SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnson & Honeysett* [2013] QCA 91
PARTIES:	**R** **v** **JOHNSON, Richard** (appellant) **R** **v** **HONEYSETT, James Terrence Robert** (appellant)
FILE NO/S:	CA No 251 of 2012 CA No 252 of 2012 DC No 1412 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2013
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeals are allowed.** **2. The convictions are set aside.** **3. A retrial is ordered on both counts.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MIS-DIRECTION OR NON-DIRECTION – DIRECTIONS AS TO PARTICULAR MATTERS – where the appellants were both convicted of one count of assault occasioning bodily harm in company, and where the appellant, Honeysett, was convicted of a further count of assault occasioning bodily harm – where at trial, evidence given by the complainant was inconsistent with that of a second Crown witness, which was favourable to the appellants - where on appeal, the appellants contended that the trial judge misstated the test to be applied by the jury when comparing inconsistent evidence of witnesses – where the trial judge, in summing-up, suggested to the jury that it

was possible that they might not accept either witness' account, but went on to suggest that a finding that the second witness was not as reliable would dispose them to accepting the evidence of the complainant – whether the jury should have been directed that if they were left in doubt as to which version of the evidence was correct, they should acquit the appellants – whether the jury should have been directed that if the evidence of the second witness left them with a reasonable doubt they should acquit – whether a miscarriage of justice occurred

APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MIS-DIRECTION OR NON-DIRECTION – DIRECTIONS AS TO PARTICULAR MATTERS – where the appellants were both convicted of one count of assault occasioning bodily harm in company – where the appellant Honeysett contended that the trial judge had misdirected the jury as to the temporal relationship between the facts underlying that count and what could be heard on an audio recording of the incident – where the trial judge told the jury that they might think that what was heard at a particular point of the recording were the events underlying the count – whether, if any error in view conveyed by the trial judge to the jury, it was material – whether the statement rose above the level of permissible comment – whether a miscarriage of justice occurred

Liberato v The Queen (1985) 159 CLR 507; [1985] HCA 66, considered
R v Booth [2005] QCA 30, cited
R v George [1980] Qd R 346, cited
R v McBride [2008] QCA 412, cited

COUNSEL: G J Seaholme for the appellant, Johnson
S R Lewis for the appellant, Honeysett
V A Loury for the respondent

SOLICITORS: Legal Aid Queensland for the appellants
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA**: The appellants, Richard Johnson and James Honeysett, were convicted after a trial of one count of assault occasioning bodily harm in company committed on the complainant, Andrew Vlaisan, while at the same trial Mr Honeysett was convicted of a further charge of assault occasioning bodily harm against Mr Vlaisan. Both appeal their convictions on the ground that the learned trial judge erred "by misstating the test to be applied by the jury when comparing inconsistent evidence of witnesses". Mr Johnson raises a further ground, that the trial judge "misstated the evidence in relation to voices heard by the jury of the people present at the scene and not supported by the evidence".

The evidence

[2] Mr Johnson and Mr Honeysett are the father and brother respectively of Amelia Popescu, the former de facto wife of the complainant. On 27 March 2011, Ms Popescu, the appellants and another, unidentified man went to the house Mr Vlaisan and the couple's three children were occupying, in order to retrieve some property belonging to Ms Popescu. There was some argument between Ms Popescu and Mr Vlaisan over who was entitled to possession of a four-wheel drive vehicle which was parked in front of the house. Another car was parked next to the four-wheel drive, close to the driver's side door. Mr Vlaisan put the three children in the back of the four-wheel drive vehicle and got into the driver's seat, asserting that he had plans to take the children to the beach. Meanwhile, Ms Popescu got in on the passenger side, and they continued to bicker about possession of the vehicle.

[3] On Mr Vlaisan's account, he was sitting in the driver's seat with the door ajar and with his leg partially out of the vehicle. James Honeysett came running towards him and kicked the door onto his leg two or three times. Mr Vlaisan attempted to call the police on his mobile telephone, but Honeysett opened the door, took the phone from him and punched him in the face. (This punch was the subject of count 1.) Mr Vlaisan got out of the car and walked quickly across his yard towards his neighbour's house. He was intercepted by Mr Johnson, who grabbed his arm and struggled with him, while Mr Honeysett took his other arm. (This, on the Crown case, was the beginning of the count 2 assault.)

[4] Mr Vlaisan struggled harder and Honeysett began to hit him again, delivering a number of punches to the top of his head. Mr Vlaisan managed to free himself; he ran, slipped and fell, and tried to get up again. Mr Honeysett took him by the back of his shirt and threw him into the brick wall of his house. Mr Vlaisan fell to his knees and Honeysett got on top of him with a knee on his back and a hand on his head, threatening to knock him out if he tried to get up. He punched him again two or more times to the top of his head. After that, Mr Vlaisan said, he stayed where he was while the appellants and Ms Popescu packed the car and left.

[5] The Crown Prosecutor, very properly, called Ms Popescu in the Crown case. She had used her mobile phone to make an audio recording of events from the time she arrived at the premises; a CD copy of the recording was put into evidence. On Ms Popescu's account, while she and Mr Vlaisan were sitting in the four-wheel drive vehicle arguing, Mr Vlaisan made a phone call which she interpreted as a request for "back-up". (Mr Vlaisan said that he had telephoned his mother.) She called to her father and brother and the other man present to park their vehicle behind the four-wheel drive so that Mr Vlaisan could not move it. In response, Mr Honeysett came towards the vehicle and took hold of the driver's side door, which he had to move in order to pass between the four-wheel drive and the car parked next to it. When he had moved around the door, Ms Popescu saw that it was opened fully and that Mr Vlaisan was leaning back on the console. He extended his right leg rapidly in Mr Honeysett's direction and, although Ms Popescu did not see it connect, she saw her brother's head jerk back. Mr Honeysett retaliated by punching Mr Vlaisan.

[6] Ms Popescu said that Mr Johnson came to the vehicle and instructed the two men to get out and to settle down. When Mr Vlaisan emerged from the vehicle, her father touched him briefly on the elbow to support him. There was no other physical

contact between the two. Mr Honeysett had moved away to the front of the vehicle; Vlaisan, with arms raised, charged at him. They fell to the ground, and she saw them wrestle on the grass in front of the vehicles. Her father and she, with the other man, went into the house to collect belongings while Mr Vlaisan and Mr Honeysett continued to struggle on the ground. At one point, she saw that Honeysett had hold of Vlaisan, who seemed to be biting him. Mr Vlaisan was face-down on the grass and Honeysett was on top of him, holding one of his arms.

[7] Neither appellant gave evidence.

The summing-up

[8] The learned trial judge commenced his summing-up by telling the jury that he would divide it into three parts, which were, essentially, standard trial directions, directions about particular legal issues arising in the trial, and a reminder of and comments on the evidence. In the first part of his summing-up, his Honour gave the jury the usual criminal trial directions, including that they were not bound to agree with anything he said about the facts and should act on their own conclusions; that the onus was on the Crown to prove guilt and that they must be satisfied of every element of the offences beyond reasonable doubt; that they could accept parts of what a witness said and reject others, and should allow for the possibility that a witness could be honest but mistaken; and that it was entirely their province to decide what evidence they would accept or reject.

[9] Immediately after making the points about assessment of witnesses' evidence, the trial judge made this observation:

> "In this case you might think there is a clear - or at least significant differences, let me put it that way, between the evidence which Mr Vlaisan gave you and the evidence which Ms Popescu gave you, or gave to you. It seems to me that at the end of the day you may well have to make a judgment as to whether you are prepared to believe one over the other, or whether you are not prepared to believe either, or what. It seems to me that type of exercise is necessary in this case. It is entirely a matter, of course, for your judgment, ladies and gentlemen."

[10] His Honour went on to remind the jury that there was a continuing dispute between Ms Popescu and Mr Vlaisan, who were estranged and were involved in litigation. He continued:

> "I should observe, and you may or may not agree, it is entirely a matter for you, these are entirely your matters, it did seem to me that Miss Popescu was very anxious that you should know much more of the bad things about Mr Vlaisan than perhaps went the other way. She was very keen to let you know that it was her car, her house, this, that and the other, and that he had done this, that and the other in the past. That may be something you can understand. It may be something that troubles you. It will be a matter for your judgment.
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> So as I say, it seems to me in this case, because I think you will probably at the end of the day make a judgment as to really, it seems to me, whether you are prepared to accept Mr Vlaisan's evidence as being reliable. I think that is what it comes down to, and that involves a finding I would have thought that you are not as prepared to rely upon Miss Popescu's evidence as you would be Mr Vlaisan's."

[11] Turning to the second part of the summing-up, the trial judge warned the jury that what he had to say about the legal issues might be complicated. However, he said,

> "It does seem to me that at the end of the day if you are satisfied that Mr Vlaisan in his basic account to you is a reliable witness, then you will probably be well on the way to convicting the accused. If, on the other hand, you have doubts about his reliability, then it would seem to me more likely that you might find one or both of the accused not guilty. I think that is what it comes down to at the end of the day, but I will come back to that."

[12] The trial judge explained the excuses of provocation and self-defence at appropriate length, applying them to the facts. In relation to count 1, in which Mr Honeysett was charged alone with punching Mr Vlaisan, both those excuses were raised by Ms Popescu's evidence of Mr Vlaisan's having kicked Honeysett, while on count 2, her evidence of Mr Vlaisan's having charged at Honeysett raised self-defence. His Honour emphasised that the onus was on the Crown to satisfy the jury beyond reasonable doubt that the excuses were negatived.

[13] In the third part of the summing-up, the trial judge reminded the jury of the content of Ms Popescu's phone recording. He emphasised that it was the recording which was the evidence, and noted that on some occasions it was difficult to be confident who was speaking. That was, he said, more so when there was "[a] skirmishing going on around [the] car", with a number of males present; but it was, he said, a matter for the jury. After recounting what the tape contained in relation to the incident in which Mr Honeysett first struck Mr Vlaisan while he was seated in the car, his Honour continued:

> "You hear her [Ms Popescu] say, 'Settle down, James.', and then you hear another male voice saying, 'Hop out of the car.' Miss Popescu says, 'We'll do this the nice way, James. Get out of the car Andy.' You hear I think it's the complainant saying, 'Sweet.' 'Get out of the car and sit down.' 'Okay.' 'I told you to sit down. Now sit down.' That's another male voice. 'Sit down, mate. Guys. Just sit down. All of you sit down.' *You might think that this is the point at which count 2 is occurring when both men are around the complainant and he's being struck,* because after that you hear the children becoming quite upset saying, 'That's my Daddy. That's Daddy.', et cetera, et cetera, and so it goes on."

(I have italicised part of the last sentence, because it gave rise to the first of Mr Johnson's grounds of appeal.)

[14] Towards the end of the summing-up, the trial judge said this:

> "It seems to me that this case depends to a very large extent on the view that you take of the complainant's evidence. If you are persuaded that Mr Vlaisan is an honest witness and one who you regard as being reliable, then it seems to me that you may well be on the way to convicting the accuseds."

His Honour went on to outline the bases on which the defence challenged Mr Vlaisan's credibility.

Johnson's appeal ground in relation to the recorded conversation

[15] At the close of the summing-up, defence counsel took no issue with the directions concerning the jury's making a judgment as between the evidence of Mr Vlaisan and that of Ms Popescu. However, counsel for Mr Johnson asked for a redirection arising from the trial judge's comment identifying with count 2 the part of the conversation in which a male gave instructions to sit down. That passage of conversation, it was contended, occurred outside the car in the driveway, whereas Mr Vlaisan's evidence was that Mr Johnson took hold of him at the very front of the yard. The trial judge refused to give any further direction on the point, saying that he remained "fairly confident" that he had correctly identified the part of the tape where the offence the subject of count 2 had occurred, and that the jury could work it out for themselves. On appeal, it was submitted that the learned judge had misstated the evidence, the error resulting in a miscarriage of justice.

[16] I do not think there is anything in this ground, for two reasons. Firstly, if the trial judge were wrong about the alleged assault constituting count 2 occurring at the precise point he identified, it was of no consequence. What can next be heard on the tape is consistent with an assault on Mr Vlaisan occurring within seconds of the identified passage. Immediately after the "sit down" conversation, Ms Popescu can be heard shrieking "Daddy's okay" and "Don't look", accompanied by howls from the children. Secondly, the trial judge had made it clear to the jury that it was up to them what they made of the recording. He put his comment in relation to when the events giving rise to count 2 occurred no higher than that the jury "might think" that it was at that point in the tape.

The joint appeal ground as to the comparison of Ms Popescu's and Mr Vlaisan's evidence

[17] Counsel for the respondent Crown, arguing in support of the directions given, adverted to this comment by Deane J in *Liberato v The Queen*:[1]

> "Provided that they are accompanied by clear and unequivocal directions about the criminal onus and standard of proof, express or implied references in a summing up to a 'choice' between particular witnesses are, no doubt, sometimes unavoidable and commonly unobjectionable."

She pointed out that the trial judge in the present case had made it clear to the jury that he was delivering the summing-up in separate parts, in the first of which he had given "clear and unequivocal directions about the criminal onus and standard of proof" and had also emphasised that the jury's own view of the facts was paramount. The later passages (set out at paragraphs [11] and [14] above), in which the trial judge had explained that an acceptance of Mr Vlaisan's reliability was fundamental to a decision to convict, were sufficient to make it clear that it was not simply a matter of choice between his evidence and that of Ms Popescu, and to accommodate the possibility that the jury did not accept the evidence of either.

[18] In *Liberato*, Brennan J made a similar point to that made by Deane J:

> "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is

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1 (1985) 159 CLR 507 at 519.

> commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving."[2]

Brennan J went on to say that in a case where evidence was given for the defence, the jury should be told that even if they did not positively believe that evidence, they could not find an issue against the accused contrary to it if it gave rise to a reasonable doubt on the issue.

[19] In the present case, there was nothing untoward in the trial judge's telling the jury that it was necessary for them to consider which of the two major Crown witnesses they could accept as reliable. The problem was that the directions set out at [9] and [10] above tended to cast the jury's task as determining whether they would accept the evidence of Mr Vlaisan or that of Ms Popescu; and suggested that a finding that Ms Popescu's evidence was not as reliable would dispose them to accepting Mr Vlaisan's evidence. Those directions were distinct from the general directions as to onus and standard of proof and primacy of the jury's own view, and were likely to have considerable force because of their specificity. The trial judge did allude to the possibility of the jury's being unable to decide whether to accept the account of Mr Vlaisan or that of Ms Popescu - "whether you are prepared to believe one over the other, or whether you are not prepared to believe either"- but he did not go on to say, in that context, that the latter outcome should produce an acquittal.

[20] It is true that the passages set out at [11] and [14] above, as the respondent submitted, properly emphasised the necessity of accepting Mr Vlaisan's evidence before the jury could convict. But, in my view, the jury might reasonably have taken from the directions as a whole a course of reasoning to this effect: that if they took an unfavourable view of Ms Popescu's evidence, Mr Vlaisan's evidence would be rendered more acceptable and that an acceptance of his evidence would, in turn, lead to conviction. The later directions relied on by the respondent would simply have provided the final link in that reasoning process.

[21] Counsel for the appellants referred to a series of cases in which this court and its predecessor emphasised that where there was conflicting Crown and defence evidence, the jury should be directed that if they were left in doubt as to where the truth lay, the verdict should be not guilty: *R v George*[3]; *R v Booth*[4]; *R v McBride*[5]. The same logic, in my view, applies in this situation. The jury should have been directed that if they were left in doubt as to which of the two versions was correct, they should acquit; and that, even if they did regard Ms Popescu's evidence as less reliable than that of Mr Vlaisan, they should not convict if the former's evidence left them with a reasonable doubt about the matters in issue: as to whether the Crown had excluded self-defence and provocation, in the case of Honeysett, and had proved Johnson's involvement in the second assault.

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2 At 515.
3 [1980] Qd R 346 at 348.
4 [2005] QCA 30 at [6].
5 [2008] QCA 412 at [30]-[31].

[22] As already noted, counsel for the appellants at trial sought no redirection. However, given that the Crown case relied entirely on the acceptance of Mr Vlaisan's evidence, I think it must be concluded that the learned judge's directions as to how the jury should approach that evidence, as compared with Ms Popescu's, did result in a real prospect of the appellants losing a chance fairly open to them of being acquitted. There has been a miscarriage of justice.

[23] I would allow the appeals, set aside the convictions and order a retrial on both counts.

[24] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[25] **DAUBNEY J**: I respectfully agree with Holmes JA.