SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hardy* [2010] QCA 28
PARTIES:	**R** **v** **HARDY, Pamela Claire** (appellant)
FILE NO/S:	CA No 308 of 2009 DC No 3026 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence – Delivery of Reasons
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered 19 February 2010 Reasons delivered 26 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2010
JUDGE:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore 19 February 2010:** **1. The appeal against conviction for counts 1, 2 and 3 of the indictment be allowed;** **2. The convictions be set aside;** **3. A retrial of the offences for counts 1, 2 and 3 be ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION AND SENTENCE – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where appellant convicted of three counts of seriously assaulting a police officer acting in execution of his duty – where all counts occurred after the police officer had handcuffed the appellant – where trial judge engaged in extensive discussion with jury – adequacy of directions — failure to link directions on law to the evidence – whether trial judge misdirected jury – whether summing-up otherwise apt to confuse – whether appellant denied procedural fairness *Criminal Code* 1899 (Qld), s 254, s 271 *Police Powers and Responsibilities Act* 2000 (Qld), s 365 *Transport Operations (Road Use Management) Act* 1995 (Qld), s 80(2), s 80(3)

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
Howe v R (1980) 32 ALR 478; (1980) 55 ALJR 5, cited
Morris v Beardmore [1981] AC 446; [1980] 2 All ER 753, cited
Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, cited
R v Patience (1837) 7 C&P 775; (1837) 173 ER 338; [1837] EngR 545, cited
R v Turner [1962] VR 30, cited
R v Whalley (1835) 7 C&P 245; (1835) 173 ER 108; [1835] EngR 909, cited
Wiltshire v Barrett [1966] 1 QB 312; [1965] 2 All ER 271, cited

COUNSEL: J Sharp for the appellant
G Cummings for the respondent

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

[1] **MUIR JA:** The appellant was convicted on 12 November 2009 after a trial of three counts of seriously assaulting a police officer acting in the execution of his duty and acquitted of a fourth such count. She appeals against her convictions on the grounds discussed below which, on the hearing of the appeal, were substituted by leave for the existing grounds.

The relevant evidence

[2] It will be useful to give a brief account of the evidence before discussing the grounds of appeal. There were three witnesses, Senior Constable Singh, the complainant, Constable Cameron, who was on duty with the complainant at the time of the subject incident, and Dr Ready, who treated the complainant for injuries sustained by him in the incident.

[3] In his evidence-in-chief the complainant said that on 12 October 2005 he was in a police car with Constable Cameron when he decided to conduct a random breath test of the driver of a Holden sedan. The complainant's vehicle followed the sedan and stopped near it when it stopped in the driveway of a vacant block of land. The appellant, who had a male passenger, alighted from the sedan and walked towards the complainant. The complainant introduced himself and requested that the appellant undertake a breath test. She failed to blow sufficient air into the breath testing device for it to operate on three occasions. The complainant then warned her that she would be arrested if she did not provide a full specimen. On the fourth attempt a reading above the legal limit was registered. The complainant then informed the appellant that she was required to accompany him to the Sandgate Police Station for the purpose of a further test. The appellant demanded that "a female officer be present at the scene" and was told that there were no female officers working that night.

[4] Also in the complainant's evidence-in-chief, this exchange took place:

> "And then what did she say? What happened next?-- And at this point in time, your Honour,[1] she started to get a bit agitated and she refused to walk back into the police car and she started - she started obscenities and I had to place handcuffs on her because her violent - her behaviour started to be a bit aggressive at that time, your Honour.
>
> And can you just give us a description or further detail about how did she refuse go back into the car, was this verbally, or physically?
>
> HIS HONOUR: How did she refuse, what did she say, what did she do?
>
> MS CUPINA: Yes?-- She refused saying, 'I'm not going with you', along the lines and I said - I told her that, 'You have to come back to the police station with us' and yes, she demanded for a female officer be present, which I've explained to her that 'There is no female officers working' and I tried - from memory, your Honour, I tried to walk her back to the car, to the police car, and she - I remember holding her hand and trying to get control of her and she had freed her hand and I then had used cuffs to restrain her to that point."

[5] Asked to state precisely what occurred, the complainant said, in effect, that as the incident was almost four years ago, he couldn't recall the exact words. He then gave an account to the following effect. The appellant said to him that she wasn't going back to the police station, whereupon he told her that if that was the case, she would be arrested and taken there. She used vulgar and offensive language, whereupon he took out his handcuffs and placed them on her. The appellant then "started to be aggressive, refusing and resisting … throwing her hands around and kicking … in order to set herself free … in getting to the police car" and he was obliged to use physical force. The appellant was handcuffed with her hands in front of her body. Constable Cameron came to the complainant's assistance. As the two police officers tried to force the struggling appellant into the police car she abused them and spat twice in the complainant's face (count 1), kicked the complainant in the face (count 2), kicked the complainant in the groin (count 3) and scratched the complainant (count 4).

[6] In cross-examination, the complainant accepted that he had given evidence to the following effect at a committal hearing in September 2006. When the complainant asked the appellant to get into the police vehicle, he told her that she was under arrest. The appellant then requested that a female police officer be present at which stage the complainant decided to handcuff the appellant because there was no need for her to "bring [up] that issue about getting a female officer". It gave him "a clear indication that something is likely to happen", namely, that the appellant was "going to be in a position where she is going to basically chuck a tantrum". It was as the complainant was putting handcuffs on the appellant that she became physically aggressive. Even if the appellant was happy to get into the police vehicle, he would still have handcuffed her for safety reasons. The appellant was handcuffed with her hands behind her.

[7] The complainant also said in his cross-examination that the appellant was "throwing her body around, … throwing her hands and legs around. At some point in time …

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[1] The complainant expressly directed to the primary judge many of his answers to questions asked by counsel.

she had scratched [his] hand in the process of restraining her …". The kick in the face, which was of sufficient severity to cause the complainant to go backwards, caused "just swelling on the lips", he accepted that the kick to his face occurred when the appellant "was probably trying to free herself". When he was kicked in the groin, the appellant was lying down and was being held by Constable Cameron and "was kicking in order to free herself from that position". The complainant accepted that he may have been kicked accidentally. His hand was bitten as he attempted to cover the appellant's mouth to prevent her spitting. She attempted to bite his hand and scratched it but he could not be certain about how the scratching happened.

[8] In re-examination, the complainant said that he arrested the appellant "when she had resisted from getting in the police car".

[9] In his evidence-in-chief, asked what he saw and heard, Constable Cameron said:

> "Sorry, yeah. I saw that he conducted - or attempted to conduct a breath test on the [appellant]. This took a little bit longer than normal and it appeared that he was having a few issues there. At the same time I was still talking with Tony Marshall but obviously watching what Senior Constable Singh was doing. Then I saw Senior Constable Singh pull his handcuffs out, so I've immediately then said to Tony Marshall, …"

[10] There was an objection, which was sustained, and the following occurred:

> "All right. Well, just tell us what you saw and heard in respect of that?-- Okay. Well, then I've walked from where Tony Marshall was and towards Constable Singh to assist. By the time I've got to him, he's got the handcuffs on."

[11] Constable Cameron said he saw the complainant pulling out his handcuffs and then heard the appellant "start yelling" abusive, vulgar language.

[12] As he and the complainant tried to force the appellant into the police car, she turned around to the complainant and spat twice. He saw moisture of some description on the complainant's face, which the complainant wiped off.

[13] In cross-examination, Constable Cameron admitted that it was after the appellant was handcuffed that she became physically aggressive and yelled obscenities. He accepted that at the committal hearing he had said that the appellant was handcuffed "at the back".

[14] It is now convenient to turn to the grounds of appeal and to consider grounds 1 and 2 together. They are:

Ground 1: the primary judge misdirected the jury in respect of whether the complainant was acting in the exercise of his duty at the time of the assaults.
Ground 2: the summing-up was otherwise apt to confuse.

The appellant's contentions on grounds 1 and 2

[15] The argument in respect of ground 1 advanced by counsel for the appellant was to the following effect. While the defence case was that no lawful arrest had been made at the relevant time, making the use of force to any extent unlawful, it was open to the jury to find that an arrest had been or was being made lawfully. In that

event, it was important for the jury to be directed clearly that they should consider whether the force used by the complainant in applying the handcuffs was reasonable in the circumstances.

[16] The primary judge identified the pivotal issue in the trial as being whether the complainant was acting in the exercise of his duty at the time of the alleged assaults but he failed to direct that "if the police officer uses excessive force he is not acting in the execution of his duty". Even if the jury accepted that a lawful arrest had been made, or was being made, it was open on the evidence for the jury to conclude that the complainant was "acting outside the execution of his duty if the application of handcuffs constituted using excessive force".

[17] A later direction in which the primary judge read s 254 of the *Criminal Code* 1899 (Qld) to the jury was helpful but the primary judge failed to direct the jury to consider whether, if they concluded that an arrest had been made, or was being made lawfully, the application of the handcuffs was reasonable to overcome the force being offered by the appellant.

[18] The judge's direction in which he gave examples of when the applying of handcuffs may or may not be lawful, included only brief reference to the evidence given on trial. The direction "served to focus the jury's mind on the lawfulness of arrests, rather than on the question of excessive force". Not only did the directions not focus on the evidence, but were in parts wrong and confusing.

The summing-up relevant to grounds 1 and 2

[19] The primary judge commenced his directions on the issues for determination by the jury by telling the jury that "the critical or principal issue upon which the offences … are based is premised or founded on the fact that [the complainant] must have been lawfully acting in the execution of his duty at the time he alleges he was assaulted by the [appellant]. So that is pivotal to all charges before the Court". He continued:

> "In considering that very important crucial issue you take a two-tiered approach. Firstly, are you satisfied beyond reasonable doubt that [the complainant] was acting in the execution of his duty, and that implies lawfully acting, at the time he was allegedly assaulted by the [appellant]? Secondly, are you satisfied beyond reasonable doubt that he was so assaulted in the manner alleged by the prosecution on any one or all of the charges before the Court?"

He directed to the effect that a police officer could only be acting in the execution of his duty in arresting a person if the arrest was lawful and then said that:

> "… it is lawful for a police officer to arrest an adult person without a warrant where the police officer 'reasonably suspects' the adult has committed or is committing an offence if it is 'reasonably necessary' for one or more of a number of reasons which includes 'to preserve the safety or welfare of any person including the person arrested'."

[20] His Honour directed that if a police officer is exceeding his duty, resistance to him is not an assault and that "When a police officer illegally arrests a person, he is not engaged in the discharge of his duties".

[21] The primary judge then proceeded to discuss the evidence in some detail, quoting extracts from it. This discussion occupies pages 31 to 42 of the transcript. When

the Court resumed after a luncheon adjournment, the primary judge discussed with counsel a note received from the jury which queried, "Is it lawful to handcuff a person before they are placed under arrest?" His Honour referred to the note and read s 254 of the *Criminal Code* 1899 (Qld) to the jury. He then proceeded to give some examples of when the handcuffing of a person may be justified, explaining:

> "Now, if there was any difficulty with that person by resisting, he would be entitled to handcuff him to execute that arrest, because that would seem to me to be reasonable force. *But it's a matter of discretion, I suppose*, and similar to what the police officer said in his evidence that was put to him, if the person who is being arrested for a start, if he goes quietly, there's no difficulty. It would seem to me, to be a very high-handed action on the part of any police officer to put handcuffs on a person before they are placed under arrest, it's as simple as that.
>
> I mean, you could say that would probably - well, that would be acting unlawfully. That would be acting illegally because if you weren't perfecting an arrest, what would you be doing putting handcuffs on people. So effectively, I mean, I suppose, technically it would be an assault. I mean, if there is no cause to handcuff a person, then handcuffing a person would be technically an assault, and *the position is that if you're going to arrest someone and you're acting in the normal execution of your duty, then it would be only where you were concerned, as I say with the person's safety, and I think I mentioned that to you, where to arrest someone without warrant, it is lawful for a police officer without warrant to arrest an adult, if the police officer reasonably suspects has committed or is committing an offence, or if it is reasonably necessary for one or more of the following reasons*, so this is one or more of the following reasons.
>
> Then there is a list of reasons which includes 'To preserve the safety or welfare of any person including the person arrested'. See that implies that the person is arrested, but to - you know, you can't go up to someone in the street and handcuff them, even if you - just for no reason unless, as I say, you reasonably suspect that the person has committed an offence, *or* is committing an offence if it is reasonably necessary, in other words to arrest a person for one or more of the following reasons.
>
> So to answer your question, 'Is it lawful to handcuff a person before they are placed under arrest?' The simple answer is, 'No, it is not lawful'." (emphasis added)

[22] Another juror asked his Honour:

> "So the application of handcuffs can't be considered using reasonable force, in opposition to force if there is some disturbance and you haven't had the chance to arrest yet?"

His Honour then, after providing an example of conduct which would, in his Honour's view, have justified an arrest, said:

> "The police officer might reasonably suspect that a person has committed an offence, or he might be in the act of committing an

> offence, he might be belting up a neighbour, for example. Well, in that instance, the police officer would be entitled to put handcuffs on the person if he considers that that was reasonably necessary force to overcome the force that was being used by the individual."

[23] The summing-up proceeded:

> "*So the answer is it's all a matter ultimately of discretion* but while the person might not specifically be under arrest, he mightn't go up and say, 'Look, you're under arrest' because he wants to investigate the matter, but if he feels it's necessary to restrain the person until that is determined, well, I think that in those circumstances it would be considered reasonable for handcuffs to be placed on the individual and he wouldn't be charged with unlawful assault or something of that nature, as the police officer wouldn't be acting outside the scope of his duty, but he's got to reasonably suspect that the relevant person has committed an offence, *or* is committing an offence before he can arrest him, and to do that, if as I say there is some melee and the only way to kerb the melee would be to apply handcuffs, well then these things might happen simultaneously.
>
> …
>
> So there is sometimes a finetuning situation, but the answer to your question, as I say, probably - or the question implies other questions, 'Is it lawful to handcuff a person before they are placed under arrest?' Well, I suppose you would have to say that depends on the circumstances. Normally it wouldn't be lawful, but if the person was at that time engaging in some sort of disorderly manner to curb that activity, then it would be reasonable. Does that answer the question?"

[24] Another juror asked:

> "When people are arrested, are they usually then placed in handcuffs or do they sometimes not be placed in handcuffs and they will be under arrest?"

His Honour responded:

> "Well, the latter applies. I mean, it is not compulsory to apply handcuffs when you arrest someone because, as I said, that particular section of the Code that I just read out says: …"

[25] After reading out s 254 of the *Criminal Code* 1899 (Qld), the primary judge added:

> "So if there is no force being exercised by the individual who is charged with an offence, then it is not necessary to use handcuffs, but if the person was arrested and handcuffs were put on him, even though he wasn't resisting, I suppose you could say that that was lawful, but it really would be probably an overreaction in that situation. So, again, if a person is arrested, handcuffs don't necessarily have to be used. All right."

His Honour then invited further questions. Another juror accepted the invitation but the exchange that took place is of little relevance for present purposes.

[26] The jury withdrew at 3.05 pm and a discussion took place between the primary judge and counsel. The jury returned at 3.12 pm. His Honour then read from the transcript the following passage from the cross-examination of Constable Cameron in which the officer had expressed an opinion about the arrest powers under the *Police Powers and Responsibilities Act* 2000 (Qld) and his own practices in that regard:

> "Now, also, sir, the power to arrest, you're familiar with that power, aren't you?-- Yes.
>
> The arrest power?-- Yes.
>
> That's governed by an Act in Queensland called the Police Powers and Responsibilities Act; isn't it?-- That's right.
>
> And to your knowledge is it correct to say that you must have grounds to arrest somebody, you can't just arrest somebody at random?-- Yes.
>
> Right. All right. And, for example, on the hypothetical proposition, if you like, that someone's just blown over the limit at the side of the road, you wouldn't automatically arrest them and throw the cuffs on them, would you?-- No, no.
>
> It's only when issues arise or possible issues arise in relation to a person being abusive to police as in obstructive?-- Yes.
>
> And that's an offence in itself?-- Yes.
>
> Or pushing police away, that type of thing?-- Yes.
>
> And looks as if that person is not going to comply with a direction to take a further test?-- Yes.
>
> Yes, right. And where, of course, there are no safety issues apparent, other than the very fact that someone might have blown just over the limit or something like that, there wouldn't be a safety issue that would be involved in arresting a person, would there?-- No, that's right."

[27] Having read this evidence, his Honour observed that it, to some extent, encapsulated what he had "been saying in the last 15 minutes …". He said, "*It is all a matter of discretion really*, so that hopefully has explained to you that particular issue, but as I say it is very important that you be clear on all these issues and I thank you for your preparing that note". (emphasis added)

Consideration of grounds 1 and 2

[28] If the jury had identified the relevant issues after the above discussion had taken place, let alone been clear on them, it would have been truly remarkable. The issues arising from the evidence included:

(a) whether the complainant was engaged in either the lawful execution of process or in arresting the appellant when he handcuffed her;

(b) whether, if yes to (a), the appellant used force in resisting arrest or execution of process (s 254);

(c) if (b) was answered affirmatively, whether the complainant, in handcuffing the appellant, used more force than was reasonably necessary to overcome the force used by the appellant (s 254);

(d) whether, if yes to (c), the appellant used such force as was reasonably necessary to make an effectual defence against the complainant's assault (s 271); and

(e) whether the complainant used excessive force in handcuffing the appellant.

[29] If an arrest is unlawful, subject to my later observations, acts done in effecting and in pursuance of the arrest will be illegal.[2] Resistance to an arresting officer may not be an assault unless disproportionate force is used.[3] Conversely, if an arrest is lawful, the arresting officer is entitled to use such force as is reasonably necessary to give effect to the arrest.[4]

[30] Neither counsel nor the primary judge appear to have appreciated that, irrespective of whether the appellant had been lawfully arrested, the complainant may have had lawful justification for the use of force. Under s 80(2) of the *Transport Operations (Road Use Management) Act* 1995 (Qld) ("the Transport Act"), an authorised police officer may request that a person provide a specimen of breath in the prescribed circumstances. Under s 80(3), the police officer may require the specimen of breath to be provided at a "conveniently located" police station "if the police officer believes on reasonable grounds that it is reasonable for such person to be taken to a police station for the purpose, having regard to the circumstances of the case". If the person of whom a requirement under sub-section (3) is made "fails to go voluntarily", any police officer may use "such force as is necessary" to take the person to the police station. (Sub-section (5)).

[31] Section 254 of the *Criminal Code* 1899 (Qld) provides:

> "**254 Force used in executing process or in arrest**
>
> It is lawful for a person who is engaged in the lawful execution of any sentence, process, or warrant, or in making any arrest, and for any person lawfully assisting the person, to use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest."

[32] The section, as its words make plain, authorises a person lawfully executing any sentence, process or warrant, or in making an arrest, to use the stipulated degree of force "necessary to overcome" force being used by a person "resisting such execution or arrest". Consequently, if the appellant was not using force prior to being handcuffed, there would be no scope for the application of s 254, at least in respect of any assault constituted by the act of handcuffing. There should have been a clear direction to that effect: there wasn't. Also, it should also have been made plain to the jury that their determination of the sequence in which events occurred was of central importance to their determination of whether the appellant was handcuffed by the complainant when lawfully executing any process or in making an arrest and, if so, whether excessive force had been used by the complainant. The summing-up did not attempt to link the evidence to these considerations.

[33] The prosecutor, in her address, based the entitlement to arrest on the appellant's alleged refusal of a direction to accompany the complainant to the police station. Defence counsel's contention was to the effect that no basis for an arrest had been

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2 *Morris v Beardmore* [1981] AC 446; [1980] 2 All ER 753.

3 *R v Patience* (1837) 7 C&P 775; 173 ER 338; *R v Whalley* (1835) 7 C&P 745; 173 ER 108.

4 *R v Turner* [1962] VR 30 at 36; *Wiltshire v Barrett* [1966] 1 QB 312 at 331, 332 and *Howe v R* (1980) 32 ALR 478 at 481.

established and that the complainant's explanation that the appellant had been handcuffed "for her safety and my safety and my partners' safety …" was spurious. He further argued that there were no grounds for an arrest under s 365 of the *Police Powers and Responsibilities Act* 2000 (Qld).

[34] Having regard to the prosecution and defence cases, the primary judge was required to direct the jury on the findings of fact which, if made, would result in the conclusion that the arrest was lawful, or unlawful, as the case may be. He directed that it was lawful to arrest where there was a reasonable suspicion that "the adult has committed or is committing an offence if it is 'reasonably necessary' for one or more of a number of reasons which includes 'to preserve the safety or welfare of any person including the person arrested'". The direction, given with respect to s 365(1)(g) of the *Police Powers and Responsibilities Act* 2000 (Qld), left open the possibility of a finding that a lawful arrest had occurred for a reason not relied on by the prosecution, not addressed on by defence counsel, or not referred to in the summing-up. The summing-up failed to mention the basis for the arrest relied on by the prosecution.

[35] The direction in paragraph [25] was also wrong if, as appears to be the case, it meant that the mere fact that a person is arrested is sufficient justification for his or her handcuffing. That erroneous or misleading direction was of significance in the scheme of things. Moreover, the absence of any precise guidance as to a principle or test in this and other parts of the summing-up, was also unfortunate.

[36] Ill-advisedly, the primary judge allowed himself to be drawn into a detailed and somewhat opaque and even contradictory discussion of the circumstances in which a police officer might handcuff a person before arresting him or her. In the course of the discussion he ventured opinions as to when it may or may not be reasonable for a police officer to handcuff a citizen and even on police practices in that regard. That discussion, even in the absence of the difficulties about to be discussed, was likely to have distracted the jury from addressing the questions they needed to address to perform their function.

[37] Some of what was said in this discourse, for example, the concluding words of the passage quoted in paragraph [21] above, although wrong, was beneficial to the appellant. However, other parts of his Honour's directions were both wrong and potentially prejudicial to the appellant. In the course of the discussion the primary judge, although asserting that the use of handcuffs was "all a matter of discretion really" and "a matter ultimately of discretion", made observations which qualified those assertions. But, even if the passages in the summing-up containing these words were not demonstrably wrong as a result of these qualifications, they were confusing, unclear and unhelpful to the jury.

[38] In the passage quoted in paragraph [27] above, which came after the other references to discretion, the primary judge said, in effect, that if a person was arrested he could be handcuffed lawfully regardless of that person's conduct: "it is all a matter of discretion really". That direction was wrong in law. The degree of force which could be used lawfully by the complainant was not a matter for his discretionary determination. A police officer executing process or effecting an arrest may use only such force as is reasonably necessary[5] and the jury should have been given a clear direction to that effect.

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[5] *R v Turner* [1962] VR 30 at 36; *Wiltshire v Barrett* [1966] 1 QB 312 at 331, 332 and *Howe v R* (1980) 32 ALR 478 at 481.

[39] I should mention that if there was any statutory justification for the use of force other than provided by s 254 (such as s 80 of the *Transport Operations (Road Use Management) Act* 1995 (Qld)), the prosecution did not rely on it on the trial.

[40] The directions, although discussing circumstances in which the handcuffing of a person by a police officer may be lawful, failed to direct the jury that if the handcuffing of the appellant involved the use of excessive force, the complainant would not have been regarded as acting in the execution of his or her duty[6] when exerting that force.

[41] Extricating the issue of excessive force from defence counsel's address to the jury is no easy task: it was obscured by his concentration on the alleged unlawful arrest. He did, however, submit to the jury that the handcuffing was not in the execution of the complainant's duty and that the appellant's reaction "… is better explained by the wrongful aspect of the cuffing and the arrest …".

[42] Irrespective of how the point was obscured in submissions to the primary judge and in addresses, it was well open on the evidence elicited from both police witnesses in cross-examination and the summing-up contained a discussion of when handcuffing may or may not be permissible. The primary judge should have seen that the question of whether the handcuffing constituted the use of excessive force was fairly raised on the evidence and summed-up on it.[7]

[43] The summing-up, apart from containing material errors of law, was confusing and, at times, contradictory, and failed to "identify the real issues in the case, the facts that are relevant to those issues and [provide an] explanation as to how the law applies to those facts".[8] The summing-up was more likely to confuse and mislead the jury than to assist it and, as a result, the appellant was denied procedural fairness.

Ground 3 - Evidence that the passenger in the appellant's vehicle was known to police was irrelevant, highly prejudicial and wrongly admitted

[44] In view of the foregoing conclusions, it is unnecessary to consider this ground.

Conclusion

[45] Plainly, the appeal had to be allowed and the Court ordered as follows on 19 February 2010 that:

1. The appeal against conviction for counts 1, 2 and 3 of the indictment be allowed.
2. The convictions be set aside.
3. A retrial of the offences for counts 1, 2 and 3 be ordered.

[46] The subject offences were alleged to have been committed in 2005. The appellant has already served part of the sentence imposed and, presumably as a result of the effluxion of time, the evidence on trial of the complainant and Constable Cameron differed in material respects from that given by them on the committal. The Director of Public Prosecutions may wish to consider these matters in deciding what course to take in relation to this matter.

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6 *Morris v Beardmore* [1981] AC 446; [1980] 2 All ER 753 at 759, 760 (H.L.); *Howe v R* (1980) 32 ALR 478 at 481.

7 See *Pemble v The Queen* (1971) 124 CLR 107 at 117 – 118 and *Howe v R* (1980) 32 ALR 478.

8 *Fingleton v The Queen* (2005) 227 CLR 166 at 196.

[47] **FRASER JA:** On 19 February 2010 I agreed with the orders then made by the Court. I agree with the reasons of Muir JA.

[48] **CHESTERMAN JA:** I agree with the reasons prepared by Muir JA for the orders made by the Court on 19 February 2010, with which I then agreed.