

SUPREME COURT OF QUEENSLAND

CITATION: *R v Moloney* [2015] QCA 12

PARTIES: **R**
v
MOLONEY, Zachary Michael
(appellant)

FILE NO/S: CA No 220 of 2013
SC No 50 of 2013

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 February 2015

DELIVERED AT: Brisbane

HEARING DATE: 13 February 2015

JUDGES: Gotterson and Morrison JJA and Jackson J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal against conviction dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty after trial of murder – where the appellant anticipated confrontation – where the confrontation took place over a few minutes – where the jury considered the issue of ‘intention’ – whether it was unreasonable for the jury to render a guilty verdict on the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was acquitted of murder of the first individual – where the appellant was not acquitted of murder of the second individual – where the events between the allegations of murder of the first individual and the second individual took place over a few minutes – whether there is a factual inconsistency between the separate verdicts

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the trial judge

redirected the jury on the defence of self-defence – where the redirection included definition of murder – whether the trial judge erred in redirecting the jury

COUNSEL: S M Ryan QC for the appellant
A W Moynihan QC for the respondent

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

- [1] **GOTTERSON JA:** I agree with the order proposed by Jackson J and with the reasons given by his Honour.
- [2] **MORRISON JA:** I have read the reasons of Jackson J and agree with those reasons and the order proposed by his Honour.
- [3] **JACKSON J:** On 19 August 2013, after a 13 day trial including three days of jury deliberation, the appellant was convicted of the murder of Brandon John Matthews. He applies for leave to appeal and appeals against the conviction.
- [4] The appellant had been charged jointly with Luke Michael Jackson with three offences, all occurring on 7 January 2012 during an extremely brief episode, between 11.25 pm and 11.29 pm.
- [5] The appellant and Mr Jackson had walked from their residence a few streets away onto the footpath across the road from 8 Hill Street, North Ipswich. Their purpose was to meet Maree Gascoigne, who knew them both. Mr Jackson wished to borrow money from Ms Gascoigne and had arranged with her to do so. She was at 8 Hill Street, which was the residence of David Barker and his partner. Brad Girling and Brandon Matthews were also at 8 Hill Street at the relevant time with their partners.
- [6] In the hour or so before the appellant and Mr Jackson went to meet Ms Gascoigne, Mr Jackson had communicated with her by telephone and text message. In the telephone conversation, Mr Girling or Mr Matthews had spoken to Mr Jackson using Ms Gascoigne's phone. There was some evidence at the trial that one or the other of them made a threat or threats against the appellant and Mr Jackson if they came to the house to borrow money from Ms Gascoigne.
- [7] At 11.19 pm the appellant sent a text to Ms Gascoigne stating that: "... *if Brad wants to start shit, that's fine. I ain't fucking scared of him ...*"
- [8] Ms Gascoigne agreed to lend money to Mr Jackson, notwithstanding the opposition of those at the party. At 11.25 pm the appellant sent a text to her saying: "*Now walking up the street, come out the front now.*"
- [9] She left the house under a pretence but in fact intended to meet the appellant and Mr Jackson. She crossed the street and gave them some money.
- [10] At that point Mr Girling, Mr Matthews and Mr Barker came out of the house. The appellant and Mr Jackson began to walk away back down the street from where they had come. Mr Girling, Mr Matthews and Mr Barker pursued them down the street. They confronted the appellant and Mr Jackson. A fight or fights ensued. The first attacker was Mr Girling. He attacked the appellant. Mr Matthews, Mr Barker and Mr Jackson joined in.

- [11] In only a couple of minutes, Mr Girling and Mr Matthews had been fatally stabbed and Mr Barker had been wounded. The appellant and Mr Jackson decamped.
- [12] At 11.29 pm a triple “O” call was made for ambulance and police assistance for Mr Girling and Mr Matthews.
- [13] The appellant was arrested and interviewed commencing at 12.51 am on 8 January 2012. He admitted that he had taken a knife with him to Hill Street. He admitted that he had stabbed both Mr Girling and Mr Matthews. Mr Girling was stabbed fatally in the abdomen. Mr Matthews was stabbed fatally in the side of the chest, below his armpit. Mr Barker had sustained two wounds to the upper buttocks. However, the appellant did not admit to causing those wounds.
- [14] The appellant and Mr Jackson were jointly charged with the murder of Mr Girling, the murder of Mr Matthews and wounding Mr Barker with intent to do him grievous bodily harm. The jury acquitted Mr Jackson of every offence and acquitted the appellant of the murder or manslaughter of Mr Girling and of unlawfully wounding Mr Barker. They found him guilty of the murder of Mr Matthews.
- [15] The appellant relies on three grounds of appeal. First, that the guilty verdict should be set aside as unreasonable or because it cannot be supported having regard to the evidence. Second, that the guilty verdict is inconsistent with the not guilty verdict of the jury of the murder of Mr Girling. Third, that the learned trial judge’s redirection in response to a request from the jury for direction as to the definition of what constitutes murder failed to ensure that the jury considered all issues, resulting in a miscarriage of justice.

Unreasonable verdict

- [16] The appellant’s challenge on the first and second grounds was limited. He did not challenge the finding necessarily made by the jury that the prosecution had excluded the defence of self-defence in the killing of Mr Matthews. Instead, the challenge was limited to the finding necessarily made that the appellant had the intention to kill or cause grievous bodily harm to Mr Matthews when stabbing him.
- [17] During the police interview, the appellant gave an account of the events which had occurred only a couple of hours before hand. The video-recording of the interview was played to the jury. The appellant submits that nothing in the interview suggests an intention to kill or do grievous bodily harm to Mr Matthews. He submits that the brevity of the episode, the nature of the struggle and the complication of alcohol which the appellant had been drinking before the fight suggest that the appellant acted without an intention to cause a particular result to Mr Matthews. He submits that immediately he appreciated the severity of the wound he inflicted he called to others to get help for Mr Matthews.
- [18] While those matters accurately reflect some of the facts they are not a complete description of the evidence of the circumstances. It is beyond question that the appellant anticipated a confrontation and armed himself with a boning knife before he went with Mr Jackson to meet Ms Gascoigne.
- [19] Shortly after the fight, and before the police interview, the appellant told a friend, Ms Stringer, on the telephone that: *“They started punching into me and Luke, and I started hurting people.”*

[20] As to the stabbing of Mr Girling, the statements made by the appellant to the police during the interview included (as transcribed):

- (a) *“... I pretty much went to ground and ... they started kicking me and punching me... I think, I’ve, I’ve rolled over or something um and I don’t know if I’ve tackled Brad or whatever, but he was next to me and it was like, you know, a bit of a wrestle, at which point I pulled out the knife and cut him on the inner thigh...”*
- (b) (responding to a question about where that cut was made) *“Um approximately around [the inside of the right thigh], I don’t really know.”*
- (c) (responding to a question as to where he was at the time of cutting Mr Girling) *“I was on the ground getting my head kicked in.”*

[21] In particular, the statements made by the appellant to the police during the interview about the stabbing of Mr Matthews included (as transcribed):

- (a) *“I’ve managed to gain my feet, um still trying to walk away, walked away, I was in the middle of the road about five metres down the road from where Brad was lying on the ground, and then Brandon’s come up to me ... he asked me, he said what are you doing here. I said I’m talking to Maree as, you know, it’s got nothing to do with anybody, it’s no, nobody’s business, and he punched me and I asked him I said whose friend are ya. And he punched me again. Um and I still had the knife in my hand and he’s thrown another swing and I don’t know if he connected with that one or not, but I pretty much ducked down and, and stabbed him in the side and then started yelling at the girls to take him to hospital.”*
- (b) (describing where he stabbed) *“Um just, into the side under... not in the armpit but just in the side there.”*
- (c) *“...I think I stabbed him more than once.”*
- (d) (as to why he said to call the hospital) *“Because I knew that it was serious... I knew straight away, as soon as I done it, that, you know, it was serious and it, it could lead to a lot of trouble. I, I, I’ve grown up, you know, on a farm and I worked at the meatworks and everything, you know, I know that it was a serious wound and that’s why I, you know, I didn’t want anybody to die and still hoping that nobody has, um, yeah.”*

[22] Mr Matthews was stabbed and wounded a number of times. The first wound was a 10.2 cm long wound across the chest. It went to a depth of 9 cm at its deepest point and entered Mr Matthew’s lung. The second wound was an incised wound perpendicular to the first wound. It tracked in a downward direction into the chest cavity near the heart to a depth of 7.5 cm. It may have incised the heart but that may have been caused therapeutically. It would have required moderate force. The third wound was a gaping wound beneath the left armpit measuring 2.1 cm by

1.8 cm. It tracked inward and forward to the right, completely incised the seventh rib, perforated through the lung and entered the heart. It was 16 cm in length. It required severe force to cut through the rib bone. The wound that entered heart was the cause of death. There was a fourth superficial 2.3 cm long wound on the front of the chest. There was a fifth incised 7.5 cm long wound on the outer aspect of the left elbow. There was a sixth 10 cm incised wound below the wound on the elbow.

- [23] Not surprisingly, given the circumstances, the primary issue at the trial was whether the appellant was not criminally responsible for killing either Mr Girling or Mr Matthews because the prosecution did not exclude beyond reasonable doubt that his actions were done in self-defence. Given that the appellant admitted to the stabbings, his acquittal of the murder or manslaughter of Mr Girling necessarily means that the jury were not satisfied that he did not act in self-defence in relation to that stabbing. On the other hand, the jury's conviction of the murder of Mr Matthews involves the jury's rejection of the defence of self-defence for that stabbing.
- [24] In my view, it was open to the jury to be satisfied beyond reasonable doubt that the appellant had the intention to cause grievous bodily harm to Mr Matthews when he stabbed him. The nature of the weapon and the number and location of the stab wounds support the inference of an intention to cause grievous bodily harm. The appellant's own statement to call an ambulance, made immediately after he had stabbed Mr Matthews, shows quite clearly that he knew immediately what he had done. His admission, within only a couple of hours, as to his pre-existing appreciation of the seriousness of such a wound also supports it, as did his statement to Ms Stringer that after they started punching into him, he started hurting people. There is no reason on the facts, in my view, why it was not open to the jury to conclude that the appellant's intended to cause grievous bodily harm at the time of inflicting the fatal wound to Mr Matthews.
- [25] It is not necessary, in the circumstances of this case, to add further references to the evidence of other eye witnesses to the events.

Inconsistency of verdict

- [26] The appellant submits that the jury's verdict of not guilty of the murder of Mr Girling is factually inconsistent with the jury's verdict of guilty of the murder of Mr Matthews. The appellant submits that the starting point is that the jury were not satisfied that self-defence was excluded in the case of Mr Girling's killing. Therefore, because the whole of the events of the brawl took only a couple of minutes, the appellant submits that a finding of a change in the appellant's purpose from defence to an intention to kill or to cause grievous bodily harm is unreasonable.
- [27] In my view, there is a false step in that reasoning. Where the necessary elements of self-defence are not excluded beyond reasonable doubt, by the prosecution, a defendant is entitled to acquittal notwithstanding that he or she had an intention to kill or cause grievous bodily harm while acting in self-defence. Therefore, the jury's verdict of not guilty of the murder of Mr Girling did not necessarily involve a finding that the appellant did not intend to kill or cause grievous bodily harm to Mr Girling. It only necessarily involves a finding that the prosecution did not exclude that the appellant satisfied the required elements for self-defence.

- [28] It is not possible to conclude, therefore, that the jury reasoned that the prosecution did not exclude the possibility that the appellant did not intend to kill or cause grievous bodily harm to Mr Girling. Further, to the extent that the jury may have reasoned that way, it does not follow on the evidence that the jury could not then be satisfied beyond reasonable doubt that the appellant intended to kill or cause grievous bodily harm to Mr Matthews. Although all the events occurred over a couple of minutes, the circumstances were not the same, as appears from the appellant's own statements to police at the interview.
- [29] In my view, therefore, the suggested factual inconsistency between the jury's acquittal of the appellant of the murder of Mr Girling and the verdict of guilty of the murder of Mr Matthews does not exist.

Error in redirections

- [30] The appellant submits that, in the course of a redirection in response to questions from the jury, her Honour should have reminded the jury in clear terms that even if they found that the prosecution had satisfied them that the defence of self-defence was excluded beyond reasonable doubt, the unlawful killing of Mr Matthews only amounted to murder if they were satisfied, beyond reasonable doubt, that the appellant acted with an intention to kill or cause grievous bodily harm.
- [31] In response to a request in writing from the jury her Honour gave a further direction or redirection about the defence of self-defence. The jury's request included a second question for guidance on a clear definition of what constitutes murder. Expressly in response to that second question, her Honour identified the elements of the offence of murder, starting with the definition of an unlawful killing, followed by the classification of unlawful killing into murder or manslaughter, followed by the direction that: "*It amounts to murder if the perpetrator intends to cause the victim grievous bodily harm or to kill the victim... In the absence of an intent to do grievous bodily harm or to kill, unlawful killing is manslaughter...*"
- [32] Her Honour then requested whether that answered the jury's question or whether there was some other aspect that the jury wanted clarified. A juror responded: "*...If a person's found not guilty of murder due to self defence, then it follows that they can't be found guilty of manslaughter...*"
- [33] Her Honour said: "*If you were acting in self defence, you're not guilty of murder and you're not guilty of manslaughter.*"
- [34] The redirection as to the definition of murder was brief but it was given in the context of the earlier summing up in which her Honour accurately and comprehensively directed the jury on the law concerning murder, manslaughter and self-defence and related them to facts.
- [35] At the time, the appellant did not object or seek any clarification in relation to the redirection. Although his counsel was not then present, he was represented by a capable and experienced solicitor.
- [36] In my view, there is no substance in the appellant's third ground of appeal as to the Judge's redirection.

Conclusion

- [37] For those reasons, in my view, the appeal should be dismissed.