# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Messent* [2011] QCA 125 |
| PARTIES: | **R**<br>**v**<br>**MESSENT, Keith Hans**<br>(applicant/appellant) |
| FILE NO/S: | CA No 134 of 2010<br>DC No 1037 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Ipswich |
| DELIVERED ON: | 17 June 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 May 2011 |
| JUDGES: | Margaret McMurdo P, Fraser and White JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Appeal against conviction dismissed.**<br>**2. Application for leave to appeal against sentence refused.** |
| CATCHWORDS: | CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – ACCIDENT – DIRECTIONS TO JURY – where the appellant was charged with unlawfully doing grievous bodily harm – where the appellant threw a glass bottle towards the complainant from a short distance causing injury – whether the primary judge failed to direct adequately the jury in relation to accident under s 23(1)(b) *Criminal Code*<br><br>CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – DEFENCE OF PERSONS OR PROPERTY – DIRECTIONS TO JURY – whether the primary judge failed to direct adequately the jury in relation to self-defence under s 271(1), s 271(2) and s 272 *Criminal Code*<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to five years imprisonment with parole eligibility after serving two and a half years – whether the sentence was manifestly excessive |

*Criminal Code* 1899 (Qld), s 7, s 8, s 23(1)(b), s 245, s 268, s 269, s 271, s 272

*Kaporonovski v The Queen* (1973) 133 CLR 209; [1973] HCA 35, cited
*R v Amituanai* (1995) 78 A Crim R 588; [1995] QCA 80, cited
*R v Berryman* (2005) 159 A Crim R 65; [2005] QCA 471, considered
*R v Bierton* [2009] QCA 68, considered
*R v Bojovic* [2000] 2 Qd R 183; [1999] QCA 206, cited
*R v Bryan; ex parte A-G (Qld)* (2003) 137 A Crim R 489; [2003] QCA 18, considered
*R v Dean* [2009] QCA 309, cited
*R v Dietz* [2009] QCA 392, cited
*R v Gray* (1998) 98 A Crim R 589; [1998] QCA 41, considered
*R v Johnston* [2004] QCA 12, cited
*R v Lacey; ex parte A-G (Qld)* (2009) 197 A Crim R 399; [2009] QCA 274, cited
*R v Prow* [1990] 1 Qd R 64, cited
*R v Stuart* [2005] QCA 138, cited
*R v Thomason; ex parte A-G (Qld)* [2011] QCA 9, considered
*R v Verheyen* [2008] QCA 150, considered
*R v Vidler* (2000) 110 A Crim R 77; [2000] QCA 63, cited
*R v Wilmot* (2006) 165 A Crim R 14; [2006] QCA 91, cited
*R v Young* (2004) 142 A Crim R 571; [2004] QCA 84, cited

COUNSEL: J J Allen for the appellant
D Meredith for the respondent

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

[1] **MARGARET McMURDO P**: I agree with White JA's reasons for dismissing the appeal against conviction and refusing the application for leave to appeal against sentence.

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

[3] **WHITE JA**: The appellant was charged with Dennis John Beattie and Cameron David Rashleigh with unlawfully doing grievous bodily harm on 2 January 2009 to Russell John Beattie (who is not related to the accused Dennis John Beattie). After a nine day trial, on 17 May 2010, the appellant was found guilty and his two co-accused not guilty. The appellant had been charged as the principal offender. The liability of the co-accused was based on both s 7 and s 8 of the *Criminal Code*. It is not contended that there was not a rational basis for the acquittals of the co-accused and the conviction of the appellant.

[4] The appellant appeals against his conviction and seeks leave to appeal against the sentence of five years imprisonment imposed on him on 18 May 2010. The grounds

of his appeal are that the trial judge failed adequately to direct the jury in relation to self-defence and accident and that the sentence imposed was manifestly excessive.

[5] It was not an issue at trial that the appellant did grievous bodily harm to the complainant when he threw a glass bottle towards the complainant when separated by a short distance which caused him injury.[1]

[6] The issues for the jury as regards the appellant were whether he could rely on the excuses of accident pursuant to s 23(1)(b) of the *Criminal Code* and self-defence. The trial judge directed the jury on accident, self-defence against an unprovoked assault pursuant to s 271(1) and (2) and self-defence against a provoked assault in s 272.

[7] The appellant neither gave nor called evidence nor did the co-accused.

**Background**

[8] The complainant sustained serious head injuries when a 660ml liquor bottle thrown by the appellant struck his head fracturing his skull during a street encounter between two groups. Part of the bottle was embedded into his forehead. There is little real controversy about the facts surrounding the offence and only those necessary to understand the issues of the appeal need be set out.

[9] A daughter of the complainant, Taliesha Strathie-Beattie aged 23 at trial, lived at 22 Sutton Street, Churchill with her two young daughters, her sister, Tiara-Lee, her child and her sister's partner, Dalton Spall. She had resided there for about 12 months. Cameron Rashleigh, one of the accused, had been her boyfriend. About six months previously they had discontinued their relationship. She had known the appellant for some years and Dennis Beattie for a few months. Goods, including furniture, belonging to the appellant and Dennis Beattie had been stored underneath the house at 22 Sutton Street as well as property belonging to other people, including the complainant. The appellant and Dennis Beattie had been asked to remove their goods in the past but had not done so. Their property sustained damage from rain water which flooded under the house in the previous November, 2008. The damaged goods had been dumped by the complainant.

[10] Dennis Beattie came to 22 Sutton Street about lunchtime on 2 January 2009 looking for his property. He responded angrily to the information that it had gone. He allegedly threatened to destroy property in the house. Taliesha Strathie-Beattie telephoned police who arrived just after Dennis Beattie had left by car.

[11] Another of the complainant's daughters, Nicole Beattie, was with her then partner, Aaron Bird, at Cameron Rashleigh's house that afternoon with Dennis Beattie, the appellant and others. She overheard them discussing the property which had been stored under the house at 22 Sutton Street and subsequently destroyed. Some of the group, including the appellant and co-accused, left later to travel to 22 Sutton Street. Nicole sent text messages to 22 Sutton Street.

[12] In the course of the afternoon the complainant and his wife and others arrived at 22 Sutton Street expecting trouble after telephone calls from Tiara-Lee. There was talk about packing up the young women and their children and leaving.

[13] Both groups, although not every person in them, had consumed some alcoholic liquor during the afternoon and evening.

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1 AR 433.

[14] At about 10.00 pm the appellant was heard and seen outside or just inside the fence line of 22 Sutton Street yelling out and waving his arms having come down Greave Street.[2] He was accompanied by Dennis Beattie and Cameron Rashleigh with other men in the background. A dog, owned by Cain Beattie, the complainant's 18 year old son, was barking. The appellant was seen to kick the dog through the air. The complainant, Cain Beattie, and others from 22 Sutton Street rushed up to the appellant. There was an angry verbal confrontation in which the complainant shouted that they were not welcome and that they were to leave. The estimate of the numbers in the appellant's group varied from six to 10. They were spread out across the road and were confronted by a group of eight from 22 Sutton Street comprising the complainant, the complainant's wife, his daughters, his son, Dalton Spall and Glen Farmer and his partner Biannca Donaldson who were visiting. There was differing evidence about whether the appellant's group were armed but there was no doubt that some, at least, of the Sutton Street group had picked up available weapons on their way out of the house and yard. These included a metal chair leg or bar, a cricket bat, sticks and, in the case of Dalton Spall, a machete which he picked up in the garden which he said he had concealed under his shirt or down his side.

[15] The complainant's evidence was that as he moved up the street he was telling the appellant's group to leave and to "leave the women and kids alone."[3] He yelled abuse at the appellant's group and was described as stomping his feet in an aggressive manner.[4] The appellant's group was steadily being backed up Greave Street by the complainant's group. This activity was accompanied by shouting and yelling. There was evidence that when the complainant paused the appellant would lunge towards him aggressively. There was also some evidence that one or more members of the appellant's group had hands raised as if in surrender. The complainant's partner, Leanne Strathie, telephoned police. She heard Cameron Rashleigh yell, "Just take the black cunt out", and "Just do it, so we can do what we come [sic] to do" [5].

[16] There was varying evidence about how the appellant came into possession of the bottle. The weight of evidence was that it was thrown to him and he then threw the bottle, containing some liquor, at the complainant from a distance of one to two metres. The bottle struck the complainant in his head and the neck of the bottle remained embedded in his forehead. The complainant fell to the ground bleeding profusely. The appellant's group then scattered. Police and ambulance arrived shortly afterwards.

**Adequacy of directions on self-defence**

[17] There are, essentially, three complaints made about the directions given to the jury in relation to self-defence. The first concerns the inadequacy of the initial directions about s 271(2) which the trial judge declined, after a request from counsel, to further illuminate. It is conceded by Mr Allen for the appellant, that his Honour corrected those deficiencies by giving further directions after a request from the jury during deliberations. However, Mr Allen submitted, when redirecting an error was made

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2 The house at 22 Sutton Street has access to Greave Street at the bottom of a slight hill, exhibit 1 (not in the Appeal Record).

3 AR 154.

4 AR 395; AR 477.

5 AR 204.

in that the mental element in s 271(2) was expressed objectively rather than subjectively as the belief of the appellant. The appellant also complains that the trial judge confused "provocation" insofar as it might be related to the defence of self-defence and "provocation" as a defence in itself. That is, his Honour directed on s 269 rather than referring to the definition of provocation in s 268. Finally, the appellant complains that self-defence against a provoked assault in s 272 ought not to have been left to the jury because there was no evidence upon which the jury could have been satisfied beyond reasonable doubt that the complainant was provoked into assaulting the appellant. The appellant's experienced trial counsel had expressly asked for such a direction.

[18] Before examining the directions given the relevant provisions of the *Criminal Code* should be set out. Section 271 provides:

> "(1) 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.
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> (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

"Provocation" is defined in s 268:

> "(1) The term ***provocation***, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person … to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered.
>
> (2) …"

Section 245 defines "assault":

> "(1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an ***assault***."

Section 269 provides:

> "(1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
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> (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact."

[19] Counsel for the appellant asked for a direction on self-defence as encompassed in s 271(2) – he did not contend that s 271(1) was open because of the nature of the force in throwing the bottle at close range[6] - and for a direction on s 272(1).

[20] The trial judge read to the jury s 271(1) and (2)[7] and the definition of assault in s 245. His Honour explained that the possibility of assault by members of the Sutton Street group was raised by their conduct in advancing up the street armed with weapons, saying threatening words and making threatening gestures. He explained the elements of s 271(1) – an unlawful assault and that the defendants must not have provoked the assault, about which there is no complaint. His Honour then paused to read the relevant provisions of s 268 on provocation, again about which there is no complaint. Uncontroversially, he said that the force used must be reasonably necessary to make effectual defence against the assault and that the force used must not have been intended, and was not such as was likely, to cause death or grievous bodily harm.[8]

[21] After giving a questionably correct example from daily life, the trial judge said:[9]

> "Were the actions of the Sutton Street group, or some of them, such as to constitute an unlawful assault, in the way that I've explained assault? Did the defendants not provoke that assault by what occurred previously, whatever it was that you think occurred previously? Did the Sutton Street group's actions constitute a wrongful act of such a nature as to be likely when done to an ordinary person, to deprive him or her of the power of self control, and to induce him to assault the other person?"

The appellant had raised no defence of provocation. This passage was not relevant to any aspect of the case, and, particularly not to s 271(1). Confusingly, a few sentences further on his Honour added:

> "Of course, if you think that the defendants did provoke the Sutton Street group's actions, especially those which occurred halfway up the street or wherever it was up the street, then this

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6 Even if inconsistent with a s 23(1)(b) defence, it would seem.
7 AR 650.
8 AR 655.
9 AR 656.

> defence, this possible defence, could not apply, because it relates only to an unprovoked assault."[10]

[22] Finally, his Honour correctly summarised[11] a s 271(1) defence. He made no reference to the elements of self-defence based on s 271(2).

[23] His Honour then turned to s 272 – self defence against a provoked assault. He read the whole section to the jury and said:[12]

> "So matters for your consideration are whether the defendants did provoke the assault? Did the defendants have a reasonable apprehension of death or grievous bodily harm – this is half way up the street? Did they believe on reasonable grounds that it was necessary in order to preserve themselves from death or grievous bodily harm to use force in self defence and was the force used by the defendants, especially [the appellant], such as was reasonably necessary to preserve him from death or grievous bodily harm?"

His Honour next said:[13]

> "Now as in the previous section which dealt with self defence against an unprovoked assault, if the prosecution were able to exclude beyond reasonable doubt any of those four things, then this defence would be excluded as well. Also the defence would not apply where the defendant – take [the appellant] or any of the defendants, first began the assault with intent to kill someone or to do grievous bodily harm to someone. It also would not apply where the defendant - take [the appellant], endeavoured to do grievous bodily harm to [the complainant] before the necessity of preserving his own situation – his own life arose."

[24] His Honour then purported to summarise the whole range of issues which the jury needed to resolve when considering self-defence:

> "So just to conclude on this, the prosecution will have excluded this possible defence if the assault – if there were an assault by the Sutton Street group or any of them was not of such violence as to cause reasonable apprehension of death or grievous bodily harm, or if there were an assault by the Sutton Street group it did not induce the defendants, especially [the appellant], on reasonable grounds to believe that it was necessary for his own preservation from death or grievous bodily harm to use the force that was used by way of self defence, or that the force used was more than was reasonably necessary to save [the appellant] or the defendants from death or grievous bodily harm, or that the defendants or one of them first began the initial assault with intent to kill or to do grievous bodily harm to some person, or that [the appellant] endeavoured to kill or to do grievous bodily harm as is this case to say [the complainant] or one of the Sutton Street group before the necessity of so preserving himself arose."[14]

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10 AR 657.
11 AR 659.
12 AR 661.
13 AR 661.
14 AR 661-2.

[25] After the jury retired to consider its verdict counsel for the appellant explained to his Honour that the appellant's case was not based on s 271(1) but s 271(2) and while the directions for s 271(1) were detailed, he was concerned that there was virtually nothing said by way of directions on the elements of s 271(2). He sought a re-direction in terms of the Supreme and District Court Benchbook for s 271(2). His Honour expressed some want of enthusiasm for the prose of the Benchbook.[15] The prosecutor then requested the judge to make clear that foreseeability and intention in s 23(1)(b) related to the appellant and not to the other accused. This will be discussed under the ground of appeal concerning accident. His Honour declined both requests.[16]

[26] After about 40 minutes the jury sought "clarification" on provoked assault and s 271.[17] Mr Allen has conceded that his Honour, in response, gave more comprehensive directions on s 271(1) and (2). However, the further complaint is made that when re-directing on s 271(2) the judge impermissibly postulated an objective test by referring to "necessary force" without qualifying it by reference to the appellant's subjective belief. The section says, relevantly:

> "… the person using force by way of defence believes, on reasonable grounds …"

After an exposition of s 271(2) his Honour identified four factors for the jury to consider. He said (having mentioned the first two):[18]

> "The third factor is, the force used by the defendant was reasonably necessary to make effectual defence against the assault … it is lawful … to use any such force … as is necessary for defence ...."

The use of the objective is submitted to have been compounded when his Honour said:[19]

> "The Prosecution seeks to exclude the defence by arguing that the force that [the appellant] used was not necessary for his defence. You'll see that section 271(2) says that it is lawful where the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm for the person to use any such force to the assailant as is necessary for defence.
>
> A question for you is whether the force that he used by throwing the bottle at [the complainant] was necessary for his defence."

His Honour made reference to the appellant making instinctive reactions in the heat of the moment but then reverted to an objective test when he said that the law permits a person to use any such force "as is necessary for defence".[20] His Honour said:

> "Was it necessary for [the appellant's] defence that he threw the bottle at [the complainant], because if you find that it was necessary for his defence if he had a reasonable apprehension of death or grievous bodily harm and had not provoked the assault … and the force that he used was not necessary for his defence …"[21]

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15 AR 665.
16 AR 665.
17 AR 667.
18 AR 679-80.
19 AR 681-2.
20 AR 682.
21 AR 682-3.

In the following paragraph his Honour again referred to the force used being greater than was necessary for defence.[22]

[27] The judge then proceeded to state the correct approach to s 271(2):[23]

> "A key component in section 271, subsection (2) is that the person using force by way of defence, that's [the appellant], believes on reasonable grounds that he cannot otherwise preserve himself from death or grievous bodily harm, unless he used the force that he used towards [the complainant]. So the critical question there is whether he, [the appellant], believed on reasonable grounds that the force he used was necessary for defence."

His Honour continued:

> "So the important question is the state of mind or belief of [the appellant]. The question is whether the prosecution has proven beyond reasonable doubt that [the appellant] did not actually believe on reasonable grounds that it was necessary to do what he did to save himself or perhaps someone else in his group from death or grievous bodily harm."[24]

[28] His Honour then re-directed on s 272. The jury subsequently sought further direction on a provoked attack under s 272 and other matters about which there is no particular complaint.

**Discussion**

[29] As McPherson JA said in *R v Gray*[25], "… the provisions of s 271 are by no means a model of clarity or simplicity." Joined to the complexity inherent in the provisions, this case also throws up some of the "… difficulties associated with multiple alternative defences of self-defence" which tend "more often than not to obscure the more viable or arguably meritorious of the alternatives."[26] As the editors of the Benchbook observe:

> "[d]iscussion with counsel and commonsense will often narrow the true defence down to sensible limits and avoid the highly confusing exercise of multiple alternative directions under ss 271(1), 271(2) and 272."

[30] Counsel below did not seek to have s 271(1) left for the jury's consideration[27] for the good reason that the test that the force used must be "reasonably necessary" for defence and "not intended" and was "not such as … likely, to cause … grievous bodily harm" could not be supported on any view of the evidence particularly in light of the admission that grievous bodily harm was suffered by the complainant and, tacitly, at the hands of the appellant.

[31] Section 271(1) and (2) are not entirely distinct because the opening word of s 271(1) - "when a person is unlawfully assaulted, and has not provoked the assault …" - are pre-conditions for the operation of s 271(2).[28] Apart from that "overlap", as was

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22 AR 683.
23 AR 683.
24 AR 684.
25 (1998) 98 A Crim R 589 at 592,
26 *R v Bojovic* [1999] QCA 206 at [10].
27 AR 665, 669 and 670.
28 *R v Gray* (1998) 98 A Crim R 589 at 593.

outlined in *Gray* and endorsed in *R v Wilmot*[29], s 271(1) requires three conditions: the force used:

(i) must be reasonably necessary to make effectual defence against the unlawful assault;
(ii) must not be intended; and
(iii) must not be such as is likely to cause death or grievous bodily harm.

Those conditions are not repeated in s 271(2) which requires that:

(i) the nature of the unlawful assault must be such as to cause reasonable apprehension of death or grievous bodily harm;
(ii) the person must believe on reasonable grounds that he cannot otherwise preserve himself from death or grievous bodily harm.

[32] McPherson JA expressed the different mental elements in s 271(1) and (2) in the following way in *Gray*:[30]

> "… there is plainly a difference between the mental condition predicated of a defender under s 271(1) and under s 271(2). In the case of s 271(1), the degree of force used must be "reasonably necessary" to make "effectual defence" against the assault. The criterion in that instance is objective and does not concern itself with the defender's actual state of mind. In the case of s 271(2), it is, at least in part, subjective. The defender must believe that what he is doing is the only way he can save himself or someone else from assault. He must hold that belief "on reasonable grounds"; but it is the existence of an actual belief to that effect that is the critical or decisive factor. There is no additional requirement that the force used to save himself or someone else must also be, objectively speaking, "necessary" for the defence."

His Honour continued:

> "If this has the effect of writing out of s 271(2), by excluding from it any requirement which at first sight appears to be imposed by, the words 'necessary for defence' in the subsection, then it is a result that is dictated by authority which is binding on this Court."

[33] In different words, his Honour succinctly summarised the differences in the two rules in *R v Young*[31] in passages usefully set out in the Benchbook:

> "[6] Both subsections of s 271 are predicated upon the happening of an unlawful assault, and both make it 'lawful' (and as such not criminal) to use force as a defence against the assailant, although the extent of the force that is authorised under s 271(1) differs from that permitted under s 271(2). In the case of the former, it is limited to such force 'as is reasonably necessary to make effectual defence against the assault', and the force used must not be intended or likely to cause death or bodily harm. The standard adopted is objective and does not depend on the impression formed by

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29 (2006) 165 A Crim R 14.
30 At 593.
31 [2004] QCA 84.

> the person assaulted about the degree of force needed to ward off the assailant. If an honest and reasonable mistake is made about it, the exculpatory provisions of s 24 of the Code are doubtless available in appropriate circumstances.
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> [7] Section 271(2), on the other hand, is concerned with a different state of affairs. It authorises the use of more extreme force by way of defence extending even to the infliction of death or grievous bodily harm on the assailant. It is available where the person using such force cannot otherwise save himself or herself from death or grievous bodily harm, or believes that he or she is unable to do so except by acting in that way. The belief must be based on reasonable grounds; but, subject to that requirement, it is the defender's belief that is the definitive circumstance."

[34] It seems that the distinction was not completely grasped by the trial judge initially but after his Honour redirected in response to the jury enquiry, the jury were then directed correctly.

[35] On the question of provocation, this court has held, at least since *R v Prow*[32], that where there is evidence to raise the question whether the unlawful assault which founds the self-defence was, in fact, provoked by the accused, the jury should be instructed on the meaning of "provoked" as defined in s 268. This was confirmed in *R v Dean*.[33]

[36] Where there is no evidence to raise provocation then the jury should not be distracted by the issue and it can be ignored. The evidence here said to raise provocation was the conduct of the appellant in entering the grounds of 22 Sutton Street, making aggressive gestures, shouting and viciously kicking the dog together with the earlier threats to property made in the afternoon. Rather than leave the jury with the task of working through s 271(1) and then s 271(2), it would have been helpful to tell them that they might find it of assistance to resolve first this issue of whether the prosecution had proved beyond reasonable doubt that any assault on the appellant by the complainant and his companions was provoked. If satisfied beyond reasonable doubt that the appellant's conduct provoked the complainant (within the meaning of s 268) to take up arms and advance with his companions in a threatening manner driving the appellant's group up the road, the jury could immediately consider s 272 without the need to consider s 271.

[37] When his Honour re-directed on s 271(2) he articulated an objective test when speaking of the "necessary" force used by the appellant rather than the appellant's belief based on reasonable grounds. He did so on some three occasions as set out above. However, his Honour did then direct the jury correctly[34] and in very clear terms. Mr Allen submitted that this did not remedy the erroneous impression which the earlier misdirection must have conveyed to the jury. In *Wilmot*[35] the President, quoting from *R v Vidler*[36], confirmed the view of McPherson JA in *Gray* that there is no objective test in s 271(2) that the force used by the defender must be

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32 [1990] 1 Qd R 64 per Shepherdson J at 86 and Williams J at 88.
33 [2009] QCA 309 per Fraser JA at [25].
34 As set out in [27] above.
35 (2006) 165 A Crim R 14 at [5].
36 (2000) 110 A Crim R 77.

reasonably necessary. To direct otherwise would be positively misleading. Initially the direction was incorrect. However, the primary judge did, finally, articulate the correct approach. It is expressed very clearly. It is in the final part of his Honour's re-direction on s 271(2). There was no application by counsel to correct any erroneous impression.

[38] Mr Allen submitted that his Honour ought to have declined to direct on s 272 because there was insufficient evidence to support it. Defence counsel very strongly urged his Honour to direct on s 272. The evidence of "over reaction" by the Sutton Street group was taking up quite intimidating implements, including a machete[37] to drive the appellant's group away. That group was not obviously armed. The two groups were in close proximity to each other. It would not have been unreasonable of the jury to have accepted that those facts were such that the prosecution had not proved that the appellant did not believe on reasonable grounds that to preserve himself from death or grievous bodily harm he had to use the level of force against the complainant (as leader) which might cause death or grievous bodily harm.

[39] There was no error in directing on s 272.

[40] Self-defence is recognised as a difficult area in which to direct a jury. The aim is to assist the jury to apply the law to the facts which they find established on the evidence. Reading the provisions of the *Code* followed by references to the elements interspersed with regular asides about "beyond reasonable doubt" and the "obligation of the prosecution to disprove" will rarely achieve this aim, particularly where there are several possible paths to a verdict. A judge should endeavour to lay out a logical and coherent pathway for the jury. In this case this would better have been achieved with some written aids in the form of bullet points or a flow chart or by some PowerPoint presentations on the screen. It is a practice now regularly engaged in at trials with the judge giving counsel an opportunity to comment on the material to be provided in advance. It has the additional advantage of encouraging clarity in identifying the issues for the jury's resolution. Jurors are literate and most are used to using technological aids in their employment and at home and might expect the courts to acknowledge those circumstances by using sensibly whatever will advance the efficient and fair disposition of the trial.

**Adequacy of directions on accident**

[41] The appellant complains that when directing the jury about the defence of accident pursuant to s 23(1)(b) of the *Criminal Code* the trial judge fell into error by inviting the jury to consider what "all the defendants" intended or foresaw would be the consequence of throwing the bottle. This, so the appellant argues, would have permitted the jury to have excluded the defence of accident in respect of the appellant if they had found that one of the other accused, but not the appellant, either intended or foresaw that a consequence would be the event of grievous bodily harm. The appellant contends that the jury ought to have been directed to consider only the state of mind of the appellant.

[42] Section 23(1)(b) of the *Criminal Code* provides:

> "(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for –

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[37] Which may or may not have been visible to them but that was a question for the jury.

…

(b) an event that occurs by accident."

In *Kaporonovski v The Queen*[38] Gibbs J said:

> "It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person."[39]

This passage was endorsed in *R v Stuart*[40] and has been adopted in the Benchbook suggested direction on s 23(1)(b).

[43] The trial judge explained, unexceptionably, to the jury:

> "'An event occurs by accident, within the meaning of that section of our law, if it was a consequence which was not, in fact, intended or foreseen by the defendant, and would not reasonably have been foreseen by an ordinary person.' The consequence was not intended or foreseen, and would not reasonably have been foreseen by a reasonable person."[41]

His Honour then said:[42]

> "So there's two aspects to that. It means that the person – take this case, assuming that Mr Messent threw the bottle, and that Mr Rashleigh said the words he said, and Mr Dennis Beattie provided the bottle to Mr Messent. It means that neither of the *defendants* intended Mr Russell Beattie to suffer grievous bodily harm – to have something in their mind. And they didn't foresee that he would, and an ordinary person would not reasonably have foreseen it either. You're the reasonable person. The group of you – the 12 of you.
>
> Now, the prosecution has to satisfy you beyond reasonable doubt that this possible defence of accident does not apply. So the prosecution must satisfy you beyond reasonable doubt that the *defendants* did not intend Mr Russell Beattie to suffer grievous bodily harm, or that they didn't foresee – I'm sorry – or that – I'll start again.
>
> The prosecution has to satisfy you beyond reasonable doubt, to exclude this possible defence of accident, the *defendants* did intend, by what they did, for Mr Russell Beattie to be – to suffer grievous bodily harm, or that they did foresee that he would. And that an ordinary person would reasonably foreseen that grievous bodily harm could occur in those circumstances."

His Honour continued:[43]

> "So that's what the Prosecution has to prove. No onus, as I've said numerous times, there's no onus on the defendants to prove or

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38 (1973) 133 CLR 209.

39 At 231.

40 [2005] QCA 138 at [17].

41 AR 640. *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231 per Gibbs J, and endorsed in *R v Stuart* [2005] QCA 138.

42 AR 640-1.

43 AR 641.

> disprove anything. The Prosecution has to prove beyond reasonable doubt that *these men* intended Mr Rusell Beattie to suffer grievous bodily harm, or foresaw it as a possible outcome, *or* that a reasonable ordinary person in the position of the defendant would reasonably have foreseen that as a possible outcome."
> (emphasis added)

[44] His Honour then directed the jury to put themselves in the picture as bystanders and set out some of the circumstances which the evidence suggested were present. He postulated:[44]

> "You're there. You're the invisible jury of 12 watching these things as they unfold. When Mr Messent threw the bottle, put yourself in Mr Messent's position. Would you reasonably have foreseen that Mr Russell Beattie could have suffered grievous bodily harm if you threw a bottle at him from a metre or two or three metres away?"

He continued:

> "The Prosecution has to satisfy you beyond reasonable doubt that the reasonable person, the ordinary person would have foreseen that, but not only that, that it was intended that the injury that constituted the grievous bodily harm was intended or that it was something that would be foreseen as a possible outcome.
>
> If you are not satisfied beyond reasonable doubt of any of those points then the defendants would be excused by law and you would find them not guilty. If you were satisfied beyond reasonable doubt of those things you would find the defendants guilty unless there was another defence, a possible defence that might apply."[45]

**Discussion**

[45] Before turning to this specific defence the trial judge had emphasised to the jury that the guilt of each of the defendants was to be considered separately.[46] His Honour gave very extensive directions on how Rashleigh and Beattie could be guilty as principals under s 7(c) or (d) and by virtue of the common purpose provisions in s 8. Later in his directions, his Honour made specific reference to the appellant and his use of force[47] and in redirections.[48] The jury could not have been confused by references to "the defendants" when they were being directed about the excuse of accident that they were to consider the defendants collectively rather than separately as they had been instructed to do just a few moments before. Furthermore, although the judge referred several times to the defendants (as emphasised above) when directing on accident, the clearest part of the direction occurred when he asked the jury to put themselves there.[49]

[46] Earlier[50] his Honour had given, in effect, a direction that made the appreciation of the ordinary person an alternative "or" when he ought to have said "and". That was

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44 AR 641-2.
45 AR 642.
46 AR 629-630.
47 AR 648-658.
48 AR 676.
49 See [44] above.
50 AR 641 quoted above at [43] in italics.

plainly a slip and would not have confused – it was to the appellant's advantage in any event.

[47] The final passages quoted above are not models of clarity but the jury's task was reasonably clear with respect to accident.

[48] There is no substance to this ground of appeal.

**Application for leave to appeal against sentence**

[49] The appellant contends that the sentence of five years imprisonment with parole eligibility on 17 November 2012 after serving two and a half years with one day in pre-sentence custody declared is manifestly excessive.

[50] The appellant was aged 22 at the time of the offence and 23 at sentence. The complainant was aged 49. The appellant had a limited criminal history of no real relevance. He had been in steady employment mainly in the meat processing industry since completing a TAFE course post high school. He was in a de facto relationship and his partner was expecting their first child.

[51] His counsel sought a head sentence in the range of three to four years imprisonment with release on parole just under the half-way mark. The prosecutor submitted for a sentence of six years imprisonment. It was accepted that the severity of the injury sustained by the complainant was the most significant factor in arriving at an appropriate sentence.

[52] The complainant was transferred from the Ipswich Hospital to the Princess Alexandra Hospital on 3 January. A CT scan revealed a compound depressed comminuted skull fracture. Dr R Laherty, the treating neurosurgeon, described the injury at the trial as a fracture of the forehead which pushed multiple pieces of bone into the brain cavity penetrating the dura. Without surgical intervention to reduce swelling to clear the area around the brain and to eliminate infection, the complainant's life was in danger.

[53] Titanium mesh was used to reconstruct the shape of the complainant's forehead. He had a second brain operation to evacuate a brain haemorrhage about 12 hours after his initial operation. He was self-discharged after two weeks in hospital. A further operation to re-insert bone into his skull took place in April 2010, some 14 months later. The complainant had regular reviews at the Brain Injury Rehabilitation Unit over the year or so following his injury. He was recorded by hospital therapists as having mild memory and other cognitive deficits as well as scarring. The primary judge described his progress as follows:

> "During his recuperation he suffered various cognitive deficits, post traumatic amnesia, anger, depression, anxiety, headaches and lack of sleep. He still suffers from many of those disabilities. He is still unable to work or to drive a car. It is not clear as to whether he has suffered permanent brain damage."[51]

In addition to his personal injury the complainant sustained financial loss due to his inability to work.

[54] The primary judge was given the benefit of extensive submissions by reference to comparable cases and to the grievous bodily harm schedule of sentences.

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51 AR 740.

His Honour accepted that the appellant acted without intent to cause grievous bodily harm. He noted that the appellant threw the bottle at the complainant with such force that it exploded on impact knocking him to the ground and that parts of the broken bottle remained lodged in his skull. His Honour distinguished cases of gratuitous street violence but noted that the appellant could easily have avoided the incident by leaving the scene earlier or immediately prior to throwing the bottle but chose to stay. His Honour noted that the injuries to the complainant were "very significant" and referred to decisions such as *R v Amituanai*[52] where it had been observed that when a person inflicts serious violence particularly to the head of another, any catastrophic results must be shared by the offender as well as the victim. His Honour noted that deterrence was an important aspect of the penalty.

[55] Mr Allen submitted for a sentence of three to four years imprisonment relying on the decisions of *R v Berryman*[53]; *R v Verheyen*[54] and *R v Bierton*.[55] In *Berryman* the applicant pleaded guilty to one count of doing grievous bodily harm and was sentenced to three years imprisonment suspended after serving 12 months with an operational period of three years. After drinking heavily in a pub the applicant, without any provocation, smashed an unbroken glass into the complainant's face and punched him two or three times before being separated. The complainant was left with significant, permanent scarring which caused the applicant to be charged with doing grievous bodily harm. The scarring had affected the complainant's social life and left him with some aching or numbness. The applicant had no prior convictions and a good work history. The application was dismissed. It is an important distinction that the injuries sustained by the complainant were not life threatening and resulted in no cognitive deficits, as is the case here, and the applicant had pleaded guilty.

[56] In *Verheyen*[56] the applicant pleaded guilty to one count of causing grievous bodily harm. There had been a contested committal in which the two complainants gave evidence and were cross-examined and the sentence hearing was also contested as to the facts and circumstances of the events which gave rise to the charge. The applicant was sentenced to three years imprisonment with a parole release date after serving 12 months which was not disturbed. The complainants operated a motel in Cairns. They entered the unit occupied by the applicant and his girlfriend about 4.00 am after hearing loud screaming and yelling. The applicant hit the complainant from behind without warning with a three-quarter full plastic bottle which caused him to fall to the floor. The applicant then delivered three powerful blows to his face which caused him to sustain a fractured jaw and loose a tooth. The complainant and his wife suffered greatly emotionally and financially and had to give up the motel. The applicant had no previous convictions for offences of violence although he had other criminal convictions. It was described as a cowardly and vicious and prolonged attack made without warning and was a gross reaction to the reasonable request that the applicant and his girlfriend leave the motel. Again, although there was little allowance for the plea of guilty in view of the contested committal and sentence, it was a plea and the injuries were not life threatening.

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52 (1995) 78 A Crim R 588.
53 [2005] QCA 471.
54 [2008] QCA 150.
55 [2009] QCA 68.
56 [2008] QCA 150.

[57] The applicant in *Bierton*[57] pleaded guilty to one count of doing grievous bodily harm and was sentenced to three years imprisonment suspended after nine months with an operational period of three and a half years. The applicant was aged 18 and had no previous criminal history. He and his father had been drinking in a club. Subsequently there was a confrontation between a member of the complainant's group and the applicant's father. According to the applicant this person was a large man and was assaulting his father. The applicant threw the glass he was holding towards that man. It did not hit him because he dodged but it hit the complainant who was seated behind him. The glass shattered causing lacerations to his face and eye and he lost the sight of his right eye. It was anticipated that he would require a prosthetic eye within two years of sentence. The complainant had been diagnosed with a major depressive disorder and post-traumatic stress syndrome. He had taken months off work and had numerous visits to doctors with significant expenses. His capacity for playing sport and his social life had significantly suffered. The applicant was very remorseful and was said to have co-operated fully in the administration of justice. The sentence imposed was not regarded as manifestly excessive when the consequences for the complainant were considered. The applicant was very young and the circumstances were more favourable than here.

[58] Mr Meredith, for the respondent, referred to *R v Thomason; ex parte A-G (Qld)*[58]; *R v Bryan; ex parte A-G (Qld)*[59]; *R v Dietz*[60] and *R v Johnston*[61], but the latter was not a relevant comparable sentence.

[59] *Thomason* was, as conceded by Mr Meredith, a more serious case. The applicant pleaded guilty to doing grievous bodily harm and was sentenced to four and a half years imprisonment with parole eligibility after 14 and a half months. The Attorney-General appealed, *inter alia*, that the sentence failed to reflect the gravity of the offence. Two soldiers on leave and their women companions were walking in central Townsville in the early hours of the morning. The respondent, who was aged 18, offered a "high five" to the complainant who was aged 21. He did not return the gesture but kept walking. The respondent, who was affected by alcohol, verbally abused the complainant, ran up to him from behind, grabbed his shoulders, spun him around and stabbed him twice with a "steak knife" with a 15 centimetre blade. The complainant punched the respondent, prising the knife from his hand. The complainant was taken by ambulance to hospital and on arrival he had no pulse. He had suffered a one centimetre slash wound to the apex of the left ventricle of his heart producing bleeding which inhibited the contraction of the heart. He underwent surgery. He had also sustained a considerably less serious neck wound. The complainant was left with four scars to his chest but no other residual physical disabilities. The injuries threatened the complainant's life. The court noted that the approach to be taken on the Attorney-General's appeal since *R v Lacey*; *ex parte A-G (Qld)*[62] did not require that the sentence should be at the lower end of the relevant range. After reviewing a number of comparable sentences the respondent was resentenced to six years imprisonment with a declaration that he had been convicted of a serious violent offence.

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57 [2009] QCA 68.
58 [2011] QCA 9.
59 [2003] QCA 18.
60 [2009] QCA 392.
61 [2004] QCA 12.
62 [2009] QCA 274.

[60] *Dietz* was convicted after a trial of doing grievous bodily harm. He was sentenced to six years imprisonment with parole eligibility after serving half of that period. The applicant was 20 and had no previous criminal history. On the evening in question the applicant had earlier assaulted another patron of a club. The applicant punched the complainant in the head. He fell to the ground hitting his head on the bitumen. As a result either of the punch or the impact of his head on the ground, or both, he suffered serious head injury. He underwent a bifrontal decompressive craniectomy to relieve pressure caused by brain swelling and the removal of the frontal bone which was stored internally for later reinsertion once the swelling had resolved. The complainant suffered memory loss, cognitive language deficits and reduced high level balance and co-ordination. He was unable to drive a car or work in paid employment for about 12 months. The complainant was left with extensive scars and some reduced vision in one eye. The President, who was in the minority as to outcome, reviewed numerous sentences which were comparable to the facts of that case. Muir JA noted that the complainant had been left with a dramatically diminished quality of life as he suffered from epilepsy, short term memory loss, high blood pressure and depression. He had lost his sense of smell and had cognitive language deficits and reduced co-ordination. His Honour and Daubney J dismissed the application. That case has similarities to the present in as much as the sentence was imposed after a trial and the complainant suffered not dissimilar, albeit, more serious, injuries, he was younger and had no previous convictions.

[61] In *R v Bryan; ex Parte A-G (Qld)*[63] a sentence of four years imprisonment suspended after 12 months with an operational period of five years was imposed on the respondent after he pleaded guilty to doing grievous bodily harm. The complainant and his girlfriend were walking in the city early on New Year's Day when the respondent, being one of a group, walked towards them and molested the girlfriend. The complainant's group kept walking and the respondent followed yelling provocative words. The complainant asked him to leave them alone but the respondent moved towards the complainant and a fight started. The complainant appeared to be getting the better of the respondent who turned and ran away. The complainant had been stabbed in the left chest cavity to such an extent that his heart and lung were visible through the wound. He had a long laceration in his upper left arm and another cut but not as deep. The injuries were described as life threatening. The complainant suffered a number of areas of numbness in his left lower arm and back. The respondent was adversely affected by drugs but had no previous criminal history for violence. He was 21 at the time of the offence. The attack was described as a vicious attack with a weapon upon a stranger and as gratuitous street violence. Williams JA noted:

> "It is difficult, if not impossible, when dealing with the offence of grievous bodily harm to speak meaningfully of a "range" when considering penalty. A great variety of acts may result in the commission of that offence. A single blow with the hand, the negligent use of a dangerous object, excessive force in resisting an attack, and blows struck in a highly emotional situation may all result in the offence being committed. Also the nature of the injuries sustained and the permanent consequences thereof may vary greatly. All of those factors will have some impact in determining the appropriate sentence."[64]

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63 [2003] QCA 18.

64 At [32].

The court held that the sentence was manifestly inadequate and imposed one of imprisonment of six years to reflect the moderation then shown after a successful Attorney's appeal. The facts of that case are distinguishable because the applicant sought out the complainant who attempted to avoid any altercation. On the other hand, there was a plea.

**Discussion**

[62] While the primary judge stated that by its verdict of guilty the jury had rejected that the appellant acted in self-defence, it is possible that the jury may have convicted on the basis that even if he was acting in self-defence to an assault that he had provoked he responded excessively or was not in fear of death or grievous bodily harm. If so, as Mr Meredith submitted, it is not a relevantly mitigating factor that the appellant was acting in self-defence and in circumstances where he had provoked the situation in the first place and was found ineligible for the defence.

[63] The injuries sustained by the complainant were very serious and occurred as a consequence of a dangerous act by the appellant in throwing a partially filled bottle at short distance at his head. The consequences for the complainant have been serious and continuing. The conduct in *Berryman*, *Verheyen* and, to a lesser extent, *Bierton*, came within the definition of grievous bodily harm because of disfiguring scarring. Here the forceful act resulted in a life threatening injury which caused brain damage with some enduring consequences. The evidence adduced at trial would suggest that the appellant was a leader in the decision to go to Sutton Street. Anger between groups can rapidly escalate as occurred here. Both personal and general deterrence was a strong factor as well as denunciation of the dangerousness of the conduct.

[64] I am not persuaded that the sentence imposed was outside the range of a sound sentencing discretion imposed, as it was, after a trial.

**Orders**

[65] I would propose the following orders:

1. Dismiss the appeal against conviction.
2. Refuse the application for leave to appeal against sentence.