SUPREME COURT OF QUEENSLAND

CITATION:	*R v Soong* [2021] QCA 53
PARTIES:	**R** **v** **SOONG, Anthony Yoon Sun** (appellant)
FILE NO/S:	CA No 43 of 2019 SC No 1223 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Southport – Date of Conviction: 5 February 2019 (Burns J)
DELIVERED ON:	26 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2020
JUDGES:	Sofronoff P and Morrison JA and Henry J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant appealed against a conviction of attempted murder – where defence counsel did not clearly establish the making of a prior inconsistent statement by the complainant – whether the course taken by the defence counsel at trial deprived the accused of a chance of acquittal which was fairly open – whether there was a miscarriage of justice *Browne v Dunn* (1893) 6 R 67 (HL), considered *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, cited
COUNSEL:	S C Holt QC, with R C Taylor, for the appellant D Nardone for the respondent
SOLICITORS:	Gatenby Criminal Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Henry J and with the order proposed.

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

[3] **HENRY J:** The appellant was seriously displeased by his former girlfriend taking up with another man, Josh Milani. After assaulting his girlfriend the appellant lured Mr Milani to meet him in a restaurant carpark. Mr Milani was driven there by his friend, Samuel Wallace. The appellant ambushed them on their arrival, firing four shots from a handgun at the driver's side of their car. One of the bullets penetrated the vehicle and the thigh of Mr Wallace, who the appellant mistakenly believed was Mr Milani. The appellant then drew nearer to the vehicle and "pistol whipped" Mr Wallace.

[4] A jury found the appellant guilty of attempted murder. The appellant appeals that decision.

[5] The sole ground of appeal relates to a course taken by defence counsel in not clearly establishing the making of a prior inconsistent statement by Mr Wallace relevant to Mr Wallace's evidence that the appellant tried and failed to fire a fifth shot at his head, immediately prior to pistol whipping him.

[6] It is necessary to say a little more about the background from which this ground of appeal arises in order to explain why the course taken by defence counsel is readily explained by forensic considerations and the appeal must fail.

Background

[7] The appellant was charged on indictment with:
Count 1 – burglary and common assault;
Count 2 – attempted murder;
alternatively
Count 3 – malicious act with intent; and
Count 4 – assault occasioning bodily harm whilst armed.

[8] All of the offences were alleged to have occurred on 6 December 2015 at the Gold Coast. Count 1 related to the appellant entering a dwelling in which his former girlfriend, Jhai Saric, was located and therein assaulting her and another man. Count 2 alleged the attempted murder of Mr Wallace. Count 3 alleged, in the alternative to count 2, the doing of grievous bodily harm to Mr Wallace with intent to do some grievous bodily harm. Count 4 alleged the assault occasioning bodily harm whilst armed of Mr Wallace, that being the pistol whipping. The appellant pleaded guilty to counts 1 and 4, and not guilty to count 2. In respect of count 3, he pleaded not guilty to doing grievous bodily harm with intent to do grievous bodily harm, but guilty to grievous bodily harm simpliciter, a plea which was not accepted by the prosecution in discharge of the indictment. This was the second trial of counts 2 and 3, a previous jury having failed to reach a verdict.

[9] The appellant's relationship with Ms Saric ended in November 2015. By 4 December 2015 Ms Saric was embarking upon a new relationship with Mr Milani. The appellant thereafter sent a variety of extremely threatening text messages to Ms Saric.

[10] At about midday on 6 December 2015 the appellant attended the unit where Ms Saric lived, striking at its windows and flyscreen and yelling for Ms Saric to come out or let him in. He eventually effected entry by smashing the door in. He was armed with a handgun. He proceeded to assault Ms Saric by pinning her on a

bed with his hand and knee. A neighbour, Mr McKenzie, entered, concerned by what he could hear. The appellant pointed the gun at him and Mr McKenzie fled.

[11] By this afternoon the appellant had already sought out Mr Milani's Facebook account and sent him a number of messages, including content such as:

> "I'm going to get you you cunt. Promise you that. You want to fuck Jhai? You fucking dog. Come meet me up, you fucking maggot."
>
> "You're a weak dog. I'm going to kill you, cunt."

[12] Mr Milani may have been unaware of some of those messages prior to the events of 6 December.

[13] It appears the appellant took Ms Saric, who did not give evidence, to another location and took a photograph of a gun pointed at her head. The appellant then telephoned Mr Milani, shouting that he wanted to meet up with him and kill him. This was shortly followed by another phone call to Mr Milani during which the appellant said he knew Mr Milani's brothers and family. Mr Milani could hear a female screaming in the background of the appellant's phone call to him. The appellant told him to look at a photograph he had sent to Mr Milani's phone. He did so and saw that it was a photograph of Ms Saric covering her face with a gun pointed at her. The appellant told Mr Milani to meet him at a Gold Coast restaurant known as Mike's Kitchen. Mr Milani's friends tried to dissuade him from going, but he was determined to go. His good friend Mr Wallace accompanied him, driving him in Mr Wallace's Jeep to the carpark area of the restaurant.

[14] On arrival at Mike's Kitchen, Mr Wallace parked the Jeep at the upper end of the carpark and soon thereafter Ms Saric's vehicle arrived.

[15] The appellant moved rapidly from that vehicle. He had a hooded jumper drawn around his head and was wielding a handgun. Mr Milani had alighted from Mr Wallace's vehicle, but as soon as he saw what was occurring he returned to the vehicle, telling Mr Wallace what he had seen. The appellant discharged four shots towards the driver's side of the vehicle.

[16] One shot impacted into the driver's door pillar. Another shot impacted into the driver's door under the handle. A third shot entered the driver's door, somewhat lower down, and a fourth shot entered the driver's side wheel arch. One of the shots to the door penetrated into Mr Wallace's thigh, occasioning what was admitted to be grievous bodily harm to him. The shots entered the vehicle at a variety of angles, raising the possibility, supported by some witness accounts, that there was movement by the appellant and Mr Wallace's vehicle during the discharge of the shots.

[17] At trial, the prosecution sought the inference that at least the shot which struck Mr Wallace in the thigh was fired in his direction, intending to kill him, apparently under the mistaken belief that Mr Wallace was Ms Saric's new love interest. The defence, on the other hand, contended for the inference that the appellant was only shooting in order to make the car stop and or at worst had some lesser intention than intention to kill.

[18] In support of its arguments to that effect, the defence relied upon the evidence of both Mr Wallace and Mr Milani, that after the four shots were fired the appellant drew nearer to the vehicle and struck Mr Wallace about the head with his handgun, saying, "Take this as a warning", before moving hurriedly away from them.

[19] Of that latter event, Mr Wallace testified that when the appellant moved closer to the vehicle, and before hitting him about the head with the handgun, the appellant actually held the gun towards Mr Wallace's head and pulled the trigger but there was a misfire, with no projectile being fired. Mr Milani did not testify to having seen any such thing.

[20] If the jury accepted there had been an unsuccessful attempt at a fifth shot, towards Mr Wallace's head, they could have more comfortably concluded that the appellant held the requisite intention to kill when he earlier fired the shot that struck Mr Wallace in the thigh. However, even if the jury did not accept that evidence, which was not supported by Mr Milani, it remained well open to the jury to conclude the appellant had held the requisite intention to kill in earlier firing the shot that struck Mr Wallace. The appellant had, after all, articulated an intention to kill, armed himself with a loaded handgun, approached the occupied vehicle rapidly and fired his gun four times towards the driver's side of the vehicle.

[21] When Mr Wallace was questioned by police about what occurred, later on the day of these events, he made no mention of the allegation that the gun had been held towards his head and misfired. The first time he is known to have mentioned this allegation was in a statement made to police about two weeks after the event. It was not expressly put to Mr Wallace in cross-examination that he failed to mention this allegation when he first gave his account to the police.

The nature of the ground of appeal

[22] It is that omission which attracts the sole ground of appeal now advanced, viz:

> "A miscarriage of justice occurred due to defence counsel's failure to put to the complainant that he did not tell the police the appellant had attempted to shoot him before he pistol whipped him, but the gun had misfired."

[23] In *TKWJ v The Queen*[1] Gaudron J summarised the test to be applied in consideration of such a ground as follows:

> "Where it is claimed that a miscarriage of justice was the result of a course taken at the trial, it is for the appellant to establish that the course was not the result of an informed and deliberate decision. This he or she will fail to do if the course taken is explicable on the basis that it could have resulted in a forensic advantage unless, in the circumstances, the advantage is slight in comparison with the disadvantage resulting from the course in question."[2]

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1 (2002) 212 CLR 124.

2 (2002) 212 CLR 124, 135. To generally similar effect see Gleeson CJ 128, McHugh J 150, Hayne J 158 (Gummow J agreed with Gaudron J and Hayne J).

[24] The rationale underlying that stringent test is that the assessment of whether there has been a miscarriage of justice usually involves consideration of whether the course complained of deprived the accused of a chance of acquittal which was fairly open.[3] The task of defending an accused invariably requires the making of tactical choices calculated at obtaining forensic advantage or avoiding forensic disadvantage. Such choices may result in the foreclosing of one otherwise open line of pursuit of a chance of acquittal because another, different line of pursuit of a chance of acquittal is preferred. In such a context the foreclosing of the forensically less preferred line will not ordinarily deprive the accused of a chance of acquittal which is fairly open.[4]

Consideration

[25] The forensic choice below involved how best to deal with Mr Wallace's allegation that the accused held the gun towards Mr Wallace's head and pulled the trigger without the gun then discharging ("the misfire allegation"). Specifically, the choice was whether to put to Mr Wallace the prior inconsistency that when he gave an account to police on the day he was shot he did not mention the misfire allegation.

[26] If it was intended to establish and address on the prior inconsistency as undermining Mr Wallace's reliability, the rule in *Browne v Dunn*[5] obliged the very experienced defence counsel to squarely put the prior inconsistency to Mr Wallace, to give him fair opportunity to comment on it. It was not so put. Had it been, Mr Wallace would inevitably have explained he was in shock when he spoke with police on the day in question and in re-examination have explained that he did mention the allegation to police two weeks later when they took his statement. This was known to be inevitable because that is what happened when the inconsistency was put at the first trial.[6] Such explanations would have carried the disadvantage for the defence that they seem reasonable and thus diminished the forensic impact of the inconsistency upon Mr Wallace's apparent reliability.

[27] At first blush the non-putting of the inconsistency may seem surprising, given the desirability of undermining the reliability of the misfire allegation. However, on closer analysis, it can be seen the omission was explicable as part of a strategy calculated at undermining the reliability of the misfire allegation indirectly and thus avoiding the disadvantageous consequence of complying with the rule in *Browne v Dunn*.[7]

[28] At the start of the trial, in an issues opening,[8] defence counsel reminded the jury of the Crown Prosecutor's opening of Mr Wallace's evidence about the misfire allegation and said:

> "[Y]ou will hear in due course that Mr Wallace was interviewed by police at about 5 pm that particular afternoon – so within an hour or so of the incident occurring. When describing what he remembers occurring to the police on that occasion, he indicated that there were shots fired towards the car, and he was hit, and the vehicle rolled forward for some period, and then the accused man walked up to the

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3 *TKWJ v The Queen* (2002) 212 CLR 124, 133.
4 *TKWJ v The Queen* (2002) 212 CLR 124, 134.
5 (1893) 6 R 67 (HL).
6 AR 580 L 1.
7 (1893) 6 R 67 (HL).
8 Per *R v Oulds* [2014] QCA 223.

> window and proceeded to pistol-whip him. During the direct interview with the police officers, he makes no specific mention of the gun being pointed at his head and then the misfire occurring."[9]

Defence counsel went on to open that Mr Milani did not witness any misfire.

[29] In the course of the ensuing trial, defence counsel went to great lengths to lead from both Mr Wallace and Mr Milani the factual information they had provided to police when first interviewed. The technique was so detailed as to carry the unstated inference that the array of information was the complete array of information given by each witness when first interviewed. The effect of that unstated inference, particularly bearing in mind the defence opening, was that Mr Wallace had failed to mention the misfire allegation when he first spoke to the police. The course taken is readily explained as a means of avoiding the demands of the rule in *Browne v Dunn*, and the consequentially disadvantageous explanations of Mr Wallace. It met this object by laying the foundation for the jury to conclude for itself, without the proposition being put, that Mr Wallace failed to mention the misfire allegation when first giving an account to police.

[30] The learned trial judge was astute to this indirect approach and raised it with defence counsel after the close of the prosecution case and after it had been indicated the defence would not go into evidence. His Honour noted what defence counsel had said on the topic in his opening and the following exchange occurred:

> "HIS HONOUR: Now, I don't know that was put to Mr Wallace. I couldn't find it.
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> MR McCARTHY: It wasn't, your Honour, with respect.
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> HIS HONOUR: No.
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> MR KIMMINS: There was – it – it was not in there, but I put to him---
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> HIS HONOUR: It wasn't.
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> MR KIMMINS: ---what I suggested were the relevant parts of his interview.
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> HIS HONOUR: It wasn't put to him. You didn't put to him that I could find – I read his evidence a couple of times yesterday. You didn't say to him, "Well, you didn't tell the police about the gun being pointed at your head and hearing a click," et cetera. That wasn't put. It's just I thought – I was looking at your opening---
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> MR KIMMINS: Yes, your Honour.
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> HIS HONOUR: ---when I was looking at preparing my summing-up, and I saw that, and I just couldn't recall it being put so I checked the transcript. So if you've got a different recollection tell me.
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> MR KIMMINS: No, no, no, no. Your Honour is correct. I should have specifically put it to him, but I left on the basis that these were the features that he did raise with the police at the time.

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9 AR Vol 1 p 36 L 28.

HIS HONOUR: Did you? Where did you do that?

MR KIMMINS: No, no. I went through, and I said, "I'm moving through what you told the police in your interview".

HIS HONOUR: Yes.

MR KIMMINS: And I took it page by page. And as your Honour indicated to the majority of it, I put to him verbatim what had occurred. So that's – put to him verbatim what had occurred during his interview with the police on the day of the incident. All of those – on the first day when I was cross-examining him, and I said, "I want to take you through your interview with the police. We will play the tape," et cetera, et cetera, but that's what I was attempting to do.

HIS HONOUR: Well, you might have been attempting to do that but you didn't put to him.

MR KIMMINS: No.

HIS HONOUR: And so, he's not had an opportunity to comment on that.

MR KIMMINS: No, no, I accept that.

HIS HONOUR: And it's a question of what you want to do with that in your address, if anything. So for example, if you had put it to him it's something you could say in the address. I don't know whether it's accurate, by the way.

MR KIMMINS: There was no mention in the interview, no.

HIS HONOUR: But he mentioned it shortly afterwards.

MR KIMMINS: In a statement some two weeks later.

HIS HONOUR: Okay. Right. Then you may have been able to submit to the jury, well, he – that's something he would have – should have expect him to mention, but he made no mention of it. And the Crown would say, "Well, that's something you mentioned a couple of weeks later".

MR KIMMINS: And that's what happened during the first trial. There was a level – I think I was erring on the side of caution this time.

HIS HONOUR: Okay. So it's not something you intend to lead?

MR KIMMINS: No."[10]

[31] Pre-summing-up discussion then moved to other topics. Importantly, what did not then occur was the making of any request by defence counsel to have Mr Wallace recalled, so it could be squarely put to him that he had failed to mention the misfire when first speaking with the police. That is explicable as a further forensic choice, also consistent with the explicable forensic purpose of the indirect approach: the

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10 AR 578 L27 – AR 580 L6.

avoidance of the disadvantageous consequences of squarely putting the inconsistency to Mr Wallace.

[32] In the ensuing addresses, defence counsel did not expressly assert to the jury that Mr Wallace had failed to mention the misfire allegation when he first spoke to the police. However, consistently with the indirect approach of doing all but that, he reminded the jury of the detail of what had been extracted from Mr Wallace in cross-examination about the information given during the first interview. In effect, defence counsel left the jury to draw the unstated inference for itself. That it was an inference already highlighted in the defence opening could only have heightened the prospect the jury would draw the inference. The approach of providing a jury with the fuel to draw an unstated inference for itself is a sufficiently well known tool in the experienced advocate's armoury to be readily recognisable here as an explicable forensic choice.

[33] The disadvantage of the indirect approach was that it was not definitively established that Mr Wallace failed to mention the misfire allegation in first speaking with police. As against this it carried the advantage the jury would likely infer the misfire allegation was not so mentioned, without the disadvantage, inherent in a direct challenge, of provoking credible explanations for the failure to mention it. It cannot be said the advantage of this apparently rational forensic choice was slight in comparison to any associated disadvantage.

[34] It follows there was no miscarriage of justice. The appeal must fail.

Order

[35] I would order:

Appeal dismissed.