



Appendix D – Mr Gary Clark Court
Judgement



**LOCAL COURT
New South Wales**

Citation: Commonwealth Director of Public Prosecutions
v
Clark

Hearing dates: 31/10/2008, 03/11/2008, 25/03/2009, 26/03/2009

Date of Decision: 29/04/2009

Jurisdiction: Criminal

Place of Decision: Downing Centre

Judgment of: Magistrate G Bradd

Decision: Mr Clark is convicted of the offence

Catchwords: Distribution of unauthorised electoral matter –
circumstantial evidence

Legislation Cited: Commonwealth Electoral Act 1918; Criminal Code Act
1995; Evidence Act 1995

Cases Cited: Trudgett v R (2008) 70 NSWLR 696; R v Turnbull
[1977] QB 224 at 228; Shepherd v R (1990) 170 CLR
555

File number: H 34331508

Representation: Mr O'Donnell and Mr Crowley representing
Commonwealth Director of Public Prosecutions

Mr Ryan representing Mr Clarke

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Background

- 1 Mr Clark has been charged with distributing an electoral pamphlet, which did not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral pamphlet. The offence is charged under the Commonwealth Electoral Act.
- 2 The offence is alleged to have occurred between 9:30 pm and 10:30 pm on 20/11/2007 at St Mary's.
- 3 St Mary's is within the Federal Electorate of Lindsay. A General Election had been called for the following Saturday, 24/11/2007. At the time of the alleged offence Mr Clark was the husband of the then sitting member for Lindsay, Ms Kelly, who was retiring as the Federal member.
- 4 Persons became aware of the possibility that certain persons were going to distribute unauthorised electoral matter within the Federal Electorate of Lindsay.

Evidence

- 5 Mr Gilchrist was a volunteer for the Australian Labour Party for the electorate of Lindsay. At about 6:00 pm, he went to the office of the Campaign Manager for the Australian Labour Party for the electorate of Lindsay, where he met Senator Hutchins, Mr Foley, Mr W. Forno, Mr S. Forno, Mr Latham, Mr Carney, and Mr Bell. He then went to Ladbury Avenue, Penrith. He saw a utility vehicle leave 3 Ladbury Avenue and return about 15 minutes later. He then saw three vehicles arrive. Six people got out of the vehicles and went into 6 Ladbury Avenue. After about fifteen minutes the group went into 3 Ladbury Avenue for about five minutes. They then returned to their vehicles, congregated around the vehicles, and after a short time the vehicles were driven away. Mr Gilchrist followed the vehicles to the corner of Boronia and Debrincat streets, St Mary's where he saw persons divide into groups of two. He saw persons putting "flyers" into post-boxes. He took a "flyer" out of a post-box. He then drove along Debrincat Street and saw a person with a bag over his shoulders. From the open window of the vehicle, he said to the person, "What are you doing?" The person ran off into another street. Mr Gilchrist ran after the person, and when he arrived at the other street he saw

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two persons walking one after another, one being the person he saw run into the street and the other being taller, with darker hair. The taller person with darker hair was covering his face with a flyer. He was carrying a bag. Mr Latham was also in the street taking photographs. Mr Gilchrist left the area and went to the office of Senator Hutchins.

6 The pamphlet taken from a post box by Mr Gilchrist does not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral pamphlet.

7 It is alleged that the person covering his face with a flyer was Mr Clark.

8 Mr Latham was with Mr Gilchrist and Mr Carney when he took photographs in Maple Road. He saw two men in the road. He describes the man with darker hair as being Caucasian, 176 centimetres tall, with brown hair; wearing a blue shirt and shorts; carrying a bag and talking on a mobile telephone. He took eight photographs of the men. He followed the men to a vehicle parked at the corner of Boronia Street. The men got into the vehicle and drove off. He took a photograph of the registration plate of the vehicle.

9 Senator Hutchins says that he has known Mr Clark for between eight and nine years. He says that Mr Clark is an orthodontist with a clinic in Penrith, and he has been to the clinic five times. He has also met Mr Clark at functions where Mr Clark accompanied his wife. He says that he can identify the man covering his face with a pamphlet as Mr Clark.

10 Senator Hutchins says when he was at his office after the events in St Mary's he saw the photographs taken by Mr Latham. He says that he went to the clinic of Mr Clark in 2008 with his daughter and says the photograph looks like Mr Clark, and he is certain it is him.

11 Mr Bell says he was in Maple Road when a person dropped a bag and a bundle of documents fell out. He picked up the bag and the bundle of documents. The bundle of pamphlets taken by Mr Bell do not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral pamphlet.

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- 12 On 21/11/2007, Mr Nutt, the then Chief of Staff to the Prime Minister, spoke to Mr Jaeschke about the incident at Lindsay. At the time, Mr Jaeschke was the State Director of the New South Wales Liberal Party and Campaign Director for the Liberal Party in New South Wales. The next day he received a document by facsimile bearing the facsimile number of the Prime Minister's Office. The document is a letter purportedly signed by Mr Clark. The letter contains an apology for the involvement of Mr Clark in preparing and distributing the pamphlet. When Mr Nutt received the document he spoke to Mr Jaeschke. After doing so he distributed the document to the Press Gallery. He says the signature on the document appears to be the signature of Mr Clark, and the contents of the document are consistent with what he was told by Mr Jaeschke. He further says that he has not subsequently been informed that the signature is not the signature of Mr Clark.
- 13 Mr Nutt says that he has seen the signature of Mr Clark on a couple of occasions over the years prior to 2006, when he was the Principal Private Secretary to the Prime Minister. The first time in relation to RAAF service, the second in relation to the pecuniary interest statement of his wife, and a third, the circumstances of which cannot be recalled. He says the earlier signatures were neither checked nor disputed. At the time of seeing the facsimile document he believed the signature to be that of Mr Clark, and can say that the signature is in the style of the signature of Mr Clark.
14. Mr Clark instructed his solicitors to plead guilty to the charge, however the instructions were withdrawn before the plea was entered. The instructions given by Mr Clark indicate that at the time of giving the instructions Mr Clark acknowledged that each of the elements of the charge were proved.

Recognition Evidence

- 15 The photographs taken by Mr Latham depict a man wearing a blue t-shirt. He is holding some of the pamphlets to his face. One can see the colour of the hair, part of the hairline, the right side of the neck, the right cheek, part of the lips, the ear, four fingers of the left

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hand, the left forearm, the rear of the head from the left side, part of the left ear, part of the left side of the face, and the front of the body from a distance.

16 On 31/10/2008, Senator Hutchins was asked to look at the first photograph, which depicts the hair, part of the hairline, the right side of the neck, the right cheek, part of the lips, the ear, four fingers of the left hand. He said, "it looks like Gary Clark to me". On 25/03/2009, Senator Hutchins was shown all of the photographs and said, "It's Gary Clark".

17 Recognition evidence is evidence that may be unreliable,¹ and there is a need for caution in determining whether to accept the evidence and the weight to be given to it.²

18 The recognition of Mr Clark is based on Senator Hutchins meeting Mr Clark over a period of eight to nine years, both in Mr Clark's capacity as the spouse of the then sitting member for the seat of Lindsay, and in his capacity as an orthodontist. There is no doubt that Senator Hutchins is well acquainted with Mr Clark, and is able to recognise him. The photographs do not depict the full face of Mr Clark, and it is not possible from the features depicted to accept the evidence that it is a photograph of Mr Clark, however it is possible to accept that the features shown by the photographs are features that are consistent with the features of Mr Clark.

19 Counsel for Mr Clark has submitted that no weight should be given to the evidence of Senator Hutchins because of his political affiliations, his affiliations with the seat of Lindsay, and his bias against the Liberal Party. I reject the submission because Senator Hutchins displayed no such bias when he gave evidence.

20 Counsel for Mr Clark submitted that there is a possibility of mistake, particularly as a photograph of Mr Clark was published in newspapers, and Senator Hutchins had a photograph of Mr Clark attached to a wall in his office. There is always the possibility of mistake when persons give evidence of recognition.³ Senator Hutchins formed the view that the photographs depicted Mr Clark when he saw the digital images on the

¹ Trudgett v R (2008) 70 NSWLR 696

² Evidence Act s 165

³ R v Turnbull [1977] QB 224 at 228

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came of Mr Latham on the night of the alleged offence, so there is no displacement effect.

Letter of Apology

- 21 Counsel for Mr Clark submits that the letter could be fabricated; it has no address; and Mr Nutt is the only person to give evidence about it.
- 22 It is true that the letter bears no address of the author, and Mr Nutt is the only person to give evidence of it. When Mr Nutt received the letter he distributed it to the National Press Gallery. Once distributed, the letter became public information. Mr Nutt has said that he has not subsequently been informed that the signature on the letter is not that of Mr Clark. One would expect that if Mr Clark was not the author he would have refuted the authenticity of the letter, but he has not done so to the knowledge of Mr Nutt. There has been no evidence of Mr Clark having refuted the authenticity of the letter.
- 23 I accept the evidence of Mr Nutt that the signature is in the style of the signature known to Mr Nutt as the signature of Mr Clark. I accept the evidence of Mr Nutt that the contents of the letter are consistent with what Mr Nutt was told by Mr Jaeschke. The fact that there is no evidence of Mr Clark having refuted the authenticity of the letter is significant. Taking all the relevant evidence into consideration I find as a fact that the author of the letter is Mr Clark.

Instructions to Plead Guilty

- 24 Counsel for Mr Clark submits that persons can plead guilty for a variety of reasons; such as the cost of defending the charge; and personal reasons, so the instructions should not be construed as an admission of facts.
- 25 What Counsel for Mr Clark submits is true, however when Mr Clark gave the instructions it is presumed that he was advised that a plea of guilty would be construed by the court as an admission of the essential elements of the offence, and on being so advised he confirmed the instructions.

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Did Mr Clark go to St Mary's to distribute the pamphlets?

26 While the recognition evidence and the instructions to plead guilty are not by themselves sufficient, when the evidence is combined with the fact of the letter of apology, and the fact that at the time Mr Clark resided at 6 Ladbury Avenue, Penrith, the combination of all the evidence is sufficient.⁴ There is no reasonable hypothesis consistent with Mr Clark not going to St Mary's to distribute the pamphlets.

Did Mr Clark distribute the pamphlet?

27 Counsel for Mr Clark submits that there is no evidence of Mr Clark distributing pamphlets. The offence carries two fault elements; first, the intention to distribute the pamphlets; and secondly, recklessness as to whether the pamphlets were authorised.

28 In so far as intention to distribute is a necessary element of the offence. The test is whether Mr Clark meant to engage in that conduct.⁵

29 The facts going to prove intention are as follows:

- The rendezvous of the group of six persons was at the residence of Mr Clark.
- When Mr Clark arrived at the corner of Boronia and Debrincat Streets with the other five persons, they split into pairs, and moved off in different directions. Mr Clark moved off with another person.
- He was photographed carrying a bag over his shoulder with some of the pamphlets covering his face.
- The pamphlet was found in post-boxes
- He made a letter of apology after the incident, which stated inter alia: "Please accept my sincere apology for the damage done by my actions in preparing and distributing a pamphlet in St Mary's on Tuesday night."

⁴ *Shepherd v R* (1990) 170 CLR 555

⁵ Criminal Code Act 1995 s 5.2 (1)

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30 I find that the evidence when considered as a whole is sufficient for the tribunal of fact to be satisfied beyond a reasonable doubt that Mr Clark meant to distribute the pamphlet. There is no reasonable hypothesis consistent with Mr Clark not engaging in the distribution of the pamphlet.

Was Mr Clark reckless as to whether the pamphlet was authorised?

31 The letter of apology tends to prove that Mr Clark knew that the pamphlet was not authorised because it states in part that he prepared it. In addition, Mr Clark hid his face when he was being photographed.

32 As recklessness is a fault element for a physical element of conduct, proof of intention, knowledge or recklessness will satisfy the fault element.⁶

33 The evidence of Mr Clark preparing the pamphlet, and the fact of him covering his face when photographed is sufficient evidence when taken as a whole for a tribunal of fact to be satisfied beyond a reasonable doubt that Mr Clark knew that the pamphlet he meant to distribute was not authorised. There is no reasonable hypothesis consistent with Mr Clark not knowing that the pamphlet he meant to distribute was unauthorised.

Conclusion

34 I am satisfied when considering the evidence as a whole that there is no reasonable hypothesis consistent with innocence.

35 I am satisfied beyond a reasonable doubt when considering the evidence as a whole that Mr Clark committed the offence.

36 Mr Clark is convicted of the offence of distributing an electoral pamphlet, which did not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral pamphlet.

⁶ Ibid s 5.4 (4)