

SUPREME COURT OF QUEENSLAND

CITATION: *R v Hall; R v Jensen* [2004] QCA 337

PARTIES: **R**
v
HALL, Shane Michael
(appellant)

R
v
HALL, Karina June (aka JENSEN)
(appellant)

FILE NO/S: CA No 181 of 2004
CA No 193 of 2004
DC No 11 of 2004
DC No 10 of 2004

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Bowen

DELIVERED ON: 17 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 23 August 2004

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

ORDERS: **In CA No 193 of 2004:**
1. Order that verdicts of acquittal be entered

In CA No 181 of 2004:
1. Allow the appeal against conviction
2. Quash the conviction
3. Order a re-trial

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where appellants convicted of burglary and assault occasioning bodily harm – where prosecution case was that female appellant had driven male appellant at night-time to premises to commit offence – where prosecution relied on identification evidence given by victim's neighbours – where witnesses did not know male

appellant and gave evidence that they had only previously seen him fleetingly when he was inside a car – where defence counsel did not request *Domican* direction – whether *Domican* direction was required

CRIMINAL LAW – EVIDENCE – IDENTIFICATION
EVIDENCE – DIRECTION TO JURY – EFFECT OF
FAILURE TO WARN – whether failure to give *Domican*
direction deprived male appellant of chance of an acquittal –
whether female appellant could be convicted by a properly
directed jury on the evidence

Domican v The Queen (1992) 173 CLR 555, applied
Parker v R (1997) 186 CLR 494, cited
R v Turnbull [1977] QB 224, cited

COUNSEL: S J Hamlyn-Harris for the appellants
M J Copley for the respondent

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

- [1] **McMURDO P:** The appellants, Mr Hall and Ms Jensen, were convicted of burglary and assault occasioning bodily harm on 26 May 2004 in the Bowen District Court. Each appeals against conviction, having abandoned an application for leave to appeal against sentence. They submit that the learned primary judge failed to adequately warn the jury as to the evidence of identification. Ms Jensen further contends that the learned primary judge misdirected the jury as to the basis upon which she could be convicted as a party.
- [2] After hearing the appeal the Court in Ms Jensen's case allowed her appeal against conviction, quashed the conviction, reserved its decision as to whether to order a retrial and granted her bail on the same terms as her original grant of bail. The Court indicated it would deliver its reasons later. The Court reserved its decision in Mr Hall's appeal.
- [3] The complainant, Michael Smith, previously lived in a de facto relationship with Ms Jensen in a house at Parkinson Street, Collinsville, where these offences were said to have occurred. Ms Jensen and Mr Smith jointly owned the house. They had a 14 year old daughter. Ms Jensen moved to Bowen and after her relationship with Mr Smith ended she formed a relationship with Mr Hall. Ms Jensen wanted to sell the house she owned with Mr Smith but they were in conflict as to when and how the house should be sold and the division of proceeds.
- [4] The prosecution case was as follows. Ms Jensen owned a blue Ford Falcon sedan with a bull-bar and personalised number plates, "KJJ-69". At the time of the offence she was living with Mr Hall, who was known as Smiley. Mr Smith gave evidence that on the Monday evening before the offence Ms Jensen phoned him to talk about selling the house. About two minutes later he received a second phone call. A male voice said, "Do you know who this is?" Mr Smith said, "No." The male said, "This is Smiley." Mr Smith said, " Oh yeah." The male said, "If you keep your shit up with Karina, I'll come down and I'll break your back." Mr Smith

said, "Well, come on down then." Shortly after midnight the following Friday morning, Valentine's Day 2003, he was asleep on the floor and was awakened by a bang on the wall. He opened the door. A male head-butted him and drove him to the floor, jumped on top of him, grabbed him by the hair and said, "Do you know who this is?" Smith said, "No." The male said, "This is Smiley. If you keep your fucking shit up with Karina, I'll be back." He left. Mr Smith had consumed 16-18 cans of beer from 9 or 10 am until 10 pm when he went to sleep. He suffered an injured nose and lip and gravel rash or carpet burn on his back and elbow. He was treated at the local hospital where he spent the night and was given Panadol. He was discharged at 8am the next morning.

- [5] Susan and John Elliot lived next door to Mr Smith in Parkinson Street. Susan Elliot gave evidence that she had known Ms Jensen and Mr Smith for about seven years and was familiar with Ms Jensen's car. At about 11.30pm on 13 February 2003 she and her husband were on their verandah celebrating their wedding anniversary. She had not been drinking. She saw Ms Jensen's car drive up the street, turn around, switch off its lights and stop in front of Mr Smith's place for a minute. It then continued down the street, switched its lights on and turned off Parkinson Street towards the dump. The area was illuminated by a street light across the road from her house. A man whom she had seen with Ms Jensen at Christmas time was driving the car. A while later she saw a man who looked like the man who was driving the car walk from the direction of the dump past her house and into Mr Smith's house. He stood at the back of Mr Smith's Toyota vehicle and it sounded as if he was knocking on the tray of the vehicle. He left and retraced his steps. About ten minutes later she saw the same man come back and enter Mr Smith's house. She was at the front door of her home. She saw him walk up the steps and then lost sight of him. She heard him knocking on the door and Mr Smith's door open. She looked out her lounge room window and saw Mr Smith standing in his house. She saw the other man move towards Mr Smith; Mr Smith fell and stumbled backwards into the wall and she heard lots of yelling. The man told Mr Smith not to run away, to stay down. Mr Smith said "something like [he] just wanted to get a towel because he was bleeding". She heard the man say something about "Karina" but she did not mention this in her original statement to police. Then she heard banging noises and footsteps. She saw the man walk down Mr Smith's stairs and return the way he came. She described the man as having short hair, broad across the shoulders and tallish. She thought she had seen him once before at Christmas in another car although at committal she said she could not be sure if this man was the man she saw on the night of the offences. She thought she discussed these events with her husband before the police arrived. Her husband was a reasonably good mate of Mr Smith and had visited his home to watch sport on television and have a drink. She denied that Mr Smith and her husband asked her to give this evidence.
- [6] John Elliot gave evidence that he had known Mr Smith and Ms Jensen for about six years. He is familiar with her car and its distinctive bull-bar and number plate. At about 11.20pm on 13 February 2003 he saw a car travel under the street light and recognised it as Ms Jensen's because of the bull-bar and colour. It turned around, travelled towards Mr Smith's place, slowed down and turned its lights off as it pulled up in front of Mr Smith's place for about three minutes. It travelled a further 20 or 25 metres with its lights off and he saw Ms Jensen and a "fairly thick set sort of bloke" driving the car. He had seen the man once before at Christmas 2002 in daylight in Ms Jensen's car outside Mr Smith's house; the car was moving and Ms Jensen was driving with the male in the front passenger seat. On the night of the

offence, the car was stopped outside Mr Smith's house for about three minutes but then turned left at the end of Parkinson Street towards the dump. The street light lit up the area through which the car travelled "really well". As to the identification of Ms Jensen, he said, "They sat for a while. Karina had a smoke and you could see her face sort of – I sort of – when they drove past Karina's outline was there. You could see there was a female in the passenger's seat." The man walked back up the street into Mr Smith's yard where he was for about four or five minutes. He rattled the back of Mr Smith's Toyota and then left, retracing his steps. About ten minutes later Mr Elliot went under his house into his office which is close to Mr Smith's kitchen door. He could not see into Mr Smith's house but he heard a man yell out and Mr Smith respond, "a bit of shuffling around, and a great loud crash and then sort of heard loud voices". He heard "Lay down. Stay on the floor or I'll fucking kill you" repeated a couple of times. The man asked if Mr Smith knew who he was. Mr Smith said "No." The male said "his name was Smiley". He heard Mr Smith ask for a rag to clean up blood on the floor. The male kept saying, "No, stay on the floor or I'll kill you". The male told him to "stay away from Karina". He rang the police and waited with Mr Smith until the police arrived about 15 or 20 minutes later. He denied that he had coloured his evidence to help Mr Smith.

- [7] When Mr Hall was interviewed by police he said that his nickname was Smiley and that Ms Jensen was his fiancée. Ms Jensen and Mr Smith were in conflict over the sale of the house in Collinsville. On one occasion, Mr Smith abused Ms Jensen over the phone. He pulled the phone out of her hand and said, "... you keep that shit up and I'll smack you in the mouth" and told Mr Smith that "it was me Smiley." He had not been in Collinsville since he made that phone call and he denied all involvement in the offences. He had never entered the house although Ms Jensen had driven him past it. He said that Mr Smith probably injured himself "he's got sour grapes because he's gonna lose the house". He knew a couple of other people called Smiley living in Townsville.
- [8] Ms Jensen told police that she could recall an argument on the phone between Mr Hall and Mr Smith but she was not at Mr Smith's house on the night of the incident. She agreed she and Mr Hall had been in Collinsville on Christmas Day and may have driven past Mr Smith's house. She described the Elliots as "very two-faced people".
- [9] Neither appellant gave or called evidence. The defence case was that Mr Smith and the Elliots were untruthful and had fabricated an account to wrongly implicate Ms Jensen and Mr Hall.
- [10] Although the defence case was not directly one of mistaken identification but rather deliberate fabrication, the prosecution case did rely significantly on the Elliots' evidence of identification of both Ms Jensen, her car, and Mr Hall. In *Domican v The Queen*,¹ the High Court said:
- "Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate

¹ (1992) 173 CLR 555, 561-562.

to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's argument is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."

- [11] Although defence counsel did not request such a direction, his Honour should have warned the jury generally as to the dangers of convicting on identification evidence and why such a warning is needed.² His Honour should also have referred to the following weaknesses in the identification evidence. The Elliots did not purport to identify the number plate of the blue Falcon with the bull-bar. The identification of both Mr Hall and Ms Jensen was fleeting, at night time with only the illumination of a street light, from a distance and whilst they were in a car which was stationary for only one to three minutes. The recognition of Ms Jensen may be more reliable than identification of a stranger but even witnesses purporting to recognise someone they know can make mistakes and sometimes mistaken identification of even close relatives and friends are made.³ Mr Hall was not known to the Elliots and on the sole previous occasion they claimed to have seen him, which enabled them to identify him on this occasion, they observed him only fleetingly from a distance and whilst he was in a moving vehicle. At committal Mrs Elliot was not sure that the person who attacked Mr Smith was the same person that she saw with Ms Jensen on Christmas Day. The jury should consider the possibility that the Elliots may have seen a blue Falcon with a bull-bar similar to but not Ms Jensen's and wrongly assumed the identity of those in the car because they associated it with Ms Jensen. The jury should also have considered whether there was a possibility that the Elliots' identification of Ms Jensen and Mr Hall was tainted by reconstruction after a conversation with Mr Smith following the attack and by their knowledge of the dispute between Ms Jensen and Mr Smith.
- [12] The only relevant directions⁴ given by the learned primary judge were that they must be satisfied that Mr Hall was the person who entered the premises and assaulted Mr Smith. As the incident took place at night time and the Elliots did not know Mr Hall well, having only seen him on the previous Christmas Day, "there may have been some limitations in identifying [Hall] in driving the vehicle at night-time". These directions did not meet the requirements set out in *Domican*.
- [13] The prosecution case against Mr Hall outlined earlier in these reasons was strong. It is, however, possible that a jury properly instructed as to the dangers of mistaken identification may have been concerned about the Elliots' reliability generally and considered that their claims that they heard Mr Smith's assailant call himself "Smiley" and refer to "Karina" were tainted by an initial mistaken identification or by reconstruction with Mr Smith after the assault with the knowledge of the strained

² *R v Turnbull* [1977] QB 224, 228.

³ *Turnbull*, above.

⁴ The judge's directions to the jury in the appeal record book are in their unrevised form.

relationship between the protagonists. Mr Hall may have been deprived of the chance of an acquittal in the absence of adequate directions as to the dangers of and weaknesses in the identification evidence. Despite the strength of the prosecution case I am not persuaded that it is possible to dismiss Mr Hall's appeal under s 668E(1A) *Criminal Code*.

- [14] Mr M J Copley for the respondent, with his customary balance, concedes that in respect of Ms Jensen the prosecution case that she aided or encouraged Mr Hall turned wholly on the identification of her as the passenger in the vehicle; the jury could not infer beyond reasonable doubt that the female in the vehicle seen by Mr and Mrs Elliot was Ms Jensen. The evidence reviewed earlier in these reasons could not, in the light of that concession, establish that Ms Jensen knowingly assisted Mr Hall in the attack on Mr Smith. In Ms Jensen's case, verdicts of acquittal should be entered.
- [15] It is unnecessary to consider Ms Jensen's second ground of appeal as to the adequacy of the judicial directions on s 7 *Criminal Code*. In Ms Jensen's case, this Court has already allowed her appeal and quashed her convictions. I would now order that verdicts of acquittal be entered.
- [16] In respect of Mr Hall, CA No 181 of 2004, the appeal is allowed, the conviction quashed and a re-trial ordered.
- [17] **McPHERSON JA:** I agree with the reasons of the President and with the orders she proposes in each of these appeals.
- [18] **HOLMES J:** I have read the reasons of McMurdo P and agree with all that she has said as to the inadequacy of the identification direction. I agree also with the orders proposed; in particular that there be no new trial of Ms Jensen.
- [19] At best, the Crown's s 7 case against Ms Jensen was relatively slight: the jury was asked to infer, on the premise that her car was used and that she was a passenger in it, that she aided the commission of the offences of burglary and assault occasioning bodily harm. To establish knowledge of the offences to be committed, the Crown pointed to the evidence that the persons in the car, on its case Mr Hall and Ms Jensen, went to Collinsville late at night, stopped outside Mr Smith's house and then drove away around the corner before Mr Hall got out, went into the yard, retreated, and then went back to the house. That seems a fairly slender basis for establishing that Ms Jensen knew that Mr Hall meant to enter the house and assault Mr Smith, as opposed to perhaps abusing or threatening him.
- [20] Matters were not improved by the dubious quality of the identification evidence. It is also of significance that by the time of the appeal Ms Jensen had served three of four months of the period of actual imprisonment imposed on her under the partially suspended sentence. The weakness of the Crown case and the time she has already spent in custody⁵ are both factors militating against the ordering of any new trial in her case.

⁵ *Parker v R* (1997) 186 CLR 494 at 520; *Dyers v R* (2002) 210 CLR 285 at 314-315.