SUPREME COURT OF QUEENSLAND

CITATION:	*R v Newton* [2012] QCA 127
PARTIES:	**R** **v** **NEWTON, Kenneth Leif** (appellant)
FILE NO/S:	CA No 304 of 2011 DC No 45 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	18 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2012
JUDGES:	Holmes and White JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of one count of grievous bodily harm – where it was not in issue at trial that the appellant caused injuries to the respondent – where the trial judge directed the jury in respect of s 271(1) *Criminal Code* 1899 (Qld) – where the trial judge did not direct the jury on self-defence under s 271(2) or s 272 of the *Code* – whether the appellant's evidence at trial raised the application of s 271(2) or s 272 – where defence counsel did not ask that direction relating to s 271(2) or s 272 be given – whether s 271(2) and s 272 defence was open on the evidence and the trial judge was obliged to direct the jury accordingly – whether the appellant suffered a miscarriage of justice *Criminal Code* 1899 (Qld), s 271, s 272, s 668E *R v Bojovic* [2000] 2 Qd R 183; [1999] QCA 206, cited *R v Corry* [2005] QCA 87, considered *R v Dean* [2009] QCA 309, considered *R v Duncan* [2006] QCA 46, considered *R v Gray* (1998) 98 A Crim R 589; [1998] QCA 41, cited

R v Muratovic [1967] Qd R 15, cited
R v Pangilinan [2001] 1 Qd R 56; [1999] QCA 528, cited
R v Vidler (2000) 110 A Crim R 77; [2000] QCA 63, cited
R v Wilmot (2006) 165 A Crim R 14; [2006] QCA 91, cited
Zecevic v Director of Public Prosecutions (Vic) (1987) 162 CLR 645, [1987] HCA 26, cited

COUNSEL: J Trevino for the appellant
S P Vasta for the respondent

SOLICITORS: O'Reilly Stevens Bovey Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA**: The appellant appeals against his conviction on one count of grievous bodily harm. The sole ground of appeal is that the trial judge erred in failing to direct the jury on self-defence under s 271(2) and s 272 of the *Criminal Code* 1899. (A direction was given in respect of s 271(1) of the *Code*.)

[2] It was not in issue at the trial that the appellant had caused injuries to the complainant, a Mr Hastie, and it was formally admitted that those injuries (a broken jaw, a broken nose and bruising) amounted to grievous bodily harm. Mr Hastie was the current partner of the appellant's former girlfriend, Ms Senna. The incident which led to the applicant's being charged with the offence of grievous bodily harm occurred on 13 September 2008. That evening, the appellant went to a bar, where, as it happened, Mr Hastie and Ms Senna were having drinks with friends. He first saw Ms Senna, with whom he had a brief, pleasant conversation. It was about an hour later that he had an encounter with Mr Hastie in the men's toilets, in which the latter sustained the injuries already described. It is at this point that the Crown and defence cases diverge. On this appeal, the Crown case was relevant, for the most part, only to an argument which the respondent advanced about the application of the proviso to s 668E of the *Criminal Code*, but it is convenient to briefly summarise that evidence first.

The Crown case

[3] Mr Hastie's version of events was that he was using a urinal in the men's toilets when the appellant accosted him and hit him in the jaw. Mr Hastie remained standing, unsteadily, and put his arms up in an attempt to deflect further blows. He at no stage struck the appellant or tried to strike the appellant. His next recall was of falling backwards and hitting his head; he was knocked unconscious. Two witnesses who had been using the toilet cubicles gave evidence. The first described seeing one man crouching over a second man who appeared to be unconscious on the ground, punching him in the face and then kicking him twice in the side of the face. The other witness said he saw one man punching another, who did not retaliate. That man fell to the ground after about half a dozen blows and was kicked by the other in the stomach and head areas. One of those witnesses and a security guard who attended to the man left unconscious on the ground (Mr Hastie) noted that he was in a state of undress; his penis was protruding from his underwear and his unzipped trousers. The evidence as to the state of Mr Hastie's clothing was not challenged by the appellant; nor was a witness' description of the appellant as of a "stocky build...very muscular, stocky".

[4] On the Crown case, about six months after these events, the appellant, on a return visit to the bar, admitted to the security guard that he had punched Mr Hastie in the back of the head and knocked him out and then kicked him in the head. He asserted that Mr Hastie "deserved it".

The appellant's evidence

[5] It is the appellant's evidence given at trial which must be scrutinised in considering whether the application of either s 271(2) or s 272 of the *Criminal Code* was raised. His account was as follows: he went into the men's toilets where he saw Mr Hastie, who had just finished using the urinal. Mr Hastie walked towards him and told him to stop texting Ms Senna. The appellant made an offensive comment about Mr Hastie's sexual capacities, after which there was a brief exchange of blows; the fighting was, the appellant said, for "like a split second". In cross-examination, the appellant could not recall how many blows were exchanged, but thought it was about three to four. He said, in his evidence in chief, "I'm pretty sure he [Mr Hastie] hit me first". Under cross-examination he was "ninety-nine per cent sure" that Mr Hastie had struck the first blow; he volunteered that he, the appellant, had a black eye. Next, Mr Hastie took the appellant in a hold: the appellant said he "got really freaked out". He described the hold as one in which Mr Hastie was behind him and had his arm across the appellant's chest on the left side of his body and on his right shoulder area. He thought Mr Hastie "was going to flip [him] on his head or something, or beat [him] up". Under cross-examination, he agreed that the hold that Mr Hastie had taken of him did not restrict his breathing, but he said, it had "disabled" him, and he was frightened; things had happened very quickly.

[6] The appellant said in evidence in chief that he pulled Mr Hastie onto his knees, although (in cross-examination) he said he did not know how he had dislodged his hold. Mr Hastie, from that position, tried to grab him around the legs. As Mr Hastie was grabbing him, the appellant thought that Hastie was "trying to put [him] on the ground". Again, he said, he was "just scared" and thought he "was going to get beat up". In what he described as a "reflex" action, he kneed Mr Hastie in the face; the latter fell backwards on his head. The appellant took hold of him and found that he was limp; he put him down and did not touch him again. As he got up, one of the toilet cubicles opened and a man (the second of the two witnesses who gave evidence of the incident) walked out. The appellant left the bar. He denied that on the occasion he returned to the bar he had made any admissions to the security guard. Under cross-examination the appellant agreed that he was a "reasonably fit" person: a scaffolder by trade, involved in "fairly physical work".

The excuse of self-defence

[7] Section 271(1) of the *Criminal Code* makes it lawful for a person to use force reasonably necessary to make effectual defence against an unlawful and unprovoked assault so long as the force used is not intended or likely to cause death or grievous bodily harm. The learned trial judge explained that defence and the evidence relevant to it at some length; there is no complaint about his directions in that regard. Although this was not an appeal ground, the appellant suggested that in light of an admission at trial that the complainant had suffered grievous bodily harm, the direction under s 271(1) arguably should not have been given; at best, it was said, the direction was useless to the appellant. Presumably, however, the appellant's extremely experienced trial counsel considered it was possible that the jury would accept that the appellant had not intended to cause grievous bodily harm

and that the blow he delivered with his knee to the complainant's face was not such as was likely to cause it, although it in fact did.

[8] The appellant's contention on appeal is that the excuses from criminal responsibility provided, in the case of unprovoked assault, by the second limb of s 271, and in the case of provoked assault, by s 272, should have been left for the jury's consideration. Those provisions are, respectively, as follows:

> "**271 Self-defence against unprovoked assault**
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> ...
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> (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

> "**272 Self-defence against provoked assault**
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> (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
>
> (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable."

The appellant's submissions

[9] The appellant submitted that his evidence of being "freaked...out" by Mr Hastie's hold on him and his fear that the latter "was going to flip [him] on [his] head or something, or beat [him] up", followed by the complainant's attempt to grab him by the legs, was sufficient to raise the application of both s 271(2) and s 272. The

latter became relevant on the basis that the jury might well have considered the appellant's initial gibe about Mr Hastie's sexual potency a provocation. Both provisions depend on, firstly, an assault of such as a nature as to cause the individual assaulted a reasonable apprehension of grievous bodily harm and, secondly, the individual's belief on reasonable grounds that it is necessary to use the force applied to save himself from that harm. Although s 271(2) refers to force "necessary for defence", previous decisions of this court establish that no objective test applies in considering the necessity to use the degree of force actually applied[1] but the reference in s 272 to "force … reasonably necessary for such preservation [from death or grievous bodily harm]" does import an objective test.[2]

[10] On the appellant's contention, from the time that Mr Hastie had him in a hold, he was afraid of being flipped on his head or beaten up; when he thought that Mr Hastie was about to seize his legs in order to take him in another hold, he believed on reasonable grounds that it was necessary, in order to preserve himself from grievous bodily harm, to knee the complainant in the head. Accepting, however, that it could be said that he had provoked, by his insult, Mr Hastie's initial assault, the appellant argued that s 272 was also available as an excuse.

[11] The learned trial judge was not asked to leave either s 271(2) or s 272 for the jury's consideration, but he was obliged to do so if there were evidence on which a reasonable jury could have regarded those defences as available; that is to say, as not having been excluded by the Crown. If raised on the evidence, albeit in a "weak and tenuous" form,[3] it was incumbent on the trial judge to leave them to the jury. The fact that the appellant had not described any fear of grievous bodily harm did not relieve the trial judge of that obligation, if such a fear could be inferred from the circumstances.[4]

[12] In submissions, counsel for the appellant referred to *R v Corry*[5] and *R v Duncan*.[6] Each of those cases concerned an appellant who feared that a weapon (in Corry's case, his own) might be used against him. Corry was charged with murder. He had, on his account, gone in the middle of the night, carrying a knife and meat cleaver, to the house of the man he killed, with the intent of frightening him. He claimed to be aware of the deceased's reputation as a dangerous man. The other man "had a go at [him]".[7] Corry's knife fell from his sleeve and he was concerned that the other would get possession of it; he struck at him with the knife because he "kept coming at [him]".[8] The response of the man whom Corry killed was undoubtedly provoked, but only the two limbs of s 271 were left to the jury. This court, accepting that a jury could take the view that the appellant could not withdraw from the situation which he had placed himself and was constrained to defend himself against the reaction of the deceased, considered that s 272 should have been left to the jury.

[13] The appellant in *Duncan* had, on his version of events, gone to the complainant's house where an argument had ensued over a former girlfriend. The complainant

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1 *R v Gray* (1998) 98 A Crim R 589; [1998] QCA 41; *R v Vidler* (2000) 110 A Crim R 77; [2000] QCA 63.

2 *R v Wilmot* (2006) 165 A Crim R 14; [2006] QCA 91.

3 *R v Muratovic* [1967] Qd R 15 at 20; *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645; [1987] HCA 26 at 665.

4 *R v Pangilinan* [2001] 1 Qd R 56 at 62; [1999] QCA 528.

5 [2005] QCA 87.

6 [2006] QCA 46.

7 [2005] QCA 87 at 18.

8 At [18].

picked up a baseball bat and swung it at the appellant, who punched him and took the bat from him, hitting the complainant three or four times across the arms with it. The complainant lunged at him and tackled him; the bat fell to the floor; and the appellant thinking, on his version, that the complainant would attack him with it, retrieved it himself and struck the complainant a few more times on the body. Muir J (as he then was), with whom Jerrard JA agreed, summarised the effect of the appellant's evidence as that he had been threatened so as to cause him a reasonable apprehension of grievous bodily harm and to make him believe, on reasonable grounds, that it was necessary to strike the complainant with the baseball bat. Self-defence should have been left to the jury; although, because of what could be inferred of the jury's findings from the verdicts actually rendered, the proviso was held to apply.

[14] In the present case, Mr Hastie, in his evidence, disclosed that he had some 18 months' training in karate and had boxed as a teenager. But none of that was known to the appellant; he did not profess to have any particular view of Mr Hastie's strength or ability to fight; and nothing in his evidence of what occurred suggested the use of any particular martial arts technique or display of fighting prowess by Mr Hastie. Neither man was armed, and there was no question of Mr Hastie using any weapon against the appellant.

[15] The case is closer on its facts to *R v Dean*[9], in which the deceased was said to have swung punches at the appellant, the appellant responding with a single punch which caused the other man to fall to the ground and hit his head, fatally. In that case, Fraser JA (with whom Cullinane J agreed) observed that fear of injury could be inferred, but s 272(1) required that "attention be directed to the degree of violence of the particular (provoked) assault...and the belief thereby induced in the appellant".[10] Also of present relevance is Fraser JA's comment on the fact that defence counsel in *Dean* had not asked the trial judge there to give directions about s 272 of the *Code*. It was not, he said, determinative of the question of whether there had been a miscarriage of justice but it was relevant:

> "[W]here experienced defence counsel has acquiesced in a trial judge leaving only one version of self-defence to the jury, the Court should pause before concluding that the trial should have been further complicated by the 'difficulties associated with multiple alternative defences of self-defence [which tend] more often than not to obscure the more viable or arguable meritorious of the alternatives'."[11]

(The latter part of the passage being a quotation from *R v Bojovic*.[12])

That observation is particularly apposite here, where defence counsel at trial was one of Queensland's most experienced practitioners in criminal law. He had at the end of the first day of the trial told the learned trial judge that the issues were self-defence under s 271(2) and s 272; but that was before his client gave evidence. He did not subsequently suggest the application of those provisions, the inference being that he did not consider his client's evidence supported them.

[16] I turn now to focus on the degree of violence entailed in the conduct attributed to Mr Hastie by the appellant. At its highest, accepting all that the appellant said,

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9 [2009] QCA 309.
10 At [37].
11 At [38].
12 [2000] 2 Qd R 183.

Mr Hastie had struck him with sufficient force to blacken his eye. If any other blow were struck in the subsequent "split second" exchange of blows it was not, apparently, of sufficient force to leave any mark on the appellant. Mr Hastie was said to have taken him in a hold, which caused him to fear being flipped on his head or beaten up. Given that the hold was not of sufficient strength or effect to prevent the appellant somehow shaking it loose and bringing Mr Hastie to his knees, it is difficult, in the circumstances, to see how that fear could have been reasonable. The assertion by the appellant that Mr Hastie had "disabled" him plainly could not be accepted by a reasonable jury; on his own evidence he was able to free himself and force Mr Hastie to the ground. Mr Hastie, thus shaken off, was then on his knees, with his genitals partly exposed and grabbing at the appellant's legs. This was a man whose grip the appellant had readily been able to dislodge. It is relevant, too, to recall in this context that the appellant was a muscular, stocky "reasonably fit" man.

[17] That state of affairs was not, in my view, such as to raise the possibility that the appellant was reacting at that point in reasonable apprehension of grievous bodily harm. To put it another way, the state of the appellant's evidence did not leave open a prospect the jury might fail to be satisfied beyond reasonable doubt that he did not have a reasonable apprehension of grievous bodily harm.

[18] I do not consider, therefore, that the learned trial judge erred in failing to leave the defences under s 271(2) and s 272 of the *Criminal Code* to the jury. I might say, however, that had I thought the evidence did raise either of those defences I would not have considered it a proper case for application of the proviso. The case was not one in which it was so inevitable that the jury must have rejected the appellant's account that it could be said that no substantial miscarriage of justice had occurred.

[19] I would dismiss the appeal against conviction.

[20] **WHITE JA:** I have read the reasons for judgment of Holmes JA and agree with her Honour that the learned trial judge did not err in failing to leave defences which arise under ss 271(2) and 272 of the *Criminal Code* to the jury. I agree with her Honour's further observation that a different conclusion on this matter would not lead to the application of the proviso in s 668E(1).

[21] **DALTON J:** I agree with the reasons of Holmes JA and with the order she proposes.