SUPREME COURT OF QUEENSLAND

CITATION:	*R v Walsh* [2005] QCA 333
PARTIES:	**R** **v** **WALSH, Thomas James** (appellant/applicant)
FILE NO/S:	CA No 114 of 2005 DC No 1193 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2005
JUDGES:	Jerrard and Keane JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where the appellant was alleged to have entered a dwelling in company with others and stolen a significant amount of property - where this stolen property included 13 model cars - where it was also alleged that the appellant had assaulted a person residing in the house during the burglary - where the appellant was convicted after trial of one count of burglary and stealing - where the appellant was acquitted of the charge of unlawful assault - where it was the same witness who identified the appellant as a person present at the burglary and as the person who committed the assault - where there were inconsistencies between the statement given by this witness to police and the evidence given at trial as to the identity of the person responsible for the assault - where the witness consistently identified the appellant as a person who had been present during the burglary - where nine model cars identical to those alleged to have been stolen were found

in the appellant's house - whether the jury had rejected evidence in order to acquit that they must necessarily have accepted in order to convict - whether there was a rational explanation for the verdicts returned by the jury

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - PROPERTY OFFENCES - where appellant had been involved in stealing property worth approximately $16,000 - where counsel for the appellant had submitted an appropriate sentence was imprisonment for between 18 months and two and a half years - where appellant was sentenced to two years imprisonment - where appellant had lengthy criminal history and had previously been sentenced to imprisonment - whether any error had been shown in the sentence imposed

Jones v The Queen (1997) 191 CLR 439, cited
M v The Queen (1994) 181 CLR 487, cited
Osland v The Queen [1998] HCA 75; (1998) 197 CLR 316, cited

COUNSEL: A J Donaldson, with J D Griffiths, for the appellant/applicant
P F Rutledge for the respondent

SOLICITORS: No appearance for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA:** In this appeal I have read the reasons for judgment of Keane JA, and agree with those, and with the orders His Honour proposes.

[2] Mr Walsh really argued this appeal on very limited grounds. He did not suggest that there was any evidence to support a claim of a miscarriage of justice, in the sense that he was not in fact present and participating in the burglary. Rather, the argument was simply that the evidence overall did not prove his participation beyond a reasonable doubt.

[3] The critical evidence against Mr Walsh consisted of two matters, which had to be considered in combination and not separately. Those were identification evidence, and possession of property stolen in the burglary. The identification evidence was given by Mr Stapleton, a victim of the burglary and the assault, who identified Mr Walsh from a set of four photo boards shown to Mr Stapleton on 2 March 2004. Mr Stapleton had at first somewhat hesitantly identified person number 1, on photo board number 1, as someone whom "I think maybe…..;" Mr Stapleton did not explain what he was identifying about that person. He made no purported identifications of anyone on either photo board number 2 or photo board number 3, but his identification of Mr Walsh, the person who was number 6 on photo board number 4, was confident. He identified Mr Walsh as "the one who told me that if I narked, that they'd come back and kill me or will come back and get me and bash

me up, or if they see me around the area, that they'd bash me. And he said that he's got mates in gaol and that [sic] are getting out soon."

[4] Mr Stapleton had provided a statement to the police on 20 February 2004, two days after the burglary in which Mr Stapleton was assaulted by one of those five men, and in that statement Mr Stapleton identified the first male person who entered the burgled premises as the one who:

- did the majority of the talking;
- assaulted him;
- uttered the threats "earlier" (the ones he said on 2 March 2004 that Mr Walsh had made).

[5] Mr Stapleton's evidence was given on 7 April 2005. When he made his identification of Mr Walsh a little over a year earlier on 2 March 2004, he distinguished Mr Walsh from the person who had done the majority of the speaking, and did not suggest that Mr Walsh had been the person who first entered the premises, and who had assaulted him. When Mr Stapleton gave his evidence in April 2005, he continued to identify Mr Walsh as the person who had threatened him, consistently with his identification in March 2004, but he claimed – apparently for the first time when in the witness box – that Mr Walsh was the person who assaulted him, as well as the person who threatened him. His oral evidence identified Mr Walsh as the assailant who had entered the premises second, not the one entering first; he continued to say that the one who entered first did most of the speaking, and was not Mr Walsh.

[6] The jury's acquittal of Mr Walsh on count 2, the count of assault of Mr Stapleton, is consistent with the fact that the accusation of assault emerged for the first time at the trial, and that fact was made very clear to the jury in the cross-examination of Mr Stapleton. The learned trial judge expressly directed the jurors in the summing up that:

> "You may conclude – and I am simply giving you examples – that the defendant was present and took part in the burglary and theft, but that the evidence leaves you unsure if he committed the assault."

There was no complaint about that direction, which was justified in the circumstances and was about a conclusion that was open to the jurors.

[7] The other matter identifying Mr Walsh as one of the five offenders was simply the fact that on 3 March 2004 when his premises were searched, he was found in possession of 13 miniature Holden cars, of which nine appeared to match exactly the description of the former contents on empty boxes from which apparently identical miniature Holden cars had been stolen from another victim of the burglary, Dwayne Ganley. All that Mr Ganley was left with were the plastic cases in which those model cars had come, which described the contents. Photographs of those plastic cases or boxes were included in exhibit 7, photographs in which the police placed next to nine of those boxes nine of the 13 miniature Holden cars recovered from Mr Walsh's premises. It was clear from the evidence that Mr Walsh and Mr Ganley each had an interest in miniature model cars, which interest the jurors were entitled to think would have been shared by a relatively small number of adult people.

[8] Mr Walsh called evidence from a Mr Stockill, which was apparently intended to persuade the jury to accept, or at least give Mr Walsh the benefit of any doubt about it, that because Mr Walsh had been a relatively steady purchaser of miniature model cars from Mr Stockill in the period from November 2003 until mid March 2004, therefore Mr Stockill may have sold one or more, or all, of those nine miniature Holden cars found in Mr Walsh's possession and matching ones stolen from Mr Ganley, to Mr Walsh. But Mr Stockill did not swear to that latter fact, and the closest he came was to swear that a photograph of cars including the nine seized from Mr Walsh – a photograph of the 13 miniature Holden cars, which formed part of a larger collection in Mr Walsh's possession – were of "…..the type of cars … Tom was buying from me."[1] Thus, he did not even clearly identify the other four of the 13, the ones not allegedly stolen from Mr Ganley, as ones he had sold to Mr Walsh.

[9] The jurors were entitled to think that that evidence had not gone far enough to raise a reasonable doubt, and that Mr Walsh's possession of those nine specific miniature cars two weeks after the burglary was a circumstance placing him in possession of stolen property, and thus strongly supporting the identification of him by Mr Stapleton as one of the five burglars. Mr Stapleton was very confident about that identification. It was open to the jurors to accept it, in the described circumstances. It was not suggested in argument on the appeal that Mr Stockill had not come up to proof in the witness box, or could now swear that he could identify any of nine miniature cars, matching ones taken from Mr Ganley, as miniatures identical to ones he had sold Mr Walsh. Since that was not suggested, there are no grounds shown for rejecting the inference that Mr Walsh was found in possession of property recently stolen in the burglary. That inference arose because of the coincidence of nine model cars being identical to those stolen, and because Mr Walsh also possessed two tachometers identical to ones stolen. The accumulation of coincidences gave rise to the inference the property was stolen, when considered in light of the identification of Mr Walsh; and that combination of circumstances is sufficient to support the convictions.

[10] **KEANE JA:** On 8 April 2005, the appellant was convicted after a trial of one count of burglary and stealing. The offence was charged to have been committed on 18 February 2004 when the appellant, in company with others, entered a dwelling house at Deception Bay and stole two silver-faced tachometers, three DVD players, a sum of money, a quantity of DVDs and compact discs, a VCR, a number of model cars and other items of personal property. The appellant was sentenced to two years imprisonment.

[11] The appellant claims that the verdict of the jury was unreasonable and, in particular, that it was inconsistent with the acquittal of the appellant on a charge of unlawfully assaulting one of the occupants of the dwelling house on the occasion of the burglary of which he was convicted.

[12] The applicant originally applied for leave to appeal against his sentence on the basis that it was manifestly excessive. This application was not pressed in argument on the applicant's behalf.

The Crown case at trial

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1 At AR 82

[13] The Crown case was that, on 18 February 2004, five men entered the house where the complainants were living. Only one complainant, Mr Stapleton, was at home. The place was ransacked, and the intruders took items of personal property belonging to the other complainant, Wayne Ganley, including, according to Mr Ganley, $3,950 in cash, a VCR, a DVD player and some videos. Two silver-faced tachometers and a number of miniature cars, various models of Holdens, belonging to his son, Dwayne, were also taken. The complainant, Mr Stapleton, was punched by one of these men on two occasions.

[14] Mr Stapleton gave evidence that at about 11.40 am he heard a knock at the front door. He opened the door and saw the five men outside. One of the men asked where Dwayne was. Mr Stapleton said that he didn't know and, after some further brief conversation, the man who had been speaking stepped inside the door and the others followed him into the house. They asked "where the money was" and began searching the house. When Mr Stapleton answered that he did not know, the man who was the second person through the door hit him on the right side of his face. This assailant was alleged to be the appellant.

[15] At trial, Mr Stapleton described his assailant as having tattoos on his arms, a "short shaved head" and a "decent sized build". He had told the police that his assailant was 185 centimetres tall, with tattoos on both upper arms, and was 18 to 25 years of age. In cross-examination, he was not sure whether the tattoos were on the upper arm or the lower arm. The appellant was 32 years of age at the date of trial and, from viewing the police photograph shown to Mr Stapleton and placed before this Court, may be said to appear to be older than 18 to 25 years of age.

[16] Mr Stapleton saw the men taking his sound stereo system, his in-dash car DVD player and other electrical goods from the house. He saw them take a DVD player from the lounge room as well as a VCR. They kept asking him "where the money" was, and the person who had earlier hit him struck him again, this time on the left side of his face.

[17] Mr Stapleton said that the intruders took the goods they had stolen out to two cars parked in the front of the house. One of these was a red Toyota Celica while the other was a white Toyota Hilux with an alloy tray. Neither the red Celica nor the white Hilux was said to be registered to, or in the possession of, the appellant when investigating police went to his house on 3 March 2004.

[18] The police were called and Mr Stapleton gave them a description of each of the intruders. Mr Stapleton's original statement to the police said that the man who assaulted him was the first man through the door. Mr Stapleton said that this was an error of transcription by the police which he, Mr Stapleton, had not picked up prior to signing the statement.

[19] On 2 March 2004, Mr Stapleton identified the appellant as one of the intruders from a number of police photo boards containing pictures of a total of 40 "candidates". This identification process was video-recorded. Mr Stapleton initially identified the photograph of another person as an intruder but then changed his mind to choose a photograph of the appellant instead. Mr Stapleton did not, on this occasion, say that the appellant had been the person who had hit him. He said that the appellant had threatened him with reprisals if he "narked" to the police. He also gave that evidence at trial.

[20] Detective Sergeant Gleeson gave evidence that on 3 March 2004 he went to the appellant's home at an address at Bracken Ridge where he executed a search warrant at premises occupied by the appellant and others. There he found 13 models of Holden cars, one model of a Ford car, one silver-faced tachometer and one black-faced one.

[21] Dwayne Ganley identified the model Holden cars as very similar to the ones which were stolen. He still had the boxes in which the cars had been packaged, and nine of the boxes matched nine of the model cars found at the appellant's home.

The appellant's case at trial

[22] The appellant did not give evidence but he called evidence from two witnesses. One witness, Mr Stockill, was a retailer of model cars who gave evidence that the appellant was known to him as a customer who purchased model cars. Mr Stockill said that the model cars found at the appellant's address were the type of cars which he had sold to the appellant both prior to February 2004 and after that date. Mr Stockill gave evidence that the appellant was very enthusiastic in acquiring the model Holdens. This evidence, of course, tends to cut both ways in that while it may tend to provide an innocent explanation for the presence of the models at the appellant's house, it also tends to confirm the appellant's interest in acquiring as many models of this kind as he could, whether his purpose in doing so was to add them to his personal collection or to trade them to others. However that may be, Mr Stockill did not identify the nine model Holdens said by Dwayne Ganley to have been stolen from him as models sold by him to the appellant. Nor was there evidence of any invoice from Mr Stockill showing the bar code product numbers of models sold by him to the appellant. The jury were, in my view, entitled to act on Mr Ganley's identification of the model cars stolen from him as being identical to those amongst the property found in the appellant's possession.

[23] The second witness called by the appellant was Mr Adamson, a friend of the appellant, who gave evidence that he had seen the appellant buy tachometers, similar to those found at the appellant's house, during the past "couple of years" at various automotive part swap meets that he and the appellant had both attended.

The appeal

[24] As I have mentioned, the appellant was acquitted on the assault charge. The prosecution case on each charge relied upon Mr Stapleton's identification of the appellant as one of the intruders. The appellant submits that the acquittal on the assault count demonstrates that the jury did not accept Mr Stapleton's evidence identifying the appellant as the person who assaulted him. The appellant submits that the two verdicts cannot stand together.[2] The appellant also submitted that the jury could not reasonably have accepted the evidence identifying the appellant as one of the men who entered the house on 18 February 2004.

[25] The circumstance that the jury convicted on the charge of burglary and stealing and acquitted on the charge of common assault is, in my respectful opinion, readily explicable by reason of the quality of the evidence available in relation to the different charges. A major discrepancy was shown in the evidence of Mr Stapleton as to which of the five men involved in the alleged burglary had struck him. The

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[2] Cf *M v The Queen* (1994) 181 CLR 487 at 493 - 494; *Jones v The Queen* (1997) 191 CLR 439 at 453.

acquittal on the common assault charge shows only that the jury were not prepared to find beyond a reasonable doubt on the basis of that evidence that the appellant had struck Mr Stapleton. It does not follow that this reasonable doubt must necessarily have carried over into their deliberations as to whether or not the appellant had been involved in the burglary. Mr Stapleton's conflicting accounts as to who was responsible for striking him did not necessarily cast doubt on his identification of the appellant as one of the persons present during the course of the burglary.

[26] It may also be said in relation to the burglary charge that the jury had also heard evidence that a significant number of the stolen model cars were identical with the model cars found in the possession of the appellant. That evidence may reasonably have been regarded by the jury as affording some independent support for Mr Stapleton's identification of the appellant as one of the intruders of 18 February 2004.

[27] For these reasons, this was not a case where a "verdict of acquittal may necessarily demonstrate that the jury did not accept evidence which they had to accept before they could bring in the verdict of guilty".[3] As the learned trial judge directed the jury:

> "You have to consider each charge separately, evaluating the evidence relating to that particular charge, to decide whether you are satisfied beyond a reasonable doubt that the prosecution has proved its essential elements and you will return separate verdicts for each charge. The elements of the separate offences are technically different and so your verdicts need not be the same. You may conclude - and I am simply giving you examples - that the defendant was present and took part in the burglary and theft, but that the evidence leaves you unsure if he committed the assault. You may also think, of course, that very much depends upon the alleged identification of the defendant and, if you have a reasonable doubt about that, you may think it would not be logical to convict him of either charge and certainly not just one of them."

[28] Since the verdicts are reconcilable on the basis of the different evidence supporting each charge, there is no reason to think that the convictions involved a miscarriage of justice by reason of the inconsistency of the verdicts.[4]

[29] The appellant's alternative submission that the jury could not reasonably have acted upon Mr Stapleton's evidence identifying the appellant as one of the intruders also fails. The jury were, in my view, entitled to accept Mr Stapleton's evidence. Mr Stapleton did not identify the appellant as one of the intruders solely on the basis that he remembered the appellant only because the appellant was the intruder who struck him. In cross-examination, Mr Stapleton took the opportunity to confirm that he was "one hundred per cent sure" of his identification of the appellant as one of the persons at the house.

Sentence

[30] The value of the property stolen was approximately $16,000.

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3 *Osland v The Queen* [1998] HCA 75 at [116]; (1998) 197 CLR 316 at 356 - 357.

4 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

[31] The Crown Prosecutor submitted that a sentence in the range between 18 months and four years was appropriate. The appellant was represented by experienced counsel who submitted that the appropriate sentence was between 18 months and two and a half years. The sentence which was imposed was in the very middle of the range for which the appellant's counsel contended.

[32] The appellant was 31 years of age at the time of the offence and 32 years of age at the date of sentence. He had a lengthy criminal history involving offences of dishonesty going back 14 years. He had previously been sentenced to imprisonment on four separate occasions. At the time of the offence of present concern, he was subject to a suspended term of imprisonment for drug related offences imposed on 14 December 2001.

[33] In imposing a sentence of two years imprisonment, the learned sentencing judge referred to "the need for personal deterrence having regard to the criminal history". Having regard to the appellant's criminal history, it is impossible not to agree with the learned sentencing judge, either in relation to the need for personal deterrence, or as to the sentence which was imposed. As I have said, no argument to the contrary was advanced on behalf of the appellant at the hearing of his appeal.

Conclusion and orders

[34] I would order that the appeal be dismissed. The application for leave to appeal against sentence should also be dismissed.

[35] **FRYBERG J:** I agree with the orders proposed by Keane JA and with his Honour's reasons for those orders.