SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chong* [2012] QCA 265
PARTIES:	**R** **v** **CHONG, Initia Rachel** (appellant/applicant)
FILE NO/S:	CA No 342 of 2011 DC No 100 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Mt Isa
DELIVERED ON:	28 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2012
JUDGES:	Holmes JA, Fryberg and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction on count 1 on the indictment is allowed.** **2. The conviction is quashed.** **3. A verdict of acquittal is entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant was convicted after a trial of one count of serious assault – where the complainant's version of the assault was that the appellant had thrown a rock at her, while another Crown witness said she had merely threatened to do so – where the Crown particularised the case according to the complainant's version, addressed the jury on the basis of that account and did not advert to the evidence of the other witness – where the trial judge directed the jury that the definition of assault would be satisfied on either version – whether the verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted after a trial of one count of serious assault – where the complainant's version of the assault was that the appellant had thrown a rock at her, while another Crown witness said she had merely threatened to do so –

where the Crown particularised the case according to the complainant's version and ran its case on the basis that the appellant had thrown the rock – where the trial judge foreshadowed to counsel that he would direct the jury that either the throwing of the rock or the threat to throw it would suffice to constitute the offence and gave a direction accordingly – where defence counsel raised no objection before or after the direction was given – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted after a trial of one count of serious assault – where the complainant's version of the assault was that the appellant had thrown a rock at her, while another Crown witness said she had merely threatened to do so – where the trial judge directed the jury in such a way as to suggest throwing, attempt and threat as three separate bases for convicting the appellant of assault – where the jury was not directed as to which physical acts were said to constitute the assault – where the jury was not directed as to the requisite intent for attempt – where defence counsel sought no re-direction – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWERS OF COURT ON APPEAL – POWER TO ORDER NEW TRIAL OR QUASH CONVICTION AND DIRECT ENTRY OF VERDICT OF ACQUITTAL – WHERE CONVICTION QUASHED AND VERDICT OF ACQUITTAL ENTERED – where the appellant was convicted after trial of one count of serious assault, while pleading guilty to a further two counts of serious assault and one count of wilful damage of police property – where the conviction has been quashed – where the appellant has served almost the entire non-parole period – where the Director of Public Prosecutions has indicated that he would be unlikely to proceed with a re-trial should the appeal be allowed – whether a verdict of acquittal should be entered

Criminal Code Act 1899 (Qld), s 245

Director of Public Prosecutions (Nauru) v Fowler (1984) 154 CLR 627, [1984] HCA 48, considered
Johnson v Miller (1937) 59 CLR 467, [1937] HCA 77, considered
Patel v The Queen (2012) 290 ALR 185, [2012] HCA 29, cited
R v Leavitt [1985] 1 Qd R 343, considered
R v O'Neill [1996] 2 Qd R 326, [1995] QCA 331, considered
R v Trifyllis [1998] QCA 416, considered

COUNSEL: J J Allen for the appellant/applicant
G P Cash for the respondent

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

[1] **HOLMES JA:** The appellant, Rachel Chong, went to trial on and was convicted of one count of serious assault, while pleading guilty to a further two counts of serious assault and one count of wilful damage of police property. On the count on which she was convicted by the jury, she was sentenced to two years imprisonment with a parole release date fixed halfway through the sentence. On the remaining serious assault counts she was sentenced to nine months imprisonment, and on the wilful damage charge, six months imprisonment, all to be served concurrently.

[2] Ms Chong appealed against her conviction on a number of grounds, some of which it has been unnecessary to deal with. Of significance to my conclusions were grounds which asserted that the fact that the serious assault count was left to the jury on a basis different from that particularised by the Crown had led to an unreasonable verdict and a miscarriage of justice, and that the learned judge had misdirected the jury as to the elements of the offence. Ms Chong also applied for leave to appeal against the sentence of two years imprisonment on the ground that it was manifestly excessive.

The Crown case

[3] Ms Chong was tried with six other persons against whom similar charges of serious assault had been brought. The charges arose out of a series of confrontations on Mornington Island between police, on the one hand, and Ms Chong and some of her relatives and friends on the other. The episode began when a police officer named Wade approached Ms Chong, who was sitting on a veranda, and took from her what he believed to be a bottle of home brew. She responded by striking his right arm, and he attempted to arrest her for assault and for possessing liquor in a restricted area. According to Constable Wade, he and his partner, Constable Hamoud, were physically prevented from making the arrest by the intervention of a number of other people, including Ms Chong's de facto husband. They retreated, returning later, at about 7.30 pm, with a number of other officers.

[4] Constable Hamoud was the complainant in respect of the count of serious assault on which Ms Chong went to trial. She said she returned with Constable Wade, their supervising officer, Sergeant Maza, and three other officers to the house where they had encountered Ms Chong, but found it empty. They went to Ms Chong's parents' residence, where they found and arrested her husband. While he was being taken to a police car, Constable Hamoud was standing in the yard near the gate. She gave evidence that she saw Ms Chong running towards her from the left side of the house, holding a large piece of rock or concrete above her head and yelling "Aah". She could not recall whether Ms Chong was holding the rock with one or both hands. Constable Hamoud threatened her with capsicum spray, but Ms Chong stopped and threw the rock at her.

[5] Constable Hamoud said that she moved to avoid being hit by the rock and applied the spray. When that happened, Sergeant Maza came on the scene and pulled Ms Chong to the ground. He, however, was struck by some of the capsicum spray

and was temporarily blinded, so Constable Hamoud took his place holding Ms Chong on the ground and attempting, unsuccessfully, to hand-cuff her. In cross-examination, Constable Hamoud said that Ms Chong was probably three metres away from her when she threw the rock, which landed somewhere to her (Constable Hamoud's) left side. She denied a suggestion that the rock in fact fell to the ground at Ms Chong's feet when she was tackled by Sergeant Maza.

[6] Sergeant Maza described going to Ms Chong's parents' house and the arrest of Ms Chong's husband. Once the latter was removed from the property, Maza said, he saw Ms Chong running from the right-hand side of the house towards the gate, inside which Constable Hamoud and another female officer were standing. She was holding a rock over her head and yelling threats: "Fuck you cunts, I'll kill youse…. I'll get you." He intercepted her, pulling her down to the ground, only to be met by a blast of Constable Hamoud's capsicum spray. Unable to see, he told his fellow officers to retreat once more to the police station.

[7] In cross-examination, Sergeant Maza was questioned and responded as follows:

> "When you grabbed her, did she still have possession of the rock?-- She did, yes.
>
> And what happened to the rock?-- It fell. When - when I - when I grabbed her, pulled her down, the rock fell forward.
>
> And I take it she didn't manage - there was no throwing action of the rock?-- No. She didn't get a chance to throw it.
>
> And indeed the rock didn't go in the direction of or past where Constable Hamoud was standing, did it?-- No.
>
> HIS HONOUR: Sorry, that was no, was it?-- No, it didn't go past where Constable Hamoud was standing.
>
> And what was the - when you commenced to grab a hold of Rachel [Ms Chong], what was the distance between yourself and front gate where Constable Hamoud was standing?—Three metres. Very close."

[8] All of the other police officers who were at the premises were engaged elsewhere at this point; none of them saw the incident involving Ms Chong and the rock, although they saw its aftermath as Sergeant Maza reacted to the capsicum spray. (None of the accused gave evidence.) Clearly, there was a conflict between the evidence of Sergeant Maza and that of Constable Hamoud, but it was one which might have been explicable as the product of different perceptions in circumstances of rapidly unfolding events, tension and fear.

[9] Sergeant Maza and another officer returned to Ms Chong's parents' house later that night, but there was another mêlée, in the course of which Ms Chong once again ran at each of the officers, holding a rock. She threw it at Maza. (Those actions gave rise to the two counts of serious assault to which Ms Chong pleaded guilty.) Both officers fled on foot, looking back to see Ms Chong smash their vehicle with the rock (founding the wilful damage count, to which she also pleaded guilty).

The particulars of the assault

[10] The conflict between the versions of Constable Hamoud and Sergeant Maza was apparent from the committal depositions. The Crown had provided particulars of

the count of serious assault against Ms Chong at the outset of the trial; they were that Ms Chong

> "threw, or threatened to throw a rock or a piece of concrete in the direction of Betty Hamoud".

The learned trial judge observed that if there were more than one act involved, the Crown could separately have charged throwing and threatening to throw as distinct assaults, but if only a single act were involved, it was incumbent on the Crown to elect whether it would proceed on the basis that Ms Chong threw the rock or that she threatened to throw it, since either would constitute an assault. The Crown prosecutor duly furnished fresh particulars, which were that:

> "[Ms Chong] threw a rock or a piece of concrete in the direction of Betty Hamoud".

[11] The question of what constituted the assault was raised again, however, after the Crown case had closed and all the accused had indicated that they would not give evidence. The trial judge, while seeking submissions on directions, observed that the evidence was equivocal as to whether Ms Chong threw the rock or threatened to throw it. His Honour said that he would direct the jury that if they accepted that she threatened to throw the rock, that would satisfy the definition of assault. Counsel for Ms Chong did not raise any objection, and the judge directed the jury in accordance with his intimation. The prosecutor, however, in her address invited the jury to focus their attention on Constable Hamoud's evidence. She said nothing about Sergeant Maza's evidence and did not seek to identify different bases for conviction.

The unreasonable verdict ground of appeal

[12] The variance between the evidence of Sergeant Maza and that of Constable Hamoud and his Honour's direction gave rise to two grounds of appeal. The first, expressed in the appeal notice as that the verdict was "unsafe" (and more correctly referred to by counsel in his submissions as that the verdict was unreasonable) was squarely based on the proposition that, in light of Sergeant Maza's evidence, it was not open to the jury to be satisfied beyond a reasonable doubt that Ms Chong had thrown a rock at Constable Hamoud. Given the absence of any Crown suggestion that Sergeant Maza's evidence should not be accepted, that proposition may well be sound. But it does not follow that the guilty verdict was unreasonable.

[13] The jury was entitled to convict of serious assault if satisfied that Ms Chong had threatened to throw the rock at Constable Hamoud, a finding which was consistent with the case left to it by the trial judge and which was open on the evidence of both officers. There would be nothing unreasonable in its doing so simply because the Crown had not particularised the offence in that way, although there might arise questions of prejudice to the defence. It is accordingly necessary at this point to turn to the second ground, which was that a miscarriage of justice had occurred because the prosecution was permitted to depart from the particulars of the count given at the start of the trial.

The departure from the particulars given

[14] I should start by saying that I do not think it was necessary for the prosecutor, in giving particulars, to elect between the versions of Constable Hamoud and Sergeant

Maza. This was not a case of latent ambiguity in which there was (as for example, in *Johnson v Miller*[1]) more than one occasion which might be embraced by the count and the particulars given of it. Rather, it involved a single course of conduct. The only question the conflict in the evidence raised was as to its extent: whether Ms Chong's behaviour went no further than her running in the direction of Constable Hamoud with a rock held over her head (as both the latter and Sergeant Maza described) or whether it included the further step of actually throwing the rock at Constable Hamoud.

[15] The first could properly be characterised as a threat to apply force within the meaning of s 245 *Criminal Code*, the second as an attempt to do so. (In no version did the incident involve any application of force to anyone.) Had the case remained as particularised with those two alternatives put, Ms Chong would now have no cause for complaint on this score. She knew the evidence to be called; she would have known the alternative ways in which the Crown would seek to prove the charge; and if convicted on one of those two factual bases, there could be no question but that she would be entitled to plead autrefois convict if charged on the other.

[16] In the event, however, the case, after being run by the Crown on the premise that the gravamen of the offence was the throwing of the rock, was left to the jury on the basis that either the throwing of the rock or the threat to throw it would suffice to constitute the offence. The question is whether that produced a miscarriage of justice. The Crown, of course, is not bound by particulars given at the commencement of the trial. In the present case, it could, at the end of the evidence or when the learned judge gave his intimation as to his intended directions, have applied to amend them. It did not; but, as counsel for the respondent pointed out, failure to do so made little practical difference. The judge made the defence aware of the basis on which the case would be left to the jury, and amended particulars would have added nothing.

[17] It is arguable, however, that the evidence of Sergeant Maza might have been approached differently had defence counsel appreciated the risk of conviction on the basis of threat. Sergeant Maza might have been challenged, it was suggested here, about the verbal threats made, or questioned as to the details of Ms Chong's posture and at whom exactly she was directing her behaviour. But the fact that counsel for Ms Chong did not, when the judge foreshadowed that he would leave both bases to the jury, raise any question of prejudice to his client, let alone suggest the need to recall Sergeant Maza or discharge the jury, rather suggests that he perceived no problem in proceeding, nor any advantage in a different approach to the Crown case. It was, after all, a viable option to leave Sergeant Maza's evidence well alone, relying on the contradictions between it and Constable Hamoud's evidence as to what Ms Chong both did and said in order to make submissions about why the Crown case, on either basis (threat or throw), could not be accepted. But it is not necessary to come to a firm view in this regard because of my conclusions in respect of a third, related ground of appeal: that the judge misdirected the jury as to the elements of the count of serious assault.

The directions on assault

[18] Nine of the ten counts on the indictment charged serious assault. The learned judge gave the jury a document which set out the elements of the offence as relevant to

---

1 (1937) 59 CLR 467.

those charges: that in each case the accused assaulted the complainant; that the complainant was a police officer; and that he or she had been assaulted while acting in the execution of his or her duty. The same document set out the salient parts of the definition of assault in s 245 of the *Criminal Code*, as follows:

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

Giving general directions in respect of the nine serious assault charges, his Honour pointed out that the extended definition included by any bodily gesture threatening or attempting to apply force, going on to say:

> "That also constitutes an assault, not the fact that I might punch someone in the nose but if I threaten or attempt to do that, then that is still regarded as an assault, and of course we'll come to that shortly."

[19] In relation to the particular count against Ms Chong, the trial judge referred the jury to the particulars, but continued:

> "Now, if you were not satisfied beyond reasonable doubt that Rachel Chong threw the rock in the direction of Betty Hamoud, then you consider whether you are satisfied beyond reasonable doubt that Rachel Chong attempted or threatened to throw a rock or piece of concrete in the direction of Betty Hamoud as the definition of assault also includes an attempt or threat to apply force of any kind to another person, as per the definition of assault that I have given you. So it is not only the throwing of an object which may constitute an assault but also an attempt or threat to do so within the terms of the definition."

Later in his summing-up, his Honour read without comment the evidence of Constable Hamoud and Sergeant Maza on the topic.

[20] During their deliberations, the jury sent the judge a note asking whether, where there were "two parts" (presumably two routes to conviction) to a count, they had to find guilt in respect of both. The learned judge answered the question by reference to the count against Ms Chong, saying this:

> "Now, if you were not satisfied beyond reasonable doubt that Rachel Chong threw the rock in the direction of Betty Hamoud then you consider whether you are satisfied beyond reasonable doubt that Rachel Chong attempted or threatened to throw a rock or piece of concrete in the direction of Betty Hamoud, as the defendant - as the definition of assault also includes an attempt or a threat to apply force of any kind to another person. All right.
>
> So it is not only the throwing of an object which may constitute an assault, but also the attempt or threat to do so within the definition - within the terms of the definition."

[21] In both the original direction and the redirection, the trial judge appeared to leave to the jury three separate bases for conviction: throwing, attempt and threat. But since, on any view, the rock did not connect with any person, throwing it could only, at best, have amounted to an attempt to assault. The way it was put, however, suggested that throwing, being distinct from attempt and threat, fell within the first part of the definition of assault; as though it could, of itself, constitute an unlawful application of force. The problem was compounded by the fact that the jury was left without an explanation of what physical acts might constitute the attempt or threat to throw the rock. And the significance of an acceptance of Sergeant Maza's account, as opposed to Constable Hamoud's, was left entirely unexamined.

[22] It is notable, too, that the jury was not told of the intent requisite to any attempted assault, expressed by Andrews SPJ in *R v Leavitt* as "meaning by action to achieve a particular result".[2] In this case, assuming the jury accepted that Ms Chong did throw the rock, it would also be necessary that they found she meant to hit Constable Hamoud with it; it would not suffice that she simply contemplated the likelihood of Constable Hamoud's being struck. In this context, the characterising of the question as one of whether Ms Chong threw the rock "in the direction of" Constable Hamoud was unfortunate; it suggested that it would be sufficient if the rock were thrown in the area of where Constable Hamoud was standing, rather than at her. What had to be shown was either a threat to apply direct force to her, as opposed to anyone else or the police at large, or an attempt to do so with the intent described above.

[23] The trial judge was not, unfortunately, given any assistance on the point by Ms Chong's counsel at trial. Although advised of his Honour's intended direction, he suggested no different course, and once the summing-up was complete did not seek any redirection. But despite the lack of objection from trial counsel, the inescapable conclusion is that a miscarriage of justice has occurred in the failure to direct the jury as to the two – not three – available bases for conviction of assault, and, in particular, the elements necessary for, and the evidence relevant to, a finding on each of those bases.

Retrial or acquittal

[24] Because of my conclusion that the jury were not properly directed on the crucial aspects of the offence, resulting in a miscarriage of justice, I would set aside the conviction. (It was not suggested by the Crown that the proviso should be applied.) The issue then is whether a retrial should be ordered. The first question in that regard, whether the evidence was sufficiently cogent to justify a conviction,[3] must be answered in the affirmative. One turns then to the competing considerations as to justice to the appellant and the public interest in the administration of justice. Relevant here is any sentence likely to be imposed were Ms Chong convicted on a new trial.[4] The conclusion that the existing conviction should be quashed renders it unnecessary to deal with the application for leave to appeal against sentence, but the sentence imposed and that likely to be imposed in the event of another conviction thus remain relevant.

---

2 [1985] 1 Qd R 343 at 345. That case establishes that where the attempt entailed is (as in s245) one to produce a particular physical result as an element of an offence, rather than constituting a distinct offence under the *Criminal Code*, the definition of attempt in s 4 of the *Code* does not apply. On this point, see also *R v O'Neill* [1996] 2 Qd R 326 at 432.

3 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627.

4 In *Director of Public Prosecutions (Nauru) v Fowler*, the High Court identified, as a relevant factor in considering whether a re-trial should be ordered, the extent of any sentence likely to be imposed.

[25] The trial judge proceeded to sentence immediately after the verdict. He was not invited to, and did not, identify on what factual basis he was sentencing Ms Chong for assault. Had he done so, given that he had himself described the evidence as equivocal on the point, it is difficult to see how he could have reached any other conclusion than that she was to be sentenced for a threat rather than any act of throwing the rock. Even allowing for Ms Chong's long history of similar offences (she had been dealt with seven times before for offences of assaulting police) that conduct would not seem to warrant a sentence of two years imprisonment. His Honour's intention, although he did not express it, may have been to impose a sentence which would reflect the criminality of Ms Chong's behaviour over the entire episode of confrontation with police that evening. Even then, it might be questioned whether, seen as an overall punishment for the three assaults, none of which involved any actual application of force, and the damage to the police car, the head sentence imposed was too high.

[26] However that may be, Ms Chong has now served 11 months imprisonment, has completed all the other terms of imprisonment imposed for the counts on which she pleaded guilty, and is only three weeks short of her parole release date on the two year sentence. Should she be convicted again, it seems entirely possible that no further sentence would be imposed; certainly the imposition of any further actual imprisonment is most unlikely.

[27] The Director of Public Prosecutions indicated that if Ms Chong's appeal against conviction were allowed, it was unlikely that he would proceed to a re-trial. In the circumstances, given that she has already completed sentences for other charges arising out of the same incident, might well receive a considerably lighter sentence were closer consideration given to the factual basis of the assault, and has, in any event, served almost all of the non-parole period, I do not consider that there is any utility in ordering a new trial.

Orders

[28] The appeal against conviction on count 1 on the indictment should be allowed, the conviction quashed and a verdict of acquittal entered.

[29] **FRYBERG J:** Most of the relevant facts are set out in the reasons for judgment of Holmes JA. I shall not repeat them.

Ground 4: departure from particulars

[30] Before the jury were sworn in, there was a discussion between the trial judge and counsel regarding, among other things, particulars. The particulars which had been given of count 1 are set out above.[5] Counsel for the appellant complained:

> "[I]f you're looking at the particulars that are outlined as there, it is unclear as to what the allegations are of the complainant in this matter. The complainant says one thing, your Honour, but the particulars don't tend to support what the - what the victim says in that - in that regard."

That was partly true. Both police officers (Hamoud and Maza) were expected to give evidence capable of sustaining a threat but only one of them would give

---

5 Paragraph [10].

evidence of a throwing. Counsel did not explain precisely what was his difficulty. He did not say whether the form of the particulars was embarrassing, duplicitous or otherwise productive of injustice.

[31] His Honour indicated a firm view that the particulars were duplicitous. He told prosecuting counsel that she had to decide which way she was going, so that the defendant had the opportunity to meet the allegation. She buckled and made an amendment to deal with his Honour's criticism. It is perhaps to be regretted that the prosecutor did not resist the judge more strongly, but I acknowledge that it is very easy to be critical from this height. In the circumstances of the case, the original particulars were not duplicitous. There was no need to amend them. I agree with what Holmes JA has written.[6]

[32] However, having delivered amended particulars, the prosecution remained bound by them unless and until they were further amended. As particulars of the indictment they formed part of the court record. They provided a gauge for the measurement of relevance. They informed the defence of the case to be met and limited the prosecution to that case. In *Patel v The Queen*, Heydon J wrote:

> "168. In *Johnson v Miller*[7], Evatt J said:
>
> > 'It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularize the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged.'
>
> But the importance of particulars does not lie only in relation to questions of inadmissibility for irrelevance. Particulars can also be necessary to enable the defence to make particular forensic judgments. Some concern the cross-examination of prosecution witnesses. Others concern the marshalling and deployment of its own evidence."[8]http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2012/29.html?stem=0&synonyms=0&query=patel - fn98

[33] Pursuant to that regime, ten Crown witnesses were called, the Crown case was closed and the appellant decided neither to give nor call evidence. Then, in the absence of the jury, his Honour invited submissions regarding directions which he might have to give. The Crown prosecutor said:

> "And my last point is that it is my intention that I'll be telling the jury that they are not bound by the particulars. That is the Crown case, of course, and that is how the Crown has run its case but as a matter of law the jury are not limited to the particulars, they are entitled to decide for themselves upon the evidence in relation to each count. If

---

6 Paragraphs [14] and [15].
7 [1937] HCA 77; (1937) 59 CLR 467 at 497-498.
8 [2012] HCA 29.

> they find evidence that would amount to a offence being committed, then they are entitled to convict for that count."

[34] Counsel for the appellant, when asked by his Honour to comment on that, deferred to another of the defence counsel. In the course of the latter's submissions this exchange occurred:

> "MR MURRAY: The purpose of giving particulars is so that the accused knows the allegation that is brought against him or her. The requirement for particularity is to ensure that the accused goes on to meet that case. Now I'm not acquainted with it. I don't suggest that I read every Court of Appeal decision. But I'm not acquainted with a case that says particulars don't matter, and my understanding of particulars was that the - the particulars bound the – the conviction that the Crown can seek. And that the conviction is within the bounds of those particulars. Otherwise there's no point in giving them.
>
> HIS HONOUR: Yes, within the definition. For example, in terms of count 1, the particulars were Initia Rachel Chong threw a rock or a piece of concrete in the direction of Betty Hamoud. Now, we know, within the definition of assault, that also includes other, if you like, lesser actions. Reading the definition, 'A person who strikes, touches or moves or otherwise applies force of any kind', et cetera, 'either directly or indirectly, or who by any bodily act or gesture attempts or threatens to apply force of any kind to another person or to the person of another without that other person's consent under such circumstances', et cetera, 'is said to assault that other person'. Whereas we know here the evidence is equivocal in terms of whether Rachel Chong threw the rock or whether she threatened to throw it.
>
> MR MURRAY: Yes, that's right.
>
> HIS HONOUR: Now, it seems to me that the fact that she – if the jury, for example, believed beyond reasonable doubt that she - or found beyond reasonable doubt that she didn't throw it, but threatened to throw it, that still falls within the definition of assault.
>
> MR MURRAY: Yes.
>
> HIS HONOUR: Would you agree with me on that?
>
> MR MURRAY: Yes.
>
> HIS HONOUR: So in other words, that - I will - I would be directing them that if they accepted that she threatened to throw the rock, then that would also satisfy the definition of assault."

When he summed up, that was what his Honour did.

[35] With great respect, the course taken by his Honour was wrong. It was open to the prosecution to ask his Honour to direct on both threat and attempt, but only if it first secured leave to amend the particulars of count 1 as they then stood. An application to amend would have focused attention on more than the definition of assault. If, for example, there had been evidence of threat admitted without objection by the defence, it might have been possible to argue that the defence had by its conduct tacitly permitted the widening of the Crown case. If the defence had asserted it would be prejudiced by the amendment attention could have been given in the

context of the trial to identifying and remedying any prejudice which an amendment might otherwise have caused. In addition there is the fact that the District Court is a court of record.[9] The particulars were part of the court record. A judge should not give directions to the jury which are inconsistent with that record.

[36] As things now stand, it is impossible to know whether the defence would have been conducted differently had the particulars remained in their original form (which in effect was what the prosecution sought to achieve). There was a real possibility that it would have. In that respect the case is unlike *R v Trifyllis*[10] which was relied on by the respondent. It is not possible to say whether an amendment of the particulars would inevitably have been allowed, or on what conditions that might have occurred. In any event, the respondent has not applied to amend them.

[37] The respondent submitted that the departure from the particulars did not deny the appellant procedural fairness. It submitted that defence counsel did not resist the proposed direction, nor did he seek a redirection when it was given. However counsel had allowed the point to be argued by counsel for one of the other defendants and the judge had made his ruling. Counsel are not required to waste time arguing the same point on multiple occasions once a ruling has been made.

[38] This ground of appeal should succeed.

Other grounds of appeal

[39] On the other grounds of appeal I agree with the reasons for judgment of Holmes JA.

Order

[40] I agree with the order proposed by Holmes JA.

[41] **NORTH J:** I have read the reasons of Holmes JA and Fryberg J.

[42] For the reasons given by Holmes JA, I agree that the trial judge misdirected the jury and there was a miscarriage of justice.[11]

[43] In the circumstances it is unnecessary for me to separately address the ground concerning the departure from the particulars.[12]

[44] I agree with the orders proposed by Holmes JA.

---

9 *District Court of Queensland Act 1967*, s 8.
10 [1998] QCA 416.
11 Reasons at [18] to [23].
12 Ground 4.