SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown* [2012] QCA 155
PARTIES:	**R** **v** **BROWN, Wayne Gary** (appellant)
FILE NO/S:	CA No 294 of 2011 DC No 134 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	15 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2012
JUDGES:	Holmes and Gotterson JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – MATTERS AVAILABLE TO JURY IN JURY ROOM – where after verdict delivered and jury discharged a one page document was found in the jury room – where document outlined the difference between a summary and indictable offence – where appellant submits a juror had conducted independent legal research – whether document represents a material irregularity resulting in a miscarriage of justice for the purposes of s 668E(1) *Folbigg v R* [2007] NSWCCA 371, cited *Martin v R* (2010) 28 VR 579; [2010] VSCA 153, cited *Qing An v R* [2007] NSWCCA 53, cited *R v Bates* [1985] 1 NZLR 326; [1984] NZCA 110, cited *R v Cogley* [2000] VSCA 231, cited *R v Domican (No 3)* (1990) 46 A Crim R 428, cited *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377, cited *R v Gillespie*, unreported, Court of Appeal, New Zealand, No 227 of 1989, 7 February 1989, cited *R v K* (2003) 59 NSWLR 431; [2003] NSWCCA 406, cited *R v Marsland,* unreported, Court of Criminal Appeal, NSW, No 60263 of 1990, 17 July 1991, cited

R v Rudkowsky unreported, Court of Criminal Appeal, NSW, No 60646 of 1992, 15 December 1992, cited
R v Skaf (2004) 60 NSWLR 86; [2004] NSWCCA 37, cited

COUNSEL: M J Woodford, with A P Simpson, for the appellant
B J Merrin for the respondent

SOLICITORS: K M Splatt & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Gotterson JA and the order he proposes.

[2] **GOTTERSON JA:** Upon trial in the District Court, the appellant was convicted of one count of entering premises and stealing (Count 1); one count of wilfully and unlawfully damaging a motor vehicle (Count 2); and one count of entering premises with intent to commit an indictable offence therein (Count 3). Verdicts were delivered on 10 October 2011. On 21 October he was sentenced on each of Counts 1 and 3 to imprisonment for a period of three years and six months, to be suspended after serving a period of 21 months for an operational period of four years. The sentence on Count 2 is imprisonment for a period of 21 months. Imprisonment under all Orders is to be served concurrently.

[3] The appellant has appealed against each conviction. He also filed an application for leave to appeal against sentence. At the hearing of the appeal his counsel confirmed that that application was not pursued whereupon it was dismissed.

[4] By an amended Outline of Argument filed on 15 May 2012, counsel for the appellant had foreshadowed that only one ground of appeal against conviction would be advanced. Leave was granted at the hearing of the appeal to amend the Notice of Appeal accordingly.

[5] The live ground on which argument of the appeal proceeded is as follows:-

> "That a substantial miscarriage of justice has occurred as a result of independent legal research being conducted by a juror, which amounts to a failure of the judicial process of such a nature that:
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> (a) there has been a failure of the conditions which are essential to a satisfactory trial; and
> (b) it raises an unacceptable appearance of unfairness in the trial and injustice."

[6] Each offence was alleged to have taken place on or about 20 February 2010. For Count 1, the premises alleged to have been entered was a black Holden Commodore utility owned by a Mr Crawford and the property alleged to have been stolen was a number of discs that were in that vehicle. For Count 2 the property alleged to have been wilfully and unlawfully damaged was a white Toyota Prado four-wheel drive owned by a Mr Kelly. For Count 3, the premises alleged to have been entered with intent was a blue Ford Laser sedan owned by a Mr Miller. These three vehicles had been left parked in the public carpark at the Buderim Tavern on the evening of Friday, 19 February 2010.

[7] In the case of Count 3, although the indictment refereed to "intent to commit an indictable offence", during the course of the trial the prosecution particularised the indictable offence as stealing and the intent as one to steal something from that vehicle.[1] The learned judge so directed the jury during the trial and again during the summing up.[2]

Circumstances of the offending conduct

[8] Two contract cleaners arrived at the Buderim Tavern in the one car at about 4.30 am on Saturday, 20 February 2010. It was dark. While parking their car, they noticed a person near the black utility. He was seen to walk from there through the carpark on to Burnett Street. The cleaners began work in the Tavern. Between 5.30 and 6 am, by which time it was daylight, one of them went into the carpark to place rubbish in a skip bin. At that point, he noticed a man near some shops in Burnett Street across from the skip bin. The man was spraying his hands and arms from a spray bottle with what appeared to be "Windex", and was trying to clean them. The cleaner watched the man for a minute and a half. On the way back to the Tavern, the cleaner noticed that a window on the black utility had been smashed. He alerted his companion who telephoned the police. The companion also observed the man spraying and wiping himself near the shops. Both cleaners saw some rocks and blood inside the utility. Both identified the appellant from police photographs as the man they had seen near the shops.

[9] An investigating police officer observed that two windows on the black utility had been smashed with broken glass both inside and outside that vehicle. He also noticed what appeared to be drops of blood on the centre console. Next he noticed the blue sedan with a front window down a little. Upon gaining access to the interior of that vehicle, he saw what appeared to be a quantity of blood in various places in it. Then the officer noticed the white four-wheel drive. A rear window was smashed. He observed broken glass inside and outside the vehicle, a rock on the bitumen nearby and what appeared to be blood on the driver's side step.

[10] The investigating officer also noticed blood in a zigzag pattern at several locations on the carpark, footpath and road surfaces leading to the shops across the road and thence to the nearby Buderim Pines Caravan Park. The appellant lived in a caravan at the caravan park. In the course of interviewing park residents that morning, two police officers called at his caravan. When the appellant opened the door, the officers noticed a gash on his hand which was bleeding. There was blood between his teeth and around his mouth area. He was pinching the gash with his fingers.

[11] Upon being told by the officers that they were enquiring into "some unlawful entries and wilful damage of cars" at the Buderim Tavern carpark, the appellant stated that he knew nothing of them. When asked about his movements that morning, he replied that he had not gone anywhere. In a recorded conversation with a police officer, the appellant said that he had cut his hand with scissors.

[12] Later in the early afternoon that day, the appellant attended at the Buderim Police Beat on Burnett Street. He told one of the officers who had called at his caravan that morning that he had lied to police. He said that he had gone to the Tavern after a party and had seen a male and a female breaking into a car. He claimed to have

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1 Record 149 L35-52.

2 Record 155 L18-22; 283 L29-39.

fought with the male and to have been dragged into one of the vehicles. That, he thought, and that was how his blood had possibly got into the vehicle. He said that the male and female left in a white Commodore. CCTV footage of the carpark did not record the presence of either a white Commodore or persons as described by the appellant at any relevant time. The cleaners saw neither a white car nor persons fighting in the carpark at any stage.

[13] The appellant was again interviewed by police on 2 March 2010. The interview was recorded. On that occasion the appellant said that he had gone jogging early on the Saturday morning, at about 4.30 am or so. Some people spoke to him and then, all of a sudden, he was in a fight with them near the front of the carpark. There were two males and a female. Punches were thrown. There was broken glass around and he cut his hand. He said that, at the time, he thought that those persons were stealing a car and that they had thought the car was his.

[14] Swab samples were taken of blood found in each of the three vehicles. DNA testing established that the blood was that of the appellant.

Circumstances of ground of appeal

[15] The ground of appeal arises from the following factual circumstances. After delivery of the verdicts and discharge of the jury on 10 October 2011, a one page document was brought to the attention of the learned judge. It had been found amongst the jurors' notes as they were being destroyed by court staff at the end of the trial. His Honour brought this document to the attention of counsel at the conclusion of the first day of the sentence hearing on 20 October 2011 and prior to passing sentence on the following morning. His Honour marked the document "M" for identification.

[16] The document "M" has printing on one side only. It has the appearance of being a computer printout of material accessed during a search at the website "Find Law Australia". The material has a heading "Frequently Asked Questions" and immediately under it:-

> "Q: What is the difference between a summary and indictable offence?"

An answer follows comprised of and introductory paragraph then headings 'Summary offences', 'Indictable offences' and 'Hybrid offences', each of which is followed by a brief description. The introductory paragraph reads:-

> "In criminal law, you may often hear people talk about summary or indictable offences. There is sometimes a distinction drawn between the two based on the seriousness of offence. However, the main difference between these two types of offences are the mode of trial."

The short description under the heading "Indictable offences" states:-

> "Indictable offences require a trial by judge and jury. If you are charged with an indictable offence and choose to plead 'not guilty', you are guaranteed the right to a trial by jury."

"Hybrid offences" are described as "…indictable offences that allow the accused to choose whether to have the matter dealt with summarily. That is, the accused can choose not have a trial by jury and have the matter dealt with by a judge alone… ."

At the foot of the page there is a statement:-

> "Read more related faqs".

[17] Two other aspects of the document "M" may be noted. One is that at the top right-hand corner there is an imprint "Page 1 of 3" and at the bottom right-hand corner, the date "6/10/2011" is printed.

[18] Further, factual content to the document "M" is given by an enquiry made of the learned judge by the jury during the trial. The jury retired for the day a little after 10 am on 5 October on account of the ill health of counsel. After they had done so, they sent a note to the learned judge requiring in respect of Count 3, clarification of the term "indictable offence". After discussion with counsel at the resumption of the trial at 11 am on 6 October, his Honour gave an explanation to the jury of what an indictable offence is.[3]

[19] Whether the document "M" was printed before or after the explanation was given is not known. Significantly, no criticism is made by the appellant either of the accuracy of the content of the document as it relates to indictable offences or, for that matter, the learned judge's explanation of what they are. Of course, his Honour had no opportunity to give any specific direction to the jury with respect to the document or its contents.

[20] The live ground of appeal is premised upon a juror having conducted independent legal research. The circumstances in which the document "M" was found strongly support an inference that it was a juror who had accessed the website, printed the document that was marked "M", and brought it into the jury room.

Irregularity and miscarriage of justice

[21] Upon the hearing of the appeal, the respondent accepted, as the appellant had submitted, that conduct on the part of the juror of the kind that may be inferred had happened here, would constitute an irregularity in jury performance. A principal point of difference between the parties is as to whether it was an irregularity which constituted a miscarriage of justice. The appellant submits that it was; the respondent that it was not.

[22] The difference is significant for an appeal against conviction which is based upon the miscarriage of justice limb only of s 668E(1) of the *Criminal Code*, as this appeal is. For such an appeal, if a miscarriage of justice is not established, the section is not engaged.

[23] Implicit in the respondent's submission is the proposition that not every irregularity in a criminal trial constitutes a miscarriage of justice. That proposition finds ample support in the authorities. In *R v Forbes*,[4] Spigelman CJ (with whom McCellan CJ at CL and Hall J agreed) observed at [28]:-

> "Clearly not every irregularity can constitute a miscarriage of justice. It is often said that the irregularity must be a 'material irregularity'."

[24] What characterises an irregularity as material in this context is impact upon the trial process of such an order that it results in the accused being deprived of a fair trial. In *Folbigg v R*[5] McClellan CJ at CL (with whom Simpson and Bell JJ agreed)

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3 Record 154 L8-155 L8.

4 (2005) 160 A Crim R 1.

5 [2007] NSWCCA 371.

explained that determination of whether or not a particular irregularity is material or not "… requires consideration of the irregularity; the relevance of the irregularity to the issues before the jury; whether the material arising from the irregularity was prejudicial; and the extent of the prejudice."[6]

[25] In *Martin v R*[7] Ashley JA (with whom Buchanan and Redlich JJA agreed), in discussion of the same issue, observed:-

> "[83] Problems of a variety of kinds have arisen with respect to the behaviour of juries. In the appellate context, a distinction has been drawn between irregularities discovered in the course of the trial and irregularities discovered after verdict. It is relevant in both contexts to consider whether any revealed irregularity was relevant to the issues before the jury, was prejudicial to the accused, and if it was, then the extent of the prejudice. Instances of the two kinds include *R v Domican (No 3)*,[8] *R v Marsland*,[9] *R v Rudkowsky*,[10] *R v K*,[11] *R v Skaf*,[12] *Qing An v R*,[13] *R v Gillespie*,[14] *R v Bates*,[15] and *R v Cogley*.[16]
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> [84] But focusing now upon irregularities discovered after verdict, in *R v K*, Wood CJ at CL undertook a substantial review of the authorities. He concluded that the appropriate test was that stated by Gleeson CJ in *Marsland*, and reiterated by his Honour in *Rudkowsky*, that is –
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> > '… the question we must ask ourselves is whether we can be satisfied that the irregularity has not affected the verdicts, and that the jury would have returned the same verdict if the irregularity had not occurred.'
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> [85] In *Skaf*, the New South Wales Court of Criminal Appeal referred to earlier authority, most particularly *R v K*, and stated (at [242]) that –
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> > 'there must be a new trial unless this Court can be satisfied that the irregularity has not affected the verdict and that the jury would have returned the same verdict if the irregularity had not occurred.'
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> In resolving whether there must be a new trial, the court focused upon the materiality of the irregularity having regard to the issues in the case and having regard to the potential prejudice to the applicants flowing from the juror's behaviour constituting the irregularity."

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6 *Folbigg* at [18] (footnotes omitted).
7 [2010] VSCA 153.
8 (1990) 46 A Crim R 428.
9 Unreported, Court of Criminal Appeal, NSW, No 60263 of 1990, 17 July 1991.
10 Unreported, Court of Criminal Appeal, NSW, No 60646 of 1992, 15 December 1992.
11 (2003) 59 NSWLR 431.
12 (2004) 60 NSWLR 86.
13 [2007] NSWCCA 53.
14 Unreported, Court of Appeal NZ, 7 February 1989.
15 [1985] 1 NZLR 326.
16 [2000] VSCA 231.

[26] Both *Folbigg* and *Martin* involved juror internet research. In the former case, the information obtained by search related to the criminal history of the appellant's father and not of the appellant herself. McClellan CJ at CL concluded that the possession of that knowledge did not result in a miscarriage of justice. His Honour reasoned to that conclusion in the following way:-

> "[55] It was submitted that with the knowledge that the appellant's father had killed her mother the jury may have engaged in impermissible coincidence or tendency reasoning. To my mind the submission should be rejected. Even though the appellant was the child of a person who killed another I do not believe there was any likelihood that a juror would reason that it was more likely that the appellant would kill her own children. The killing of a spouse may tragically occur in circumstances of the break down of a relationship or be occasioned by temporary loss of control accompanied by a violent and fatal act. The circumstances and motive for the killing are likely to be quite different from those which will exist if a mother has killed her own children. There could be no suggestion that the killing of the appellant's mother by her father indicated any tendency in the appellant to kill her own children. In my judgment the knowledge obtained by the juror did not lead to a miscarriage of justice."

[27] In *Martin*, the information obtained by search was not of factual matter. It was an exposition of the criminal standard of proof. There was seven pages, drawn from five websites, which addressed the meaning of "beyond reasonable doubt". Upon assumptions that the jurors impermissibly resorted to the downloaded material to give meaning to that phrase and that they did not all apply the same expression of the test, Ashley JA concluded that a material irregularity had not occurred. His Honour was influenced to that view by the facts that the trial judge had directed the jury correctly as to burden of proof and that each of the formulations of "beyond reasonable doubt" was no less burdensome upon the Crown than that conveyed by the language of the judge's charge to the jury.[17]

Analysis of the ground of appeal

[28] Taken on its own, the information printed on the document "M" was not relevant to any issue the jury had to decide. Count 3 was one of entering premises (the blue sedan) to commit an indictable offence which had been particularised as stealing. The jury were required to consider whether the appellant had entered the blue sedan with intent to steal. They were not required to consider whether the appellant had entered that vehicle with intent to commit some unparticularised indictable offence. Hence, they were not required to consider what characterises an offence as an indictable offence or to reach a conclusion whether any particular type of offence was an indictable offence or not. Moreover, the information on the document was neither inaccurate nor inconsistent with the learned judge's explanation. It was not prejudicial to the appellant.

[29] The ground of appeal was developed in several ways beyond the content of the information printed on the document. First, it was argued that the totality of the information accessed by the juror at the website must have extended beyond that

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17 At [88].

printed on the page having regard to the imprint "Page 1 of 3". Thus, it was put, one does not know what the extent of the information accessed was. Whilst it may well be that the juror could have read other frequently asked questions and answers to them at the website, there is no reason to suppose that the questions or answers could have related to the appellant, the facts, or any of the issues for the jury to decide. That they were "Frequently Asked Questions" indicates that they were questions relating to matters of general application and that they did not deal with matters specific to the issues in the trial. Moreover, the closeness in time of the print to the jury question suggests that the enquirer's interest was a limited one, restricted to what an indictable offence is.

[30] Secondly, it was argued that the undertaking of the research was in direct disregard of a jury direction made by the learned judge and, on that account, tended to demonstrate that the juror concerned was a person who was prepared not to follow specific directions. A perusal of the transcript of the introductory remarks by his Honour to the jury indicates that the direction that was given to them concerning enquiry into matters by electronic means was given in the context of not attempting to investigate either something inadvertently heard by them about the trial, or the defendant. Whilst the jury were told that it was inherently unjust for them to act on information not in evidence and which neither prosecutor nor defence knew was being acted upon, the jury were not told, in terms, that they were not to access legal sources, electronic or otherwise.

[31] The information accessed here was not within the context to which his Honour had expressly directed his remarks. Having regard to this and to the absence of reference to accessing legal sources, I consider that the juror's conduct here is not apt to be characterised as having been undertaken in direct disregard of a direction given by the learned judge. Nor do I consider that the conduct gives rise to a reasonably grounded apprehension that the juror concerned was a person who was prepared not to follow specific directions.

[32] Thirdly, the appellant argued that there was a "real risk" that the other members of the jury panel may have been contaminated by the views of a particular juror "who was willing to disregard the learned judge's directions". As I have explained, the juror's conduct here did not go so far as to display a willingness to disregard judicial direction. That being so, a real risk of contamination of the kind suggested did not arise.

[33] Here, the case against the appellant at trial was a very strong one. His observed presence in the vicinity of the carpark, the injury to his hand, the presence of his blood inside each of the vehicles and the trail of his blood from the vehicles to the caravan park, his differing accounts and contradiction of them by himself and by other witnesses, all combine to present an overwhelming case that he was the perpetrator in a trial where the principal issue was one of identity. On appeal, the appellant does not take issue with the learned judge's directions or summing up on that issue or in any respect.

[34] Turning to the test stated in *Marsland*, the considerations referred to in this analysis satisfy me that the jury would have returned the same verdicts had the irregularity on which this appeal is based not occurred.

[35] I conclude that that irregularity did not result in a failure of conditions essential to a satisfactory trial or in an unacceptable appearance of unfairness in the trial and injustice, as the ground of appeal asserts.

[36] For these reasons I am of the view that the appellant has not established a material irregularity resulting in a miscarriage of justice for the purposes of s 668E(1).

Orders

[37] I would order that the appeal be dismissed.

[38] **PHILIPPIDES J:** I have had the advantage of reading the judgment of Gotterson JA and agree with the order proposed.