SUPREME COURT OF QUEENSLAND

CITATION:	*R v Orreal* [2002] QCA 547
PARTIES:	**R** **v** **ORREAL, Jeffrey Mark** (appellant)
FILE NO/S:	CA No 296 of 2002 DC No 2017 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	6 December 2002
JUDGES:	McMurdo P, Helman and Philippides JJ Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed;** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – where appellant convicted of unlawful wounding after second trial – where appellant struck complainant on face with glass bottle – where witness for prosecution did not give evidence in first trial – where witness was a friend of complainant – whether failure to warn jury about circumstances in which witness came to give evidence – whether failure to warn jury about contradictions in prosecution evidence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – OTHER IRREGULARITIES – where volume enhancing device used when appellant gave evidence – where trial judge intervened in questioning of certain witnesses – whether interventions adverse to appellant's interests – whether

conduct of trial oppressive to appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSON – where appellant sentenced to 18 months imprisonment – whether manifestly excessive – whether failure to consider mitigating circumstances

COUNSEL: B M Orreal with leave to appear on behalf of the appellant
B G Campbell for the respondent

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

[1] **McMURDO P:** I agree that the appeal against conviction should be dismissed and the application for leave to appeal against sentence refused for the reasons given by Philippides J.

[2] **HELMAN J:** I agree with the orders proposed by Philippides J and with her reasons.

[3] **PHILIPPIDES J**:

Background facts

The appellant was charged with unlawfully doing grievous bodily harm and, in the alternative, with unlawful wounding. He was acquitted on the grievous bodily harm charge, but convicted on the wounding charge and sentenced to 18 months imprisonment.

[4] The circumstances of the offence were that on 12 May 2000, the complainant, Ryan Combes, had attended a party at Bray Park. He left in the early hours of the following morning, intending to walk home. He crossed the road from the party and entered a park, where a group of young people had gathered. One of the group, Alicia Sutherland, the appellant's girlfriend, and another girl were arguing.

[5] The complainant's evidence was that he laughed at Alicia. However, evidence was given by a witness called by the prosecution, Rebecca Bain, that the complainant also said to Alicia something like "settle down you silly slut" to which she responded by screaming at the complainant. She then went across to the appellant at the party, who then approached the complainant saying "Did you call my missus a slut?".

[6] The Crown alleged that the appellant then struck the complainant on the face with a bottle. A scuffle between the appellant and the complainant ensued. The complainant suffered lacerations around the eye. Medical opinion indicated that the injuries were more likely to have been caused by a bottle that had been broken before impact. Both the complainant and Ms Bain gave evidence that the appellant struck the complainant. Ms Bain gave evidence that she heard the sound of a bottle breaking in the vicinity of where the appellant was and saw something glistening in

the appellant's hand before he struck the complainant and thereafter saw what she thought was blood coming from his face.

[7] The appellant gave a statement to police, stating that the complainant had called his girlfriend a slut and that when he challenged the complainant, the complainant repeated the insult and then started to shape up for a fight, at which stage he had struck the complainant over the head with a bottle. He said that he was trying to knock out the complainant. The appellant gave similar evidence at the trial. The appellant's girlfriend and a friend of the appellant also gave evidence supporting the appellant's version.

Grounds of Appeal

New Ground

[8] At the hearing of the appeal, an additional ground of appeal was added by leave. The appellant contended that the conduct of the trial was oppressive to the interests of the appellant so as to found a reasonable apprehension of a miscarriage of justice. The sole basis for this submission is the use of a volume enhancing device for the appellant's evidence. It was said that this was capable of founding an apprehension on the part of the jury that the appellant's evidence was to be treated differently from that of the complainant and his witnesses.

[9] It appears that there had been some difficulty in hearing witnesses generally. At an early stage in the trial, during the complainant's evidence, this difficulty was mentioned and the learned trial judge indicated that he had sought a volume enhancer for the courtroom. It does not appear that the appellant was singled out for special treatment, but rather that the volume enhancer became available when the appellant gave evidence. Its use in those circumstances cannot reasonably be said to have had a detrimental effect or connotation for the appellant. This ground must fail.

Ground A (i)

[10] The appellant appeals against his conviction on the ground that the trial judge erred in failing to warn or adequately warn the jury to scrutinise the circumstances in which Ms Bain came to be an eye witness to the incident and the circumstances in which she initially decided to keep quiet, but then decided to give a statement to the police. This ground appears to centre on the contention that there was a discrepancy between the evidence of Ms Bain that she was a reluctant witness and that of Constable Innes which was said to be to the contrary. It was also said that insufficient warning was given as to the assessment of Ms Bain's evidence, in light of the fact that Ms Bain was a good friend of the complainant.

[11] The appellant was convicted after a second trial, the jury in the first trial having been unable to reach a unanimous verdict. Ms Bain had not given evidence at the first trial. The police evidence was that the police only became aware that Ms Bain was a possible witness after the first trial. Ms Bain was called to give evidence in a *voir dire* at the commencement of the second trial. During the *voir dire* she was extensively cross-examined in relation to the circumstances surrounding her decision to provide a statement. Her evidence was that when approached by the

police, she initially said she did not know anything about the incident, but that she then decided to tell the truth and provide a statement.

[12] Ms Bain was subsequently called to give evidence at the trial and again extensively cross-examined concerning the circumstances under which she came to give her version to the police. Constable Innes, the police officer involved, was also cross-examined about the circumstances relating to Ms Bain providing a statement.

[13] The learned trial judge gave directions to the jury as to how they might approach questions of credibility and reliability of witnesses in general. His Honour also specifically referred to the evidence of Ms Bain in relation to her initial claim to police to have no knowledge of the incident. His Honour also gave other directions concerning Ms Bain's credibility, including her previous conviction as a child. No redirection was sought in relation to this aspect of the directions.

[14] I do not consider that the learned trial judge gave insufficient directions in relation to the assessment of Ms Bain. The matters raised concerning Ms Bain's credibility were comfortably within the capacity of the jurors to evaluate properly. As a result of the thorough cross-examination, the jury were clearly alerted to the fact that she was a friend of the complainant and had ample opportunity to assess Ms Bain and consider her evidence and the circumstances in which she came to give evidence and any inconsistency with the evidence of Constable Innes.

Ground A (ii)

[15] The appellant also appeals against his conviction on the ground that the trial judge erred in failing to warn or adequately warn the jury to scrutinise the evidence that Ms Bain was improperly induced to give evidence by the police officer Innes.

[16] No request for such a direction was made by defence counsel. The Crown submitted that there was no evidence of any improper inducement by the police to Ms Bain to provide evidence, and therefore that there was no need to give a direction in relation to this matter.

[17] This ground of appeal appears to be based firstly on the submission that, on one interpretation of the evidence, Ms Bain was shown a photograph of the complainant's disfigured face in order to induce her to provide a statement and secondly, on the following statement of Constable Innes, as reported by Ms Bain:

> "Well, look, what you did, Beck. You paid for it. Look what's happened to Ryan. You know, the person that did that, they have to pay for that."

[18] I am not persuaded that these matters raise any issue of any coercion or inducement. There was nothing improper in Ms Bain having been shown a photograph of the complainant in the course of being questioned. Further, as regards Constable Innes' statement referred to above, it was clear from the evidence that there was no issue of Ms Bain having been cajoled or induced, as the following excerpt from her evidence indicates:

> "Counsel: Well, the policeman was exhorting you to give a statement and sign it because, 'Look what happened to Ryan.' You had to pay for your misdeeds --?
>
> Witness: The police officer did not push me to do anything
>
> Counsel: Sorry?
>
> Witness: The police officer did not push me to sign, make a statement or anything."

[19] In those circumstances, I do not consider that there was an error by the learned trial judge in failing to give any specific warning as contended.

Ground A (iii)

[20] The appellant further appeals on the ground that the learned trial judge erred in failing to warn or adequately warn the jury that there was conflicting evidence between Ms Bain and the arresting officer, Constable Innes, about how she was recruited to give evidence, particularly given the lack of opportunity by the appellant's legal representatives to cross-examine them. The complaint is that the learned trial judge failed to direct and sum up properly as to what are said to be conflicts in the evidence of Ms Bain and Constable Innes.

[21] The discrepancy between Ms Bain's evidence and Constable Innes' focussed on whether or not she had initially been a reluctant witness as she had said. A review of their evidence indicates quite minor discrepancies on this issue. While Ms Bain indicated that she had said, when initially approached, that she did not know anything about the incident, she explained why she said that, referring to her reluctance to appear in court given her past conviction and to not wanting to "dob in" the appellant. Constable Innes' evidence was that when initially contacted, Ms Bain did not say that she knew nothing and that she appeared willing to provide a statement, but that she showed some reluctance in becoming involved when asked if she would sign her police statement. As I have mentioned, both Ms Bain and Constable Innes were extensively cross-examined concerning the background leading to Ms Bain giving her statement. I do not consider that a need for any special warning arose, nor was any such warning requested.

Ground A (iv)

[22] The appellant further appeals on the ground that the trial judge erred in failing to warn or adequately warn the jury about the reliability of Ms Bain's evidence, given the internal contradictions, the manner in which her evidence was given and the conflicts between her evidence and the evidence of all other witnesses concerning the location of the incident and the appellant's whereabouts immediately prior to the incident.

[23] This ground centred on the submission that Ms Bain gave evidence, which was said to be contrary to the evidence of the other witnesses, that immediately prior to the incident, the appellant had come from the house. A review of the evidence of the other witnesses does not indicate that Ms Bain was clearly contradicted on this issue. As I have said, his Honour gave proper directions concerning the assessment

of Ms Bain's reliability and credibility and reminded the jury of the defence submissions in relation to her. The matters were properly within the capacity of the jury to assess and no further direction was required or requested.

Ground B

[24] This ground was abandoned at the hearing of the appeal.

Ground C

[25] The appellant abandoned part of this ground of appeal. This ground of appeal was reduced to a complaint about certain interventions of the learned trial judge, which were said to have been adverse to the appellant's interests so that they might unfairly have influenced the verdict of the jury and thus have rendered the verdict unsafe and unsatisfactory.

[26] The interventions complained of were limited to his Honour's questioning of Dr Thiele, a plastic surgeon, and an intervention during Constable Innes' evidence.

[27] In regard to his Honour's interventions concerning Dr Thiele's evidence, the intervention cannot be said to have been to the appellant's disadvantage, because it effectively excluded a basis for the charge of doing grievous bodily harm.

[28] The other intervention complained of occurred when Constable Innes was questioned by the appellant's counsel as to what Ms Bain said when she was initially approached by him. The question was aimed at investigating, *inter alia,* whether Ms Bain was a reluctant witness. His Honour intervened at one stage to state Ms Bain's version of the conversation, that is, that initially she said that she new nothing about the incident because she did not want to get involved. Constable Innes had not heard Ms Bain's evidence on that matter and it was regrettable that her evidence was put before the Constable through the intervention. Nevertheless, it is clear that when Constable Innes was questioned about the initial conversation, immediately following his Honour's intervention, he was uninfluenced by any information provided by his Honour's intervention. He went on to give evidence that Ms Bain did not indicate that she knew nothing about the incident. The intervention therefore had no adverse effect for the appellant.

Application for leave to appeal against sentence

[29] The appellant also seeks leave to appeal the sentence of 18 months imprisonment on the ground that the sentence was manifestly excessive or involved wrong sentencing principles. It was submitted that the learned trial judge erred in treating the case as necessarily "a glassing case" and the sentence imposed did not take any or any sufficient account of mitigating circumstances, including:

(a) the appellant's age, antecedents and family circumstances;
(b) the difficult position in which he was placed by the insulting and aggressive conduct of the complainant;
(c) the fact that the complainant might have also been adversely affected by the consumption of alcoholic liquor and severely insulted the appellant's girlfriend in circumstances reasonably suggestive of an intention on his part to inflict grievous bodily harm on the appellant.

[30] In addition, it was contended by the appellant that "the learned trial judge erred in principle in that he was influenced by the fact that the appellant had pleaded not guilty".

[31] The sentence imposed by the learned sentencing judge was premised on certain findings of fact, in particular, that the appellant was not assaulted by the complainant prior to his striking the complainant and that the appellant struck the complainant in the region of his eye with a bottle which he knew to be broken.

[32] In imposing the sentence, his Honour noted that while the bottle did not strike the eye itself and the scarring sustained did not amount to serious disfigurement, it nevertheless caused the complainant embarrassment. His Honour also found that the cause of the incident had been that the appellant was drunk and had lost his temper. His Honour considered that no allowance should be made for co-operation or for remorse, the appellant decamping after the incident without any signs of concern about the injury inflicted. However, his Honour also took into account mitigating circumstances, including the appellant's youth, the fact that the appellant had the benefit of strong family and other support, and his good references.

[33] The findings that the appellant used a broken bottle, a finding which was open on the evidence of Ms Bain and on the medical evidence, and that he acted deliberately were significant considerations in determining the appropriate sentence. The findings of fact made by the learned sentencing judge were open on the evidence and consistent with the jury's verdict. His Honour had regard to correct sentencing principles and I do not consider that it has been demonstrated that the sentence was based on any erroneous principle. Nor, having regard to the comparable cases, which indicate a sentencing range of 18 months to 2 years imprisonment, am I able to accept that the sentence imposed in this case was manifestly excessive.

Orders

[34] In the circumstances, I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.