SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gould* [2014] QCA 164
PARTIES:	**R** **v** **GOULD, Martin Karl** (appellant)
FILE NO/S:	CA No 271 of 2013 DC No 260 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	22 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2014
JUDGES:	Muir and Fraser JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The appellant's convictions be quashed.** **3. Verdicts of acquittal be entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted after a trial of: unlawfully confining the complainant against her will; assaulting the complainant with intent to rape; and raping the complainant – where the complainant was driving home from a hotel at night when she pulled over to investigate a suspected flat tyre – where the driver of a van approached the complainant and asked if she needed help – where the driver seized the complainant and raped her in the van then pushed her out of the van and drove away – where the complainant saw her assailant for a short amount of time in low light – where the complainant assisted police to prepare a "com-fit" image of the attacker – where nine months after the incident the complainant selected a photo of the appellant from a photo board, stating "number 6 looks like him" – where the prosecution case was inherently weak – where only one other person in the photo board resembled the complainant's description of the attacker – whether the identification made by the complainant, together with the other evidence in the

case, could satisfy the jury beyond reasonable doubt that the person the complainant saw immediately prior to being attacked was in fact the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant argued that if the complainant's statement that "number 6 looks like him" in relation to the photo board did not constitute a positive identification of the appellant, it was circumstantial rather than direct evidence – whether, if the evidence was circumstantial, the primary judge erred in not giving the usual direction to the jury as to the use of circumstantial evidence – whether the verdict could be sustained by reference to purely circumstantial evidence

Alexander v The Queen (1981) 145 CLR 395; [1981] HCA 17, considered
Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, followed
Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, followed
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
Kelleher v The Queen (1974) 131 CLR 534; [1974] HCA 48, applied
King v The Queen (1986) 161 CLR 423; [1986] HCA 59, cited
Pitkin v The Queen (1995) 69 ALJR 612; [1995] HCA 30, applied
R v Bliesner , unreported, Court of Criminal Appeal, Qld, CA No 202 of 1989, 30 November 1989, cited
R v Evan, Robu and Bivolaru (2006) 175 A Crim R 1; [2006] QCA 527, applied

COUNSEL: D C Shepherd for the appellant
D C Boyle for the respondent

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

[1] **MUIR JA**: **Introduction** The appellant was convicted on 18 October 2013, after a trial which commenced on 15 October 2013, of on 7 August 2010: unlawfully confining the complainant against her will (count 1); assaulting the complainant with intent to rape (count 2); and raping the complainant (count 3). He appeals against his convictions on the grounds identified below.

[2] Before discussing the grounds and the arguments advanced in support of them, it is desirable to summarise the evidence. The complainant gave evidence. The appellant did not give or call evidence.

The complainant's evidence

[3] The complainant's evidence was to the following effect. On 7 August 2010, the complainant, who was then 49 years of age, was driving home from a hotel at

Drayton at about 11.00 pm when she pulled off the Drayton Connection Road to investigate a suspected flat tyre. She left her parking lights on, alighted from her vehicle and was about to inspect the front left hand tyre with the aid of a torch when a white van pulled up. The van driver approached the complainant and asked if she needed a hand. He was then about a metre away. The complainant declined his offer.

[4] The person turned as if he was leaving, the complainant turned to look at the wheel. The torch was shining on the ground. The complainant was seized, pushed to the van and thrust inside through its side door. The complainant struggled but was subdued by a blow to the face. She was threatened with injury from a knife produced by her assailant. He pulled down her jeans, leggings and underpants and raped her. When he finished he opened the door and pushed her out of the van with his foot. He then drove off.

[5] The complainant described her assailant:

> "He was about five eight, five ten. He was balding and darkish hair. I couldn't see the colour of his eyes. He had dark jeans on and a – like a windcheater thing, a nylon type sort of top, and it was dark. I think it was dark blue. That's – he had a belt on I think… I believe he had a belt on."

[6] Asked if she could see her assailant's face when he was talking to her, the complainant replied:

> "Well, he was balding, just – you know, there might have been a bit of hair on the top but there wouldn't have been much. It was more around the – I call it Friar Tuck because I don't know what else to call it, like a – like a monk sort of hair back. He had a – like an upturned nose. Well, I couldn't see the colour of his eyes but I assume they were dark. They looked dark."

[7] The complainant said that she could not see her assailant's teeth but that they smelt bad. She said that the van stank of bad socks and cigarettes and that there was no light inside the van when its door was closed, as it was during the attack.

[8] After undergoing a medical examination by a hospital doctor, the complainant participated in the construction of a "com-fit" image. The police officer responsible for the preparation of the suspect's image stated the suspect's age as 50 years, his height 178 cm, his build as "fat/obese" and his complexion as "light fair". The vaginal swabs taken by the inspecting doctor were subjected to DNA analysis. No semen was detected and DNA testing of the complainant's clothing also failed to provide relevant evidence.

[9] Although the complainant did not need glasses to read, she used them for driving and other distance purposes. She said, "Close up is fine. From about a metre and a half, two metres on I have problems".

[10] In cross-examination, the complainant accepted that in the course of the compilation of the com-fit image she described her assailant as having "a fat, round face". She accepted that during the assault she noted that her attacker, who touched both her breasts with his hand for "as long as a couple of minutes", had soft hands "[l]ike an office worker". She accepted also that her attacker had "really terrible breath".

Other oral evidence

[11] A former partner of the appellant gave evidence to the following effect. On 7 August 2010, she, the appellant and their children went to the home of one of the children's aunties to celebrate the child's birthday. They returned home at about 6.30 to 7.00 pm. She retired to bed at about 8.30 or 9.00 pm. Asked if, after she had gone to bed "and the [family] car started, is that something that would regularly wake you up", she answered, "No … I've slept through it because [the appellant] was coming and going for work … at hours of – [un]Godly hours".

[12] She was not asked about the appellant's breath. Asked what his teeth were like, she said, "Gross, terrible, stained, bad, missing". She said that the appellant's personal hygiene was "Fairly decent … He showered on a regular basis".

[13] She agreed that the appellant was born in June 1974[1] and was about 187 cm tall. She said that the appellant was working at Nolans Transport in August 2010. She accepted that "[a]mong other things" he was a "forklift truck driver". It was put to her in cross-examination that the appellant had "very scarred hands". She replied:

> "No, not really because he was working for Nolans. It was a lot better than when he was working on the actual fields."

[14] The exchange continued:

> "Yes. But they were still really rough, weren't they?---No, no, not as bad at all because he, most of the time, used gloves at work.
>
> Well, he had callouses on his hands?---Yes, like a normal male would but I wouldn't say they were rough."

[15] The dentist, who inspected the appellant's dental hygiene on 11 August 2011, noted that the appellant's teeth "appeared to be dirty, stained and green", that a molar at the back of the appellant's mouth had been recently extracted and that there was a build up of tartar behind the bottom front teeth. Asked if the calculus build up behind the appellant's lower front teeth would have an effect on his breath, the witness said, "Yep, definitely calculus always cause bad breath because of the bacteria produce toxins and then they smell". The witness said that he was not examining the appellant for bad breath.

[16] It is convenient to now consider the grounds of appeal.

There was miscarriage of justice because the trial judge misdirected the jury:

(a) by telling the jury that (only) one witness says that it was the accused who committed the offences when the identifying witness said only that the photo she selected looked like the offender;

(b) by structuring the whole of the summing up on the premise that this was an "identification case" rather than a circumstantial case; and

(c) by failing to give the jury any direction about circumstantial evidence.

[17] In the course of summing up, the trial judge said:

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[1] He was thus 36 at the time of the subject incident.

> "So then turning to the real issue in the trial, ladies and gentlemen, it's this question of identification. And of course, identification is a question of fact. So it's a question for you to decide. The case really rises and falls on the correctness of the visual identification of the accused by the complainant, in circumstances where the accused says that she's mistaken."

[18] Shortly afterwards, the trial judge said:

> "But in this case there's only one witness who says that this was the accused. And even if the witness is being honest, you have to be satisfied of reliability as well. So you have to be satisfied that beyond reasonable doubt that the identification is not mistaken."

[19] The appellant argued that the complainant did not identify the appellant as the offender and that the prosecution case, at best, was a circumstantial one. In argument in the absence of the jury, the prosecutor said:

> "My closing will be that she chose the picture quickly and without hesitation, but just whether or not that needs a direction, I wasn't sure."

[20] Defence counsel did not take issue with this statement, merely asserting that the complainant's words were, "it looks like" and that he may "in a general way … make a comment" about the complainant's appearance at the time she made the identification. The trial judge remarked, "'It looks like him.' Yes, I'm not sure how much weight the jury will place on that comment. She seemed pretty certain it was him". Defence counsel responded, "Nonetheless, that's what she says, your Honour".

[21] There is no substance in the argument that the trial judge erred in telling the jury that "… there's only one witness who says that this was the [appellant]". The trial judge was careful to explain to the jury that the complainant did not make a positive, unequivocal identification. She said:

> "And of course, you'd take into account the fact that she didn't say that it was definitely [the appellant]. She said it looks like him. Now, you've got a DVD of that identification, so you can make some assessment of how certain she was about that identification, but she does [say] that he looks like him rather than it is him."

[22] The appellant's argument is essentially a semantic one. The complainant did not say directly that the person whose photo was number 6 on the photoboard was her assailant. As the above passage from the discussion between the prosecutor, defence counsel and the trial judge indicates, in saying "it looks like him", the complainant did not appear to demonstrate uncertainty. The DVD recording of the identification process shows that immediately after being handed the photo board images and asked to consider them, the complainant became quite obviously distressed. She became more anxious and upset when the police officer asked her to elaborate on why she had selected the person in photo number 6 and to sign and date the back of the photo board.

[23] The appellant argued to the following effect. If the complainant's statement that "number 6 looks like him" in relation to the photo board did not constitute a positive

identification of the appellant, it was circumstantial rather than direct evidence.[2] If the statement was circumstantial, the primary judge erred in not giving the usual direction to the jury as to the use of circumstantial evidence. *Pitkin v The Queen*[3] is authority for the proposition that before an accused can be convicted solely on the basis of a witness' purported identification, the identification must be clear and unambiguous. The complainant's words were not clear and unambiguous.

[24] In *Pitkin*, the Court concluded that statements by a witness who had seen the offender and identified photographs of the appellant with the comment, "this looks like the person" did not, as a matter of literal meaning, amount to positive identification. That was because such statements "were plainly consistent with an intention by [the witness] to indicate nothing more than that the person depicted in the three photographs looked like the offender whom she had seen".[4] It was held that, as the words used by the witness were consistent with an absence of positive identification, the evidence of her selection of the photographs was, of itself, incapable of sustaining a finding by a reasonable jury that the appellant was, in fact, the offender.

[25] The respondent submitted that if the trial judge correctly left the complainant's evidence to the jury on the basis that it was identification evidence, it was open for the jury to be satisfied beyond reasonable doubt as to the identification of the appellant and to convict. However, if the evidence should have been left as a circumstance in a circumstantial case, it was conceded that the customary circumstantial evidence direction should have been given and that the evidence would be insufficient to sustain a conviction. That was because the jury, acting reasonably, could not be satisfied that the only rational inference from the circumstantial evidence was that the offender was the appellant.

[26] The matters relied on by the respondent to distinguish *Pitkin* were:

1. The preparation of the com-fit picture bearing some resemblance to the appellant the day after the offence.

2. The fact that the complainant picked the photograph relatively quickly and became visibly distressed upon recognition of the appellant.[5]

3. Whilst the words used did not unequivocally identify the appellant, it was open to the jury to conclude that she did make a positive identification of the appellant.

[27] It is by no means apparent to me that the matters relied on by the respondent were capable of converting the equivocal words of the complainant into a clear and unambiguous identification. The fact that some nine months before the purported identification the complainant prepared a com-fit picture bearing some resemblance to the appellant would not appear to have much to do with whether the complainant was making a clear and unambiguous identification of the appellant. The fact that the complainant selected a particular photograph relatively quickly is likely to be partly attributable to the composition of the photo board. That composition will be

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2 See e.g. *Festa v The Queen* (2001) 208 CLR 593 at 610–611.

3 (1995) 69 ALJR 612 at 614–615.

4 *Pitkin v The Queen* (1995) 69 ALJR 612 at 615.

5 See in this regard *R v Bliesner* (CA No 202 of 1989, unreported, 30 November 1989).

discussed in more detail shortly. The complainant's distress could just as easily have arisen from her having identified a person whom she thought may well be her assailant as from a belief that the person in photo 6 was in fact her assailant. If, as appears to be the case, the complainant is a reasonable and considered person, the circumstances in which she was able to observe the appellant on the evening of 7 August 2010 would suggest that the complainant chose words that accurately embodied her intention.

[28] It is not necessary, however, to pursue the respondent's argument in this regard any further. The trial judge's directions included the following:

> "During that identification in the DVD, ladies and gentlemen, she obviously becomes upset. I'd ask you not to use that as any sort of strengthening of the identification. Obviously being taken into a police station and asked to look at a photo board in a situation where she was attacked would be very stressful as it is, and no doubt very upsetting. So that doesn't actually strengthen the identification one way or the other. It's an understandable reaction of the complainant in the circumstances, but it doesn't make the identification stronger."

[29] This Court should proceed on the assumption that the trial judge's directions were followed.[6] Consequently, the respondent's argument that the complainant gave direct identification evidence cannot succeed.

[30] It was properly conceded that the verdict could not be sustained by reference to purely circumstantial evidence. The question for the jury was not semantic or linguistic in nature or one of evidentiary categorisation: it was whether the identification made by the complainant, such as it was, together with the other evidence in the case, could satisfy them beyond reasonable doubt that the person the complainant saw immediately prior to being attacked was in fact the appellant.

[31] In *Festa v The Queen*,[7] Hayne J, referring to the purpose of a comprehensive warning[8] by a trial judge about "the difficulties in [identification] evidence which, because it is so seductive, has so often led to proven miscarriages of justice", said:[9]

> "Giving effect to that purpose does not depend upon, or require, the classification of evidence as positive-identification evidence or as evidence of similarities, as circumstantial or direct. The problem is more concrete than that. It is that witnesses may, with perspicuous honesty, give evidence that it was the accused they saw, or a person like the accused, or a person having particular physical characteristics (like those of the accused) and yet the painful experience of the law is that they may be mistaken. The duty of the judge is to draw the jury's attention in *every* such case, where the reliability of the evidence is disputed, to how and why the evidence may not be reliable."

[32] The careful directions of the trial judge on the identification evidence were not criticised except in one respect.

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6 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 per Gleeson CJ and Gummow J.

7 (2001) 208 CLR 593.

8 Of the nature of that discussed in *Domican v The Queen* (1992) 173 CLR 555.

9 *Festa v The Queen* (2001) 208 CLR 593 at 658-659.

[33] There were 12 photos on the photo board. Photos 5, 8, 9 and 11 were of men with fairly full heads of hair. Photos 3, 4, 7 and 10 were of men with receding hairlines who would not be regarded as balding or as having a distribution and quantity of hair similar to that shown on the com-fit image. The remaining photos were 1, 2, 6 and 12. Photo 12 was of a comparatively young slim man who had obvious hair on top of his head. Photo 2 was of a man who could not be described accurately as fat, obese, chunky or as having a fat or round face. The man in photo 1 had a hairline which was not as receding as the appellant's. He appeared to be less "chunky" or "fat" than the appellant and the shape of his face was more rectangular than round. Photo 6, for reasons unexplained, was the only photo in which the person photographed did not appear against a neutral background.

[34] It was thus not surprising that the complainant, having considered the photo board, would select the photo of the person whose appearance most closely matched the com-fit image and which, by virtue of its background, stood out from the other photos. The following observations of the Court in *Pitkin* are pertinent:[10]

> "The use of photographs of suspects by law enforcement agencies for the purpose of identifying an offender is a necessary and justifiable step in the course of efficient criminal investigation. Nonetheless, it is attended by some danger of consequential and unfair prejudice to an accused. One such danger is that identification through a photograph is likely to be less reliable than direct personal identification since differences in appearance between the offender and a suspect may be less noticeable when a photograph of the suspect is used. In that regard, once there has been purported identification through a photograph, any subsequent direct identification may be less reliable by reason of the subconscious effect of the photograph upon the witness's recollection of the actual appearance of the offender. Another such danger is that a witness who is shown photographs by investigating police will ordinarily be desirous of assisting the police and will be likely to assume that the photographs shown to her by the police are photographs of likely offenders. In that context, and in an environment where the ultimate accused will necessarily be absent and unrepresented, there may be subconscious pressure upon the witness to pick out any photograph of a 'suspect' who 'looks like' the offender notwithstanding that the witness cannot, and does not purport to, positively identify the subject of the photograph as the offender."

[35] Thus, in my opinion, the jury should have been warned that the identification by use of the photo board needed to be approached with particular caution as the composition of the photo board was capable of suggesting a particular identification. Moreover, there was the tendency, remarked on in the cases, of the mind to substitute a photographic image once seen for a hazy recollection of the person initially observed.[11] In this case, it was possible that the com-fit image would have supplanted or interfered with the complainant's originally recollected image.

[36] The warning that the trial judge is required to give in circumstances such as those under consideration does not need to follow any particular formula but it must be

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10 *Pitkin v The Queen* (1995) 69 ALJR 612 at 614–615.

11 *Alexander v The Queen* (1981) 145 CLR 395 at 426 per Mason J.

"cogent and effective", "appropriate to the circumstances of the case"[12] and the jury's "attention should be drawn to any weaknesses in the identification evidence".[13] Reference to counsel's argument is insufficient.

[37] In *R v Evan*,[14] Keane JA, after discussing the principles established by *Domican v The Queen*[15] and other authorities, concluded that the trial judge should "…isolate and identify, by way of direction on his authority for the benefit of the jury, and not merely by way of comment which the jury are at liberty to disregard, matters which might reasonably be regarded as undermining the reliability of the identification evidence." As I have just explained, that was not done.

[38] An even more fundamental problem for the respondent, however, is that the prosecution case was inherently weak. It rested, for the most part, on the complainant's identification of the appellant. She had seen her assailant only very briefly at night aided by the illumination provided by her vehicle's parking lights and by a light from a torch she held directed at the ground. Her eyesight had the defects mentioned earlier. She had not seen her assailant before the incident and was not called on to identify the appellant until more than nine months after the attack.

[39] There were other matters that detracted from the strength of the prosecution case. No evidence linked the van to the appellant. If he was the offender, he probably would have left his home after his partner went to bed at about 8.30 or 9.00 pm, obtained the van from an unknown source and driven from Gatton to the scene of the subject incident. It was common ground that he was not working on Saturday 7 August or Sunday 8 August. The evidence did not disclose the existence of any reason for the appellant to be in the vicinity of the incident on the evening of 7 August, even though it would have been physically possible for him to have been there.

[40] None of the DNA evidence implicated the appellant. The complainant's description of the appellant at the time of the preparation of the com-fit picture as "obese" did not accord with her later recollection that he was "chunky". Her description of her attacker's face as fat and round did not match the appellant's appearance particularly well. The com-fit picture is not entirely dissimilar to the photograph of the appellant identified by the complainant but the former does show a person with a somewhat rounder, fatter face and a more distinctive bulbous nose than the appellant's. The com-fit put the appellant's height at a 178 cm. The appellant's former partner gave his height as 187 cm. The com-fit gave the appellant's age as 50 years. At the time of the subject incident he was 36.

[41] The complainant seemed to have a clear recollection that her assailant had soft hands. The evidence of the appellant's former partner in that regard was, if anything, slightly supportive of the defence case.

[42] Contrary to the appellant's submissions, there was evidence from which the jury could infer that the appellant had bad breath at the time of the offence. That, however, was a minor detail in the scheme of things.

[43] For the above reasons, I have concluded that it was not open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's

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12 *R v Evan* (2006) 175 A Crim R 1 at 10.
13 *Kelleher v The Queen* (1974) 131 CLR 534 at 551.
14 (2006) 175 A Crim R 1 at 15.
15 (1992) 173 CLR 555.

guilt. Accordingly, the verdicts should be set aside. I would not order that there be a retrial. The evidence on the trial was not sufficiently cogent to justify a conviction.[16] Counsel for the respondent, appropriately in my respectful opinion, accepted that the prosecution's evidence would not get any better on a retrial.

[44] I would therefore order that:

1. The appeal be allowed.

2. The appellant's convictions be quashed.

3. Verdicts of acquittal be entered.

[45] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.

[46] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Muir JA, with which I agree. I also agree with the orders proposed by his Honour.

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16 See e.g. *King v The Queen* (1986) 161 CLR 423 at 433.