SUPREME COURT OF QUEENSLAND

CITATION:	*R v Booth; R v Combarngo* [2018] QCA 74
PARTIES:	**In CA No 79 of 2017** **R** **v** **BOOTH, Carlos Clinton** (appellant) **In CA No 82 of 2017** **R** **v** **COMBARNGO, Leniece Leigh** (appellant)
FILE NO/S:	CA No 79 of 2017 CA No 82 of 2017 DC No 592 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Convictions: 24 March 2017 (Jones DCJ)
DELIVERED ON:	20 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2018
JUDGES:	Gotterson JA and Douglas and Flanagan JJ
ORDERS:	**In Appeal No 79 of 2017 (in relation to Booth):** **Appeal dismissed.** **In Appeal No 82 of 2017 (in relation to Combarngo):** **Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where three people robbed a convenience store – where identity of robbers unknown – whether jury could have been satisfied beyond reasonable doubt that Booth was one of the robbers CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where three people robbed a convenience store – where one of the robbers was holding a shortened gun – where Combarngo had asked for equipment to shorten a gun the day before the robbery –

where it was uncertain whether the gun used in robbery was the same gun Combarngo had sought to modify – whether it was an intermediate circumstantial fact requiring a *Shepherd v The Queen* style direction that the gun used in the robbery was the same that Combarngo had sought to modify

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where three people robbed a convenience store – where Combarngo was overheard making a statement against interest after the robbery – where Combarngo was recorded making another statement against interest after the robbery – whether a direction about these statements against interest ought to have been given

Criminal Code (Qld), s 7(1)(a), s 7(1)(b), s 7(1)(c)

Burns v The Queen (1975) 132 CLR 258; [1975] HCA 21, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Magill v The Queen (2013) 42 VR 616; [2013] VSCA 259, distinguished
R v Clapham [2017] QCA 99, followed
R v Kuruvinakunnel [2012] QCA 330, applied
R v Schaeffer (2005) 13 VR 337; [2005] VSCA 306, distinguished
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, followed

COUNSEL: L K Crowley for the appellant, Booth
A M Hoare for the appellant, Combarngo
M T Whitbread for the respondent

SOLICITORS: Legal Aid Queensland for the for the appellant, Booth
Boucher Khan Toowoomba for the appellant, Combarngo
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Douglas J and with the reasons given by his Honour.

[2] **DOUGLAS J:** These are two appeals from a trial where each appellant was charged with committing armed robbery in company. There were four accused, one of whom, Michael Hearn, was acquitted. Another, Jake Hearn, did not pursue his appeal. Mr Booth was said to be one of three principal offenders charged under s 7(1)(a) of the *Criminal Code* while Ms Combarngo was charged as a party aiding or enabling the principal offenders in the commission of the offence pursuant to s 7(1)(b) and s 7(1)(c).

[3] Mr Booth's ground of appeal is that the verdict was unreasonable or cannot be supported by the evidence. Ms Combarngo's grounds of appeal were:

> "1. An intermediate circumstantial fact was critical in reaching the verdict of guilt. That is, the jury were required to find beyond reasonable doubt that the weapon that was cut down by the appellant was the weapon used in the armed robbery. That intermediate fact ought to have been clearly identified and a *Shepherd* direction ought to have been given in respect of it.
>
> 2. The Crown relied upon evidence that was said to be admissions against interest. There was no direction given as to how that evidence should be used by the jury and such a direction was required in this case."

[4] Mr Booth's ground of appeal requires the court to independently examine the evidence as to its sufficiency and quality to determine whether it was open to the jury to be reasonably satisfied beyond reasonable doubt of the appellant's guilt.[1]

The evidence

[5] On 2 August 2015 at 19:42:23 pm, according to CCTV footage of the event in ex 67, three men whose faces were covered and who were wearing gloves, entered the Gowrie One Stop Convenience store at Gowrie Junction and robbed two employees, Mr Bianchi and Mr Hevers, at gunpoint within a period of about 90 seconds. The first offender to enter the store jumped the counter and pointed a silver hand gun at Mr Bianchi. That offender was wearing a blue hoodie, shorts and yellow sneakers. The second offender to enter, holding a sawn-off firearm and wearing a grey "Everlast" jumper, was said to be wearing blue and white Adidas shoes as well as trousers. CCTV footage showed that the third offender appeared to be wearing a grey hoodie and trousers also. The significant issue, in respect of Mr Booth, was whether he could be identified as one of those three offenders, particularly whether he was the second person to enter the premises.

[6] Mr Bianchi saw one of the men holding what he believed to be a sawn-off shotgun.[2] That was not the man whom he described as jumping the counter with a silver pistol in his hand. Mr Bianchi's evidence of the man carrying the "shot gun" was that he was also tall and lanky and was wearing Dunlop Volleys on his feet.[3] He believed that one of the men he saw was carrying a black bag which he thought was a garbage bag.[4]

[7] Mr Hevers was mopping the floor in the kitchen area of the shop about two metres away from Mr Bianchi.[5] He saw the man in a blue hoodie and a silver revolver or hand gun and said he also saw a "sawn-off".[6] He described the two men holding those objects as close to each other with one coming through the door nearly at the register and the second one not far behind.[7] He went behind a door on the premises but was able to look into the kitchen and see Mr Bianchi on the floor in the middle of the kitchen lying down in front of the sink area.[8]

---

1 See *M v The Queen* (1994) 181 CLR 487; *SKA v The Queen* (2011) 243 CLR 400, 405-406 at [11]-[14].
2 AR 59/4.
3 AR 56/39-40; 57/2.
4 AR 65/36-45.
5 AR 67/15, 36-37.
6 AR 68/7-8.
7 AR 68/12-18.
8 AR 69/4-27.

[8] The robbers left and he tried to get a better description of them.[9] He had some familiarity with firearms.[10] He believed the silver gun was a revolver and that the other weapon was a double barrelled shot gun. He owned two shot guns at the time.[11] He believed the sawn-off weapon he observed had two barrels side by side.[12] He said that he knew it was a sawn-off because shot guns are longer than the weapon he observed.[13]

[9] The CCTV footage in ex 67 showing part of the offending was significant evidence. The likely conclusion from my viewing of that video was that the shortened weapon was a rifle rather than a double-barrelled shotgun. The footage also showed a large dark bag in the possession of the robbers.

[10] The circumstantial evidence relating to Mr Booth included the fact that he associated with Ms Combarngo. That evidence was given by Abe Reinbott who lived with his father, David Reinbott, in a house at Gowrie Mountain.[14] Ms Combarngo also lived at that address intermittently.[15] Through her Abe Reinbott met a man whom he knew as "Carlos" which is Mr Booth's first name.[16] He had seen both of them in a Toyota HiLux four wheel drive the first time he met Carlos.[17] Sometime in August 2015 he observed Ms Combarngo with Carlos and a couple of other men in a small white Suzuki sedan.[18] She then had something wrapped up in a towel more than a metre in length.[19] She described it to Abe Reinbott who recalled it being a "Kendo stick or a piece of furniture or something".[20]

[11] David Reinbott's evidence was also significant. He had known Ms Combarngo for "a couple of years".[21] He met Carlos though her as well as two other men.[22] He was familiar with a little white Suzuki as a car used by her and Carlos.[23] On 2 August 2015, Ms Combarngo and Carlos came to his home and he met the two other men.[24] He said that they went to "their room" and were talking there for a while when Ms Combarngo asked him if he had anything to cut metal.[25] She was in her room together with Carlos and the two other men. When he asked her what she wanted to cut, she said "a gun barrel" and he offered her a hacksaw from his garage together with four new blades.[26] He retrieved them from his garage or car shed.[27] After he gave her the hacksaw and blades she went back to her bedroom. He did

---

9 AR 70/19-21.
10 AR 70/38-45.
11 AR 72/26.
12 AR 72/31-33.
13 AR 72/40-44.
14 AR 80/19-24.
15 AR 80/38-41.
16 AR 81/11-14.
17 AR 81/20-22.
18 AR 81/24-82/1.
19 AR 82/11-23.
20 AR 82/31-36.
21 AR 113/24-27.
22 AR 114/1-16.
23 AR 114/25.
24 AR 114/43-45.
25 AR 115/1-5.
26 AR 115/37-39; 117/19-21.
27 AR 115/37-44; 116/32-43; 117/13-14.

not see any of them use the hacksaw.[28] All four of them later left at about half past three or four o'clock.[29] He saw that they had a big bag with them.[30] He described it as about a metre and a half long and about three quarters of a metre deep.[31]

[12] He heard about the robbery the next day at work, which was a Monday, and then on the Tuesday saw the front page of a newspaper at a shop.[32] When he went home Carlos was there with Ms Combarngo.[33] He showed them the newspaper article including a blurred photograph and said "that was you pair, wasn't it?".[34] They said "no" to him but he later heard them or saw them reading the newspaper and said that they were laughing about it.[35] In particular, he said that they were laughing about the gun because the paper said it was a sawn-off shot gun and they had a look at the photograph of it in the paper and said that it is not a sawn-off shot gun, "any mug could see that".[36]

[13] There was no direct evidence of what was in the photograph shown with the news story but in cross-examination David Reinbott said, in effect, that the newspaper's written description of the weapon as a sawn-off shotgun was not consistent with what he saw in the accompanying photograph.[37] So it seems from that evidence that the appellants were said to be referring to a newspaper photograph of a weapon that was not consistent with the written description of it as a shotgun. This is something that is relevant to Ms Combarngo's ground of appeal that there was no direction given by the learned trial judge as to how any admissions against interest by her should be used by the jury. Mr Booth's counsel did not make any submissions about whether such a direction should have been made for his client.

[14] David Reinbott also identified an item seized by police on 25 August 2015 when they executed a search warrant at his premises.[38] It was initially described as a long brown piece of metal rod but was later identified by Senior Sergeant Piper to be part of the barrel of a .22 calibre Stirling model 14 rifle.[39] He believed it had been severed from the remainder of the barrel by a hacksaw although he could not exclude another possible cutting instrument such as a diamond blade.[40] There was a hacksaw and a blade beside it on a bench when the barrel was found by police in David Reinbott's shed but no metal filings were found on the bench in the shed or Ms Combarngo's room.[41] Mr Reinbott had not seen the barrel there before the police came on 25 August and did not know how long it had been there.[42]

---

28 AR 155/20; 149/25-150/5.
29 AR 118/38-40.
30 AR 115/1-5.
31 AR 119/12-39.
32 AR 120/7-27.
33 AR 120/32-33.
34 AR 120/37-38.
35 AR 120/37-121/5.
36 AR 121/1-2.
37 AR 148/43-149/3.
38 AR 122/42-123/22.
39 AR 315/24-38.
40 AR 329/18-34.
41 AR 150/7-27; 235/40-41.
42 AR 123/25-26.

[15] David Reinbott accepted that he was an alcoholic and said that he had problems with his memory.[43] His Honour gave an appropriate direction about how the jury should approach his evidence in those circumstances.

[16] A Stirling model 14 rifle was a type made in the millions in the Philippines.[44] It was a repeating bolt action rifle with a magazine very close to the trigger guard.[45] The weapon shown in the CCTV footage was similar to another image of a weapon in ex 69, a photograph taken of Jake Hearn and Michael Hearn on a mobile telephone showing them holding weapons similar to those used in the robbery.

[17] The rifle shown in ex 69 was identified by Senior Sergeant Piper, a police firearms expert, as having all the features of a Stirling model 14 .22 calibre bolt action repeating rifle.[46] He did not, however, give evidence that the weapon shown in the CCTV footage was a Stirling rifle. The learned trial judge ruled that such evidence should not be given by him. The comparison between the weapons in the images was left for the jury to make themselves.

[18] Michael Hearn was acquitted. One rational basis for that result was because a pair of yellow Adidas shoes linked to him by DNA evidence were excluded by Mr Bianchi's evidence as having been worn by one of the offenders.[47] There was little other evidence linking him to the crime.

[19] Ms Combarngo's aunt gave evidence that in August 2015 Ms Combarngo had a large duffel bag a little less than a metre in length and probably 40 centimetres wide.[48] She described it as a dark blue bag.[49] She also gave evidence of her niece having a small back pack in her possession then.[50]

[20] An off-duty police officer, Senior Constable McHugh, was in his car in the vicinity of the shop around the time it was robbed on 2 August 2015.[51] He believed he was there about 7.40 pm.[52] As he was driving by he saw a white SUV which looked like a Rav 4 with Queensland plates on it parked a bit unusually next to a phone box.[53] Shortly after he saw three people with a fourth person coming slightly after them running out of a service station.[54] He thought that it was a bit unusual and did a U-turn. By the time he arrived back at the forecourt of the service station the vehicle that had been parked there was gone.[55] He identified the premises where he saw the people running from as the Gowrie One Stop shop. He said the men looked athletic and young.[56]

[21] Molly McNab drove past the Gowrie One Stop shop on 2 August 2015 at 7.42 pm.[57] She also noticed a car at the roundabout near the shop which she described as a

---

43 AR 146/22-23; 148/5-23.
44 AR 315/26-38.
45 AR 315/38; 316/14-17.
46 AR 323/21-29.
47 AR 56/7-9.
48 AR 88/8-20.
49 AR 88/38.
50 AR 89/27-28; 90/19-20.
51 AR 94/5-9.
52 AR 94/17-18.
53 AR 94/27-31.
54 AR 94/33-38.
55 AR 94/40-43.
56 AR 104/21-22.
57 AR 106/9-24.

white Suzuki "sedan-type" with a spoiler on its back.[58] It was behind a post box near the shop. She observed Mr Bianchi in the store appearing to be folding boxes.[59] She knew him slightly.[60] She had previously described the vehicle she observed as a Lancer rather than a Suzuki.[61] She described herself as really bad with makes and models of vehicles.[62] If her recollection of the time was accurate compared with that shown on the CCTV footage she must have passed by just before the robbery.

[22] Another police officer identified photographs of shoes seized from Mr Booth on 6 August 2015. Shoe prints had been left on the counter of the shop. When they were compared with the prints from the shoes seized from Mr Booth, there was an association of class characteristics such as their size, shape and general design so that they were said to be similar and to correspond.

[23] A grey Everlast hoodie was located in belongings taken from Ms Combarngo's room that was collected by her cousin after the offending and later provided to police. The brim of a cap seen under the grey Everlast hoodie in the CCTV footage is similar to that on a cap located in the backyard of a residence in the early hours of the morning of 6 August 2015 that had, admittedly, been worn by Mr Booth on 5 August 2015. The brim of that cap, shown in ex 17, has a "Limited Edition" logo on it. The video footage of the man wearing the grey "Everlast" hoodie, who was also wearing a cap, has what appears to be a logo in a similar position on the brim of the cap. The brim of the cap is also similar in colour to that shown in ex 17.

[24] There was evidence linking Ms Combarngo to the scene of the robbery when it occurred based on messages on a telephone found in her possession combined with phone tower locations showing that the telephone was in that general area. She was also recorded in telephone conversations after the robbery where, when told that police had seized a grey Everlast jumper "connected to a stick-up", she replied "yes I know". She also then said: "What the fuck is going on with (sic), they found the gun barrel out there." She also said that a backpack was at "Aunty Christine's" and to "leave that there".

[25] It is these statements together with the conversation between Mr Booth and Ms Combarngo overheard by David Reinbott about the newspaper story that were said to require a direction by the learned trial judge as to how that evidence should be used by the jury. There was no request for such a direction at the trial although the jury asked for the evidence about the newspaper story to be read back to them.[63]

Was the verdict against Mr Booth unreasonable or unsupported by the evidence?

Submissions

[26] Mr Crowley's argument for Mr Booth focussed on the proposition that the prosecution case did not exclude the reasonable possibility that the second robber was some other person than Mr Booth. He conceded that the evidence may lead to the view that Mr Booth knew something about the robbery but said that it was not

---

58 AR 106/45-107/7.
59 AR 108/30-32.
60 AR 108/34-35.
61 AR 108/45-109/2.
62 AR 109/10-12.
63 AR 590-591.

sufficient to identify him as the second robber. He pointed out that the victims could not positively identify any of the accused nor any of the clothes or weapons as being the actual clothes or weapons used in the robbery.

[27] He criticised the CCTV footage as not clear and not able to be used to make a positive identification of any individual. That submission is correct but it is still possible to identify, for example, the Everlast hoodie, the colours of shoes, the coloured brim extending from under the hoodie of the second robber and the appearance of some form of logo on it.

[28] In addressing the evidence that "Carlos" was with Ms Combarngo during the afternoon of 2 August 2015 at Mr Reinbott's residence when the conversation about cutting a gun barrel occurred, he submitted that the discovery of the metal rod in Mr Reinbott's shed did not establish how long it had been there nor link it to the rifle apparently used in the robbery.

[29] The conversation about the newspaper story overheard by David Reinbott was explicable on the basis that Ms Combarngo and Carlos were joking about what was written in the newspaper compared to what could be seen in the photograph in the story. Apparently the weapon in the photograph was not a sawn-off shotgun as it had been described in the article.

[30] Mr Booth's admission that he had worn the cap shown in ex 17 on 5 August 2015 could not lead to a conclusion that Mr Booth was wearing that cap on 2 August during the robbery. The CCTV only briefly showed part of a cap sticking out from under the hood of the jumper. It could not reliably be matched to ex 17.

[31] The existence of the Everlast jumper found by Ms Combarngo's cousin on 15 August 2015 at Mr Reinbott's residence again could not be linked to the appellant or the robbery. The evidence led in the Crown case about the recorded conversations involving Ms Combarngo and the Everlast jumper could not be used against Mr Booth but, in his submissions, suggested knowledge and possible involvement with that jumper and the robbery by a third party. Police had spoken to two other individuals on 7 August 2015, one of whom was wearing a grey Everlast hoodie and in possession of a cut-off end of a rifle barrel at the time but that evidence was discounted by the police evidence as irrelevant to this case.[64] There was further inconclusive evidence about a third person shown in a photograph that was not tendered who may have been associated with the alleged robbers and who was definitely not Mr Booth.[65]

[32] In addressing the evidence of the shoe imprints and their comparison with the shoes seized from Mr Booth on 6 August 2015, he argued that the association of class characteristics between the left shoe partial sole imprint and a test impression taken from the scene merely meant that there were similarities in the shape and size of the shoe and the pattern on its outside. The evidence in respect of the right shoe was similar and led to the conclusion, he submitted, that the shoe imprint evidence established no more than the fact that shoe prints found on the store counter had similarities to the shoe prints taken from the appellant's shoes.

[33] He argued that the fact that the evidence established that Mr Booth had been together with Jake and Michael Hearn on the afternoon of 2 August 2015 at David

---

64 AR 503/3-11.

65 AR 398/27-400/21.

Reinbott's house, coupled with the jury's finding that each of Jake Hearn and Ms Combarngo were involved in the robbery, led to the real danger that the case against Mr Booth was no longer one where the jury were focussed on whether the evidence admissible in his case considered as a whole was capable of proving his guilt beyond reasonable doubt. Rather, he submitted, there was a real possibility that the jury would simply have reasoned that, because there were four persons involved and because the appellant was associated with the two of those who were guilty, he must necessarily have been one of the other robbers so that guilt was established by association. He submitted that, although the antecedent circumstances legitimately formed part of the prosecution case against the appellant, proof of an association before the robbery by itself was of little probative value and did not compel a conclusion that the second robber must necessarily have been Mr Booth.

[34] The respondent's submission on this issue was that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence. The circumstantial evidence on which the submission was based has been detailed in my summary of the evidence earlier.

Consideration

[35] What seemed to me to be the significant features of that circumstantial evidence included the association of Mr Booth with Ms Combarngo and two other men where she lived earlier on the day of the robbery. They were seen in a white Suzuki sedan by Abe Reinbott and David Reinbott. Ms Combarngo was seen carrying something "on the plus side of a metre" wrapped in a towel. Mr Booth was in her bedroom with two other men when she returned with hacksaw blades supplied by David Reinbott to help her cut a gun barrel. Mr Booth left that residence with Ms Combarngo and the two other men on that day when she was carrying a long bag.

[36] Mr Booth's laughter at the newspaper story may not have been very significant but was still part of the mosaic of relevant events. The following further details proved in the prosecution case were all important in establishing his guilt:

1. A barrel sawn from a rifle was later found at David Reinbott's residence.
2. It had been removed by the use of a hacksaw blade.
3. A sawn-off rifle of the same type associated with the barrel was likely to have been used in the robbery.
4. A white vehicle similar to the one in which Mr Booth was observed earlier was seen by independent witnesses outside the shop where the robbery occurred at about the time that it occurred. The types of vehicle identified were not all consistent but that is not surprising given the circumstances in which the witnesses identified them.
5. An Everlast hoodie similar to one worn by one of the robbers carrying the shortened rifle was found in Ms Combarngo's belongings after the event.
6. The shoe prints found at the scene had very similar characteristics to the shoes seized shortly afterwards from Mr Booth which were also similar in appearance to the shoes worn by the robber wearing the Everlast hoodie.

7. The brim of the cap he had been wearing on 5 August 2015 and the brim of the cap shown in the CCTV footage were also very similar.

[37] This combination of circumstantial evidence amounts to a very strong case pointing directly to Mr Booth's involvement in the robbery. The only other individual identified by police as a possible suspect was excluded by their inquiries. That an unidentified third person may have been present with the robbers some time after the event was not compelling evidence against the conclusion that Mr Booth was the second robber. The evidence summarised at points 6 and 7 of the previous paragraph are highly persuasive indications that he was the second robber.

[38] The advantage that the jury had here from seeing and hearing the witnesses may not be as great as in some other cases because of the difficulties in identifying the robbers in disguise at the scene but the jury did have the advantage of seeing and hearing the witnesses from whom the other circumstantial evidence was led. The principles that apply were recently summarised by Fraser JA in *R v Clapham*:[66]

> "… The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if 'it would be dangerous in all the circumstances to allow the verdict of guilty to stand'. The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the 'starting point … is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses', but:
>
> > 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.'"

[39] In this case my independent assessment of the sufficiency and quality of the evidence has satisfied me that it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. The evidence seems to me to be both sufficient and to be of the appropriate quality to allow the verdict of guilty to stand.[67]

[40] Accordingly, I would dismiss the appeal by Mr Booth.

Was it necessary to direct the jury to find beyond a reasonable doubt that the weapon presumably cut down by Ms Combarngo or at her direction was the weapon used in the armed robbery?

---

66 [2017] QCA 99 at [4], citations omitted.

67 See *SKA v The Queen* (2011) 243 CLR 400, 408-409 at [21]-[22].

Submissions

[41] The submissions of Mr Hoare for Ms Combarngo focussed on the decision of the High Court in *Shepherd v The Queen*.[68] His argument was that proof that the weapon used in the robbery was the same as that cut down at Ms Combarngo's behest was an indispensable link in a chain of reasoning towards an inference of guilt against her. Because the victims at the scene described the weapon as a shotgun it was irrelevant that his client apparently had access to a .22 rifle.

[42] Mr Hoare conceded that other circumstantial facts such as the existence of the Everlast hoodie and the duffel bag did not possess such an indispensable character but were at best forensically neutral because, for example, Mr Booth as an associate of Ms Combarngo was capable of obtaining those items without her knowledge. He submitted, however, that there was no direct evidence of any communication between the appellant and her co-accused before the robbery. For her to be guilty as a party to the offence pursuant to s 7(1)(b) or s 7(1)(c) of the *Criminal Code* he argued that she must have cut down the .22 calibre weapon or, presumably, have asked one of the other co-accused to cut it down, with the intention that it be used in the robbery. He argued that it would then follow that the jury could only find the relevant intention in Ms Combarngo if the jury was satisfied beyond reasonable doubt that the weapon used in the robbery was the same weapon cut down by the appellant.

[43] The respondent's argument was, unsurprisingly, that the circumstantial case here was one drawn from evidence that consisted of strands in a cable rather than links in a chain so that it was not necessary for the jury to draw the necessary inferences beyond a reasonable doubt as to whether the weapon used was the same as the one apparently shortened at the house shortly before the robbery.

Consideration

[44] The proposition advanced on behalf of Ms Combarngo does not withstand detailed analysis. There is in fact no evidence that she cut down the weapon. The evidence suggests that she had that intention as she told David Reinbott that she wanted to cut a gun barrel and a severed gun barrel was what was found later at his premises. That evidence was relevant to help establish her intention to commit a robbery but it was not vital to the prosecution case to satisfy the jury beyond reasonable doubt that the weapon used in the robbery was the same as that said to be cut down by or for the appellant.

[45] That fact was simply part of the background facts including Ms Combarngo's association with Mr Booth and Jake Hearn, her possession of the duffel bag, the location of her telephone at the relevant times and the later recorded telephone conversations to which I have referred earlier. That the victims believed the robber had a shotgun did not require the jury to accept their evidence on that point given the other evidence of the type of weapon led at the trial.

[46] It was not necessary to establish her participation in the crime to direct the jury that they must be satisfied beyond reasonable doubt that the weapon used in the robbery was the same as the one apparently cut down by or for Ms Combarngo. The

---

68 (1990) 170 CLR 573, 579.

evidence about the shortening of the weapon was relevant to establish that she had the intention of enabling or aiding the men who entered the shop to commit the offence of armed robbery but it was merely part of the surrounding circumstances from which the jury were capable of drawing the inference of her guilt beyond reasonable doubt.

[47] Would she be any the less a party to the offence, for example, if the shortening of the barrel at the Reinbott house had rendered that rifle unusable and she had obtained another shortened rifle for use in the robbery?

[48] I would dismiss this ground of appeal.

Should a direction in respect of any statements against interest led against Ms Combarngo have been given?

Submissions

[49] Mr Hoare identified two pieces of evidence to which I have referred as statements against interest, namely the conversation between Ms Combarngo and Mr Booth in respect of the newspaper article and the transcript of the taped telephone call between her and a third party. He submitted that there was no forensic advantage in failing to seek directions that the jury could only use that evidence against her if they were satisfied that they were said by her and that they were true. It is significant, however, that the evidence was not challenged or made the subject of submissions by Ms Combarngo's or Mr Booth's counsel at the trial. Objectively speaking Ms Combarngo's counsel may not have wished to draw any further attention to the evidence than had already occurred.

[50] The conversation about the newspaper article although described as a statement against interest, was not the subject of any direction about how the evidence should be used. No direction was given that the jury could only use it against her if the jury was satisfied it was said and was true and no direction was given as to what weight to give to the evidence and what the jury may think it might prove. The same applied in respect of the transcript of the taped telephone call to which I have referred where Ms Combarngo spoke of the discovery of the Everlast jumper and the finding of the gun barrel.

[51] Such a direction was given in respect of telephone conversations concerning Jake Hearn that were said to amount to admissions but which his Honour characterised as statements against interest.[69] It is also clear that his Honour intended to direct the jury about how they should treat statements against interest.[70] He did not, however, turn his mind to making such a direction in respect of Ms Combarngo, nor did counsel submit that he should do so.

[52] Mr Hoare submitted that such a direction was particularly critical where the two statements identified by him post-dated the robbery and were capable of being explained as a recitation of generally known facts rather than facts known only peculiarly to the actual offenders. When one analyses the evidence of David Reinbott dealing with the conversation about the newspaper article, it seems evident

---

69 AR 530/9-24.

70 AR 516/21-517/15.

to me that it was capable of being explained on that basis as referable simply to the story and photograph in the newspaper.

[53] Mr Whitbread for the respondent submitted that the conversations were not challenged nor touched on in counsel's address. David Reinbott's evidence had been the subject of an appropriate warning that the jury would need to scrutinise it with a high degree of care before acting on it and should analyse it very carefully and act on it only if they were convinced of its truth and accuracy.[71] Mr Whitbread also submitted that the telephone conversations were undisputed and that there had been an appropriate direction in relation to circumstantial evidence such that no further directions were required so that there had not been any miscarriage of justice.

Consideration

[54] There was no confession made in the conversation about the newspaper article. It was appropriate, however, to treat it as a statement against interest. The jury could have thought, after hearing David Reinbott's evidence in chief, that Ms Combarngo's knowledge that it was not a sawn-off shotgun could come from her involvement in the events. It was not until the later cross-examination of Mr Reinbott that it became more apparent that the conversation was also explicable by reference to what was seen in an accompanying photograph to the newspaper story.

[55] If the conversation were to be treated as a confession it would normally have been incumbent on the learned trial judge to give a direction to the jury that they should not treat it as such unless they were satisfied that it was said and that it was true. Mr Hoare also submitted that the jury should have been told that the conversation may well have related simply to the apparent contrast between the written story and the weapon shown in an accompanying photograph.

[56] Similarly, Mr Hoare submitted that the statements in the recorded conversations about the Everlast jumper and the gun barrel, although not confessional, should be treated as statements against interest. It would also have been appropriate to direct the jury as to the use they could make of the statements having regard to the fact that they were made after the robbery and may have been facts not known only peculiarly to the actual offenders.

[57] The leading decision of the High Court about the use of confessional statements, *Burns v The Queen*[72] discussed some of the relevant issues in this area in these terms:

> "It is clear and elementary law that once a confessional statement has been admitted into evidence its weight and probative value are matters for the jury. It is for the jury to determine whether the alleged confession was made and whether it was true in whole or in part. Unless the jury are satisfied that so much of a confession as tends to show the guilt of the accused was true they cannot treat it as a proof of guilt. However, a confessional statement may be only one piece of the evidence against the accused and the jury are entitled to consider all the relevant evidence together in deciding upon their verdict. The

---

71 AR 539/16-18; AR 541/22; AR 541/25.

72 *Burns v The Queen* (1975) 132 CLR 258, 261, citation omitted.

> nature of the direction necessary to be given properly to instruct the jury as to the use of evidence of an alleged confession must depend on all the circumstances of the case. 'There is no rule of law or of practice which requires the Judge to caution the jury against acting on such evidence or which prescribes any measure of the comment which it is his duty to make upon it.' (*Ross v. The King*)."

[58] There may be differing views as to whether a trial judge should give such a direction in the case of statements against interest as opposed to a full confession. Such a direction has been described as "conventional" or "standard" in Victoria for "cases where the Crown relies in part on statements, made by way of admission or confession, to support its case".[73] Much will depend on the circumstances, however, as *Burns* makes clear.

[59] In *Magill v The Queen*[74] a majority of the Victorian Court of Appeal regarded it as necessary to make such a direction in a case where there was a live dispute as to whether the appellant was the author of the whole or any part of a relevant text message. With respect to the opposing view, that conclusion is hardly surprising. Here, however, there was no challenge to the identity of the maker of the statements or as to their having been made. They were not confessions but statements against interest. No direction of the type now sought was requested at the trial although the making of directions about such statements was raised by the trial judge.

[60] The failure to seek such a direction may well be explicable on the basis that trial counsel believed that there was no advantage to her client in drawing any further attention to the evidence. As Muir JA said in *R v Kuruvinakunnel*:[75]

> "As counsel for the respondent pointed out, there is no question about the accuracy of the recording. It was admitted into evidence without objection indicating that defence counsel had no concern about its contents. Defence counsel's failure to seek an appropriate direction or redirection is not necessarily fatal to the success of a ground of appeal based on a criticism of a summing up. However, objectively considered, there was good forensic reason for defence counsel not to request specific directions in respect of various passages in the record of interview. To do so would have risked unnecessary attention being drawn to those passages in the summing up. It follows that there was no unfairness in the conduct of the trial and no miscarriage of justice occurred."

[61] Those statements seem to me to be equally applicable to this case. His Honour's remarks were based in part on the decision of the High Court in *TKWJ v The Queen.*[76] In his reasons for that decision Gleeson CJ said, for example:[77]

> "It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply

---

73 *R v Schaeffer* (2005) 13 VR 337, 341 at [13], 352 at [65], referred to in *Magill v The Queen* (2013) 42 VR 616, 632 at [74].

74 (2013) 42 VR 616. Compare the dissenting views of Neave JA at [44]-[65].

75 [2012] QCA 330 at [54], citations omitted.

76 (2002) 212 CLR 124.

77 (2002) 212 CLR 124, 130-131 at [16].

> because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks."

[62] Similarly Gaudron J said:[78]

> "The question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open'. The word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open.
>
> One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test. An appellate court does not inquire whether the course taken by counsel was, in fact, taken for the purpose of obtaining a forensic advantage, but only whether it is capable of explanation on that basis.
>
> As already indicated, if there is a defect or irregularity in the trial, the fact that counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage is not necessarily determinative of the question whether there has been a miscarriage of justice. It may be that, in the circumstances, the forensic advantage is slight in comparison with the importance to be attached to the defect or irregularity in question. If so, the fact that counsel's conduct is explicable on the basis of forensic advantage will not preclude a court from holding that, nevertheless, there was a miscarriage of justice.
>
> …
>
> Where it is claimed that a miscarriage of justice was the result of a course taken at the trial, it is for the appellant to establish that the course was not the result of an informed and deliberate decision. This he or she will fail to do if the course taken is explicable on the basis that it could have resulted in a forensic advantage unless, in the

---

78 (2002) 212 CLR 124, 133-135 at [26]-[28] and [33] citations omitted.

> circumstances, the advantage is slight in comparison with the disadvantage resulting from the course in question. ..."

[63] Had these unchallenged statements by Ms Combarngo been repeated by the learned trial judge in the context of a direction that they may have been said by her because of knowledge acquired after the event, that emphasis could well have operated as a reminder to the jury that she may also have known of the relevant facts because she was actively involved in the robbery. That is an objective reason why no request was made at the trial for the direction now sought. His Honour's omission to make such a direction in these circumstances does not seem to me to have deprived Ms Combarngo of a chance of acquittal that was fairly open.

[64] Accordingly, I would dismiss this ground of appeal on the ground that there has been no miscarriage of justice.

Orders

[65] I would dismiss both appeals.

[66] **FLANAGAN J:** I agree with the orders proposed by Douglas J and with his Honour's reasons.