SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cleary* [2005] QCA 39
PARTIES:	**R** **v** **CLEARY, Graham Shawn** (appellant)
FILE NO/S:	CA No 391 of 2004 DC No 430 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	25 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2005
JUDGES:	de Jersey CJ, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Retrial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER JURY WOULD HAVE RETURNED SAME VERDICT – MISDIRECTION AND NON-DIRECTION – where appellant charged with grievous bodily harm – where appellant's evidence raised the defence of self-defence under s 271(1) of the *Criminal Code* 1899 (Qld) – where trial judge directed jury that self-defence did not apply in this case – whether the trial judge erred in withholding that defence *Criminal Code* 1899 (Qld), s 271, s 668E(1A) *R v Prow* (1990) 1 Qd R 64, cited *R v Young* (2004) 142 A Crim R 571, cited
COUNSEL:	T Moynihan for the appellant M R Byrne 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 Jerrard JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **JERRARD JA:** On 19 October 2004 Graham Cleary was convicted by a jury of the offence of having unlawfully done grievous bodily harm to Steven Templeton on 5 August 2003. The learned trial judge sentenced Mr Cleary to three years imprisonment. He has appealed against that conviction, and his counsel argues that appeal on the ground that the learned trial judge erred in failing to let the jury consider defences of self-defence by Mr Cleary, which would have relied on s 271(1) and s 271(2) of the *Criminal Code*.

[3] Those sections provide as follows:

> "271(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
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> (2) 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 the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

[4] The following helpful observations were made McPherson JA in *R v Young:*[1]

> "Both subsections of s 271 are predicated upon the happening of an unlawful assault, and both make it 'lawful' (and as such not criminal) to use force as a defence against the assailant, although the extent of the force that is authorised under s 271(1) differs from that permitted under 271(2). In the case of the former, it is limited to such force 'as is reasonably necessary to make effectual defence against the assault', and the force used must not be intended or likely to cause death or bodily harm. The standard adopted is objective and does not depend on the impression formed by the person assaulted about the degree of force needed to ward off the assailant. If an honest and reasonable mistake is made about it, the exculpatory provisions of s 24 of the *Code* are doubtless available in appropriate circumstances.
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> Section 271(2), on the other hand, is concerned with a different state of affairs. It authorises the use of more extreme force by way of defence extending even to infliction of death or grievous bodily harm on the assailant. It is available where the person using such force cannot otherwise save himself or herself from death or grievous bodily harm, or believes that he or she is unable to do so except by acting in that way. The belief must be based on reasonable grounds, but, subject to that requirement, is the defender's belief that is the definitive circumstance."

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1 [2004] QCA 84 at [6] and [7]

[5] As those remarks make clear, the prosecution will have excluded a defence based on s 271(1) if it satisfies the jury that the force used by a defendant was more than was reasonably necessary to make effectual defence, that being a matter for the objective consideration of the jury and not dependent upon the defendant's state of mind.[2] Likewise that defence is excluded if the prosecution satisfies the jury beyond reasonable doubt that force used by a defendant was likely to cause grievous bodily harm. Those limitations on the defence available under s 271(1) are relevant to the merits of this appeal.

The complainant's evidence

[6] The evidence from Steven Templeton was that on 4 August 2003 he had visited a friend, David Swales, at a house at number 80 Moores Pocket Road at Tivoli, where Mr Swales was renting a room. Mr Templeton drank one large bottle of beer, and thought it prudent not to drive home. He went to sleep in the back of his station wagon vehicle, which was then parked at the back of number 80.

[7] He was awoken by the sound of some voices yelling, and upon getting up and going down the driveway to in front of the house, he saw two men standing outside the fence who were strangers to him. They were in fact Graham Cleary and his brother. Mr Templeton's evidence was that one man (Graham Cleary) was making remarks about a car that had broken down, and saying that he was going to take another car in the yard which was for sale. Mr Templeton realised that the car which had broken down was one that had been sold to Mr Cleary by Mr Swales.

[8] On Mr Templeton's evidence he asked the two men to come back in the morning to see Mr Swales, because he was asleep and there were two other people there. While one of the two men walked away, the other – Mr Cleary – opened the gate and walked into the yard. He appeared to be drunk, and was staggering and slurring his words. He held a bottle at one side.

[9] Mr Templeton's evidence was that Mr Cleary said that he was going to take the other car that was for sale, and Mr Templeton said Mr Cleary could not do that, he should leave the yard, and come back tomorrow and then sort it out with Mr Swales. Mr Templeton could recall another house resident, Alan Carvolth, coming to a window in the residence, but not his saying anything. Mr Templeton asked Mr Cleary to leave the yard, and Mr Templeton described Mr Cleary becoming a bit aggressive and that he "started grinding his teeth". Mr Templeton recalled that next "I got shoved, I shoved him back". He described being shoved by Mr Cleary with both hands up in Mr Templeton's shoulder area, and his responding in the same way. On his description both men remained standing after having shoved each other, and then Mr Templeton was bitten from behind by Mr Carvolth's dog. Mr Templeton then bent down to release his right leg from the dog's mouth, prised it open, and as he was rising back to his feet he "just saw a bottle coming towards me". As he described it, he then "stepped back, but not quick enough. It ended up hitting me up here somewhere," indicating his left forehead. After that he saw "stars", and his knees just buckled underneath him. He yelled out for help, and Mr Carvolth let him into the house. Mr Cleary left the front yard.

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[2] See the discussion in *R v Gray* (1998) 98 A Crim R 589; and *R v Greenwood* [2002] QCA 360 at [20]

Medical evidence

[10] Exhibit 2, photographs taken at a relevant time, record both the injury to his head and bite marks on his leg from the dog. The medical evidence was that he suffered from a depressed skull fracture of the fronto-parietal area, quite a large one, it being basically on the side of the head towards the front; and that a fractured skull with depression of the skull table was associated with bleeding into the brain and with a risk of infection. Mr Templeton was actually unconscious when examined at the hospital, and therefore also at risk of vomiting and breathing in his own vomit. That risk, and the quite catastrophic consequences of any infection which might develop in the brain from bleeding, meant that the injury was life threatening. Even had there been no other sequelae, Mr Templeton, if untreated, would have had a depression in the top of his head.

[11] The relevant medical evidence, not challenged in that regard, was that it would have required quite considerable force to cause that injury. When specifically asked whether the force necessary to cause it would be consistent with someone being punched in the head by a person whose hand was holding a bottle when inflicting the punch, the doctor replied that he would not expect a punch to cause a skull fracture; and: "It would be more likely to injure the person punching". The jurors would have been entitled to understand that as meaning that punching someone in the head while holding a bottle in the hand throwing the punch would be more likely to injure the person punching.

Mr Carvolth's evidence

[12] This was that in the early hours of Tuesday 5 August 2003 he had seen two men walking up the road, and recognised one of them. The other man walked up to the fence, wanting to speak to David Swales about a car Mr Swales had sold that man. Mr Cleary – there was no dispute that it was he – complained to Mr Carvolth that he had driven that vehicle only three times, and that it had then broken down. He wanted his money back or another car. Mr Carvolth noticed that Mr Cleary had a bottle in his hand, and thought he was a "little bit under the weather".

[13] Mr Cleary then saw Mr Templeton "come around", presumably into the front yard, and then Mr Carvolth spoke to Mr Cleary from inside the house, and Mr Templeton spoke to Mr Cleary from the front yard. Mr Carvolth's evidence was that he was then engaged in pouring a cup of tea inside the kitchen in the house, and did not see what occurred, but heard a couple of "thumping" noises, and Mr Templeton calling out. He was let in, and Mr Carvolth saw a lump on Mr Templeton's head. Mr Cleary, who had at some stage jumped over the fence into the front yard, jumped back out again and stood on the footpath saying "come on, come on". After some five minutes he left.

[14] Mr Carvolth's evidence included that when Mr Templeton had been removed into the house he was mumbling and difficult to understand, but that what he said included that "I think I gave him two hits", that the dog bit him, and that as he was "coming back" up he got hit in the head.

[15] Mr Swales was called, and said the time that he was awoken by noise was around 1.00 am on 5 August 2003. The car he had sold Mr Cleary on 22 July 2003 was an unregistered 1980 Mazda, sold for $150.00. He heard men yelling and the dog

"going off." He did not see the incident, and the first he saw was the injured Mr Templeton.

Mr Cleary's evidence

[16] Mr Cleary's evidence was that he had gone on 4 August 2003 to his mother's residence at 144 Moores Pocket Road, with his brother, and that they consumed alcohol from about 12.00 or 1.00 pm that afternoon until they left that residence around midnight. They had been drinking schnapps, which they used to make a cocktail, and beer. Mr Cleary described himself as being "pretty drunk", and he and his brother had set off to visit a friend. On the way they stopped at number 80, because they had seen the lights on, apparently turned on by Mr Carvolth when making his cup of tea or coffee.

[17] Mr Cleary then called out asking if anyone was there, and a man came to the window. Mr Cleary asked could he speak to the bloke that he had "bought the car off". He then spoke to a woman (Mr Carvolth's fiancée) who had also come to the window, and told both of them, on his recollection, what was wrong with the vehicle he had bought from Mr Swales, and how it had seized.

[18] To make that explanation he had jumped over the fence into the front yard, and he recalled being told by the woman that he should come back in the morning. Then Mr Templeton came around from the side of the house, and Mr Cleary's evidence was that Mr Templeton told him to get out of the yard, that the man was not there, and come back tomorrow at 6.00 pm. Mr Cleary recalled telling Mr Templeton that it was none of his business, and that he was talking to the woman, and that Mr Templeton became aggressive with him. Mr Cleary recalled having the bottle in his hand, telling Mr Templeton again that it was nothing to do with him, and then Mr Templeton hit him twice. Mr Cleary fell back, and "I just retaliated and went bang bang and punched him back." The bottle was still in his hand, and he had not put it down because he was not expecting Mr Templeton to hit him. After the incident he returned to his mother's residence, from which the schnapps bottle was recovered by police later that day.

[19] The two blows he said landed on him were to the face, and Mr Templeton was just standing there when Mr Cleary retaliated. As a consequence of Mr Cleary's two punches Mr Templeton "went back a bit", and it was only then that Mr Templeton was bitten by the dog. His reason for punching Mr Templeton was because "I thought he was going to lay into me so I am going to punch him back as well".

[20] Mr Cleary's evidence was that he did not have any bruises to his face, and had not been hit very hard by Mr Templeton. He denied having instigated the physical confrontation, namely that he first pushed Mr Templeton, and denied that Mr Templeton had pushed him back. He described the two punches he threw as "a good hit", and said that he had the bottle in his right hand, held by the neck, when he hit Mr Templeton with his second punch. His first punch had been with his left hand. He insisted that Mr Templeton had been in a fighting position when he, Mr Cleary, threw his two punches in retaliation. While he also described his two punches as "very hard hits", he said that the bottle accidentally hit Mr Templeton. He had difficulty explaining why his two punches had made contact with the top part of Mr Templeton's forehead.

Rulings made at the trial

[21] The learned trial judge declined to allow self-defence to be put to the jury, remarking that it did not matter "if he hit you twice. You don't have self-defence in this case".[3] The learned judge added that "This is a charge of grievous bodily harm which means provocation does not apply at all, self-defence in your case is not going to apply". The learned judge did not give reasons to Mr Cleary's counsel in explanation of the ruling that self-defence could have no application, but did direct the jury[4] that:

> "I should say, ladies and gentlemen, there is some suggestion here from Mr Cleary, that the complainant punched him first and he was just punching back. Now, even if you accept that evidence, I will tell you as a matter of law, it is not a question of self-defence in this case. All right. So, just – you can put that out of your mind because of the nature of the injuries, self-defence is not open for you to consider in this case nor as to whether Mr Templeton provoked Mr Cleary into assaulting him."

[22] Mr Moynihan, counsel for Mr Cleary at the appeal, did not dispute that any possible defence of provocation was excluded because the charge was one of unlawfully doing grievous bodily harm.[5] He contended that the learned trial judge was nevertheless in error in not allowing the jury to consider self-defence, which Mr Moynihan submitted was fairly raised for the jury's consideration on Mr Cleary's evidence.

[23] Mr Cleary did not give any evidence suggesting that the two punches delivered to him had caused him any apprehension of either death or grievous bodily harm, nor that he believed he could not defend himself except by hitting Mr Templeton hard on the head with a bottle. His defence was that he was lawfully defending himself with his fists and that the bottle hitting Mr Templeton's head was accidental. That account did not raise any defence under s 271(2), but did raise a defence under s 271(1), in combination with s 23.

[24] The learned trial judge did allow a defence of accident to go to the jury. The judge directed the jurors that it was only if they considered that the facts of the case were that there were the two punches by Mr Cleary, and one of the punches was when he had the bottle in his hand, that the jury needed to consider that question of accident. Leaving a defence under s 23(1)(b) to the jurors for their consideration, namely that the doing of grievous bodily harm to Mr Templeton had been an event that had occurred by accident, which defence was left for their consideration on the assumption that Mr Cleary's evidence was either accepted, or could not be rejected beyond reasonable doubt, does appear inconsistent with refusing to allow the jurors to consider a defence of self-defence relying on s 271(1).

[25] The learned judge reminded the jurors of the Crown's submission that, even if they accepted everything Mr Cleary said, accident would be negatived because reasonable people would anticipate or foresee that serious injury such as a skull

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3 At AR 55

4 At AR 67 and 68

5 In *Kaporonowski v R* (1973) 133 CLR 209 the High Court by majority upheld the decision by majority in *R* v *Kaporonowski* [1972] Qd R 465 that the defence of provocation applied only to offences in the definition of which an assault was an element

fracture was a possible outcome of punching hard at someone, while holding a large bottle in the hand. The jurors took very little time to return a verdict of guilty after retiring, and must be taken to have accepted that submission; or else they rejected Mr Cleary's evidence and accepted Mr Templeton's and the medical evidence.

[26] On the directions given, if the jurors either acted on Mr Cleary's account or had a reasonable doubt as to its accuracy, they were nevertheless satisfied that the defence of accident could be rejected, because grievous bodily harm could be foreseen from what Mr Cleary admitted doing. It is difficult to see, as a matter of logic, how the jurors would not equally have been satisfied that the force Mr Cleary used was likely to cause grievous bodily harm, thus excluding any defence under s 271(1), had that been left to them for their consideration. However, the jurors may have been much more willing to consider a defence termed 'self-defence', which readily admitted the use of force, than a defence termed 'accident', which asserted the force used was accidental. This Court has previously required that where self-defence is raised on the evidence, it be left to the jury and in proper terms (*R v Prow* (1990) 1Qd R 64; *R v Young* (2004) 142 A Crim R 571). The learned trial judge erred in withholding that defence, notwithstanding that Mr Cleary's counsel did not ask for the defence to be left.

[27] Counsel for the DPP informed the Court in the respondent's written submission that it accepted that the issue of self-defence under s 271(1) was one that should properly have been left to the jury, and that the failure to leave that defence was an irregularity going to the root of the trial. The respondent also, and equally fairly, submitted that it was not an appropriate case for the application of the proviso in s 668E(1A). Accordingly the only appropriate order is that the appeal should be allowed, and a retrial ordered. If the evidence follows a similar path self-defence should be explained to the jury for their consideration.

[28] **MACKENZIE J:** I have had the advantage of reading the reasons prepared by Jerrard JA and agree with them. I only wish to add the following. On the appellant's version of events, after he had been punched twice by the complainant, he struck him back twice. While his evidence as to his motivation for striking the complainant is ambiguous and perhaps not entirely consistent, on the most favourable version to him he was concerned that the complainant might strike him again and therefore threw the punches.

[29] One punch was with his left hand; the other was with his right hand which was clutching a bottle by the neck. From the description of how he was holding the bottle, its neck would have been facing the proximal side of his hand rather than the distal side, as it would be if the bottle was intended to be used as a makeshift club. He later said that, when he threw the punch at the complainant, "the bottle accidentally hit him", which implies that there was not a deliberate striking of the complainant with the bottle. However, there was no suggestion that he threw the punch without adverting to the fact that he was holding the bottle.

[30] Accident was left to the jury in relation to the situation where there were two punches, one of which was delivered with the hand with the bottle in it. An orthodox direction was given about the concept of an event occurring by accident. Then, the learned trial judge told the jury that if an ordinary person in the position of the appellant would not have foreseen grievous bodily harm to the complainant

as a possible outcome of his actions, namely hitting him with the bottle, the person would be excused by law.

[31] Putting the matter to the jury on the basis that the issue was foreseeability of grievous bodily harm as a possible outcome of hitting the complainant with the bottle rather than as a possible outcome of striking a blow with a fist holding a bottle in the way described does not, in my view, conclude, adverse to the appellant, the question whether the force used was such as to be likely to cause grievous bodily harm.

[32] On the best view of the facts for the appellant, in my view s 271(1), but not s 271(2) should have been left to the jury. On the basis of the appellant's evidence that there had been an unprovoked assault by the complainant on him, it was lawful for him to use such force as was reasonably necessary to make effectual defence against the assault provided the force used was not intended to cause death or grievous bodily harm and was not such as was likely to cause death or grievous bodily harm. There is no suggestion that the force used was intended to cause death or grievous bodily harm.

[33] At its highest for the appellant, he had, in my view, discharged the evidential onus sufficiently to require the issues of whether the force used was reasonably necessary to make effectual defence and whether the force used was such as was likely to cause grievous bodily harm to be left to the jury. Taking the defence case at its highest, which must be done for present purposes, I am not persuaded that, given the evidence about how the bottle was held and that the intention was to strike with fist only, it can be safely concluded, by a process of reasoning backwards from the fact that grievous bodily harm was in fact caused, that the force used must inevitably have been such as to be likely to cause grievous bodily harm. The proposition may not be weighty, but unless that conclusion could be drawn the defence should have been left to the jury.

[34] I agree with the orders proposed by Jerrard JA.