SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dibble; Ex parte Attorney-General (Qld)* [2014] QCA 8
PARTIES:	**R** **v** **DIBBLE, Samyal James** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 167 of 2013 DC No 501 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal Against Stay of Prosecution by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2013
JUDGES:	Fraser and Gotterson JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY & CAPACITY – DOUBLE JEOPARDY – AVAILABILITY OF DEFENCE – where the respondent was observed by police swinging punches at the complainant – where the police intervened and charged the respondent with committing public nuisance – where the complainant wished to make a formal complaint against respondent – where the respondent in the Magistrates Court pleaded guilty to public nuisance and fined – where afterwards the police charged the respondent with causing grievous bodily harm – where the respondent sought a permanent stay of grievous bodily harm proceedings based on s 16 *Criminal Code* 1899 (Qld) ("*Code*") – where the District Court judge ordered a permanent stay – where the appellant appealed against the stay pursuant to s 669A(1A) *Code* – whether the "same punishable acts or omissions" test was satisfied – whether the defendant's punishment for the public nuisance offence was a bar to prosecution for grievous bodily harm *Criminal Code* 1899 (Qld), s 16, s 669A

Connolly v Meagher (1906) 3 CLR 682; [1906] HCA 20, considered
R v Donnelly (1920) 14 QJPR 62, considered
R v Gordon, ex parte Attorney General [1975] Qd R 301, applied
R v Harris; ex parte Attorney General [1999] QCA 392, considered
R v Hull (No 2) [1902] St R Qd 53, considered
R v Tricklebank [1994] 1 Qd R 330; [1993] QCA 268, considered

COUNSEL: M R Byrne QC for the appellant
A Vasta QC, with K Payne, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Fraser Power Lawyer and Notary Public for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** Samyal James Dibble who is the respondent to this appeal was charged on indictment in the District Court at Roma on one count alleging an offence against s 320 of the *Criminal Code* (Qld) ("*Code*") in that on 30 December 2011 at Roma, he unlawfully did grievous bodily harm to William Colbran. The indictment was presented on 15 November 2012 and the matter was adjourned. It was adjourned again in February 2013 for hearing in the June 2013 sittings of the District Court at Roma.

[3] In the meantime, a pre-trial hearing was convened in Brisbane for 16 May 2013 at which the respondent applied for a permanent stay of the prosecution of the indictment. Argument on the application was heard that day. Later, on 29 May 2013, the learned judge who heard the application made an order in its terms. On 27 June 2013, the Attorney-General of Queensland, exercising the right given by s 669A(1A) of the *Code*, filed a Notice of Appeal against the permanent stay order.

The circumstances of the offending and the Magistrates Court proceedings

[4] The circumstances of the respondent's offending are compendiously set out in the reasons for judgment under appeal as follows:

> "[1] In the early hours of 30 December 2011, on a footpath in Roma, police observed Mr Dibble swinging haymaker style punches at the complainant, who was lying on the ground, trying to protect his head from further blows, while another man tried to stop the attack. Others at the scene witnessed Mr Dibble's violent conduct towards the complainant. Police intervened.
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> [2] Mr Dibble was taken to the Roma Watch house where he was charged with committing a public nuisance. He was required to appear at the Magistrates Court in Roma on 17 January 2012.

> [3] The complainant was transported to Roma hospital. When the police visited him there, he told them he was not sure if he would make an assault complaint; it would depend on the seriousness of his injuries.
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> [4] In fact, he had sustained significant facial injuries. The next day, he was transferred to the Princess Alexander Hospital. He underwent two operations. On 3 January 2012, before he was discharged, the complainant advised police he wished to make a formal complaint against Mr Dibble. On 10 January, he gave a statement to police.
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> [5] A week later, on 17 January, 2012, Mr Dibble appeared in the Magistrates Court at Roma, as required. He entered a plea of guilty to the charge of public nuisance and was fined $400. No conviction was recorded.
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> [6] On 2 March 2013, the police charged Mr Dibble with causing grievous bodily harm, having received a medical opinion about the injuries sustained by the complainant."[1]

[5] On 30 December 2011, the respondent was charged with having that day committed a public nuisance offence under s 6 of the *Summary Offences Act* 2005 (Qld). Section 6(2) thereof provides that "A person commits a public nuisance offence if-

> (a) the person behaves in–
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> (i) a disorderly way; or
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> (ii) an offensive way; or
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> (iii) a threatening way; or
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> (iv) a violent way; and
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> (b) the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public."

[6] The charge itself did not particularise the behaviour of the respondent that was alleged to have constituted the public nuisance; nor was such behaviour particularised during the course of the proceedings in the Magistrates Court. As well, the charge did not characterise the behaviour as disorderly, offensive, threatening or violent. Provided that the behaviour was capable of being characterised as at least one of them, which it evidently was, such a characterisation was not necessary.

[7] The respondent pleaded guilty in writing. The plea was received by the Magistrate at Roma at a hearing on 17 January 2012. On that occasion the prosecutor outlined the facts briefly in the following way:

> "About 25 minutes past midnight 30th of December 2011, Bowen Street Roma, police observed a group of people on footpath watching two males fighting. Defendant was throwing haymaker style punches towards the face of another male who was attempting to cover his head from being further assaulted and male on the ground was bleeding."[2]

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1 AB25.

2 AB51.

[8] The Magistrate then gave the following decision:

> "Well, this is fighting in the street. He has obviously been collecting a few. A few of his punches must have been effective because the other person was on the ground.
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> He's fined $400.
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> No conviction is recorded in view of the absence of any suggestion he has got previous.
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> I refer the fine to SPER."[3]

The decision on the application

[9] The application for the permanent stay was based upon s 16 of the *Code* which provides, relevantly:

> "A person can not be twice punished under the provisions of this Code or under the provisions of any other law for the same act or omission …"

[10] The argument in support of the application was that were the respondent to be punished upon conviction on the count in the indictment, he would be punished twice for the same act or omission for which he was punished by way of fine. That was an outcome which s 16 precluded. Hence, to permit the prosecution on indictment to proceed would be to condone an infringement of s 16.

[11] The argument against the application sought to distinguish the act or omission for which the respondent was punished in the Magistrates Court from the act or omission for which he would be punished upon conviction on the count in the indictment. It was submitted that, for the former, the relevant act was the respondent's behaviour and, for the latter, it was his having caused grievous bodily harm. No infringement of s 16 would result.

[12] The learned judge had regard to judicial statements concerning the meaning and scope of s 16 and then applied the law as she understood it to be to the facts of the case. Her Honour concluded:

> "Nevertheless, this Court must apply the law as it stands to the facts. I consider there is a unity of time and place between the acts relied upon for the two charges. The basic act relied on for the charge of grievous bodily harm is the same act punished on the charge of public nuisance. The charges may be distinct in their legal formulation, but in this case they rest on the same course of conduct. Allowing the indictment to proceed, would, in my mind, be contrary to s l6 and, as such, constitute an abuse of process."[4]

The grounds of appeal

[13] Two grounds of appeal are stated in the Notice of Appeal, namely:

1. The learned judge erred in finding that for the purposes of s 16 of the *Code*, the offences of public nuisance and grievous bodily harm with which the respondent was charged were based on the same act.

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3 AB53.

4 Reasons [40].

2. The learned judge erred in finding the prosecution for unlawfully causing grievous bodily harm was an abuse of process.[5]

[14] On the hearing of the appeal, counsel for the appellant, Attorney-General for Queensland, did not advance separate arguments in respect of each ground. That approach reflected the reality that the second ground was a challenge only to the conclusion to which the finding challenged by the first ground inevitably led. The second ground did not raise any additional issue requiring separate consideration.

Punishment for the same act or omission

[15] Sir Samuel Griffith, the author of the *Code* enacted in 1899, when sitting as Chief Justice of Australia in 1906 observed in *Connolly v Meagher*:[6]

> "It is provided by sec. 16 of the *Criminal Code* that no person shall be twice punished for the same act or omission. That is not quite the same as the law which allows the defence of '*autrefois convict*,' which is dealt with in secs. 17 and 598 of the Code. The rule in sec. 16 may or may not be identical with the common law, but it is the law of Queensland."

[16] In the course of argument of that application for special leave, his Honour had described s 16 as laying down a "new test". It was a test, the meaning and scope of which fell to be defined by the course of judicial decision making. Indeed, in 1902, sitting as Chief Justice of Queensland, his Honour had taken some of the first steps in that process. In *R v Hull (No 2)*,[7] he said:

> "I think it is only necessary to look at the words 'the same act or omission', to say, that when it is alleged that acts referred to in two indictments are the same, there is implied a unity, at least, of time and place."[8]

[17] Whilst s 16 was applied in several reported cases which followed *Hull (No 2)*,[9] it was not until 1975 that detailed consideration was given to the meaning of s 16. In *R v Gordon ex parte Attorney-General*[10] the driver of a motor vehicle which collided with the rider of a motor cycle pleaded guilty in the Magistrates Court of being in charge of a motor vehicle whilst under the influence of liquor or a drug. He was fined and disqualified from holding a driver's licence. Later, in the District Court, the driver pleaded guilty to a charge of dangerous driving causing grievous bodily harm and the same facts as had been put before the Magistrate were put before the judge. The judge ordered that the driver be convicted but held that because of s 16, he could not be punished for the offence. The Attorney-General appealed.

[18] Hanger CJ considered the Queensland decisions to which I have referred and to decisions on the common law from elsewhere. He then expressed the following conclusion:

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5 AB81-82.
6 (1906) 3 CLR 682 at 684.
7 [1902] St R Qd 53.
8 At 57.
9 *Connolly v Meagher ex parte Meagher* [1906] St R Qd 125 and *R v Donnelly and Maher* (1920) 14 QJPR 62.
10 [1975] Qd R 301.

> "Section 16, in saying that a person cannot be twice punished for the same act or omission, must be referring to **punishable acts or omissions**; and the prohibition applies though the acts or omission would constitute two different offences. It is to these cases that the section is directed."[11] (Emphasis supplied.)

[19] His Honour then applied s 16 with that meaning to the case before him, holding that it did not apply to it. He said:

> "If this construction of s 16 is right, then the section would have no application to the circumstances of the present case. The punishable act or omission which had already been dealt with by the Magistrate being in charge of a motor vehicle while under the influence of liquor or a drug – was not the punishable act or omission before his Honour – dangerous driving causing grievous bodily harm. His Honour therefore proceeded on a wrong footing in taking the course which he did …"[12]

[20] E S Williams J, the other member of the full court who delivered a judgment (Hart J having died before judgment was delivered) agreed in the result, having stated that he thought that the proper test for s 16 was whether the same wrongful act or omission which had previously resulted in punishment 'is the central theme, the focal point or … the basic act or omission in the later offence charged'."[13]

[21] The test of same punishable acts or omissions articulated by Hanger CJ was subsequently applied by McPherson JA and Demack J in *R v Tricklebank*.[14] Their Honours did not regard the addition of an aggravating circumstance of being adversely affected by alcohol to a dangerous driving charge as having transformed the act of dangerous driving into the same act of drink-driving of which the offender had been punished in the Magistrates Court.

[22] Some years later, in the *R v Harris ex parte Attorney-General of Queensland*,[15] Pincus JA regarded the same punishable acts or omissions test as that to be applied for s 16. The other members of the court, de Jersey CJ and Thomas JA, agreed generally with his Honour's reasons.

[23] The same punishable acts or omissions test has been consistently adopted and applied in Queensland since its formulation. The test was not the subject of challenge in this appeal. To the contrary, both sides made submissions on the footing that it is the prevailing test. In my view, it ought to be adopted and applied for this appeal. I would add that it is in no sense inconsistent with the observations of Griffith CJ in *Hull (No 2)*. The test bespeaks a unity of time and of place, at least, in the punishable acts or omissions. Thus those observations are consistent with it.

Application of the test

[24] The appellant sought to differentiate the acts which constituted the public nuisance offence from those that constitute the indictable offence of causing grievous bodily

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11 At 306.
12 At 307.
13 At 323.
14 [1994] 1 Qd R 330 at 336-337 and 341 respectively.
15 [1999] QCA 392.

harm by reference to one specific type of act: the landing of a punch or punches by the respondent on the complainant. That the respondent landed a wounding punch or punches on the complainant was an act or a series of acts essential to the causing of grievous bodily harm to him by the respondent. By contrast, the appellant submitted, for the public nuisance offence, neither was it necessary that any punch thrown by the respondent have landed on the complainant nor was it put to the Magistrate that any punch or punches thrown by the respondent had been observed to land on the complainant.[16]

[25] For a public nuisance offence such as this, identification of the punishable act or acts which sustained a particular conviction will depend upon the totality of the behaviour which is put before the court as constituting the offending behaviour. If that behaviour is violence which includes landing a punch on another person, then the landing of the punch is part of the punishable acts. It is not to point to propose that other aspects of the offending behaviour (to the exclusion of the landing of the punch) would be sufficient to characterise that other behaviour as disorderly, offensive, threatening or even violent, as might sustain a conviction for a public nuisance offence.

[26] Here, as noted, the offending behaviour was not particularised in a way which excluded any punch thrown by the respondent that landed on the complainant. Significantly, the transcript of the brief proceedings at the hearing on 17 January 2012 indicates quite clearly that the respondent was convicted on the basis that he threw more than one punch that had landed on the complainant. The prosecutor stated that the respondent was throwing haymaker style punches towards the complainant's face; that the complainant was attempting to cover his head from being **further** assaulted; and that the complainant was on the ground bleeding. The Magistrate described the respondent as obviously "collecting a few" and that his punches must have been effective because the complainant was on the ground.

[27] The circumstances of *Donnelly* and *Maher*[17] are comparable. They were charged before a police magistrate with resisting arrest and using obscene language. They pleaded guilty to using obscene language, but not guilty to resisting arrest. They were tried and convicted on that charge before the magistrate. Later, they were charged on indictment in the Supreme Court of having assaulted a police constable in the execution of his duty. The prosecutor proposed to lead "substantially and practically" the same evidence as had been led before the magistrate. In asking the jury to return a verdict of not guilty on a defence based on s 16, Shand J observed that the magistrate must necessarily have taken the facts of the assault into consideration in convicting the offenders for resisting.[18]

[28] For these reasons, I consider that the differentiation that the appellant seeks to make is not a valid one. The punishable acts for which the respondent was convicted in the Magistrates Court included the punches thrown by him which landed on the complainant and caused the latter harm. It follows that to punish the respondent a second time for those acts would offend s 16.

Disposition

[29] The appellant has failed to establish either ground of appeal. The appeal ought therefore be dismissed.

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16 Transcript 1-4 LL37-42; appellant's written outline paragraph 3.9.

17 See footnote 9.

18 At 64.

Order

[30] I would propose the following order:

1. Appeal dismissed.

[31] **BODDICE J:** I have read the reasons for judgement of Gotterson JA. I agree with those reasons, and the proposed order.