SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hill*; *ex parte A-G* [2003] QCA 379
PARTIES:	**R** **v** **HILL, Christopher Kenneth** (appellant/respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (applicant)
FILE NO/S:	CA No 95 of 2003 CA No 242 of 2003 CA No 248 of 2003 DC No 1435 of 2002
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeal against Conviction Sentence Application Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	1 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2003
JUDGES:	McMurdo P, Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal against conviction allowed, conviction set aside and a re-trial ordered. Not necessary to consider the application for leave to appeal against sentence and the Attorney-General's appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – MISCARRIAGE OF JUSTICE – MISDIRECTION AND NON-DIRECTION - whether learned primary judge erred in continuing the trial in the absence of the appellant when the appellant had not been called upon as to his giving evidence in his own defence CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE - where appellant sentenced to five years imprisonment – whether sentence manifestly excessive in all the circumstances CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL- whether sentence manifestly inadequate

	Penalties and Sentences Act 1992 (Qld), s 161B *Criminal Code*, s 27, s 618
	Festa (2000) 111 AcrimR 60, distinguished *R v Mentink* [1966] 1 Qd R 532, considered *R v Winston* [1994] QCA 435; CA No 368 of 1994, 28 October 1994, distinguished
COUNSEL:	K M McGinness for the appellant in Appeal Nos 95 and 242 of 2003 and respondent in Appeal No 248 of 2003 M J Copley for the respondent in Appeal Nos 95 and 242 of 2003 and appellant in Appeal No 248 of 2003
SOLICITORS:	Legal Aid Queensland for the appellant Appeal Nos 95 and 242 of 2003 and respondent in Appeal No 248 of 2003 Director of Public Prosections (Queensland) for the respondent in Appeal Nos 95 and 242 of 2003 and appellant Appeal No 248 of 2003

THE PRESIDENT: On the 19th of March 2003 the appellant was convicted of one count of unlawful wounding with intent to do grievous bodily harm on 21 August 2000. A presentence report was ordered and on 26 June 2003 he was sentenced to five years imprisonment and declared to be convicted of a serious violent offence under s 161B *Penalties and Sentences Act* 1992 (Qld).

He appeals against his conviction and applies for leave to appeal against his sentence. The Attorney-General of Queensland also appeals against the sentence contending it is manifestly inadequate.

The complainant, a 52 year-old vision impaired man, resided in the same block of units as the appellant. He visited Mr Gough, another resident in the units, on the 21st of August 2000. Whilst sitting on a stool on Mr Gough's balcony he was stabbed in the area of his heart. It is sufficient to say for the purposes of today's decision that the prosecution case was a strong one in terms of implicating the appellant as the

attacker. It included opportunity, similarity of description and very persuasive DNA evidence implicating the appellant.

The defence case was that the appellant was not the person who stabbed the complainant but alternatively if he was then he was of unsound mind at the time and not criminally responsible under s 27 of the *Criminal Code*.

A number of grounds of appeal are raised but the pertinent one is that the learned trial Judge erred in continuing the trial in the absence of the appellant when the appellant had not been called upon as to his giving evidence in his own defence.

This matter is simplified by the respondent's concession that this ground of appeal is a good one and there has been a miscarriage of justice in this case in respect of it. Nevertheless, this Court must determine whether the concession is rightly made.

On Monday, 17 March 2003 the appellant presented at Court for his part heard trial having taken an overdose of prescribed medication, apparently a cocktail of Valium, Temazepam, a medication for his schizophrenia, and blood pressure tablets. His psychiatrist, Dr Larder, was at Court to give evidence in his trial and examined him. Dr Larder, the Court was informed by the appellant's counsel, was of the view that the appellant was unfit to instruct on his trial for between 24 and 48 hours and he was also in urgent need of medical attention.

The learned primary Judge granted the appellant bail until 10 a.m. the following Wednesday, the 19th of March 2003 and the appellant was taken to hospital. The appellant's counsel at trial indicated his reluctance to continue with the case without the appellant's instructions, but the trial then took the very unusual course of continuing in the appellant's absence.

The next day, Tuesday, 18 March 2003, the Judge was informed that the appellant had been discharged from hospital, was resting at home in bed but his mother did not think he was well enough to attend his trial. This assessment was consistent with the psychiatrist's assessment the previous day. Defence counsel again raised the difficultly of his position; he simply had no instructions that enabled him to conduct the defence on the part of the appellant. In any case the trial continued in the absence of the appellant.

The Judge determined that this was the appropriate course because the overdose of prescribed medicine was a voluntary act on the part of the appellant and therefore the trial could continue in his absence. This course, it must be said, was not particularly resisted by either counsel at trial and it seems that his Honour may not have been given the assistance in this matter that he should.

The learned primary Judge explained to the jury that the appellant was absent because of a voluntarily ingested overdose of prescribed drugs and on the view of at least one

psychiatrist urgent medical assistance was required which he was then receiving and for that reason the trial was proceeding in his absence.

The Crown Prosecutor then closed the prosecution case and his Honour called on the appellant's counsel in the absence of the appellant asking him, "… what course he will be taking on his client's behalf." The appellant's counsel indicated that the appellant would call only psychiatrist Dr Gary Larder. Dr Larder gave evidence for the defence and psychiatrist Dr Donald Grant gave rebuttal evidence for the prosecution. The appellant was subsequently convicted.

The respondent's concession that there has been a miscarriage of justice in this case in respect of the second ground of appeal and that the conviction should as a result be quashed and a retrial ordered is because of the mandatory terms of s 618 *Criminal Code*. The provisions of that section were not met here. This was not a case where, for example, an accused person fled during his trial so that the requirements of s 618 could not be met: cf *Festa* (2000) 111 ACrimR 60. Nor was this a case within s 617(2) *Criminal Code* where an accused person has conducted himself so as to render the continuance of the proceedings in the person's presence impracticable and giving the Court power to order that the person be removed and to direct the trial to proceed in the person's absence. The requirements of s 618 of the *Criminal Code* are not procedural requirements of the type that do not affect the legitimacy of

the conviction: see *R v Mentink* [1966] 1 QdR 532 at 533 to 534 and 540 to 542.

Here the appellant's bail had been extended until 10 a.m. the Wednesday morning following his non appearance. The Court was informed at the time when his counsel was called upon in his absence to indicate whether he intended to give or call evidence that the appellant was resting at home. The medical evidence given on the previous day was that the applicant would be unfit to give instructions at his trial for between 24 and 48 hours. The trial could easily have been adjourned until the Wednesday morning; the applicant had bail until that time when the trial could have continued in his presence. There was no proper basis for the learned trial Judge to conclude here that the appellant exhibited a clear desire not to take any further part in his trial: cf *R v Winston* [1994] QCA 435; CA No 368 of 1994, 28 October 1994, at page 6 and *R v Stuart & Finch* [1974] QdR 297.

It follows that the appeal against conviction must be allowed, the conviction set aside and a new trial ordered. The application for leave to appeal against sentence and the Attorney-General's appeal against sentence do not, in those circumstances, arise for consideration.

DUTNEY J: I agree.

PHILIPPIDES J: I also agree.

THE PRESIDENT: That is the order of the Court.
