SUPREME COURT OF QUEENSLAND

CITATION:	*R v Faulkner* [2017] QCA 301
PARTIES:	**R** **v** **FAULKNER, Dennis Hecta Tipene** (appellant/applicant)
FILE NO/S:	CA No 152 of 2017 DC No 427 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 14 June 2017; Date of Sentence 16 June 2017 (Kent QC DCJ)
DELIVERED ON:	8 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2017
JUDGES:	Fraser and Morrison JJA and Henry J
ORDERS:	**1. The appeal is allowed.** **2. The conviction entered on 14 June 2017 and the orders made on 16 June 2017 are set aside.** **3. A new trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted after trial of one count of grievous bodily harm – where the appellant was sentenced to two years and six months' imprisonment, suspended after 12 months, with an operational period of three years – where the appellant appeals against his conviction and seeks leave to appeal against his sentence – where the conviction appeal is brought on the grounds that a miscarriage of justice resulted from the learned trial judge's response to a jury question about self-defence, that re-directions on the issue of self-defence caused the appellant to be denied procedural fairness and that the learned trial judge failed to direct the jury with respect to pre-emptive strike – where the offence was captured on CCTV footage – where the footage shows a series of interactions between the appellant and complainant spanning some minutes – where the jury inquired as to the point in time at which self-defence must be proven – where the learned trial judge suggested that self-defence must be in response to an immediate threat – where the learned trial judge's commentary would have been

received as a direction, causing the jury to confine their consideration of self-defence to the period immediately before the offence – whether there has been a miscarriage of justice – whether a re-trial is necessary

Criminal Code (Qld), s 271

R v Beetham [2014] QCA 131, cited
R v De Silva (2007) 176 A Crim R 238; [2007] QCA 301, applied
R v Muratovic [1967] Qd R 15, followed
R v Pangilinan [2001] 1 Qd R 56; [1999] QCA 528, cited
Zecevic v Director of Public Prosecutions (Vic) (1987) 162 CLR 645; [1987] HCA 26, followed

COUNSEL: M L Longhurst for the appellant/applicant
C N Marco for the respondent

SOLICITORS: Donnelly Law Group for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** In the course of an altercation between himself and the complainant, Mr Faulkner, a security guard at a hotel, punched the complainant and broke his jaw.

[3] On 14 June 2017 he was convicted after a trial on one count of grievous bodily harm. He was sentenced to two years and six months' imprisonment, suspended after serving 12 months, with an operational period of three years.

[4] Mr Faulkner appeals against his conviction and seeks leave to appeal against the sentence imposed.

[5] The grounds of appeal in respect of the conviction are as follows:[1]

(a) ground 2: a miscarriage of justice resulted from the way in which the learned trial judge dealt with a jury question with respect to self-defence;

(b) ground 3: there was a denial of procedural fairness in redirections given on the issue of self-defence; and

(c) ground 4: the learned trial judge failed to direct with respect to pre-emptive strike.

[6] For the reasons which follow the appeal must be allowed and a retrial ordered. For that reason there is no need to deal with the application for leave to appeal against sentence.

Circumstances of the offending

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[1] Ground 1, that the verdict was unsafe and unsatisfactory, and not supported by the evidence, was abandoned on the hearing before this Court.

[7] At trial there was no dispute that Mr Faulkner had punched the complainant in the face, nor that the punch had broken the complainant's jaw in a way that constituted grievous bodily harm. The only issue was whether the Crown could exclude self-defence.

[8] The complainant and his brother (**P**) arrived at the hotel in the early hours of 9 February 2014. Each had been drinking and was intoxicated to some extent. P was staying there with another brother and that brother's partner. The complainant and P were directed to the reception desk where they gave P's room number, and explained that P did not have a key to his room but was a paying guest there. The person on reception asked for P's photo ID, refusing to ring up to the room where P was staying. Mr Faulkner told them that if they could not produce photo ID then they had to leave.

[9] When the person on reception refused to let P up to his room, there followed an altercation in the hotel foyer between the complainant, P, Mr Faulkner, and another security guard, Mr Evans.

[10] A large part of what followed was captured on CCTV. The description below comes from the CCTV footage, and draws on individual accounts only to a limited extent.[2] It is not intended to be an exhaustive description but sufficient to show the basis for the self-defence issue.

Inside the foyer

[11] At the reception desk the complainant and Mr Faulkner exchanged words, with the complainant holding his hands out, palms outward. As they spoke, P was behind the complainant. During this period the reception person seemed to be looking at a computer, then spoke to the complainant. P then moved around the complainant to stand close to Mr Faulkner. At that point the complainant put his arm up against P. The complainant and Mr Faulkner spoke for some time, during which the complainant kept his arm against P, eventually pushing him back and away from the two of them.[3]

[12] At that point the complainant and Mr Faulkner stood head to head, both of them leaning in towards the other. P then intervened and dragged the complainant back away from Mr Faulkner. P then inserted himself in front of Mr Faulkner and touched foreheads with him. Mr Faulkner pushed P backwards. The complainant put his left hand out flat against Mr Faulkner's chest. A few seconds later Mr Evans joined the group.

[13] The complainant and P then pushed Mr Faulkner backwards. Mr Evans grabbed P from behind. The complainant had both hands resting on Mr Faulkner's chest, evidently preventing him from engaging with P. Mr Evans grappled with P behind them, eventually dragging him to the floor. At that point the complainant left Mr Faulkner and went to where Mr Evans and P were on the floor. They all moved out of camera range for about 16 seconds, when the complainant appeared, pushing P back away from the security guards. The complainant stood between P and Mr Faulkner, his right hand staying on P's chest. P circled around to where Mr Faulkner was, at which point Mr Evans grabbed him and dragged him away. At

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2 Because a retrial is to be ordered it is better to say as little as possible about competing witness accounts.

3 About 23 seconds elapsed during this time.

that time the complainant was evidently speaking to Mr Faulkner, with his left hand resting on Mr Faulkner's right elbow. The complainant and Mr Faulkner continued speaking, and the complainant had his arms and hands outstretched, as in a questioning mode, and gestured towards the reception desk where two women were standing. He then turned and walked out of camera, Mr Faulkner following.

[14] A taxi driver who was waiting for the complainant entered through the front doors and walked towards where the complainant and P were. Nothing in his manner of approach would suggest any violent altercation then occurring.

[15] About 30 seconds later Mr Faulkner held P with P's arms behind his back and walked him backwards towards the front doors. P appeared to be struggling against that. In the course of that struggle Mr Faulkner fell backwards and he and P ended up on the floor near the front doors. At that point the complainant appeared to try and prevent P from falling, and then seemed to grapple with Mr Faulkner while he was on the floor. Mr Evans intervened at that point, and appeared to try to pull the complainant back. The taxi driver also went over to where P and Mr Faulkner were on the ground.

[16] Once on their feet P and Mr Faulkner continued to grapple, pushing and shoving near the doors. The complainant and Mr Evans intervened and joined in pushing and shoving. Mr Evans got a headlock on P and led him out through the front doors. At the same time Mr Faulkner was pushing the complainant back. As Mr Evans got P out the doors, the complainant and Mr Faulkner stopped grappling and walked out the doors side by side. At the same time the taxi driver walked over and exited just behind the complainant.

[17] To that point no punches had been thrown. All that had happened[4] was some pushing and shoving, and two episodes of head to head posturing.

Outside the doors

[18] As Mr Evans got P outside the doors, he pulled P by his jacket, which came off over his head. P then threw the jacket down and advanced on Mr Evans. The complainant arrived and stepped between Mr Evans and P. He held each of them apart with one arm, and then pushed P away backwards. Mr Faulkner joined Mr Evans then. The taxi driver came out and picked up the jacket. The complainant continued pushing P backwards.

[19] As the complainant turned back towards Mr Evans and Mr Faulkner, P came forward again. Once again the complainant intervened and stopped P from coming in. The taxi driver walked over to the group, holding P's jacket, then stepped back. P then stepped back away from the guards.

[20] At that point the complainant and Mr Faulkner stood head to head again for about one to two seconds. Mr Evans pushed him away, as did Mr Faulkner a moment later. P then came in and the two guards pushed him away. As they did Mr Faulkner threw a punch at the complainant.

[21] By then Mr Evans was on one side with P, and grappled with him, eventually putting him on the ground.

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4 Physically speaking only, as the CCTV had no audio.

[22] Mr Faulkner pushed the complainant away, using his hands on the complainant's upper chest or neck area. He pushed the complainant three times that way, then pulled him forward and down. From this point the complainant's hands remained by his sides. The complainant stood up and stepped towards Mr Faulkner. Mr Faulkner pushed him twice more, then punched him with his right fist. The complainant fell, unconscious. It was this punch that broke his jaw.

The directions on self-defence

[23] The learned trial judge commenced his directions on self-defence in these terms:[5]

> "If the Prosecution cannot, to your satisfaction, beyond reasonable doubt, exclude the possibility that the doing of the grievous bodily harm occurred in self-defence, as the law defines it, that is the end of the case. The Defendant's use of force would be lawful, and you would find him not guilty, if the Prosecution cannot exclude that. To explain that a bit further, the criminal law, as you might expect, does not only punish. It protects as well. It does not expect citizens to be unnaturally passive, especially if their safety is threatened by somebody else. Sometimes, an attacker may come off second-best, but it doesn't follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself, as I will shortly explain to you when I read another section from the Criminal Code.
>
> You should appreciate that the law relating to this is drawn in fairly general terms to cover any situation that may arise. Each jury hearing such a case has to apply it to a particular situation according to the facts of the particular case. No two cases are exactly alike, so the results depend on the common sense and community perceptions that you, as jury members, bring into Court.
>
> You will not be surprised to know that if the violence of an attacker is such that the person defending himself reasonably fears for his life or safety, then the violence that might be justified in those circumstances will be greater as well. The level of justifiable self-defence depends very much on the level of danger created by the attacker and the reasonableness of the Defendant's reaction."

[24] His Honour then quoted part of s 271[6] of the *Criminal Code* 1899 (Qld) and continued:[7]

> "The first matter that arises is whether Mr Faulkner was unlawfully assaulted by [the complainant]. If you conclude that [the complainant] did not assault the Defendant, for example, by shaping up to him, or punching or attempting to punch him, the defence is simply not open. The high point of an alleged assault by [the complainant] seems to be either that he shaped up to him, or he tried

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5 Appeal Book (**AB**) 128 line 28 to AB 129 line 2.

6 The part quoted omitted the words at the end of s 271(1): "if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm". That omission was deliberate, and the result of following the Benchbook direction: AB 136 line 24, AB 137 line 42. No complaint was made as to that approach.

7 AB 129 line 18 to AB 130 line 14.

> to punch him. That was what was put in cross-examination to [the complainant] yesterday.
>
> [His Honour then quoted from the evidence]
>
> So that was what was put in issue during the conduct of the defence. It arguably went further today, at least at one point of the evidence, because on Ms Baddiley's evidence this morning, there may have been a striking of Mr Faulkner just prior to the causing of the grievous bodily harm. However, you might think, at the end of the day, it is a matter for you.
>
> But her evidence is not supported by any other witness, nor could she point to it on the recording, and the learned Crown Prosecutor has shown to you again the relevant footage of what seems to be the suffering of the grievous bodily harm, that is, the point where [the complainant] is punched and falls to the ground, apparently unconscious. And it is a matter for you, but the recording might seem to show that immediately prior to that, [the complainant] had his hands at his sides."

[25] Then, having given the jury definitions of assault and grievous bodily harm, the learned trial judge returned to the jury's task in considering self-defence:[8]

> "You have not heard from the Defendant, but the Defence points to circumstances that they argue give rise to such a state of mind. The question is whether the Prosecution has proved beyond reasonable doubt that the Defendant did not actually believe, on reasonable grounds, that it was necessary to do what the Defendant did to save himself from death or grievous bodily harm. So has the Prosecution excluded that beyond reasonable doubt?
>
> The Defendant does not have to prove that his response was reasonable. Rather, the Prosecution must satisfy you that the Defendant did not actually believe, on reasonable grounds, that he had to do what he did to save himself from being killed or suffering a very serious injury.
>
> You will need to assess, looking at all the circumstances of the case, the level of physical menace which you think the Complainant was actually presenting before the serious force was used by the Defendant. You are in the advantageous position that it is captured on film, and you can – you have already seen it a number of times. You will probably be able to watch it again. Relevant to this question, you might think, is the fact that the Complainant does not seem to have struck the Defendant at the relevant time and, indeed, on one view of the footage, simply had his hands by his sides. Was it, then, reasonable for the Defendant to break his jaw in self-defence?"

[26] After the jury retired they sent a question to the learned trial judge, asking: "*From what point in time do we base the self-defence? 1) Start at reception, 2) Point of the hit.*"

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8 AB 131 lines 9-29.

[27] The issue was then debated and Counsel for Mr Faulkner contended that the relevant threat to which Mr Faulkner had responded was not confined to the point immediately prior to the punch:[9]

> "… the threat and the concern for the defendant's own safety did start … at the reception desk, and then the incident has moved into the lobby, and then it's moved to the front door, and then it's moved out in the driveway. So it's been one situation of threat all along."

[28] The learned trial judge took issue with that contention in the course of argument, saying:[10]

> "What seems to me to be completely and utterly divorced from the world of logic at the moment is the idea that somebody can punch somebody in the jaw and that can somehow be a defence against something that happened two minutes earlier. I just don't perceive how that can be logically connected."

[29] The learned trial judge read the same part of s 271(1) again, and then answered the jury in this way:[11]

> "So the point of the section is that you are, firstly, assaulted. There's no suggestion here of any provocation – if there was any assault. Then you're entitled to use force as is reasonably necessary to make effectual defence against the assault. **As to whether the basis of the self-defence could arise at the beginning of the engagement between these people at the reception, ultimately, the facts are a matter for you, but you might think it difficult to establish the proposition that it's reasonably necessary to defend yourself against something that happened a couple of minutes prior, in another location, to then throw the punch that caused the grievous bodily harm in this case.**
>
> I think you've got the recording in there. Ms Geary tells me that if one measures the time lapsed between those events, the initial events at the reception were between one and two minutes, but probably closer to two minutes, prior to the hit which is – which has caused the grievous bodily harm. **So in terms of your note and the way in which the law is framed, is it reasonably necessary to make effectual defence against something that happened a couple of minutes earlier, to then punch somebody? That may, with respect, seem a very difficult logical proposition to make. If someone throws a punch at somebody, generally the recipient doesn't say, "I'll get back to you in a couple of minutes about that, if that's okay." Generally, there has to be an immediate connection for it to be self-defence, it seems, as a matter of logic.**
>
> The other things that I said to you about self-defence earlier – I'll just repeat them or some of them. The law is drawn in fairly general terms to cover any situation that may arise. You have to apply it to the particular situation according to the facts of the particular case.

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9 AB 146 lines 13-16; see also AB 146 line 34, AB 147 lines 7, 30, AB 150 line 3.
10 AB 149 lines 42-45; see also AB 151 line 2.
11 AB 153 line 39 to AB 155 line 2. Emphasis added.

> No two cases are exactly alike, so the results depend heavily on the commonsense and community perceptions which juries bring into court. You won't be surprised to know that, if the violence of the attacker is such that the person defending himself reasonably fears for his life or safety, then the violence that might be justified would be greater also. The level of justifiable self-defence depends very much on the level of danger created by the attacker and the reasonableness of the defendant's reaction. **And on that particular phrase, I suppose a question that arises out of your inquiry is, is it reasonable to wait a couple of minutes and then respond?**
>
> The first question here is whether Mr Faulkner was unlawfully assaulted by [the complainant]. At the time immediately prior to [the complainant] being hit, the video seems to show him with his hands by his sides. If you conclude [the complainant] did not assault the defendant by shaping up to him or punching or trying to punch him, the defence is simply not open. The critical question is whether the defendant believed on reasonable grounds that the force used was necessary for defence.
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> The important issue is the state of mind or belief of the defendant. You don't have any direct evidence of what his state of mind or belief was. Rather, what the defence seems to be pointing to is circumstances that are established by the evidence, and I suppose they're asking you to draw an inference from the way in which the events are shown on the video. The question is whether the prosecution has proved beyond a reasonable doubt that the defendant did not actually believe on reasonable grounds that it was necessary to do what the defendant did to save himself from death or grievous bodily harm. **Now, that being the logical connection, it's difficult to see how a blow struck by the defendant could be saving himself from something that happened a couple of minutes earlier in a different location.**
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> You need to assess, looking at all of the circumstances of the case, the level of physical menace which you think the complainant was actually presenting before the serious force was used by the defendant. Relevant to this question is the fact that the complainant does not seem to have struck the defendant at the relevant time. **As I say, the video seems to show him with his hands by his sides, so then the question for you seems to be: was it then reasonable for the defendant to act as he did, causing the defendant's jaw to be broken and that action being capable of being seen as being in reasonable self-defence?**

Submissions

[30] For Mr Faulkner it was submitted that the redirection in response to the jury's question wrongly told the jury that there had to be an immediate connection between the assault and the reaction for self-defence to be sustained. Further, the comments by the learned trial judge, while perhaps intended as his own thoughts, would have been understood by the jury as directing them that the punch could not be a response that gave rise to self-defence. That was most evident in the passages highlighted in paragraph [29] above. It was submitted that at no time did the

learned trial judge state that he was expressing his own opinion and his Honour proceeded without making it clear that the ultimate decision on the issue was for the jury or cautioning the jury. The jury could have seen this as a binding direction of law, or even as a direction to convict, when it is not.

[31] The submissions drew attention to authority holding that a person does not have to wait for the assailant to strike the first blow or fire the first shot.[12] It was submitted that the jury were left thinking that it was a time-based defence like provocation or that it must occur within some sort of window or the force can only be used within a certain proximity.[13]

[32] Finally it was submitted that the fact that trial counsel did not seek a redirection did not detract from the point. It was incumbent upon a trial judge to instruct a jury concerning any defence that fairly arises on the evidence and therefore needs to be considered.[14]

[33] For the Crown it was submitted that Mr Faulkner did not request any special directions regarding self-defence prior to the trial judge commencing the summing up. The directions given by the trial judge during the summing up included the full definition of an "assault" and specifically the assertion that the complainant shaped up to Mr Faulkner or punched him or attempted to punch him. Neither Counsel made an application for re-directions but clarification was sought by the Crown Prosecutor that the directions encompassed sections 271(1) and (2) *Criminal Code*.

[34] Following the receipt of the note from the jury, after the learned trial judge indicated an intention of saying to the jury that "although the facts are ultimately a matter for (them) it is difficult to see how the provisions of self-defence could justify waiting two minutes and then hitting someone", Counsel for Mr Faulkner raised for the first time that in considering self-defence the jury should be directed to take into account the conduct of the complainant towards the appellant from the foyer as demonstrating an ongoing threat to which the appellant responded.

[35] The learned trial judge's remark was a comment, rather than a direction, that the jury was not obliged to accept. The comments drew to the attention of the jury the real issues in the trial and did not usurp their role as the judges of the facts.[15]

[36] The time that lapses between the assault and the act that caused the grievous bodily harm was relevant to determining whether the act was reasonably necessary for Mr Faulkner to make an effectual defence.

[37] Alternatively, it was submitted that no substantial miscarriage of justice had occurred. The preponderance of the evidence was that the complainant was standing with his hands by his sides when he was struck by Mr Faulkner. The complainant was intoxicated. The most aggression he had shown towards Mr Faulkner was going head to head with him. Otherwise, while outside the hotel, the

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12 Appellant's outline paragraph 57; *Beckford v The Queen* [1988] AC 130, [1987] 3 All E R 425; *R v Lawrie* [1986] 2 Qd R 502 at 505.

13 *Zevevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, [1987] HCA 26.

14 *Stevens v The Queen* (2005) 227 CLR 319, [2005] HCA 65, *Fingleton v The Queen* (2005) 227 CLR 166, [2005] HCA 34; *Murray v The Queen* (2002) 211 CLR 193, [2002] HCA 26; *Stingel v The Queen* (1990) 171 CLR 312 at 333-334.

15 Reliance was placed on *R v Hyde* [2017] QCA 148 at [59]-[66].

complainant had pushed Mr Evans and P, seemingly to break up and/or prevent an altercation between them. He had been pushed around by Mr Faulkner, who was a security officer and presumably capable of defending himself by means other than a forceful punch to the face.

Discussion

[38] It is convenient to commence by considering the direction given in response to the jury's question. The question plainly sought a direction as to the start point in the interaction between the complainant and Mr Faulkner which was relevant to the issue of self-defence.

[39] The answer contained a number of components.

[40] First, the learned trial judge told the jury that "whether the basis of the self-defence could arise at the beginning of the engagement between these people at the reception, ultimately, the facts are a matter for you". That told the jury that it was up to them to decide if that was the start point for consideration.

[41] However, that was immediately qualified by his Honour saying: "but you might think it difficult to establish the proposition that it's reasonably necessary to defend yourself against something that happened a couple of minutes prior". The jury could well have understood that as giving his own view as to whether the defence could be sustained if they considered the start point was at the events at the reception desk.

[42] Secondly, having reminded the jury of the time that elapsed between the events at the reception and the punch, his Honour commenced the next part of his response by saying "in terms of your note and the way in which the law is framed". In my respectful opinion, those words would have highlighted to the jury that what was to follow was a direction about the law, responding to their note.

[43] Thirdly, what did follow was the learned trial judge telling them that it was a "difficult logical proposition" to say that the punch could be a reasonably necessary response to whatever happened two minutes earlier, i.e. at the reception desk. That ended with his Honour saying: "Generally, there has to be an immediate connection for it to be self-defence, it seems, as a matter of logic".

[44] In my respectful opinion, in the context of what was said before that would have been understood by the jury as a direction to them. Counsel for the Crown conceded before this Court that if it was a direction it was unsustainable, and therefore a misdirection. In any trial, the question whether s 271 is raised will turn upon all the facts of each case.[16] In *R v Muratovic*[17] it was held that those facts may include previous threats and assaults that were relevant to the question whether the nature of the assault was such as to cause a reasonable apprehension of death or grievous bodily harm. In *Muratovic*, Gibbs J said:[18]

> "It was submitted on behalf of the Crown that the appellant could not reasonably have believed that Markovic and Smaczny intended to kill him or do him serious injury in the presence of many other people in a public bar in the city of Mackay, or that in that situation

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16 *R v Beetham* [2014] QCA 131; *R v Pangilinan* [2001] 1 Qd R 56, [1999] QCA 528 at [25].

17 *R v Muratovic* [1967] Qd R 15 at 19-20 per Gibbs J, Lucas J concurring.

18 *Muratovic* at page 20.

> he could not have saved himself except by the use of his knife, and stress was laid on the facts that the appellant did not cry for help, but stabbed Markovic twice and Smaczny five times. When these circumstances are kept in mind, the plea of self-defence may seem to a judge to be weak and tenuous, but it is for a jury not a judge to decide upon a plea of this kind, as upon any other question of fact, provided, as I have said, that there is evidence on which a reasonable jury could decide the issue favourably to the accused."

[45] In that light the concession was correctly made, as the following passage from *Zecevic v Director of Public Prosecutions (Vic)* demonstrates:[19]

> "When upon the evidence the question of self-defence arises, the trial judge should in his charge to the jury place the question in its factual setting, identifying those considerations which may assist the jury to reach its conclusion. In attempting to identify those considerations in any abstract manner here, there is a danger of appearing to elevate matters of evidence to rules of law. For example, it will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part. There is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone. The trial judge should also offer such assistance by way of comment as is called for in the particular case. No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection."

[46] Fourthly, the learned trial judge gave immediate emphasis to that point when he said, referring to the reasonableness of the reaction:

(a) "And on that particular phrase, I suppose a question that arises out of your inquiry is, is it reasonable to wait a couple of minutes and then respond?" and

(b) "Now, that being the logical connection, it's difficult to see how a blow struck by the defendant could be saving himself from something that happened a couple of minutes earlier in a different location."

[47] Finally, the learned trial judge told the jury that when they were assessing "the level of physical menace which you think the complainant was actually presenting", the video showed the complainant with his hands by his sides, and the question for them was: "was it then reasonable for the defendant to act as he did, causing the defendant's jaw to be broken and that action being capable of being seen as being in reasonable self-defence?"

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19 (1987) 162 CLR 645 at 662-663 per Wilson, Toohey and Dawson JJ.

[48] In my respectful opinion, that last passage emphasised the direction that there had to be an immediate connection for it to be self-defence, and conflated two different issues, one being the force used in response, and the second, the outcome, i.e. a broken jaw. There can be little doubt that the jury would have understood that as a direction. After all what was said reflected a passage earlier in the summing up: see the last paragraph of the passage quoted in paragraph [25] above.

[49] Considered in full, the direction to the jury would have been understood by them as confining their consideration of the self-defence issue to the period immediately before the punch, and not extending back to take into account the events at the reception desk. As Counsel for the Crown properly conceded, if that was the direction, it was unsustainable. The practical outcome was that the defence case, that the events from the reception desk were relevant to the issue of self-defence, was not properly left to the jury.[20]

[50] It follows that the conviction should be set aside, and that there should be a retrial. I agree with Henry J's comments about the operation of s 271(1).

[51] I propose the following orders:

1. The appeal is allowed.

2. The conviction entered on 14 June 2017 and the orders made on 16 June 2017 are set aside.

3. A new trial is ordered.

[52] **HENRY J:** I agree with the reasons of Morrison JA and the orders proposed.

[53] This appeal involved no argument requiring consideration of whether the defence of self-defence pursuant to s 271(1) of the *Criminal Code*, which was not left to the jury at first instance, should have been left. However, since a new trial is to be ordered, it seems prudent to note the focus of the exclusory words at the end of s 271(1) is not upon whether the force used caused death or grievous bodily harm but whether the force used was such as was "likely" to cause death or grievous bodily harm. The fact a complainant has suffered grievous bodily harm or death does not of itself exclude the operation of s 271(1).[21]

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20 *R v De Silva* (2007) 176 A Crim R 238, [2007] QCA 301.

21 See for example *R v Bojovic* [2000] 2 Qd R 183, 185 [11].