SUPREME COURT OF QUEENSLAND

CITATION:	*R v Croll* [2004] QCA 255
PARTIES:	**R** **v** **CROLL, Leonard Theodore** (defendant/appellant)
FILE NO/S:	CA No 112 of 2004 DC No 2856 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2004
JUDGES:	de Jersey CJ, Davies JA and Mullins J 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 – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – CONSIDERATION OF SUMMING UP AS A WHOLE – where the appellant was convicted on two counts of dangerous operation of a motor vehicle – whether the trial Judge exhibited partisanship in the summing-up – whether the trial Judge properly instructed the jury on the nature of the evidence CRIMINAL LAW – EVIDENCE – GENERALLY – whether the regularity of the trial process can be challenged *RPS v R* (2000) 199 CLR 620, cited
COUNSEL:	The appellant appeared on his own behalf M J Copley for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ**: The appellant was convicted in the District Court on two counts (counts 2 and 3 on the indictment) of the dangerous operation of a motor vehicle. The jury was unable to agree on one other similar count, and the appellant was acquitted on a count of wilful damage and a count of assault occasioning bodily harm with a circumstance of aggravation. He appeals against his conviction on the two counts of the dangerous operation of a motor vehicle. For the first of the convictions, he was given 12 months probation, and for the second, 100 hours community service. Convictions were recorded, and he was disqualified from driving for six months. Before this Court, the appellant represented himself. At the trial, he was represented by a senior and experienced member of the criminal bar.

[2] The convictions arose out of conflict on the road between the appellant, who was driving a Toyota Celica sedan, and Wesley Mathers who was driving a Mitsubishi van, with his brother Daniel as a passenger. The events occurred in the evening of 13 August 2002 in the northern suburbs of Brisbane.

[3] The first count, on which the jury could not agree, concerned the appellant's tailgating the van, or cutting in and out in front of it, and likewise with a vehicle driven up ahead by Mr Mathers senior, and the count was left to the jury on those particulars.

[4] The evidence from the brothers was that the appellant was following their van at a distance of only one and a half to two metres behind. They were travelling at 40-60 kms per hour. At one stage, Wesley Mathers tapped his brakes to send a signal to the appellant, and later moved to the left so that the appellant could overtake, which the appellant did. A little later, leaving from an intersection following a change of lights, the appellant cut off the vehicle driven by Mr Mathers senior. Mr Mathers had to ease off to let the appellant ahead, otherwise Mr Mathers would have been forced onto the gravel verge. As he passed, the appellant shook his fist towards Mr Mathers. A little later again, Wesley Mathers called to the appellant: "Don't fucking tailgate", but on the Mathers' evidence, the appellant continued to do so. At one stage the appellant flashed his lights on high beam onto the rear of the van.

[5] The appellant gave evidence. He said that he came up behind the van when it was travelling at only 40 kms per hour. He overtook it. He stopped at a red light shortly afterwards, and an occupant of the van spat at him and yelled. He followed the van and flashed his lights with a view to reading its registration number.

[6] The second count, on which the jury convicted the appellant, concerned a collision between the Celica and the van in South Pine Road. Daniel Mathers said that when the van was about to stop, the Celica struck its front at about 40 kms per hour. Wesley Mathers said that the van was stopped, and the appellant rammed the Celica into the driver's side front of the van, which was damaged. The appellant kept driving. Wesley Mathers said that he followed the Celica in order to get its registration number.

[7] The appellant accepted that the van was stopped, but said he drove past with no contact between the vehicles.

[8] Mr Mathers senior gave evidence that the van was not previously damaged on the driver's side, yet when his sons arrived at home, the driver's side was damaged, with the front right wheel pushed in, and the driver's side door could not be opened.

[9] As to damage to the Celica's left hand side, the appellant said that there was none. Sergeant Clarke closely examined the Celica that evening, prior to any complaint in respect of this incident. As to the left side, there was apparently old damage to the quarter glass window, but as to other damage, he said in cross examination: "No, don't remember … don't remember anything like that", when particular species of possible damage were put to him. Counsel for the respondent characterized that as a somewhat less than definite exclusion of the possibility of damage to the left side.

[10] When interviewed by Sergeant Thompson on 19 March 2003, the appellant was asked these questions about impact between the vehicles, and gave the following answers:

> "Question: Did your vehicle hit the vehicle at all?
>
> Answer: Not that I can recall.
>
> Question: Could it possibly have done so?
>
> Answer: Not a 100% cent sure. I – it was a – quite a – I mean, like a bad situation. I don't really know."

Counsel for the respondent submitted that the jury may have felt it significant that the appellant was somewhat equivocal in that way, on such a central issue.

[11] The third count, on which the jury also convicted the appellant, was particularized as the swerving of the appellant's Celica at the brothers, who were standing on the road or footpath. The brothers gave evidence that at a speed variously estimated at 50-60 kms per hour or 40-50 kms per hour, the appellant swerved towards them, coming to within two metres of them, such that they had to jump out of the way.

[12] On the appellant's account given in evidence, he was stationary at the intersection. The van rapidly approached from behind and suddenly stopped. The rear left quarter glass window in the Celica smashed. The van pursued him. A little later, he saw one of the brothers standing on the road, and drove around him. Then another brother jumped into the street in front of him. He swerved to avoid him, and the right hand corner of the Celica hit a lamppost.

[13] Plainly the jury accepted the evidence of the Mathers brothers and rejected the evidence of the appellant.

[14] The fourth count, on which the appellant was acquitted, was of wilful damage. The Mathers brothers gave evidence that after the Celica swerved at them, the appellant drove it into the side of their van, mounting the gutter and hitting a light pole. The appellant denied driving into the van.

[15] The learned trial Judge instructed the jury properly on the need to be satisfied as to the element of wilfulness: actually intending to cause the damage, or deliberately acting, aware of the likelihood of damage, and continuing recklessly regardless of

that risk. The respondent's explanation for the acquittal is that the jury may not have been satisfied beyond reasonable doubt of that element. They may have concluded, for example, that the Celica at that stage was simply out of control.

[16] The fifth count, on which the appellant also was acquitted, was a count of assault occasioning bodily harm with a circumstance of aggravation. The complainant was Daniel Mathers.

[17] On the evidence of the brothers, after the van hit the light pole, the appellant alighted holding a bar of some sort, reinforcing steel on Daniel's evidence and an iron bar according to Wesley. The appellant struck Daniel on the hand. Daniel could previously have used bad language towards the appellant. Daniel had raised his hands in self defence. Seeing the confrontation, Wesley fetched a hammer and a piece of steel from the van, and chased the appellant off.

[18] The appellant's account in evidence was that he alighted from the Celica armed with insulation cable. He was confronted by a man with fists raised. There was no actual assault. The second man approached with an iron bar and hammer, at which the appellant decamped. He later found a hammer on the back seat of his vehicle.

[19] The learned trial Judge directed the jury on the Crown's need to exclude provocation and self defence. The respondent explains the appellant's acquittal on this count, on the basis that the jury may not have been satisfied that the Crown had beyond reasonable doubt excluded the appellant's having acted in self defence, given the evidence of the brothers that one of them approached the appellant armed with a hammer and an iron bar.

[20] The notice of appeal contains 13 grounds. Some concern the summing-up: the learned Judge "in summing up to the jury showed bias in favour of the Police case", that "the Jury was not properly advised on the nature of evidence", that "the jury was not addressed on all the relevant evidence", and that "His Honour misunderstood the issues of evidence … and did not properly address the jury as a result". Another challenged the regularity of the trial process: the charges on the indictment were changed during the process of the trial by the prosecution thus causing the defence surprise and confusion, and "lost opportunity to properly cross-examine witnesses." Another contends that "evidence led by the prosecution was not plausible". Another contends that the evidence of the Mathers "was misleading and lacked feasibility", matters overlooked by the Judge while instructing the jury. The grounds substantially challenge the convictions because of evidence that there was no damage to the left hand side of the Celica, and also challenge the evidence of Mr Mathers senior that there was tape holding the driver's side window together. The evidence of Sergeant Clarke that there was plastic film on the windows of the Celica was said to be deliberately misleading. Then it is contended that the police have used the court "as an instrument of persecution", and that the jury did not bring a sufficiently educated mind to the determination of the case.

[21] In support of those grounds, the appellant provided a comprehensive 28 page document updated at the hearing, in which he focuses on his version of the events, trenchantly criticizes the contrary evidence from Crown witnesses, trespasses in respects beyond the evidence given at the trial, and engages in much assertion. He

presented a substantial oral submission, in addition. It is possible to assess the grounds of appeal briefly.

[22] The summing-up exhibits no partisanship on the part of the trial Judge, an aspect to which I will briefly return. The jury was properly instructed on the nature of evidence. The jury was comprehensively and sufficiently reminded of the evidence given in the case. There is no ground for concluding the learned Judge misunderstood that evidence, or communicated any mistaken view to the jury. As to the process, the particulars on which the Crown relied were in certain respects changed during the trial, but the jury was made plainly aware of the final position. Looking at the evidence globally, it would be wrong to contend that the Crown evidence was implausible. The evidence of the Mathers, while exhibiting some internal inconsistency, as might be expected of course, was perfectly adequate to support the convictions, when seen also with the other evidence in the case on which the jury were entitled to rely. As to damage to the left hand side of the Celica, reference has been made to the apparently less than certain evidence on that aspect from Sergeant Clarke. The jury may have accepted the brothers' evidence of impact, and not been dissuaded by the evidence of Sergeant Clarke from the conclusion that damage would have been inflicted on the Celica. As to the evidence of the tape, the jury was entitled to accept the evidence of Mr Mathers senior and Sergeant Clarke and reject the appellant's version on that aspect. There is no need to address the other grounds, which are self-evidently of no substance.

[23] In the course of covering the evidence relevant to the various counts earlier in these reasons for judgment, I highlighted why the jury may have been disposed to accept the Mathers' and other evidence and reject the appellant's evidence where they have convicted, and not been satisfied beyond reasonable doubt where they have acquitted. There is no need to re-cover that ground.

[24] As to the summing-up, it dealt with all relevant matters, and did so with balance and objectivity. The jury was reminded comprehensively of the appellant's out of court statements to Sergeant Thompson, the account he gave in his evidence, and of the importance to the defence of Sergeant Clarke's evidence about damage to the left hand side of the Celica. The jury was warned appropriately about how to approach the history of the appellant's dealings with the police. The Judge identified factors both supporting, and detracting from, the appellant's credit, depending on the jury's assessment, and sufficiently summarized the defence case.

[25] On the other hand, while necessarily covering in some detail the evidence from the Crown witnesses, in the course of instructing the jury on the elements of the charges, the Judge also reminded the jury of the weaknesses in the crucial evidence of the Mathers brothers. The appellant's complaint that more of the evidence was not covered in the summing-up cannot withstand the feature that defence Counsel sought no relevant re-direction. The Judge was not required to make further reference to the evidence.

[26] The summing-up complied with the guidelines suggested in *RPS v R* (2000) 199 CLR 620, 637.

[27] In my view the appeal should be dismissed.

[28] **DAVIES JA:** I agree with the reasons for judgment of the Chief Justice and with the order he proposes.

[29] **MULLINS J:** I agree with the reasons for judgment of the Chief Justice and that the appeal should be dismissed.