SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lovett* [2020] QCA 86
PARTIES:	**R** **v** **LOVETT, Kylie** (appellant/applicant)
FILE NO/S:	CA No 128 of 2019 DC No 788 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 17 April 2019; Date of Sentence: 18 April 2019 (Allen QC DCJ)
DELIVERED ON:	28 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2019
JUDGES:	Morrison and Philippides and McMurdo JJA
ORDERS:	**1. The appeal be allowed.** **2. The conviction be set aside.** **3. A retrial be ordered.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – JURISDICTION – WHERE QUESTION OF EXTRA-TERRITORIALITY RAISED – LOCALITY OF CRIME – where the appellant was charged with an offence of extortion – where demands and threats were made by emails – where it was not established that at least three of the emails were sent by the appellant when she was in Queensland – where this deficiency in the prosecution case was not recognised by anyone before or during the trial – whether the issue of locality had to be raised by the defence case CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – OTHER CASES – where the respondent submitted that there is an unfairness caused by the jurisdiction point not being taken by the appellant at the trial, because the prosecution was denied the opportunity to undertake further investigations – whether the evidence at the trial was sufficient to justify a conviction – whether a new trial should be ordered *Criminal Code* (Qld), s 12, s 415

Gerakiteys v The Queen (1984) 153 CLR 317; [1984] HCA 8, cited
R v Taufahema (2007) 228 CLR 232; [2007] HCA 11, distinguished
R v WAF & SBN [2010] 1 Qd R 370; [2009] QCA 144, distinguished
Reid v The Queen [1980] AC 343, cited
Thompson v The Queen (1989) 169 CLR 1; [1989] HCA 30, applied

COUNSEL: D R Wilson for the appellant/applicant
D Balic for the respondent

SOLICITORS: Stewart Burr and Mayr Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have had the advantage of reading the draft reasons prepared by McMurdo JA. For the reasons he gives, I agree that the appeal must be allowed and the conviction set aside. However, I would order a retrial for the reasons which follow.

[2] The trial concerned the sending of four emails. The first three were on 25 September 2015, 25 February 2016 and 7 March 2016. The last was on 7 April 2017. The evidence adduced by the Crown on the hearing of the appeal consisted of records of the appellant's arrival into and exit from Australia in the period between 19 March 2015 and 14 November 2016. Those records established that the first three emails were sent at a time when the appellant was not in Australia, but in New Zealand.

[3] However, the evidence revealed that the appellant last left Australia on 16 June 2016, and arrived back in Brisbane on 14 November 2016. The appellant did not depart from Australia after 14 November 2016. Thus, on the evidence the last email was not sent when the appellant was in New Zealand.

[4] That evidence is relevant to some matters which the appellant said in her police interview on 2 August 2017. She told the police:

(a) she had recalled the conduct which was the subject of the emails, in February 2015 at which time she was on the Sunshine Coast in Queensland, "where my family was", "So I was naturally back there";

(b) the bank account supplied for payment of the amount demanded was one at a Westpac Bank in Queensland and "the only reason we used that account is because it was … the account we weren't using. It was … in Sunshine Coast and we were both in New Zealand";

(c) at the time of the interview the appellant's partner was in Grafton, in New South Wales; the appellant and her partner had been in Sydney, where the appellant was working, and her partner got an employment opportunity in Grafton so they both moved there; however, as soon as the appellant got there she could tell that her partner did not want her there, and therefore "I did the right thing for me and just took off for a while";

(d) she had been finally separated from her partner "for about the last five weeks"; and

(e) she was not with her partner when she wrote the emails.

[5] The jury were told there was only one issue in the trial. The Crown opening included this statement when referring to the elements of the offence:[1]

> "There's a timeframe, divers dates – that means, simply, particular dates within that period of time. **Brisbane or elsewhere in the State of Queensland, there's no question in this trial about the jurisdiction**."

[6] Then, after having gone through the emails, the prosecutor said:[2]

> "Now, the issue in this trial, I suspect, will be whether or not you accept that her demands for money were a genuine demand … with intent to gain a benefit, and the Crown says that … the evidence that you'll have, shows that beyond any reasonable doubt."

[7] The statement, "there's no question in this trial about the jurisdiction", was not put in issue by the defence. In fact, when the defence opened its case immediately after the prosecution, the jury were told:[3]

> "Members of the jury, I wish to address you very briefly right at the outset **to flag to you what the real issue is in this trial**. It's only going to be a short trial from all expectations, and **there's really only one key matter in dispute in this trial**. **The issue is whether Ms Lovett intended to receive any money – any benefit – from these emails** …"

[8] Thus the jury were told, without objection, that there was no issue as to jurisdiction (i.e. that if an offence was proved it occurred in Queensland), and there was only one matter in dispute, which was whether the appellant intended to receive any money or benefit from the email threats.

[9] Then, in the defence address the jury were told at the outset that "the only issue that I'm pressing on you in this trial is about what Ms Lovett intended".[4] The address ended with the jury being told that "The element that is in dispute here is about what she intended …".[5]

[10] In the summing up the jury were reminded that the defence raised only one issue, which was the question of intent.[6] Given what had been said on the issue of location or jurisdiction it is not surprising that the learned trial judge addressed it on the basis that it was not in issue:[7]

> "**And having said all that, it doesn't seem to me that there's any particular questions, ultimately, as to the primary facts which**

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1 Appeal Book (Vol 1) (**AB**) 12 lines 6-8; emphasis added.
2 AB 15 lines 32-36.
3 AB 16 lines 5-9; emphasis added.
4 AB 28 lines 5-6.
5 AB 35 line 21.
6 AB 49 lines 23-25.
7 AB 40 lines 20-40; emphasis added.

> **you are to consider. That is, those evidence – that evidence established by the emails themselves.** I'll have some more to say about the other evidence before you, in particular the interview between the defendant and the police later but what I'll do is I'll do that in the context of addressing the elements of the offence, which the prosecution must prove, and I'll hand out to you a document which I hope may assist in explaining to you what the elements of the offence are.
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> So, firstly, I've set out the terms of the charge in the indictment as it was read to the defendant at the start of the trial, and you'll see that that follows a form which has been prescribed for many years and perhaps, isn't the easiest syntax to read. The defendant is charged that on divers, and that's various, dates between the 24th day of September 2015 and the 8th day of April 2017 at Brisbane or elsewhere in the State of Queensland that she demanded money, without reasonable cause, with intent to gain a benefit for herself or another, threatened to cause a detriment to [the complainant].
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> That being said, the elements of the offence can be more simply expressed. The prosecution must prove each element of the offence beyond a reasonable doubt to prove the defendant guilty. Those elements are four in number."

[11] It is true to say that the jurisdictional point was not taken at the trial, but in my view, it is open to infer that that was the result of a deliberate act on the part of the defence. The prosecutor told the jury, without any objection then or later, that so far as the indictment averred the offence occurred in Queensland, "there's no question in this trial about the jurisdiction". Such a statement could only have been made on the basis that the defence had already made that known. That is consistent with the way the defence opened its case and addressed.

[12] In my view, it can also be inferred that the consequence was that the prosecution did not concern itself with the pursuit of evidence as if that was in issue.

[13] Based on what they were told it is highly likely that the jury did not concern themselves with the issue of location or jurisdiction, a question which otherwise they would have to decide.[8]

[14] The case therefore does not fit into the category dealt with by Chesterman JA in *R v WAF & SBN*,[9] where the objection to jurisdiction is taken on a motion to quash the indictment or as part of a plea of not guilty. In *WAF* the issue arose during cross-examination of a prosecution witness, and leave was granted to the prosecution to adduce further evidence. And that issue was then the subject of directions in the summing up. The evidence ultimately proved inadequate to prove the offences occurred in Queensland, but as Chesterman JA pointed out, "the Crown was not deprived of the opportunity to call such evidence as it could on the point when the point was raised", and that is why no unfairness to the Crown occurred.[10]

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8 *Thompson v The Queen* (1989) 169 CLR 1 at 22; [1989] HCA 30.
9 [2009] QCA 144 at [12]-[20]; Applegarth J concurring at [71].
10 *WAF* at [20].

[15] That is sufficient to demonstrate that *WAF* was a different case to the present one, where the jury was told there was no jurisdiction issue, no such issue was raised at trial, the jury was not asked to address it, and the point was not even raised in the first notice of appeal.

[16] In my view, a retrial would not be inconsistent with authority. *Gerakiteys v The Queen*[11] was a case not concerned with location or jurisdiction but with the general insufficiency of evidence to prove the charged conspiracy. The insufficiency arose in the context of the relevant issue having been fully litigated at trial. The foundation of the principle expressed by Gibbs CJ in *Gerakiteys* was the decision of the Privy Council in *Reid v The Queen*.[12] Their Lordships were not dealing with a case where jurisdiction was the relevant issue, let alone one where jurisdiction had been effectively conceded, but whether the evidence of identification of the offender was sufficient. Their Lordships were careful to articulate that the factors governing whether a retrial should be ordered will vary case to case, and that they were not laying down an exhaustive catalogue of applicable factors.[13]

[17] *R v Taufahema*[14] was not a case concerned with location or jurisdiction issues, but rather misdirections on joint criminal purpose and common purpose in a murder trial. The Court of Criminal Appeal had declined to order a new trial, and entered verdicts of acquittal. The Crown sought to appeal only in respect of whether a retrial should have been ordered. That was sought so that the Crown could advance a case that had not been put at the trial or before the Court of Criminal Appeal. That would have affected questions of admissibility of evidence at the trial.[15]

[18] In that context the High Court explained that the reason why an order for a retrial would conflict with basic principle was, in part, that a new trial should not be ordered **merely** to give the prosecution an opportunity of presenting evidence which it failed to present at the first trial.[16] Implicit in that approach is a recognition that cases where the question of a retrial is concerned will be decided according to their differing facts.

[19] Here the defence accepted that there was no question as to jurisdiction, the jury were told that, the only live issue raised by the defence was as to intent, and the summing up proceeded on the basis that jurisdiction was accepted. Whilst it is true to say that the obligation to establish jurisdiction remained throughout on the prosecution, there is no reason to think that had a jurisdictional challenge been a live issue, the prosecution would not have paid additional attention in terms of evidence on that issue.

[20] Further, though Applegarth J applied *Taufahema* in *WAF*, the majority did not. And, Applegarth J concluded in *WAF* that it was doubtful whether additional evidence could cure the location deficiency and there was no suggestion that additional evidence could not have been presented at the trial. In my view, that is not the case here.

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11 (1984) 153 CLR 317.
12 [1980] AC 343 at 349-350.
13 *Reid* at 346, 348-351.
14 (2007) 228 CLR 232 at 256 [52]; [2007] HCA 11.
15 *Taufahema* per Gleeson CJ and Callinan J at [29]-[30].
16 *Taufahema* at [52].

[21] In my view, given the way in which the trial was conducted on the basis that the defence accepted that jurisdiction was not in question, that the point is now sought to be agitated for the first time on appeal does create relevant unfairness on the part of the Crown.

[22] The prosecution here contended that it should be given the opportunity to gather evidence on that issue as concerns the last email, the first three being undoubtedly sent while the appellant was in New Zealand. It was accepted that the Crown case could be proven by reference to the last email alone, if the jurisdiction existed. In circumstances where the appellant was in Australia and not New Zealand, and was neither in Sydney nor Grafton for a period, and where she regarded her parents' house in Queensland as being the natural place to be from time to time, there is more than a remote possibility, in my view, that further investigations by the Crown might establish the requisite link with Queensland. The appellant had been finally separated, according to her police interview, from her partner since sometime in June 2017. However, in the interview she referred to the fact that when she left Sydney to go to Grafton to join her partner, it was obvious that her partner was unhappy with her being there, and so she left. That was not said to be the final separation. One possibility is that she returned to Queensland at a time which does not exclude the date of the email, 7 April 2017.

[23] For these reasons I would order a retrial.

[24] **PHILIPPIDES JA:** I have had the advantage of reading the reasons of both Morrison and McMurdo JJA.

[25] For the reasons given by McMurdo JA, I agree that the appeal should be allowed and the conviction set aside.

[26] However, I agree with Morrison JA that a retrial should be ordered.

[27] **McMURDO JA:** The appellant was charged with an offence of extortion under s 415 of the *Criminal Code* (Qld). It was alleged that on occasions between 24 September 2015 and 8 April 2017, "at Brisbane or elsewhere in the State of Queensland", she demanded money, without reasonable cause, and with an intent to gain a benefit for herself, and threatened to cause a detriment to the person from whom the money was demanded.

[28] The prosecution case was that her demands and threats were made by four emails from her to the complainant, which were sent on 25 September 2015, 25 February and 7 March 2016, and 7 April 2017. The appellant demanded that the recipient pay her an amount of $624,000, and, failing that payment, she threatened to expose the recipient as a paedophile who had raped and molested children.

[29] The defence case was that the jury would not be satisfied that the appellant did intend to receive a benefit, and in particular the money which she demanded, and that her intention was only to have the complainant admit his offending. The appellant did not give evidence and that case was argued to the jury from the terms of the emails and the evidence of her interview by police. The jury took little time in returning with their verdict of guilty. The appellant was sentenced to a term of three years' imprisonment, with release on parole after 18 months. She had served 98 days of her sentence when, ahead of the hearing of this appeal, she was granted bail.

[30] Unfortunately, no one at the trial realised that there was a deficiency in the prosecution case which, it is conceded by the respondent, must result in this appeal being allowed and the conviction being set aside. The deficiency was that on the evidence, it was not established that any of the emails was sent by the appellant when she was in Queensland, or (if it mattered) any of them was received by the complainant when he was in Queensland. The evidence was that three of the emails were sent by her when she was in New Zealand, and that all of them were received by the complainant when he was in France. The last of the emails was apparently sent when the appellant was in Australia, but the evidence did not prove, on the balance of probabilities,[17] that she was then in Queensland.

[31] Section 12 of the *Criminal Code* relevantly provides:

> "Application of Code as to offences wholly or partially committed in Queensland
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> (1) This Code applies to every person who does an act in Queensland or makes an omission in Queensland, which in either case constitutes an offence.
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> (2) Where acts or omissions occur which, if they all occurred in Queensland, would constitute an offence and any of the acts or omissions occur in Queensland, the person who does the acts or makes the omissions is guilty of an offence of the same kind and is liable to the same punishment as if all the acts or omissions had occurred in Queensland.
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> (3) Where an event occurs in Queensland caused by an act done or omission made out of Queensland which, if done or made in Queensland, would constitute an offence, the person who does the act or makes the omission is guilty of an offence of the same kind and is liable to the same punishment as if the act or omission had occurred in Queensland."

[32] As the respondent accepts, the "act", for the purposes of s 12, was the sending of an email. The respondent further submits that the complainant's receipt of an email would be "an event" in the terms of s 12(3), but accepts that this occurred, for each email, outside Queensland.

[33] The case did have connections with Queensland. The conduct which the appellant, by her emails, alleged against the complainant, was conduct which had occurred in Queensland. And her threats to expose that conduct included threats that she would go to the police in Queensland, with the result that he would be prosecuted here. There was also a threat to expose the complainant's conduct to his business associates in this State. But these circumstances were not sufficient, according to s 12, to engage the operation of s 415 of the *Code* in this case.

[34] Section 415(1) provides as follows:

> "Extortion

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17 See *Thompson v The Queen* (1989) 169 CLR 1; [1989] HCA 30.

> (1) A person (the ***demander***) who, without reasonable cause, makes a demand—
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> (a) with intent to—
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> (i) gain a benefit for any person (whether or not the demander); or
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> (ii) cause a detriment to any person other than the demander; and
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> (b) with a threat to cause a detriment to any person other than the demander;
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> commits a crime."

[35] The relevant "act" which "constitutes an offence" is that act which renders the person doing it liable to punishment.[18] Under s 415, those acts are the making of a demand and the making of a threat to cause detriment. And to be liable to punishment for an offence under s 415, the person must make the demand with a certain intention. However, it is not an element of the offence that there be any result from the offender's conduct. In particular, s 415 does not require the offender to have caused any detriment to any person. The fact that the detriment or detriments which were threatened, had the appellant made good on her threats, would have been experienced in Queensland, is of no consequence for present purposes.

[36] Unfortunately, this deficiency in the prosecution case was not recognised by anyone before or during the trial. Indeed, it was not recognised when the notice of appeal was filed. But that is not fatal to the point being raised ultimately on appeal, as was held in *R v Hildebrandt*,[19] and more recently in this Court in *R v Young*.[20]

[37] In *Thompson v The Queen*, Brennan J said:[21]

> "In other words, if the charge alleges the commission of an offence against the law administered by the court (the law of the forum), the court has jurisdiction to hear and determine the charge, but when an issue is raised as to the locality of the offence the jury may have to decide the issue in order to determine whether the conduct charged falls within the territorial ambit of the law of the forum. Locality then becomes a fact on which liability to conviction depends."

In *R v Young*, this Court rejected a submission that the words "when an issue is raised as to the locality of the offence" in that passage meant that the issue had to be raised in the defence case, rather than being raised by the evidence.[22]

[38] The conduct which was charged against the appellant did not fall within the territorial ambit of s 415 of the *Code*. But there is an issue of whether the appellant should be acquitted, or instead, as the prosecution suggests, she should be retried.

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18 Section 2 of the *Criminal Code* and see *R v Barlow* (1997) 188 CLR 1 at 9; [1997] HCA 19.
19 [1964] Qd R 43.
20 [2020] QCA 3 at [121]-[125].
21 (1989) 169 CLR 1 at 22; [1989] HCA 30.
22 [2020] QCA 3 at [125].

[39] The prosecution tendered evidence in this Court, which detailed the movements of the appellant in and out of Australia at relevant times. That evidence does not show that, in truth, the appellant was in Queensland when she sent any of the emails. Nor does it indicate a particular prospect that further evidence, from which that fact could be proved, might be obtained. There is the possibility that the appellant was in Queensland when she sent the last of the emails. But if there is to be a retrial, that fact would have to be proved on the balance of probabilities, and there is no evidence, even by now, by which that could be proved. There is no more than a possibility that by further investigations, that evidence might be found.

[40] The submission for the respondent is that there is an unfairness caused by the point not being taken by the appellant at the trial, because the prosecution was denied the opportunity to cause further investigations to be made to overcome this deficiency in its case. It is unfortunate that the point was not taken by the appellant at the trial, but there is no suggestion that this was done deliberately. Nor can it be concluded that it led to an unfairness in the absence of anything more than a theoretical possibility that the necessary evidence existed and could have been found had the point been taken then.

[41] In any case, to order a retrial would be inconsistent with the authorities which govern the Court's exercise of this discretion. In *Gerakiteys v The Queen*,[23] Gibbs CJ, when considering what was a sound exercise of the power of a court of criminal appeal to order a new trial, said:

> "It would conflict with basic principle to order a new trial in a case in which the evidence at the original trial was insufficient to justify a conviction."

[42] Referring to that passage, Gummow, Hayne, Heydon and Crennan JJ said in *R v Taufahema*:[24]

> "That proposition rests in part on the idea that if the evidence is unchanged at the second trial, accused persons should not be placed in jeopardy of conviction by a second jury where an appellate court has found that the evidence was insufficient at the first trial; and in part on the idea that a new trial should not be ordered merely to give the prosecution an opportunity of mending its hand and presenting new evidence at the second trial which it failed to present at the first."

[43] In *R v WAF & SBN*[25], those authorities were applied by Applegarth J, to a case of the present kind, as follows:

> "These principles are apposite in the present case. The evidence at the trial on the location issue was insufficient to justify convictions on counts 1, 2 and 3. It is doubtful whether additional evidence can cure that deficiency. However, a new trial should not be ordered merely to give the prosecution an opportunity of presenting new evidence at a second trial which it failed to present at the first. There is no suggestion that any additional evidence that the prosecution would

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23 (1984) 153 CLR 317 at 321; [1984] HCA 8.
24 (2007) 228 CLR 232 at 256 [52]; [2007] HCA 11.
25 [2010] 1 Qd R 370; [2009] QCA 144 at [78].

> wish to present at a new trial on the location issue could not have been presented at the trial. The matter is governed by the principle stated by Gibbs CJ in *Gerakiteys* and it would not be a sound exercise of the Court's discretion to order a new trial on counts 1, 2 and 3." (footnotes omitted)

[44] The respondent's submission that there should be an order for a retrial cannot be accepted.

[45] I would order as follows:

1. Allow the appeal.
2. Set aside the conviction.
3. Acquit the appellant of the charge on the indictment.