DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Sandy* [2020] QDC 63
PARTIES:	**R** **v** **ALFRED NAMURLUCH SANDY** (defendant)
FILE NO:	148/2020
DIVISION:	Criminal
PROCEEDING:	Trial
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	28 April 2020
DELIVERED AT:	BRISBANE
HEARING DATES:	20 April 2020 and 21 April 2020
JUDGE:	Judge Dick SC
VERDICT:	**Not guilty**
CATCHWORDS:	Judge alone trial
COUNSEL:	B Mumford for the Crown G Webber for the Defendant
SOLICITORS:	Office of the Director of Public Prosecutions (Qld) for the Crown Australian and Torres Strait Islander Legal Service (ATSILS) for the Defendant

[1] The defendant is charged with one count of unlawfully doing grievous bodily harm to Jaiden Scicluna (the complainant). The offence is said to have occurred on 28 May 2019 when the defendant was 19 years of age. The offence is said to have occurred in a Correctional Centre at Wacol.

[2] On 9 April 2020, an order was made pursuant to s 615(1) of the *Criminal Code Act 1899* (Qld) that the defendant be tried by a judge sitting without a jury.

[3] The trial commenced before me on Monday, 20 April 2020. The defendant entered a plea of not guilty. The evidence was concluded in one day and on 21 April 2020 counsel addressed me on the relevant law and factual issues. At the conclusion of the submissions I reserved my decision.

[4] In a trial by a judge sitting without a jury, the judge is required by s 615B(1) of the *Criminal Code Act 1899* (Qld), so far as it is practicable, to apply the same principle of law and procedure as would be applied at a trial before a jury. Section 615B(3) of the *Criminal Code Act 1899* (Qld) provides:

> "**615B Law and procedure to be applied**
>
> …
>
> (3) If an Act or the common law—
>
> (a) requires information or a warning or instruction to be given to the jury in particular circumstances, the judge in a trial by a judge sitting without a jury must take the requirement into account if the circumstances arise…"

[5] The judge sitting without a jury, may make any findings and give any verdict a jury could have made or given if the trial had been before a jury: s 615C(1)(a) of the *Criminal Code Act 1899* (Qld):

> "**615C Judge's Verdict and judgment**
>
> (1) In a trial by a judge sitting without a jury:
>
> …
>
> "(a) any finding or verdict has the same effect as the finding or verdict of a jury:
>
> (b) The judgment must include principles of law that have been applied and the findings of fact that had been relied on
>
> (i) The judgment must include principles of law that have been applied and the findings of fact that had been relied on."

Preliminary matters

[6] A defendant in a criminal trial is presumed to be innocent. The Crown has the burden of proving the defendant's guilt beyond reasonable doubt. In order to do so, the Crown must prove all the essential elements of the offence beyond reasonable doubt. Before I make a finding of guilt I must be satisfied beyond reasonable doubt of the elements of the offence.

[7] The offence of grievous bodily harm is defined in s 320 of the *Criminal Code Act 1899* (Qld) as follows:

> "**320 Grievous bodily harm**
>
> (1) Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years."

[8] There are some matters that are not in issue in the trial. There is no dispute that the injuries suffered by Mr. Scicluna amount to grievous bodily harm and there is no dispute that the man depicted in the CCTV footage striking Mr. Scicluna is the defendant.

[9] The issue for determination is whether the prosecution is able to prove beyond reasonable doubt the element that the defendant **"unlawfully**" did grievous bodily harm to the complainant. Specifically, the fact in issue is whether the prosecution has proved beyond reasonable doubt that the defendant was not acting in self-defence at the time of striking the complainant.

[10] The trial was in short compass. The Crown called the complainant, Mr. Scicluna, and tendered the CCTV footage of the incident.

[11] From the outset the complainant was an uncooperative witness. For example, he was shown the CCTV footage in evidence in chief and asked if was he able to point out on the screen where he was. His reply was "I don't wish to." He continued to answer questions in examination in chief and cross-examination by answering "no comment" or "don't wish to". For example at 1-12, line 46 of the trial transcript, he was asked "All right. Did you give anyone any permission to punch you?" Answer: "No comment."

[12] He claimed to have no independent recollection of the incident on the CCTV. During cross-examination his attention was drawn to a statement he had given to police. He claimed that the information he gave police had been supplied to him by his mother because he had no recollection of the event. It seems to me, however, that some of the information he supplied to the police could not have come from his mother. It must have come from him. For example, in the recording the following questions were asked: "When you – when you got struck did you expect – were you shaping up to him to have a fight?" and the answer recorded from Mr. Scicluna was "Yeah I was expecting to get into a punch on but he didn't hit me straight away so I walked off on him". That is an example of some of the information that he gave to the police which could not have come from his mother. That evidence was introduced as a prior inconsistent statement pursuant to s 101 of the *Evidence Act 1977* (Qld).

[13] During cross-examination, the complainant did, however, make some statements which might be viewed as concessions by him. I observed Mr. Scicluna closely during his evidence and I formed the view these were concessions rather than opinions.

[14] At page 118, line 7:

> "Mr: Webber: Can I just stop you there. When you say it could have happened either way what do you mean?

Mr. Scicluna: What if I hit him first and that happened? I could be here. It could have happened either way judging by the footage."

Later at lines 23 to 27:

"Mr. Webber: Let me ask you this then. Do you accept having watched the TV footage, the possibility that you were the one starting the fight on that day?

Mr. Scicluna: No comment.

Mr. Webber: Do you accept that's a possibility?

Mr. Scicluna: Yeah.

Mr. Webber: OK. Do you accept there's a possibility on that CCTV footage, just as a possibility, that you were shaping up to Mr Sandy before you were struck?

Mr. Scicluna: Yeah.

Mr. Webber: Is that what you mean when you said it could have gone either way, as in if he didn't hit you, you were going to hit him?

Mr. Scicluna: Judging by the footage.

Mr. Webber: Is that a yes?

Mr. Scicluna: I couldn't tell you.

Her Honour: But what did you mean judging by the footage? You're saying looking at the footage?

Mr. Scicluna: Judging by the footage it looked like a fight was going to happen."

At page 119, line 1:

"Mr. Webber: And when you said earlier you said judging by the footage, it looks like a fight was going to happen, what specifically about the footage?

Mr. Scicluna: It's in a jail unit.

Mr. Webber: Yeah?

Mr. Scicluna: That's what happens."

Later at page 120 the following exchange occurred:

"Mr Webber: OK. You were saying where's the cloth?

Mr. Scicluna: I don't know.

Mr Webber: He was saying leave me alone.

Mr. Scicluna: Maybe.

Mr Webber You were saying "why are you trying to run away?"

Mr. Scicluna: Maybe.

Mr Webber: At this point you had your chest out and your fists clenched?

Mr. Scicluna: Yeah agree.

Mr. Webber: And that is the context of this walking back and forth. He's still trying to walk away from you?

Her Honour: Do you agree, disagree, not know?

Mr. Scicluna: Yeah, agree."

CCTV

[15] The CCTV footage is an independent record of the incident that gives rise to the charge. There is no audio component to the recording and the incident takes place at the opposite end of the room to where the camera is located. This limits the usefulness of the recording, on its own, to determine exactly what happens but the following points can be made from the footage:

1. The complainant approaches the defendant in a very purposeful way from the other end of the room to where the defendant was walking.

2. The complainant begins following the defendant in close proximity.

3. The defendant appears to try to walk ahead from the complainant.

4. The complainant continues to follow the defendant and appears to be blocking him at each turn.

5. Immediately before he is struck, the complainant appears to clench his fist and loom over the defendant.

6. The injury was caused by a single blow dealt by the defendant which knocked the complainant to the ground and I am told that the injury related to the complainant hitting his head on the floor.

[16] It is on the basis of the concessions by the complainant and the CCTV footage that the defence submit the defence of self-defence arises. It is not for the defendant to prove this defence, it is for the prosecution to exclude it.

[17] In this case the defendant did not give evidence. That is his right. He is not bound to give or call evidence. He is entitled to insist that the prosecution prove the case against him, if it can. The fact that he did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill in any gaps in the evidence led by the prosecution. The fact that he did not give evidence cannot be considered at all when deciding that the prosecution has proved its case beyond reasonable doubt. It cannot change the fact that the prosecution retains its responsibility to prove the guilt of the defendant beyond reasonable doubt.

[18] The defence approach is to say that the defendant has a defence under s 271(1) of the *Criminal Code Act 1899* (Qld).

[19] Section 271(1) of the *Criminal Code Act 1899* (Qld) says:

> "**271(1) Self-defence against unprovoked assault**
>
> (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the attacker as is reasonably necessary to make an effective defence against the assault if the force used is not intended, and is not such as likely, to cause death or grievous bodily harm."

[20] It is not for the defendant to prove this defence, rather, it is for the prosecution to exclude the defence.

[21] In order to exclude it the prosecution must prove beyond reasonable doubt any one of the following matters:

(1) That the defendant was not unlawfully assaulted by the complainant. There is authority for the proposition that advancing in a threatening manner with clenched fists with intent to strike would amount to an assault at law. An assault can be a threat not actual direct force.[1] The defence say the defendant was assaulted in that the complainant threatened to apply force by approaching and then following the defendant, clenching his fist and looming over the defendant (in the context of the prison environment).

(2) The defendant provoked the assault.
The defence argued that the defendant did not provoke this assault, as it was the complainant who approached the defendant rather than the other way round. The defence points to the aggressive manner in which the complainant approached the defendant and the way in which the complainant appeared to be threatening him through bodily gestures. That circumstance is exacerbated by the context in which they are in prison.

(3) The force used was disproportionate.
The defence say that the force used was proportionate and reasonably necessary in the circumstances in that the complainant concedes that he had his chest out and his fists clenched and his concession that "judging by the footage it looked like a fight was going to happen."

(4) The force used was intended to or was likely to cause death or grievous bodily harm.
The defence argued the force used was not actually intended or was not likely to cause death or grievous bodily harm even though that is what occurred because the complainant's head hit the ground. It was one punch.

(5) That s 271(2) of the *Criminal Code Act 1899* (Qld) applies.
The defence argued that s 271(2) of the *Criminal Code Act 1899* (Qld) also applies in that the defendant was assaulted - that is, the complainant threatened to apply force by approaching and then following the defendant – at one point with his chest out clenching his fists. It was not unreasonable that the defendant reasonably feared death or grievous bodily harm from an assault from the complainant in these circumstances. The defendant could not otherwise save himself. The defence point to the evidence that it was a single blow.

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1 *R v Agius* [2015] QCA 277.

Findings of fact

[22] From the CCTV footage and the concessions by the complainant I am satisfied that the complainant approached the defendant in a purposeful manner. He followed the defendant in close proximity, confronting him on each turn, and immediately before the blow he appeared to loom over the defendant. The injury was caused by a single blow.

Conclusion

[23] For the reasons stated above I am not satisfied beyond reasonable doubt that the grievous bodily harm charged was unlawful. I have come to the view that the provisions of s 271(1) and 271(2) of the *Criminal Code Act 1899* (Qld) arise on the evidence and that there is no evidence otherwise to exclude those defences beyond reasonable doubt.

[24] Accordingly, I find the defendant not guilty of the offence.