SUPREME COURT OF QUEENSLAND

CITATION:	*R v Steindl* [2001] QCA 434
PARTIES:	**R** **v** **STEINDL, Thomas William** (appellant)
FILE NO/S:	CA No 80 of 2001 DC No 37 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	12 October 2001
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2001
JUDGES:	McMurdo P, Davies and Thomas JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – ASSAULTS – GRIEVOUS BODILY HARM - where appellant's punch dislodged an artificial lens inserted into the complainant's eye resulting in a conviction for grievous bodily harm – appeal against conviction - where conflicting pre-trial rulings under s 592A Criminal Code as to whether an artificial lens implant in the eye constituted a "defect weakness or abnormality" for the purposes of s 23(1A) Criminal Code CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – ABUSE OF PROCESS - whether the re-opening of the initial pre-trial ruling was an abuse of process – where the re-opening of a pre-trial ruling should not be lightly undertaken – where 'substantial disagreement' with earlier ruling not enough to re-open - where a special reason is necessary before a pre-trial ruling under s 592A Criminal Code may be re-opened – where the unusual circumstances involving the interpretation of an uncertain and important point of the law with no clear authority constituted a 'special -

reason' and allowed the Judge to re-open – where no forum shopping or abuse of process

INTERPRETATION – GENERAL RULES OF CONSTRUCTION - where the meaning of the words "weakness, defect or abnormality" are a question of statutory construction – where the legislature did not intend to limit these words – where the words should be given their current meaning consistent with changing technology – where s 23(1A) Criminal Code is not restricted in its operation to abnormalities naturally caused.

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Appeal Costs Fund Act 1973 (Qld)
Criminal Code s 23, s 23(1A), s 23(1)(a), s 23(1)(b), s 592A, s 592A(2)(e), s 592A(3), s 592A(4), s 594, s 669A, s 669A(2)

Mamote-Kulang of Tamagot v The Queen (1963-1964) 111 CLR 62, considered
R v Amituanai [1995] QCA 80; CA No 524 of 1994, 28 March 1995, considered
R v Bennett and Bennett [1999] QCA 46; CA Nos 443 and 449 of 1998, 26 February 1999, referred to
R v Camm [1999] QCA 101; CA No 431 of 1998, 1 April 1999, referred to
R v Charles [2001] QCA 320; CA No 66 of 2001, 2 August 2001, referred to
R v Francisco [1999] QCA 212; CA No 59 of 1999, 8 June 1999, referred to
R v Hansen [1964] Qd R 404, considered
R v Hooper (1999) 108 A Crim R 108, referred to
R v Kennedy [2000] QCA 48; CA No 355 of 1999, 28 February 2000, referred to
R v Martyr [1962] Qd R 398, considered
Rogers v The Queen (1994) 181 CLR 251, considered
The Council of the Shire of Lake Macquarie v Aberdare County Council (1970-71) 123 CLR 327, referred to
Van den Bemd v The Queen (1993-1994) 179 CLR 137, considered
Walton v Gardiner (1992-1993) 177 CLR 378, referred to
Ward v R [1972] WAR 36, referred to

COUNSEL: K M McGinness for the appellant
P D Kelly for the respondent

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

[1] **McMURDO P:** The appellant was charged in the District Court at Bundaberg with one count of stealing water between 1 May 1996 and 1 May 1998 and one

count of doing grievous bodily harm or, alternatively, assault occasioning bodily harm on 4 April 1998. He was convicted of stealing and grievous bodily harm after a three day trial and was sentenced to six months imprisonment for the stealing and three years imprisonment for the grievous bodily harm. He appeals against his conviction and seeks leave to appeal against his sentence.

[2] An indictment was first presented in the District Court at Bundaberg on 19 August 1999 charging the appellant with one count of stealing and one count of grievous bodily harm with no alternative count. A District Court judge in Bundaberg was requested to make a pre-trial ruling on a question of law under s 592A(2)(e) *Criminal Code* as to whether an artificial lens implant in the eye of the complainant in the grievous bodily harm charge was a "defect, weakness or abnormality" under s 23(1A) *Criminal Code*. The learned judge found that: "Doing the best [he could] and without the assistance of any authority …" those words refer to "natural conditions of the body as distinct from conditions brought about by the insertion of foreign objects in the body and … the presence of that lens in the eye is not correctly described as a defect, weakness or abnormality for the purpose of that section."

[3] The prosecutor then endorsed the indictment that the Crown would not proceed further on the count of grievous bodily harm and informed the court that the Attorney-General would refer the matter to the Court of Appeal. The appellant was discharged on that count and was granted a certificate under the *Appeal Costs Fund Act* 1973 (Qld).

[4] Although s 592A(4) *Criminal Code* prohibits an interlocutory appeal by an accused person, s 669A(2) *Criminal Code* allows the Attorney-General to:

> "(2)…refer any point of law that has arisen at the trial[1] upon indictment…to the Court for its consideration and opinion thereon if the person charged has been –
>
> …
>
> (b) discharged in respect of that charge after counsel for the Crown, as a result of a determination of the court of trial on that point of law, has duly informed the court that the Crown will not proceed upon the indictment in relation to that charge;"

[5] It is not clear why the Attorney-General did not refer the legal point to this Court as foreshadowed by the prosecutor. It was not suggested in this appeal that s 669A(2)(b) *Criminal Code* did not apply to pre-trial rulings under s 592A *Criminal Code* but it may be that it was thought the "point of law" here had not "arisen at trial" because this was a pre-trial ruling before arraignment: see s 594, *Criminal Code*. That question was not argued before us and it is neither necessary nor prudent to consider it further.

[6] Seven months later on 12 March 2001 the prosecution presented a fresh indictment, the details of which are set out in para [1] of these reasons, before a different District Court judge in Bundaberg. After arraignment, counsel for the appellant applied to stay the indictment for abuse of process contending that the appellant

---

[1] A trial is deemed to begin when the accused person is called upon to plead to the indictment: s 594(1) and (3) *Criminal Code.*

suffered prejudice and oppression because he was deprived of the advantageous ruling from the first judge; had his trial proceeded at that time he would have been acquitted.

[7] The prosecutor sought leave to reopen the pretrial ruling under s 592A(3) *Criminal Code*.

[8] The learned trial judge found there was no abuse of process because no jury was empanelled on the first occasion when the trial was adjourned; this was an important question of law on which there was no clear authority, the appellant had been granted a certificate under the *Appeal Costs Fund Act* 1973 (Qld); there was no question of double jeopardy or oppression in the prosecution proceeding again on a fresh indictment charging grievous bodily harm. His Honour gave leave to reopen[2] the preliminary application; he was in substantial disagreement with the earlier ruling[3] which overlooked "amazing advances in modern surgery". His Honour ruled that "a defect, weakness or abnormality under s 23(1A) *Criminal Code* includes one which has been brought about by the insertion of a foreign object in the body."

[9] The appellant's first ground of appeal is that the judge should have stayed the indictment as an abuse of process and not reopened the pre-trial hearing.

[10] There has been no explanation why the course outlined by the first judge was not followed by the prosecution although it is by no means certain the Attorney-General has a right of appeal under s 669A *Criminal Code*. There was some delay in applying to reopen the pre-trial application but the trial took place in a circuit court with infrequent sittings. The facts of this case did not require the learned trial judge to exercise his discretion to conclude that the proceedings involved such unacceptable injustice, unfairness[4] or oppression that the proceedings must be stayed because of an abuse of process.

[11] A reopening of a pre-trial hearing should not be lightly undertaken. It is obviously undesirable that there be two conflicting decisions on a matter of law from different judges of the same court. Substantial disagreement with the earlier ruling may not always justify its re-opening. For example, if a party applies for a re-opening of a pretrial hearing solely or primarily for the purpose of judge-shopping, such an application should ordinarily be refused and, if appropriate in all the circumstances, the proceedings stayed as an abuse of process. There was no reason here to compel a conclusion that the prosecution was forum-shopping. The unusual circumstances of this case which involved the interpretation of an uncertain, important and novel point of law did allow, (but not, of course, require) the judge to re-open this pretrial hearing. His Honour cannot be said to have erred in the discretionary exercise involved.

[12] The appellant's first ground of appeal must fail.

[13] The appellant's remaining grounds of appeal against conviction turn on whether the learned trial judge's ruling and subsequent jury directions on s 23(1A) *Criminal*

---

2 *Criminal Code*, s 592A(3).
3 *R v Hooper* (1999) 108 A Crim R 108, de Jersey CJ at 112.
4 *Walton v Gardiner* (1992-1993) 177 CLR 378, Mason CJ, Deane and Dawson JJ, 392-396.

Code were correct. In order to determine that question, it is useful to briefly review the facts.

[14] The appellant lived next to vacant premises owned by Mr Henry, the complainant in the stealing charge. Mr Henry employed Mr Fryer, the complainant in the grievous bodily harm charge, as a casual caretaker of his vacant premises. The prosecution case was that the appellant stole water by running a hose from a tap on Mr Henry's premises to his own premises. Mr Fryer noticed this hose on occasions prior to 4 April 1998 and confronted the appellant, who claimed he was running the hose only because Mr Henry's tap was leaking. Mr Fryer fixed the leak but later observed that Mr Henry's water meter recorded unexplained and unpredictable heavy water usage. He again confronted the appellant who said that local children must have been responsible. In March 1998, Mr Fryer once more noticed that Mr Henry's tap was running whilst connected to a garden hose which led to the appellant's property; the appellant said that it had only been there for half an hour and Mr Fryer told the appellant to remove the hose.

[15] On 4 April 1998, Mr Fryer noticed a vehicle parked in Mr Henry's driveway. He investigated and spoke to the appellant over the back fence. The appellant said the car belonged to his father-in-law, raised his voice in anger and immediately punched Mr Fryer to the left cheekbone and eye area. The appellant then held him by the hair and abused him; he accused the complainant of spying and threatened to kill him if he returned. Mr Fryer was bleeding, vomited and struggled to his car where a friend, who was waiting in the car, assisted him. He made a complaint to police and then sought hospital treatment.

[16] Mr Fryer was examined by Dr Lai who noticed an abnormally shaped iris in the left eye, which had previously had a lens repair for a cataract. He referred the complainant to ophthalmologist, Dr Waite, who later that day observed that the laser lens implant was displaced; instead of sitting behind the pupil and iris, it protruded through the pupil. If left untreated this could lead to iritis which in turn could cause bleeding, a rise in eye pressure and ultimately blindness. Without medical treatment, the injury was likely to cause a permanent injury to the complainant's health. After the eye failed to respond to conservative treatment, Dr Waite operated to reposition the implant. Dr Waite noted that cataract surgery is the most common surgery in Australia and virtually always involves implants. The complainant's eye is presently functioning well but the trauma to it is probably responsible for a rise in interocular pressure (glaucoma) which could cause Mr Fryer future problems.

[17] The appellant gave evidence denying the theft of the water; on 4 April 1998 Mr Fryer was the initial verbal aggressor; although they had heated words he did not assault Mr Fryer. The appellant called a number of witnesses: one heard the verbal altercation with the complainant but did not see any physical assault; others saw children running taps on Mr Henry's property; the appellant's wife did not see the argument or the assault and never saw a hose running from Mr Henry's property to their premises.

[18] Section 23 *Criminal Code* relevantly provides:

> "**23.** (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for –
> …
> (b) an event that occurs by accident.
> (1A) However, under sub-section (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness or abnormality even though the offender does not intend or foresee or cannot reasonably foresee the death or grievous bodily harm."

[19] Sub-section (1A) became operational on 1 July 1997. The meaning of its words "defect, weakness or abnormality" has not previously been considered by this Court.[5] There is no corresponding statutory provision elsewhere in Australia so that no assistance can be gained from other jurisdictions.

[20] The question is one of statutory construction. The interpretation which best achieves the purpose of the legislation is to be preferred: s 14A *Acts Interpretation Act* 1954 (Qld). In the Second Reading Speech of the Criminal Law Amendment Bill[6] the then Attorney-General stated that the amending clause:

> "… will amend section 23, which provides the defence of accident, to overrule the decision of the High Court in *Van den Bemd v The Queen* to the extent that where a person causes death or grievous bodily harm to another then the offender must 'take the victim as he or she finds him or her' if the victim is later shown to have had some defect, weakness or abnormality such as an egg-shell skull."[7]

[21] The appellant submits that these comments demonstrate that the legislature intended, in legislatively overruling *Van den Bemd*,[8] to return to the position where "defect, weakness or abnormality" referred only to constitutional or natural defect, weakness or abnormality and should not be extended to cover a defect, weakness or abnormality caused by artificial or foreign objects in the body. To evaluate that submission, it is necessary to consider *Van den Bemd*, and those cases it overturned.

[22] In *Van den Bemd*[9] the accused was convicted of manslaughter when he struck the deceased on the left side of the neck causing a haemorrhage and death. The deceased may have had a predisposition because of a natural infirmity or because of the consumption of alcohol. The trial judge did not give any direction as to the effect of s 23 of the *Criminal Code* consistent with the approach taken in *R v Martyr*[10] because the blow was a willed act and the death a direct result of it. The jury were therefore not asked to consider whether the Crown had proved that the death was a foreseeable consequence of the blow or was an event which occurred by accident for which the appellant was not criminally responsible under s 23. On

---

5 Although s 23(1A) *Criminal Code* was considered in *R v Charles* [2001] QCA 320; CA No 66 of 2001, 2 August 2001 this point was not touched upon.
6 *Acts Interpretation Act* 1954 (Qld) s 14B.
7 Second Reading , Criminal Law Amendment Bill, 4 December 1996
8 [1995] 1 Qd R 401; (1993-1994) 179 CLR 137.
9 (1993-1994) 179 CLR 137.
10 [1962] Qd R 398.

appeal, the appellant challenged that ruling and asked the Court of Appeal to consider the correctness of *Martyr* which was apparently approved by the High Court in *Mamote-Kulang of Tamagot v The Queen*[11] and was followed by the Queensland Court of Appeal in *R v Hansen*.[12] In *Van den Bemd* the Court of Appeal noted:[13]

> "It is not easy to reconcile all of the reasoning in those cases. *Mamote-Kulang* and *R v Hansen*, like *R v Martyr*, adopted an interpretation of s 23 that views its function as being primarily causal, meaning that under it a person remains criminally responsible for a consequence of his willed act if that consequence is 'immediate and direct', notwithstanding that, by reason of circumstances that were unknown and even unknowable, it was not reasonably foreseeable by a person of ordinary intelligence."

The essence of the Court of Appeal decision in *Van den Bemd* was that "*R v Martyr* is no longer good authority. The test of criminal responsibility under s 23 is not whether the death was an 'immediate and direct' consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it"[14]; that question should have been put to the jury.

[23] On appeal to the High Court, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in refusing special leave noted that the question was essentially one of statutory construction the answer to which does not depend upon an important point of principle and "[t]he words of the section are inherently susceptible of bearing the meaning placed upon them by the Court of Appeal."[15]

[24] Neither the High Court nor the Court of Appeal were concerned with the meaning of "defect, weakness or abnormality" but rather the circumstances when the question of whether an "event that occurs by accident" under s 23 *Criminal Code* can be left for the jury's determination. *Martyr* excluded the defence of accident from the jury's consideration if the immediate and direct consequence of the willed act was the event. After *Van den Bemd*, the question for the jury in determining the defence of accident became whether the event could reasonably have been foreseen as a consequence of the willed act by an ordinary person. The meaning of the words "defect, weakness or abnormality" was not considered.

[25] The appellant emphasises the following passages in *Martyr* as supporting the conclusion that a "defect, weakness or abnormality" in s 23(1A) *Criminal Code* refers only to natural conditions of the body. Mansfield CJ stated:

> "'Accident' therefore, in my view does not include an existing physical condition or an inherent weakness or defect of a person, such as an egg-shell skull, or as in this case, a possible inherent weakness in the brain."[16]

Philp J observed:

---

11 (1963-1964) 111 CLR 62.
12 [1964] Qd R 404.
13 [1995] 1 Qd R 401, Davies and McPherson JJA and de Jersey J at 403
14 Ibid 405
15 (1993-1994) 179 CLR 137 at 139
16 [1962] Qd R 398 at 407

> "I will assume that [the] death would not have resulted from the blows if [the deceased] had not been suffering from some invisible and highly unusual weakness or constitutional abnormality. … the fact that [the deceased] had a constitutional abnormality did not in my view make his death an 'accident' as that word is used in the section. If a haemophilic bleed to death from a small cut, his death cannot be said to be an accidental outcome of the cut.
>
> The words under discussion I think have operation in the following circumstances. If a non-fatal blow be struck and there supervenes upon the blow an unforeseeable happening whereby the actual fatal force is applied to the body of a victim, his resultant death occurs by accident. But that is not the case here since here the death was the immediate – the direct result of the willed act. What I have said does not only apply to homicide. If a man not knowing whether a vase is fragile or not deliberately taps it and it thereupon shatters, the shattering, in my view, is not an event which occurs by accident."[17]

Townley J noted:

> "It would also appear that the blows struck by the appellant were not such as to be likely to cause the death of a person in an ordinary or normal condition of health and that the deceased probably had some inherent weakness of the blood vessels of the area of the brain in which the haemorrhage occurred."
>
> "In this case, it is admitted that the appellant intentionally struck the deceased a blow or blows which, on the evidence, directly caused his death. In those circumstances, the death was not, in my opinion, an event which occurred by accident."[18]

[26] The appellant also emphasises that the term "constitutional defect" was used in both *Mamote-Kulang*[19] and *Ward v R*.[20]

[27] *Martyr*, *Mamote-Kulang* and *Ward* all involved victims suffering constitutional or natural defects, weaknesses or abnormalities. Those cases established the principle, subsequently overturned in *Van den Bemd*, that an offender is responsible for the direct and immediate results of the offender's intentional act, even where the result is not reasonably foreseeable. In applying that principle to the facts in each of those cases, which involved only natural conditions of the body, the courts were not limiting that principle to natural or constitutional bodily conditions. The comments of the then Attorney-General at the time of the Second Reading Speech, that the purpose of s 23(1A) *Criminal Code* was to overrule *Van den Bemd*, do not therefore support the appellant's contention.

[28] Indeed, it seems unlikely the legislature would wish to so limit the words "defect, weakness or abnormality". Modern surgical techniques increasingly involve the

---

17 Ibid 414-415.
18 Ibid 416-417
19 (1963-1964) 111 CLR 62.
20 (1972) WAR 36.

use of prostheses not only in eye surgery but also in other fields, for example, orthopaedics, hernia repairs and heart surgery. The words "defect, weakness or abnormality" should here be given their current meaning consistent with changing technology: *The Council of the Shire of Lake Macquarie v Aberdare County Council*.[21] The Macquarie Dictionary[22] defines "defect" as "1. a falling short; a fault or imperfection. 2. Want or lack, esp. of something essential to perfection or completeness; deficiency." "Weakness" is defined as "1. a state or quality of being weak; feebleness. 2. a weak point, as in a person's character; slight fault or defect." "Abnormality" is defined as: "1. an abnormal thing, happening or feature; 2. deviation from the standard, rule or type, irregularity."

[29] Here the lens implant remedied the inherent weakness or defect in the complainant's eye caused by naturally occurring cataracts. But the lens implant left the complainant with an abnormality in that he was different from the "normal" person. As a result of the appellant's act and Mr Fryer's abnormality, Mr Fryer suffered grievous bodily harm which was not excused under s 23 *Criminal Code*. Were the appellant's contention correct, any defect, weakness or abnormality caused by a previous assault, surgery, motor vehicle accident, sporting or war injury would be excluded from the words "defect, weakness or abnormality" in s 23(1A) *Criminal Code* as not being "natural" or "constitutional". It is implausible that the legislature had such an intention in enacting s 23(1A) *Criminal Code*. Adopting either the purposive approach to statutory construction or simply giving the words their ordinary meaning, the term "abnormality" in s 23(1A) *Criminal Code* includes the condition of those who have had lens implants in the course of surgery to remedy cataracts. The learned primary judge was right to so conclude and to direct the jury accordingly. The remaining grounds of appeal against conviction must also fail. It follows that the appeal against conviction must be dismissed.

[30] At the conclusion of the hearing this Court granted the application for leave to appeal against sentence, allowed the appeal against sentence and as to the stealing offence ordered the appellant be sentenced to six months imprisonment fully suspended with an operational period of two years and as to the offence of grievous bodily harm ordered the appellant be sentenced to a period of 18 months imprisonment suspended forthwith with an operational period of two years. The Court noted that it would publish its reasons later, observing that if the appeal against conviction were successful, it would be unnecessary to determine the application for leave to appeal against sentence.

[31] The appellant was 52 years old at the time of sentence and had no relevant previous convictions. He was a married man with a good work history who had performed National Service between 1969 and 1971. The assault occurred in the heat of the moment when the appellant briefly lost his temper. The injuries were inflicted by a single blow. The learned sentencing judge did not sentence the appellant on the basis that the appellant knew the complainant had lens implants. The appellant has had the disadvantage of these offences hanging over his head since 1998 and that delay has been no fault of his. Mr Fryer has made a full recovery although there is a real prospect that he may have further complications in the future.

---

21 (1970-1971) 123 CLR 327

22 2nd revised ed, Macquarie Library, 1991.

[32] There are serious aspects to the offence of grievous bodily harm. The community and the courts will not tolerate the use of violence in neighbourhood disputes such as this and a deterrent sentence must be imposed. The victim impact statement reveals Mr Fryer was understandably deeply distressed by the assault and remains concerned about the long term prognosis as to his eye. The complainant was 10 years older than the appellant.

[33] Overall however, the factors in the appellant's favour bring this case within the limited category of assaults resulting in grievous bodily harm where a period of imprisonment could have been fully suspended or suspended after a comparatively short period. See, for example, *R v Bennett and Bennett*[23] and *R v Camm*.[24] The appellant here has already served 142 days. The comparable sentences relied on by the respondent include *R v Amituanai*[25] and *R v Kennedy*.[26] In the former, the unfortunate complainant suffered serious permanent brain damage which gravely and permanently impaired his prospects of a happy and useful life. In the latter, the applicant took vigilante action through a home invasion and had a number of recent convictions involving weapons. Both were much more serious than this offence. The sentence imposed on appeal by this Court in *R v Francisco*,[27] namely the immediate suspension of a two year sentence with an operational period of three years after the applicant served 113 days, also supports the orders made here.

[34] For these reasons, this Court granted the appellant's application for leave to appeal against sentence, allowed the appeal, and made the subsequent orders on 3 August 2001 set out in [30] of these reasons. The only further order now necessary is to dismiss the appeal against conviction.

Order: The appeal against conviction is dismissed.

[35] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of the President and Thomas JA. I agree with the orders proposed by Thomas JA and, with one exception, with his reasons. That exception is as follows.

[36] I would pose as the principal question: whether an eye, in which there has been surgically implanted a plastic lens, is thereby abnormal.

[37] The appellant's punch dislodged a plastic lens surgically inserted in the complainant's left eye causing the lens to protrude through the pupil. It was because the complainant's left eye had the lens inserted in it that he suffered grievous bodily harm.

[38] The complainant's left eye was, in my opinion, abnormal because it had the lens inserted in it. That lens abnormally altered that eye; in particular, it abnormally altered the way in which the eye functioned. Consequently it can be said that the grievous bodily harm resulted to the complainant because of an abnormality of his left eye.

---

23 [1999] QCA 46; CA Nos 443 and 449 of 1998, 26 February 1999.
24 [1999[QCA 101; CA No 431 of 1998, 1 April 1999.
25 [1995] QCA 80; CA No 524 of 1994, 28 March 1995.
26 [2000] QCA 48; CA No 355 of 1999, 28 February 2000.
27 [1999] QCA 212; CA No 59 of 1999, 8 June 1999.

[39] The lens alleviated an actual abnormality in the complainant's eye and created an artificial one in it. Where Justice Thomas and I disagree, I think, is that his Honour would be prepared to describe the artificial substance as the abnormality whereas I would, in this case, describe the eye with the artificial substance inserted as constituting the abnormality.

[40] In many cases, like this, the insertion of an artificial substance may cause an existing bodily part to function abnormally; obvious examples, apart from the present one, are a pacemaker inserted in the heart and a device inserted in the ear to improve hearing. In many others such an insertion may replace an existing bodily part, as in a transplanted heart or kidney or an artificial joint, causing the body to function abnormally. And, as Thomas JA has pointed out, foreign matter may enter the body unintentionally, for example something swallowed or shrapnel from a war wound, resulting in bodily abnormality. I think that the phrase "defect, weakness or abnormality" in s 23(1A) is intended to include bodily abnormalities however caused.

[41] During the course of argument in this case reference was made to the not uncommon habit, these days, for some people to decorate their bodies by things attached artificially, the most common examples being rings inserted in ears or noses or navels. However though each of these may still be considered abnormal, and may themselves be described as abnormalities, I do not think that they result in any bodily abnormality in the sense in which that word is used in the above phrase. Their superficial nature and the fact that they have no effect on bodily function is sufficient, in my opinion, to preclude that. But it is unnecessary to reach any final view on that in this case.

[42] I would adopt the reasoning of Thomas JA to conclude that there is nothing in the legislative history of s 23, the way in which it was construed before the introduction of subsection (1A) or any extrinsic material which would restrict its operation to abnormalities naturally caused or preclude the construction of it which I have reached.

[43] Thomas JA's statement of the principal question as whether the existence of a surgically implanted plastic lens in the eye of a complainant is a defect, weakness or abnormality for the purpose of s 23(1A) adopts the way in which the learned trial judge first put the matter to the jury in his summing up. However the learned trial judge's direction to them was then in the following terms:

> "I direct you, as a matter of law, that a defect, weakness or abnormality may be constituted either by the natural condition of Mr Fryer's body or by the condition of Mr Fryer's body brought about by the insertion of a foreign object in the body of Mr Fryer, that is the artificial lens implant.
>
> In the eyes of the law it does not matter at all if the defect, weakness or abnormality results from the insertion of a foreign object in the body, that is the artificial lens implant."

In giving this direction his Honour appears rather to be adverting to the question which I have posed.

[44] It may well be that the learned trial judge did not distinguish between these two questions because, in his earlier ruling, he said:

> "I consider that the phrase 'defect weakness or abnormality' includes a defect, weakness or abnormality that has been brought about by the insertion of a foreign object in the body."

Here again his Honour appears to have in mind the question which I have stated.

[45] In my opinion it is not necessary to resolve this apparent uncertainty in the learned trial judge's directions because even if, in the present case, the plastic lens was not relevantly an abnormality for the purpose of s 23(1A) (as to which I express no opinion) the eye in which the lens was inserted was abnormal and that abnormality was a cause of the grievous bodily harm. The need to negative this conclusion in order to succeed in this appeal was adverted to by Mrs McGinness, for the appellant, in her submission:

> "that if one looks to the ordinary meaning of these words, they cannot be seen to apply to the laser implant or to the state of the body after correction by that implant".

[46] As I think an affirmative answer must have been given to the question which I have posed I agree with the orders proposed by his Honour.

[47] **THOMAS JA:** The appellant was convicted of grievous bodily harm.

[48] The primary question that arises on this appeal may be stated as follows –

> Is the existence of a surgically implanted plastic lens in the eye of a complainant a "defect, weakness or abnormality" for the purposes of s 23(1A) of the Code?

[49] The question arose in this way. The complainant had cataracts in both eyes. He underwent surgery which resulted in the implanting of a plastic lens in each eye. Such a lens is secured with wire hooks behind the pupil and iris, and is sometimes referred to as a "laser implant". The offence was committed by the appellant punching the complainant once in the vicinity of his left eye. This caused the implant to be displaced and to protrude through the pupil. If left in that position it was likely to cause irritation of the iris which would, if left untreated, present a serious risk of blindness. Corrective surgery was performed which successfully repositioned the lens. It is common ground that in these circumstances the expanded definition of "grievous bodily harm" was satisfied. It is also accepted that but for the existence of the laser implant, grievous bodily harm would not have been caused.

[50] The question remains whether the appellant was criminally responsible for causing that grievous bodily harm.

[51] Section 23 relevantly 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; or
>
> (b) an event that occurs by accident.
>
> **(1A)** However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that

> results to victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or cannot reasonably foresee the death or grievous bodily harm."

[52] A ruling was obtained from a District Court judge under s 592A of the Code to the effect that the words "defect, weakness or abnormality" refer to natural conditions of the body as distinct from conditions brought about by the insertion of foreign objects such as the laser implant. A nolle prosequi was then entered and the appellant was discharged. However, a considerable time later, a fresh indictment was presented before another District Court judge who strongly disagreed with that ruling, "reopened" it and ruled to the contrary. The trial then proceeded and the appellant was convicted. I shall return later to the consequences, if any, of the procedures that were followed. For the moment it is necessary to determine whether the second ruling was in substance correct.

"Defect, weakness or abnormality?"

[53] After much consideration by the courts it may now be said with reasonable confidence that the "event", contemplated by s 23(1)(b) is the consequence of the relevant actions of the accused[28]. In the present matter the "event" is the consequence to the victim, that is to say the grievous bodily harm that in fact occurred.

[54] The terms of s 23(1A) seem curious unless it is understood that its purpose is to reverse something that would not otherwise be particularly obvious from reading the section. Its purpose is to reverse the judicial rule which was introduced in *R v Van den Bemd*[29]. This is clear when one traces the history of decisions interpreting s 23, and is confirmed both by the explanatory notes[30] and the second reading speech[31].

[55] Such a provision would have been unnecessary before this court's decision in *Van den Bemd* which was delivered in October 1992. Under earlier authorities[32] an offender had to "take the victim as he finds him" even if the consequences were not necessarily foreseeable because of a weakness or condition such as an eggshell skull. The position was strikingly exemplified by Philp J in *R v Martyr*[33] -

> "What I have said does not only apply to homicide. If a man not knowing whether a vase is fragile or not, deliberately taps it and it thereupon shatters, the shattering, in my view, is not an event which occurs by accident.[34]"

The effect of *Van den Bemd* was to make reasonable foreseeability a relevant issue in determinations under s 23(1)(b). The most common situation in which it arose was in cases where the relevant consequence (eg grievous bodily harm) would not

---

28 See *Vallance* (1961) 108 CLR 56; *Mamote-Kulang v The Queen* (1964) 111 CLR 62; *Timbu Kolian* (1968) 119 CLR 47*; Kaporonovski* (1973) 133 CLR 209*; Falconer* (1990) 171 CLR 30 and *R v Morgan,* CA 131 of 1999, 11 September 1999.

29 [1995] 1 Qd R 401*;* special leave refused in High Court 1993-1994, 179 CLR 137.

30 *Queensland Acts* 1997 Vol 1 "Explanatory Notes" at 290.

31 Criminal Law Amendment Bill, 4 December 1996, Hon DE Beanland 4 December 1996, at 26.

32 *R v Callaghan* [1942] St R Q 40*; R v Martyr* [1962] Qd R 398*; Mamote-Kulang* above.

33 *Martyr* above.

34 Ibid at 415.

have occurred but for the existence of an unknown weakness or condition of the victim. Formerly, accidental "events" were rare, and defences were more readily found in unwilled acts (s 23(1)(a)) than in unwilled results (s 23(1)(b)). The 1997 Act specifically set out to remove the extension that V*an den Bemd* had made to the operation of s 23(1)(b). The effect of the amendment however is not necessarily to restore precisely the position that stood in *R v Martyr*. The words of the amendment need close examination. It should be remembered that the amendment was made in 1997 when the legislature should be taken to be aware of the progressive achievements of modern medical science.

[56] The main argument for the appellant, presented by Mrs McGinness, is that the words "defect, weakness or abnormality" should be taken to refer only to natural physical conditions of the human body. The discussion in the earlier cases (*Martyr*, *Mamote-Kulang*[35] and *Ward*[36]) dealing with what is now s 23(1)(b) refer to such matters as "highly unusual weakness", "constitutional abnormality", "inherent weakness", "any existing physical condition or an inherent weakness or defect of a person"[37], "abnormality"[38] and "constitutional defect"[39]. Those discussions had the effect of ruling out "accident" as a defence when such conditions existed. There is however no reason to think that the result would necessarily have been any different had the question of a vulnerability through the presence of a surgical device been raised. Such a question does not seem to have previously arisen. The fact that earlier discussions centred on natural conditions are by no means decisive of how the words "defect, weakness or abnormality" in the 1997 amendment should now be read.

[57] I do not think that the above historical discussion suggests that the words should be read down as Mrs McGinness submits. Modern surgery has made commonplace the insertion of many kinds of prothesis, the transplantation of organs, and the performance of operations which intentionally leave behind supporting fibres, plates, screws and other items that are designed to assist the patient to get on with his or her life. In the context of medical and surgical intervention, these items or devices are invariably introduced to cure, supplement or relieve a natural abnormality, defect or injury. Within those words I would include the consequences of trauma and disease. It would in my view be absurd in the present context to endeavour to distinguish between a natural abnormality and an abnormality as alleviated by medical or surgical intervention. I would add that in my view a surgical improvement of the present kind fairly fits the description "abnormality" within the ordinary comprehension of that term.

[58] No doubt difficult cases will arise at the fringes, but it seems to me that when the function of an item or such device is the direct result of medical or surgical intervention to ameliorate a natural weakness or constitutional abnormality, the result should be regarded as an "abnormality" for the purposes of s 23(1A).

[59] The term "abnormality" in my view would include transplanted organs, scars (natural or surgical) and would include other abnormalities such as fragments of

---

35 *Mamote-Kulang* above.
36 (1972) WAR 36.
37 *Martyr* at 414, 416 and 407 respectively.
38 *Mamote-Kulang* above at 64.
39 *Ward v R* above.

shrapnel or a coin lodged in a digestive organ. I will leave open the question whether alterations for purely cosmetic purposes should properly be so regarded. The wearing of ornaments or jewellery would however not seem to fit within the above terms, and if such an object produced a more serious injury than was reasonably foreseeable, a *Van den Bemd* defence would still appear to be available.

[60] The issue stated in para [48] above is that which was here argued. I do not disagree with Davies JA's view that "abnormality" may embrace the combination of the original condition together with the implant. The evidence in the present case was clear enough to permit a narrower focus upon the mere presence of the implant. There will be other cases where it will be appropriate to look at the combined effect of the original abnormality and the implant. In neither case will a defence arise under s 23(1)(b).

[61] I conclude that the ruling given in respect of the second indictment by the learned District Court judge was correct and that it was not open to the defence to rely upon a s 23 defence.

Objection to "re-opening" procedure

[62] When the first District Court judge had ruled against the Crown in determination under s 592A a nolle prosequi was entered. The Crown prosecutor then intimated that the matter would be referred to the Court of Appeal, no doubt by means of an Attorney-General's reference under s 669A(2).

[63] However the appellant had not at that stage been arraigned. It follows that the trial had not begun[40]. As the s 669A(2) procedure is only available in respect of a point of law "that has arisen at the trial" this was no doubt later seen by the prosecution as some sort of impasse. Some time later the prosecution saw fit to present another indictment before a different District Court judge.

[64] Where there is a pre-trial or ruling which in effect destroys the prosecution, and the case or the point is seen to be important, the preferable procedure for the Crown is to have the accused arraigned, and request that the ruling be repeated. That would seem to open the way to a reference under s 669A(2)) for a determination of the point of law that has arisen. This point has not been fully argued, but as at present advised I see no good reason to think that such a procedure would not be available to the Crown in such a case.

[65] The procedure in the present case was unfortunate and open to interpretation as forum shopping. One District Court judge does not have appellate power over another, and in the ordinary case the fact that second judge disagrees with the opinion of another on a point of law would not be sufficient reason for re-opening the s 592A ruling. However I am not prepared to say that this can never be done. The decision of the second judge in this matter can be upheld in the special circumstances of the original ruling having been given in circumstances where the Crown had no access to the court under s 669A(2), where the appellant had been granted a certificate under the *Appeal Costs Fund Act*, and where the original ruling was arguably incorrect. A "special reason" is necessary before a pre-trial ruling

---

[40] *Criminal Code* s 594.

under s 592A may be re-opened[41]. In the circumstances I am not prepared to hold that the second District Court judge erred in proceeding to re-open the original ruling. I repeat however that where such a situation arises the correct course is for the Crown to have the point determined under s 669A(2) rather than bring proceedings by means of obtaining an inconsistent ruling from another judge. Whilst no estoppel was created by the first ruling, such a situation approaches "the scandal of conflicting decisions", which in the circumstances of *Rogers v The Queen*[42] was considered by the majority as requiring the stay of further proceedings.

[66] In the present case, even if it were thought that error occurred in the re-opening of the earlier ruling and in the failure to grant a stay, it seems to me that the error lies in the sequence and timing rather than in the quality of the eventual trial upon which the appellant was convicted. The original ruling did not free the appellant from jeopardy. A s 669A(2) procedure could have been arranged, and once the appropriate interpretation of s 23 was obtained it was and would be appropriate that he be brought to trial. In the circumstances the appellant was tried before a jury who heard the evidence and to whom the law was correctly explained. In my view no miscarriage of justice has in fact occurred, and if there was a procedural error it would be appropriate that the proviso be applied.

Sentence

[67] I agree that the sentence that was imposed was manifestly excessive. I agree with the order for a substituted sentence that was made at the end of the appeal hearing and with the President's reasons for the substituted sentence.

Order

[68] The appeal should be dismissed.

---

41 Section 592A(3).

42 (1994) 181 CLR 251, 280.