SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coomer* [2010] QCA 6
PARTIES:	**R** **v** **COOMER, Keith Seymour** (appellant)
FILE NO/S:	CA No 185 of 2009 DC No 73 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	5 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2009
JUDGES:	Keane and Holmes JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant convicted by jury of one count of doing grievous bodily harm – where complainant and second witness for the Crown gave several versions of incident – where third witness for the Crown gave version of incident inconsistent with second witness – whether inconsistency rendered third witness' evidence unreliable CRIMINAL LAW – GENERAL MATTERS – DEFENCE MATTERS – OTHER MATTERS – where appellant alleged evidence fit for jury's consideration of defences of accident and provocation – where appellant alleged learned trial judge erred in not directing jury to consider defences – whether learned trial judge so erred *Criminal Code* 1899 (Qld), s 1, s 23, s 620, s 668E *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited *Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34, cited *Kaporonovski v The Queen* (1973) 133 CLR 209; [1973] HCA 35, applied

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, cited
R v Chai (2002) 187 ALR 436; [2002] HCA 12, cited
R v Drier [2006] QCA 237, cited
R v PAH [2008] QCA 265, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, distinguished
The Queen v Soma (2003) 212 CLR 299; [2003] HCA 13, cited
Van Den Hoek v The Queen (1986) 161 CLR 158; [1986] HCA 76, cited

COUNSEL: S J Hamlyn-Harris for the appellant
M R Byrne SC for the respondent

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

[1] **KEANE JA:** On 23 July 2009 the appellant was convicted upon the verdict of a jury of one count of doing grievous bodily harm. The appellant was sentenced to three years imprisonment; 23 July 2010 was fixed as his parole release date.

[2] The appellant seeks to appeal against his conviction on two broad grounds:

(a) that the jury could not have been reasonably satisfied of the appellant's guilt beyond reasonable doubt because of discrepancies in the Crown case;

(b) that the learned trial judge erred in not directing the jury as to the defences of accident and provocation.

[3] I will discuss the arguments advanced in respect of these grounds after first summarising the evidence at trial.

The evidence at trial

[4] The appellant was working as a security guard at a nightclub in Surfers Paradise early in the morning of 29 January 2008. The complainant had been drinking all night in a nearby nightclub. At around 5.00 am, the complainant was walking back to the hotel where he was staying when he spoke to Mr Kara and Ms Lazaro who were cleaning the complex where the appellant was working. The complainant became rude and aggressive towards Mr Kara. The appellant and his fellow security guard, Mr Flanagan, approached the complainant. The appellant proceeded to escort the complainant down a non-operational escalator to the street.

[5] At some distance from the bottom of the escalator, in circumstances which were disputed, the complainant fell to the pavement, suffering a broken jaw as a result.

[6] Dr Edward Hsu, an oral and maxillofacial surgical registrar, said that he examined the complainant's injuries after the fall. There was no dispute that Dr Hsu's evidence established that the complainant's injuries amounted to grievous bodily

harm. Dr Hsu was of the opinion that the complainant's injuries were similar to a "guardsman's fracture" where a soldier faints and falls straight down and strikes the ground. There were no other injuries suggestive of a kick to the face or that someone had jumped on the complainant's body.

[7] The complainant gave evidence that he felt a hit on the back of his head and fell. He had given a number of other versions of the incident. The learned trial judge directed the jury that they could not convict on the complainant's evidence alone because of inconsistencies in the various accounts he had given of the incident. It may be accepted that the jury acted in conformity with this direction.

[8] Mr Flanagan and the cleaners said that they did not see what caused the complainant to fall. Mr Flanagan agreed in cross-examination that at the committal hearing he had said: "The guy turned around and done something to [the appellant]. I can't recall what, if he swung a punch or whatever. Got down to the bottom and then the guy started running."

[9] There were two other Crown witnesses, Mr Kucko and Mr Rodgers. These gentlemen were travelling in cars in opposite directions, and were stopped at nearby traffic lights. They gave different accounts of the incident.

[10] Mr Kucko gave evidence that he saw someone flying through the air and landing on the ground. He said he saw the appellant and another security guard come up and the appellant kick the complainant in the head and jump on his back with his full force while the complainant was lying on the ground. Mr Kucko agreed in cross-examination that his initial account to police was that he saw the appellant throw the complainant to the ground from the top of the stairs and then kick him in the face.

[11] Mr Rodgers' evidence was that he:

> "saw a guy running down the stairs where the escalators are and another guy chasing him down … He did say something to the guy he was chasing … It was – he was using the F word a bit … 'Come back here' … As they got to the bottom of the stairs they both took off in the direction north where I was heading in my truck … I watched them go up north and then the guy behind him finally got to him and he threw his right hand and connected with the guy who he was chasing and knocked him down … it hit him on the right-hand side of the face, and then automatically the guy fell down … He just lay there."

[12] The appellant gave evidence that he followed the complainant down the escalator. At the foot of the escalator, the complainant turned, spat in the appellant's face and then ran off. The appellant said that he gave chase but just as he reached out to grab the complainant, the complainant fell and hit his face on the pavement. The appellant said that he did not make any contact with the complainant. He did not hit or trip the complainant before he fell. After the fall the appellant tried to rouse the complainant by prodding him in the back twice with his foot. He did not kick him or stomp on him.

[13] In cross-examination the appellant said that he pursued the complainant because the complainant had spat upon him and he wanted to detain the complainant because of

that. He said that he did not know why he did not stay around and detain the complainant. He said he just wanted to go and get the spit off his face.

[14] I turn now to consider the arguments advanced in support of the grounds of appeal.

A reasonable verdict?

[15] The first ground of appeal is to the effect that the jury could not reasonably have been satisfied beyond reasonable doubt on all the evidence at trial of the appellant's guilt.[1]

[16] It may readily be accepted that the evidence of neither the complainant nor Mr Kucko would have been sufficient to establish the appellant's guilt beyond reasonable doubt. The complainant gave several versions of the incident; so did Mr Kucko.

[17] Further, so far as Mr Kucko was concerned, the absence of medical evidence of the kind of injuries one would have expected if the appellant had stomped on the complainant while he was lying on the ground is good reason to regard Mr Kucko's evidence as an insufficient basis for a conclusion of guilt beyond reasonable doubt.

[18] That leaves the evidence of Mr Rodgers. The principal thrust of the appellant's argument in this regard was that a conviction based on Mr Rodgers' account alone would be unreasonable. That is said to be because of the inconsistencies between his evidence and the evidence of Mr Kucko.

[19] But to the extent that Mr Kucko's evidence was clearly unreliable it does not afford a basis for doubting the reliability of Mr Rodger's evidence. The jury were, in my respectful opinion, entitled to regard the evidence of Mr Rodgers as a reliable narrative of the incident in which the complainant was injured. There was no reason to doubt his veracity, and his evidence was supported in material particulars by that of the complainant.

[20] It is then said on the appellant's behalf that the evidence of Mr Rodgers was consistent with the complainant tripping and falling face down onto the ground. But Mr Rodgers did not speak at all of the complainant tripping: rather, he spoke of him being hit and then "automatically" falling down.

[21] I would reject this ground of appeal.

An arguable defence of accident?

[22] The next ground of appeal concerns the absence of any direction by the learned trial judge that the jury should consider whether the grievous bodily harm suffered by the complainant occurred by accident. In this regard, it is argued that there was "some evidence fit for [the jury's] consideration"[2] that the complainant's injuries occurred by accident.

[23] Section 23(1)(b) of the *Criminal Code* 1899 (Qld) provides relevantly for present purposes that "a person is not criminally responsible for … an event that occurs by accident".

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1 Cf *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606; *R v PAH* [2008] QCA 265.

2 *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161.

[24] It is submitted on the appellant's behalf that on Mr Rodgers' evidence a reasonable jury could have concluded that the "event", being the occurrence of grievous bodily harm suffered by the complainant, was one that occurred by accident even if the appellant did strike the complainant. More precisely, of course, the issue is whether the jury could have been satisfied beyond reasonable doubt that the grievous bodily harm suffered by the complainant was not accidental.

[25] As to what is meant by accident in this context, as Gibbs J said in *Kaporonovski v The Queen*:[3]

> "It must now be regarded as settled that an event occurs by accident within the meaning of [s 23(1)(b)] if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person".

[26] On behalf of the respondent, it is submitted that even if one accepts the evidence of Mr Rodgers there was no evidence fit for the jury's consideration that the complainant's injuries occurred by accident.

[27] There is force in the respondent's submission. If a person strikes on the head a person who is fleeing from him on a footpath in a built-up area, it is, to say the least, strongly arguable that a reasonable person would foresee that grievous bodily harm may result from the blow. It is not necessary that the precise nature of the grievous bodily harm, or the precise mechanism whereby it might be inflicted, be foreseeable. A blow of the kind struck here might not always lead to a fall with serious injuries, but it is readily apparent that injuries of the kind which occurred here might well occur.

[28] On the appellant's behalf, reference is made to the decision of the High Court in *Stevens v The Queen*[4] in which the majority of the High Court emphasised the importance of ensuring that an accused person should not be denied a fair chance of acquittal by the jury where there is some evidence of accident.

[29] In this case the appellant did not seek a direction from the learned trial judge that the jury should consider the defence of accident. In *Stevens v The Queen*, such a direction had been sought from the learned trial judge and refused. It was this refusal which was held to be an error. In the present case, it is difficult to say that the learned trial judge erred so as to enliven the right of appeal to correct "a wrong decision [on a] question of law" conferred by s 668E(1) of the *Criminal Code*.[5]

[30] It must be accepted that a trial judge is obliged to explain the law to the jury "in a manner which relates it to the facts of the particular case and the issues to be decided",[6] but the directions which a trial judge must give depend upon the real issues in the trial.[7] In my view, it is difficult to say that the learned trial judge erred in failing to discern that an issue as to accident had arisen in this case even on the most favourable view of the evidence for the appellant.

[31] The suggestion that the learned trial judge should, of his own motion, have given a direction in relation to s 23(1)(b) of the *Criminal Code* raises a question as to

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3 (1973) 133 CLR 209 at 231.
4 (2005) 227 CLR 319.
5 *The Queen v Soma* (2003) 212 CLR 299 at 303 – 304 [11], 305 [15] and 312 [42].
6 *R v Chai* (2002) 187 ALR 436 at 441.
7 Section 620(1) of the *Criminal Code*.

whether the evidence of accident was such that his Honour was in error in failing to conclude that he should direct the jury to consider a defence which had, at best, only the faintest evidentiary basis and which proceeded on the assumption, denied by the appellant, that he did actually strike the complainant. That a direction as to accident was not sought by the defence is not sufficient of itself to conclude the question whether the trial judge should nevertheless have given the direction as to accident against the appellant,[8] but the circumstance that no such direction was sought provides some support for the view that his Honour did not err in failing to conclude that the prospect of an acquittal on the ground of accident was so remote that the appellant's best chance of an acquittal lay in adhering to the stance which had been adopted by the defence. In my respectful opinion, this Court should be slow to reach a contrary view.

[32] The question is not whether the learned trial judge should have concluded that there was a basis in the evidence on which the jury could reasonably have entertained a doubt as to whether the appellant turned his mind to whether the blow which he was about to strike the complainant would cause the latter to suffer a fall causing a broken jaw, or as to whether the appellant believed that there was a likelihood that such an injury would result. The question is whether the judge should have concluded that the jury could entertain a reasonable doubt that, in the scenario on which the arguable defence of accident depends, a bodily injury to the complainant of "such a nature that, if left untreated, would … cause or be likely to cause permanent injury to health"[9] would not reasonably have been foreseen by an ordinary person. I am unable to say that his Honour erred in law in failing to conclude that there was sufficient evidence of accident to engage s 23(1)(b) of the *Criminal Code* and directing the jury accordingly.

[33] On this basis, the appellant can succeed on appeal only if the absence of a direction on accident occasioned a "miscarriage of justice" within the meaning of that phrase in s 668E(1) of the *Criminal Code*. The absence of a direction will have occasioned a miscarriage of justice only if the appellant was thereby denied a reasonable prospect of acquittal.[10]

[34] At trial the appellant did not seek to raise a defence of accident, evidently preferring to put his case on the footing that he did not strike the complainant at all, the prosecution evidence that he did being insufficient to prove his guilt beyond reasonable doubt. One can well understand why his lawyers pursued this course and shunned the possibility of inviting the jury to focus upon the evidence that the appellant struck the complainant while the complainant was running away from him and to consider whether the consequences of that blow were accidental.

[35] Even if one were to conclude that it would have been prudent for the trial judge to have given a direction in relation to s 23(1)(b) of the *Criminal Code*, I do not consider that there is any reasonable possibility on the evidence that such a direction would have affected the verdict. Accordingly, no miscarriage of justice within the meaning of s 668E(1) occurred.

[36] I would reject this ground of appeal.

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8 *Pemble v The Queen* (1971) 124 CLR 107 at 110 – 118; 132 – 133; *Fingleton v The Queen* (2005) 227 CLR 166 at 196 – 198 [77] – [80]; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161 – 162; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41].

9 See the definition of "grievous bodily harm" in s 1 of the *Criminal Code*.

10 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38], 28 – 29 [100].

The arguments on appeal: an arguable defence of provocation?

[37] The appellant also argues that the defence of provocation was raised on the evidence even though he did not give evidence that he was provoked or that he struck the complainant in the course of reacting to that provocation.[11]

[38] It is not necessary to deal with this submission at any length. It is acknowledged on the appellant's behalf that it is not open to this Court to uphold this submission. That is because the decision of the High Court in *Kaporonovski v The Queen*[12] is binding authority for the proposition that provocation is not available as a defence to a charge of causing grievous bodily harm. For that reason this ground of appeal must be rejected.

Conclusion and orders

[39] The appellant's grounds of appeal cannot be accepted.

[40] The appeal should be dismissed.

[41] **HOLMES JA:** I agree with the reasons of Keane JA and the order he proposes.

[42] **MARGARET WILSON J:** The appeal should be dismissed for the reasons given by Keane JA.

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11 Cf *R v Drier* [2006] QCA 237 at [23]; *R v Pangilinan* [2001] 1 Qd R 56 at [25].

12 (1973) 133 CLR 209.