SUPREME COURT OF QUEENSLAND

CITATION:	*R v Young* [2005] QCA 32
PARTIES:	**R** **v** **YOUNG, Christine Lorraine** (appellant)
FILE NO/S:	CA No 289 of 2004 DC No 410 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2005
JUDGES:	de Jersey CJ, McPherson JA, Chesterman 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:	CRIMINAL LAW – EVIDENCE – GENERALLY – where a witness inadvertently gave inadmissible evidence at trial – whether the Trial Judge erred in failing to discharge the jury under the circumstances CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where the appellant was sentenced to six years' imprisonment for wounding with intent to do grievous bodily harm – where appellant was also sentenced to two and a half years' imprisonment for assault occasioning bodily harm whilst armed, to be served concurrently – whether the sentence imposed was manifestly excessive *Criminal Code* (Qld), s 271 *Crofts v R* (1996) 186 CLR 427, discussed
COUNSEL:	Mr J R Hunter for the appellant Ms S G Bain for the respondent

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

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Chesterman J. I agree that for those reasons, the appeal against conviction should be dismissed and the application for leave to appeal against sentence should be refused.

[2] **McPHERSON JA:** I have read and agree with the reasons of Chesterman J for dismissing this appeal. With reference to the application to discharge the jury because of the introduction at the trial of the testimony about what the complainant said to Ms Friend, I would add only that it seems to me that it was in any event almost certainly admissible as part of the *res gestae*: see *R v Andrews* [1987] AC 281. On any view of it, it cannot be seen as something that required the trial judge peremptorily to discharge the jury, and there was no miscarriage of justice in her not doing so.

[3] The appeal against conviction, and the application to appeal against sentence should, for the reasons given by Chesterman J, be dismissed.

[4] **CHESTERMAN J:** The appellant was tried on an indictment which alleged that, on 12 June 2002 in Brisbane, she attempted to murder Christina Christova, or in the alternative, she unlawfully wounded Christina Christova with intent to do her grievous bodily harm. A third count alleged that at the same time and place the appellant unlawfully assaulted John Michael Williams, and did him bodily harm, whilst armed with an offensive instrument. On 13 August 2004 the appellant was convicted of the alternative count of wounding with intent to do grievous bodily harm and on the third count of assaulting Williams.

[5] The appellant appeals against her conviction on the sole ground that the trial judge failed to discharge the jury after a witness had inadvertently given inadmissible evidence. The challenge does not extend to the conviction for assaulting Mr Williams while armed, and causing him bodily harm.

[6] The appellant and Mr Williams had, in the euphemism of the age, enjoyed a relationship for about four years. It ended in November 2001 though thereafter they kept in touch and occasionally copulated. Mr Williams described his relationship with the appellant as "volatile and violent". He ascribed its character to the appellant's jealous nature. Their intertwined finances meant that, on the separation, a monetary adjustment had to be made between them. Agreement took six months to reach, but on 27 May 2002 they executed a deed under which Mr Williams was to pay the appellant $17,000. For reasons, the validity of which need not be investigated, the money was not paid until 12 June 2002, the date of the offences.

[7] After the separation the appellant moved to Sydney. Mr Williams lived in a townhouse in Paddington, Brisbane. His business took him to a convention in Chicago where he met the complainant Ms Christova. She decided to spend some time in Queensland, where she had a friend from her school days, and to improve her friendship with Mr Williams. While in Brisbane her accommodation alternated between the former school friend's house and Mr Williams' townhouse. Her friendship with Mr Williams had not developed beyond the platonic by 12 June 2002.

[8] The appellant was concerned by the delay in receipt of the $17,000 though, it is to be noted, it was no more than two weeks in duration and there was arguable justification for it.

[9] The appellant's concern about the delayed receipt of the money increased. It is a fair inference that her concern turned to anger and she resolved to demand payment. She drove from Sydney to Brisbane arriving a little before 6:00 am on June 12 2002. She telephoned Mr Williams at his home a little after 7:30 am and abusively demanded payment. Mr Williams told her that she would be paid and asked her to leave him alone. In the course of the day Mr Williams paid the money into a nominated bank account. There is no evidence that the appellant knew that the deposit had been made prior to the events in question.

[10] Late in the afternoon of 12 June the appellant went to the townhouse and rang the door bell. Ms Christova who was then staying in the house answered the door. Mr Williams was absent. He had gone to work but was on his way home. When Ms Christova opened the door she was confronted by the appellant who pushed into the house forcing Ms Christova with her. The appellant shut the door forcibly and commenced to stab Ms Christova with a knife. The trial judge inferred, when passing sentence, that the appellant had brought the knife from Sydney. She made such remarks as, "This is what you get for sleeping with my boyfriend" and "You're going to die". Ms Christova sustained a large number of stab wounds, though fortunately none was deep. As well she was bitten on the arm.

[11] The appellant's attack on Ms Christova was interrupted by Mr Williams' return home. He intervened and separated the two women. He tried to restrain the appellant by pushing her onto the floor and pinning her there by his body weight. He was cut as he tried to take the knife from the appellant. Ms Christova took the opportunity afforded by Mr Williams' intervention to flee from the townhouse. She took with her a cordless telephone with which she intended to summon the police, but being foreign she did not know the emergency telephone number. She found herself adjacent to the entrance of an adjoining townhouse occupied by a witness, Ms Anna-Marie Friend.

[12] Ms Friend's evidence was

> "... I heard someone calling for help ... female voice ... I went through from my back courtyard to the front which is one level above the ground ... there is a balcony ... (I) looked over the balcony and I saw a woman staggering between the buildings. She had a phone in one hand and she was covered in blood. ... I asked her what the problem was. She said "Help me. I need to call the police." I told her to wait where she was and that I would come straight down. I went down ... to her assistance. ... I (took her inside my unit) ... she was deeply distressed. She had blood down the front of her white top. She had blood down her right thigh. She was concerned that she was dying. She was distressed because she didn't know why somebody would want to stab her."

[13] It is the last sentence in this passage which is objected to as inadmissible, and which it is said should have led to the discharge of the jury. The respondent did not contend that the evidence was admissible, and the appeal was argued on the basis that it was not.

[14] Counsel for the appellant objected immediately. The prosecutor simultaneously accepted the validity of the objection. He admonished Ms Friend not to tell the court "the conversation", and asked her about the assistance Ms Friend had rendered Ms Christova.

[15] It appears that the objection from the appellant's counsel was so prompt and vociferous that it coincided with what Ms Friend was saying and may have made it inaudible. There is no reason to doubt the accuracy of the transcript, but neither counsel nor the trial judge heard the concluding three words of the statement because of the objection. One cannot, of course, assume that the jury did not hear it.

[16] The impugned sentence is, literally, a statement of fact but it is a fact of which Ms Friend could not have had direct personal knowledge. The fact is a description of Ms Christova's state of mind (distress) and the reason for it. The first part of the statement, that Ms Christova was distressed, must be understood as a conclusion or opinion formed by Ms Friend from her observations of Ms Christova. That part of the sentence is inadmissible as being an opinion offered by someone, other than an expert, and on an irrelevant topic. The second part of the statement may implicitly contain an element of hearsay. That part, containing the reason for Ms Christova's distress, may be a rendition in the third person of something that Ms Christova had said in the first person. The challenged passage should thus be understood as meaning "Ms Christova said to me: 'I don't know why the accused would want to stab me'." This may in turn contain an implication that there was, in fact, no discernible reason for the appellant's attack.

[17] The following morning, the third day of the trial, counsel for the appellant asked the trial judge to discharge the jury because of the statement made by Ms Friend. He put the application on the basis that the statement was "rank hearsay" and that evidence of Ms Christova's state of mind "shortly after the attack" was inadmissible. The real vice in the evidence, the submission continued, was that "the jury could ... quite improperly rely upon that evidence to form a conclusion that ... (the attack) was started by the accused."

[18] It is only if one performs the layered analysis just described that one can understand the impugned evidence as containing the hearsay statement "Ms Christova told me that she did not know why anyone would want to stab her". The objection was advanced only on the basis that the evidence should be so understood. The inadmissible opinion that Ms Christova was distressed following the attack cannot have had any consequence for the fairness of the trial. The jury had Ms Christova's own evidence to that effect, and it is self evident that a woman who had been stabbed repeatedly with a kitchen knife, in what was in effect her own home, would be distressed. The jury would no doubt have assumed that to be the case regardless of any evidence concerning the point.

[19] The reception of the hearsay had some importance to the appellant's case which was that there *was* a reason why she stabbed Ms Christova. Moreover the appellant claimed it was a reason which justified the wounding. It was that she acted in self defence and was entitled to the protection of s 271 of the *Criminal Code*.

[20] The appellant did not testify but a statement she made to the police at the townhouse was put into evidence. The appellant said that she went to the townhouse to demand payment from Mr Williams. She knocked on the door which was opened by a

woman, Ms Christova, who was holding a knife. She was, she said, proficient in Tae Kwon Do and knew "how to defend herself". She grabbed the knife with one hand and Ms Christova's hair with the other. Ms Christova then dropped the knife to the floor. The appellant picked it up and stabbed Ms Christova, she thought four or five times. In fact there were 11 wounds. The stated motive for the wounding was to prevent Ms Christova striking her with the knife.

[21] It may be noted that the appellant's attack on Ms Christova continued until Mr Williams came home. When he separated the women the appellant continued to struggle, though by this time any prospect that Ms Christova might become the assailant had disappeared. In the course of the struggle with Mr Williams the appellant bit him and cut him with the knife as he attempted to disarm her. The appellant's own account cast considerable doubt upon the self protective element of her actions. She recounted that, as she continued her assault, Ms Christova expressed fear for her life and begged the appellant to end the attack. She said, "Please don't. Please don't. I have a kid. I have a kid."

The appellant's callous response was to say to Ms Christova that the attack had been initiated by her and she "should have thought of that" when she began the attack on the appellant.

[22] On the appellant's version Ms Christova did not attack her. She came to the door armed with a knife, but the appellant did not describe any other act of aggression.

[23] The appellant's concern, as expressed by her counsel, was that the jury would rely on Ms Christova's hearsay statement to Ms Friend that there was no reason for the attack, and would disregard the appellant's statement that she acted in self defence.

[24] The trial judge refused the application to discharge the jury. Her Honour thought that by giving an appropriate direction which did not repeat the inadmissible evidence the jury should be able to disregard it. Her Honour thought that because the trial was relatively short the evidence should not be ignored in the hope that the jury might overlook it. For that reason her Honour thought that some direction should be given.

[25] The form of the direction was discussed with counsel who agreed it was appropriate if the jury was not to be discharged. Counsel for the appellant did not resile from his position that there should be a discharge. Her Honour told the jury:

> "Mr Campbell and Mr Hunter are both experienced counsel. They ask questions, you would have noticed, in a way to get answers so that there was admissible evidence brought out from the witnesses. Every now and then a witness says something that they were not directly asked and which is inadmissible. That happened with Ms Friend. She was the witness ... who tended to Ms Christova. Ms Friend was asked whether she noticed something about Ms Christova ... she went on to say something about what Ms Christova told her and you might recall at that particular point and time both counsel jumped up and spoke over Ms Friend because they were trying to stop her saying what she went on to say.
>
> To the extent that Ms Friend recited what she said Ms Christova told her, I rule that that is inadmissible evidence because it is hearsay.

> Ms Friend could not give evidence properly before you of anything that Ms Christova said about what happened and that will be quite apparent to you because you heard Ms Christova give evidence. She told you what happened herself so that you are able to evaluate the reliability and truthfulness of Ms Christova's evidence from what she said herself. If you did hear what Ms Friend said, do not take into account in your deliberations, that part that I have indicated ... was inadmissible evidence."

[26] The relevant principles were explained in the joint judgment of Toohey, Gaudron, Gummow and Kirby JJ in *Crofts v R* (1996) 186 CLR 427 at 440. Their Honours said:

> "No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact. ... [M]uch leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript."

[27] The court nevertheless emphasised that when the exercise of a discretion to refuse to discharge a jury is challenged an appellate court should decide for itself whether in the circumstances the refusal occasioned the risk of a substantial miscarriage of justice. Their Honours described (at 440) as correct the principles which the Court of Criminal Appeal had applied in *Crofts*. That court said:

> "The question is whether in the circumstances ... there was such a high degree of necessity for the ... discharge that the failure to have ordered such a discharge has resulted in a mistrial. That is to say, was ... the judge ... bound to discharge the jury?"

[28] Dawson J, who dissented in the result, expressed the principle in rather similar terms. His Honour said (at 432):

> "Whether or not a jury should be discharged by reason of some incident which occurs during the course of a trial is a matter within the trial judge's discretion. But it is a discretion which is to be exercised in favour of a discharge only when that course is necessary to prevent a miscarriage of justice. It is in that sense that it has been said that the underlying principle is that of necessity and that 'a high degree of need for such discharge' must appear before a discharge will be ordered."

The question for consideration is therefore whether failing to discharge the jury gave rise to the risk of a substantial miscarriage of justice. There will be no such risk if it can be seen that the impugned evidence could not have influenced the outcome of the trial.

[29] The impugned evidence was only relevant to the issue of self defence and the operation of s 271. Indeed it was only relevant to the first element of that section, i.e. whether the appellant had been unlawfully assaulted by Ms Christova.

[30] There are two grounds for concluding that Ms Friend's evidence did not affect the outcome of the trial. The *first* is that the very issue to which the evidence went was the subject of extensive evidence, both in chief and cross-examination, of Ms Christova. It was also the sole topic of the interview between police and the appellant. A sustained attack was made upon Ms Christova's credit. There were some bases in the evidence for thinking that she had been warned by Mr Williams that the appellant was excitable and prone to violence, and that she was apprehensive that the appellant might come to the townhouse and make trouble. Ms Christova denied that this was her frame of mind but nevertheless she had said as much in a statement to the police. That version and its inconsistency with her testimony was forcibly put before the jury, who also had the appellant's assertion that when Ms Christova opened the door she was armed with a knife and her demeanour was such as to make the appellant fear for her own safety.

[31] In the course of the trial judge's careful summing up her Honour instructed the jury on the elements and application of s 271. As her Honour remarked on one occasion during the trial, a question of fact to be addressed was who "started the fight". On the appellant's version of events Ms Christova was the instigator and she was stabbed in the course of the appellant's attempts at self defence.

[32] In addressing this issue it cannot sensibly be supposed that the jury would be influenced by Ms Friend's oblique remark. On the assumption on which much of the administration of criminal justice is based, that juries are conscientious and rational, the jury would have answered the question by reference only to the immediate, direct evidence about it given by Ms Christova and the appellant. This was the reason which the trial judge advanced for refusing to discharge the jury. It was the thrust of her Honour's direction.

[33] The *second* ground is that the question of who instigated the violence was immaterial to the verdict. Section 271 provides that when a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force as is reasonably necessary to make effectual defence against the assault. If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that (she) cannot otherwise preserve (herself) from death or grievous bodily harm, it is lawful to use such force on the assailant as is necessary for defence even though such force may cause death or grievous bodily harm.

[34] Whether or not Ms Christova "started the fight", the prosecution would have excluded the operation of s 271 if the appellant had no reasonable grounds for believing she could not preserve herself from death or grievous bodily harm except by stabbing Ms Christova as she did.

[35] It will be recalled that on the appellant's statement, she disarmed Ms Christova very early on in their struggle. The appellant was proficient in one of the martial arts. She told police she was skilled in techniques of self defence. That being so, once she had disarmed Ms Christova, there cannot have been any reasonable basis for her to pick up the knife and repeatedly stab Ms Christova. Nevertheless she did so.

When begged to stop she refused. She did not then give as her reason for continuing with the attack that she was only endeavouring to preserve herself. It was, rather, justified on the basis that Ms Christova had been the instigator and could not complain when the table was turned. There were, as I said, 11 stab wounds. There were three puncture wounds to the left chest wall, two on a shoulder blade and two on the upper left arm which had penetrated "through and through" the limb. There were two further stab wounds to the abdomen, one that penetrated the peritoneal cavity and touched the liver. There was a further stab wound to the upper thigh that penetrated into the fat. As well the appellant had bitten Ms Christova on her left forearm with considerable force.

[36] The inevitable conclusion is that the impugned evidence was immaterial. It went only to the first element of s 271 – that the appellant had been assaulted without provocation. Whether that was so or not s 271 could have no application. The evidence did not deprive the appellant of a fair trial or expose her to a miscarriage of justice.

[37] In my opinion that appeal should be dismissed.

Application for leave to appeal against sentence

[38] The appellant complains that the declaration that she had been convicted of a serious violent offence made her sentence of six years' imprisonment manifestly excessive. It was pointed out that the appellant was a mature woman, 45 at the time of the offence, who had no previous convictions. It was submitted that she had been treated "shabbily" by Mr Williams and that her motivation for going to his townhouse was to demand payment of the debt he owed her.

[39] The trial judge found as a fact that the appellant went armed to the townhouse. Her Honour found that the appellant pushed Ms Christova into the townhouse when she opened the door and slammed it behind her, preventing escape. She stabbed Ms Christova first in the abdomen and then in the back, chest and limbs. She bit her viciously and punched her. Ms Christova was, naturally, severely shocked and upset by the attack. She bled profusely and had to be treated for some days in hospital. Her nervous reaction to the attack has continued and she remains significantly stressed.

[40] It is obvious that the offence was a very serious one. Apart from the number and nature of the wounds inflicted, there are other exacerbating factors. There was a degree of premeditation in the attack: the appellant went armed to the townhouse. This follows from the finding that it was not Ms Christova who had the knife when she opened the door. The appellant concealed her vehicle so that her approach to the townhouse would be unobserved. The attack was on an unarmed woman who was, in effect, in her own home. It is nothing to the point that the appellant resented Mr Williams' delay in making payment. It was not Mr Williams whom she attacked but his companion against whom the appellant had no complaint. Uncontrolled jealously would appear to be the motive for what can only be described as a prolonged and vicious assault.

[41] The trial judge accepted as accurate this description of the offence. Addressing the appellant, Her Honour said:

> "… your attack was calculated to induce terror and it was a sustained and terrifying attack. Ms Christova thought she was going to die. The attack continued even when Ms Christova endeavoured to shield herself … by curling up into a ball and was … endeavouring to protect herself from further attack … . The attack did not stop … you continued to slash with the knife when Mr Williams intervened."

[42] The only factors in mitigation were personal to the appellant. She had no previous criminal history and was suffering at the time from an adjustment disorder with depressed mood. The disorder was the result of some unsatisfactory episodes in the appellant's life, including her separation from Mr Williams.

[43] Given the nature and circumstances of the offence these personal considerations are of little consequence. The trial judge was referred to, and considered, comparable cases which were also referred to on the appeal. It is not necessary to analyse them. There can be no sensible criticism made of the sentence of six years' imprisonment. The making of the declaration was a matter for judicial discretion. Her Honour clearly had regard to the relevant facts including those personal to the appellant. The declaration is not manifestly unreasonable. Indeed it is entirely appropriate given the circumstances. The community would be justifiably disappointed if the courts did not impose condign punishment on those who behave as this appellant did.

[44] In my opinion the application to appeal against sentence should be refused.