SUPREME COURT OF QUEENSLAND

CITATION:	*R v Povlakic* [2020] QCA 213
PARTIES:	**R** **v** **POVLAKIC, Avdulah** (appellant)
FILE NO/S:	CA No 247 of 2019 DC No 1440 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane- Date of Conviction: 13 September 2019 (Lynch QC DCJ)
DELIVERED ON:	2 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2020
JUDGES:	Fraser and Morrison JJA and Jackson J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of two counts of kidnapping for ransom and two counts of robbery in company while armed or pretending to be armed with a dangerous weapon, one count involving personal violence – where the issue at trial was one of identity, namely whether it was proved beyond reasonable doubt that the appellant was the co-offender – where the appellant submits that the verdict is unreasonable as there were inconsistencies, discrepancies or inadequacies in the evidence – whether the jury should have entertained a reasonable doubt as to the appellant's guilt by reason of the inconsistencies, discrepancies or inadequacies of the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where the appellant submitted that there were three unsatisfactory aspects of the prosecutor's address to the jury that amounted to unfairness – where the appellant did not request any direction from the trial judge regarding the three aspects of the prosecutor's address – whether the prosecutor's address was unfair or encouraged the jury to follow an impermissible path of reasoning

Criminal Code (Qld), s 354A(1)(a)(2), s 409, s 411, s 668E(1)

Pell v The Queen (2020) 94 ALJR 394; (2020) 376 ALR 478; [2020] HCA 12, applied
R v Gathercole [2016] QCA 336, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: K M Hillard for the appellant
J A Wooldridge for the respondent

SOLICITORS: Anderson Fredericks Turner for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Jackson J and the order proposed by his Honour.

[2] **MORRISON JA:** I have read the reasons of Jackson J and agree with those reasons and the order his Honour proposes.

[3] **JACKSON J:** This is an appeal or application for leave to appeal against conviction.

[4] On 13 September 2019, after a five day trial, the appellant was convicted of four offences, namely:

> Count 1 - on 8 August 2018, the appellant and Stefan Opacic kidnapped MQ for ransom;[1]
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> Count 2 - on 8 August 2018, the appellant and Stefan Opacic kidnapped RT for ransom;[2]
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> Count 3 - on 8 August 2018, the appellant and Stefan Opacic robbed MQ in company and were armed or pretended to be armed with a dangerous weapon and used personal violence;[3]
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> Count 4 - On 8 August 2018, the appellant and Stefan Opacic robbed RT in company and were armed or pretended to be armed with a dangerous weapon.[4]

[5] The particular issue at the trial was one of identity, namely whether it was proved beyond reasonable doubt that it was the appellant who was the co-offender with Opacic. In describing the circumstances of the prosecution case I will refer to the person identified in evidence as the appellant as the co-offender.

[6] On the evening of 8 August 2018, the co-offender and Opacic first approached MQ, who was then a 16 year old school boy, in a car.[5] Opacic was driving.[6] MQ was forced

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1 *Criminal Code* (Qld), s 354A(1)(a)(2); AB 2/316 line 26.
2 *Criminal Code* (Qld), s 354A(1)(a)(2); AB 2/316 line 35.
3 *Criminal Code* (Qld), ss 409 and 411(1) and (2); AB 2/316 line 44.
4 *Criminal Code* (Qld), ss 409 and 411(1) and (2); AB 2/317 line 6.
5 AB 2/134 lines 13-33.
6 AB 2/134 line 42.

into the car by the co-offender showing him a hand gun.[7] He sat in the backseat on the driver's side with the co-offender also in the back seat on the passenger side.[8] The co-offender and Opacic demanded money.[9] MQ said he did not have any, but he had a friend who could help.[10] MQ called RT, aged 17, who was his school friend.[11]

[7] The trio in the car drove to RT's house. RT came outside, saw the gun and was told to get inside the car.[12] He did so.[13] From there, the group drove around to a number of destinations. Opacic and RT got out of the car and RT withdrew amounts of cash using his debit or credit card.[14] MQ remained in the car with the co-offender.[15] Eventually, after RT's bank account was exhausted, they drove to RT's house again and he was dropped off.[16]

[8] After that, whilst still in the car, the co-offender and Opacic obtained access to MQ's banking app on his phone, used it to transfer $1,000 to a third person's account,[17] attempted to use it to withdraw $500 cash from an ATM,[18]and finally used it to transfer $500 to RT's account.[19] The co-offender and Opacic then dropped MQ off at the Calamvale Hotel.[20]

[9] When he was dropped off at home, RT told his father what happened.[21] Shortly afterwards he received a telephone call from MQ about receiving an electronic funds transfer from MQ of an amount to be transferred on to the co-offender.[22] RT said to the co-offender that he would receive the money in a couple of days.[23] The co-offender said he expected to receive the money on the following day.[24] RT's mother contacted police that night or early the next morning.[25]

[10] Within minutes of being dropped off at the Calamvale Hotel, MQ also contacted police.[26] He was then picked up by police.

[11] MQ was interviewed by police early in the morning of 9 August 2018 (a video recording of that interview was tendered at the trial)[27] and then again on 10 August 2018 (a video recording of that interview was also tendered at the trial).[28] On both occasions, MQ gave information as to the identity of his kidnappers and robbers.

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7 AB 2/135 lines 1-30.
8 AB 2/135 25-38.
9 AB 2/136 lines 15-21.
10 AB 2/136 lines 15-21; AB 2/137 lines 12-14; 40-42.
11 AB 2/138 lines 7-9.
12 AB 2/194 lines 35-39.
13 AB 2/194 line 39.
14 AB 2/138 line 29; 2/139 line 3; 2/140 lines 16-17; 2/140 lines 43-44.
15 AB 2/139 lines 31-32.
16 AB 2/141 line 5.
17 AB 2/141 lines 12-43.
18 AB 2/142 lines 10-15; 2/143 lines 1-2.
19 AB 2/142 lines 25-45.
20 AB 2/143 lines 25-35.
21 AB 2/204 lines 1-2.
22 AB 2/204 lines 18-23; AB 2/230 lines 23-40.
23 AB 2/204 lines 25-28.
24 AB 2/204 line 28.
25 AB 2/204 lines 44-45.
26 AB 2/144 line 25.
27 Exhibit 2.
28 Exhibit 4.

[12] On the morning of 9 August 2018, he mentioned a name of the co-offender "Micky" and said to police "I can actually show you who this person is on Facebook".[29] He logged into Facebook and directed police to the profile for "Micky Povlakic",[30] which showed a photograph of the appellant.[31]

[13] On 10 August 2018, MQ identified the appellant on a photo board.[32]

[14] On 9 August 2018, RT was also interviewed.

[15] On the second day of the trial, MQ gave evidence orally and was cross examined at length, particularly as to his evidence about two occasions on which he said that he had met with the appellant before 8 August 2018, his identification of the appellant to police and the circumstances of the incident. The cross-examination was informed by reference to the previous accounts of the events he had given to police and at the committal hearing.

[16] As stated above, MQ did not identify the appellant by his correct name, but as someone he knew as "Micky".[33] There was no challenge that MQ had been introduced to a "Micky" on one prior occasion at a nightclub. The suggestion made to MQ in cross-examination was that the person to whom he had been previously introduced to as "Micky" was not the appellant.[34] MQ rejected the suggestion.[35]

[17] MQ also rejected the suggestion that he had gone onto Facebook and seen photographs of the appellant and thereby convinced himself incorrectly that it was the appellant who was the co-offender.[36]

[18] MQ was cross-examined at length about transactions on his phone to suggest that he was dealing in drugs, as going to his credibility. He rejected that suggestion and said that he was selling sneakers.[37]

[19] RT also gave evidence. Broadly speaking, his evidence supported MQ's evidence. Again, the evidence in chief was detailed. The evidence included contemporaneous closed circuit photographs or images of RT and Opacic at one of the stores from which RT withdrew money.

[20] RT was also extensively cross-examined as to his recollection of the details of the incident. His evidence included that he recalled seeing the appellant at the committal hearing and saying that he appellant was the co-offender, "100 per cent".[38] He gave evidence as to seeing the co-offender's tattoos on the night in question.[39]

[21] He also gave evidence that he and MQ sold shoes together.[40]

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29 AB 2/247, lines 21-23.
30 AB 2/247, lines 24-26.
31 Exhibit 8; AB 2/175 lines 25-34.
32 AB 2/257 lines 1-42; Exhibit 5.
33 AB 2/133 lines 8-12.
34 AB 2/192 lines 22-24.
35 AB 2/192 line 24.
36 AB 2/175 lines 40-45.
37 AB 2/187 lines 31-46; 2/188 lines 1-4.
38 AB 2/211 lines 32-36.
39 AB 2/210 lines 22-23.
40 AB 2/214 lines 43-46; 2/215 lines 1-8.

[22] The trial judge directed the jury to ignore RT's identification of the appellant at the committal hearing.[41] Accordingly, the prosecution case of identification largely turned on MQ's evidence that the co-offender was the appellant, who he knew as "Micky". However there was some other circumstantial evidence supporting the inference that the appellant was the co-offender, including finger prints of the appellant on a panel of the car that was used in the kidnapping,[42] that MQ had the appellant's phone number saved in his phone contacts under the letter "M",[43] and evidence of tattoos on the co-offender's arms.

[23] Necessarily, the jury's verdicts mean that they were satisfied beyond reasonable doubt that the appellant was the co-offender in respect of each of the offences. Both at trial and on appeal, the appellant submitted that there were inconsistencies, discrepancies or inadequacies in the evidence that mean that the jury should have entertained a reasonable doubt about whether that was so. It is convenient to deal with the relevant subject matters seriatim, while recognising that it may be their combined effect that has to be assessed.

Facebook identification

[24] The appellant submitted that the way Facebook was used and viewed by MQ on 9 August 2018 created a risk of displacement of his later photo board identification on 10 August 2018. The detailed submissions made in support of this point focussed on two factors. The first was that the Facebook profile page photograph[44] showed that the appellant had an ear piecing, whereas MQ had not mentioned a piercing at his initial interview with police.[45] But whether or not MQ failed to recall an ear piercing was of no great significance in the process by which he identified the appellant. It was MQ who volunteered to police at or immediately after his first interview only hours after the incident that he knew the co-offender and MQ who found the appellant's Facebook profile page and showed it to police. It may be accepted that the photo board identification followed a day after the Facebook identification by MQ of the appellant. But it also should not be forgotten that it was not disputed that MQ had met the appellant on one occasion prior to 8 August 2018.

Tainting by the Facebook identification

[25] The appellant submitted that MQ's evidence about the appellant's tattoos was vague, referring to them being on the appellant's arms and neck, chest and a shield somewhere.[46]

[26] The appellant submits that MQ did not refer to a number of more or less distinctive features of the appellant's tattoos depicted in photographs tendered in evidence. That is true, but not all of the photographs of the appellant's tattoos were shown to MQ and not all the features shown by those photographs were pointed out to him.

Introduction by Opacic

[27] MQ's evidence at the trial was that he met "Micky" at an apartment and then at a nightclub,[47] whereas at the committal hearing he had only referred to meeting the appellant at the nightclub.[48] However, at one of the interviews with police, on

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41 AB 1/76 lines 7-12.
42 AB 2/236 – 238.
43 AB 134 lines 4-12.
44 Ex 8.
45 Ex 4.
46 AB 2/155 line 30 – AB 2/156 line 45.
47 AB 2/166 lines 5-50.
48 AB 2/170 line 10 – AB 2/171 line 37.

9 August 2018 or 10 August 2018, he also said that he met the appellant before the incident at the apartment and the nightclub[49] and he also said that they met in both places in the statement he signed for police on 9 August 2018.[50]

[28] This inconsistency was adequately explored in MQ's evidence. It was for the jury to decide what they made of it.

Other particular inconsistencies

[29] The appellant relies on the absence of any evidence from MQ or RT that the co-offender had a wrist injury, whereas the appellant had such an injury when arrested on 10 August 2018.[51]

[30] The appellant also relies on RT's and RT's father's evidence that the co-offender had a "European"[52] or "Serbian" accent that was "noticeable"[53] and MQ's evidence that the co-offender had a "noticeable" accent,[54] whereas there was evidence from a police officer that the appellant had a "very faint" accent.[55]

[31] The appellant also relies on the fact that the appellant's palm and fingerprints were not on the door of the car next to where the co-offender was identified as sitting in the car by MQ and RT.[56]

[32] These were matters for the jury to consider in relation to whether there were any inconsistencies casting doubt on whether the appellant was the co-offender.

Phone service location evidence

[33] In addition to the points already mentioned, the appellant relied heavily at trial and also on appeal on suggested inconsistencies between evidence as to the locations of the events of the night of the kidnapping and robbery and the location of the appellant's mobile phone at those times. The appellant had a mobile telephone service number ending with the digits "032" ("#032 service"), about which evidence was led at the trial. In particular the evidence at trial[57] showed that the #032 service was connected to a particular mobile phone tower at the following times and locations:

Time (pm) on 8 August 2018	**Tower suburb location**
8:15	Coopers Plains
8:56	Coopers Plains
10:47	Coopers Plains

[34] The evidence was further that a mobile phone service may connect to a tower within a radius of about 10 kilometres.[58] The appellant submitted at trial that these entries

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49 AB 2/158 lines 42-45.
50 AB 2/166 lines 5-50.
51 AB 2/281 lines 25-36.
52 AB 2/213 line 17; AB 2/AB 232 line 45.
53 AB 2/233 line 8.
54 AB 2/174 lines 25-40.
55 AB 282 line 29.
56 AB 2/236 – AB 2/238.
57 Ex 41; AB 2/337-339.
58 AB 2/298 line 25 – AB 2/300 line 40.

were inconsistent with the appellant being at the location of the events of the kidnapping and robbery on 8 August 2018.[59] The prosecution submitted that the defendant could have had another phone on 8 August 2018.[60]

[35] If the assumption is made that the appellant was in possession of the #032 service phone and it was connecting to telephone towers during the events of the kidnapping and robbery, this evidence supported a significant inconsistency between the appellant's alleged locations according to the evidence of MQ and the location of the #032 service and, therefore, operated in the appellant's favour.

[36] However, by the time that the appeal was argued, it had become apparent that there was a mistake in the evidence as to the connection to the Coopers Plains tower location of the #032 service. In fact, those entries were for the connection to the Coopers Plains tower of a different telephone service, not the #032 service and not belonging to the appellant.[61] The error was one made in the appellant's favour at the trial. It did not operate to create a miscarriage of justice in the appellant's convictions.

General inconsistencies

[37] The appellant submitted that there were other inconsistencies between MQ's evidence and his earlier accounts, including in respect of the time of day of the events commencing,[62] the details of what occurred when he first encountered the co-offender and Opacic[63] and his failure to mention in evidence in chief that the offenders had demanded $30,000.[64]

[38] The appellant submitted further that there were differences between MQ's evidence and RT's evidence as to events, including that the description of the gun and its use differed,[65] whether the name "Micky" was used in the car,[66] whether MQ was repeatedly slapped[67] and that MQ's denial of involvement in drugs was questionable.

[39] These were matters for the jury to consider in deciding whether or not to accept MQ's evidence and whether they were satisfied beyond reasonable doubt as to the appellant being the co-offender who committed the alleged offences.

Unreasonable verdict ground

[40] The summary of the evidence set out above is sufficient to deal with the ground of appeal that the verdicts of the jury were unreasonable.[68] Proceeding on the assumption that the jury considered that MQ was credible and reliable as to the critical matters to sustain the convictions, the appellant sought to show, in what may be described fairly as minute detail, that the jury ought nonetheless to have entertained a reasonable doubt as to the appellant's guilt by reason of the inconsistencies,

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59 AB 1/52 lines 10-35.
60 AB 1/36 lines 20-35.
61 Affidavit of Peter Wagels sworn 2 September 2020, paragraphs 3-8 and Exs A and D.
62 In the police interview in Ex 4 he said it was 8:30 pm whereas in evidence (AB 2/134 line 19) he said about 6 or 7pm, but accepted that the police interview time was right (AB 2/164 line 4).
63 AB 134 line 40 – AB 135 line 35; AB 2/161 lines 19-34.
64 AB 2 163 lines 5-25.
65 AB 2/164 lines 8-25; AB 2/196 line 14 and AB 2/196 lines 26-38.
66 AB 2/160 lines 20–29; AB 2/213 lines 33-46.
67 AB 2/139 line 45 – AB 2/140 line 3; AB 2/140 lines 5-10; AB 2/155 lines 23-28.
68 *Criminal Code* (Qld), s 668E(1).

discrepancies and inadequacies within MQ's evidence and between his evidence and other evidence led at the trial.[69]

[41] In my view, there was nothing about the evidence of either MQ or RT or any of the other evidence that made it unreasonable for the jury to find that it was the appellant who was the co-offender in the backseat of the car with a gun who kidnapped and robbed them. On the evidence that was not challenged, the facts were that the complainants spent several hours in the car with the person who was the co-offender; MQ identified the appellant as the co-offender within a relatively short period after the time of the offences by the Facebook profile page; he had met the appellant previously; he had the appellant's telephone number in his phone; the appellant knew Opacic; and the appellant's finger and palm prints were on a door of the car used in the kidnapping and robbery.

[42] Having considered the evidence independently as a whole, in assessing the reasonableness of the verdicts,[70] in my view, there is not a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the required standard of proof.[71]

Prosecutor's submission ground

[43] In some circumstances, where a prosecutor's address is unfair or encourages the jury to follow an impermissible path of reasoning, it may follow that a defendant has lost a chance of being acquitted that constitutes a miscarriage of justice.[72] The appellant submits that there were three unsatisfactory aspects of the prosecutor's address to the jury that amounted to unfairness in the present case.

[44] First, the appellant submits that the prosecutor invited the jury to disregard the tower suburb location evidence discussed above.

[45] The prosecutor submitted to the jury that "[c]ell towers don't tell you where a person is. The best [they] can do is tell you where a phone is within, say, 10 ks. Someone can put a SIM card from one phone to another. The evidence doesn't help or hinder you in deciding the defendant's ID. All it would do is take for the defendant is to leave his phone at home or give it to someone else… There is evidence that the defendant had a phone on him on the night. That's not to say he had this phone with him on the night."[73]

[46] In my view, there was nothing unfair about that submission by the prosecutor. The appellant did not request any direction from the trial judge about it.

[47] Second, in similar vein, the appellant identifies the prosecutor's submission that: "[t]here's evidence that [the co-offender] was messaging on Facebook Messenger. There's evidence that there was the utilization of Wickr… Those messages wouldn't show up on those phone records."[74] The appellant orally submitted on the appeal that there was no evidence that those messages wouldn't show up on those phone records.

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69 *Pell v The Queen* (2020) 376 ALR 478, 486 [38]-[39].
70 *SKA v The Queen* (2011) 243 CLR 400, 405 [11]-[12].
71 *Pell v The Queen* (2020) 376 ALR 478, 480 [9].
72 *R v Gathercole* [2016] QCA 336, [49] and [52]-[56].
73 AB 1/36 lines 27-34.
74 AB 1/36 lines 41-43.

[48] In my view, it would have been more accurate for the prosecutor to submit that there was no evidence that messages on those platforms would show up on the phone records, but the difference was a small one in the circumstances. The appellant did not request any direction from the trial judge about it.

[49] Third, the appellant submits that the prosecutor submitted that MQ was reliable because he had correctly identified Opacic and given reliable and consistent accounts of where they went and what occurred. The appellant submits that the case against Opacic was corroborated by other independent evidence. And so it was. But that does not detract from the fact that MQ's evidence about matters (other than the appellant's identity) was reliable and consistent and that he had identified Opacic, whom he had met about five times previously, accurately, as one of the co-offenders.

[50] In my view, there was nothing unfair about that submission by the prosecutor. The appellant did not request any direction from the trial judge about it.

[51] Overall, in my view, there was no submission to the jury that invited them to reason in an impermissible manner. I am fortified in this conclusion by the circumstance that in a careful summing up the trial judge identified in substance all of the reasons advanced by the appellant both at the trial and on appeal as to why the jury should not be satisfied beyond reasonable doubt of the appellant's identity and guilt of the offences charged.[75]

Conclusion

[52] In my view, the appeal should be dismissed.

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75 AB 1/73 line 15 – AB 1/78 line 2.