SUPREME COURT OF QUEENSLAND

CITATION:	*R v Burton* [2003] QCA 370
PARTIES:	**R** **v** **BURTON, Zeph Ryan** (appellant)
FILE NOS:	CA No 93 of 2003 CA No 131 of 2003 DC No 3278 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2003
JUDGES:	Williams JA, Muir and Holmes JJ Separate reasons for judgment of each member of the Court, Muir and Holmes JJ concurring as to the orders made, Williams JA dissenting in part
ORDERS:	**1. Allow the appeal and set aside the conviction on count 2 of the indictment** **2. Direct that verdict and judgment of acquittal be entered on count 2** **3. Dismiss the appeal on count 1 on the indictment** **4. Grant leave to appeal against sentence** **5. Allow the appeal against sentence** **6. Set aside the existing term of imprisonment on count 1 of the indictment and substitute a term of imprisonment of six months wholly suspended with an operational period of two years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where appellant convicted on two counts of assault occasioning bodily harm in company whilst armed – where raised the defence of self-defence – where learned primary judge did not direct jury that

for self-defence the force used had to be reasonably necessary to make effectual defence – whether directions were inadequate as to defence of self-defence – whether convictions should be set aside

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where the appellant was sentenced to 12 months imprisonment suspended after two months with an operation al period of two years on each of two counts of assault at age 20– where conviction on one count quashed on appeal and appellant re-sentenced on the remaining count – where appellant's criminal history minimal – whether in the circumstances the sentence originally imposed was manifestly excessive

Criminal Code 1899 (Qld), s 271(1), s 274, s 275, s 277, s 283

R v Lawrie [1986] 2 Qd R 502, referred to

COUNSEL: M J Byrne QC for the appellant
C W Heaton for the respondent

SOLICITORS: A W Bale & Son for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Muir J wherein the relevant issues raised by counsel for the appellant on the hearing of the appeal are discussed. I agree that the summing-up was defective in that it did not adequately explain self-defence, particularly in the context of what the jury may have considered were two separate assaults by the appellant on Vels; it was open to the jury on the evidence to find there was an initial assault by the appellant on Vels, and then a threatened more serious assault by Vels on the appellant which justified the latter acting in self-defence. The jury was never directed that for self-defence to be made out the force used had to be "reasonably necessary to make effectual defence against the assault." As the jury was not directed that there was such relativity between the force used by way of self-defence and the force to which it was a response, the verdict with respect to the assault on Vels (count 2) cannot stand.

[2] However, no basis has been established for setting aside the conviction for the assault occasioning bodily harm to Howlett whilst armed and in company (count 1).

[3] I agree with Muir J in concluding that, in the rather unusual circumstances of this case, no re-trial should be ordered with respect to the charge (count 2) involving Vels.

[4] When it came to sentence the learned trial judge imposed a sentence of 12 months imprisonment suspended after two months on each of the charges and ordered that the sentences be served concurrently. As the appellant now stands convicted of only one offence this court should re-sentence the appellant; in any event it is my

view that a sentence of 12 months imprisonment suspended after two months would be manifestly excessive for the offence involving Howlett alone.

[5] As the reasons of Muir J indicate there were a number of unusual features about the case. The appellant was a young man, aged 20 at the time of the offence, with a good work history and good references. At the time of committing the offence he had no prior convictions. He had on earlier occasions been asked by Shane Fasano to watch the latter's house whilst he was away. There appears to be no doubt that on the occasion in question the appellant approached Fasano's house, and the complainants, in the belief that he was protecting Fasano's property. He also appears to have acknowledged that he overstepped the mark to some extent. Shortly prior to trial he offered to plead guilty to assault charges against both Vels and Howlett but on a more limited basis than was acceptable to the prosecution. That does indicate some remorse, a matter acknowledged by the learned sentencing judge in imposing sentence. After sentence the appellant was released on bail on 17 April 2003; that means that he has spent 17 days in custody.

[6] Bearing in mind that the appellant has spent that period of time in custody I am of the view that the appropriate sentence for the offence against Howlett (count 1) is imprisonment for six months, suspended after 17 days, with an operational period of two years.

[7] My orders would therefore be:

(1) Allow the appeal and set aside the conviction for the offence being count 2 on the indictment;

(2) Direct that verdict and judgment of acquittal be entered on count 2;

(3) Dismiss the appeal against the conviction for the offence being count 1 on the indictment;

(4) Grant leave to appeal against the sentence imposed with respect to the offence being count 1 on the indictment; and

(i) allow the appeal;

(ii) set aside the sentence imposed of 12 months imprisonment suspended after two months with an operational period of two years;

(iii) impose a sentence of six months imprisonment, suspended after serving 17 days imprisonment, with an operational period of two years.

[8] **MUIR J:** The appellant was convicted after a trial in the District Court on two counts of assault occasioning bodily harm in company when armed with an offensive weapon. He was sentenced on each count to 12 months' imprisonment suspended after two months with an operational period of two years. The sentences were ordered to be served concurrently. He appeals against conviction and, provisionally, against the sentences imposed.

[9] Count 1 on the indictment alleged an assault on 27 September 2001 by the appellant and his co-accused Ralphs on one Mark Howlett. Count 2 alleged an assault by

them on the same day on Gregory Vels. Ralphs was acquitted on these two counts and also on a third count alleging assault by him alone.

[10] On 27 September 2001, the appellant, a 20 year old brick layer, was residing with the Donovan family in Melaleuca Drive, Strathpine. 49 Melaleuca Drive, situated 130 metres or so from the Donovans, was occupied by a Mr Fasano. His wife who had had a sexual relationship with another resident of the street had left the house about a month before. The appellant knew the Fasanos and, in his sentencing remarks, the learned sentencing judge observed that he "… to some extent looked up to the older Shane Fasano". He further noted that the appellant knew of the reason for the disruption of the Fasanos' marriage.

[11] After finishing work on the 27th the appellant went with his female friend, a daughter of Mr and Mrs Donovan, to a house which they were building together and then travelled to the Donovans'. On arrival at the Donovans', Mr Donovan informed him that he had observed two people enter the Fasano residence, that he had attempted to telephone Shane Fasano and that he had telephoned the police. The appellant and Mr Donovan observed the Fasano residence in the gathering dusk and noticed a white utility in its driveway reversed up to the garage door and a station wagon parked in the street. After a while the appellant saw a person, then unidentified by him, appear to run out with an object in his hand, place it in the back of the station wagon and run back into the house. He then observed a person, who may have been the person he first noticed, repeat the same actions.

[12] The appellant then went outside, took from the back of his utility a length of PVC pipe and together with Mr Donovan and Mr Donovan's son Michael aged 15, proceeded on foot towards the Fasano residence. The appellant saw somebody run towards the station wagon and he too ran towards that vehicle. As he approached the person beside the vehicle, he recognised him as Gregory Vels, whom he had met at the Fasanos. He was aware that Mr Fasano had fought with Vels and he had been told that Vels "could go pretty hard".

[13] The appellant called out to Vels "Put Shane's stuff back". He also gave evidence, uncontradicted in cross-examination, that he said "The police are on their way. Stay, stay here". On his evidence, Vels kept moving as if to get in the vehicle whereupon he struck him with the pipe. The appellant's evidence, which is consistent in this regard with that of Vels, is that Vels then adopted a boxer's stance and came towards him. Vels was aged about 35 and was more heavily built than the appellant. The appellant swore that he struck Vels two further blows before Vels got into the station wagon and drove off.

[14] Vels swore to being struck on his shoulder and on his right side three or four times with "a long instrument", to receiving a blow on the head which knocked him down and to then being kicked by a person other than the appellant. He said he heard someone call out "stop" and at that point his two assailants ran over to Howlett and attacked him. Vels then drove off.

[15] Howlett gave evidence that when he went outside the Fasano residence to his utility he noticed a car with its headlights on coming down the street with approximately three people running beside it, at least two of whom were armed with weapons. He then saw Vels being attacked by two people, one of whom had "a baton of some description". On seeing Vels go to the ground he called out words to the effect,

"Stop hitting him". That attracted the attackers to him. There was an exchange about his reasons for being where he was and two men then attacked him with fists and "the baton" about the head and body. He fell to the ground and was kicked for a short period. Being unable to get up he crawled round to the back of his utility where he lay until the police arrived some time later. He thought he was hit with the baton about six to 10 times and punched about the same number of times.

[16] The appellant's version of the attack on Howlett is that he struck Howlett once with the pipe, they grappled, he punched him "pretty hard" twice and Howlett dropped to the ground. He claims not to have seen anyone else attacking either complainant. It is implicit in the jury's verdict that they concluded that he did not act alone.

[17] The evidence discloses that Vels, a friend of Mrs Fasano, and Howlett, an acquaintance of Vels, went to the house at the request of Mrs Fasano to take possession of some property which she claimed as hers. They each drove a vehicle as did Mrs Fasano who parked her car in the garage. After they had been shifting and packing items under Mrs Fasano's direction for a number of minutes a telephone call alerted them to the possibility of Mr Fasano's imminent return to the house. They prepared to leave but the appellant and those who accompanied him arrived at the house before they could make good their departure.

[18] The primary judge was of the view that the injuries inflicted on Vels and Howlett, may have been caused by a fairly substantial object such as a piece of rounded timber. If caused by a piece of PVC pipe, his Honour concluded, it must have been applied with great force.

[19] Both of the complainants were examined by a medical practitioner on 27 September. He described Mr Howlett as being quite stunned and having a lot of bruises on his body. He noted injuries and bruises on Howlett's left loin area, bruises on his anterior chest wall about 3 cm wide and 9 cm long, a graze on his right ear, a lump on top of his head about 2 cm by 2 cm, a laceration on his upper lip, bruising on his right internal forearm area. The doctor gave the opinion that it was likely that the injuries he observed were caused by the application of moderate force. Mr Vels' injuries were described as a lump about 2 cm by 2 cm on the right forehead, a bruise about 3 cm by 6 cm on his right lower rib, tenderness in the area of his left jaw, a 10 cm graze on his right forearm, a bruise 7 cm by 3 cm on his right shoulder, and tenderness in the back of his neck.

[20] The injuries to both complainants were described as soft tissue injuries.

[21] On the hearing of the appeal, the following grounds were relied on –

(1) Failure to direct the jury appropriately, having regard to the fact that count 2 on the indictment "related to two separate assaults each giving rise to a different defence";

(2) Failure, in the directions, to refer to s 271(1) of the *Criminal Code* "either directly or in terms adapted to explain its meaning";

(3) Failure in the directions to alert the jury to the circumstances and perception of the appellant that Vels, who was older and heavier than the appellant, was a competent fighter;

(4) Failure of the summing up to deal with the defence open under s 277 of the *Criminal Code* except in a cursory way.

It is convenient to consider each of these grounds separately.

Ground (1)

[22] This point relates to the evidence given by the appellant, and not dissented from by Vels, that the appellant demanded that Vels put Fasano's property back. It relies also on the appellant's evidence that he demanded that Vels stay until the police came and that he struck him with the pipe in his lower back after Vels attempted to get in his vehicle whereupon Vels shaped up and came towards him with his fists up.

[23] The summing up plainly separates out the initial striking of Vels with the implement from what happened after Vels "shaped up" to the appellant. The trial judge instructed the jury concerning ss 274, 275 and 277 of the *Criminal Code* and directed that, if the striking of the initial blow fell within any of those provisions, the assault by Vels on the appellant, if they found one, should be regarded as unprovoked.

[24] The trial judge started to quote s 271(1) of the *Criminal Code* but, after quoting the first 12 words, digressed to explain the concept of provocation. The jury was not taken again to the wording of the sub-section. After going on to explain how the conduct of Vels was capable of being regarded as an assault on the appellant, the trial Judge said –

> "In other words, the initial act, he says, was done in circumstances which were in his mind; that he acted honestly; what he did only amounted to use of reasonable force in the circumstances, and I emphasise what's reasonable depends upon the circumstances. … But here, Burton says – Burton himself was a smaller man; he was younger; he was 19; he was perhaps immature. He didn't know quite what he was facing. Out from there came, you saw Vels himself seems to be well, fit looking person. And Burton thought was a trespasser, and in those circumstances it is for you to decide whether that's what happened or you think that's what may have happened whether Burton has the protection of the defences that I have referred to you, and then if Burton came – Vels came towards Burton with arms raised – fists raised, as both of them say he did, then you need to consider that question of the defence of self-defence so far as that part of it is concerned."

[25] Although the summing up did not state, in terms, that the possibility of two separate assaults giving rise to two separate defences should be considered, it, effectively, and without unfairness to the appellant, separated out the two stages of the attack on Vels.

Ground (2)

[26] The trial judge did not acquaint the jury with the terms of s 271(1), let alone advert specifically to its components and, in particular, the appellant's right to use "such force as is reasonably necessary to make effectual defence against the assault". Instead, the summing up repeatedly referred, in a general way, to the necessity for reasonableness. This approach may be contrasted with that taken in respect of s 274 and s 275 where his Honour specifically referred respectively, to the ability to use such force as is reasonably necessary "in order to resist the taking of such property by a trespasser" and "in order to defend the person's possession of the property".

[27] After giving directions in respect of the attack on Vels, his Honour gave brief directions in relation to the attack on Howlett. In so doing he did not refer specifically to s 271(1) or its language and concluded with the observation "… but it is a matter for you to essentially decide what's reasonable in the circumstances and, ultimately, to decide whether the Crown has importantly negatived these defences".

[28] Later in the summing up, his Honour gave directions concerning s 283 of the *Criminal Code*. In the course of so doing, he made general references to a person's entitlement to defend himself and his or a neighbour's property as long as only reasonable force was used. Again, there was no differentiation between the requirements of the sections under consideration and it is reasonable to conclude that, by the end of the summing up, the jury may have lost sight of the fact that if s 271 applied the appellant was entitled to use "such force … as is reasonably necessary to make effectual defences against the assault."

[29] There is another difficulty with the primary judge's treatment of s 283. After quoting it, his Honour placed his own gloss on its terms explaining –

> "You are entitled to defend yourself as citizens. Any citizen is entitled to do that. You are entitled to defend your moveable property or assist some neighbour whether the neighbour is there or not in defending his or her property or premises, but you are limited in the eyes of the law to using only reasonable force, quite apart from grievous bodily harm or not. If in the jury's assessment of things excessive force was used, then the defence does not avail the accused concerned. The use of excessive force will be unlawful."

[30] Each of s 274, s 275, s 277 and s 271 specify the force which may be used lawfully in the circumstances in which the section applies. It was thus unnecessary to refer to s 283. Although that reference, in itself, could not be said to be harmful, in the absence of a clear direction as to the application of s 271(1), the jury would have been left with the impression that the test for the application of s 271(1) was simply whether the force used was excessive.

Ground (3)

[31] It is true that the trial judge did not put the matter as succinctly and effectively as did Connolly J in the following passage from his reasons in *R v Lawrie.*[1]

> "This is not to say however that what is reasonably necessary to make effectual defence will not depend on the circumstances as perceived by the defender. An honest and reasonable belief that a blow is about to be struck may justify a pre-emptive blow."

The trial judge, however, did instruct the jury that what was reasonable depended on the circumstances.

[32] In that context he drew attention to the relative immaturity and smaller size of the appellant as well as the fact that the appellant did not "quite know what he was facing". That treatment did not quite do justice to the evidence that the appellant had reason to understand that Vels was a competent fighter. Nor did it include the usual warnings against the use of hindsight and concerning the absence of opportunity for

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[1] [1986] 2 Qd R 502 at 505.

considered judgment in a time of stress. Nor, in that context, was attention drawn to the appellant's youth.

Ground (4) - The section 277 defence

[33] The essence of this complaint is that the summing up, having dealt with s 24 at considerable length, dealt with s 274 and s 275 but then relatively cursorily with s 277. His Honour introduced his treatment of the section by observing –

> "So for what it adds, if it does add anything, I'll read it out. It really relates to defence of possession of real property; that's defence of possession of the house…"

[34] His Honour then read out the section and explained that possession of a house included the right to prevent trespassers entering it. He said –

> "So in a sense you might think, if you accept what Burton says happened, that's basically what he was doing. So you might think that section adds something to the position."

Having regard to the treatment by the trial judge of s 274 (Defence of movable property against trespassers) and s 275 (Defence of moveable property with claim of right) the trial judge, in my view, concluded correctly that s 277 was unlikely to add anything in any practical way to the other defences he had previously addressed. Indeed, it is doubtful that the section had application on the facts. In any event, his summing up in relation to s 277, although terse, was adequate.

Conclusion on the merits of the appeal against conviction

[35] Mr Heaton, who appeared for the Crown, argued that although the summing up failed to direct the jury's attention to the terms of s 271(1) his Honour's treatment was, in effect, more favourable to the appellant than a direction in terms of s 271(1). That was because such a direction would have focussed attention on the degree of force "reasonably necessary to make effectual defence against [Vels'] assault".

[36] There is substance in Mr Heaton's submission. But it is impossible to tell, with any degree of certainty, what verdict the jury would have returned if their minds been focussed on the correct, and more precise, matters for determination rather than on the application of a general concept such as reasonableness. That focus would have assisted the trial judge in giving appropriate directions and, in consequence, the jury would have been in a rather better position to consider all matters relevant to the defences raised.

[37] As there were two counts of assault against the appellant and a co-accused, a separate charge against the appellant's co-accused and a number of defences open on the evidence, the summing up was both long and complex. This, in addition to the matters discussed above, despite the obvious strength of the Crown case, make it impossible to be satisfied that the misdirection in relation to s 271(1) would not have affected the verdict in respect of count 2. Accordingly, the conviction on that count should be set aside. The misdirection and other considerations which led to this conclusion have no application to count 1 and the conviction on that count should stand.

[38] Accordingly, I would set aside the conviction on count 2 and dismiss the appeal in respect of count 1. In the circumstances and as the appellant has served a period of actual imprisonment, it is inappropriate that there be a retrial in respect of count 2.

Appeal against sentence

[39] It is argued on behalf of the appellant that although a term of imprisonment of six to nine months would have been justified in the circumstances, it should have been wholly suspended. The principal features upon which the appellant relies are his age (not quite 20 years), the fact that he had no previous convictions of any relevance and a good work history. The circumstances of the assaults were unusual. The appellant's motivation was, initially at least, a desire to protect the property of a friend and neighbour. Furthermore, it is argued that by the time the appellant was convicted over 18 months had passed "and he had substantially moved on with his life and completed his own home."

[40] It may be accepted that when the appellant set out towards the Fasanos' house he was motivated by the desire to protect the property of the friend and neighbour and, further, that his apprehension was that whoever was in the house had no right to be there. In my view, the evidence suggests that, even once the appellant became aware of the identity of one of the intruders, his belief that their conduct was unauthorised or unlawful did not change. Nevertheless, the appellant was convicted and the likely basis for the conviction was that the jury concluded that the use of force was more than "reasonably necessary".

[41] That amount of force did not amount to grievous bodily harm and the evidence suggests that the implement used in the attack was a piece of PVC piping. The wounds inflicted although reasonably extensive and no doubt very painful, were described in the medical evidence as "soft tissue injuries" and there is no suggestion of any broken or fractured bones.

[42] It is significant in my view that the appellant acted as he did, knowing that police had been called and, presumably, believing that they were on their way. His conduct is explicable in part by an overenthusiastic desire to apprehend perceived criminals until they could be handed over to lawful authority. That, and the fact that the appellant understood himself to be acting in and of a neighbour's legal rights, distinguishes this case from the decisions relied on by the Crown.

[43] The appellant was sentenced on the basis that he was guilty of two assaults. His conviction for one of them has been set aside. Accordingly, it is necessary for the sentencing discretion to be exercised afresh by this Court.

[44] When regard is had to the above considerations and proper account is taken of appellant's age and lack of relevant criminal history, in my view, the appropriate sentence for count 1 is six months' imprisonment wholly suspended.

[45] I would set aside the existing term of imprisonment and substitute a term of imprisonment of six months wholly suspended with an operational period of two years.

[46] **HOLMES J:** I concur with the conclusion reached by Williams JA and Muir J that the conviction on Count 2 should be set aside and no re-trial ordered. Given the appellant's youth and good record, taken with the unusual circumstances of the

offence, actual imprisonment is not called for in respect of the conviction on Count 1. I agree with Muir J that a sentence of six months imprisonment wholly suspended for an operational period of two years is appropriate.