SUPREME COURT OF QUEENSLAND

CITATION:	*R v Seaton* [2011] QCA 75
PARTIES:	**R** **v** **SEATON, Joanne Dawn** (appellant/applicant)
FILE NO/S:	CA No 161 of 2010 CA No 266 of 2010 DC No 109 of 2010 DC No 353 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction (Extension Granted) Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	21 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2011
JUDGES:	Fraser JA, Margaret Wilson AJA, Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In CA No 161 of 2010: the appeal against conviction is dismissed;** **2. In CA No 266 of 2010: the application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where the appellant was convicted of grievous bodily harm – where the Crown case was based upon s 7 and s 8 of the *Criminal Code* 1899 (Qld) – where the appellant contended that the trial judge's directions in relation to s 8 were confusing and led the jury into error by stating an incorrect test for "common intention", and incorrect acts as the "unlawful purpose" and "probable consequence" – where the summing up should be considered as a whole – whether the trial judge misdirected the jury *Criminal Code* 1899 (Qld), s 8 *Stuart v The Queen* (1974) 134 CLR 426; [1974] HCA 54, cited *The Queen v Barlow* (1997) 188 CLR 1; [1997] HCA 19, cited

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

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

[1] **FRASER JA:** On 16 April 2010, after a three day trial in the District Court at Townsville, a jury found the appellant and a co-offender Ainslee Willis Gee Gee guilty of doing grievous bodily harm to Larry Arthur Elliott on 14 February 2009 at Townsville. The appellant was sentenced on the same day to four years imprisonment with a parole eligibility date of 16 April 2011. On 5 July 2010 the appellant filed an application for an extension of time within which to appeal, a notice of appeal against the conviction and an application for leave to appeal against sentence (CA 161 of 2010). On 27 July 2010 the Court granted the necessary extension of time.

[2] The applicant has also applied for leave to appeal against a sentence imposed on 21 October 2010 for unrelated offences in November 2008 (CA 266 of 2010).

[3] The application for leave to appeal against the sentence imposed for the grievous bodily harm offence was formally abandoned on 28 March 2011. The appellant's notice of appeal against conviction included four grounds of appeal against conviction. At the hearing of the appeal the appellant abandoned those grounds and the Court acceded to the appellant's application, which was unopposed, for leave to substitute two grounds of appeal alleging misdirections by the trial judge.

The appeal against conviction: CA 161 of 2010

[4] The Crown case against the appellant was that she was a party to the offence which occurred in the afternoon of 14 February 2009 at the complainant's residence in Deeragun. Mr Morganson, who lived in the same street, gave evidence that he had witnessed an altercation between the appellant and her co-offender, and the complainant, earlier that afternoon. Mr Morganson said that he saw the appellant and her co-offender return to the complainant's residence about half an hour later in the company of a number of others. A fight broke out and the appellant's co-offender punched the complainant in the side of the head as he was turning away from her. The complainant fell to the ground and the appellant and her co-offender stomped on his head. Other witnesses gave evidence which in some respects supported the case against the appellant, but it is not necessary to analyse the evidence in view of the nature of the grounds of appeal. The appellant did not give or call evidence.

[5] The complainant sustained lacerations, a depressed fracture of his right cheek bone, and fractures to the floor of the eye socket and the nasal auxiliary region. If he had not received medical treatment, the complainant would have suffered a permanent disfigurement of his face and would have experienced difficulty opening his mouth.

[6] It was necessarily difficult for the Crown to prove who delivered the blow which caused the grievous bodily harm. The Crown relied upon s 7(1)(a), s 7(1)(c) and s 8 of the *Criminal Code* 1899 (Qld) to establish criminal responsibility on the part of the appellant. No complaint is made about the trial judge's directions in relation to s 7 but the appellant contends that the trial judge misdirected the jury in relation to s 8.

The section 8 directions

[7] Section 8 of the Code provides:

> "When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[8] The summing up occupied about 50 minutes in the afternoon of the second day of the trial and about one hour on the morning of the third day of the trial. On the second day the transcript record shows that the trial judge gave the following relevant directions in relation to s 8:[1]

> 1. "Our law provides, members of the jury, that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. Here there is not evidence that no one's come along and said, "I overheard a conversation", for example, "Between these defendants and someone else to the effect that we're going to go bash persons living at the Baker address."
>
> 2. The Crown therefore need to ask you to look at the evidence to see whether an inference can be drawn that there was a plan of that kind. That there was a plan to form a common intention. So if two or more plan to do something unlawful together and in carrying out that plan, an offence is committed, the law is that each of those persons is taken to have committed the offence but if, and only if, it's the kind of offence likely to be committed as a result of carrying out that plan.
>
> …
>
> 3. So it's all of those circumstances, depending of course very much on the question of identification, that you ask yourselves whether you're satisfied that there was, by inference, a plan to something to do the unlawful thing, that is, to assault, to carry out an assault at or near the Baker residence at the time. Had there been a common intention? The circumstances include rhetorically, as the Crown Prosecutor said, "Why did they go there?" Was there a reason for anger? Was it retaliatory? They are the matters that you, the jury, will have to consider. Are you satisfied beyond a reasonable doubt that there was a common intention to prosecute an unlawful purpose, that is, for an

[1] I have emphasised the contentious directions and, for ease of reference only, I have added paragraph numbers.

assault. You must fully consider and in detail what was the alleged unlawful purpose, that is, to assault, what its prosecution was intended to involve. Did it involve, of course, the intention to assault persons who were there and in particular, the person who had pursued the accused defendants at a - shortly earlier in the afternoon. You consider carefully what actually happened at the time that the grievous bodily harm was caused.

4. You consider whether the offence was of such a nature that it in its commission it was a probable consequence of the purpose. A great deal, obviously, depends on what the nature of any common unlawful purpose proved by the evidence in the light of the circumstances of the case, particularly the state of knowledge of the defendant. It's the defendant's own subjective state of mind, as established by the evidence, which decides what was the content of the common intention to prosecute an unlawful purpose. That common intention is critical because it defines the restrictions on the nature of the acts done or admissions made which the defendant is deemed by this section to have done or made.

5. This gets to the point, by way of explanation, members of the jury, that if grievous bodily harm is unlawfully caused this is one potential route. Depending on what you make of it that it could involve the accused in criminal responsibility. You should consider whether you're satisfied beyond a reasonable doubt that the defendant agreed to this common purpose and the common purpose is to go the Baker's house and assault persons, including Mr Elliott, if the opportunity arose. Here, that involved a common purpose which involved the possible use of violence or force. If you're satisfied beyond reasonable doubt that there was a common intention to prosecute an unlawful purpose and what that was, you must ask yourself are you satisfied that the offence of grievous bodily harm was committed in the prosecution or carrying out of that purpose.

6. You consider, of course, the nature of the offence committed. Was its commission a probable consequence of the prosecution or furtherance carrying out a common unlawful purpose? A probable consequence is a consequence which would be apparent to an ordinary, reasonable person in the position of the defendant, with the defendant's state of knowledge at the time when the common purpose was formed. *Whilst you consider whether the defendants* ***had*** *such a common intention, the test is not what they would have personally thought, it's what you the jury set as a standard, it's an objective test, what would a reasonable person conclude, whether the defendants recognised themselves that an unlawful assault was*

> *a probable consequence of them arriving at the scene and doing what they did*. [The emphasis indicates stress.][2]
>
> 7. A probable consequence is more than a mere possibility, it must be one that you would regard as probable in the sense that it could well have happened. Probable, is, in a sense, that it could well have happened in the prosecution of the unlawful purpose. *At the core is whether an inference can be drawn that there was a plan to cause violence which might have included violence in the street.*
>
> 8. I should address you briefly with respect to what is evidence, members of the jury, but I'll come to this first. You are allowed to draw inferences on facts that you find to be proven. That's what the Crown ask you to do here with respect to the question of whether a common intention can be inferred. Can that inference be drawn from all of the circumstances of the case and what happened on the day? What happened, in particular, soon after the arrival of the party at the Baker's residence at the relevant time and what had happened beforehand? You look at those facts and ask yourself can the inference be drawn that that was the intention to the standard of proof I've mentioned? If there are competing alternative hypothesis that would leave open a competing hypothesis that they may not have formed such an intention, then of course you would not be satisfied that such an intention had common intent had been proven.
>
> 9. If you think of an alternative, the probable consequence and the intention, that I've mentioned, must be the only reasonable hypothesis open on the evidence. So you look at all those facts and ask yourself, *"Well on that evidence, am I satisfied beyond a reasonable doubt that the only reasonable hypothesis here is that they've gone to the Baker's house for the purpose of delivering abuse, but more importantly, and being involved as a probable consequence in violence?"* They are questions of fact for you, members of the jury."

[9] The transcript of the directions given on the third day of trial occupies 24 pages, with the first two excerpted paragraphs on page 3-13 of the transcript and, after other directions which are not presently relevant, the subsequent paragraphs between pages 3-15 and 3-19. On the following day (the last day of the trial) the remainder of the summing up occupies some 26 pages in transcript form. The relevant passages read:

> 10. "I mentioned to you yesterday that there, of course, is one method by which you are invited to come to the conclusion, drawing inferences, that there was a common unlawful

---

[2] Having listened to the digital recording, I consider that what the trial judge told the jury is more accurately conveyed by this paragraph than by the slightly different version in the unrevised transcript. Neither party contended to the contrary after the Court invited submissions on this topic.

> purpose to assault and that what took place was a probable consequence. I am paraphrasing it very briefly.
>
> …
>
> 11. … As to whether there was a common plan to carry out assault, [the appellant's counsel] described that you wouldn't be able to draw the inference that that was the case. It involved an invitation to you to speculate. Simply to infer that there was a plan after there'd been a chase and people returning that there was a common plan to assault is not something you would conclude was open. After all, this started off between Mr Elliott and Mr Gee Gee, on one view of the evidence, as a consensual fight. It clearly could not ever be sought to be part of a consensual common plan that that would be the situation, that is, to have a fair fight. If it's open to conclude that there was a plan to have a fair fight, well, as [the appellant's counsel] said, the Crown fail.
>
> …
>
> 12. [The appellant's counsel] referred to the need to prove a common purpose. The need to prove a subjective state of mind by the objective process that I mentioned yesterday. There was no direct evidence as to what was in the mind of Joanne Seaton at the relevant time. You're merely being asked to draw inferences. It's not for the defence to prove that there was some alternative motive or some alternative state of mind. It's for the Crown to establish that there was a common purpose by inference. You must prove what was the scope of the understanding. That is that there was a common intention to assault and that as a consequence, the offence was an act that would give rise to the probability of injury."

[10] The direction in paragraph 10 was given shortly after the trial judge resumed summing up on the last day of the trial. The directions in paragraphs 11 and 12 were given about one hour later, shortly before the summing up concluded at 10.41 am.

[11] No redirections were sought with respect to s 8 of the Code. Defence counsel sought redirections in relation to other matters and such redirections were given shortly before 11.00 am. The jury delivered the verdicts at about 3.00 pm, shortly after part of the evidence had been re-read to the jury in response to the jury's request.

The appellant's contentions

[12] The appellant conceded that the trial judge directed the jury correctly in relation to s 8 in some parts of the summing up but argued that the trial judge misdirected the jury in the emphasised passages.

[13] The appellant argued that the directions in paragraphs 6 and 7 were unclear, confusing, and convoluted, and may have led the jury into error by suggesting that

the common intention was to be determined by reference to an objective test,[3] or that the relevant consequence to be considered was unlawful assault, which was not the offence charged. The appellant argued that the connection made in paragraph 6 between "unlawful assault" and "probable consequence" was wrong in law and created a real risk that the jury might wrongly have reasoned to guilt by applying an objective test in relation to common intention and by finding that the probable consequence of an unlawful assault was sufficient to establish the offence.

[14] The appellant's complaints in relation to the direction in paragraph 9 were: it defined the common purpose as "delivering abuse", which ordinarily understood would not be an unlawful purpose; it was not consistent with the particulars of the offence provided by the Crown, which stated the common purpose as being "to assault somebody"; it stated the probable consequence to be considered as "being involved … in violence", which was not the offence charged; and it compounded the misdirection in the first passage. The appellant argued this direction may have led the jury to convict the appellant on the incorrect basis that "the Appellant had gone to the house with the purpose of delivering verbal abuse and a probable consequence of that purpose was to be involved in violence (even if such violence did not rise to the level of grievous bodily harm)."

[15] The respondent contended that neither direction would have led the jury into error when viewed in its proper context, and when considered together with the other correct directions.

Consideration

[16] There was some confusion in the directions challenged by the appellant, but in the context of the summing up as a whole it appears that the jury was given appropriate directions about s 8.

[17] The contentious direction in paragraph 6 was potentially misleading if considered in isolation, but the jury was initially and, after the contentious direction, subsequently directed in clear terms that common intention must be determined by reference to the subjective state of mind of the persons alleged to have formed that common intention. That was implicit in the first three quoted paragraphs of the summing up. In the fourth paragraph the trial judge unambiguously directed the jury that, "[i]t's the defendant's own subjective state of mind, as established by the evidence, which decides what was the content of the common intention ...". In the fifth paragraph, immediately before the contentious direction in paragraph 6, the trial judge again directed the jury in terms which were consistent with the application of a subjective test. On the following day, the trial judge returned to the topic and, in paragraphs 10 and 11, gave a direction and referred to defence counsel's argument in terms which again suggested that the common intention must be determined by reference to subjective states of mind established by the evidence. In paragraph 12, in the course of summarising defence counsel's arguments, the trial judge again made it plain that his earlier directions concerned the need for the Crown to prove the common purpose by proof of a "subjective state of mind".

[18] Having regard to the trial judge's repeated, correct directions before and after the contentious direction in paragraph 6, and also bearing in mind the trial judge's

---

[3] That would be a misdirection: see *The Queen v Barlow* (1997) 188 CLR 1 at 13 per Brennan CJ, Dawson and Toohey JJ. The trial judge correctly referred to an objective test in relation to "probable consequence": see *Stuart v The Queen* (1974) 134 CLR 426 at 454 per Jacobs J.

emphasis on the word "had" in the last sentence in paragraph 6, I accept the respondent's submission that the jury would have understood the direction in paragraph 6 ("the test is not what they would have personally thought ... It's an objective test ...") as being referable to the question earlier posed by the trial judge: "Was its commission a probable consequence of the prosecution or [in furtherance of] a common and unlawful purpose?" The answer to that question did turn upon an objective test and the trial judge's direction to apply an objective test related only to that matter.

[19] I do not accept that the directions in paragraph 9 misled the jury as to the probable consequence that had to be proved. In this respect the argument for the appellant focused upon the trial judge's references in paragraphs 6 and 7 to "an unlawful assault" and "violence", but it is again necessary to see those expressions in context. In paragraph 1 the trial judge commenced this part of the summing up by accurately quoting s 8 of the Code, including the requirement that "the offence" was a probable consequence of the prosecution of the unlawful purpose. The trial judge again emphasised that requirement in paragraph 2 where his Honour said, "... but if, and only if, it's the kind of offence likely to be committed as a result of carrying out that plan." Again, in paragraph 4, the trial judge directed the jury to consider whether "the offence" was of such a nature that its commission was a probable consequence. Clearly the jury understood that the offence charged against the appellant was that she unlawfully did grievous bodily harm. The emphatic effect of those directions was that it was necessary for the jury to find that the offence of unlawfully doing grievous bodily harm was of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose. That was stressed again when the trial judge gave the direction in paragraph 5 requiring the jury to ask themselves whether they were satisfied that "the offence of grievous bodily harm" was committed in the prosecution or carrying out of the common purpose; and yet again in the first two sentences of paragraph 6.

[20] The subsequent text in paragraphs 6, 7 and 9 upon which the appellant's counsel relied did not dispel the effect of those repeated, correct directions, especially when regard is also had to the trial judge's reminder in paragraph 10, shortly after the summing up resumed on the last day of the trial, that the jury had been invited to find that there was a common unlawful purpose "to assault" and that "what took place" (a reference to the alleged grievous bodily harm) was a probable consequence. The trial judge's remarks about defence counsel's address on this topic, in paragraph 12 shortly before the conclusion of the summing up, pointed in the same direction.

[21] It is true that, if the expression "the purpose of delivering abuse" and the word "violence" are given their literal meanings, the former was not unlawful or the purpose alleged in the Crown particulars and the latter might be insufficient to constitute grievous bodily harm. However, when regard is had to the context provided by other passages in the summing up, it is clear that "delivering abuse" and "violence" were references to the unlawful purpose of assaulting someone and to the charged offence of doing grievous bodily harm. As to the expression "the purpose of delivering abuse", the trial judge had earlier made it plain in paragraphs 3 and 5 that the alleged unlawful purpose was to assault persons. On the following day the trial judge again made that clear in the direction in paragraph 10, and that was reinforced by the trial judge's reference to defence counsel's argument in paragraph 12. In relation to the word "violence", I have already referred to the

directions to the jury which emphasised the Crown's onus of proving that the charged offence of doing grievous bodily harm was a probable consequence of the prosecution of the unlawful purpose.

[22] When the summing up is read as a whole, as it should be, the appellant's argument that the jury was misdirected in relation to s 8 of the Code falls away. The appeal against conviction should be dismissed.

The application for leave to appeal against sentence: CA 266 of 2010

[23] On 21 October 2010 the appellant was sentenced to 18 months imprisonment, with a parole eligibility date of 30 June 2011, for offences of aggravated burglary and stealing. The contention for the appellant in her application for leave to appeal against sentence was that if the appeal against conviction for the unrelated grievous bodily harm offence were allowed and the conviction set aside, then it would be open to this Court to consider that the sentence imposed for these offences was manifestly excessive. The respondent's counsel accepted that the sentence in this matter was influenced by the sentence for the grievous bodily harm offence, so that this Court should exercise the sentencing discretion afresh if it set aside the grievous bodily harm conviction.

[24] The appellant did not seek to challenge this sentence if her appeal against conviction were dismissed, as I consider it should be. That being so, it is unnecessary to elaborate upon my conclusion that if, contrary to my view, the appeal against conviction should be allowed, it would be appropriate in CA 266 of 2010 to set an immediate parole release date in lieu of the parole eligibility date of 30 June 2011 fixed by the sentencing judge.

Proposed orders

[25] I consider that the appeal in CA 161 of 2010 should be dismissed and the application for leave to appeal against sentence in CA 266 of 2010 should be refused.

[26] **MARGARET WILSON AJA:** I agree with the orders proposed by Fraser JA, for the reasons given by his Honour.

[27] **ATKINSON J:** I agree with the reasons for judgment of Fraser JA and the orders proposed by his Honour.