SUPREME COURT OF QUEENSLAND

CITATION:	*R v Beale* [2003] QCA 373
PARTIES:	**R** **v** **BEALE, Craig Robert** (applicant/appellant)
FILE NO/S:	CA No 294 of 2002 CA No 356 of 2002 DC No 2358 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2003
JUDGES:	Williams JA and Muir and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant convicted of six counts of armed robbery and five counts of unlawful use of a motor vehicle to facilitate commission of indictable offence – where search of appellant's car by police led to discovery of bullet-proof vest – where also found other paraphernalia of an armed robber – where no evidence that the person who carried out the robberies in question wore a bullet-proof vest – whether evidence of its finding was more prejudicial than probative and should therefore have been excluded CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL –

IMPROPER ADMISSION OR REJECTION OF EVICENCE – where was agreement between prosecution and defence that the finding of methadone in the car would not be mentioned during the trial – where witness mentioned the methadone in oral evidence – where methadone was mentioned in a video which jury could have played when deliberating – where there was a fundamental error such as constituted a miscarriage of justice – whether verdict was unsafe or unsatisfactory

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – JOINT OR SEPARATE TRIAL – GENERALLY – where some of the robberies in question were committed on liquor outlets and some on financial institutions – where pre-trial hearing was held to determine whether separate trials should be held – whether there was a marked difference between the two groups of charges such as warranted ordering separate trials

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – GENERAL PRINCIPLES – where appellant applied for adjournment of the hearing of the appeal so that he could have certain items tested for DNA – where no request to have tests done before trial – whether identification of a person in this manner would strengthen the defence case – whether any proper basis for a direction that DNA testing be carried out

Criminal Code 1899 (Qld), s 592A, s 597A

R v Button [2001] QCA 133; CA No 247 of 2000, 10 April 2001, distinguished
R v Sharp [1999] QCA 393; CA No 144 of 1999, 17 September 1999, distinguished

COUNSEL: M J Byrne QC, with D Walsh, for the appellant
C W Heaton for the respondent

SOLICITORS: A W Bale & Son for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** The appellant was convicted by the jury of six counts of armed robbery and five counts of unlawful use of a motor vehicle with the circumstance of aggravation that it was used to facilitate the commission of an indictable offence. In addition on about the fourth day of trial the appellant pleaded guilty to a further count of unlawful use of a motor vehicle. The jury acquitted him of one count of armed robbery. On each count of armed robbery he was sentenced to 12 years imprisonment with a declaration that the offences were serious violent offences. He was sentenced to concurrent terms of three years imprisonment on each of the counts of unlawful use of a motor vehicle. He appeals against conviction, and seeks leave to appeal against sentence.

[2] The grounds of appeal stated in the notice of appeal are as follows:

> "1. The jury was misled by reason of admission of evidence of the location of prescribed methadone in the accused's motor vehicle at the time of his arrest;
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> 2. An order should have been made for separate trials in relation to counts 1 to 5 inclusive on the indictment;
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> 3. Learned Judge erred in admitting evidence of the accused's possession of a bulletproof vest at the time of his arrest;
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> 4. The learned trial judge erred in directing the jury in accordance with the principles laid down in R v WEISSENSTEINER; and
>
> 5. The verdict is unsafe and unsatisfactory."

[3] The outline of argument on behalf of the appellant, and oral submissions, concentrated on the issues of separate trials and the reference in the evidence to the finding of Methadone. There was also a request for an adjournment in circumstances which will be discussed later.

[4] In October and November 2000 a number of liquor outlets and financial institutions in the southern suburbs of Brisbane were the subject of daylight robberies. Investigating police noted some similarities. The following are some examples of the similarities. In all of the robberies a handgun was used. Generally the persons held up, and other witnesses, commented upon the calmness of the robber. On numerous occasions the robber was observed walking from the scene, still wearing a balaclava, towards a motor vehicle parked nearby. In all but one case a balaclava was worn; in that one case a "scream" mask covered the robber's face. Each vehicle identified as being used by the robber was a Ford Falcon which had been stolen. The stolen vehicles, identified as having been used in the robberies, were returned, generally undamaged, a few days later to a location not far from where they had initially been taken.

[5] Given that the motor vehicle thefts and the robberies took place in the same geographical area investigating police set up a covert surveillance team which monitored activity generally in shopping centre carparks in the locality. Ultimately the appellant became a person of interest to them and a specific surveillance operation of him was conducted in December 2000. The appellant was actually videoed stealing the vehicle which was the subject of count 13. It was taken from the Sunnybank Hills Shopping Centre carpark on the afternoon of 28 December. It was after the tendering of that video evidence that the appellant changed his plea on count 13 to guilty.

[6] The surveillance continued on 29 December. The appellant was observed leaving his residence at 6 Lorna Street, Browns Plains, in his blue Commodore sedan 530-FGE. That was followed until it ultimately was parked in the Sunnybank Hills Shopping Centre carpark. Police kept that vehicle under observation and ultimately apprehended the appellant in the vicinity of that vehicle.

[7] A search of that vehicle was conducted by police officers; a video was taken of that search and it was in evidence for the jury. A number of items of particular interest

were located in that vehicle. A bullet-proof vest was lying on the back seat behind the driver's position. In a small black bag on the front passenger's seat there was a Colt semi-automatic .32 calibre handgun with ammunition. The magazine was fully loaded and there was one round in the barrel. Also found in the vehicle were items of dark clothing similar to the clothing witnesses had described the robber wearing when earlier robberies were committed. There was also a radio scanner capable of listening in to the police frequency, screwdrivers, and a tool designed to break into the locks of motor vehicles. Other objects which could reasonably be said to form the paraphernalia of an armed robber were found in the vehicle.

[8] Of particular significance was a document specifically identified on a later occasion. During the initial search of the vehicle as recorded on video, a number of documents were seen to be located in the glove box. A subsequent more careful scrutiny of those documents revealed that one was a Royal Life Saving Society document given to a Mr Bryce Kelly who was the owner of vehicle 139-DOI which had been stolen on 23 November 2000 and located by police on 5 December 2000. That was the vehicle the subject of count 10 on the indictment, and the person who committed the robbery alleged in count 11 was seen to depart the scene in a red Falcon registration number 139-DOI. The defence suggested the document could have been "planted" in the glove box by police. Once that suggestion was raised detailed evidence was led as to the finding of vehicle 139-DOI and its security before being returned to its owner. Kelly's evidence was the document was in his car when it was stolen. The prosecution case was that no relevant police officer had the opportunity of "planting" the document. That was a question of fact for the jury and there was clear evidence on which they could have been satisfied that the document was not "planted" by police. Once that position was reached the finding of the document in the appellant's car was strong evidence implicating him in the commission of the offences, counts 10 and 11.

[9] After completing the search of the vehicle the police turned their attention to the appellant's residence at 6 Lorna Street. There in the garage a scream mask was located. That mask was identified by a witness at the trial as the mask worn by the person who committed the robbery the subject of count 3. Other items of clothing of probative value were found in the house along with ammunition, a firearm holster and a radio scanner.

[10] The evidence is voluminous and it is not necessary to recount it all in great detail. There were numerous matters which, whilst each was not necessarily decisive in itself, would have entitled a jury to conclude that all the robberies were committed by the same person, and that the person was the appellant.

[11] There were significant features (or coincidences) which, unexplained, made it easier for the jury to conclude beyond reasonable doubt that the appellant was guilty. Mention in that regard can be made of the finding of both a balaclava and a scream mask in circumstances linking them to the appellant, and the location of the document belonging to Kelly in the appellant's car.

[12] No complaint was made about the summing up. The jury were told, of course, that they had to consider each count separately, and evaluate the evidence relevant to each count when so doing. There was no identification of a motor vehicle used in the robbery which was count one on the indictment and that could well have been regarded by the jury as a significant factor resulting in them having a reasonable doubt that it was the appellant who committed that robbery. The acquittal on that

count demonstrates that the jury heeded the direction of the learned trial judge that they were to look at each count separately.

[13] Counts 1, 2 and 3 on the indictment related to a robbery at a liquor outlet, whereas counts 6, 8, 10 and 11 related to the robbery of financial institutions. There was a pre-trial hearing pursuant to s 592A of the Criminal Code at which counsel for the appellant sought an order pursuant to s 597A of the Code that counts 1 to 5 (relating to liquor outlets) be severed from counts 6 to 12 (relating to financial institutions). For reasons then given the counts were not severed; the learned District Court judge hearing that application was of the view that there were significant features of similarity in the circumstances surrounding the commission of the offences justifying the joinder.

[14] On the hearing of the appeal it was submitted that separate trials should have been ordered on the s 592A hearing. Counsel did not add in oral argument to what was contained in the written outline. It was submitted that there was a marked difference between the two groups of charges such as warranted ordering separate trials.

[15] In my view there was a strong case, primarily a circumstantial one, pointing towards a single offender being responsible for each of the robberies. The test to be applied in determining whether counts should be severed pursuant to s 597A is clear, and I am not persuaded that there was any error in this case in refusing to sever the counts relating to liquor outlets from those relating to financial institutions. The similarities in the modus operandi of the robber were such that there were clear grounds for concluding that the joinder of the charges was proper. This ground of appeal is not made out.

[16] When Constable Brown carried out his inspection of the contents of the appellant's motor vehicle 530-FGE, and had that inspection recorded on video, he located in the centre console three small bottles of Methadone. Counsel for the appellant at trial was concerned as to the possible prejudicial effect of that finding if that evidence went to the jury. The matter was discussed out of court between defence counsel and the prosecutor and an agreement reached that the Methadone would not be referred to. Unfortunately there was a breakdown in communication and Constable Brown gave oral evidence that he, "Found two phials of Methadone," in the centre console. Those words were used in the context of listing other items found; there was no particular emphasis placed on the words. When the video (exhibit 87) was played in court the sound was turned down so that there was nothing audible to the jury.

[17] Counsel for the appellant shortly after that evidence was received submitted there was a mistrial because of the reference to the Methadone. The learned trial judge rejected that submission and indicated that there should be no further reference to Methadone in the course of the trial. In the context of the whole trial, which took many days, the evidence was given little significance. The court was told that there was no mention in addresses of the Methadone, and there was no mention of it in the summing up. Unfortunately exhibit 87 went to the jury and it is possible that the jury could have played it and heard the audio. I have listened to the audio on that tape and a reference to phials of Methadone is barely audible; it occurs a good way into the tape and after more damaging items had been referred to.

[18] It is unfortunate that in the circumstances that evidence was given notwithstanding the agreement between counsel. However in the context of the whole trial there was, in my view, no fundamental error such as constituted a miscarriage of justice. This court had to consider a somewhat similar situation in *R v Sharp* CA 144 of 1999. The material in that case which wrongly went into the jury room was potentially more damaging than the video here. The finding in the appellant's car of a loaded firearm, a bullet-proof vest, and other paraphernalia of an armed robber would undoubtedly have been regarded by the jury as far more significant than the finding of some Methadone.

[19] In my view the learned trial judge was correct in ruling as he did after the initial reference in the oral evidence of Constable Brown to the Methadone. The subsequent error in allowing the jury to have at least the opportunity of hearing a reference on the video to the Methadone did not alter the position.

[20] There is no substance in this ground of appeal.

[21] It was then submitted that the learned trial judge should not have admitted into evidence the finding of the bullet-proof vest in the appellant's motor vehicle. It was said that such evidence was of little probative value but of possibly significant prejudicial effect. The point was made that there was no evidence that the robber who carried out any of the robberies the subject of the trial was wearing a bullet-proof vest at the time. That is so, but most of the witnesses referred to the robber wearing bulky clothing which could readily have concealed such a vest. Given the finding of the loaded handgun in the motor vehicle, the vest was no more than another item of the paraphernalia of an armed robber found in the car. There does not appear to have been excessive emphasis placed on the finding of the vest in the course of the trial. It cannot be said that the evidence in question was of no probative value, and its prejudicial effect was no different to that applying to other items found. There is no substance in this ground of appeal.

[22] Counsel for the appellant informed the court that he could "advance no submissions" in respect of the "*Weissensteiner* point."

[23] The ground that the verdict was unsafe and unsatisfactory depended on the other arguments addressed to the court on behalf of the appellant. The matters already dealt with would not support a conclusion that the jury verdict was unsafe.

[24] Counsel for the appellant also intimated that the application for leave to appeal against sentence was not being pursued.

[25] That leaves for consideration an application for an adjournment which was foreshadowed in writing before the appeal was heard and formally made at the outset of the hearing.

[26] Prior to the hearing the solicitor for the appellant (who was not the solicitor instructing defence counsel at trial) raised with the Director of Public Prosecutions the question of having certain items tested for DNA. Relevantly one of the letters said:

> "We understand the evidence revealed that cigarette butts, hairs and a soft drink bottle were recovered from a motor vehicle but these were not tested to determine where an identifying DNA profile could be

> obtained. That vehicle was a white Falcon, registration 854 BPS. It was alleged the lawful owner of that vehicle was Choon Kit Wong.
>
> Wong, at trial, alleged he was not a smoker."

[27] The evidence revealed that Wong's vehicle, 854-BPS, was stolen on about 12 October and recovered on 19 October (Count 4). The evidence also clearly established that it was used by the person who committed the robbery on 17 October 2000 which was count seven on the indictment. When the vehicle was returned by the police to Wong he noted that there were cigarette butts and a soft drink bottle on the floor of the vehicle which were not his.

[28] The butts and bottle were not tendered in evidence, and no-one was able to say at the hearing before this court whether they were still available for testing. One would think they would have been discarded by Wong some years ago. But in any event it is difficult to see how such testing could possibly strengthen the appellant's position. That was the response of the Director of Public Prosecutions to the letter. The vehicle was in the possession of whoever took it for some days and any number of people could have been in it over that time. Even if testing was able to identify the DNA profile of a person other than the appellant as the likely depositor of the cigarette butts and bottle in the vehicle that would neither strengthen the defence case nor weaken the prosecution case.

[29] The response of the prosecution to the letter from the appellant's solicitor appears to have resulted in a change in the request for forensic testing. By letter of 14 August 2003 an adjournment was sought as "none of the exhibits have been scientifically tested for the presence of DNA." The letter asserted that the defence could have those exhibits scientifically tested within a matter of days. At the hearing of the appeal no specific exhibits were initially identified as being required for further testing. When that was put to counsel for the appellant a list of almost everything of any significance located in the appellant's motor vehicle and home was supplied. The latest position adopted by the appellant is that he asks an order directing that the following exhibits be examined for DNA:

- Exhibit 9 scream mask
- Exhibit 81 balaclava
- Exhibit 84 Uniden scanner and earpiece
- Exhibit 85 an earpiece
- Exhibit 88 two white gloves
- Exhibit 89 Slazenger pants
- Exhibit 90 black jacket
- Exhibit 104 black Nike sandshoes
- Exhibit 106 boots
- Exhibit 109 dirty boots
- Exhibit 115 two black leather gloves

- Exhibit 141 gloves

[30] All of that material was available to the defence for testing prior to trial. The items in question were seized by the police on 29 December 2000, the date of the appellant's arrest. The trial did not take place until 12 August 2002. No request was forthcoming from the defence to have those items examined for DNA during that period. No issue was raised at trial as to DNA testing. Cross-examination does not indicate that there was any dispute that the items specified were located in the appellant's motor vehicle or home. The appellant did not give evidence at trial.

[31] The request is tantamount to asking an appellate court to give a direction which might lead to fresh evidence when the opportunity was clearly available prior to trial for the defence to have carried out the necessary testing. Counsel for the appellant sought to rely on the decision of this court in *R v Button* [2001] QCA 133. That case is clearly distinguishable. In that case DNA testing had been carried out on the sheet and other items and it had been reported as inconclusive. That was the subject of specific cross-examination of the forensic scientist at trial. That was then made the subject of a specific ground of appeal. In those circumstances this court acceded to a request that it should direct that further DNA testing be carried out. As the judgment indicates that subsequent testing was such as to exonerate the appellant in that case.

[32] The Notice of Appeal in this case does not seek leave to adduce fresh evidence. It is not alleged that fresh evidence is available. At best for the appellant the proposition is that further testing might reveal something which might indicate there is fresh evidence which might have some bearing upon the safety of the conviction. Bearing in mind the law relating to the reception of fresh evidence, no proper basis has been advanced for this court directing that DNA testing be carried out on any or all of the exhibits nominated.

[33] If, subsequent to the dismissal of this appeal against conviction, the appellant arranges for DNA testing to be carried out and that establishes fresh evidence relevant to the conviction, then steps are available to the appellant to have his conviction re-considered in the light of that fresh evidence.

[34] On the material presently available to the court the only conclusion that can be reached is that the verdict of the jury was not unsafe and unsatisfactory and there is no other basis for setting aside the conviction.

[35] The appeal should be dismissed and the application for leave to appeal against sentence refused.

[36] **MUIR J:** I agree with the reasons for judgment of Williams JA and the orders he proposes.

[37] **HOLMES J:** I agree with the reasons for judgment of Williams JA and the orders he proposes.