

MILLER v TCN CHANNEL NINE PTY LTD

SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

5 **HANDLEY, SELLER and CRIPPS JJA**

5, 6 August 1993, 15 September 1993

[1993] NSWCA 181

10 The appellant was found guilty of contempt for attempting to suborn witnesses proposed to be called by the respondent in a defamation action. The appellant had brought defamation proceedings against the respondent for its portrayal of the appellant's "Talent Scouts" agency on the "Willessee" programme. The appeal was only on the question of guilt.

15 The notice of appeal alleged the trial judge erred in law in directing himself as to the nature and application of the onus of proof and in his observations with respect thereto that there was an evidentiary onus on the appellant to which it could be inferred that there was a reasonable hypothesis consistent with innocence. It was also claimed that if the trial judge had evidence before him which the appellant asked the appeal court to receive he may not have made the findings he did.

20 Held: The trial judge had erred in his reasoning process in respect of one witness. However, the circumstance that a finding of fact is either erroneous or less persuasive than it ought to be does not of itself require a conclusion that the decision of the trial judge be set aside. The trial judge's conclusions of fact were manifestly correct. The fresh evidence was not admitted. The trial judge was correct in allowing the jury to return a verdict on the circumstantial evidence as the circumstances were such as to be inconsistent with any reasonable hypothesis other than the guilt of the appellant. The trial judge did not err in his comments concerning the evidentiary onus.

Listening Devices Act 1984

Supreme Court Act 1970 s75A(b)(6), s75A(10), s75(8)

30 John Fairfax and Sons Ltd v Cojuangco (1988) 165 CLR 346

AMIEU v Mudginberri Station Pty Ltd (1986) 161 CLR 98

R v Turnbull [1977] QB 224

Alexander v The Queen (1985) 145 CLR 135

R v EJ Smith [1984] 1 NSWLR 461

35 Regina v Brownlow (1987) 7 NSWLR 461

Gallagher v R (1986) 160 CLR 392

Peacock v The King (1911) 13 CLR 619

Barca v The Queen (1975) 133 CLR 82

Purkess v Crittenden (1965) 114 CLR 164

40 Caswell v Powell Duffryn Assoc Collieries Ltd [1940] AC 152

Handley JA I agree with Cripps JA.

Sheller JA I have had the benefit of reading the judgment of Cripps JA and agree with it and the orders therein proposed.

45 **Cripps JA** On 11 December 1989 Mr Justice Hunt, Chief Judge of the Common Law Division of the Supreme Court, found the appellant, Mr Miller, guilty on two charges of contempt of court. The contempt in each case was an attempt to suborn witnesses proposed to be called in a defamation action in which he was the plaintiff. He was fined \$6000 on the first charge and \$4000 on the
50 second charge. He has appealed against the findings of guilt. He has not appealed against the fines.

BACKGROUND

On 4 February 1986 TCN Channel Nine Pty Ltd (the prosecutor in the contempt proceedings and one of three defendants in the defamation proceedings) telecast a segment of the "Willesee" programme criticising an agency known as "Talent Scouts", a business owned and run by the appellant. The programme alleged that clients of the agency had been deceived by the appellant. It was said that clients paid large sums of money for sub standard photographs and received no offers, or inadequate offers, of work. In one case it was alleged that a client had been cheated. The Court was not shown the segment but what took place is clear enough from the judgment of Hunt J. An employee of Trans Media Productions Pty Ltd, the company which prepared the presentation for Channel Nine, pretended to be a client of the agency. Some time later, reporters and cameraman from Trans Media confronted the appellant in his office. Relevant to the charges is the circumstance that while there they made an illegal tape recording of conversations with the result that Channel Nine and Trans Media were fined substantial amounts by the Supreme Court for illegal behaviour under the Listening Devices Act 1984.

On 24 February 1986, Mr Miller sued Channel Nine, Trans Media and Mr Willesee in defamation. The defendants pleaded, inter alia, that the imputations sued upon were true. In February 1988 the appellant (or his solicitors) received copies of documents produced by Channel Nine pursuant to an order for discovery. The discovered documents included notes earlier prepared by Miss Jacqui Donaldson, a researcher employed by Trans Media. The case was fixed for 5 December 1988. Interrogatories had been served on the appellant and, in September 1988, he was ordered to answer them. In early October 1988, Channel Nine's solicitors told the appellant's solicitors that it was also proposing to plead contextual truth. Earlier, in its particulars, Channel Nine had identified certain witnesses it proposed to call. The same names were again supplied in the particulars of the defence of contextual truth. The list of witnesses included the names of five persons who gave evidence in the contempt proceedings. On 21 October 1988, Channel Nine's solicitors told Mr Miller's solicitors that they would be applying on 28 October 1988 to add the defence of contextual truth.

On 23 and 24 October five named witnesses were telephoned by a person identifying himself by various names but, in each case, as being a person involved in the preparation of Channel Nine's case. In each case, the caller attempted to dissuade witnesses from giving evidence for Channel Nine against the appellant. The inducements were expressed as a concern that the witnesses themselves might be sued by the appellant. In one case, a witness believed that, if she gave evidence, compromising photographs of her and the appellant taken in an apartment in the Kings Cross area could be produced to the Court. The witness believed that the photographs were of her naked and in the act of sexual intercourse with the appellant.

On 26 October 1988, Channel Nine was granted leave by the Supreme Court to issue a motion for contempt of court and an ex parte order was made restraining the appellant up to and including 28 October from approaching or speaking to any person included in Channel Nine's list of prospective witnesses. The first motion for contempt referred to an approach made to four witnesses, Ms C, MacLaren, Tuckwell and Turnbull. In the proceedings before Hunt J, Channel Nine also called another witness, Shipley, who had received a phone call on 23 October and was told that she was liable to be sued if she gave evidence. On 31 October, the five witnesses who received the earlier phone calls each received an

envelope containing photostat copies of newspaper comment of a recent decision of the High Court (*John Fairfax and Sons Limited v Cojuangco* (1988) 165 CLR 346). The comment referred to the High Court's decision as having a "chilling effect on those who would supply information" to newspapers. The material also
5 included reference to the prosecution of Channel Nine under the Listening Devices Act. The mailing of the newspaper material was the contempt alleged in the second motion.

The proceedings were heard over nine days in November, December and January 1988 - 1989. They were conducted upon the basis that, for Channel Nine
10 to succeed, in each case the contempt had to be established beyond reasonable doubt. Although disobedience of the Court's interlocutory order could, on one view of the matter, be characterised as civil contempt, the theoretical distinction between the two classes of contempt referred to in *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 was not explored in the judgment for the reason, one
15 supposes, that the contempt on the second occasion was, if established, of the same nature as the contempt the subject of the first charge. It was for this reason also, I assume, that the prosecutor accepted that it had to prove its case beyond reasonable doubt in each case.

Before Hunt J and on appeal, the proceedings were conducted upon the basis
20 that whoever made any one of the phone calls to the five persons who gave evidence in support of the first charge, made the phone calls to the others. Furthermore, it was accepted that whoever made the phone calls also mailed the threatening material the subject of the second charge. The case against the
25 appellant, therefore, was established if he was found to the satisfaction of Hunt J, beyond reasonable doubt, to have made any one of the telephone calls. All witnesses claimed to identify the appellant's voice. One of them, Ms C, was granted anonymity to encourage her to give evidence. In an affidavit, she referred to an episode in the appellant's private apartment in the Kings Cross area where
30 she had been photographed naked and had had sexual intercourse with the appellant. She was sure it was the appellant who spoke to her. She said she had a tape recording of his voice and she played it immediately after the telephone conversation.

The appellant gave evidence denying he made the telephone calls or that he
35 posted threatening material to the witnesses. Hunt J found he was untruthful and unreliable. He found he lied about his claimed lack of knowledge of the injunctive order made against him and he lied about his association with the witness, Ms C. He did not deny sexual intercourse had occurred in his apartment. However, he endeavoured, unsuccessfully, to persuade Hunt J that it was Ms C,
40 then aged 18, who had lured him, a middle aged man, to his apartment, plied him with liquor and seduced him while being photographed. He said the photographs were taken by a Polaroid camera to explain, presumably, why he could not produce them. Ms C said it was a camera used by professional photographers set on automatic and that the appellant kept the film.

45 THE APPEAL

It is agreed that the appeal against Hunt J's determination comes to this Court pursuant to s75A of the Supreme Court Act 1970. The Court has the same powers and duties of the judge from whom the appeal is brought including the drawing of inferences and the making of findings of fact (s75A(6)(b)). The Court may also
50 make any findings or assessment which ought to have been given or made or which the nature of the case requires (s75A(10)).

In the notice of appeal it was alleged that Hunt J erred in law in directing himself as to the nature and application of the onus of proof and in his observations with respect thereto that there was an evidentiary onus on the appellant to point to material or produce evidence from which it could be inferred
5 that there was a reasonable hypothesis consistent with innocence. It was also submitted that he erred in concluding that the maker of the calls conveyed information to Ms C and Ms Tuckwell which only the appellant and the witness in each case were aware of. (With respect to the last mentioned ground of appeal and in so far as it relates to the evidence of Ms Tuckwell, the complaint is now
10 not that Hunt J erred in his determination on the material before him but that had he had evidence which the appellant asks the Court to receive in these proceedings, he may not have made the findings he did.)

It is not alleged that Hunt J misdirected himself with respect to his refusal to order separate trials or his order with respect to anonymity for Ms C. Nor is it
15 alleged he erred in his conclusion that he would not accept the appellant's evidence. Hunt J recognised that the disbelief of the appellant did not establish the facts that he had denied. He understood that, to succeed, Channel Nine had to prove beyond reasonable doubt that it was the appellant who made one or more of the phone calls. He referred, in terms, to cases emphasising the need for
20 caution before accepting voice identification evidence and for the need to guard against the risk that voice identification evidence may be honestly mistaken (see R v Turnbull [1977] QB 224, Alexander v The Queen (1985) 145 CLR 135, R v EJ Smith [1984] 1 NSWLR 462 and Regina v Brownlow (1987) 7 NSWLR He also took cognizance of the circumstance that witnesses who claimed to
25 recognise the appellant's voice did so assuming that, in each case, only the appellant and the recipient knew about the information being conveyed in the telephone calls and that in all but two cases the assumptions were incorrect. He also recognised that care had to be taken because the solicitor acting for Channel Nine had, after receiving the complaints, asked certain witnesses to view the telecast which showed the appellant speaking, and the sound of his voice. He was
30 aware of the possible "displacement" effect that may have had. In fact not all witnesses looked at the segment. At least one declined to do so because he realised that it was the voice, not the picture, that was important.

Hunt J's findings extended over 68 pages. It is not necessary for me to repeat
35 them in this judgment. It is, however, not inappropriate to point out that where, as in the instant case, it is alleged that one of the findings of fact is either erroneous or less persuasive than it ought to be, that circumstance does not of itself require a conclusion that the decision of the judge appealed against must be set aside. As will be seen, I am of the opinion that there was relevantly an error
40 in the reasoning process of Hunt J with respect to the call to the witness, Ms C. However, in my opinion, he was not in error in concluding that Ms C identified the appellant's voice and, in my opinion, that conclusion was not infected by the error to which I shall refer. I am persuaded, therefore, that there should not be a new trial of the matter, that being the order the appellant seeks. In my opinion and
45 for reasons which I shall shortly explain, Hunt J's conclusions were manifestly correct that the appellant made the telephone calls and posted the threatening material to the witnesses.

THE ALLEGED ERRORS OF FACT

The only two errors of fact alleged are the conclusion with respect to the
50 telephone conversation the caller had with Ms C and one he had with Miss Tuckwell. As I have said, in both cases it was alleged, and found, that the caller

and the person to whom he was speaking were the only persons who had knowledge of the matters discussed. In the case of the witness, Ms C, Hunt J found that nobody but the appellant and Ms C knew that nude photographs were taken in his apartment and, accordingly, the implied reference to them by the caller established that the appellant made the calls. In the telephone call to Miss Tuckwell the nickname "Bozy" was mentioned as the person who took certain photographs. Hunt J concluded that that information was known only to the appellant and Miss Tuckwell. As events turned out, it was not submitted that Hunt J was not entitled, on the evidence, to find that "Bozy" was known only to the appellant and Miss Tuckwell. However, it was submitted that the appellant ought be allowed to adduce further evidence to the effect that, on the occasion of the confrontation referred to above, a receptionist, Ms Kapsis, employed by the appellant, heard the name Bozy mentioned when the appellant was being interviewed by Ms Grant. It was submitted that the evidence of Ms Kapsis established, or at least ought to be considered as capable of establishing, that the name "Bozy", a nickname for Mr Vine Miller, was known to members of Channel Nine staff at the time the telephone call was made.

I have already referred to the notes of the researcher, Jacqui Donaldson, which were made available by Channel Nine pursuant to the discovery of documents. She was the researcher employed by Trans Media. She made notes of discussions with dissatisfied clients of the appellant's agency. It is clear that whoever made the calls had access to her notes. Further, more probably than not, the caller had the notes in front of him when he was speaking to the witnesses. The notes were tendered by Channel Nine to establish that fact. Jacqui Donaldson was not called and she was not asked to attend for cross examination. One can only speculate why Ms Donaldson was not called. Channel Nine asserts that for its case it needed to prove no more than that her notes were in the possession of the appellant at the relevant time. However, their existence was relied upon by the appellant to advance the submission that Channel Nine had failed to exclude or negative beyond reasonable doubt the possibility that some person, in the employ of Channel Nine, used the notes to discourage witnesses from giving evidence in the proceedings. It was submitted that there was a possibility, not negated, that Channel Nine had a disgruntled employee anxious to prevent it from establishing the truth of the imputations alleged by the appellant or to provoke Channel Nine into bringing contempt proceedings which would be unsuccessful thereby inflating the damages the appellant would receive in the action. Hunt J rejected the submission.

THE ALLEGED ERROR WITH RESPECT TO MS C

The first affidavit of Ms C made reference only to the possibility of her being sued by the appellant. In the second she deposed to the receipt of the newspaper clippings referred to above. The third, for which she claimed anonymity, referred to an episode in the appellant's premises at Kings Cross in the course of which she was photographed naked with the appellant and had sexual intercourse with him under the shower. Hunt J accepted her evidence in its entirety. He found she was honest and accurate. Ms C said that she had not told anyone else about the existence of the photographs which were referred to in the conversation in question. She agreed that she had mentioned to Ms Jacqui Donaldson something about a photographic session at a location which included facilities for a sauna and a shower. She did not spell out to Ms Donaldson what precisely had occurred; she told her that she had been in the shower and left it to her to guess what had happened.

The inference is thus reasonably open that Ms Donaldson knew that some sexual activity had taken place between Ms C and the respondent and that Ms C was embarrassed by the incident. She was not told that the photographs which had been taken included shots of Miss C naked (either alone or in the company
5 of the appellant who was also naked). The photographs were not produced on discovery. There is no material to suggest that Ms Donaldson made any record other than that produced. However, it is reasonable to infer (in the absence of any denials from Ms Donaldson) that she may have passed on the information about the matter to those involved in the litigation.

10 If I understand the appellant's submission correctly, it is that any person who had access to Ms Donaldson's notes could have concluded that some act of indecency had taken place at the premises at Kings Cross and that by focusing on what Ms C understood to be the threat, Hunt J overlooked the actual words used.
15 Had he put out of his mind what it was that Ms C believed the caller was trying to say, so it was submitted, he would have recognised that it was possible that the call was made by some person who had access to Ms Donaldson's notes.

Ms Donaldson's notes of the investigation included, in one place "photo session in underwear and photos in sauna and shower" and in another "photo
20 session" "fourth floor", "underwear", "strip", "invited to his place", "more photos - sauna, - shower".

Ms C deposed that the caller said:

"Now they have coloured photos of you, did you know that. Pictures of a shower."

25 She said: "I don't know of coloured photographs".

He said: "Well they have coloured photographs of you. "

She said: "They weren't taken at the studio. They were taken at another location. It was somewhere round Potts Point/Kings Cross area. There was a shower there and a sauna.

30 He said: "Do you remember where it was we'd like to have a look. If these were taken to Court, how would you feel?"

She said: "I'd feel devastated. I'd feel as though I'd have a mental breakdown."

35 Hunt J concluded that the caller was, in fact, referring to nude photographs. The appellant said he had not told anybody about the occasion. His Honour found it was the photographs, not the sexual intercourse, to which the caller referred.

Mr Adams QC submits that the words used could have been used by some person who had no knowledge about what had actually happened other than what
40 Ms Donaldson had written and had no detailed knowledge of the activities engaged in by the appellant and Ms C at the relevant time. To the extent, therefore, that Hunt J found that the appellant was the caller only because the information he conveyed was known to no one other than the appellant and Ms C his reasoning was, with respect, erroneous. However, that, of course, does not
45 conclude that matter. As I will shortly explain, it has not been demonstrated that Hunt J erred in concluding that Ms C in fact identified the appellant's voice, not because he said things that she thought only he and she knew, but because she actually recognised his voice.

RE THE EVIDENCE OF MS TUCKWELL

50 As I have said, it is submitted that this ground of appeal must fail unless the appellant is allowed to adduce fresh evidence. The caller said to Ms Tuckwell:

“You did a commercial for the Electricity Commission which you received \$50 for. I understand that, whilst doing the ad (sic) you spoke with Bozy who told you that you would be getting \$100 for the commercial. I have spoken to Bozy; he says now that he only said \$50. Did you sign anything?”

- 5 Hunt J noted that the respondent asked Ms Tuckwell no questions about the matter but relied on the circumstance that Ms Tuckwell did not in her evidence say she had not told anyone else about the incident. He noted that the documents produced on discovery made no reference to “Bozy”. The appellant now wishes to call Ms Kapsis to say that the name “Bozy” was mentioned at the relevant time
10 when the interview/confrontation took place between the appellant and the television reporters. In my opinion, “no special grounds” have been made out as required by s75A(8) of the Supreme Court Act 1970. The “special grounds” relied on are that the appellant was taken by surprise when the matter was raised in submissions before Hunt J and that had anyone sought to approach Ms Kapsis,
15 it is possible she could not have been found because, at the time, she was no longer working for the appellant. She lived with her parents whose address was not given to the appellant. The difficulty with the appellant’s submission is that he was present in Court when the submission was made that the name “Bozy” did not appear in the notes of Jacqui Donaldson and that it was known to the
20 appellant. The submission was made at the conclusion of the evidence but it was within the discretion of Hunt J to allow the appellant to re open to give evidence to the effect that in his presence the name Bozy was mentioned and heard by Channel Nine’s reporters at the time of the interview/confrontation. His then counsel decided not to do so. Accepting that this Court would take a more
25 generous attitude to the reception of new evidence in an appeal of this kind than in appeals generally, there nonetheless must be grounds made out before it is admitted.

- The question for determination is whether, in the light of the material sought to be put before the Court, the refusal to accept it would lead to a miscarriage of justice. I am prepared to adopt the test referred to in *Gallagher v R* (1986) 160
30 CLR 392 at 402 where it was said:

- “The appellate court will conclude that the unavailability of the new evidence at the time of the trial involved such a miscarriage if, and only if, it considers that there is a significant possibility that the jury, acting reasonably, would have
35 acquitted the applicant of the charge if the new evidence had been before it in the trial. Obviously, that question can only be answered in the context of, and by reference to, ‘the probative force and nature of the evidence already adduced at the trial’; *Craig* (1933) 49 CLR at 439”.

- The appellant was represented by Mr Sully QC (as he then was), an
40 experienced advocate. Although Mr Adams QC surmises that his predecessor may have been taken by surprise, Mr Sully made no protest about the submission being made and, as I have said, made no application to recall his client or ask for an adjournment. The “fresh” evidence is that the name Bozy was mentioned not only in the presence of Channel Nine’s employees but also in the presence of the
45 appellant. I record, however, that although Hunt J was entitled to draw the conclusions he did and although no grounds have been made out for the admission of the additional evidence, his Honour did not place a great amount of weight on it.

- Mr Adams has quite properly acknowledged that if his ground of appeal with
50 respect to the evidence of Ms C was unsuccessful, that would conclude the matter against him. That is because the proceedings were conducted by his predecessor

upon the assumption that if the appellant made any one of the calls the subject of complaint he made them all and posted the material which was the conduct the subject of the second charge. In fact Hunt J made a positive finding that Ms C was accurate in her identification of the appellant. I do not understand that finding to be dependant upon the finding that no one other than the appellant could have uttered the words complained of. He did so because he accepted Ms C as being an honest and accurate witness. He said: "In the light of my findings relating to the weight of the respondent's case, I have no hesitation in accepting to that degree of satisfaction that it was the respondent who telephoned Miss C on Monday 24 October. I am prepared to make that finding upon the basis of her evidence alone. Because it is quite obvious that it was the same person who telephoned each of the five prospective witnesses (as counsel for the respondent realistically conceded that it was), that finding may be used to resolve any doubts which would otherwise have arisen in relation to the evidence of the other three who were named in the applicant's first motion. There was nothing put forward which was inconsistent with the caller to each of those three also being respondent. Despite the reliance of each of those three upon the erroneous belief that only the respondent knew of some of the matters discussed in those conversation (sic) each to a greater or lesser extent relied also upon a recognition of the voice itself as being that of the respondent. I am therefore satisfied beyond reasonable doubt that it was the respondent who telephoned each of the four prospective witnesses named in the applicant's first Motion." (Underlining mine)

Hunt J understood perfectly well that he had to exercise caution before accepting voice identification evidence. The effect of Mr Adams' submission is in effect that it was not open to Hunt J to accept her evidence as accurate. That submission must be rejected. Not only had she a closer association with the appellant than others but she compared his voice immediately afterwards with a tape recording she had of it. In my opinion, the learned judge was entitled to conclude, as he did, that the appellant made the telephone call to Ms C.

30 THE CIRCUMSTANTIAL EVIDENCE CASE

Even if it be assumed that all the voice identification evidence was suspect, the appellant faced a powerful circumstantial evidence case, as Mr Adams, on his behalf, rightly conceded. In the course of his lengthy judgment, the trial judge took cognizance of a number of factors. It is not necessary, in my opinion, to set them out. I do not understand the approach of Hunt J to be challenged otherwise than in respect of his conclusion that there was no hypothesis established consistent with the appellant's innocence. It was submitted that in so holding he was in error. In the course of giving evidence, the appellant, in cross examination, was invited to say who, other than the appellant, might have made the telephone calls and why they might have been made. He advanced a theory which Hunt J characterised as absurd.

There has been no challenge to Hunt J's conclusion. However, after all the evidence was completed and in address, Mr Sully QC, on behalf of the appellant, advanced the hypothesis referred to above. The first alternative (the attempt to inflate the damages) was dismissed, correctly in my opinion, as being "80 convoluted as to warrant it being disregarded". He also rejected the second alternative. He said:

"There are a number of answers to the suggested explanation. Firstly, only the respondent knew of the nude photographs mentioned to Miss C and the identity of the cameraman mentioned to Ms Tuckwell. Secondly, the first alternative is so convoluted as to warrant it being disregarded; the second alternative is also

improbable, in that such a person would be unlikely to have described himself in the calls as acting for the defendants if he had really wanted to avoid subsequent detection. Thirdly, and most significantly, there is simply no evidence in the case that such a disaffected or disgruntled employee existed at that time.”

- 5 Before turning to the learned judge’s analysis of authorities dealing with the proposition that before a jury can return a verdict of guilty upon circumstantial evidence, the circumstances must be “such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused” (see *Peacock v The King* (1911) 13 CLR 619 at 634), it is necessary to point out that, contrary to Mr
10 Adams’ submission, Hunt J, in fact, considered the so called “reasonable hypothesis”. That is, he had regard to the possibility advanced by Sully QC in address. It was submitted that Hunt J in fact determined he would not even consider the possibility of a hypothesis of innocence.

- However, in my respectful opinion, that submission is gainsaid by the second
15 reason given by Hunt J why he rejected what was put to him as a reasonable hypothesis of innocence. I do not understand it to be suggested that his Honour was not correct when he described the first alternative advanced by counsel for the appellant at trial as being “so convoluted as to warrant it being disregarded”. As to the second alternative, Hunt J’s approach was, in my respectful opinion,
20 somewhat generous. For my own part, I would have described the second alternative as teetering on the edge of absurdity. The hypothesis supposes that the disgruntled employee knew of all the material Channel Nine had in its possession with respect to the defamation action and that that person had such a sophisticated knowledge of the way defamation proceedings were conducted that
25 he thought he could wreck Channel Nine’s defence by frightening its witnesses. It was not, of course, sufficient to establish a hypothetically disgruntled employee. The hypothesis requires the existence of a person who would behave as the caller behaved. Furthermore, it is hardly likely that Channel Nine would continue to employ anybody if it knew that person was prepared to behave as
30 the hypothetical caller may have behaved. Such a person would not be likely to admit what he or she had done if called to give evidence. What is suggested is, undoubtedly, a possibility. But that is all it is. It is mere conjecture - nothing else.

In *Barca v The Queen* (1975) 133 CLR 82 at 104, Gibbs, Stephen and Mason JJ said:

- 35 “To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference (circumstantial evidence) but that it should be ‘the only rational inference that the circumstances would enable them to draw’: *Plomp v The Queen* (1963) 110 CLR 234 at 252; see also *Thomas v The Queen* (1960) 102 CLR 584 at 605 to 606.
40 However, ‘an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence; (*Peacock v The King* (1911) 13 CLR at 661). These principles are well settled in Australia.”

- 45 In the present case, at the end of the day and on the assumptions I am prepared to make in favour of the appellant, all that remained after the evidence of Channel Nine was the remote possibility that some person in the employ of Channel Nine might have made the calls. It is, in my opinion, highly unlikely that the calls were made by anyone other than the appellant. Hunt J’s reference to the evidentiary
50 onus and to *Purkess v Crittenden* (1965) 114 CLR 164 at 167 to 168 was not an assertion that in a criminal case the onus of proof shifts to the accused. All he was

saying was that there must be some material from which it could be inferred that there was a reasonable possibility that some person within Channel Nine’s organisation behaved as the hypothesis suggested (see *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169).

5 His Honour found that he was satisfied beyond reasonable doubt that that the appellant telephoned the witnesses. In my opinion, not only was that conclusion open, it is difficult to see how Hunt J could have found otherwise bearing in mind his total rejection of the appellant as a witness of truth. For reasons which were conceded in the proceedings below and repeated in this Court, a finding that the
10 appellant made the telephone calls carries with it the finding that he was the person responsible for posting the threatening material to the witnesses.

In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

15 Counsel for the Appellant: MF Adams QC/B Morris

Instructed by: WG McNally and Co

20 Counsel for the Respondent: B McClintock

Instructed by: Gilbert and Tobin

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