SUPREME COURT OF QUEENSLAND

CITATION:	*R v Folland* [2004] QCA 209
PARTIES:	**R** **v** **FOLLAND, Kenneth Wayne** (applicant/appellant)
FILE NO/S:	CA No 41 of 2004 SC No 347 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2004
JUDGES:	de Jersey CJ, Williams JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	EVIDENCE – WITNESSES – HOSTILE WITNESSES – where appellant charged with murder and convicted of manslaughter – where appellant's brother was a key prosecution witness – where brother was declared a hostile witness and was cross-examined by prosecution before the jury – where brother gave evidence that differed from his statement to police – where learned trial judge found that brother's demeanour suggested hostility to prosecution case – whether learned trial judge erred in declaring brother a hostile witness – whether miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where there was some conflict in evidence given by various witnesses – where appellant did not give evidence – whether jury was entitled to conclude that appellant intentionally struck deceased with his car – whether verdict of manslaughter open on the evidence CRIMINAL LAW – JURISDICTION, PRACTICE AND

PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – PROVOCATION – appellant sentenced to nine years imprisonment with serious violent offence declaration – whether learned sentencing judge erred in holding that the verdict of manslaughter was based on defence of provocation rather than criminal negligence – whether serious violent offence declaration should have been made – whether sentence imposed manifestly excessive

Evidence Act 1977 (Qld), s 17
Penalties and Sentences Act 1992 (Qld), s 161A, s 161B

McLellan v Bowyer (1961) 106 CLR 95, followed
R v Andrews [1987] 1 Qd R 21, considered

COUNSEL: B W Walker SC, with B W Farr, for the applicant/appellant
D L Meredith for the respondent

SOLICITORS: Ryan & Bosscher for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ:** In my opinion the appeal against conviction should be dismissed, and the application for leave to appeal against sentence refused. I have had the advantage of reading the reasons for judgment of Williams JA, with which I agree.

[2] **WILLIAMS JA:** After an altercation between the appellant and the deceased (James Niebling) the latter left the front of the house where that incident occurred and began walking away. He crossed the road and was on or very adjacent to the footpath on the opposite side of the road to that house. The appellant got into a motor vehicle, reversed it into a light pole (reversing it away from where the deceased was) and then drove the vehicle forward partly on the footpath until it ultimately struck the deceased. The deceased died at the scene from injuries sustained.

[3] The appellant was charged with murder, and on arraignment pleaded not guilty. After a trial he was convicted by the jury of manslaughter. The acquittal on the murder charge could have been based either on the fact the jury was not satisfied beyond reasonable doubt that he had the requisite intention for the crime of murder or on the basis of provocation (s 304 of the Criminal Code).

[4] A key prosecution witness was the appellant's brother, Kym Folland. He was the only witness who saw both the initial altercation and most of the events leading to the vehicle striking the deceased. On application made by the prosecution he was declared a hostile witness and was briefly, but relevantly, cross-examined before the jury.

[5] The appellant appeals against his conviction on the grounds that the learned trial judge erred in law in declaring Kym Folland to be a hostile witness and that the verdict was unsafe and unsatisfactory.

[6] The appellant was sentenced to nine years imprisonment with a declaration pursuant to s 161A and s 161B of the *Penalties and Sentences Act* 1992 that he was convicted of a serious violent offence. He seeks leave to appeal against that sentence on the grounds that it was manifestly excessive, that the learned sentencing judge erred in making the declaration, and that the learned sentencing judge erred in holding that the verdict of manslaughter was based upon the defence of provocation rather than criminal negligence.

[7] In ruling on the initial application to have Kym Folland cross-examined on the voir dire to establish hostility the learned trial judge said: "The matters relied upon by the Crown prima facie do suggest that the witness is not attempting to tell the truth." He then referred to some specific instances, to which I will refer subsequently, and then went on to say:

> "In so interpreting them, I take into account my own impression of the witness. I have seldom seen such an unimpressive witness. He has throughout his evidence delivered his testimony in a manner indicative of rote learning, which of course is not against him, but indicative of learning a story which is tailored to fit the facts. The discrepancies with his earlier statement are marked and are not the only ones, though of course they are the major ones, which I have noticed as the evidence was given. …
>
> … I will, therefore, permit the Crown Prosecutor to cross-examine the witness on the voir dire for the purpose which has been indicated and unless there is some persuasive argument put to the contrary, I see no reason to restrict the topics on which he can cross-examine."

[8] Thereafter Kym Folland was cross-examined on the voir dire and it was put to him that evidence given at trial capable of being exculpatory of his brother was not contained in his original statements to police. He agreed with that proposition and gave a lengthy explanation for the omission. Essentially he claimed that at the time the initial statement was made he was in a state of shock, was in severe pain and discomfort from a back condition, and was under the influence of strong medication.

[9] After hearing that evidence on the voir dire the learned trial judge gave reasons for declaring Kym Folland to be hostile and allowing him to be cross-examined before the jury. Inter alia he then said:

> "... the Crown Prosecutor does not wish to cross-examine the witness generally nor to tender the earlier statement but rather to prove that the assertions made in evidence were not contained in the earlier statement, the inconsistency therefore being one of omission. Both applications are based on the assertion by the Crown that the witness has demonstrated a willingness to lie on oath.
>
> The application is opposed on the ground first that it is not permissible for the Crown in relation to an application such as this to rely on evidence which was in its possession before the trial.... Second, that what the witness has said did not amount to lies being either correct or arguably so or if erroneous, then attributable to stress occasioned by the circumstances and possibly by the consumption of alcohol. Third, the defence relies on a submission

that I should exercise my discretion to refuse the application in any event.

... He has admitted unequivocally not only that the earlier statement does not contain the matters about which the Prosecutor wishes to examine him but that he may not have mentioned them to the police officer who took the statement... .

…

In the present case I am satisfied that Kym Folland is a witness who has shown a desire not to tell the truth and who cannot effectively be examined without cross-examination being permitted. His demeanour has left me with a firm belief that he has lied not only before the jury but also in the course of his evidence on the voir dire. He was in his evidence unresponsive to questions. He added material favourable to the accused and when that material was not called for and avoided the thrust of questions which he did not wish to answer. These matters occurred over and over again. On occasions he behaved in the witness box like an amateur dramatist. ... He exaggerated on numerous occasions, particularly when comparison is made between the statement and the evidence which was given.

I am also satisfied that he told lies on oath. Examples include his evidence in answer to questions about his attempt at concealment of his identity to the emergency services operator on the telephone. ...

Another example is to be found in his answer to questions about his movements after the car struck the deceased. He claimed that he did not go across to the scene but remained on the side of road outside his house or went back into his house. That is inconsistent with his knowledge of the critical injury sustained by the deceased, knowledge which is clearly demonstrated in the telephone call. ...

Another example is his evidence that he was unable, after the streetlight went out, to see the car yet he also gave evidence that he saw his brother get out of the car. ...

… I do not think that the suggested explanation that his original statement was made at a time when he was under stress is sufficient to explain his failure to raise these important issues and, indeed, I found his explanation for why he did not tell the police or the Crown Prosecutor of them before he was called even though he realised the existence of the discrepancies at least within the week prior to his being called quite unsatisfactory. …

...

For these reasons, the application is allowed. The witness is declared to be a hostile witness and on the basis of my finding that he has

> proved adverse, the Crown Prosecutor has leave to prove that the witness has made at another time a statement inconsistent with his testimony in respect of the two areas which I enunciated at the beginning of these reasons."

[10] Senior counsel for the appellant attacked the observations of the learned trial judge on the demeanour of Kym Folland. It was submitted that Kym Folland had a "rather idiosyncratic manner" of speaking and that the learned trial judge had not given weight to that consideration in reaching an unfavourable impression as to the demeanour of the witness. Against that background senior counsel for the appellant asked the court to listen to the tape of Kym Folland's emergency telephone call after the incident. The court did so, and it could be said that the tape did indicate that the witness had a rather stilted, perhaps idiosyncratic, way of speaking. I have borne that in mind in reviewing the basis on which the declaration in question was made.

[11] A reading of the evidence of Kym Folland prior to the application being made strongly suggests that at every opportunity he inserted into an answer to a question from the prosecutor something of benefit to his brother, the then accused. The following are a random sample of statements falling within that category. "It was just basically an unprovoked attack out of the blue." "My brother just left because I could see that if he didn't leave, things were going escalate because James was really provoking to – to fight and to – and to be violent." "I then feared for my brother's safety because obviously you don't rip all your shirt and jackets off unless you're wanting to be violent. It's a violent gesture." "James ... was a very formidable sight when he was angry." "... my brother fell back on his back and landed with his head in the garden bed area right next to the rocks there and he laid there motionless. I didn't know whether he was alive or whether he was unconscious or what and I was pleading with James. I came up next to James and said, 'Please stop. Please stop. Stop. You're going to kill him. Please stop.'" "I didn't know whether he had killed him or whether he was unconscious. I was very worried for him – for my brother's life because he had taken blows to the head and it was sickening." "I heard my brother scream out very loud and it was a terrible, horrible scream and he was screaming in agony ..." "... it was obvious to me that he wanted to get to my brother again." "It was going reasonably fast and it appeared to me that my brother had lost control of a straight line and it veered slightly and only just caught the street pole." "... I thought that if the vehicle can get far enough down the road, then James might stop pursuing it – might not pursue it." "No, the car headlights were not on when the vehicle proceeded forward from that pole ..." "No, I could not follow the path of where the vehicle was going and I did not know anything of its movements until I heard a loud noise." "I was very concerned for my brother and I didn't know – I thought perhaps that he wasn't in a – in a fit state to even coordinate his movements from all the heavy blows to the head and I thought perhaps he had lost all sense of direction ..."

[12] Some of those statements could probably have been true, but the way in which they came out in unresponsive answers to a precise question would have raised in the mind of any objective observer the issue whether the witness was telling the truth or endeavouring to paint a picture most favourable to his brother.

[13] The appellant was examined at the Caboolture Hospital after the events in question but was released the same night. X-rays taken at the hospital suggested he had three

broken ribs on the left side. Photographs taken that night showed bruising to the right eye but otherwise there was no indication of any head injury.

[14] The critical inconsistencies by way of omission referred to by the learned trial judge were the following. In evidence-in-chief before the application was made Kym Folland gave evidence that after the appellant drove some 30 to 40 metres down the road he brought the vehicle to a halt whereupon the deceased "yelled out rather loudly" the following: "Oh, he wants some more, does he?" According to the witness the deceased then "ran down on to the road and came up from behind the vehicle towards the driver's door of the vehicle" and yelled out: "You want some more, do you, cunt" and then further yelled out: "I'm going to fucking kill you."

[15] None of that evidence appeared in the initial statement of Kym Folland given to the police shortly after the incidents in question. On the voir dire Kym Folland admitted he had not made those statements to the police and gave the explanation for not doing so which has been recorded previously. Then, after he was declared hostile, before the jury under cross-examination by the prosecutor Kym Folland conceded he did not say those words to the police officer who took his statement.

[16] It is in those circumstances that this court is asked to conclude that the learned trial judge erred in permitting that cross-examination on the basis that Kym Folland was a hostile witness.

[17] Section 17 of the *Evidence Act* 1977 provides that, with the leave of the court, a party producing a witness may prove that the witness has made at other times a statement inconsistent with the present testimony of the witness. In *R v Andrews* [1987] 1 Qd R 21 the Court of Criminal Appeal said at 30: "It is a matter peculiarly for the discretion of the trial judge whether or not in any particular case leave should be given to treat a witness as hostile or adverse." In so saying the Court referred to *McLellan v Bowyer* (1961) 106 CLR 95. That was a civil case but the principle involved is the same. Indeed there are a number of similarities between the facts in *McLellan* and the present case. In an action for damages the defendant called as a witness the plaintiff's son who had been present at the scene of the accident. Shortly after the accident that witness had signed a statement which had been taken down by a police officer and was damaging to the plaintiff's case. At the trial that witness, though his demeanour was not hostile, gave an account of the accident inconsistent with that statement and counsel for the defendant was given leave to treat him as a hostile witness. All members of the High Court concluded that the trial judge was correct in granting leave to treat the witness as hostile. At 103 Dixon CJ, Kitto and Taylor JJ observed that there were substantial grounds for concluding that the witness had resolved that he would, if possible, say nothing that would damage his father's case. Their Honours went on to say:

> "But it has been settled for many years that although hostility, or adverseness, may appear from the demeanour of the witness, this is not the only factor to which a court may have regard. In particular, it may have regard to previous inconsistent statements made to a party ... or to a party's attorney ... or upon oath in a court of bankruptcy ... or to an officer of police. ... But although it must be conceded that not every witness who testifies inconsistently with an earlier statement can properly be regarded as hostile, or adverse, it is clear that the existence of an earlier inconsistent statement, in whatever circumstances it may have been made, will always be a material

> matter and, when taken into consideration with other features of the case, may furnish grounds for concluding that the witness is hostile."

[18] Here the demeanour of Kym Folland satisfied the learned trial judge that the witness was demonstrating hostility to the prosecution case. Further the learned trial judge was persuaded that the witness was hostile or adverse because he introduced into his evidence statements favourable to the accused which were inconsistent with his earlier statement to investigating police. Those conclusions were clearly open. In those circumstances it cannot be said that the learned trial judge erred in the exercise of his discretion in permitting the jury to know that the critical statements in question had not previously been included in the witness's statement given to police shortly after the incident.

[19] All of that is particularly pertinent given that ultimately the appellant did not give evidence. An objective observer could be forgiven for concluding that the witness knew that when giving evidence and was attempting to get before the jury whenever he could material favourable to his brother regardless of its truth.

[20] The jury was clearly entitled to know that the highly relevant statements attributed by the witness to the deceased were not included in the initial statement made by the witness to police shortly after the incident. A reasonable jury was entitled to conclude that the witness could not have forgotten those statements (even given the witness's explanation for the omission) given the other detail contained in that initial statement.

[21] It is sufficient to conclude by saying that, consistently with the approach taken by the courts in *R v Andrews* and *McLellan v Bowyer*, no error in the exercise of discretion by the learned trial judge has been demonstrated. It follows that inadmissible material was not placed before the jury and there was no miscarriage of justice.

[22] I turn now to consider the submission that the verdict was unsafe and unsatisfactory because the finding of the jury was not supported by the evidence.

[23] The altercation between the appellant and the deceased was reasonably serious and, as already noted, the appellant sustained three broken ribs and some bruising in the region of his right eye. It appears that the deceased was the aggressor and was physically stronger than the appellant. Understandably the appellant felt aggrieved by the injuries he had sustained particularly as the cause of the incident had nothing to do with him. It appears the deceased became agitated after a telephone discussion with his partner and that then led to the outbreak of the violence. The brothers Folland and the deceased had been drinking (the deceased had a blood alcohol level of .156%) and intoxication was obviously a relevant background factor.

[24] At the time of the altercation the appellant's motor vehicle was parked in the driveway of Kym Folland's home; there was a conflict of evidence as to which way it was facing when parked. There was ample evidence which the jury could accept that the deceased left his shirt on the ground in the yard of Kym Folland's house, and walked across the road travelling a broad northerly direction. As already indicated he ultimately reached a point where he was either on or very adjacent to the footpath. After the altercation came to an end the appellant entered his motor vehicle and drove it from the yard onto the street. He reversed in a general easterly

direction and the rear driver's side corner of his motor vehicle collided with a street light pole on the opposite side of the road to his brother's house. The rear tail light assembly on that side of the vehicle was shattered. The evidence indicated that the impact put out the street light for a brief time. The appellant then drove off in a forward direction travelling partly onto the footpath on the north-eastern side of the roadway (demonstrated by a tyre scuff mark in the grass on the footpath) and it travelled along that path until the front driver's side mudguard struck a tree and then the vehicle ran completely over the deceased. The impact with the tree shattered the driver's side headlight assembly. Marks on the deceased's body indicated that a tyre of the vehicle had run over him. The distance between the light pole and where the deceased was struck was at least 20 metres. There was evidence that the jury could accept that the vehicle's headlights were on as it drove away from the pole it had reversed into.

[25] Not surprisingly there was some conflict in the evidence given by witnesses who had seen some, but not all, of the car's movements as it was being driven by the appellant. None of those inconsistencies was of such a nature as to necessarily require the jury to have a reasonable doubt as to the general accuracy of the evidence. Given all of the evidence, and particularly in the absence of any evidence from the appellant, the jury was clearly entitled to conclude that the appellant intentionally drove his vehicle at and struck the deceased.

[26] There was no complaint on the hearing of the appeal about the summing up. The learned trial judge fully and fairly put all the evidence before the jury and gave appropriate directions on issues of law. Provocation was one of the matters left for the jury's consideration, and the jury was clearly entitled to conclude that the assaults by the deceased on the appellant in the course of the altercation constituted provocation for the appellant's subsequent conduct in driving his motor vehicle at the deceased. Hence the verdict of manslaughter.

[27] Having regard to all of the evidence I am satisfied that there was no miscarriage of justice, that the verdict of manslaughter was clearly open on the evidence, and it cannot be regarded as unsafe and unsatisfactory.

[28] The appeal against conviction should therefore be dismissed.

[29] I now turn to consider the application for leave to appeal against sentence.

[30] The learned trial judge recognised that the verdict of manslaughter may have been both reached either by reason of provocation or by reason of negligence. He then went on to say:

> "In my view, the facts, as proved during the trial, quite clearly demonstrate that this is a case falling within the former category. I am satisfied that the submission on behalf of the Crown that your conduct reflected angry retribution, is quite correct. It is not a case where what you did occurred simply by way of gross negligence."

[31] A little later on the learned trial judge observed that the appellant had been assaulted by the deceased and was "responding, ultimately, to that assault."

[32] That evaluation of the jury's verdict was open to the learned trial judge. Particularly in the absence of any evidence from the appellant explaining his conduct the

inference was clearly open that his conduct was angry retribution responding to the assault on him.

[33] It followed, as said by the learned sentencing judge, that the appellant's conduct "demonstrated a high level of violence". The learned sentencing judge was also justified in stating in his remarks that the appellant "demonstrated no remorse for what you have done". Though the appellant had no relevant criminal history a significant custodial sentence was called for.

[34] Once it is accepted that the appellant had to be sentenced on that basis imprisonment for nine years was not manifestly excessive.

[35] Also, once it is accepted that that was the basis on which the appellant was to be sentenced it cannot be said that the learned sentencing judge erred in the exercise of his discretion in making a declaration pursuant to s 161A and s 161B of the *Penalties and Sentences Act* 1992.

[36] It follows that the application for leave to appeal against sentence should refused.

[37] The orders of the court should therefore be:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

[38] **PHILIPPIDES J:** I agree for the reasons set out in the judgment of Williams JA that the appeal against conviction should be dismissed and that the application for leave to appeal against sentence should be refused.