SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ross* [2010] QCA 63
PARTIES:	**R** **v** **ROSS, Jeffrey John** (applicant/appellant)
FILE NO/S:	CA No 214 of 2009 DC No 277 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	23 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2010
JUDGES:	Holmes and Fraser JJA and P Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed;** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the appellant was convicted of unlawfully doing grievous bodily harm – where the appellant challenged the admissibility of evidence upon which the Crown relied to prove the complainant suffered injuries amounting to grievous bodily harm – where the doctor's opinion evidence was premised on foundational facts contained in medical notes – whether the trial judge erred in determining that a doctor was qualified to give expert evidence – whether the doctor's opinion evidence was inadmissible CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – in circumstances where defence counsel did not object to the doctor's evidence of the content of the medical notes – where defence counsel may have conducted the trial in that way for forensic advantage – where the trial judge gave appropriate directions about the

quality of the evidence – where there was no ground for concluding that the doctor's evidence was inaccurate – whether the receipt of the inadmissible evidence occasioned a miscarriage of justice in terms of s 668E(1) *Criminal Code* 1899 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant gathered the group of men together and transported some of them to the site of the assault – where the appellant had no criminal history of violent offences, his involvement was not aggravated and the trial judge accepted that he had the least involvement – whether the sentence imposed was manifestly excessive

*Criminal Code*1899 (Qld), s 1, s 7(1)(c), s 668E(1)
Evidence Act 1977 (Qld), s 93(1)(b)(ii), s 93B

Ali v The Queen (2005) 79 ALJR 662; [2005] HCA 8, cited
Gordon v R (1982) 41 ALR 64, cited
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305, cited
Nudd v R (2006) 225 ALR 161; [2006] HCA 9, cited
R v F (1995) 83 A Crim Rep 502, cited
R v Naidu [2008] QCA 130, cited
R v Ping [2006] 2 Qd R 69; [2005] QCA 472, cited
R v S (2002) 129 A Crim R 339; [2002] QCA 167, cited
R v Van Ling [2003] QCA 382, cited
Ramsay v Watson (1961) 108 CLR 642; [1961] HCA 65, cited
Suresh v the Queen (1998) 72 ALJR 769; [1998] HCA 23, cited

COUNSEL: K A Mellifont for the applicant/appellant
M J Copley SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Department of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** After a six day trial in the District Court at Rockhampton, on 4 August 2009 a jury found the appellant guilty and he was convicted of unlawfully doing grievous bodily harm to Mr Anthony John Prior on 13 May 2006. On 14 August 2009 the trial judge, Newton DCJ, sentenced the appellant to imprisonment for two years and fixed 4 August 2010 as the parole release date. The appellant has appealed against his conviction and applied for leave to appeal against sentence.

Appeal against conviction

[3] At the hearing of the appeal the appellant abandoned the grounds of appeal stated in his notice of appeal and was given leave to substitute the following grounds;

> "**Ground 1.**
>
> The reception of the opinion evidence of Dr Bures was wrong at law because Dr Bures lacked the necessary expertise to give opinion evidence as to whether the injuries suffered by the complainant amounted to grievous bodily harm.
>
> **Ground 2**
>
> Foundational facts of Dr Bure's expert opinion were not proved in evidence, namely that the complainant had suffered an intracerebral haemorrhage and a spleen laceration."

[4] The appeal is confined to those challenges to the admissibility of the evidence upon which the Crown relied to prove that the complainant suffered injuries amounting to grievous bodily harm. I will discuss those grounds of appeal after I have first outlined the Crown case.

[5] The appellant shared his house with the complainant Mr Prior and Ms Natalie Grisbrook. On 13 May 2006 the three of them argued about rent. The Crown alleged that the appellant left the house and returned some time later with other men, that members of this group then assaulted the complainant and Ms Grisbrook, and that the complainant was beaten with lumps of wood and bats. The appellant used his fists to strike the complainant and also applied pressure to the complainant's body with the heel of a foot, but the appellant did not strike the blows which allegedly left the complainant with a lacerated spleen and an intracerebral haemorrhage. The Crown case was that the appellant was criminally responsible for unlawfully causing the complainant that alleged grievous bodily harm under s 7(1)(c) of the *Criminal Code* 1899 (Qld). The Crown alleged that he had aided his co-offenders by transporting some of them to his house when he was aware that violence might possibly occur because some of the men were armed with batons, sticks or clubs, by striking the complainant, and by striking Ms Grisbrook or creating a physical barrier between her and the telephone to prevent her from ringing the police. The jury acquitted the appellant of an unlawful assault causing bodily harm to Ms Grisbrook but found him guilty of unlawfully doing grievous bodily harm to the complainant.

[6] I turn now to the grounds of the appellant's appeal against his conviction.

Ground 1: Was Dr Bures qualified to give the opinion evidence?

[7] Dr Bures gave evidence that the complainant's spleen injury could cause severe bleeding to the abdominal cavity, a trauma that caused such a substantial risk of death that the complainant had to be admitted to a hospital capable of managing the injury and closely observed from admission shortly after the assault on 13 May 2006 until discharge on 18 May 2006; that the complainant's intracerebral haemorrhage was an injury to the brain which, particularly because of the trauma of the injured spleen, could have catastrophic consequences; and that the two injuries together certainly did endanger life. If the jury accepted that evidence, as it

evidently did, it was entitled to conclude that the complainant's spleen and head injuries were of such a nature as would endanger or be likely to endanger the complainant's life and constitute "grievous bodily harm" as defined in s 1 of the *Criminal Code*. The contrary was not argued by defence counsel or in this appeal. The issue instead concerns the admissibility of Dr Bures' evidence.

[8] Defence counsel argued that Dr Bures did not have the required expertise to give the evidence. That was the subject of a voir dire in which the doctor gave evidence of his qualifications. Defence counsel's point was that Dr Bures had no speciality training in relation to cerebral haemorrhages or spleen injuries. The doctor gave evidence that he was awarded a Bachelor of Medicine and Surgery from the University of Queensland in 1984, he was made a Fellow of the Royal Australian College of General Practitioners in 1999, he had practical experience as a doctor in the Czech Republic (formerly Czechoslovakia) between 1977 and 1981, he had practical experience as a doctor in Australia from January 1985, and he had worked as a doctor in a hospital emergency department since 1996. In light of those qualifications it is unsurprising that in the course of cross-examination on the voir dire Dr Bures' answers demonstrated an apparently close and detailed familiarity with the particular physical effects and consequences for bodily health of the complainant's injuries.

[9] At the end of the voir dire defence counsel maintained his objection that Dr Bures did not have sufficient specialist knowledge to give the expert evidence. The trial judge decided that the doctor was qualified to express his opinions. In my respectful opinion, that was plainly correct. It is not necessary to discuss the case to which we were referred by the appellant's counsel,[1] which turned upon very different facts. On the face of Dr Bures' evidence of his academic qualifications and extensive practical experience as a medical practitioner, including in particular his many years of medical practice in the emergency department of a hospital, he was qualified as an expert in a field of expertise which comprehended the effects and likely effects upon life of the complainant's spleen and brain injuries.

[10] In my respectful opinion no error has been shown in the trial judge's decision that Dr Bures was properly qualified to give his expert evidence.

Ground 2: Proof of foundational facts

[11] It was not in controversy in this appeal that expert opinion evidence is inadmissible unless the facts relied upon by the expert, or facts sufficiently like those relied upon by the expert to make the opinion useful, are identified and proved in evidence.[2] Under the second ground of appeal the appellant's counsel argued that Dr Bures' opinion evidence was inadmissible because it was premised upon an unproved assumption that the complainant had suffered an intracerebral haemorrhage and spleen laceration. The appellant's counsel argued that there was no admissible evidence that the complainant had sustained either injury because no medical practitioner who had treated the complainant gave such evidence and, the complainant having died before the trial, no such evidence was given under s 93B of the *Evidence Act* 1977 (Qld).

[12] Dr Bures had not treated the complainant. He based his expert evidence upon the description of the complainant's injuries in medical notes entitled "Rockhampton

---

1 *R v F* (1995) 83 A Crim Rep 502.

2 See *Ramsay v Watson* (1961) 108 CLR 642, at 648-649; *Gordon v R* (1982) 41 ALR 64; *R v Ping* [2006] 2 Qd R 69, at [43]-[46]; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

Hospital DISCHARGE SUMMARY" which he produced on behalf of the hospital. The medical notes were not tendered in evidence but the prosecutor adduced evidence of their contents through Dr Bures. In evidence in chief Dr Bures said that the medical notes referred to the complainant (by name and as a "40 year old man, brought in by ambulance") and described the appellant's injuries as a small intracerebral haemorrhage, a minor spleen laceration, and a fractured left fibula. In summing up to the jury the trial judge read out those passages of Dr Bures' evidence which recited the descriptions of those injuries in the hospital notes.

[13] The appellant's counsel conceded that that the content of the medical notes provided a sufficient factual foundation for Dr Bures' expert opinion evidence, but she argued that the evidence was inadmissible. Counsel argued that Dr Bures' evidence of the notes was not admissible and that the medical notes were themselves not admissible under s 93 of the *Evidence Act* 1977 (Qld) because there was no evidence, as required under s 93(1)(b)(ii), that it was not reasonably practicable to secure the attendance of the doctor who had supplied the information upon which the record was based. The respondent contended that any absence of proper proof of the medical notes was irrelevant because defence counsel had acquiesced in proof of the complainant's injuries by the relevant part of the medical notes being read out to the jury. Defence counsel had conducted the defence case on the premise that it was unnecessary for the Crown formally to prove that the complainant had suffered the injuries which the Crown contended amounted to grievous bodily harm. Anticipating that argument, the appellant's counsel referred the Court to passages in the transcript which were submitted to demonstrate that it remained incumbent upon the Crown to prove that the complainant had sustained the relevant injuries.

[14] Defence counsel did not object to the opinion evidence of Dr Bures on the ground, now advanced, that his evidence was inadmissible because of absence of proof that the complainant had suffered the intracerebral haemorrhage and spleen laceration described by the doctor. Indeed, defence counsel positively acquiesced in the Crown's informal mode of proof of the content of the medical notes for the purpose of proving those foundational facts for Dr Bures' expert evidence. After the luncheon adjournment on the second day of the trial, and in the absence of the jury, the prosecutor told the trial judge of discussions with defence counsel about the medical evidence:

> "MR FUNCH: Thank you, your Honour. Your Honour, the other issue is the medical notes. I've had discussions with my learned friend and indicated to him the course that I propose to take in relation to that issue. I propose to tender a copy of the notes. The copy that your Honour already has seen. I do not propose to make those notes available to the jury in the jury room. The only reason I propose to tender those notes is so that Dr Bures can speak to them. Mr Murray's indicated to me that he does not require a representative of the hospital to give evidence in order for me to tender those notes.
>
> HIS HONOUR: If it's your intention that they not go to the jury, why are you tendering them? Why not just have the doctor refer to them? Is there any need to tender them?
>
> MR FUNCH: Only if my learned friend intends to make any issue of their authenticity, I suppose, which he inferentially has indicated to

> me he will not be doing, by allowing me to tender them without the witness. Perhaps they don't need to be tendered, your Honour?
>
> HIS HONOUR: Well, if you don't want them to go before the jury, it seems to me unnecessary to tender them.
>
> MR FUNCH: Certainly, your Honour.
>
> HIS HONOUR: What's your view to this, Mr Murray?
>
> MR MURRAY: Yes, I didn't know that it depended upon me not challenging them, but, no, I had a conversation before your Honour came in about that, and I certainly don't require them to be tendered."

[15] We have not been told what occurred in the discussions between the prosecutor and defence counsel which led to the arrangement expressed in that passage, but defence counsel unambiguously acquiesced in the informal proof of the content of the medical notes and expressly waived what otherwise would have been the necessity for the Crown strictly to prove the medical notes in order to render Dr Bures' expert opinion evidence admissible.

[16] Because that course apparently reflected arrangements made immediately beforehand, it is not easy to see how anything in the transcript at an earlier stage of the proceedings could justify any different conclusion. In any event the issues which defence counsel had agitated earlier did not touch upon the mode of proof of the medical notes. Earlier in the trial the trial judge expressed concern about the prosecutor's proposed reliance upon Dr Bures rather than upon a doctor who had examined the complainant. Defence counsel pursued that point and objected on the ground that Dr Bures was not sufficiently qualified to give expert evidence about the effect of the injuries. Although defence counsel at one stage foreshadowed an objection to the tender of the medical notes pursuant to s 93 of the *Evidence Act* 1977 (Qld), that objection, on the ground that the jury could not "have a set of hospital notes and make any sense out of it", was not pursued. In subsequent debate on the point, defence counsel did not make any objection to the informal mode of proof of the content of the medical notes. The passage quoted earlier demonstrates that when the prosecutor set out to prove the relevant contents of the notes by asking Dr Bures to confirm those contents in evidence in chief defence counsel quite deliberately acquiesced in that course.

[17] Furthermore, as the appellant's counsel frankly informed the Court, although defence counsel made a no case submission at the conclusion of the Crown case, counsel did not take the present point. On the contrary, defence counsel submitted to the trial judge that the prosecution, "don't have to – the thing is, they don't need to find the treating doctors with medicos, they can find anybody … as long as they can venture a professional opinion." Nor did defence counsel ask for any direction or re-direction on the footing that the opinion evidence of Dr Bures was not admissible because of the Crown's omission properly to prove the foundational facts.

[18] Contrary to the literal terms of this ground of appeal, the foundational facts for Dr Bures' evidence were proved in evidence by Dr Bures reading out the content of the medical notes. That evidence was inadmissible in that form, but because defence counsel did not object to it the appellant could not contend, and his counsel did not argue, that the trial judge made any wrong decision on a question of law in

terms of s 668E(1) of the *Criminal Code*. The appellant's argument therefore must be that the receipt of the inadmissible evidence of the contents of the medical notes occasioned a miscarriage of justice in terms of s 668E(1) *Criminal Code*.

[19] In deciding whether there has been such a miscarriage of justice it is a very relevant consideration that defence counsel did not object to the evidence now submitted to be inadmissible and so conducted the trial for what could have been legitimate forensic reasons.[3] Defence counsel might have considered that an objection to Dr Bures' evidence of the content of the medical notes would result in the prosecutor adducing more direct and detailed evidence of the complainant's injuries. On that footing, by agreeing to the Crown's informal mode of proof of the injuries defence counsel obtained a legitimate forensic advantage in the trial. Defence counsel exploited that advantage: in cross examination of Dr Bures, defence counsel made the point that the medical notes had been compiled by nurses and doctors to whom Dr Bures had not spoken and in addressing the jury defence counsel observed that Dr Bures "was reading some notes that some other doctors – presumably doctors, hopefully doctors – had written about what was wrong with him". Defence counsel emphasised to the jury on this aspect of the Crown case that Dr Bures had not treated or seen the complainant for the spleen or brain injury.

[20] Furthermore, the relative weakness in the quality of proof of the complainant's injuries was properly drawn to the jury's attention in the summing up. Consistently with the manner in which the defence had been conducted the trial judge directed the jury that it was up to the jury to give such weight to the opinion of Dr Bures as the jury thought it should be given, having regard to the doctor's qualifications, whether the jury thought him impartial or partial to either side, "and the extent to which his opinion accords with whatever other facts you find proved". The trial judge reminded the jury that Dr Bures' opinion had been based upon what he had gleaned of the facts from reading the hospital notes, that he had not seen or treated the complainant, and that if the facts contained in the hospital notes upon which his opinion was based had not been established to the jury's satisfaction, then the opinion of Dr Bures may be of little value. His Honour also observed that it had been pointed out to the jury that Dr Bures had never seen the complainant and the jury had heard no evidence as to why none of the treating doctors was called.

[21] In circumstances in which defence counsel unequivocally acquiesced in the proof of the nature of the complainant's injuries through Dr Bures' inadmissible evidence, where defence counsel might have conducted the trial in that way for legitimate forensic purposes, where there is no ground for concluding that Dr Bures' evidence about the complainant's injuries was inaccurate, and where the trial judge gave appropriate directions about the quality of that evidence, there was no miscarriage of justice occasioned by the admission of that inadmissible evidence.[4]

[22] Accordingly I would dismiss the appeal against conviction.

Sentence application

[23] The appellant's counsel argued that the sentence was manifestly excessive in all the circumstances, particularly given that the appellant was a man without prior history

---

3 *Nudd v R* (2006) 225 ALR 161, at 164, per Gleeson CJ; *Ali v The Queen* (2005) 79 ALJR 662; [2005] HCA 8 at [9], [23]-[26], [99]; *Suresh v The Queen* (1998) 72 ALJR 769 at [23], [56]-[58]; [65]; *R v S* [2002] QCA 167 at [19]-[20].

4 In addition to the authority cited earlier, see *R v Naidu* [2008] QCA 130 at [7], [78]-[82], [85], in which a similar conclusion was reached in an analogous case.

for offences of violence and that his involvement in the offence did not include the use of any weapon. It was submitted that the appropriate sentence would be imprisonment for a term in the order of 18 months suspended after time already served.

[24] In addition to the circumstances of the offence mentioned earlier it is relevant to note that the trial judge accepted defence counsel's submission that the appellant should be sentenced on the footing that he had the least involvement of those who assaulted the complainant. However, the appellant was the moving spirit in gathering the group together and he transported some of them to the house. The sentencing judge observed that even after the trial it was not entirely clear what the appellant's precise intention was in gathering that group of men together and taking some to the house, but although the appellant may have had no clearly defined intention it must have been in his mind at least that there would be violence. The appellant was aware at the time when the group entered the residence that at least some of the group were armed with batons, sticks or clubs. The offence took place at night time and, although the house was owned and occupied by the appellant, he relied upon a ruse to gain entry for the group of men. The group was led by a man who had experience as a security guard. The sentencing judge also took into account the seriousness of the injuries inflicted upon the complainant. The appellant was 41 years old when the offence occurred. He did have a criminal history but he had not committed any offences of violence. He had been engaged as an industrious worker but as a result of the present matter had lost his business, his home and a good deal of money. He had been in a relationship for four or five years and had a child of that relationship who was two years old at the time of sentence. All of those and the other circumstances I have mentioned were expressly taken into account by the trial judge in fixing upon the sentence.

[25] In my respectful opinion there is no ground for thinking that the sentence imposed was manifestly excessive. That it was within the sentencing discretion finds support in this Court's decision in *R v Van Ling* [2003] QCA 382 in which, in broadly similar circumstances, this Court imposed a term of 18 months imprisonment after substituting a verdict of unlawful assault occasioning bodily harm in company for the conviction at trial of unlawfully doing grievous bodily harm.

Proposed orders

[26] I would dismiss the appeal and refuse the application for leave to appeal against sentence.

[27] **P LYONS J:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with his Honour's reasons, and with the orders which he proposes.