SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnston* [2013] QCA 257
PARTIES:	**R** **v** **JOHNSTON, Jacob Prebble** (appellant)
FILE NO/S:	CA No 65 of 2013 DC No 1749 of 2012 DC No 1993 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2013
JUDGES:	Muir and Gotterson JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where the appellant was convicted of two counts of aggravated robbery and one count of aggravated burglary – where the defence case was conducted such as to cast imputations on the character and honesty of two of the prosecution's most important witnesses – where there was also an implicit suggestion of impropriety on the part of a police officer involved in the investigation – where the trial judge permitted cross-examination of the appellant in relation to a previous conviction for aggravated robbery pursuant to s 15(2) of the *Evidence Act* 1977 (Qld) – where the appellant submits that the trial judge did not weigh the prejudicial effect to the defence case of the disclosure of the appellant's previous conviction against the cumulative detriment to the prosecution case by the manner in which the defence case was conducted – whether the trial judge erred in permitting cross-examination of the appellant in relation to his previous conviction – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO

MISCARRIAGE – OTHER IRREGULARITIES – where the trial judge repeated a factual statement by the prosecutor that a co-offender, Ms Kaukau, who did not give evidence at trial, had pleaded guilty to the offence – where, in cross-examination, another co-offender, Ms McLean, agreed that when she was sentenced Ms Kaukau was sitting next to her in the dock – where there the appellant contends that there was no direct or indirect evidence about any plea by Ms Kaukau – where the appellant submits that the trial judge erred in failing to give a warning in relation to the apparent plea by Ms Kaukau – where the respondent submits that the trial judge's implicit reference to Ms Kaukau's plea did not advance the undisputed position that Ms Kaukau had been identified by one of the complainants as a co-offender – whether a miscarriage of justice occurred

Evidence Act 1977 (Qld), s 15(2)

Matusevich v The Queen (1977) 137 CLR 633; [1977] HCA 30, cited
Phillips v The Queen (1985) 159 CLR 45; [1985] HCA 79, cited
R v Brown [1960] VR 382; [1960] VicRp 62, cited
R v Symonds [2002] 2 Qd R 70; [2001] QCA 199, considered

COUNSEL: D Shepherd for the appellant
P J McCarthy for the respondent

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

[1] **MUIR JA: Introduction** The appellant was convicted on 7 March 2013 of two counts of aggravated robbery and one count of aggravated burglary after a trial in the District Court. He appeals against his convictions on the grounds that:

1. there was a miscarriage of justice because the trial judge permitted cross-examination of the appellant in relation to a previous conviction for aggravated robbery; and

2. there was a miscarriage of justice because the trial judge repeated a factual statement by the prosecutor that a co-offender, who did not give evidence at the trial, had pleaded guilty to the offence when there was no evidence of that fact and, in any event, failed to give any warning about the use which could be made of that information.

[2] An application for leave to appeal against sentence was abandoned.

The evidence

Evidence of Mr Ahmad

[3] The evidence of one of the complainants, Mr Ahmad, was to the following effect. He resided in a home unit in Carina Heights with the other complainant, Ms Grieff.

He was at home with Ms Grieff at about 1.00 pm on 11 January 2011 when he heard a knock on the door. He opened it and saw two girls standing in front of him. They questioned him as to whether "George" was there. As he was speaking to them, three males barged into the house. One was carrying a shotgun and another was carrying a shovel. The third male was wearing a grey "hoodie", sunglasses and gloves. Mr Ahmad was grabbed and asked where the money and "gear" were. He was punched and struck repeatedly with the shovel as a result of which he suffered a broken nose, damage to his eye and elbow.

[4] He could hear Ms Grieff, who was in the bathroom upstairs, becoming distressed. He became angry and started throwing things. Shortly after that the intruders left the unit. He subsequently discovered that some property had been taken from the unit.

[5] Mr Ahmad attended the police station where he was shown three photo boards on three different days. DVD recordings of the complainant's viewing of the photo boards were admitted into evidence despite objection from defence counsel. On the first two occasions he failed to identify any of his attackers. On 28 February 2011, he was shown a third photo board and selected a photograph of the appellant. He also selected two other photographs which, in his opinion, resembled the men carrying the gun and the shovel, but he was not certain of his identifications.

[6] In cross-examination, he was questioned about the presence of methylamphetamine in the unit at the time of the attack and denied that there was any present. He was cross-examined also about his prior use of drugs, including cocaine, and about where those drugs were kept by him. Part of the questioning was designed to elicit an admission or evidence of his dealing in drugs and his theft of a prescription pad.

Evidence of Ms Grieff

[7] Ms Grieff said in her evidence that she was in the bathroom when Mr Ahmad answered the door. She heard fighting and "hitting noises". A person approached her with a gun and pushed her into the main bedroom, telling her to stay there and not to look at him. She then saw two girls whom she thought were around 20 years of age. One looked to her to be of Maori descent. That girl searched the room and placed property in a backpack. The intruder with the gun kept coming into the room "looking for something".

[8] Ms Grieff was wearing only a shirt and asked one of the girls if she could put pants on. She was given permission and told not to worry and that nothing was going to happen to her. Whilst this was taking place she could hear Mr Ahmad screaming and calling out to her, asking if she was okay. The girl with the Maori appearance instructed her to tell Mr Ahmad that she was okay and she complied. The man with the gun came into the bedroom again, turned the mattress around and searched the room again. She was taken to the kitchen where she saw another man for the first time. He was wearing a hood and sunglasses and carried a shovel which he used to strike Mr Ahmad. When she went to call the police, she noticed that her mobile phone was missing.

[9] Ms Grieff identified on a photo board the two young women who had taken part in the incident. She was unable to identify the three male intruders.

Evidence of Ms McLean

[10] One of the women identified, Ms McLean, was a prosecution witness. She said that she knew the other female intruder, Ms Kaukau, and that Ms Kaukau and the appellant were partners who used to live with her. Shortly after she came out of a mental health facility at the Logan Hospital, she was contacted by Ms Kaukau and the appellant and asked if she wanted to make some money and get onto some drugs. On the day of the incident, she picked up Ms Kaukau and the appellant from their residence and then picked up two other men. Her role, and that of Ms Kaukau, was to knock on the door to provide access to the unit to the three men who would be waiting nearby for the door to open. She gave an account of events in the unit which generally corroborated the account given by Ms Grieff.

[11] Ms McLean was cross-examined by defence counsel about her involvement with drugs and her psychiatric history. It was put to her, and she accepted, that she had been sentenced in the District Court on 7 March 2012 and that "Ms Kaukau was in the dock sitting next to [her] during the process". She was cross-examined at length about how she came to give her evidence and provide a statement to police. It was put to her that one of the reasons she gave her statement was that she "wanted to stay in good with the police … to protect [her] position on parole". It was also put to her that her allegations against the appellant were made "just to keep the police happy".

[12] In re-examination, Ms McLean said that she was told prior to being sentenced that if she testified against the appellant she "would be released earlier from prison" but that she "did not take the deal".

Evidence of Senior Constable Taylor

[13] A police officer, Senior Constable Taylor, who was involved in the investigation and who had spoken to Ms McLean with a view to her giving evidence, was asked in cross-examination if it was a fair question to ask "if [he] leaned on [Ms McLean] to give her a (sic) statement". There was also questioning of the police officer about his having a photograph of the appellant in his possession at the time of the photo board identifications. He was asked if he showed the photograph to Mr Ahmad. The question was asked again by defence counsel at the end of his cross-examination. On both occasions he denied having shown the photograph to Mr Ahmad.

Ground 1

The appellant's argument

[14] Counsel for the appellant submitted that the exercise of the trial judge's discretion in allowing cross-examination of the appellant about his prior conviction for aggravated robbery miscarried and denied the appellant a fair trial. The trial judge, it was argued, did not properly take into account the fact that the appellant's previous conviction was of the same character as the offences before the jury and that the prejudicial effect on the appellant of admitting the evidence of the prior conviction would far outweigh its legitimate evidentiary effect on his credibility. The decision was, in effect, a roundabout way of introducing inadmissible propensity evidence. Moreover, the trial judge failed to weigh the damage such

a disclosure would cause the appellant against any damage to the prosecution case by the manner in which the defence was conducted. Nor did the trial judge determine whether it would be unfair to the prosecution not to allow questioning of the appellant on his prior conviction.

[15] The trial judge seemed to place greatest reliance on the cross-examination of Mr Ahmad and the fact that that cross-examination was for the purpose of suggesting that the witness should not be believed simply because he had previous drug convictions. In this regard, the trial judge failed to take into account that such evidence assisted the prosecution case in that it provided an explanation as to why the complainant may have been targeted by people specifically looking for drugs and money, when otherwise that issue would have been left to speculation.

[16] Finally, the trial judge failed to give proper weight to the fact that the cross-examination was legitimate in exploring possible explanations for the evidence of prosecution witnesses with which issue was taken.

Consideration

[17] Section 15 of the *Evidence Act* 1977 (Qld) (the Act) relevantly provides:

> "(2) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character, unless—
>
> (a) the question is directed to showing a matter of which the proof is admissible evidence to show that the person is guilty of the offence with which the person is there charged;
>
> (b) the question is directed to showing a matter of which the proof is admissible evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged;
>
> (c) the person has personally or by counsel asked questions of any witness with a view to establishing the person's own good character, or has given evidence of the person's good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceeding; …
>
> (3) A question of a kind mentioned in subsection (2)(a), (b) or (c) may be asked only with the court's permission."

[18] It is clear from the earlier narrative that s 15(2)(c) of the Act applied and that the trial judge had a discretion as to whether to permit the appellant being questioned about his prior convictions. The character and honesty of two of the prosecution's most important witnesses, Mr Ahmad and Ms McLean, were called into question and the cross-examination of Senior Constable Taylor involved an implicit suggestion of impropriety on his part.

[19] In *Phillips v The Queen*,[1] Mason, Wilson, Brennan and Dawson JJ affirmed that the Court's discretion under s 15(2) was unfettered and thus not subject to any unstated qualification that the discretion could be exercised only in exceptional circumstances.[2] Referring to *Matusevich v The Queen*[3] and *R v Brown*,[4] their Honours said:[5]

> "*Brown* and *Matusevich* rightly emphasize that, although the nature or conduct of the defence is such as to attract the discretion, the primary exclusionary rule remains of importance in determining the manner of its exercise. Although these cases show that there is no prima facie rule that 'in the ordinary and normal case' (to use the phrase of Singleton J.) the discretion should be exercised in favour of the Crown, they do not support the submission that the discretion should be exercised against the Crown unless the circumstances can be described as exceptional. The discretion is at large but the primary exclusionary rule is a factor always relevant to its exercise."

[20] The trial judge was referred by defence counsel to *R v Symonds*[6] and, in particular, to the following passage from the reasons of Thomas JA who, referring to *Phillips v The Queen*,[7] said:[8]

> "Although identifying the discretion as an entirely unfettered one, the judgment of Mason, Wilson, Brennan and Dawson JJ. identifies the first four of the following considerations as a 'valuable guide', and the fifth as a consideration 'to be weighed in the scales when considering the exercise of the discretion'.
>
> 1. The legislation is not intended to make the introduction of an accused's previous convictions other than exceptional;
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> 2. The prejudicial effect on the defence of questions relating to the accused's criminal record needs to be weighed against such damage as the trial judge might think had been done to the Crown case by the imputations;
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> 3. On the issue of credibility it might be unfair to the Crown to leave the Crown witnesses under an imputation while preventing the Crown from bringing out the accused's record;
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> 4. The actual prejudicial effect of the cross-examination, if allowed, might far exceed its legitimate evidentiary effect upon credit;
>
> 5. The fact that an accused, in making imputations against the prosecution witnesses, is not doing anything more than

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1 (1985) 159 CLR 45.
2 *Phillips v The Queen* (1985) 159 CLR 45 at 56.
3 (1977) 137 CLR 633.
4 [1960] VR 382.
5 *Phillips v The Queen* (1985) 159 CLR 45 at 54.
6 [2002] 2 Qd R 70.
7 (1985) 159 CLR 45.
8 *R v Symonds* [2002] 2 Qd R 70 at 71.

> presenting his defence, should tend against allowing cross-examination as to previous convictions. But if the accused makes quite gratuitous imputations that are not necessarily involved in the proper conduct of the defence, the court will be more ready to exercise its discretion in favour of the Crown.
>
> Extrapolations of each of those particular considerations can be found in other parts of the judgment. On a more general level the judgment also includes the following statement:
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> > 'It is right to stress the exceptional character of a case in which the credibility of an accused person is open to be attacked by reference to his bad character or previous convictions and it is undoubtedly right that the discretion of a trial judge to permit such an attack be sparingly and cautiously exercised.'
>
> The court also emphasised that 'the essential thing is a fair trial'." (citations omitted)

[21] The trial judge referred to the above passage a number of times in the course of argument. He also referred to it in his ex tempore reasons for his decision to allow the application under s 15. In those reasons, the trial judge explored the nature and extent of the attacks on the credibility and character of prosecution witnesses.

[22] It is clear from the trial judge's reasons that he followed and applied the approach to determining an application under s 15(2) of the Act suggested by Thomas JA in *Symonds*. At the commencement of his reasons his Honour quoted in full the passage from Thomas JA's reasons set out above.

[23] Contrary to a submission made by the appellant's counsel, his Honour plainly weighed the prejudicial effect on the defence of the admission of evidence of the appellant's prior conviction against the damage to the prosecution case of the imputations on the character of prosecution witnesses. After discussing the nature and extent of the attacks on the character of each of Mr Ahmad, Ms McLean and Senior Constable Taylor, the trial judge expressly referred to the detriment to the defence case of the revelation of the appellant's prior conviction and implicitly balanced this detriment against the cumulative detriment to the prosecution case of the relevant attacks on three of its four most important witnesses. He said in this context:

> "In my view the nature of the cross-examination was such as to potentially significantly damage the [prosecution] case …"

[24] Counsel for the appellant argued that the trial judge had erred in considering potential detriment to the prosecution and defence cases rather than actual detriment. Thomas JA referred to "[t]he prejudicial effect" and to "[t]he actual prejudicial effect of the cross-examination, if allowed," in paragraphs 2 and 4 respectively of his list. But, his Honour could only have been referring to a potential detriment in paragraph 4 as he was referring to a future possibility. In the case of both paragraphs 2 and 4, the prejudicial effect to be considered was necessarily "potential". There could be no prejudicial effect until the questions asked and answers given had operated on the minds of the jurors.

[25] This argument, which, with respect, was entirely without substance, illustrates dangers of the all too common tendency of lawyers to treat discussions in reasons, intended as a helpful guide to considerations relevant to the exercise of a statutory discretion, as a code supplanting the words of the statute granting the discretion. The error, as was the case here, is often amplified by subjecting the superimposed source of power to minute linguistic analysis. I add that in making these observations, I intend no criticism of the appellant's counsel. His task was not an easy one and he put his client's arguments skilfully and with reasonable precision.

[26] It was not demonstrated that the trial judge had failed to give due consideration to any relevant matter or had taken irrelevant matters into account. The exercise of his discretion did not miscarry in any respect. This ground was not made out.

Ground 2

The appellant's contentions

[27] In summarising the prosecutor's argument in the course of his address, the trial judge said:

> "He referred also to the fact that Ms Grieff had picked both females in the photoboard, indicating that they were clearly there, consistent with their pleas."

[28] In cross-examination, Ms McLean agreed that when she was sentenced on 7 March 2012 in the District Court, Ms Kaukau was sitting next to her in the dock. There was no direct or indirect evidence about any plea by Ms Kaukau, who did not give evidence. An appropriate warning was given with respect to the effect of Ms McLean's plea but no warning was given in relation to the apparent plea by Ms Kaukau to the effect that it could not be used as evidence against the appellant.

[29] The relationship between the appellant and Ms Kaukau was relied on by the prosecution in proof of its case. The relationship had a tendency to improperly corroborate the evidence of Ms McLean as to the identity of the others involved in the robbery. In those circumstances, there is a real possibility that what might have otherwise been regarded as an inadvertent slip assumed some significance in the jury's deliberation.

Consideration

[30] The appellant's argument must be rejected. Ms Grieff identified Ms Kaukau as one of the offenders. This evidence was not challenged in cross-examination. Counsel for the respondent submitted that the implicit reference to the plea of Ms Kaukau did not advance the undisputed position that Ms Kaukau had been so identified. The obvious inference to be drawn from the questioning by defence counsel, referred to in paragraph [11] above, and the answers the questioning elicited, was that Ms Kaukau was a co-accused who had also pleaded guilty. In cross-examination, the appellant accepted that Ms Kaukau had told him when he was with her in a police station that she was involved in the subject robbery. Counsel for the respondent submitted that the prosecutor, properly, relied on Ms Kaukau's conviction only to support the accuracy of the unchallenged identification by Ms Grieff of the two female intruders. This identification was verified by Ms McLean's evidence.

[31] The appellant gave evidence in which he admitted having been in a relationship with Ms Kaukau at relevant times and knowing Ms McLean. He denied that he had any prior knowledge of or involvement in the incident on 11 January 2011.

[32] Defence counsel sought no direction or redirection in respect of the evidence he had elicited in respect of Ms Kaukau.

[33] The respondent's counsel submitted that there was no reasonable possibility that the alleged irregularities in the summing up (the reporting of the prosecution's statement that Ms Kaukau had pleaded guilty and the failure to give any warning about the use of that information) could have affected the verdict and that, in consequence, there was no miscarriage of justice. These submissions should be accepted. In addition to the matters already discussed, the evidence that Ms Kaukau had admitted participation in the subject offending said nothing more about the appellant's participation in the subject incident than was already apparent from the evidence of Ms Greiff and Ms McLean which was relevantly unchallenged. Moreover, the appellant himself gave evidence that Ms Kaukau was his partner at relevant times and had admitted her participation in the incident.

[34] There was no miscarriage of justice. Any direction about Ms Kaukau's guilt or plea of guilty would have served no useful purpose. It is readily apparent that competent defence counsel could reasonably have concluded that it was preferable for the trial judge not to make any more references to Ms Kaukau in his summing up than was necessary.

Conclusion

[35] I would order that the appeal against conviction be dismissed.

[36] **GOTTERSON JA:** I agree with the order proposed by Muir JA and with the reasons given by his Honour.

[37] **NORTH J:** I agree with the reasons of Muir JA and with the order proposed by his Honour.