SUPREME COURT OF QUEENSLAND

CITATION:	*R v Booth* [2005] QCA 30
PARTIES:	**R** **v** **BOOTH, William David** (appellant)
FILE NO/S:	CA No 302 of 2004 DC No 201 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	18 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2005
JUDGES:	McMurdo P, McPherson JA and Jerrard JA Separate reasons for judgment for 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 – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where appellant tried by jury on three counts of indictable offences - where trial judge directed the jury that a reasonable doubt is a doubt which they find to be reasonable – whether trial judge erred in directing the jury to this effect CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where trial judge refused a request to direct the jury that if they were left in doubt as to where the truth lay, the verdict should be not guilty – where trial judge subsequently gave further directions to the effect that a rejection of part or all of the appellant's evidence did not necessarily mean that the prosecution had succeeded – whether trial judge erred in giving these directions

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER JURY WOULD HAVE RETURNED SAME VERDICT – GENERAL PRINCIPLES – where appellant contended that evidence from co-accused which was unavailable at trial was now available on appeal – where appellant did not call co-accused as a witness during trial – where no statement by co-accused indicative of appellant's innocence put before court – whether the jury would have acquitted appellant if co-accused's evidence supporting appellant had been before it at trial

Green v R (1971) 126 CLR 28, applied
R v George [1980] Qd R 346, applied

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

[2] **McPHERSON JA:** For the reasons given by Jerrard JA, which I have read and with which I agree, this appeal must be dismissed.

[3] **JERRARD JA:** On 19 August 2004 William David Booth, known as Dave Booth, was convicted by a jury on three charges. These were of entering the dwelling of Wayne Charles Roberts on 17 August 2003 with the intent to commit an indictable offence, robbing Mr Roberts that day while armed with an offensive weapon and when in the company of another, and of unlawfully assaulting Mr Roberts that day whilst so armed and in company. Mr Booth's co-offender, one Andre Timothy Bonne, had also pleaded not guilty before the jury at what was to be the start of their joint trial, but changed his plea to guilty on all three counts after the lunch adjournment, and before the Crown opened its case. He was given bail, and the jury were told that the matter involving Mr Bonne had been adjourned. On 20 August 2004 both offenders were sentenced to four years imprisonment on the robbery count, and to concurrent three year terms on the others. Mr Booth has appealed against his conviction on three separate grounds.

Ground 1

[4] The first is that the learned trial judge erred in directing the jury to the effect that a reasonable doubt is a doubt which they find to be reasonable. The learned judge had directed the jury in the following terms.

> "Before you can convict an accused, you must be satisfied of their guilt beyond a reasonable doubt. That phrase "reasonable doubt" is one that you will have all heard at some time in the past. It is a phrase that should be readily understood by you. It is not a term of art and it has got no technical meaning. It bears its ordinary

> everyday meaning. That is, a doubt which you as a jury find reasonable. If at the end of your deliberations you find yourself with a doubt as to the accused's guilt, provided that doubt is a reasonable one, you will have a reasonable doubt and you would have to find the accused not guilty. It would not be enough if you thought the accused probably was guilty. You must be satisfied beyond a reasonable doubt. If you are satisfied beyond a reasonable doubt of the guilt of the accused on a particular charge, then it is your sworn duty to find the accused guilty of that charge. If you are not so satisfied, then it is equally your sworn duty to find the accused not guilty of that charge."

[5] That direction contained the relevant critical proposition stated in *Green v R*[1], that a reasonable doubt is a doubt which the particular jury entertain in the circumstances; the people on the jury themselves set the standard of what is reasonable in the circumstances. That proposition was described by this Court as a helpful observation in *R v Holman* [1997] 1 Qd R 373 at 378, and repeated by this Court in *R v Irlam; ex parte A-G*[2], in *R v Punj*[3], and *R v Kidd*[4]. A direction in essentially similar terms is suggested in the *Queensland Supreme and District Court Bench Book* at 57.1. The learned trial judge was accordingly quite correct in directing the jury in terms which have been approved by the High Court, subsequently repeated and approved by this Court a number of times in the last decade, and which accord with the direction suggested in the *Bench Book.* That direction was cited with apparent approval in *R v Irlam*. That ground of appeal must fail.

Ground 2

[6] The second ground of appeal was that the learned trial judge erred in not directing the jury to the effect that if they be left in doubt as to where the truth lies, the verdict should be not guilty. That ground of appeal reflected the course of the trial before the jury, in which the complainant Wayne Roberts gave evidence describing an attack on him at the same time by both Mr Booth and Mr Bonne, whereas Mr Booth gave evidence admitting his presence when Mr Bonne attacked Mr Roberts, but denying having taken any part in the attack by Mr Bonne. The learned trial judge had refused, when requested, to direct the jury that if the jurors were left in doubt as to where the truth lay, the verdict should be not guilty. Had the trial judge adhered to that position, that would have resulted in an error of law. That point was settled in *R v George* [1980] Qd R 346 at 347. In that case the Court of Criminal Appeal cited with approval decisions of the Victorian and New South Wales Courts of Criminal Appeal, which emphasised the desirability in cases in which evidence is led for the defence in contradiction of evidence called by the Crown, of a direction that if the jury is left in doubt as to where the truth lies the verdict should be not guilty.

[7] The learned judge did give the jury further directions, at the request of Mr Booth's counsel, directing them that if they rejected Mr Booth's evidence or part of it, that

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1 (1971) 126 CLR 28 at 32-33
2 [2002] QCA 235 at [58]
3 [2002] QCA 333 at [14]
4 [2002] QCA 433

did not necessarily mean that the prosecution had succeeded. The re-direction continued:

> "You must still consider all the rest of the evidence in the trial that you do accept and see whether that satisfies you of the accused's guilt. By that I mean that if you reject the accused's evidence, then you still obviously have to look at Mr Robert's evidence and see whether that satisfies beyond a reasonable doubt of the accused's guilt. You do not just say 'I reject the accused's evidence, therefore what Mr Roberts is saying must be true.' If you reject the accused's evidence, then you still have to consider all the rest of the evidence and see whether that satisfies you of the accused's guilt."

[8] Those further directions convey the same message as that approved in *R v George*, and remedied the deficiency that would have otherwise existed. Those directions ensured that the case did not go to the jury as simply a choice between two conflicting accounts. That ground of appeal must also be dismissed.

Ground 3

[9] The third ground of appeal was that there has been a miscarriage of justice, because evidence from the appellant's co-accused which was not available at the trial was now available. To understand and evaluate that ground, it is necessary to refer to the evidence led at the trial.

[10] In summary this was that Wayne Roberts knew Mr Bonne ("Tim") better than he knew Mr Booth ("Dave"), having known Tim a few years and Dave about a year and a half. Mr Booth's evidence was that he bought amphetamines from Wayne Roberts. Tim and Dave shared a unit at 1/48 Paxton Street, North Ward, Townsville; Wayne Roberts lived in a caravan at Ingham Road. Both Mr Roberts and Dave Booth received disability support pensions.

[11] It was common ground that on 17 August 2003 Dave Booth went to Wayne Robert's Caravan at about 8.30 pm that night, knocked on the door, and was invited inside. They had some desultory conversation for a few minutes, which ended when Tim Bonne suddenly entered the caravan and attacked Wayne Roberts. Tim Bonne was armed with a baseball bat, and carrying an ignited distress flare.

[12] Wayne Robert's evidence was that Tim Bonne hit him with the bat, and that when he attempted to escape through the door he was pushed back onto the couch by Dave Booth. Further, when Wayne Roberts grabbed the bat to prevent Tim Bonne hitting him with it, Dave Roberts intervened and Wayne Roberts was forced to let go of the bat to fend off Dave Booth. Wayne Roberts escaped eventually out the door of the caravan, but ended up on the ground outside it, with both Tim Bonne and Dave Booth kicking him. Dave Booth then armed himself with a piece of wood, and hit Wayne Roberts with that; and then Tim Bonne asked Wayne Roberts where his wallet was. When Wayne Roberts said it was in his back pocket, Dave Booth removed it from there. While he was doing that, Tim Bonne was choking Wayne Roberts. After the wallet was obtained Mr Roberts was able to make good an escape.

[13] The next day Mr Roberts reported the matter to the police, who searched the Paxton Street unit at approximately 6.15 pm on 18 August 2003, and recovered both a

baseball bat and Mr Robert's wallet. Mr Roberts identified Dave Booth in the court room; but identification was not an issue in the trial.

[14] It was put to Mr Roberts, and he agreed, that when Dave Booth knocked on his door and entered the caravan Mr Booth was not carrying anything, and he also agreed that Mr Booth did not say anything when Tim Bonne entered and attacked Mr Roberts. He denied the suggestion put to him that Mr Booth had not pushed him while in the caravan, and the further suggestion that Mr Booth had simply jumped up and left the caravan when Tim Bonne entered and assaulted Wayne Roberts. He likewise denied that Dave Booth was not present when the struggle with Tim Bonne occurred outside the caravan.

[15] Mr Booth swore that when he had intentionally gone to visit Wayne Roberts that evening in an effort to buy amphetamines, Tim Bonne had accompanied Mr Booth for reasons unexplained by Tim Bonne, but that they had separated when near the caravan. He had noticed Tim Bonne was carrying a bag, but Mr Booth did not know what was in it. He did not know where Mr Bonne had gone to just before Mr Booth knocked on Mr Robert's door. Mr Booth swore that he had not recognised the person who came through the doorway, because there was a lot of smoke "going on", and that "things started going a bit erratic", although he did see a bat. He immediately ran away. He went to a park and was later joined there by Mr Bonne, to whom he described what had happened in the caravan. After that the two men went home. The next day the police visited. He had not seen the black wallet found in the premises before the police located it. He denied taking any part in the attack on Mr Roberts.

[16] Mr Bonne was not called as a witness at Mr Booth's trial. Mr Booth did not provide this Court on his appeal with any signed or sworn statement from Mr Bonne describing what he would say on oath about Mr Booth's involvement in the robbery. In respect of two of the offences to which Mr Bonne pleaded guilty, the indictment alleged, as a circumstance of aggravation, that he was in company with another person (when relevantly robbing Mr Roberts and doing him bodily harm with an offensive instrument). On the other hand, when submissions in mitigation of sentence were made on Mr Bonne's behalf, the learned judge was informed that Mr Roberts and Mr Bonne were in the practice of lending each other the morphine tablets each was entitled to have on prescription, and that Mr Roberts owed Mr Bonne "a couple". Accordingly when Mr Booth decided to go around and buy amphetamines from Mr Roberts, Mr Bonne decided to go and collect the tablets, if they were available, or reinforce his demand that he be given tablets as soon as possible. On the appeal hearing Mr Booth directed the Court's attention to that part of the transcript, but did not give any other description of what Mr Bonne would say, beyond asserting that a solicitor had told him that what Mr Bonne would say was the same as what Mr Booth himself has sworn to.

[17] Mr Booth also told this Court that, apparently in response to inquiries from himself after Mr Bonne had changed his plea to guilty, Mr Booth's counsel had told Mr Booth during his trial that Mr Bonne was not prepared to be a witness for Mr Booth. Mr Booth's counsel had told Mr Booth that Mr Bonne's counsel had advised that Mr Bonne would not give evidence, because doing so might prejudice his sentence.

[18] In one sense it can therefore be said that evidence from Mr Bonne, voluntarily given, was not available to Mr Booth at his trial. Obviously enough, he made no

attempt at the trial to have Mr Bonne subpoenaed or produced from custody on the order of the court. It appears from what this Court was told that Mr Booth's lawyers did not have any statement from Mr Bonne before the trial started, and Mr Booth did not describe to this court any reason or grounds for his having any opinion at the time of his trial that Mr Bonne, if called, would give evidence that would assist Mr Booth. Learning that that potential evidence was now available, and the fact of its asserted availability, happened after Mr Booth's trial ended.

[19] Mr Booth's appeal faces the overwhelming difficulty that even now he has not put before the court any statement by Mr Bonne indicative of Mr Booth's innocence. This Court is therefore unable to conclude that there is evidence which is apparently credible, or not incapable of belief,[5] and which supports the evidence Mr Booth gave. The circumstances which have been disclosed to this Court suggest that a decision may have been made not to force Mr Bonne into the witness box at the trial because of the risk that evidence he gave would incriminate Mr Booth.

[20] The second, equally overwhelming, problem for Mr Booth is that the jurors heard the clear contradiction between Wayne Roberts on the one hand, and Mr Booth on the other, and were satisfied beyond reasonable doubt that Mr Booth was guilty. The circumstances indicative of guilt, namely that Mr Bonne entered so soon after Mr Booth gained entry by consent, that both men returned to their home together with the baseball bat and Mr Robert's wallet, and Mr Robert's unequivocal description of an attack in which both men assaulted him, would still have existed even if Mr Bonne had been called and given evidence identical with Mr Booth. Furthermore, Mr Bonne would have had to explain why, by his plea, he admitted being in the company of another person when he offended. That plea admitted more than just that there was coincidentally a third person present. As the learned judge instructed the jury, that circumstance of aggravation required that the victim be confronted by the combined force or strength of two persons, or that the force of two persons be deployed against the victim; it is not necessary that more than one participant actually strike the victim, and sufficient (and necessary) that the defendant and one or more other person or persons be physically present for the common purpose of robbing the complainant and physically participating if required.

[21] A direction in those terms was given by the learned judge on Mr Booth's trial, and accords with the suggested direction in the *Bench Book* at 99.1.[6] Mr Bonne was represented by counsel; his plea admitted being in company as described, and it would have been legitimate to cross-examine him on that plea and what he had admitted, had he been called to support Mr Booth.

[22] Once the jury knew – as they would – that Mr Bonne had admitted his own guilt as charged, there is no reason to think there was a significant possibility, or that it was likely, that the jury, acting reasonably, would have acquitted Mr Booth if Mr Bonne's evidence supporting Mr Booth had been before it at the trial. That is the test Mr Booth must satisfy, established in the decision in *Gallagher v R* (1986) 160 CLR 392 at 399.

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5 See *Gallagher v* R (1986) 160 CLR 392 at 397

6 The direction cites and follows *Brougham* (1986) 43 SASR 187, at 191 per King CJ, and *Leoni* [1999] NSWCCA 14

[23] This ground of appeal too must fail, and I would order that Mr Booth's appeal against conviction be dismissed.