SUPREME COURT OF QUEENSLAND

CITATION:	*R v Beetham* [2014] QCA 131
PARTIES:	**R** **v** **BEETHAM, Matthew Richard Colin** (appellant)
FILE NO/S:	CA No 17 of 2014 DC No 348 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	Orders delivered ex tempore 7 March 2014 Reasons delivered Friday 6 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2014
JUDGES:	Margaret McMurdo P and Muir JA and Douglas J Separate reasons for judgment of each member of the Court, each agreeing as to the orders made
ORDERS:	**Delivered ex tempore on 7 March 2014:** **1. The appeal is allowed.** **2. The conviction is set aside.** **3. A retrial is 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 a repeat customer of the business managed by the complainant – where the business supplied parts which were neither paid for nor returned – where the complainant phoned the appellant to discuss the payment or return of the parts and a heated argument developed – where the complainant gave evidence that the appellant punched him with his right closed fist on the left side of his jaw – where the appellant gave evidence that the complainant threw a punch which the appellant was able to duck and only then did he punch the complainant – where the appellant's account was supported by all eyewitnesses other than the complainant and raised s 271(2) *Criminal Code* – where the trial judge directed the jury only

in terms of s 271(1) *Criminal Code* – where neither counsel at trial nor the judge discussed whether s 271(2) *Criminal Code* should be left to the jury – whether the failure to direct on s 271(2) *Criminal Code* constituted a miscarriage of justice

Criminal Code 1899 (Qld), s 271(1), s 271(2)

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited

COUNSEL: P Callaghan SC, with B P Dighton, for the appellant
P J McCarthy for the respondent

SOLICITORS: Anderson Telford Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Matthew Richard Colin Beetham, was convicted after a four day trial on 17 January 2014 of doing grievous bodily harm to Anthony David Bird on 23 June 2011 at Townsville. He appealed against his conviction contending that the learned trial judge erred in failing to direct the jury as to s 271(2) *Criminal Code* 1899 (Qld). At the appeal hearing on 7 March 2014, this Court allowed the appeal, quashed the conviction and ordered a retrial, and stated it would give its reasons for those orders later. What follows are my reasons for joining in those orders.

The evidence at trial

[2] The following evidence was led at trial. The appellant was a repeat customer of the trailer parts business managed by the complainant which, in early 2011, supplied the appellant with parts, which were found to be unsuitable. The business retrieved the previously supplied parts and supplied new ones at no further cost. Later, the business supplied trailer rims which were neither paid for nor returned. Months later, when the complainant realised the appellant had not paid for the rims, he spoke to the appellant about two unpaid invoices. At about 9.00 am on the morning of the offence, the complainant phoned the appellant to discuss the payment or return of the rims. Unfortunately, the matter got completely out of hand and a heated argument developed. The complainant gave evidence that the appellant threatened him and offered to come over and sort him out. Each left their respective workplaces to find the other. When the complainant arrived at the appellant's workplace he spoke to the appellant's father. Meanwhile, the appellant arrived at the complainant's workplace which the complainant had left about 10 minutes earlier. When he was told that the complainant had gone to the appellant's workplace, he immediately left to find him.

[3] Mr Barry Smylie, who worked in the complainant's business at the time, heard the appellant, who was looking pretty angry and upset when he was at the premises, ask, "Where the fuck is the cunt?". He told the appellant to leave and he stormed out. Mr Robert Hussey, who also worked in the business, gave evidence that he saw the appellant drive off quite quickly with his tyres spinning.

[4] The complainant's evidence was that whilst he was speaking with the appellant's father at the appellant's workplace, the appellant pulled up in his car in the driveway, walked up to them and stood beside his father. The appellant was

a couple of metres away on the complainant's left hand side. As the complainant turned towards his car to leave, the appellant punched him with his right closed fist on the left side of his jaw. The punch knocked him over but he got up. The appellant's father told the appellant to go inside. The appellant walked away. With the assistance of the appellant's father, the complainant loaded some trailer parts into his car. His face was bleeding and he had difficulty talking. He then locked himself in the car and rang the police on the emergency 000 number. He drove to his parents, who arranged medical treatment and he was operated on that evening.

[5] His jaw was fractured in two places. Had he not had medical treatment, he had an extremely high likelihood of developing a life threatening infection. The injury could have caused a malocclusion making eating very difficult and resulting in a facial deformity.

[6] The appellant gave and called evidence from his father and four employees who were present at the time of the incident. The appellant gave evidence that in the phone call the complainant asked him where the rims were. The appellant said he could come and get them. The complainant became quite angry. The appellant said he would come over and they would sort it out. The complainant said, "Come over here, you cockhead, and I'll smash your fucking head in" and then hung up. He went to the complainant's workplace and was told the complainant had gone to see him. He drove to his workplace and saw the complainant pointing his finger at the appellant's father and waving papers. The complainant was abusing his father, was angry and was waving his arms about. The appellant told him to leave. He stayed for about 10 minutes, abusing the appellant and calling him a "cockhead" two or three times. The complainant told him to "get out on the road" and to "do it", inferentially to fight. The appellant's father was beside him. The complainant stepped towards the appellant and threw a punch which the appellant was able to duck. Only then did the appellant punch the complainant "you know, self-defence like – yeah. He took a swing at me, so I punched him back." Once the complainant fell to the ground, he did not punch him again. The appellant said "He took a swing at me, so I punched him back."

[7] In cross-examination, he was asked, "… would you be aware that a single punch with the force described by [the complainant] would in fact cause a significant injury as described? – Would you accept that it's foreseeable that a punch as described would cause the injury that's been sustained?" He responded, "No." He maintained that he would not have punched the complainant if he had not thrown the first punch. The appellant was concerned for his father and asked him to leave three or four times. He punched the complainant with medium force as an instant, quick reaction to the complainant's punch.

[8] The appellant's father gave evidence that the complainant "put his hands up like this, and then [the appellant] stood back a bit and [the complainant] swung" and in a very quick reaction to that swing the appellant punched the complainant who continued to abuse the appellant. After the complainant was on the ground, he got up, took off his coat and threw it in his car. He said to the appellant "Come out here, you cockhead, I haven't finished with you yet." The appellant's father encouraged the complainant to calm down as he was badly hurt. The complainant kept yelling at the appellant "Come out here. I'm not finished with you." The father had hold of him and saw that a couple of teeth were leaning over. He told the complainant to stop or he would get badly hurt. He sent the appellant away and arranged for an employee to give the complainant the rims. The complainant called

the police. The father asked if he was right to drive. The complainant said he was alright and drove away.[1] In cross-examination the father described the appellant's conduct as self-defence.[2]

[9] Mr Todd Small, who worked for the appellant, gave evidence that the complainant was aggravated and yelling loudly. He was holding a piece of paper and waving it at the appellant's father. He was worried for the safety of the appellant's father because of the way the complainant was carrying on. The appellant arrived in his car. There was more yelling from the complainant but he could not make out what was said. The complainant "raised his fists up a couple of times and then [took] a swing at [the appellant]. And [the appellant] retaliated and punched [the complainant] back." The complainant continued his aggression towards the appellant from the street. On the appellant's instructions, he put the trailer rims in the complainant's car.[3]

[10] Mr Brian Rushbrook, who also worked for the appellant, gave evidence that he saw the appellant's father with a man who was "acting pretty aggressive".[4] The appellant and complainant argued for a short time and then the complainant "threw a punch. [The appellant] ducked it quickly and threw a quick punch back."[5] He described the complainant's punch as "a bit of an overhand punch … designed to produce more force in the punch."[6]

[11] Terrence Willis, who also worked for the appellant, heard the complainant yelling aggressively at the appellant's father. He stopped paying attention once the appellant arrived as he thought the appellant could handle it.[7] The next thing he saw was the complainant getting up off the ground saying "come on" like he wanted to fight. The appellant's father stood between the complainant and appellant and said "that's enough".[8]

[12] Mr James McClelland, who also worked for the appellant, gave evidence that he did not see either protagonist throw a punch. He could only see the appellant's back but "at one stage [the appellant] kind of jumped back and ducked away". He thought the complainant "had had a swing at him. Then [the appellant] kind of went forward."[9] He thought the complainant took a swing at the appellant who was going to swing back.[10]

The directions to the jury

[13] Counsel for the appellant at trial (not counsel in the appeal) asked only that the jury be directed in terms of s 271(1) *Criminal Code* and accepted that, although it was not the defence case, the judge should address on the second limb under s 23(1) *Criminal Code*.[11] Neither counsel nor the judge discussed whether s 271(2) should be left to the jury.

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1 AB 164, T2-58.
2 AB 167, T2-61.
3 AB 190-192, T2-84 to T2-86.
4 AB 208 T-102.
5 AB 210 T2-104.
6 AB 219 T2-113.
7 AB 227 T2-121
8 AB 228 T2-122.
9 AB 239 T2-133.
10 AB 245 T2-139.
11 AB 251-252 T2-145 to T2-146.

[14] The judge's directions on self-defence were as follows:

> "If you are satisfied that it was not something that occurred by accident, you would then have to consider the second matter of justification or excuse that's relied upon here, and that is self-defence. Now, it's true that the prosecution must establish to your satisfaction that the [appellant] did not act in self-defence. He doesn't have to prove he did. They have to prove that he did not. The use of force is lawful unless it is shown to be unjustified, that is, unless self-defence is excluded. The criminal law of this state doesn't only punish; it protects people as well. It doesn't expect that citizens will be unnaturally passive, especially when their safety is threatened by someone else. It sometimes occurs that the attacker comes off second best, but it doesn't follow that the one who wins the struggle has committed a crime. The law doesn't punish someone for reasonably defending himself, as I'll shortly explain to you when I read a section of our Code to you.
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> You should appreciate that the law is drawn in general terms to cover any situation that might arise. Each jury has to apply it to the particular situation according to the facts of the case. No two cases are exactly alike, and results depend heavily on commonsense and community perceptions that juries bring to the court. Now, what the law says is this – when a person is unlawfully assaulted and he has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault *if the force is not intended and not such as is likely to cause death or grievous bodily harm*.
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> So in this case, the important things are whether the [appellant] was unlawfully assaulted, whether he provoked the assault, whether the force was reasonably necessary to make a defence against the assault, and *whether the force was such as was likely to cause grievous bodily harm*. You will have to consider those four things – first, was there an unlawful assault on the accused. Well, of course, he says there was, and his witnesses give some evidence to support that. The complainant says there was not. That's the first question you want to resolve to your satisfaction.
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> The second matter is whether or not the [appellant] provoked that assault. Well, if you could not exclude the fact that he was assaulted, that is, if you thought that he was, that a punch was thrown that didn't connect with him, or you couldn't exclude the possibility that that's how the exchange began, you would treat that assault upon him as being one that was not provoked because there's just nothing in the evidence that could have provoked, provided legal provocation for that. So if you're satisfied or you don't exclude that there was an assault, you should treat it as an unprovoked assault.
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> But that's not the end of the matter because there are two further things that you have to consider – first, was the force used by the [appellant] reasonably necessary to make an effective defence against

that assault. Next, *was the force intended to or was it such that it was likely to cause grievous bodily harm because if the Crown satisfies you of any one of those things, then the Crown satisfies you that the [appellant] was not acting in self-defence*. Remember that the burden remains upon the prosecution to prove that the [appellant] was not acting in self-defence, and the prosecution must do that beyond reasonable doubt before you can find the [appellant] guilty. So as I say, the first matter is whether the [appellant] was unlawfully assaulted by the [complainant]. If you conclude that [the complainant] did not assault him, that is, did not swing that punch at him, then the defence of self-defence could not be open. As I say to you, if you conclude that he did or if you can't exclude the possibility that [the complainant] swung the first punch, you would treat that as an unprovoked assault.

The next matter that arises is whether the force used by the [appellant] was reasonably necessary to make an effectual defence against that punch that was swung at him. When you're considering that question, you should bear in mind that an accused person defending himself cannot be expected to weight precisely the amount of defensive action that might be necessary. Instinctive reactions and quick judgments are often essential. You should not judge the actions of the [appellant] on that day as if he had the benefit that we have had of a leisurely and careful consideration of all of the evidence. This was an event that happened quickly. You should understand when you consider whether the degree of force used was reasonably necessary that that is a matter for you to decide in an objective way – you objectively consider the evidence and conclude whether or not that was force that was reasonably necessary.

It doesn't depend upon what the [appellant] might have thought. It's a question for you to assess whether it was force that was reasonably necessary to make an effectual defence, or, to put it in the context of this case, whether the Crown has satisfied you that it wasn't force that was necessary to make an effectual defence. *The last matter is whether the forced used was not intended and not such as was likely to cause grievous bodily harm*. Now, I've told you what grievous bodily harm means. It means an injury of such a nature that if left untreated would endanger or likely to endanger or life, or cause or be likely to cause permanent injury to health.

And you remember what I told you about what Dr Dance said about that, that *the question is whether the force was such as was likely to do that*. Not whether he did it, in fact, but whether it was likely to do it. The fact that the force did cause the grievous bodily harm is not the point, the question is whether that was likely in all of the circumstances. So then to summarise this defence: *if the prosecution can satisfy you beyond reasonable doubt that* the [appellant] was not assaulted by the complainant or that the force used was more than was reasonably necessary to make an effectual defence against any assault offered by the complainant or that *the force used was intended to or was likely to cause grievous bodily harm, then the prosecution has proved that the defence does not apply*.

> Remember, there is no burden on the [appellant] to satisfy you that he was acting in self-defence. The prosecution must satisfy you beyond reasonable doubt that he was not. …" *(my emphasis)*

[15] After explaining to the jury the competing contentions, his Honour stated:

> "Well, how will you start? I'd suggest to you that *there are, perhaps, three questions* to ask, the third with two parts. Are you satisfied that it was a blow delivered by the [appellant] that caused [the complainant's] injury? That might be one of the matters about which there's the least contention in this case, but, as I say, it's a matter for you whether you're satisfied that the injury was caused by the blow struck by the [appellant]. If you are, are you satisfied that that injury amounts to grievous bodily harm? And you'll recall the definition I told you about and the evidence of Dr Dance that I read to you.
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> *The third question is whether*, if you're satisfied of both of those things, whether *that injury was caused unlawfully*. And I suggest to you it might be wise if you were to think first about the matter of accident that I told you about, because accident doesn't really depend in this case on whether it was the first punch or it was a retaliatory punch. It mightn't be necessary for you to resolve that when you think about accident. If the Crown cannot satisfy you that the accused foresaw serious injury as a consequence of the blow he struck or that a reasonable person in his position would have done that, then he should be acquitted, so that would be the end of your consideration.
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> If you say that you are satisfied that either he foresaw it or that a reasonable person in his position would have foreseen serious injury of that sort, then you would have to consider the second matter of justification or excuse that's offered, and that is self-defence. And as I say to you, when you come to self-defence, you would have to consider whether or not there was an assault. To put it in the correct context here, have the Crown satisfied you that [the complainant] did not assault the [appellant]. If so, there cannot be self-defence. Have the Crown satisfied you that the force used was an unreasonable response, that is, it was not necessary – not reasonably necessary to make an effectual defence against the threat offered by [the complainant].
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> If they have, then self-defence can't apply. The third thing you would ask is *whether the Crown has satisfied you that the force used was such as was likely to cause grievous bodily harm. If they've satisfied you of that matter then self-defence can't apply*. So there are three ways that the Crown can exclude self-defence and it is only if the Crown has excluded self-defence by satisfying you of one of those things that you could return a verdict of guilty in this case. If you find that you need further direction about the rule you should send me a written message through the bailiff. Further, if you want to be reminded of the evidence, you let the bailiff know about that and make a note of what it is that you want to be reminded about and I will provide such assistance to you as I can in respect of that." *(my emphasis)*

Section 271, *Criminal Code*

[16] Section 271 *Criminal Code* relevantly provides:

> "**271 Self-defence against unprovoked assault**
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> (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
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> (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

The contentions in this appeal

[17] The appellant contends that the evidence that the complainant swung at the appellant prior to the appellant punching him was an assault of such a nature as to cause a reasonable apprehension of at least grievous bodily harm, raising s 271(2). Although the complainant's punch did not connect, it was reasonable for the appellant to believe that another punch could follow. In light of the considerable commitment and energy the complainant put into the first punch, there was a risk that the complainant could punch forcefully at the appellant's head again, with a risk of killing him or doing grievous bodily harm. The evidence raised the possibility that, in retaliating and pre-empting another punch, the appellant was acting in self-defence as discussed in s 271(2). On the evidence in this case, justice required that the jury be instructed as to s 271(2). The whole incident occurred over a few seconds. It was a question for the jury whether they were persuaded that the appellant did not believe on reasonable grounds that he could not otherwise preserve himself from grievous bodily harm unless he retaliated as he did. The failure to leave s 271(2) for the jury's consideration deprived the appellant of a chance of acquittal that was open on the facts. This failure constituted a miscarriage of justice as it was reasonably possible that the failure to direct the jury on s 271(2) may have affected the verdict: *Dhanhoa v The Queen*.[12]

[18] The respondent contends that the appellant's evidence did not directly raise a fear of death or grievous bodily harm and that an inference to that effect could not be drawn from the evidence. In those circumstances, s 271(2) was not raised. Counsel did not ask for the jury to be directed as to s 271(2) and did not seek any redirection on it. The judge directed the jury that the resultant injury suffered by the complainant was not determinative of the issue of the likelihood of the force causing such an injury. Submissions focussing on a reasonable apprehension on the appellant's behalf of grievous bodily harm from a further blow from the complainant

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12 (2003) 217 CLR 1, [38].

could only have detracted from the appellant's best prospects of a defence under s 271(1) where the jury would be invited to consider the likelihood of grievous bodily harm from the appellant's blow. For those reasons, s 271(2) was not raised, no direction on it was required and the failure to direct on it has not caused a miscarriage of justice.

Conclusion

[19] The question whether s 271(1) or s 271(2) or whether both s 271(1) and s 271(2) are raised in any trial will always turn on the facts of each particular case. Other cases on s 271 which turn on their own particular facts are of limited assistance in deciding whether the evidence in this case raised s 271(2).

[20] It is true that the appellant did not directly state in terms that he punched the complainant thinking that, if he did not, he was at risk of death or grievous bodily harm. But after the well-publicised "One Punch Can Kill" campaign, most members of the community know that even a moderately powerful punch to the head can kill or cause serious injury. The appellant's self-serving and probably disingenuous answer in cross-examination that he did not think his punch to the complainant could actually cause a significant injury[13] did not detract from this. Indeed, it was very likely that, in light of the notoriety that one punch to the head can kill, the jury would be satisfied beyond reasonable doubt that the appellant's punch to the complainant's head was likely to cause grievous bodily harm, thereby rejecting the defence under s 271(1).

[21] The appellant stated more than once that he reacted instantaneously to the complainant's punch which missed him. This version was supported by all eyewitnesses other than the complainant. According to the appellant, the complainant had earlier threatened to "smash [his] fucking head in". Once the complainant was on the ground after that single punch, the appellant did not involve himself in any further violence. By contrast, the appellant's father, Mr Small and Mr Willis gave evidence that the complainant remained aggressive and wanted to continue the fight, after the appellant knocked him to the ground.

[22] The evidence was capable of raising the following real possibilities under s 271(2). The complainant's initial powerful swing towards the appellant's head may have been such as to cause the appellant to have a reasonable apprehension of grievous bodily harm as it was reasonable for him to think that the complainant may have tried to forcefully punch him to the head again. The appellant may have believed on reasonable grounds that an immediate response by way of a retaliatory punch to the complainant's head was the only way to prevent another imminent and forceful punch from the complainant to the appellant's head capable of causing the appellant grievous bodily harm. The defence under s 271(2) was raised on the evidence.

[23] Although defence counsel at trial did not ask for a jury direction in terms of s 271(2) either before or after the judge's summing-up to the jury, it was the judge's obligation to leave to the jury all defences raised on the evidence. There is a real possibility in this case that the jury rejected the defence under s 271(1) on the basis that they were satisfied beyond reasonable doubt that the appellant's punch to the complainant's head was force likely to cause the complainant grievous bodily harm.[14] Had s 271(2) been left to the jury, there was a real possibility of an acquittal so

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13 Discussed at [7] in these reasons.

14 See the italicised portions of the judge's direction to the jury set out in [14] and [15] of these reasons.

that the failure to do so constitutes a miscarriage of justice: *Dhanhoa v The Queen*.[15] These matters should be determined by a jury properly instructed as to the applicable law.

[24] For these reasons, I joined in the order of this Court on 7 March 2014 allowing the appeal, quashing the conviction and ordering a retrial.

[25] **MUIR JA:** I agree with the reasons of McMurdo P.

[26] **DOUGLAS J:** I agree with the President's reasons.

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15 (2003) 217 CLR 1, [38].