SUPREME COURT OF QUEENSLAND

CITATION:	*R v Koani* [2018] QCA 272
PARTIES:	**R** **v** **KOANI, Christopher Charles** (appellant)
FILE NO/S:	CA No 38 of 2018 SC No 67 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 2 February 2018 (Douglas J)
DELIVERED ON:	16 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2018
JUDGES:	Sofronoff P and Gotterson JA and Flanagan J
ORDERS:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – MISCARRIAGE OF JUSTICE – where the appellant was convicted of murder for killing his girlfriend by discharging a shotgun at close range – where the appellant had pleaded guilty to manslaughter but this plea was not accepted by the Crown – where the sole issue at trial was whether the appellant intended to kill or cause grievous bodily harm to the deceased – where the shotgun that killed the deceased was old and had a number of defects, including that the spur of the gun's hammer had been shortened and the firearm was capable of discharge, if the hammer was sufficiently pulled back and released, without the trigger being pulled – where defence counsel submitted that the discharge of the gun that caused the deceased's death was "a terrible fatal accident" – where expert evidence was given as to the defects in the firearm and the manner in which it could be discharged without the trigger being pulled – where defence counsel emphasised the possibility that the appellant's thumb slipped off the hammer while he was cocking the shotgun, causing it to discharge – where the jury were allowed to handle the shotgun in the jury room – where the appellant submits that the jury ought not have been allowed to handle the shotgun in the jury room without any appropriate direction by the trial judge – where both counsel at trial reminded the jury of the use that they might make of

the gun in their deliberations – where no directions as to the use that the jury may make of the shotgun were sought by either counsel at trial – whether allowing the shotgun to go into the jury room without any directions on the use that could be made of it by the jury in their deliberations gave rise to a risk of the jury engaging in experimentation that might lead to new evidence unknown to the court

Kozul v The Queen (1981) 147 CLR 221; [1981] HCA 19, applied
R v Kozul [1980] 2 NSWLR 299, discussed
R v Skaf (2004) 60 NSWLR 86; [2004] NSWCCA 37, cited

COUNSEL: B J Power for the appellant
G J Cummings for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** This is an appeal against a conviction for murder.

[2] The appellant and Natalie Robyn Leaney were in a relationship that was deteriorating. On 10 March 2013 Ms Leaney was in the home unit in which she lived. After exchanging a series of angry text messages, the appellant joined her there. A friend of the appellant's, Shea Fenton, then arrived. He saw that the appellant and Ms Leaney were engaged in loud and angry argument. Mr Fenton sat on a set of stairs from which he could not quite see Ms Leaney. Mr Fenton heard the appellant say to Ms Leaney, "I don't give a fuck. I'm going back to jail anyway." A few moments later he heard the appellant say, "I don't give a fuck … I don't care. I'll shoot you." He could see the appellant pick up a shotgun and load it. "Then I just heard a bang."

[3] Another friend of the appellant's, Shane Writer, had been drinking with him that afternoon at a nearby pub. He came to the appellant's unit and was standing outside it from where he could hear the appellant and Ms Leaney hurling obscene insults at each other. He saw Mr Fenton arrive and he followed him into the unit. The appellant and Ms Leaney were still shouting abuse at each other. After a short time Mr Writer also saw the appellant pick up a shotgun cartridge and load it into a shotgun. He heard the appellant say "something along the lines of … 'I'll kill you'". He said, "He then pulls his arm up and it went bang."

[4] The shot killed Ms Leaney.

[5] When first asked by a police officer at the crime scene who had killed Ms Leaney, the appellant said that he did not know. A little later he said that "two skinny white guys" had come into the unit and one of those men had killed her. He was unable to describe them further. He could not describe their clothing. He said that they "just came in looking for a drug". He said that he had met them before but did not know them. A little later he said that one of these men had "robbed" him about a year and a half ago in Beenleigh. He did not know if the men had arrived by car. He did not know where they lived. He could not specify their approximate ages. He could not describe the colour of their hair. Intermittently he would repeat, "It's all my fault."

[6] The shotgun was an exhibit at the trial. It had been modified by somebody from its original state. The stock had been shortened as had the single barrel. The hammer too had been modified. The spur, the part on which one's thumb rests to cock the hammer, had been ground down to a stub. The effect was, evidently, to convert the shotgun into a concealable weapon. The reduction of the spur on the hammer would prevent the hammer catching on clothing. There was no suggestion that the appellant had altered the gun.

[7] A friend of the appellant's, Brendan Lalot, had seen him with the gun. Mr Lalot was himself familiar with firearms. He held a gun licence in New Zealand. He found the shotgun difficult to "break" open for loading. He was unable to do it. The appellant, he saw, was "playing around with it … locking and loading".

[8] Senior Sergeant Everist gave expert evidence about the shotgun. When he had first received the gun it had bloodstains on its surface. He had cleaned it a number of times during testing. He had disassembled and reassembled it. Photographs of the gun showed that when the appellant had fired it, the stock had been bound with black electrical tape. That tape had been removed, no doubt during Senior Sergeant Everist's examination of it. Otherwise, there was no evidence that the gun, as tendered, was in any different state, apart from its cleanliness and the removal of the tape, from its state when the appellant used it to shoot and kill Ms Leaney. No questions were asked by either counsel about this subject.

[9] Senior Sergeant Everist said that there were two ways by which this shotgun could be fired after it had been loaded. First, the hammer could be pulled back fully into the cocked position. This required it to be pulled back about 16.8 millimetres. In that state, the trigger had to be pulled to discharge the firearm. Second, the hammer could be pulled back at least 10 millimetres and then released. The resulting spring tension created by pulling the hammer back gave sufficient force to the hammer to discharge the weapon. Pulling the hammer back less than 10 millimetres would not generate an impact with the detonator on the cartridge that was sufficient to discharge the load. This means of firing the gun was not designed but was a defect that arose due to wear and tear. However, nothing turns upon the reason for the existence of this feature.

[10] Senior Sergeant Everist said that he had test fired the gun with the hammer pulled back and then released from distances of 10, 13.5 and 16.8 millimetres. He examined the resulting depression left by the gun's firing pin on the fired cartridges. As expected, the further back the hammer had been pulled, the deeper was the resulting depression. His examination of the cartridge that had been fired by the appellant led him to conclude that it was likely that it had been fired from the fully cocked position (using the trigger) or almost-cocked position (by releasing the hammer). He said that it was unlikely that it had been fired from a 10 or 13.5 millimetres position; the mark was too deep for that. It followed that it was likely that the appellant had cocked the gun and pulled the trigger or that he had pulled the hammer almost to the cocked position and had then released it.

[11] The appellant did not contest the fact that he had fired the gun and killed Ms Leaney. Indeed, he had pleaded guilty to manslaughter but that plea had not been accepted by the Crown. His defence maintained that he had fired the gun unintentionally. The expert evidence established that the reduction of the hammer spur meant that it was possible for a person who was thumbing back the hammer to

release it accidentally before it had been pulled back to the cocked position. The relevant testimony given in cross-examination was as follows:

> "And that removal of the spur might make it easier to mishandle the hammer in some way; is that right? --- Yes. If you were unfamiliar with the firearm I would say that it could make it more difficult to cock. Yes.
>
> Might it make it easier for [the gun] to discharge? --- If you were unfamiliar with the operation of the gun ---
>
> Yes? --- I would say that you could encounter a hammer-slip event."

[12] There was no evidence that the appellant was unfamiliar with the operation of the gun. The issue for the jury was whether or not the Crown had excluded the hypothesis that the appellant's thumb had accidentally slipped off the hammer, so that the gun discharged accidentally.

[13] The appellant did not give evidence.

[14] The Crown prosecutor, Mr Cash QC, as his Honour then was, put to the jury the prosecution's primary case upon the footing that the appellant had cocked the gun and pulled the trigger intending to kill his victim. He emphasised the unchallenged and uncontradicted evidence that the appellant had threatened to kill Ms Leaney, picked up the gun, opened the breech, inserted a cartridge, closed the gun, pointed it at Ms Leaney and pulled the hammer back. He invited the jury to conclude, from the evidence of Mr Lalot, that the appellant was familiar with the gun. He reminded the jury about the evidence of Mr Fenton and Mr Writer that the appellant had said "I'll kill you" and "I'll shoot you". He asked the jury to consider, as evidence of the appellant's consciousness of his guilt of murder, his subsequent lies to police about the fictitious two assailants.

[15] He then said:

> "The gun itself will be with you in the jury room. There's no evidence that suggests that it is in some materially different condition from that in which it was back in March 2013, and you're entitled to look at the gun for yourselves. You don't have to, of course. It's entirely a matter for you. If you choose to do so, you might come to the conclusion that someone who was operating this gun is very unlikely to accidentally discharge it. You would only shoot this gun as a result of deliberate conduct on the part of the person who was handling it."

[16] The appellant's counsel at trial, Mr Mumford, submitted to the jury that the evidence pointed to "a terrible fatal accident". He submitted that there was no evidence of the appellant's intention to kill Ms Leaney. He reminded the jury that the evidence of Senior Sergeant Everist was that the gun had defects, "hammer slip primarily among them". He submitted that Senior Sergeant Everist's evidence confirmed that hammer slip "was a possibility once the hammer was pulled back to some extent".

[17] It was important for the defence to respond to the evidence of Mr Lalot, upon which the prosecution relied to prove that the appellant was familiar with handling the gun,

in order to exclude an accidental discharge. Consequently, Mr Mumford submitted as follows:

> "But that's all [Mr Lalot] saw, opening and closing a gun. You will have that exhibit. There was no evidence from Mr – sorry, from Sergeant Everist, the forensic – the ballistics officer that this was in any way difficult to open or close. You can assess that for yourselves as you'll have the gun with you in the exhibit room. But that's all Mr Lalot said. He described it as – the loading mechanism being horrible and he couldn't load it. This is a matter for you, of course, but you might have thought that his frustration with – that seemed to be evident in the witness box was that he was someone who had an interest and experience with firearms, who'd been some sort of deer hunter in New Zealand, couldn't operate a gun. And all he did was open and close it. Mr Lalot makes no mention of Mr Koani pulling back the hammer or showing anything to do with the hammer slip, which I will come to. He didn't even say he cocked the trigger – sorry, cocked the hammer in full or in part. That's all the – that's all that Mr Lalot was able to say."

[18] Douglas J summed up to the jury and neither counsel sought any redirections. In due course, the jury returned a verdict of guilty of murder.

[19] The appellant appeals against his conviction for murder on the following grounds:

> "1. A miscarriage of justice was occasioned by the firearm being provided to the jury in the jury room during their deliberations without directions about the limitations of any experimentation with the firearm in the jury room to determine the issues in the trial.
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> 2. A miscarriage of justice was occasioned by a combination of the following circumstances:
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> (a) The learned Crown Prosecutor's statement to the jury, namely "there's no evidence that suggests that it [the firearm] is in some materially different condition from that in which it was back in March 2013" (AR 291.02);
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> (b) The Crown Prosecutor's invitation the jury to conduct their own experimentation with the firearm in order to answer the central issue in the trial; and
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> (c) The lack of directions or warnings to the jury from the learned trial judge on the Crown Prosecutor's submissions on this issue.
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> 3. A miscarriage of justice was occasioned by the Crown Prosecutor's address inviting the jury to find (on the basis of their own experimentation) that the accidental discharge of the firearm was "very unlikely" when this proposition was contrary to the evidence of the prosecution's expert witness and this contention had not been put to the prosecution's expert witness to give him the opportunity to comment on the proposition. In those circumstances, the submission by the

> Crown Prosecutor offended against the rule in *Browne v Dunn* (1893) 6 R 67 (HL)."

[20] Those grounds boil down to three issues. First, whether there was error in permitting the jury to have the gun in the jury room without any appropriate direction by the trial judge, particularly after the prosecutor had made his statement about how the jury might use the gun in the course of deliberations. Second, whether there was any miscarriage of justice in the prosecutor having told the jury that there was no evidence that the condition of the gun, which he had invited the jury to examine, was materially different from its condition when the offence was committed. Third, whether the prosecutor had impermissibly contradicted his own witness by suggesting that the jury might conclude that a hammer slip was very unlikely.

[21] The law relating to the use by a jury of exhibits is not controversial. In another case in which the central issue was the use that could be made by a jury of a gun that had been tendered as an exhibit, *Kozul v The Queen*,[1] the High Court established the following principles:

1. Exhibits are as much a part of the evidence as oral testimony;[2]
2. The jury is entitled to have the exhibits with them in the jury room, to examine them and to have regard to them in reaching a verdict;[3]
3. The jury may touch and handle exhibits;[4]
4. The jury may, "within limits that are readily understood in practice if difficult to define with precision, engage in a limited amount of simple experimentation with them."[5]

[22] In *Kozul* the trial judge had invited the jury to "feel it, test it, examine it" and to "test it for yourselves … use your commonsense, in determining whether or not, while it is uncocked some blow to the hand can cause the finger to move that distance back, and the gun to go off".[6]

[23] When the case was before the Court of Appeal of New South Wales, Street CJ said:

> "The revolver was properly in evidence. There was expert evidence regarding what was needed to make it discharge. It seems to me no less than common expectation that the jury would try out for itself the propensities of this weapon, its liability to discharge, the ease and difficulty of operating it, and do such other things in relation to it as would enable them to make up their minds as to whether or not the Crown had proved beyond reasonable doubt that this weapon was deliberately discharged by the appellant on the night in question."[7]

[24] Glass JA said that what the judge had asked the jury to do was "to use their own powers of observation with respect to the pistol to estimate the value of the

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1 (1981) 147 CLR 221, affirming [1980] 2 NSWLR 299.
2 *supra*, at 226 per Gibbs CJ.
3 *supra*, at 226 per Gibbs CJ and 234 per Stephen J.
4 *supra*, at 226 per Gibbs CJ.
5 *ibid*.
6 *supra* at 224.
7 *R v Kozul* [1980] 2 NSWLR 299 at [13].

testimony before them and not to carry out experiments of their own for the purpose of gathering additional evidence".[8]

[25] As Gibbs CJ observed, the line may be a difficult one to draw, but the relevant distinction is between, on one side of the line, the use of an exhibit in order to appreciate better the value of testimony and, on the other side of the line, the use of an exhibit to generate further evidence out of the hearing and view of the court.[9]

[26] Stephen J said that it was proper for the trial judge to tell the jury that they might experience for themselves trigger pressures of twelve and four pounds by pressing the trigger while the revolver was both cocked and uncocked.[10] Gibbs CJ made the same point and observed that in "experimenting in this way the jury are doing no more than using their own senses to assess the weight and value of the evidence".[11]

[27] That was precisely the position here. The characteristic of the gun to discharge if the hammer was released was a central issue in the trial. Both parties addressed it. Appropriately, both counsel, each of them highly experienced criminal trial barristers, reminded the jury of the use that they might make of the gun to aid in their deliberations in just the way Street CJ described in *Kozul*. Neither counsel invited the jury to do anything that might amount to the kind of "experiment" that would generate fresh evidence. Neither of these two experienced barristers considered that this was an occasion on which they should be concerned that the jury might misuse the advantage of access to the exhibit. Nor did the experienced trial judge. Accordingly, neither counsel asked Douglas J to give the directions that are now urged as having been essential for justice to be done.

[28] In my view the judgment of the trial barristers was right. This was nothing more than a case of a very common kind in which a jury is asked to consider the oral evidence and the rival theories of the case by reference to the jury's own observations, sensations and judgment about a piece of tangible evidence. There was no risk here of the jury engaging in some kind of experiment that might lead to new evidence unknown to the court. Indeed, when asked in the course of oral argument what kind of experiment the jury might have conducted that might have risked an injustice, counsel for the appellant was unable to respond. That is understandable. The members of this Court have examined the weapon. In particular, the shortness of the hammer lends verisimilitude to the proposition that one's thumb might slip off the hammer in the act of cocking the gun. It is hard to think of much that could have been done by the jury with respect to this simple single barrel shot gun that might generate some evidence or even a false notion about it.

[29] I would reject this ground of appeal.

[30] The second issue raised by the grounds of appeal concerns the prosecutor's suggestion to the jury that there was no evidence that suggested that at the trial the gun was in a materially different state from its state at the time of the shooting.

[31] The prosecutor's statement was manifestly true because there was no such evidence. However, during oral argument on the appeal, it was pointed out by the appellant's counsel that the gun had been cleaned and disassembled and reassembled by Senior

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8 *supra* at [19].

9 cf. *R v Skaf* (2004) 60 NSWLR 86, a case of an unauthorized private view by jurors.

10 *supra* at 235.

11 *supra* at 226.

Sergeant Everist more than once during testing. That is true. But that does not mean that the condition of the gun was materially changed. In written submissions the appellant said that the gun "was likely to be in a different state now than it was on 10 March 2013". That submission cannot be accepted. Apart from its cleaning, the removal of the tape and firing it, nothing had been done to the gun since March 2013. Certainly, at the trial, when Mr Mumford for the appellant invited the jury to consider the gun during deliberations, he did not suggest that any material changes had been made. Nor, as I have said, did he question Senior Sergeant Everist about this issue.

[32] This was not in issue at the trial and it is not an issue now. I would reject this ground.

[33] The final ground of appeal concerns what is now said to be a contradiction of his own witness by the prosecutor.

[34] In his address, the prosecutor submitted to the jury that their examination of the gun might lead to the conclusion that "someone who is operating this gun is very unlikely to accidentally discharge it". The appellant submits that statement was "in clear conflict with the Prosecution's expert witness" and that "no such proposition had ever been put to the expert for comment".

[35] In his evidence in chief Senior Sergeant Everist had said that the modification to the hammer made it "more difficult to control the rearward movement of the hammer during the cocking process" and he repeated this in cross-examination. He also said, "If you were unfamiliar with the operation of the gun … I would say that you could encounter a hammer-slip event." He was unable to say whether the cartridge had been fired by operation of the trigger or by releasing the hammer. He did not say whether an accidental discharge was likely or unlikely.

[36] The prosecutor's argument was not contrary to the evidence and neither did it conflict with the evidence of Senior Sergeant Everist. It was an argument based upon what the jury might think after they had seen and handled the weapon. Any firearm might be discharged accidentally. The possibility that was emphasised by the defence in this case was that the appellant's thumb might have slipped off the hammer while he was cocking it. That possibility did not metamorphose during the trial into a likelihood. It remained a possibility. It remained true that, as with any such gun that has been fired, the whole of the circumstances surrounding its firing, and not just the condition of the weapon itself, will determine the likelihood that the shot was fired accidentally. As I have said, the appellant did not give evidence. However, the jury had evidence that, if accepted, proved that the appellant had threatened to kill Ms Leaney; was familiar with the operation of the gun; had loaded it without the kind of difficulty that Mr Lalot, a man who had experience with firearms, had encountered; had pointed it at Ms Leaney and had then pulled back the hammer, an act that was necessary if he intended to fire the weapon. There was also the important evidence of Senior Sergeant Everist that the mark left by the gun's firing pin on the cartridge made it likely that the hammer had been fully cocked or almost fully cocked when the gun was fired. This was a very strong circumstantial case of an intentional killing. The evidence certainly justified the prosecutor's submission which, in any case, did not contradict anything that Senior Sergeant Everist had said. Certainly defence counsel must have seen nothing

improper in the submission for he raised no objection to it and neither did Douglas J.

[37] I would reject this ground and, for these reasons, I would dismiss the appeal.

[38] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.

[39] **FLANAGAN J:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.