SUPREME COURT OF QUEENSLAND

CITATION:	*R v Forster* [2016] QCA 62
PARTIES:	**R** **v** **FORSTER, Aaron Richard** (appellant)
FILE NO/S:	CA No 170 of 2015 DC No 133 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 2 July 2015
DELIVERED ON:	15 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is allowed.** **2. The guilty verdict is set aside.** **3. Instead, a verdict of acquittal is entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of one count of entering a dwelling with intent – where it was alleged that the appellant stole approximately $12,000 from a bolted safe – where the safe had been washed – where a small smear of blood was found on a doona cover inside the bedroom – where the appellant's DNA profile matched a swab of the stain on the doona cover – where police found fingerprints that could not be identified on a tin, discovered by the complainant, which had been inside the safe with money in it – where the tin was in a suitcase underneath the bed covered by the blood smeared doona – where, prior to the offence occurring, the complainant's daughter, Nicole, had resided in the house – where Nicole left the house in disarray and the complainant said she could not collect her belongings until the house had been cleaned – where Nicole was angry at the complainant for refusing her entry into the house – where the complainant gave his daughter Kelly a key to arrange for Nicole's belongings to be collected

– where the complainant arranged for the house to be professionally cleaned – where the appellant gave evidence of an innocent explanation for being in the house at about the time of the offence – where the complainant's daughter, Nicole, gave the appellant's partner, who was cold, a doona in which she and the appellant cuddled – where the appellant had an injury to his shin that bled when knocked – where the prosecution did not call the complainants' daughters – where the prosecution failed to exclude a rational hypothesis consistent with innocence – whether the verdict was unreasonable or insupportable having regard to the evidence

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited

COUNSEL: J Sharp for the appellant
P J McCarthy for the respondent

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

[1] **MARGARET McMURDO P:** The appellant was convicted on 2 July 2015 after a two-day jury trial of burglary and stealing. He has appealed against his conviction on three grounds. The first is that the verdict was unsafe and unsatisfactory. The second is that a miscarriage of justice was occasioned by the content of the prosecutor's closing address. The third is that a miscarriage of justice was occasioned by the trial judge's summing up, in that there was a failure to direct the jury that the fingerprints on the White Wings tin might have come from a person other than the appellant or the complainant; to adequately correct a misstatement of the evidence; and to fairly put the defence case before the jury.

[2] For the reasons that follow, I would allow the appeal on the first ground and it is unnecessary to deal with the remaining grounds. I would set aside the guilty verdict and direct a verdict of acquittal.

[3] A consideration of this ground of appeal requires a review of the whole of the evidence at trial.

The evidence at trial

[4] The prosecution case turned on circumstantial evidence to establish that the appellant entered the complainant's home on Magnetic Island sometime between 20 and 24 March 2014 and stole about $12,000 from a safe bolted inside a wardrobe in the main bedroom.

[5] The complainant gave evidence that his daughter, Nicole, had been living there with her daughter for about six to eight weeks from January 2014, having separated from her partner. When she moved out the complainant was unhappy with the state the house was left in and told Nicole to clean it before collecting her belongings. It looked like "a bomb had gone off inside". He did not allow Nicole to have the spare key to the house. He arranged for a friend of his daughter, Kelly, to collect Nicole's belongings and return them to her. He agreed that Nicole was angry with him for not allowing her to come to the house to collect her belongings. He arranged for a professional cleaner to thoroughly clean the house between 12 and 17 February 2014.

[6] The cleaner made the beds including the bed in the master bedroom. She did not notice anything unusual about the doona cover. She left the main bedroom in perfect condition with the bed "totally made up…ready for someone to move into the house."[1]

[7] The complainant's partner washed all the bed linen in the house, including the doona cover in the main bedroom, prior to the house being cleaned.[2]

[8] The complainant gave evidence that he checked the property was locked and secured on Thursday, 20 March 2014. When he returned the following Monday, a garage door was raised, the laundry door was open and damaged, and the safe in the main bedroom was gone. He notified police who came to the house.

[9] Scenes of Crime officers found damage to the door handle on the laundry door. One officer noticed "spray droplets" on the glass sliding door of a walk-in wardrobe in the main bedroom. Inside the wardrobe there was a bolt protruding from the floor. There was a small red stain about three or four centimetres long, which looked like blood, on the left edge of the doona cover in the main bedroom, that is on the side of the bed nearest to the desk. He took a swab and labelled and packaged it for analysis. There was a safe in the ensuite bathroom to the main bedroom. It was opened and damaged, with rough edges and water in the bottom of it. In another bathroom, police noticed drawers slightly ajar and a spray bottle of Pine O Cleen on the edge of the vanity. Police used tape to lift any material present from the edge of the spray bottle handle but no identifiable prints were found. Police did not test the safe for prints because it was completely wet.

[10] A DNA profile from the swab of the stain on the doona cover matched the appellant's profile with a probability ratio of 1 in 2,600 billion.[3]

[11] The complainant installed a new lock and secured the premises. He later looked under the bed in the main bedroom and noticed a suitcase which was usually kept inside a built-in wardrobe. He said he did not touch the suitcase and notified police of it.[4]

[12] Another Scenes of Crime officer came to the house and saw an open suitcase beside the bed. Inside was a blue cloth with a black plastic tray on top, together with clothing. On the lid of the suitcase was a red White Wings tin. He fingerprinted the tray and the tin and took samples of some small plastic pieces inside the suitcase which looked similar to the paint flaking off the damaged safe. The officer said that the complainant told him he found the suitcase under the bed and moved it out to the side.[5] No fingerprints were found on the tray or on the handle of the suitcase. Three latent fingerprints were found on the tin but were not identified. They were, however, not the appellant's fingerprints.

[13] The parties admitted that the fingerprints on the tin were not analysed for comparison against the fingerprints of the complainant and that on 21 April 2014 the appellant had a DNA sample taken and was charged with this offence of burglary.[6]

[14] The complainant gave evidence that some of the stolen money had been inside the tin and the tray found inside the suitcase.

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1 T1-41.
2 T1-40.
3 T1-51.
4 T1-27.
5 T1-21.
6 Exhibit 32, AB 114.

[15] No objection was taken to police evidence that enquiries revealed that Nicole had purchased a car for cash on Monday, 24 March 2014. The seller advised a police officer that Nicole was with her mother who paid for the car. The police officer thought the car was purchased for a couple of thousand dollars but he was no longer sure of the price.

[16] Neither Nicole nor Kelly were called to give evidence.

[17] The appellant gave evidence that in late March 2014 Nicole's partner invited him to the complainant's home on Magnetic Island. He had been there a couple of times in the preceding months. Since 2008 he had been friendly with the complainant's other daughter, Kelly, and had also visited there a couple of years earlier. He and his girlfriend, Ruth Anthony, accepted Nicole's invitation and went to the house at about 5.30 pm or 6.00 pm. The roller door was up and he walked through the garage area. He and Ms Anthony were there for about an hour or an hour and a half with about four or five others. Ms Anthony did not get along with Nicole who was in a grumpy mood and "going off" at her partner. Ms Anthony was a little lonely and most of the time was lying on a couch by herself. She "didn't want to be there at all."[7] It was a windy night and she was under a doona watching TV. He thought Nicole got the doona for Ruth. He lay down beside her and they cuddled and kissed. About a month earlier he injured his shin riding a pushbike. It was taking a long time to heal as he kept bumping it and the scab was infected. He still had a scar from the injury. He did not go into the bedroom. He did not break into a safe. He did not steal any money. He did not see anyone else doing those things. He left with Ms Anthony and they returned to the mainland.

[18] During cross-examination the judge asked him whether Nicole was living at the house at the time. He responded that he knew from Kelly that Nicole and her partner had a house in Townsville but he understood they could go to this house on Magnetic Island anytime they wanted. It was like their holiday home. The judge asked whether it was tidy. The appellant responded that it was tidy and clean but there were "cartons of alcohol and stuff."[8] He thought Nicole was still living with her partner, although they were arguing and it was "pretty volatile." The appellant again denied committing the offence; he would not do that to his friend, Kelly.

[19] Ms Anthony gave evidence that in the last week of March, she wasn't exactly sure of the date, Nicole and her partner invited the appellant and her to their place on Magnetic Island. It was late afternoon, early evening, dusk. There were four or five other people present apart from Nicole and her partner. Ms Anthony was a little anxious in social situations and for much of the time sat by herself on the couch. The house was pretty neat. She understood Nicole and her partner were staying there but it was a holiday house. She felt cold and asked Nicole for a jumper or jacket. Nicole gave her a doona which she put around her shoulders. The appellant sat down on the couch with her and cuddled her a few times; he was hugging her to keep her warm and to show affection. When she was walking around talking to people she had the doona draped around her. She didn't hear or see anything unusual whilst she was there. They were at the house for about an hour or two. She asked Nicole if she should fold the doona and put it away but Nicole said she would look after it and Ms Anthony left the doona on the couch.

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7 T1-64.
8 T1-69.

[20] In cross-examination she said the doona was white. She did not know that the appellant had an injury to his leg. She agreed she loved the appellant but insisted that she was giving truthful evidence.

Unsafe and unsatisfactory

[21] The appellant contends that the verdict is unreasonable and unsupported by the evidence. Whilst it may be accepted that the jury rejected the appellant's evidence, they were only entitled to convict him if satisfied that the prosecution case established beyond reasonable doubt his guilt. The DNA evidence did nothing more than establish that he was at the scene. It did not show that he was guilty of burglary and stealing. The jury could not convict him on the circumstantial evidence on which the prosecution case was based unless the only rational inference was one of guilt. The evidence left open the possibility that although the appellant had been in the house, another person or persons, perhaps the complainant's disgruntled daughter Nicole or another or others associated with her, were the offender or offenders. Nicole had a motive in that she was angry with the complainant and she purchased a car for several thousand dollars on the day the offence was discovered. Any fingerprints found were not associated with the appellant. The jury could not be satisfied beyond reasonable doubt of the appellant's guilt. The appeal should be allowed, the conviction set aside and a verdict of acquittal entered.

[22] The respondent contends that the only reasonable hypothesis was that the offender, or one of the offenders, injured himself when forcing the safe open and left blood on the nearby doona when depositing items from the safe into the suitcase and placing it under the bed. The wet condition of the safe was consistent with the offender washing blood off the safe. Nicole was excluded as a suspect as she did not have a key to the house. The only reasonable explanation as to how the appellant's blood got on the doona cover was that he was the offender or one of the offenders. The respondent contends that for these reasons the appeal against conviction should be dismissed.

Conclusion on this ground of appeal

[23] The prosecution case established that the offence occurred sometime between 20 and 24 March 2014. This was a time when the appellant, on his own evidence, could have been at the complainant's house. The complainant's evidence, however, left open the reasonable possibility that Kelly passed on the key of the house to Nicole after it was cleaned. Another reasonable possibility open on the evidence was that Nicole, in her anger at being locked out of the house by her father, forced an entry through the laundry door and held a gathering there. She had lived in the house and must have known about the safe. It is true that the appellant's blood smear was found on the doona cover in the main bedroom. The suitcase, inside which were items from the safe which had contained stolen money, was under the bed, below the blood smeared doona cover. But this was the only evidence linking the appellant to the offence. Fingerprints were found on the tin which had been in the safe and contained some of the money which was stolen, but they were not the appellant's fingerprints. He and Ms Anthony provided an innocent explanation for him to be at the house between 20 and 24 March and for a small smear of his blood to be on the doona. The evidence at trial left open the reasonable possibility that Nicole, or someone associated with her, committed the offence, after the appellant and Ms Anthony left the house. The small blood smear could have come from his injured leg when he was cuddling Ms Anthony who was wrapped in the doona. It was reasonable to conclude that

Nicole would have replaced the doona on the bed. If an offender had cut himself on the safe, having been so fastidious as to completely wash the safe to remove blood and/or fingerprints, he would have been unlikely to leave behind a visible blood smear on the doona cover. The prosecution could have, but did not, call Nicole to establish that she was not involved in the offence.

[24] In determining whether a conviction is unreasonable and against the weight of the evidence the question is whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[9] It was open to the jury to consider the appellant may have been guilty or may have been involved in some way in the offence. But it was not open to them to conclude that the only rational inference was that the appellant was guilty of the offence. The rational explanation, that he was innocently at the complainant's house between 20 and 24 March 2014 and that a smear of blood from his injured leg got onto the doona cover when he was cuddling Ms Anthony, and that another or others put the doona on the bed in the main bedroom and committed the offence after he and Ms Anthony left, could not be excluded beyond reasonable doubt. It was not open to the jury to conclude that the only rational explanation for the appellant's blood smear being on the doona cover was that he entered the complainant's residence and stole the money from the safe.

[25] For these reasons I would allow the appeal, set aside the guilty verdict and instead direct a verdict of acquittal.

Order:

1. The appeal against conviction is allowed.
2. The guilty verdict is set aside.
3. Instead, a verdict of acquittal is entered.

[26] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.

[27] **BOND J:** I agree with the reasons and orders of the President.

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9 *M v The Queen* (1994) 181 CLR 487, 493-495.