SUPREME COURT OF QUEENSLAND

CITATION:	*R v Christophers* [2011] QCA 337
PARTIES:	**R** **v** **CHRISTOPHERS, Lynden Hugh** (appellant)
FILE NO/S:	CA No 102 of 2011 DC No 335 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2011
JUDGES:	Muir and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL - PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of one count of wilfully and unlawfully damaging a motor vehicle and one count of unlawful assault occasioning bodily harm whilst armed with an offensive instrument – where the appellant submitted that the jury could not have been satisfied beyond reasonable doubt that the complainant suffered the injury to his hand as a result of being struck by the appellant with a pinch bar whilst he was holding a shovel – where there was evidence that the complainant only noticed the injury after the incident had occurred – where the complainant's evidence in respect of the sequence of events was inconsistent – where evidence of past dishonest conduct by the complainant was before the jury – where the prosecution called a number of witnesses at the trial who were present at the time of the incident – where the complainant's injuries were consistent with a blow from an iron bar – whether the verdict was unreasonable or insupportable having regard to the evidence
COUNSEL:	C F C Wilson for the appellant R G Martin SC for the respondent

SOLICITORS: Burchill & Horsey Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** After a trial in the District Court, the appellant was convicted of one count of wilfully and unlawfully damaging a motor vehicle and one count of unlawful assault causing bodily harm whilst armed with an offensive instrument. He appeals against his convictions on grounds that the verdicts are unreasonable and cannot be supported having regard to the whole of the evidence.

[2] The complainant, an 18 year old landscape gardener, had boarded with the appellant for about four months prior to the subject incident. Differences had arisen between the complainant and the appellant and the latter demanded that the former leave. The complainant did so, but at the time of the incident he had not removed all of his property from the appellant's house. The appellant claimed ownership of a car engine which the complainant asserted was his and the complainant refused to return keys to the house until he took possession of the engine and his other property. This led to an altercation between the two men in which, according to the complainant, he was assaulted by the appellant and threatened with a pitchfork. The complainant returned to the house the following day with a view to retrieving the engine and other property. The police were called and the complainant left empty handed.

[3] The complainant was served on 24 October 2008 with a summons under the *Peace and Good Behaviour Act* 1982 (Qld). At about 6.00 pm that day, the complainant, accompanied by his female friend, Ms Collins, drove to the residence of the appellant's next door neighbour seeking a "character reference" in relation to the court proceedings.

The complainant's evidence

[4] The complainant gave evidence-in-chief to the following effect. He parked his vehicle in the appellant's neighbour's driveway. After spending a few minutes with the neighbour, the complainant reversed out of the driveway and was about to drive off when he saw the appellant approaching wielding a metal pinch bar. The appellant told the complainant to stop the car saying words to the effect that he would "call the coppers and wait for the coppers". He also said in response to the complainant's calling for him to get out of the way, "Get out or I'll smash the fucking window".

[5] The appellant proceeded to smash the windscreen on the passenger's side of the car, which was then stationary, with the pinch bar. The complainant and Ms Collins, who was carrying a dog, alighted from the car. The complainant took a shovel out of the back of the car and held it defensively in front of him. The appellant "was wielding [the pinch bar] sort of like holding an axe sort of thing like that and started swinging in a sort of downward motion and I was sort of tilting back trying not to get hit by it…". The complainant initially avoided being struck by the bar which was swung at him "[a]bout four times". The pinch bar connected with the complainant's hand on the fourth swing. He felt the blow but did not know what damage had been done.

[6] In response to a question by the trial judge, the complainant agreed that his hand was injured when he was still holding onto the shovel. The complainant also

confirmed to his counsel that he was still holding onto the shovel when his hand was struck. He was then asked, "You threw the shovel onto the side of the road?" and responded, "Yes". Asked to explain what happened after he threw the shovel, he said that he got a grip on the pinch bar but eventually let go and retreated. He also said that as the appellant was swinging the bar at him, he was trying not to get hit in the head and that the appellant "was furious".

[7] The prosecutor, who persisted in asking leading questions throughout his examination-in-chief, asked, "You said the metal pinch bar connected with your hand, and you said you didn't realise at first that it was injured?" The complainant responded, "That's right, yes". Asked when he first realised "it was injured", the complainant said, "When I was walking back up towards the crowd of people up behind my car, one of the people up there pointed out and said, 'Your hand's bleeding,'".

[8] The complainant's evidence in cross-examination was to the following effect. He had convictions for wilful destruction or damage of property, unauthorised dealing with shop goods (shoplifting) and driving an unregistered motor vehicle. Charges against him relating to not paying for fuel taken at service stations on three occasions had been withdrawn after he had made payment. He rejected the proposition that he went to the neighbour's house to provide an excuse for being at or near the appellant's house. The appellant came towards the complainant's vehicle at a "fast walk". His vehicle had stopped for a few seconds before being struck by the appellant on the windshield. At the time, the appellant was "in the vicinity of the front" of the vehicle.

[9] After the complainant took the shovel from the back of the vehicle, he advanced towards where the appellant was standing at the front of the vehicle, with a view to protecting it. When he saw "an opportune time to make a lunge for the bar" he threw his shovel to the side and as he went "to grab the bar, the bar has hit [his] hand and then [he] grabbed hold of it". This exchange took place:

> "So what you are saying is that the bar hit your hand shortly after you had got rid of the shovel? -- Yes.
>
> Okay. And you are sure about this? You can recall this? -- I can, yes."

[10] He said there was no pain immediately, but he felt the blow when hit on the fourth occasion on which the appellant struck at him with the bar.

[11] He grabbed the bar with both hands and he and the appellant were struggling over it when a person from across the road, Mr Stone, intervened. Mr Stone took hold of the bar and the complainant relinquished his hold when he saw that Mr Stone had a grip on it.

[12] The complainant was referred to evidence he had given at the committal hearing concerning the throwing of the shovel:

> "'Across in both hands like that. He is swinging so I'm holding the shovel up just trying to, you know, dodge back and then I saw the opportune time too, I threw the shovel to, I thought it was the right side of me, and then just lunged for the bar.' That's all correct, and

> then you say, 'And somewhere in between all of it, Mr Christophers had hit my left hand.'? -- Yes."

[13] The following passage refers to a statement that the complainant had given to police in relation to the incident, which he admitted he had used to refresh his memory:

> "Now, at paragraphs 36 and 37 of your statement - 36 - I will read the whole paragraph, so I am criticised - 'I managed to avoid getting hit in the head or body by the metal pinch bar by moving away quickly and holding the shovel out in front horizontally.' Still paragraph 36 - 'On the last of the occasions that Mr Christophers swung that pinch bar, I received a direct and heavy blow to my left hand which also happens to be my writing hand.' My understanding of that would have been that while you were holding it horizontally on the last of the occasions, that is when you were struck. You say that's wrong? -- That's right. The shovel was not in my hand when I was -----
>
> You say - paragraph 37 - 'On that last occasion I threw the shovel away to right side of the road. I lunged forward and attempted to take the metal bar from Mr Christophers.' My reading of that, those two paragraphs together, is that Mr Christophers, according to what you told to the police, three days after - five days after the event, was that on the last of the blows while you had this, the shovel had your hand, you were struck and after that, you got rid of the shovel? -- Bit twisted."

[14] It was put to him that the effect of such evidence was that "after the last blow which caused the injury, [he] got rid of the shovel and… lunged forward". His response was:

> "No. The last swing, it would have been as in, like, the last swing before the injury, the shovel went to the side, made a lunge for it, bang, caught me. So in fair reading, whatever fair reading is, it really depends on the view of the person who's reading it, as to what their understanding is of it."

[15] The complainant accepted that, on his evidence in the trial, his injury occurred when he lunged for the bar. He initially accepted that the appellant was "not advancing to" him at the time. He said, "… [the appellant] didn't have a chance to because beforehand he was swinging like a madman". He corrected himself shortly afterwards, in response to a question from the trial judge, to say that the appellant was advancing before he took hold of the bar.

[16] The following exchange took place in re-examination:

> "Did you discuss what evidence you were going to give or what you were going to say to the police? -- No, definitely not.
>
> Today you seem sure that you were struck on the hand after you let go of the shovel? -- Yes.
>
> Yesterday you said that you were struck on the hand while you were still holding the shovel. You said, 'Just as I've gone to throw the shovel away it's connected.'? -- Right.

> 'And then I've let go of shovel and lunged for the pinch bar.' It seems to be that you are saying something different today. I'm just wondering if you can clear up any confusion that might be left there? -- Yeah. Well, what was - like what I said today, what happened, you've got hold of the bar, right, as it's come down just as I've thrown the shovel, it's come down as the hand is just about to let go, like, just bang, felt it, and then as the sequence of events folded out it just happened and keeps going."

[17] Asked to further explain what he meant, the complainant said:

> "… Mr Christophers was swinging. I had the shovel in the hand. Mr Christophers had swung and as he's - you put it before, it was all just sort of like a movement thing, like it comes down. As I had the shovel, it's come down, smacked, but in between throwing the shovel away."

[18] Asked by the trial judge to explain when he said he got hit on the hand, he responded:

> "All right. Just as the shovel was across, he's made his swings and as in the process of between throwing the shovel and making a lunge for the bar, that's when the hit occurred."

Mr Stone's evidence

[19] Mr Stone said that on the night of the incident he heard a crashing noise which caused him to go outside to investigate. He saw the complainant at the door of the vehicle and the appellant "at the front near the engine of the car". The complainant had a shovel which he held "up above his shoulder". Both "had a swing at each other, but… missed". They stepped back. He approached to within two metres of them and called on the complainant to drop the shovel, which he did. Prior to that, the complainant and the appellant had taken another swing at each other. After dropping the shovel, the complainant ran towards the appellant and grabbed the bar; the two men wrestled over it. He took hold of it as well and the complainant relinquished his hold. A little later, he convinced the appellant to relinquish his hold on the bar.

[20] Mr Stone's evidence in cross-examination was to the following effect. The complainant, carrying the shovel, ran towards the appellant. When the complainant "went forward" to the appellant, the bar was not being swung towards him. He did not notice or see any blood on the bar or on himself after wrestling for possession of the bar. He did not observe any "swings [that he] saw" make contact.

[21] The following exchange took place on re-examination:

> "I think you agreed with the suggestion that you had seen the start of this incident? -- Mmm.
>
> But later on you said that there could have been some swings before you came out. I mean, what made you agree that you did see the start of this incident? -- I assumed from - because they were standing a bit apart that that's what made me assume that it was towards the start of the incident, so-----

> That they were standing a bit apart? -- Yeah.
>
> Did they approach or did someone approach another person after you got there? -- No, they just slowly got closer towards each other, so-----
>
> Was one person stationary and the other person approached, or was it both equally approaching as you-----? -- Probably just both equally approaching because as they'd swing they would sort of take a step forward and then take a step back."

The evidence of Ms Bolous and Mr A Bolous

[22] Ms Bolous was visiting in Goodall Street at the time of the incident. On hearing a crashing noise, she went outside where she observed the appellant standing in front of the complainant's vehicle and the complainant standing in front of the driver's door. The appellant had a crowbar in his hands and was calling out, "[c]all the police". She did not observe the complainant to be holding anything.

[23] Mr Bolous went outside with his sister when he heard a noise. He observed the appellant holding a crowbar in two hands. After a while he saw him swing the crowbar. After the complainant had alighted from his car, "they were both in front of the car and yelling and swinging and stuff". He did not recall if the complainant had anything in his hands. He did not recall seeing the crowbar connect with the hand, but he noticed that the complainant's hand was bleeding when the ambulance was there.

The evidence of Ms Vass

[24] Ms Vass, a resident of Goodall Street, gave evidence to the following effect. She saw the complainant's vehicle start to pull away and then stop. There was "a lot of yelling". The appellant appeared out of nowhere, he was yelling, "You're not supposed to be here. I was at the police this morning". He called out, "Call the police. Call the police". The appellant moved around to the passenger side of the vehicle and struck the windscreen with the metal bar which he held in one hand. The windscreen shattered and the appellant moved to the other side of the vehicle. He was very angry and agitated. The position of the appellant and other cars in the street prevented the complainant's vehicle from moving. The complainant alighted from his vehicle saying, "I'm not here. I'm not at your place". He then got a shovel out of the back of the vehicle which he held with two hands "trying to fend off the bar". He was not holding it like a baseball bat, but "crossways… parallel to the road".

[25] The appellant looked as if he was trying to hit the complainant. She demonstrated what was described by the prosecutor as "perhaps a striking motion". She accepted that she was explaining something similar to the act of striking "the window". The shovel was knocked out of the complainant's hands and hit a car. She did not see the complainant swing the shovel at the appellant. The complainant had his back to her and she was unable to see whether any of the swings of the metal bar connected with the complainant.

[26] In cross-examination, she accepted that at the committal hearing she said of the metal bar "I didn't see exactly it hit the windscreen". She said that she gave that answer because she was nervous. She accepted that the complainant went to the

back of his vehicle and took up a shovel which he held in a defensive manner "to flick off the metal bar". The complainant walked towards the appellant. At no time did he swing the shovel at the appellant. The appellant swung the bar at the complainant at least once. She said that she heard it hit the shovel. When it was put to her that she did not hear it hit the shovel, she said that she could not recall. She also said that she could not recall exactly how the shovel was knocked out of the complainant's hands. She accepted that she could not say "as a fact" that the shovel was knocked out of the complainant's hands. She accepted also that she said in a statement made in November 2008 that she observed the complainant "losing control of the shovel".

Ms Wullschleger's evidence

[27] Ms Wullschleger, who lived in Goodall Street at the time of the incident, gave evidence to the following effect. She stopped behind the complainant's vehicle. Upon stopping she saw the appellant coming from his property "very fast and approaching [the vehicle] to hit …[it] with a metal pole". She got out of her vehicle. A lady alighted from the passenger side of the other vehicle followed by a dog. She observed the appellant, who was angry at the time, "bashing his metal pole on the [vehicle's] …windscreen". When he struck the vehicle with the bar he had it "above his head with both hands and smashed it down on the windscreen". The complainant stepped out of the driver's side of the vehicle, took a shovel out of the back and was "defending himself, holding it up above his head". The appellant was "still trying to hit him with the pole". The appellant was calling out, "'Call the police, call the police, call the police' while he was still hitting the pole on the young guy".

[28] Ms Wullschleger sounded her horn and other people came out. She said, "another man tried to step between these two to stop the fight, which then happened". The complainant had "a wound on his hand" and she took baby wipes from the car and tried to clean the wound. She heard the appellant saying, "I'm going to kill you" after the two men had been separated. He was standing in front of the vehicle at the time. She said that if the complainant had held the shovel like a baseball bat and tried to swing it at the appellant she would have seen that. Asked if the complainant was the aggressor in the altercation, she said, "No, not at all". She remembered calling out, "Don't hit him, don't - don't hit each other, don't hit each other". She did not see what happened to the shovel.

[29] In a statement, which Ms Wullschleger had provided to police in October 2008, she described the appellant walking from the front of the vehicle to its left hand side, drawing the bar behind his head and swinging it at the vehicle's windscreen. The appellant struck the vehicle with the bar more than once. She estimated four times. As the appellant started striking at the complainant "he puts (sic) the shovel up to defend" himself. She estimated that the appellant struck at the complainant seven or eight times.

The evidence of Ms Collins

[30] Ms Collins, the young woman who accompanied the complainant in his vehicle to the scene of the incident, gave evidence to the following effect. She was then aged 15. The appellant, who walked towards the vehicle "pretty slow", swung the iron bar over his left shoulder and hit it on her side of the windscreen. She grabbed her dog, left the complainant's vehicle and ran to the car behind the vehicle. The complainant grabbed a shovel out of the back of his vehicle to defend himself. She

heard "like a little altercation going on". The complainant threw the shovel to the side of the road, "screaming out for somebody to try and take the bar off [the appellant]".

[31] Asked if she could see the complainant holding the shovel, Ms Collins said, "I do recall him holding it like that to protect himself… as [the appellant] was swinging at him". She described what appeared to be the complainant holding the shovel so as to protect himself. She said that she did not see the complainant swing the shovel and thought that she would have seen it had he done so. She was not watching all of what happened because she "had tears running down [her] face" and her vision was blurred. She did see the appellant swinging the bar at the complainant twice and the complainant trying to protect himself by holding the shovel up.

[32] In cross-examination, Ms Collins further described the holding by the complainant of the shovel in a defensive way.

The appellant's evidence

[33] The appellant gave evidence to the effect that immediately before the incident, he saw the complainant in a vehicle looking in his direction when starting to reverse out of his neighbour's driveway. The appellant saw a pinch bar, took it up with his left hand and hit the windscreen of the vehicle. The complainant got out of the vehicle, ran to the back shouting out something like "I'm going to kill you, you fuckwit" and grabbed a shovel. He then ran towards the appellant holding the shovel up "like a chopper". The appellant tried to get away. The complainant swung the shovel at him, swinging it like a baseball bat. He used the pinch bar, holding it to fend off at least four blows. Each time the complainant swung the shovel he responded by swinging the pinch bar and leaning back so that the shovel could not connect with his body.

[34] After Mr Stone intervened forcefully, the complainant threw the shovel on the ground. When somebody was picking up the shovel to throw it away, the complainant lunged at the appellant and grabbed the bar. He tried to take it from the appellant and they, together with Mr Stone, struggled over it. The complainant eventually let go, leaving the appellant and Mr Stone holding the bar. He noticed no blood on the bar, his clothing or on any part of his body.

The appellant's submissions

[35] The jury, acting reasonably, could not have been satisfied beyond reasonable doubt that the complainant suffered the injury to his hand as a result of being struck by the appellant with the bar whilst he was holding the shovel. The complainant gave different evidence on the point and said prior to the trial that he only noticed the injury after his confrontation with the appellant had ended. The opinions given by Ms Collins and Ms Wullschleger that the complainant's injury was caused by the appellant striking the complainant whilst he was holding the shovel could have been no more than guesswork on their part. No other witness gave evidence of observing the complainant actually being struck.

[36] The case as opened was that the complainant's hand was struck whilst he held the shovel defensively. Consequently, the appellant could not be found guilty of an assault arising out of a lunge at the bar by the complainant. There was also the possibility, which was reasonably open, that the complainant injured his hand while obtaining or discarding the shovel. In short, it was submitted that the jury must have descended into impermissible speculation in order to convict the appellant on count 2. That being the case, neither verdict should stand.

Consideration

[37] It may be accepted that the complainant's evidence was not entirely consistent. Having made it plain in evidence-in-chief that he was holding the shovel when his hand was injured, he professed to be sure, in cross-examination, that he had thrown the shovel away when the bar hit his hand.

[38] The complainant's evidence-in-chief of first realising his hand was injured when someone pointed out that his hand was bleeding after the confrontation had ended was not necessarily inconsistent with his evidence that he felt the blow from the bar when delivered. He said that there was no immediate pain and it may well have been the case that he did not associate the sensation he had felt with an injury until his attention was drawn to the blood on his hand.

[39] As well as the inconsistencies in the complainant's account, the jury had been made aware of his past dishonest conduct which required his evidence to be approached with caution.

[40] The jury were also entitled to approach the appellant's evidence with caution. He told them that his dog, with whom he communicated, told him "It's Condon [the complainant]" when he heard the sound of a motor vehicle as he was hosing in his backyard, before the incident. His account of being fearful when he recognised the complainant as the driver of the vehicle does not sit comfortably with his taking up the pinch bar and proceeding with it to the roadway. Nor does his evidence provide any sensible explanation for the complainant's injury.

[41] The jury were entitled to bear in mind that the witnesses, including the complainant, were describing a fluid situation in which events unfolded quickly. In the complainant's case, they were entitled to take the view that, having regard to the threat he was facing during the incident, uncertainty or mistakes over matters of detail or concerning the precise sequence of events, did not impair his general credibility.

[42] The prosecution case, however, was far from being entirely dependant on the complainant's evidence. There was virtually no evidence which contradicted the accounts of each of the complainant, Ms Collins, Ms Vass and Ms Wullschleger that the appellant had approached the complainant's vehicle armed with a pinch bar shouting out and had forcefully struck the vehicle's windscreen. That evidence and the other evidence of the appellant's obvious anger at the time set the scene for what followed. There was evidence, which the jury was entitled to accept, which corroborated the complainant's account that he had held the shovel only in a defensive position after taking it from the back of his vehicle and that the appellant had swung the pinch bar at him a number of times.

[43] Ms Collins saw the complainant holding the shovel only in a defensive manner. She saw the appellant swinging the bar at the complainant twice. Ms Wullschleger observed the appellant trying to hit the complainant with the pinch bar as the complainant held the shovel defensively. She did not see the complainant acting aggressively. Ms Vass also observed the complainant holding the shovel defensively, trying to fend off the pinch bar wielded by the appellant.

[44] Mr Stone's evidence was of two protagonists swinging at each other and of the incident commencing with the complainant running towards the appellant with the

shovel. It is not clear, however, that Mr Stone saw the initial stages of the incident. His recollection was that when he first saw the complainant and the appellant, the complainant was holding a shovel "up above his shoulder". The weight of the evidence was inconsistent with Mr Stone's observations. Mr Bolous also recalled seeing the appellant swinging the pinch bar, but did not recall if the complainant had anything in his hands. Ms Bolous' recollections were similar to those of her brother.

[45] The complainant's injuries, a laceration to the hand and a compound fracture of the second metacarpal shaft, which was treated by being fixed with metal pins and screws, were consistent with a blow from an iron bar.

[46] It was well open to the jury to conclude that the complainant's injury was caused by a blow from the bar wielded by the appellant. Whether the complainant was holding the shovel defensively at the time he suffered his injury, whether he had thrown it away or was in the act of throwing it away, or whether, at the time, he was reaching out in an attempt to grasp the bar were points of detail, the resolution of which was not critical to the jury's determination of guilt. The critical issues on the assault count were that the complainant was injured when struck by the pinch bar wielded by the appellant as the complainant attempted to protect himself.

[47] It was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that these questions should be answered affirmatively and that, consequently, the appellant was guilty. Accordingly, I would order that the appeal be dismissed.

[48] Counsel for the respondent's submission that the appellant's contention that the evidence left open the possibility that the complainant was injured when he threw the shovel away or by striking the bar while it was being held harmlessly by the appellant was fanciful was well founded.

[49] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the order proposed by his Honour.

[50] **MULLINS J:** I agree with Muir JA.