

DISTRICT COURT OF QUEENSLAND

CITATION: *R v Bigham* [2020] QDC 87

PARTIES: **THE QUEEN**

v

MICHAEL JOHN BIGHAM

FILE NO: Indictment 2621 of 2019

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 18 May 2020

DELIVERED AT: Brisbane

HEARING

DATES: 5 and 6 May 2020

JUDGE: Rosengren DCJ

VERDICT: **Count 2 – Armed robbery – Not guilty.**

CATCHWORDS: CRIMINAL LAW – GENERAL MATTERS – PROCEDURE – TRIAL HAD BEFORE JUDGE WITHOUT JURY – VERDICT – where the accused made an application for a judge alone trial pursuant to s 614 of the *Criminal Code 1899* (Qld) – where no jury trial orders were made pursuant to s 615 of the *Criminal Code 1899* (Qld) – where the accused was tried by a judge sitting without jury

CRIMINAL LAW – where the defendant was charged with one count of armed robbery – where the defendant was tried by a judge sitting without a jury – where the defendant pleaded not guilty – where the Crown case against the defendant was based on the principal Crown witness – whether the witness was honest and reliable – where there was no other evidence implicating the defendant in the commission of the offence — whether the Crown could prove beyond reasonable doubt that the defendant was the person

who committed the armed robbery

Criminal Code 1899 (Qld) s 1, s 390(a), s 391, s 409, s 614, s 615, s 615B(1), s 615B(3), s 615C(1), s 615C(3)
Penalties and Sentences Act 1992 (Qld) s 13A

COUNSEL: A Braithwaite for the Crown
 G Webber for the defendant

SOLICITORS: Director of Public Prosecutions (Qld) for the Crown
 A W Bale & Son for the defendant

- [1] The defendant is charged that on the second day of July 2018 at Calamvale in the State of Queensland, he robbed Ethan Benjamin Schloss, and was armed with a dangerous weapon, namely a firearm.
- [2] The trial commenced on 5 May 2020 without a jury after orders to that effect were made on 28 April 2020 pursuant to s 615 of the *Criminal Code 1899* (Qld) ('the Code'). The defendant entered a plea of not guilty. The Crown case was concluded within the day. The defendant did not call or give evidence. The addresses of counsel were heard on the morning of the following day.
- [3] Section 615B(1) of the Code provides that, in a trial by a judge sitting without a jury, the judge must apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial before a jury. Pursuant to s 615B(3) of the Code, if a statute or the common law requires information, a warning or an instruction to be given to the jury in particular circumstances, the judge in a trial by a judge sitting alone must take that requirement into account if those circumstances arise in the course of the trial.
- [4] In arriving at a verdict, the judge may make any findings or give any verdict that a jury could have made or given, if the trial had been before a jury, any finding or verdict that the judge has, for all purposes, has the same effect as a finding or verdict of a jury.¹ The reasons for the verdict must include the principles of law that the judge has applied and the findings of fact on which he or she has relied.²
- [5] These are my reasons for the verdict to which I have arrived, along with the principles that I have applied.

Preliminary

- [6] An accused in a criminal trial is presumed to be innocent. Before a verdict of guilty may be returned, I must be satisfied of the guilt of the defendant beyond reasonable doubt. The Crown has the burden of proving the defendant's guilt. There was no onus on the defendant to prove anything. The fact that he did not give or call evidence is not evidence against him.
- [7] As will, I trust, be evident from my reasons below, my verdict has involved a determination of the facts based on the evidence that was placed before me. This being

¹ s 615C(1) of the Code.

² s 615C(3) of the Code.

what the witnesses have said and the exhibits that have been tendered. Gavin Saylor, Ethan Schloss and Senior Constable David Courtney were called to give evidence in the Crown case and each was cross-examined. Mr Saylor and Senior Constable David Courtney gave evidence via audio-visual link and Mr Schloss gave evidence in person. The exhibits received into evidence were the police media release, CCTV footage from the scene and numerous photographs of items of property found on 25 August 2018 during the course of a search of a property where the defendant had been residing. There were also photographs of some of the rooms of the property.

- [8] I am required to determine what evidence I accept and then apply the law to the facts as I find them to be. I may only draw reasonable inferences based on facts I find proved by the evidence. If there is an inference reasonably open which is adverse to the defendant and an inference in his favour, I may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in my mind.
- [9] Evidence may be accepted in whole or in part or not at all. Matters which have concerned me in this regard are the credibility of the witnesses and the reliability of their evidence. I have considered the likelihood of the accounts of each witness and tested it with other evidence which I accept. I have also considered the opportunity each witness had to see, hear or know particular things that the witness has testified about.

The elements of the offence

- [10] Before the defendant can be found guilty of armed robbery, the Crown must prove beyond reasonable doubt each of the elements of the offence. The offence of robbery is defined in s 409 of the Code.
- [11] The first element that the Crown must prove is that the defendant stole something. The offence of stealing is defined in s 391 of the Code. It includes fraudulently taking anything capable of being stolen. Pursuant to s 390(a) of the Code, anything that is the property of any person is capable of being stolen if it is moveable. The word ‘property’ is defined in s 1 of the Code and includes money.
- [12] The second element that the Crown must prove is that at the time of, or immediately before, or immediately after stealing property, the defendant used or threatened to use actual violence to any person or property. Any degree of violence is sufficient. Some degree of force must be used. The use or threat of violence must be done in order to obtain the thing stolen or to prevent or overcome resistance to it being stolen.
- [13] The charge includes the circumstance of aggravation, namely that the defendant was armed with a dangerous weapon, being a firearm.
- [14] There is no dispute that on the evening of 2 July 2018, there was an armed robbery at the bottle shop of the Calamvale Hotel (‘the bottle shop’). A sum of money was stolen. The issue for determination is whether the Crown is able to prove beyond reasonable doubt that it was the defendant who carried out the robbery.

Crown case

Ethan Schloss

- [15] Mr Schloss was working a two hour shift behind the counter at the bottle shop, having commenced at 8pm on 2 July 2018. He explained that just prior to 9pm he was involved in an armed robbery. Mr Schloss explained that the person who held him up was a male. He was wearing a hoodie and some sort of mask over his face. The only part of the male's face Mr Schloss could see were his eyes, although he could not recall the colour of them. Mr Schloss gave evidence that the male was holding a gun type object. He said that while he did not think it was real, that he was not prepared to take any chances. The male yelled at him to open the till. When it became apparent to Mr Schloss that the male was unlikely to desist, he complied and placed the notes from the till in a plastic bag which was on the corner of the counter. The male then asked for the coins as well and Mr Schloss again complied. The male subsequently left the bottle shop.

Gavin Saylor

- [16] Mr Saylor was living at a property at Stretton ('the Stretton property'). The defendant would come and go from the property and there were other people also living there. The owner of the property had also left some belongings there.
- [17] It was the day after the armed robbery that Mr Saylor first became aware of its occurrence. This was some six to eight weeks after he had moved into the Stretton property.
- [18] As to how Mr Saylor became aware of the robbery, he said in evidence in chief that he thought he saw it on the Channel 9 morning news. He could not recall whether the news story showed video footage or a still picture of the person who had allegedly committed the armed robbery. However, he accepted in cross-examination that in his statement to police dated 19 August 2018 ('his earlier police statement') he had said that he learned of the armed robbery via police media. He conceded that his knowledge of relevant events as detailed in his earlier police statement was likely to be more accurate given that it was prepared only some five or so weeks later.
- [19] It was Mr Saylor's evidence that he had known the defendant for approximately six months and recognised him as the person depicted in the news story carrying out the armed robbery. He recognised the mannerisms of the person to be those of the defendant. The person was also wearing a hoodie and holding a gun which Mr Saylor thought were the same as ones belonging to the defendant.
- [20] Mr Saylor was shown the CCTV footage in evidence in chief. This is exhibit 2. He did not recognise it as the same footage that he had seen on the day following the robbery. He thought the person shown in this footage looked like it was the defendant, although he could not be certain. It appeared to him that the black bag being carried by the person and the gun being held by the person were the property of the defendant. He also said that the defendant would wear a cap under his hoodie similar to that shown in the footage. However, in cross examination, Mr Saylor ultimately conceded that he was less certain that the person shown in the CCTV footage is the defendant. He accepted that he could not be certain the black bag belonged to the defendant. This is in circumstances where there are no particular identifying features of the bag, apart from the colour and general shape of it. He also gave a description of the gun which was

inconsistent with the gun shown in the CCTV footage and the gun like object seized from the Stretton property during the course of the police search on 25 August 2018.

- [21] In evidence in chief, Mr Saylor was shown photographs of a number of other items of property seized during the course of the search. He explained that his eye sight was deteriorating. It was readily apparent that he could not give reliable evidence regarding at least some of the items depicted in the photographs. For example, there are two photographs of a dark hooded jacket on top of a washing machine. Mr Saylor had trouble seeing the jacket in one of the photographs and said that it looked like a blanket to him. On another occasion he described what he could see as a '*jumbled mess*'. He said that he had seen one of the photographs on the television the day after the armed robbery. This could not be correct as the photograph was not taken until some six weeks later. He then went onto concede that he did not know whether the jacket depicted in those photographs was the same jacket he observed the male to be wearing in the CCTV footage. Exhibit 3 includes photographs of a black bag seized during the search. Mr Saylor could not be sure that the black bag was the defendant's, rather than property of someone else living at the Stretton property.
- [22] The Crown case also rested on a conversation that Mr Saylor gave evidence of having with the defendant on the day after Mr Saylor learned of the armed robbery. Mr Saylor said that he showed the defendant a YouTube clip of the news story of the armed robbery and commented that the defendant had been on candid camera. He said that the defendant responded with words to the effect that he had '*done it*' and that it was '*one of his*'. It was Mr Saylor's recollection that he then asked the defendant whether he had benefited from the robbery and the defendant indicated that he had not. However, Mr Saylor's recollection of this conversation differed in important respects from the subject conversation as detailed in his earlier police statement. On the earlier occasion, Mr Saylor made no mention of the defendant providing a verbal response confirming that he had committed the armed robbery. Rather, the statement refers to the defendant simply dropping his head down with a cheeky smile on his face.

Officer Courtney

- [23] Plain Clothes Senior Constable Courtney was involved in investigating the armed robbery. He attended the bottle shop in the early hours of the morning on 3 July 2018 and obtained the copy of the CCTV footage which is exhibit 2. He also executed the search warrant of the Stretton property on 25 August 2018. The defendant had been located at this address earlier that day but was not present at the time of the search.
- [24] Senior Constable Courtney described the property as a mess with clothing, tools and other items of property strewn throughout the house. The photographs which are exhibit 3 were taken at the time of the search. Police were looking for items depicted in the CCTV footage. As it is not of particularly good quality and definition, only items potentially resembling those shown in the footage were seized. This did not include a flannelette top, as there were multiple such tops located during the search. Nothing of forensic value was located on any of the items seized. Further, the black hoodie shown in the CCTV footage has a red motif on it. The one seized by the police during the search did not have this on it. The baton or metal object depicted in in exhibit 3 was tested and found not to be part of a firearm. There was no gun, shotgun shells or ammunition found.

Findings of fact

- [25] The principal witness for the Crown is Gavin Saylor. This case turns on whether I accept his evidence as honest, accurate and reliable. In my view, there are numerous reasons to scrutinise Mr Saylor's evidence with great care, together with all the other evidence, before arriving at a conclusion of guilt.
- [26] Mr Saylor inculpated the defendant in the commission of this offence in mid-August 2018 when he was being questioned by police as a potential suspect with respect to unrelated offending. He was on bail and subject to a suspended sentence. He admitted in cross examination that he was concerned about being taken into custody. It was while being questioned for this unrelated offending that he volunteered his knowledge of the defendant's involvement in the armed robbery and subsequently provided his earlier police statement. He conceded in cross-examination that it was his understanding that the provision of the statement by him was potentially beneficial to him by way of a reduction in his sentence for the unrelated offending.
- [27] On 10 October 2018, Mr Saylor pleaded guilty to and was sentenced for the unrelated offending. His sentence was reduced because he had undertaken to co-operate with law enforcement agencies pursuant to s 13A of the *Penalties and Sentences Act 1992* (Qld) in relation to the Crown case against the defendant for the armed robbery. He understood that if he withdrew his co-operation at any time, that he could be resentenced for the unrelated offending. In these circumstances, I am mindful that he may have been motivated by self-interest to falsely implicate the defendant in the commission of the armed robbery.
- [28] Mr Saylor was also cross examined about aspects of his criminal history. His evidence was that he had previously been sentenced for drug related offending. He also explained in his evidence that he had recently been released from custody for 39 offences, including unlawful use of a motor vehicle. I have taken this into account when considering his credibility and the weight to be given to his evidence. The fact that he has previous convictions does not mean that I cannot act on his evidence. Rather, it is necessary to consider the rest of the evidence, including any evidence that provides independent support to his evidence and to weigh his evidence and the fact that he has these previous convictions, including convictions for offences of dishonesty.
- [29] In November 2018 Mr Saylor was diagnosed with an aneurism. He explained that this has had a significant impact on his memory. He gave evidence from a room at the Gladstone Magistrates Courthouse and said that he could not remember how he '*got up here this morning*' and that sometimes he would black out for no apparent reason.³ He went on to explain that in addition to his memory deteriorating, so had his sight and hearing.
- [30] Further, as detailed above there were numerous inconsistencies between Mr Saylor's evidence and his earlier police statement and also between his evidence in chief and his cross-examination. I do not accept he is a reliable witness as to his identification of the

³ T1-31.

defendant in the CCTV footage, nor as to his conversation with the defendant in the days after the armed robbery.

- [31] In my view, the items found by police during the search of the Stretton property on 25 August 2018 do not corroborate Mr Saylor's evidence that the defendant is the person in the CCTV footage. There is nothing distinguishing about any of the items found. There was not forensic testing to determine whether the items could be linked to the offending. Further, the Crown has not established that those items belonged to or were in the possession of the defendant. This is in circumstances where there were items belonging to people other than the defendant and Mr Saylor at the Stretton property.

Conclusion

- [32] In all of the circumstances, I have a reasonable doubt as to the defendant's guilt and find him not guilty.