SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mickelo* [2018] QCA 295
PARTIES:	**R** **v** **MICKELO, Morris Steven** (appellant)
FILE NO/S:	CA No 29 of 2017 DC No 1096 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 9 February 2017 (Rafter SC DCJ)
DELIVERED ON:	30 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2018
JUDGES:	Fraser and Morrison JJA and Flanagan J
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant, following a three-day trial, was convicted by jury of unlawfully wounding a police officer with intent to resist or prevent that officer from acting under lawful authority, and of wilfully obstructing another police officer while that officer was acting in the execution of duty – where the police officers had attended at a residential unit in response to noise complaints – where one of the police officers sought to handcuff the appellant – where the appellant twice forced that police officer into a window, shattering the window and causing lacerations to the officer's arms – where the appellant had earlier refused to follow a repeated direction from the other police officer that he go downstairs – where footage from this second officer's body-worn camera was tendered at trial – whether it was reasonably open to the jury, upon the whole of the evidence, to be satisfied beyond reasonable doubt that the first officer was acting under lawful authority when he sought to handcuff the appellant, and that the second officer was acting in execution of her duty when she instructed the appellant to go downstairs CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL

WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the learned trial judge, in the course of summing up, made no reference to accident pursuant to s 23(1)(b) of the Queensland's *Criminal Code* in respect of the unlawful wounding offence – where the appellant's defence counsel at trial at no point sought directions of that kind – where, immediately before the relevant police officer's second collision with the window, the appellant said words similar to "I'm gonna put your head through" – whether there was evidence before the jury raising the possibility that neither the appellant, nor an ordinary person, could reasonably have foreseen that the lacerations suffered by the relevant police officer were a possible consequence of the appellant's use of force – whether the learned trial judge's failure to direct the jury as to accident amounted to an error in law or occasioned a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the Crown at trial did not seek to identify which of the two collisions with the window caused the lacerations to the relevant police officer's arms – whether the Crown's failure to distinguish between the collisions gave rise to latent ambiguity within the unlawful wounding charge – whether the defendant was consequently unable to properly know and respond to the case against him, occasioning a miscarriage of justice

Criminal Code (Qld), s 23

Irwin v The Queen (2018) 92 ALJR 342; [2018] HCA 8, applied
R v Coomer [2010] QCA 6, applied
R v Rad [2018] QCA 103, applied
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited

COUNSEL: A J Edwards, with J R Green, for the appellant (pro bono)
D C Boyle for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

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

[3] **FLANAGAN J:** On 9 February 2017, following a three day trial in the District Court at Brisbane, the appellant was convicted of the following two offences:

(a) that on the fifth day of April 2014 at Capalaba in the State of Queensland, he with intent to resist or prevent Reece Andrew Jarman, a public officer, from acting under lawful authority, unlawfully wounded Reece Andrew Jarman (count 1); and

(b) that on the fifth day of April 2014 at Capalaba in the State of Queensland, he wilfully obstructed Samantha Leigh Schofield, a police officer, while Samantha Leigh Schofield was acting in the execution of her duty (count 3).

[4] Having found the appellant guilty of count 1, the jury were not required to consider the alternative offence (count 2) of assault of a police officer while acting in the execution of his duty. In respect of count 1, the prosecution also alleged a circumstance of aggravation, namely that the appellant caused bodily harm to Constable Jarman.

[5] On 10 February 2017, the appellant was sentenced to five years' imprisonment on count 1 and 12 months' imprisonment on count 3 with a parole eligibility date fixed at 28 April 2019. Twelve days' pre-sentence custody was declared.

[6] The appellant appeals against his convictions. The only ground of appeal identified in the notice of appeal[1] is that the verdicts were unsafe and unsatisfactory (ground 1). This ground requires the Court to perform an independent examination of the whole of the evidence to determine whether it was open to the jury to be satisfied of the guilt of the appellant of counts 1 and 3 beyond reasonable doubt. In performing this exercise this Court must have proper regard for the pre-eminent position of the jury as arbiter of fact.[2]

[7] At the hearing of the appeal, the appellant sought and was granted leave to argue two further grounds of appeal. The respondent did not oppose the grant of leave.[3] The two further grounds are that:

(a) the learned trial judge either erred in law, or there was a miscarriage of justice occasioned, as a result of the trial judge failing to direct the jury on count 1 in relation to criminal responsibility for events that are not intended or are unforeseen (*Criminal Code* s 23) (ground 2); and

(b) the charge the subject of count 1 suffered from latent duplicity in that the specific act alleged to have wounded Constable Jarman was not specified.

[8] As to ground 1, counsel for the appellant informed the Court that while he did not have specific instructions to abandon this ground, no oral or written submissions would be advanced in support of it.[4] It is, in any event, necessary to consider the prosecution case for the purposes of considering grounds 2 and 3.

The Prosecution Case

[9] The case for the prosecution primarily consisted of the evidence of Constable Schofield and Constable Jarman together with a video recording of the events.

[10] On 5 April 2014, Constable Schofield and Constable Jarman were on duty when they were dispatched to a unit at Denison Court, Capalaba. Both officers were in

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1 AB 189 at 190.

2 *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13 at 408-409, [20]-[22] per French CJ, Gummow and Kiefel JJ; *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35 at 329-330, [65]-[66]; *R v Brock* [2018] QCA 185 at [16]-[19] per Morrison JA.

3 Respondent's Outline of Argument, paragraph 2.3.

4 Transcript of Proceedings, 1-17, lines 1-22; Appellant's Outline of Argument, paragraph 44.

uniform. Prior to their arrival, they had been informed that there was a disturbance at the address. Reports of that disturbance described a number of people having been partying for approximately three days, and yelling and screaming coming from the address. The officers were attending the address for the purposes of investigating this disturbance.

[11] They arrived at approximately 7.20 pm. Each officer was carrying a service firearm, tasers, a baton, OC spray and handcuffs. Constable Schofield activated her body-worn video camera when she arrived at the unit.

[12] Upon entering the unit the officers encountered the appellant and observed a female (Eleanor Webb) with a broom sweeping up glass from a broken fanlight. Constable Schofield observed that the appellant appeared to be intoxicated. He was slightly swaying in his stance and his speech was slurred.

[13] The unit had two storeys. There was a toilet on the lower floor near the entrance and a combined toilet and bathroom upstairs. Both officers heard voices and some scuffling from upstairs. Constable Jarman went to investigate while Constable Schofield remained downstairs. She engaged in a conversation with Ms Webb in order to investigate suspected domestic violence.

[14] Having heard Constable Jarman raise his voice, Constable Schofield followed him upstairs and observed another male at the top of the stairs and a young female stumble out of one of the bedroom cupboards. The young female (Deanna Airey) had red marks and blood on her. Both the male and Ms Airey were compliant with instructions given to them by the officers.

[15] While situated approximately three-quarters of the way up the staircase, Constable Schofield commenced questioning Ms Airey. Constable Schofield then became aware that the appellant was walking up the stairs behind her. She turned to face the appellant and asked him to go downstairs. He stated that he needed to use the toilet, to which Constable Schofield replied, "There's a toilet downstairs".[5] The appellant then tried to push past Constable Schofield. He was asked approximately nine times by Constable Schofield to go downstairs. The appellant's refusal to comply with Constable Schofield's directions to go downstairs was the subject of count 3.[6]

[16] Constable Schofield estimated that the appellant was approximately 178 to 180 centimetres tall and weighed between 100 and 110 kilograms. In cross-examination she accepted that the appellant may have weighed between 90 to 100 kilograms.[7]

[17] The appellant eventually went down the stairs and was directed by Constable Schofield to sit down on the lounge. This direction was repeated by Constable Jarman. The appellant did not comply with this direction. Constable Jarman formed the view that he ought to handcuff and thereby detain the appellant, and accordingly directed the appellant to put his hands in front of him. Constable Jarman was prevented from handcuffing the appellant and attempted to turn the appellant around to handcuff him behind his back. Constable Schofield then observed the beginning of a scuffle between the appellant and Constable Jarman. She observed the appellant punch

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5 AB 25, lines 43-45.
6 AB 163, lines 4-6.
7 AB 60, lines 13-16.

Constable Jarman twice in the stomach and then both grab a hold of each other. Constable Schofield deployed her taser, which did not work. There was pushing and shoving.

[18] Constable Schofield contemplated reloading and re-deploying the taser. At this stage however, the appellant and Constable Jarman were heading towards the bottom of the staircase. At the bottom of the staircase was a pole and an adjacent window. Constable Schofield was approximately two to three metres away from the appellant and Constable Jarman. Constable Schofield described what she thereafter observed:

> "I saw Mr Mickelo then grab Constable Jarman from behind and he threw him onto the stairs. He then threw him up against the wall near the – near the stairs, and that's when I saw Constable Jarman starting to become really limp and dazed, and at that time I was starting to think he's going to be at risk of serious injury now. He's either going to be knocked out or have some sort of permanent injury, as in, you know, like a broken bone or a concussion, that sort of thing. I still had the taser in my hand. I was still considering tasering him again at that point, and then I saw Mr Mickelo pretty much pick up Constable Jarman from behind and put his shoulder and head area through the window. … The window – the glass, it smashed everywhere … So his head and shoulder area broke the glass. … He was – he was pushed through it – through it with force. … He [Mickelo] was holding him on his body and shoulder area."[8]

[19] Fearing for the life of Constable Jarman, Constable Schofield shot the appellant twice with her service pistol.

[20] The recording from Senior Constable Schofield's body-worn video camera was tendered as exhibit 1 at trial and played to the jury. A transcript of this recording was also made available to the jury. The recording and transcript are considered below.

[21] In cross-examination Constable Schofield accepted that Constable Jarman impacted the window twice.[9] No part of the cross-examination of Constable Schofield challenged her evidence that the appellant overpowered Constable Jarman and pushed him into the window with force. The cross-examination was rather directed to the question of whether Constable Jarman was justified in seeking to handcuff the appellant.

[22] Constable Jarman's evidence was that when he sought to turn the appellant around to handcuff him, the appellant grabbed him across the top of his head and neck area in a "bear hug sort of motion" and began to punch him in the side of his face.[10] Constable Jarman stated that he was "pretty well overpowered" and he tried to push the appellant in the chest and torso region in an attempt to free himself. He described being overpowered "very, very quickly".[11] As he continued to struggle with the appellant, Constable Jarman heard a "pop", which he assumed was the taser being deployed by Constable Schofield. Constable Jarman described what happened thereafter:

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8 AB 33, line 26 to AB 34, line 5.
9 AB 75, lines 45-46.
10 AB 97, lines 29-31.
11 AB 97, lines 39-40.

> "And then the next thing I recall, I felt my head striking a hard object. I heard glass breaking. I heard the metal clanging of a – of, like, a window frame. And I could feel – I could feel my head and my upper shoulder region being forced into some glass that kept breaking and was giving way under the force.
>
> What caused you to be forced into the glass?--- The defendant. He still had hold of me.
>
> And whereabouts was he holding you?--- Around the neckline. Around the neck of my shirt. Around my shoulder area. He had hold of that. I recall, in the middle of that, my shirt ripped. I do recall that, from the force.
>
> …
>
> Now, do you recall which part of your body connected with the glass first?--- Not – I believe it – I thought it was my head first, because I felt – my head was the first thing I noticed that was being forced against another object.
>
> And did any other parts of your body make contact with the window?--- Yes, my arms did.
>
> You heard the glass shatter?--- Yes.
>
> And what then happened?--- After the glass – I'd heard that breaking sound a few times, I then – I heard another pop. And shortly after, pretty much as that happened, the defendant fell to the ground, and he dragged me down with him; I fell to the ground next to him. At stage, I then had a real – I had a very strong smell of gunpowder."[12]

[23] Constable Jarman recalled that when the taser was fired the appellant "briefly paused, and, kind of, groaned. However, it didn't stop any behaviour, and he kept holding onto me."[13] Constable Jarman believed that he had been pushed into the window more than two times "with a lot of force". He heard glass breaking on each occasion that he was forced into the window. He recalled his arms making contact with the glass window and suffering lacerations to both of his arms.[14] It was an admitted fact at trial that the lacerations to Constable Jarman's arms constituted the injuries defined by law as a wound and bodily harm.[15]

[24] Constable Jarman accepted that what is shown on the video recording was slightly different to what he recalled.[16]

[25] In cross-examination Constable Jarman gave the following evidence:

> "There's no doubt that you were grabbed hold of, he resisted your attempts at handcuffing, and that there was a fight, and it appears – and you say you were punched, but on the video, it appears there was a punch. In the – during the wrestle, where you go from one side –

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12 AB 98, line 16 to AB 99, line 2.
13 AB 98, lines 9 to 11.
14 AB 100, line 21 to AB 101, line 2.
15 AB 122, lines 16-19.
16 AB 112, lines 14-15.

> or, the middle of the room, over to the stairwell – do you know what I'm talking about? You have to say yes or no?--- Yes.
>
> Do you recall him pushing you towards that corner, or in that general direction?--- I remember the – I don't remember whether it was pushing or pulling, but I remember I was forcefully dragged over to that side of the room.
>
> All right. Is that change in position – is that consistent with the taser going off?--- Yes.
>
> The – are you able to remember the difference between the first part, before the taser, and the second part after the taser? And I'm not critical of you if you can't?--- No. The next thing I remember, after the taser, was the glass.
>
> All right. Is it possible that in the second half of that part that I'm talking about … pre-taser and post-taser, that you were pushing him back into the corner, for your own safety?--- At no time did I feel like I was pushing him, or I had the edge on him, I guess, if you would say."[17]

[26] Apart from this exchange, no part of the cross-examination of Constable Jarman sought to raise any relevant considerations for the purposes of s 23(1)(b) of the *Criminal Code*.

[27] The prosecution also called Damien Lee Hayden, the officer in charge of the Operational Skills section. His evidence concerned the deployment and operation of tasers, including circumstances in which a taser may fail. When deployed, tasers override the central nervous system, including causing involuntary muscle "lock up".[18]

[28] The video recording shows the appellant walking up the stairs and being emphatically instructed by Constable Schofield to move downstairs. The appellant seeks to go past Constable Schofield on the stairs but finally returns downstairs. There are numerous comments from Ms Webb, pleading with the appellant to "stop", "stop please", and asking him, "What are you doing?"

[29] Both Constable Schofield and Constable Jarman instruct the appellant to sit on the lounge. The appellant does not comply with this direction. Constable Jarman instructs the appellant twice to put his hands out in front of him for the purpose of being handcuffed. He then seeks to turn the appellant around to handcuff him behind his back. The video then shows the appellant slapping Constable Jarman's hand away and an ensuing struggle, soon after which Constable Schofield deploys her taser. The appellant then pulls Constable Jarman towards the corner and bottom of the staircase. The transcript records the appellant saying the words, "I'm gonna put your head through …".[19] Constable Jarman seeks to take hold of the staircase pole but the appellant, while grabbing hold of Constable Jarman, forces him into the screen side of the window, resulting in the glass smashing. Constable Jarman then falls down on the stairs, but is lifted up by the appellant from a near seated position and spun around. Constable Jarman once again seeks to hold on to the staircase

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17 AB 114, lines 4-12 and lines 35-45.
18 AB 117, lines 41-42.
19 AB 186, line 20.

pole but is forced backwards into the window, shattering more glass. Constable Jarman appears to impact the window on the first occasion with his left side, including his left arm. On the second occasion he impacts the window with his right side, including his right arm.

[30] In my view, the video shows that Constable Jarman was overpowered by the appellant and twice impacted with the window because of the force exerted by the appellant.

The Summing Up

[31] A consideration of the trial transcript and the summing up reveals that neither prosecution nor defence counsel sought any directions or redirections from the learned trial judge in respect of s 23(1)(b) of the *Criminal Code*. This was in circumstances where his Honour, prior to addresses and summing up to the jury, invited counsel to raise any matters.[20] In response to his Honour's invitation, defence counsel identified the "real issue" as follows:

> "The real issue in the trial, in my submission, will be the lawfulness of the acts of Constable Jarman in the attempted handcuffing. … the jury will have to be instructed in relation to that, and I think it's section 609 of the PPRA (*Police Powers and Responsibilities Act* 2000 (Qld)) gives the power of entry and the power to detain."[21]

[32] Defence counsel conceded that the evidence supported Constable Schofield and Constable Jarman having a "domestic violence suspicion" rendering the entry to the unit lawful.[22] The issue was whether Constable Jarman had a lawful right to detain the appellant.

[33] The learned trial judge discussed other proposed directions with counsel, including a direction concerning propensity,[23] the use of force in terms of s 283 of the *Criminal Code*,[24] relevant provisions of the *Police Powers and Responsibilities Act*,[25] intoxication[26] and alternative verdicts in relation to count 1.[27]

[34] After the prosecution address, the learned trial judge clarified with counsel the act relied on for count 3. This was identified as being the appellant's refusal to obey Constable Schofield's directions to go downstairs.[28]

[35] In the course of the summing up the learned trial judge gave no directions in respect of s 23(1)(b) of the *Criminal Code*. As to count 1, his Honour gave directions in relation to the relevant intention, being the appellant's intention to resist or prevent Constable Jarman from acting under lawful authority.[29] His Honour stated that the prosecution must prove that the appellant actually had a subjective intent to achieve the described result to resist or prevent Constable Jarman from acting under lawful

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20 AB 125, line 18.
21 AB 127, lines 16-20.
22 AB 127, lines 10-12 and lines 23-28.
23 AB 128, lines 25-30.
24 AB 129, lines 1-3.
25 AB 129, line 32-45.
26 AB 133, line 40-45.
27 AB 137, line 9 to AB 145, line 17.
28 AB 148, lines 40-41.
29 AB 159, lines 9-10.

authority. His Honour then dealt with the issue of intoxication in circumstances where a specific intention was an element of count 1.

[36] His Honour directed the jury that the main issue as identified by defence counsel was "the issue of acting under lawful authority or acting in the execution of duty".[30] His Honour also identified an issue for the jury as to whether the appellant caused the lacerations to Constable Jarman in relation to count 1.

[37] As to the issue of causation for count 1, his Honour gave the following direction:

> "The Crown case is that the lacerations occurred when Constable Jarman was pushed into the glass window. In relation to the question of whether the defendant caused the lacerations, this is a question to be determined by applying common sense to the facts as you find them to be, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.
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> Provided that you are satisfied beyond reasonable doubt that an act of the defendant substantially or significantly contributed to the lacerations suffered by Constable Jarman, the Crown will have proved this fact. Whether the act of the defendant relied upon by the Crown substantially or significantly contributed to the lacerations suffered by Constable Jarman is a matter of fact for you to decide as a matter of common sense."[31]

[38] His Honour directed the jury in respect of count 3 by identifying the relevant elements of the offence, including the meaning of "wilfully" being "deliberate or intentional".[32] As to the intentional element of count 3, his Honour directed the jury in relation to intoxication.[33] His Honour also identified the particular act as being "the defendant's refusal to comply with Constable Schofield's direction to go downstairs".[34]

[39] The learned trial judge summarised the rival contentions of counsel, and in particular the primary defence argument that matters had not escalated to the point where the handcuffing of the appellant was justified and that the degree of force used was unlawful.[35] In summarising the rival contentions, it is apparent that there was little contest in relation to count 3:

> "Mr Harrison submitted that at best, count 3 would be the only count on which [you] would find the defendant guilty. In making that submission, of course, he did not accept that you would find the defendant guilty of count 3, but made the submission that at best, for the prosecution, that would really be the only count on which you would consider returning a guilty verdict."[36]

[40] The learned trial judge summarised the prosecution case in respect of the unlawful wounding aspect of count 1 as follows:

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30 AB 160, lines 28-31.
31 AB 161, lines 3-15.
32 AB 162, line 26.
33 AB 163, lines 1-6.
34 AB 163, lines 5-6.
35 AB 165, lines 21-24.
36 AB 170, lines 2-6.

> "Ms Kovac pointed out that on the evidence the defendant pushed Constable Jarman into the window, the glass smashed, the defendant then said words along the lines, he will put your head through and there's an indistinct part on the recording, but at the very least, the words, 'I'll put your head through' can be heard, according to Ms Kovac's submission, although that is entirely a matter for you. However, after that, the defendant brought Constable Jarman's body into contact with the broken window. It was after that, that Constable Schofield made the decision to use her firearm."[37]

[41] It is apparent from a consideration of his Honour's summary of the defence contentions that, consistent with the cross-examination of Constable Schofield and Constable Jarman, defence counsel did not suggest that Constable Jarman came into contact with the window through any other mechanism than the force applied by the appellant.

Ground 2

[42] The appellant submits that the learned trial judge should have directed the jury in terms of s 23(1)(b) of the *Criminal Code*. The appellant contends that as a result of the directions which were given (and inferentially the failure to give a direction in terms of s 23(1)(b) of the *Criminal Code*), "it was left open to the jury to conclude that it was sufficient to convict [the appellant] if the force he used, substantially or significantly, resulted in [Constable Jarman] impacting the window and sustaining wounds of the type he suffered whether or not injuries of those types were intended, foreseen, or an ordinary person in [the appellant's] position would reasonably have foreseen that type of wounding."[38]

[43] The relevant Criminal Benchbook Direction requires the trial judge to instruct the jury that the prosecution must prove that the defendant intended that the event in question should occur or foresaw it as a possible consequence or that an ordinary person in his position would reasonably have foreseen the event as a possible consequence. The Criminal Benchbook Direction requires the trial judge to identify and refer to the evidence raising the possibility of the defence of accident and instruct the jury as follows:

> "That evidence raises for your consideration the possibility that neither the defendant nor an ordinary person could reasonably have foreseen that [the event] would occur."[39]

[44] What is required is proof beyond reasonable doubt that an ordinary person in the position of the appellant would reasonably foresee the possibility of the type of injury in fact caused. As observed in *Irwin v The Queen*:[40]

> "All that needed to be foreseen was that harm of the kind in fact suffered was a possible consequence."

[45] As is evident from the Criminal Benchbook Direction, a trial judge need only give a direction in terms of s 23(1)(b) if there is evidence which raises for the jury's consideration the possibility that neither the defendant nor an ordinary person could

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37 AB 168, lines 21-28.
38 Transcript of Proceedings 1-2, lines 30-37.
39 Queensland Supreme and District Courts Criminal Benchbook, No. 78.1.
40 (2018) 92 ALJR 342; [2018] HCA 8 at [52].

reasonably have foreseen that the event in question would occur. The issue in relation to ground 2 is therefore whether there was evidence that raised for the jury's consideration such a possibility.

[46] A similar issue was considered by this Court in *R v Coomer*,[41] where Keane JA (as his Honour then was) stated:

> "[26] On behalf of the respondent, it is submitted that even if one accepts the evidence of Mr Rodgers there was no evidence fit for the jury's consideration that the complainant's injuries occurred by accident.
>
> [27] There is force in the respondent's submission. If a person strikes on the head a person who is fleeing from him on a footpath in a built-up area, it is, to say the least, strongly arguable that a reasonable person would foresee that grievous bodily harm may result from the blow. It is not necessary that the precise nature of the grievous bodily harm, or the precise mechanism whereby it might be inflicted, be foreseeable. A blow of the kind struck here might not always lead to a fall with serious injuries, but it is readily apparent that injuries of the kind which occurred here might well occur.
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> [28] On the appellant's behalf, reference is made to the decision of the High Court in *Stevens v The Queen*[42] in which the majority of the High Court emphasised the importance of ensuring that an accused person should not be denied a fair chance of acquittal by the jury where there is some evidence of accident.
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> [29] In this case the appellant did not seek a direction from the learned trial judge that the jury should consider the defence of accident. In *Stevens v The Queen*, such a direction had been sought from the learned trial judge and refused. It was this refusal which was held to be an error. In the present case, it is difficult to say that the learned trial judge erred so as to enliven the right of appeal to correct 'a wrong decision [on a] question of law' conferred by s 668E(1) of the *Criminal Code*.[43]
>
> [30] It must be accepted that a trial judge is obliged to explain the law to the jury 'in a manner which relates it to the facts of the particular case and the issues to be decided',[44] but the directions which a trial judge must give depend upon the real issues in the trial.[45] In my view, it is difficult to say that the learned trial judge erred in failing to discern that an issue as to accident had arisen in this case even on the most favourable view of the evidence for the appellant."

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41 [2010] QCA 6.
42 (2005) 227 CLR 319.
43 *R v Soma* (2003) 212 CLR 299 at 303 – 304 [11], 305 [15] and 312 [42].
44 *R v Chai* (2002) 187 ALR 436 at 441.
45 Section 620(1) of the *Criminal Code*.

[47] The statements of Keane JA in *R v Coomer* apply with equal force to the present appeal. The evidence at trial did not, in my view, require the learned trial judge to direct the jury in terms of s 23(1)(b) of the *Criminal Code*. In arriving at this conclusion, the Court has the distinct advantage of watching and hearing the video recording of the events as they unfolded on 5 April 2014. The sequence of events in the video recording readily explains why experienced defence counsel did not seek a direction in terms of s 23(1)(b), nor to cross-examine Constable Schofield or Constable Jarman on any issue relevant to such a defence. The video recording also explains why the learned trial judge did not direct in terms of accident. As discussed above, the video recording demonstrates that Constable Jarman was overpowered at an early stage in the struggle. It is evident that by the time Constable Jarman is in the area of the stairs near the window, he has been overpowered by the appellant. It is both the manhandling of Constable Jarman by the appellant and the appellant's application of force that results in Constable Jarman being smashed against the window twice in rapid succession. The amount of force applied by the appellant is also evident when one observes Constable Jarman's failed attempts to grip onto the staircase pole before each impact with the window. The video recording does not evidence that these impacts with the window arose from either the suddenness and fluidity of what occurred or as a result of a combination of forces exerted by each upon the other or by the appellant having been tasered prior to Constable Jarman coming into contact with the window.[46] Additionally, the words spoken by the appellant "put your head through" are inconsistent with any suggestion that the wounding was not intended.[47] In short, there was no evidence in the present case that raised for the jury's consideration the possibility that neither the appellant nor an ordinary person could reasonably have foreseen the type of wounding inflicted on Constable Jarman. No defence under s 23(1)(b) "fairly arises" on the evidence.[48] As such, the learned trial judge did not err in law by not giving a direction in terms of s 23(1)(b) and there has been no miscarriage of justice.

Ground 3

[48] The appellant submits that as the evidence at trial demonstrated that Constable Jarman impacted the window on two separate occasions and the Crown did not identify which of those occasions (or both) was alleged to have caused the wounding to Constable Jarman, questions of latent duplicity arise. The rule against latent duplicity rests upon considerations of fairness, namely, that an accused should know what case he or she has to meet.[49]

[49] Ground 3 fails primarily for two reasons. First, the appellant's reliance on latent duplicity only arises in the context of the application of a defence pursuant to s 23(1)(b) of the *Criminal Code*.[50] As discussed above in relation to ground 2, the evidence at trial did not fairly raise accident for the jury's consideration. No unfairness therefore arises in the prosecution not identifying on which occasion Constable Jarman suffered the lacerations to his arms when he came into contact with the window.

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46 Appellant's Outline of Argument, paragraph 22(b)-(d).
47 Respondent's Outline of Argument, paragraph 5.11.
48 *Irwin v The Queen* (2018) 92 ALJR 342 at [51]; [2018] HCA 8 at [51]; *Stevens v The Queen* (2005) 227 CLR 319 at 342, [68] per Kirby J.
49 *S v The Queen* (1989) 168 CLR 266 at 285 per Gaudron and McHugh JJ.
50 Appellant's Outline of Argument, paragraphs 39-42.

[50] Secondly, as observed by this Court in *R v Rad*,[51] latent ambiguity does not arise where the different acts which could constitute the offence can be said to constitute "one activity". The video shows that the appellant at all times maintained physical contact with Constable Jarman when he forced him into the window. The two impacts with the window occur approximately six seconds apart and, in my view, constitute the one activity. As such, there was no latent ambiguity in the prosecution including both impacts with the window as count 1, nor was there any resulting unfairness to the appellant.

Ground 1

[51] As observed above, counsel for the appellant did not advance any written or oral submissions in support of ground 1.

[52] As is evident from the cross-examination of Constable Schofield and Constable Jarman and the learned trial judge's summing up, the main issue at trial in relation to count 1 was whether Constable Jarman was "acting under lawful authority" when he sought to handcuff the appellant.

[53] In determining whether the prosecution had established this element, the jury had before them the evidence of both Constable Schofield and Constable Jarman together with the video recording and a transcript of this recording. The learned trial judge directed the jury that the prosecution had to prove beyond reasonable doubt that Constable Jarman was acting under lawful authority.[52] The summary of the rival contentions by the learned trial judge highlighted to the jury the relevant evidence, including the video recording, which could be considered by them in determining this issue. This evidence included the fact that Constable Jarman knew Eleanor Webb. The only dealings that he had previously had with Ms Webb related to domestic violence incidents. Constable Jarman was under the impression that it was more than likely that domestic violence had occurred within the premises. Prior to seeking to handcuff the appellant, Constable Jarman had located Ms Airey crouched down in the bedroom wardrobe upstairs. She had red marks and blood on her when located. The jury also had photographs of Ms Airey taken on 6 April 2014.[53] The learned trial judge summarised the prosecution case in respect to count 1 in the following terms:

> "The prosecution case is that the circumstances justified the use of reasonably necessary force so, therefore, Constable Jarman was quite justified in attempting to handcuff the defendant. The prosecution case is that considering the whole of the circumstances, Constable Jarman was justified in attempting to handcuff the defendant and so, therefore, he was acting under lawful authority in terms of count 1 …"[54]

[54] The defence contention as summarised by his Honour was that matters had not escalated to the point where handcuffing was justified and therefore the use of that degree of force was unlawful.[55]

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51 [2018] QCA 103 at [25] per Davis J (with whom Gotterson and Morrison JJA agreed).
52 AB 163, lines 20-26.
53 Exhibit 5.
54 AB 165, lines 15-20.
55 AB 165, lines 21-24.

[55] There was, in my view, a proper evidentiary basis for the jury to be satisfied that the prosecution had established beyond reasonable doubt that, when he sought to handcuff the appellant, Constable Jarman was acting under lawful authority. In addition to the evidence already outlined, prior to the attempt to handcuff him, the appellant had started walking upstairs and was told approximately nine times to stay downstairs. He was also directed by both Constable Schofield and Constable Jarman to sit down on the lounge. As is apparent from the video recording, the appellant became increasingly aggressive. He was also bigger in size than both of the police officers. With the advantage of the video recording, the jury were able to consider the appellant's demeanour and his overall behaviour in the sequence of events prior to the attempt to handcuff him. In evidence Constable Jarman expressed concerns that the appellant may have escalated his behaviour. The video recording also shows Ms Webb repeatedly pleading with the appellant to "stop" and asking him, "What are you doing?"

[56] It was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt of count 1.

[57] Similarly in relation to count 3, the video recording reveals evidence upon which the jury could have been satisfied beyond reasonable doubt of the appellant's guilt of count 3.

[58] As to count 3, the learned trial judge instructed the jury that the prosecution had to prove beyond reasonable doubt that at the time Constable Schofield instructed the appellant to go downstairs, she was acting in the execution of her duty.[56] There was no dispute at trial that both Constable Schofield and Constable Jarman were lawfully entitled to enter the unit.

[59] His Honour gave detailed instructions as to the meaning of a police officer acting in the execution of his or her duty.[57]

[60] It was open to the jury to be satisfied beyond reasonable doubt, based on the evidence of Constable Schofield and the video recording, that when instructing the appellant to go downstairs Constable Schofield was acting in the execution of her duty. This was in effect acknowledged by defence counsel, who submitted to the jury that count 3 was the only count on which the jury would consider returning a guilty verdict.[58]

Disposition

[61] The three grounds of appeal fail. I would order that the appeal be dismissed.

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56 AB 163, lines 30-33.
57 AB 164, lines 1-7.
58 AB 170, lines 2-6.