SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wiedman* [2019] QCA 71
PARTIES:	**R** **v** **WIEDMAN, David Gregory** (appellant)
FILE NO/S:	CA No 244 of 2018 DC No 89 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba – Date of Conviction: 14 September 2018 (Chowdhury DCJ)
DELIVERED ON:	3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2019
JUDGES:	Sofronoff P and McMurdo JA and Bowskill J
ORDERS:	**1. Appeal allowed.** **2. Conviction set aside.** **3. Order that there be a retrial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant fired an arrow from a compound bow which ricocheted off a pole and struck the complainant on the chin, causing an injury that constituted grievous bodily harm – where the appellant was convicted of one count of unlawfully doing grievous bodily harm with an intent to maim, disable or disfigure, or to do some grievous bodily harm – where an issue at trial was whether the appellant held the requisite intention – where the complainant gave evidence to the effect that the appellant had aimed the arrow at him – where the appellant gave evidence that he aimed the arrow at the pole – where the appellant appeals against his conviction on the ground that the verdict is unreasonable or cannot be supported on the evidence – whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant held the requisite intention APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-

DIRECTION – JUDGE'S SUMMING UP – OTHER MATTERS – where the appellant was convicted of one count of unlawfully doing grievous bodily harm with an intent to maim, disable or disfigure, or to do some grievous bodily harm – where the learned trial judge told the jury that he would direct them about "a possible alternative verdict" of "grievous bodily harm without an intention" – where no objection was taken by counsel as to the summing up – whether the learned trial judge directed the jury on the alternative verdict of grievous bodily harm without an intention – whether the appellant was deprived of a real chance of acquittal on the one count of unlawfully doing grievous bodily harm with an intent to maim, disable or disfigure, or to do some grievous bodily harm

Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited

COUNSEL: N V Weston for the appellant
C N Marco for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant and Mr Cameron Boyd had been friends for some years. On 17 September 2017 Mr Boyd was at the appellant's house and harsh words were exchanged. He left and more harsh words were exchanged over a telephone call. Mr Boyd came back to the appellant's house and there was further argument. Mr Boyd punched the front door. The appellant made attempts to go outside to confront Mr Boyd who, for his part, tried to keep the door shut to prevent his exit. The appellant used a knife to stab the screen door that stood between him and the complainant. He did this near the complainant's hand to try to make him release it. This did not work. The appellant then armed himself with a compound bow and threatened to shoot Mr Boyd. In fact he shot an arrow which struck the screen door and landed inside the house. The appellant picked up that arrow and pushed it through the screen door a few times trying to stab the complainant with it.

[2] He then notched an arrow into the bow and fired it in the direction of Mr Boyd. It struck a pole behind which Mr Boyd was sheltering, ricocheted off it and hit Mr Boyd on the chin causing an injury that constituted grievous bodily harm.

[3] The appellant was charged with one count of unlawfully doing grievous bodily harm to Mr Boyd with an intent to maim, disable or disfigure or to do some grievous bodily harm to him. A jury found him guilty of that offence.

[4] The appellant now appeals against that conviction on two grounds:

1. The verdict is unreasonable or cannot be supported on the evidence.

2. The learned trial judge's direction with respect of alternative verdicts was deficient and resulted in a miscarriage of justice.

[5] The Crown case at trial was that the appellant shot the arrow that injured Mr Boyd deliberately intending to hit him and cause grievous bodily harm. As it happened, he missed but the arrow hit the pole which deflected the arrow to its intended target.

[6] The complainant gave evidence about the things that happened immediately before he was struck. He was standing and facing the appellant at a distance of about two and a half metres:

> "What did he do next?---He's proceeded to grab a compound bow. He got a compound bow, and he's pointing it at me, threatening to shoot me with it. And he's released the arrow. It's hit the screen door and rebounded back inside, on his side."

[7] A little later, Mr Boyd said that the appellant drew his bow and started pointing it at him "for some time". His evidence then continued:

> "Has he said anything to you at this point?---Yeah. He's just – the same thing again. He's going to shoot me, he's going to shoot me. Like, "Fuck off", rahdy rahdy rah.
>
> Did you leave at that time?---No.
>
> And why didn't you leave?---In fear of being shot in the back. You know, most people would ---
>
> Well, just---?--- --- run.
>
> MR JONES: I object.
>
> MS PETRIE: Just stop – stop there?---Sorry. Sorry.
>
> Then you said that he's been pointing this arrow at you?---Yeah.
>
> What's happened next?---I'm just sort of moving around, as he's trying to shoot me with it – pointing it at me. He was pointing it at me for some time, a couple – probably a couple of minutes. As – as you can see – probably see in the footage, that you can see.
>
> Well, we'll come to that shortly. Just---?---Yep.
>
> So what's happened next though? So he's been pointing it at you?---I'm just moving around as I'm talking to him. I can't remember what I was saying to him. I was trying to calm him down, in a sense.
>
> And then what's happened after that?---Yeah. He's obviously released the arrow. And, yeah, it struck me in the face.
>
> And whereabouts did it strike you? You just pointed to your chin?---Yeah.
>
> And it's your right side?---Yeah, my right side of the chin."

[8] The appellant gave evidence. In his evidence in chief he acknowledged that he had aimed the bow at Mr Boyd. But he said that he then changed his aim to the wooden post in front of Mr Boyd:

> "Is there – because – what was the purpose of releasing the arrow at that point in time, in your mind; what were you trying to do?---To scare him. I tried – trying to hit the pole.
>
> And you said, to scare him. So is there a reason why you didn't shoot to your left, Mr Boyd's right, in this direction?---Yeah, because there's nothing there, and the neighbour's house it [*sic*] there, so it could have gone over his shoulder and into the neighbour's place.
>
> This pole, we said, was made out of wood?---Yep,
>
> Have you fired an arrow into wood before?---I have, yes.
>
> What did you expect to happen to the arrow?---Just to stick in the timber.
>
> How far away was that pole from you, at that point?---Metre and a-half, if that."

[9] He repeated this version of events in cross-examination:

> "HIS HONOUR: Were you aiming at his head?---No. I was aiming at the pole. As I said, I had to adjust my position when I held it at him. Then I moved to the pole, let it go.
>
> And aiming at the pole, as you've just demonstrated, is that at the same level as Mr Boyd's head?---Probably a little bit lower than his head.
>
> MS PETRIE: But you agree that it ended up hitting his chin?---Yep.
>
> Which is part of his head?---Yep."

[10] The Crown case on intent was not limited to just these pieces of oral evidence. There was uncontested evidence that the appellant had poked sharp objects through the screen door at the body of the complainant. He had used a knife and an arrow in this way. The appellant had also actually fired an arrow as a warning. The appellant had said to the complainant that he was going to kill him.

[11] A video recording captured by a security camera placed over the door to the appellant's home showed Mr Boyd approaching the door and then raging at the appellant, who is unseen in the video. At one point the arrow which the appellant had poked through the door can be seen jabbing at the body of Mr Boyd in a fast motion. In the seconds before he was shot, Mr Boyd can be seen retreating behind a wooden pole placed about a metre from the front door. As he positioned himself behind this narrow shield, he continued raging at the appellant. The arrow can then be seen flying towards the pole, bouncing off and striking Mr Boyd, who visibly reacts to being hit.

[12] The appellant submits that on this evidence the jury's verdict of guilty was unreasonable or, alternatively, the verdict cannot be supported by the evidence. This Court is obliged to decide for itself whether, notwithstanding that there is evidence upon which a jury might convict, nonetheless it would be dangerous in all

the circumstances to allow the verdict of guilty to stand.[1] The question which the Court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[2]

[13] In my view this ground of appeal cannot be sustained. There was direct evidence from the complainant that the appellant had aimed the arrow at him. In cross-examination he said that it was pointing at him "dead centre". The post stood between the appellant and the complainant. It lay along the projected flight of the arrow. There was direct evidence from the appellant the other way. While the jury might have accepted the appellant's firm assertion about his actual intention, it was not obliged to do so. If it rejected that evidence and put it to one side, the remaining evidence led by the Crown was capable of supporting a rational conclusion that the appellant had aimed his arrow directly at the complainant intending to hit him.

[14] The evidence was sufficient to justify a rational conclusion that the appellant had intended to cause grievous bodily harm to Mr Boyd.

[15] I would reject the first ground.

[16] By his second ground of appeal the appellant contends that the summing up was defective because it did not alert the jury properly to the possibility of an alternative verdict of guilty to the offence of causing grievous bodily harm.

[17] Although the case now appears to be a simple and straight forward one, that was not how it was presented to the learned trial judge or to the jury. At the trial the defence chose to dispute almost everything and to raise several defences. The defence did not admit that the injury caused to Mr Boyd was of the necessary kind. By the indictment the Crown offered the jury several alternatives: "maim, disable or disfigure" as well as "grievous bodily harm" itself. Intent was also in issue, as has been said. The defence also raised for the jury's consideration several defences. The first of these was self-defence against an unprovoked assault. This raised for the jury's consideration the character of Mr Boyd's conduct towards the appellant. It also raised for the jury's consideration the question whether the appellant himself had provoked Mr Boyd's "assault" if that is what it was. It required the jury also to consider whether the firing of the arrow was reasonably necessary in the circumstances to make defence against Mr Boyd's assault. Finally, the issue whether the force used was not such as to cause death or grievous bodily harm became an issue. The related defence of self-defence of another person was also raised, as was defence of a dwelling. The latter defence required the jury to consider, among other things, whether Mr Boyd was attempting to enter the appellant's home with intent to commit an indictable offence within it. A range of possible indictable offences was on offer. Whether the firing of the arrow was necessary to achieve that defensive purpose was also raised for the jury's consideration.

[18] Mistake also made an appearance, as did accident.

[19] The result was that the case became a very complicated one for the learned trial judge to sum up, let alone for the jury to comprehend.

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1 *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ.

2 *Ibid*. at 493.

[20] This complexity had a number of consequences. One of these was that, although the learned trial judge told the jury that he would direct them about "a possible alternative verdict" and later stated his intention to discuss on the following day "the alternative charge of grievous bodily harm without an intention" inadvertently he never did so. The only reference in the summing up to a path of reasoning the jury might follow, if satisfied the injury to Mr Boyd did amount to grievous bodily harm, but not satisfied the appellant had the requisite intention, was wrapped up in the direction about the defence of accident. This was confusing, and could have led the jury to conflate intention and foreseeability. After giving directions about the many issues raised his Honour concluded by informing the jury, in the usual way, about what would happen after they had reached a verdict. He said that if the jury found the appellant not guilty of doing a malicious act with intent then:

> "… you'll then be asked by my Associate, "Do you find the accused guilty or not guilty of grievous bodily harm?" You will then deliver your verdict on that, whether guilty or not guilty."

[21] The problem is that the jury was never directed that if they were satisfied that the appellant had caused grievous bodily harm to Mr Boyd and that none of the defences raised had exculpated him, but if they were not satisfied that he had intended to cause grievous bodily harm, then they should find him guilty of the lesser offence. The alternative offence was not even referred to in the final direction that I have quoted.

[22] No objection was taken to this problem in the summing up but, in the circumstances of this case, that does not matter. In my view the appellant has been deprived of a real chance of being acquitted on the charge of malicious act with intent. This was not a case in which a conviction on that charge was inevitable.[3] As a consequence there has been a miscarriage of justice[4] and the appeal must be allowed. The conviction should be quashed, the sentence set aside and there should be an order for a retrial.

[23] **McMURDO JA:** I agree with Sofronoff P.

[24] **BOWSKILL J:** I agree with the orders proposed by Sofronoff P and with the reasons given by his Honour.

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3 *R v Jeffrey* [2003] 2 Qd R 306 and *cf R v Willersdorf* [2001] QCA 183 at [20] per Thomas JA.

4 *Gilbert v The Queen* (2000) 201 CLR 414.