SUPREME COURT OF QUEENSLAND

CITATION:	*R v Franicevic* [2010] QCA 36
PARTIES:	**R** **v** **FRANICEVIC, Tony Ralph** (appellant)
FILE NO/S:	CA No 285 of 2009 DC No 577 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	26 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2010
JUDGES:	Keane and Fraser JJA and P Lyons J Separate reasons for judgment of each member of the Court each concurring as to the orders made
ORDERS:	**1. Allow the appeal;** **2. Set aside the conviction;** **3. Order a new trial.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – IDENTIFICATION EVIDENCE – WARNING ADVISABLE OR REQUIRED – ADEQUACY OF WARNING – GENERALLY – where the appellant was found guilty of armed robbery – where the appellant appealed on the ground that the verdict was unsafe and unsatisfactory – where the trial judge allowed a dock identification of the appellant – whether the trial judge gave adequate jury directions in relation to the dock identification of the appellant – whether the omission of further directions about the identification evidence amounted to a wrong decision on a question of law that constituted a ground of appeal under s 668E(1) *Criminal Code* 1899 (Qld) CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – whether the jury's verdict was unreasonable or could not be supported by the evidence due to inconsistencies in the eye-witnesses accounts of the robber's height and build – whether a new trial should be ordered or a verdict of acquittal entered

Criminal Code 1899 (Qld), s 668E(1), s 668E(1A)
Evidence Act 1977 (Qld), s 17, s 18, s 93A, s 101
Penalties and Sentences Act 1992 (Qld), s 13A

Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, followed
McLellan v Bowyer (1961) 106 CLR 95; [1961] HCA 49, cited
R v Baira [2009] QCA 332, cited
R v Hadlow [1992] 2 Qd R 440, cited
R v Hayden and Slattery [1959] VR 102, cited
R v Kong [2009] QCA 34, cited
R v Lawrie [1986] 2 Qd R 502, cited
R v Leak [1969] SASR 172, cited
R v Parkinson [1990] 1 Qd R 382, cited
R v Taufahema (2007) 228 CLR 232; [2007] HCA 11, cited
R v Tyler [1994] 1 Qd R 675; [1992] QCA 170, cited

COUNSEL: H C Fong for the appellant
M J Copley SC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Department of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by Fraser JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **FRASER JA:** After a two day trial in the District Court a jury found the appellant guilty of armed robbery. The trial judge, Samios DCJ, recorded a conviction and sentenced the appellant to imprisonment for a period of four years, with eligibility for parole fixed on 17 October 2010.

[3] The appellant appealed to this Court on the ground that the verdict was unsafe and unsatisfactory, and not supported by the evidence adduced at trial, and that the trial judge erred in allowing the re-opening of the Crown case to allow a dock identification of the appellant. At the hearing of the appeal the Court gave the appellant leave to amend the notice of appeal to permit him to rely upon the contentions to the following effect in the written outline of argument prepared by his counsel, Mr Fong:

> "A the jury's verdict was unreasonable and/or cannot be supported having regard to the evidence;
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> B inadequate directions to the jury were given;
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> C the trial judge erred by declaring that a witness was hostile and by admitting in evidence a prior inconsistent statement by that witness;
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> D the appellant was not afforded a fair trial.
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> and that in all the circumstances there was a miscarriage of justice."

[4] Under the second ground the appellant argued that the trial judge did not give the jury adequate directions about the evidence upon which the Crown relied to identify the appellant as the robber. For the respondent, Mr Copley SC frankly conceded that the trial judge's directions were inadequate and that the appeal should be allowed for that reason. After I have first summarised the evidence at trial I will explain why I consider that the respondent's concession was appropriate and that this Court should set aside the verdict of guilty. I will then explain why I would reject the appellant's contention that this Court should enter a verdict of acquittal rather than ordering a re-trial. Those conclusions render it unnecessary to rule upon the other grounds of appeal, but I will express my views about some of those points in the course of summarising the evidence.

Summary of the evidence

[5] The Crown case was that on 4 August 2008 at about 6.30 pm a man whose body and face was obscured by dark clothing so that only the area around his eyes was exposed rushed into a takeaway food shop in Gladstone, brandished a knife, and demanded money. After an employee gave the man some money he rushed back out of the shop. Evidence to that effect was given by three young shop assistants (Ms Grieve, aged 15 at the time of the offence, Mr Williamson, then aged 13, and Mr Richardson, then aged 17) and by a customer, Ms Edwards. Consistently with their evidence, a bystander across the road from the shop, Ms Saville-Callis, gave evidence that she saw a person wearing dark clothes and carrying something silver in his hand get out of a car and enter the shop. She also saw a second man get out of the car and go round to the back of the shop. Subsequently she saw the first person return to the car. Ms Saville-Callis gave evidence that she recognised the driver of the car as Ms Noeleen Nicol. Ms Nicol gave evidence in the Crown case that she was an accomplice. Her job was to drive four men to the shop. She identified three of those men as people she knew, Messrs Luke, Shane and Alan Jones. Defence counsel did not challenge any of that evidence. The real question for the jury was whether the appellant was the robber. The eye witnesses could only estimate the robber's height and build: I will return to that evidence. The identification of the appellant as the robber depended substantially upon the evidence of the accomplice Ms Nicol.

[6] Ms Nicol's evidence in chief was initially vague, so much so that the jury might have regarded it as incredible. To each of the questions about whose car she was driving, how she came to be driving it, where she drove from, and how long she had been in the car before going to the shop, Ms Nicol responded that she did not know. When pressed she responded that she was on drugs at the time. Ms Nicol then gave evidence that the fourth passenger in the car was the man who went into the shop. She said that she knew him as "Tony" and that his surname started with "F". She knew him "through other people". She had previously met him on two occasions but had not had any dealings with him before this robbery. She described him as having brown hair, being about 180 centimetres tall, and having a medium build. Ms Nicol gave evidence that she had assumed that they were going to the shop to obtain food but that just before the robbery she suddenly became aware the robbery was to occur. After describing "Tony's" movements in getting out of the car with a knife and going to the store, Ms Nicol said that Mr Shane Jones got out and went around to the back of the shop. She then turned the car around. (That was consistent with evidence given by Ms Saville-Callis). After some time, the length of which she said that she could not estimate because she was "on the nod", "Tony"

and Mr Shane Jones returned to the car. She drove them somewhere, got out of the car, and was collected by someone else.

[7] At that point in the evidence-in-chief the prosecutor applied in the absence of the jury to have Ms Nicol declared hostile. The prosecutor referred the trial judge to what was said to be a prior inconsistent statement by the witness. The trial judge expressed the view that Ms Nicol was adversely influenced by drugs, that her demeanour was hostile, that she was not cooperating, and that she was only doing the minimum that she thought that she had to do. Although the trial judge voiced some reservations in the course of argument he ultimately declared the witness hostile and permitted the prosecutor to cross-examine Ms Nicol. In so ruling the judge repeated that the witness was not cooperating.

[8] The appellant argued that in the absence of cross-examination in a voir dire there was insufficient evidence to conclude that Ms Nicol had made a prior inconsistent statement. However the declaration that she was adverse was not founded upon inconsistency between her oral evidence and any prior statement. The ground upon which the trial judge decided that she should be declared hostile was that she was "not cooperating". In the context of Ms Nicol's strange and apparently reluctant evidence in chief those words sufficiently conveyed the trial judge's conclusion that Ms Nicol was not willing "to tell the whole truth for the advancement of justice".[1] The trial judge had ample opportunity to observe Ms Nicol giving evidence to form that view, which was based at least in part upon her demeanour. In *McLellan v Bowyer*,[2] Dixon CJ, Kitto and Taylor JJ observed that it had been settled for many years that hostility or adverseness might appear from the demeanour of the witness. In such a case, it is not always necessary to conduct a voir dire to decide if the witness is hostile.[3] The appellant has not demonstrated any error in the trial judge's decision to permit the prosecutor to cross-examine Ms Nicol as a hostile witness.

[9] In the subsequent cross-examination by the prosecutor Ms Nicol gave evidence which was inconsistent with parts of her earlier evidence in chief but consistent with a prior statement to police. She said that on 19 February 2009 she had told the police that "Tony" had told her to drive to the shop, that he had said that he would go in through the front door, that Shane would go to the back of the shop, and that she had to spin the car around and be ready to go when they returned. The prosecutor then tendered and the trial judge admitted in evidence the relevant paragraphs of Ms Nicol's prior statement:

> "Then Tony told me to drive to the Golden Chicken. While we were driving there Tony told us that we were going to rob the Golden Chicken. He said that I'd be the driver, and that he would go in through the front door, and that Shane was to go round the back, and that I had to spin the car around and get ready to go for when Tony and Shane came back, because when we got there I was going to park nose in.
> . . .
> They both got back into the Holden and then I took off. Then we drove back to Tony's place. As we were driving, Tony was telling

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1 The test was so expressed by Sholl J in *R v Hayden and Slattery* [1959] VR 102 in a passage endorsed by the High Court in *McLellan v Bowyer* (1961) 106 CLR 95 and consistently applied in this State: see *R v Baira* [2009] QCA 332 at [30], *R v Kong* [2009] QCA 34 at [26], *R v Hadlow* [1992] 2 Qd R 440 at 448 and *R v Lawrie* [1986] 2 Qd R 502 at 512.

2 (1961) 106 CLR 95 at 103.

3 *R v Hadlow* [1992] 2 Qd R 440 at 449 per Cooper J, de Jersey J agreeing.

> Allan about what he'd done inside. He was telling Allan about how he'd grabbed the girl inside the shop. When we got back to Tony's place I parked the car, they all went inside and I walked round to my Auntie's Sue's place in Glenlyon Road."

[10] The appellant argued that the trial judge erred in law in admitting that document because s 18 of the *Evidence Act* 1977 (Qld) allows that course only where the witness does not distinctly admit that the witness made the prior inconsistent statement, but Ms Nicol had admitted the substance of her prior statement under cross-examination by the prosecutor. That submission should be rejected. In the case of a hostile witness a prior inconsistent statement may be proved under s 17.[4] Subsection 17(1) provides that where (as here) in the opinion of the Court the witness proves adverse, the party producing the witness "may by leave of the court prove that the witness has made at other times a statement inconsistent with the present testimony of the witness". Subsection 17(2) provides that before such proof can be given, "the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the witness has made such statement". That was done and the trial judge gave the prosecutor leave to prove the prior inconsistent statement by admitting the relevant paragraphs of the document in evidence. Under s 101 of the *Evidence Act* 1977 (Qld) those paragraphs were evidence of the facts stated in them. It should be noted that s 17 does not contain the qualification expressed in s 18 that proof of a prior inconsistent statement may only be given where "the witness does not distinctly admit that the witness has made such statement". I see no ground for implying any similar condition in s 17, which instead makes admissibility dependent upon evidence that the witness is adverse, and upon the judge granting leave.

[11] Of course the trial judge retained the discretion to refuse to admit the document in evidence or to withhold it from the jury in appropriate circumstances. Defence counsel did not ask the judge to take either course, but those matters (like the question whether the trial judge should give directions about the weight to be given to the document) should ordinarily be considered by trial judges in such circumstances. However, as I think that there must in any event be an order for a new trial (in which it is to be hoped that the course of the evidence would not replicate what happened in this trial) it is unprofitable to address the appellant's further contention that the trial judge erred in failing to exercise one of those discretions favourably to the appellant.

[12] After the conclusion of the prosecutor's cross-examination of Ms Nicol, defence counsel extracted that when Ms Nicol was interviewed by police on the day after the robbery she had given a description of "Tony" which included that he had a beard. She gave evidence, however, that this was a "fake description". After Ms Nicol admitted that she was arrested and released on bail on 7 August she agreed that when she was interviewed by police and shown photo boards she was "high on drugs". She agreed that she told police that she was not able to identify anyone in the photo boards and, in particular, that she was not able to identify "Tony", but she added that she could have but did not want to identify someone.

[13] In re-examination about that evidence Ms Nicol said that she had recognised a person on the photo boards. The trial judge refused the prosecutor's request for

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[4] *R v Baira* [2009] QCA 332 at [29].

leave to show those photo boards to Ms Nicol but did give the prosecutor leave to re-open the evidence-in-chief to seek a dock identification. Ms Nicol then identified the appellant in the dock as the man "Tony" who she had mentioned in relation to the robbery. She said that she recognised him "Through jobs and what…". In further cross-examination by defence counsel Ms Nicol said that if she looked at the man in the dock, which she did not wish to do, she probably could positively say that the person sitting in the dock was "Tony". She agreed with defence counsel's suggestions that on each of the occasions she had met "Tony" she was under the influence of drugs and that she had not seen him since the robbery (4 August 2008) until she gave this evidence (on 28 October 2009). In further re-examination Ms Nicol gave evidence that she held to her earlier testimony that the man in the dock was the person "Tony" who was with her at the robbery.

[14] The prosecutor called the arresting officer, Senior Constable Smith. He gave evidence that later on the day of the robbery he went to a residential unit where he found the appellant together with Messrs Alan and Luke Jones. The appellant was dressed in black clothing, but the description of that clothing did not tally with the descriptions given by the eye witnesses of the robber's clothing. I will return to other aspects of Constable Smith's evidence.

[15] The appellant did not call or give evidence.

The trial judge's directions about the identification evidence

[16] I should first mention that the trial judge directed the jury that Ms Nicol had given a statement to the police "which has the effect of reducing her own sentence", explained the effect of s 13A of the *Penalties and Sentences Act* 1992 (Qld), directed the jury that there might be a strong incentive for a person in her position to implicate the appellant, and directed the jury to scrutinise her evidence with great care and act on it only if, after considering it and all the other evidence in the case, the jury was convinced of its truth and accuracy.

[17] As to the identification evidence, the trial judge directed the jury about the well known dangers of dock identifications. The judge cautioned the jury very strongly about that kind of evidence, pointed out that it was dangerous and of very limited value, and drew the jury's attention to the weakness in such evidence that any witness would quickly appreciate and might be influenced by the fact that the person sitting in the dock was the person accused of the offence. The trial judge did not give any other directions about the identification evidence.

[18] Mr Copley SC conceded that the trial judge's omission to give further directions about Ms Nicol's identification evidence amounted to a wrong decision on a question of law such as to constitute a ground of appeal under s 668E(1) of the *Criminal Code* 1899 (Qld). That concession was appropriate. In *R v Tyler*,[5] in which the sufficiency of directions concerning dock identification evidence was in issue, this Court held that it is necessary for a trial judge to give directions of the kind identified in *Domican v The Queen*.[6] In that case Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ said:

> "Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the

5 [1992] QCA 170 at [12]-[13].
6 (1992) 173 CLR 555.

> dangers of convicting on such evidence where its reliability is disputed . The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed "as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case". A warning in general terms is insufficient. The attention of the jury "should be drawn to any weaknesses in the identification evidence". Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."[7]

[19] In this case there were significant matters which might reasonably have been regarded as undermining the reliability of Ms Nicol's dock identification but which the trial judge did not mention in his directions to the jury. These included the facts that, on Ms Nicol's evidence, she had met "Tony F" only on two occasions prior to the robbery; on each of those occasions and on the occasion of the robbery she was affected by drugs; some 15 months elapsed between the robbery and when she gave evidence at the trial identifying the appellant as the robber; she did not identify the appellant as the robber when police showed her a photo board with his photo on it (although she sought to explain that failure by evidence that she deliberately chose not to identify him); and she told police that the robber had a beard (although she claimed in evidence deliberately to have misled the police by that assertion).

[20] In *Domican v The Queen*,[8] the High Court also held that if a trial judge has failed to give an adequate warning concerning identification a new trial will ordinarily be ordered, even when other evidence makes a very strong case against the accused. Although the evidence which I summarise under the next heading provided some support for Ms Nicol's identification evidence, the Crown case ultimately depended upon the jury accepting her identification of the appellant as the robber. This is not a case in which the Court could conclude that no substantial miscarriage was occasioned by the absence of a necessary direction and sustain the conviction by application of the proviso in s 668E(1A) of the *Criminal Code* 1899 (Qld). The respondent correctly disclaimed any contention to that effect. The appeal must be allowed and the conviction must be set aside.

Should the Court order a re-trial?

[21] The remaining question is whether or not a new trial should be ordered. The appellant's counsel argued that it was open to the Court to enter a verdict of acquittal. That would be the appropriate order if the appellant made out the ground of appeal that the jury's verdict was unreasonable or could not be supported by the evidence,[9] but I would hold that the appellant did not establish that ground.

[22] The appellant's contention was that the verdict was unreasonable and not supported by the evidence because the evidence of the robber's height and build given by the eye witnesses differed from other evidence given in the Crown case so markedly as

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7 (1992) 173 CLR 555 at 561-562.
8 (1992) 173 CLR 555 at 565.
9 See *R v Taufahema* (2007) 228 CLR 232 at [35], [52], [159]; [2007] HCA 11.

necessarily to raise a reasonable doubt that the person the eye witnesses saw was the appellant.

[23] One weakness in that argument is that the evidence to which the appellant pointed as establishing the appellant's height and build was surprisingly imprecise. Curiously, the Crown did not adduce any evidence that the appellant's height or weight had been measured. In examination-in-chief Senior Constable Smith said that when he observed the appellant some hours after the offence was committed he estimated that appellant was about 6 feet 2 inches tall with an average build. It may be accepted that experienced police officers are likely to give more accurate estimates of this kind than many other people, but still this was merely opinion evidence.

[24] In cross-examination Senior Constable Smith was shown some video surveillance footage. That video demonstrated that about two hours before the robbery was committed at a different place the appellant was wearing clothes similar to those which police saw that he was wearing when they spoke to him after the robbery. These clothes did not tally in all respect with the evidence of the eye witnesses, but that was not the appellant's point under this ground of appeal. The appellant argued that the eye witnesses had all given evidence to the effect that the robber had a thin build but although the video evidence gave no reliable indication of the appellant's height it demonstrated that the appellant had a solid build. In order to make that point, and with the consent of the respondent, the appellant tendered as evidence in the appeal two photographs taken from the video. As the appellant's counsel acknowledged, the photographs seem to show that the appellant was wearing a loose fitting shirt and other clothing which makes it difficult to judge his build. In my view the photographs are inconclusive.

[25] There is then the difficulty which the eye witnesses must have encountered in giving reliable estimates of the robber's height and build. Mr Richardson, who was about 185 centimetres tall, thought that the robber was some 15 - 20 centimetres taller. On that estimate the robber was very tall, between about 200 and 205 centimetres. On the other hand, Ms Grieve said in her statement admitted under s 93A of the *Evidence Act* 1977 (Qld) that the robber looked pretty tall and thin. She thought he was "6 foot maybe". Mr Williamson gave a different estimate again. He said in his s 93A statement that he was pretty sure that the robber was about 6 feet 2 inches tall and skinnier than a normal person. In cross-examination Mr Williamson said that he had guessed that the robber's height was about 180 centimetres and that his mother had then told him that this equated to 6 feet 2 inches. (180 centimetres is in fact about 5 feet 10 inches.). Ms Edwards said that the person she saw was about 6 feet 4 inches tall and had a "normal sort of size build". She thought he was quite a bit taller than her husband, who was 6 feet tall.

[26] The differences between the estimates given by the eye witnesses in the shop is unsurprising. They were confronted by the fearful spectacle of a disguised man rushing into the shop and brandishing a knife. The appellant argued that particular weight should be attributed to the estimates given by Ms Edwards and Mr Richardson because they were able to compare the robber's height with familiar standards. I am not persuaded that this evidence necessarily contributes to a reasonable doubt about the appellant's guilt. Apart from the imprecision in Constable Smith's estimate and the fact that marked variations in estimates of this kind are to be expected in such circumstances, it is relevant that the Court is denied

the jury's distinct advantage of seeing and hearing all of the witnesses give their evidence. The jury evidently did not consider that the evidence upon which the appellant now relies cast a reasonable doubt upon Ms Nicol's identification evidence.

[27] This is not a case like *R v Parkinson*,[10] in which Macrossan CJ observed that it would almost inevitably be the case that a conviction cannot safely be entered when the only real evidence to support it consists of a prior statement of a prosecution witness which is steadfastly contradicted and declared to be false by that witness on oath at the trial. Under cross-examination by the prosecutor Ms Nicol adopted her prior statement and she identified the appellant as the robber in response to non-leading questions in re-examination. The Crown could also point to the coincidences that "Tony's" fellow passengers in the car driven by Ms Nicol had the same surname as the men found with the appellant later the same day, that the appellant and the robber wore similar clothing, and that on Ms Nicol's consistent evidence the robber and the appellant bore the same first name and a surname which started with "F". The dock identification remained essential to the Crown case and it had the limited value described by the trial judge, but in my opinion it was nevertheless open to a properly directed jury to find the appellant guilty of the offence beyond reasonable doubt. It is not appropriate to enter a verdict of acquittal.

[28] The appellant's counsel referred to the lack of strength in the Crown case and the fact that the appellant had already served a substantial part of his custodial sentence as grounds for declining to order a new trial. The Crown case could not be described as strong, but I would not conclude that a properly directed jury is so unlikely to acquit the appellant that the hardship he must bear in facing an appeal and two trials is sufficient to displace the public interest in the administration of justice according to law.[11] In my view the Court should order a re-trial. It will then be a matter for the authorities to decide whether, taking into account the matters identified by the appellant, that trial should proceed.

Proposed orders

[29] In my opinion the Court should allow the appeal, set aside the conviction, and order a new trial.

[30] **P LYONS J:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with his Honour's reasons, and with the orders which he proposes.

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[10] [1990] 1 Qd R 382 at 384.

[11] cf *R v Leak* [1969] SASR 172 at 176.