SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dykstra* [2011] QCA 175
PARTIES:	**R** **v** **DYKSTRA, Benjamin** (appellant)
FILE NO/S:	CA No 33 of 2011 DC No 44 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	26 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2011
JUDGES:	Fraser JA, Margaret Wilson AJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed;** **2. Conviction set aside;** **3. New trial ordered;** **4. Order that a warrant issue for the arrest of the appellant, to lie in the registry for 14 days or until further order.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of doing grievous bodily harm – whether verdict of guilty is unreasonable, or cannot be supported, having regard to the evidence APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where appellant argues that the trial judge misdirected the jury on lies, flight, and accident – whether the trial judge should have given an *Edwards* direction APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – where appellant argued that prosecutor's address to the jury used personal,

insulting terms – whether this amounted to a miscarriage of justice

Criminal Code 1899 (Qld), s 23, s 668E

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
R v Bridgman (1980) 24 SASR 278, cited
R v Condon [2010] QCA 117, cited
R v Hay and Lindsay [1968] Qd R 459, cited
R v M [1991] 2 Qd R 68, considered
R v Melrose [1989] 1 Qd R 572, cited
R v Power & Power (1996) 87 A Crim R 407; [1996] SASC 5653, cited
R v Roulston [1976] 2 NZLR 644, considered
R v Taiters; ex parte Attorney-General [1997] 1 Qd R 333; [1996] QCA 232, applied
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, applied

COUNSEL: M J Byrne QC for the appellant
R G Martin SC for the respondent

SOLICITORS: Connolly Suthers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Margaret Wilson AJA and the orders proposed by her Honour.

[2] **MARGARET WILSON AJA**: Benjamin Dykstra was convicted of unlawfully doing grievous bodily harm to Carl Darwin Crossman. He has appealed against the conviction.

[3] He relies on five grounds of appeal:

(a) lie: that the trial judge misdirected the jury that an out of court denial that he had committed the offence was capable of amounting to a lie showing a consciousness of guilt;

(b) flight: that the trial judge misdirected the jury that his conduct in leaving the premises where the assault allegedly occurred was capable of being evidence of flight showing a consciousness of guilt;

(c) accident: that the trial judge's directions on s 23 of the *Criminal Code* 1899 (Qld) were erroneous and misleading;

(d) prosecutor's address: that he was deprived of the right to a fair trial according to law by the prosecutor's intemperate and emotional remarks in his closing address, which may have improperly influenced the jury and so caused a miscarriage of justice; and

(e) unreasonable verdict: that no reasonable jury properly instructed could have found him guilty on the evidence had it properly applied itself to its task, given the presumption of innocence and that the charge had to be proved beyond reasonable doubt.

The facts

[4] The prosecution case was that the appellant unlawfully did grievous bodily harm to the complainant in an incident in the male toilet at the Townsville Motor Boat and Yacht Club ("the club")'s premises on 22 May 2009.

[5] The complainant was a 51 year old man who worked as the director and manager of a paramedical rescue service that worked out of the mines in Central Queensland. He worked two weeks on, two weeks off. He had previously run a martial arts school and worked in the security industry.

[6] The appellant was a 45 year old man who ran a pool building company. He and his wife Joanne Dykstra had separated in August 2008. They had reached agreement on the division of their matrimonial property, and apparently moved on with their lives. Mrs Dykstra had formed a relationship with the complainant, and the appellant was seeing another woman from time to time.

[7] The appellant was a longstanding member and regular patron of the club. He used to attend the club with his wife before they separated, and he continued to frequent it after they separated. The woman he was seeing was also a patron.

[8] The complainant was not a regular attendee at the club. He knew that the appellant was a regular patron. Mrs Dykstra's daughter invited her mother and the complainant to a party at the club on 22 May 2009.

[9] They arrived with another couple, entering through the front entrance. Mrs Dykstra saw the appellant and pointed him out to the complainant. The complainant went to the bar for some drinks, and then proceeded to the smoking area out the back of the premises. There were three trestle tables in the smoking area, and the appellant was at one of them. The complainant, Mrs Dykstra and their friends sat at another table – according to Mrs Dykstra, as far away from him as they could.

[10] A woman at the appellant's table looked in the direction of the complainant, saying words to the effect, "Who is he, who is he? Which one is he?" The complainant responded by waving his hands in a circular motion and saying, "It's me".

[11] The complainant saw an old friend at another table, approached him and took him back to his table. They had a second, possibly third, round of drinks. Mrs Dykstra's daughter arrived.

[12] The complainant then got up and walked inside in the direction of the male toilet. Video footage showed the appellant with a cigarette in his mouth; when he saw the complainant going in that direction, he stopped what he was doing and followed the complainant. To this point there was no confrontation between them.

The male toilet

[13] The male toilet was inside the club premises. Approached from the smoking area, it was beyond the gaming room, and accessed by a hinged wooden door. It contained

a urinal against one wall, two cubicles with pedestal lavatories, two hand basins, a partitioned and curtained area for dressing, and a shower cubicle. The stainless steel urinal was set in a besser block alcove a step up from the floor. The floor was tiled.

The complainant's evidence

[14] The complainant gave evidence that he was wearing jeans with buttons over the fly and a belt. He was wearing glasses.

[15] As he entered the toilet, he did not know if anyone was walking behind him and he did not know where the appellant was. He used the urinal, and when he did so, there was no one else present. He had finished urinating, and was doing up his jeans when he heard someone come in and say, "So, you're the big paramedic," or something to that effect. He did not recognise the voice. At that stage he was standing facing the urinal, at the far left hand side of it as he faced it. The voice was coming from behind him. He turned and saw the appellant beside him to the right. The appellant was standing on the step: their heads were at the same level.

[16] The complainant said the appellant's closed right hand struck him on the left side of the jaw. He said he was knocked to the floor and landed on his right side. His head did not strike the floor and he was not knocked unconscious, but his glasses landed somewhere behind him. When he hit the ground, the appellant stood over him and said words to the effect, "Get the bitch and get out of here". The complainant said he was feeling pretty groggy and tried to say that they were not there for trouble but to attend an 18th birthday party.

[17] According to the complainant, after the appellant left the toilet he found his glasses and walked back to the table where he had been sitting, supporting his jaw with one hand. He was angry. He spent about 10 minutes trying to find the appellant, but without success.

[18] There was a conversation between the complainant and the appellant on Mrs Dykstra's phone to the following effect –

> Complainant: "That was a low act."
> Appellant: "Do you want me to come back and finish it off?"
> Complainant: "I wish you would."

Prior statements by the complainant

[19] The complainant was taken by ambulance to the Townsville Hospital. En route to the hospital he told the ambulance officers that he had a full recollection of what had happened. He said he had been king-hit to the left side of the face.

[20] At the hospital the complainant told the triage nurse that he had been hit on the left jaw. He told a police officer who attended the hospital that he had been standing at the urinal when the appellant had walked into the room behind him and punched him in the face, causing him to fall to the floor.

[21] He was allowed to go home that night. He had to return to the hospital for surgery on his jaw two days later, and was discharged on 25 May. About 10 pm on the day of his discharge, he attended a police station where he gave a statement over about an hour or an hour and a-half.

[22] In the statement he gave on 25 May, the complainant said that he entered the toilet and went to the urinal. He did not see anyone else at that time. He had almost

finished relieving himself at the urinal "when all of a sudden [he] felt this whack across the left side of [his] face". The person who hit him had come up from behind him, and he had not seen him at first. His glasses were knocked off his face and fell to the floor. He continued –

> "At first, I didn't know what was happening because I hadn't actually heard anyone come in after me. I managed to do up the fly on my jeans and turned around to find my glasses. As I turned I saw Ben standing there. No-one else was there. Ben was saying something but it didn't register at first what he was saying. I went to bend down, pick up my glasses and my legs gave out from underneath me. I fell on the floor on my hands and knees. Ben stood over me at this point and was yelling something like, 'Get the bitch and get out of here.' I think I responded with something like 'We're only here for the 18th birthday party, not for any trouble.' Ben kept saying, 'Get the bitch and get out.' I started to get up and Ben left the toilet."

In that version the complainant made no mention of the appellant saying, "So you're the big paramedic".

[23] About a week later the complainant contacted the investigating police officer and told her he wished to clarify a few matters, resulting in his giving a second statement on 1 June. He said in cross-examination that the version in his statement of 25 May had been wrong, and acknowledged the version he gave on 1 June was different. His evidence before the jury apparently accorded with the version he gave on 1 June. His explanation for the change was that at the time he gave the first statement he was still groggy from the anaesthetic. The investigating police officer who took the statements told the jury that she knew he had just come out of hospital when he gave the first statement, and that she was careful to ensure he "felt okay" to provide the statement. She agreed in cross-examination that the second statement went beyond clarification of a few things to a different version.

[24] In cross-examination of the complainant and in his address to the jury defence counsel suggested that the complainant had changed his story because he had realised that the first version did not "stack up": that if he had been standing on the left hand side of the urinal, there would have been too little room for someone to have come up on his left and hit him with a right hand.

The appellant's evidence

[25] The appellant told the jury that as he walked to the toilet he did not see anyone in front of him going there. He went to the urinal, and stood in front of it, not on the step, roughly in the middle, relieving himself. He was not aware of the presence of anyone else, although there could have been someone in one of the cubicles.

[26] He was just finishing when he heard someone from behind say, "Stop contacting Jo." He looked around to see who it was, finished urinating, did up the zip of his fly, and turned around completely. At the time he did not know who the person was. A few words were exchanged –

> Appellant: "Who are you?"
> Complainant: "I'm Jo's partner."
> Appellant: "Well, mind your own business. What's it got to do with you?'

The complainant gave him a push; he backed against the urinal a little bit; he pushed the complainant back; the complainant came at him trying to punch him; he ducked out of the way; he came up and put his arm up to defend himself; in doing so he hit the complainant in the face area with his forearm; the complainant fell to the ground.

[27] The appellant walked out of the toilet, calmly walked through the club without raising a complaint with anyone, and exited via the front door. There was a taxi on a rank over the road. He took the taxi and went straight home. In evidence-in-chief he was asked why he did that, and he said –

> "'Cause of my ex-wife there, and their friends and that, I just didn't want the drama that was going to go with all of this sort of thing."

In cross-examination about this he said he had not realised the complainant had been seriously hurt. He gave two reasons for leaving as he did – a desire to avoid being involved in "a scene" with his ex-wife and concern that his club membership might be in jeopardy. He said his understanding was that any member involved in an altercation on club premises would be asked to show cause why his membership should not be suspended or cancelled. He denied walking out as calmly as he could to avoid attracting attention. He denied that he was fleeing the scene because he had been the aggressor.

[28] After he arrived home he received a phone call from his ex-wife, who abused him and then hung up. Then he received a further call, from a man, who said words to the effect –

> "You're a mongrel, you're dead. I'm going to get you for this."

He replied –

> "Well, you know where I live,"

and hung up.

Conversation between appellant and Henk Pit

[29] Henk Pit was a duty manager at the club. He gave evidence as follows –

> "At some stage after this incident on a different occasion altogether you in fact saw Mr Dykstra again; is that right?-- Yes.
>
> And you spoke to him about the incident that night?-- Briefly, yes.
>
> What was Mr Dykstra's response?-- Just to say to me that he didn't do it."

[30] The appellant was cross-examined about this conversation –

> "Do you remember sometime after this, I think Mr Pit said a week or two after this incident, you had a brief discussion about this?-- Yes.
>
> This was after you'd been charged?-- Yes.
>
> And you were talking about it and then you've told him that you didn't do it?-- Correct.
>
> What do you mean by that?-- I - I didn't want to go into the situation with Henk. I've already had to put in a letter to the board of directors

> of the club stating what happened and my actions. So, as Henk being the duty manager I just didn't want to go into it with him.
>
> But that's not the truth, is it? It's not the case that you didn't do it, you were involved, but you're acting in self defence?-- I was involved in an incident with Carl Crossman at the Motorboat Club, yes.
>
> And acting in self defence on your version?-- Yes.
>
> So, what did you mean by you didn't do it?-- To me that just seemed like the easiest way of not having to discuss it. He left it at that and I left it at that.
>
> As opposed to saying, 'Listen, I've been charged. I don't really want to talk to you about this'?-- In hindsight, that most probably would've been the correct thing to say, but that's what I just said, 'I didn't do it', and left it at that.
>
> Is it the case that you're moving the goal posts?—From where?
>
> From, 'I didn't do it', to-----?-- I don't quite-----
>
> -----'Yeah I was involved, I was acting in self defence'?-- I - I - I knew the whole time from the night that I was involved in the incident. I just didn't want to discuss it with the duty manager of the motor boat club."

Direction on lie

[31] After the close of the defence case and before counsel addressed the jury, the trial judge discussed with counsel what directions would be necessary. His Honour proposed giving directions about flight and the significance of lies. In relation to lies, his Honour foreshadowed giving a direction in respect of the conversation between the appellant and Pit, saying –

> "It should be given out of an abundance of caution, I think, because there is much to be said for the explanation that the accused gives."

Counsel did not try to dissuade him from doing so.

[32] Defence counsel addressed the jury first. He referred to the evidence of the appellant's conversation with Pit and the reasons the appellant had given for answering Pit as he did, and continued –

> "He chose the words he did, but he's given you a quite rational and proper explanation for doing so and, members of the jury, don't accept any suggestion to try and make something more of that at all if there is any such suggestion made to you that some type - somehow, that's some sort of implied admission of wrongdoing or something like this because, in my submissi[on], in the circumstances, with the explanation given to you by my client, that just doesn't have that quality at all about it."

[33] The prosecutor addressed the jury in these terms –

> "The next thing, and [defence counsel] again correctly predicted I was going to talk about this, but I'm going to talk to you about an implied admission. So, you've got admissions and confessions where people say, 'Yes, I've done it'. Well, in this case I'm suggesting to you that when he spoke to the witness who works at the club, Mr Pit, Henk Pit, and he said I didn't do it you might think that from that statement - I know he's tried his best to explain it, but you might think from that statement, him saying, 'I didn't do it', you might take from that the only rational, reasonable conclusion is they've got the wrong person or he wasn't even there. But you might think he's just changed the goal post from; (a) ['']I didn't do it['']; to now saying, 'Yes. Listen, I did do it but, listen, he attacked me first and I was acting in self-defence.'
>
> His Honour will give you directions on it. You heard his - the accused's explanation as to why he said I didn't do it. He said - he just said, 'I told Mr Pit that I didn't do it because I didn't want to go into any details about it. I didn't want to talk about it.' Why didn't he just say, 'Listen, I've been charged. I don't want to talk about it'. Just as easy but he says, 'No, I didn't do it', implying he wasn't even there and now he gives you a version, 'I was there' - perhaps because the CCTV captured him walking in. 'Listen, I was there but I was acting in self-defence.'"

[34] In due course his Honour gave the jury a direction on flight followed by the following direction on lying -

> "The prosecution also says that the accused told a lie about the matter when he spoke to Mr Pit later. The lie in question here is the accused man's statement to Mr Pit that he did not do it. You will recall that he said that simply because he didn't wish to discuss the matter with Mr Pit, and he says that against his explanation that he understood the club rules might require him to explain himself to the committee later.
>
> Before you can use any lie against the accused, you must be satisfied of a number of things; and unless you are satisfied of these things, you should not use that evidence against him. First, you must be satisfied that the accused told a deliberate untruth. There is a difference between a mere mistake and a lie.
>
> Second,... You must be satisfied that the lie told is concerned with a circumstance or event connected with the offence. You can only use the lie if you are satisfied that it reveals knowledge of the offence or some aspect of it.
>
> Third, you must be satisfied that the lie was told because the accused knew that the truth would implicate him in the commission of this offence. The accused must be lying because he is conscious that the truth would convict him. There are many reasons for people to tell a lie apart from a realisation of guilt and people, you might think, often have an innocent explanation for lying. The accused here has told you that he had been charged and he didn't wish to discuss it with Mr Pit. It's a matter for you to consider that explanation. And if

> you think that might possibly be true, then you should not use the lie as evidence against him."

[35] Senior counsel for the appellant submitted that, in a case where the central issue for determination was one of credit between the complainant and the appellant, it was unfair to give what purported to be an *Edwards*[1] direction, and further that the directions given was inadequate in the circumstances.

[36] In *Edwards v The Queen* the High Court explained that the telling of a lie usually goes only to credibility. However, in limited circumstances the telling of a lie by an accused person can amount to an implied admission because it is evidence of consciousness of guilt of the offence charged. When it does amount to such an implied admission, it may be used to strengthen the prosecution case or as corroborative evidence. The Court went on to discuss what directions a trial judge should give a jury where the telling of a lie is said to constitute an implied admission because it was told out of a consciousness of guilt. In *Zoneff v The Queen*[2] the High Court stressed that as a general rule an *Edwards*-type direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because the accused knew that the truth would implicate him in the commission of the offence and if, in fact, the lie in question is capable of bearing that character. There may be cases in which the risk of misunderstanding on the part of the jury as to the use to which they may put lies is such that a trial judge should give an *Edwards* type direction notwithstanding that the prosecutor did not put that the lie had been told out of consciousness of guilt.[3]

[37] Before a jury may reason that an accused person told a lie out of a consciousness of guilt they must first be satisfied that he told a lie, i.e. a deliberate untruth.

[38] Pit was asked what the appellant's response had been when he had spoken to him about the incident; Pit answered –

> "Just to say to me that he didn't do it."

[39] In cross-examination of the appellant, the prosecutor was hamstrung by Pit's evidence. He put it to the appellant that the conversation with Pit had been after he was charged, to which he agreed, and continued –

> "And you were talking about it and then you've told him that you didn't do it?"

with which he agreed. The appellant gave evidence that he did not wish to discuss the incident with Pit. He had written to the club's committee of management "stating what happened and [his] actions." The contents of his letter were not before the jury, and although it may have been open to them to infer that he had given some explanation as to what had occurred, it would not have been open to them to speculate upon what that explanation was.

[40] Senior counsel for the appellant submitted that the prosecutor used the appellant's response to Pit that he "didn't do it" as an *Edwards* lie when he told the jury that the appellant had "changed the goal posts" from saying to Pit that he "didn't do it" to saying at trial that he was acting in self-defence.

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1 *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63.

2 (2000) 200 CLR 234; [2000] HCA 28.

3 At 244 per Gleeson CJ, Gaudron, Cummow and Callinan JJ. See also *R v Sheppard* [2010] QCA 342 and *R v Wehlow* [2001] QCA 193.

[41] However, in my view the jury could not be satisfied the appellant told a lie without knowing what "it" was. I do not accept senior counsel for the respondent's submission that it was a natural use of language in a case like this for "I didn't do it" to mean "I wasn't there" or "It wasn't my blow". Nor do I accept that it was a natural use of language for it to mean that the appellant was not guilty of doing grievous bodily harm because the prosecution would not be able to exclude self-defence or accident. In principle the validity of an explanation for telling a lie is a matter for the jury to evaluate, but the appellant's explanation for answering Pit in that way did not necessarily involve any acknowledgement that he had lied in saying that he "didn't do it".

[42] In support of his submission that the giving of an *Edwards* direction was unfair, senior counsel for the appellant pointed to the circumstance that the statement was not made to a police officer or person in authority. However, there is no authority or reason to suggest that such a direction should be given only where the statement was made to someone in a position of authority, and, in my view, this circumstance was not relevant to whether the giving of such a direction was unfair.

[43] A case that turns on credibility calls for circumspection in giving an *Edwards* direction. In this case, the trial judge erred in purporting to do so. He ought to have explained to the jury that it was not open to them to treat what the appellant said to Pit as an implied admission. Instead, he wrongly elevated a somewhat obscure and ambiguous statement to something they might be satisfied was a deliberate untruth.

[44] Further, there were deficiencies in the direction the trial judge gave.

[45] In giving an *Edwards* direction, a trial judge must adequately explain to the jury that they need to be satisfied that the accused person told a deliberate untruth before they can move on to consider whether they are satisfied he did so out of a consciousness of guilt. Here the trial judge said –

> "First, you must be satisfied that the accused told a deliberate untruth. There is a difference between a mere mistake and a lie."

The distinction between a deliberate untruth and a mere mistake was unhelpful where there was no possibility of a mistake: the appellant admitted saying words to the effect he "didn't do it" and went on to give an explanation for doing so.

[46] His Honour adequately explained the requirement that the jury be satisfied that the lie told was concerned with some circumstance or event connected with the offence.

[47] His Honour explained to the jury that they must be satisfied that the lie was told because the appellant knew that the truth would implicate him in the commission of the offence. In doing so, he said –

> "The accused here has told you that he had been charged and he didn't wish to discuss it with Mr Pit. It's a matter for you to consider that explanation. And if you think that might possibly be true, then you should not use the lie as evidence against him."

[48] His Honour failed to mention other possible innocent reasons for lying such as concern that his club membership was in jeopardy, or a wish to conceal embarrassment or shame.

[49] On the other hand, in telling the jury that if they thought the explanation the appellant gave was possibly true they should not use it as evidence against him, his Honour seemed to suggest that elements of the lie had to be established beyond reasonable doubt. That was a misdirection that favoured the appellant.

[50] In my view the trial judge should not have given an *Edwards* direction. He ought to have told the jury that they could not use what the appellant said to Pit as evidence of his guilt; that they could use it only in assessing his credibility.

Direction on flight

[51] Senior counsel for the appellant submitted that the trial judge should not have directed the jury on flight as consciousness of guilt. He did not make any complaint about the actual words of the direction given, but submitted the direction should not have been given.

[52] However, it was incumbent on his Honour to give the jury some direction on how they might use the evidence of the appellant's conduct after the incident in the toilet in light of what the prosecutor said to the jury in his address. The prosecutor referred to the appellant's conduct in walking out of the toilet and leaving the club as not the reaction of an innocent man but rather –

> "... a reaction of someone who is trying to sneak out of the club without drawing attention to himself because he cowardly just king hit somebody and broke their jaw."

[53] The appellant gave two reasons for leaving as he did – a desire to avoid being involved in "a scene" with his ex-wife and concern that his club membership might be in jeopardy. Those explanations were not necessarily true or necessarily false: it was for the jury to evaluate them.[4] It was proper for the trial judge to direct the jury on the matters of which they needed to be satisfied before they could use the appellant's conduct as an implied admission of guilt.

Accident

[54] Section 23(1) of the *Criminal Code* 1899 (Qld) provides –

> "23(1) ... a person is not criminally responsible for –
>
> (a) an act... that occurs independently of the exercise of the person's will; or
>
> (b) an event that –
> (i) the person does not intend or foresee as a possible consequence; and
> (ii) an ordinary person would not reasonably foresee as a possible consequence."

[55] In *R v Taiters; ex parte Attorney-General*[5] this Court held –

> "It should now be taken that in the construction of s 23 the reference to 'act' is to 'some physical action apart from its consequences' and the reference to 'event' in the context of occurring by accident is

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4 See *R v Power & Power* (1996) 87 A Crim R 407, 408-409; [1996] SASC 5653; *R v Bridgman* (1980) 24 SASR 278; *R v Melrose* [1989] 1 Qd R 572, 579.

5 [1997] 1 Qd R 333; [1997] QCA 232.

> a reference to 'the consequences of the act'. Even if, as has been said, there can on occasion be some difficulty, in an exceptional case, in distinguishing the border line between act and event so viewed, this theoretical distinction is clear. Taking an example from *Kaporonovski* [*Kaporonovski v The Queen* (1973) 133 CLR 209] itself, the thrusting of the glass by the accused was the act and the injury to the victim's eye which constituted the grievous bodily harm was the event. A number of occurrences can as a result of the operation of one or more chains of causation follow upon the doing of an act. However, s 23 is concerned to excuse from criminal liability so the relevant event for the purpose of the section should be taken to be the one which, apart from the operation of the section, would constitute some factual element of an offence which might be charged. In cases when grievous bodily harm is charged the state of bodily harm will be the relevant event and when unlawful killing is charged, the death will be the relevant event."

[56] The trial judge correctly instructed the jury in terms of *Taiters*, identifying the "event" as the injury. Relying on the authority of *R v Condon*,[6] senior counsel for the appellant submitted that his Honour erred in not telling them that they needed to be satisfied that the actual injury, *i.e.* the broken jaw, or at least a similar injury was foreseeable before accident could be excluded. Senior counsel for the respondent submitted that *Condon* should not be followed because it had been wrongly decided, but he did not make full supporting submissions.

[57] This case is not an appropriate vehicle in which to review *Condon*. The trial judge made repeated references to "the injury" and "the serious injury" and one reference to "serious injury". In doing so his Honour was clearly referring to the broken jaw. There was no inadequacy in his direction, and no room for misunderstanding.

Prosecutor's address

[58] Senior counsel for the appellant submitted that the prosecutor's address to the jury was couched in personal, insulting terms as an attack upon both the appellant and his trial counsel. He cited these phrases used by the prosecutor as particularly stark examples –

> "lied through his teeth"
>
> "framed an innocent man"
>
> "tried to plant some fear in you"
>
> "that was a stupid submission"
>
> referring to the appellant as "Mr Squeaky Clean"
>
> "reaction of him walking out is a reaction of someone who is trying to sneak out of the club without drawing attention to himself because he cowardly just king hit someone and broke their jaw".

[59] An accused person is entitled to a fair trial. It is often said that a prosecutor must "prosecute with restraint". In *R v Hay and Lindsay*[7] WB Campbell J cited with approval this passage from *Kenny's Outlines of Criminal Law*[8] –

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6 [2010] QCA 117.

7 [1968] Qd R 459, 476.

8 Cecil Turner, *Kenny's Outlines of Criminal Law* (Cambridge University Press, 17th ed, 1958) 569.

> "'A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty – that of doing everything that he honourably can to protect the interests of his clients. He is entitled to 'fight for a verdict'. But the Crown counsel is a representative of the State, 'a minister of justice'; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. 'It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.' 'It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done.'"

[60] *R v M*[9] was an appeal against conviction on the ground that the prosecutor in his address to the jury had so exceeded the bounds of proper comment and submission that the effect would not be and was not repaired by the judge's summing-up. Cooper J surveyed relevant Australian, English and New Zealand authorities,[10] including *R v Roulston*[11] where the New Zealand Court of Appeal said –

> "…it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon the accused. Such conduct is entirely inappropriate and a basic misconception of the function of any barrister who assumes the responsibility of speaking for the community at the trial of an accused person. Naturally enough a proper balance needs to be maintained. The view expressed in 10 Halsbury's Laws of England (3rd edition) para 761 that prosecuting counsel 'should regard themselves as ministers of justice assisting in its administration' ought not to lead to the assumption of a role so emasculated as to merit Lord Devlin's remarks in Trial by Jury (1966), pp. 122–123:
>
> > '...in some places the pendulum has swung so far, and the ministry has moved so close to the opposition, that the prosecution's case is not adequately presented, and counsel, frightened of being accused of an excess of fervour, tend to do little except talk of reasonable doubt and leave the final speech on the facts to the judge'.
>
> The feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another. Nevertheless, it is wrong for Crown counsel to become so much the advocate that he is fighting for a conviction and quite impermissible

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9 [1991] 2 Qd R 68.

10 At 80 – 81.

11 [1976] 2 NZLR 644.

> to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to follow the safe course and order a new trial."

[61] In *R v M* the Court of Criminal Appeal held that if there were a serious possibility that, having regard to the conduct of the case and the issues before the jury, the words complained of might have influenced the jury to return a verdict of guilty, then there was a miscarriage of justice within the meaning of s 668E of the *Criminal Code* 1899 (Qld), and the appellant was entitled to a new trial unless the proviso[12] applied. It was not fatal on appeal that counsel had not taken an objection and sought the discharge of the jury.

[62] In the present case defence counsel addressed the jury first, and in doing so attacked the complainant aggressively. The prosecutor responded in kind. His conduct was intemperate and ill-advised, but did not amount to impropriety giving rise to a miscarriage of justice.

Unreasonable verdict[13]

[63] Senior counsel for the appellant submitted that in a case where it was word against word, the jury should have entertained a reasonable doubt having regard to the following matters –

(a) There was uncontested evidence that the appellant had expressed "no problem at all" with his ex-wife being at the club; which was consistent with his "happy-go-lucky type of guy" demeanour.

(b) He had never been seen to be involved in any arguments at the club.

(c) He had been seen to be "minding his own business".

(d) By contrast, the complainant was, after the event, angry and threatening.

(e) The complainant at first did not recall and later could not explain demonstrating a left hook at body level after this event.

(f) The complainant had given a statement to police over a period of hours which was completely at odds with the version he gave at trial.

[64] However, as senior counsel for the respondent submitted, this was not simply a case of "word against word". The CCTV footage showing the appellant following the complainant into the toilet was a strong indicator of who was the aggressor. There was also the disparity in the protagonists' respective skills in fighting.

[65] And general statements about the protagonists' demeanour before and after the incident are of little use.

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12 *Criminal Code* 1899 (Qld) s 668E(1A).

13 *Criminal Code* 1899 (Qld) s 668E(1).

[66] In *MFA v The Queen*,[14] the High Court enunciated this test for an unreasonable verdict –

> "The question an appellate court must consider to determine whether a verdict of guilty is unreasonable, or cannot be supported, having regard to the evidence, is whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[15]

This confirmed the test enunciated by the High Court in *M v The Queen.*[16] That test is not satisfied in the present case.

Outcome

[67] The trial judge having erred in giving an *Edwards* direction on lies, the conviction should be set aside and there should be a re-trial.

[68] The appellant has been on bail pending the determination of the appeal. A warrant should issue for his arrest, to lie in the registry for 14 days or until further order.

Orders

[69] I would order as follows –

(i) Appeal against conviction allowed.
(ii) Conviction set aside.
(iii) New trial ordered.
(iv) Order that a warrant issue for the arrest of the appellant, to lie in the registry for 14 days or until further order.

[70] **MULLINS J:** I agree with Margaret Wilson AJA.

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14 (2002) 213 CLR 606, 606; [2002] HCA 53.
15 At 493-494 per Mason CJ, Deane, Dawson and Toohey JJ.
16 (1994) 181 CLR 487; [1994] HCA 63.