SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sharpley* [2011] QCA 124
PARTIES:	**R** **v** **SHARPLEY, Robert John** (appellant)
FILE NO/S:	CA No 268 of 2010 SC No 25 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Toowoomba
DELIVERED ON:	14 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2011
JUDGES:	Chesterman and White JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal is allowed;** **2. The conviction is set aside and a verdict of acquittal is entered instead.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of unlawfully killing a man – where the appellant appeals against his conviction on the grounds that it was not open to the jury to exclude self defence and that the verdict was unsupported by the evidence and/or unreasonable – where the appellant and deceased were involved in a scuffle – where the cause of death could not be determined upon a post mortem examination – where there was no weapon used by either the appellant or deceased – where there was no evidence that the appellant continued to use force after he had successfully extricated himself from the deceased's grasp – whether the jury could have been satisfied beyond reasonable doubt of the appellant's guilt *Criminal Code* 1899 (Qld), s 271(1), s 293 *Humphries v The King* [1943] St R Qd 156, considered *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, applied

R v Sherrington & Kuchler [2001] QCA 105, applied
Royall v The Queen (1990) 172 CLR 378; [1991] HCA 27, applied

COUNSEL: PJ Davis SC, with A Katsikalis, for the appellant
M J Copley SC for the respondent

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

[1] **CHESTERMAN JA:** After a three day trial the appellant was, on 3 November 2010, convicted of unlawfully killing John Campbell at Toowoomba on 30 May 2009. He has appealed against his conviction on a number of grounds raised by an Amended Notice of Appeal. It is only necessary to mention two of those grounds because if they are made out, as in my opinion they are, the conviction must be set aside.

[2] The grounds are that:

(i) It was not open to the jury to exclude self defence;
(ii) The verdict was unsupported by the evidence and/or was unreasonable.

[3] The deceased died sometime between 4.00 am and 6.00 am on Saturday morning 30 May 2009. The cause of death could not be determined on a post mortem examination, a fact relevant to the second ground of appeal. The only evidence of the circumstances in which the deceased died came from accounts given by the appellant. In short he said that he and the deceased had been involved in a scuffle, in Mort Street where the deceased died. There was no other evidence connecting the appellant with the death and his account given to investigating police officers and a friend is the only known version of the relevant events. Nothing found at or near the site of the encounter and death contradicts what the appellant said.

[4] Mr Shannon Popp lived at number 2 Christmas Street, Toowoomba. That street intersects with Mort Street. At about 4.00 am on 30 May 2009 Mr Popp was woken by the sound of knocking at his front door. It was the appellant who asked Mr Popp to be driven to his (the appellant's) brother's house. The appellant said that "he'd been in a fight, and … needed a lift home", and that he might have "grabbed (the other man) in a headlock." The appellant said the other man "had attacked him and it was self defence and (the) bloke was trying to take his newspapers."

[5] Mr Popp noticed that the appellant had some blood on his shirt and "he looked like he'd been in a scuffle … ." He told the appellant to go to the kitchen and cleaned himself up. As that happened he dressed and then drove the appellant to his brother's house. On the way they drove along Mort Street passing the scene of the fight. Mr Popp "sort of saw some bags on the side of the road, and as (he) steered over there (the appellant) grabbed the steering wheel and pointed it forward, (saying) 'Don't point the lights'". Mr Popp observed "a set of feet … down the driveway." The body was later found on the driveway of business premises, Gilroy's Automatics.

[6] Mr Popp suggested calling an ambulance but the appellant "didn't want to make a call in case they traced the phone call."

[7] In cross-examination Mr Popp seemed to accept that he told the police in a statement that as he drove along Mort Street near Gilroy's Automatics the appellant had said "turn your high-beams on", casting some doubt upon Mr Popp's earlier testimony that the appellant did not want headlights illuminating the body. He also repeated in cross-examination that the appellant had told him that he had acted "in self-defence" and that the deceased "must have wanted (my) newspapers".

[8] Mr Popp noticed that the appellant had in his possession three plastic wrapped and rolled up newspapers. He took them with him to his brother's house. The likely inference is that they were home delivered newspapers which he had stolen as he walked home.

[9] The appellant had been drinking alone until about 3.00 am. Mr Popp thought he was affected by alcohol, describing the appellant as six "on a scale of one to 10", 10 being drunk.

[10] Having left the appellant at his brother's Mr Popp returned home. He later returned to work where he spoke to some colleagues and returned with one of them to Gilroy's Automatics where the deceased's body still lay. They then telephoned the police.

[11] The deceased's own habits were distinctly odd. He was wandering the streets of Toowoomba alone in the early hours of the morning carrying a number of shopping bags full of rubbish. He had, it appears, been scavenging and collecting the rubbish before his encounter with the appellant.

[12] The appellant himself had no stable residential address. He had fought with the girlfriend with whom he had been staying, and could not, or did not want to, return to her house. He stayed, for how long is unknown, at his parents' house, but he asked Mr Popp to take him to his brother's place. He worked as a truck driver. His schooling finished at year 8.

[13] Both appellant and deceased appear from this rather fragmentary account of their habits to have been societal misfits.

[14] The appellant was questioned by investigating police officers shortly after 10.00 am on the morning of the death. He described his condition as "hung over" and "a bit tipsy". He thought that he would "probably still blow the bag" i.e. be unfit lawfully to drive a motor vehicle. His account of his meeting with the deceased was this:

> "… I do remember … walking along Mort Street and … I do remember … there was a bloke … walking towards me … and then there was a … assault. He … sort of pushed me and then he started wrestling and he grabbed me and threw punches and there were … a few punches thrown an(d) … (w)e were wrestling on the ground and stuff and yes there was a bit of an altercation. … he was by himself … he had shit in his hands but I don't know what it was. I wouldn't have a clue … it was like bags … I have no idea what it was … I was a bit worried actually."

[15] Later, in response to some further questions, he said:

> "…we were both on the same side of the road and as I've walked towards him. … We've like come towards each other and as I've

> gotten closer and closer and he's getting closer and closer and then … he's like sort of bumped me … .
>
> …
>
> [POLICE OFFICER]: How did he bump you?
>
> [APPELLANT]: I don't know it was shoulder sort of shit. … there's two sides of the road and at that hour of the night it's not exactly, and you don't really feel like walking on the same side as someone but anyway, I did. And yeah, as he's walked past he's … hit me in the shoulder I suppose. And … I just turned around and pushed him away. … And then … he's sort of turned back and just came in swinging … swinging his arms and … He connected a few and … That's when I've … sort of … pushed him and well yeah, and we had a bit of an altercation … .
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> [POLICE OFFICER]: Did you punch him?
>
> …
>
> [APPELLANT]: A couple of … punches were thrown … And … he threw a few more than what I would have but … Like I said … I was a bit worried … what he had, I wouldn't have a clue what he had."

[16] The appellant said that he and the deceased did not speak to each other. He said the deceased:

> "…gave my face a bit of a pounding and, and he was sort of just swinging like a mongrel I suppose, he was just swinging. And that's about it. And then we just … pushed and shoved … . … he was sort of getting away from me. He was a bit bigger than me so … I gave him a bit of a roughing up. … maybe I was lucky enough to get a couple in … .
>
> [POLICE OFFICER]: …were you both standing up … ?
>
> [APPELLANT]: Oh we were wrestling around and … we were on the ground … he's bigger than me and he was sort of throwing me around a bit … (s)o … we ended up on the ground and … I was doing whatever I could to get away … . … we were just on the ground wrestling and … throwing a few punches … I ended up getting him off me and … I just left him there."

[17] The appellant denied kicking the deceased and said that when he left ("ran away") the deceased "was on the ground coughing and farting … ."

[18] The appellant admitted that he had in his possession some rolled up newspapers which he "found". He said, however, that he could not recall any conversation with the deceased about the papers nor could he recall the deceased trying to take the papers from him. He said he not recall telling Mr Popp that the deceased had tried to take the newspapers. Nor could he recall telling Mr Popp that he had, or might have, put the deceased in a headlock.

[19] He was asked again to describe the wrestling between him and the deceased, and said:

> "...(H)e was sort of just on top of me and I was just sort of trying to get off him. … he was just on top of me and he sort of just kneed me and shit. … I just pushed him off me and just tried to grab him off me so I could … get him off me. … he sort of had me on the chest and sort of kneeing me and shit. And then … I just pushed him away … trying to go sideways … to wrestle him off me."

[20] Photographs of the scene taken that morning show the deceased lying transverse to the footpath, his feet towards the road and his head near a garden bed outside Gilroy's Automatics. Three bags, one plastic and two cloth, were near him at varying distances away. There was as well a quantity of thick black plastic and a soft drink can. The scene is not indicative of any particular violence.

[21] The deceased was 179 cm tall (5 feet 10 inches) and 114 kilograms in weight. The pathologist described his condition as morbidly obese.

[22] Post mortem examinations revealed the deceased suffered two injuries and two conditions. The injuries were (a) mild brain damage which probably caused temporary loss of consciousness but did not cause death; (b) injuries to neck structures which may have caused death. The conditions were; (c) narrowing of the coronary arteries and (d) dilation of the structures of the heart. Both conditions could have caused death, independently or in combination, at any time.

[23] The evidence from Dr Tannenberg in relation to the brain injury was:

> "… there was only one abnormality … on examination of the brain … . This was the presence of tiny little haemorrhages in an area of the brain which is termed the corpus callosum … a bundle of nerve fibres which crosses from one side of the brain to the other. … there's been tearing of very small blood vessels to produce those little haemorrhages.
>
> …
>
> Is there a particular label to the injury that is associated with that nerve fibre damage? – Yes … It's called diffuse axonal injury.
>
> … he didn't have any other evidence in the brain of other diffuse axonal injury. … His … was at the very lower level of damage in which he had very isolated appearance of damage, just to the corpus callosum. So what you would expect … would be a possible loss of consciousness … . But it is not enough … to be a cause of death."

[24] Dr Tannenberg described the likely mechanism of the brain injury as being:

> "…a rotatory movement of the head … on the neck with a swirling or shearing force applied to the inside of the brain. That occurs, usually, with a blow or … impacts, where the body is free to move… ."

[25] The doctor accepted that a punch to the left cheek or face could have caused the nerve damage. He repeated in cross-examination that the injury was minor.

[26] Dr Milne, pathologist, said:

> "There's four chambers in the heart … and all of them were dilated … . … the appearance is consistent with a disease known as dilated

> cardio-myopathy, which is a disorder of the heart muscle which causes the heart to become enlarged, dilated and flabby and in the long term that can lead to cardiac failure and in the short term … to … sudden death from an abnormal heart rhythm. … That was the first main finding in the heart. The second was he had severe narrowing of the arteries of the heart … (which) is what causes most heart attacks. So he had a severe degree of narrowing. There was no evidence of an old heart attack or a recent heart attack, but I can't exclude that either of those happened. … in summary … he's got two significant pre-existing abnormalities of the heart."

[27] Dr Milne testified that each condition could "lead to death at any time." The deceased might be:

> "…lying in bed, he could be walking down the street, doing anything and can just suddenly die … . … You're more likely to run into problems with an abnormal heart rhythm or a heart attack when the body is under … added strain, so … involvement in an altercation, being frightened, for example … (the heart) it's struggling to get by as it is and if you put extra pressure on that heart you're more likely to run into these problems."

[28] There was as well an injury to the deceased's neck indicated by haemorrhaging to the sternocleidomastoid muscles on both sides of the neck suggesting some impact to the neck. There was no damage to the larynx or hyoid bone both of which are relatively easily damaged. A headlock applied to the neck could have caused the injuries. Dr Milne thought only a mild degree of force would be necessary to cause the injury described.

[29] In relation to the possible causes of death Dr Milne said:

> "In my report I certify the cause of death as undetermined, the findings … are difficult … to interpret … . … four factors … are potentially relevant. The first one … is the … head injuries and we've heard from Dr (Tannenberg) … that they're (not) enough to cause death. … What we're left with … is the other three factors which are the neck injuries, the narrowing of the arteries of the heart and the dilated cardio-myopathy. … either of those cardiac conditions (could have caused) sudden death at any time, more likely … in the circumstances of an altercation. … the neck injuries … themselves are mild but that doesn't exclude death could've occurred from pressure on the neck."

[30] There were no signs of asphyxiation which one might expect if the deceased had died from the effect of the neck and airways being compressed in a headlock.

[31] In relation to the neck injury Dr Milne said:

> "… the injuries themselves are mild but that doesn't exclude death (occurring) from pressure on the neck. The history that would really help me is what happened at the time. If someone's died directly as a(n) … effect of pressure on the neck … then generally they're going to die while that pressure is being applied. Say we had a history that he appeared to be dead with the pressure on his neck. Then I'd say

> that the neck injuries are most likely the primary cause of death. Say we had a history of … pressure on the neck, he's left at that stage but he's alive, then probably the most likely cause of death is one of the heart conditions or a combination of the heart conditions."

[32] Dr Milne observed other injuries on the deceased. These were abrasions and bruises consistent with a minor scuffle or fight. There were no facial fractures or loosening of the teeth. The pushing, wrestling and punching described by the appellant in his interview were "entirely consistent with the external injuries" Dr Milne observed.

[33] The appellant submits that the evidence did not permit the prosecution to disprove the application of s 271(1) of the *Criminal Code* so that it could not, beyond reasonable doubt, prove that Mr Campbell's death did not occur in circumstances which did not involve criminal liability. The section provides:

> "When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm."

[34] There are four elements identified in the section, all of which must be present before the use of force is authorised. They are:

(a) The accused must have been unlawfully assaulted;

(b) He did not provoke the assault on him;

(c) The force used to resist the assault is reasonably necessary to make an effective defence to the assault; and

(d) The force used was not intended to cause death or grievous bodily harm and was not in its nature likely to cause death or grievous bodily harm.

[35] Unless the prosecution disproves at least one of the elements self defence, as defined by s 271(1), will authorise the force used by an accused. The standard of proof, or disproof, is beyond reasonable doubt.

[36] All that is known about the fight between the appellant and the deceased comes from the accounts given to Mr Popp and the police. The former was fragmentary and the latter disjointed. Those accounts depict the deceased as the instigator of the quarrel and the first to use force. The account establishes that the appellant was unlawfully assaulted and did not provoke the assault. His account to the police also establishes that the same level of force was used by both men. There was pushing, shoving, punching and wrestling, but no evidence of a disproportionate response by the appellant. No weapon was used by one and not the other. Nor was there evidence that the appellant continued to use force after he had successfully extricated himself from the deceased's grasp.

[37] There is, of course, no suggestion of any intention to cause death or grievous bodily harm. The medical evidence supports rather than disproves the requirement that the force used by way of defence not be such as is likely to cause death or grievous bodily harm. I have rehearsed enough of the medical evidence to show that mild force was used and relatively minor injuries were inflicted. The injuries to the soft

tissue of the neck was a possible cause of death but the force used to inflict the injury was mild. It cannot be said that holding an assailant in a headlock is an excessive response to an assault which results in both protagonists struggling and wrestling on the ground.

[38] In this regard the medical evidence as to the impossibility of ascertaining the cause of death is particularly relevant. Dr Milne's evidence was that distress or exertion as a result of a physical struggle was a likely precipitant of a fatal heart attack. It is entirely consistent with the medical evidence that in the course of a fight of no great physical intensity the deceased died from natural causes. Given the minor nature of his injuries it cannot be concluded that the prosecutor disproved the third and/or fourth elements of the defence. The appellant's version of the struggle provided a sufficient basis for finding the first three elements. There is nothing in the evidence to contradict his account.

[39] Mr Copley SC who appeared for the respondent argued that the jury could disregard that account because of doubt cast on it by the facts that the appellant did not want the body illuminated by the head lights of Mr Popp's car, and did not want to call an ambulance in case he be associated with the injuries. It was argued that this behaviour was inconsistent with someone who acted in self defence and constituted an implicit admission that the appellant knew he was responsible for the death. The submission continued that it was open to infer from the circumstances that the appellant had not used a justifiable degree of force in self defence or, indeed, acted in self defence. There was a separate but related submission that the position of the bags which the appellant had apparently been carrying before he encountered the appellant showed that the fray had not developed as the appellant described.

[40] The last point can be dismissed immediately. There is nothing in the photographs showing the juxtaposition of the bags to the deceased's body, or the state of the bags and their contents, which appear to have any relevance. They give no indication as to how the confrontation began, developed or concluded.

[41] The other factors relied on by the respondent to disprove the applicability of s 271(1) are more troubling. They do give rise to a suspicion that the course of the struggle and the exchanges of force between appellant and deceased may not have been exactly as the appellant described. The appellant's failure to summon help for the deceased and his attempt to conceal the fact of his involvement with the deceased immediately prior to death do suggest some awareness that he was criminally responsible for the death.

[42] The respondent's submissions involve disentangling the appellant's account of what happened between him and the deceased. The respondent relies upon his admissions that he fought with the deceased but disregards his description of the origin and course of the struggle. This is not, I think, permissible without some objective facts showing that particular aspects of the account are wrong. One is left with an account about which there may be some scepticism but no basis for contradiction. The account given squarely raised s 271(1) of the Code as authorising the degree of force objectively observed to have been applied to the deceased.

[43] There is, as well, the point that the appellant's unsatisfactory response to the death may have been the result of personal factors rather than a consciousness of guilt.

He was drunk; he was, at least on that night, homeless; he was engaged in minor but nonetheless antisocial behaviour. It may not be safe to judge him by the standards one would apply to a man of sense, education and civic responsibility.

[44] The matters identified by the respondent do raise a doubt about the applicability of s 271(1). The doubt is not quite sufficient to disprove, beyond reasonable doubt, that the appellant did not act within the terms of s 271(1) of the Code. Consequently it was not open to the jury to be satisfied beyond reasonable doubt that he unlawfully killed the deceased.

[45] The second ground of appeal depends upon the evidence that the cause of death was unknown and therefore could not be attributed to the death. The evidence was pressed into support for several arguments but it is sufficient to notice the simplest one.

[46] Section 293 of the Code defines "killing":

> "Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person."

[47] The appellant's point is that the prosecution did not prove, beyond reasonable doubt, that he directly or indirectly, by any means whatever, caused the deceased's death. Philp J noted in *Humphries v The King* [1943] St R Qd 156 at 170 the causal connection required by the Code between an act and death "sufficient to fix the actor with liability for homicide is very broadly expressed".

[48] In *R v Sherrington & Kuchler* [2001] QCA 105 McPherson JA said [4]:

> "… a person causes the death of another if his act or conduct is a substantial or significant cause of death, or substantially contributed to the death."

[49] His Honour relied for the proposition upon *Royall v The Queen* (1990) 172 CLR 378, in which Brennan J said (398):

> "The basic proposition relating to causation in homicide is that an accused's conduct, whether by act or omission, must contribute significantly to the death of the victim … . It need not be the sole, direct or immediate cause of the death." (Footnote omitted)

Toohey and Gaudron JJ said (423) that in cases where there may be more than one cause of death:

> "… the jury will concentrate their attention on whether an act of the accused substantially contributed to the death."

[50] Notwithstanding that the test of causation contained in s 293 is broadly expressed and that a person is deemed to have killed another if he causes the death indirectly by any means, the prosecution must still prove that some act (or omission) of the accused caused the death. Applying the exegesis found in *Royall* and *Sherrington* the accused's act must have substantially contributed to the death.

[51] The medical evidence makes it impossible to find causation to the requisite standard of proof. Any one of three causes might have been responsible. Only one of those (the neck injury) can be said to be causally connected with an act of the appellant. The dilated heart and narrowed coronary arteries could by themselves and without any conduct by the appellant have caused death.

[52] Dr Milne, it will be remembered, stated that if the deceased were alive after the struggle with the appellant had ceased, then one of the congenital heart conditions was more likely to have been the cause of death. There was evidence in the appellant's account to the police officers that the deceased was sitting up "coughing and farting" as the appellant left to go to Mr Popp's house. There is nothing to contradict that account. The points raised by the respondent for doubting its overall veracity do not entitle a tribunal of fact to disregard that statement from the only witness to the relevant events.

[53] Even if one put little weight on that assertion by the appellant it remains the case that the evidence showed that the cause of the deceased's death could be unconnected with anything done by the appellant as with his coming to blows with the deceased.

[54] Even the evidence that the exertion and fright which the deceased experienced in the course of the fray may have precipitated a heart attack is not sufficient to prove that the appellant's conduct was a substantial cause of the death. As has been pointed out several times only slight force was used by both men as they grappled. That may have been sufficient to bring on the heart attack but the fragility of the deceased's health makes it impossible to conclude, beyond reasonable doubt, that the appellant's acts in struggling with the deceased was a *substantial* cause of the death.

[55] As with the first ground of appeal the conclusion, whether or not the conviction is unreasonable, is not straightforward. The test propounded in *M v The Queen* (1994) 181 CLR 487 is whether there is a significant possibility that an innocent person has been convicted. The court pointed out that in most cases a doubt experienced by an appellate court will be a doubt which the jury ought also to have experienced. The debate in this appeal concerns the sufficiency of evidence, not its evaluation. If a Court of Criminal Appeal, having made its own assessment of the evidence, considers that it was not open to the jury to be satisfied of guilt beyond reasonable doubt, it must intervene.

[56] With respect to both grounds of appeal the evidence is not sufficient to support a conviction. When the doubts concerning self defence and cause of death are considered together the court is bound to conclude that the conviction is unreasonable. The evidence does not satisfactorily prove that the killing was unlawful or, indeed, that the appellant caused the death.

[57] The appeal should be allowed, the conviction set aside and a verdict of acquittal entered.

[58] **WHITE JA:** I have read the reasons for judgment of Chesterman JA and agree with his Honour for the reasons that he gives that the appeal must be allowed, the conviction set aside and a verdict of acquittal entered.

[59] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Chesterman JA and with the orders he proposes.