ADAPTING THE CHARGE BOOK

In two decisions in December 2017, the Victorian Court of Appeal gave its imprimatur to trial judges who adapted the standard directions and checklists in the Charge Book to the particular facts of this case. This note outlines the details of those cases and then puts forward some practical suggestions for how judges and practitioners can work together to clarify the issues in a trial and provide the clear directions a jury deserves.

Confining incriminating conduct directions – *Maher v R [2017] VSCA 381*

In *Maher*, the accused was charged with culpable driving after colliding with a bicycle after drifting into the left hand lane on Nepean Highway. The prosecution case asserted that the accused was driving while fatigued and relied on evidence of several near-miss collisions shortly before the accused hit the deceased. After the incident, the accused did not stop to render assistance and was said to have concealed her car in a railway station carpark, parking the car with its nose pushed deep into bushes.[1] The prosecution relied on this as incriminating conduct, within the meaning of *Jury Directions Act 2015* s.18.

The defence case in relation to the alleged incriminating conduct was that she had been unaware of hitting the cyclist and had parked in the railway station carpark so that her mentally unwell brother would not see the damage to it.[2]

Between addresses, the trial judge sought submissions about his proposed directions under *Jury Directions Act 2015* s.21, which specifies mandatory directions regarding incriminating conduct. The section requires the trial judge to direct the jury that it may use incriminating conduct evidence:

> as evidence that the accused believed that he or she had committed the offence charged or an element of the offence charged or that he or she had negated a defence to the offence charged, only if it concludes that
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> (i) the conduct occurred; and
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> (ii) the only reasonable explanation of the conduct is that the accused held that belief…

The trial judge observed that culpable driving does not require proof that the offender believed that his or her conduct was grossly negligent. On that basis, the trial judge informed the parties that in giving the s.21 direction, he would tell the jury that they could use the incriminating conduct as evidence that the accused thought that she had collided with the cyclist and would not refer to a requirement that the accused thought her driving was grossly negligent.

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[1] *Maher v R* [2017] VSCA 381, [6], [13].

[2] Ibid, [7]

While the defence did not objection to this form of direction, it was the subject of a ground of appeal. The Court of Appeal stated that:

> The course of the trial shows that the trial judge engaged with counsel to keep the directions to the jury as simple as possible. *This was entirely consistent with the underlying purpose of the JDA*. The outcome of that process was a direction which omitted words that strict compliance with s 21 would have required, to the effect that the jury must be satisfied that the appellant believed that she had not only hit a cyclist but committed the offence charged. *But s 6 of the JDA makes it clear that strict compliance is not demanded, and that must especially be so where the form of the direction is agreed upon by counsel*.
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> The direction here reflected the real issue at trial about post-offence conduct, namely whether the appellant thought when she left the scene of the accident that she had hit a cyclist or a rock.[3]

The decision reveals two important principles for trial judges directing juries under *Jury Directions Act 2015* s.21.

First, the reference in s.21 to the accused "[believing] that he or she had committed the offence charged or an element of the offence charged" involves the offender's subjective beliefs, even if the offence or element does not require subjective fault. The logic of incriminating conduct reasoning is that the offender's conduct shows that he or she was subjectively aware that he or she had committed an offence (even if unsure or erroneous about the legal definition of the offence). This subjective focus operates even if the legal definition of the offence involves objective fault elements.

Second, directions under s.21 can focus on the actual issues in dispute. In some cases, the factual dispute about alleged incriminating conduct makes it unnecessary to explicitly refer to any subjective belief which that conduct demonstrates. Either the conduct occurred for the reason specified, in which case the subjective belief follows as a matter of logic, or it did not and there is no need to separately consider the accused's beliefs. As the Court explained here:

> Counsel submitted that the jury should have been directed that the appellant must have believed that her driving had been 'reprehensible'. But if she knew she had hit a cyclist, her subsequent actions were inconsistent with driving normally as she claimed. *In the circumstances, it is impossible that she could have thought her driving other than reprehensible.* Certainly defence counsel did not suggest that the appellant could derive any benefit from a consideration by the jury of her having any

[3] Ibid, [31] – [32] (footnotes omitted, emphasis added).

other belief. The defence case was that she simply did not know that she had hit a cyclist.[4]

Summary

This case demonstrates the importance of the general rule in s.6 that a trial judge need not use any particular form of words, and the guiding principle in s.5(4) that judges' directions to juries should "be as clear, brief, simple and comprehensible as possible". It also reinforces the central role that trial counsel play in raising objections or, by silence or acquiescence, agreeing that the judge may depart from the strict requirements of the *Jury Directions Act 2015*.

Integrated directions, Question trails and Previous Misconduct Evidence – *Dunn & Watts v R* [2017] VSCA 371

In *Dunn & Watts*, the two accused were charged with a series of drug offences after police executed a search warrant at Dunn's property and found equipment and precursor chemicals used to manufacture methylamphetamine. Dunn's defence was that he was ignorant of the methylamphetamine manufacture and that the materials had been planted there by the Bandidos motor cycle gang. As part of its case, the prosecution led evidence that Dunn had been involved in trafficking methylamphetamine in 2001 to show that he had expertise in either running or recognising a clandestine drug laboratory.

Dunn challenged this evidence on appeal. The Court rejected the challenge on the basis that the evidence was admissible for the same reason that previous drug dealings were admitted in *Harriman v The Queen*.[5] As it *Harriman*, the previous dealings with clandestine laboratories were relevant as they undermined his claim that he knew nothing about the equipment at his premises.[6]

Watts was charged on the basis of principles of joint criminal enterprise, with the prosecution alleging that he was in possession of a quantity of phosphorous acid, a precursor chemical. The defence case was that Watts had nothing to do with the phosphorous acid. On the appeal, the defence argued that there were three issues the jury needed to consider:

a) whether Watts was ever a party to the joint criminal enterprise;
b) if so, whether the agreement to which he had been a party remained on foot when the offence was committed; and
c) if so, whether Watts had been proved to have participated in the joint criminal enterprise.

The defence argued on appeal that the second and third issues had not been left to the jury.

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[4] Ibid, [33] (emphasis added).

[5] (1989) 167 CLR 590.

[6] *Dunn & Watts v R* [2017] VSCA 371, [33].

The judge had directed the jury by use of a question trail. Her Honour had provided this to the parties after receiving submissions on required directions and before final addresses. In relation to the joint criminal enterprise, part of the question trail asked the jury to determine whether Watts was party to an agreement to possess phosphorous acid and whether, pursuant to the agreement, one or more of the parties to the agreement possessed phosphorous acid.[7] The judge explained that she was concerned about jurors understanding how a person can be part of a joint criminal enterprise to possess a substance, when the accused was not in physical possession.[8]

The judge also asked the parties whether the jury needed to consider the prescribed quantity or whether, in the circumstances of the case, proof of agreement and possession were sufficient. In relation to this process, the Court of Appeal remarked:

> With respect, this process of active engagement between trial judge and counsel is exactly what the JDA 2015 contemplates. Her Honour was here quite specifically asking counsel for Watts to address her on whether a particular aspect of charge 4 was or was not in issue, as s 11(b)(i) requires.[9]

Counsel for Watts agreed that the question about the prescribed quantity could be removed, and was content with the formulation of the questions on agreement and possession. The Court of Appeal observed that:

> If counsel for Watts had had any concern that the questions as drafted by her Honour for charge 4 did not adequately expose for the jury's consideration the matters he had put in issue on that charge, he could — and undoubtedly would — have raised it. On the contrary, he accepted that the putting of the two questions to the jury, and the giving of an affirmative answer to both questions, would be a proper basis on which the jury could convict his client on that charge.[10]

The judge provided the agreed question trail to the jury before the parties started final addresses. The judge also asked whether there were any objections after giving final directions, and the parties raised no objections.

The Court of Appeal reiterated the points made in *Xypolitos v R*[11] and *Dunn (a pseudonym) v The Queen*[12] that the residual obligation to give directions that were not sought under *Jury*

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[7] The question trail used the phrase "exercise dominion and control" rather than the term "possess", as the parties had agreed that this was the appropriate meaning of possession in the circumstances.

[8] *Dunn & Watts v R* [2017] VSCA 371, [60]-[61].

[9] *Dunn & Watts v R* [2017] VSCA 371, [63].

[10] *Dunn & Watts v R* [2017] VSCA 371, [66].

[11] (2014) 44 VR 423, [43].

[12] [2017] VSCA 95, [22]

Directions Act 2015 s.16 "is a good deal more stringent than" the common law.[13] A trial judge can, and an appellate court will, pay close attention to the way the parties have formulated the issues and what directions the parties have requested. The Court reiterated that the language of s.16:

> …reinforces in emphatic terms the policy which underpins ss 11, 12, 14 and 15 of the JDA 2015, namely, that it is for trial counsel to determine how the case is presented to the jury and to identify which directions are required. Where, as here, counsel have discharged their obligations under ss 11 and 12 with obvious care, it is not ordinarily for the judge to override the forensic judgments which underpin the identification of the matters in issue and the requests for directions.[14]

Summary

Dunn & Watts is the first appellate judgement which has closely examined integrated directions given under *Jury Directions Act 2015* s.65 (also known as question trails). The judgement supports trial judges who choose to direct in this manner, and demonstrates the high threshold appellants will need to cross when seeking to appeal against a misdirection or non-direction about an element where the issue has not been identified by trial counsel and where the trial judge obtained counsel's agreement to the wording of the charge.

As the Court recognised, Part 3 of the *Jury Directions Act 2015* places significant responsibilities on counsel to identify the matters in issue and to request directions. As the Court explained:

> These provisions recognise the reality that it is trial counsel who, by their conduct of the trial in accordance with their respective instructions, define what is, and what is not, in issue in the trial. For that reason, trial counsel are quite properly expected to take responsibility for identifying the directions which the judge should give, so that the jury are properly equipped to 'determine the issues in the trial'.[15]

In this case, the Court found that:

> [T]he trial judge engaged with counsel in exactly the way contemplated by the JDA 2015, giving them full opportunity to consider their respective positions and to specify what was, and what was not, in issue. As Parliament clearly intended, adherence to those procedures makes it a task of particular difficulty to persuade this Court on appeal that, notwithstanding the position taken by trial counsel, there were nevertheless 'substantial and compelling reasons' for the judge to have given a direction which she was not requested to give.[16]

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[13] *Dunn & Watts v The Queen* [2017] VSCA 371, [82].

[14] *Dunn & Watts v The Queen* [2017] VSCA 371, [85].

[15] *Dunn & Watts v The Queen* [2017] VSCA 371, [54].

[16] *Dunn & Watts v The Queen* [2017] VSCA 371, [6].

In combination, *Dunn & Watts* and *Maher* offer encouragement to trial judges to adapt standard jury instructions, such as those found in the Victorian Criminal Charge Book, to omit matters that the parties have indicated are not in issue. The cases also demonstrate the value of trial judges giving the parties advance notice of how the judge intends to direct on a particular issue and seeking submissions on whether that form of direction adequately directs the jury about the issues as they exist in the case at hand.