SUPREME COURT OF QUEENSLAND

CITATION:	*R v Uittenbosch* [2013] QCA 96
PARTIES:	**R** **v** **UITTENBOSCH, Shane Anthony** (appellant)
FILE NO/S:	CA No 190 of 2012 SC No 154 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2013
JUDGE:	Fraser and Gotterson JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of three offences – where the appellant alleges that there was insufficient evidence to prove intention – where there was evidence upon which it was open for a jury to find that the appellant had made a decision to attend the unit and had taken a knife with him – whether the evidence was sufficient for a jury to convict the appellant of the three offences CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the learned trial judge admitted into evidence the statements of two persons who had passed away before the trial pursuant to s 93B of the *Evidence Act* – where the learned trial judge instructed the jury as to the reliability of those statements – whether the learned trial judge should have exercised a discretion under s 130 of the *Evidence Act* to exclude the statements CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF

JUDGE – OTHER CASES – where the appellant gave evidence at trial – where the appellant was subsequently cross-examined on his criminal history – where the full circumstances of the appellant's past offences were not brought to the attention of the jury during cross-examination – whether the learned trial judge erred in exercising her discretion to allow cross-examination on the appellant's criminal history

Evidence Act 1977 (Qld), s 93B, s 130

Phillips v The Queen (1985) 159 CLR 45; [1985] HCA 75, cited
R v Symonds [2002] 2 Qd R 70; [2001] QCA 199, cited

COUNSEL: The appellant appeared on his own behalf
V A Loury for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA**: I agree with the reasons for judgment of Martin J and the order proposed by his Honour.

[2] **GOTTERSON JA**: I agree with the order proposed by Martin J and with the reasons given by his Honour.

[3] **MARTIN J**: On 2 July 2012 the appellant was convicted by a jury of –

(a) Burglary in the night, with violence, while armed and in company;
(b) Armed robbery, in company, with personal violence; and
(c) Malicious act with intent.

[4] He was acquitted of attempted murder and wounding.

[5] He appeals against those convictions on these grounds:

(a) "the evidence … was unsafe, unsatisfactory and insufficient to support the guilty verdicts";
(b) The learned trial judge erred in admitting the statements of two deceased persons under s 93B of the *Evidence Act* 1977 (Qld); and
(c) The learned trial judge erred in allowing the appellant to be cross-examined on his criminal history.

[6] The offences occurred at about 1 am on 6 October 2009. The complainants were Mark Leeder and Gavin Hyde. Both of these men died from causes unrelated to this matter before the trial commenced.

[7] The police obtained statements from Leeder and Hyde on 6 October and 7 October 2009, respectively.

[8] Hyde had been released from prison on 6 October 2009. His account was that he had gone to Leeder's flat at Moorooka. They had been friends for some time. They had also both been drug users for some time. When he got to the flat he met a man

named Brad Ferguson-Tait. During the afternoon Hyde and Ferguson-Tait went to the shops. While there, Hyde withdrew $1,000 from an ATM. They then returned to the flat. Ferguson-Tait left the flat later in the afternoon and Hyde and Leeder then went into Fortitude Valley to play some poker machines. They drank some beer and Hyde purchased about $100 worth of amphetamines. They then went back to the flat where they consumed the amphetamines.

[9] Shortly after they returned home, Ferguson-Tait knocked at the front door. He walked in and was followed by a man who was not known to either Hyde or Leeder. This was the appellant. The appellant asked Hyde's name and put his right hand out as if to shake it. As he did that he stabbed Hyde in the stomach using his left hand. A struggle began and the appellant continued to attempt to stab Hyde. He stabbed him twice in the stomach, once in the upper left arm and once on the right side of his head. While this was going on, Hyde heard the appellant say, "Brad, grab the money, grab the money".

[10] The appellant then ran from the unit. Hyde was unable to follow him because of his injuries and he was taken to hospital by ambulance. He suffered a penetrating epigastric wound which required surgery to stop the bleeding from his liver and the stab tract. Hyde later discovered that about $900 had been removed from his wallet.

[11] Leeder gave a different account of the evening. He said that he and Hyde and Ferguson-Tait went from Fortitude Valley back to his flat and that as they entered the kitchen of the flat he noticed the appellant in the kitchen. He said that the appellant launched himself at Hyde, that he tried to grab the appellant but he was pushed in the chest and fell down. Leeder sustained a cut to the top of his right arm.

[12] Ferguson-Tait testified at the trial. He had already been convicted of burglary with circumstances of aggravation and robbery in company with actual violence for his involvement in these events. He had been sentenced pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld). He said that he had first met the appellant in 2002; he had known Leeder for some time but did not meet Hyde until 5 October 2009. His evidence about what occurred with respect to going to Fortitude Valley and withdrawing money was similar to the account given by Hyde. He said that he rang the appellant and told him that he had some money and they arranged to meet. Both of them and the appellant's girlfriend went to a motel at Moorooka. Ferguson-Tait said that during a conversation he told the appellant that Leeder and Hyde had money and the appellant said, "Let's go get it".

[13] Each of Hyde, Leeder, and Ferguson-Tait were heavy drug users. At the relevant time Ferguson-Tait said that he had consumed a substantial quantity of alcohol and other things and that he was "so smashed off his head" that he could not remember whether he told the appellant that there was money at the unit. Ferguson-Tait's significant criminal history for offences including stealing, fraud, receiving stolen property, and armed robbery was exposed to the jury. It was also established that he had initially lied to police about his involvement and it was not until he was taken to the police station that he admitted to those lies.

[14] The appellant gave evidence. The effect of his evidence was that when he went to the flat it was Hyde who had assaulted him and started kicking him in the stomach, throwing punches and swinging a hammer at him. He said that as Hyde was throwing punches at him he grabbed a knife out of the sink in the kitchen and in the

momentum of having a fight, the knife went into Hyde. He said that he panicked and thought that Hyde was going to kill him and as he ran towards the door in an effort to leave, he ran straight into Leeder while holding the knife.

[15] He accepted that he had lied to police about what had happened and that he had told other lies. The prosecutor was given leave to cross-examine him about his convictions and established that he had been convicted of offences of violence when he was 17 and 23 years old. It was also established that he had been convicted of possession of tainted property, stealing, possession of controlled substances, and possessing a knife in a public place at a time close to the events of 6 October 2009. He said that his reason for lying to the police was that he was afraid and lacked clear judgment at the time.

Ground 1 – unsafe and unsatisfactory

[16] In his written submissions the appellant does not deny injuring Hyde but says that he did not go there with any intention of robbery or violence. He submits that the only evidence anywhere in the trial that supposedly refers to a "plan" was the evidence of Ferguson-Tait that he said "Let's go get it" after being told by Ferguson-Tait that there was money at the flat. He submitted that it was Ferguson-Tait who stole Hyde's wallet after the fight and that this occurred after he had left the unit.

[17] The evidence given by Ferguson-Tait, notwithstanding its shortcomings, was supported generally by the statements of both Leeder and Hyde. There was consistency across the three statements that it was the appellant who was the aggressor. There was nothing in their evidence that was inherently unbelievable and it was open to the jury to accept what was said by Ferguson-Tait about the events both leading up to entering the unit and the course of events within the unit.

[18] It was also open to the jury to find that the appellant went to the unit already armed with a knife and from that to deduce he had an intention to either assault someone or to steal. Thus, it was open to find that the appellant had an intention to commit an indictable offence.

[19] There was also evidence to support a finding that the appellant intended to maim Hyde. The attack upon him was fast and ferocious. He stabbed him with considerable force to vital areas of his body and the evidence was such that the jury was entitled to conclude that the appellant intended to disable Hyde so that he was unable to offer any resistance.

[20] The appellant's account was entirely inconsistent with a version he had first given to the police. He claimed that his memory had improved in the three years since the event had occurred.

[21] When viewed as a whole, the evidence was sufficient to allow the jury to convict the appellant of the three offences.

Ground 2 – s 93B *Evidence Act*

[22] The learned trial judge admitted the statements of Hyde and Leeder pursuant to s 93B of the *Evidence Act*. That section provides:

"93B Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable

(1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact—

(a) made a representation about the asserted fact; and

(b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.

(2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was—

(a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or

(b) made in circumstances making it highly probable the representation is reliable; or

(c) at the time it was made, against the interests of the person who made it.

(3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding—

(a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;

(b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.

(4) To avoid any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence.

(5) In this section—

prescribed criminal proceeding means a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 32.

representation includes—

(a) an express or implied representation, whether oral or written; and

(b) a representation to be inferred from conduct; and

(c) a representation not intended by the person making it to be communicated to or seen by another person; and

(d) a representation that for any reason is not communicated."

[23] The appellant contends that the admission of those statements was an error because his counsel had no opportunity to cross-examine those men. That, of course, will always be the case for statements admitted under this section. Her Honour carefully instructed the jury as required by that section and specifically raised for the jury's

consideration matters relating to the reliability of those statements including: the drug and alcohol use of both the men, the mental health problems suffered by Leeder, and that each had a criminal record. The section was otherwise satisfied in that the statements were taken very shortly after the particular incident.

[24] At trial, it was argued that the learned trial judge should have exercised her discretion under s 130 of the *Evidence Act* to exclude the statements.

[25] After giving consideration to the submissions, the learned trial judge concluded that there were not any circumstances which rendered the admission of the statements so unfair that the discretion allowed under s 130 was available. Nothing that was raised on appeal suggests to me that her honour erred in that regard.

Ground 3 – Cross-examination on the appellant's criminal history

[26] The appellant argues that while he was aware that giving evidence would allow the Crown to apply to cross-examine him on his criminal history he says that the details of the offences were not brought to the jury's attention. He submits that the jury did not have the full background circumstances of the offences explained to them.

[27] The discretion to permit cross-examination on the appellant's criminal history was conceded to have been enlivened by his counsel. Once the statutory preconditions have been satisfied there is an unfettered discretion to allow cross-examination on an accused's criminal history. The learned trial judge took into account the considerations set out in *Phillips v The Queen* (1985) 159 CLR 45 and later referred to in *R v Symonds* [2002] 2 Qd R 70. She came to the conclusion that the imputations which had been made against Ferguson-Tait by the appellant as part of his attempts to support his own credit meant that it would be unfair to leave those imputations before the jury unless the Crown was allowed to cross-examine on the appellant's criminal record.

[28] The respondent argues, correctly in my respectful opinion, that the limited cross-examination which did take place was, in fact, more to the benefit of the appellant than to his detriment. Had the cross-examination proceeded to deal with all of the circumstances underlying the previous offences, then substantial similarity would have been established between those offences and the ones for which he was on trial. In any event a trial judge cannot dictate the form of questions which must be asked. Any details which were not exposed in cross-examination could have been raised in re-examination – assuming that counsel for the defendant decided that such a course was in the defendant's interests.

[29] The appellant has not demonstrated that the learned trial judge erred in exercising her discretion to allow cross-examination on the appellant's criminal history.

[30] No error has been demonstrated in the learned trial judge's conduct of the trial or in her summing up. I would dismiss the appeal.