SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hill* [2003] QCA 73
PARTIES:	**R** **v** **HILL, Kevin Douglas** (appellant)
FILE NO/S:	CA No 323 of 2002 CA No 385 of 2002 DC No 276 of 2002 DC No 314 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2003
JUDGES:	McMurdo P, McPherson JA and Mullins J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant convicted of armed robbery and unlawfully attempting to strike with a projectile with intent to resist lawful arrest – where inconsistencies found in complainant's statement to police – whether evidence admissible in court – whether jury verdict was unsafe and unsatisfactory – whether sufficient evidence for conviction *Penalties & Sentences Act* 1992 (Qld), s 13A, s 161
COUNSEL:	D J Murray for the appellant R G Martin for the respondent
SOLICITORS:	Bradley Munt & Co for the appellant Director of Public Prosecutions (Qld) for the respondent

[1] **McMURDO P:** In the District Court at Ipswich on 9 September 2002 the appellant pleaded not guilty to attempted armed robbery (count 1); unlawfully attempting to strike with a projectile with intent to maim (count 2); unlawfully attempting to strike with a projectile with intent to resist lawful arrest (count 3) and unlawful use of a motor vehicle with a circumstance of aggravation (count 4). A jury trial ensued. At the close of the prosecution case, her Honour directed the jury to return a not guilty verdict on count 4 and the prosecution indicated they would not proceed further on count 3. The appellant was convicted on 12 September 2002 of counts 1 and 2. He then pleaded guilty to a further three counts; dangerous operation of a motor vehicle with a circumstance of aggravation, for which he was sentenced on 25 October 2002 to four years imprisonment; receiving, for which he was sentenced to 12 months imprisonment and a summary offence for which he was convicted but not further punished; a declaration was made as to imprisonment already served under s 161 *Penalties & Sentences Act* 1992 (Qld). He appeals against his convictions arising out of the jury verdict and contends that the sentence of four years concurrent imprisonment on the offence of dangerous operation of a motor vehicle with a circumstance of aggravation was manifestly excessive.

The appeal against conviction

[2] The appellant has abandoned his second ground of appeal which alleged flagrant incompetence on the part of his barrister at trial.

[3] Mr David Murray, who appears for the appellant in this appeal but not at first instance, sought leave to argue another ground of appeal, namely that, to the detriment of the defence, the prosecutor at trial did not call a witness. When the court pointed out that defence counsel had a copy of that statement but apparently made no request of the prosecutor at trial to call the witness, Mr Murray withdrew his application to amend the grounds of appeal to include this contention.

[4] His sole ground of appeal now is that the jury verdict was unsafe and unsatisfactory. That ground of appeal is based on a number of contentions; it requires a review of the evidence.

[5] The complainant, Mr Morrow, who was 58 years old at trial, gave evidence that on 5 July 1993 he and his wife operated a fish and chip business in Redbank Plaza and sometimes they would place the business' takings in a safe in a shed at their home. On Monday morning 5 July they sat down to breakfast. Their dog barked and Mr Morrow saw a person with a covered head come up the cement path holding what looked to be a pistol. He told his wife to get the gun and she went inside to get the .22 rifle they kept under their bed. He went in the opposite direction towards the office and located a single barrel shotgun and two 12 gauge cartridges; he put one in his pocket and the other in the barrel. He ran out the door of the office, near the laundry. The person with the pistol fired without warning and the bullet hit the chamferboard wall of the laundry behind him. He confronted the person with the pistol and "without any warning with anything, he – which he had the pistol off high, he fired, I heard the bullet hit the wall behind me … the laundry wall." Mr Morrow is 5 feet 8½ inches tall. Tendered photographs showed what appeared to be a bullet hole in the exterior wooden wall of the house. This person then retreated towards a white Falcon utility. At the same time, a second person with a covered head walked out of Mr Morrow's shed. This person seemed to be carrying a modified shotgun which he moved in an arc towards Mr Morrow who immediately fired at him. This second person stumbled, fell towards the utility, and got in on the

passenger's side. Two or three more shots were fired from the vehicle and it disappeared around the complainant's shed. Mr Morrow then rang 000 for police assistance.

[6] There were a number of inconsistencies between Mr Morrow's statement to police in 1993 and his evidence. In his statement Mr Morrow said the first person he saw was 15 to 20 yards away; when he came out the door of his house this person was in the driver's seat and the utility was reversing back slowly; he went along the path about 14 to 15 feet and stood near a small tree in the garden; he heard the driver shout something like "Shane"; Mr Morrow yelled "stop" as he loaded his gun; the driver of the utility stopped about 15 to 20 yards away from him and reached out of the driver's side window with one hand holding what appeared to be the pistol; Mr Morrow heard what appeared to be a light rifle type of shot; the driver then continued to reverse the utility another 10 or 15 feet and yelled something out and stopped the utility; another person ran from the back of the shed towards the utility; the utility then spun its wheels, went forward about 12 to 15 feet, stopped and the driver reached out of the window again with his pistol and fired another shot.

[7] Mr Morrow agreed that he had said these things in his statement but they were not correct. Nor did his statement refer to a bullet hitting the house or travelling close to him even though he showed police the bullet hole in the wall and they marked, photographed and removed it.

[8] He did not notice these errors in his statement because he was distressed when he made it; when he re-read it more recently he realised he had omitted some events; Mr Morrow remained adamant that he was standing in front of the house near the laundry door when he was shot at by the first armed person.

[9] In 2001, police asked him to explain on video his recollections of the events of 5 July 1993. He conceded he made a mistake in the video by indicating the position of the bullet hole on the wrong wall. Mr Morrow conceded that it was physically possible for the bullet hole to have been caused by someone firing from near the shed.

[10] During cross-examination, Mr Morrow said "ballistics people" told him to stand where he was standing and "they took levels, they took trajectories and it was exactly in line with (Mr Morrow's) cattle truck …"; they did tests as to where he was standing, based on the line of the shot he fired and "that was proven beyond a shadow of a doubt". He could not remember if police took measurements of his head or shoulder height against the wall. Mr Morrow remained adamant that the person that fired the shot at him was the first armed offender. He carefully examined the house and no other bullets appeared to have hit it.

[11] Mrs Morrow answered a telephone call at about 8.15 am on 5 July. A softly spoken male voice, possibly with a slight accent, asked for Norm. When her husband came to the phone the caller had hung up. As they sat down to breakfast the dog barked and she saw a person totally covered in dark clothing and apparently carrying a gun walking along the path towards the back door. Her husband told her to get the gun and she ran to the bedroom whilst her husband went in the other direction towards the back door. She heard shots being fired, people screaming and loud voices. Because she was frightened and upset she could not get the magazine into the gun

and kept dropping bullets and by the time she loaded it her husband was talking on the phone.

[12] Police officer Richards attended at the Morrow's home on 5 July 1993 and later that day located an abandoned white Falcon utility parked on a gravel road in a lightly wooded area. The rear and side windows had been sprayed with black paint and he saw a red substance, which he thought could be blood, inside the vehicle.

[13] Christopher Rix gave evidence that he was serving a term of imprisonment for his involvement in these offences. The appellant was a friend whom he had known for about a year. On 4 July, he went with the appellant to a Brisbane night club, drank beer and took amphetamines supplied by the appellant. He had been taking amphetamines for about a week beforehand. The appellant asked him if he wanted to do something with him and he agreed. They picked up a white utility which the appellant drove; he followed in a Commodore. They went to Carl White's place where the appellant spray painted the car windows black. The appellant said he was going to rob someone of "20 grand". They stopped at a phone booth in Barellan where the appellant seemed to make a phone call. They were both wearing dark clothing with shirts tied over their heads. The appellant had a semi-automatic .22 rifle; he knew this from information obtained from television because he had never held a gun before. They drove into a property towards a house. The appellant gave him a sawn-off manual .22 rifle and told him to run into the shed. His role was to be a backup for the appellant in case something went wrong when the house was robbed. The appellant turned the car around whilst he was in the shed. He heard yelling and a gun firing. He ran from the shed pointing his gun in an arc, with his finger on the trigger but the bullet in his gun jammed. The owner of the house was at the back door with a shotgun and shot him. Gun shots discharged by the appellant from the front seat peppered the house with bullets; he was able to distinguish the shot from a .22 rifle and the shot from a shotgun which is a much louder noise. He did not see the appellant get out of the car but he could not see the appellant earlier when he was in the shed. The gun shot from the owner knocked him out and he was on the ground for about 5 or 10 minutes. He got up, ran to the utility and the appellant drove off; he did not see the utility reversing. He felt blood dripping from his face and realised he had been shot. He did not seek treatment for these wounds to his face and shoulder. They discarded the utility behind the complainant's property. Carl White picked them up in his Commodore and they returned to his house. He heard nothing more about the incident until police contacted him in about 2000; they had identified his blood and fingerprints; he took part in a record of interview in which he told them what had happened.

[14] In cross-examination he maintained that this version of events was true. He did not give this account until he was contacted by the police in 2000. At the time of the offence he was a drug addict in the grip of a serious and expensive addiction to amphetamines. By the time he was spoken to by police he was 28, free of his addiction and had rebuilt his life with his partner and children. He had not been offered a reward for his involvement in the robbery but in submissions in mitigation at his sentence in November 2001 his lawyer said that he was involved in the offence because of a promise of a reward of drugs.

[15] Police officer Magill interviewed Mr Rix in January 2001. He was present when a government medical officer x-rayed Mr Rix and confirmed the presence of gun shot pellets in Mr Rix's upper body. From an early stage he indicated to Mr Rix that he

would like him to give evidence against his co-offender. Mr Rix initially referred to Carl White as Carl Chapman and did not indicate to police where this person lived. The person Carl has not been located. Items of clothing located in the car were destroyed in 1998 prior to any DNA or other scientific testing. Scientific officer Riedel, who carried out an investigation of the crime scene in 1993 had resigned from the police force by the trial and was uncontactable on a trip around Australia. Efforts, apparently fruitless, were made to locate her to investigate the possibility of receiving her evidence by telephone.

[16] At the conclusion of the prosecution case, the learned primary judge indicated to the prosecutor that he should elect which of counts 2 and 3 he wished to pursue because they were alternative counts based on the same single act of discharging a firearm at the complainant. The prosecutor elected to proceed only on count 2 and endorsed the indictment that the Crown would not proceed further upon count 3. Her Honour explained this to the jury. Immediately before that explanation, her Honour directed the jury to return a verdict of not guilty in respect of the offence of unlawful use of a motor vehicle because the prosecution was unable to prove that the vehicle had been taken without the consent of one Kellie Kitchener, the person in lawful possession thereof.

[17] Mr Murray first contends that because the prosecution withdrew count 3 at the close of its case, the appellant's trial was unfairly prejudiced by the duplicity created in originally charging both count 2 and count 3; there is a likelihood that some jurors may have considered there was insufficient evidence in regard to count 2 to convict but convicted the appellant in any case because they thought there was some evidence on count 3.

[18] The learned trial judge explained to the jury that the prosecution were relying only on the first shot fired at Mr Morrow and because the prosecution was no longer proceeding on count 3, the jury would only have to consider count 2. In the summing-up, Her Honour gave careful directions to the jury as to the elements of count 2 about which there is no complaint. The jury could have been in no doubt that they could only convict the appellant on count 2 if they were satisfied of those elements beyond reasonable doubt. As count 2 turned on the very same facts as count 3, there was no prospect that inadmissible evidence tainted the verdict on count 2. This contention is without substance.

[19] The appellant's next contention is that when it was put to Rix by the appellant's barrister that he was on speed before he met the appellant, Rix denied this, stating he was totally against drugs until he was introduced to speed by the Hills. The appellant contends this answer prejudiced him. The question was asked by the appellant's barrister in cross-examination, apparently on instructions, and after Rix had given evidence, without objection, of his and the appellant's amphetamine use on the night prior to committing the offences. Her Honour's summation of the defence case in the summing-up demonstrates that defence counsel made the best of these unfavourable answers by submitting to the jury that this demonstrated Mr Rix's animosity towards the appellant and his dishonesty as a witness. The appellant cannot complain about answers to tactical questioning which he now thinks may not have helped his case. There is nothing in this contention.

[20] Mr Murray next submits that Mr Morrow's evidence about the shot fired at him by the first intruder is so inconsistent that it throws doubt on the jury verdict. These

inconsistencies, the more significant of which are set out in my statement of Mr Morrow's evidence, were fully canvassed by defence counsel at trial and were referred to by her Honour in her summary of the defence case. Mr Morrow's evidence on this point was supported in a general way by Mr Rix's evidence and by the photographs showing the bullet hole in the wall. The jury were entitled to accept Mr Morrow's evidence that the first intruder discharged a gun directly at him, and that therefore this was done with an intent to strike Mr Morrow with the bullet and to maim him. This contention is without substance.

[21] The appellant next contends Mr Morrow's evidence about the "ballistics people"[1] was inadmissible and may have wrongly influenced the jury's evidence. This evidence related to the position of Mr Morrow when he fired the gun at Mr Rix and arose out of cross-examination by the appellant's counsel. The learned primary judge was not asked to strike it from the record or to direct the jury as to its inadmissibility, probably because this would have highlighted it; nor was there any application for a retrial because of that evidence. It did not feature in counsels' addresses or in her Honour's summing up. There is no reason to conclude that the jury placed any weight on it or that it had any impact on their verdict but in any case the appellant cannot now complain about answers to questions pursued by his counsel, apparently for tactical reasons. This ground is without substance.

[22] Mr Murray next contends that the evidence of Mr Rix was too unreliable and dangerous to allow the appellant to be convicted on either count. The applicant emphasises the following discrepancies in Mr Rix's evidence. First, Mr Rix said when he left the shed he had the rifle pointed in the air and this conflicts with Mr Morrow's evidence. It is hardly surprising that there is a difference between the evidence of Mr Rix and Mr Morrow on this point. Each was reporting a harrowing experience, which occurred many years earlier, from his own perspective. Even if Mr Rix's evidence was not accepted on this point because it was thought he was minimising his actions, the jury were not required to reject his evidence as to the appellant's involvement in the offence.

[23] The second inconsistency emphasised is that when Mr Rix was shot he said he fell to the ground and was unconscious for 5 to 10 minutes. This portion of Mr Rix's evidence must be inaccurate if the evidence of Mr and Mrs Morrow is accepted and, as appears likely, the whole incident happened very quickly. But again, the rejection of the reliability of Mr Rix on this point does not mean his evidence as to the involvement of the appellant in this offence must be rejected.

[24] Third, Mr Murray contends that Mr Rix's evidence is unreliable because, prior to these events, Mr Rix had been taking amphetamine for a week and was very tired. Her Honour referred to this matter in warning the jury of the dangers of convicting on the basis of Mr Rix's unsupported evidence. Despite this warning, the jury were nevertheless prepared to accept his evidence about the appellant's involvement.

[25] The remaining matters raised as throwing doubt on the reliability of Mr Rix may be dealt with together. The fourth matter is Mr Rix's evidence that his co-offender peppered the side of the Morrow's house with gunshots. This evidence is plainly inconsistent with Mr Morrow's evidence, the photographic evidence and the fact that only one bullet mark was found on the house. The appellant's fifth point is that

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1 See [10] of these reasons.

it seems implausible that Mr Rix was only able to describe the weapon used by his co-offender because of what he subsequently saw on television. Sixth, the appellant submits that Mr Rix stated that he only became involved in the robbery because he would help anyone out and not for reward when this is contrary to a submission that was made on his behalf at sentence in November 2001. Finally, the appellant emphasises that Mr Rix claimed he may have pulled the trigger of his rifle as he exited the shed but then claimed the gun was jammed; this is implausible.

[26] Even if the jury rejected Mr Rix's evidence on some or all these matters, they were not required to reject his evidence as to the appellant's involvement. The learned primary judge gave careful directions to the jury as to the dangers of acting on Mr Rix's evidence because he was an accomplice, had an interest in minimising his own role and perhaps wrongly implicating others; had been taking drugs at the time of the offence and had an interest, because of s 13A *Penalties & Sentences Act* 1992 (Qld), in maintaining in his evidence the claims he made in his statement to police. Her Honour told the jury that it would be dangerous to convict on the basis of Mr Rix's evidence, which was unsupported by other evidence, unless they scrutinised it carefully and were satisfied of its truth beyond reasonable doubt. Many of the matters referred to by the appellant, as well as others, were fully canvassed by defence counsel and repeated in her Honour's summing up of the defence case to the jury. The jury were not required to accept all of Mr Rix's evidence before convicting but only those portions which implicated the appellant in the commission of the offences. The jury verdict indicates that despite the judge's warnings and the difficulties with Mr Rix's testimony, they were prepared to accept it as true beyond reasonable doubt insofar as it implicated the appellant. There was, after all, no competing evidence called or given by the appellant. This ground of appeal also fails.

[27] Finally, the appellant objects to some questioning by the prosecutor of police officer Magill as to the fact that the registered owner of the utility used in the commission of the offence, Kelly Chapman, was not available to give evidence and could not be found. Defence counsel objected to this questioning and her Honour ruled that the question could not be pursued. In legal argument in the absence of the jury, the prosecutor said he was attempting to establish ownership of the vehicle in this way because he was unable to do it in any other way. Because of the objection by the appellant's counsel at trial the question was not allowed and no answer was given. As a result, a directed verdict of not guilty was later entered on count 4. During defence counsel's address the jury passed a note to her Honour inquiring whether Kelly Chapman and Kellie Kitchener[2] were the same person and whether she is connected to Carl Chapman.[3] Her Honour responded:

> "The short answer to that is I don't know. There's no evidence of that so you can't really speculate about that. You'll just have to have that question unanswered, sorry."

Counsel did not request any further direction.

[28] The appellant contends that there is a danger the jury may have speculated about these matters and wrongly convicted the appellant. There is nothing to suggest that, following her Honour's response to the jury's question, these matters were of any

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2 The complainant named in the indictment in count 4.

3 See [15] of these reasons.

further concern to the jury. They were not expanded upon in addresses or in the judge's summing up, although her Honour gave the usual jury directions to determine the facts and the verdict only on the evidence given in court. There is no reason to suppose that the jury did not follow her Honour's direction in answering their query not to speculate and her Honour's subsequent directions in the summing up. This ground of appeal is without substance.

[29] None of the matters raised by the applicant either individually or collectively establish that the jury verdicts were not reasonably open on the evidence. I would refuse the appeal against conviction.

The application for leave to appeal against sentence

[30] The appellant has filed an application for leave to appeal against the sentence of four years concurrent imprisonment imposed for the offence of dangerous operation of a motor vehicle with a circumstance of aggravation. Mr Murray has stated that he only wishes to pursue this application if he were successful on his appeal against conviction. As that appeal has been unsuccessful, it is not necessary to further consider this application.

[31] I propose the following orders:

Appeal against conviction dismissed.

Application for leave to appeal against sentence refused.

[32] **McPHERSON JA:** I agree with the reasons of the President, and would dismiss both the appeal against conviction and the application for leave to appeal against sentence.

[33] **MULLINS J:** I agree with the reasons for judgment of the President and the orders proposed.