SUPREME COURT OF QUEENSLAND

CITATION:	*R v Morcus* [2012] QCA 95
PARTIES:	**R** **v** **MORCUS, Matthew David**
FILE NO/S:	CA No 195 of 2011 DC No 80 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	17 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2012
JUDGES:	Chesterman and White JJA, and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – WHERE APPEAL DENIED – where appellant was found guilty at trial of one count of wounding with intent to do grievous bodily harm and one count of wilful damage to a motor vehicle – where appellant submitted that the jury was permitted to reason to guilty verdicts on a basis not fairly open to them – where appellant submitted that the jury was not directed about the matters relevant to their consideration of the appellant's credit – where defence counsel had not put questions to the complainant consistent with the appellant's version of events – where the appellant made the forensic decision not to have the complainant recalled – whether the failure to give such a warning would not have affected the verdict in light of the whole of the evidence – whether the appellant was wrongly deprived of a chance of acquittal CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL

DENIED – where appellant submitted that his contention that he was not armed with a machete was supported by other evidence – where the complainant's contention that the appellant was armed with a machete was not supported by other evidence – where the possibility that the wound was caused by accident was not negatived beyond reasonable doubt on the medical evidence given – where the evidence supporting the appellant's contention might have been disbelieved by the jury – where photographic evidence might have been believed by the jury – whether the jury were able to exclude the possibility of accident beyond reasonable doubt

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
R v Foley [2000] 1 Qd R 290; [1998] QCA 225, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: M Copley SC for the appellant
T A Fuller SC for the respondent

SOLICITORS: Howden Saggers Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHESTERMAN JA:** I agree that the appeal should be dismissed for the reasons given by White JA.

[2] **WHITE JA:** The appellant was found guilty after a trial in the District Court at Ipswich of one count of wounding with intent to do grievous bodily harm and one count of wilful damage to a motor vehicle.

[3] On 5 October 2011 this Court granted him an extension of time to 8 July 2011 within which to appeal his conviction.

Grounds of appeal

[4] At the hearing of the appeal the appellant was given leave to amend the existing ground which had been prepared by the appellant himself and to add a further ground of appeal. As argued by Mr M Copley SC for the appellant, the grounds are:

> "Ground 1
> A miscarriage of justice occurred in that the jury was permitted to reason to guilty verdicts on a basis not fairly open and/or that the jury was not directed about the matters relevant to their consideration of the appellant's credit.
>
> Ground 2
> That the verdicts of guilty were unreasonable."

Summary of evidence

[5] At about dusk on 1 June 2010 the complainant, who was the appellant's younger brother, drove his utility motor vehicle to the appellant's residence which he shared

with his companion, Ms Jennifer Thomas. The brothers lived in residences separated by some acres on their father's rural property of some 45 acres near Esk. The complainant owed about $20,000 to the appellant arising out of the purchase of a block of land and other matters. He decided to repay some of that money that evening. He parked his utility outside and went inside where the appellant and Ms Thomas were eating their evening meal.

[6] The complainant said that as he entered he saw his weightlifting bar wired up above the front door. He told his brother that he would take it back and his brother agreed. Ms Thomas helped him get it down and placed it on the ground inside next to the door. The complainant sat down at the table near the appellant. He was offered a beer by his brother which he refused. The complainant gave the appellant $1,000. The complainant had a receipt book which he wished to have signed to keep track of the payment of the debt. The complainant mentioned an offset debt owed to him by the appellant and the conversation started to get heated. The complainant thought his brother was getting too close and pushed him in the chest with his hand. The appellant had a hip disability which required him to use a "half" crutch.[1] The appellant stood up, grabbed his crutch and took a swing at the complainant hitting him on the arm. The end of the crutch tapped him behind the ear. Those injuries were subsequently noted at the hospital.

[7] The complainant punched the appellant a few times in the face. He was pulled off by Ms Thomas. The appellant swung his crutch again and hit the complainant on his left elbow. The complainant then punched the appellant several more times in the face before Ms Thomas pulled him off again. The appellant and Ms Thomas told the complainant to leave. The complainant said he wanted a steel hook which had been wired onto the weights bar removed. The appellant picked up a hammer and struck the end of the weights bar to remove the hook. He "shaped up" with the hammer held up above his head in his right hand a couple of metres away from the complainant. The complainant picked up the weights bar; the appellant lowered his hammer; Ms Thomas yelled at the complainant to get out; the complainant grabbed the weights bar and asked for his thongs; Ms Thomas threw them at him; he grabbed them and the weights bar, walked outside and put the bar into the back of his utility.

[8] The appellant approached holding a machete in his right hand as the complainant was at the back of his utility. The appellant walked to the front of the utility while the complainant backed away keeping some distance between them. He described the appellant as swinging the machete over his head, backwards and forwards. The complainant saw the appellant turn and walk along the back of the utility to the side smashing the windscreen of the utility with the machete and then the driver's side window.

[9] The complainant decided to tackle the appellant hoping to knock him over before he was able to swing the machete again. They were about two metres apart. The complainant described running in and felt the appellant hit him. The complainant landed on top of the appellant on the ground and "gave him a couple of punches". Ms Thomas pulled him off. The complainant felt "hot stuff" running down his face and shoulder. He jumped into the car as Ms Thomas was standing next to the door. The appellant got up from the ground, came over to the car and swung the machete at the side mirror and damaged the plastic and glass.

---

1 Depicted in Exhibit 15.

The complainant drove off. He described the light as "[g]etting dark".[2] As he was driving back to his shed he passed his father in his motor vehicle.

[10] When he got home the complainant wiped up the blood from his head with his shirt. His father arrived and told him to have the father's girlfriend look at it. The complainant rang his girlfriend who took the complainant into the Esk Hospital. He was taken by ambulance to the Ipswich Hospital where his injuries were attended to. Police were called and photographs taken of his injuries.

[11] In cross-examination the complainant denied that the appellant had not used a machete during any part of their altercation and the only thing that he swung was the crutch. He also denied that he tackled and brought the appellant to the ground close to a trailer which was parked near the residence and, effectively, that they were fighting under the trailer. It was the appellant's contention that the prosecution could not exclude that the complainant cut his head on the trailer while they were fighting underneath.

[12] The prosecution called Ms Thomas. She said that the complainant came uninvited to the appellant's residence and seemed angry. He came in, sat down at the table having asserted his ownership of the weightlifting bar. She assisted him to get it down. Ms Thomas said the complainant threw $1,000 on the table and told the appellant to "[t]ake it off the bill". He pulled a receipt book out of his pocket, threw that down and asked for a receipt. Ms Thomas got a pen and the appellant filled in the receipt book. An argument then ensued about what should be taken off the bill.

[13] Ms Thomas recalled the complainant launching at the appellant and punching him. She tried to pull the complainant off; he eventually got up and took a couple of steps. She observed the appellant using his crutch to get up and swing at the complainant. She was unsure if contact was made. She saw the complainant pick up the weights bar from the ground and "went to go at [the appellant] with it."[3] Ms Thomas observed both men heading towards the door. She said she panicked and went to the back of the shack to telephone their father. She was unable to see anything going on outside and described herself as still panicking. She was not long on the phone; got her torch and went outside because she could hear scuffling including "Get off" and the sounds of fighting. There was no light outside. With the aid of her torch she could see the complainant on top of the appellant. She tried to get him off. Ms Thomas saw the appellant swinging "to defend himself".[4] She said:

> "I didn't see [the complainant] get into his car. I saw him leave. I saw him walk away and then I had gone inside. I was just panicking. I was all over the place, I was – I can't be a hundred percent sure what happened, if I walked straight back in or – but [the complainant] had gotten off of [the appellant] and he was leaving again …".[5]

[14] In answer to the query that she saw the complainant go to his car and walk away, Ms Thomas responded:

> "Because I kind of – well, I don't want to say pushed. I kind of guided him to his car, not – I wasn't physically assaulting him, but

---

2 AR 33.
3 AR 61.
4 AR 62.
5 AR 62.

> I was guiding him to his car, like, go away, get out. And just screaming at him and just profanity …".[6]

She thought that the appellant had finished swinging by then and she went inside, followed closely by the appellant.

[15] In cross-examination Ms Thomas said that although she had been living with the appellant for a couple of months and had moved the appellant's property there from another place, she had not seen a machete. As far as she could recall the men were fighting close to a box trailer located near the residence depicted in Exhibit 1 in the photographs. Although Ms Thomas was asked specific questions about the order in which the brothers had gone outside while she was ringing the father, she was uncertain about the details. When asked by the trial judge whether she saw any injuries on the complainant she answered "I can't be sure. I don't think so"[7], and when asked did she see any blood on him she responded "I don't think so".[8] She did not see the appellant hit the car because it was dark outside. In response to her Honour's question if she heard any noise of glass smashing, she said she was screaming and panicking so was unable to be sure of any sound of breaking glass.

[16] The father, Alphonsus Morcus, gave evidence that he went to the appellant's residence as soon as he was telephoned by Ms Thomas at about half past seven to eight o'clock and it was dark. As he passed the complainant, the complainant patted his head and shortly afterwards the father went to his residence and saw his head injury. The father said that he did once own two machetes but no longer did so and was unable to say if the appellant had one.

[17] A scenes of crime police officer conducted an examination of the appellant's residence on 7 June 2010. He took a number of photographs of the trailer. He examined the trailer, the edging, the brackets and everything underneath the trailer looking for "skin, hair, blood, anything that would be related to what might have happened at that particular location".[9] He found nothing relevant. He undertook presumptive tests for blood with negative results. He saw no blood on the ground anywhere around the trailer.

[18] Police searched the appellant's residence and surrounding area on 2 June 2010 (some 24 hours after the relevant events) in the evening but found no sharp implements.

[19] Dr Hoskins gave evidence, relying on medical statements from the complainant's treating doctors and photographs taken at the hospital. Dr Hoskins had expertise in forensic medicine. In his opinion the wound depicted in the photographs and as described by the treating medical officers had the appearance of being caused by an impact rather than a "drawing along". He concluded that the object which caused the injury went straight in as opposed to at an angle and was consistent with a sharp object coming onto the head. In response to the inquiry whether the injury was consistent with the head hitting part of the trailer, Dr Hoskins conceded that it could be but his answer was conditioned in the following way:

> "... [B]ut it's effectively box shaped with a bottom, two sides and up here, off the photograph, there's a top. And attempting to measure

---

6 AR 62.
7 AR 65.
8 AR 65.
9 AR 79.

> this earlier on the distance between this bottom portion and the top portion on – on my measurement was 12 centimetres so longer than the length of this wound [admitted to be seven centimetres]. If this wound was caused by striking either of these sides which are relatively thin, then we – we'd need to be certain that there – there was a fairly forcible impact because these are not truly sharp edges. So it – it would be a – a very large amount of force on impact. We also need to know that it – neither the bottom part nor the top part came into contact at all because if the bottom part had come into contact or – or the top part had come into contact then either there would be an L-shape in part of the wound or there would be tearing due to up and down movement at the point of impact and those features are absent. So, essentially this would require the head to be moving sideways towards the box-shaped structure to strike the head exactly in the midpoint of – of the upward portion and at the same time do so in a way that didn't cause the second limb of the – the – the box-shaped structure to strike the head because there's no parallel mark suggesting a box-shaped impact. So provided all those conditions were met, then yes that would be possible."[10]

[20] Dr Hoskins said that the injury was caused by forcible contact between a narrow or sharp object and the skull but it was not possible to say which one was moving. It was more likely to be due to a reasonably heavy knife. Dr Hoskins was confident that the injury observed at the hospital was not caused by the appellant's crutch largely because the crutch was too light and would require "an enormous amount of force"[11] and, because it was a curved surface, there would have been "a lot more squash in the middle" of the cut.[12]

[21] The prosecution tendered a number of photographs which graphically depicted the seven centimetre cut across the top of the complainant's head (which had been shaved before suturing at the hospital), as well as the damage to the utility.

[22] The appellant gave evidence consistently with the complainant and Ms Thomas that he and his brother had engaged in a fight inside the residence which was broken up by Ms Thomas. The appellant admitted that he was swinging his crutch and hit the complainant over the head. The appellant recalled they were both still yelling as the complainant left the residence ahead of him:

> "... [A]ll I remember is getting tackled, falling backwards, and my head nearly hit the back of the trailer and [the complainant] was on top of me still punching punching punching. Jen come out again ... grabbed [the complainant] off of me. [The complainant] got up off the ground. I'm swinging the crutch around to get him back. I don't know if it's collected him. It's pitch black, and then it sort of – that's it. [The complainant's] into his car, I don't remember him getting into his car and then dad – you could hear dad coming up. [The complainant] was in his car. It fizzled out and then they passed each other right on my fence line ...".[13]

---

10 AR 93.
11 AR 97.
12 AR 97.
13 AR 105.

[23] The appellant said that the complainant was nearly in his car and that he, the appellant, was about two metres behind him:

> "I just get off the patio, he turns around and tackles me and we end up just behind the wheel of the trailer, like my head's just a slight bit under the trailer with him on top of me punching into me."[14]

The tackle was forceful and the appellant received four or five punches. The appellant insisted that he was carrying his crutch, not a machete or any other weapon and denied hitting the complainant with anything other than the crutch inside or outside the house.

[24] The trial judge asked the appellant if he hit the complainant with the crutch outside the house. He answered:

> "No. I defended myself, like when he was trying to get into his car and trying to get him away from me I do feel – I don't know if it collected him. I do feel it hit his side window ... because he was trying to get in to open the door, I'm swinging the crutch, like you know, we're swearing at each other ...".[15]

This was the first time the appellant had mentioned hitting the car with his crutch. Her Honour asked:

> "So you think you hit his side mirror but you don't think you hit him?"[16]

The appellant responded:

> "Not his side mirror, his side glass on the door".[17]

He noticed "just a tiny little bit of glass" the following day.

[25] In cross-examination the appellant firmed up on hitting the driver's side of the utility adding:

> "Because he was trying to get in and I'm trying to bloody fight him and he's fighting me and I do feel that ... I feel that I have [hit the driver's side window], yes."[18]

The appellant said he did not hear any bang and did not "feel" as if he had broken the window but accepted that he must have done so because there was some glass on the ground in the morning. However, he denied hitting the windscreen or side mirror.

[26] In the absence of the jury the trial judge asked defence counsel if he wished to apply to have the complainant recalled to put "the new version of events".[19] This arose because defence counsel had not put to the complainant that the only damage possibly done by the appellant to the utility was to the driver's side window. Counsel responded that he may have misunderstood his instructions because the appellant accepted that he was swinging the crutch and he could not exclude that he had caused some damage. He (counsel) had not itemised each item of alleged

---

14 AR 106.
15 AR 107.
16 AR 107.
17 AR 107.
18 AR 110.
19 AR 119.

damage. He suggested that "perhaps" the complainant should be recalled.[20] The trial judge made it abundantly clear that the prosecutor could use the failure to put the appellant's denials of damage, other than possibly to the driver's side mirror, in her address.[21] Her Honour stood the hearing down to enable defence counsel to obtain instructions.

[27] When court resumed, approximately half an hour later, defence counsel said:

> "… it's actually probably really my application if I'm the one who's going to be browned and done [sic] to some extent. But I hold instructions not to seek to make application to the Court and cross-examine him on that point."[22]

[28] In addressing the jury defence counsel conceded that the jury:

> "… would probably have little doubt in finding that he did some or all of that damage and the question really arises about whether or not that is excused in law …".[23]

[29] The prosecutor took the opportunity to address the jury fully on the issue. She explained that barristers are given instructions by their clients to put the version of events to the witnesses about what had happened.

> "So, on this occasion, the defendant would have given my learned friend instructions about whether he damaged [the complainant's] vehicle. And if he disputed that in any way, [the complainant] would have been asked questions about the damage. No such questions were ever asked of [the complainant] about the damage to the side mirror, damage to the windscreen and damage to … the driver's side window. No questions were asked about that damage at all. So from that you can assume that the defendant was not challenging, at that point, the damage to [the complainant's] car."[24]

The prosecutor noted that when the appellant gave evidence he conceded that he might have hit the side window but denied hitting the side mirror or the windscreen. That, the prosecutor said, was "entirely inconsistent" with what he had instructed his barrister to ask of the complainant. She added:

> "So that really is the most telling sign of the defendant's case, members of the jury. It really is an extraordinary thing where someone changes their version midway through a trial."[25]

Discussion

Ground 1 – miscarriage of justice

[30] Mr Copley SC, for the appellant, contended that the trial judge ought to have directed the jury that they should disregard the prosecutor's statement set out above and draw no inference against the defence case or, at the least, direct that caution was required before drawing an inference adverse to the appellant. This was because defence counsel may have forgotten to put questions to the complainant or had thought that he had adequately conveyed his instructions. Mr Copley submitted

---

20 AR 120.
21 AR 121.
22 AR 122.
23 AR 132.
24 AR 144.
25 AR 144.

that the jury needed to be told that before any adverse inference could be drawn against the appellant, the jury had to be satisfied that there was no other reasonable explanation for the omission to cross-examine the complainant on the issue, citing *R v Foley*.[26] On his submission, this would be apt to guard against any unfairness and the failure to do so has occasioned a miscarriage of justice because the appellant was wrongly deprived of a chance of acquittal.

[31] A difficulty with this submission is that forewarned that the prosecution might take advantage of the apparent change in the defence position in addressing the jury, the appellant made the forensic decision not to have the complainant recalled so that questions could be put to him consistent with the appellant's evidence. In that circumstance it is difficult to argue now that the appellant suffered any unfairness. The failure to give a warning, even were it thought necessary, would not have affected the verdict[27] in the light of the whole of the evidence.[28]

Ground 2 – unreasonable verdicts

[32] In *SKA v The Queen*[29] French CJ, Gummow and Kiefel JJ stressed[30] that:

> "by applying the test set down in *M* and restated in *MFA*, the Court is to make 'an independent assessment of the evidence, both as to its sufficiency and its quality'".

Elsewhere in their reasons[31] their Honours said that the appellate court

> "was required to determine whether the evidence was such that it was open to a jury to conclude beyond reasonable doubt that the applicant was guilty of the offences with which he was charged"

and that the appellate court's task "was to make an independent assessment of the whole of the evidence, to determine whether the verdicts of guilty could be supported".

[33] The appellant contends that the verdict of unlawful wounding with intent to do grievous bodily harm was unreasonable on two bases – the first is that Ms Thomas did not see the appellant armed with a machete and thus supported the appellant's evidence. This is to be contrasted with the complainant's evidence which was otherwise unsupported. Had a machete been employed by the appellant after the appellant followed the complainant outside, Ms Thomas, following him "a minute or so later"[32] carrying a torch, would have been present in sufficient time to see the machete had it been used. The appellant contends that there would have been insufficient time for him to have disposed of the machete before Ms Thomas emerged.

[34] The second basis is the concession made by Dr Hoskins of the possibility that the wound was caused by the complainant hitting his head on an edge of the trailer and thus accident was not negatived beyond reasonable doubt.

[35] Mr Copley conceded that if it was open to the jury to conclude beyond reasonable doubt that the complainant's head wound was caused by a machete then it was also open to find the wilful damage count proven.

---

26 [2000] 1 Qd R 290 at 291-292.
27 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38], [49].
28 As discussed under Ground 2.
29 (2011) 243 CLR 400.
30 At 406.
31 At 408-409.
32 Submissions at [24].

[36] Ms Thomas did not see the machete and she was not challenged that she was giving untruthful evidence. The jury could have approached her evidence on the basis that she gave little detail about what she saw outside, ascribing that uncertainty to panicking. She was also inside telephoning and getting a torch at the time when the wound was most likely inflicted. The night was dark and, on her evidence, she needed a torch to see anything at all as there was no other lighting. The other approach to her evidence was to disbelieve her because of her close relationship with the appellant.

[37] The most compelling and objective evidence was the photographs of the injury to the top of the complainant's head and to the side mirror of the utility. The seven centimetre cut across the top of the complainant's head is plainly consistent with Dr Hoskins' evidence of a downward blow by a sharp implement, more likely a reasonably heavy knife, certainly not a crutch. More telling is the deep cut to the side mirror of the complainant's utility which could never have been made by the crutch and looks remarkably similar to the cut on the complainant's head. The conditions necessary for the cut to the complainant's head being made by the trailer were very particular. When the injury to the head is considered with the nature of the damage to the side mirror, the jury were well able to exclude the trailer explanation beyond reasonable doubt.

[38] The jury could be satisfied beyond reasonable doubt on the whole of the evidence that the appellant was guilty of the two offences with which he was charged.

[39] The order which I would propose is:

> The appeal be dismissed.

[40] **DAUBNEY J:** For the reasons given by White JA, with which I respectfully agree, I would also order that the appeal be dismissed.