# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Wilks* [2012] QCA 14 |
| PARTIES: | **R**<br>**v**<br>**WILKS, Jamie Christopher**<br>(appellant) |
| FILE NO/S: | CA No 148 of 2011<br>DC No 649 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 21 February 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10 February 2012 |
| JUDGES: | Margaret McMurdo P and Muir and Fraser JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The appeal is allowed, the conviction set aside and a new trial is ordered.**<br>**2. The application for leave to adduce evidence is refused.**<br>**3. Exhibits 1 and 2 in the appeal are to be returned to the appellant.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – GROUNDS FOR INTERFERENCE – UNREASONABLE OR UNSUPPORTABLE VERDICT – where the appellant was convicted of armed robbery – where the evidence linking the appellant with the robbery was circumstantial – whether jury could find guilt beyond reasonable doubt on the evidence<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MIS-DIRECTION OR NON-DIRECTION – NON-DIRECTION – where off-duty police officers witnessed events preceding the robbery – where police officer subsequently arrested appellant – where police officer gave evidence of the circumstances of the arrest – where that evidence was irrelevant – where police officers testified in uniform – whether the inferences that could be drawn from the testimony of the police officers was |

prejudicial to the appellant – whether the trial judge failed to direct the jury not to draw impermissible inferences from the evidence

*Criminal Code* 1899 (Qld), s 668E(1)

*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited

COUNSEL: R E East for the appellant
S P Vasta for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, Jamie Christopher Wilks, was convicted after a four day trial in the Brisbane District Court on 23 May 2011 of armed robbery of a liquor store on 6 March 2010. He has appealed against his conviction on four grounds. The first is that the verdict was unsafe and unsatisfactory, that is, it is unreasonable or cannot be supported having regard to the evidence: s 668E(1) *Criminal Code* 1899 (Qld). The second and third grounds are that inadmissible and seriously prejudicial evidence was led at the trial and that the judge's failure to either discharge the jury or to direct the jury about that evidence resulted in a miscarriage of justice. The fourth is that the prosecution at trial failed to disclose information to the defence; this amounted to a denial of procedural fairness and has led to a miscarriage of justice. The appellant applied to adduce further evidence in support of the fourth ground of appeal and the respondent sought to lead responsive evidence to negate that ground. Before returning to discuss these matters, it is necessary to set out the relevant evidence at trial.

**The evidence at trial**

[2] The complainant, a 31 year old woman, gave evidence that on Saturday, 6 March 2010 she was employed at a Bray Park liquor store. At about 7.20 pm, a man whom she knew as Steve warned her that a person was outside staring at the store and acting suspiciously. She walked with Steve to her car and saw this man emerge from the shadows. When she walked back to the store the man followed her but instead of entering the store he turned at 90 degrees and walked across the car park. She observed him for about 30 seconds from a distance of around five metres. It was dark but there was some light from surrounding shops. He was wearing red and black microfibre tracksuit pants and a zip up jacket of matching black and red microfibre. He had a slim build, a gaunt looking face, and blondish-brown shoulder length hair. She had seen him on a few prior occasions.

[3] Steve and his friend, Lance, waited at the store with her until another employee, Rob, arrived. Steve and Lance left at 7.30 pm and Rob left at about 7.40 pm. Uniformed police arrived at about 7.50 pm and she gave them a description of the man. After the police left, she made notes of the incident and served customers. She telephoned her partner and was telling him her finishing time when the man wearing the red and black tracksuit returned. He was dressed in "exactly the same thing". He had a balaclava over his head but his long hair was visible underneath it. She could see his hair was shoulder length and the same colour as that of the man

who was acting suspiciously earlier. His voice "sounded very Australian … even yobbo-ish". She did not know if he was wearing gloves. Both the man she saw earlier and the robber were Caucasian. He waved a gun in her face and asked for money. She dropped the phone and screamed. The man shouted, "Give me all of the money." She responded, "Please don't shoot me." He was really agitated and kept on looking outside to see if anyone was coming. She opened the till and threw the money on the counter. He took it saying "That'll be all, thanks", left the store and ran across the car park. She locked the door and pressed the duress alarm. CCTV footage of the incident was tendered.[1] Police later showed her a photo board containing 12 photos, including one of the appellant, but she did not identify him.

[4] During cross-examination she agreed it was a dark night and raining lightly. She confirmed that the man whom she saw in the car park wore a matching jacket and pants. His pants were black with red stripes. His jacket was black with some red on the sleeves. The robber's balaclava had one big opening in front of the eyes but did not expose the nose. She could not remember the robber's eye colour but she agreed she probably described it as bluish-green at the committal proceedings. She could not say whether the hair underneath the balaclava was real or a wig. He was wearing white soled sneakers or joggers. The robber had to push open the sliding door to enter the store. His fingers would have brushed the counter as he grabbed the money, scooping it into his hand before running out. Police dusted the counter and the door for fingerprints.

[5] Daniel Bust gave the following evidence. He was a sergeant of police at Petrie. He knew the appellant and knew that he resided in the Strathpine area. When asked by the prosecutor if he had any problem in identifying the appellant he answered "no". On 6 March 2010, he and his friend, fellow police officer Ty-Le Connell, were off-duty. They drove to Bray Park at about 6.15 pm and bought beer at the liquor store. It was still daylight. As they left, they saw the appellant walking on the grass footpath. He was wearing a black and red tracksuit top and black pants. Mr Bust was unsure if the pants were trackpants or other long pants, but they were black. The appellant was between 175 and 180 cms tall, Caucasian, with loose sandy-brown shoulder-length hair. The appellant looked into their car but he seemed very distant; his eyes were unfocused and he appeared to be a little nervous. He was familiar with the appellant's voice which he described as having a raspy pitch and a very strong Australian or "ocker" accent. The appellant always spoke in short sentences. Mr Bust did not learn of the robbery for some time as he was on recreation leave. In cross-examination, he said he did not know the type of material from which the appellant's clothing was made.

[6] Ty-Lee Connell gave the following evidence. He was a senior constable of police currently stationed at the Bray Park police beat and he knew the appellant. When asked by the prosecutor whether he would have any problem identifying the appellant, he responded, "no". On 6 March 2010, he and Mr Bust were off-duty and went to the Bray Park shops to buy beer. He saw the appellant on the grass. He appeared extremely nervous and was looking over his shoulder as though waiting for something to happen or someone to come. He appeared drug affected. His face was emotionless. He was "acting suspicious" and stared in their direction but did not appear to recognise them. The appellant was a Caucasian male, 175 cm tall of slim build with shoulder length brown hair. He was wearing a black long-sleeved top with red material and an HSV emblem on the left side of the chest, and black

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1 Ex 7.

pants. It was daylight and the lighting conditions were "fine". The next day he became aware that there had been an armed robbery at the Bray Park liquor store the previous night. He rang the Criminal Investigation Branch and reported that the appellant had been acting suspiciously there and described his clothing. He was then provided with images from the liquor store's CCTV footage. Twelve days after the robbery, he arrested the appellant when he happened to see him at the Kingston Village shops.

[7] In cross-examination, he agreed the tracksuit top worn by the appellant with its HSV insignia was a typical Holden supporter's jacket but he disagreed that there were many such jackets around in the area at the time. The appellant's jacket did not have a collar; it had a zip down front. He agreed that it was not possible to identify any detail of the robber's clothing from tendered CCTV footage. He recalled that the appellant's tracksuit pants were plain black without significant markings. The following exchange occurred about the arrest of the appellant:

> "… so he was on your list as being suspect in this matter?-- Yes.
>
> And you saw him and you wanted to question him so you arrested him on the basis that-----?-- When I saw him I immediately identified him as soon as the door was opened. He was exiting the centre. I then arrested him immediately and contacted the CIB straight away.
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> Did he walk up to you and cause you any problems or did he just say to you, 'What do you guys want?' or something like that? What was the conversation you had?-- I drew my firearm and I commanded him straight to the ground - directed him straight to the ground-----
>
> Yes?-- -----and remained there - remained there, handcuffed him, restrained him, and then I awaited the CIB.
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> So why was it necessary to draw your firearm?-- Because there was warnings on the [appellant] at that time to approach with extreme caution, there was a flyer, and also the fact that a weapon had been used in the armed hold-up.
>
> But he has not been established to have been the perpetrator of the armed hold-up, has he?-- No, he hasn't.
>
> He was only a suspect?-- At that time, yes."

[8] The person whom the complainant knew as Steve gave the following evidence. On 6 March 2010, he drove to the Bray Park shops with his friend, Lance, to buy pizza. The car was travelling at about 10 or 15 kph and it was drizzling. They saw a man crouched underneath a tree in the dark. He looked at the man for about three or four seconds. The man was wearing dark clothing. His top was noticeably red. His eyes were very pale and seemed to be staring into nothing and did not react to the car headlights. The state of the man's eyes made him think he was on drugs. Steve went into the store and warned the complainant about this man. When Steve left the store the man was still under the tree. As he and Lance began to drive out of the car park, he saw the complainant at her vehicle. The man had entered the car park and was walking towards the store. The jacket seemed to be a little big for him but his pants seemed tighter. It was hard to see his build because of the big jacket but he seemed to be of medium build. He had shoulder length hair but it was difficult to tell its colour because it was wet. Before the man entered the store he diverged off to the left. Lance stopped the car and he and Steve returned to the store to check on

the complainant. They stayed until a male employee arrived and left at about 7.20 pm. When they arrived home they telephoned police and told them of their observations and concerns. At about 9.00 pm, police telephoned and told him that there had been an incident at the liquor store. He participated in a photo board identification at the police station. He identified a photo of the appellant as the man whom he had seen acting suspiciously outside the store before the robbery.

[9] In cross-examination he agreed he had drunk one or two bourbon and cokes before he saw the man outside the store. He did not get closer than 10 or 20 metres to him. The man's jacket was predominantly black with red splashes across the top. The pants were black. He could not recall any red stripes on the pants. He did not notice any particular insignia or advertising on the jacket. He did not recall the appearance of the man's shoes.

[10] Lance gave evidence that the man outside the store was wearing a red and black jacket, windcheater or jumper; it was mainly red. He could not remember the colour of his pants. He had shoulder length "lighty-brown" hair and was of slim build. He thought he was in his mid-20s. His face was somewhat drawn. He could not remember if he had facial hair. Lance's car was barely travelling 5 kph when he saw the man. The next day Lance took part in a photo board identification at the police station. He selected three photos which may have been the man but he was unable to positively identify anyone.

[11] In cross-examination he agreed that as he was driving the car he had only a glance at the man under the tree. At one point, however, the car was only two or three metres from him. Later when this person was sitting on a fence he saw he was wearing a red and black jacket.

[12] It was not put in cross-examination to Steve, Mr Bust or Mr Connell that the man they saw acting suspiciously outside the store between 6.15 pm and 7.20 pm was not the appellant.

[13] I have viewed the CCTV footage of the robber (ex 7) and the enhanced stills taken from it (ex 18). They depict a person of apparently slim to medium build, of average height, wearing a balaclava and no gloves. From the little skin that is visible, he appears to be Caucasian. His hair seems entirely covered by the balaclava. That does not mean the complainant did not see his hair; it is simply not discernible from the footage and stills. His jacket is predominantly red on the back and front, possibly with two black stripes on the side, and with some white markings on the front and back. The sleeves are black with some white markings on the side. The pants are black with some white vertical markings on the sides. The balaclava appears to make identification of the robber from the footage and stills almost impossible.

[14] Fingerprints were found at the scene but they did not belong to the appellant. No gun, balaclava, clothing or any other item linking the appellant to the robbery was found in his possession when he was arrested. There was no direct evidence about the colour of the appellant's eyes but the photos of him in the photo boards suggested they were brown rather than bluish-green.

**Was the jury verdict unreasonable?**

[15] The appellant's counsel conceded that the jury could have concluded that the appellant was present at the scene before the robbery. He contended, however, that

the evidence linking the appellant with the later robbery was so weak, tenuous and confusing that it could not satisfy a jury beyond reasonable doubt that the robber was the appellant. In making that contention, counsel emphasised the following matters. The complainant's description of the robber as wearing a mainly black top with red down the sleeves was inconsistent with the evidence in the CCTV footage and could well have been a description of the jacket worn by the appellant earlier in the evening. None of the witnesses who gave evidence about the clothing worn by the man earlier in the evening described the white markings on the sleeves or pants depicted in the CCTV footage and enhanced stills. Steve and Mr Bust described the appellant as wearing a jacket that was loose or too big, whereas the CCTV footage and enhanced stills do not suggest that the robber's jacket was ill-fitting. These matters all suggested that the appellant was not the robber.

[16] The appellant's counsel argued that no weight could be placed on the fact that both the appellant and the robber were Caucasian, of medium or slight build and wearing white soled shoes as these were common features. Similarly, the fact that both the appellant and the robber had shoulder length light brown hair was insignificant as this was not an unusual feature. And little weight should be placed on the fact that both the appellant and the robber had a strong Australian accent and a tendency to respond with short answers. The witnesses who saw the appellant described him as appearing nervous and drug affected but the complainant did not describe the robber in this way. Importantly, counsel contended, in the committal proceedings the complainant described the robber's eyes as bluey-green whereas the photo boards suggested the appellant's eyes were brown. For all these reasons, the jury ought to have been left with a reasonable doubt as to whether the robber was the appellant.

[17] In determining whether a jury verdict is unreasonable and cannot be supported on the evidence (s 668E), an appellate court must look at the whole of the evidence and decide whether it was open to the jury on that evidence to be satisfied beyond reasonable doubt of the accused's guilt: *M v The Queen*;[2] *MFA v The Queen*.[3]

[18] The appellant's counsel does not contend that the judge's warnings to the jury about the dangers of identification evidence were flawed or inadequate. And counsel rightly conceded that the jury were entitled to conclude that the man they saw near the liquor store between 6.15 pm and 7.20 pm was the appellant. That was because of the uncontradicted evidence that Mr Bust and Mr Connell knew the appellant and recognised him and that Steve later selected his photo from a photo board.

[19] The critical issue in this ground of appeal is whether the jury were entitled, on the evidence, to be satisfied beyond reasonable doubt in taking the final step in the prosecution case, and to determine that the appellant was the robber. The only eyewitness to the robbery was the complainant. It is true she was unable to identify a photo of the appellant from 12 photos on a board. But she gave uncontradicted evidence that the man acting suspiciously outside the liquor store between 6.15 pm and 7.20 pm was the person who robbed her at about 8.00 pm. She said that both were wearing clothing similar in style and colour, had similar length and colour hair and both were Caucasian. The robber spoke with a strong Australian accent and Mr Bust gave evidence that the appellant also spoke with a strong Australian accent.

[20] It is true that the complainant's identification of the robber as the man who was acting suspiciously earlier (the appellant according to Steve, Mr Bust and

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2 (1994) 181 CLR 487, 493-495.

3 (2002) 213 CLR 606 [25], [59].

Mr Connell) was made in circumstances where she clearly had this man in her mind as someone who might rob her later that evening. There was therefore a danger that she wrongly jumped to the conclusion that this man was the robber. It is also true that she observed the robber in circumstances which were less than ideal and clearly stressful for her and that the robber's balaclava made a reliable identification particularly difficult. Another difficulty with her evidence is that her earlier viewing of the man identified by others as the appellant was brief and in imperfect lighting conditions, although she had seen him before.

[21] But as I have explained, the jury were entitled to conclude that it was the appellant who was outside the store acting suspiciously shortly before the robbery. The complainant's uncontradicted evidence that this man was the robber was supported by the evidence that the robber had similar complexion, height, build, and hair colour and length to the appellant. In addition, the complainant's evidence that the robber spoke with a strong Australian accent, together with the evidence that the appellant had a strong Australian accent, supported her identification. It is true there were discrepancies between the witnesses' descriptions of the clothing of the man outside the store before the robbery and the clothing of the robber depicted in the CCTV footage and stills. But the description by witnesses of the red and black clothing worn by the man earlier was broadly similar to that worn by the robber and depicted in the CCTV footage and stills. It is also true that none of the identifying features relied on by the prosecution was striking in itself or even in combination. But in the absence of any competing evidence, and despite the weaknesses in the prosecution case identified by the appellant's counsel, a properly instructed jury was entitled to find them a persuasive enough combination of circumstances to support the conclusion beyond reasonable doubt that the robber was the same person as the man outside the store earlier, that is, the appellant. It follows that this ground of appeal fails.

**Did inadmissible and prejudicial evidence result in a miscarriage of justice?**

[22] The second and third grounds of appeal raised the contention that parts of the evidence of Mr Bust and Mr Connell were inadmissible and prejudicial and that the absence of careful judicial directions to the jury has resulted in a miscarriage of justice. Mr Bust and Mr Connell were off-duty police officers when they identified the appellant outside the store. The fact that they were police officers, argued the appellant's counsel, was both irrelevant and prejudicial and should not have been led. This error was compounded by the fact that they gave their evidence wearing police uniform. It was further compounded by Mr Connell's evidence of his arrest of the appellant. The appellant's counsel conceded that the arrest 12 days later was admissible so that the prosecution could explain why no evidence linking the appellant to the robbery was found in his possession. But, counsel argued, Mr Connell's subsequent recognition and arrest of the appellant tended to give illegitimate support to the complainant's evidence that the robber was the person she, Mr Connell and others saw shortly before the robbery. That prejudice was even further compounded when, during defence counsel's[4] cross-examination, Mr Connell volunteered unnecessary, irrelevant and prejudicial evidence about the dramatic circumstances of the appellant's arrest.[5] The prosecution case invited the jury to infer that the appellant was known to police as a very bad and dangerous man who might well commit an armed robbery and that was why Mr Connell

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4 Defence counsel at trial was not counsel in this appeal.

5 Set out at [7] of these reasons.

arrested him at gunpoint. Even though defence counsel did not ask the judge to discharge the jury or to direct them to disregard this evidence, the judge ought to have done so.

[23] In the circumstances of this case where neither counsel applied to discharge the jury, I remain unpersuaded that the judge was obliged to do so. But there is substance to the appellant's contentions as to the absence of judicial directions on this evidence. As I have explained, a reasonable jury properly instructed could have been satisfied beyond reasonable doubt on the admissible evidence that the appellant was the robber. But equally, a properly instructed reasonable jury could have been left in doubt about the identity of the robber and could have acquitted the appellant. An unusual and concerning feature of the prosecution case was that two significant witnesses, police officers Bust and Connell, gave evidence that they knew the appellant prior to the robbery and identified him as a suspect in the vicinity of the robbery shortly before it occurred. In the absence of appropriate judicial directions, there was a real danger that the jury may have considered the prosecution case was strengthened by drawing the inference from that evidence that police officers Bust and Connell knew the appellant because he was a criminal whom they considered likely to commit a robbery. This was especially so where, as here, the evidence of photo boards containing the appellant's photo further suggested the appellant was adversely known to police.

[24] The inference that the appellant was a dangerous criminal known to police may have been strengthened by the dramatic but irrelevant evidence about the circumstances of his arrest by Mr Connell after viewing the CCTV footage of the robbery. Another possible impermissible inference from Mr Connell's evidence was that he viewed the CCTV footage of the robbery, formed the view that the robber was the appellant and then dramatically arrested this dangerous man at gunpoint. The jury may have used all, some or one of these irrelevant pieces of evidence to wrongly support the critical evidence of the complainant that the robber was the same man who was acting suspiciously earlier that evening.

[25] It is true that Mr Connell gave the controversial evidence of the arrest in response to defence counsel's cross-examination and that neither trial counsel asked the judge to direct the jury about it or the other evidence raised in these two grounds of appeal. But, in this circumstantial case where the jury could equally have acquitted or convicted the appellant, it was essential the judge do everything possible to ensure the jury did not draw impermissible inferences from the evidence. His Honour should have raised this matter, in the absence of the jury, with both counsel prior to their closing addresses. Unless defence counsel gave persuasive forensic reasons for not doing so, his Honour should have warned the jury in terms such as this:

> You must not speculate as to how Mr Bust and Mr Connell knew the defendant before 6 March. That would be wrong and unfair. It is irrelevant and cannot be used in any way in your deliberations. It does not matter if Mr Connell formed a view that the defendant may have been the robber after viewing the CCTV footage. The fact that Mr Connell saw the CCTV footage and the circumstances of his arrest of the defendant are irrelevant and cannot be used in any way to strengthen the prosecution case. Put that evidence out of your mind. It is your duty to determine on the whole of the relevant evidence and only on that evidence whether the prosecution establishes beyond reasonable doubt that the defendant was the robber.

[26] The absence of directions of this kind in the present circumstances leads me to conclude that, had the jury been properly instructed, they may not have been persuaded beyond reasonable doubt that the appellant was the robber. It follows that there had been a miscarriage of justice. The appeal must be allowed, the conviction set aside and a retrial ordered.

[27] This means it is unnecessary to deal with the fourth ground of appeal and the applications for leave to adduce further evidence. The information which the appellant contended was not disclosed at trial is now in the possession of his lawyers and is available for use in any retrial. The clothing tendered in the appeal hearing (exs 1 and 2) should now be returned to the appellant.

ORDERS:

1. The appeal is allowed, the conviction set aside and a new trial is ordered.

2. The application for leave to adduce evidence is refused.

3. Exhibits 1 and 2 in the appeal are to be returned to the appellant.

[28] **MUIR JA:** I agree with the reasons of the President and with her proposed orders.

[29] **FRASER JA:** I agree with the reasons for judgment of the President and the orders proposed by her Honour.