SUPREME COURT OF QUEENSLAND

CITATION:	*R v Guillard* [2002] QCA 27
PARTIES:	**R** **v** **GUILLARD, Mark Anthony** (appellant)
FILE NO/S:	CA No 247 of 2001 SC No 252 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	19 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2002
JUDGES:	McMurdo P, Thomas JA, Ambrose J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – MANSLAUGHTER – appellant convicted of manslaughter – circumstantial case – no body recovered CRIMINAL LAW – DEFENCE MATTERS – ACCIDENT – GENERALLY – whether defence of accident open on the evidence – whether directions on accident necessary – where issue only arises when there is evidence to suggest that there was a reasonable possibility that the injury occurred by accident – *R v Taiters* distinguished CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – MISCARRIAGE OF JUSTICE – UNSAFE OR UNSATISFACTORY VERDICT – WHERE EVIDENCE CIRCUMSTANTIAL – where evidence against appellant included a number of unrecorded confessional statements to a Crown witness – whether witness unreliable – where jury directed to scrutinise his evidence carefully – where strong circumstantial case *Criminal Code* (Qld), s 23(1)(b)

R v Bojovic [2000] 2 Qd R 183, referred to
R v Griffiths (1994) 69 ALJR 77, distinguished
R v Grimley [2000] QCA 64, CA No 362 of 1999, 14 March 2000, applied
R v Taiters, ex parte Attorney-General [1997] 1 Qd R 333, distinguished

COUNSEL: A J Rafter for the appellant
C W Heaton for the respondent

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

[1] **McMURDO P:** I agree with the reasons for judgment of Thomas JA and with the order proposed.

[2] **THOMAS JA:** On his trial for murder in the Supreme Court at Cairns the appellant was acquitted of murder and convicted of manslaughter.

[3] He appeals against that conviction on two grounds:

1. A miscarriage of justice has resulted by reason of the trial judge's failure to direct the jury in accordance with s 23(1)(b) of the *Criminal Code*.

2. The verdict is unsafe and unsatisfactory.

[4] The deceased (Carl Thygesen) was 70 years of age and the appellant 35. During the six months prior to the deceased's disappearance around 10 April 1999 the appellant resided with Thygesen at Thygesen's residence at 3 Skull Road, White Rock. Thygesen had lived there for 18 years.

[5] The last known contact Thygesen had with any person was at 1.05 p.m. on Saturday 10 April 1999 when he telephoned his brother's residence and spoke briefly to his nephew. He was a person with regular habits and the last sighting of him had been shortly before then at the Earlville Shopping Centre. No transactions were conducted on his bank account after 9 April 1999 when a small amount had been withdrawn by him. Although he suffered a number of ongoing medical problems he had not seen his general practitioner since 12 March 1999, and was not in any unusual condition of frailty.

[6] The Crown case against the appellant was circumstantial. It included:

1. Evidence of blood on the appellant's boots and carpet at 3 Skull Road.

2. Evidence of prior animosity by the appellant towards the deceased.

3. Admissions made by the appellant to Nicholas Sidebottom.

4. Evidence of a lie by the appellant when he claimed not to have seen Thygesen since Friday night.

Summary of Evidence

[7] The following summary is largely an adoption of the summary contained in the helpful outline of Mr Rafter who appeared for the appellant.

Prior animosity

[8] Sergeant Peter Bannigan gave evidence that while performing mobile patrols with Sgt David Cuskelly on 19 February 1999, they received information from Police Operations to go to 3 Skull Road. On arrival, he observed the appellant abusing Thygesen. He said that the appellant was shouting abuse at the elderly male and that he continually warned the appellant about his language. When he continued to use such language he was arrested and placed in the rear of the police vehicle. On the way to the police station, the appellant said that it was Thygesen's fault he was being arrested and that he was "going to get him for this".

[9] Samantha Carthew was a member of the Mormon Church as was Carl Thygesen. She did volunteer work for the Leukaemia Foundation. On Sunday 29 March 1999, she was fundraising for the Foundation at the Grand Hotel when she met the appellant. She said that the appellant asked her if she was a churchgoing person and when she said she was, the appellant asked her "what church?" When she said she was a Mormon, the appellant asked if she knew Carl Thygesen. She said that she knew him and that the appellant then became very aggressive and angry. She said that the appellant said that Carl had ripped him off, that he needed a good bashing, that he was the one that was going to bash him and that he was going to go up to the church and say what a bad person he was and how he'd ripped him off. Ms Carthew further observed that on Sunday 4 April 1999 two church elders were escorting the appellant away from the church premises.

[10] Anthony Matthews was related to Carl Thygesen. Thygesen was his father's uncle. In January/February 1999, Matthews stayed with his father at the White Rock Caravan Park. On one occasion, he observed the appellant wake Carl up and disturb and annoy him. Following the arrival of the police the appellant repeatedly yelled "You're a compulsive liar".

[11] Mr Matthews said that a few times before this, the appellant had come over to his place and said that "…he'd like to cut his throat and that he'd be able to get away with it and no-one would be able to find the body".

Admissions to Sidebottom

[12] In September 1999, Nicholas Sidebottom said that he was drinking with the appellant underneath the jetty at the pier when the appellant suddenly threw a stubby against a rock and said, "All right, I did it. There you have it. I probably shouldn't have told you, but I don't care. Do with it what you will". He added that he thought the appellant said, "I killed the old bloke". Sidebottom said that the appellant continued, saying that "the cops were going to put him away for it, or how he wasn't going to see his son again and how he was going to get done for it". There had been an earlier conversation when Sidebottom asked the appellant "if he did it" and the appellant denied it. This later conversation came "out of the blue".

[13] In a further conversation in November 1999, while they were drinking in Barlow Park, Sidebottom said that the appellant told him "I punched him in the throat; I

watched him fall. I could've saved him – I let him die". He said that the appellant told him that he "went away, came back, took him out and buried him". Sidebottom said that he asked why the appellant had done it and that the appellant told him that there were rumours that Thygesen was a paedophile. He said that the appellant said that he "fronted" Thygesen about it one night and he confessed. The appellant said that "he just lost it and hit him".

[14] In a further conversation at the Railway Hotel, Sidebottom said that the appellant "started going on again about how he was going to gaol, how he would never see his son again, how the cops were going to do him".

Lie told by the appellant to the police

[15] In his statement to the police dated 12 April 1999, the appellant said that he arrived home by taxi at about 7.00 pm on Friday 9 April 1999, that he saw Thygesen sitting at the kitchen table drinking Powers Gold and that he had remarked to Thygesen "You're a fuckwit for drinking while you're on antibiotics". He said that Thygesen went into his bedroom where he remained for 1 minute and then strolled out the back door. That was the last time he had seen him.

[16] However, the Telstra records showed that Thygesen had made a telephone call to his brother's home on Saturday 10 April 1999 at 1.05 pm. A telephone call approximately two and a half minutes later was made by the appellant (on the same phone) to Byron Harvey. Although the witness thought the phone call was received by him at about 3.00 pm, the Telstra records showed the call at about 1.08 pm. According to the appellant's statement to the police, he stayed home all day Saturday until after lunch. It was the prosecution contention that since there was only one telephone at the house at 3 Skull Road and it was located in Thygesen's bedroom and that the two telephone calls made shortly after 1.00 pm were made so close to each other that the appellant must have been aware of Thygesen's presence at the house on Saturday. The prosecution case was that the appellant lied to the police with respect to not seeing Thygesen after Friday night so that he was not the last person to have seen him alive.

Forensic evidence

[17] Sergeant Remedios from the Brisbane Scientific Section detected blood on a piece of carpet on the kitchen floor, on a kitchen chair, an empty Banrock Station wine bottle found in recycling bin, a Natwest shirt found lying on a bed in Thygesen's bedroom and on a pair of black boots located in the appellant's bedroom.

[18] Using blood samples from the shirt, a handkerchief and from Carl Thygesen's brother and sister, a forensic biologist, Peter Clausen, obtained a DNA profile to compare with the other samples. He concluded that blood found on the carpet, the kitchen chair and the wine bottle were consistent with having come from Carl Thygesen. The appellant had purchased two bottles of Banrock Station wine from the Balaclava Hotel at 8.47 pm on 9 April 1999.

[19] Furthermore, Clausen noted the appellant's left and right boots were covered in blood on numerous areas. The blood was consistent with the DNA profile of Carl Thygesen.

[20] Sergeant Michael Holohan, a scientific officer, examined the boots and concluded that they had come into contact with a large body of blood. He said that the shoes had walked through a pool of blood on a soft type of surface.

[21] The police took possession of the black boots and other items on 13 April 1999. There were areas of blood on the boots that were still wet. Sgt Remedios said that some areas had started to crust, but most had not. He estimated that it would take 2-3 days for blood to start to form a crust.

Whether directions on accident were necessary

[22] The learned trial judge did not direct the jury concerning any possible defence of accident. Indeed he was not requested to do so. That however does not mean that the point cannot now be raised if such an issue were properly to have been placed before the jury for its determination.

[23] According to Mr Rafter's submission one of the hypotheses upon which the jury might convict the appellant was by acting upon the admissions that he made to Nicholas Sidebottom. The admissions made in November 1999 include the words "I punched him in the throat; I watched him fall; I could have saved him – I let him die". Mr Rafter submits that this raises an issue as to whether Thygesen's death was reasonably foreseeable by the appellant as a possible outcome and that a direction should have been given in accordance with *R v Taiters*[1].

[24] The basic question is whether any such issue was "fairly raised on the evidence"[2]. In my opinion there was no evidence that raised any rational issue under s 23(1)(b) of the Code, or for that matter any defence at all other than that the appellant was not proved to have caused the death of Thygesen. No body was recovered, and there was no evidence upon which any rational discussion could take place on cause of death or foreseeability of death from the acts for which the appellant was responsible. The mere fact (assuming it to be a fact) that death may have resulted from a punch followed by the victim falling does not raise such an issue. The appellant's statement that he could have saved Thygesen says nothing about the means by which he caused him to be in a state that needed saving. There is no suggestion (or inference available) that a fall, if one happened, produced any further injury.

[25] The same issue, namely whether the defence of accident under s 23(1)(b) should have been left to the jury arose in *Bojovic*[3]. The court held that in order fairly to raise such an issue "there needs to be some evidence from which the jury might reasonably conclude that it is reasonably possible that the result could not have been foreseen by an ordinary person in the position of the accused". The evidence here does not come close to satisfying that test. The admission to Sidebottom contains not even a hint of surprise at the death or of any matter that raises a question as to whether Thygesen's death may not have been reasonably foreseen by the appellant. Mr Rafter made reference to the fact that such a question was held to have arisen in *Griffiths*[4] where there was evidence that the accused regarded the shooting of his friend as an accident. There was no comparable evidence here and *Griffiths* is

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1 *R v Taiters, ex parte Attorney-General* [1997] 1 Qd R 333.
2 Cf *Howe* (1980) 55 ALJR 5, 7; *R v Grimley* [2000] QCA 64 para 8.
3 *R v Bojovic* [2000] 2 Qd R 183, 187.
4 (1994) 69 ALJR 77.

clearly distinguishable. In terms used by the court in *R v Grimley*[5] the hypothesis that the injury was caused by accident can properly be called fanciful. I also agree with the observation of Pincus and Davies JJA in *Grimley*[6]:

> "One way, perhaps, of testing whether a defence is fairly raised on the evidence is by attempting to construct a sensible direction on the basis of the evidence given".

To require a *Taiters* direction to be given in the present case would be to require principles of law to be stated in a vacuum.

[26] In my view no such question arose and no error occurred. To have given the direction now suggested would have done no more than confuse the jury with a statement of law on a matter in relation to which there was no evidence.

Unsafe and unsatisfactory

[27] Mr Rafter's principal submission is based upon the alleged unreliability of Sidebottom as a witness, and the limited strength of the remainder of the evidence. He submits that the remainder of the evidence, standing alone, would not be a safe basis for a conviction. I do not find it necessary to determine whether that is so, but note that that evidence, particularly the forensic evidence, objectively implicates the appellant, and that along with the substantial body of evidence of continuing animosity between the appellant and the deceased, and his false denial of presence at a very material time this combination of evidence may well have been sufficient to go to a jury even in the absence of his admissions to the crime. In any event an adequate case may exist from a combination of circumstances, each of which considered alone is quite inadequate to found a conviction. The essence of a circumstantial case is the consideration of the evidence as a whole. Despite Mr Sidebottom's problems with alcoholism, and other features mentioned by Mr Rafter, his evidence might properly be accepted by a jury. The learned judge in his summing up drew attention to the weaknesses associated with Mr Sidebottom's evidence and directed the jury to scrutinise his evidence very carefully and emphasised that before acting upon it, the jury must be satisfied that the appellant not only said those things to Mr Sidebottom but also that what he said to Mr Sidebottom was true. In summarising the defence case, the judge again referred the jury to the unsatisfactory aspects of Mr Sidebottom's evidence. That was a reasonable response to the situation and nothing more was required. In my opinion this was a strong circumstantial case, unanswered by any evidence on behalf of the defence.

[28] The decision was one for the jury to make. In the absence of satisfactory evidence as to the circumstances in which death was caused, the jury obviously gave him the benefit of the doubt as to whether the killing was accompanied with an intent to kill or cause grievous bodily harm and returned a verdict of manslaughter. Such a verdict was quite safe and satisfactory. The appeal should be dismissed.

[29] **AMBROSE J:** I agree.

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5 *Grimley* above at paras 6-9.

6 *Grimley* above at para 9.