# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Lee* [2004] QCA 284 |
| PARTIES: | **R**<br>**v**<br>**LEE, Patrick Arthur**<br>(appellant) |
| FILE NO/S: | CA No 113 of 2004<br>DC No 42 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Maroochydore |
| DELIVERED ON: | 6 August 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 July 2004 |
| JUDGES: | McMurdo P, Jerrard JA and Mackenzie J<br>Separate reasons for judgment of each member of the Court, McMurdo P and Jerrard JA concurring as to the orders made, Mackenzie J dissenting |
| ORDERS: | **1. Allow the appeal**<br>**2. Set aside the verdict of guilty**<br>**3. New trial ordered**<br>**4. Set aside the order of the trial judge of 26 March 2004 activating the suspended sentence imposed on 28 October 2002**<br>**5. On the offence of assault occasioning bodily harm, grant the appellant bail on his own undertaking** |
| CATCHWORDS: | CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – CHARACTER AND PREVIOUS CONVICTIONS – OTHER MATTERS – where appellant convicted of assault occasioning bodily harm – where issue was whether Crown could disprove provocation – where witness gave evidence that appellant fled the scene when he became aware police had been called, saying that he already had 'something round his head' – where evidence fell spontaneously from the witness – where verdict of guilty open on the evidence – whether prejudicial evidence may have caused a miscarriage of justice |

*Lergesner v Carroll* [1991] 1 Qd R 206, cited
*R v Raabe* [1985] 1 Qd R 115, cited

COUNSEL: B G Devereaux for the appellant
B G Campbell for the respondent

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

[1] **McMURDO P:** Patrick Arthur Lee was convicted on 25 March 2004 of assaulting Noel John Cahill and doing him bodily harm at Kawana Waters on 22 March 2003. He now appeals against that conviction on three grounds.

[2] The first is that the learned trial judge erred when he rejected an application by the appellant's counsel to discharge the jury after Mr Cahill gave prejudicial evidence suggesting that Mr Lee had been in trouble with police. He next contends that the learned primary judge erred in allowing police officer Betts to give evidence of a statement made to him out of court by Mr Lee because the statement was self-serving and the whole conversation was not put into evidence. He has been given leave to argue a third ground of appeal, that the learned primary judge's directions to the jury as to the proportionality of Mr Lee's reaction to the provocation were inadequate.

**The evidence**

[3] The relevant evidence in the case is as follows. Mr Cahill was driving to work in his 4WD Nissan Patrol on the Nicklin Way at about 6.15am on 22 March 2003. He was 55 years old, a little over six feet tall and weighed at least 105 kilograms. The road was two lanes each way with a 20 foot wide bitumen stopping lane beside the south bound lane in which Mr Cahill was travelling. Mr Cahill saw Mr Lee ride his bicycle erratically over the kerb onto the stopping lane about 500 metres ahead and assumed the bike rider was a child who needed to be watched carefully. As Mr Cahill approached, the bike rider continued to travel towards Mr Cahill's lane. A car behind Mr Cahill and another to his right made it difficult for him to travel around the bike rider so that Mr Cahill continued to slow his vehicle. By the time he reached the bike rider, the bike rider was stopped one metre inside Mr Cahill's lane and the bike had fallen over between his legs.

[4] Mr Cahill stopped, put down his electric window and said in anger, "Well, you bloody idiot, I could of fucking run over you and killed you. … Either learn how to ride or put it back in the shed." Mr Lee replied, "Oh, you've got a problem, have you?" in a drawl which Mr Cahill assumed was because he was affected by an intoxicating substance or that he was "a bit mental". Mr Cahill again repeated, "I could have fucking ran over you and killed you … bla, bla, … just piss off." Mr Lee again asked whether Mr Cahill had a problem. Mr Cahill drove past him, stopped the car and got out. The protagonists continued abusing each other in similar terms. Mr Lee put the handle bars of his bike against Mr Cahill's car door whilst he straddled the bike. Mr Cahill said, "just piss off out of me life … get away from me car, you're going to scratch it, I just want to go to work." Mr Lee did not respond and Mr Cahill went around the car to the bike and repeated his request. When Mr Lee did not comply, Mr Cahill grabbed the back wheel of the bike, put his hand on Mr Lee's shoulder, grabbed his shirt and dragged him and his bike some

five or six feet away, saying, "Just fuck off out of me life." Mr Lee said, "You shouldn't have done that … I'm a boxer, I'm a fighter." Mr Lee then started throwing punches at him right, left and centre, effectively backing him up against the car. Mr Cahill said, "Look, all I want to do is go to work, just fuck off out of me life, for Christ's sake," but Mr Lee continued to throw punches. Mr Cahill pushed him away a couple of times saying, "Just nick off, leave me alone" but each time Mr Lee responded by coming at him with more punches.

[5] Mr Cahill "bopped a few" and finally pushed Mr Lee hard, again saying, "Just fuck off and leave me alone. I'm going to work." As he turned towards his car, he felt an unanticipated powerful punch to the left side of his jaw which knocked him to the kerb on which he hit his head. He received an assortment of injuries including a ripped nail, gravel rash, a cut to his head, broken teeth, a split lip and an aggravation of an old neck injury. Most of these injuries resulted from his head hitting the kerb. Another man assisted him to a sitting position and placed a towel on his head to stop the bleeding. Mr Lee came over and squatted down, saying "I'm a fucking fighter, you shouldn't have picked me, I'm a boxer, I'm a fighter." Mr Cahill said, "I don't give a fuck … I don't care who you are, just fuck off out of me life … just piss off." Somebody indicated that they would call an ambulance and the police.

[6] Mr Cahill then gave the following evidence, which is the subject of the first ground of appeal:

> "So, the last thing I heard was, 'Oh, shit, I'm not hanging around', you know, 'I've already got something round me head, so, I'm gone.' So, the last I see of him was riding a pushbike up - disappeared."

[7] Mr Cahill was taken to Caloundra Hospital and then Nambour Hospital where he was treated and held for observation for a couple of days. He received eight stitches to his head. He did not work for about a fortnight and was on pain killers for a period. He had difficulty eating because of his broken tooth and had trouble sleeping. He developed a nervous rash for a few months. Photographs of his injuries taken after his discharge from hospital were tendered. These depicted minor injuries to his face, hands, knee and thumb and the more significant gash to his head caused in the fall to the kerb. The photographs did not show a broken tooth.

[8] In cross-examination Mr Cahill agreed that as soon as he approached Mr Lee he noticed he had "bark off his nose", a graze with some blood on it.

[9] Mr Gavin McArthur gave evidence that when he was driving on the Nicklin Way that morning he noticed something happening on the side of the road about 300 metres ahead. Two men were arguing and gesticulating in a "sort of road rage incident". He saw the older male (Mr Cahill) turn slightly after indicating that he was not arguing any more and then the other man hit him to the left side of the jaw. The older man went down and hit his head on the kerb. Mr McArthur was concerned enough to stop his vehicle and went over to the scene with his mobile phone. Mr Cahill asked for assistance. Mr Lee was in front of him bouncing around like a boxer saying, "Come on, get up, come on." Mr McArthur said, "Oh, he's had enough, he's had enough." Mr Lee told him to stay out of it, but Mr McArthur pointed out that Mr Cahill needed help. Mr Lee said, "Fuck off, and stay out of it or I'll … come over there and give you a touch up." Mr McArthur returned to his car to get some wood to protect himself. He thought Mr Lee might have

been drunk or on drugs but his manner may have been because he was "all pumped up and excited". Another man came on the scene and assisted Mr Cahill while Mr McArthur called an ambulance. Mr Lee left the scene and a woman who was nearby then came over. Mr Cahill was taken away in an ambulance. Shortly afterwards he saw Mr Lee getting into a police vehicle.

[10] Mrs Lisa Alexander, who was walking her dog, also saw the incident. Mr Cahill tried to move the bike away from the driver's side of his car and Mr Lee was attempting to grab his bike back. She heard raised voices and saw the protagonists fighting. Mr Cahill was swinging punches to defend himself. Mr Lee swung one big punch, knocking Mr Cahill to the ground. Mr Cahill was trying to sit up and Mr Lee looked as if he might punch him again. Another car pulled up and a third man arrived. Mr Lee was jumping up and down in a boxing stance. She saw the third man use his mobile phone. Eventually Mr Lee rode off on his bike. She had by this time taken her dog home so that she could assist. Mr Cahill was dazed, bleeding profusely from a large cut to his head and had a lot of blood on him. She removed his broken watch. Shortly afterwards police and ambulance arrived.

[11] Police officer Betts attended the scene at 6.35 am where he saw the injured Mr Cahill. He set off in his police vehicle looking for someone on a green mountain bike and shortly afterwards intercepted Mr Lee. Mr Lee had a lump on the bridge of his nose which was bleeding slightly. His speech was slurred and he was incoherent as to place and the time of day. The following exchange then occurred:

> "[Prosecutor]: Now, you needn't answer this question … if my friend wishes to object. Did he give you an explanation of the cause of the injury to his nose? Just a moment.
> [Defence counsel]: No. I will object to that. Thank you."

[12] The jury then left the court room whilst the matter was argued. The prosecutor said that he proposed leading evidence of a portion of a tape-recorded conversation between police officer Betts and Mr Lee after Mr Lee had been comprehensively warned, in which he said that he had received a broken nose whilst sparring with his nephew, a 22 year old man, earlier that day. Although the prosecutor had originally decided not to lead evidence of the full conversation because it was self-serving and irrelevant, he now wished to lead this portion of it. Defence counsel objected, contending that if any of that conversation was to be led, then evidence of the whole conversation should be given. His Honour observed that Mr Cahill had said that prior to the fight Mr Lee had some "bark off his nose" and that the jury were entitled to hear the portion of the conversation containing Mr Lee's explanation to the police officer of how he received these injuries because it supported Mr Cahill's credibility.

[13] This was the first time the jury had left the court room since Mr Cahill's evidence the subject of the first ground of appeal. Defence counsel took this opportunity to object to that inadmissible evidence, not wishing to unnecessarily highlight the inadmissible evidence to the jury by an earlier application, and requested that the jury be discharged because of the prejudicial effect of the evidence. The prosecutor stated that he had not led this evidence but that it "fell spontaneously from the witness". His Honour refused to discharge the jury and asked defence counsel whether he requested any direction as to how the jury should treat that matter. At no stage did defence counsel seek any such direction, again, it may be inferred, because he did not wish to highlight the inadmissible and prejudicial evidence.

[14] Police officer Betts then continued his evidence:

> "During the course of your conversation with him, did you ask how he had come by that abrasion to the nose? – That's correct, yes.
>
> What did he tell you? – He said that he'd got the injury from sparring with his nephew that morning.
>
> Did he say how old the nephew was? – He didn't. I can't recall if he did or he didn't, but I don't think he did, no."

[15] Dr Andrew Doneman treated Mr Cahill at the Nambour General Hospital. The injuries included a sutured laceration on his forehead about 5cm in length and a surrounding haematoma, some upper cervical spine tenderness and grazes on his hands consistent with a fall onto rough cement; he also complained of an altered sensation or numbness to his shoulders. These injuries were consistent with a fall onto a kerb.

[16] Mr Lee did not give or call evidence.

**Mr Cahill's inadmissible evidence**

[17] At the commencement of the trial in his preliminary instructions to the jury before evidence was given, the learned primary judge said:

> "Your determination or your findings of facts will be based only on what you hear or see during the trial in this courtroom … ."

[18] Mr Cahill, to the surprise of the prosecutor, gave inadmissible evidence that, after Mr Lee became aware that the police were to be called, he said he was "not hanging around" and that he already had "something round me head, so, I'm gone", before he disappeared on his bike. This evidence must have been very damaging to the defence case; it made plain that Mr Lee had reason to avoid the police because he was already in trouble for something else. Defence counsel could not contest this evidence, even had he instructions to do so, without highlighting it. It was therefore uncontested. Even though this piece of evidence was not adverted to in counsel's addresses or the judge's summing-up, the jury were never instructed to disregard it. Because of their earlier instruction, the jury must have understood they could act on the inadmissible evidence. The judge and counsel appear to have assumed that any such direction would be detrimental and would only emphasise the evidence.

[19] The primary issues for the jury's determination in this trial were whether the prosecution established beyond reasonable doubt, first that Mr Cahill did not provoke Mr Lee into assaulting him and, if not established, whether Mr Lee, in punching Mr Cahill and knocking him to the ground, used disproportionate force in response to Mr Cahill's provocation. His Honour effectively completed his summing-up at 3.46 pm on the afternoon of 24 March 2004. The jury indicated that they would prefer to commence deliberations the next morning. His Honour briefly concluded his summing-up and the jury retired to consider their verdict at 9.36 am. Neither counsel applied for redirections but at 10.20 am the court reconvened to deal with enquiries from the jury as to the law of provocation and to have a portion of Mrs Alexander's evidence read to them. The jury retired again at 10.30 am. When the court reconvened at 2.32 pm, his Honour referred to a note from them stating that they were "irreconcilably hung". On enquiry, the jury indicated that,

despite the note, they could use more time. At 2.55 pm they returned with the guilty verdict.

[20] This chronology suggests that the jury's path to convicting the appellant was not straight forward. Although the verdict of guilty was plainly open on the evidence, a verdict of not guilty was also open. I am not persuaded that this very prejudicial and inadmissible evidence did not unfairly tip the scales in favour of the prosecution. The jury may well have thought that someone who not only danced around like a boxer and had earlier that day been sparring with his nephew but who also was not prepared to wait for the police because of something round his head would react disproportionately to the provocation. The inadmissible evidence may well have deprived Mr Lee of the chance of an acquittal. The verdict of guilty should be set aside and a new trial ordered. No doubt this will be inconvenient and unpleasant for Mr Cahill and the other prosecution witnesses but Mr Lee is entitled to a fair trial determined on admissible evidence.

**The remaining grounds of appeal**

[21] The second ground of appeal concerns the evidence from police officer Betts as to Mr Lee's explanation for the injury to his nose. Mr Lee's own counsel elicited in cross-examination from Mr Cahill that Mr Lee had a graze on his nose before their fight. Police officer Betts' report of Mr Lee's explanation to him about how he received this graze was relevant and admissible to explain to the jury that these injuries were not caused in the altercation with Mr Cahill. This ground of appeal is without substance.

[22] Mr Lee's final contention is that because the case was finely balanced and because Mr Cahill's injuries were the indirect result of force, the jury should have been directed not to place undue weight on the extent of the injuries suffered by the complainant when assessing the proportionality of the appellant's force in response to provocation: *R v Raabe*[1] and *Lergesner v Carroll.*[2]

[23] No such redirection was sought, no doubt because it was clear from the evidence, including the photographs of the injuries, that they largely occurred in the fall to the kerb. It was never the prosecution case that these injuries resulted directly from the force of the blow. The prosecution did not contend that the extent of Mr Cahill's injuries demonstrated a lack of proportionality but rather that Mr Lee reacted disproportionately in powerfully punching Mr Cahill as he was walking away from the altercation.

[24] The learned primary judge in explaining the law of provocation emphasised that the issue was whether the force used was disproportionate to the provocation. His Honour stated on many occasions that it was for the prosecution to prove beyond reasonable doubt that either Mr Lee was not provoked or that the force used by Mr Lee was disproportionate to the provocation given by Mr Cahill. These statements were repeated in the redirections. His Honour's directions as to provocation and proportionality were adequate and appropriate. This ground of appeal is also without substance.

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1 [1985] 1 QdR 115, Thomas J (as he then was) at 122-123; Derrington J at 124-125.

2 [1991] 1 QdR 206 at 219.

[25] Nevertheless, for the reasons given on the first ground of appeal, the appeal should be allowed, the verdict of guilty set aside and a new trial ordered. The appellant was on bail on his own undertaking without conditions or surety.

ORDERS:

1. Allow the appeal.

2. Set aside the verdict of guilty.

3. New trial ordered.

4. Set aside the order of the trial judge of 26 March 2004 activating the suspended sentence imposed on 28 October 2002.

5. On the offence of assault occasioning bodily harm, grant the appellant bail on his own undertaking.

[26] **JERRARD JA:** In this appeal I have had the benefit of reading the reasons for judgment of the President and of Mackenzie J, and the careful explanation each of those learned judges has given for the conclusion to which that judge came. Although I respectfully observe that there is a great deal of merit in what Mackenzie J has written, I agree with the orders the President proposes.

[27] This is because the evidence carefully described by the learned President reveals that the admissible evidence the jury heard would have allowed them to conclude that the appellant:

- was possibly stupefied or intoxicated, and certainly adversely affected by either drugs or alcohol;
- had spoken repeatedly of his being "a boxer, a fighter";
- but had thrown quite a number of apparently ineffectual punches;
- and only one effective blow.

[28] I agree with the President that on that admissible evidence, and the other evidence described in the President's judgment, a verdict of not guilty was clearly open, where the only real issue was whether the appellant had used disproportionate force in retaliation to the complainant's provocation. I also agree that the appellant's chances of an acquittal were reduced by the jury learning that he had declared at the scene that he would be disadvantaged by police investigation of the matter, inferentially because of something else in his life likely to be known to attending police or else activated by his contact with them.

[29] **MACKENZIE J:** The facts are set out comprehensively in the reasons for judgment of the President. I agree with her that the grounds of appeal concerning the evidence about the injury to the appellant's nose and the adequacy of the direction with regard to provocation fail for the reasons given by her. However, I am not persuaded that the appellant is entitled to succeed on the ground that evidence was given by the complainant that may have been excluded in the exercise of the judicial discretion to do so.

[30] It is apparent from what the Crown Prosecutor said that he was not expecting the evidence to be given. The complainant had given detailed evidence, set out in the President's reasons, about the incident. The evidence of which complaint was made were the appellant's parting words, which arose in the following context:

> "And someone said they're going to call the ambulance and call the police. So, the last thing I heard was, 'Oh, shit, I'm not hanging around', you know, 'I've already got something round me head, so, I'm gone.' So, the last I see of him was riding a pushbike up – disappeared."

[31] With the benefit of knowledge of the appellant's criminal history, it is easy to conclude that the appellant was referring to the fact that he was subject to a suspended sentence for a previous offence and was concerned that it may be activated as a result of the incident. However, without that knowledge, it is, in my view, at least uncertain that jurors would have understood the remark as necessarily referring to previous bad character. But even if there was a risk that they might have done so, I am unconvinced that, in the circumstances of the case, a perception that the appellant may have been in some kind of unspecified trouble before would have affected the outcome.

[32] This was a case where the facts were essentially uncontroversial. The complainant's evidence, supported by that of an eyewitness, was that he had begun to turn away after indicating that he was quitting the confrontation when he was hit with a punch to the left side of the jaw and fell to the roadway. There was therefore no issue of credibility to be determined. The only issue was whether the appellant's response to what probably would have been taken to be provocation by the complainant was out of proportion to the provocation.

[33] There was uncontradicted evidence that the appellant, before and after knocking the complainant to the ground, referred to being a boxer, and adopted the stance and mannerisms of one. Any nuances in the evidence complained of that the appellant was inclined to engage in physical combat would not have added to the state of the jury's knowledge about him. If they factored the appellant's professed interest in the "sweet science"[3] into their decision as to proportionality of response to the provocation, it is difficult to imagine the evidence objected to was critical to it. The case was essentially one where a person who defined himself as a boxer punched a person who was neither expecting nor prepared to receive a blow, with a degree of force that knocked him to the ground.

[34] Other factors that may have exacerbated the effect of the evidence were also absent. No emphasis was given to it by an immediate objection. It was not until a break in proceedings a considerable time later that objection was taken to it in the absence of the jury. Nor was it subsequently referred to before the jury, in accordance with what is generally perceived, in my experience, to be a sensible approach in a case where an issue of this kind arises but the jury is not discharged. In the circumstances, the risk that the appellant was deprived of the chance of acquittal because the jury heard the evidence complained of was insignificant.

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[3] Pierce Egan, *Boxiana 1818-1824*

[35] For these reasons, I am not persuaded that the trial miscarried. I would dismiss the appeal against conviction.