SUPREME COURT OF QUEENSLAND

CITATION:	*R v Evans* [2004] QCA 458
PARTIES:	**R** **v** **EVANS, Phirajit** (appellant/applicant)
FILE NO/S:	CA No 216 of 2004 SC No 462 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2004
JUDGES:	McPherson and Davies JJA and Fryberg J 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 dismissed**
CATCHWORDS:	CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Particular grounds – Unreasonable or insupportable verdict – Other cases – Whether a reasonable jury could have rejected as a rational inference the possibility that the appellant did not intend to kill her husband CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Objections and points not raised in court below – Misdirection and non-direction – Particular cases – Whether trial judge should have directed evidence of hostility had limited relevance to the issue of intent – Whether trial judge should have warned against too readily making an assumption of murderous intent – Whether it was reasonably possible that a failure to direct the jury affected the verdict CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Appeal against sentence – Appeal by convicted persons – Applications to reduce sentence – When refused – Particular offences - Offences against the person – Generally – Attempted murder – Previous convictions for breaching domestic violence orders

BRS v The Queen (1997) 191 CLR 275, referred to
KRM v The Queen (1997) (2001) 206 CLR 221, cited
R v Chevathen and Dorrick [2001] QCA 337; CA No 301 of 2000 and CA No 31 of 2001, 24 August 2001, discussed
R v Glattback [2004] QCA 356; CA No 53 of 2004, 1 October 2004, followed

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

SOLICITORS: Callaghan Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** For the reasons given by Fryberg J, which I have had the advantage of reading, the appeal against conviction should be dismissed. The application for leave to appeal against sentence should also be dismissed.

[2] **DAVIES JA:** I agree with the reasons for judgment of Fryberg J and with the orders he proposes.

[3] **FRYBERG J:** On 3 April this year, Phirajit Evans was convicted on two counts of attempting to murder her husband Christopher Evans, but was acquitted of two counts of attempting to murder his baby son, Chad Dillon-Ham. The facts were largely uncontroversial. Toward the end of 1996, Ms Evans, then aged 34 and the mother of a teenage daughter, met Mr Evans in a bar on Samui Island, a holiday destination in Thailand. After they had spent two or three months together, Mr Evans invited her to join him in Australia. She came with him to Australia in January 1997 and they married less than six weeks later. They lived together for about three years, separating in early 2000 when Ms Evans moved out of their home. During that time, Ms Evans' daughter came to Australia and she herself worked at a childcare centre.

[4] After they separated there were, according to Mr Evans (whose evidence was largely unchallenged), a number of confrontations between them. He testified that Ms Evans "cleaned the whole house, left me nothing". Some weeks after the separation he sold their car for less than was owing to the bank on it. Shortly after that she broke into his house, rang him at work and demanded the car. On being told he had sold it, she threatened to burn the house down. He immediately returned home, accompanied by his brother, to find her smashing the windows of the house with a mattock. His brother gave evidence that on that occasion Ms Evans swung the mattock at him. He grabbed it, with one of them (whether him or her is unclear) saying, "I'll kill you, I'll kill you." She then went to the front of the house and started smashing her head against a rock on the garden bed. On another occasion, she drove "her boyfriend's car" to Mr Evans' house. At the time, he was discussing the sale of a trailer with another person in his front yard. She screamed obscenities at him and produced a knife. There was a struggle during which she bit him on the arm. She then drove her car straight into his (it was parked in the carport at the time). On another occasion, when he was building a fence at his property, she drove up in a car, got out and attacked him with a timber level which he had been using. She then started kicking and "belting" the fence. A source of friction on several occasions was her demand that he pay her debt to the Australian Taxation Office in respect of money which she had earned at the childcare

centre. On occasions, she threatened to kill Mr Evans, but he said that he did not take the threats seriously, at least up to some time in 2001, when he obtained a domestic violence order against her. He testified that she "went to court three times for breaking it" but thereafter everything "went pretty quiet" for about 12 months.

[5] Mr Evans' sister testified that in an unstated number of telephone conversations between them subsequent to February 2000, Ms Evans "made threats that she would kill him [Mr Evans] or she would do this or do that and with every conversation she was very upset with him." In the last such conversation, in late August 2001,

> "she started getting really nasty and started screaming and yelling and saying that she was going to kill Chris, she wanted to kill Chris, and she told me that she bought a gun and was going to use it on him. … she was very, very upset, she was hysterical."

[6] In mid-2000, Mr Evans formed a relationship with one Loretta Dillon-Ham. She and her nine year-old son had occupied a room at his house in May 2000 while her house was being renovated. Ms Dillon-Ham described an incident when Ms Evans came to the house and in the course of an argument with Mr Evans "ripped the phone off the wall" and hit Mr Evans with it. She also outlined an incident in June 2000 when Ms Evans came to the house when Mr Evans was not home, tipped her out of bed and took the bed linen. She described another incident in September 2000 when Ms Evans came to the house and physically attacked her.

[7] In mid-2001 Ms Dillon-Ham gave birth to Mr Evans' son, named Chad. She and Mr Evans separated, but remained on good terms. By October 2002, when the baby was 16 months old, he would stay with his father on a regular basis for three or four days a week. Mr Evans testified that on 1 October 2002, four days after the expiry of the domestic violence order, Ms Evans telephoned him at about 6 am. He thought the call related to the ongoing issue concerning the taxation debt. He hung up. Shortly afterwards, he set out with the baby in a pram to walk to his mother's house nearby. He stopped on the footpath to talk to a neighbour, Ms Simpson. Ms Evans drove up in a Mitsubishi four-wheel-drive vehicle. She was yelling and screaming at him and said, "It's an ugly baby" and "You'll never live to enjoy that baby". This evidence was not challenged in cross-examination. He walked away, towards his mother's home. She came after him, driving slowly on the other side of the road and yelling at him. Then he heard the vehicle "rev up" and saw it coming across the road toward him. He ran into an adjacent vacant lot, pushing the pram. Ms Evans followed him and veered into him. The bull bar hit him in the back throwing him through the air. He saw the pram in pieces, ran to it and retrieved the baby in part of the pram. He heard the vehicle revving loudly and saw it coming back. He ran toward an area on the allotment adjacent to the footpath where three cars were lined up for sale; he ran to these for protection. While he was close to one of them, the Mitsubishi rammed it, pushing it past him to the kerb of the road. Then it reversed and he tried to use the other two cars for protection. The Mitsubishi sideswiped one of them and he ran 40 or 50 yards to a house with a Besser block fence. When he got near the fence he turned and saw Ms Evans "just drive around and she left". The baby, still in part of the pram, started crying, so he knew it was alive (it was in fact uninjured). Eight eye-witnesses observed the event, or part of it, including one Patricia Lindsay.

[8] Ms Evans gave evidence. The following summary is taken from her counsel's outline of argument:

> "She said she had gone to Mr Evans' address to confront him (AR 166/45). She saw him talking to a neighbour and lowered the car window and asked him to give her a divorce and to arrange for payment of her tax (AR 167). She said that an argument developed. She admitted that during arguments they had each said they would kill the other, but she had never held any such intention (AR 168/30-40).
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> The appellant said that Mr Evans walked down Stannard Road towards the vacant allotment. She said she decided to "try and scare him" so that he would talk to her (AR 168). The appellant agreed that she had turned into the vacant allotment, but she said she did not mean to hurt or do any harm to Mr Evans (AR 169/10). The appellant agreed that she chased Mr Evans (AR 169/50), although she was unaware that the vehicle came into contact with him (AR 170/40). She drove around in a circle. She saw Mr Evans running to hide behind the parked cars. Although she admitted ramming the car, she said she was simply trying to find her way out (AR 172). She denied intending to kill Mr Evans (AR 173)."

The first ground of appeal

[9] For Ms Evans, it was submitted that the jury, acting reasonably, could not have rejected as a rational inference the possibility that Ms Evans simply intended to scare Mr Evans. It was submitted that there was a distinct possibility that in a trial which involved a considerable degree of emotion the jury too readily inferred a murderous intent.

[10] An important task for the jury in this case was determining the credibility of witnesses. If Ms Evans had been believed in relation to her intention at the relevant time the jury must have acquitted her. Plainly, she was not believed. Her credibility was a question for the jury.[1] They could, and no doubt did, take into account not only her demeanour in the witness box but also the consistency or otherwise of her evidence with that of other witnesses, and its inherent probability. It was open to them to reject her credibility and, on the crucial point at least, they did so.

[11] The question of intention therefore fell to be inferred by the jury from the evidence which they accepted. The question for us is, could the jury, acting reasonably, have rejected as a rational inference the possibility that Ms Evans drove the vehicle at Mr Evans without an intent to kill.[2] We must make our own assessment of the evidence within the limits imposed by the fact that we have neither seen nor heard the witnesses. We must act upon the conclusions of fact which the jury were entitled to adopt having seen and heard the witnesses. Those facts include the following:

- a motor vehicle is capable of killing someone - it is not a feather duster;
- Ms Evans was at the relevant time angry with and hostile toward Mr Evans;
- the history of their relationship after their separation demonstrated a high level of hostility on her part;
- Ms Evans yelled at Mr Evans shortly before the incident, "You'll never live to enjoy that baby";
- Ms Evans not only drove the vehicle at Mr Evans, she chased him with it;
- the vehicle hit him and threw him into the air;

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1 *M v The Queen* (1994) 181 CLR 487 at pp 493, 494.

2 Compare *Knight v The Queen* (1992) 175 CLR 495 at p 502.

- she persisted with her conduct even after her vehicle hit him;
- she did these things knowing he had a baby with him.

[12] I have no doubt that, at the relevant time, Ms Evans intended to kill Mr Evans. No other inference, and in particular, no inference that she intended only to scare him, was reasonably open.

[13] Consequently, in my view, this ground of appeal must fail.

The second ground of appeal

[14] At the beginning of the hearing counsel for Ms Evans was granted leave to add a further ground of appeal in the following terms:

> "A miscarriage of justice has resulted by reason of the failure of the trial judge to direct the jury in relation to evidence of hostility by the appellant towards the complainant, his brother (Alan Evans) and Loretta Dillon-Ham."

No particulars of what the judge ought to have said were given, but they are apparent from counsel's outline of argument.

[15] I have already summarised the evidence of which complaint is made. Counsel for Ms Evans divided it into two categories: evidence of a history of hostility to the victim and evidence of hostility to others. To the former category, he assigned the evidence of hostility given by Mr Evans and his sister; to the latter, the evidence of hostility given by Mr Alan Evans and Ms Dillon-Ham. He submitted that in relation to the former category, his Honour should have given a warning in similar terms to that considered appropriate in *R v Chevathen and Dorrick*, where this Court said:

> "The appropriate warning would … be against too readily making an assumption of the murderous intent that is necessary before a person is guilty of murder." [3]

In relation to the latter category he initially submitted, citing *BRS v The Queen*[4], that his Honour "ought to have carefully directed the jury that the evidence had no bearing on the issues to be determined", but in the course of argument that was modified to a direction that "those events … had limited relevance to the issue which concerned the jury. That is whether or not the appellant had an intent to kill Mr Evans and the child." He disavowed any reliance on inadmissibility of any of the evidence in the latter category. For the Crown, it was submitted that the distinction was artificial, in that the violence to others was directly and immediately derivative of Ms Evans' anger toward Mr Evans.

[16] In my judgment, the distinction drawn by counsel for Ms Evans was not artificial; it was real and comprehensible. Whether the distinction matters is another question. However, I do not accept that the two categories identified by counsel were mutually exclusive. Some of the evidence given by Ms Dillon-Ham fell into both categories. So did the evidence of Mr Alan Evans (assuming that it is to be understood as referring to something said by Ms Evans). Only Ms Dillon-Ham's evidence of the incident in September 2000 cannot be said with confidence necessarily to show hostility to Mr Evans.

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3 [2001] QCA 337 at p 12.

4 (1997) 191 CLR 275 at p 305 per McHugh J.

[17] One point can be made about both categories. No redirection was sought by counsel for Ms Evans (who, as seems usually to be the case these days, was not representing Ms Evans in the Court of Appeal.) The case therefore falls squarely within the description given by Jerrard JA in *R v Glattback*[5]:

> "The lack of any application for directions about the evidence of the parties' relationship means that this appeal falls within that class described in the joint judgment of McHugh and Gummow JJ in *Dhanhoa v R* (2003) 199 ALR 547 at 555. Their Honours wrote there that when no redirection concerning evidence is sought at a criminal trial, and where a convicted person then seeks to quash a conviction on the ground that the trial judge failed to direct the jury concerning some part of the evidence, that appellant could only rely on a failure to direct the jury if he or she established that that failure constituted a miscarriage of justice. None would have occurred unless that appellant demonstrated that the directions should have been given, and that it was reasonably possible that the failure to direct the jury may have affected the verdict."

The wording of the ground of appeal recognised the onus of demonstrating a miscarriage of justice which lay upon Ms Evans.[6]

[18] Did the evidence in the first category make it necessary for Byrne J to warn the jury "against too readily making an assumption of the murderous intent that is necessary before a person is guilty of murder"? In some respects there are similarities between this case and *R v Chevathen and Dorrick*. Here, as in that case, a warning against using the evidence to demonstrate propensity was unnecessary. The evidence was plainly not demonstrative of a propensity to kill or attempt to kill. There was no significant risk of misuse of the evidence in that way by the jury. Byrne J referred the jury to the acknowledgement by counsel for Ms Evans that she had threatened to kill Mr Evans on occasions, but also to counsel's argument that she did not really mean it. He further referred them to the evidence that Mr Evans himself had brushed aside such threats, and had not taken them seriously. Ms Evans did not complain at trial of the absence of such a warning. The submission was that here, as in *R v Chevathen and Dorrick*, a considerable degree of emotion was involved; therefore the warning was required.

[19] In my judgment, the Court in *R v Chevathen and Dorrick* was not laying down a direction to be given in all cases where a trial is conducted in emotive circumstances. It would be surprising if such a gloss were placed upon the requirement for satisfaction beyond reasonable doubt without according the question much fuller consideration than was given it in that case. Rather, it was focussed on what was appropriate in the particular circumstances of the case. It is a decision on its own facts. On this issue it lays down no point of law. As Thomas JA has observed, there are dangers in appeal courts exponentially prescribing warnings that must be given by trial judges upon penalty of retrial.[7]

[20] There was nothing in the circumstances of the present case to make such a direction necessary, notwithstanding any emotional overtone which might have arisen from the charges and the evidence in respect of the baby. The issue at the trial was intent and the jury knew that they had to be satisfied on that issue beyond reasonable doubt.

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5 [2004] QCA 356.

6 See generally *TKWJ v The Queen* (2002) CLR 124 at [73] per McHugh J, approved in *Subramaniam v The Queen* [2004] HCA 51.

7 *R v Self* [2001] QCA 338.

There is no suggestion that they approached their task in a cavalier manner. A warning in the terms suggested would have been at best meaningless and at worst confusing.

[21] It follows that not only was the direction unnecessary, but also there was no reasonable possibility that its omission might have affected the verdict.

[22] As to the evidence of hostility toward Mr Alan Evans and Ms Dillon-Ham, the submission of counsel for Ms Evans was that it had little if any probative value and created the risk of significant prejudice to Ms Evans. For this reason, Byrne J ought to have directed the jury in the terms set out above.[8] There was no application to exclude the evidence on the ground that its probative value was outweighed by its prejudicial effect.

[23] For the respondent, it was submitted that any violence (or, presumably, threats) to Mr Alan Evans or Ms Dillon-Ham "was simply displaced anger at the complainant". I do not find this submission convincing. With one possible exception, the evidence was, however, admissible. The evidence of the threat to kill Mr Alan Evans was part of the narrative of the incident in which he was involved, an incident which displayed Ms Evans' hostility to the complainant. The evidence of Ms Dillon-Ham about the incident with the telephone and the events of June 2000 (the bed linen incident) was relevant to Ms Evans' hostility to her husband. The relevance of the September 2000 incident is more difficult to perceive. However, there was no objection to it and no complaint is now made about its admission or admissibility.

[24] In support of his submission counsel for Ms Evans referred to the decision of the High Court in *BRS v The Queen*[9]. There McHugh J said:

> "If evidence revealing a criminal or reprehensible propensity is admitted, the trial judge must give the jury careful directions concerning the use which they can make of the evidence. If the evidence is admitted for a reason other than reliance on propensity, the judge must direct the jury that they can use the evidence for the relevant purpose and for no other purpose."

However the submission that there is a universal need for a warning was rejected in *KRM v The Queen*[10].

[25] What I have said above about the need for Ms Evans to demonstrate a miscarriage of justice applies with even more force to evidence in this category. There was no reference to this evidence in the summing up, and if counsel referred to it in their addresses they did so only in a most oblique and transient way. To have sought a redirection in the terms suggested would have risked elevating its prominence. Counsel might well have thought that it was better forensic tactics to let sleeping dogs lie. I venture to think that such an approach would have been sound.

[26] The appeal should be dismissed.

[27] On each count Ms Evans was sentenced to imprisonment for 10 years and it was declared that the convictions were of serious violent offences. A declaration was also

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8 Para [15].
9 (1997) 191 CLR 275 especially at p 305.
10 (2001) 206 CLR 221.

made as to 74 days pre-sentence custody. Ms Evans seeks leave to appeal on the ground that the sentences are manifestly excessive.

[28] Ms Evans was 40 years old at the time of the offences. She had three previous convictions, all for breaching the domestic violence order. For the first offence, she was fined $250. For the second and third offences, she was placed on probation for 18 months commencing 27 March. Her probation therefore expired only a few days before the subject offences were committed. Byrne J accepted that they were not premeditated and arose from a lack of self control. A number of favourable references were tendered on her behalf.

[29] The sentencing process was adjourned to enable Ms Evans to obtain a psychiatric report. A report was obtained from Dr Ian Curtis, but it was largely a waste of time and money. It was replete with falsehoods related to Dr Curtis by Ms Evans and, at the sentence hearing, counsel for her did not rely on it as evidence of the truth of these matters. Both there and on the application counsel used it to support a submission that the applicant perceived herself to be disempowered and disadvantaged in her relationship with Mr Evans, but did not seek to blame him for anything which happened. She showed no evidence of remorse; quite the contrary.

[30] Counsel for Ms Evans submitted that the sentence was outside the range of imprisonment for a case where no serious injury was done to anyone. He referred to *R v Folland*[11], a manslaughter case as a comparable decision. He also submitted that the case arguably fell under s 538 of the *Criminal Code*, conceding however that this must depend on the then-pending decision of this court in *R v Witchard and Ors; ex parte A-G (Qld)*.

[31] The last point may be disposed of briefly. *Witchard* has now been decided[12] and it is plain that the section cannot assist Ms Evans.

[32] The respondent submitted that the sentences were well within range for attempted murder. Like manslaughter, attempted murder is an offence where the circumstances and the appropriate sentence will vary widely from case to case. That does not mean that manslaughter cases are necessarily comparable. The respondent submitted they were not and I think that will usually be the case. It is unnecessary to discuss this somewhat theoretical point at length. Even if *Folland* is regarded as in some way comparable, the sentence in that case of imprisonment for nine years with a declaration that the offence was a seriously violent one does not suggest that the sentences in the present case lay outside the judge's discretion. They were not manifestly excessive.

[33] The application should be dismissed.

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11 [2004] QCA 209.

12 [2004] QCA 429.