

SUPREME COURT OF QUEENSLAND

CITATION: *R v Lovell; Ex parte Attorney-General (Qld)* [2015] QCA 136

PARTIES: **R**
v
LOVELL, Dylan David
(respondent)
EX PARTE ATTORNEY GENERAL OF
QUEENSLAND
(applicant)

FILE NO/S: CA No 226 of 2014
DC No 400 of 2013

DIVISION: Court of Appeal

PROCEEDING: Reference under s 669A(2) Criminal Code

ORIGINATING COURT: District Court at Townsville – Unreported, 10 July 2014

DELIVERED ON: 24 July 2015

DELIVERED AT: Brisbane

HEARING DATE: 13 May 2015

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

ORDER: **The question referred,**
“Is a disfigurement which is remedied by medical treatment capable of amounting to a serious disfigurement within the meaning of ‘grievous bodily harm’ in s 1 of the *Criminal Code*?”
should be answered “yes”.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – OTHER MATTERS – CASES STATED AND REFERENCE OF QUESTION OF LAW – where the respondent was charged under s 320 *Criminal Code* (Qld) with doing grievous bodily harm – where the complainant suffered a disfiguring injury to the right side of his face which was surgically repaired – where the complainant would have been left severely disfigured had he not received medical treatment – where the primary judge ruled that in order to prove grievous bodily harm it was necessary that the Crown demonstrate that the complainant was presently disfigured – where the Crown consequently entered a nolle prosequi – where the Crown referred the question to this Court pursuant to s 669A(2) *Criminal Code*

(Qld) – whether a disfigurement which is remedied by medical treatment is capable of amounting to a serious disfigurement within the meaning of ‘grievous bodily harm’ in s 1 of the *Criminal Code* (Qld)

Criminal Code (Qld), s 1, s 320, s 669A(2)
Legal Aid Queensland Act 1997 (Qld), s 47

Australian Postal Commission v Melbourne City Council (2005) 14 VR 678; [2005] VSCA 295, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Hanrahan [1999] QDC 277, considered
R v Lobston [1983] 2 Qd R 720, considered
R v Tranby [1992] 1 Qd R 432; (1991) 52 A Crim R 228, cited

COUNSEL: A W Moynihan QC for the applicant
No appearance for the respondent
J J Allen QC for Legal Aid Queensland

SOLICITORS: Director of Public Prosecutions (Queensland) for the applicant
No appearance for the respondent
Legal Aid Queensland appeared on its own behalf

- [1] **HOLMES JA:** The Attorney-General has referred a point of law to this Court, pursuant to s 669A(2) of the *Criminal Code*. The point is framed as follows:

“Is a disfigurement which is remedied by medical treatment capable of amounting to a serious disfigurement within the meaning of ‘grievous bodily harm’ in s 1 of the *Criminal Code*?”

Section 669A(4) of the *Criminal Code* requires the Court to hear argument on the reference, after which it must consider the point referred and give the Attorney-General its opinion.

The charge of grievous bodily harm

- [2] Mr Lovell was the defendant in the case from which the reference springs. He has not sought to be heard on the reference, but Legal Aid Queensland appears to assist the Court pursuant to s 47 of the *Legal Aid Queensland Act 1997*. The Crown case against Mr Lovell was that he had in some way pushed the complainant from his bicycle, causing him to injure the right side of his face. The complainant was taken to hospital where he was diagnosed as suffering a tetrapod fracture of the right zygomatic maxillary complex. According to a medical report, the right side of his face was “severely depressed”, and without treatment he would have been left severely disfigured. In the event, the complainant’s facial depression was surgically re-aligned and internally fixed with plates and screws so as to avert that result.
- [3] Mr Lovell was charged under s 320 of the *Criminal Code* with doing grievous bodily harm to the complainant. “Grievous bodily harm” is defined in s 1 of the *Criminal Code* as meaning:

- “(a) the loss of a distinct part or an organ of the body; or
- (b) serious disfigurement; or
- (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available.”

The grievous bodily harm relied on in this case was said to be serious disfigurement by the facial fracture and resulting facial depression.

The ruling the subject of the reference

- [4] The trial judge ruled, in effect, that it was necessary for the Crown to prove existing serious disfigurement in order to succeed. His reasoning was as follows:

“In this case the accused is charged with having caused grievous bodily harm unlawfully. The Crown has particularised the grievous bodily harm relied upon as being that defined in subparagraph (b) of the definition of grievous bodily harm which of course is set out in section 1 of the Criminal Code.

The learned Crown prosecutor has told me quite properly and fairly that the Crown does not suggest that the complainant in the matter is now seriously disfigured. As I understood the case that the Crown intended to make, it was that had the injury said to have been caused by the accused not been treated, then there would have been a serious disfigurement. I have some difficulty understanding the whole of the definition that’s set out in the code and I’ll just read it.

Grievous bodily harm means:

- (a) *the loss of a distinct part or an organ of the body, or*
- (b) *serious disfigurement, or*
- (c) *any bodily injury of such a nature that if left untreated would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health.*

And then there’s set out on a separate line of the definition:

...whether or not treatment is or could have been available.

As one looks at the layout, if I can call it that, of the definition, one would perhaps assume that that last qualification is meant to qualify or modify each of the subparagraphs (a), (b) and (c). The trouble I have with that is that with great respect it just doesn’t seem to make sense if one looks at (a) and reads it:

Grievous bodily harm means the loss of a distinct part or an organ of the body whether or not treatment is or could have been available.

With great respect [it] just doesn’t seem to me to make sense. There’s either a loss of such an organ or there is not. Likewise, as it seems to me when one reads subparagraph (b):

Grievous bodily harm means a serious disfigurement whether or not treatment is or could have been available.

Again, it seems to me that the – I have difficulty making sense if that is how the paragraph is meant to be read. It seems to me that, notwithstanding the way that the definition is set out, the last line – that is “whether or not treatment is or could have been available” really is only intended to qualify or modify subsection (c).

The learned Crown prosecutor has submitted that one can have regard – or the jury can have regard to, as it were, the immediate aftermath and consider at that point whether or not there is serious disfigurement. I have difficulty with that proposition. As I said in discussion with counsel, there must be man[y] injuries which are temporarily disfiguring, for example, I said black eyes, but which will in time resolve and could not, I would have thought, on any view come within or be intended to come within the definition of grievous bodily harm. Neither counsel have been able to refer me to any cases where this particular point has been considered. The learned Crown prosecutor has referred me to a footnote which I believe appears in the bench book but no authority is cited for the proposition contained in the bench book.

It seems to me that I should therefore rule or direct the jury that the Crown, to succeed in this case, must demonstrate that the complainant suffered an injury which has resulted in his being seriously disfigured.”

- [5] In consequence of that ruling, the Crown presented a nolle prosequi and the jury was discharged from returning a verdict.

Discussion

- [6] It is not entirely clear whether the trial judge meant by his ruling that in order to constitute grievous bodily harm, serious disfigurement must be permanent, in the sense of being incapable of repair or natural resolution, or simply that it must be in existence at the time of the trial in order for the offence to be made out. Whichever is the case, I have concluded, with respect, that his Honour’s ruling was not correct.
- [7] There seem to have been two matters which influenced the trial judge in reaching the conclusion he did. The first was his view that the clause “whether or not treatment is or could have been available” was incapable of being read as referring to subsections (a) and (b) of the definition of grievous bodily harm. Secondly, his Honour considered that a temporarily disfiguring injury could not amount to serious disfigurement, so that it was not sufficient to have regard to the immediate aftermath of the injury.
- [8] As to the second consideration, the trial judge was not referred to this Court’s decision in *R v Lobston*.¹ *Lobston* concerned grievous bodily harm at a time when the term was defined as

“any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health”.

The “bodily injury” in that case was a broken femur. The medical evidence was that, untreated, the fracture would have had serious sequelae, but it was in fact successfully treated. The appellant argued that the definition should be read as qualified by a requirement that regard be had to the availability and result of the administration of due and proper medical care, so that what had to be considered in respect of the likelihood of permanent injury was the state of affairs after treatment. The Court of

¹ [1983] 2 Qd R 720.

Criminal Appeal rejected that argument, holding that what was to be considered in deciding whether grievous bodily harm was caused was the nature of the injury at the time the harm was done, not the surrounding circumstances and availability of medical assistance.

- [9] The Attorney-General has pointed also to a ruling by McGill DCJ in *R v Hanrahan*,² which concerned subsection (b) of the definition of “grievous bodily harm” in its current form. In that case, the defendant had sought a ruling that there was no case to answer. The complainant’s injury entailed a cut to the lower lip which, untreated, would have left him with a gap in the lip and a portion of it hanging down, and a displacement of the nose. The injuries were treated in such a way as to leave the complainant with no obvious scarring. McGill DCJ refused the application, concluding that the offence was committed when serious disfigurement was inflicted, whether or not it was subsequently relieved by treatment. It was of some significance, his Honour noted, that the word “permanent” was not used in either subsection (a) or (b) of the definition.
- [10] I agree with McGill DCJ that the absence of the word is a compelling reason for considering that permanence was not intended by the legislature to be a requisite for serious disfigurement. It would be consistent with the approach in *Lobston*, too, if the question for the jury were whether the injury as sustained amounted to serious disfigurement, regardless of the availability of treatment. The trial judge’s concern here that the definition might catch a fleeting disfigurement – for example, the infliction of a black eye – is, I think, misplaced. A disfigurement which can be expected to resolve naturally and quickly is unlikely to be regarded as “serious”.
- [11] The trial judge’s remaining concern was the clumsiness of applying the clause “whether or not treatment is or could have been available” to each of subsections (a) and (b). In that connection, it is worth considering the history of the definition of “grievous bodily harm”. In 1997, it was amended from the version considered in *Lobston* to include the loss of a distinct part or organ or serious disfigurement. That amendment was made in consequence of the decision in *R v Tranby*,³ in which it was held that loss of part of the complainant’s earlobe, although disfiguring, did not amount to a permanent injury to health within the definition as it then stood.
- [12] The Explanatory Notes to the *Criminal Law Amendment Bill* 1996 described the amendments in the Bill as resulting from a consultative strategy. An Advisory Working Group had produced a set of proposed amendments, upon which submissions were received, resulting in drafts, ultimately refined.⁴ The Working Group had recommended amendment of the definition to read:
- “‘Grievous bodily harm’ means any loss of a distinct part of the body or serious disfigurement or bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely, if untreated, to cause permanent injury to health.”⁵
- [13] It can be seen that the definition as enacted was significantly different from that initially proposed. The Working Group had raised the issue of treatment with the phrase “if untreated” (no doubt with *Lobston* in mind), but apparently intended it to apply only to bodily injury likely to endanger life or permanently injure health. The legislature chose, instead, to divide the different forms of harm into subsections (possibly to

² [1999] QDC 277.

³ [1992] 1 Qd R 432.

⁴ *Criminal Law Amendment Bill* 1996 Explanatory Notes at 3.

⁵ Report of the Criminal Code Advisory Working Group to the Attorney-General July 1996 at p 65.

obviate argument that all the words following the phrase “of such a nature ...” were meant to govern loss of a body part or serious disfigurement); to incorporate the “if untreated” concept into subsection (c); and to add the rider as to availability of treatment.

- [14] The question is whether the rider was intended to apply to all three subsections. The topic of treatment is otherwise picked up only in subsection (c), with the phrase “if left untreated”. But the positioning of the clause “whether or not treatment is or could have been available” at the end of, and separately from, the subsections suggests a considered choice that it should apply to all three. It would have been a simple matter had it been meant to qualify only the bodily injury described in subsection (c) of the definition to incorporate it into that subsection. Indeed, as qualifying (c), it is largely otiose; the irrelevance of treatment as a consideration is already dealt with in that subsection, because the use of the phrase “if left untreated” makes it clear that it is the state of the injury absent treatment which is to be considered. That makes it all the more imperative that the clause be construed as applicable to (a) and (b), to avoid superfluity;⁶ a rule of statutory interpretation which “applies with greater force where... the provision in question has been added by amendment”.⁷
- [15] It is possible and practicable to read each subsection as qualified by the clause “whether or not treatment is or could have been available”, if the clause is understood as meaning “whether or not treatment is or could have been available to rectify it”. The language is not elegant, but it makes sense. In the case of subsection (a), the loss of, for example, a finger, for which treatment is or could have been available by way of re-attachment would nonetheless be grievous bodily harm. Similarly, treatment may be available to remedy serious disfigurement, as it was here; and, indeed, plastic surgery might have done a good deal to improve the appearance of the earlobe partly lost in *Tranby*. The prospect or reality of repair can be accommodated by the application of the closing clause of the section. It would, on the other hand, be a perverse result if a conviction for injuries of such seriousness could result only if the damage remained unrepaired.
- [16] Each of the subsections of the definition should be read as qualified by the clause “whether or not treatment is or could have been available”, so that an injury can amount to “serious disfigurement” constituting grievous bodily harm whether or not it is, or is capable of being, medically repaired.

Conclusion

- [17] The question referred,
- “Is a disfigurement which is remedied by medical treatment capable of amounting to a serious disfigurement within the meaning of ‘grievous bodily harm’ in s 1 of the *Criminal Code*?”
- should be answered “yes”.
- [18] **GOTTERSON JA:** I agree with the order proposed by Holmes JA and with the reasons given by her Honour.
- [19] **PHILIPPIDES JA:** I agree with the order of Holmes JA for the reasons given by her Honour.

⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382, [71].

⁷ *Australian Postal Commission v Melbourne City Council* (2005) 14 VR 678 per Charles and Nettle JJA at 684.