SUPREME COURT OF QUEENSLAND

CITATION:	*R v Condon* [2010] QCA 117
PARTIES:	**R** **v** **CONDON, Christopher Gerard** (appellant)
FILE NO/S:	CA No 253 of 2009 DC No 114 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	21 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2010
JUDGES:	McMurdo P, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Conviction set aside.** **3. Re-trial ordered.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – ACCIDENT – EVENT OCCURING BY ACCIDENT OR CHANCE – DIRECTIONS TO JURY – appellant convicted of doing grievous bodily harm – appellant hit complainant – complainant's jaw was broken – trial judge directed jury that defence of accident under s 23 *Criminal Code* 1899 (Qld) is negatived if person in position of appellant would reasonably have foreseen the "event" as a possible outcome of act – trial judge identified "event" as serious injury amounting to grievous bodily harm rather than actual injury suffered by complainant – whether a properly instructed jury would inevitably have concluded beyond reasonable doubt that prosecution negated accident under s 23 – whether miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – complainant gave inconsistent statements – complainant's account of events consistent with doctor's evidence and independent

unchallenged witness – whether open to a properly instructed jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of doing grievous bodily harm – whether verdict unreasonable or cannot be supported having regard to the evidence

Criminal Code 1899 (Qld), s 23, s 668E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Taiters; ex parte Attorney-General [1997] 1 Qd R 333; [1996] QCA 232, applied
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81 cited

COUNSEL: J Henry for the appellant
M B Lehane for the respondent

SOLICITORS: Anderson Telford Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The appellant, Christopher Gerard Condon, was convicted in the Townsville District Court on 1 September 2009 of doing grievous bodily harm to the complainant on 1 March 2008. He was sentenced to two years imprisonment with an order that he be released on immediate parole and that he pay $10,000 compensation to the complainant. He appeals only against his conviction. His counsel in this appeal, Mr Henry SC, contends that the primary judge erred in directing the jury on accident (s 23 *Criminal Code* 1899 (Qld)). The judge, Mr Henry submits, erred in identifying "the event" in s 23 as an injury amounting to grievous bodily harm, rather than identifying "the event" as the actual injury suffered by the complainant, namely, a broken jaw. Mr Henry also contends that the jury verdict convicting the appellant of doing grievous bodily harm is unsafe and unsatisfactory, that is, it is unreasonable or cannot be supported having regard to the evidence.[1] He contends that the appeal should be allowed, the conviction set aside and a verdict of acquittal entered.

[2] Before returning to these grounds of appeal, it is necessary to set out the relevant evidence and judicial directions to the jury.

[3] Defence counsel at trial, who is not counsel in this appeal, admitted on behalf of the appellant that the injury suffered by the complainant was likely to endanger life if left untreated, and that it amounted therefore to grievous bodily harm. The only issue was whether the prosecution proved beyond reasonable doubt that the appellant unlawfully caused the complainant to suffer grievous bodily harm. That required the prosecution to disprove beyond reasonable doubt both self-defence and accident.

The relevant evidence

[4] The complainant gave the following relevant evidence. On 1 March 2008, he was staying in a cabin at a caravan park near the Townsville showgrounds. He had been

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1 *Criminal Code*, s 668E(1).

shopping and took a shortcut home through the showgrounds. He heard a male voice yell out, "What the fucking hell are you doing here?" He turned around and saw a man (the appellant) coming towards him. The complainant stopped about a metre and a half in front of the appellant who said, "I'm sick of you vandal cunts coming through here." The appellant pointed to a black sign on a trailer that had been defaced with yellow writing and asserted that the complainant was responsible. The appellant pointed to a woman who had come out of an office at the showgrounds, stating that she saw the complainant vandalise the sign. The appellant then struck the complainant. The woman was looking straight ahead, not in the complainant's direction, when the appellant struck the complainant. The complainant's hands were by his side. The blow knocked him to the ground. He hit the ground on his "backside". He used his left hand to break his fall. His head did not strike the ground. The incident happened quickly. The appellant interrogated him, claiming to be the manager of the showgrounds and the caravan park. The appellant said that "it was just a bitch slap" and added, "Get up off the ground, and I'll knock you out." Despite this threat, the complainant got up and left.

[5] In cross-examination, the complainant denied that he struck the appellant first. He conceded that the appellant's striking of him could have been with an open hand. He maintained that his head did not strike the ground when he fell. He agreed that at the committal proceedings, he stated that it was possible that his broken jaw could have been sustained when he struck the ground with his chin. But he added in his cross-examination at trial that this did not happen.

[6] Narelle Anderson gave the following evidence. She had known the appellant for about 22 years as an acquaintance whom she saw infrequently. On 1 March 2008, she was in the office at the showgrounds to discuss arrangements for a party. She understood that the appellant had some sort of involvement in the security industry at that time. Whilst she was at the office counter, she heard loud voices but she could not distinguish the words. She looked out the glass doors and saw two people, one of whom she recognised as the appellant. The other man (the complainant) was walking towards the appellant. When they were a couple of feet apart, the complainant raised one hand: it looked like he hit the appellant. This happened very quickly: the complainant's hand came straight up and made contact with the appellant's upper head. She later saw a reddish mark on the appellant's forehead. Before the appellant was hit, he was "just…yelling". After the appellant was hit, he moved slightly backwards and then retaliated with his open left hand, striking the complainant to the face and causing him to fall: "it looked like [the complainant] just crumpled." She could not say how the complainant's body hit the ground. The complainant got up "pretty well straight away". After some further conversation with the appellant, the complainant walked off.

[7] Dr Van Der Merwe examined the appellant at the Townsville Hospital later on 1 March 2008. She could not detect any external injury but the complainant was unable to properly close his jaw. The complainant claimed that he had been assaulted an hour previously by two men who had punched him repeatedly in the jaw.

[8] Dr Julian Hirst examined the complainant on 3 March 2008. He found that the complainant's jaw was broken on both sides. He arranged for the complainant to have surgery to his jaw on 4 March but he discharged himself against Dr Hirst's

advice, claiming that people wanted to kill him.[2] Dr Hirst considered that the blow causing the injury to the complainant's jaw would have been "very hard" with "significant force". If the injury had been caused by his chin hitting the ground, Dr Hirst would have expected lacerations to the chin, but there were none. The injury was certainly consistent with being caused by a punch or a kick. It could have been caused by a forceful slap with the heel of the hand. Dr Hirst agreed it was possible that the broken jaw was caused in the course of an uncontrolled fall onto paving.

[9] The appellant did not give or call evidence.

The judge's relevant directions to the jury

[10] The judge's jury directions included the following.

[11] His Honour explained to the jury that the prosecution case as to self-defence was that the jury would accept the evidence of the complainant. On the complainant's account, he did not assault the appellant and self-defence did not arise. Alternatively, on Ms Anderson's evidence, even if the complainant initially struck the appellant, the appellant then assaulted the complainant using such excessive force in the circumstances that self-defence did not apply.

[12] The judge explained that the appellant's case as to self-defence was that the complainant unlawfully assaulted the appellant and that the force he then used to defend himself was no greater than was reasonably necessary to make effectual defence against that assault. The appellant's trial counsel submitted that the prosecution had not disproved the application of self-defence so that the appellant was entitled to be found not guilty.

[13] The judge warned the jury that, before acting on the complainant's account alone, they should examine it with great care and caution and be satisfied beyond reasonable doubt that it was both truthful and accurate. This was because there was evidence that when the complainant first went to the hospital he told a doctor that he had been assaulted by two men and he later repeated this account to a member of the hospital staff.

[14] In directing the jury as to accident, the judge stated:

> "So, the Crown, to negative accident, members of the jury, must establish that an accused intended that the injury should occur … or that the [appellant] foresaw the injury as a possible outcome of the blow delivered … or, thirdly, that an ordinary person, in the position of the [appellant], would reasonably have foreseen *serious injury amounting to grievous bodily harm* as a possible outcome of the blow delivered by the [appellant].
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> And that, you may think, is the critical one so far as this issue of accident is concerned. But if the Crown were to satisfy you to the requisite standard of any one of those three things, they're [sic] subject to that matter of self-defence with which I've already dealt, you would find the [appellant] guilty of the offence charged.
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> …

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[2] The complainant underwent surgery to his jaw a few days later.

> … It is a matter of whether an ordinary person in the [appellant's] position would reasonably have foreseen that an *injury amounting to grievous bodily harm* was a possible outcome of the [appellant's] actions." *(my emphasis)*

[15] The judge reminded the jury that the prosecution case in respect of accident was that the force used by the appellant was sufficient to knock down the complainant; the use of such a degree of force made it reasonably foreseeable that the complainant "*may strike his head in such a way as to cause injury amounting to grievous bodily harm*". If so, the jury would be satisfied beyond reasonable doubt that the defence of accident was negated. The defence case was that the jury could not be so satisfied, especially having regard to the evidence of Ms Anderson.

The direction to the jury on accident (s 23 *Criminal Code*)

[16] Mr Lehane, counsel for the respondent in this appeal, fairly and properly conceded that the primary judge's directions in respect of accident (s 23) were in error. Those directions are emphasised in the two preceding paragraphs of these reasons.

[17] Section 23(1) relevantly provides:

> "23(1) … a person is not criminally responsible for –
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> (a) an act … that occurs independently of the exercise of the person's will; or
>
> (b) an event that occurs by accident."

[18] It is clear since this Court's decision in *R v Taiters; ex parte Attorney-General*[3] that "event" in s 23(1)(b) is a reference to the consequences of the "act" in s 23(1)(a):

> "It should now be taken that in the construction of s 23 the reference to 'act' is to 'some physical action apart from its consequences' and the reference to 'event' in the context of occurring by accident is a reference to 'the consequences of the act'. Even if, as has been said, there can on occasion be some difficulty, in an exceptional case, in distinguishing the border line between act and event so viewed, this theoretical distinction is clear. Taking an example from *Kaporonovski* [*Kaporonovski v The Queen* (1973) 133 CLR 209] itself, the thrusting of the glass by the accused was the act and the injury to the victim's eye which constituted the grievous bodily harm was the event. A number of occurrences can as a result of the operation of one or more chains of causation follow upon the doing of an act. However, s 23 is concerned to excuse from criminal liability so the relevant event for the purpose of the section should be taken to be the one which, apart from the operation of the section, would constitute some factual element of an offence which might be charged. In cases when grievous bodily harm is charged the state of bodily harm will be the relevant event and when unlawful killing is charged, the death will be the relevant event."[4]

[19] It follows that in the present case the "event" was the injury suffered by the complainant constituting the factual element of the offence of doing grievous bodily harm, namely, a broken jaw. The issue for the jury was whether an ordinary person

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[3] [1997] 1 Qd R 333; [1996] QCA 232.

[4] Above, 335.

in the appellant's position would reasonably have foreseen the complainant's broken jaw was a possible outcome of the appellant striking the complainant. The primary judge three times misdirected the jury by widening that concept to any injury amounting to grievous bodily harm. This could include a less serious injury than a broken jaw. His Honour stated the issue was whether an ordinary person in the appellant's position would reasonably have foreseen that an injury to the complainant amounting to grievous bodily harm was a possible outcome from the appellant's blow.

[20] The experienced defence counsel at trial did not ask for a re-direction on this aspect of the judge's jury directions on s 23(1)(b). He requested re-directions on a quite different aspect of s 23 which concerned earlier grounds of appeal abandoned before the hearing. Unfortunately, the misguided emphasis placed on those issues may have resulted in the overlooking of this flawed aspect of the judge's jury directions.

[21] This error in directing the jury means that this Court must allow the appeal and set aside the conviction unless, after reviewing the whole of the evidence, the Court considers it establishes the appellant's guilt beyond reasonable doubt so that no substantial miscarriage of justice has actually occurred: see *Weiss v The Queen*[5] and s 668E(1A) *Criminal Code*.

[22] Mr Lehane contends that when regard is had to the medical evidence, a reasonable jury properly instructed as to accident (s 23) would inevitably have concluded beyond reasonable doubt that the prosecution had negated accident under s 23 and that a conviction was inevitable.

[23] I am unpersuaded by this contention. The Court was informed at the hearing of this appeal that the complainant was about 60 years old and the appellant was about 47 years old at the time of the incident. This age disparity would have been clear to the jury. The primary judge stated that he sentenced the appellant broadly in accordance with the account given by Ms Anderson. The judge therefore seems to have considered that accident (s 23) was rejected by the jury and that they convicted on the basis of Ms Anderson's evidence, that the appellant used excessive force in retaliating against the complainant's initial assault. Accepting that a properly instructed jury could well have come to that conclusion, I cannot accept that, had the jury been properly instructed as to accident (s 23), a guilty verdict would have been inevitable. Both self-defence and accident (s 23) were fairly raised on the evidence. It was necessary for the prosecution to negate both issues before a jury could convict the appellant. On the judge's flawed directions to them on accident (s 23), they may have convicted the appellant on a wrong basis. They may have been satisfied beyond reasonable doubt that an ordinary person in the appellant's position would have reasonably foreseen as a possible outcome of his striking the complainant that the complainant may suffer injury amounting to grievous bodily harm which was less than a broken jaw. A properly instructed jury may have acquitted the appellant. For that reason, it cannot be said that, notwithstanding the judge's error in directing the jury, no substantial miscarriage of justice has occurred.

[24] It follows that the appeal must be allowed and the conviction set aside. Whether a re-trial should be ordered or a verdict of not guilty entered turns on whether the second ground of appeal is also successful.

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5 (2005) 224 CLR 300; [2005] HCA 81.

Was the guilty verdict unreasonable on the evidence?

[25] Whether the appeal should be allowed under s 668E(1) *Criminal Code* turns on whether the guilty verdict was unreasonable or cannot be supported having regard to the evidence: *M v The Queen*;[6] *MFA v The Queen*.[7]

[26] I have reviewed the evidence earlier in these reasons. Ms Anderson's testimony was reasonably independent and largely unchallenged. It was sufficient to satisfy beyond reasonable doubt a reasonable jury, properly instructed as to the law, that the force used by the appellant in retaliating against the complainant's assault on him was excessive in all the circumstances. This was especially so in light of the difference in age between the complainant and the appellant; the nature of the injury to the complainant; and the medical evidence as to the force required to inflict it. The jury were also entitled to accept the complainant's evidence, that he fell on his "backside" and that his chin did not hit the ground, despite his earlier concession at the committal proceedings and his unreliable statements at the hospital. That evidence was supported by Dr Hirst's evidence that the absence of marks to the complainant's chin did not suggest the chin hit the ground. It was not inconsistent with Ms Anderson's account. The evidence as a whole was capable of negativing beyond reasonable doubt the issues of both self-defence and accident (s 23).

[27] After reviewing the whole of the evidence, I am well satisfied that it would be open to a properly instructed jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of doing grievous bodily harm. It follows that a re-trial must be ordered.

ORDERS:

1. Appeal against conviction allowed.

2. Conviction set aside.

3. Re-trial ordered.

[28] **FRASER JA:** I have had the advantage of reading the President's reasons for judgment. I agree with those reasons and with the orders proposed by her Honour.

[29] **CHESTERMAN JA:** I agree with the orders proposed by the President for the reasons given by her Honour.

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6 (1994) 181 CLR 487, 493-495; [1994] HCA 63.
7 (2004) 213 CLR 606, [25], [59]; [2002] HCA 53.