SUPREME COURT OF QUEENSLAND

CITATION:	*R v Morales* [2010] QCA 288
PARTIES:	**R** **v** **MORALES, Kevin Arthur** (appellant)
FILE NO/S:	CA No 65 of 2010 DC No 542 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Innisfail
DELIVERED ON:	22 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2010
JUDGES:	Chief Justice and Muir JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – appellant convicted of unlawful assault after a trial – trial judge refused to grant appellant an adjournment – appellant submits trial judge wrongly stated appellant had dismissed his previous lawyer – whether conduct of trial judge amounted to bias CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – appellant submits assault not proved beyond reasonable doubt – appellant submits there were inconsistencies in respondent's case – whether verdict unreasonable or insupportable having regard to evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – appellant submits his solicitor and barrister advised him not to give evidence or call evidence – whether conduct of counsel resulted in a miscarriage of justice *Nudd v The Queen* (2006) 225 ALR 161, [2006] HCA 9, applied

COUNSEL:	The appellant appeared on his on behalf D L Meredith for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree that the appeal should be dismissed, for those reasons.

[2] **MUIR JA:** The appellant was convicted after a trial in the District Court of having unlawfully assaulted the complainant on 24 October 2008 at Innisfail and sentenced to perform unpaid community service for 100 hours. At the direction of the primary judge, the jury returned a verdict of not guilty on the second count – wilful and unlawful damage to a motor vehicle. The direction was based on the primary judge's conclusion that the prosecution had led no evidence of damage to a front door of the vehicle, which was the location in which the damage was alleged to have been sustained.

[3] The appellant appeals on grounds that:

(a) The primary judge had obvious bias against him;

(b) The verdict of the jury was unreasonable;

(c) The jury was "tainted by unrelated evidence";

(d) The primary judge failed to direct the jury properly;

(e) He was strongly advised by his "lawyer and Barrister not to give evidence to submit witnesses to assist in [his] defence".

[4] Before considering these grounds, it will be useful to refer briefly to the relevant evidence. The substance of the complainant's evidence was as follows. She was 56 years of age and lived in Mourilyan Road, Innisfail. On the evening of 24 October 2008 she heard what sounded like a domestic argument taking place in the street. She ignored it for a time but eventually looked out and saw a man, who she subsequently knew to be the appellant, carrying a one year old child on his hip. She saw him deliver at least half a dozen open-handed slaps to the head of a woman who appeared to be trying to take the child off him.

[5] The complainant, in order to protect the woman, walked across the road and told the appellant that she thought of calling the police but that if he would give the child back to its mother she would not do so. The appellant said to her, "Do you want some of it too?". The complainant then heard what she thought was her daughter's car coming down the street. She turned around to verify that it was her car. As she turned back to face the appellant she saw that he was about to hit her. She pulled back but was nevertheless struck with an open-handed blow on the side of her face. Her daughter screamed out, "Stop. How dare you hit my mother". The complainant crossed the road to her house and called the police. She noticed that the appellant appeared to be drunk.

[6] The complainant's daughter gave evidence that as she drove down Mourilyan Road she saw the appellant strike her mother at the back of her head. She pulled into her carport, called out to the appellant to stop and for her mother to come back across

the road. The appellant was yelling loudly at her mother and the other female present, who was crying, pulling at the appellant, and asking him to come home. The police soon arrived and she observed police officers struggling with the appellant as they attempted to get him into the police car.

[7] There was only one other witness, a police officer, who gave evidence of having been called to the incident on the evening of 24 October 2008. She said that when she arrived at the scene of the incident she saw an Asian female outside a phone booth holding a child. She saw the appellant push the Asian female twice and stumble over to the police car. She could smell alcohol on his breath when he put his head in the window of the police car. The appellant abused the police officer and the other police officer who accompanied her. The police officers put the appellant in the back of the car, whereupon he yelled and screamed and kicked at the passenger rear door and window.

[8] I will now turn to a consideration of the grounds of appeal.

Ground 1 – Bias

[9] The appellant's contentions are as follows. At a mention of the proceedings in the District Court on 22 February 2010, the primary judge was informed by the appellant's solicitor that legal aid had only just been granted, that he had just met the appellant outside the Court and, as yet, had no instructions or a brief. The primary judge queried whether the appellant had "previously sacked his lawyers" and was told by the solicitor that that was his understanding. The judge also queried that the matter had been adjourned previously when listed for trial because the appellant had sacked his lawyers. The prosecutor confirmed that that was so and said she would be opposing an adjournment, remarking that it was a very simple matter. The primary judge said that he intended to finalise the matter in the present sittings and was going to leave the matter as the trial for the following week. The prosecutor said that she could provide a copy of the prosecution material to the appellant's solicitor that day and the judge said that he thought the solicitor should be given everything that day so that he could confer with his client. He stated that he would not be granting an adjournment "unless there's clear prejudice shown" and that he would need "material for that".

[10] The appellant asserted that the judge wrongly stated that he had sacked his previous lawyer, "possibly suggesting [he] lost [his] right to an adjournment". There was no admissible evidence before this Court on this matter but historical matters such as those relied on by the appellant have little relevance, as there is no evidence which suggests that the trial was not ready to proceed on 1 March 2010.

[11] It would seem that the judge's insistence on the matter proceeding was regarded by the appellant as evidence of bias. The matter was, in fact, a simple one which was capable of being prepared for trial without difficulty between 22 February 2010 and the day on which the trial commenced, 1 March 2010. There was nothing untoward in the primary judge's desire to have the matter disposed of during his sittings. He made it plain that the trial would not take place if to proceed would cause prejudice to the appellant. Critically, as I have noted, the evidence does not show that the matter was not in fact ready for trial on 1 March 2010.

[12] Counsel for the respondent pointed out that on the trial, the primary judge was required to make only three rulings and that he ruled in favour of the appellant on

each occasion. It has been seen already that the primary judge directed an acquittal on count 2. The appellant's submissions also overlook the fact that it was the jury not the judge which determined questions of fact.

[13] The other arguments advanced in this regard were that the primary judge directed the jury that the complainant denied calling the appellant a "dickhead", contrary to her evidence, which was that she couldn't recall having done so. When the primary judge's mistake was drawn to his attention, he readily gave a full and careful redirection.

[14] The other complaint is that in summing up, the primary judge, in directing the jury on provocation, said:

> "Now, at the outset there must be a wrongful act or insult by the complainant and this is constituted by the allegation that the complainant called the defendant a dickhead.
>
> She of course, denies this."

[15] The use of the words "of course", which seem to be the gravamen of the complaint, are innocuous enough in the context in which they were used. The primary judge was merely referring to the complainant's evidence which, it might be said, was not contradicted by any evidence from the appellant and the comment was overtaken by the judge's redirection.

Ground 2 – The verdict of the jury was unreasonable

[16] The appellant asserted that it was not open to the jury on the whole of the evidence to be satisfied of his guilt beyond reasonable doubt. He contended also that the fact that the assault actually took place was not proved beyond reasonable doubt. Additionally, he relied on what he alleged were the following inconsistencies in the prosecution case.

(a) Not only did the complainant not deny calling the appellant a "dickhead" but she also called him that during cross-examination;

(b) The complainant's evidence was that the children were 50 to 100 yards behind the accused but the daughter's evidence was that they were just "standing around"; and

(c) The complainant said she was slapped across the face but the daughter said the complainant was hit on the back of the neck by the accused.

[17] The relevant evidence of the complainant is set out above. Although she did not deny calling the appellant a "dickhead", she did not accept that she had used the word. The discrepancy, if there is one, between the evidence of the complainant and her daughter about the children was that the descriptions of where the children were standing by the complainant and her daughter may not have been referable to the same points in time. The daughter was speaking of a time after she had asked the complainant to come back across the road and, it seems, after the time at which the complainant had called the police. The complainant's evidence about the children was vague: "All the kids were around …".

[18] In any event, the evidence of the location of the children was extremely peripheral to the issue in the case, which was whether the appellant had unlawfully assaulted the complainant. The complainant's evidence was that he struck her in the face.

The cross-examination was conducted on the basis that he had done so but that he had been provoked. The fact that the complainant's daughter, observing the incident from a distance, thought that the blow landed elsewhere on the complainant's head is neither here nor there. It does not impugn the uncontested evidence of the complainant that the appellant struck her a blow.

[19] The primary judge, generously for the accused, summed up on provocation. The jury were quite entitled, on the evidence before them, to reject the defence. It would have been surprising had they acquitted. The prosecution case was overwhelming. The evidence was that the complainant female intervened in a restrained manner to prevent the continued maltreatment of another woman by the appellant. The appellant gave no evidence and the jury was entitled to consider it fanciful that there was conduct on the part of the complainant which would be such, if done to an ordinary person, to deprive that person of the power of self-control and induce the person to assault the complainant.

Ground 3 – The jury was tainted by unrelated evidence

[20] No complaint was made by the appellant's counsel in the trial about the evidence given by the police officer. That is not surprising. It had little bearing on the assault case, except to the extent that it recorded the observations of the police constable at the scene of the incident. The constable's evidence was relevant insofar as it described the appellant's inebriation and course of conduct in prolongation of the incident in which the assault occurred.

[21] The appellant appears to be complaining about the direction to the jury to acquit on count 2 as that, according to him, deprived him of an opportunity to give his version of events. That is not correct. He had the opportunity to give his evidence in respect of count 1 but elected, on advice, not to do so. The complaint that he was advised by his solicitor and barrister not to give evidence or call evidence was not supported by sworn evidence. It is clear, however, that if such advice was given, it was explicable on the basis of a reasonable forensic decision.

[22] Where the conduct of counsel in failing to cross-examine, cross-examining in a particular way, leading particular evidence, or failing to lead evidence is alleged to have resulted in a miscarriage of justice, ordinarily, the question of whether a miscarriage of justice has occurred is to be determined by an objective assessment of the conduct in question. In *Nudd v The Queen*,[1] Gleeson CJ, said in this regard:

> "[8] … Similarly, where the conduct of counsel, as a participant in the trial process, is said to give rise to, or to be involved in, a miscarriage of justice, ordinarily it was what was done or omitted that is of significance, rather than why that occurred.
>
> [9] … It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct."

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[1] (2006) 225 ALR 161 at 164-165. See also the observations of Callinan and Heydon JJ at paragraph [157].

[23] The evidence of the complainant was clear. It was not disputed that she had been struck by the appellant. The appellant could have given evidence of the complainant's being close to him, pointing her finger at him and calling him a "dickhead". However, there was overwhelming evidence that he was drunk at the time and the prospects of his being believed over the complainant would have been modest. His taking the witness stand would have given the prosecutor the opportunity to highlight through cross-examination the cowardly and brutish nature of the appellant's conduct in relation to the complainant and the other woman, his de facto spouse.

[24] There is thus no substance in this ground of appeal.

Ground 4 – The primary judge failed to direct the jury properly

[25] This ground appears to relate to matters already addressed. There is no merit in it.

Conclusion

[26] The appellant also contended that a "new witness has recently come to light", namely his daughter. There was no evidence of what his daughter could say, relevantly and it is unknown whether any further evidence would have assisted the appellant's case. Moreover, any such evidence could, with reasonable diligence, have been ascertained and made available on the trial. The appellant did not establish a basis for the admission of this evidence even if it had been identified.

[27] In the course of his oral submissions the appellant said that the primary judge had rolled his eyes when directing the jury in relation to provocation. This allegation was not mentioned in the notice of appeal, the appellant’s written submissions or in any sworn evidence. It should be disregarded.

[28] There is no substance in any of the grounds of appeal and I would order that the appeal be dismissed.

[29] **PHILIPPIDES J:** I agree that the appeal should be dismissed for the reasons stated by Muir JA.