SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gimm* [2015] QCA 256
PARTIES:	**R** **v** **GIMM, Adam Roy** (appellant)
FILE NO/S:	CA No 146 of 2015 DC No 351 of 2015 DC No 355 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2015
JUDGES:	Philip McMurdo JA and Jackson and Bond JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The order of the court is:** **The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was found guilty of robbery – where the crown case was a circumstantial case – where three witnesses were unable to identify the offender – where fingerprints on a "V" can handled by the offender were those of the appellant – where CCTV footage showed the offender's general physique – where the appellant was seen 1.5 kilometres away within about 10 minutes – whether it was open for the jury to convict the appellant on the evidence *Plomp v The Queen* (1963) 110 CLR 234; [1963] HCA 44, applied *R v Hillier* (2007) 228 CLR 618; [2007] HCA 13, applied *R v Omid (No 2)* [2012] QCA 363, applied *R v Richardson* [2010] QCA 216, followed
COUNSEL:	The appellant appeared on his own behalf S J Farnden for the respondent

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

[1] **PHILIP McMURDO JA:** I agree with Jackson J.

[2] **JACKSON J:** On 11 June 2015 the appellant was found guilty of an offence of robbery whilst armed with an offensive weapon committed on 13 July 2014. He was convicted and sentenced.

[3] The appellant appeals against the conviction on the ground that in all the circumstances it was unsafe and unsatisfactory, meaning that there was a miscarriage of justice.

[4] The circumstances of the offence involved an unsuccessful robbery of the Red Shop Convenience Store at Finucane Road Alexandra Hills on 13 July 2014 shortly after 6.50 am. There were three witnesses to the events and CCTV cameras in the Red Shop recorded them.

[5] Mr Qi Li and his wife Yin Du were inside the Red Shop when the offender entered. The camera footage showed that the offender was wearing long pants and a black long sleeved top with a hood and letters written on the front and back. The hood was pulled over his head. It circled his face. Shortly after the offender entered, Mr Li went behind the counter and they spoke. The conversation was about the purchase of cigarettes. After about a minute, Ms Du also went behind the counter and walked past Mr Li.

[6] The camera located above and behind the cash register showed the offender and Mr Li talking, Mr Li selecting a pack of cigarettes and the offender apparently reaching into his pocket. Mr Li's evidence was that the offender said that he had left his wallet probably in the car and that he would go back to the car to get it.

[7] The camera located behind the cash register shows the offender then walking towards the entrance. He stopped and moved back into the store to a glass fronted refrigerator cabinet. He then opened the cabinet door, removed a can from the cabinet and walked back to the cash register where he placed the can on the counter before again moving to the entrance and out the door and his evidence was to the same effect.

[8] The camera footage showed that the offender carried the can in his right hand from the point at which he removed it from the cabinet until the point when he placed it on the bench in front of Mr Li.

[9] It was a short time before he returned, entering again through the front door and walked to the cash register where Mr Li was still standing. They spoke.

[10] Mr Li said that the offender said: "Open the till. Give me the cash". Mr Li reached for and picked up a stick which was located on a shelf underneath the counter. The offender uncrossed his arms which had been crossed from the time when he re-entered the store to reveal that he was carrying a tomahawk. He transferred the tomahawk to his right hand and held it up in a threatening manner. Mr Li backed away slightly. The offender grabbed the cash register and ran the few steps to the front door.

[11] The camera behind the counter showed that in the process of grabbing the cash register the offender pushed aside a lolly jar that was standing on the counter.

[12] In the meantime, Ms Du who had been standing behind the offender down an aisle in the Red Shop raced out the front door calling for help. By the time the offender reached the front door carrying the cash register he was confronted by a person who appeared to be coming towards the entrance.

[13] Michael Phipps gave evidence that he was on his way to the Red Shop to buy the Sunday newspaper and was about to enter when a person came running out with a tool he described as a short tomahawk. The confrontation or encounter was very brief with the offender heading out the door in the direction of Mr Phipps stopping about two metres in front of him and then running in another direction. Other evidence given at the trial showed that the offender dropped the cash register at that time as well.

[14] Although Mr Li, Ms Du and Mr Phipps gave evidence at the trial, none of them was able to identify the appellant as the offender.

[15] Forensic examination of the items which the offender had appeared to touch during his time at the scene led to the development of fingerprints taken on the door of the cabinet, the can of "V" drink removed from the refrigerator and placed on the counter near the cash register, the lolly jar and the bottom of the tray of the cash register.

[16] Apart from the fingerprints on the "V" can, the fingerprints were not those of the appellant. There were three fingerprints developed on the "V" can that were identified as fingerprints from the appellant's right hand. One of them was his right thumb. Another was his right middle finger. They were positioned on the can on either side consistently with the way it had been selected from the cabinet and placed on the bench by the offender.

[17] It was mutually admitted at the trial that shortly after 7.00 am on 13 July 2014 the appellant was at the Shell Service Station on Finucane Road, Alexandra Hills. The distance between the Red Shop and the Shell Service Station is approximately 1.5 kilometres. At approximately that time the appellant called his mother to pick him up from the service station. His mother drove to the Shell Service Station and gave the appellant a lift home.

[18] It was also mutually admitted at the trial that the appellant's mother had not ever seen him wear a black hooded top with letters over the front or back such as those depicted in the camera footage or purple jeans or a pair of black Nike sneakers with orange soles.[1]

[19] The evidence as set out above demonstrates that this was a circumstantial case. In such a case the jury can only convict if satisfied that no explanation other than guilt was reasonably open on the evidence.[2]

[20] That question is one which must be resolved on the whole of the evidence, not a particular part of it. The question of conviction or no conviction turned on whether the appellant was the offender shown by the camera footage and the oral evidence of Mr Li, Ms Du and Mr Phipps.

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1 Although it was also mutually admitted that the appellant's right ring finger was a fingerprint on the "V" can, the cross-examination of Sgt Nugent is consistent with only two of three prints on the "V" can being identified as coming from the appellant.

2 *Plomp v The Queen* (1963) 110 CLR 230, 243; *R v Hillier* (2007) 228 CLR 618, 637 [46]; and *R v Omid (No 2)* [2012] QCA 363, [49].

[21] The appellant submits that the evidence did not identify him. He submits the only evidence that might support the inference that he was the offender were the finger prints on the "V" can.

[22] He points to the difference between his height at 170 cm and the height of the offender described by Mr Phipps as 5 foot 10 inches (180-182 centimetres). Further he submits that no clothing of the offender or weapon used in the robbery was located. Lastly he relies on the distance between the Red Shop and the Shell Service Station on Finucane Road and that he was at the Shell Service Station shortly after 7.00 am.

[23] It may be accepted that the evidence of the appellant's fingerprints on the "V" can is critical to the outcome of the case. As Sgt Nugent said, the location of the appellant's fingerprints was a right thumb print on one side of the can and a right middle fingerprint on the other. That was consistent with the way the can was carried by the offender before placing it on the counter.

[24] The respondent relies on the evidence considered together. In particular the respondent relies on the similarity in appearance of the appellant to the offender in the camera footage, the presence of the appellant's fingerprints on the "V" can and the appellant's presence in the general area at the time of the robbery.

[25] The respondent submits that the absence of fingerprints or DNA otherwise does not lead to a conclusion that the jury must have entertained a sufficient doubt as to require a verdict of not guilty. The respondent submits that the fact that no clothes or weapons were located is of no consequence because the appellant had time to dispose of them after he ran away from the Red Shop.

[26] The question resolves to the possibility that the appellant's fingerprints came to be placed on the "V" can by some method other than when the offender selected the can from the cabinet and carried it over and placed it on the counter next to the cash register.

[27] A case with passing similarity is *R v Richardson*[3]. In that case a robber had entered an Australia Post office, vaulted the counter between the public and staff areas, and ordered a staff member to put all the money from the tills into a bag. The offender left through a door that opened from the staff area into the public area and then exited the store. There was DNA on the inside door handle consistent with that of the defendant. There was a possibility that some secondary DNA transfer might explain his DNA on the inside door handle. White JA said:

> "The idea that the offender or some other person innocently had contact with the appellant and then touched the door handle thus depositing some of the appellant's DNA was something that the jury could consider. But, additionally, the jury had the benefit of the CCTV footage which they could compare with the general physique of the appellant. Furthermore, the swab from the door handle was taken immediately after the offence was committed and the staff side of the door was not a place to which members of the public normally had access. The theory of secondary transference was just that and the jury were entitled to consider that it was inherently unlikely that a person would reach over and touch the handle on the door, which was used up to six times a day, and inadvertently transfer the appellant's DNA."[4]

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3 [2010] QCA 216.

4 *R v Richardson* [2010] QCA 216, [22].

[28] Of course there are differences between that case and this one. There was evidence at the trial in the present case that the fridge may not have been restocked with "V" cans for possibly up to 10 days before the robbery. There is a theoretical possibility that the appellant may have entered the store and put his hand on the "V" can at some time prior to the robbery and that by some concatenation of events the same can was at the front of the cabinet in time to be selected by the offender in a way that coincidentally made it appear that the appellant's fingerprints were those that had been left on the can by the offender. Undoubtedly, fingerprints can be preserved on the surface of such a can for a significant period of time.

[29] In my view, however, these were all matters that the jury could consider. They were entitled to consider those possibilities as well as the CCTV evidence of the offender which they could compare to the general physique of the appellant and the appellant's presence in the general area of the robbery.

[30] In my view, when considering all the evidence, the jury could be satisfied beyond reasonable doubt that the appellant was the offender. The appeal should be dismissed.

[31] **BOND J:** I have read the reasons of Jackson J and agree with those reasons and the order his Honour proposes.