SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jeffrey & Daley* [2002] QCA 429
PARTIES:	**R** **v** **JEFFREY, Deborah Marie** (appellant) **DALEY, David Charles King** (appellant)
FILE NO/S:	CA No 140 of 2002 CA No 150 of 2002 DC No 1149 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2002
JUDGES:	McMurdo P, Jerrard JA, and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeals by David Charles King Daley and Deborah Marie Jeffrey against their convictions for robbery with personal violence and robbery respectively allowed, and each conviction quashed and a retrial ordered on the charges of robbery and robbery with personal violence on which the respective appellants had originally been convicted** **2. Application by Deborah Marie Jeffrey for leave to appeal against the sentence imposed on her for the offence of assault occasioning bodily harm dismissed** **3. The appellant Daley be remanded in custody until further order**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – ROBBERY – GENERALLY – where appellant Daley claimed he was entitled to money possessed by the complainant as of a right in the appellant Jeffrey to compensation – where appellants acted together in taking money from complainant – where appellant Jeffrey convicted only by reason of her being a party to the robbery committed by appellant Daley – operation of s 22 of the

Criminal Code – whether appellant Daley had an honest claim of right to the money

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – OTHER MATTERS – where learned trial judge declined to direct the jury on defence under s 22 of the *Criminal Code* – where learned judge ruled that because the evidence of appellant Daley was that he did not take the money but was given it by the complainant, the s 22 defence could not apply – where appellant Daley was not cross examined as to the basis or honesty of his claimed belief – whether lack of direction to jury on s 22 defence deprived appellant Daley of the chance of an acquittal

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant Jeffrey acted from sense of grievance – where applicant disavowed a claim of right – where applicant committed assault occasioning bodily harm in complainants' home – whether sentence manifestly excessive

Criminal Code (Qld), s 8, s 22, s 24, s 668E

Gilbert v R (2000) 201 CLR 414, followed
Mackenzie v The Queen (1996) 190 CLR 348, considered
Mitchell v Norman; ex parte Norman [1965] Qd R 587, followed
R v Barlow (1996-7) 188 CLR 1, considered
R v P [2002] 2 Qd R 401, considered
R v Skivington [1968] 1 QB 166, applied
R v Williams [1988] 1 Qd R 289, applied
Walden v Hensler (1987) 163 CLR 561, followed

COUNSEL: K M McGinness for the appellants
S G Bain for the respondent

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

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

[2] **JERRARD JA:** On 3 July 2001 the appellants David Daley and Deborah Jeffrey discovered that Ms Jeffrey's Datsun Sedan motor vehicle, parked in front of the appellants' residence on Macley Island, had been deliberately damaged overnight. The appellants strongly suspected, if not believed, that the complainants Mark Wilkins and Caroline Thorburn, who at that time also lived on Macley Island, were responsible. The appellants promptly enough attended at the complainants' home that same morning, and personal violence then occurred in those premises. At the

end of the visit the complainant Mark Wilkins had paid an amount of $360.00 to the appellant David Daley, and each of Mark Wilkins and the complainant Caroline Thorburn had suffered bodily harm. The appellants were each convicted on 19 April 2002 of having robbed Mr Wilkins, and the appellant Daley was also convicted of the aggravating circumstance of using personal violence at the time of that robbery. The appellant Deborah Jeffrey was additionally convicted of having assaulted Caroline Thorburn and caused her bodily harm. David Daley was sentenced on 19 April 2002 to four years imprisonment, and Deborah Jeffrey was sentenced on both counts to 18 months imprisonment, to be suspended after she had served six months, such suspension being for a period of three years. Each appellant appeals their conviction(s) and applies for leave to appeal against the sentence(s) imposed.

[3] The complainants had been living at Macley Island since approximately late January 2001, and the appellants had lived there for longer. Approximately two weeks before 3 July 2001, a Subaru motor vehicle belonging to the complainants had been damaged whilst parked near their residence. The appellant Daley asserted that after that damage, Mr Wilkins accused him of damaging the complainants' motor vehicle, whereas Mr Wilkins and Ms Thorburn denied having so suggested. It was agreed that the complainants had visited the appellants' residence after that damage had occurred, and had told the appellants about it. There did seem to have been some limited social interaction between the two couples apart from that visit, because it was common ground that as at 3 July 2001 Mr Wilkins owed David Daley the amount of $57.00, lent in separate amounts at different times.

The Crown Case

[4] The Crown case was that the two appellants went to the complainants' home for the purpose of obtaining money from them to pay for the damage done to Ms Jeffrey's vehicle. It had had all four tyres slashed, a rear louvre ripped off, the petrol tank popped open, and the number plates partially removed. Mr Wilkins' description of the visit the complainants received on 3 July 2001 from the appellants was that when he opened the door to them, Mr Daley called him a "fucking dog cunt", and began to hit him in the face and head. Wilkins was accused by Mr Daley of having damaged Ms Jeffrey's car, and Mr Wilkins then gave Mr Daley $60.00 in repayment of the $57.00 previously lent. Mr Daley continued to speak about the complainants having damaged Ms Jeffrey's car, picked up a coffee table, and hit Mr Wilkins on the head with it. Mr Wilkins fell down, and was then kicked in the face, head, and chest by Mr Daley who asked a number of times for Mr Wilkins to pay for the damage done to the car tyres. When Mr Wilkins placed his hand in his pocket where he had $300.00, Mr Daley pulled Mr Wilkins's hair, hit him some more times, and took possession of the money.

[5] Meanwhile, as Mr Wilkins' recalled it, events unseen but heard by him had occurred between Ms Thorburn and the appellant Jeffrey, and Mr Wilkins heard Ms Jeffrey say to Mr Daley "that's enough Dave"; and then the assault upon Mr Wilkins stopped. He saw that as Mr Daley was leaving he punched Ms Thorburn in the head. Both appellants left through the kitchen, and Mr Wilkins thought he heard the door of the fridge opening.

[6] Ms Thorburn's description and evidence was of a similarly hostile visit from the two appellants, and for Ms Thorburn that involved Ms Jeffrey screaming obscenities

at her, and accusing Ms Thorburn of having damaged the car; and Ms Jeffrey wanted Ms Thorburn to pay for that damage. Ms Thorburn's account was that when she told Ms Jeffrey she didn't have any money to pay to Ms Jeffrey, Ms Jeffrey began to assault Ms Thorburn by pushing her, and ripped her shirt and a diamond chain. Ms Jeffrey then hit Ms Thorburn around the head, shoulders and breast with a piece of wood, (the leg of the coffee table apparently used by Mr Daley to strike Mr Wilkins), during which assault Ms Thorburn lost control of her bladder. This led to Ms Jeffrey's saying "yes, you ought to be frightened, you fucking dog cunt".

[7] Ms Thorburn recalled seeing Mr Daley hitting Mr Wilkins across the face with the leg of the table, and kicking Mr Wilkins. She swore that after Mr Daley stopped assaulting Mr Wilkins, Mr Daley came towards her and struck **her** in the shoulder area as well with the table leg; and she saw that Mr Daley had a roll of notes in his hand. She saw both appellants leave, and that as they did Ms Jeffrey opened the fridge and left the premises with something in her hand. Ms Thorburn believed that there were sausages found to be missing from the fridge after that visit.

[8] Both Mr Wilkins and Ms Thorburn gave evidence that the appellant Daley had threatened to "kill you" (addressing both of them), if they contacted or involved the police in the matter. This threat was allegedly uttered just before the appellants quitted the complainants' home. Ms Thorburn also said that Mr Jeffrey had made that threat. The complainants did involve the police and the appellants faced the jury on:

- A charge (count one) that on that day they had entered the complainants' dwelling and stolen food items in it;
- A charge (count two) that they robbed Mr Wilkins and had then used other personal violence to him;
- A charge (count three) of having assaulted Ms Thorburn and done her bodily harm when being armed with a dangerous instrument.

Inconsistent Verdicts

[9] Both were charged as joint offenders on all three counts and both were acquitted of the offences in count one, and Mr Daley was acquitted of the offences in count three. The appellants' complain that Mr Daley's conviction of robbery of Mr Wilkins with the aggravating circumstance of using personal violence, and Ms Jeffrey's conviction of robbery simpliciter of Mr Wilkins and assault occasioning bodily harm to Ms Thorburn, (without the aggravating circumstance of use of a weapon) are inconsistent with their acquittals on those other counts.

[10] That ground of appeal raises the issue of whether there is a discernable rational basis for there being differing verdicts by the jury on those counts.[1] As to that I consider that the Crown case itself carries a sufficient explanation for those differing verdicts without any need to refer to the case made by Mr Daley and Ms Jeffrey, discussed below. The necessary rejection of their case shown by the convictions is not inconsistent with the acquittal.

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1 *R v P* [2000] 2 Qd R 401 at 410 judgment of Thomas JA and Chesterman J; *Mackenzie v The Queen* (1996) 190 CLR 348 at 365-7.

[11] This is because the evidence called by the Crown included evidence from a Dr Khalil who was working at the Redland Hospital on 3 July 2001. The Doctor examined the complainants at around 1.30p.m. that day, and observed that Mr Wilkins had bruising to the left eyeball area, abrasions to the forehead, bruising under the right eye, and abrasions to the right side of his nose and right cheek. He had an injury to the inner lower lip, and bruising to the left side of his chest wall. Ms Thorburn had bruises to the left side of her face around her left eyeball, and complained of pain and tenderness to the left side of her chest. Significantly for the defence, the doctor had no notes or recall of having been told by either Mr Wilkins or Ms Thorburn of either of them having been struck with a piece of timber, although both described their having been assaulted by hits and kicks. Counsel for the appellants pressed throughout the trial the argument that had a wooden table or chair leg been used as a weapon, greater injuries than were observed may have been expected, as well as a complaint at the time to the doctor. Both appellants denied in their own evidence having used any implement as a weapon. I think the apparent absence of complaint to Doctor Khalil about any weapon makes the acquittal of assault of Ms Thorburn with the aggravating element of use of a dangerous instrument an understandable enough verdict.

[12] Mr Daley's acquittal of having committed any assault upon Ms Thorburn has the discernable rational basis (compared to his conviction for robbing Mr Wilkins), that Ms Thorburn's only complaint of any assault by Mr Daley was a complaint of assault with the table leg, and she did not herself describe or complain at all about having received the push Mr Wilkins said he saw Mr Daley inflict on her. Since Ms Thorburn made no complaint of that assault, one can see a rational basis for acquitting Mr Daley of it.

[13] Regarding count one, the jury were directed that the Crown had to prove that the appellant entered that dwelling house with the intention to steal from it, and had done so. The Crown alleged food was stolen. Only Ms Thorburn said she saw the fridge opened, and her evidence in cross examination when asked what was missing was:

> "Sausages – look I don't know, we were away from the home, we got home and there was food missing. Sausages in particular was one thing I remember distinctly."

The reference to being away from the home appears to have been a description of leaving Macley Island and attending the Redlands Hospital for treatment. The jury were certainly entitled to the view that the Crown case on burglary was little better than reasonable supposition, and not proof beyond reasonable doubt.

[14] Those verdicts appear rationally consistent with the general acceptance of the complainants' account of events which would be necessary to sustain the respective convictions for robbery of Mr Wilkins, and assault of Ms Thorburn. It was not suggested in the Crown case that Ms Jeffrey had herself used any personal violence to Mr Wilkins, and her conviction for robbery depended upon the jury finding a common purpose (in the appellants) to rob Mr Wilkins. The latter described only Mr Daley actually assaulting him.

The Defence Account

[15] The appellants presented a quite different picture of the events in evidence. Mr Daley described Mr Wilkins being nervous when the former first entered the latter's

residence that morning, and described how after the $60.00 was repaid, he (Mr Daley) brought up the subject of damage to Ms Jeffrey's car. Mr Daley alleged that Mr Wilkins eventually admitted to causing that damage, saying it was a "pay back". That alleged admission was not put in such specific terms to Mr Wilkins. Mr Daley's evidence continued with a description of there being an argument between the two men resulting in Mr Wilkins twice attempting to punch Mr Daley, who thereupon hit Mr Wilkins three times with the heel of his hand. Mr Wilkins fell over, and then attacked Mr Daley with the coffee table. The two men wrestled over the possession of that table with Mr Daley overpowering Mr Wilkins.

[16] On Mr Daley's account he then said to Mr Wilkins:

> "We don't need this. We do need any violence here you know, just pull up, give me the money for the tyres, and it will all be over."

Mr Wilkins got up and gave Mr Daley the money. Mr Daley left, advising Mr Wilkins that the latter was lucky "that I don't ring the police on this".

[17] Mr Daley's account in evidence thus described Mr Wilkins giving him that $300.00, and it included the sworn belief that "I am entitled to the money for the tyres he destroyed". Despite that asserted belief, he conceded in cross examination that when spoken to by the police that day, he had denied that he had taken the $300.00 from Mr Wilkins. He agreed that he had lied to the police in that denial, and endeavoured to justify the lie by distinguishing between having "taken" the money and being "given" it, about which the police did not ask him. His evidence also included the assertion in cross examination that Mr Wilkins had come by his injuries by an assault committed by Ms Thorburn on Mr Wilkins after the visit by the appellants, and before the complainants arrived at the Redlands Hospital.

[18] Mr Daley swore in evidence that after he had been given the $300.00 by Mr Wilkins, Ms Thorburn had "jumped" on Mr Daley's back, and started pulling his hair. This led to Ms Jeffrey intervening to "wrest" Ms Thorburn from Mr Daley's back. Ms Jeffrey's evidence generally agreed with that, and she described having twice hit Ms Thorburn on the face at that time. She also admitted in cross examination having falsely denied to the investigating police that day of having any knowledge whatsoever of the $300.00 being taken.

[19] The evidence given by Mr Daley about **his** entitlement to money for tyres Mr Wilkins had destroyed was not actually echoed by any evidence to like effect from Ms Jeffrey. She denied having personally asked Mr Wilkins for any money; and swore that what she said to Ms Thorburn about money was only to ask Ms Thorburn for all the money back that Ms Jeffrey said Ms Thorburn had borrowed from other people, to whom Ms Jeffrey had introduced Ms Thorburn. Ms Jeffrey did not claim any entitlement herself to any money from either Mr Wilkins or Ms Thorburn. It appeared common ground between Ms Jeffrey and Mr Daley that Ms Jeffrey owned the vehicle whose tyres were damaged. Mr Daley appeared to assume an entitlement on Ms Jeffrey's behalf to payment for those damaged tyres; or perhaps he paid for the tyres. There is no cross examination of him at all about the basis of the claimed belief.

Section 22

[20] Counsel for the appellant raised with the learned trial judge at different stages of the trial the matter of directions to the jury in terms of s 22 and s 24 of the *Criminal*

Code. The learned judge ruled that since the evidence of the accused Daley was that he had not taken the money, but rather Mr Wilkins had given it to him, s 22 did not apply. The learned judge also held that on the account of the accused Daley, in which he had simply overpowered and pacified a man who attacked him, and then accepted money given by that man, s 24 had no application either. The learned judge declined to direct on either defence. The judge had also expressed in argument some considerable hesitation about whether a defence relying on s 22 could arise when an accused person claimed only a right to compensation, as distinct from rights in respect of identified property.

[21] Although the submission by counsel for the two accused to the learned trial judge tended to lump together the appellants' beliefs and defences, the evidence of the appellant Jeffrey actually raised no claim of right to any money (s 22), nor any matters of fact about which she was mistaken, and which might give rise to a defence under s 24. The appellant Daley's claimed belief could only be, as the learned trial judge observed, a belief in a right (presumably in Ms Jeffrey, and presumably a right to recover by lawful action in a court) to money in compensation for the damage suffered by Ms Jeffrey. This belief was offered in justification for accepting or taking $300.00, that being all the cash that Mr Wilkins actually had then on his person.

[22] Despite the understandable doubts of the learned trial judge, I consider that that claimed belief did raise for consideration by the jury a defence pursuant to s 22 of the *Criminal Code*. Section 22(2) relevantly provides that:

> "A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

The appellant Daley took possession of and carried away the amount of $300.00, and now claims to have believed then to an entitlement, apparently as of a right, in Ms Jeffrey to compensation. As it is the Crown case that the appellants were acting together in taking money from Mr Wilkins, the appellant Daley must be entitled to the protection of any honest belief he had then as to Ms Jeffrey's right to monetary damages as compensation for the physical damage to her vehicle, and right to money from Mr Wilkins as that compensation.

[23] While Mr Daley's claimed belief must be honestly held to raise a defence under s 22, it does not matter if the right asserted by the belief is one which is unfounded in law or fact.[2] An honestly held belief in a claim of right in Ms Jeffrey, whom he was assisting, to at least as much money as Mr Wilkins then had on him, although unfounded or unreasonable, would relieve Mr Daley from criminal responsibility for taking that money from Mr Wilkins' possession with intent to permanently deprive him of it. The lack of criminal responsibility for the element of stealing, which is an essential part of the offence of robbery, would mean he could not be held criminally responsible for that more serious offence. This would not relieve him of criminal liability for the serious assault the jury necessarily found he committed at that time.

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[2] See the judgment of Gibbs J in *Mitchell v Norman ex parte Norman* [1965] Qd R 587 at 594-595 cited by Brennan J in *Walden v Hensler* (1987) 163 CLR 561 at 568 and see too the judgment of Macrossan J in *R v Williams* [1988] 1 Qd R 289 at 295.

[24] The judgment of Macrossan J (as he then was) in *R v Williams* (see footnote 2) observed at page 295 line 32 that there seems to be no reason to doubt the correctness of the decision in *R v Skivington* [1968] 1 QB 166, in which was held that on a charge of robbery with aggravation, an honest belief by the accused person of his entitlement to the money in question, was enough to raise the defence of honest claim of right. This was because it was not necessary for the accused also to believe that he was entitled to take the money in the way that he did. Those observations of Macrossan J, with which I respectfully agree, apply in the instant case. A claimed belief under s 22 might save Mr Daley from a conviction for robbery, but not for assault occasioning bodily harm. The latter offence is not one relating to property.

[25] There are a number of matters revealed in the evidence which appear entirely inconsistent with the existence of the claimed belief. These include the appellant Daley's admitted and dishonest denial to the police that day that he took the $300.00, and the evidence of the threat to kill the complainants if they brought the police into the matter. There was also an entire absence of any evidence as to the appellant Daley's belief as to the cost of replacing or repairing the tyres, or as to how much money he thought at the time he was actually getting from Mr Wilkins.

[26] Those matters could lead to a jury quickly dismissing beyond reasonable doubt the honest existence of any such claimed belief. However, the appellant Daley was not cross examined as to its basis or honesty, and this was probably because the learned trial judge had intimated, before either appellant was called, the views the learned judge held as to the probable non-existence of any defence based on s 22. Counsel for the Crown may have shortened the cross examination with that known attitude in mind. The result of all that is that absent cross examination on that issue, it is difficult to be affirmatively satisfied that withholding directions to the jury concerning a defence based on s 22 made no difference to the appellant Daley's chances of acquittal. The jury may not only have had a reasonable doubt on the point, but may have even have accepted he did have the claimed belief.

[27] In deference to the observations by Callinan J in *Gilbert v R* (2000) 201 CLR 414 at 438, to the effect that there is a diminished inclination in recent times to invoke the proviso in s 668E, (even in otherwise very strong Crown cases) where misdirection has been shown upon an important ingredient of the law applicable to the trial, I consider that a lack of direction on a defence, even if one but faintly available, makes it impossible to be satisfied that Mr Daley was not thereby deprived of a chance of an acquittal. Accordingly a retrial should be ordered, on his case in the count of robbery with personal violence.

[28] Curiously, that also applies to Ms Jeffrey even though her own evidence actually eschewed any statements made by her when in the complainants' home which might reflect or suggest the existence of any such belief, and who did not claim it in her own evidence. She was convicted only by reason of her being a party to the robbery Mr Daley committed, and the admissible evidence in her case would include the evidence given by Mr Daley as to his belief. She **may** be an example of a person caught by the "mastermind" effect of s 8 discussed in *R v Barlow* (1996-7) 188 CLR 1 at 14, by reason of her being criminally responsible for the acts done by Mr Daley when she had a state of mind he lacked, which would make her guilty of a more serious offence than him. However, the jury were not asked to consider that point; and the jury may well have preferred Ms Thorburn's evidence that Ms Jeffrey did

demand money in payment for the damage to the motor vehicle. If so, the jury may have thought Ms Jeffrey's evidence did not necessarily do justice to her own case.

[29] With regard to her application to appeal against her sentence for assault occasioning bodily harm, it is contended on her behalf that the sentence imposed was manifestly excessive taking into account her lack of relevant prior convictions, her age and her health. It appears that she does suffer from acrophobia and bipolar disorder and that she takes medication for one or both conditions; and she has only minor convictions for drugs matters and stealing a pot plant. Her counsel had agreed in the submissions on her behalf that a "head" sentence of 18 months imprisonment would be appropriate, but submitted that that should be suspended after a "very short period of time". That submission was made in respect of both the robbery and the assault convictions.

[30] The only issue is whether the order that she serves six months of that 18 month term of imprisonment results in a manifestly excessive sentence, for assault occasioning bodily harm. That assault was committed in the other person's home, and while Ms Jeffrey does seem to have acted from a sense of grievance, she disavowed a claim of right. I consider it appropriate in the circumstances that her application for leave to appeal against the sentence for assault occasioning bodily harm be dismissed.

[31] In the circumstances I would order that the appellant Daley be remanded in custody rather than released on bail by order of this Court. It appears from the sentencing remarks of the learned judge that neither appellant had relevant pre-sentence custody, and both appeared at trial. However, this Court does not know what other charges, if any, are outstanding now.

[32] I would order:

1. That each of the appeals by David Charles King Daley and Deborah Marie Jeffrey against their convictions for robbery with personal violence and robbery respectively be allowed, and each conviction quashed and a retrial ordered on the charges of robbery and robbery with personal violence on which the respective appellants had originally been convicted.
2. That the application by Deborah Marie Jeffrey for leave to appeal against the sentence imposed on her for the offence of assault occasioning bodily harm be dismissed.
3. That the appellant Daley be remanded in custody until further order.

[33] **ATKINSON J:** I agree with the reasons of Jerrard JA and with the orders he proposes.