SUPREME COURT OF QUEENSLAND

CITATION:	*R v Banhelyi* [2012] QCA 357
PARTIES:	**R** **v** **BANHELYI, Charles Gene** (appellant)
FILE NO/S:	CA No 158 of 2011 DC No 263 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2012
JUDGES:	Holmes JA and Fryberg and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. Verdict of guilty set aside;** **3. New trial ordered.**
CATCHWORDS:	EVIDENCE – ADMISSIBILITY AND RELEVANCY – OPINION EVIDENCE – EXPERT OPINION – MOTOR VEHICLES – GENERALLY – where appellant found guilty of one count of dangerous operation of a motor vehicle causing death and grievous bodily harm of another person – where there was a circumstance of aggravation – where there was inadmissible and prejudicial opinion evidence admitted into evidence before the jury– whether the expert was an expert to give opinion evidence in photography or interpretation of images from video footage – whether the admission of the opinion evidence occasioned to a miscarriage of justice – whether s 669E(1A) *Criminal Code* 1899 (Qld) applies *Criminal Code* 1899 (Qld), s 23(1)(a), s 668E(1), s 668E(1A) *Anandan v R* [2011] VSCA 413, cited *BBH v The Queen* (2012) 245 CLR 499; (2012) 86 ALJR 357; [2012] HCA 9, cited *Clark v Ryan* (1960) 103 CLR 486; [1960] HCA 42, cited *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited

Patel v The Queen (2012) 86 ALJR 954; [2012] HCA 29, cited
R v LM [2004] QCA 192, cited
R v Urbano [2011] QCA 96, cited
Smith v The Queen (2001) 206 CLR 650; [2001] HCA 50, cited

COUNSEL: R A East for the appellant
M R Byrne SC for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of North J and the orders he proposes.

[2] **FRYBERG J:** I agree with the orders proposed by North J and with his Honour's reasons for those orders. As there is to be a retrial, I add some short observations.

[3] I have felt considerable disquiet about the use made of still pictures manufactured from the video footage tendered into evidence. No objection to the tender of those stills was taken. That is perhaps surprising. There was a conflict in the evidence about the frame rate of the video camera; no evidence was given about how the stills were manufactured; and the quality of the stills seems higher than that of the original footage. Investigations ought to have been made to determine whether the stills fairly reflect what happened. Perhaps they were; but none was referred to in the evidence. If the stills did not fairly reflect what happened, I doubt their admissibility. If they did, but only arguably, questions about their probative value compared to their prejudicial effect on such a central issue might arise.

[4] Second, North J has referred to the evidence of Dr McLaughlin. It seems to me that that evidence was in part infected with two errors. The relevant passage was:

> "[W]hat I had thought *when I originally read the evidence* was that he may have suffered a seizure producing a tonic extension of the leg and under normal extensions you might expect the arm of the same side to be involved, that the posture might be this...this...or this...and if the-----
>
> Just for the record, you're indicating a right hand posture, low, medium and then above your head?-- Yes. And that because this occurred in the act of driving, the right hand would be expected to be rested on the steering wheel, that as - as a normal part of that type of seizure the hand would clench and so it would clench onto what it was on, but the foot was free to move and would just depress on what was ever in front of it, *which I would have anticipated would be the accelerator*. Now, the onset of that type of seizure - just consider he has a seizure, independent of this gentleman's history, is that that could occur very abruptly from a normal level of awareness, but more typically it would develop over a matter of seconds where there's a diminished level of awareness before the motor activity becomes prominent and that was my reasons for considering if that seizure occurred as he was about to enter the intersection, then he

> would have been oblivious to the presence of the motorcyclist in front of him, stationary, and after the impact the tonic phase would then account for the acceleration and the progress further up the road. However, the evidence that the brake lights went on is harder to get clear in my mind. *Is it possible that he has touched the brake with his foot as the right hand came down*, but I would be uncertain as to the mechanism of how the indicators could be activated, so if I, by necessity, leave that to the side, what's - apart from that, yes, a seizure producing a tonic seizure could do it, but I'm left uncertain as to if the car's entered while he's in an altered state of awareness before the tonic phase has occurred, how does the brake light or the indicator get activated? I have an uncertainty about that."[1]

[5] It is tolerably clear from earlier answers that when Dr McLaughlin referred to his reading of the evidence, he was talking about documents which were in fact not evidence. That is impermissible. An expert's opinion must be based on facts proved in evidence. There are various ways in which such proof might be adduced, but none was adopted in relation to this answer. The Crown prosecutor did not object to the answer, so nothing turns on the point.

[6] Both parties approached the appeal on the basis that the third emphasised clause in the above passage should be read "It is", not "Is it". I am unpersuaded that this assumption is correct when the rest of the sentence is read, but I am content to proceed on the basis that it is.

[7] On that basis both the second and the third emphasised passages of evidence are infected with the same error as the evidence of Mr Ruller: they express an opinion about the evidence in an area beyond the witness's expertise. Dr McLaughlin was competent to opine about the behaviour of the leg and the arm. It was for the jury to say whether the accelerator would have been in front of the foot and whether it was possible for the foot to have touched the brake in the circumstances. Of course questions based on carefully phrased assumptions might have enlarged the ambit of the doctor's evidence in other ways, but in my judgment the second and third emphasised passages were inadmissible.

[8] **NORTH J:** The Appellant was convicted by a jury of one count of dangerous operation of a motor vehicle causing death (and grievous bodily harm of another person) with a circumstance of aggravation (excessively speeding).

[9] It is common ground that in the prosecution case inadmissible opinion evidence was admitted into evidence. The Appellant appeals against his conviction. The issues are whether the admission of that evidence in the circumstances of the trial occasioned a miscarriage of justice and whether, if so, the "proviso" might be applied.[2]

The issue for the jury

[10] It was not contested that the Appellant was the "driver" of the motor vehicle at the relevant time.[3] It was also admitted that an inspection of the vehicle did not reveal

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1 Emphasis added.

2 Section 668E(1A) Criminal Code.

3 The death of one person and the infliction of grievous bodily harm on the other as a result of the injuries sustained was also admitted. Exhibit 45, AR 819.

anything about its condition that could have contributed to the accidents. The defence case rested on non-insane automatism, that at the time of the relevant driving the Appellant was suffering an epileptic seizure. Consequently the important issue for the jury was whether the prosecution proved, beyond reasonable doubt, that the Appellant was consciously driving his car.[4]

Evidence at trial

[11] The evidence concerning the Appellant's driving involved incidents at two intersections in excess of 465 metres apart.[5] At about 8.30 am the Appellant was driving his motor vehicle outbound upon Charters Towers Road, Townsville approaching the intersection with Boundary Street. That intersection is controlled by traffic lights. As the Appellant approached the intersection he was facing red lights. Stopped at the lights in front of the Appellant was a motorcyclist. Without stopping the Appellant struck the motorcyclist and drove through the intersection.[6] The Appellant's motor vehicle continued outbound along Charters Towers Road where, at the intersection with Philp Street, the motor vehicle moved into the inbound lane and collided with an inbound motor vehicle. The passenger in that motor vehicle died from injuries sustained and the driver suffered grievous bodily harm.

[12] Video footage from a roadside camera at the first intersection was tendered. It showed the collision with the motorcyclist and the movement of the Appellant's motor vehicle through the intersection. Using that film a traffic accident investigator (Mr Ruller)[7] calculated the speed of the Appellant's motor vehicle at approximately 60 kilometres per hour.[8] Near the intersection with Philp Street is a service station and video footage from a camera at that service station showed the Appellant's motor vehicle passing by just before the intersection and the fatal collision. Using that film the witness Ruller calculated the speed of the Appellant's motor vehicle as it passed the service station within "a range of about 127 to 135 kilometres per hour".[9]

[13] The witness Ruller was called as an expert "collision analyst".[10] When he was called a curriculum vitae was tendered into evidence.[11] His expertise was proven when he was called[12] and significantly his Honour informed the jury that Mr Ruller's expertise was not contested or challenged in any way.[13]

[14] Relevant to the issue for the jury was whether the Appellant activated his indicator or brake lights at the first intersection and just after the collision with the motorcyclist. A number of witnesses to the events at that intersection gave evidence but only one, Obadiah Geia, spoke of seeing lights. In evidence-in-chief he was asked:[14]

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4 See s 23(1)(a) Criminal Code.
5 AR 396, l 5-15.
6 No specific charges were levelled against the Appellant for that collision though it was alleged to be part of a course of dangerous operation.
7 Styled "Collision Analyst".
8 AR 392, l 25. The speed limit on Charters Towers Road was 60 kilometres per hour.
9 AR 396 l 1.
10 AR 389 l 20.
11 Exhibit 14, AR 79 92.
12 AR 389-90.
13 AR 390 l 25.
14 AR 231 l 30-60.

> "Right. Did you see any lights come one?—Yeah. That's when the guy hesitated.
>
> What – what do you mean he – he hesitated? What did – just tell us what you saw?—Saw his brake lights come on with the hesitation. That – that sort -----
>
> Okay. How-----?-- -----what I – yeah.
>
> -----long were his brake lights on for?—Oh, just a short – short press, yeah.
>
> Mmm?—Enough-----
>
> But did-----?-- -----to notice them, anyway."

[15] In cross-examination the witness conceded that he had not mentioned anything about brake lights in the statement he provided to police on the day of the collision. In his evidence he was not asked nor did he say if he saw any indicator light activated at the time.

[16] The video footage of the events at the first intersection was shown to the jury. The witness Ruller gave the following evidence concerning that footage[15]:

> "And did your assessment involve you examining in detail the video footage?-- Yes, I – I looked at it numerous times.
>
> And in relation to the – the operation of lighting of the blue Nissan at – at that point of the collision, we'll look at some still images in due course, but, what did you conclude from the video footage that – which lights and at which stage had been illuminated on the Nissan?—Well as you watch the vehicle pass through, and I – I believe it's about a four or five frames per second video, you can actually see during those frames the tail lights are dark and then you can see brightness. One case you can actually see real bright on the right-hand side which to me appears to be the indicator coming on. So from no brake lights it appears like the brake lights have then been applied to the vehicle, and then you can see them come off again as the vehicle goes down the road.
>
> And in relation to the indicator, did you mention the indicator?—I did mention the indicator. The right indicator appears to have been activated for a very – very short time."

[17] In addition to commenting on the video footage and giving evidence of the activation of the lights Mr Ruller identified some photographs, being stills from the video footage taken from the camera at the intersection and he was asked questions by reference to the photographs to identify the indicator or brake lights that were activated according to his interpretation.[16] It is notable that concerning Exhibit 22, Mr Ruller expressed the opinion that what could be seen might not be the activation of a light but the reflection of light from some other source but he gave emphatic

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15 AR 393 l 1-20.

16 See AR 407-409 and the commentary on Exhibits 22, 23, 24 and 25.

evidence of the activation of the brake lights in Exhibit 23 and the activation of the right indicator lights in Exhibit 24 and 25.

[18] At the hearing of the appeal the Respondent did not contend that the witness Ruller was qualified as an expert witness to give opinion evidence that the images depicted in the video footage and in the photographs demonstrated either the activation of the indicator or the brake lights. The witness was experienced in the investigation of accidents. The perusal of his curriculum vitae[17] does not suggest that he has made a specialised study of photography or of the interpretation of images obtained from CCTV footage, video footage or from some like technology. Even assuming there is such a specialised body of knowledge and science the witness was not so qualified.[18]

The opinion evidence – the trial context

[19] Once it is recognised that the evidence of the witness Ruller was not expert evidence then, absent exceptional circumstances, evidence from a witness of an interpretation of what is depicted in film or photographs was inadmissible, the issue being a matter for the jury.[19] If objection had been made the jury would have been left with the video and photographs and the eyewitness evidence.

[20] The video film footage itself is not of high quality. I have viewed the film. It is grainy and it is possible that jurors, uninfluenced by inadmissible "expert" opinion evidence, might have a doubt as to whether either the brake or traffic indicator lights were activated.

[21] Of the witnesses to the events at the first intersection only one claimed to have seen any lights activated on the car driven by the Appellant. That witness, Geia, claimed to have seen the brake lights. No witnesses saw the turn indicators activated.

[22] In support of the defence that the Appellant was suffering an epileptic seizure Dr D B McLaughlin, consultant neurologist, was called. Based upon his experience and upon various earlier medical assessments and tests conducted in respect of the Appellant and also statements obtained from witnesses to the accidents in question he gave evidence that:[20]

> "I had formed the opinion that on that evidence that consideration should be given to the possibility that a partial onset seizure arising within the right frontal lobe could have accounted to the series of collisions reported."

[23] The prosecution led evidence from a consultant neurologist.[21] Her opinion, based on the information available to her, was that the Appellant was not suffering from a seizure at the relevant time.[22]

[24] Dr McLaughlin acknowledged that evidence pointing to the operation of the brake light and to the activation of the turn indicator light might point to the other

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17 Exhibit 14.

18 *Clark v Ryan* (1960) 103 CLR 486, 491-2 (Dixon CJ); *Anandan v R* [2011] VSCA 413 at [11].

19 *Smith v The Queen* (2001) 206 CLR 560; *R v LM* [2004] QCA 192 at [73] & [86]; *R v Urbano* [2011] QCA 96 at [69].

20 AR 529 l 50-55.

21 Dr Reid.

22 AR 83 l 35 – 84 l 20.

conclusion, that the Appellant was consciously in control of the vehicle. Dr McLaughlin's evidence-in-chief was that consistent with the possibility of a seizure, the brake light might have been activated by an uncontrolled extension of the leg and foot in the process of a seizure thereby catching the brake pedal transiently. However because the turn indicator would have to be activated by the manipulation of the stalk on the steering wheel that was inconsistent with the Appellant suffering a seizure. That was because the hands would have been anchored to the steering wheel while in the grip of a seizure.[23] In cross-examination Dr McLaughlin confirmed this in answer to a series of questions:[24]

> "Is that because the explanation could rationally be that Mr Banhelyi wasn't having a seizure?— If the activation of the traffic indicator is present, that certainly raises the possibility that this was not a seizure at all and it's for that reason I have worded my report that this may be an explanation.
>
> In fact, is it not the case that the operation of that indicator leads in the opposite direction that the – that makes the tonic seizure extremely unlikely?— I think that's as strongly as it should be put. I couldn't say never in the world of medicine, but I would say is very, very unlikely.
>
> Now, you were asked on a previous occasion, that's prior to today, that if the first impact was related to a seizure or do you recall saying this, 'If the first impact was related to a seizure, that is, the patient's level of awareness was such that he could no longer control the vehicle, the brake lights I cannot explain how they could be activated briefly and I could not explain on the basis of a seizure how the traffic indicator could illuminate.'?— Yes. That's exactly what I said.
>
> Yes?— Having considered the matter, there's an outside possibility of the right foot catching the brake pedal coming down, but I think myself that that's improbable, that is, if the brake lights have truly been activated, it, like the activation of the traffic indicator, makes a seizure of the type that I have postulated very unlikely.
>
> Very unlikely?— I consider that, yes."

[25] It might be observed that the way in which the video footage was dealt with when Dr McLaughlin was examined in-chief also had the capacity to introduce to the jury an interpretation of the film. Rather than asking a question in the form such as:

> "If it's accepted that in the driving of a motor vehicle the indicator was operated and the brakes were operated and then the accelerator, is that consistent or possible with a driver … "[25]

A question was asked of Dr McLaughlin where, contained within a long recitation of suggestions concerning the events, the Applicant's counsel at trial suggested:

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23 AR 531 l 20 - 532 l 30.

24 AR 538 l 1-30.

25 See for example AR 481 l 20.

> "There is a momentary activation of the brakes, that is, the brake lights are seen to flash, the right indicator is seen to flash, but to give you an idea of the – the brevity of that, of all the eye witnesses only one is able to give evidence that that took place, although there's other photographic evidence to suggest that it – that it has."[26]

[26] The formulation of a question in evidence-in-chief in this way is not sound practice. It leads, and importantly in the context of this appeal, the questioner's interpretation of the primary evidence.

A miscarriage of justice and the "proviso"

[27] The Respondent submitted that in the absence of an objection to the evidence or an application for a redirection there was no wrong decision upon a question of law[27] nor a miscarriage of justice.[28] Alternatively it was submitted that no substantial miscarriage of justice had actually occurred.[29]

[28] The evidence of Mr Ruller was not objected to. Consequently inadmissible and prejudicial evidence was before the jury. None of the techniques for dealing with inadmissible prejudicial evidence was employed:

> "One of those techniques is striking out the evidence. Another is telling the jury to ignore it. A third is telling the jury to treat the case as if the evidence had not been given. A fourth is discharging the jury."[30]

In the absence of an objection the trial judge was not asked to adopt any of the possible strategies.

[29] The only challenge to the evidence of Mr Ruller upon this issue when he was cross-examined was an attempt to raise a question of doubt as to the interpretation[31]:

> "All right. If I could just have one moment, please? Were you able to detect brake lights being activated at the first accident with the naked eye just watching the footage as it ran?— You could see the change in the light – change in their appearance.
>
> Right. Is it fair to say that it was only when you were able to break it down four to five frames a second, that you could be certain what appeared to be lights coming on, actually happened?— You know I looked at the video last night and I've also been going through the stills as well and I'm pretty sure you can see it on the video but I do stand to be corrected on that.
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> I guess that's a matter for the jury. Thank you, your Honour."

[30] That the evidence was prejudicial to the defence may be granted from the tendency it had to undermine the defence of non-insane automatism. The video footage and

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26 AR 530 l 40.
27 See *Dhanhoa v The Queen* (2003) 217 CLR 1 at [49].
28 s 668E(1) Criminal Code.
29 s 668E(1A) Criminal Code. See further, *Patel v The Queen* (2012) 86 ALJR 954 at [114].
30 *BBH v The Queen* (2012) 86 ALJR 357 at [94], per Heydon J.
31 AR 441 l 5-20.

the photographs assumed crucial significance at the trial, that was recognised by the trial judge's directions to the jury.[32] The presentation to the jury of the fact of the activation of brake lights and the indicator lights is a matter of "expert" testimony was likely to suggest to jurors that the opinion evidence uncontradicted as it was by contrary "expert" opinion evidence should be accepted and acted upon by them in preference to their own interpretation.[33] It had the further tendency to reduce the significance of the absence of corroborative eye witness evidence from those who were present at the scene.[34]

[31] The Respondent pressed the submission that there was a forensic advantage in not objecting to the evidence of Mr Ruller because of that witness's concession that one of the scenes that might otherwise be interpreted as the activation of the brake light might in fact be caused by reflected light. The Respondent submitted that there was no way of getting the benefit of that favourable comment without the admission of the other opinion evidence.[35]

[32] On behalf of the Respondent it was submitted that the failure to seek a redirection thereby required the Appellant to prove that there had been a miscarriage of justice.[36] Reliance was placed upon other evidence of Mr Ruller concerning the driving of the vehicle along Charters Towers Road as it approached the intersection with Philp Street. It was submitted that the evidence of the path of the vehicle when analysed in conjunction with the camber of the road and other features of the road made it impossible for the Appellant's vehicle to have crossed into the inbound lane where it did unless the Appellant was controlling the vehicle; actions inconsistent with the condition postulated by Dr McLaughlin.

[33] The short answer to the submissions is that inadmissible and prejudicial evidence was admitted that struck at the heart of the defence of non-insane automatism and deprived the Defendant of an opportunity to have his defence considered by the jury in the absence of such prejudicial evidence. In the circumstances there was a miscarriage of justice.

[34] Concerning "the proviso"[37] it cannot be said that a jury, on the evidence that might properly be admitted, could not entertain a reasonable doubt.[38]

Orders

[35] In the circumstances the orders that I would make are:

1. Appeal allowed;
2. Verdict of guilty set aside;
3. New trial ordered.

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32 AR p 665-666.
33 Recall par [13] above.
34 Recall pars [20] and [21] above.
35 See for example *Gately v The Queen* (2007) 232 CLR 208 at [77].
36 See *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38], [49], [60].
37 s 668E(1A) Criminal Code.
38 *Patel v The Queen* (2012) 86 ALJR 954 at [120]; *Weiss v The Queen* (2005) 224 CLR 300 at [44].