

SUPREME COURT OF QUEENSLAND

CITATION: *R v Clark* [2013] QCA 341

PARTIES: **R**
v
CLARK, Robert Wayne
(appellant)

FILE NO/S: CA No 49 of 2013
DC No 29 of 2013

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 12 November 2013

DELIVERED AT: Brisbane

HEARING DATE: 7 August 2013

JUDGES: Margaret McMurdo P, Muir JA and Atkinson J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The appeal against conviction is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of armed robbery – where the case was circumstantial – where the robber had a long goatee – where the appellant had a long goatee before the robbery – where the appellant claimed he shaved off his goatee on the day of, but prior to, the robbery – where a pharmacy assistant followed the robber outside and, despite momentarily losing sight of him, purported to see him get into a vehicle, the number plate of which matched that of the appellant's vehicle – where the appellant was driving his vehicle in the general area of the pharmacy on the day and at about the time of the robbery – where no other person was using the appellant's vehicle that day – where the appellant contended that there were inconsistencies between descriptions of the robber and the appearance of the appellant – where the appellant contended that there was no DNA or fingerprint evidence, nor did the police find any clothes in his possession which matched the robber's clothing – where the trial judge, in her directions to the jury, explained the critical issue was whether the man who robbed the pharmacy was the appellant – whether

verdict unreasonable or cannot be supported having regard to the evidence

Criminal Code 1899 (Qld), s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13,
cited

COUNSEL: The appellant appeared on his own behalf
D C Boyle for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **MARGARET McMURDO P:** The appellant, Robert Wayne Clark, was convicted on 13 February 2013 of armed robbery of a pharmacist, Mr Thien Khoa Nguyen, at Camira on 1 June 2012. He has appealed against his conviction and is now self-represented. The sole ground of appeal is that the verdict was unsafe and unsatisfactory, that is, under s 668E(1) *Criminal Code* 1899 (Qld), it is unreasonable or cannot be supported having regard to the evidence.
- [2] A consideration of that ground requires this Court to review the whole of the evidence at trial and to determine whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *M v The Queen*.¹

The evidence at trial

- [3] Mr Nguyen gave the following evidence. He was working at a Camira pharmacy on 1 June 2012 when, shortly after 1.30 pm, the pharmacy assistant, Ms Zoe Cox, asked a customer if she could help him. The customer mumbled, "I want some morphine".² Mr Nguyen and Ms Cox had trouble hearing him and asked him to speak up. He repeated, "I want some morphine".³ They were still having trouble understanding him and he was becoming frustrated. He pulled a knife from his pants and said, "I want some morphine and money now."⁴ Ms Cox stepped back. Mr Nguyen said that he did not have any morphine. The man said, "well, give me some money."⁵ Mr Nguyen slowly opened the till, playing for time. He noticed that the man had a moustache and a greying goatee coming down to a point two or three centimetres below the edge of his chin. He was wearing a blackish-green hoodie, pale blue jeans and white sneakers. He had fair skin and his face was slim; quite narrow. His eyes seemed a bit glassy but Mr Nguyen could not recall their colour. He did not seem "really with it."⁶ Another pharmacist, Ms Vicki Law, was also present, but Mr Nguyen was unable to attract her attention. Mr Nguyen counted out some \$5 notes. The robber became agitated and said: "No, I want the bigger money."⁷ He came around to the till. Mr Nguyen grabbed some \$50 notes

¹ (1994) 181 CLR 487, 493, 495.

² T1-12.48.

³ T1-12.51-52.

⁴ T1-12.56.

⁵ T1-13.3.

⁶ T1-13.28.

⁷ T1-13.56.

which the robber snatched from his hand and left. By this time Ms Cox was on the phone, apparently seeking police assistance. Mr Nguyen ran around the counter and followed the robber out of the store to the middle of the car park. Ms Cox and Ms Law went out to the road. He last saw the robber inside the store.

- [4] As Mr Nguyen gave his evidence he related it to a DVD recording from the pharmacy security camera.⁸ I have watched it several times. It depicted the robber wearing blue jeans and a grey-green hoodie with the hood up over his head so that it was impossible to clearly see his face. He seemed of average to solid build and had a goatee coming to a distinctive point about 10 cm below his chin.
- [5] In cross-examination, he agreed that he had originally described the robber's goatee and moustache as "whitish grey".⁹
- [6] Ms Cox also gave evidence by reference to the security camera footage.¹⁰ She described the robber as unable to speak very coherently or clearly. She asked him if he had a prescription for morphine, explaining it was a prescription item. He responded that he did not have a prescription and he did not have any money, so he was also asking for money. He spoke quietly and was quite calm but also "a little bit sort of anxious".¹¹ When she explained that they could not give him any money, he showed the handle of a knife. Later, she saw it had a black handle and a serrated blade. It was 30 cm long including the handle, like an over-sized steak knife. Mr Nguyen said: "We're not really sure what it is that you're asking. Think that you're asking for money."¹² Mr Nguyen opened the till and offered two \$5 notes. The robber said, "I don't want the small stuff, I want the big stuff".¹³
- [7] His face was partially covered but she could see that his eyes were quite red and irritated; she thought he was suffering from an eye condition. His bulky jacket made him look of fairly large build but she thought he "was of sort of a slim, medium build... His face was – like sort of long with a very lengthy thick goatee... it sort of came down to a point... it wasn't like a square cut, it sort of was moulded".¹⁴ She demonstrated its length. Ms Cox walked over to Ms Law to call the police. She could not hear any further conversation between Mr Nguyen and the robber.
- [8] She followed the robber out of the pharmacy whilst she was speaking on the phone to police. Ms Law was a few metres away. She saw him walk very quickly across the car park to a bright blue four-door sedan parked down a driveway near the grassed area depicted in the photographs tendered as exs 6, 7 and 8. She could clearly read the registration. He got in the driver's side. No-one else was in the car and he drove off along Old Logan Road towards Springfield. She could not remember if it was a Ford or a Commodore but it was in that size range and no smaller than a Camry. She was relaying everything she saw to the police on the phone. She called out to Ms Law to get a pen and she gave Ms Law the number plate of the blue sedan: 272 MEX.

⁸ Ex 1.
⁹ T1-16.7.
¹⁰ Ex 1.
¹¹ T1-19.1-2.
¹² T1-19.16-18.
¹³ T1-19.19-20.
¹⁴ T1-19.45 – T1-20.3.

- [9] In cross-examination, she stated that the robber's goatee was about 10 cm in length. She lost sight of the robber for about 10 seconds as he left the pharmacy. Mr Nguyen was the first to follow the robber out of the store into the car park. She caught sight of him again before he reached the treed area. When she came out of the pharmacy he was within the treed area. She stated that the garden area was not so thick that "it distorts your vision" and maintained she was still able to see through the trees. She agreed that she rang police on 000 and was giving them a description of the robber.
- [10] Ms Vicki Law gave evidence by telephone. She was working in the Camira pharmacy in the dispensary behind the counter on 1 June 2012 undertaking an assessment for the Pharmacy Guild of Australia. She saw the robber walk into the shop but did not take much notice, thinking he was a customer. Mr Nguyen called out to her and she looked up but again she did not take much notice. When Mr Nguyen called out again she looked up and heard the robber say something like, "give the money quick, be quick."¹⁵ She could only see the top part of him. He was wearing a grey-green coloured hoodie. She could not see his face but she could see his goatee poking out from the hoodie. Mr Nguyen gave him some money and he left. Mr Nguyen, Ms Cox and Ms Law followed him into the car park. She stopped in the car park while Ms Cox followed him towards his car. She could not say how many cars were parked in the vicinity but she did not notice any other cars moving or any pedestrians in the area. She did not see the robber after he left the pharmacy. Ms Cox called out the number plate as 272 MEX. Ms Law wrote this on her hand. She later showed her hand with the number plate written on it to a detective.
- [11] In cross-examination, she agreed she was not taking a great deal of notice of the robber when he first walked into the pharmacy. She thought he was about the same height or a little bit taller than Mr Nguyen, about 5 foot 4 inches, and of medium build. She agreed he was wearing a mid-grey, bordering on green-coloured, hoodie. She did not notice what else he was wearing. She described him as having a fairly prominent grey goatee sticking out from under the hoodie. She could not honestly estimate its length. She agreed that she possibly lost sight of the robber both inside and outside the pharmacy. She did not see him get into a car.
- [12] Ms Cox was later recalled and further cross-examined. She described the robber as wearing a dark olive green hoodie. Defence counsel put to her that she told police the man was wearing a blue hoodie. She responded, "I'm not sure. Unless it was a dark blue – blue-green. I – I don't know."¹⁶ The only car parked on the street was the one the robber got into. There were no other people in the vicinity of that car.
- [13] Ms Tania Ross gave evidence that the appellant is her step-son. She had known him for about 13 years; he lived with her from time to time and was living with her on 1 June 2012. She was "pretty sure"¹⁷ she saw him at around 11.30 am near her home in Warrill View about 20 km from Ipswich. He was in a blue Chrysler Neon two-door sedan, registration 272 MEX.
- [14] The photographs tendered as exs 9 and 10 were of the car (in fact, they depicted a four-door car). The car belonged to Ms Ross's daughter, Tameka Piggott, and was usually kept at Ms Ross's home. They all had access to the vehicle and the keys were left on a hook in the kitchen. In June 2012, the appellant had short hair and

¹⁵ T1-57.58 – T1-58.1.

¹⁶ T1-64.40-41.

¹⁷ T1-26.46.

a goatee. She demonstrated its length. In cross-examination, she described the goatee as brown in colour and about four to six inches in length.

- [15] Police officer Jeffery O'Reilly was in charge of the investigation. When he attended the pharmacy, Ms Law showed him her hand on which she had written the registration 272 MEX. As a result of his investigations, he later went to the appellant's address and spoke with Ms Ross. On 4 June 2012, the appellant telephoned and arranged to meet at his residence at Warrill View at about 4.30 pm.
- [16] He recorded that conversation which was later transferred to an audio disk.¹⁸ After warning the appellant of his right to remain silent and that he could contact a solicitor of his choice, he explained they were investigating a robbery at the Camira pharmacy. The appellant said he knew where it was because his doctor was there. The police officer outlined how the pharmacy was robbed and that Ms Ross had said that the appellant had gone out on the previous Friday about 12.30 pm. The appellant said it would have been later. He was stuck in traffic on the M1 at Jacobs Well at about 1.00 pm or 1.30 pm and surveillance footage of the M1 would confirm this. He had been away for about three days staying at Jacobs Well on the beach. The police officer asked if he left on Friday morning or at lunchtime, to which the appellant gave a non-committal answer. He stated that no-one else had been in or using his car since Friday. The police officer asked who was the other person with him. He responded that he had somebody else driving when he was at Jacobs Well but before he got there no-one else was driving his car. He denied any involvement in the pharmacy robbery.
- [17] The police officer explained that a woman at the scene wrote down the registration of the robber's vehicle, 272 MEX, on her hand. This vehicle was detected going through the Loganlea toll point eastbound on 1 June at 2.40 pm. A Google map of south-east Queensland was tendered.¹⁹ The area of Ms Ross's home at Warrill View was marked "A", the Camira area where the pharmacy was located as "B", the Loganlea area as "C" and the Jacobs Well area as "D". The route from Ms Ross's home at Warrill View to Jacobs Well via the pharmacy and Loganlea was 116 kilometres, about one hour and 35 minutes travelling time.
- [18] Police officer O'Reilly arrested the appellant who was later photographed at the watch house. The photograph was tendered.²⁰ It depicts the appellant with blue/green/grey eyes, fair skin, very short hair with a receding hairline and a neat trimmed moustache and neat, close-cropped beard without a point or any noticeable length below the chin line. He had no eye infection. The beard was light brown in colour, liberally sprinkled with grey.
- [19] In cross-examination, police officer O'Reilly agreed it was raining on 1 June 2012. There was no fingerprint evidence. He did not locate any clothing or shoes in the possession of the appellant matching the description of that worn by the robber. He did not check to see if there were any steak knives of the kind used in the robbery at the appellant's residence or in his possession. The distance between point "A" (the appellant's home) and point "C" (Jacobs Well) on the map was 52.5 kilometres and driving between those points at the speed limit would take approximately

¹⁸ Ex 11.

¹⁹ Ex 12.

²⁰ Ex 13.

41 minutes. The distance between point "B" (the pharmacy) and point "C" was 28.9 kilometres which would take about 24 minutes travelling at the speed limit.

[20] In re-examination, police officer O'Reilly stated that he recalled on the day of the robbery there was a major traffic accident on the M1 which caused delays in both directions between points "B" and "C".

[21] Over the lunchtime break on the first day of the trial, the jury formulated three questions:

"Question one, re the witness attendant, how many cars were parked in the street near the offender's car? Question two, when the attendant saw the offender get into his car how many people were there or nearby? And question three, if there were other people were the others dressed in identical clothes?"²¹

[22] In the absence of the jury, the prosecutor explained why some police notes recorded the number plate 277 MEX. The car registered as 272 MEX is recorded by Queensland Transport (QT) as a white car. It was subsequently spray painted blue but that was not reported to QT. When the robbery was reported and the number plate given to police checked against QT records, it did come up as a white car, not a blue car. Police found that the vehicle registered as 277 MEX was a blue sedan. Police subsequently realised that the car registered as 272 MEX was originally white but had been painted blue so that there was no longer any reason to query the original reported registration of the vehicle. As a result, police officer O'Reilly was recalled.

[23] In further cross-examination, he agreed that Ms Cox was recorded as telling the 000 operator at 1.48 pm that the suspect was a Caucasian male with a goatee, 180 cm tall, of solid build wearing a blue hoodie. The job card also recorded "INF confirms rego possibly 272 MEX or 277 MEX, a blue sedan". Police officer O'Reilly confirmed that the vehicle with the registration 277 MEX was a blue Holden Commodore and the vehicle registration 272 MEX was recorded as a white Chrysler, not a blue Chrysler.

[24] In further re-examination, he stated that subsequent enquiries revealed that the Chrysler with the registration 272 MEX was no longer white but blue, although QT had not been informed of the colour change. If a vehicle owner repainted a vehicle and continued to pay registration, QT recorded the vehicle's original colour.

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

The judge's directions to the jury

[26] The trial judge, in her directions to the jury, explained that the critical issue was whether the man who robbed the pharmacy at about 1.30 pm on Friday, 1 June 2012 was the appellant. Through his not guilty plea and his statements to police officer O'Reilly, the appellant said that he was not the robber. The questions the jury had to determine were whether the person Ms Cox saw get into the blue car was the same person who robbed the pharmacy. Crucial to this was the registration of the car and whether it was the same car that the appellant was driving on the day of the robbery which police found three days later at Warrill View. The ultimate question was

²¹ T1-43.7-12 (errors in original).

whether the jury could be satisfied beyond reasonable doubt that the appellant was the person who robbed the pharmacy. The case was a circumstantial one. If there was a reasonable possibility consistent with innocence that it was not the appellant who was the robber then they must find him not guilty.

- [27] Her Honour explained that the defence emphasised that the appellant's face was not long yet Ms Cox described the robber's face as long. The prosecution also emphasised that Ms Cox recorded the number plate of the car into which the robber got as a bright blue sedan with the registration 272 MEX. The appellant was in possession of a bright blue sedan with that registration at the time of the robbery. The defence contended that, as there was confusion about whether the registration was 272 MEX or 277 MEX and, as registration 277 MEX belonged to a blue Holden Commodore, the jury could not be satisfied beyond reasonable doubt that the vehicle parked outside the pharmacy had the registration 272 MEX. The defence also emphasised that there was a discrepancy between the witnesses as to the colour of the robber's hoodie. No clothing matching the description of that worn by the robber and no knife was found by police in the appellant's possession. No fingerprints or other DNA evidence linked him to the crime. The defence case was that they would be left in reasonable doubt about the accuracy of Ms Cox's evidence and that they could not be satisfied the appellant was the robber. There were significant differences in the description of the robber's facial features when compared to the appellant's. He gave police officer O'Reilly an innocent explanation as to why he was driving from Warrill View through Loganlea that day. At the very least, the jury would be left in doubt about his guilt.
- [28] The prosecution emphasised that the vehicle 272 MEX went through the Loganlea toll point eastbound on Friday, 1 June at 2.40 pm. The appellant said that he was travelling to Jacobs Well. He could have committed the offence on the way. The appellant told police that no-one else was driving his vehicle that day and that he was stuck in a traffic jam on the motorway that afternoon. Police officer O'Reilly's investigations confirmed there was a major traffic accident on the M1 banking up traffic that afternoon. The prosecution case was that the jury would be satisfied beyond reasonable doubt that the vehicle Ms Cox saw the robber get into was the appellant's vehicle and that the appellant was the robber.
- [29] The judge pointed out differences between the descriptions of the robber's goatee and the appellant's beard. Her Honour highlighted to the jury that the appellant was not known to Ms Cox and there was a gap of at least 10 seconds when she lost sight of the robber. Ms Cox said that she was sure the robber and the person she was following and saw get into the car was the same person. Her Honour warned the jury of the special need for caution before convicting someone relying on the correctness of that identification because honest witnesses could be mistaken and a mistaken witness may be convincing. The judge highlighted potential weaknesses in Ms Cox's evidence, asked the jury to consider those matters and to treat her evidence of identification with care. They should be cautious before concluding that she was not only honest but accurate in her evidence.
- [30] The jury ultimately retired to consider its verdict at 11.52 am and returned with its guilty verdict at 1.56 pm.

The appellant's contentions

- [31] The sole ground of appeal was that the jury verdict is unsafe and unsatisfactory. In his written and oral submissions, he referred to the police interview, contending that

whilst he was questioned he was highly under the influence of morphine and methadone and was continually interrupted and belittled. He emphasised that the police did not find any clothing in his possession which matched the robber's. There was no DNA evidence or fingerprint evidence linking him with the offence. The descriptions of the robber by the eyewitnesses did not match him. He emphasised that he had pale blue eyes and no eye condition. If he had been the robber, the eyewitnesses would have noticed his buck teeth. The eyewitnesses lost sight of the robber so there could be no certainty that the person Ms Cox saw getting into the car was in fact the robber. Eyewitnesses described his face as long and slim when he has a short, round face. The robber's getaway vehicle could well have been the blue Holden Commodore 277 MEX and not his car.

Conclusion

- [32] In determining whether the conviction is unsafe and unsatisfactory, that is, that it is "unreasonable or cannot be supported having regard to the evidence" in terms of s 668E(1) *Criminal Code* 1899 (Qld), this Court must consider whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. See *M v The Queen*²² and *SKA v The Queen*.²³
- [33] The appellant complains about the fairness of his interview with police although it was not the subject of any discrete ground of appeal. The police originally interviewed the appellant in respect of two offences of armed robbery and the appellant was jointly charged in respect of both. At a pre-trial hearing on 16 November 2012, the trial judge ordered that the charges be severed and the prosecution elected to proceed with this count first. The judge determined that the interview was admissible, noting that police warned him of his full rights; he did not at any stage ask for a lawyer and was happy to converse with the police officers. Although the judge found there was not strict compliance with the *Police Powers and Responsibilities Act 2000* (Qld) in respect of an earlier telephone interview, the later tape-recorded interview did comply.
- [34] The judge ruled that both interviews were admissible but at this trial, the prosecution relied only on an edited version of the later tape-recorded interview which excluded all reference to the other robbery. I have listened to the interview. Although it is sometimes hard to hear the appellant who spoke much more softly than the police, he answered the questions responsively and appeared to be aware of his rights. He asserted he was not involved in the offence. It did not appear he was noticeably under the influence of drugs or that he was being overborne by the police. The police were forthright, persistent and assertive but they did not continually interrupt and belittle him. He has not demonstrated that the interview was wrongly admitted in evidence.
- [35] The weaknesses in the prosecution case upon which the appellant relied were fully canvassed at trial. The judge explained the real issues in the case to the jury and gave fair and relevant directions. As the judge explained, there was no doubt that Mr Nguyen was the victim of an armed robbery at the Camira pharmacy at about 1.30 pm on 1 June 2012. The only issue was whether the appellant was the robber. The photograph of him taken three days later on 4 June 2012 shows him with a neatly clipped brown-grey beard and moustache, not a goatee. The DVD footage

²² (1994) 181 CLR 487, 493-495.

²³ (2011) 243 CLR 400, [11].

of the robbery does not clearly depict the robber's face but it does show that he had a long goatee and was wearing a grey-green hoodie. The appellant's beard was more brown than grey, but it was certainly partially grey. There were discrepancies between the eyewitnesses' descriptions of the robber and the appearance of the appellant three days later. His stepmother gave evidence that he had a four to six inch goatee beard in June 2012. The jury were well-entitled to reject his evidence that he shaved it off only on the morning of the robbery.

- [36] The critical evidence is that when Ms Cox followed the robber out of the pharmacy, although she lost sight of him for about 10 seconds, there were no other people walking around the car park. She saw the robber enter a blue sedan and had a clear view of that car's number plate which she called out to Ms Law. There was no reason to think this person may have been someone other than the robber. Ms Law wrote on her hand the number plate 272 MEX. This was the number plate of the car being driven by the appellant at 2.40 pm that day at Loganlea. The Camira pharmacy was between the appellant's home and Loganlea. He also told police that nobody else was in possession of his vehicle at the time of the robbery.
- [37] It is true there was some initial confusion in the investigation because the number plate 272 MEX was recorded by QT as belonging to a white vehicle. Police found there was a blue Commodore 277 MEX and for a time made enquiries about this. It was explained in evidence, however, the vehicle registered as 272 MEX was originally white but had been repainted blue without its new colour being recorded by QT. The police investigation of the blue Commodore 277 MEX was therefore a non-issue as Ms Cox called out the number plate of the car into which the robber got as 272 MEX and that was what Ms Law wrote on her hand.
- [38] It is true that there was no DNA or fingerprint evidence linking the appellant or anyone else with the robbery and that the appellant, three days later, was not found in possession of clothes of the kind worn by the robber or with a like weapon. But that does not mean he cannot be convicted if the evidence is otherwise sufficient. The critical evidence set out in [36] was compelling.
- [39] The colour of the appellant's eyes, his alleged buck teeth (which are not obvious from his watch house photo) and the fact that the watch house photo three days later did not show he had an eye infection did not require the jury to reject Ms Cox's evidence that the robber entered the blue sedan with the registration 272 MEX. The watch house photograph depicts a face which could be described as long and its length would be accentuated by a goatee.
- [40] The appellant had a goatee in June 2012 and, although there were discrepancies between the eyewitness descriptions and his appearance, he was of a similar height and build as the robber. The pharmacy was between his home which he left at about 11.30 am and Loganlea where he was at 2.40 pm. There was major traffic congestion on the inter-connecting M1. Ms Cox saw the robber get into a blue sedan and called out the number plate 272 MEX to Ms Law who wrote it on her hand. This was the appellant's car. No one else was using his car at the time of the robbery.
- [41] After reviewing the whole of the evidence, I am satisfied that the jury were entitled to conclude beyond reasonable doubt that the only rational inference open was that the appellant robbed the Camira pharmacy shortly after 1.30 pm on 1 June 2012.
- [42] For these reasons, I would dismiss the appeal against conviction.

- [43] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by the President.
- [44] **ATKINSON J:** I agree that the appeal should be dismissed for the reasons given by the President.