SUPREME COURT OF QUEENSLAND

CITATION:	*R v Katsidis* [2003] QCA 82
PARTIES:	**R** v **KATSIDIS, Michael Alan** (appellant/applicant)
FILE NO/S:	CA No 396 of 2002 DC No 126 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	7 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2003
JUDGES:	Davies and McPherson JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Dismiss the appeal against conviction.** **2. Dismiss the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - OTHER MATTERS - where appellant was a professional boxer - where appellant punched the complainant several times in the face - where appellant's defence was accident - where trial judge's direction to the jury was consistent with that suggested in *R v Taiters; ex parte Attorney-General* [1997] 1 QdR 333 - whether inconsistent with the decision in *R v Van den Bemd* [1995] 1 QdR 401 - whether trial judge's direction was a misdirection CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - OTHER MATTERS - where appellant pleaded self-defence - where trial judge's direction ambiguous as to the necessary state of mind of the accused - where trial judge corrected this

error immediately - where trial judge correctly re-directed on this point - whether trial judge's direction was a misdirection

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - where appellant interviewed by television journalist - where evidence of conversation adduced - where statement of appellant in conversation false - whether statement admissible

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where appellant sentenced to two years imprisonment suspended after eight months - where complainant instigator of attack - where complainant incompetently drunk - where appellant professional boxer - where appellant's criminal history disclosed one prior assault occasioning bodily harm - whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 23

Edwards v The Queen (1993) 178 CLR 193, considered
Kaporonovski v The Queen (1975) 133 CLR 209, cited
R v Camm [1999] QCA 101; CA No 431 of 1998, 1 April 1999, considered
R v Dodd [1998] QCA 323; CA No 241 of 1998, 17 September 1998, considered
R v Francisco [1999] QCA 212; CA No 59 of 1999, 8 June 1999, considered
R v Grimley [2000] QCA 64; CA No 362 of 1999, 14 March 2000 considered
R v Steindl [2001] QCA 315; CA No 80 of 2001, 3 August 2001; [2001] QCA 434; CA No 80 of 2001, 12 October 2001, considered
R v Taiters; ex parte Attorney-General [1997] 1 QdR 333, discussed
R v Van den Bemd [1995] 1 QdR 401, discussed

COUNSEL: A J Glynn SC for appellant/applicant
R G Martin for respondent

SOLICITORS: Flehr & Associates (Toowoomba) for appellant/applicant
Director of Public Prosecutions (Queensland) for respondent

[1] **DAVIES JA:** The appellant was convicted after a trial in the District Court on 1 November 2002 of unlawfully doing grievous bodily harm to Jamie Thomas Halpin on 3 November 2001 at Toowoomba. He was sentenced to two years

imprisonment suspended after eight months. The appellant appeals against his conviction and seeks leave to appeal against his sentence.

[2] The incident which gave rise to the offence occurred outside the Toowoomba Sports Club on the night of 3 November 2001 some time shortly after 10.00 pm. The complainant and his companion Mr Tighe had been drinking at various places in Toowoomba that evening and by this time both were very drunk. The complainant decided that he needed to urinate. He handed his companion a kebab he was carrying and commenced to urinate in the gutter behind a car. It may be accepted that he also urinated on the car.

[3] At about this time the owner of the car Mr Ellis, emerged from the Sports Club and saw what was happening. He asked the complainant and his companion to move away and there was apparently some argument. Mr Ellis then returned to the Club where he informed several people, including the appellant, of what had occurred. According to one of them, Mr Lamb, the appellant said "Oh, we'll come out". Mr Ellis then came out of the Club again, this time in company with the appellant, his brother Stathi, Stathi's wife Lisa, Mr Lowien, Mr Lamb and apparently some others. Ellis, the appellant and the appellant's brother then crossed the road to where the complainant and Mr Tighe were standing, apparently to confront them.

[4] According to Lisa, the appellant said to the complainant "Why are you peeing all over this car? It's my - basically it's my friend's car. … What are you doing?" One of the witnesses, Lamb, also recalled the appellant confronting the complainant in this way; and Buntain, another witness who emerged from the Club a little after the others, heard the appellant's raised voice. Of the witnesses, it was only Ellis who said that it was he who first confronted the complainant.

[5] The complainant apparently responded in an aggressive manner and, again according to Lisa, the appellant suggested to him that he should apologize for peeing over his friend's car. The complainant then apparently threw a punch at the appellant which missed.

[6] One of the witnesses described both the complainant and his companion as paralytic, meaning plainly incompetently drunk. No-one contradicted this description. The appellant, by contrast, was not apparently affected by liquor. In fact he worked at the Sports Club and had been working there that night. He was a professional boxer.

[7] The sequence of events thereafter is not entirely clear because there were several different versions. Two things, however, are abundantly clear. One is that the complainant was obviously never a physical danger to anyone except possibly by falling over on top of them. The other is that the appellant punched the complainant several times in the face causing blood to come from the vicinity of his mouth.

[8] The most likely sequence of events, as it emerged from several of the witnesses is that, after the complainant's first missed swing at the appellant, the appellant punched the complainant one or possibly several times in the face, the complainant made another swing which missed again and the appellant punched him again several times in the face.

[9] At the trial the appellant's defences were self-defence and accident. It is not in the least surprising that the jury rejected both of those defences. As to self-defence it

was plain that the degree of force used by the appellant was well beyond what was reasonably necessary to make effectual defence against an assault by a "paralytically" drunk man such as the complainant. The appellant did not need to confront the complainant in the way in which several of the witnesses said he did. He could have avoided the complainant's swings without attempting to hit him back. He could have walked away. What he did was plainly unnecessary. It was a rather clinically executed beating, albeit of short duration, of a man who was plainly helplessly drunk.

[10] As to accident, if it was the appellant's blows which broke the complainant's jaw, as the jury no doubt thought it plainly was, there could be no doubt that an ordinary person in the appellant's position ought to have foreseen this. The only substantial basis for a defence of accident was the evidence of one witness, a Mr Buntain who said that after the events I have described the complainant and his companion backed away across the street whereupon they both fell into the gutter and the complainant hit his head against a pole. It was suggested that this might have caused his injury. This was fanciful and Dr Broadbent, the only medical witness in the case, said that he thought it was unlikely that a single blow would have caused the complainant's injury, which was a double fracture of the jaw, or that a fall such as that described would have caused this injury. He estimated the degree of force necessary as severe, more likely to be caused by more than one blow to the face.

[11] Before turning to the grounds of appeal against conviction I should also advert to one other disturbing feature of this case. One of the witnesses, Mr Lamb, gave evidence that, on 26 November 2001 at about 6.00 pm he received a phone call from the appellant's brother who was speaking on a speaker phone in a car with the appellant. The appellant's brother, in the appellant's presence told Lamb that, in his interviews with police he should be vague, that he should not remember much and that he should tell the police that he was drunk; in effect to say that he saw nothing. This evidence of Mr Lamb was uncontradicted because neither the appellant nor his brother gave evidence at the trial.

[12] As the appeal was argued there were only three grounds of appeal. The first was that the learned trial judge misdirected the jury on the question of accident. The second was that he misdirected the jury on self-defence. And the third was that he wrongly admitted into evidence and then wrongly directed the jury as to the use to be made of a statement by a journalist about a conversation which he had with the appellant after the latter had been charged.

The direction on accident

[13] Mr Glynn SC for the appellant concedes that the direction which the learned trial judge gave is consistent with that suggested by this Court in *R v Taiters*; *ex parte Attorney-General* [1997] 1 QdR 333 at 338. There this Court said:

> "By way of summary and looking at the matter from the point of view of the prosecution, it can be said that if the circumstances of the case call for the s 23 defence of accident, ie that based on the words 'an event which occurs by accident', to be excluded, the applicable onus will be sufficiently stated if the jury is told that:
>
> > 'The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary

> person in the position of the accused would reasonably have foreseen the event as a possible outcome.'
>
> This casts the matter in an acceptable positive form. If this direction is given it will be desirable for the trial judge to add that in considering the possibility of an outcome the jury should exclude possibilities that are no more than remote and speculative."

[14] However Mr Glynn SC submitted that this direction is inconsistent with the decision of this Court in *R v Van den Bemd* [1995] 1 QdR 401 which this Court plainly thought it was applying in *R v Taiters*. It also seems to be implicit in this submission that the use of the word "possible" in that direction is too vague.

[15] As to the first of these submissions, there is, in my opinion, no inconsistency between the direction suggested in *Taiters* and the decision of this Court in *Van den Bemd*. The former applied *Van den Bemd* and, at the same time, suggested a proposed formulation of the test set out in that earlier case and in the High Court case decision of *Kaporonovski v The Queen* (1975) 133 CLR 209 by expressing it, without the use of double negatives, in terms of what the Crown is obliged to establish in order to exclude this limb of the defence of accident, now contained in s 23(1)(b) of the *Criminal Code*. See also *R v Grimley* [2000] QCA 64; CA No 362 of 1999, 14 March 2000 at [9], [17].

[16] As to the second, the last sentence in the passage which I have quoted from the judgment in *Taiters* makes it clear that "possible" in the context of such a direction has a meaning which is reasonably clear.

[17] The appellant also appeared to criticize that part of his Honour's direction where, if taken in isolation, it might appear that he was withdrawing the question of accident from the jury if they were satisfied that the complainant's injuries were caused by the appellant's punches. The relevant statement was as follows:

> "So, at the end of the day, if you are satisfied, beyond reasonable doubt, the complainant's injuries were caused by the accused punching the complainant on the jaw, then the defence of accident would fail."

That sentence follows two sentences in which his Honour was stating the Crown's submissions on the defence of accident. It would have been heard by the jury in that context as, no doubt, his Honour intended that it should. No redirection was sought on this question.

[18] Moreover, as already mentioned, if it was the appellant's punches which caused the double fractures of the complainant's jaw, the defence of accident was fanciful (cf *Grimley* at [6]) and even if, strictly speaking, that question should have been left to the jury (*Grimley* at [17]), a jury properly instructed on this question must have been satisfied beyond reasonable doubt that it was not an accident.

[19] This ground of appeal therefore fails.

Self-defence

[20] The direction complained of is in the following terms:

> "Now the criterion in that instance, is objective and does not concern itself with the defendant's actual state of mind. The defendant must believe that what he is doing is the only way he can save himself from assault. He must hold that belief on reasonable grounds, but it

> is the essence of an actual belief to that effect that is the critical or decisive factor."

[21] That direction was given in answer to a question from the jury which his Honour recites immediately before the paragraph which I have quoted. His Honour said there:

> "You ask, 'should the accused's intentions have any bearing at the time of the assault for ruling on reasonable force?' I'll just say to you again what the law says. Our law provides that when a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assailant. That's the part you're concerned with, I gather."

Then followed the passage which I have quoted.

[22] Mr Glynn SC's criticism is of the second sentence in the first quoted paragraph but that criticism may be made with equal force of the third sentence. He submitted, correctly in my opinion, that it is not the defendant's belief which is relevant but rather whether, objectively, the force is more than was reasonably necessary to make effectual defence against the assault. However his Honour corrected this error immediately by what he then said which was this:

> "So, it's an objective test. It's what someone looking at the scene; some person, apart from the accused, looking at what was going on and might decide it was necessary. It's an object test, not a subjective test. So, the intentions of the accused have nothing to do with it.
>
> The Crown says that he used excessive force. The Crown seeks to exclude the defence because it contends that the force the accused used was not reasonably necessary to make effectual defence against the assault by the complainant.
>
> Now, what was reasonably necessary is an objective test; it's a test applied by you as members of the community. But you must remember, when you're considering the Crown's submissions on this aspect of the defence, you should bear in mind that a person, in defending himself, can't be expected to weigh precisely the exact amount of defensive action that may be necessary. Instinctive reactions and quick judgments may be essential. And it's at this point, where things go wrong, that juries are asked to decide whether someone has gone too far. So, it's a matter for you to decide this, as members of the community. You have the facts before you. You have to decide whether the accused went too far. That is the way, whether what the accused did was not reasonably necessary, in the circumstances, for effectual defence. It's very much your decision on the facts that have been placed before you.
>
> What do you say? You've heard the evidence. Are you satisfied beyond reasonable doubt that what the accused did was not reasonably necessary, in the circumstances, for effectual defence? It's an objective matter for you."

[23] I have not included everything which his Honour said on this occasion but it continued along the same lines. I should also add that his Honour had earlier directed on this question and no criticism is made of those directions.

[24] Nevertheless counsel for the appellant at the trial submitted that the error to which I have referred may still have misled the jury and asked his Honour to re-direct. His Honour did so in the following terms:

> "I just want to repeat to you, from this question of the state of mind of the accused, the degree of force used must be reasonably necessary to make effectual defence against an assault. The criterion, in that instance, is objective and does not concern itself with the defendant's actual state of mind.
>
> I then went on to read a further - which I read more to you - but what I read to you after that passage relates to another section of the *Code*; I made a mistake there. So, I'll just repeat to you the criterion, in this case - in this instances - is objective and does not concern itself with the defendant's actual state of mind.
>
> So, as I said to you, it's very much a question for you. It's an objective test and you, the jury, have to look at the facts of the case as they have been presented to you and decide, whether, on the facts that you have before you, you're satisfied beyond a reasonable doubt that, what the accused did, was not reasonably necessary in the circumstances for effectual defence.
>
> Now if you're not satisfied beyond a reasonable doubt that what he did was not reasonably necessary in the circumstances for effectual defence, you must acquit him."

[25] After those directions, the jury could not, in my opinion, have been in any doubt as to the test which they must apply.

[26] I would therefore reject this ground.

Admissibility and use of the appellant's statement to a journalist

[27] On 4 December 2001, after he was charged, the appellant was interviewed by a television journalist in front of the Toowoomba Police Station. He was first asked what he had to say in relation to the charges to which he replied:

> "It's a crying shame that a guy such as myself can't go out in Toowoomba without being approached by thugs such as the complainant in question. At the end of the day I am a big fish in a little pond and I am in trouble for defending myself and defending myself well."

He was then asked whether he thought a line should be drawn given that he was a professional fighter to which he replied:

> "I think Toowoomba is a very small place and like I said I'm a big fish in a little pond and there are going to be a lot of people approach me and have a crack at the title so to speak but like I said, it's hard to get around without being approached by some thug like the complainant in question."

He was then asked whether that wasn't where restraint needed to come in on his behalf to which he replied:

> "No I don't think so. I defended myself and defended myself well without using excessive force. I mean if this guy wants to go and run into a pole full of whatever drugs he may have been on that's his business."

[28] The evidence of this conversation was sought to be adduced because of the lie said to be contained in this last passage, and that statement was made by the appellant, so it was submitted, because the appellant knew he had gone too far. However it seems to me that there are two passages in this interview which are relevant on the question of lies. The first is the plainly false statement that the complainant was a "thug" who wanted to have a "crack" at his title, whatever that was, but presumably as a well-known boxer. And the second was the one on which the Crown relied, the assertion that the complainant had run into a pole and, in effect, done himself the injury alleged. As to the first of these, the evidence established that the complainant was, though aggressive, plainly physically incompetent; "paralytic" was the term used by one witness. Nor was there even the faintest suggestion that the complainant knew, or was even capable of recognizing, who the appellant was. As to the second, on the evidence as a whole, the assertion that the complainant had done himself the injury by falling onto a pole was simply fanciful.

[29] In considering why the appellant may have made these statements, the jury were entitled to take into account the fact that, when first apprehended by the police, the appellant had denied his presence at the scene of the incident on the night in question; and that he, or his brother with his approval, sought to persuade Mr Lamb to tell police, that, in effect, he did not recall what had taken place on the night in question. So they might have thought, reasonably enough, that both of these statements made in the interview were further attempts by the appellant to distance himself publicly from responsibility for the complainant's serious injury in circumstances in which he knew that the truth would implicate him in the offence: *Edwards v The Queen* (1993) 178 CLR 193 at 210.

[30] I think that, in each of the above respects, the evidence of the interview was admissible against the appellant on this basis.

[31] That is the basis upon which the last of the appellant's statements, that is the one about running into the pole, was put to the jury by the learned trial judge in his directions. After setting this statement out his Honour said:

> "Well, the Crown - it's the Crown case, well, that that's a lie. That you'll be satisfied that the complainant did not run into a pole, but he was injured by the accused punching him."

His Honour then went on to refer to the evidence of Buntain and the competing contentions about Buntain's evidence, including, by the Crown, that Buntain was an associate of the appellant and that when he first spoke to police he did not mention the complainant striking his head on a pole.

[32] His Honour then directed the jury in terms of the joint judgment of the High Court in *Edwards v The Queen*.

[33] Mr Glynn SC submitted that, even if the jury rejected Buntain's evidence and concluded that what was said by the appellant in this respect was a lie it could not be used as demonstrating a consciousness of guilt. On the contrary it seems to me that the very purpose of telling a lie, if it was a lie, in the circumstances in which he did, would have been to establish defences of accident or self-defence of the kind which he sought to do.

[34] I would therefore reject this ground also. For those reasons the appeal against conviction must be dismissed.

Sentence

[35] The sentence imposed on the appellant was, as I have already indicated, two years imprisonment suspended after serving eight months with an operational period of three years. The appellant is a young man. He was only 21 at the time of the offence and is now 22. Although his criminal history discloses only one prior offence it is one of assault, possibly more than one, occasioning bodily harm committed on 7 October 2000, only a little over a year before the commission of this offence. It must be accepted, as the learned sentencing judge did, that these assaults were not of a very serious nature because no conviction was recorded and he was ordered to enter into a recognizance of $1,000 to be of good behaviour for a period of 12 months and ordered to pay compensation. Nevertheless it is disturbing that he should have committed this offence of serious violence so soon after he had been apprehended for an admittedly less serious violent offence.

[36] There is very little that needs to be added to the facts which I have already stated. The learned sentencing judge accepted that the complainant was the instigator and that there is no suggestion that the appellant went over to the scene of the incident initially with the intention of attacking anyone.

[37] On the other hand it appears that a number of sober young men, including the appellant went over to the complainant and his companion both of whom were aggressively but incompetently drunk, in order to remonstrate with them. Moreover it seems that, on the evidence of all of the witnesses except Ellis, it was the appellant who did the remonstrating, including asking for an apology, something which, given the complainant's obvious state, seemed unlikely to be forthcoming. It is difficult to escape the impression that the appellant and his companions could easily have avoided what occurred by not confronting the complainant and his companion in the first place or by walking away before the incident developed in the way in which it did.

[38] Telling against the appellant also is the fact that the jury must have accepted that there were several severe blows delivered by him in circumstances in which, in all probability, none were necessary, to a man who appears to have been helplessly drunk.

[39] It should also be mentioned that the consequences for the complainant appear to have been quite serious. His jaw remains disfigured in that the right side of his face projects more than the left and he has two visible scars. He also has a loss of sensation in his bottom lip. His biggest problem is a loss of confidence in returning to his work of riding racehorses in training because of the risk of further injury, and its effect on his ambition to become a trainer himself. It is uncertain whether or not this confidence will return.

[40] On the other hand the appellant, apart from the previous assault to which I have referred, appears to have led a blameless life. He apparently has considerable skill as a boxer with some prospect of success in that profession.

[41] Mr Glynn SC submitted that the case most comparable to this is *R v Camm* [1999] QCA 101; CA No 431 of 1998, decided by this Court on 1 April 1999. Camm was initially sentenced to three years imprisonment to be suspended after nine months. This Court reduced that sentence to one of two years suspended immediately with an operation period of three years. However because, by the time the appeal was

heard, Camm had been in prison for four and a half months, the sentence which this Court substituted was, in effect, one of two years imprisonment suspended after four and a half months.

[42] The facts in that case were very different from those in this. The complainant's injuries there arose from one push down some stairs to the ground a metre below in circumstances in which the applicant had been aggressively awoken from sleep and there had then been an altercation between the applicant and the complainant, who was his employee, about some aspects of their employer/employee relationship. There the applicant was a 47 year old man with no prior criminal history of any relevance. It seems to me that that case was a less serious example of the offence than this.

[43] The other case most relied on by Mr Glynn SC was *R v Francisco* [1999] QCA 212; CA No 59 of 1999, 8 June 1999. The applicant was a security officer in a hotel. The complainant, who was drunk, had been ejected from the hotel. He tried to sneak in past the appellant while the latter's attention was distracted. The appellant thought that the complainant was coming behind him to assault him and flung his arm back. The sideways movement of his forearm connected with the complainant's head propelling him backwards down some stairs in consequence of which he suffered a head injury. The applicant was a 29 year old man of good character with no previous convictions. The Court described the incident as one of lashing out with a single blow on the spur of the moment. It was conceded that the circumstances were less serious than those in *Camm*. A sentence of two years imprisonment without any recommendation or suspension was set aside and replaced by one of two years suspended that day which was 113 days after the applicant had entered prison. However that case is of little assistance being less serious than that in *Camm*.

[44] The other cases referred to by Mr Glynn SC of *Dodd* [1998] QCA 323; CA No 241 of 1998, 17 September 1998 and *Steindl* [2001] QCA 315; CA No 80 of 2001, 3 August 2001, [2001] QCA 434; CA No 80 of 2001, 12 October 2001, are even more remote from the facts of this case.

[45] Somewhat closer to this case is *R v Grimley*, referred to earlier in which the appellant was convicted after a trial of grievous bodily harm caused by punching another man in the jaw and breaking it, as in this case, in two places. The appellant was a 46 year old man who, like this appellant, had one previous offence of assault occasioning bodily harm in which no conviction had been recorded and a good behaviour bond given. This Court thought that a sentence of two and a half years imprisonment was manifestly excessive, substituting a sentence of one year and eight months imprisonment. However that sentence was not suspended in any way and there was no recommendation for parole. McPherson JA was of the view that the sentence in fact imposed was not manifestly excessive and would have dismissed the application for leave to appeal against sentence.

[46] Mr Martin for the respondent referred us to a number of cases taken from the Crown schedule of comparable sentences. However none of these is sufficiently closely comparable to this case to warrant specific reference. It is sufficient to say, in my opinion, that the sentence imposed here was for more serious and more deliberative acts of violence than that imposed in *Camm* and closer in seriousness to the facts of *Grimley*. Accordingly it is my opinion that the sentence imposed here was not

manifestly excessive. I would therefore refuse the application for leave to appeal against sentence.

Orders

1. Dismiss the appeal against conviction.
2. Dismiss the application for leave to appeal against sentence.

[47] **McPHERSON JA:** I agree with the reasons of Davies JA for dismissing the appeal against conviction and the application for leave to appeal against sentence.

[48] **PHILIPPIDES J:** I agree with the reasons of Davies JA for dismissing the appeal against conviction and the application for leave to appeal against sentence.