SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sawyers* [2015] QCA 255
PARTIES:	**R** **v** **SAWYERS, Samuel Eathen** (appellant)
FILE NO/S:	CA No 47 of 2015 DC No 61 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton – Unreported, 13 February 2015
DELIVERED ON:	4 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2015
JUDGES:	Morrison JA and Peter Lyons and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the appellant was convicted of grievous bodily harm following a three day trial – where the appellant appeals against this conviction on the basis his trial was 'unfair' – where the appellant relied upon a defence of self-defence at trial – whether self-defence was not able to be excluded beyond reasonable doubt by the Crown CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the conduct complained about included the manner of cross examination; cross examination eliciting hearsay evidence; failing to object to prejudicial evidence; misstatements of law; and providing a copy of a defence witnesses' statement to the Crown – where the appellant submitted that as a result of all the conduct complained of, the evidence admitted was so prejudicial as to amount to a miscarriage of justice – whether the conduct of the appellant's defence at trial was so flagrantly incompetent that a miscarriage of justice had occurred *R v Carter* [2003] 2 Qd R 402; [2002] QCA 431, considered *R v Paddon* [1999] 2 Qd R 387; [1998] QCA 248, considered

COUNSEL:	S G Bain for the appellant D L Meredith for the respondent
SOLICITORS:	A W Bale and Son Solicitors for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Dalton J and agree with those reasons and the order her Honour proposes.

[2] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Dalton J, with which I agree. I also agree with the order proposed by her Honour.

[3] **DALTON J:** The appellant was convicted of grievous bodily harm after a three day trial in the District Court at Rockhampton. He appeals against conviction on the basis that he had "an unfair trial" – to use the term in the notice of appeal. Counsel appearing for him on the appeal sought leave to add a further ground of appeal: that his conviction ought to be set aside because of the incompetence of his counsel at trial. Leave was given at the outset of the hearing. Counsel for the appellant abandoned the appeal against sentence.

[4] To set aside a conviction on the basis of incompetence of trial counsel, an appellant must establish that the conduct of his defence below was so flagrantly incompetent that a miscarriage of justice has been occasioned – *R v Paddon*[1]. In *Carter*, McMurdo P commented that there were many different ways of conducting a defence case and that the incompetence which must be shown to succeed on an appeal such as this must go beyond "an error of judgment made under the significant pressures of litigation". In *Carter* the counsel concerned undertook a course which was described by Jerrard JA as, "one that would never be thought by competent counsel in the circumstances of the trial to be of any possible advantage to the accused" – [56]. The result was that the one point which the appellant Carter had – that the record-of-interview he gave police was inadmissible – was never raised. It was conceded in that case that without the record-of-interview the Crown could not have established a case against Carter. There was a miscarriage of justice for the conduct by counsel was flagrantly incompetent and it deprived the appellant of a significant possibility of acquittal.

[5] In the present case the Crown case was that the complainant was dancing with his girlfriend, Ms Thompson, at a nightclub when the appellant attempted to dance with, and touch, Ms Thompson. The complainant pushed or slapped away the appellant's hands. He then remembered nothing until waking from unconsciousness on the dance floor. Despite the fact that there was CCTV footage of the incident, it was of such poor quality that it did not show anything of use as to the physical interaction of the two men. Immediately after these events, security personnel at the nightclub ejected Mr Sawyers into the street. He ran away from police, who were apparently stationed outside the nightclub anticipating persons ejected in this way. When police caught the appellant he was warned, and the allegation that he punched someone in the face in the nightclub was put to him. The appellant said that he did not wish to say anything until he spoke to a lawyer but then almost immediately added:

> "Except for, I was struck at first. He swung at me, I punched him, he fell, then I kicked him, so … I felt threatened, he was a lot bigger than me, I weigh about 68 kilos, I'm a small, Aussie, white guy … he swung

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1 [1999] 2 Qd R 387; *R v Carter* [2002] QCA 431.

> at me, he missed, I swung at him, I punched him in the chin, he fell over, he started mouthing off. I didn't meant to, but I kicked him, Sir. I'm sorry but that's exactly what happened."

[6] The defendant relied upon a defence of self-defence. He gave evidence at the trial. His version of events was that Ms Thompson approached him as he was standing at a bar on the edge of the dance floor. He placed one of his hands on her hip and danced with her. He said that the complainant grabbed him so that he nearly "hit the floor" and then the complainant screamed at him, walked towards him and began striking his left hand, which he had extended to keep a distance between them. He said he felt threatened and that the complainant continued to punch down on his left hand with a sort of hammer punch. He put that at nine or 10 on a scale where 10 was extreme force. He said he continued walking backwards away from the complainant until he hit something and could not go back any further. At that point he said he stepped to the side of the complainant and struck him twice in the face. He said after that he was grabbed and his hands "tied up", so he then kicked the complainant. He was not sure whether in this kicking he had made contact with the complainant's face. This part of his evidence was difficult to understand. He said that he then fled the nightclub.

[7] While the CCTV footage was of no use in deciphering the circumstances of the physical interaction between the complainant and the appellant, it did not show Ms Thompson leaving the main dancers and going to the periphery of the dance floor near the bar and there dancing with the appellant. The evidence of both the complainant and Ms Thompson was that she remained dancing in the main throng on the dance floor and that the appellant approached her, trying to dance with her and touch her. Ms Thompson did not see the physical interaction between the two men, and the complainant could not remember it. There were no other witnesses to the violence, so that the jury was left with the evidence of the complainant, Ms Thompson and the CCTV footage, as well as the testimony of the appellant.

[8] The appellant's argument on appeal started with the proposition that, even leaving the appellant's evidence to one side, the prosecution was not able to exclude self-defence beyond reasonable doubt. That was not the case. It was for the jury to decide whether or not the Crown had excluded self-defence. The evidence of Ms Thompson was that it was a matter of seconds between when she saw her boyfriend push the appellant's hands off her and when she saw him lying on the floor. That timeframe is not consistent with the version of events given by the appellant. If the jury rejected his version and had regard solely to the prosecution evidence, they may well have been satisfied to the requisite standard that there was no assault on the appellant and no reasonable necessity for the appellant to make defence against an assault on him.

[9] The complainant gave evidence that after he pushed the appellant's hands away from Ms Thompson the "next thing" he remembered was waking up on the ground. When cross-examined as to the defence version he denied it. I think it was open to the jury to take the view that his evidence was that he was rendered unconscious very soon after attempting to push the appellant's hands away from his girlfriend, rather than the effect of his evidence being that he was unconscious and, as a consequence, had forgotten a scenario where he assaulted the appellant and was then himself attacked. In any event, the complainant was able to give evidence that he had not stopped dancing with Ms Thompson or moved from the dance floor before coming into conflict with the appellant. Thus it was not the case that the prosecution was not able to exclude beyond reasonable doubt that the appellant acted in self-defence. That was a matter for the jury.

[10] A series of errors on the part of trial counsel for the defendant were relied upon by the appellant. The appellant's case was not that any individual error amounted to flagrant incompetence, nor for that matter that any individual piece of evidence which was let in through less than desirable questioning was sufficient to cause a miscarriage of justice. The appellant's argument was that in cumulative terms what occurred was sufficient incompetence to found an appeal, and that, in total, the evidence admitted was so prejudicial as to amount to a miscarriage of justice.

[11] First, it was said that in cross-examination, trial counsel for the defendant failed to capitalise upon the complainant's lack of memory as to the circumstances of his being punched, but instead allowed him, when cross-examined, to disagree with aspects of the defence case on self-defence without strictly confining him to matters he could actually recall. The same criticism was made about cross-examination of Ms Thompson. Presumably because the appellant intended to give evidence, defence counsel put the detail of the appellant's version of events to both the complainant and Ms Thompson in cross-examination. It is easy to imagine that the cross-examination could have taken place in a more assertive manner than it did, and that defence counsel may have tried to make more play of the fact that neither the complainant nor Ms Thompson could give any evidence of what happened during the physical interaction between the two men. Nonetheless, it is speculative whether such a cross-examination technique would have produced a result more favourable for the defendant than the result which was actually achieved.

[12] Secondly, it was complained on behalf of the appellant that cross-examination of security witnesses from the nightclub and police produced hearsay from them as to what the CCTV footage showed, and hearsay evidence that the appellant had hit the complainant. Again, this might be a valid criticism of the approach taken in cross-examination. However, in a case where the appellant admitted that he did hit and kick the complainant, and where there was no issue as to his identity, it is hard to see that there was prejudice in the cross-examination eliciting statements such as "I was advised that he had been assaulted. Someone told me that he had been kicked in the face." One security guard gave evidence that people on the dance floor had identified the appellant because he was wearing a distinctive t-shirt and that he followed the appellant out of the club and indicated to police officers waiting outside that they ought to speak to the appellant. The cross-examination of this witness elicited that he did not see the incident himself, and thought he had no reason to speak to police officers because "it is not our decision to decide what happened if we didn't see it. We let them know. They can review the video footage and it's up to them what they want to do with it from there." This evidence is not particularly prejudicial in a case where identity, and assault on the complainant, were not in issue. The same can be said for the appellant's complaint that defence counsel did not object to hearsay evidence along these lines when it was led by the Crown.

[13] There was a question asked of one of the police officers who had viewed the CCTV footage at the nightclub, rather than simply viewed the copy which was so hard to decipher. In response he said that the footage he viewed on the night was better quality, and that when he viewed it at the nightclub he saw the defendant "swinging his arm and hitting the victim in the head, and then the victim subsequently falling on the ground." That answer was certainly unhelpful for the defence case, but in my opinion asking the question did not indicate flagrant incompetence.

[14] Thirdly, during his opening, counsel for the appellant misstated the law as to onus of proof in relation to self-defence. That was immediately corrected by the trial judge who informed the jury of the correct position, so that was not productive of any miscarriage of justice.

[15] Fourthly, a Mr Quirk was called in the defence case. It is apparent from his cross-examination that the Crown had a copy of his statement and that the Crown used this to some effect to cross-examine him about inconsistencies between what he said in his statement and what he had said in his evidence. The appellant asked this Court to draw an inference that the defence counsel, or perhaps defence solicitors, had given the Crown the statement. There was no evidence as to how the Crown obtained the statement. It may be that the Crown approached Mr Quirk and he gave them a copy of the statement. In those circumstances I do not think that the complaint in this regard adds anything to the appellant's case.

[16] Lastly, complaint was made that defence counsel did not object to evidence from Ms Thompson that her interpretation of what the appellant attempted in touching her was not simply to take her hands, which were by her sides, but to put his hands on her buttocks. The answer was objectionable as it was a conclusion rather than an observation. However, in the context of the entire case involving three young people dancing at a nightclub in the early hours of the morning the matter is hardly significant.

[17] In my opinion while aspects of defence counsel's performance appear to demonstrate inexperience, they were not so flagrantly incompetent that this Court would interfere with the result of the trial. Nor was the total evidence put before the jury as a result of inexperience so prejudicial that it could be said a miscarriage of justice occurred. The appeal must be dismissed.