DISTRICT COURT OF QUEENSLAND

CITATION:	*Eugene v Commissioner of Police* [2019] QDC 146
PARTIES:	**CHRISTOPHER WILLIAM EUGENE** (appellant) **v** **THE COMMISSIONER OF POLICE** (respondent)
FILE NO:	D1/19
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Maroochydore (Baldwin M)
DELIVERED ON:	16 August 2019
DELIVERED AT:	Maroochydore
HEARING DATE:	7 August 2019
JUDGE:	Cash QC DCJ
ORDERS:	**1. The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – SUFFICIENCY OF EVIDENCE – CIRCUMSTANTIAL EVIDENCE – s 222 *Justices Act* – where the appellant was convicted of one charge of breaking and entering premises and stealing – where the appellant's fingerprint was found on an item inside the store – where the case was entirely circumstantial – whether reasonable hypotheses consistent with innocence was excluded by the evidence. *Criminal Code 1899* (Qld) ss 7, 8 *Evidence Act 1977* (Qld) ss 18, 101 *Justices Act 1886* (Qld) ss 222, 223 *Allesch v Maunz* (2000) 203 CLR 172 [22]-[23] *Azzopardi v The Queen* (2001) 205 CLR 50, [67]-[68] *Forrest v Commissioner of Police* [2017] QCA 132, 5 *McDonald v Queensland Police Service* [2017] QCA 255; [2018] 2 Qd R 612 *R v McEwan* [2019] QCA 16, [24]-[29], [62] *Robinson Helicopter Company Inc. v McDermott* (2016) 90 ALJR 679, 686-687; [2016] HCA 22 [43] *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 , 969 *Teelow v Commissioner of Police* [2009] QCA 84, [4] *Victorian Stevedoring & General Contracting Co. Pty Ltd v Dignan* (1931) 46 CLR 73, 107 *Weissensteiner v The Queen* (1993) 178 CLR 217, 223-224,

228

COUNSEL:	J Cook for the appellant A Stark for the respondent
SOLICITORS:	Bell Dore Lawyers for the appellant Office of the Director of Public Prosecutions for the respondent

Introduction

[1] In October 2018 the appellant appeared before a Magistrate at Maroochydore in relation to an allegation that around Anzac day that year he broke into a café at Montville and stole items in the premises. He pleaded not guilty but on 23 November 2018 was convicted by the Magistrate. The case against the appellant was circumstantial. The only evidence implicating the appellant was that his fingerprints were found on a box in the premises. Having secured an extension of time within which to appeal, the appellant filed a notice of appeal in January 2019. In essence, the appellant's complaint is that, "the evidence, rationally and properly considered as a whole, did not … exclude all reasonable hypotheses consistent with innocence."

[2] For the reasons that follow I am satisfied that the evidence proved beyond reasonable doubt the guilt of the appellant and that there were no errors in the decision of the Magistrate. The appeal will be dismissed.

Applicable legal principles

[3] An appeal to this court pursuant to section 222 of the *Justices Act 1886* (Qld) is to be determined in accordance with section 223 of that Act. That is, the appeal is by way of rehearing on the evidence before the Magistrate (and any other evidence introduced with leave of this court) rather than a hearing de novo. It is for the appellant to demonstrate that the decision the subject of the appeal is the result of some legal, factual or discretionary error.[1] An appeal by way of re-hearing involves the appellate court conducting a "real review" of the evidence given at the trial. In *Robinson Helicopter Company Inc. v McDermott*[2] the High Court said:

> "A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings."

[4] In *McDonald v Queensland Police Service*[3] Bowskill J said that:

> "It is well established that, on an appeal under s 222 by way of re-hearing, the District Court is required to conduct a real review of the trial, and the Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight

[1] *Allesch v Maunz* (2000) 203 CLR 172 [22]-[23]; *Teelow v Commissioner of Police* [2009] QCA 84, [4]. Cf *Forrest v Commissioner of Police* [2017] QCA 132, 5.
[2] (2016) 90 ALJR 679, 686 – 687; [2016] HCA 22 [43] (footnote references omitted).
[3] [2017] QCA 255; [2018] 2 Qd R 612.

to the Magistrate's view. Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error."

[5] The error suggested is that the Magistrate was wrong to conclude that the evidence excluded, beyond reasonable doubt, all innocent hypotheses. If having reviewed the evidence at first instance, and giving weight to the view of the Magistrate, I conclude the evidence proved the guilt of the appellant the appeal should be dismissed.

Summary of the evidence

[6] Only three witnesses were called in the prosecution case; Julie Walters who was the owner of the business, Senior Constable Simon Troy, a police officer who found fingerprints on the router, and Sergeant Bruce Crowl who described himself as a fingerprint expert. The appellant elected not to give or to call evidence.

[7] Ms Walters testified that she was the owner of the business. The business is a café that sells sweets. At about 4.00 pm on the afternoon of Anzac day 2018 Ms Walters and other staff began cleaning and closing down the café. Ms Walters locked the float and spare change money in a cupboard in the office area. The café was secured as Ms Walters left by locking the two external doors. The next morning Ms Walters was advised there had been a break-in. She attended the café and saw a window at the back of the premises was broken. She could see chocolates on the ground and a chair underneath the window. Unlocking and entering through front door, Ms Walters saw items within the store had been moved, draws had been opened and computer equipment was missing. Going into the office area Ms Walters saw the cupboard where she secured the float and spare change had been forced open and the money stolen. The office area was a separate area at the back of the café.

[8] A white box that had once held a wifi router was on the window ledge underneath the broken window.[4] Before the break-in the box was kept in the office above the computer equipment that had been stolen.[5] Ms Walters testified, "It was kept on a shelf in the back office and had just never been moved."[6] The box had been delivered three to six months before the break-in when Ms Walters changed telephone companies.[7] In cross-examination Ms Walters confirmed that the box was placed on a shelf in the office soon after it was delivered and had not been moved until it was discovered under the broken window.[8]

[9] Senior Constable Troy is a scenes of crime officer. He testified that he attended the café at about 10.45 am on 26 April 2018. He detected fingerprints on the box underneath the broken window. One identifiable print was found on the top of the box and two on the bottom. Senior Constable Troy said he had been told by Ms Walters that the box had been removed from a drawer underneath the window (rather than a shelf in the office) and moved to the position where it was found.[9] It was admitted by the appellant that a print of his right thumb was on the top of the

[4] T.1-10.4-5.
[5] T.1-10.10-11.
[6] T.1-9.36-37.
[7] T.1-10.40-42.
[8] T.1-13.14-21.
[9] T.1-15.40-45.

box and prints of his right middle and ring fingers were on the bottom of the box.[10] Senior Constable Troy also found fingerprints on two tills from the café.[11] These prints were not identified.[12]

[10] In cross examination Senior Constable Troy was asked about being told the box was from a cupboard under the broken window. The prosecutor objected to the question but it was allowed by the Magistrate.[13] Senior Constable Troy agreed he was told by Ms Walters that the box had been moved from a cupboard underneath the window.

[11] Sergeant Crowl confirmed the appellant's fingerprints were found on the box but the prints otherwise located were not identified. He agreed in cross-examination that depending on circumstances a fingerprint could be detected as long as six months after it had been deposited.[14]

The appellant's case at trial

[12] As the appeal requires consideration of possible innocent hypotheses in the context of a circumstantial case, it is helpful to consider the alternative theories posited by the appellant at the trial. Three possibilities were raised. First, it was suggested that there was evidence that the box was in an area of the café accessible to the public (the drawer or cupboard under the broken window). On this basis there was said to be a reasonable possibility that the appellant left his fingerprints on the box while innocently visiting the café. Secondly, it was suggested the prosecution has not excluded the reasonable possibility that the appellant's fingerprints came to be on the box before it was delivered to the store. The third possibility concerned the potentially broad timeframe during which the offence was committed. It was suggested that someone else may have broken the window and stole items from inside the café and the appellant subsequently came across the scene and touched the box, leaving his fingerprints.

[13] It is of course necessary for the prosecution to exclude all reasonable hypotheses consistent with innocence. If there remains on the evidence some reasonable innocent hypothesis apart from the three proposed by the appellant he is still entitled to be acquitted. But when assessing the reasonableness of various possibilities it is instructive that these are the three matters the appellant submitted were reasonable possibilities. They may properly be thought to exhaust the possible theories of how the appellant's fingerprints came to be on the box.

The appellant's contentions on the appeal

[14] While the appellant pursued three grounds of appeal they may conveniently be condensed into the single complaint set out above: that the evidence, rationally and properly considered as a whole, did not exclude all reasonable hypotheses consistent with innocence. The appellant maintained the submission that there was conflicting evidence as to the location of the box before the break-in. On appeal the appellant seemed to add a fourth hypothesis for consideration. This submission was to the effect that even if the appellant had left his fingerprint on the box during the break-

[10] T.1-3.16-23.
[11] T.1-17.39-41.
[12] T.1-22.45-47.
[13] T.1-18.7-40.
[14] T.1-24.20-21.

in it may have been another person who stole in the premises. It was argued that as the prosecution did not expressly rely upon the provisions for derivative liability found in sections 7 and 8 of the *Criminal Code* the prosecution also had to exclude this scenario as a reasonable possibility.

Consideration

[15] It is convenient to commence with the appellant's proposition that there was competing evidence as to the location of the box before the break-in. The only direct evidence as to the location of the box was that of Ms Walters. Her evidence was unequivocally to the effect that the box had been stored in the office area rather than in the part of the café that was generally publically accessible. There was no challenge to her evidence in cross-examination. The evidence of Senior Constable Troy could not be relied upon to prove the location of the box: the rule against hearsay prohibited such a use.[15] There could be no suggestion the evidence was admitted to prove a prior inconsistent statement that had not been "distinctly admitted" by Ms Walters. The provisions of the *Evidence Act 1977* (Qld) were not engaged.[16] At best for the appellant the testimony of Senior Constable Troy was relevant to the assessment of the truthfulness and reliability of Ms Walters' own evidence. If she had told the police officer the box was in a drawer or cupboard under the window that may cause doubt about the reliability of her testimony that it was on a shelf in the back office.

[16] Assessing the evidence for myself, I do not doubt the reliability of Mr Walters' evidence. The conversation recalled by Senior Constable Troy was not put to Ms Walters. Nor was she challenged on her evidence that the box was stored in the office. In my view the tendency of Senior Constable Troy's evidence to undermine that of Ms Walters was slight. I am satisfied beyond reasonable doubt, as was the Magistrate[17], that the box was in the office before the break-in.

[17] This finding presents the appellant with considerable difficulty. Theories about how his fingerprints came innocently to be on the box cease to be reasonable once it is accepted that the box was in a private part of the café and was moved during the break-in. This finding deals with the possibility that the appellant deposited his fingerprints while innocently browsing the store. It leaves open the possibility that he deposited his fingerprints at some time before the box was delivered to the store and the possibility that he touched the box through the broken window after someone else had already committed the offence.

[18] The possibility that the defendant left his fingerprints on the box before delivery is not a reasonable one. It is beyond credulity to think that the appellant was somehow involved in the manufacture of the box. The possibility that the appellant was involved in the sale or delivery of the box seems to me so unlikely that it is not reasonable. There remains the possibility that the appellant happened across the scene after the break-in had occurred and handled the box. This too seems so unlikely, and requiring such extraordinary coincidence, it is not a reasonable possibility on the evidence.

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[15] *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 969.
[16] *Evidence Act 1977* (Qld) ss 18, 101.
[17] Transcript of decision, 23 November 2018, T.7.13-15.

[19] I find these conclusions easier to reach in the absence of any explanation from the defendant himself. The prosecution case was simple but compelling. If the appellant was involved in the manufacture or delivery of the box, if he was out walking in Montville on the night of break-in and put his hand through the window, these are additional facts uniquely within his knowledge. In the absence of evidence of such additional facts from the appellant the argument that the appellant is guilty is strengthened.[18]

[20] The remaining possibility is that the appellant, while involved in some way with the break-in, did not himself carry out the acts that constitute the offence with which he was charged. It was argued that unless this possibility is excluded the appellant could not be guilty of the offence charged as the prosecution did not suggest he was liable as a party. In my view this theory should also be dismissed as too unlikely to be a reasonable possibility. While experience suggests that offending of this kind may often involve more than one person, the only evidence in this case to support such a notion is the presence of unidentified fingerprints on the tills. These prints may have been left by another burglar, but they are also explained as the fingerprints of employees of the café. The evidence does not in my view provide a sufficient basis for a reasoned conclusion that the appellant was aiding another criminal in the offence.

[21] There remains another difficulty with the appellant's submission. Even if it were a reasonable possibility that he did not carry out the entire offence alone, the inescapable conclusion would be that he is liable as either someone who aided the offence or as a participant in an unlawful common purpose (sections 7(1)(c) and 8 of the *Criminal Code*). It is true that the prosecution did not rely upon these provisions in the trial. But the process in which I am engaged is a rehearing rather than an appeal in the strict sense. Having assessed the evidence I must reach a decision as to the guilt of the appellant based on the facts and the law as it stands at the time of the hearing.[19] In these circumstances the possibility that someone else participated in the offence would not entitle the appellant to an acquittal.

Conclusion

[22] Having considered the evidence I am satisfied beyond reasonable doubt that the box on which the appellant's fingerprints were found had been stored in the private office and moved during the break-in. There exists no reasonable possibility that the appellant's fingerprints came to be on the box other than in the process of breaking into and stealing from the café. The appeal is dismissed.

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[18] *Weissensteiner v The Queen* (1993) 178 CLR 217, 223-224, 228; *Azzopardi v The Queen* (2001) 205 CLR 50, [67]-[68]; *R v McEwan* [2019] QCA 16, [24]-[29], [62].

[19] *Allesch v Maunz* (2000) 203 CLR 172, [23]; *Victorian Stevedoring & General Contracting Co. Pty Ltd v Dignan* (1931) 46 CLR 73, 107 (Dixon J).