

SUPREME COURT OF QUEENSLAND

CITATION: *R v Starkey and Hester* [2001] QCA 195

PARTIES: **R**
v
STARKEY, Craig Edward
HESTER, Carla Anne
(appellants)

FILE NO/S: CA No 291 of 2000
CA No 292 of 2000
DC No 128 of 2000

DIVISION: Court of Appeal

PROCEEDING: Appeal Against Conviction

ORIGINATING COURT: District Court at Toowoomba

DELIVERED ON: 25 May 2001

DELIVERED AT: Brisbane

HEARING DATE: 23 February 2001

JUDGES: McMurdo P, Davies JA and Ambrose J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made.

ORDER: **In each case appeal against conviction dismissed.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES OR ACCUSED PERSONS – IDENTIFICATION EVIDENCE – MODES OF PROOF – CIRCUMSTANTIAL EVIDENCE – whether a reasonable jury properly instructed was entitled to infer beyond reasonable doubt that the female appellant had robbed the service station – where positive identification of offender not made – where a very strong circumstantial case was established

CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES OR ACCUSED PERSONS – IDENTIFICATION EVIDENCE – DIRECTION TO JURY – ADEQUACY OF WARNING – where trial judge, after directing jury upon the weaknesses of the identification evidence, directed them upon circumstantial evidence indicating that they could be satisfied beyond reasonable doubt that the female appellant was the robber on that evidence even if they would not be so satisfied on the identification evidence – whether direction served to confuse or misdirect the jury

Jones v The Queen (1997) 191 CLR 439, 450 - 452, applied
M v The Queen (1994) 181 CLR 487, 493, applied
Shepherd v The Queen (1990) 170 CLR 573, applied

COUNSEL: J R Hunter for appellants
 N V Weston for respondent

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

- [1] **McMURDO P:** I have read the reasons for judgment of Davies JA who sets out the relevant facts and issues. I agree with his Honour that the appeal must be dismissed for the reasons he gives.
- [2] As Davies JA has demonstrated, the evidence of the complainant combined with the evidence of Mr & Mrs Cluff and their three daughters, together formed a strong circumstantial case against the appellants such that it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused (*M v The Queen*¹); there is no significant possibility that the appellants have been wrongly convicted (*Jones v The Queen*²); the jury verdict was not unreasonable or unsupportable on the evidence.
- [3] The learned primary judge carefully and adequately warned the jury of the dangers of identification evidence in this case and specifically highlighted any weaknesses in that evidence.
- [4] The case was not simply one of identification. No witness purported to identify the female appellant as the robber. The complainant identified the man to whom she spoke outside the service station prior to the robbery as the male appellant. The prosecution case was circumstantial and depended on the accuracy of the evidence, including visual descriptions, given by the complainant and the Cluffs. In order to convict the appellants, it was necessary for the jury to be satisfied beyond reasonable doubt that the woman who robbed the complainant was the same woman the Cluffs saw running out of the service station and the same woman the Cluffs then saw in the vehicle in Mackenzie Street, a short distance north of the service station.
- [5] The learned primary judge correctly explained to the jury the meaning and use to be made of circumstantial evidence and concluded:
 "... to enable you to bring in a verdict of guilt based on circumstantial evidence it is necessary not only that guilt should be a rational inference but the only rational inference that the circumstances will enable you to draw.

If there is any reasonable conclusion, explanation or interpretation consistent with the innocence of the accused person, and the Crown

¹ (1994) 181 CLR 487, 493.

² (1997) 191 CLR 439, 450-452.

has not negated that beyond a reasonable doubt, it is your duty to acquit and bring in a verdict of not guilty.

The prosecution bears the burden of proving all of the elements of the offence beyond a reasonable doubt. That means the essential elements must be proved: the date alleged that the store was robbed; that the person had a knife; and, *most importantly, you are satisfied beyond a reasonable doubt of the identity that the accused was Carla Ann Hester who robbed the service station.*" (my emphasis)

- [6] This direction sufficiently identified for the jury the relevant matters in this circumstantial case of which they must be satisfied beyond reasonable doubt: *Shepherd v The Queen*³.
- [7] I agree with the orders proposed by Davies JA.
- [8] **DAVIES JA:** The appellants were convicted of armed robbery on 12 October last after a trial in the District Court. Both appeal against their convictions. Their grounds of appeal, which are identical, are, as amended:
 - "(a) The verdicts are unsafe and unsatisfactory in that they are unreasonable.
 - (b) That the learned Trial Judge erred in law by failing to fully identify the fundamental importance of the identification evidence of the Cluffs to the Crown case and thereby failed to warn the jury adequately of the dangers of acting upon it.
 - (c) That the learned Trial Judge erred in law by not fully considering the significance of the time evidence and by not warning the jury adequately or at all of the implications that it had for the Crown case.
 - (d) That the learned Trial Judge's directions that the case was a circumstantial as well as an identification case, whilst correct in law, served to confuse or misdirect the jury by encouraging them not to fully or adequately appreciate the true importance of the flawed identification evidence in the prosecution case."
- [9] The appellants were convicted on the basis that the female appellant Hester, whilst armed with a knife, robbed a service station at the corner of Perth and Mackenzie Streets, Toowoomba and made her escape in a car driven by the male appellant Starkey. There is no doubt that the service station was robbed at about 9.00 pm on 24 January 2000. The matter on which the jury had to be satisfied beyond reasonable doubt was that it was the female appellant who was the robber. There was no doubt that shortly after the robbery, Starkey, with Hester as his passenger, was driving along Mackenzie Street a short distance from and in a direction away from the service station.
- [10] On the night in question the only occupant of the service station was Monika Phillips who was then employed as its attendant. About 20 minutes before the robbery, there being no customers, she went outside to have a cigarette. As she went to the side of the building she saw a man standing there who appeared to

³ (1990) 170 CLR 573.

quickly put something behind his back. He was not smoking. She spoke to him briefly and he said that he was waiting for someone. She later identified that man as Starkey. That identification was not challenged at the trial. She then went inside to serve a customer who had arrived and after she had served him she went outside again to finish her cigarette. Starkey had by then gone.

- [11] About 20 minutes later a young woman entered the service station waving a knife and demanding money. Mrs Phillips gave her money and she ran out of the shop. When giving evidence Mrs Phillips gave the following description of the offender:
 "She was wearing pale jeans. They were blue – blue or a grey colour. She had her shirt out. It was a creamy colour with, I think, a paisley print. She was broad-set but I wouldn't call her fat. She was very rounded in the belly, hip and thigh area and she had a big shirt on sort of like you wear when you put on a bit of weight and want to hide it a bit. And she had a pillowcase over head. From recollection, it was creamy white colour and it had a pattern on it. It had two small holes for her eyes. I'm sure she had blonde hair but I don't know how I know."
- [12] The appellants' counsel makes some criticism of the fact that this was a more detailed description, and one more implicative of Hester, than the one which she gave to the police shortly after the robbery and before she spoke to members of the Cluff family at the police station shortly after the robbery. Her description of her assailant then was "170 centimetres tall, sort of heavy set and was wearing a pair of faded jeans and a creamy coloured shirt with a paisley pattern on it".
- [13] The main point which Mr Hunter for the appellants made about the difference between these descriptions is that the one which she gave in evidence was much more consistent with a person who was obviously pregnant. The appellant Hester was about seven months pregnant at the time of the robbery. However we were shown a video taken in another service station earlier that day showing Hester at the counter of that service station. She was not, in that video, obviously pregnant although she appeared rather large around the middle. Her appearance was consistent with her being rather overweight. I do not think that "heavy set" would be an inaccurate description.
- [14] One other difference between the two descriptions is the reference in the later one to blonde hair. There does not seem to have been any basis upon which Mrs Phillips could have seen her assailant's hair and it may be inferred that she ascertained this from what she was later told. However that does not, in my opinion, affect her credibility and I did not understand it to be asserted that it did.
- [15] The other people in the vicinity of the service station on the night in question were members of the Cluff family, Mr and Mrs Cluff and their five children. They had just driven in a northerly direction along Mackenzie Street and had just turned left into Perth Street when those of them who gave evidence noticed a woman running out of or away from the service station. Their descriptions differ somewhat but are similar in important respects. Mr Cluff said that the person he saw had short blonde hair or hair that was pulled back, was of medium build and was wearing a short fawn coloured coat. The person was running fast. He was unable to say whether the person whom he saw at that stage was a male or a female. Brodie Cluff, aged

- 17, who was seated at the back on the driver's side also saw a person with fair hair, wearing, she said, a grey tracksuit and carrying a black object. The person was running. She described the person as being of medium build. She was also unable to determine whether the person was male or female.
- [16] Mrs Cluff was seated in the middle of three rows of seats in the four wheel drive vehicle in which they were travelling and was on the left side. She saw a woman with blonde hair in a short pony tail running around the side of the service station. She was about five foot six high wearing light coloured clothing that was long. She was of medium build but a bit heavier in the hips. Fiona Cluff, aged 14, was seated in the rear passenger side of the vehicle. She saw a person running whom she described as of medium build, wearing a grey tracksuit and with a stocking over his or her head. The person pulled that off to reveal a short blonde pony tail. Helen Cluff, aged 19, was seated in the front passenger seat. She saw a woman run from the service station wearing grey long pants, a grey top and a hood over her head. She removed the hood to reveal blonde hair with a pony tail. The person had just come out of the door of the service station when she saw her.
- [17] There can be no doubt that the person whom they saw was the robber. But it is plain that no witness was able to identify the facial features of the offender. No-one saw his or her face. All of the Cluffs were agreed that the person had a blonde pony tail. Several of them described the person as of medium build and Mrs Cluff was able to add that she was a bit heavier in the hips which was consistent with Mrs Phillips' description of her as heavy set.
- [18] Mr Cluff executed a U-turn in Perth Street to bring his vehicle into the driveway of the service station. When they were opposite the position where the attendant was Mr Cluff and Helen, who was seated beside him in the front seat, noticed that she was either ringing up or on the phone, they presumed to the police. She appeared to be agitated but unharmed. Helen said that she motioned to her something like "Are you alright?". Mr Cluff described her as mouthing words to that effect but the windows of his vehicle were up and the air-conditioning was on.
- [19] It is plain that by this time Mrs Phillips was indeed agitated. She thought that the Cluffs included in their number the robber and that she was being threatened by Helen. But nothing turns on this.
- [20] Mr Cluff then drove out onto the street. The only vehicle in sight was one in which, it was not disputed at the trial, the only occupants were the appellants. Starkey was driving and Hester was the passenger. It was then travelling in a northerly direction on Mackenzie Street away from and a short distance north of the service station. Various estimates were given by members of the Cluff family of the distance it was from the service station when they first saw it. It was somewhere between Perth Street and James Street, the next major intersection. Mr Cluff thought that when he first saw it it would have been just before the intersection of Acacia and Mackenzie Street which is only a short distance from the service station. Others saw it at points further up Mackenzie Street but all had seen it by the time it stopped at the traffic lights at the corner of Mackenzie and James Streets. Mr Cluff decided to follow this vehicle.

- [21] They caught up with this vehicle after it had turned left into James Street and they were able to come along side it. Several of the Cluffs were able to observe that the female passenger had blonde hair in a pony tail. Helen Cluff who may be thought to have had the best view, being seated in the front passenger seat, observed that the woman was breathing heavily. Several also noticed that she had grey pants and a grey top.
- [22] Although several of the Cluffs went so far as to say that this was the person they had seen running from the service station, plainly none of them could identify her positively and several of them conceded this.
- [23] Mr Cluff continued to follow this vehicle. It travelled a most circuitous route, sometimes at high speed, the most reasonable inference from this being that the driver was attempting to escape from them. Mr Hunter did not shrink from this but submitted that this was equally consistent with concern on the part of the driver and his passenger that, at night, they were being followed by strangers for no reason which they could explain.
- [24] Neither of the appellants gave evidence and a search of their home about 17 hours after the robbery revealed nothing of significance. The only explanation from either of them as to Starkey's presence at the service station about 20 minutes before the robbery and their being occupants of a car driving away from the service station immediately after the robbery came through Mr Nevin, a witness called by the prosecution. He was the owner of the vehicle which Starkey was driving that night. He said he lent it to the appellants when he was away working. They therefore had his permission to use the car on the night in question. Although he said he could not remember who said what, he said that one or other of them had told him that, on the night of the robbery they were arguing as they drove north along Mackenzie Street. Starkey stopped the car and Hester stormed off towards Lake Annand Park. The park was opposite the service station also on the corner of Perth and Mackenzie Streets. The service station was on the north western corner of that intersection and the park was on the south western corner. Starkey got out of his car which was apparently parked somewhere in Mackenzie Street and waited for her beside the service station where he had a cigarette. That is how he came to speak to the attendant. Hester then returned and they drove off. Initially Mr Nevin said that Starkey told him that the attendant said she had just been robbed but under cross-examination from the appellants' counsel conceded that he may have been mistaken about that.
- [25] The question raised by the first ground of appeal is whether a reasonable jury, properly instructed, was entitled to infer, beyond reasonable doubt, that it was Hester who had robbed the service station. In my opinion they were so entitled. Indeed I think it was a strong circumstantial case.
- [26] In the first place they were entitled to think that Starkey's explanation for his presence beside the service station about 20 minutes before the robbery, as explained by Nevin, was an unsatisfactory one. There was no reason to believe that, if Hester had, as he said, stormed off into the park, she would emerge from it on the service station side. There had certainly been no arrangement between them, on his version, to meet there.

- [27] Secondly, although Hester could by no means be identified as the robber, she conformed to the build, sex (in the case of Mrs Cluff), colour and shape of hair and clothing to the person seen running away from the service station. And the vehicle in which she was observed shortly after the robbery was the only vehicle, apart from that of the Cluffs, in the immediate vicinity of the service station and it was driving away from it. Moreover Hester was observed, at least by one witness, to be breathing heavily which was consistent with her having run recently as the witnesses had observed the offender running.
- [28] And finally there was the evasive action taken by Starkey in driving both in a circuitous route and, at times very fast. It is true that this is also consistent with an innocent explanation and consequently alone might not be of great significance. Indeed that is true of each of the matters I have just set out. However, taken together, they established, in my view, a very strong circumstantial case that it was Hester who had robbed the service station.
- [29] Of the remaining grounds of appeal Mr Hunter did not press ground (c) which related to evidence from a police officer of the time it would take to run from the service station to a parked vehicle as against the time it would have taken Mr Cluff to complete his U-turn, stop at the service station and drive into Mackenzie Street. In my opinion Mr Hunter was right not to pursue this ground. The evidence was, at most, of marginal relevance.
- [30] Nor was it submitted that the learned trial judge's directions on identification evidence, or the weakness of the evidence in this case in purporting to identify Hester as the robber, were defective in any way. Accordingly, to the extent that ground (b) may appear to rely on any such defect it was abandoned. The learned judge's directions in this respect were adequate.
- [31] The principal contention of the appellants, with respect to his Honour's directions, was that, even if it was open to the jury to infer that Hester was the robber, the learned trial judge failed to sufficiently direct them that the identification of Hester by some of the Cluffs as the person seen running away had to be established beyond reasonable doubt. However that contention, in my opinion, fails to have regard to the fact that the case against the appellants was primarily a circumstantial one. Consequently the question upon which the jury had to be satisfied beyond reasonable doubt was whether, on the whole of the evidence, Hester was the robber; and that was the direction which the learned trial judge gave. After his Honour's careful direction upon the weaknesses of the identification evidence he directed upon circumstantial evidence pointing out that the jury could be satisfied beyond reasonable doubt, on the bases of that evidence even if, on the identification evidence, they would not be so satisfied.
- [32] I do not think that anything which the learned trial judge said in his summing up could have confused the jury. Nor do I think that there was anything which he should have said which he did not say. If anything, his Honour's directions favoured the appellants because they appeared to concentrate to a very large extent upon the purported identification evidence and its weaknesses, whereas as I have mentioned, it seems plain that the strength of the prosecution case was not identification but a circumstantial one, based on the circumstances to which I have referred.

- [33] I can therefore find no error in the learned trial judge's summing up. The case was, as I have already said, a strong circumstantial one. The appeal must, in my opinion, be dismissed.
- [34] **AMBROSE J:** I agree.