SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBJ* [2020] QCA 32
PARTIES:	**R** **v** **WBJ** **(appellant/applicant)**
FILE NO/S:	CA No 285 of 2017 CA No 16 of 2018 DC No 2443 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 24 November 2017; Date of Sentence: 24 January 2018 (Martin SC DCJ)
DELIVERED ON:	3 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2019
JUDGES:	Sofronoff P and Fraser and Philippides JJA
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted on 12 counts of various violent offences, with the aggravating factor of these offences being domestic violence offences – where these offences included grievous bodily harm, assault, deprivation of liberty, torture and unlawfully throwing a destructive substance (count 6) and a corrosive fluid (count 8) – where in count 6 the appellant poured/threw caustic soda over the complainant, with intent to maim her – where in count 8 the appellant poured/threw petrol over the complainant, with intent to maim her – whether caustic soda in count 6 was a *destructive substance* – whether petrol in count 8 was a *corrosive fluid* – whether the verdicts on counts 6 and 8 were unreasonable and insupportable on the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where count 8

concerned the appellant throwing/pouring a *corrosive fluid*, namely petrol, over the complainant – where the trial judge directed the jury regarding a *destructive substance* rather than a *corrosive fluid* – where no re-direction was sought at trial – whether the appellant has lost a real chance of acquittal through that misdirection – whether the misdirection resulted in a miscarriage of justice

Criminal Code (Qld), s 317

Alford v Magee (1952) 85 CLR 437; [1952] HCA 3, cited
Krakouer v The Queen (1998) 194 CLR 202; [1998] HCA 43, cited
R v Storey (1978) 140 CLR 364; [1978] HCA 39, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, cited

COUNSEL: M Horvath, with N Edridge, for the appellant/applicant (pro bono)
D Balic for the respondent

SOLICITORS: Jeff Horsey Solicitors for the appellant/applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant was found guilty of 12 counts after a trial.[1] The counts were as follows:

Count 2:	grievous bodily harm
Count 3:	unlawful assault occasioning bodily harm while armed
Count 5:	deprivation of liberty
Count 6:	unlawfully throwing a destructive substance at a person
Count 7:	torture
Count 8:	unlawfully throwing a corrosive fluid at a person
Count 10:	unlawful assault
Count 11:	unlawful wounding
Count 12:	unlawful assault occasioning bodily harm
Count 13:	unlawful assault
Count 14:	unlawful assault occasioning bodily harm
Count 15:	torture

[2] The appellant was sentenced to nine years imprisonment on counts 6 and 7, with a serious violent offence declaration in each case, and to lesser concurrent terms of

---

1 He was acquitted on three other counts:
Count 1: unlawful assault occasioning bodily harm
Count 4: common assault
Count 9: threats

imprisonment on counts 2, 3, 5, 10, 11, 12, 13, 14 and 15. He was convicted but not further punished on count 8.

[3] He now appeals against his convictions on counts 6 and 8.

[4] Section 317 of the *Criminal Code* (Qld) provides, relevantly:

> "Any person who, with intent … to maim … unlawfully … throws any such [corrosive] fluid or [destructive] substance at or upon any person …is guilty of a crime, and is liable to imprisonment for life."

[5] Counts 6 and 8 on the indictment were in the following terms:[2]

> "Count 6: that on the twenty-third day of October, 2014 at Bundaberg in the State of Queensland, WBJ with intent to maim or disfigure CMI unlawfully threw at CMI a destructive substance.
>
> Count 8: that on the thirty-first day of December, 2014 at Bundaberg in the State of Queensland, WBJ with intent to maim or disfigure CMI unlawfully threw at CMI a corrosive fluid."

[6] Count 6 was particularised, relevantly, by alleging that the appellant "poured/threw caustic soda over the complainant, with the intent to maim her". Count 8 was particularised, relevantly, by alleging that the appellant "poured/threw petrol over the complainant, with intent to maim her".

[7] The appellant's amended notice of appeal concerning count 6 pleads:

> "*Caustic soda not destructive; inconsistent or improbable event*
>
> 3. The verdict on count 6 is unreasonable and unsupported by the evidence because (**appeal ground 3**):
>
> (a) caustic soda is a corrosive fluid;
>
> (b) caustic soda is not a destructive substance;
>
> (c) there was no expert evidence of caustic soda being a destructive substance;
>
> (d) the scar on the complainant's left leg (exhibit 1) is inconsistent with her legs being zip tied together while caustic soda was poured on her.
>
> The learned trial judge ought to have directed the jury to acquit the appellant, as the element of caustic soda being a destructive substance was not satisfied, because:
>
> (a) if the properties of caustic soda were within the ordinary knowledge and experience of the jury, caustic soda is a corrosive fluid not a destructive substance; or,
>
> (b) if the properties of caustic soda were not within the ordinary knowledge and experience of the jury, there was no expert evidence of caustic soda being a destructive substance."

---

2 Each of these offences was also alleged to be a domestic violence offence.

[8] Exhibit 1 includes a photograph that shows a substantial scar on the inner part of the complainant's left thigh. According to her evidence, that scar was caused in the following circumstances.

[9] The complainant is a young woman. The appellant forcibly took her into bushland where he tied her to a tree and then poured the contents of a bottle of caustic soda over her. She said that her skin felt like it was on fire. The pain was excruciating. The caustic soda pooled in the area of her thigh. The complainant suffered burns on her chin, stomach, legs and ankle as well as her thigh. She suffered scarring on her leg, ankle and stomach. The scars were photographed and tendered as exhibits.

[10] The defence case in relation to this count was to deny that the appellant had poured caustic soda over the complainant. Her credit was attacked and the jury was invited to reject or to doubt her account.

[11] The ground of appeal in relation to count 6 is unsustainable. As everyone knows, caustic soda is described as 'caustic' because of its capacity to burn.[3] As the appellant's ground of appeal itself states, caustic soda is a corrosive fluid. It is therefore capable of being a destructive substance when applied to human skin, as it was in this case. In any case, the ground raises an argument about the facts that was never raised as an issue below.

[12] Contrary to the contention in ground 3(d), the photograph in Exhibit 1 is by no means inconsistent with the complainant's evidence of the offence.

[13] This ground is without merit and should be rejected.

[14] Ground 2 of the amended notice of appeal concerns count 8 and is as follows:

> "***Petrol not corrosive***
>
> 2. The verdict on count 8 is unreasonable and unsupported by the evidence because (**appeal ground 2**):
>
> (a) petrol is a destructive or explosive substance: *R v Dinh* (2010) 199 A Crim R 573; and,
>
> (b) petrol is not a corrosive fluid; or,
>
> (c) there was no expert evidence of petrol being a corrosive fluid.
>
> The learned trial judge ought to have directed the jury to acquit the appellant, as the element of petrol being a corrosive fluid was not satisfied, because:
>
> (a) petrol is a destructive or explosive substance not a corrosive fluid as a matter of law;
>
> (b) if the properties of petrol were:
>
> (i) within the ordinary knowledge and experience of the jury, petrol is a destructive or explosive substance not a corrosive fluid; or

---

[3] The word 'caustic' is derived from the Greek word "kaustikos", meaning 'capable of burning'.

(ii) not within the ordinary knowledge and experience of the jury, there was no expert evidence of petrol being a corrosive fluid."

[15] Count 8 arose from the following circumstances. The complainant said that the appellant poured petrol over her from a red jerry can. In her evidence she said that "he's just come in with the petrol and he's just, like, tipping it everywhere, like, just throwing it everywhere". The appellant then tried to light the petrol with a barbeque lighter. There was the following exchange in the complainant's examination in chief:

> "How much petrol were you covered with? --- Well, enough for it to burn the shit out of my skin."

[16] Later, the complainant said that her "skin was on fire from the petrol". She said that the petrol left redness on her skin and that it interfered with her breathing.

[17] Again, the defence case was to dispute that the appellant had thrown petrol over the complainant and to put in issue his state of mind. The effect of the petrol upon the complainant's skin was not the subject of particular challenge.

[18] The appellant's contention is that petrol is not a corrosive fluid but is a destructive or explosive substance. Like the previous ground discussed, this ground raises an argument about the facts that was not raised at the trial.

[19] The term 'corrosive' and 'destructive' are not defined in the *Criminal Code* (Qld). They do not need to be because they are ordinary English words that do not carry any special or technical meaning. The word 'corrode', from which the adjective 'corrosive' is derived, means to wear away or to destroy gradually 'as if by eating or gnawing away the texture'.[4] It is a term that is often applied to the action of a chemical upon another substance. The adjective 'corrosive' refers to the quality of eating away, especially by chemical action, for example by an acid.

[20] The term 'destructive' is derived from the verb 'destroy'. That verb includes the meanings to 'consume or dissolve'.[5]

[21] It is immediately apparent that a corrosive fluid or substance may also be a destructive fluid or substance and usually will be. Consequently, to submit, as the appellant does in ground 2 of his notice of appeal, that "petrol is a destructive … substance" is not to deny that petrol is a corrosive substance. It is within ordinary experience that petrol acts in a corrosive way upon human skin and, in particular, upon a person's eyes. The pain and redness described by the complainant as the consequences of the appellant's pouring petrol over her are the expected results when petrol is applied to human skin. It is a corrosive as well as a destructive fluid and no expert evidence was required to prove that fact.

[22] This ground should be rejected.

[23] The final ground concerns the directions that the learned trial judge gave in relation to count 8. Ground 1 in the amended notice of appeal states:

---

4 *Oxford English Dictionary*, 2nd ed.

5 *Ibid*.

> "The learned trial judge erred by directing the jury regarding a destructive substance, where the appellant was charged with intent to maim or disfigure, with a corrosive fluid, particularised as petrol."

[24] This is not a valid ground of appeal because, as will appear, although it is true that the learned trial judge directed the jury in terms of a "destructive substance" rather than, as alleged in the count, a "corrosive fluid", no objection was taken to this direction and no re-direction was sought. As a consequence it is not open for the appellant to raise as a ground of appeal that there was a "wrong decision on any question of law" within the meaning of s 668E(1) of the *Criminal Code* (Qld). On that basis, this ground should be rejected as misconceived. However, I proceed to consider whether the misdirection resulted in a miscarriage of justice.

[25] In cases like the present, in which a misdirection has not been the subject of complaint at the trial, it is for the appellant to demonstrate that the misdirection resulted in a miscarriage of justice.[6] The question is not disposed of by the discovery of error at the trial. There remains the question whether the appellant has really, through that error, lost a real chance of acquittal.[7] In some cases a material irregularity will itself constitute a miscarriage of justice.[8] However, an error, impropriety or unfairness at a trial need not necessarily prejudice or colour the overall trial.[9] It is for the appellant to show that the irregularity affected or may have affected the result of the trial.[10]

[26] Count 8 alleged that the petrol, which the appellant threw at the complainant, was a *corrosive* fluid. The direction about which the appellant complains arose as follows. The learned trial judge first directed the jury about count 6, concerning caustic soda which was alleged to be a *destructive* substance. He itemised the elements as being these:

(a) That the accused 'cast or threw a destructive substance upon the complainant';

(b) The accused did so unlawfully;

(c) The accused did so with intent to maim or disfigure.

[27] His Honour gave directions about the evidence that supported count 6 and then directed the jury about count 7, which alleged that the appellant had tortured the complainant. The torture was alleged to have been carried out by the appellant inflicting violence upon the complainant in a number of ways, including by pouring petrol over her and threatening to set her alight. That same act of pouring petrol was the basis for count 8. Having dealt with count 7, including directing the jury about the evidence of the pain that the complainant suffered from the application of petrol to her skin, his Honour turned his attention to count 8 and said:

> "So the same elements persist as those in count 6, and, therefore, I won't go through them again but, of course, remind you that in this case, the *destructive* substance was petrol, and the allegation is that

---

6 *per* McHugh J in *TKWJ v The Queen* (2002) 212 CLR 124 at [63].
7 *per* Barwick CJ in *R v Storey* (1978) 140 CLR 364 at 376.
8 *Simic v The Queen* (1980) 144 CLR 319 at 331.
9 *per* Deane J in *Wilde v The Queen* (1988) 164 CLR 365 at 375-376.
10 *per* McHugh J in *TKWJ*, *supra*, at [71].

> in the complainant's room, the accused poured petrol over her and attempted to light the petrol by sparking the barbecue lighter."
>
> (emphasis added)

[28] A little later his Honour said:

> "So the issue: on the whole of the evidence in this trial, has the prosecution proved the elements of the offence beyond reasonable doubt. If satisfied beyond reasonable doubt that the incident described by the complainant occurred, particular attention must be given to the element "an attempt to maim or disfigure". As I've instructed you, an intention in the relevant charges must be considered to see if you're satisfied that that element is proved beyond reasonable doubt."

[29] In the written summary of the elements of the charges, the jury was also referred to a requirement for the prosecution to prove that the substance thrown was a "destructive substance". This was defined to mean a substance that was "destructive to the skin".

[30] These references to a "destructive substance" rather than to a "corrosive fluid" were undoubtedly misdirections. The question is whether the misdirections have resulted in a miscarriage of justice.

[31] What was in issue at the trial was whether the appellant had thrown or poured anything at all over the complainant and, if he did, whether he intended to maim or to disfigure her. In relation to intention, in addressing the jury, defence counsel raised the question whether the jury ought be satisfied that the appellant had intended, by throwing petrol at the complainant, to maim or disfigure her or whether he had merely intended to "hurt her" or to "scare her".

[32] The character of petrol, as a corrosive substance, was simply not in issue. The failure of defence counsel, or anyone else, to advert to the misdirection is therefore understandable.

[33] As Dixon, Williams, Webb, Fullagar and Kitto JJ said in *Alford v Magee*,[11] if in a stealing case the only issue was the *asportavit*,[12] a Judge would simply tell the jury that if the accused did a particular act then he was guilty of larceny and if he did not do that particular act he was not guilty of larceny. The Judge would not direct the jury about the general law of larceny. *Alford v Magee* is the frequently cited case that establishes that the only law upon which a trial judge ought to direct a jury is "so much as must guide them to a decision on the real issue or issues in the case".[13]

[34] The learned trial judge's direction quoted above in paragraph [27] is, in accordance with *Alford v Magee*, a direction that draws the jury's attention to what was really in issue on the trial of count 8. That petrol was a corrosive fluid that was capable of damaging human skin was simply not in issue. Further, in defining "destructive" in the written memorandum given to the jury, his Honour directed the jury about the

---

11 (1952) 85 CLR 437 at 466.

12 "taking away": see *Russell on Crime*, 12th ed, volume 2 at 908.

13 *supra Alford v Magee* at 466.

essential point, namely whether the substance or fluid was "destructive to the skin". It was not in issue that it was.

[35] It should be remembered that even a misdirection about the elements of an offence does not mean that a trial is fundamentally flawed. This will be so if, as in this case, the misdirection is about an element that was not in issue.[14]

[36] In this case, once the jury was satisfied beyond a reasonable doubt that the appellant had poured petrol over the complainant in the way she claimed, then it would have been bound to return a verdict of guilty. The character of petrol as a substance that was corrosive to human skin was not in issue for the obvious reason that that is an indisputable fact. As a consequence, the misdirection made no possible difference to the outcome of the trial and it occasioned no miscarriage of justice.

[37] For these reasons the appeal should be dismissed.

[38] The appellant also applied for leave to appeal against his sentence. However, that application was premised upon a need to resentence in the event that his appeal against conviction succeeded. The application should be refused.

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

[40] **PHILIPPIDES JA:** I agree that the appeal and application for leave to appeal against sentence should be refused for the reasons given by Sofronoff P.

---

14 *Krakouer v The Queen* (1998) 194 CLR 202 at [23] per Gaudron, Gummow, Kirby and Hayne JJ.