SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bartram* [2013] QCA 361
PARTIES:	**R** **v** **BARTRAM, Dianne Yvonne** (appellant/applicant)
FILE NO/S:	CA No 124 of 2013 DC No 10 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	Orders delivered ex tempore 21 November 2013 Reasons delivered 6 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2013
JUDGES:	Muir and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 21 November 2013:** **1. The appeal be allowed.** **2. The appellant's conviction be set aside.** **3. A retrial be ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted of one count of unlawful wounding – where the appellant stabbed the complainant, who was collecting his possessions which were stored near the laundry underneath the appellant's house, with a knife attached to a metal pole – where the complainant had been subject to, and breached, domestic violence orders in favour of the appellant – where, on the morning of the incident, the complainant kicked down a door at the appellant's residence in breach of a domestic violence order – where, on one view of the evidence, the complainant was armed and refused to leave the premises despite repeatedly being asked to do so – where the jury were directed as to self-defence – where the appellant submits that the trial judge erred in failing to direct the jury on the application of s 267 of the *Criminal Code* (Qld) (defence of

dwelling) – where the respondent submits that the underneath of the residence did not constitute a "dwelling" as defined in s 1 of the Code – whether the appellant was denied a fair chance of acquittal under s 267 of the Code – whether the failure to so direct the jury gave rise to a miscarriage of justice

Criminal Code 1899 (Qld), s 1, s 267, s 668E(1)

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
R v Coomer [2010] QCA 6, cited
R v Soma (2003) 212 CLR 299; [2003] HCA 13, cited

COUNSEL: M A Green for the appellant/applicant
P J McCarthy for the respondent

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

[1] **MUIR JA**: **Introduction** The appellant appeals against her conviction in the District Court at Ipswich on 6 May 2013 of the offence of unlawful wounding. She also sought leave to appeal against her sentence of two years imprisonment with an order for release on parole on 5 May 2014. The application was abandoned. On the hearing of the appeal against conviction, leave was granted to substitute the following as the only ground of appeal:

> "There was a miscarriage of justice in that the learned trial judge erred in not directing the jury on the application of s 267 of the *Criminal Code* (defence of a dwelling), thereby denying the appellant a reasonable prospect of acquittal."

The evidence

[2] The complainant gave evidence to the following effect. He suffered from schizophrenia and the appellant had been his carer. In July 2012, the appellant lived in a house in Brisbane Street, Goodna, with a Mr Perkins. On the evening of 26 July 2012 he had slept the night under the house where he had personal possessions stored. After he left the house on the morning of 27 July 2012, he received a text message from the appellant to "come and get [his] stuff". He arrived at the house around 11.00 that morning in a van driven by a friend.

[3] As the complainant was opening the rear door of the van, which was parked near the laundry, the appellant came "flying down the back stairs with a stick and a knife on … the end of it". Mr Perkins also appeared. He had a hammer in his hand and threatened the complainant with it.

[4] The complainant later said, somewhat inconsistently with his earlier evidence, that when he first saw the appellant he was "standing sort of under the house near that cardboard". The piece of cardboard to which he referred was located on concrete tiles in fairly close proximity to the laundry. The complainant's possessions were heaped nearby. The laundry was built in at one corner of the underneath of the house, which was built on a sloping block so that it was near ground level at the

front and highset on concrete stumps at the back. The external stairs ran from the upstairs of the house to a concrete path from the laundry to a Hills Hoist. The stairs met the path at a point just outside the laundry door.

[5] The appellant swung her weapon at him, striking him on one arm which he had raised to protect his neck. The complainant accepted that the appellant had been granted a domestic violence order against him in 2011 but claimed that she had told lies in order to obtain it. He accepted that he had been convicted on 6 August 2012 in the Ipswich Magistrates Court of breaching a domestic violence order obtained by the appellant.

[6] Mr Perkins gave evidence to the following effect in the prosecution case. The complainant came to a door of the appellant's house and asked the appellant if he could get a glass of water. She refused and told him to go downstairs, whereupon he kicked the door and broke it off its hinges. The appellant threatened to ring the police. The complainant left but later came back in a van with a friend to pick up his possessions. When the complainant arrived, the appellant was upstairs in her room in the house. The van reversed down to the back of the house to "where the laundry is" and the complainant started loading his possessions into the van. Mr Perkins went downstairs to see what was happening.

[7] The appellant came down the back stairs and told the complainant several times to leave. Mr Perkins commented of the complainant, "He's not supposed to be on the premises". At the time, the appellant was standing near the back stairs and the complainant was standing at the back of the van. The complainant refused to leave and kept "putting his stuff in the van". The complainant said, "I'm not going anywhere until I get all my stuff".

[8] The complainant had something in his hand which he was swinging around "like a lunatic". He "started yelling and that and then she just took a strike at his – at him and he put his arm up". At the time, the appellant had a "small knife" which was attached to a pole.

[9] Having initially said that the incident occurred "next to the van", Mr Perkins subsequently corrected himself to say that the incident happened "under the house" when the complainant was "getting his stuff". He identified the location as being near the paved area at the back of the laundry. He repeated that the appellant told the complainant to leave and that he refused.

[10] A police officer gave evidence of attending at the appellant's residence on the morning of 27 July 2012 in response to a telephone call. The appellant complained of the breach by the complainant of a domestic violence order. Another police officer gave evidence of the existence of a domestic violence order against the complainant in favour of the appellant at the time of the incident and of the order having been breached twice after it was made in May 2012.

[11] In the appellant's police interview, which was played to the jury, she outlined allegations of threats made by the complainant on the night before the incident. She said that she had ongoing issues with the complainant which is why she had domestic violence orders in place. She said that she had told the complainant not to come to her house but that he did. Mr Perkins and the driver of the van warned the complainant to stay in the car. The appellant said in that context, "he'd just hop out of the car and [INDISTINCT], I don't know, I don't know whether he woulda charged me or not but he was just there … I just grabbed the knife and stabbed him".

[12] The appellant also told the interviewing police officer that on the previous evening the complainant had threatened to "slit her throat from ear to ear".

The appellant's contentions

[13] It was submitted that there was evidence capable of supporting a reasonable belief on the part of the appellant that the complainant intended to commit an indictable offence and that it was necessary to use force to repel the complainant from remaining in the dwelling. The matters relied on were:

(a) the complainant had been subject to a domestic violence order in favour of the appellant;

(b) the complainant had been convicted of breaches of the order;

(c) the complainant had attended the appellant's residence on the morning of the incident and had kicked down a door in breach of the domestic violence order;

(d) if Mr Perkins' evidence and the unsworn statement of the appellant were accepted, the complainant refused to leave the premises after several demands for him to do so;

(e) if Mr Perkins' evidence was accepted, the complainant was armed; and

(f) the complainant threatened violence to the appellant on the evening prior to the incident if an unsworn statement of the appellant to this effect was accepted.

Consideration

[14] Section 267 of the *Criminal Code* (Qld) (the Code) provides:

> "**267 Defence of dwelling**
>
> It is lawful for a person who is in peaceable possession of a dwelling, and any person lawfully assisting him or her or acting by his or her authority, to use force to prevent or repel another person from unlawfully entering or remaining in the dwelling, if the person using the force believes on reasonable grounds—
>
> (a) the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling; and
>
> (b) it is necessary to use that force."

[15] The respondent accepted that there was evidence "fit for the jury's consideration" that the appellant believed on reasonable grounds that the complainant intended to commit an indictable offence, namely to assault her. It was submitted, however, that the evidence was not such that it could be inferred that the appellant had a belief on reasonable grounds that the complainant was "attempting to enter or to remain in the dwelling"[1] with that intention. Nor was the state of the evidence such that it might be inferred that the appellant stabbed the complainant in order to prevent him from entering or remaining in the dwelling.

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1 *Criminal Code* (Qld), s 267(a).

[16] It was submitted that the complainant was under the dwelling, in an open area and moving between that area and the van parked nearby and that the appellant was coming from outside the home and towards this area when the confrontation took place.

[17] The respondent's theory was that the underneath of the residence where, on one view of the evidence, the incident occurred was not within the "dwelling" as defined in s 1 of the Code because there was "no communication between the residence and underneath the residence sufficient to meet the statutory definition".

Consideration

[18] "Dwelling" is defined inclusively in s 1 of the Code as:

> "***dwelling*** includes any building or structure, or part of a building or structure, which is for the time being kept by the owner or occupier for the residence therein of himself or herself, his or her family, or servants, or any of them, and it is immaterial that it is from time to time uninhabited.
>
> A building or structure adjacent to, and occupied with, a dwelling is deemed to be part of the dwelling if there is a communication between such building or structure and the dwelling, either immediate or by means of a covered and enclosed passage leading from the one to the other, but not otherwise."

[19] The respondent's construction of s 1 of the Code is altogether too restrictive. There is no reason why, by reference to the plain words, "building or structure, or part of a building or structure … kept by the owner or occupier for the residence therein of himself or herself …" should not extend to the underneath of a highset residence which is accessible and used, or even useable, by the owner or occupier for domestic purposes. The definition does not purport to confine a "dwelling" to any particular part of a "building" or "structure". It, in fact, extends the meaning of dwelling to include "part of a building or structure". In everyday speech, reference to a highset "dwelling", at least as a general proposition, includes reference to the whole of the relevant structure from the top of the roof to the ground.

[20] In this case, a normal, and perhaps integral, part of a dwelling, the laundry, was located under the house and linked to the living area by external stairs. The laundry and the rest of the underneath of the house, part of which was accessible and useable for storage and other purposes, were part of the relevant residential "building" or "structure".

[21] Mr Perkins gave ample evidence from which it could be inferred that the complainant was either "unlawfully entering" or "remaining in the dwelling". It will be recalled that Mr Perkins said that the appellant asked the complainant to leave several times and that he "kept putting his stuff in his van and getting stuff out of the laundry". According to Mr Perkins, the complainant stated that he was "not going anywhere" until he retrieved all of his possessions. There was evidence that some of the complainant's possessions were upstairs. There was thus evidence that, if accepted, would enable the jury to conclude that the appellant used force to "prevent or repel"[2] the complainant from unlawfully entering or remaining in the dwelling.

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[2] *Criminal Code* (Qld), s 267.

[22] The respondent argued that, as no direction was sought on the application of s 267 of the Code, there was no "wrong decision [on a] question of law"[3] to enliven the right of appeal conferred by s 668E(1) of the Code. The consequence of this was said to be that the appellant could succeed only by establishing that the absence of such a direction occasioned a "miscarriage of justice" within the meaning of those words in s 668E(1) of the Code.[4] It was submitted that, even if s 267 of the Code applied and a direction in relation to it should have been given, it was not "reasonably possible" that the failure to give the direction "may have affected the verdict".[5] Accordingly, no miscarriage of justice occurred and the appeal should be dismissed.

[23] Those arguments must be rejected also. The evidence is confused. There are competing versions of events and the resolution of such conflicts is quintessentially a jury's role. The appellant was denied a fair chance of acquittal under s 267 of the Code.

Conclusion

[24] At the conclusion of the hearing of the appeal on 21 November 2013, this Court ordered that the appeal be allowed, that the conviction be set aside and that there be a retrial. The above are my reasons for those orders.

[25] **GOTTERSON JA:** I agree with the reasons of Muir JA.

[26] **DAUBNEY J**: I concur.

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3 *Criminal Code* (Qld), s 668E(1).

4 See *R v Soma* (2003) 212 CLR 299 at 304 [11], 305 [15] and 312 [42]; *R v Coomer* [2010] QCA 6 at [28]–[29].

5 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38].