SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hudson* [2016] QCA 80
PARTIES:	**R** **v** **HUDSON, Sean Christopher** (appellant)
FILE NO/S:	CA No 69 of 2015 DC No 99 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton – Date of Conviction: 26 March 2015
DELIVERED ON:	5 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2016
JUDGES:	Gotterson and Morrison JJA and Jackson 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 – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was found guilty of robbery whilst armed with a dangerous weapon – where the appellant was convicted and sentenced to seven years' imprisonment with a parole eligibility date set at 8 June 2017 – where the appellant filed a notice of appeal to the Court of Appeal against his conviction – where the appellant submits a miscarriage of justice occurred because the jury was not given an appropriate warning about the evidence contained in the statement of a witness who was deceased by the time of the trial – where a record of the deceased's interview was played to the jury to assist in their determination of her demeanour – where it is alleged the learned trial judge failed to warn the jury of the defence's lack of opportunity to: (1) explore alleged inconsistent statements by the deceased; and (2) cross-examine the deceased on factors that may have affected her recollection of the evening of the offence – where the deceased's record of interview was not evidence and therefore there was no evidential inconsistency arising from different versions – where there was no clear and important conflict between the evidence of

the witnesses – whether the failure to properly warn, as the appellant alleges, amounts to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was found guilty of robbery whilst armed with a dangerous weapon – where the appellant was convicted and sentenced to seven years' imprisonment with a parole eligibility date set at 8 June 2017 – where the appellant filed a notice of appeal to the Court of Appeal against his conviction – where the appellant submits the verdict was unreasonable on the whole of the evidence – where it is alleged that the only direct evidence that the appellant was the actor in terms of s 7(1)(a) *Criminal Code*, that is, the evidence of a co-offender, is not credible because such evidence is an inconsistent statement made in cross-examination – where an explanation of the inconsistent statement as to the identity of the actor was provided in re-examination – whether the co-offender's evidence could be supported by other witnesses – whether it was open to the jury to have been satisfied beyond reasonable doubt that the appellant was the actor in the robbery

Justices Act 1886 (Qld), s 111(1)

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Henriques v The Queen [1991] 1 WLR 242; (1991) 93 Cr App R 237, considered
R v Horan [1951] VLR 249; [1951] VicLawRp 32, cited
R v Melling & Baldwin [2010] QCA 307, cited
R v Mendham and Foster (1993) 71 A Crim R 382, considered
R v Schuurs [1999] QSC 176, cited
Scott v The Queen [1989] AC 1242; (1989) 89 Cr App R 153, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: M J Copley QC for the appellant
M Cowen QC for the respondent

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

[1] **GOTTERSON JA:** At a trial over four days in the District Court at Rockhampton, the appellant, Sean Christopher Hudson, was found guilty on 26 March 2015 of an offence against s 411 of the *Criminal Code* (Qld). The single count on the indictment on which he was tried alleged that on 2 October 2012 at Rockhampton, the appellant robbed Joanne Therese Randall. The count further alleged the circumstance of aggravation that the appellant was armed with a dangerous weapon when he committed the robbery.[1]

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1 *Code*, s 411(2).

[2] The jury retired after addresses and the summing up at a little before 11.30 am on the fourth day of the trial. At about 2.45 pm that day, they returned the guilty verdict. The appellant was convicted and sentenced to seven years' imprisonment. A parole eligibility date of 8 June 2018 was set.

[3] On 17 April 2015, the appellant filed a notice of appeal to this Court against his conviction.[2]

Circumstances of the alleged offending

[4] The complainant, Ms Randall, was a shop assistant at a newsagency in Dean Street, Frenchville, a suburb of Rockhampton. At about 5 am on 2 October 2012, just after opening, she was in the process of rebooting a till. A man walked in through the front door. He was armed with what looked like a shortened rifle with a barrel; in all, about 30 centimetres long.[3] He was wearing dark clothes which Ms Randall described as "like tracky pants and a jumper". He had a dark-coloured balaclava over his head with just his eyes showing. The skin around his eyes was pale.[4]

[5] The man held the weapon at waist level. He had it pointed towards Ms Randall. He demanded that she take him to the safe. She replied that she could not because her employer did not give her access to it. She added that all the employer gave her was a blue tin which she showed to the man. It was her float tin. First thing that morning, there had been $1,000 cash in the tin but by the time the man had appeared, Ms Randall had put $500 of it into a drawer for one of the two tills. She told the man that there was money in the drawer as well. The man picked up the money from the drawer and also the blue tin. He walked out of the newsagency with them. Ms Randall then rang the police.[5]

[6] Detective Senior Constable B V Howes gave evidence that she viewed CCTV footage taken on a camera at a business premises situated on the other side of Dean Street from the newsagency. The footage was in black and white and "quite grainy". It depicted two persons running to the front of the newsagency. Only one of them entered. The other stayed outside at the front. When the person who had entered re-emerged, they both ran down Dean Street in the direction opposite to that of their approach to the newsagency. Detective Senior Constable Howes was unable to download or make a copy of the footage.

[7] Oral testimony was adduced in the prosecution case from three persons who knew the appellant. They were James Pattenden, Martin Hattersley and Lisa Cleland. At the time he testified, Mr Pattenden was serving a sentence of imprisonment for his participation in the robbery. On his account, he was the lookout. He, Tracey Cornford and the appellant had left in a car from a house in Simpson Street, North Rockhampton to drive to the newsagency.

[8] Mr Hattersley was declared a hostile witness upon a *voir dire* hearing within the trial.[6] After the declaration was made, he accepted that he had told police on 22 August 2013 that he saw the appellant, Ms Cornford and Mr Pattenden leave the house in Simpson Street together in her car on the morning of 2 October 2012. He said that he could not "recall things vividly".[7]

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2 AB462-464.
3 AB104; Tr2-41 ll40-47.
4 *Ibid*, ll13-17.
5 AB105; Tr2-42 l10 – AB107; Tr2-41 l1.
6 AB172; Tr3-9 ll41-44.
7 AB187; Tr3-24 ll21-41.

[9] Ms Cleland, who was a former partner of Mr Pattenden, lived at the house in Simpson Street. She gave evidence that she was woken that morning by a screech made by Ms Cornford's car. She observed the appellant, Ms Cornford and Mr Pattenden in the car.

[10] Ms Cornford did not give evidence at the trial. She had died by hanging on 27 January 2014. However, she had been interviewed by police on 6 February 2013. A written statement was prepared following the interview and signed by Ms Cornford on 7 February 2013. It was accepted that the written statement satisfied the requirements of s 110A(13) of the *Justices Act* 1886 (Qld).

[11] An application had been made by the defence to exclude the written statement from evidence. At a pre-trial hearing on 30 May 2014, a judge of the District Court declined to exclude the statement and ruled that it might be read as evidence at the appellant's trial.

[12] At trial, the following account of events was read to the jury from Ms Cornford's written statement:

> "5. I remember attending a house in Simpson Street in Rockhampton when I finished work that day (2/10/2012), I was working at the Kalka Hotel. I finished maybe after ten or eleven at night. I do not recall what number Simpson Street but I have been there before as I used to get drugs there. The house at Simpson is low level, blue with a landing at the front. When your(sic) inside you walk straight into the lounge room then to the kitchen. I know the house number is one hundred and something, but I'm not sure exactly what number. At Simpson Street I had a shot of Morphine. James who is going out with Lisa lives at Simpson Street but Damian WELLS, Martin, James, Sean HUDSON and Lisa were there.
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> 6. Damian WELLS is my ex partner. James is medium build, probably a bit bigger like chubby maybe, roundish face, got a bit of weight on him with blondie/brown coloured hair. He was with Lisa (*they are, or were at this time, boyfriend/girlfriend*) and they were living at Simpson Street. He looks in his thirties. I have known James for about three months. Yesterday I didn't know his last name but last night I looked at my court papers and James's last name is PATTERSON or similar.
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> 7. I have known Sean HUDSON for about six months or something like that. I know Sean that's how I met James, they're like besties. By besties I mean best friends, Sean is taller than me, brown hair shortly cut, blue/hazel eyes, medium build and he is in his forties.
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> 8. Martin lives at this house in Simpson Street too. I don't know what his last name is, but he lives there.
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> 9. When I was at Simpson Street I was asked to drive somewhere but I didn't know where I was going.
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> 10. Sean said "can you drive up this way to the shops".

11. I said "yeah I can do that, no problems".

12. I drove my car, it is a pink Suzuki Swift with something maybe 972 ITC as the registration. It has been in the family for a while, it was a business car for our family business called Sweet and Yummy which is a café. I drove just up the road somewhere, I just drove out, onto the main street, turned left and the school was on my left. I got through a few traffic lights and then turned right. Sean HUDSON sat in the front of my car, James was in the back on the left hand side.

13. We pulled up into the car park … They jumped out of the car and Sean pulled a beanie down over his head. I didn't see if James did, but when they were walking away from the car I saw they both had beanies or something pulled over their heads. I remember thinking to myself that was strange because it wasn't cold. I couldn't see if they were carrying anything at this time. I lost sight of them and I sat in the car shaking.

14. About one minute later they came running back. It was Sean's idea to go there, he was the one who asked me. I didn't drive anywhere else just straight there.

15. When they came running back Sean was holding a bag, I didn't see anything else, just a bag. It was like a black school bag. They jumped in the car and said "drive".

16. I said, "What's going on?"

17. Sean said, "We just did the place over".

18. They were both huffing and puffing when they got back in the car.

19. I drove back to Simpson Street drove around the back of the house near a tennis court or church. They told me to park up there but that's what I normally do. James jumped the fence, the fence is tall, at the front it is wood, I don't know what type of fence is at the back. Me and Sean got out of the car first, James was the one in the back of the car. James went to the right of me and jumped the fence and I walked with Sean around the side. When I got home Lisa. Martin and Damian were there.

20. I went inside and lay down in the room to the right of the kitchen on a mattress on the floor. When I got up they gave me some money and pills and told me to keep my mouth shut. Sean gave me about $400 in notes, no coins. They have got nothing and don't work so I think it was money from the robbery. Sean gave me the money as I was walking out into the lounge room just before I left and it was Sean that said to me, "Shut your mouth."

21. I said, "Yep, I am going."

22. James was there when this happened and I got a look from James. Like the look of otherwise they will kill me.

23. At the shop when they got out of the car with beanies covering their heads I should have driven off, or gone to police. I feel

> terrible for the lady. During my interview with police yesterday I provided consent for police to take photographs of the outside of my Suzuki.
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> 24. When the interview finished I was issued with a Notice to Appear in court for Armed Robbery by Plain Clothes Senior Constable Adam BAILLIE."[8]

It is accepted on appeal that all the statutory pre-conditions necessary for the statement to have been read as evidence on the appellant's trial pursuant to s 111(1) of the *Justices Act*, as that provision applies to a deposition of a deceased person, were satisfied.[9]

[13] An audio-visual DVD recording of Ms Cornford's interview was played to the jury.[10] That occurred because the prosecutor had agreed to a defence request made at the pre-trial hearing that it be played at the trial to give context to the written statement.[11] The recording and a 59 page transcript of the interview were marked as an exhibit.[12] Each juror was given a copy of the transcript to peruse while the recording was played but not to keep and take into the jury room.[13]

[14] Mr Pattenden gave evidence that it was still dark when they set out for the newsagency. He said he had a lot of trouble recalling specific details. He had taken a lot of drugs that night but he did know "we robbed it and took the money".[14] He kept lookout at the front of the newsagency while the appellant "went inside and took the money".[15] He saw the appellant holding a sawn-off rifle at the newsagency.[16] Ms Cornford drove them to the newsagency. He did not remember how they got back to the house in Simpson Street. His next memory after that of running from the newsagency was of Ms Cleland remonstrating that there were "heaps of people in the house at that hour of the morning".[17]

[15] Mr Hattersley was serving a sentence of imprisonment for robbery with violence at the time he testified. His victim was a drug dealer. He said that by October 2012, he had known the appellant and Mr Pattenden for a couple of years. Prior to the commencement of a *voir dire* to determine the prosecutor's application for a declaration that he was a hostile witness, Mr Hattersley gave evidence that he was not sure whether he saw the appellant at the house in Simpson Street in early October 2012.[18] He could not be sure that he saw the appellant there on 2 October 2012.[19] He did not see the appellant leave the house in the early hours of any morning in October 2012.[20]

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8 AB399-401. A copy of the statement edited to display only what was read to the jury was marked Exhibit MFI B: AB111; Tr2-48 l6.

9 Appellant's Written Submissions, paragraph 15.

10 AB113. The learned trial judge incorrectly referred to the recording as a "CD" in the summing up: Affidavit J M Phillips sworn 25 January 2016.

11 AB39 ll10-13; AB162; Tr2-99 ll27-29.

12 Exhibit MFI C; AB112.

13 AB112; Tr2-49 ll8-30.

14 AB118; Tr2-55 ll13-15.

15 *Ibid*, ll17-22.

16 AB119; Tr2-56 ll7-15.

17 *Ibid*, ll29-35.

18 AB127; Tr2-64 ll37-39.

19 *Ibid*, ll41-45.

20 AB128; Tr2-65 ll8-9.

[16] Ms Cleland testified that she was in a relationship with Mr Pattenden until late 2012. She was wakened by the car screech at about 6.30 am. Her bedroom was at the front of the house. She opened the curtains and saw Ms Cornford's light pink Suzuki Swift. It had come to a stop in front of her house. She saw Ms Cornford in the driver's seat. The appellant was in the front passenger seat. Mr Pattenden was in the back seat.[21]

[17] Ms Cleland said that she saw the appellant get out of the car. He was holding a long object that looked to be wrapped up. The occupants of the car came inside the house. The appellant lay the object on the ground. She could see that the wrapping was a blue towel. The appellant unwrapped the towel and exposed a "shotgun". No one would answer her questions about why they were there. She returned to her bedroom and went back to sleep.

[18] About two days later, the appellant spoke to Ms Cleland when they were in her lounge room. He said to her that Ms Cornford was "going to dob me in".[22] She asked him what was going on. He said that Ms Cornford was unhappy with the outcome of the robbery. Later that day, he told her that they "only got $1,000".[23]

Directions with respect to Ms Cornford's statement and the DVD recording

[19] The learned trial judge gave the following directions to the jury with respect to Ms Cornford's written statement and the DVD recording of her interview in his summing up:

> "I would warn you that it's only the statement of Cornford first that is evidence of the facts directly relevant to your verdict. That's because statutory provisions provide that because that statement was tendered in committal proceedings, which are proceedings in the Magistrates Court to determine whether or not the defendant should stand trial, because that statement was tendered at those committal proceedings, and because Ms Cornford subsequently died, that statement is admitted as evidence on the defendant's trial. The extent to which you accept it and act upon it is, of course, a matter for you having regard to your assessment of the whole of the evidence and the submissions of Mr Phillips and Ms Bryson, and also having regard to her CD of the recording – or the recording of her speaking to police.
>
> That CD recording isn't evidence of the facts stated in that interview. It was played to you not to prove the factual content of what was said by her, but in the interests of fairness so you can see something of what she was like as a person. You should, and can, use that recording only to assist you with your determination of her demeanour. That might be relevant to issues of credit and so on. As a result of viewing it you may form a view as to her demeanour and can take that into account in assessing the value of her statement and the extent to which you rely upon it, which, as I said, the statement, that is, is directly relevant to your assessment of the facts of the case."[24]

[20] His Honour also made the following references to what the prosecutor and defence counsel had said in their addresses:

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21 AB195; Tr3-32 ll22-42.
22 AB198; Tr3-35 ll5-7.
23 *Ibid*, l40.
24 AB230 ll1-19.

> "In respect of Ms Cornford, he, the Crown prosecutor, rightly conceded that you don't have the benefit of her being cross-examined but said that the statement is nevertheless admissible because she is now dead. He said that while you had not seen her cross-examined, you would have the opportunity of observing her in the CD recording and would be able to make an assessment of her. …"[25]
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> " … [Defence counsel] points out, as the Crown prosecutor did, as I have already mentioned, that she wasn't tested under cross-examination and urged you of the need to put aside any natural feelings of sympathy you might have for her because of her untimely death."[26]

[21] The learned trial judge also drew the attention of the jury to a number of factors that they might bear in mind in assessing the evidence of Ms Cornford and of some of the witnesses who had testified. He spoke of her and Mr Pattenden having admitted their involvement in the robbery and cautioned that persons in such a position may have reasons of self-interest to lie, falsely implicate others in the offending, or blame-shift. Their evidence ought to be scrutinised on that account.[27] Because of their involvement, they were "likely to be people of bad character" and, for that reason, they might be unreliable and untrustworthy.[28] So also, those who frequented the house in Simpson Street might be unreliable and untrustworthy if the jury considered that they were addicted to drugs.[29] Reference was made to the possibility that Ms Cornford bore malice towards the appellant because of a failed relationship with him.[30]

[22] His Honour's summing up also included the following warning:

> "Because of what I've said to you about the issues of accomplices giving evidence and so on, the inherent need to very carefully examine their evidence, I warn you it would be dangerous to convict the defendant based solely on the evidence of either Cornford or of Pattenden. You should, before convicting, find that their evidence is supported in a material way by the fact that each gave broadly similar accounts implicating the defendant, and perhaps broadly similar with that of independent witnesses, or by independent evidence implicating the defendant in the offence."[31]

Grounds of appeal

[23] At the hearing of the appeal, the appellant was given leave to amend the grounds of appeal to the following:

1. A miscarriage of justice occurred because the jury was not given an appropriate warning about the evidence contained in the statement of Ms Cornford.

2. The verdict was unreasonable.

[24] It is convenient to consider these grounds separately.

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25 AB236 ll36-40.
26 AB238 ll35-38.
27 AB230 ll21-30; ll40-42.
28 *Ibid*, ll30-32.
29 *Ibid*, ll34-38.
30 AB231 ll19-23.
31 AB232 l43 – AB233 l2.

Ground 1

[25] **Appellant's submissions**: Senior counsel for the appellant based submissions on this ground on the observation of Fryberg J in *R v Schuurs*[32] that where evidence is given under s 111(1) of the *Justices Act*, "the jury should be cautioned in appropriate terms"; and also on several authorities which his Honour had cited as authority for the observation.

[26] In one of the authorities, *R v Mendham and Foster*,[33] the New South Wales Court of Criminal Appeal considered the corresponding provision in the *Crimes Act* 1900 (NSW). Gleeson CJ (with whom Handley JA and Grove J agreed) said:

> "The authorities make it clear that … the trial judge should have given the jury an appropriate warning of the approach to be taken of that evidence. His Honour was asked to give such a warning but declined to do so.
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> In *Henriques* (1991) 93 Cr App R 237 at 242 the Privy Council said:
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> > 'When a judge allows deposition evidence to be admitted he should as a matter of course warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination and that they must take this into consideration when evaluating the reliability of his evidence. Furthermore as Lord Griffiths said in *Scott and Barnes* [1989] AC 1242 at 1259; (1989) 89 Cr App R 153 at 161:
> >
> > > 'in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination'.'"[34]

[27] To similar effect, the Full Court of Victoria in *R v Horan*[35] observed:

> " … we find that he nowhere points out to the jury that, the deposition being the principal if not the only evidence against the applicant, it was necessary for the jury to bear in mind that they had not seen the witness to judge of her credibility, and that there had been no opportunity to cross-examine her. In such a case, we think that a warning was in the highest degree desirable and that the jury should have been warned to scrutinise the evidence in the deposition with great care before acting upon it…"

[28] It is submitted for the appellant that the directions given by the learned trial judge did not deal with the considerations raised in these authorities and therefore failed to warn them properly about how to approach the evidence in Ms Cornford's statement. Specifically, the jury were not warned that, to the possible detriment of the appellant, there had been no opportunity at trial to explore why, in the interview, Ms Cornford's recollection varied as to whether the comment "[w]e just did the place over" was ever

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32 [1999] QSC 176 at [13].
33 (1993) 71 A Crim R 382.
34 At 388.
35 [1951] VLR 249 at 251.

made.[36] Nor were they warned that Ms Cornford could not be cross-examined about her admitted ingestion of morphine shortly before the robbery and how that might have affected her memory. Another issue in this category was why, in the interview, Ms Cornford twice could not recall who was in the back seat of her car;[37] yet, later, she said it was Mr Pattenden.[38]

[29] Senior counsel for the appellant supplemented his submissions with a written document handed to the Court. The document sets out a form of direction that, if given, would have warned about the lack of opportunity for defence counsel to cross-examine on those specific issues.

[30] **Respondent's submissions**: The respondent submitted that the appellant had failed to establish that a miscarriage of justice had occurred.[39] The jury had the benefit of observing Ms Cornford's manner and demeanour in an interview of some length. The respondent did not argue against the desirability of warning a jury, when a statement of a deceased person is received as evidence, that they had not seen the maker of the statement give evidence or being cross-examined upon it. It was submitted that, in the circumstances, the directions which were given, in their totality, sufficiently alerted the jury to potential disadvantages.

[31] **Discussion**: In *Henriques*, the Privy Council spoke of warning the jury, as a matter of course, that they have neither had the benefit of seeing the deponent whose deposition is admitted into evidence nor of hearing his or her evidence tested in cross-examination, and that they must take that into consideration in evaluating the deponent's credibility. Here, it would have been inexact for the learned trial judge to have told the jury that they had not seen Ms Cornford. Whilst they did not see her testify before them, they did see the DVD recording for the express and uncontroversial purpose of giving context to her statement. The jury were instructed that that was the purpose and that what they viewed and heard on the recording was not evidence in the trial.

[32] A significant contextual feature for the statement was Ms Cornford's demeanour during the interview on the preceding day. The jury were enabled to make an assessment of that from what they saw and heard. Whilst it was not her demeanour as a sworn witness who was cross-examined, it was nevertheless demeanour which would assist them in their assessment of the reliability of her statement.

[33] With respect to Ms Cornford not having been cross-examined, the jury were reminded of that on several occasions. In the summing up, his Honour referred to statements made by both the prosecutor and defence counsel to that effect in their respective addresses. The lack of benefit of seeing Ms Cornford cross-examined was therefore a topic about which the jury were repeatedly warned both in addresses and the summing up.

[34] The advice in *Henriques* also cited from the speech of Lord Griffiths in *Scott and Barnes* as to development of the warning by pointing out particular features of the

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36 In the interview, Ms Cornford said, at one point, that the appellant made the comment: AB415 ll34-39; yet, later, she said, first, that the comment had not been made and, next, that she did not remember it being made: AB439 ll24-31.

37 AB410 l47; AB418 l40.

38 AB427 ll40-50.

39 Defence counsel had not sought a direction broadly similar to that in the document handed to the Court on the appeal. Hence, no question of error of law in refusing to give such a direction arises.

evidence that would be appropriate "in many cases". His Lordship instanced evidential features in a deposition which conflict with other evidence and which could have been explored had the deponent been available for cross-examination.

[35] A striking illustration of an evidential conflict of the type of which Lord Griffiths spoke, is given in *Mendham and Foster*. There, the deposition of Sergeant Hain at committal had been admitted over objection at trial pursuant to s 409 of the *Crimes Act*. Hain testified at the committal that he had made no note in his police notebook of an incriminating conversation between Mendham and Foster which had been overheard at a hotel. At trial, a plain clothes policeman, Eastwood, gave evidence that Hain had made a record of the conversation in Hain's notebook which he, Eastwood, had seen about a week before the trial. This, Gleeson CJ observed, was a clear and important conflict between the evidence of Hain and that of Eastwood. It was "just the sort of matter that should have been dealt with in the course of an appropriate warning".[40]

[36] The specific matters to which the appellant refers in submissions as having required individual warnings are not closely analogous with the type of conflict of which Lord Griffiths spoke or which is illustrated in *Mendham and Foster*. Two of the three matters involve a topic on which Ms Cornford gave differing versions in the record of interview: one was as to the comment about doing the place over; the other, as to who was in the backseat of her car. What was said by Ms Cornford in the record of interview was not evidence. Hence, there was no internal inconsistency in her evidence arising from the different versions. Moreover, the jury were not given transcripts of the record of interview for their deliberations. For the learned trial judge to have specifically mentioned those matters risked more than drawing attention to what the jurors might not have noted or remembered. It also risked elevating anything Ms Cornford had said in the interview to the status of evidence, in the minds of the jurors.

[37] The third matter referred to in the appellant's submissions is Ms Cornford's ingestion of morphine before the robbery. In her statement, she said that she had had a shot of morphine at the Simpson Street residence during the evening prior to the robbery.[41] It is true that there was no opportunity to cross-examine Ms Cornford about that evidence. However, the absence of opportunity did not arise within a context of an evidential conflict concerning this matter. Hence, no occasion arose for qualifying the repeated warning that was given about cross-examination with a reference to a specific conflict in evidence.

[38] It remains to mention that, in reply, senior counsel for the appellant referred to an apparent difference in the evidence of Ms Cornford and that of Ms Cleland. Counsel referred to paragraph 19 of the former's statement in which she spoke of parking around the back of the Simpson Street residence after the robbery, with the occupants alighting from her car there. In evidence-in-chief, Ms Cleland, however, testified to having observed the occupants alighting from the car at the front of the house.

[39] Ms Cleland's evidence about what she saw from her front window was diminished by her acceptance in cross-examination that in a statement made by her to police in February 2013, she had told untruths in order to protect Mr Pattenden. She had gone to the point of saying that it was Damian Wells whom she saw sitting in the backseat

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40 At 388.

41 AB399, paragraph 5.

of the car, and not her then partner.[42] For this reason, Ms Cleland's evidence on the matter lacked cogency. Unlike the situation in *Mendham and Foster*, there was no clear and important conflict between the witnesses to which his Honour need have referred.

[40] For these reasons, I am unpersuaded that the jury were not adequately directed with respect to Ms Cornford's evidence. In my view, there was no miscarriage of justice arising from an inadequacy of directions in that respect. This ground of appeal cannot succeed.

Ground 2

[41] **Appellant's submissions**: Senior counsel for the appellant submitted that on the whole of the evidence, it was not open to the jury to have been satisfied beyond reasonable doubt of his client's guilt.[43] The further submission was made that given the manner in which the prosecution conducted the case, the independent enquiry which this Court must undertake is as to whether it was open to the jury to have been satisfied beyond reasonable doubt that the appellant was the person who entered the newsagency and robbed Ms Randall. It will be insufficient if all that can be concluded is that it was open to the jury to have been satisfied beyond reasonable doubt that the appellant was an aider by virtue of the operation of s 7(1)(c) of the *Criminal Code* (Qld).[44]

[42] The appellant's case is that the only direct evidence that he was the actor in terms of s 7(1)(a) of the *Code* was that of Mr Pattenden in evidence-in-chief to which I have referred. That evidence, it is submitted, was not credible. Mr Pattenden's credibility had been gravely impaired by a statement made by him in a *voir dire* proceeding earlier in the trial that he was the robber.[45]

[43] Reliance is placed by the appellant upon the following passage in cross-examination of Mr Pattenden before the jury:

> "Now, it's the case, isn't it, that you have previously given sworn evidence that you were, in fact, the person that entered the newsagency whilst armed and committed the robbery that you now say Sean Hudson committed. You agree with that?---No.
>
> Well, I want you to think about that.
>
> HIS HONOUR: What she's asking you is at any time have you told the court that it was you who entered the newsagent?---No. I was mistaken this morning. I was confused in what was being said.
>
> MS BRYSON: Okay. I'll stop you there, and I'll ask the question again, and it's important that you listen to the question?---Yep.
>
> It's the case that you have previously sat in that witness box under oath and said that you were the person that entered the store?---Yes. I was confused, but, yes.
>
> But you have given that evidence, haven't you?---Yes.

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42 AB203; Tr3-40 ll1-13.

43 See *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606 at [25]; *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 at [11], [78].

44 *R v Melling & Baldwin* [2010] QCA 307 per Holmes JA at [28].

45 AB69; Tr2-6 ll31-33.

> You've previously said that you were the person that entered the newsagency and committed the armed robbery. You've said that in your evidence before, haven't you?---Yes.
>
> And you've said under oath previously that it was Tracey Cornford who acted as the lookout in the robbery?---Yeah. She was in the car, yeah.
>
> That's not my question, and you need to listen to the question?---Yes. But I was confused at the time, but, yes.
>
> Okay. But you've said that as recently as this morning? ---Yes."[46]

It is submitted that having regard to Mr Pattenden's impaired credibility, the jury could not reasonably have acted on his evidence-in-chief in the absence of independent supporting evidence.

[44] It is further submitted for the appellant that none of the other prosecution witnesses provided such evidential support. Ms Cornford made no mention of a rifle. She said that she could not see if the men were carrying anything when they alighted from the car at the shops. When they returned, she saw the appellant carrying a bag. She did not see him carrying anything else. So far as Ms Cleland's evidence is concerned, any of the occupants of the car could have picked up the wrapped object and brought it inside the house; besides, that was too far distant from the scene to be of evidential use. Further, her credibility overall was impaired by her attempt to protect Mr Pattenden. Mr Hattersley's evidence was no more than that he could not be sure of the identity of the individuals he saw leaving the house together that morning.[47]

[45] **Respondent's submissions**: The respondent accepted that the relevant enquiry is whether it was open to the jury to have been satisfied beyond reasonable doubt that the appellant was the person who entered the newsagency and robbed Ms Randall. However, the respondent did not accept that Mr Pattenden's evidence was so unreliable that it could not have been acted on, or that the prosecution case relied solely upon the evidence of Mr Pattenden.

[46] With regard to Mr Pattenden, reference was made to the following explanation given by him in re-examination before the jury of what he had said on the *voir dire*:

> "MR PHILLIPS: What led to your confusion?---Just the fact that I've already been done for it, and I felt that that was sufficient.
>
> What do you mean?---That Sean didn't need to go down for it as well."[48]

[47] Further, it was submitted that Mr Pattenden's evidence-in-chief was supported, in a material way, by other witnesses. They confirmed that it was the appellant, Mr Pattenden and Ms Cornford who left the house and returned to it together that morning. Ms Cleland's description of the shortened rifle matched that of Ms Randall. It was significant that it was the appellant who showed her the weapon and that, a few days later, told her he was concerned that Ms Cornford was going to inform on him and that they had taken only $1,000. Reference was also made to the fact that, whilst the appellant did not testify, the defence case put at trial was that he did not participate in the venture.

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46 AB125; Tr2-62 l30 – AB126; Tr2-63 l11.
47 AB195; Tr3-28 ll5-6.
48 AB126; Tr2-63 ll27-30.

[48] The respondent submitted that, in all the circumstances, it was open to the jury, with the necessary warnings as to caution, to have been satisfied beyond reasonable doubt that the appellant was the robber.

[49] **Discussion**: Of itself, the evidence-in-chief of Mr Pattenden, if accepted by the jury, was evidence on which they could have been satisfied beyond reasonable doubt that it was the appellant who entered the newsagency and committed the robbery. The live question posed by the appellant's submissions is whether Mr Pattenden's credibility was so impaired that the jury could not have accepted that evidence. Certainly, his acceptance in cross-examination that he had given evidence earlier implicating himself in the role of the robber would have given good reason to treat reservedly what he had later said in evidence-in-chief about the issue. Yet, the explanation he gave in re-examination had a plausible expediency to it. It might well have appealed as truthful to the jury who had not only the advantage of observing him testify but also the guidance of unambiguous directions to consider his evidence with great care.

[50] It is true that Mr Pattenden's evidence on the issue was not directly corroborated. However, it did find support, in my view, in Ms Cleland's evidence that the appellant carried the wrapped rifle into the house and unwrapped it, and that he was concerned that Ms Cornford would inform on him. Further, the evidence of Ms Cornford that it was the appellant's idea to go to the newsagency; that it was he who was holding the bag when they returned to the car and said that they had just "done the place over"; and that it was he who gave her the $400 and told her to shut up, all point to a commanding role undertaken by the appellant in the venture.

[51] For these reasons, I have concluded that it was open to the jury to have been satisfied beyond reasonable doubt that the appellant was the robber and that he was guilty of the offence of which he was charged. This ground of appeal, too, cannot succeed.

Disposition

[52] As neither ground of appeal has succeeded, this appeal must be dismissed.

Order

[53] I would propose the following order:

1. Appeal dismissed.

[54] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.

[55] **JACKSON J:** I agree with Gotterson JA.