SUPREME COURT OF QUEENSLAND

CITATION:	*R v Scott-Wallace* [2003] QCA 358
PARTIES:	**R** **v** **SCOTT-WALLACE, Aaron Liam** (appellant)
FILE NO/S:	CA No 226 of 2003 DC No 58 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	22 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2003
JUDGES:	Williams and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of dangerous driving causing death – where appellant's vehicle collided with another vehicle at an intersection controlled by traffic lights – where evidence given by other driver was that he went through an amber light – where appellant told two people at the scene that he was looking at his speedometer at the time of the collision – where appellant did not give evidence at the trial – whether conviction can be supported by the evidence *R v Fatseas & Brook* [1995] QCA 425; CA No 255 and 258 of 1995, 17 August 1995, discussed *R v Faulkner* [1987] 2 Qd R 263, referred to
COUNSEL:	The appellant appeared on his own behalf M R Byrne for respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for respondent

[1] **WILLIAMS JA:** The principal contention advanced by the appellant is that it was unreasonable for the jury to reject the "expert" evidence from the witness McDonald. In so far as the evidence from that witness suggested that the evidence of Blade should not be accepted because the collision would not have occurred where it did if Blade's evidence was correct, it is important to note that McDonald's evidence is based on certain assumptions of fact. As the submissions of the prosecutor, referred to by the learned trial judge in his summing-up, demonstrate, the facts assumed by McDonald only had to be varied slightly for his evidence to confirm, rather than rebut, that given by Blade. As in all criminal trials it was for the jury to make the relevant findings of fact. The jury was not obliged to accept the evidence of McDonald merely because it was said he was an expert. Indeed, most, if not all, of his evidence hardly satisfies the test for the admissibility of expert evidence. In essence he was doing no more than making arithmetical calculations based on assumed facts. Once the jury had made relevant findings of fact it was easy for them, if necessary, to make the necessary mathematical calculations.

[2] The verdict here is not rendered unreasonable because it is not consistent with an opinion expressed by McDonald.

[3] The only other issue raised on behalf of the appellant related to the failure to call the witness Togni. The witness was available at the trial, the prosecutor initially intimated he would call her, but subsequently the court was informed that the prosecution did not intend to call her and that the defence did not require her for cross-examination. In those circumstances the evidence of Togni does not meet the test for the reception of fresh evidence. In any event, it is difficult to see from a reading of her statement to the police and her evidence at committal that anything she could say would have added materially either to the prosecution or defence contentions.

[4] The appellant's mother, who was given leave to make submissions to the court assisting the appellant's case, contended that defence counsel at trial failed in his duty to call Togni when he was instructed to do so. The material before the court does not establish any fault on the part of defence counsel and, as already noted, the evidence of Togni would not have materially affected the state of the evidence before the jury. In those circumstances there is no substance in the complaints about the failure to call Togni to give evidence.

[5] I agree with the reasons of Jerrard JA wherein the relevant facts are more fully set out.

[6] The appeal against conviction should be dismissed.

[7] **JERRARD JA:** Aaron Scott-Wallace was convicted on 5 June 2003 of dangerous driving causing the death of Olga Polson and of Isabell Clair Taylor. He was sentenced to 18 months imprisonment, such imprisonment to be suspended after he had served three months of it and suspended for a period of 18 months.

[8] The charge against him arose out of a collision occurring on 19 June 2001 at about 8.45p.m. He was 17 years old when it happened. The evidence at the trial was that the weather was fine at that time, the road dry, and it was described by one witness as a cool clear night with a cloudy sky. Mr Scott-Wallace had been driving a Magna car southbound on Coolangatta Road at the Queensland Gold Coast, and his

vehicle had collided with a Hyundai Elantra motorcar driven by a Mr Brian Blade, which was travelling in a westerly direction along Musgrave Street. That street crosses Coolangatta Road at an intersection controlled by traffic lights facing drivers in both streets. Mr Scott-Wallace was sober, and there was no suggestion he was exceeding the 60 kph speed limit.

[9] Mr Scott-Wallace was sentenced on the basis that he had driven through a red light because of momentary inattention, and had then collided with the Hyundai, killing two of the passengers in that car. The experienced and learned trial judge took into consideration when imposing sentence that Mr Scott-Wallace had also been convicted on 14 August 2001, of failing to stop at a red traffic light on 17 June 2001, two days before the events resulting in this conviction. The learned trial judge did not have regard to the appellant's record of having exceeded the speed limit subsequent to the fatal collision on 1 February 2002, and again on 7 February 2002, and by in excess of 15 km per hour on each occasion; and also had no regard to his conviction for driving with a blood alcohol concentration of .064 on 5 December 2002.

[10] The Crown case was that Mr Blade had entered upon the intersection when the light facing him was yellow, and when the traffic light facing Mr Scott-Wallace was at all times red. The Crown contended on the appeal that the evidence showed the collision occurred in the southbound lane of Coolangatta Road and as Mr Blade's car crossed that lane. The appellant's mother, who spoke for him in the argument on appeal, was inclined to contend that the collision occurred in the northbound lane of Coolangatta Road.

[11] That argument appeared to accept that Aaron Scott-Wallace was travelling south, and to suggest he had perhaps made a right hand turn into Musgrave Street and was thus travelling westward when his vehicle collided with the Elantra. That vehicle, it would seem, must also have made a right hand turn and would have been travelling then in a northbound direction. That proposition – that both vehicles made a right hand turn – is a near unavoidable inference if the collision was in the northbound lane, simply because of the photographs (exhibits 3 and 4) of the damage to each vehicle. The Magna sedan was damaged extensively and only across its front, and from that damage appeared to have collided with a moving object apparently travelling at right angles to the Magna's path of travel. The Elantra was damaged only on its driver's side, that damage being to the right front mudguard and to both right side doors. It was, judging by the damage, struck by an object travelling at 90 degrees to its path of travel.

[12] The arguments that the collision occurred in the northbound lane depended upon some answers Mr Blade gave in evidence, asserting he had travelled "three quarters" of the way across the intersection before the collision. The appeal record records statements from the prosecutor, with which Mr Blade agreed, describing Mr Blade as hard of hearing, and neither counsel at the trial established whether or not Mr Blade meant that his vehicle had travelled three quarters of the way across the whole intersection, or three quarters of the way across the southbound lane.

[13] The point as to where the collision occurred has relevance really only as a possible consequence of the major issue raised in argument on the appeal, which is whether Mr Blade had entered the intersection only very soon after the light facing him in Musgrave Street turned yellow, as he swore; or whether it had been yellow for quite

some time, and was perhaps changing to red, as the appellant's mother's argument inferred.

[14] As far as the evidence went as to where the collision occurred, a Senior Constable Bruvels of the Accident Investigation Squad gave opinion evidence without objection[1], that the collision occurred in the southbound lane of Coolangatta Road (at AR 13). He said in cross-examination he thought the Hyundai was in the "centre" lane of Musgrave Street and that the collision was some 3–4 metres from the stop line in Musgrave Street over which the Hyundai had crossed (at AR 27). Those later propositions were not led in evidence in chief, and they were not challenged when given in cross-examination.

[15] Aaron Scott-Wallace gave no evidence himself at the trial, but called evidence from a Mr Geoff McDonald, an ergonomic and safety consultant. That evidence had relevance to some evidence given by Mr Blade and one of his two surviving passengers, his partner Jean Ibbs. Their evidence was that as their vehicle approached the intersection the light facing them changed from green to yellow, and that this happened as their car crossed the stop line in Musgrave Street (the evidence from Mr Blade at this point is at AR 32 and 48; and from Ms Ibbs at AR 65). Mr Blade swore that it changed from green to yellow too late for him to stop his vehicle from entering the intersection. His evidence was that he said "another bloody yellow light" at that point; Ms Ibbs recalled his saying "another yellow light" or "generally the lights were yellow again" (AR 68). The other surviving passenger, Shirley Hogan, was looking to her left and did not notice the colour of the lights. She did not say she heard anything said about their colour.

[16] That evidence as to the remark made by Mr Blade prompted evidence from Mr McDonald that an average of the time Mr McDonald had measured that it took three other people to say "we've got another yellow light" or "we've got another amber light" was 1.5 seconds. The clear inference from this evidence, admitted without objection[2], was that allowing for the time it took Mr Blade to react to seeing the light change and then speak, his vehicle may have been facing a yellow light for a (much) greater distance in Musgrave Street than simply from when it crossed the stop line. It was in fact put in cross-examination by counsel for Mr Scott-Wallace that Mr Blade had travelled through a red light. Mr Blade's other evidence, that he was doing 60km per hour (the speed limit), and was travelling in his centre lane in Musgrave Street, was not challenged in cross-examination. Nor was the inference from his evidence and from that of Ms Ibbs that he intended simply to cross the intersection and not to turn right and travel north. I add that Mr Blade swore that his car was hit just as he finished his remark about the yellow light (AR 49), and that Ms Hogan thought that Mr Blade was travelling at about 50km per hour.

[17] The Crown led unchallenged evidence that there was no recorded complaint that the lights at that intersection facing traffic travelling in all directions were not operating correctly at that time, that they were operating correctly when the police arrived, and were programmed to show amber for 4.2 seconds facing Mr Blade's vehicle before showing red all round for a further 2.1 seconds. There was thus a 6.3 second interval between the change from green to yellow facing Musgrave Street traffic travelling west, and the change to green facing Coolangatta Road traffic travelling

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1 But see *R v Faulkner* [1987] 2 Qd R 263; *Clark v Ryan* (1960) 103 CLR 486; and the comments of Callinan J in *Fox v Percy* (2003) 197 ALR 201 at [149-150]

2 See note 1

south. At 60 km per hour Mr Blade would travel (6.3 x 16.6) 104.8 metres in that time. At 50 km per hour he would travel (13.8 x 6.3) 86.9 metres.

[18] The possibilities Mr McDonald's evidence suggested of fault in Mr Blade were directly contradicted by the express claims of Mr Blade and Jean Ibbs, namely that the light facing them had just changed to yellow; and the proposition that the collision was in the northbound lane was challenged by the opinion evidence from Constable Bruvels and by the actual damage to each vehicle, assuming that Mr Blade intended simply to cross Coolangatta Road. But the real problem facing Mr Scott-Wallace on the appeal, and resulting from his election not to give evidence at that trial, is that there was therefore no explanation other than dangerous driving by him for the unchallenged evidence led by the Crown that after the collision, and when spoken to at the scene, Mr Scott-Wallace had told two people that he did not know what had happened, and that was because he was looking at his speedometer before the collision. He told a Constable Skerke that "I was heading down Coolangatta Road" (indicating to the officer that he had come from the north), and "I was looking at my speedo and then bang" (AR 74). He said much the same to a Susan Moore, a nearby resident who came to the scene to render assistance, and who asked Mr Scott-Wallace:

> "…whether the lights were green. He said he didn't know because he'd glanced down at the time when he got hit, he didn't see the lights, so he didn't know."

[19] The only response from the defence to those crucial pieces of evidence was to obtain agreement from Susan Moore in cross-examination that Mr Scott-Wallace appeared "pretty dazed", in some pain, and "banged around" when she spoke to him at the scene. He was obviously conscious and making responsive answers to questions. There was no evidence led of whatever medical treatment, if any, he received after the collision. The other unchallenged evidence – that whenever they changed to yellow, the lights facing Mr Blade had been green – means those facing Mr Scott-Wallace (if operating correctly) had been red while those facing Mr Blade were first green and then yellow, and as the appellant's vehicle had approached the intersection.[3] At the absolute best for him, those facing Mr Blade had changed to red and those facing Mr Scott-Wallace had changed to green as each vehicle came to the intersection, but Mr Scott-Wallace did not know that latter fact, because he was not looking at the lights, or the intersection, or even outside his car.

[20] Even on that hypothesis, contradicted by the evidence actually given, Mr Scott-Wallace could properly be convicted by the jury of dangerous driving causing death. This court has upheld convictions in the past where the drivers of each of two vehicles which had collided and killed a third person were found guilty of dangerous driving causing death[4]. One had entered an intersection against a red light; the other as it changed from yellow to red.

[21] The appellant's mother clearly understood this point in argument, (that both drivers could be guilty), and responded with more general complaints about the presentation and conduct of the prosecution and defence cases. One complaint was

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[3] The evidence included a report (Exhibit 6) that recorded that a green light faced, in turn, westbound, then southbound, then northbound traffic; and a yellow light showed only after a green and not after a red.

[4] See *R v Fatseas and Brook* [1995] QCA 425; CA No 255 and 258 of 1995 judgment delivered 17 August 1995

that she had heard the Crown Prosecutor inviting a potential witness (a Natalie Togni), whom the Crown ultimately did not call, to give evidence that that witness had turned off the lights of Mr Blade's car before the police arrived at the scene. Overhearing this conversation had led the appellant's mother to complain to the appellant's counsel at that time, who spoke with the prosecutor; and that witness was not called.

[22] The appeal record shows that the Crown Prosecutor did announce to the court that he was not calling that particular witness, and that he had been advised the witness was not required for cross-examination (AR 69). The appellant now makes a point that the witness swore in the Magistrates Court at the committal hearing that Mr Blade had said to her at the scene that:

> "I came around the corner approaching the lights and they were amber";

and that this evidence may have made a difference. The difficulty with this complaint is that the statement the witness gave to police records that Mr Blade also said "it was amber as I went through it". That additional remark takes away much of the force of the evidence the appellant's counsel may have extracted from that person, if called as a witness.

[23] As for the implication of improper suggestions being made by the Crown Prosecutor to that potential witness, that accusation made by the appellant's mother was not the subject of any sworn evidence on the appeal, and was really irrelevant to any possible grounds on which the conviction could be set aside. Even if Mr Blade had his car lights turned off both when the police arrived at the scene, as was suggested, **and** before the collision, the evidence is that the appellant was looking at his own speedometer. It would only be if the appellant was actually looking at the lights, saw that those facing him were red, saw no other cars approaching the intersection, and decided to go through the red light, that a lack of lights showing from Mr Blade's car could have made any difference to whether or not a collision occurred. That hypothesis was not the case the appellant made.

[24] The learned trial judge gave careful directions to the jury on all matters, including on whether or not, and in what circumstances, the jury could take into account what Mr Scott-Wallace had said at the scene, when injured and dazed, to Ms Moore and to Constable Skerke. There is no complaint made on the appeal of those directions, and while his mother's upset at the conviction and jailing of her son is easily understood, the appeal against that conviction cannot succeed and must be dismissed.

[25] **MUIR J:** I agree with the separate reasons of Williams and Jerrard JJA and with the order proposed by Jerrard JA.