SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kadir* [2004] QCA 136
PARTIES:	**R** v **KADIR, David John** (appellant)
FILE NO/S:	CA No 384 of 2003 DC No 181 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	30 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2004
JUDGES:	McMurdo P, Davies and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - GENERAL PRINCIPLES - where the appellant was convicted of armed robbery in company of a petrol station - where the appellant submitted that the evidence of a pretext telephone call had a prejudicial effect which outweighed its probative value - whether the learned trial judge should have allowed the evidence to be admitted - whether the learned trial judge made unfair statements concerning the evidence of the pretext telephone conversation during the trial EVIDENCE - WITNESSES - EVIDENCE ON VOIR DIRE - where the witness had previously been in a relationship with the appellant - where the trial judge rejected the evidence of the witness on a voir dire regarding a previous statement she had made - where the previous statement was admitted as evidence of a previous inconsistent statement - whether the learned trial judge erred in finding the witness to be an adverse witness and admitting proof of the previous inconsistent statement from her

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - MISCARRIAGE OF JUSTICE - PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE - OTHER IRREGULARITIES - where there was late provision by the prosecution of some of its evidence to the appellant - whether the late provision of the evidence prejudiced the appellant causing the trial to miscarry

COUNSEL: The appellant appeared on his own behalf
B G Campbell for respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for respondent

[1] **McMURDO P:** I agree with Davies JA that the appeal against conviction should be dismissed for the reasons he gives.

DAVIES JA:

The appeal

[2] On 5 November 2003 the appellant was convicted in the District Court of armed robbery in company. He was sentenced to three years imprisonment. He appeals against that conviction. His grounds of appeal are as follows:

(a) the trial judge erred in admitting evidence of a pretext telephone call as an admission against interest between David John Kadir and Christopher Robert Miller where the probative value of the evidence was outweighed by its prejudicial effect;

(b) the trial judge erred in granting the Crown its application to allow proof of a previous inconsistent statement from the witness Cassandra Ann Moore;

(c) the trial judge erred in finding Cassandra Ann Moore an adverse witness;

(d) the trial judge erred in inviting the Crown in the presence of the jury to lead more and particular evidence on two occasions about exhibit 40 (the tape of the pretext telephone call) after the Crown had indicated that it had no more questions of the witness Miller where the invitation and the significance of the evidence led subsequently could only and unfairly give the authority of the court to that evidence;

(e) the trial judge erred in failing to grant the defendant's application for a mistrial on the basis of the Crown's conduct of the prosecution;

(f) that collectively and ultimately the conduct of the prosecution case by the Crown was unfair to the accused to the point that the accused suffered irretrievable and irremediable prejudice; and

(g) the verdict of guilty was unsafe and unsatisfactory and against the weight of the evidence.

[3] The appellant's grounds of appeal and his written outline of argument were plainly prepared by a lawyer. In this Court the appellant, who represented himself, was content to rely on those grounds and that outline. Where I refer in this judgment to

the appellant's argument or contentions I am referring to those contained in the written outline.

The case against the appellant

[4] On 4 March 2001 the BP service station in Albert Street Rockhampton was robbed at gunpoint by two persons. The Crown case in the appellant's trial was that those persons were Christopher Miller and Cassandra Moore. That much was admitted by each of Miller and Moore, who had been convicted by the time of the appellant's trial.

[5] The case against the appellant was that he was a party to the offence because he counselled and procured Miller and Moore to commit the offence and aided them by providing the firearm to Miller in order to commit it.

[6] The principal evidence against the appellant at the trial was that of Miller who, having admitted his involvement in the armed robbery, swore that the appellant provided him with a replica firearm to be used in such robbery and instructed him as to how to use it and as to how to approach the console operator in the service station. There were, however, reasons to doubt the reliability of Miller's evidence. The principal one was that it appeared to change on several occasions. Plainly his initial statement to police implicated the appellant in the above way. However when he first gave evidence on the first day of trial he retreated from this somewhat. Then on the second day of trial, apparently after he had spoken to someone from the prosecution, he returned to his assertion that the appellant was involved in the way in which I have described.

[7] His Honour pointed out those discrepancies to the jury and described Miller as an unreliable witness. He told them it would be dangerous to convict on the evidence of Miller alone. No complaint was made about his Honour's directions in any respect.

[8] The balance of the evidence against the appellant was circumstantial. However when taken together it was strong circumstantial evidence of the appellant's involvement in the robbery in the way described by Miller.

[9] The first of these pieces of evidence came from Ms Lowry and Ms Lakin both of whom were in the service station on 17 December 2001, the robbery having been committed on 4 March 2001. On 17 December, according to each of them, a man came into the service station. He behaved in an unusual way including saying that he and a cousin had planned the armed robbery which had occurred at that service station. On 9 January 2002 Ms Lowry was able to identify, from a photo board, the appellant as the man who had come into the service station on 17 December 2001. Ms Lakin was unable to identify the appellant as that man but recalled the event and the conversation on 17 December.

[10] The second of these pieces of evidence was a recorded pretext telephone conversation, at the suggestion of a police officer, between Miller and the appellant on 13 March 2001. In that conversation were the following pieces of evidence linking the appellant, in some way, with the robbery.

[11] First Miller asked the appellant "Have you still got that piece of mine?" which the prosecution submitted was a reference to the replica gun. The appellant replied that

he did and in answer to Miller's expressed concern about being worried about it, replied "Oh, don't get worried about it, bro".

[12] Secondly, Miller told the appellant that he had burnt the box, which the prosecution submitted was a reference to the box which had contained the replica gun. When he told the appellant that, the appellant said "Yeah, good man". Miller then said "So it leaves no evidence?" to which the appellant's reply was indistinct.

[13] Thirdly, Miller complained about lack of money and asked the appellant what he could do about it to which the appellant replied "Remember the same thing we did the other - that time?". The conversation then continued:

> "Yeah, yeah, yeah?-- Do the same one and the same place too because, ah, it's a weekday and they'll have fucking quadruple the profit.
> Oh, right. Yeah?-- Sounds all right?
> Yeah?-- And because what happened over north side-----
> Yeah? -- ----- all the - all the heat 'll be over there.
> Yeah, true?-- True?
> Yeah, I didn't think of that. Yeah?-- Yeah.
> 'Cause they'll be watching over there-----?-- Tonight's a good night.
> Tonight's a real good night.
> Yeah, they'll be watching over there, see?-- Fucking oath."

The reference to it being a week day and that night being a good night was, it was contended by the prosecution, a reference to the fact that that night would be a Monday night and the robbery the subject of this appeal, from which there had been little return, had been committed on a Sunday. And the reference to what had happened over northside and the heat being all over there was, it was contended, a reference to the more recent robbery, referred to earlier in the conversation, which had been committed only the night before on a BP station on the northside of town.

[14] And fourthly, Miller asked the appellant if he had fixed the pin up, to which the appellant replied "Sort of. Not really but sort of." The prosecution's contention was that this was a reference to the replica gun which had a faulty pin mechanism.

[15] And the third piece of circumstantial evidence was of a search conducted of the appellant's premises on 13 March 2001. In a cupboard in a bedroom of the premises there was found a replica firearm of the general description of that used in the robbery. It was found under some clothing within the cupboard. In a black bag on a chest of drawers was found the appellant's wallet and some other documents in the appellant's name. In another black bag located in the bottom drawer of another chest of drawers in the same room was found some gloves and a bluish coloured balaclava. A separate duffel bag, found in the same room, had the appellant's name on it and contained a green balaclava.

[16] Unsurprisingly, in view of the matters referred to when discussing grounds (b) and (c), the witness Moore, who was in a long term relationship with the appellant and who also lived at these premises, claimed that these incriminating items were, when found, in her possession. However the jury were entitled to find, as the learned judge did in the voir dire, that Moore deliberately lied in order to protect the appellant.

[17] There was no reason why the jury should have doubted the reliability of any of this circumstantial evidence or doubted that, when added to the other circumstantial evidence, it was probative of the appellant's guilt. On that evidence alone it would have been open to them to convict the appellant.

A discussion of the grounds of appeal

Ground (a) - that the evidence of the pretext telephone call had a prejudicial effect which outweighed its probative value

[18] The contention of the appellant here was that there was insufficient information in the conversation to link the appellant to the time and place of this robbery, that the evidence was equivocal and ambiguous and that it could have related to knowledge gained by the appellant after the robbery. However it seems to me that it was at least open to the jury to conclude that the appellant's reference to "the same thing we did the other - that time", read in context, was a reference to this robbery. It may be reasonably inferred that it was in the context of advising Miller to perform a robbery, on the night of their conversation, upon the same service station because its profits would be much greater on that night than they had been on the Sunday of the subject robbery and because attention of the police that night would be concentrating on the robbery, committed the night before, on another BP service station on the northside of town. It was common ground that the subject service station was on the southside of town.

[19] If it was open to the jury to accept that view of that part of the conversation then it was also open to the jury to conclude that Miller was inquiring as to whether the appellant still had the gun in his possession, that the appellant was commending Miller for destroying the box which had contained the gun and that the reference to fixing the pin was a reference to fixing the faulty firing pin on this gun.

Grounds (b) and (c) - error in finding Moore to be an adverse witness and admitting proof of a previous inconsistent statement from her

[20] The appellant was content to argue these grounds together and it is convenient to consider them together. However in order to discuss these grounds it is necessary first to state some further facts.

[21] Cassandra Moore was called as a witness by the prosecution. As already mentioned she had been in a long term relationship with the appellant; there was a child of that relationship. She denied that the appellant was involved in the robbery. On a voir dire she admitted to giving a statement to Constable McLeod whilst she was in prison but denied making those portions of her typed but unsigned statement that implicated the appellant.

[22] Constable McLeod, who was then called on the voir dire, said that he had taken the statement down on his laptop computer whilst in Moore's presence on 10 July 2002 and that she had adopted the contents of the statement. However when it was printed she refused to sign it because, according to him, she said she did not want to be known as "a dog" in the prison community.

[23] The learned trial judge appeared to have no difficulty in accepting the evidence of Constable McLeod as that of an honest witness and in rejecting that of Ms Moore, concluding that she had deliberately withheld evidence because of an unwillingness to tell the truth. There can be no doubt that his Honour was entitled to reach those conclusions and it followed, in my opinion, that the prosecution was entitled to

adduce the evidence of Constable McLeod as evidence of a previous inconsistent statement by Moore.

[24] Once admitted the statement was evidence of the truth of the facts contained in it: *Evidence Act* 1977 s 101. Yet when directing the jury on the admissibility of this statement, the terms of which were read out by Constable McLeod, his Honour said:

> "That evidence was placed before you for one purpose and one purpose only and you can only use it for that purpose, namely, to see if you accept that Cassandra Moore has been consistent on another occasion in telling the police that David Kadir had nothing to do with the robbery."

It seems to me, with great respect to his Honour, that, for the reason I have already given, that direction was unduly favourable to the appellant.

Ground (d) - unfair statements made by the learned trial judge to the prosecutor concerning the evidence of the pretext telephone conversation

[25] In order to explain this ground it is necessary to say something about the course of the trial relevant to this evidence. When the prosecutor was in the course of eliciting from Miller the circumstances leading up to the making of the pretext telephone conversation, the learned trial judge interrupted by suggesting to counsel that, chronologically, he should first ask Miller about a conversation he had had with the appellant a couple of days before the robbery. The prosecutor acceded to his Honour's suggestion in this respect, discontinued his questions about the pretext telephone conversation, the tape recording of which had been tendered through an earlier witness, and elicited evidence of this earlier conversation. The prosecutor then appears to have inadvertently failed to return, in eliciting evidence from Miller, to the topic of the pretext telephone conversation which had, at this stage, not been played to the jury.

[26] The learned trial judge alerted the prosecutor to this and the tape was then played. The prosecutor then proceeded to ask Miller about whether he had made a written statement to police and his Honour interrupted to ask the prosecutor if he could deal with exhibit 40, the tape, first. His Honour suggested that the prosecutor might ask if the witness could identify anybody's voices on that tape. The prosecutor replied that he was going to the tape but he just wanted to clear up something before he went there. His Honour then apologized. However his Honour interrupted once again, apparently taking over the questioning. After several innocuous questions by his Honour the prosecutor took over the questioning once again to establish who the persons were whose voices were recorded on the tape, namely Miller, Cassandra Moore and the appellant.

[27] In my opinion the appellant's contention that this sequence of events was to draw undue and unnecessary attention to the evidence of the pretext telephone call and to give the evidence the authority of the court is without substance. On the contrary, read as a whole, this sequence of evidence and interruptions by the learned trial judge tended to make Miller's evidence on this point somewhat disjointed. Moreover the evidence was doing no more than identifying the speakers whose voices were recorded on the tape; a matter on which there never appears at any stage to have been any dispute.

Grounds (e), (f) and (g) - the prosecution case was conducted in a manner prejudicial to the appellant

[28] These grounds were argued together by the appellant in this Court and it is convenient accordingly to deal with them together. The appellant's contention was that the late provision to the appellant of some of the prosecution evidence so prejudiced the appellant in the conduct of his trial as to cause it to miscarry.

[29] This contention was made to the learned trial judge on the third day of the trial but rejected by him. His Honour gave a number of reasons for rejecting this contention.

[30] First he said that an application could have been made by the appellant for more time to consider the documents that were provided late. No such application was made.

[31] Secondly, his Honour said that no forensic disadvantage was shown to have been occasioned to the appellant in consequence of the late provision of this evidence. That seems plainly to have been correct at the time of his Honour's ruling and still seems to be the case.

[32] The only contention to the contrary in this Court is that a timely provision of the video tape of events in the BP service station on 17 December 2001 "would have allowed the appellant to properly investigate and possibly produce evidence of alibi". There are two answers to this contention. First, the video had no, or at least only little probative force. Neither Ms Lowry nor Ms Lakin claimed to identify the person in the video as the appellant. Rather it was Ms Lowry's identification, from a photo board, of the appellant as the person who entered the shop on 17 December 2001, which called for contradiction.

[33] Secondly, and more importantly, if there were any real possibility that if Ms Lowry's statement had been produced earlier it may have been able to be met by evidence of an alibi, it would have been the obligation of counsel for the appellant to seek an adjournment to investigate that possibility. He did not do so and even at this stage no such evidence has been produced. It is still described by the appellant only as a possibility. In my opinion this shows that there is nothing in this contention.

[34] It was plainly reasonably open to the jury, on the evidence which I have described, to be satisfied beyond reasonable doubt that the appellant was a party to the offence of armed robbery in company on 5 November 2003. Accordingly the appeal must be dismissed.

[35] **JERRARD JA:** I have read the reasons for judgment and order proposed by Davies JA and respectfully agree with those reasons and order.