SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mead* [2010] QCA 370
PARTIES:	**R** **v** **MEAD, Daniel Aaron** (appellant)
FILE NO/S:	CA No 107 of 2010 DC No 1462 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2010
JUDGES:	Margaret McMurdo P, White JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction is dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – ROBBERY – ELEMENTS OF OFFENCE – appellant convicted of robbery with personal violence – appellant and two other men formed plan to steal money from newsagency – appellant and another offender distracted shop assistant whilst third offender took cash from till – third offender pushed shop assistant away with some force – trial judge commented that there was no dispute as to whether third offender committed the offence of robbery - whether trial judge should have instructed jury to consider whether the third offender's push was violence used immediately after stealing to obtain the thing stolen or prevent or overcome resistance to it being stolen under *Criminal Code* 1899 (Qld), s 409 and s 411 CRIMINAL LAW – PROCEDURE – VERDICT – ALTERNATIVE VERDICTS – DIRECTIONS TO JURY – trial judge did not leave alternative verdict of stealing for jury's consideration – appellant requested at trial that alternative verdict not be left to the jury – prosecution submitted alternative verdict authorised and can be left open to jury under s 584 and s 575 *Criminal Code* 1899 (Qld) – whether alternative verdict of stealing fairly arose for

consideration on the whole of the evidence – whether *Criminal Code* 1899 (Qld), s 575 required trial judge to direct jury to consider alternative charge of stealing

CRIMINAL LAW – APPEAL AND NEW TRIAL - VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – video footage showed third offender taking money from till and moments later pushing shop assistant with some force – whether it was open to the jury to be satisfied beyond reasonable doubt that immediately after third offender took money he used actual and personal violence to shop assistant to prevent or overcome resistance to the stealing – whether verdict is unreasonable and not supported by the evidence

Criminal Code 1899 (Qld), s 7, s 8, s 409, s 411, s 575, s 584

R v Rehavi [1999] 2 Qd R 640; [1998] QCA 157, distinguished
R v Willersdorf [2001] QCA 183, distinguished
Smith v Desmond [1965] AC 960, cited
The Queen v De Simoni (1981) 147 CLR 383; [1981] HCA 31, considered

COUNSEL: K A Mellifont SC for the appellant
G Cummings for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, Daniel Aaron Mead, was convicted after a two day jury trial of robbery with personal violence.

[2] He appeals against his conviction on three grounds. The first is that the trial judge erred in not directing the jury to consider whether or not the violence used was "immediately after the time of stealing … in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen" under s 409 *Criminal Code* 1899 (Qld). The second is that the judge erred in not directing the jury to consider an alternative charge which was open on the indictment, namely, stealing. The third is that the verdict of guilty on the offence of robbery was not reasonably open on the evidence: the evidence did not establish beyond reasonable doubt that the violence occurred with sufficient immediacy after the stealing to allow the jury to conclude that the violence was used in order to obtain the money or to prevent or overcome resistance to its being stolen.

[3] The circumstantial prosecution case relied solely on s 8 *Criminal Code*. It was that the appellant and two other men formed a plan to steal money from a newsagency in Adelaide Street, Brisbane. The plan was that the appellant and another offender would distract the shop assistant, Ms Le, while a third offender took money from the till.

[4] The incident was recorded on security footage which was tendered and played at trial and in the appeal. The video footage is in real time. The appellant formally admitted through his counsel at trial that he was the man depicted in the footage wearing the black t-shirt who, together with a second man, spoke to Ms Le about a magazine and wrapping paper. The footage showed the appellant and another man apparently making enquiries of Ms Le about a magazine. Ms Le moved away from the till to show them where it was. The appellant looked around the shop. The two men made further enquiries of Ms Le. Whilst that was happening, the footage depicts a third man stealing money from the till. Ms Le saw the man at the till, moved towards him and confronted him. Ms Le was standing between the thief and the exit. He pushed Ms Le out of the way with some force and ran from the shop with the money. There were only moments between the stealing of the money and the pushing of Ms Le. She gave evidence consistent with the video footage.

[5] The appellant did not give or call evidence.

[6] The prosecution submitted that the offence committed by the man who stole the money from the till was robbery with personal violence. That offence was a probable consequence of the prosecution by the appellant and the thief of their plan to steal money from the till.

[7] The defence case was that the prosecution had not established beyond reasonable doubt that the appellant was associated with the thief. The prosecution could not displace beyond reasonable doubt the rational hypothesis that the appellant was innocently in the shop.

[8] Prior to closing addresses, counsel and the judge discussed relevant matters of law. The prosecutor submitted that the judge should allow the jury to consider an alternative verdict, guilty or not guilty of stealing. Stealing was not charged on the indictment as an alternative count, but the prosecution submitted that the alternative verdict was authorised by s 584 *Criminal Code* and under the common law: see *Smith v Desmond*.[1] The judge rightly determined that s 584 did not support the prosecutor's contention. The prosecutor next submitted that, consistent with *R v Willersdorf*,[2] the alternative verdict of stealing was able to be left to the jury under s 575 *Criminal Code*.

[9] Defence counsel objected (although not strongly) to the jury being invited to consider an alternative count of stealing. The prosecution case was always based only on s 8. If stealing was left as an alternative verdict, the prosecution case would have to be based on s 7 *Criminal Code*. Defence counsel therefore argued that the prosecution should not be allowed to amend its case at this late stage by including an alternative count of stealing based on s 7.

[10] The judge concluded that the English cases referred to by the prosecutor were not applicable to charges brought under the *Criminal Code*. Section 575 *Criminal Code* seemed to apply only where the principal offence charged a circumstance of aggravation. It would be anomalous if s 575 allowed stealing to be an alternative verdict to robbery with a circumstance of aggravation, but not to robbery simpliciter. The judge determined that stealing should not be left to the jury as an alternative verdict.

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1 [1965] AC 960.

2 [2001] QCA 183, [17]-[20].

[11] The judge in his jury summing-up gave the following relevant directions to the jury. The judge read the definition of robbery under s 409 *Criminal Code* to the jury. He explained that there must first be a stealing and read out the definition of "stealing". His Honour next explained that "robbery" required that:

> "- at or immediately before or immediately after the time of stealing, the person doing the stealing uses or threatens to use actual violence to any person. Now here what the Crown says is – immediately after the stealing, the man who you saw put his hand in the till, did use personal violence because he pushed aside Ms Le - and the Crown says that was the use of actual violence to a person and that was done in order to obtain things stolen or to prevent or overcome resistance to its being stolen. And again, the Crown would submit to you that that - the pushing aside of Ms Le was done to stop him leaving the store with the money. So that's what's meant by robbery.
>
> *In this case, there doesn't seem to be any dispute that the man who put his hand into the till and ran out of the shop, was in fact - committed the offence of robbery. There doesn't seem to be any argument about that. What of course is critical, is whether or not [the appellant] is guilty of the same offence.*" *(my emphasis)*

[12] The judge explained the prosecution case. It was that the jury could infer from the video footage beyond reasonable doubt that the only rational conclusion was that the appellant had a common intention with the thief to steal money from the till; and further, that a probable outcome of effecting that intention was the commission of the offence of robbery with personal violence. The judge told the jury several times that they could only draw that conclusion if it was the only rational conclusion open. If there was any other explanation open on the evidence they must find the appellant not guilty.

[13] His Honour explained the defence case in this way. Defence counsel submitted the jury could not be satisfied on the evidence that the appellant was acting with the thief. The video footage suggested otherwise.

[14] The judge in his report for the Court of Appeal provided the following comment:

> "After the jury retired I had some misgivings as to whether this case really was a robbery case – or whether it was really a stealing followed by an assault. The case was conducted by both counsel on the basis that the principal offender was in fact guilty of robbery – and I did not discuss my misgivings with counsel. The notes at page 3552 (paragraph [s 411.20] of *Carter* seem to be apposite."

[15] The submissions of the appellant's counsel on all grounds seem to be influenced by the trial judge's report set out in the preceding paragraph. It was, however, common ground by the time of the appeal hearing that the common law cases referred to in the note cited in the trial judge's report are not apposite to s 409 and s 411 *Criminal Code* which, as part of a Code, must be construed according to their terms, not the common law.

Ground 1

[16] The appellant's submissions on ground 1 are as follows. The evidence as to whether the timing of the thief's push of Ms Le established robbery with violence, rather

than an assault after a separate stealing, was equivocal. The jury should have been directed to consider whether or not the push was violence used "immediately after the time of stealing … in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen". The judge's directions gave the jury the impression that whether or not the thief had in fact committed the offence of robbery was not something that needed serious consideration. Brennan J (as he then was) in *The Queen v De Simoni*[3] noted "… it has long been settled that violence after the taking of property cannot turn the stealing of that property into robbery."

[17] The answer to the appellant's contentions is in the terms of s 409, s 411 and the evidence at, and issues in, the trial. Section 409 *Criminal Code* provides:

> "*Any person who steals anything, and*, at or immediately before or *immediately after the time of stealing it, uses* or threatens to use *actual violence to any person* or property *in order to* obtain the thing stolen or to *prevent or overcome resistance to its being stolen*, is said to be guilty of ***robbery***." *(my emphasis)*

[18] Section 411 *Criminal Code* relevantly provides:

> "**411 Punishment of robbery**
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> (1) Any person who commits the crime of robbery is liable to imprisonment for 14 years.
>
> (2) *If … at or* immediately before or *immediately after the time of the robbery, the offender … uses any other personal violence to any person*, the offender is liable to imprisonment for life." *(my emphasis)*

[19] Nothing said in *De Simoni* detracts from the clear terms of s 409 and s 411, the relevant aspects of which I have emphasised. Brennan J's observations in *De Simoni* relied on by the appellant were made in discussing the difference between violence or threat of actual violence which is an element of the offence of robbery simpliciter (s 409), and violence which is a circumstance of aggravation (s 411(2)) to the offence of robbery simpliciter. True it is that Brennan J noted that it was well settled that violence after the taking of property cannot turn the stealing of that property into a robbery. His Honour, however, went on to observe that, if personal violence was used against a victim "in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen", the offender committed robbery as well as aggravated robbery.[4] The present case is in the category referred to by Gibbs CJ in *De Simoni*, where the element of actual violence required as an element of robbery simpliciter under s 409 was also the violence constituting the circumstance of aggravation of personal violence under s 411(2).[5]

[20] The appellant rightly points out that the trial judge told the jury that there did not seem to be any dispute that the man who pushed Ms Le had in fact committed robbery. The trial was conducted on that basis. The judge was required to give the jury directions as to the law that applied to the evidence at trial, to assist them in determining the real issues in the case. His Honour directed them correctly as to the elements of the offence of robbery with a circumstance of aggravation of personal violence: see [11] of these reasons. The jury would have well understood from those directions that they must be satisfied of those elements beyond reasonable

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3 (1981) 147 CLR 383, 403.

4 *De Simoni*, above, 404-405.

5 *De Simoni*, above, 393-394.

doubt before convicting the appellant. But the real issue at trial was, as the judge suggested to the jury, whether the appellant was associated with the thief. See the italicised portion of the directions set out in [11] of these reasons. Defence counsel did not ask for any redirection, clearly because the judge had correctly stated the relevant law relating to the issues in the trial.

[21] The judge did direct the jury that they must be satisfied that Ms Le was pushed "immediately after the time of stealing … in order to obtain the money or to prevent or overcome resistance to its being stolen". In this trial, the judge was entitled to comment that it did not seem to be in issue that the thief had committed the offence of robbery. The judge made no error of law and nor have the impugned comments caused a miscarriage of justice. The first ground of appeal is not made out.

Ground 2

[22] The appellant next contends that s 575 *Criminal Code* required the judge to direct the jury to consider an alternative charge open on the indictment, namely, stealing. This Court has held that a trial judge's duty to ensure a fair trial according to law requires the judge to leave alternative verdicts for the jury's consideration under s 575 where the accused person "may be convicted" of an offence established by the evidence which is an element of the offence charged. See *R v Rehavi*,[6] where this Court gave a broad interpretation to "circumstance of aggravation" in s 1 and s 575 *Criminal Code*, and *R v Willersdorf*.[7] Whenever an alternative verdict fairly arises for consideration on the whole of the evidence, failure to leave the alternative verdict prima facie deprives the accused person of a chance of acquittal of the principal offence.[8]

[23] The appellant's contention that the alternative verdict of stealing should have been left to the jury therefore would be persuasive, but for the appellant's reasons for requesting at trial that it not be left to the jury. Defence counsel was rightly concerned that if the jury was allowed to consider the alternative verdict of stealing, there would have been a fundamental change to the prosecution case after its close from one of robbery with personal violence under s 8, to an alternative count of stealing under s 7(1)(b), (c) or (d). The judge's decision not to leave the alternative verdict of stealing for the jury's consideration was, in my opinion, correct, even if the reasoning may have been flawed.

[24] It follows that, unlike *Rehavi* and *Willersdorf*, this was not a case where the alternative verdict of stealing *fairly* arose for consideration on the whole of the evidence. It was not the way the case was conducted, and defence counsel, for arguably sound forensic reasons, considered the appellant would be prejudiced by the changing prosecution case if the alternative offence of stealing was left for the jury to consider. I am not persuaded the judge erred in refusing to allow the alternative offence of stealing to be considered by the jury. This ground of appeal is also without substance.

Ground 3

[25] The appellant's counsel's final contention is that the evidence at trial did not establish beyond reasonable doubt that the violence to Ms Le occurred with

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6 [1999] 2 Qd R 640.

7 [2001] QCA 183, [17]-[20].

8 *Willersdorf*, above, [20]

sufficient immediacy to the stealing so as to constitute the offence of robbery. The guilty verdict is unreasonable and not supported by the evidence.

[26] Video footage depicts the thief taking money from the till immediately before Ms Le confronted him. As Ms Le moved towards the thief and asked him what he was doing, he pushed her with some force and ran off. Ms Le was between the thief and the exit. Ms Le gave evidence consistent with the video footage. I have watched the video footage. The push is mere moments after the stealing. After reviewing the whole of the evidence, I am confident that it was well open to the jury to be satisfied beyond reasonable doubt that *immediately* after the thief stole the money he used actual (s 409) and personal (s 411(2)) violence to Ms Le to prevent or overcome resistance to the stealing. As noted earlier, the same act of violence can, as here, constitute both actual violence under s 409 and the aggravating circumstance of personal violence under s 411(2): see *De Simoni*.[9] It follows that this ground of appeal also fails: see *M v The Queen*;[10] *MFA v The Queen*.[11]

Conclusion

[27] In case I am wrong in respect of any ground of appeal, in my opinion the video footage and Ms Le's evidence established beyond reasonable doubt that the appellant was guilty of robbery with personal violence by way of s 8. There has been no substantial miscarriage of justice under s 668E(1A) *Criminal Code* and the appeal should be dismissed on this basis. See *Weiss v The Queen*.[12]

[28] It follows that the appeal against conviction must be dismissed.

[29] **WHITE JA:** I agree with the President that the appeal should be dismissed.

[30] **JONES J:** For the reasons expressed by the President, I agree that the appeal should be dismissed.

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9 Gibbs CJ at 393 and Brennan at 403-4.
10 (1994) 181 CLR 487, 493-495.
11 (2002) 213 CLR 606, [25], [59].
12 (2005) 224 CLR 300.