SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thurlow* [2015] QCA 89
PARTIES:	**R** **v** **THURLOW, Monica Lynn** (appellant)
FILE NO/S:	CA No 289 of 2014 DC No 397 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Unreported, 14 October 2014
DELIVERED ON:	22 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2015
JUDGES:	Holmes and Morrison JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal against conviction.** **2. Set aside the conviction and order a re-trial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of one count of wounding – where the trial judge admitted evidence that the appellant had declined to participate in a police interview – where the discussion about the admissibility of the evidence took place in the presence of the jury – where the trial judge directed the jury not to draw any adverse inference from the appellant's exercise of her right to silence – whether the evidence was wrongly admitted – whether the direction was sufficient to remedy any error CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted of one count of wounding – where the offence occurred during an altercation between the appellant and the complainant in the beer garden of a hotel – where a prosecution witness gave evidence about the manner in which the appellant left the venue – where the prosecution did not suggest that the evidence indicated consciousness of

guilt – where the trial judge gave the jury a direction on flight – whether the evidence was sufficient to establish an attempt at flight – whether the trial judge erred in giving the direction

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted of one count of wounding – where the offence occurred during an altercation between the appellant and the complainant in the beer garden of a hotel – where the complainant alleged that the appellant struck her with a glass tumbler – where aspects of the evidence of the complainant and other witnesses were inconsistent with the CCTV footage of the incident – where the CCTV footage did not depict the glass coming into contact with the complainant's head – where the defence counsel asked the trial judge to leave the defence of accident to the jury – where the trial judge declined to give the direction – where the jury subsequently asked the trial judge whether an unintentional striking would constitute unlawful wounding – whether the trial judge erred in declining to direct the jury on accident pursuant to s 23(1)(a) of the *Criminal Code*

Criminal Code 1899 (Qld), s 23(1)(a)

Duffy v The Queen [1981] WAR 72; (1980) 3 A Crim R 1, cited
James v The Queen (2014) 88 ALJR 427; [2014] HCA 6, cited
Petty v The Queen (1991) 173 CLR 95; [1991] HCA 34, applied
R v Ireland (1970) 126 CLR 321; [1970] HCA 21, applied

COUNSEL: R A East for the appellant
D C Boyle for the respondent

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

[1] **HOLMES JA:** The appellant appeals her conviction of unlawful wounding. The first ground of appeal was that the trial judge had wrongly failed to direct the jury on accident under s 23(1)(a) of the *Criminal Code*. Three remaining grounds, that his Honour had admitted evidence that the appellant declined to be interviewed by police, that he had allowed argument concerning the admission of that evidence to take place in the presence of the jury and that he gave a direction concerning flight as evidence of consciousness of guilt when that was not part of the Crown case, were said to have involved errors which collectively produced a miscarriage of justice.

[2] The complainant, Lana Watson, was injured in the course of an altercation with the appellant at a Townsville hotel in which, it was alleged, the latter struck her with a glass. The appellant admitted at trial that Ms Watson had sustained a five cm laceration over her left temple which was superficial, but broke the skin, and required seven stitches to close the cut. The injury was of a kind which could be caused by a glass

tumbler, and constituted a wounding. Photographs of Ms Watson which were tendered in evidence show a cut running more or less vertically a couple of centimetres from her left eyebrow.

The lead-up to the wounding

[3] On the evening in question, the appellant was drinking at the hotel, as were Ms Watson, Ms Watson's boyfriend, Mr Dancy, and a friend, Mr Burgess. The appellant and Mr Dancy had in the past been employed in the same workplace. Over the course of the evening, there was some argument between them about whether Mr Dancy had been responsible for the appellant's losing her job. In the dispute, the appellant used some abusive terms to Mr Dancy and there was an exchange between her and Ms Watson, again with some level of abuse, in which, effectively, the appellant told Ms Watson to mind her own business, and Ms Watson told the appellant to go away. She did so, but later rejoined Mr Dancy and his companions in the hotel beer garden. The group suggested she could go elsewhere. There was an unfriendly exchange of words between Ms Watson and the appellant.

The footage of the incident in which the wounding occurred

[4] A CCTV camera recorded some of what followed. The footage lasts for a minute and a half. At no stage can the contact of the glass with Ms Watson's head be seen. On the footage, four people can be seen seated at a beer garden table. Mr Dancy and another man, a Mr Whittle (who did not give evidence), are sitting at one end, opposite each other and against a wall. At the other end are the appellant and Ms Watson, facing each other. Mr Burgess is standing behind Ms Watson at the centre of the table. The appellant rolls a cigarette before picking up a bag, putting it over her shoulder with her right hand and standing. With her left hand, she picks up her drink and throws its contents over Ms Watson. At this stage, Mr Burgess has turned away from the table and has his back to what is occurring. Ms Watson immediately springs up and throws herself against the appellant with both arms swinging. By this point, Mr Burgess has turned to look at them and Mr Dancy has stood up.

[5] What happens next is obscured in part by a pole as the two women move a metre or two away from the table, but it is evident that they are in a scuffle, and Ms Watson's arms continue to flail. Mr Dancy takes hold of the appellant and pulls her to the ground while Ms Watson continues to push in her direction with her fists raised. Mr Burgess takes hold of Ms Watson's arm. After they are separated, the appellant gets back to her feet and then stands for a brief period straightening her hair. She then walks some paces and seems to be about to leave but pauses, returns and looks for something on the floor. Someone appears to hand her her glasses, which she puts on. She then walks away again, with Mr Dancy in pursuit. He is held back by a large man, possibly a hotel employee, who makes a pointing gesture to the appellant.

The Crown witnesses' versions of the incident and its aftermath

[6] Ms Watson, Mr Dancy and Mr Burgess all gave evidence of what occurred in the beer garden. On Ms Watson's account, the appellant refused to leave and then fell silent. She saw that the appellant was packing up a tobacco pouch which she was slamming on the table, and then slamming into her bag, apparently frustrated. Ms Watson continued:

> "… And then she's stood up and tipped her drink down my shirt and I'd stood up in reaction to that and as I stood up she – one clear, swift motion from what I can recall – was just a – she, yeah, hit me across the head with a glass tumbler."

Ms Watson said that she saw the glass in the appellant's right hand and heard a smash; her next recall was of looking down and seeing that she was standing in glass. After that her memory was of holding the appellant by her left arm and then being pulled away from her by Mr Burgess; her head was bleeding. It was put to Ms Watson that when the appellant threw the drink on her she "snapped". She responded:

> "No. I don't know what I did. All I know is that I got a drink chucked on me and then I felt impact on my head and a glass – hearing a glass shatter, and then the rest I can't even – I can't even tell you what happened, apart from – that's the first time I know what's happened, from seeing the CCTV, because I had no recollection."

She accepted that she had not in her police statement said that she was struck on the side of the head with a glass tumbler. What she had said was established in re-examination:

> "I sprang up from my seat. I then remember hearing a glass break. I then remember looking down on the ground as I was standing on shattered glass. I had a hold of her with my left arm."

[7] Ms Watson said in cross-examination that immediately before the appellant threw the drink at her, she had informed the latter that she had been getting "really pissed off" with her, but now she felt sorry for her because she was being so ridiculous. Questioned by reference to the CCTV footage, she rejected some propositions, which seem to have been accurate, as to what it showed: that the appellant had not slammed anything on the table and that she, Ms Watson, had reacted by throwing punches immediately the contents of the glass were thrown at her. Ms Watson insisted that when she stood up, the appellant broke a glass on the side of her head, and it was only then that she started throwing punches. She agreed, however, that her description of the appellant standing and with one action hitting her with the glass was wrong. The appellant had, in fact, the glass in her left, not her right hand, and it was after she had herself stood up that she had been struck and defended herself. She denied that at the time she was pulled away from the appellant she was still throwing punches, but accepted that she was moving forward to get at the appellant; that was, she said, because she was concussed.

[8] Mr Dancy also recalled that Ms Watson had told the appellant that she felt sorry for her. At that point the appellant had stood up and thrown her drink over Ms Watson, who stood up, and the two came together. The appellant had hit Ms Watson over the head with a glass as they were scuffling; he believed, but was not completely certain, that it was with her right hand. In cross-examination, Mr Dancy agreed that when the appellant was sitting at the table, she was quiet. When he had demanded to know why she was sitting there, she had responded that she could sit where she liked. There was a further conversation, he agreed, in which he had told her that it was her own fault she had lost her job because she had failed in her legal responsibilities to children in her care. Ms Watson had contributed something along

the lines, "I was getting quite frustrated with you at first; now, I just feel sorry for you", and had laughed at the appellant. At that point, the appellant stood and threw her drink at Ms Watson, who had stood up.

[9] According to Mr Dancy, both women came together throwing punches. They had hold of each other, with Ms Watson moving forward and the appellant moving backwards. Ms Watson may have been attempting to throw punches at the appellant with her free hand; he rejected the proposition that she was punching at the appellant with both fists. Ms Watson was struck by the glass when the two women were either at the table they had been sitting at, or close by it. On his recall, Mr Burgess reached Ms Watson first and pulled her back while she was still endeavouring to "go at" the appellant. He then pulled the appellant away. She "walked around and fairly quickly to try and disappear"; he followed and saw that she was at the front door. Over objection, Mr Dancy was permitted to say that he had called to a security guard to detain her "because she was trying to get away after just glassing [Ms Watson]".

[10] Mr Burgess said that after it had been made plain to the appellant that she was not welcome at the table, she had continued to sit there rolling a smoke and drinking. He remembered that the appellant had called Ms Watson a "plastic Barbie bitch" and Ms Watson had told her to "fuck off". At that point the appellant had thrown the contents of her glass, held in her right hand, over Ms Watson; some of it splashed on him as he sat to Ms Watson's right. Both women stood up and advanced towards each other. The appellant swung out with her right hand, which still held the glass, and hit Ms Watson. The two then engaged in hair pulling and "slapping actions". On noticing that Ms Watson had a cut to her face, "we [he and Mr Dancy] broke it up". He denied that Ms Watson, once the drink was thrown at her, had jumped up and started throwing punches at the appellant. He said, instead, that she had stood up and wiped her blouse where the drink had struck her.

[11] On viewing the CCTV footage, however, Mr Burgess agreed that he had his back turned when the drink was thrown, and had not seen it. Ms Watson had not wiped herself down, but instead (on his perception of the footage), she seemed to go straight into the attack, throwing punches at the appellant. The two women had moved away to the back wall where Mr Dancy had grabbed the appellant before he, Mr Burgess, had taken hold of Ms Watson.

[12] A security guard at the hotel gave evidence that he was told that there had been a fight and the appellant was pointed out to him. Asked by the prosecutor what she was doing, he answered that she was "trying to leave the venue". She was walking towards the doors of the hotel leading to the car park, with what he described as "a bit of pace in her step". He stopped her just outside the doors and asked her to remain; she did so. After having spoken to Mr Dancy, he asked for her version of what had happened. The appellant said that she had had an argument with the other woman and that "she had smacked her in the head with the glass".

Admission of evidence as to the appellant's refusal to be interviewed

[13] A police officer who was called to the hotel gave evidence that he spoke to the appellant there and arranged some months later for her to attend the police station. He commenced to say that he had offered the appellant the opportunity to participate in a record of interview. At that point, defence counsel objected, saying that because no such interview had taken place, the evidence was irrelevant. The following exchange then took place between the trial judge and defence counsel:

> "HIS HONOUR: No. It's not irrelevant, is it, because it's relevant to know whether the matter was investigated or not, whether any attempt was made to interview her.
>
> MR BASSETT: Well - - -
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> HIS HONOUR: Now, I have to give the jury directions about the significance of her declining to participate, but it can't be said that it's inadmissible evidence, can it?
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> MR BASSETT: Well, the High Court has said so.
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> HIS HONOUR: They – really? When did they say that? I think that this is a misapprehension completely.
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> MR BASSETT: Well - - -
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> HIS HONOUR: Police officers give evidence all the time of conducting investigations, and sometimes they come to nothing, but it doesn't mean that they're left out. You say the jury should go out there not knowing whether any interview was offered or not.
>
> MR BASSETT: Sorry, your Honour?
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> HIS HONOUR: You say the jury should be considering their verdict not knowing whether the matter was ever investigated or not?"

[14] At this point, defence counsel read out a passage from *R v Ireland*[1] to the effect that the fact that an accused who had been warned was asked questions and made no answer was not probative and not admissible. His Honour responded:

> "HIS HONOUR: Well, I don't know where you get that note from, but it seems to me it's wrong. Why do we have paragraph 29 in the book of directions that have to be given to juries about these matters?
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> MR BASSETT: In my submission, that's in those cases where this sort of evidence is improperly admitted. Then it has to be dealt with.
>
> HIS HONOUR: Why wouldn't the book tell me, then, that it's improper to admit it - - -
>
> MR BASSETT: Well - - -
>
> HIS HONOUR: - - - rather than that I should explain to the jury that a person doesn't have to answer questions if they don't want to?
>
> MR BASSETT: I - - -
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> HIS HONOUR: That's what the police tell them when they go to the police station.
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> MR BASSETT: I cannot answer that for your Honour, but what I can submit to your Honour is that the High Court has pronounced on it.
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> HIS HONOUR: Well, let's hope that this is not the vehicle that – I'm against you about that. I think the police officer can tell us what he did by way of an attempt to investigate, and that I will give the necessary

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1 [1970] HCA 21; (1970) 126 CLR 321 pp 331-332 [21].

> direction, should it then – about the significance of the failure. But otherwise juries are left, and it's done commonly in this city, and it seems to me it's quite wrong. I don't know how the practice has grown up. But I'll give you the chance. You'll be able to go back to the Court of Appeal or the High Court and demonstrate that I'm wrong again."

[15] All of that discussion took place before the jury. The prosecutor then elicited from the police officer that the appellant had been asked to attend the police station and offered the opportunity to participate in a formal record of interview which she declined, and that she was then arrested, charged, and released on bail. When the prosecutor had finished questioning him, the trial judge intervened:

> "HIS HONOUR: Yes. I take it in relation to what you said about the accused coming to the police station you told her that she didn't have to answer questions if she didn't want to?---That's correct, your Honour.
>
> Yes. Well, members of the jury, that's the fact. That's what he did. She didn't answer any questions. I'll tell you later it's got nothing to do with it. It's not an admission by her. But you are, in my view, entitled to know that he did ask her if she wanted to answer questions, and she said she didn't. …"

[16] In his summing up, the trial judge directed the jury as follows:

> "Now, you heard a discussion between Mr Bassett and myself yesterday about the accused having been offered the opportunity to participate in a record of interview and she declined. Well, that's her right. So we don't draw any inference about that. She was silent when she was asked by the police. Her silence is not evidence against her. The warning the police give – and you remember I asked the constable whether he told her she didn't have to say anything if she didn't want to, and he did tell her that and she elected not to say anything. So it doesn't take the case anywhere. It's relevant material because you're entitled to know that the police did ask her. You might think it would be a bit odd if they didn't, but it doesn't take the case anywhere that she exercised what we call "the right to silence". It's quite wrong to reason that because she was silent or didn't answer questions that she has something to hide or must be guilty of the offence, so you can't make any use of that as a piece of evidence that tends to point to guilt."

[17] Counsel for the appellant here submitted that not only was the evidence irrelevant, but it was additionally problematic that the jury were told that they were entitled to the information. The trial judge's reference to the "significance of the failure" (to answer questions) was a prejudicial way of describing the appellant's exercise of her legal rights. The fact that the argument was conducted in the presence of the jury may have given the impression that defence counsel was anxious to keep the evidence from the jury. Counsel for the respondent conceded that the fact that the appellant had declined to be interviewed was irrelevant, and that it was desirable that argument occurred in the absence of the jury. However, the judge's direction had remedied any error.

[18] There is much to be concerned about in the trial judge's approach to the matter. The respondent's concessions were properly made. The evidence that the appellant, having been warned, declined to answer questions was, in the circumstances of this case, irrelevant, and should not have been led: *R v Ireland; Petty v The Queen*.[2] The jury had no entitlement to know anything which was not relevant and probative. Nonetheless, the direction given was, in my view, apt to ensure that the jury did not draw an inference adverse to the appellant from the fact that she declined to be interviewed. While it was unfortunate that the admissibility of the evidence should have been canvassed in front of the jury, the argument added nothing to what they heard in any event by way of the evidence itself and the direction. Since I do not consider any harm was done, there is no reason to consider these matters in conjunction with the direction on flight to determine whether by some cumulative effect there was a miscarriage of justice.

The direction on flight

[19] In her closing address, the prosecutor invited the jury to look at the behaviour of the appellant after the offence, saying that her actions were relevant and important. She placed no reliance (properly) on Mr Dancy's expression of opinion that the appellant was trying to get away, but she referred to the evidence of the security guard about the appellant trying to leave the venue and walking towards the main doors "with a bit of pace in her step". However, she said nothing further in relation to that piece of evidence. Instead, she went on to remind the jury of the security guard's evidence about the appellant's statement that she had "smacked" Ms Watson in the head with her glass. She did not at any stage suggest the appellant's move to leave the premises could be regarded as indicating a consciousness of guilt. Defence counsel did not comment on the security guard's evidence of the appellant's move to depart, instead focussing on whether he had an accurate recollection of what she had said.

[20] The trial judge did not raise with counsel whether the evidence had any particular significance, but said this in his directions:

> "I should say something to you about post offence conduct. The prosecution asks you to have regard to the fact that the accused was in the process of departing the scene, after the events in question, when she was contacted by Mr Guse and told to remain there. The prosecution suggests that that gives you an indication of her guilt. Before you could use that as an indication of guilt you would have to find that she departed because she knew that she was guilty of the offence charged and not for any other reason."

He went on to give the conventional direction that the jury should consider other explanations for the conduct before deciding whether it was motivated by consciousness of guilt of the offence charged.

[21] Counsel for the appellant submitted that the evidence was not sufficient to justify any direction on flight. He referred to *R v Adam*[3] by way of illustration; that case turns on its facts and contains no general statement of principle. The appellant was, he contended, prejudiced by the trial judge's raising for the jury's consideration a non-

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2 (1991) 173 CLR 95 at 99.
3 (1999) 106 A Crim R 510.

existent issue which was not part of the Crown case. Counsel for the respondent pointed out that there was some danger that the jury, having heard Mr Dancy's and the security guard's expressions of opinion that the appellant was trying to leave the hotel combined with the description of her walking with "a bit of pace in her step", would use the evidence to infer guilt. A direction as to the possibility of an innocent explanation for the behaviour was necessary in order to avoid any misuse by the jury of the evidence.

[22] In my view, counsel for the appellant is correct in his contention that the evidence did not rise to the level of establishing an attempt at flight. The expressions of opinion of Mr Dancy and the security guard were, obviously, irrelevant. The CCTV footage showed no particular haste on the appellant's part in leaving the beer garden; the fact that she walked quickly towards the hotel's doors may have had something to do with Mr Dancy following her. Critically, there is nothing to show what her intentions actually were when she walked through the doors of the hotel. There was not even any evidence as to whether she had a car parked in the car park. She might have been going outside to have a cigarette or to telephone her mother, who was also at the venue, with the intention of meeting her there, rather than inside, where the atmosphere was no doubt somewhat fraught. In the absence of evidence to show that she actually was in the process of leaving the hotel grounds there and then, there was no basis to suggest a flight, let alone a guilty one.

[23] The prosecutor's address in inviting the jury to look at the behaviour of the accused after the offence, suggesting that her actions were relevant, and referring to the security guard's evidence that she had tried to leave the venue was equivocal; if she intended to suggest flight, she said nothing further to indicate that the Crown relied on it as indicating a consciousness of guilt. It might have been prudent for the trial judge to ascertain from the prosecutor whether she was in fact attempting to suggest that there was evidence of flight from which an inference of guilt could be drawn and, if not, to inform the jury of the fact.

[24] I concur with counsel for the respondent that there was some danger that the jury would misapprehend the effect of the evidence, and that a direction was, therefore, required. However, the appropriate direction would have been one which told the jury that there was no evidence that the appellant was trying to flee. In my view, it was an error on the part of the learned trial judge to suggest to the jury that there was evidence of an attempt at flight from which they could infer guilt. Because of my conclusion in relation to the remaining ground, it is unnecessary for me to consider whether it resulted in a substantial miscarriage of justice.

Refusal to leave accident

[25] Defence counsel asked the trial judge to leave the defences of accident and self-defence to the jury. He said that it was clear from the CCTV footage that the glass had not come into contact with Ms Watson's head while she was in the vicinity of the table. Any contact had occurred after Ms Watson had launched a fierce attack on the appellant, so that there was some overlap between accident and self-defence. Counsel did not identify the limb of s 23 in respect of which he sought a direction, but it seems clear that it was s 23(1)(a). That sub-section provides:

> "(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
>
> (a) an act or omission that occurs independently of the exercise of the person's will…"

[26] The trial judge declined to give any direction on accident. He expressed the view that it was a question of whether the eye witnesses were accepted when they said that the glass was in the appellant's hand when it contacted Ms Watson's head; there was no intermediate position giving rise to accident. What the defence sought to rely on was not evidence, but a lack of evidence in the CCTV footage. The only defence his Honour left for the jury's consideration was self-defence.

[27] After the jury had been retired for about an hour, they sought a re-direction on the topic of self-defence and added a further question to which the trial judge responded:

> "SPEAKER: Yes. [indistinct] if the accused did not intend to strike the complainant with the glass would that still constitute – sorry, would that still constitute unlawful wounding [indistinct] person.
>
> HIS HONOUR: I'm not quite sure what the background to that question is. If – when you say intend, it's not necessary that she intend the precise outcome of what happened, what is necessary is that it be a willed; that is, a deliberate striking with the glass. It doesn't have to be intended that the glass would break. It doesn't have to be intended that any particular consequence would follow, but what has to – what has to follow is that the wounding is the result of that striking; that is, the injury that's admitted to be a wound resulted from striking with the glass. Is that – does that clarify what you – and there's no specific intention here. It's a question of whether there was that striking and that striking caused the wound…"

[28] The appellant contended that the CCTV footage raised the possibility that the striking with the glass was an unwilled act that occurred either in the scuffle between the two women or as the appellant was pulled away from Ms Watson; for example, in a reflex movement to fend off the other woman or a flailing movement of the arm as the appellant was pulled backwards. The jury's question made it clear that they considered there to be a live possibility that the appellant did not intend to strike the complainant with the glass. Once that possibility was raised, it was incumbent on the trial judge to give a full direction on accident under s 23(1)(a). In particular, the jury should have been made aware that it was necessary for the Crown to exclude accident as a reasonable possibility.

[29] Counsel for the respondent accepted that if a direction on accident were necessary, his Honour's statement to the jury was not adequate. He contended, however, that accident was not raised on the evidence. Each of the three witnesses described a deliberate striking of Ms Watson with the glass, and the appellant's statement to the security guard to the effect that she had "smacked" Ms Watson with the glass was not consistent with accident. The CCTV footage did not reveal how the glass

had come into contact with Ms Watson's head. It had not been put to the Crown witnesses that there had been some inadvertent movement with the glass. The trial judge's duty was to identify "the real issues in the case and to instruct the jury on so much of the law as [was] necessary to decide those issues."[4] The evidence in the case did not give rise to any issue of accident.

[30] It is often difficult to determine whether evidence has reached the level of raising the possibility of an excuse from criminal responsibility. One can sympathise with the judge's reluctance to leave the defence. There was evidence which the jury could have accepted, at least that of Mr Burgess and Mr Dancy, as to a deliberate blow. The appellant's statement to the security guard that she had "smacked" Ms Watson with a glass was powerful evidence against accident, although it was capable of being regarded as the product of hindsight. However, when the jury sought assistance on the position if the striking with the glass were unintended, it became clear that a direction on the first limb of s 23(1) was required in this case.

[31] The jury's question was not unfounded. It was for them to decide whether it accepted the witnesses' evidence, and what they made of the appellant's apparent admission, and the CCTV footage was significant. That footage showed that there was a flurry of movement by Ms Watson, which raised the possibility of the glass coming into contact with her head by some movement of the appellant which was not intentional. Indeed, if the jury considered it possible that the appellant struck a blow in a reflex defensive action without adverting to the fact that she had a glass in her hand, the striking with the glass would be an act which occurred independently of the exercise of her will: *Duffy v The Queen*.[5] The sheer speed of the confrontation reduced the likelihood of the witnesses' having a clear appreciation and recollection of what took place, as the disparity between Ms Watson's and Mr Burgess' accounts and the CCTV footage demonstrates. There was, too, an area left unexplained on the Crown case: Mr Dancy's and Mr Burgess' recollections were that the appellant struck the blow with her right hand, and the position of the injury on the left temple made it improbable that the blow was struck left-handed; but there was no evidence as to how the glass had moved from the appellant's left hand (in which she can be seen in the footage holding it) to her right.

[32] The fact that the jury at least at one stage of its deliberations contemplated the possibility that there had been an unintentional striking with the glass in the course of the scuffle makes it plain that there was a live issue as to whether the act of hitting Ms Watson with a glass was one which occurred independently of the exercise of the appellant's will, on which instruction was required. The trial judge's re-direction went some of the way towards what was necessary, but was, as counsel for the respondent conceded, inadequate. It did not tell the jury that if the Crown had not excluded accident within the meaning of s 23(1)(a) as a reasonable possibility, they should acquit. The failure to give a direction in those terms was an error. Counsel for the respondent disavowed any reliance on the proviso should such an error be found; in my view, appropriately.

Orders

[33] I would allow the appeal, set aside the conviction, and order a re-trial.

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4 *James v The Queen* (2014) 88 ALJR 427 at 435.

5 (1980) 3 A Crim R 1.

[34] **MORRISON JA:** I have had the advantage of reading the reasons of Holmes JA and agree with those reasons and the orders her Honour proposes.

[35] **DALTON J**: I agree with the reasons of Holmes JA and with the proposed orders.