SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Rourke* [2003] QCA 220
PARTIES:	**R** **v** **O'ROURKE, Lachlan Maurice** (applicant/appellant)
FILE NO:	CA No 38 of 2003 DC No 2325 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2003
JUDGES:	McPherson JA, White and Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – JOINT TRIAL OF SEVERAL PERSONS – where application for separate trials rejected – where application made after change in legal representation for the appellant – whether trial judge erred in law by refusing to order a separate trial CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE EVIDENCE CIRCUMSTANTIAL – where appellant convicted on one count of grievous bodily harm – where witnesses gave conflicting reports – whether verdict unsafe or unsatisfactory CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO

ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant convicted of one count of grievous bodily harm – where sentenced to three years' imprisonment – where applicant seeks leave to appeal against sentence – where applicant has criminal history – where unprovoked attack on someone previously unknown to applicant – whether the sentence imposed was manifestly excessive

M v The Queen (1994) 181 CLR 487, applied
R v Elliott [2001] QCA 507; CA No 168 of 2001, 14 November 2001, considered
R v Richmond [1997] QCA 321; CA No 233 of 1997, 17 July 1997, considered
R v Weare [2002] QCA 183; CA No 54 of 2002, 31 May 2002, distinguished
Webb & Hay v The Queen (1994) 181 CLR 41, applied

COUNSEL: R Clifford for the appellant
D A Holliday for the respondent

SOLICITORS: Lake Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MCPHERSON JA**: I agree with the reasons of Wilson J for dismissing this appeal against conviction. I also agree with her Honour's reasons for refusing the application to appeal against sentence.

[2] **WHITE J**: I have read the reasons for judgment of Wilson J and agree with her Honour that the appeal against conviction should be dismissed and the application for leave to appeal against sentence should be refused.

[3] **WILSON J**: Lachlan Maurice O'Rourke was found guilty of having unlawfully done grievous bodily harm to Jason Gary Iselin. He was sentenced to 3 years imprisonment. This is an appeal against his conviction and an application for leave to appeal against the sentence.

[4] The charge arose out of an incident at the Hemmant Hotel on 7 December 2001. The appellant and Trevor Thompson were jointly charged. The prosecution case was that the appellant struck the complainant and that Thompson aided him. The complainant sustained a fractured cheekbone and lower facial fractures as well as an undisplaced fracture of the temporal bone just above his left ear. The jury convicted the appellant, but acquitted Thompson.

Trial Judge's refusal to order separate trial

[5] The first ground of appeal was that the trial judge erred in not ordering a separate trial of the appellant after he withdrew his instructions to Mr Rosser of counsel and Grays Lawyers.

[6] The trial commenced on Wednesday 15 January 2003. The defendants were represented by the same counsel (Mr Rosser) and solicitors (Grays). The Crown case finished at the end of the first day. When called upon, the appellant responded

through Mr Rosser that the defence would be giving evidence. The next morning (Thursday 16 January) the trial judge was informed that the appellant had withdrawn his instructions to Mr Rosser and the solicitors. The trial judge agreed to adjourn the trial until the following Monday (20 January) to allow the appellant to obtain separate legal representation. His Honour quite properly told the jury simply that a matter had arisen which made it inconvenient for the trial to proceed that day and that it would resume on Monday.

[7] On the Monday morning Mr R Clifford of counsel announced his appearance on behalf of the appellant. He was instructed by Lake Lawyers. Mr Clifford asked the trial judge for a separate trial for the appellant. He said the application was "based on fairness to Mr O'Rourke. Obviously there are some matters that have arisen on the first day of the trial that were of some concern to him where he wanted to separate himself from his legal representation." The trial judge refused the application saying it was a classic case calling for a joint trial, and offered to give the appellant a further election whether to give or call evidence. Mr Clifford responded that the appellant intended giving evidence. The jury were brought in, and the trial judge invited Mr Clifford to announce his appearance in front of them. He did so, and the judge told the jury that there had been a change of legal representation for the appellant, and that Mr Rosser would continue to represent Thompson. The trial proceeded. The jury retired to consider their verdict on the Tuesday afternoon.

[8] It was submitted on behalf of the appellant that the jury were left to ponder why there had been a change of legal representation for the appellant, but not for the co-accused and that they may have taken a prejudicial view of him in the circumstances. Further, it was submitted that had a separate trial been ordered, there would have been further cross-examination of Dr Voltz, a medical practitioner who had given evidence during the prosecution case. Neither of these points was taken before the trial judge. There was no application that Dr Voltz be recalled.

[9] It was within the discretion of the trial judge to sever the trial of the appellant after the joint trial had commenced. However, as the High Court affirmed in *Webb v The Queen* (1994) 181 CLR 41 it is prima facie desirable that coaccused who have been jointly charged be tried together. There is a public interest in the efficient despatch of trials, and in the conserving costs and inconvenience to witnesses by their having to attend a number of trials. However, prejudice to an accused which cannot be surmounted by an appropriate direction will call for separate trials. An appellate court will not interfere with a trial judge's exercise of the discretion whether to order separate trials unless there has been a resultant substantial miscarriage of justice. In the present case there is no foundation for the claim of prejudice, especially given that the appellant and Thompson gave similar evidence. They did not try to blame each other: to the contrary, their evidence was to the effect that the complainant Iselin was the aggressor, and that the appellant struck back in self defence.

[10] Dr Voltz was a medical practitioner with specialist qualifications in oral and maxillofacial surgery. He also had a degree in dentistry. It seems that Mr Clifford would have liked to have cross-examined Dr Voltz about his expertise - apparently with a view to showing that the extent of the injury was not such that it could amount to grievous bodily harm. There is no substance in the submission that the

appellant was substantially prejudiced by the absence of such further cross-examination of Dr Voltz.

Whether the verdict was unsafe and unsatisfactory

[11] The next ground of appeal is that the verdict was unsafe and unsatisfactory. Upon the whole of the evidence, was it open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty - bearing in mind that the primary responsibility for determining guilt or innocence rests with the jury: *M v The Queen* (1994) 181 CLR 487 at 494-5?

The Evidence

[12] The appellant and the complainant were not known to each other. The complainant arrived at the hotel with a workmate after finishing work at about 2.30pm. He started drinking in the public bar. A few hours later the appellant arrived at the hotel in company with three other men (the co-accused Thompson, Michael McKinnon and Bruce Tooman) and a young woman Lauren Sullivan to whom they had given a lift. The appellant, Thompson, McKinnon, Tooman and Ms Sullivan were together around a table in the lounge bar area. The complainant and his workmate joined them. The bar manager recalled hearing yelling and seeing Thompson being aggressive towards the complainant, but things settled down without his intervention.

[13] The complainant and Ms Sullivan recalled that the complainant was asked if he wanted to go outside for a smoke - which he took to mean a joint of cannabis. The complainant thought the invitation was extended by the appellant, whereas Ms Sullivan thought it was Thompson who asked the complainant outside. The evidence of the complainant, Ms Sullivan and the bar manager Mr Madden was that the appellant and Thompson left the table and that the complainant followed a short time later.

[14] The complainant's evidence was that he went outside to a courtyard area, where he found the appellant about 8 metres from the glass door which led into the courtyard. He started to walk towards the appellant. The appellant advanced toward him and grabbed him. The complainant said something like "Fuck off, mate. Why?" and the appellant replied "You're fucked". Thompson came from the left, taking up a position about 3 - 4 metres away, blocking his re-entry into the hotel. The complainant's next and last recollection was of being on the ground and something hard (not a fist) hitting his face. It was open to the jury to infer that he was kicked.

[15] The appellant said he could not recall anyone inviting the complainant outside for a smoke. His evidence was that Thompson got up to go to the toilet. Then he saw the complainant go out. He finished his last beer and went out of the hotel. As he came out Thompson was on his left and the complainant was on his right. The complainant had Thompson by the scruff of his shirt. The appellant said something to try to break it up, when the complainant turned on him saying "Fuck off, you fat cunt", whereupon the complainant "swung a wild fist at me from his right hand". The complainant threw a further fist at the appellant, hitting him on the lower jaw. The appellant fought back. Thompson was walking towards his car saying "No". The complainant grabbed the appellant around the throat and the appellant fell on top of him on the complainant.

[16] Thompson's evidence was that he went to the toilet. When he emerged, he walked out the back door, and was confronted by the complainant who grabbed him by the shirt and said something about him being fucked. The complainant grabbed Thompson and shook him. Thompson grabbed the complainant around the shoulders. No blows had been exchanged when the appellant came out of the door and said something like, "Leave him go". The complainant gave Thompson a punch and then turned to the appellant and swung at him twice. Thompson was moving back toward his car. He was about 2 – 3 metres from them when the complainant hit the appellant on the jaw. There was a struggle between the appellant and the complainant. They fell to the ground. The appellant got up. The complainant tried to grab him around the leg to bring him back down. The appellant got free and put his foot on the complainant's chest, telling him to stay down. Thompson said he did not see the appellant put his foot on the complainant's head.

[17] The bar manager said he found the complainant lying on the ground. He saw the appellant and Thompson walking away and yelled out, "What are youse doing?" The appellant and Thompson ran away and got into a vehicle.

[18] It was open to the jury to prefer the evidence of the complainant to that of the appellant and Thompson as to the circumstances of the assault. Ms Sullivan supported the complainant's version that he was invited outside for a smoke. On either version there was a short and quite sharp exchange of blows between the complainant and the appellant. In these circumstances the jury may well have been left in doubt as to whether Thompson aided in the assault by blocking the complainant's potential means of escape. There is nothing inherently inconsistent in their finding the appellant guilty, but not being satisfied beyond reasonable doubt of Thompson's guilt.

[19] I am not persuaded that the verdict against the appellant is unsafe and unsatisfactory.

Sentence

[20] The appellant seeks leave to appeal against the sentence of three years imprisonment on the ground that it was manifestly excessive in all the circumstances. He seeks a suspension of the sentence after 8 months.

[21] The appellant was born on 10 September 1970 – so that he was aged 31 at the time of the offence. He had a criminal history including assault occasioning bodily harm in 1990 for which he was given community service and probation; a series of stealing offences in 1990 for each of which he was given probation; a series of break and entering offences and dishonesty offences and an offence of assault with intent to prevent detention in 1996 and 1997 for which he received a head sentence of 4½ years with a recommendation for parole after 15 months.

[22] This was a serious example of grievous bodily harm involving an unprovoked attack upon someone previously unknown to the appellant. The appellant was convicted after trial, and showed no remorse. The injuries to the complainant were serious, and but for surgery would have left him disfigured and with a gross maladjustment of his jaw.

[23] The appellant had an unfortunate childhood with the death of his father and the subsequent alcoholism and suicide of his mother. As the sentencing judge noted, he had had a considerable time in which to address problems arising from those tragedies. The sentencing judge made a recommendation that he be provided with psychological treatment.

[24] At the time of sentence the appellant had recently taken up a new job, with some prospects of fulltime training and advancement. He was in a relationship with a young woman who was pregnant with his child.

[25] The decision in *R v Weare* [2002] QCA 183, CA No 54 of 2002 relied on by the appellant is not truly comparable. It was a case of an unprovoked attack on a hotel patron. But Weare was only 19 and with no previous convictions for violence. He pleaded guilty and made full admissions. He was sentenced to 3½ years imprisonment; this was altered on appeal by the addition of a suspension after 12 months.

[26] The decisions in *R v Richmond* [1997] QCA 321, CA No 233 of 1997 and *R v Elliott* [2001] QCA 507, CA No 168 of 2001 relied on by the prosecution demonstrate that the sentence imposed was within range. In all the circumstances the sentence was a fair one, and the appellant has not demonstrated that the sentencing judge erred in failing to make provision for early release.

[27] I would dismiss the appeal against conviction and dismiss the application for leave to appeal against sentence.