SUPREME COURT OF QUEENSLAND

CITATION:	*R v McPherson* [2002] QCA 401
PARTIES:	**R** **v** **McPHERSON, Terri Ann** (appellant)
FILE NO/S:	CA No 118 of 2002 DC No 39 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	4 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2002
JUDGES:	Davies and Williams JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against convicition dismissed**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – IDENTIFICATION EVIDENCE – DIRECTION TO JURY – ADEQUACY OF WARNING – where appellant convicted of unlawful use of a motor vehicle to facilitate the commission of an indictable offence and robbery in company with personal violence - whether there was such serious weakness in the identification evidence such that the learned trial judge failed to satisfy the *Domican* requirements in his summing up *Domican v The Queen* (1991-92) 173 CLR 555, considered
COUNSEL:	K M McGinness for the appellant D L Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Williams JA and with the order he proposes.

[2] **WILLIAMS JA:** The appellant appeals against her conviction on two charges, namely:

(1) Unlawful use of a motor vehicle to facilitate the commission of an indictable offence;

(2) Robbery in company with personal violence.

[3] At the trial it was not disputed that a young woman named Simpson was robbed on 29 January 2002. The trial was conducted on the basis that the robbery was committed by two young women, Green and Williams. The incident took place in Raff Street, Toowoomba at about 5.45pm. After assaulting Simpson and grabbing her purse the two robbers were seen to get into a motor vehicle which drove away. That motor vehicle was a red Commodore which had been unlawfully taken (stolen) from Brisbane earlier in the day. Witnesses recorded the registration number of the vehicle and it was intercepted by police approximately 12 minutes after they were notified of the incident. It was stopped in Godfrey Street after a police vehicle travelling in Campbell Street initially saw it travelling southbound on McKenzie Street. Campbell Street crosses Raff Street near where the robbery occurred, so it could reasonably be inferred that Godfrey Street was not too far away from the scene of the crime.

[4] When the vehicle was intercepted it was being driven by Williams, who, as noted above, was one of the robbers. Green, the other robber was in the rear seat behind the driver. The appellant, McPherson, was in the middle rear seat with a very young child sitting on her lap. A 14 year old girl named Kayla Bond was in the rear seat against the passenger side door and a 13 year old boy, David Bond, was in the front passenger seat.

[5] Whilst the robbery was taking place the red Commodore was seen to drive slowly past the scene, do a U-turn, come back down Raff Street, and then do another U-turn so that it was again going slowly towards where the incident was taking place. It pulled up just after where the robbery was taking place and the two assailants jumped into the car and it then "took off". It is obvious that Williams, one of the actual attackers, was not driving the vehicle at that time, so there must have been a change of drivers in the approximate 12 minutes which elapsed before the vehicle was intercepted by police.

[6] Neither could Green have been the driver of that vehicle whilst it was in Raff Street. It is therefore a reasonably logical inference that either the appellant or one of the Bond children was driving at that time.

[7] There was evidence from a witness to the events in Raff Street, Becken, identifying the appellant as the driver of the vehicle when the two assailants were picked up. It was primarily on his evidence that the appellant was convicted. The appellant contends that the learned trial judge failed to direct the jury fully in accordance with *Domican v The Queen* (1992) 173 CLR 555 and generally that because of the unsatisfactory nature of the identification evidence the verdict was unsafe and unsatisfactory.

[8] It was also contended that the learned trial judge erred in law in directing the jury that a verdict of unlawful use of a motor vehicle without the circumstance of

aggravation was not open as an alternative to the first charge. That contention can be disposed of shortly.

[9] The particular direction in question was given in response to a question from the jury. The jury asked whether the appellant could be convicted on the first count if she was a passenger at all times in the vehicle. The learned trial judge told the jury that given "the way the prosecution has presented the case to you" in order to convict "you must be satisfied beyond reasonable doubt she was the driver of the vehicle". He also said "to find the accused guilty of both counts, you would have to be satisfied beyond reasonable doubt she was the driver of the vehicle". Because count 1 contained a circumstance of aggravation which equated the offence in count 2 he went on to say that it was "all or nothing in respect of both counts in this sense".

[10] In my view those directions were apposite given the circumstances of the case. Also, given the manoeuvres of the red Commodore around the scene where the robbery took place, the driver must have been aware of what was occurring. Whoever was driving had a clear, uninterrupted view of what was happening on the footpath. The vehicle then stopped to pick up the other two. It could not be disputed that that was a deliberate move on the part of the driver. In those circumstances there was no rational basis for concluding that the driver was guilty of the offence of unlawful use of a motor vehicle but without the circumstance of aggravation.

[11] Essentially the submission on behalf of the appellant is that the learned trial judge did not give the jury the opportunity of arriving at a compromise verdict. If anything, the direction was favourable to the appellant.

[12] The critical question was that of identification. Whoever was the driver when the two assailants were picked up was guilty of the two counts. That means that the real issue on the hearing of this appeal is the sufficiency of the evidence of identification and the directions given with respect thereto.

[13] Police photographed each of the five occupants of the red Commodore shortly after apprehension. The photographs show them in the clothing they were wearing at the time. Two photographs of each of the four young women and one photograph of the young boy were in evidence. The jury could have regard to those photographs when evaluating all the evidence as to identification.

[14] Though for present purposes the critical issue is the identification of the appellant it is instructive to record the identification evidence given with respect to each of the five occupants of the vehicle.

[15] The complainant Simpson gave a statement to a police officer at the scene very shortly after the incident occurred. She described the first girl who approached her broadly as follows:

> "…fair small hair and fair skin. … slim build … about my height. I am 159 centimetres … aged about 16 to 19 years but probably closer to 16 years … wearing light coloured clothes …"

[16] The second girl who joined in the attack was described by Simpson to the police as follows:

> "… taller than the first girl, a bigger build but not fat … skin colour as though she was a light-coloured Aboriginal or was part Aboriginal. She was wearing a brightly coloured pinkie-maroon top … she had her hair pulled back. She was about 26 to 30 years old."

[17] The eyewitness Becken was also interviewed at the scene by police shortly after the incident occurred. From the evidence of Constable Mouatt it appears that he was only asked then to provide a description of the actual robbers. He gave the following description of the first assailant:

> "She looked fairly young; about 17 years. Fair-skinned with her hair in a ponytail. She had a singlet top on. It was white or light-coloured with some sort of patterns on it".

[18] With respect to the girl who then joined in as the second assailant he gave the following description:

> "… about the same age – 16 or 17 years … She had a red singlet top on and wearing dark shorts. She had her hair in a ponytail and appeared to be part aboriginal. She had what appeared to be a dark birthmark on her right rear shoulder."

[19] Constable Gleeson was one of the police officers involved with the interception of the red Commodore in Godfrey Street. He was the witness who gave evidence as to where the five persons were seated in the vehicle, and also identified Williams as the person driving the vehicle when it was intercepted. He noted that Williams "had a birthmark on her right shoulder" and her hair was in a "ponytail". He also gave evidence that Green's hair was in a "ponytail".

[20] It should also be noted that another witness, Quinton, saw some of the incident. Of relevance for present purposes is his evidence that he saw a girl wearing a "red singlet" jump into the red Commodore.

[21] For purposes of evaluating the identification evidence the descriptions given by the witnesses to police officers immediately after the incident occurred are the most relevant. But I also record what each of Simpson and Becken said in oral evidence at the trial as to the description of the actual attackers.

[22] The description given by Simpson of the first girl was as follows:

> "young girl … About 16 … Fair hair … Skin colouring – fair … clothing – light coloured … Slim".

[23] With respect to the second girl who joined in the attack she gave the following description:

> "Dark skinned, but not really dark. She looked like she was a light skinned sort of aboriginal … hair pulled back … nicely dressed … Heavier set".

[24] Becken's description in evidence of the first girl was as follows:

> "She was in a white floral print shirt … Between 15 and 17 … Hair – lightish brown – in a ponytail … fair complexion … wearing a floral print singlet – white with flowers on it".

[25] With respect to the second girl who joined into the attack, Becken gave the following description in evidence:

> "in a red singlet top. She had dark pants on … hair in a ponytail … hair – darker brown … darker complexion … birth mark on her right shoulder blade".

[26] As already noted the jury had photographs of Green and Williams in the clothes they were wearing at the material time. The photograph of Green depicted a young girl of slim build, with fair hair, fair complexion, and wearing a white singlet type top with a floral pattern on it.

[27] The photograph of Williams showed a young woman of dark complexion who could well be described as appearing to be part Aboriginal. She was wearing a red top and dark shorts. She was of bigger build than Green.

[28] When one considers the photographs, and the recorded observations of Constable Gleeson, it has to be said that the descriptions given by Simpson and Becken, particularly the latter, were remarkably accurate. In particular it should be noted that Becken in his statement to Constable Mouatt at the scene referred to the birthmark on the shoulder of Williams. But it is also a fact that Becken picked out the wrong photographs when asked if he could identify the robbers from a photo board some months after the incident.

[29] I now turn to the identification of the appellant. As already noted Constable Mouatt did not ask at the scene for Becken to provide a description of the driver of the vehicle. Constable Gleeson asked him to provide a description of the driver on 3 February 2001. Gleeson said he believed the description then given was "short haired girl, part-Aboriginal appearance." On 30 April 2001 Constable Gleeson showed Becken a photo board containing twelve photographs. A video recording was made of the interview and it showed Becken making the identification. He identified a photograph of the appellant as being the driver of the vehicle in Raff Street at the time of the robbery. In evidence in chief at the trial Becken was asked to describe the driver of the vehicle. He said:

> "Was short or wasn't very tall in the seat; had short hair . . . had a dark complexion."

The photograph of the appellant showed a young woman with apparent short hair and of dark complexion.

[30] It seems clear that the only observation Becken had of the driver was whilst the vehicle was moving. He was cross-examined about the view that he had of the driver. He saw the driver more than once and said that on the third time the vehicle passed him it was "going slowly". On one other occasion it was going "about normal speed".

[31] It is also clear that at some stage Becken told police that there were two male children in the back seat aged about eleven years. He said one had a baseball cap on backwards. He referred to the one without the baseball cap as having short curly hair which was dark black. The jury had photographs Kayla Bond and David Bond. The former had a baseball cap in her possession when first seen by Constable Gleeson; he did not say she was then wearing it. She also had short dark hair and (as shown by the photograph) was of "boyish" appearance. David Bond had the baseball cap with him when photographed. Becken said in evidence the person

wearing the cap was male and he could only be mistaken about the sex of the person not wearing the cap.

[32] Under cross-examination Becken conceded his error in attempting to identify the actual robbers on the photo boards. When it was put to him that it was possible he made a mistake in identifying the driver of a moving vehicle he answered: "Anything is possible." A jury could well come to the conclusion that Becken was not endeavouring to overstate his identification evidence.

[33] As already noted the jury had photographs of all the people in the motor vehicle when it was intercepted. Given that the trial was run on the basis that Green and Williams were the actual assailants, they could not have been the driver at the material time. The jury could well have been satisfied that Kayla Bond and David Bond were the two young people of boyish appearance said by Becken to have been in the back seat. Each was clearly quite different in appearance from the appellant. The jury had the photograph of the appellant and may readily have concluded that no one would confuse her with either Kayla Bond or David Bond. Against that background they had the evidence that the eye witness Becken picked her out as the driver. Given that the appellant did not give evidence, and at least she was in the motor vehicle shortly after the critical time, it was easier for the jury to conclude beyond reasonable doubt she was the driver.

[34] In his summing up the learned trial judge directed the jury that the prosecution case depended "to a significant degree" on the correctness of the visual identification of the appellant by Becken. He warned them of the "special need for caution" in convicting on identification evidence. He drew to their attention that it was "quite possible for an honest witness to make a mistake in identification". He also observed that a "mistaken witness may . . . be convincing". The jury was therefore directed to examine carefully the circumstances in which the identification by Becken was made. Particular reference was made to the delay between 29 January when the incident occurred and the identification from the photo board on 30 April. The learned trial judge enumerated various matters which were relevant to the acceptance or otherwise of Becken's evidence. He reminded the jury that with respect to the identification of the actual robbers Becken "had nominated two other persons as being persons in that vehicle when shown the photo board on 17 March 2001." He said it was a matter of significance that "Becken identified persons on a previous occasion, and was wrong about that identification".

[35] The learned trial judge did say in his summing up that Becken only saw the appellant "the one time" and then the vehicle was travelling at about 60 kms per hour in the opposite direction to him. That was not in accordance with the evidence and unduly favourable to the appellant. As already noted the Commodore drove up and down the road a number of times. On the third occasion according to Becken it was "going slowly" and that appears to be when he had his best observation of the driver. On an earlier pass he said the vehicle was travelling "about normal speed" but that seems to have been translated by the learned trial judge into a speed of 60 kms per hour.

[36] Counsel for the appellant nominated four weaknesses in the identification evidence which the learned trial judge did not point out to the jury. But on more detailed analysis only two (which were interrelated) were not touched upon in the summing up.

[37] It was asserted that Becken wrongly identified the two people in the back seat as two male children aged about eleven years and said he could only be mistaken about the one without the cap being male. He identified the person in the cap in the back seat as being definitely male, and said he had a better view of that person than of the driver.

[38] The basis of the appellant's contention was that it was the female, Kayla Bond, who had the cap, and that in consequence there were serious weaknesses in the identification because she was female. But the contention loses much of its force when it is realised that the submission is based on the fact that some twelve minutes after the identification by Becken, Kayla Bond "had" the cap. Constable Gleeson was not asked whether she was wearing it backwards and he did not proffer that such was the case. All he said was that she had the cap. It is significant that David Bond was holding the cap when photographed. Given that there had obviously been a change of drivers, it was more than possible that David Bond was wearing the cap backwards when the vehicle passed Becken and Kayla Bond was holding it when the group was first seen by Constable Gleeson. In the circumstances there is not, in my view, such a serious weakness about the identification evidence indicated by those considerations to support a conclusion that the learned trial judge failed to satisfy the *Domican* requirements in his summing up.

[39] Having regard to the totality of the evidence I am not persuaded that there were any deficiencies in the summing up and I am further satisfied that the verdict was not unsafe and unsatisfactory. In the absence of any explanation from the appellant the jury was clearly entitled to draw the inference beyond reasonable doubt that she was the driver of the motor vehicle at the material time and that in consequence she committed each of the offences charged.

[40] The appeal should be dismissed.

[41] **JONES J:** I agree with the reasons for judgment of Williams JA and with the order he proposes.