

SUPREME COURT OF QUEENSLAND

CITATION: *R v Hoet* [2016] QCA 230

PARTIES: **R**
v
HOET, Reece Karaitana
(appellant)

FILE NO/S: CA No 64 of 2016
DC No 548 of 2016

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane: Date of Conviction – 7 March 2016

DELIVERED ON: Orders delivered ex tempore 9 September 2016
Reasons delivered 13 September 2016

DELIVERED AT: Brisbane

HEARING DATE: 31 August 2016

JUDGES: Margaret McMurdo P and Fraser JA and Daubney J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **Delivered ex tempore on 9 September 2016:**
1. Allow the appeal.
2. Order that the conviction of the appellant on Counts 8, 9 and 10 be quashed.
3. Order a retrial on Counts 8, 9 and 10.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted of two counts of wounding and one count of assault occasioning bodily harm while armed and in company – where there was a confrontation between two complainants, the appellant’s co-accused and the appellant – where there were competing versions of the events which directly concerned the offences of which the appellant was convicted – where the appellant gave evidence that one complainant was holding a hammer in his hand and was repeatedly hitting the appellant’s co-accused in the back of the head and, in response, the appellant struck the complainant on the back of the leg with a machete – where the appellant contended that the trial judge erred in law in directing the jury as to s 273 and s 271(2) of the *Criminal Code* (Qld) – where the trial judge gave oral and written directions to the jury which

directed, in effect, that it could exclude the s 273 defence (Aiding in Self-Defence) if it was satisfied beyond reasonable doubt that the appellant's co-accused was not acting or entitled to act in self-defence – where the issue of whether the s 273 defence (Aiding in Self-Defence) was available should have been the subject of a mistake of fact direction – where the respondent conceded this was an error – whether the misdirection gave rise to a miscarriage of justice

Criminal Code (Qld), s 271, s 273

COUNSEL: A D Anderson (*sol*) for the appellant
S J Farnden for the respondent

SOLICITORS: Anderson Fredericks Turner for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MARGARET McMURDO P:** I agree with Daubney J's reasons for allowing this appeal against conviction and with the orders he proposes.
- [2] **FRASER JA:** I agree with the reasons for judgment of Daubney J and the orders proposed by his Honour.
- [3] **DAUBNEY J:** The appellant and another man, Siciliani, were charged with a variety of offences alleged to have been committed in an incident at Wacol on 18 June 2014. After a four day trial, the jury returned guilty verdicts only on the following:
- Count 4 – common assault (Siciliani only)
 - Count 8 – wounding (appellant only; Siciliani acquitted);
 - Count 9 – wounding (appellant only; Siciliani acquitted);
 - Count 10 – assault occasioning bodily harm while armed in company (appellant and Siciliani);
 - Count 12 – threatening violence (Siciliani only).
- [4] The trial judge had ruled on Count 1, which concerned only Siciliani, that there was no case to answer. Otherwise, the jury acquitted on the remaining counts.
- [5] The appellant now appeals against his convictions.

Background

- [6] As will be seen, the jury was presented with competing versions of the events which directly concerned the offences of which the appellant was convicted.
- [7] The prosecution case was founded in the evidence of two complainants, Mr Hing and Ms Conlon. They lived in a house in the same cul-de-sac as Siciliani and a Ms McDougall. All of these parties knew one another. On 18 June 2014, the appellant was a visitor at Siciliani and McDougall's home.
- [8] The appellant, who elected to give evidence at trial, said that he was inside the house writing music when he heard a commotion outside. He looked outside and saw Siciliani, Hing and Conlon becoming engaged in a confrontation.

- [9] It was not known to the appellant at that time, but subsequently emerged, that Conlon had been upset by Siciliani when they encountered one another a little earlier at a nearby service station. Conlon then went to see McDougall and told her that Conlon was going to the police over what had happened at the service station. The two women ended up discussing the matters in the middle of their street. Conlon went back to her house, but returned to McDougall a short time later, accompanied by Hing.
- [10] Hing and Conlon both said that they were planning to go to the police. They said Siciliani arrived at that point on his motorcycle and, within a short time of dismounting, acted aggressively towards both Conlon and Hing.
- [11] McDougall said that she went inside when Hing and Conlon started yelling at Siciliani, and she did not see what ensued. She did say, however, that she had not seen anything in Hing's hand, although she did concede of the possibility.
- [12] Quite different accounts of the events which followed were given in evidence.
- [13] Both Hing and Conlon said that they were assaulted by Siciliani before the appellant came from the house and started helping Siciliani to assault them. They described the appellant as aggressively wielding a machete, and deliberately striking Hing three times and Conlon once. They said Siciliani encouraged the appellant in these attacks.
- [14] Siciliani was convicted on Count 4 of assaulting Hing. The appellant gave evidence of having seen this punch from inside the house, but described Hing and Conlon as aggressively approaching Siciliani. The appellant said he saw Hing holding a hammer in his hand. The appellant's evidence was that, after seeing the situation, he grabbed a machete which was inside the house and went outside to save Siciliani.
- [15] Both Hing and Conlon denied that Hing was carrying a hammer.
- [16] The appellant's evidence was that when he got outside, he saw that Hing had Siciliani face down on the ground, and that Hing was repeatedly hitting Siciliani with the hand which was holding a hammer. He said that he thought Siciliani's head was going to get "caved in" and that Hing was hitting Siciliani in the back of the head. The appellant said that he did not hear Siciliani making any noise, and that it definitely looked like Hing was using the hammer to strike Siciliani. He said he first punched Hing to the back of the head, but it had no effect. The appellant was acquitted of a charge of assault relating to this.
- [17] The appellant said that after striking Hing, he was momentarily engaged in a struggle with Conlon. It is possible that Conlon suffered some injury in the course of this struggle. In any event, the appellant was acquitted of all charges relating to assaults on Conlon.
- [18] The appellant said he returned his focus to Hing, who was still on top of Siciliani and continuing to hit him. The appellant said that it was at this point that he struck on the back of the leg with the machete (Counts 8 and 9). He was asked what he was thinking when he struck the back of Hing's leg and said¹:

"I did it because – well, I was pretty scared for my brother, you know, like I was. He's on the ground, old mate's whacking him in the head, he's got a hammer in his hand. I think, I'm not hearing anything from my brother neither and I'm not waiting around to – you know, and – yeah. So that's – that's what I had to do."

¹ AR 210.

- [19] Under cross-examination, the appellant affirmed that it definitely looked to him as if Hing was using the hammer to hit Siciliani.²
- [20] These strikes to Hing's legs caused Hing to stand up and face the appellant. The appellant said that Hing was still carrying the hammer. Siciliani was still on the ground. The appellant described Hing making a movement towards him while moving the arm holding the hammer, and this caused the appellant to respond by swinging the machete towards Hing. This was the event which caused bodily harm to Hing (Count 10). The appellant said that Hing then put the hammer down, and the appellant put the machete down.
- [21] The appellant was acquitted of a further alleged assault on Hing (Count 11).
- [22] The evidence was uniform that Hing and Conlon then went back to their house, and the appellant went back into Siciliani's house.
- [23] A neighbour, Ms Green, then went to Hing and Conlon's house and witnessed the threatening behaviour by Siciliani which was the subject of Count 12. Ms Green also said that she saw the appellant with what she described as a knife.
- [24] The appellant said that he returned outside and collected the machete and hammer from where they had been left on the ground. He said that, in panic, he put the machete in a towel in the washing machine in Siciliani's house. When police attended, both Siciliani and the appellant refused to leave the house for some time. At trial, the Crown disavowed reliance on this as evidence on consciousness of guilt.
- [25] DNA testing on a hammer and machete recovered by police from the scene was inconclusive.

Grounds of appeal

- [26] In the circumstances described in the appellant's evidence, it was clear that in the case against the appellant, at least in relation to Counts 8, 9 and 10, the jury would need to consider self-defence and the defence of aiding another in self-defence. Also given the divergence between the versions, it was necessary for the jury to consider whether the appellant acted under an honest and reasonable but mistaken belief as to the facts.
- [27] The appellant advanced two grounds of appeal:
- (a) The learned trial judge erred in law in directing the jury as to s 273 and s 271(2) of the *Criminal Code*;
 - (b) The learned trial judge erred in directing the jury on the application of s 24 of the *Criminal Code*.
- [28] The second ground of appeal raised interesting issues:
- (a) Whether the trial judge misdirected the jury in relation to s 24 by effectively withdrawing it from consideration in relation to whether the appellant was honestly and reasonably mistaken as to whether Siciliani was acting, or was entitled to act, in self-defence;
 - (b) Whether the trial judge erred by failing to direct the jury on the application of s 24 in relation to the nature of the assault being carried out by Hing against Siciliani.

² AR 222.

- [29] The very helpful submissions of both counsel before this Court identified some tension in the authorities, particularly concerning the first of these issues. However, it is unnecessary to explore this ground of appeal, because the first ground of appeal, in my respectful opinion, gives rise to a definite outcome.

The directions on s 273 and s 271(2)

- [30] Section 273 of the *Criminal Code* provides:

“273 Aiding in self-defence

In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person’s aid to use a like degree of force for the purpose of defending the first person.”

- [31] There was no issue at trial that, on the appellant’s evidence about the nature of the assault which he said he saw being inflicted on Siciliani, consideration of s 273 also required consideration of s 271(2). Section 271 of the *Criminal Code* provides:

“271 Self-defence against unprovoked assault

- (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.
- (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.”

- [32] During the summing up, the learned trial judge gave the jury a document containing directions which the judge expressly incorporated as part of his summing up. Relevantly, that document said:

“For counts 8, 9 and 10, where Hoet is alleged to have injured Hing with the machete – To exclude aiding by Hoet in self defence of Siciliani, the Crown must prove beyond reasonable doubt any one of the following:

1. Siciliani was not acting or entitled to act in self defence, or
2. That Hoet was not mistaken that Siciliani was acting or entitled to act in self defence, or
3. Hoet was not acting in good faith, or
4. That the force used by Hoet was more than was reasonably necessary to make effectual defence.”

- [33] Having given the jury this document, his Honour then reinforced the contents of the document to the jury by saying:³

“Now, I’ve set out in that other document you have there those four points that I’ve just mentioned. If you go to the second half of the first page under Self-defence, it talks about self-defence where the force used was likely to cause grievous bodily harm and in those counts where the machete was used, you could have regard to the possibility of self-defence where the force was likely to cause grievous bodily harm and the Prosecution must exclude those matters beyond reasonable doubt in order to prove its case on those counts.

Now, of course, in relation to counts 8 and 9, where Hoet is alleged to have struck Hing on the leg with the machete, there’s no suggestion that Hoet was defending himself at the time. Even on Hoet’s account, Hing was bending over the other man on the ground and Hoet was coming at him from behind or the side. He wasn’t presenting any danger to Hoet. So Hoet, only aiding in defence of another, arises there. And I’ve read the provision of our law to you about that and on page 2 of the document before you, I’ve set it out.

So for counts 8 and 9 and possibly 10 where Hoet is alleged to have injured Hing with the machete, to exclude aiding by Hoet in self-defence of Siciliani, the Crown must prove beyond reasonable doubt any one of the following points there: that Siciliani was not acting or entitled to act in self-defence, or that Hoet was not mistaken that Siciliani was acting or entitled to act in self-defence, or Hoet was not acting in good faith, or that the force used by Hoet was more than was reasonably necessary to make effectual defence.”

- [34] Both the written and oral directions were erroneous. On these directions, the jury was instructed that it could exclude the s 273 defence if it was satisfied beyond reasonable doubt that Siciliani was not acting or entitled to act in self-defence. The disjunction between items 1 and 2 on the list provided to the jury meant that the jury could have excluded the s 273 defence on the basis of item 1 alone. The issue raised in item 1 should, however, itself have been the subject of the mistake of fact direction which appeared at item 2.
- [35] The respondent properly conceded before this Court that this was an error, but argued that, when the whole of the summing up was considered, the jury would not have been under any misapprehension that if they determined that Siciliani was not acting in self-defence they would go on to consider whether the appellant laboured under a reasonable but mistaken belief about that fact.
- [36] It is true that, in the course of a long and careful summing up, the learned trial judge in several places directed the jury on these issues in general terms. But despite that, it remains the fact that when directing the jury specifically in relation to the defences available on the only counts on which the appellant was convicted, erroneous instructions were given to the jury. The oral misdirection went to the heart of the relevant case against the appellant, and was reinforced by the terms of the written directions given to the jury. The misdirections therefore gave rise to a miscarriage of justice.

³ AR 298.

[37] In those circumstances, it is clear to me that the convictions on Counts 8, 9 and 10 cannot be permitted to stand. The nature of the misdirections is such that there is a palpable prospect that the appellant was deprived of a fair chance of acquittal on these counts. The centrality of the issues on which the misdirection was given means that I could not be satisfied that no substantial miscarriage of justice actually occurred.

Conclusion

[38] For these reasons, I would:

1. Allow the appeal;
2. Order that the conviction of the appellant on Counts 8, 9 and 10 be quashed; and
3. Order a retrial on Counts 8, 9 and 10.