SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sheppard* [2005] QCA 235
PARTIES:	**R** **v** **SHEPPARD, Geoffrey John** (appellant)
FILE NO/S:	CA No 396 of 2004 DC No 153 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	28 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2005
JUDGES:	de Jersey CJ, White and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Conviction quashed** **2. Order a new trial**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – CONDUCT OF LEGAL PRACTITIONERS – where appellant convicted at trial of grievous bodily harm for hitting complainant and breaking his jaw – where appellant sentenced to 12 months imprisonment to be served by way of an intensive correction order – where appellant claimed he hit the complainant in self defence – where appellant's solicitor advised him not to give or call evidence – where defence counsel did not suggest at trial that appellant did not assault complainant – where defence counsel did not challenge witness' evidence of a confession by the appellant – whether miscarriage of justice from the incompetent conduct of case at trial *Ali v R* (2005) 214 ALR 1; [2005] HCA 8, followed *R v Birks* (1990) 19 NSWLR 677, cited *TKWJ v R* (2002) 212 CLR 124, followed
COUNSEL:	P J Callaghan SC for the appellant M J Copley for the respondent

SOLICITORS: Carew Lawyers 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 McMurdo J. I agree with the orders proposed by His Honour, and with his reasons.

[2] **WHITE J:** I have read the reasons for judgment of McMurdo J and agree with his Honour that the appeal should be allowed and the conviction quashed. I also agree with his Honour that a new trial should be ordered and it is for the prosecuting authority to decide whether it should proceed.

[3] **McMURDO J:** The appellant was convicted, after a trial in the District Court, of one count of doing grievous bodily harm. After he was convicted he spent eight days in custody before being sentenced to 12 months imprisonment to be served by way of an intensive correction order.

[4] He appealed against that conviction, originally on the ground that the verdict was not open. That ground is now abandoned and the appellant now argues that there was a miscarriage of justice from the incompetent conduct of his case at the trial.

The Crown case at trial

[5] The complainant, Mr Nally, had worked with the appellant in Gladstone. They were not on friendly terms. The complainant recalled an occasion, about a year prior to the offence, when the appellant said to him: "I'm going to wipe the nose off your face when you least expect it."

[6] At about 3.30 am on 1 February 2004, the complainant left a Gladstone nightclub. He had been drinking since the previous morning, and he had been to a party and then a hotel before being at the nightclub for some time. He was with a Mr Ball, and another man, and they left the nightclub at the same time. The complainant said that he was, at least by then, "pretty well drunk". He began to walk through a park when the next he could recall was that two people were helping him up from the ground. He thought that he had lost consciousness and he had a very sore jaw. Indeed, his jaw was broken. The evidence established that he suffered grievous bodily harm.

[7] He met up again with Mr Ball and they began to walk along the street to look for a taxi. The complainant said that he then saw the appellant, not having seen him earlier that night, and the appellant said to him: "What happened mate? Did you get a bit of a knock? This is for the $160 you stole off me. Come out here so I can finish you off." The complainant said that he and Mr Ball walked on to a café, being followed for a while by the appellant and others.

[8] Mr Ball said that he left the nightclub at the same time as did others, including the complainant, because the nightclub was then closing. He saw the complainant across the street, holding his jaw. He and the complainant began to walk towards the café when one of a group of persons called out: "Come on Matt (the complainant), come over here, we're going to finish you off … come on, come over here. I'll teach you for stealing this $160 bucks off me … I'm the one that hit you." Mr Ball had not seen this person before, but he then asked the complainant who it was, and he was told it was the appellant. Mr Ball later identified the appellant on a

photoboard and said that he was "pretty confident" and "reasonably certain" that it was the appellant who had called out.

[9] A Mr Stenner then worked at the same workplace as the appellant. He said that a few weeks after the incident, he had a conversation with the appellant about it. According to Mr Stenner, the appellant asked him "if something happened to Matthew" saying that he had "just heard something". Mr Stenner replied "What, after you king hit him?", to which the appellant said "Oh, is that what he's saying?". Mr Stenner told the appellant that the complainant had had to go to Brisbane to have surgery upon his jaw to which the appellant said "It's surprising what a hit – a punch to the back of the head can do … next time I see him again I'll – I'll go whack again", and as the appellant said this he punched a clenched fist into the palm of his other hand.

The Defence case

[10] The appellant did not give or call evidence. There was some testing of the prosecution evidence without there being any strong challenge to it. Consistently with the defence counsel's instructions, he could not have suggested that the appellant was not present or that there was no exchange between them. Nor could he have suggested that the appellant did not assault the complainant. The defence approach was to try to make the evidence of the complainant and Mr Ball seem unreliable, an approach which had some promise. It was not suggested to the complainant that the appellant had never threatened him, and in particular had never said that he would "wipe the nose off his face". There was some attempt to highlight discrepancies between the respective accounts of the complainant and Mr Ball. The possibility that the complainant's jaw was broken in some other way, such as by a fall without an assault, was also explored.

[11] Most importantly, the evidence of Mr Stenner was hardly challenged. It was only on the eve of the trial that Mr Stenner provided a statement to police. The defence were not provided with a copy until the morning of the trial. Mr Stenner was examined on a *voir dire*. In that testing of his evidence, no promising line of cross-examination emerged. Mr Stenner gave a plausible explanation for why he had not provided a statement any earlier. He was definite and consistent in his recollection of the conversation. Defence counsel suggested to him that he had not had much contact with the appellant at all, to which Mr Stenner agreed. From that enquiry, there emerged no indication that Mr Stenner had any reason to give untrue evidence or that his evidence was unreliable.

[12] Later that day, Mr Stenner gave his evidence before the jury. Again, his evidence-in-chief seemed to indicate no particular basis on which it might be discredited. When asked about the appellant's demeanour in the course of their conversation, Mr Stenner said that the appellant was in "a friendly type of mood". That seemed to encourage defence counsel to all but suggest that whatever was said was between friends in a jocular way, such that the appellant's words were not to be taken seriously. At one point, in what was a very short cross-examination of Mr Stenner, he appeared to concede that he could not "remember exactly what was said". The cross-examination ended there, without any suggestion that the appellant had not said words to the effect related by Mr Stenner. In re-examination, Mr Stenner confirmed that he did have a genuine recollection of what was said and that he had not understood a question in cross-examination when he had indicated otherwise. Counsel for the respondent described the cross-examination of Mr Stenner as an

attempt to "neutralise" that evidence. In my view, it had no effect other than to make it appear that the appellant accepted that he had made such statements or ones of like effect to Mr Stenner, and that he had thereby admitted that he was the one who had assaulted the complainant.

[13] Mr Stenner's evidence, and the absence of any real challenge to it was, to say the least, highly prejudicial to the defence case. Both the prosecutor's address and the trial judge's summing up placed particular importance upon this evidence and the fact that it was unchallenged. His Honour emphasised, several times, that it was never suggested to Mr Stenner that the confession had not been made. He told the jury that they could convict upon Mr Stenner's evidence alone, saying that: "Even if you have reservations or hesitations or strong criticisms of the evidence of (the events on the night in question) you … will not take your eye off the ball in relation to what has been the functional Crown case … the confession to Mr Stenner." His Honour continued:

> "If you act on – if you come to the conclusion that on that evidence alone you are satisfied beyond reasonable doubt then that may arguably be the end of the matter … you may well have thought that there was … an overly long concentration in the submissions on what happened at Flinders Parade. How much attention was paid to the evidence of Mr Stenner which arguably one way or another was the greater hurdle to overcome?"

The case on appeal

[14] The appellant argues that the conduct of his case provided no real prospect of an acquittal. The appellant says that his case should have been conducted on the basis that he assaulted the complainant but in self defence. It is argued that there is a significant possibility that he would have been acquitted if the case had been conducted in this way.

[15] The appellant accepts that he must demonstrate that his case was conducted in a way which cannot be reasonably explained and that there is a significant possibility that this irregularity affected the outcome: *TKWJ v R* (2002) 212 CLR 124; *Ali v R* (2005) 214 ALR 1; [2005] HCA 8. It was submitted for the respondent that in the consideration of the first of those issues, this Court should look only at the record of the trial, and that if there is an apparently rational explanation for the conduct of the defence case as appears from the record alone, that is the end of the matter. That submission cannot be accepted. In some cases a material irregularity leading to a miscarriage of justice will be apparent from the record. In many cases a miscarriage will have occurred because there was an arguable defence which was not at all indicated by the conduct of the defence case. For example, an appellant might have had an unanswerable alibi of which the jury heard nothing because of the incompetence of his lawyers. The assessment of the conduct of the case remains an objective one, but it is one upon the factual premises of what challenge could have been made to the prosecution evidence, and what evidence could and would have been given by the appellant had he been so advised.

[16] On the hearing of this appeal, affidavit and oral evidence was given by the appellant, the appellant's father and the solicitor who acted for the appellant at the trial. The solicitor was called by the respondent. Each of them was cross-examined. The appellant also tendered an affidavit from a Mr Bale who was not cross-examined.

[17] There are some differences between the respective versions of the appellant and his former solicitor, but it is unnecessary to resolve them or to express any view as to the reliability of either witness. In relevant respects there was ultimately no contest as to the effect of the appellant's instructions to his solicitor. And there is no reason not to accept that such further instructions would have been given as the appellant claims he would have provided if asked.

[18] The appellant said that he told his solicitor, Mr Krebs, that he had hit the complainant but in self defence. There can be no doubt that he gave instructions to that effect because the solicitor's file records them. His file note of a conference with the appellant on 1 July 2005 reads: "considered had valid defences of consent or self defence to fight he was involved in". And in the instructions to counsel prepared on 7 October 2004, the solicitor wrote: "Our client admits that he struck Nally in self defence". The appellant's version is that he had seen the complainant at the nightclub, that at one stage he was in a courtyard at that place talking to a young woman when the complainant came and sat a few metres behind him and began laughing at him. The appellant and the woman then walked away. He said that when he left the nightclub he noticed the complainant across the road a few feet away from the appellant's friend Mr Bale. The complainant was then swearing and waving his arms around as he walked over to them. The complainant said something finishing with the word "cunt" when the complainant then swung his arm around with a clenched fist aimed at the appellant's head. The punch missed but the appellant's immediate response was to punch him on the left side of his face and the complainant then fell. The appellant said that he related all of this to his solicitor. But according to the solicitor's affidavit, the appellant's instructions were that "Nally had invited the appellant to fight and he Nally had shaped up to him … the Appellant struck Nally once to the face, effectively, by way of pre emptive strike" and the appellant did not instruct him that Nally had thrown a punch at him.

[19] Unfortunately the solicitor did not take more detailed notes. His particular recollection as to a "pre-emptive strike" is unsupported by any note. But whatever was actually said by the appellant to his solicitor, the solicitor's assessment of it was that on the appellant's version he was acting in self defence.

[20] After the assault, according to the appellant, he and Mr Bale began walking along the street when the complainant and Mr Ball caught up with him, although they were on the other side of the road. The complainant and Mr Ball were yelling abuse at them but they did not respond and walked on to where they eventually caught a taxi. That version, within paragraph 33 of the appellant's affidavit, is apparently disputed by Mr Krebs as a version given to him. In Mr Krebs' affidavit he said: "I refer to paragraph 33. The information contained in those paragraphs [*sic*] is not consistent with the instructions provided by the Appellant or the account obtained from Bale." But Mr Krebs then said: "The Appellant instructed that there was no further encounter with Nally or any encounter at all with Ball. Bale confirmed that account." It is common ground then that the appellant's instructions were that there was nothing said by the appellant after the assault and, in particular, that the appellant did not say things such as "come here so I can finish you off … this is for the $160 you stole".

[21] The appellant denies making any threat of the kind which the complainant said occurred a year or so prior to the assault, although he agrees that they were on unfriendly terms. On the appellant's version he had been subjected to some

workplace bullying by the complainant and others over an extended time. The appellant was born in 1985 and was 18 at the time of the offence. He began work as an apprentice diesel fitter when he was 15, and shortly after his 16th birthday he began to work at the same place as the complainant, another man Mr Bonnici, and Mr Stenner, who gave the evidence of his implied confession. The complainant and Mr Stenner were older men, each about 30. He says there were a series of events involving the appellant, Mr Bonnici and Mr Stenner in the nature of bullying and at an incident in which Mr Stenner head butted the appellant, which shocked him but did not particularly hurt him. The appellant said that he reported this to his supervisors and expected that Stenner would be dismissed, but this did not occur. The appellant said that there was an incident involving the complainant the day before the complainant left that employment in which he believes the complainant stole about $70 which went missing from the appellant's wallet. The appellant reported that matter to his supervisor and also to the police. He said that from that time on, whenever he had seen the complainant "anywhere, in a pub or anywhere else he and his mates would always stare at me and I would end up leaving because I'm worried that they might jump me". The appellant related other incidents of bullying by Mr Stenner and of a further instance in which Mr Stenner assaulted him at work. It would often happen that as he walked past Mr Stenner at work, Mr Stenner would "drop an elbow into me, hitting me with his shoulder". The appellant's perception was that the complainant, Mr Stenner and Mr Bonnici were friends, formed a group distinct from other workers and were intent upon bullying him.

[22] In paragraph 44 of his affidavit, the appellant swore:

> "I do not specifically recall whether Brad Krebs asked me if I had ever said to Nally 'I am going to wipe the nose off your face when you least expect it', but I did tell him about the workplace issues that involved Nally."

[23] According to Mr Krebs' affidavit, the appellant made brief mention of an incident in which the appellant says paint was sprayed in his face and eyes, for which he received medical treatment. But Mr Krebs recalls that the appellant had said that it was Mr Nally who did that, rather than Mr Bonnici as the appellant now says. Mr Krebs recalls instructions as to the money said to have been stolen from the appellant's wallet, but says that the appellant told him nothing about any encounter with the complainant after the complainant had left this particular workplace. Apart from some brief instructions in relation to Mr Stenner, which were obtained on the day of the trial and which are discussed below, no instructions were given about Mr Stenner.

[24] Prior to and at the trial, Mr Krebs' consistent advice was that the appellant should not give or call evidence. As the appellant recalls, and Mr Krebs agrees, Mr Krebs advised the appellant, after receiving witness statements from the police, that the case against him was weak. Again, there are some differences in detail between the respective versions as to what Mr Krebs did or did not say to the appellant. But plainly the appellant was advised that he should not give or call evidence. In attendances with his solicitor, the appellant had the assistance of his father. Neither of them, of course, had any legal training or other ability from which to sensibly gainsay the advice of Mr Krebs. And the day of the trial, this advice was given without any anticipation that there would be evidence as Mr Stenner gave.

[25] On the morning of the trial, Mr Krebs and defence counsel showed the appellant the statement of Mr Stenner. Referring to the alleged confession, the appellant told them that he did not say those words, that he worked in a different department from Mr Stenner, and that he had no reason to go near him. Mr Krebs agrees with that evidence. The appellant says he also told his solicitor and counsel about the incident when Mr Stenner had head butted him, but Mr Krebs says that he was not told of that matter. It is plain that the lawyers did not endeavour to obtain any detailed instructions from which the Stenner evidence could have been substantially challenged. In particular, information was not sought as to why Mr Stenner would volunteer untruthful evidence against the appellant. There was no discussion of an application for an adjournment so that those matters could be investigated.

[26] Immediately after the trial began, counsel cross-examined Mr Stenner upon the *voir dire*. As I have mentioned, that revealed no promising line of cross-examination. There was no advice given to the effect that the strategy of not giving or calling evidence should be reconsidered, although the lawyers had no apparent basis for effectively challenging Mr Stenner's evidence.

[27] As Mr Copley for the respondent submits, the appellant's counsel made some progress in his cross-examination. He extracted from the treating doctor that the injury could have been caused, for example, by the complainant falling on to a hard surface, which was not unlikely if he was "pretty well drunk" and he had no recollection of how he came to be on the ground. From the cross-examination of the complainant, counsel established that the complainant had not seen the appellant earlier that night and he could identify the appellant as the maker of the remark only from some purported identification of his voice. There were also some inconsistencies on matters of detail between the complainant's evidence-in-chief, his evidence at the committal, and his statement to police. When cross-examining Mr Ball, he established that Mr Ball had consumed 18 stubbies, that previously Mr Ball had not been sure that it was the appellant whom he saw on the street and that Mr Ball had a conviction for an offence of dishonesty.

[28] But as already mentioned, the cross-examination of Mr Stenner was quite ineffective, and simply made it appear that the appellant accepted that he had said those things to him.

[29] In his address to the jury, defence counsel raised the possibility, amongst others, that the complainant was assaulted by somebody else and related that to the doctor's evidence that a blunt object could have caused the injury. He attacked the evidence of the complainant and Mr Ball along lines which were indicated, and to some extent supported, by the cross-examination. In relation to Mr Stenner's evidence, counsel repeated to the jury what Mr Stenner had said, before emphasising that the appellant did not have to explain anything and had a right to silence. He then diverted to some speculation as to Mr Stenner's source of information about the incident, which had led Mr Stenner to suggest to the appellant that he was responsible. It seemed to be an attempt to discredit those sources of information, but it was not an argument which discredited Mr Stenner's recollection of the appellant's admission. Counsel then appeared to concede that the statement was made by the appellant, submitting that it was "explicable" although the basis for the explanation was not developed. Then he argued that Mr Stenner's evidence that the appellant was in a "friendly type of mood" was inconsistent with a serious admission that he was the assailant. On the state of the evidence, counsel was left

with no effective argument in relation to Mr Stenner's evidence, and it is unsurprising that counsel's argument about it was so clearly unpersuasive.

[30] Defence counsel had two options. One was to try to make an impact upon the prosecution case by cross-examination, with the intention that the appellant would not give or call evidence. The alternative was to call at least the appellant and to conduct the cross-examination with that intention. Clearly the course of the cross-examination would be different according to whether it was intended that the appellant would give evidence. If he was not to give evidence, a line of cross-examination which suggested self defence would have had obvious disadvantages. And assuming that counsel had had instructions as to the long standing ill will by the complainant, Mr Stenner and others towards the appellant, a direct challenge to Mr Stenner's evidence upon the basis that he was trying to support his friend, the complainant, and have the appellant convicted, could have been disadvantageous. Suggestions of that history of disagreement might have suggested to the jury that the appellant did assault the complainant because of a long standing resentment towards what the appellant saw as the complainant's group.

[31] Had Mr Stenner not been called, there was a real prospect of making a sufficient impact upon the prosecution case by cross-examining as defence counsel did and by not calling evidence. Both the complainant and Mr Ball had been intoxicated on the night and, of course, neither said that he saw the appellant at the moment of the assault. The alleged threat by the appellant was well prior to the assault and the complainant had agreed that he had had no recent contact with the appellant. The event took place in the early hours of the morning, whilst it was still dark and as many people were leaving the nightclub at the same time. There was a real prospect of an acquittal by the conduct of the case in that way, apart from the impact of Mr Stenner's evidence.

[32] Once the evidence of Mr Stenner emerged, and that evidence was tested, upon the *voir dire*, the prosecution case became considerably stronger. That evidence had emerged late but Mr Stenner provided a plausible explanation. Counsel had no reason to expect that Mr Stenner's evidence could be discredited, and a realisation of that should have called for a reconsideration of the defence strategy. Absent any effective challenge to Mr Stenner, the jury was very likely to convict. Indeed, there was no significant prospect of an acquittal.

[33] The appellant's instructions had always been that he acted in self defence. The disadvantage of that case was, of course, that it conceded that the appellant was the assailant. But that was going to be established by Mr Stenner's evidence. There was some support for the self defence case in Mr Bale's evidence. And by calling the appellant, the defence could have had the jury hear the appellant's detailed account of his being bullied by the group of older men which included the complainant and Mr Stenner. Of course, that account may or may not be true and the jury may or may not have been persuaded by it. It is sufficient to say that there was a significant prospect that the jury may have been unable to reject it. Similarly, there was a significant prospect that the jury would not have been able to exclude self defence.

[34] As Gleeson CJ observed in *R v Birks* (1990) 19 NSWLR 677 at 684, a common theme running through the cases where this ground of appeal, a miscarriage of justice by the incompetent conduct of the defence case, is raised is that appellate

intervention is a matter about which the courts are extremely cautious. As his Honour said at 685:

> "As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions or involve areas of judgment or even negligence."

But in the present case, from the time the first witness in the trial was called, there was no reasonable explanation for conducting the case as defence counsel did, because a conviction was at least highly likely, whereas the alternative course, as I have described it, provided what was at least a significant chance of an acquittal. In that way there was what McHugh J described in *TKWJ v R*[1] as a material irregularity in the trial from which there was a significant possibility that the outcome was affected. And ultimately, there was a miscarriage of justice.

[35] The appeal should be allowed and the conviction should be quashed. The appellant has served eight days in custody and approximately two thirds of the intensive correction order. He submits that in all the circumstances, there should be no order for a new trial. In my conclusion, a new trial should be ordered and it should be left to the prosecuting authority to decide whether it should proceed.

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1 At 149 [79]; cited by Hayne J in *Ali v R* at 6 [18].