

SUPREME COURT OF QUEENSLAND

CITATION: *R v Carlyle* [2018] QCA 188

PARTIES: **R**
v
CARLYLE, Peter Joseph
(applicant/appellant)

FILE NO/S: CA No 232 of 2017
DC No 148 of 2017

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Ipswich – Date of Conviction and Sentence: 14 September 2017 (Horneman-Wren SC DCJ)

DELIVERED ON: 10 August 2018

DELIVERED AT: Brisbane

HEARING DATE: 21 March 2018

JUDGES: Gotterson and Morrison JJA and Boddice J

ORDERS: **1. The application for leave to adduce further submissions is granted.**
2. The application for leave to adduce further evidence is refused.
3. The appeal against conviction is dismissed.
4. Leave to appeal against sentence is refused.

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – BURGLARY, HOUSEBREAKING AND LIKE OFFENCES – SENTENCE – AGGRAVATED OFFENCES – where the appellant was convicted by a jury of one count of armed robbery – where the complainant was threatened with a gun – where the appellant was one party to the armed robbery – where the appellant had provided information to the man who committed the armed robbery (“the co-offender”) – where that information included the location and layout of the complainant’s premises, security at the premises, and information about the complainant – where the appellant had formerly worked for the complainant and had installed the security device at the premises where the robbery took place – where the appellant claimed at trial that he only provided the information because the co-offender threatened him with a gun – where the appellant claimed the co-offender was intoxicated by drugs at the time – where the co-offender denied this –

where the complainant was telephoned at his premises prior to the robbery – where there were conflicting accounts as to whether the appellant or the co-offender made the phone call to the complainant

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEALS – POWERS AND DISCRETION OF COURT ON APPEAL – LEAVE TO ADDUCE FURTHER EVIDENCE/SUBMISSIONS – where the appellant sought to adduce further submissions and evidence on appeal – where the appellant was not legally represented on appeal – where leave to adduce further submissions was granted – where further evidence was outlined by the appellant in handwritten summaries of alleged discrepancies in the evidence given at trial – whether a miscarriage of justice occurred – where the appellant has not obtained any such evidence – where such evidence, if it exists, could have been obtained with reasonable diligence prior to trial – whether such evidence would have materially added to the evidence to be considered by the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – whether it was open to the jury to accept the co-offender’s evidence, and reject the appellant’s account, of the robbery – where the co-offender gave consistent evidence at trial of the information provided by the appellant – where the appellant’s evidence contained inconsistencies – where the appellant did not tell police he had been threatened with a gun – whether it was open to the jury to be satisfied, beyond reasonable doubt, of the appellant’s guilt of armed robbery

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to three years six months imprisonment, with parole eligibility fixed at 18 months – where comparable authorities indicate a sentence of three to four years imprisonment is appropriate – where the appellant received a lesser sentence than that imposed on the co-offender – whether such a sentence was manifestly excessive

R v Casey [\[2003\] QCA 152](#), cited

R v Houldsworth & Crossman [\[1999\] QCA 322](#), cited

R v Morton [\[1997\] QCA 266](#), cited

R v Sherman [\[2007\] QCA 322](#), cited

COUNSEL: The appellant appeared on his own behalf
D Nardone for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the

respondent

- [1] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.
- [2] **MORRISON JA:** I agree with the reasons of Boddice J and the orders his Honour proposes.
- [3] **BODDICE JA:** On 14 September 2017, after a two day trial, a jury found the appellant guilty of armed robbery. He was sentenced to imprisonment for 3.5 years. After declaring six days spent in pre-sentence custody, the appellant was given a parole eligibility date of 8 June 2019.
- [4] The appellant appeals against his conviction and seeks leave to appeal against his sentence. The ground of appeal against conviction is that the verdict is unreasonable or cannot be supported having regard to the evidence. The ground of appeal against sentence, should leave be given, is that the sentence imposed was manifestly excessive in all the circumstances.

Background

- [5] The appellant was born on 5 October 1972. He was 44 years of age at the time of sentence and 42 years of age when he committed the offence.
- [6] The offence of armed robbery was committed on the night of 15 January 2015. The victim was Noel Smith, a 74 year old male operating his own motor vehicle repair service. He was confronted by a man who demanded money. The man showed him a gun, at the bottom of a backpack. The gun turned out to be a replica.
- [7] The man who committed the armed robbery was JSB. He pleaded guilty to that offence on 25 February 2016. He was sentenced to 4.5 years imprisonment. His parole eligibility date was at 18 months of that sentence.
- [8] The Crown case was that the appellant was a party to the armed robbery in that he provided information to JSB, concerning the complainant and his business premises, in order to facilitate the successful robbery of the complainant. The appellant had formerly worked for the complainant and had installed the security device at those premises. JSB removed that device at the time of the robbery.
- [9] The defence case was that JSB had threatened the appellant with a gun, demanding information in order to obtain money. The appellant gave him some information about Smith but not for the purposes of facilitating the armed robbery of Smith.

Evidence

- [10] On the evening of 15 January 2015, Smith was in the residential premises attached to his work premises in Goodna. At about 9.10 that evening, he received a telephone call from a male person. The male said his car had broken down and he needed a new battery. That person telephoned Peter Novak, an electrical businessman at Goodna who had given them Smith's telephone number.
- [11] Smith knew Peter Novak. They had assisted each other in business over many decades. Employees or former employees of Smith would be aware of that connection.

Smith told the male to give him 15 to 20 minutes to open up the reception of his workshop and he would get a battery for his car. Smith said the fact the male had mentioned Novak's name suggested to him the call was genuine.

- [12] Later that evening, Smith met with a male outside his workshop facilities. He unlocked the gates and allowed that person to come inside reception. Smith only opened the security gate to the premises after he spoke to the male who called out, "Are you Noel?". To the best of Smith's knowledge, the male had the same voice as the person in the telephone call. The male was carrying a large black and grey shoulder bag.
- [13] The male asked if Smith had EFTPOS. Smith then showed this male person two batteries he thought would be suitable. The male turned around, put his hand in the shoulder bag and said, "Can you see this?". Smith saw that the male had his hand on a revolver at the bottom of the bag. The gun reminded Smith of an old model silver or chrome revolver. It was approximately a foot long. The male did not ever remove the gun from the bag.
- [14] At that point, the male said, "Give me your money. Give me the safe." Smith replied he did not have a safe for money. He only kept business records in the safe. The male then came towards Smith who kept walking back into the main office. Smith said the male knew exactly where everything was within the office.
- [15] The male first grabbed the CCTV recording device in the main office. Underneath it was a recorder pushed right back in the drawer. The male knew its location. He went straight to it, pulled the recorder out and tore all the wires out and put the recorder in the bag. That happened straight away when he walked into the main office area.
- [16] The male then demanded Smith remove the drawer from the till, followed by requesting the money box, a petty cash tin kept on the filing cabinet of the office. Smith described the male as going through every drawer of the desk and grabbing everything he wanted or could see. The male grabbed a laptop off the desk. Smith gave the male a false password for his laptop.
- [17] The male then went into Smith's residential premises. He went through Smith's personal belongings. Smith tried to pacify him but the male was getting so agitated there was nothing he could do. The male had become agitated when the till drawer was empty. The money box also only contained loose coins. Smith gave the male his wallet to try and settle him down. Smith estimated he handed over between \$1,000 and \$1,300. The male spoke about having personal problems with one of his sons in Melbourne and of needing money for Melbourne in a hurry. After that, he did not speak further to Smith.
- [18] Whilst in the bedroom the male went through all the bedside tables and drawers. He took anything of value, including jewellery and watches. He also took two mobile phones. Smith asked if he could have the SIM card for the phones as he needed them for his business. The male allowed him to remove the SIM card.
- [19] When the male had finished getting everything he wanted he said, "Do not call the police ... because if you do I will come back and I will kill you."¹ The male then

¹ AB 20/25.

- quickly walked out of the premises. Smith waited 10 minutes before going to reception to look around to see if he could see the male. He then telephoned the police. He estimated the time was around 10 o'clock in the evening.
- [20] Smith said that at all times whilst inside the premises the male kept one hand in the bag with the gun. He used his left arm to collect the items taken by him. It took approximately 15 minutes. The male knew exactly what he wanted and what he wanted to go through. He knew everything. The male had demanded access to the complainant's safe in the bedroom. Smith told him he did not have one in the bedroom. Smith said he had never seen the male previously in his life.
- [21] Smith said the CCTV device was installed by the appellant in 2012 or 2013. The equipment had not been moved since that installation. The appellant had undertaken contract work for Smith from 2011 until early 2013. Initially, he helped rebuild after the January 2011 flood had totally wiped out Smith's business. The appellant did the rebuilding of the offices, kitchen, lounge and everything else. The appellant was well aware of Smith's business relationship with Novak. The appellant knew and dealt with Novak personally. The appellant also knew Smith lived on the premises.
- [22] Smith did not have a safe when the appellant worked for him. Smith also did not keep large amounts of cash on the premises. After the appellant finished working for him, he did not remain in contact. However, Smith had received a telephone call from the appellant a few days before 15 January 2015. The appellant wanted Smith to sell some electric drills and things that had some super batteries that could be recharged in 10 or 15 minutes. Smith declined the offer. Smith thought it was unusual the appellant had called him in January 2015.
- [23] In cross-examination, Smith agreed the male was extremely agitated and in a mad frenzy during the robbery. Smith was petrified he was going to do something crazy. He had the impression the male was under the influence of substances. He appeared absolutely desperate.
- [24] Smith accepted that when he first spoke to police the next day he told police the male had continually threatened that if he telephoned police he would be dead. Whilst those threats were made, the male still had his hand in the bag with the gun. Smith feared for his life. That was why he delayed for 10 minutes before calling the police.
- [25] JSB gave evidence he had known the appellant for a few years. He also knew a Wayne Patu, although that was for less time. JSB admitted he had committed the armed robbery of Smith on 15 January 2015. Prior to doing so, he had been driving around with the appellant and Patu. They were talking about ways to earn some money. JSB owed Patu money for drugs. That day was the last day Patu had given JSB to come up with the money. He was supposed to have paid for it weeks and weeks before.
- [26] JSB said they had a conversation about a mechanic the appellant had worked for who JSB could rob to obtain money. The appellant suggested he rob the mechanic. The appellant knew the layout. He knew where the CCTV security DVR box was and knew Smith lived on the premises and would be on-site in the evening. The appellant

- told him to say a local auto-electrician recommended that he give Smith a call in regards to getting a car battery² so Smith would open up the premises to get him a battery.
- [27] The appellant rang Smith from a telephone box in Goodna and organised to go to the premises. JSB then attended those premises. JSB said the appellant told him there would be a lot more money at the premises than was actually obtained by JSB. JSB was under the impression there was going to be a safe with heaps of money in it. He was not told where the safe was located in those premises.
- [28] The appellant told JSB the location of the DVR box. That box controlled the cameras on the CCTV system. If you do not have the DVR box, you do not have a back-up recording of what happened at those premises. If JSB took the DVR box the cameras would be useless. JSB was told the appellant had installed it. The appellant told JSB he had helped build things for Smith.
- [29] JSB said it was the appellant's idea to make the telephone call to Smith. They discussed what was going to be said in that conversation. The appellant also drew a diagram of the battery to give to Smith so that they could match it up. After that telephone call, JSB picked up Patu from Riverview. Patu was carrying a bag with a gun in it.
- [30] When Patu entered the vehicle, they had a discussion that they were going to do a job and JSB had found a way to get the money. Patu was told JSB was going to do an armed robbery on a mechanic and then take Patu to Nundah. JSB did not recall any specific conversation about using a gun but said Patu always had the gun on him.
- [31] During the conversation, the three of them discussed hitting the complainant on the head with the butt of the gun. JSB did not want to actually inflict injury. JSB took the gun out of Patu's bag and put into his backpack. It was an imitation .44 revolver about 35 centimetres long, silver in colour, with a black or brown-coloured handle.
- [32] JSB said they drove through Goodna and stopped near Smith's workshop area. JSB put a hat on, said, "I'm just going to do it", and walked off to Smith's workshop. He left the appellant and Patu in the motor vehicle.
- [33] When he arrived at Smith's premises the gate was shut. Smith asked, "Are you here for the battery?" and JSB replied, "Yes, I am". Smith then let him in. JSB gave Smith the battery diagram to check the terminals. They went inside the premises and Smith showed him batteries.
- [34] JSB asked if Smith took EFTPOS. JSB then pulled out the handle of the revolver and said, "Do you know what this is?". Smith said yes. JSB put the revolver back into the bag and asked for the location of the cash. By that stage, they had moved from the reception area into the office area.
- [35] JSB had Smith open the till to make sure there was no money in the till. JSB disconnected the DVR box from underneath the bench. Smith then handed JSB his wallet. JSB removed the money and gave the wallet back. JSB said he kept asking where the safe was. JSB removed a laptop from the office area and then walked into the bedroom at the rear of the premises. JSB went through Smith's possessions. He grabbed a handful of things. JSB recalled taking a watch, a set of

² AB 32/35.

- binoculars and mobile phones. JSB gave Smith back his SIM cards. JSB also took keys.
- [36] JSB said he was asking for the location of the safe because he was under the impression there was going to be a safe there containing money. He did not have any idea as to the location of that safe in the building. JSB said he targeted these premises because he thought there would be enough money there based on the information he had obtained from the appellant. JSB was telling Smith that everything was going to be alright, that he was not going to get hurt and to calm down. JSB recalled apologising to Smith.
- [37] JSB returned back to the motor vehicle. The appellant and Patu were still in the vehicle. JSB handed the bag to Patu and they drove off. JSB thinks they were shocked he had actually committed the robbery. There was a bit of a laugh and happiness, although JSB had mixed feelings. He recalled the appellant's reaction as being a bit of a shock.
- [38] JSB dropped the appellant off at the station at Wacol. The appellant was given some money by Patu. JSB and Patu then drove to the Moorooka train station where the DVR box and telephones were dumped before they drove to Nundah. JSB then returned to a friend's house where he shaved off his goatee beard and head. He then returned to pick up Patu and drove back to Goodna.
- [39] In cross-examination, JSB agreed it was about six months after the robbery that he contacted the police and gave them a statement implicating the appellant and Patu. At that time, he was in custody in relation to other offences. JSB agreed police had come to the prison to question him about the armed robbery. At that stage he did not make a statement. However, on 20 July 2015 he asked to speak to police in relation to the armed robbery.³ At that time JSB put his hand up for committing the robbery.
- [40] JSB accepted he had a lengthy criminal history in New South Wales, Victoria and Queensland. He had previously been convicted of the offence of robbery, amongst other offences. He had spent lengthy periods of time in custody. He knew he would face a lengthy sentence for the armed robbery. He denied knowing that if he implicated someone else he would receive a significant reduction in that sentence.
- [41] That was not the reason he made the statement to police. JSB had been sitting in a cell for three months and realised he had a pattern of behaviour of getting into trouble and he was now too old. He wanted to be out of the game. He had had enough. He decided to put his hand up, plead guilty and serve the time. It was not about implicating other people to benefit himself.
- [42] JSB told police he wanted to give evidence of what happened in the situation. He told police that on the night of the robbery he was driving around with the appellant. They had had a discussion in which the appellant gave him information about his old workplace. The appellant then made a telephone call whilst JSB waited in the motor vehicle. The appellant waited in the motor vehicle whilst JSB committed the robbery.
- [43] JSB denied that the only conversation he had had with the appellant in respect of Smith's workshop had occurred some weeks before the robbery in the carpark of the

³ AB 43/30.

Redbank Plains Tavern, when JSB was high on Ice and had a gun held at the appellant's head. JSB denied he had grabbed the appellant by the shirt, put a gun to his head and said words to the effect, "Pete, if you don't take me to where you bought the fucking drugs I'll put a bullet in your head."⁴ He denied he told the appellant he wanted the appellant to take him to his drug dealer's house so he could steal from him and that in that context the appellant had said he could, "Go rip off my old work. He might have cash around."⁵ JSB denied asking questions about the workplace; whether there were cameras, alarms, money and a safe.

- [44] JSB denied that about two weeks after that incident he contacted the appellant and apologised for what had happened and asked if he wanted to buy some items from him so that JSB could make money. He denied the appellant later made a telephone call and said he could not sell it for him.
- [45] JSB denied that when he first saw the appellant on 15 January 2017, Patu was already in the front passenger seat of the motor vehicle. JSB denied he offered the appellant a lift and then did a detour, stopped the vehicle and said he would return in a minute. He denied he took a bag from the boot and returned 10 to 15 minutes later and put the bag through the back window and told the appellant not to touch it.
- [46] JSB agreed that when he spoke to police about six months after the offence he did not mention at any point in the interview that the appellant received any proceeds of the robbery. He told police Patu got all the proceeds. JSB said he answered the questions asked of him. If that question was not raised it is possible he did not mention it to police.
- [47] JSB accepted he had received a reduction in his sentence for armed robbery as a result of giving the statement and evidence against the appellant. JSB was aware that if he did not go through with giving evidence he could be taken back to Court and lose that reduction. He agreed he would have received a sentence of five and a half years imprisonment but for his assistance in implicating the appellant and Patu. As a result of that cooperation, his sentence was reduced to four and a half years imprisonment.
- [48] JSB agreed that at the time of the armed robbery he was addicted to Ice, injecting most of the time on a daily basis. He was affected by the substance at the time of the robbery. He was supposed to be taking antipsychotic medication at that time but had stopped taking that medication. He agreed that as a result of his addiction he had stopped working and had lost his job contract and lost his house. He was in significant debt and in a desperate situation. He was also desperate to get drugs.
- [49] Jayce Gilchrist was the main police investigator of the robbery on 15 January 2015. That investigation revealed that at 9.10 in the morning of 15 January 2015, a telephone call had been made from a telephone box at Goodna to Smith's premises. CCTV footage also confirmed that the appellant had been dropped at the Wacol train station on the night of the offence, after its commission.
- [50] Gilchrist said he was approached by JSB on 20 July 2015. By that stage JSB had been charged with the offence of armed robbery of the complainant. JSB told him

⁴ AB 49/5.

⁵ AB 50/15.

he wished to participate in an interview in relation to the armed robbery and wished to inform him of the involvement of Patu and the appellant.

- [51] At the conclusion of the Crown case, the jury was informed that it was admitted JSB had been spoken to by a police officer on 25 May 2015, at which time he had declined to participate in an interview with police. JSB was charged on 3 July 2015 with the offence of armed robbery of the complainant and again declined to participate in an interview with police. On 20 July 2015 JSB participated in an interview with police. On 25 July 2015, JSB provided a six page statement to police regarding the armed robbery offence.
- [52] The appellant gave evidence in his defence. He admitted he had previously worked for Smith at his Goodna premises. He had undertaken general handyman work after the January 2011 floods. He worked for Smith for about three or four years. During that period, he had installed CCTV cameras as part of a DVR system. The appellant had only occasionally spoken to Smith since finishing work. He recalled telephoning Smith often. He had heard through a work colleague that the complainant was accusing him of the break and enter.
- [53] The appellant met Peter Novak about eight months after starting work with Smith. If Smith had an electrical fault that he could not work out, he would call Novak who was an auto-electrician. The appellant also knew JSB and Patu. The appellant accepted that in May 2014 and early 2015 he was using drugs. He would use the drug Ice regularly but did not abuse it.
- [54] The appellant had discussed with JSB breaking into Smith's premises. One evening, at the Redbank Plains Tavern, the appellant noticed JSB as the appellant left the building. This was about four to six weeks prior to the robbery. JSB had two other people in his motor vehicle. JSB asked the appellant if he had any drugs on him. When the appellant replied yes, JSB indicated he wanted to purchase some drugs.
- [55] The appellant entered the rear passenger seat of JSB's vehicle. There were two other male passengers in the vehicle. The appellant did not know those other males at that time. JSB grabbed the appellant by the shirt and put a "big silver thing" to his head. JSB said if the appellant did not tell him where he had obtained his drugs he was going to put a bullet in his head. The appellant remembered seeing a barrel that was hitting the side of his head.
- [56] The appellant would not tell JSB the address because there were two young children and an elderly woman at the house. JSB "was just ropeable". He was fidgety, shaking and sweating. JSB asked where he could get some money, saying he needed cash now. JSB's voice was deep and desperate. JSB was still pointing the gun at the appellant's head. At that point, the appellant mentioned Smith's work, saying there might be some money down there. JSB asked if there were alarms, cameras and a safe. The appellant told him there were cameras. He could not recall what else he told JSB.
- [57] The appellant told JSB about Smith's workplace because it was quiet and dark and there was no-one around that could be hurt down there. The appellant was "just shitting myself",⁶ trying to work out how he would get out of the situation. He directed JSB to a block of units. When they arrived, he jumped over a fence and

⁶ AB 71/37.

fled the area. The block of units was not the drug-house he had talked about to JSB. It was the best thing he could come up with a gun held to his head.

- [58] The appellant next saw JSB when he was driving past the appellant's parents' house approximately two weeks later. JSB was sweating and he had that sense of desperation. JSB asked the appellant to help. The appellant said that JSB had put a gun to his head. He told JSB to leave. JSB apologised and said it was not real. JSB produced some material from his car that he wanted the appellant to sell. The appellant made a phone call and then told JSB he could not help him to sell the material. He asked JSB to leave the premises.
- [59] The appellant did not see JSB after that time at his parents' house until an evening when the appellant was meeting his girlfriend at the Richlands Tavern. It was about two and a half weeks after the visit to his parents' house. The appellant was walking towards Goodna train station. JSB pulled up beside him on the side of the road with Patu. It was night-time. JSB said he was heading to Brisbane. He offered the appellant a lift.
- [60] The appellant hopped into the vehicle and sat in the rear passenger seat. JSB was in the driver seat. Patu was in the passenger seat. As they were travelling towards Brisbane, JSB said he had to make a detour. They parked in a street near Smith's premises. The appellant thought JSB was obtaining drugs as he knew there were three or four drug houses in the area. The appellant awaited with Patu.
- [61] After 10 or 15 minutes JSB returned to the vehicle. He threw a laptop through the window and a couple of other items. There was a black bag behind the seat. JSB said not to touch anything. He jumped in the car and they drove off. The appellant said JSB was playing it cool. JSB dropped the appellant off at the Wacol train station. JSB did not give the appellant anything at that time. The appellant then met his girlfriend and travelled to the Richlands Tavern. The appellant said he did not know about the robbery that night. He first heard about it the next day from a work colleague.
- [62] The appellant denied taking part in any conversation concerning the robbery on 15 January 2015. He denied being present at any stage when other people were discussing the robbery on 15 January 2015. He denied ever seeing a gun on that day or hearing any discussion concerning a gun. The appellant denied making a telephone call to Smith that evening. He denied being present when JSB or any other person made such a telephone call from a payphone.
- [63] The appellant said after he escaped from JSB on the night outside the Redbank Tavern he did not make a complaint to police. He does not "dog". The appellant feared for his children's life and that of his mother. The appellant said when he was interviewed by police he told them everything he knew about the offence, except he did not tell the police about the occasion JSB pulled a gun on him. The appellant was scared.
- [64] The appellant accepted a lift from JSB on the night of 15 January because JSB had apologised to him since the incident at the Redbank Plains Tavern. He had accepted that apology. The appellant accepted he had a criminal history but said he had not spent any time in custody. He had not previously been convicted of offences of robbery, armed robbery or breaking and entering style offences.
- [65] In cross-examination, the appellant said he only knew JSB before the robbery through drugs. The appellant accepted he told police that JSB owed money. The appellant

might have heard that because a friend knew JSB. He accepted he told police he knew Patu through a friend but said he did not know Patu before the robbery. He told police Patu did not have anything to do with the robbery because Patu was with him.

- [66] The appellant agreed that when he finished work with Smith, he claimed Smith owed him money. He estimated he was owed between \$2,900 and \$3,000. He told police Smith owed him three and a half thousand dollars. Smith never paid anybody properly.
- [67] The appellant said at the time he was interviewed by police he was not aware JSB had provided the statement to them. He did recall seeing a friend at Goodna at some point who told him she had been at the police station all day, being questioned about the appellant's sticking a gun to JSB's head because the appellant was in debt to the Russians or the Chinese Mafia. The appellant accepted he told police he could not believe what JSB had said in his statement and that it was "a fucking crock of bullshit".⁷ He did not tell police he had come to know about JSB's version from the friend he had seen at Goodna, who told him the story that JSB had said he had stuck a gun to his head.
- [68] The appellant agreed he told police he did not have a conversation with JSB in relation to Smith's address but said JSB knew he worked there. Everybody knew the mechanic around Goodna. JSB might have heard it in general conversation. The appellant also accepted he never contacted Smith to tell him he had disclosed information about his premises. It did not come into his mind because there was a 50/50 chance Smith would not have been at the premises. Smith did not live at the premises full-time. He would go to the Philippines six weeks off, six weeks on.
- [69] The appellant agreed he at one point told police he had been with two girls on the night in question, whereas he had earlier said he was with Patu at the time of the offence. He denied he was now giving a third version of what he was doing on the night of 15 January 2015. The appellant said, "There's a bit of crossed wires somewhere". The appellant said that the reason Patu did not do the robbery was because he knew he was with him at the time the robbery took place. They were both sitting in JSB's motor vehicle.
- [70] The appellant accepted he told police on 8 September 2016 he was not a thief and did not go around stealing. He accepted he had been convicted on 16 October 2015 of unauthorised dealing with shop goods, namely, putting \$20 worth of a fuel into a pump without paying for it. He had been further convicted on 28 July 2016 of a similar offence. He had also been convicted in 1990 of attempted false pretences and in April 2017 of drug offences and unauthorised dealing with shop goods for which he received four months imprisonment with immediate release on parole. The appellant said he had recently obtained assistance for his drug problem.
- [71] In re-examination, the appellant said he only knew of Patu in January 2015. By the time he was interviewed by police in September 2016, he knew Patu because Patu had branded him a dog.

Submissions

⁷ AB 80/35.

- [72] The appellant submits the verdict of the jury was unreasonable and against the weight of the evidence because there were significant discrepancies in JSB's account which ought to have caused a reasonable jury to have a reasonable doubt as to the appellant's guilt of the offence. The appellant relies on matters such as JSB's belief that there would be a safe and large amounts of cash in circumstances where the evidence of Smith was that he did not have a safe containing large amounts of cash, and never did have large amounts of cash on the premises.
- [73] The appellant submits the sentence imposed was manifestly excessive having regard to the delay in the proceeding, the time already served and his personal circumstances.
- [74] The respondent submits that a consideration of the evidence as a whole amply supports a conclusion that it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt. JSB gave direct evidence of the appellant having provided JSB with the address and details of the contents of the premises, including the position of the CCTV equipment. Smith's evidence supported in material respects JSB's evidence of knowing the whereabouts of the CCTV equipment and the layout of the premises. There was also evidence of a telephone call having been made to the complainant's premises shortly prior to the robbery. This evidence was consistent with and supportive of JSB's account of the ruse to arrange entry to the premises for JSB.
- [75] The respondent submits the sentence was not manifestly excessive. It properly reflected the appellant's involvement as a party in the armed robbery of an elderly person in his own premises.

Consideration

Leave to adduce further evidence

- [76] After the hearing of the appeal, the appellant sought leave to adduce further submissions and evidence on the appeal. That evidence related to handwritten summaries prepared by the appellant in respect of discrepancies in the evidence given at trial, evidence from witnesses as to the installation of a DVR and camera, evidence from police as to statements allegedly made by JSB, photographic evidence of the DVR box position and video footage of the appellant and JSB together on the night in question.
- [77] As the appellant was not legally represented on the appeal, I would grant leave for the appellant to adduce the further submissions. However, I would not grant leave for the appellant to adduce the remaining evidence. The appellant does not have, and has not obtained, any of the evidence sought to be adduced in those categories. There is no evidence that such material exists and if it does, all of it is in the category of evidence which would have existed prior to trial and which could have been obtained with reasonable diligence. In any event, none of it would materially add to the evidence that was placed before the jury. Accordingly, there is no basis to conclude that a miscarriage of justice arises if that evidence not be adduced on appeal.

Conviction

- [78] As to the conversation, JSB gave consistent evidence at trial of being provided information by the appellant as to Smith's address, the layout of his premises, the

position of the security system and of the name of the person to mention in the telephone call to arrange access to those premises. JSB's evidence was not shaken on cross-examination. Whilst there were aspects of that evidence that may have caused a jury to question its reliability, such as the reference to the existence of a safe and large amounts of cash in circumstances where Smith's evidence was that there was no safe at the time the appellant worked for him and there was never large amounts of cash on the premises, they were ultimately matters for the jury.

- [79] There was independent support for JSB's account. Smith's evidence of the nature and circumstances of the telephone call received by him shortly prior to JSB's arrival at the premises was remarkably consistent with the account given by JSB. The complainant also gave evidence that JSB knew of the whereabouts of the CCTV system, again supportive of JSB's account of the information provided to him by the appellant. The appellant's own account to police also placed the appellant in JSB's motor vehicle on the night of the robbery.
- [80] There was ample basis for the jury to reject the appellant's account of the circumstances in which he came to be in JSB's vehicle. The appellant never made a complaint to police of being threatened by JSB holding a gun to his head. He did not give that account to police when he was interviewed in relation to the robbery. His evidence before the jury was riddled with inconsistencies.
- [81] Once the jury rejected the appellant's account, there was overwhelming evidence supportive of an acceptance of JSB's account that the appellant had encouraged and assisted him in undertaking the armed robbery of Smith. That evidence also supported an alternate basis for the appellant's guilt, namely, that he had formed a plan with JSB to rob the complainant.
- [82] The consideration of the evidence as a whole satisfies me that it was open to the jury to find the appellant guilty of the offence of armed robbery, beyond reasonable doubt. The appeal against conviction should be dismissed.

Sentence

- [83] At sentence, the appellant's counsel conceded that the penalty contended for by the Crown, namely, a sentence of three to four years imprisonment, was open in all the circumstances. That concession was appropriately made, having regard to comparable authority.⁸
- [84] The sentence imposed on the appellant was substantially less than that imposed on JSB, who was sentenced to four and a half years imprisonment, with a parole eligibility date after serving 18 months of that sentence. JSB had pleaded guilty, and received the benefit of cooperation with the administration of justice. JSB did, however, have a more significant and directly relevant criminal history.
- [85] The appellant had few mitigating factors in his favour. There was a lack of cooperation and no evidence of remorse. Whilst his criminal history was limited, his involvement in the offence of armed robbery was significant, providing the necessary information for its commission. Smith was a 73 year old man, who the appellant knew would be at the business premises at the time of the robbery.

⁸ *R v Houldsworth & Crossman* [1999] QCA 322; *R v Sherman* [2007] QCA 322; *R v Casey* [2003] QCA 152; *R v Morton* [1997] QCA 266.

[86] Even allowing for the appellant's more limited involvement, a sentence of three and a half years imprisonment for the offence of armed robbery was not manifestly excessive. If anything, it may have been on the lenient side. As there were no features by way of mitigation, the setting of a parole eligibility date at 50 per cent of that sentence was an entirely appropriate exercise of the sentencing discretion.

[87] The application for leave to appeal against sentence should be refused.

Order

[88] I would order:

1. The application for leave to adduce further submissions be granted.
2. The application for leave to adduce further evidence be refused.
2. The appeal against conviction be dismissed.
3. Leave to appeal against sentence be refused.