

SUPREME COURT OF QUEENSLAND

CITATION: *R v Freeman* [2009] QCA 354

PARTIES: **R**
v
FREEMAN, Geoffrey Wayne
(appellant)

FILE NO/S: CA No 120 of 2009
SC No 610 of 2008

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 30 September 2009

JUDGES: Fraser JA, Cullinane and P Lyons JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Appeal dismissed**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSON – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – Where appellant convicted after trial of one count of murder – where evidence of a witness identified the appellant as the person who was wearing a red shirt and inflicting violence upon the deceased – where appellant only person wearing a red shirt – where witness saw the appellant’s drivers licence at the police station – whether identification evidence of witness was admissible or should have been excluded

R v Abbott [\[1996\] QCA 443](#), referred to
R v Murphy [1996] 2 Qd R 523, cited

COUNSEL: A J Glynn SC for the appellant
S G Bain for the respondent

SOLICITORS: Robertson O’Gorman for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **FRASER JA:** I have had the advantage of reading the reasons for judgment prepared by Cullinane J. I agree with those reasons and with the order proposed by his Honour
- [2] **CULLINANE J:** The appellant was convicted of murder after a trial in the Supreme Court at Brisbane.
- [3] He appeals against his conviction. On the hearing of the appeal, a single ground was advanced.
- [4] This concerned the admission of the evidence of a witness, one Michael James Macklan, a witness who purported to identify the appellant as the person whom he saw inflicting violence upon the deceased. The nature of his evidence and the nature of the objection taken to it will appear a little later in these reasons.
- [5] It was not contended that the evidence in question was inadmissible. The appeal therefore involves a challenge to the exercise of a discretion with the difficulties that such a challenge involves.
- [6] The relevant events occurred on the evening of 11 March 2006 in a street near the Royal Hotel at Beenleigh. There were two other hotels in the vicinity, the Imperial Hotel and the Sundowner Hotel.
- [7] A substantial number of persons were present in the area at the relevant time. Not surprisingly a number of different versions emerged in the evidence of the many witnesses called.
- [8] The deceased died as the result of trauma inflicted by a kick or kicks to his head whilst he was lying upon the ground. There is no dispute as to the causal connection between this trauma and his death.
- [9] There was evidence from seven witnesses who saw a person wearing a red t-shirt kicking the deceased in the head.
- [10] Macklan, who was a security officer at the Royal Hotel identified the appellant as a person wearing a red shirt and whom he saw strike the deceased, knocking him to the ground. He did not claim to see any kicks administered to the deceased.
- [11] He was one of two witnesses who purported to positively identify the appellant. The other witness was also a security officer at the Royal Hotel, one Hartnett, who also described the appellant as wearing a red t-shirt. He did not see any punches or kicks administered to the deceased. No objection was taken to the evidence given by him.
- [12] There was some evidence that the accused was the only person present in the relevant area wearing a red t-shirt. Some of this evidence came from a member of the deceased's group, one Agars, who gave evidence that he thought that the appellant was wearing a red t-shirt and blue jeans. In re-examination he was asked:
*"Alright. There was at one stage -- did you see any other person with a red shirt on? Not that I can recall."*¹
- [13] In addition to this evidence the appellant in his record of interview with the police acknowledged that he was wearing a red t-shirt and when asked whether there was

¹ RB 139, transcript 1-99, lines 7-8.

any other person wearing such a t-shirt he nominated a member of the band at the Royal Hotel but acknowledged that that person was not in the relevant area at the relevant time.

- [14] The relevant events occurred late in the evening. The appellant was with a group of persons who had been drinking at the Royal Hotel prior to one of them being asked to leave because of his level of intoxication. The group consisted primarily of males with one female, each of whom was called as a witness at the trial.
- [15] The deceased was in another group who had been drinking at the Imperial Hotel. The members of this group were also called as witnesses. In addition, security staff and the assistant manager of the Royal Hotel were called as were persons who happened to be in the vicinity. Security officers employed at the Imperial Hotel were also called.
- [16] As the appellant's group left the Royal Hotel there was some confrontation between the members of that group and hotel security staff. The deceased and his friends came from the Imperial Hotel and appear to have joined in on the side of the security staff. This confrontation quickly broke up. Shortly after this, the appellant with some others in his group returned to the Royal Hotel looking for a purse or wallet which had been lost by the female member of the group. Macklan said that he spoke to the appellant and that there was some exchange between them which included a conversation in which the appellant spoke of having friends or relatives in a motorcycle gang "The Finks". According to Macklan this was said in a threatening manner. There was some further exchange between members of the appellant's group and the security staff following which the former returned to where the other members of the group were. One of the deceased's group came from one of the hotels and confronted the appellant's party and the deceased joined with him. The deceased was seen by witnesses to be in a fight with two persons including one wearing a red t-shirt. Macklan gave evidence that those involved in the fight included the person in a red t-shirt with whom he had earlier had the conversation just referred to and whom he later identified as the appellant.
- [17] A small amount of the deceased's blood was found on the bottom of one of the legs of the appellant's jeans.
- [18] The appellant did not give evidence but was interviewed by the police and the video recorded interview was placed before the jury. Prior to the interview and when first spoken to by the police he said that the limit of his involvement in the relevant events had been the breaking up of a fight. In the recorded interview he said that a member of his group, one Price, had been involved in a scuffle with some other person and after this approached the appellant and asked him to come with him saying, "they've got my missus." The appellant and others went with Price and according to this account he pulled Price from "that blonde headed dude" which from other evidence was clearly a reference to the deceased. He said that he saw Price leaning over this man punching him and he saw the man's head bouncing on the cement. The appellant and another member of the group then pushed Price up the road. He says that he saw the deceased man lying on the roadway and that when the deceased hit the ground Price "kept going" and he said to Price, "that's enough." He did not think that Price had kicked the deceased but had punched him probably 10 times in the head and face.

[19] The appellant denied that he had struck anyone that night.

[20] In his summing up to the jury the learned trial Judge summarised the evidence of the various witnesses. The appellant accepts that this summary is accurate. His Honour's summary of the evidence of Macklan commences at RB page 668:

"Michael Macklan was one of two security guards at the Royal Hotel that night.

Michael Macklan recalls a group coming to the hotel at about 9 or 9.30. They sat near the right-hand side of the public bar. One wore a red t-shirt, another a brown shirt with a pinkish stripe, and a third had a white shirt. A fourth man was in the group.

At about 10 p.m., the man in the pink and brown striped shirt was 'cut off'. The whole group left a few minutes later.

The man in the brown and pink shirt was dancing backwards towards the hotel steps leading outside. Eric Hartnett grabbed him. The others in the group turned around to see Hartnett holding Rowbottom in a bear hug. They started swearing. One asked, 'Why are you grabbing my mate?' According to Macklan, Daniel Wade came running over from the Imperial Hotel, apparently to help out if there was to be a fight between the security men and the group.

About 20 seconds later, Matt Joyce and Ryan Lampshire, friends of Daniel Wade, also ran over. Then it started. The males in the group and Michael Macklan, Eric Hartnett, Daniel and Ryan were all involved. Daniel was fighting with two from the group. Eric was trying to break up the fight. The small female kept jumping on his back.

Macklan put his knee on the chest of one of the four on the ground. After a few seconds, he was grabbed by two from the group. One wore a white shirt; the other wore a red. He hopped up to see Hartnett trying to calm Rowbottom down who was shaping up to him. The one he had put his knee on was the fourth in the group: seemingly, Brad Price.

The group then moved away towards the Sundowner.

Macklan told you that the red-shirted man, the woman and perhaps someone else from the group came back asking about a lost wallet. Macklan remembers the man in the red shirt saying that some relation of his was in the Finks and was going to get him, that is Macklan. At this stage, Daniel Wade was inside the Royal Hotel.

Later, the four males and the group came back, probably after about five to 10 minutes. Macklan thought that Daniel Wade and Matt Joyce walked from the Sundowner as the group of four returned, then about 30 metres away. The area was not well lit but was good enough for Macklan to see. He recalls an exchange of words. Then Macklan saw Daniel Wade fight with the two men in the white shirt and the red shirt. Matt - apparently a reference to Matt Joyce - fought with the other two from the group.

Daniel Wade was near the median strip, fighting. The punches thrown by the man in the white shirt missed. Then the man in the red shirt hit Daniel twice with his right fist. One punch struck the face. Daniel fell back. He looked to Macklan to be knocked out before he even hit the ground.

At that, Macklan and Eric Hartnett ran towards the fight. Macklan did not see a kick, although, as you know, through the power of another person's suggestion, he had at earlier proceedings said that he had seen Daniel kicked. Cars in fact obstructed his view of the scene.

Macklan saw the four males walk away.

From a video recording, he later identified the accused as the man in the red shirt. But, as I have said, about 10 days before he did so, he saw the accused's driver's licence on the desk at the police station and saw the photo. He did not tell the police then that the person whose photo was on the licence was the man in the red shirt who had attacked Daniel Wade.

Macklan claims that he recognised the person he identified, correctly, as the accused in the video from the incidents that night and not from having seen his photograph on the licence. Macklan gave his recollection of who was where on the steps of the Royal Hotel at the time of the fatal encounter. He recalls Hartnett having been on the top step. He says that he himself had one leg on the third stair and one on the top. He remembers Susan Kersland being to his left. Paul Robins, he said, was behind him.

In cross-examination, he said that not only did he not see anyone kick Daniel but also he did not see any attempt by the man in the red shirt to do so. He did not hear anyone say 'that's what you get for hitting a woman'.

He was taxed in cross-examination by Mr Martin with the idea that someone bashed Daniel's head into the roadway. He rejected that suggestion."

- [21] The appellant challenged the admissibility of Macklan's evidence. The particular feature of the evidence of Macklan which it is said deprived his purported identification evidence of any probative value and which required its exclusion relates to his seeing a driver's licence containing the appellant's photograph at a police station:

"Alright. Let's come to the situation where the police were taking your statement, right, and you said that there was a driver's licence there on the desk?-- Yes.

Did the police officer say, 'Have a look at this'?-- No.

When did you look at it to see the picture and the name?-- Because he had to go grab some papers, or something like that, and I was just looking around, I saw the licence. I thought, 'Who is that?' Had a look, it happens to be Geoffrey's.

HIS HONOUR: What did you see when you looked at it?-- The whole driver's licence, picture, name.

MR MARTIN: Alright. Picture, name of it. Can I suggest this to you: that when you saw that, you didn't say, for instance, to the police officer, 'That's the fellow I saw hit Daniel'?-- No.

Why not? Did you recognise him straight away?-- Yeah, I recognised him straight away, yes.

Why didn't you say that if you thought that was the person?-- Well, they already had him, so I didn't say anything about it.

You knew you were giving a statement to the police?-- Yes.

They wanted to know if you could identify anyone. That's why they took a description from you of the various people, didn't they?-- Yes.

Surely, if you put two and two together and said, 'That's him, that's the fellow', you would have said that, if that was what you thought at the time?-- Well, it was only a face. There is no colours showing what shirt he is wearing, something like that. How would I know if he was wearing a red shirt?

That's right. That's right. You see, are you saying this: if he didn't have a red shirt, you would never be able to recognise him?-- No, I would be able to recognise him.

Could I suggest this to you: after seeing - after seeing the driver's licence, then when you went and viewed the video and pointed him out, that what you were really doing was pointing out the person that you'd seen on the driver's licence?-- No".²

- [22] Objection was taken to the admission of this evidence at the commencement of the trial. It will be obvious that the identification of the appellant as the person wearing a red t-shirt and whom Macklan says he saw punch the deceased was potentially evidence of critical importance when taken with the other evidence of a person wearing a red t-shirt kicking the deceased whilst lying on the ground and the evidence that the appellant was the only person wearing a red t-shirt in the relevant group.
- [23] Senior counsel for the appellant compared Macklan's evidence of seeing the photograph in the licence and identifying the appellant as the person in the photo as the equivalent of a witness identifying a person from a single photograph. However Macklan was not being asked to make an identification and saw the photograph by chance.

² RB 310, transcript 3-59, lines 10-54.

- [24] The learned trial Judge in rejecting the application to exclude the evidence said:
*"There are other items of evidence tending to implicate the applicant in the fatal attack. There was only one person in the crowd, it seems, who was wearing a red shirt and that was the applicant. I am informed that those who were involved in the melee were tested for DNA and that only the applicant was found to have the DNA of the deceased on his body or clothing. His trousers had blood of the deceased on them below the knee and at the back of them, and it was from that blood that the DNA was extracted so that there was a circumstantial case to implicate the applicant in acts of violence which may well have directly caused the death."*³
- [25] He went on to say:
*"In my view, it is possible to fashion a warning to a jury concerning the risk that the displacement effect accounts for the identification made after the video line-up. The direction would necessarily caution the jury about the risk of substitution of the image in the photograph for whatever memory of the appearance of the applicant might otherwise have been retrieved at the time of the video line-up. In other words, in my opinion, such frailties as exist in respect of the video line-up identification can be adequately addressed by warnings, and in these circumstances I am not persuaded that there is such a risk of misuse of the video line-up as could justify the conclusion that the unfair prejudicial value of the identification outweighs its potential probative value."*⁴
- [26] Although some argument was addressed to us suggesting that His Honour erred in considering other evidence tending to link the appellant to the commission of the offence it is plain that His Honour's was the correct approach. In *R v Murphy*,⁵ Pincus JA said:
"It is fallacious to consider each piece of evidence pointing towards the accused as the offender separately and to exclude it unless, considered in isolation, it strongly identifies the accused. Commonly, the question whether or not an accused has been proved to be the offender to the requisite standard depends, as in this case, upon the jury's consideration of a number of pieces of evidence of varying strength."
- His Honour gave directions to the jury on the question of identification evidence both generally and specifically in the case of some witnesses including Macklan. These directions, it is acknowledged, were clear and extensive and no objection could be taken to them.
- [27] In my view it has not been demonstrated that His Honour made any error in his approach to his consideration of the admissibility of Macklan's evidence. His Honour was entitled to conclude that the evidence was capable of significant probative value but had specific features which required the court to draw the attention of the jury to such matters and to give appropriate directions to the risks associated with such evidence and the need to carefully scrutinise the evidence. This is precisely what his Honour did.
- [28] It is not possible to accept the contention that the evidence was so tainted by what had occurred at the police station when the driver's licence was seen by the witness

³ RB 38, transcript 1-32, lines 1-12.

⁴ RB 39, transcript 1-33, lines 17-31.

⁵ [1996] 2 Qd R 523 at 525; see also *R v Abbott* [1996] QCA 443 at 7.

that its exclusion was the only course open to the Court. Indeed, I think his Honour's decision not to exclude the evidence was in all of the circumstances unsurprising.

[29] The appeal should be dismissed.

[30] **P LYONS J:** I have had the advantage of reading in draft form the reasons for judgment of Cullinane J with which I agree. I also agree with the order proposed by his Honour.