.

The High Court in *MWJ v R*[111] advised caution in the application of *Browne v Dunn* to the defence case. However, the Court did not exclude the rule's operation in relation to the Crown. Post *MWJ v R*,[112] *R v MAP*[113] elaborates on the explication of the rule in *Browne and Dunn* by exploring the circumstances which may surround a failure to cross examine on a fact in issue. In circumstances where the defence counsel is in error or makes an oversight, a failure to cross examine

[102] Ibid.
[103] Ibid.
[104] (2001) 205 CLR 50.
[105] (1959) 101 CLR 298.
[106] (2001) 205 CLR 50.
[107] (2002) 210 CLR 285.
[108] [2004] 146 A Crim R 547, 561.
[109] (2005) 222 ALR 436.
[110] Ibid 449.
[111] Ibid.
[112] Ibid.
[113] [2006] QCA 220 (Unreported, Supreme Court of Queensland, McMurdo P, Keane JA and Jones J, 21 June 2006).

cannot support an inference of tacit admission on the part of the accused.[114]

V. CONCLUSION

In *MWJ v R*[115] the defence counsel was faced with either seeking to have evidence excluded by reason of its prejudicial effect, or deliberately leaving it untouched to provide a basis for a submission that there was a fundamental evidential inconsistency.[116] On the facts, the trial judge and Court of Criminal Appeal misapprehended and subsequently erred in the application of the rule in *Browne v Dunn*. In deciding that the appellant was not obliged to seek to have the complainant recalled[117] the High Court's articulation of *Browne v Dunn* provides clarity, particularly with regard to a failure to cross-examine within a criminal proceeding. The facts of *R v MAP*[118] provided the Queensland Court of Appeal with the opportunity to elaborate upon this point. Reasons for a failure to cross-examine are numerous and include recent invention on the part of a witness and counsel error. Given the breadth of circumstances in which the rule in *Browne v Dunn* might be raised, the content of any direction or comment made as a consequence of a breach must reflect the rule's specific relevance to the conduct of the trial and the manner in which *Browne v Dunn* interacts with other rules of law and legal practice.

MWJ v R[119] confirms that *Browne v Dunn* applies to criminal proceedings, though with important qualifications. The application of the rule must be considered on a case by case basis, having regard for the essential accusatory nature of criminal trials.[120] The doubts expressed in relation to the application of *Browne v Dunn* in criminal proceedings focus on the protection of an accused's right to silence and the prevention of a displacement of the prosecution's onus of proof. The High Court's explication of the rule in *Browne v Dunn* indicates that the application of the rule in criminal proceedings is not fundamentally incompatible with these principles.

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[114] Ibid [59].
[115] (2005) 222 ALR 436.
[116] Ibid 448.
[117] Ibid.
[118] [2006] QCA 220 (Unreported, Supreme Court of Queensland, McMurdo P, Keane JA and Jones J, 21 June 2006).
[119] (2005) 222 ALR 436.
[120] 'Digest of Criminal Law Cases' (2006) 30 *Criminal Law Journal* 119, 124.