SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tapara* [2010] QCA 320
PARTIES:	**R** **v** **TAPARA, Phillip Shayne** (appellant/applicant)
FILE NO/S:	CA No 166 of 2010 CA No 171 of 2010 SC No 5 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2010
JUDGES:	Muir and Chesterman JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where appellant charged with attempting to unlawfully kill the complainant; alternatively with doing grievous bodily harm with intent – where appellant convicted on the second count – whether it was reasonable for the jury to conclude the appellant did not intend to kill the complainant but did intend to cause grievous bodily harm – whether appellant's plea of guilty to further alternative charge of dangerously operating a vehicle thereby causing grievous bodily harm with the circumstance of aggravation prejudiced his defence of counts 1 and 2 CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – AMENDMENT – IMMATERIALITY OR ABSENCE OF PREJUDICE – where the indictment mistakenly omitted the word "unlawfully" in its recital of the offence of doing grievous bodily harm – where appellant's counsel agreed the indictment be amended to include the word "unlawfully" –

where the amendment was not material to the merits of the case – whether the amendment prejudiced the appellant's trial

CRIMINAL LAW – PROCEDURE – JURIES – DISCHARGE AND EXCUSING FROM ATTENDANCE – INDIVIDUAL JURORS – where one juror was discharged after the conclusion of the summing up because of a family emergency – where this course was permitted by s 56(1)(c) of the *Jury Act* 1995 (Qld) – whether the conviction by 11 jurors was unsound

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant deliberately drove his car into the complainant out of revenge or retaliation causing injury – where appellant sentenced to five and a half years' imprisonment for doing grievous bodily harm with intent – where appellant pleaded guilty to a lesser charge of dangerously operating a vehicle thereby causing grievous bodily harm with the circumstance of aggravation – where appellant's criminal history was in the distant past – where complainant fortuitously did not suffer permanent injuries – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 317, s 572, s 597C(3)
Jury Act 1995 (Qld), s 56(1)(c)

R v Eade [2005] QCA 148, cited
R v LT [2006] QCA 534, cited
R v Nielsen [2006] QCA 2, considered

COUNSEL: The appellant appeared on his own behalf
D Meredith for the respondent

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

[1] **MUIR JA**: I agree that the appeal against conviction should be dismissed for the reasons given by Chesterman JA. The sentence in respect of which leave to appeal was sought was not manifestly excessive as the reasons of Chesterman JA explain and I also would refuse leave to appeal.

[2] **CHESTERMAN JA**: The appellant was charged on indictment with attempting unlawfully to kill Malachy Johnson on 22 February 2009 at Southport; alternatively with doing grievous bodily harm to Johnson with intent to do it; alternatively with dangerously operating a vehicle thereby causing grievous bodily harm to Johnson with the circumstance of aggravation that the appellant knew or ought reasonably to have known that he had injured Johnson and left the scene of the incident other than to obtain help.

[3] When arraigned the appellant pleaded guilty to the third, alternative count. The plea was not accepted and the trial commenced. After five days, on 23 June 2010, the

appellant was convicted of count 2, of doing Johnson grievous bodily harm with intent. He was sentenced to five and a half years' imprisonment. 478 days of pre-sentence custody was declared to be time already served under the sentence. The appellant, who appeared for himself, challenges both his conviction and the sentence.

[4] On 22 February 2009 Johnson celebrated his birthday with some family members at the Southport Workers' Club. When they left he drank on his own for about an hour and then went to a hotel on the corner of Scarborough and Nind Streets in Southport. There he met the appellant and became involved in an altercation with him. There was some pushing and shoving and the appellant fell or was knocked to the floor. Hotel employees quickly separated the men and ejected both of them from the premises from different exits. Johnson was intoxicated. The appellant was not.

[5] The prosecution case was that the appellant deliberately drove his car into collision with Johnson as he was crossing Windmill Street at its intersection with Scarborough Street in Southport. Johnson was seriously hurt. The appellant drove off. The indictment alleged that the appellant intended to kill Johnson, or cause him grievous bodily harm. The third alternative was that the appellant drove dangerously injuring Johnson but without intending to kill or maim.

[6] The appellant's guilty plea to the third count, while not accepted in discharge of the indictment, was an admission of all of the elements necessary to constitute that charge. By the plea he admitted he had driven dangerously and caused Johnson grievous bodily harm. As a consequence the trial was limited to one issue: was the collision deliberate and, if it was, did the appellant intend to kill or to cause grievous bodily harm?

[7] After his expulsion from the hotel Johnson walked south along Scarborough Street, across Nind Street and came to the intersection with Windmill Street. The appellant walked to his car and drove onto Scarborough Street. He parked a little distance from Windmill Street. When the complainant approached the intersection the appellant drove into a parking bay closer to the intersection. When the complainant crossed Windmill Street the appellant drove his car at an accelerating pace turning right into Windmill Street knocking Johnson down. The appellant drove off along Windmill Street which took him away from the route he would follow to go home.

[8] A witness, Sara Menzies, was in the vicinity at about 5.30 pm. She drove along Nind Street and turned left into Scarborough Street. She noticed a white Holden Commodore parked on the left hand side in Scarborough Street. It pulled out in front of Ms Menzies causing her "to tap on (her) brake". She drove behind the Commodore which turned right into Windmill Street. As it did she saw "a person's feet up in the air and the person was upside down." She stopped and ran over to the man, Johnson, who had been hit by the Commodore which did not stop. According to Ms Menzies it "sped off". Ms Menzies described the Commodore as speeding up when it pulled out of a parking bay in Scarborough Street and "in a fluid motion … (speed) around the corner."

[9] Another witness, Justin Heritage, was also in the vicinity intending to have an early meal at an Indian Restaurant. He parked his car on the eastern side of Scarborough Street and walked towards the restaurant. He noticed Johnson, whom he did not

know, walking in front of him. He thought Johnson might be "a bit drunk" and kept an eye on him. Johnson:

> "just walk(ed) straight ahead … his head down and his arms … flopping."

Mr Heritage noticed a white car driving in Scarborough Street and as it approached the intersection with Windmill Street it turned:

> "a bit sudden … and then accelerated a bit … and then as it went to Windmill Street … run him over."

Mr Heritage saw Johnson "look at the last second and … sort of stuck his arm up, hit the bonnet, and rolled over and then rolled into the gutter." Mr Heritage described the Holden's passage into and along Windmill Street as accelerating at "full speed".

[10] The appellant was interviewed by police. He admitted to being the owner of a white Holden Commodore and the driver of it on 22 February 2009 at 5.45 pm. The appellant was initially unco-operative but when told the police had security camera footage of the collision he was more forthcoming. He said:

> "(Johnson) came to my car. He walked over here and I just drove home, and as the paper says the other day (he was) clipped by a car. I seen that and I just gone … . I knew he'd be alright. He's a big boy. I knew he'd be alright.
>
> …
>
> I know I clipped him. … my recollection is just going there see him walking right across the road and I thought oh yeah I'll scare him.
>
> …
>
> Go real close to him and but yeah I got too close."

He estimated his speed at about 50 kmph. He admitted he did not stop after the collision. His reason, he said was that:

> "I looked in the mirror and I seen him on the ground and he was (moving?) so I knew he'd be alright."

[11] Dr Mahoney, a forensic medical officer employed by Queensland Health, testified that Johnson suffered:

> "fractures around the jaw. There was a fracture through the upper jaw … involving the lower part of the upper jaw and the upper central teeth. There (were) fractures to the lower jaw … below the teeth and … a fracture … near the ear on the upper right side of the lower jaw."

As well there was a compound fracture of both bones of the left forearm, and a number of facial lacerations and abrasions to the back of the head. On admission to hospital the fractures of the jaw and forearm were plated to provide stability. The doctor described the injuries, without objection, as amounting to grievous bodily harm.

[12] The grounds of appeal are a miscellany. The first is that the conviction was "unreasonable and unreliable" because it required the jury to speculate as to the intent which accompanied the appellant's actions of driving at the complainant.

The appellant's point appears to be that the conviction on count 2 was inconsistent with the acquittal on count 1.

[13] The contention is clearly untenable. The prosecution case was that the circumstances described by the witnesses, coupled with the appellant's admission that he intended to scare the complainant supported an inference that he collided deliberately with the pedestrian, intending either to kill or cause grievous bodily harm. The trial judge gave clear directions on the point. Her Honour said:

> "… the question of intent and what intent or lack of intent of Mr Tapara at the time that he drove his car, so as to bring it into a point of collision with Mr Johnson, is the critical aspect of this trial. It is an essential element of the offence of attempted murder that Mr Tapara intended to kill Mr Johnson at the time he struck him with his motor vehicle. Anything less than an intent to kill is insufficient to establish the offence of attempted murder."

Her Honour then gave helpful instructions on intoxication as it might be relevant to the existence of intention and the means by which an inference as to a particular intention might be drawn from the facts. Her Honour went on:

> "If, because of the evidence … you are not satisfied … that Mr Tapara did, in fact, form the necessary intent for either count 1 or count 2, you must find (him) not guilty … because those offences involve a specific intent."

Later her Honour said, with respect to count 2:

> "Now, with respect to the element of intention for this alternative charge, you apply the same process of drawing inferences from the facts which you find proved by the evidence to determine whether the prosecution has satisfied you beyond reasonable doubt that (the appellant) intended to do grievous bodily harm to Mr Johnson when he drove his car in a manner that resulted in the car striking Mr Johnson.
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> If you are satisfied that more than one inference is reasonably open … an inference which points to (the appellant) having the intention to do grievous bodily harm and an inference … consistent with his innocence in respect of this charge, that is lack of the requisite intention, you must give (the appellant) the benefit of the inference in his favour.
>
> … If you thought it was a rational inference that (the appellant) had either the intent to kill or the intent to cause grievous bodily harm … but was recklessly indifferent as to whether death might be caused from his actions, it would follow that you would be satisfied … that (the appellant) had at least the intent to do some grievous bodily harm … falling short of a sole intent to kill and therefore element 3 would be proved."

[14] The directions were clear. The evidence was more than sufficient to support the conviction. The jury was fully entitled to conclude that the appellant intended to hurt but not to kill the complainant. Absence of an intent to kill is not inconsistent with the presence of an intent to cause grievous bodily harm. The jury was distinctly instructed to consider whether the appellant had one or other of the two

intentions if they were satisfied he deliberately ran Johnson down. The verdict shows it did so.

[15] The second ground is that the trial judge was biased in favour of the prosecution and intervened to support its case, to the detriment of the defence. The point behind this serious complaint displays a lack of understanding by an unrepresented appellant of the legal process. The real complaint appears to be that towards the end of the trial the trial judge allowed an amendment to the indictment which the appellant thought "added an element for a conviction which is in the interest of the prosecution."

[16] Count 2 of the indictment alleged:

> "[T]hat on the twenty-second day of February, 2009 at Southport in the State of Queensland, PHILLIP SHAYNE TAPARA with intent to do some grievous bodily harm to MALACHY RHEECE JOHNSON, did grievous bodily harm to MALACHY RHEECE JOHNSON."

Section 317 of the *Criminal Code* pursuant to which this count was formulated provides that:

> "Any person who, with intent –
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> …
>
> (b) to do some grievous bodily harm … to any person …
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> …
>
> either –
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> …
>
> (e) in any way unlawfully … does grievous bodily harm … to … any person …
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> …
>
> is guilty of a crime, and is liable to imprisonment for life."

[17] It will be noted that the indictment omitted the word "unlawfully" in its recital of the offence of doing grievous bodily harm. The trial judge noted the omission late on the third day of the trial. Her Honour informed counsel that "one of the elements of the offence is that the act was unlawful" and that she would "certainly be summing up irrespective of whether it (was) amended or not on the basis that implicitly the allegation is unlawful." The prosecutor sought leave to amend the indictment and the appellant's counsel said she had "no difficulty with that course". The amendment was accordingly made and the appellant re-arraigned on count 2. Again he pleaded not guilty.

[18] Section 572 of the *Criminal Code* provides:

> "(1) If, on the trial of a person charged with an indictable offence, … it appears that any words that ought to have been inserted in the indictment have been omitted … the court may, if it considers that the … omission … is not material to the merits of the case, and that the accused person will not be prejudiced thereby … order the indictment to be amended, so far as it is necessary, on such terms (if any) as

> to postponing the trial, and directing it to be had before the same jury or another jury, as the court may think reasonable.
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> (2) The indictment is thereupon to be amended in accordance with the order of the court.
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> (3) If the court is satisfied no injustice will be done by amending the indictment, the court may make the order at any time before, or at any stage of, the trial … or after verdict.
>
> (4) When an indictment has been amended, the trial is to proceed, at the appointed time, upon the amended indictment, and the same consequences ensue, in all respects and as to all persons, as if the indictment had been originally in its amended form.
>
> (5) … ."

[19] The trial judge correctly concluded that there had been an omission from the indictment which did not therefore accurately express the offence created by s 317 of the Code. The trial had proceeded on the basis that to secure a conviction on count 2 the prosecutor had to prove that the infliction of grievous bodily harm was unlawful. The amendment to cure the omission was not material to the merits of the case and could not have prejudiced the appellant's trial. Before and after the amendment the trial proceeded on the express basis that to secure a conviction on count 2 the prosecution had to prove the infliction of grievous bodily harm was unlawful. There was in the case no possibility that the infliction of grievous bodily harm on Johnson, by the appellant, was lawful. The appellant admitted, formally when arraigned, and in his police interview, that he had inflicted grievous bodily harm on the complainant. The trial judge's proper amendment was without consequence.

[20] It should perhaps be pointed out that the appellant should not have been re-arraigned on the amended count. If satisfied, as her Honour was, that the amendment would cause no injustice to the appellant, and was not material to the merits of the case, the trial was to continue, after amendment, "in all respects … as if the indictment had been originally in its amended form".

> "It is no light thing to arraign an accused. It is a legal solemnity given significance by s 597C (of the Code)."

R v LT [2006] QCA 534 at [33].

[21] Section 597C(3) provides that the trial against an accused is deemed to begin when he is arraigned. The trial against the appellant did not recommence. It continued, as it should have, "as if the indictment had been originally in the amended form". The re-arraignment was unnecessary. It fulfilled no function but did no harm.

[22] The appellant's next point is that his conviction followed a verdict delivered by only 11 jurors, the twelfth having been discharged. The appellant submitted:

> "After the jury has retired and started deliberations, a juror cannot be dismissed as the normal practice. That once the jury start to deliberate they … reach a verdict or a hung jury."

There was a subsidiary complaint that the transcript of the trial did not record the events leading up to the juror's discharge, or the discharge itself.

[23] The latter point can be answered briefly. As not infrequently occurs now, the appeal record consisting of the trial's transcript was incomplete. There was no record of the discharge or the reason for it. The deficiency was noticed and the missing transcript was provided to the parties prior to the appeal.

[24] The appellant was right that one of the jurors was discharged. The summing up concluded at 10.57 am on the fourth day of the trial. The jury was not sequestered but allowed to go home that evening when they had not reached a verdict. Over night one of the jurors learnt that his son had been admitted into a neurosurgical intensive care unit at the Royal Prince Alfred Hospital in Sydney and was close to death. The juror went as soon as he could to Sydney. He notified the court of what had happened and that he would not attend court the next day. The judge informed counsel of events and canvassed the options: discharging the jury or the one juror. Having obtained instructions the appellant's counsel supported the second course. The prosecutor agreed. The trial judge then recalled the jury, told them briefly why one of their number was absent and charged the remaining jurors with returning a verdict.

[25] The course followed was obviously appropriate given the late stage at which the juror became unable to continue participating in deliberations. The course was permitted by s 56(1)(c) of the *Jury Act* 1995. Section 57 of that Act allowed the trial to continue with 11 jurors.

[26] There is no possible basis for complaint. The appellant's own counsel sensibly agreed in the course adopted.

[27] The appellant also argued that his plea of guilty to the third count prejudiced his defence to counts 1 and 2. Any basis for the complaint is hard to discern. By his plea the appellant admitted that he drove dangerously and caused Johnson grievous bodily harm. Those facts were incontestable given the appellant's admissions to the police, the evidence of Ms Menzies and Mr Heritage and the film which depicted the manner of driving. What was in issue was whether the appellant intended to kill or cause grievous bodily harm. That issue was put fairly to the jury. It was not affected by an admission of the other elements of the offence unrelated to intent.

[28] In any event the plea was offered for forensic reasons by the appellant who had competent legal representation.

[29] The notice of appeal and the appellant's written submissions made reference to a number of other complaints concerning the manner in which the trial was conducted. It is not easy to understand many of the complaints but they appear to arise from a misunderstanding of what happened at the trial or what are the ordinary procedures of a criminal trial. None of them was the subject of expanded oral exposition. For that reason and because the complaints do not appear to have substance it is not necessary to deal with them.

[30] The case against the appellant was both straight forward and strong. The trial appears to have been conducted with due regularity. The appeal against conviction should be dismissed.

[31] There is also an application for leave to appeal against sentence. In passing sentence the trial judge said:

> "… at the commencement of the trial you pleaded guilty to (the third) count, although the prosecution refused to accept that … plea.
>
> … I consider that you should get some credit for that guilty plea because it indicates some degree of co-operation with the administration of justice in that it allowed for the trial to proceed on the basis that the elements of that particular offence were admitted which meant that your involvement as the driver of the vehicle … was admitted. That said, the matter still went to trial and the sentence proceeds on the basis that the conviction is one after trial.
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> …
>
> … it was more good luck than good management that Mr Johnson wasn't more severely injured. … it does not appear that he has any significant residual disability.
>
> … your offending conduct was aggravated by the callousness on your part in not stopping after you had collided with Mr Johnson. …
>
> The jury … has found that you intended … to do him grievous bodily harm … . That is a conclusion … open on the evidence, as one would infer from the fact that you used your car as a weapon … . The path you took as the vehicle turned into Windmill Street was clearly intended to cross with Mr Johnson … .
>
> The Prosecutor described your actions as premeditated. I don't accept that as an appropriate characterisation. I accept that there was sufficient time after the fracas in the hotel for a mature man like you to have used a bit of commonsense … . Your conduct was a reaction, however, and your getting into your car was immediately after you left the hotel … ."

[32] Her Honour then referred to two decisions of this Court, *R v Eade* [2005] QCA 148 and *R v Nielsen* [2006] QCA 2. Her Honour thought *Eade* unhelpful and *Nielsen,* in which a sentence of six years' imprisonment was imposed after a guilty plea, a worse case. Accordingly the sentence was one of five years' and six months imprisonment.

[33] The appellant was 42 years old at the time of the offence and 44 when sentenced. He had traffic history with six entries overall, five in New Zealand and one in Queensland. More relevantly he had a criminal history in New Zealand. When he was 24, in 1990, he took part in a series of robberies and kidnappings. His part was said to be minor but he was sentenced to three years for the kidnappings and 10 years for the robberies. Since his release in 1998 he has not re-offended. He has formed a stable relationship with a woman he intends to marry on his release from the present term of imprisonment. He has a good work history and has been a model prisoner.

[34] The appellant does not identify any particular error in the exercise of the sentencing discretion. He complains that the sentence is manifestly excessive by reference to factors such as: his co-operation with the administration of justice by offering to

plead guilty to count 3; his criminal history was in the distant past and in more recent times he had been of good character; the complainant was the instigator of the unpleasantness in the hotel which led to the offence; Johnson's injuries, though amounting to grievous bodily harm, resolved without residual disability.

[35] I think there is no doubt that the appellant now deeply regrets his actions which have given rise to his imprisonment. I accept that his conduct was aberrant and that he is, by and large, if not completely, committed to a peaceful and law abiding life. I regard his previous convictions as largely irrelevant and as being the product of an unsatisfactory upbringing and the influence of bad company. There are grounds for thinking that upon his release the applicant will not re-offend.

[36] To say all this in the appellant's favour is not to cast doubt upon the justice or appropriateness of the sentence imposed. The trial judge rightly recognised the seriousness of the offence. A civilised society cannot tolerate its members using motorcars as weapons of revenge or retaliation. The complainant may not have been seriously injured but that was pure fortuity. He could easily have been killed, or gravely and permanently damaged. The sentence must punish for what was a callous and deliberate attack with a weapon apt to cause terrible injuries, and act as a deterrent to others who may be tempted to behave in a similar fashion.

[37] I would respectfully dissent from the notion that the appellant's conduct was not premeditated. Although only a short time elapsed between the altercation in the hotel and the running down it was long enough for the appellant to drive his car to where he suspected the complainant would be and to wait for his appearance before implementing what was clearly a formed plan to hurt him.

[38] The only truly comparable case to which we were referred was *Nielsen*. There a sentence of six years' imprisonment was held not to be manifestly excessive. The case was roughly similar in circumstance. In some ways it was more serious but none of the pedestrians run down by Nielsen were seriously hurt. He pleaded guilty. After a trial the sentence would no doubt have been substantially higher.

[39] Nielsen, who was drunk, got into an argument with a number of people who were leaving a tavern in the early hours of the morning. He went to his car and drove at about 40 kmph onto the footpath in front of the tavern into a crowd of people all but one of whom managed to jump clear. He was a security officer who had not been involved in the earlier argument. Nielsen drove on and swerved at least three times towards different groups of people walking along the road or on the footpath. He pursued the woman with whom he had argued hitting her on the leg and knocking her onto the roadway. He swerved towards pedestrians a third time at a speed estimated at about 55 kmph. Again the crowd scattered but one pedestrian was dealt a glancing blow. None of the persons hit suffered more than minor injuries.

[40] Nielsen's offending was more persistent and involved more victims but would appear to have involved less malice than the appellant's offending. He was drunk and did not lie in wait. His victims suffered minor injuries. The complainant was quite seriously hurt, though luckily he made a good recovery.

[41] A comparison between the sentence imposed on the appellant and that imposed upon Nielsen provides no basis for thinking that the former is manifestly excessive. The *ratio* in *Nielsen* was, as I mentioned, only that six years in the circumstances was not manifestly excessive. I would myself regard it as moderate. The appellant

does not have the benefit of a plea and has the disadvantage that his attack on Johnson was planned. His sentence, too, was moderate. It is impossible to characterise it as excessive.

[42] The application for leave to appeal against sentence should be refused.

[43] **McMEEKIN J**: I agree with the reasons of Chesterman JA and the orders his Honour proposes.