SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bain* [2003] QCA 389
PARTIES:	**R** **v** **BAIN, Jennifer Joy** (appellant)
FILE NO/S:	CA No 185 of 2003 DC No 220 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	9 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2003
JUDGES:	Williams JA and Muir and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Convictions on both counts set aside**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – CONSIDERATION OF SUMMING UP AS A WHOLE – where appellant convicted of assault occasioning bodily harm and assault occasioning bodily harm whilst armed – where learned trial judge, when summing up, discouraged jury from considering evidence contradictory to that of the complainant – where learned trial judge reversed onus of proof in directions – whether the jury could have been satisfied of the appellant's guilt beyond reasonable doubt *R v Hildebrandt* (1963) 81 WN (Pt 1) NSW 143, cited *Thomas v R* (1960) 102 CLR 584, cited
COUNSEL:	A J Rafter for the appellant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** The background facts relevant to the determination of this appeal are fully set out in the reasons for judgment of Holmes J which I have had the advantage of reading.

[2] I agree with the observation of Muir J that the prosecution case was a relatively simple one, and quite strong. The injuries which the complainant suffered were explicable only by some incident of the type she referred to in her evidence.

[3] The appeal against the convictions stands or falls on an evaluation of the summing-up. The critical passages of concern are set out in the reasons for judgment of Holmes J.

[4] Ultimately, and not without some hesitation because of what I perceive to be a strong prosecution case, I have come to the conclusion that the jury may well have been confused, if not positively misled, as to how they should approach their task of returning a verdict. Taken in isolation each of the passages from the summing-up quoted by Holmes J may not be sufficient to warrant overturning the convictions, but when the effect of the passages in question is considered overall the regrettable conclusion, in my view, is that the convictions cannot stand.

[5] Ordinarily it would follow that there be a re-trial, and I am conscious of the complainant's position. On count 1 the appellant was sentenced to six months imprisonment, and on count 2 imprisonment for 12 months. It was ordered that be suspended after serving four months. By the time these reasons are delivered the appellant will have served over three months of that period. In those circumstances I agree with Holmes J that it would be inappropriate to order a re-trial.

[6] The appeal should be allowed and the conviction on each count set aside.

[7] **MUIR J:** I am grateful to Holmes J for her careful exploration of the facts in this case. With considerable reluctance, I agree with the orders she proposes. The Crown case was a relatively simple one and, in my view, very strong. The complainant suffered obvious injuries consistent with her account of events. The appellant called no evidence on her behalf and no evidence to support a defence of provocation was elicited by cross-examination.

[8] I do not share the concern expressed by Holmes J in paragraph [21] of her reasons. In my view, the learned trial judge was saying no more than that the complainant's version of events stands uncontradicted. Nor do I see any particular difficulty with the trial judge's reliance on a perceived difficulty on the part of one of the witnesses to effect an accurate canine identification. His Honour, I consider, was saying no more than that the witness seemed to have difficulty in distinguishing between a rather tall dog with a distinctive appearance and a rather short one, also of distinctive appearance.

[9] I have concluded, however, that the summing up, viewed as a whole as it must be, was such as to create an unacceptable degree of confusion in the minds of the jurors as to the meaning of "reasonable doubt" and the path by which verdicts beyond reasonable doubt might be reached. There are a number of passages in the summing up, as Holmes J points out, which are not only inaccurate but calculated more to confuse than to clarify or assist. As a result of these matters, it is impossible to conclude that the appellant has had a fair trial.

[10] **HOLMES J:** The appellant was convicted after a District Court trial of one count of assault occasioning bodily harm and one count of assault occasioning bodily harm whilst armed. In support of her appeal it was contended that the verdict was unsafe and unsatisfactory, and that the learned trial judge had made errors in: failing to direct the jury that consent to an assault could be expressed or implied from the circumstances; directions to the jury as to the onus and standard of proof; elaborating on the expression "beyond reasonable doubt"; and criticism of the evidence of two crown witnesses. To give an understanding of the significance of the learned judge's directions, it is necessary to set out the evidence in some detail.

The evidence

[11] The evidence on the charges came principally from the complainant, Tina Louise Dyson. She said that at about 6 pm on 16 June 2001 she went to premises at 16 Tenth Avenue, Palm Beach where her dog, a Rhodesian ridgeback, was kept. As she approached the property, the accused, who lived in the adjoining house, accosted her and said the complainant's dog had bitten her dog and that she, the complainant, would have to pay the vet bill. According to the complainant, she agreed and apologised, but as she went to walk away the appellant struck her on the side of the face with her hand. She had been holding car keys and a can of dog food, and dropped them when that happened; at some stage the appellant picked them up. The appellant came towards her; the complainant took hold of the appellant's arm between the elbow and the shoulder in order to stop her. At that point, she said, there was a witness to events, Malcolm Owens. He stood in between them and to the side. The appellant then head-butted her, striking her in the left eye. This was the blow which gave rise to the first of the counts on the indictment.

[12] The complainant immediately felt swelling around her left eye and cheekbone, and could not see out of the eye. The appellant told her to remove her dog from the house where it was kept, and she agreed, saying she would need her car keys. The appellant refused to surrender them. The complainant went into the house at No 16, and saw there Gavyn Crowley and Jason Dunne, who lived there, and Malcolm Owens, a visitor. (Mr Crowley could not be located for trial, but both Mr Owens and Mr Dunne gave evidence.) She remained in the house at that stage for about 20 minutes, and then, believing the police had been contacted, went outside to see if they had arrived. She encountered the appellant again, and again asked for her keys and dog food back so that she could leave with her dog. The appellant went into her house and came back carrying the can of dog food, which she threw on the ground towards the complainant. Again she refused to give back the keys and returned inside her house. She came back out with something that the complainant did not clearly see, apart from "a brown ball of some sort", and struck the complainant on the side of the head with it. (A few days later the appellant produced an ornamental club to police officers searching her house.) The blow, which was the subject of the second count on the indictment, made her fall to the ground. Somehow she and the appellant arrived at a position in which she was sitting on the appellant, who was pulling her hair and poking her eyes. Mr Dunne came to her assistance, removing her hair from the appellant's grasp. She did not consent to being assaulted.

[13] Under cross-examination, the complainant said that the whole incident took between 20 –30 minutes. She expressed certainty that she was at the house at 6 pm and not earlier. She had grabbed the appellant's arms immediately after being slapped, and held them only briefly because the "fellow", presumably Malcolm

Owens, came on the scene and got in between the two of them. The head-butt occurred while he was there, and she agreed it would have been necessary for the appellant to lean over or around him to effect it. She diverged then somewhat from earlier accounts, and said that she grabbed the appellant's arms after being head-butted. She agreed to some confusion about the order of events in relation to the grabbing of the arms, the dropping by her of the can and the keys, and the head-butt. The injury from the head-butt immediately produced a bump like a golf ball on the left side of her face. She denied a suggestion that she had made an aggressive movement towards the appellant so that they had struck heads, and that they had both become involved in a physical altercation. She also denied that some hours had elapsed between the first and second incidents, saying it was a matter of 5-10 minutes, and rejected a suggestion that Mr Owens had cautioned her against returning outside. In response to cross-examination as to how she and the appellant came to be on the ground after the blow with the object, she said that the appellant had grabbed her hair and pulled her towards her, so that she fell on top of her. She agreed that at the committal she had said that she had lunged at the complainant, had grabbed her and taken her down to the ground with her. Although she had also suggested later in her committal evidence that the appellant had grabbed her hair and pulled her down, that was not in her statement. She rejected a suggestion that if her head had come into contact with the ball shaped object it was in the course of the struggle, not because of any direct swing at her head.

[14] Dr Donald Campbell gave evidence as to the contents of the medical records from the Gold Coast Hospital Emergency Department in relation to the complainant. She had actually been treated by an English doctor who was no longer in Australia. The triage notes recorded a small laceration under the right eye, a laceration to the right parietal area of the scalp, bruising to both eyes and pain in the left zygoma. The doctor's notes recorded a bruise under the left eye with some associated swelling, a small graze under the right eye about 1cm in length and a 2cm laceration to the right scalp which was 1cm deep. There was also a 15cm bruise on the inner right thigh and bruising on the anterior right arm and some pain on compression of the muscles at the back of the right side of the neck. According to Dr Campbell the 2cm laceration to the right scalp and the left eye injuries were both consistent with trauma, although he agreed in cross-examination that the blunt trauma involved could be produced by a number of things. The laceration under the right eye might be consistent with a fingernail scratch. If the weapon produced by the Crown were used, some damage to the tissue and bruising associated with that damage would be expected, but no such bruising or swelling around the laceration was noted. In re-examination he agreed, however, it was possible that the weapon had produced the scalp injury.

[15] The effect of Jason Dunne's evidence, as given in examination in chief and cross-examination was as follows: he saw the complainant in the lounge room at No 16 at about 6:30pm that day when he arrived home. He agreed that in his statement he had described the complainant when he first saw her in the house as upset and angry. She did not have any injuries on her at that time. She left the house to go to the appellant's house to retrieve her dog food and car keys. He heard a loud argument and sounds of a scuffle. When he went outside he saw the two of them on the ground, the complainant on top of the appellant. The women were wrestling on the ground, each pulling the other's hair. Mr Owens was there and tried unsuccessfully to part them; he intervened and broke up the scuffle. He pulled on

their arms to make them let each other's hair go. After the complainant returned to the house at No 16 he saw that she had a bleeding gash in the side of the head.

[16] Malcolm Owens said that he was visiting Mr Crowley when the complainant arrived at the house. He heard the sound of an argument and saw the complainant in the appellant's front yard. He stepped between complainant and appellant, and saw no physical contact between them. He saw the appellant pick up the car keys which the complainant said were hers. He "[m]anaged to get Tina (the complainant) back inside." He did not notice anything unusual about her appearance. She stayed in the house for a couple of hours before going back outside, despite his telling her that if she did so he would not come and help. However, he did, at Mr Crowley's request, go outside again, and saw the appellant on top of the complainant, pulling her hair. He tried to separate them; Mr Dunne succeeded in doing so. After they were pulled apart, he saw a club on the ground with a ball on the end.

[17] The appellant did not give evidence.

The summing-up

[18] In the course of summing up, the learned trial judge informed the jury that the Crown had the onus of proving each of the charges beyond reasonable doubt. Unfortunately, he elaborated:

> "A reasonable doubt, as you have heard, is one that cannot be defined. It has words of ordinary meaning. Reasonable doubt is what you determine to be a reasonable one and not something light and fanciful or imaginary."

[19] The learned trial judge outlined to the jury the elements of assault occasioning bodily harm, including that it involved the application of force to another without that person's consent. He reminded the jury of what appeared in a photograph of the complainant's left eye and of the medical evidence of the bruising and report of pain in that area, from which they might conclude that there were signs of an assault there, "a clear application of force indicated". He told them that the Crown must prove beyond reasonable doubt that the assault was unlawful. He went on to say:

> "In the circumstances revealed here that assault on the complainant – if you find it was committed – was unlawful unless you find the complainant so unreliable generally that you cannot be satisfied that her evidence as to the elements of the offence cannot be relied upon.
>
> In fact the defence goes further and suggests that you will not be satisfied that there was an assault. Again, on that basis <u>it is open to you to find there was no assault, if you are satisfied that her credibility has been so assailed and destroyed that you could not find anything she said about the elements of the offence beyond reasonable doubt.</u>" (underlining added)

[20] The only redeeming feature of this direction is that its opening sentence – as to unlawfulness – is so confusing with its triple negative that the jury may not have been able to attribute any meaning at all to that part. But, given the relative clarity of the underlined section, the effect of the direction as a whole is to inform the jury that it must reject all aspects of the complainant's evidence as to the elements of the

offence before it may reach any conclusion that there was no assault, or that any assault was not unlawful; and, in turn, that in order to acquit it is necessary to make positive findings that there was no assault, or that any assault was lawful.

[21] The learned trial judge went on to repeat the essentials of the complainant's version of the events giving rise to the first count. He continued,

> "No-one else saw that incident apart from the accused and as I've said there is no evidence from her to contradict the complainant's [ac]count."

That comes worryingly close, in context, to suggesting that it was incumbent upon the appellant, as the only other person present, to give contradictory evidence. It also ignores the fact that Mr Owens was said by the complainant to have been present during the incident.

[22] But the learned trial judge next moved to the subject of the two witnesses, Mr Dunne and Mr Owens. Of Mr Dunne he said that he had referred to the complainant's ridgeback as looking like a pit-bull terrier; and, he continued,

> "if you have the most basic knowledge of dogs you will realise how wrong that description is and you might wonder how observant he is, in fact."

[23] In respect of Mr Owens he made these points: he had not seen the dog food can or the keys; he had said that there was an argument going on in the appellant's backyard; he had said that there was no dividing fence between the two properties; and his recall of the second incident was of the appellant being on top of the complainant. His Honour, after making those comments, said of Mr Owens:

> "So you might wonder what powers of observation he has at all or is there a defect in memory."

He concluded the topic by saying with reference to both men:

> "Now, these are matters for you to take into account. Both of them fail to see anything relating to the elements of the offences."

[24] It hardly needs saying that the capacity to distinguish between dog breeds is a doubtful gauge of witness reliability. And Mr Owens' evidence was not fairly represented in the judge's comments. While he said he had not initially seen any objects near the two women, he did not say in terms that he had not seen the dog food can or the keys, and in fact did refer to seeing the keys when the appellant picked them up from the ground. He had said that he had seen the complainant in the appellant's backyard, but had immediately corrected himself to say it was the yard at the front of the house, on the street. His impression that there was no dividing fence was hardly a crucial point. The learned trial judge was correct in pointing out that Mr Owens' recollection that the appellant was on top of the complainant was at odds with other descriptions. But to suggest to the jury that for these reasons, some of them inaccurately reflecting the evidence, it should dismiss his evidence that no assault had taken place in his presence – hardly a question of observation of detail – was simply extraordinary. And it was implicit in the statement that both had failed "to see anything relating to the elements of the

offences" that there were elements of the offences to be seen. That the jury might, having regard to Mr Owens' evidence that he saw no physical contact, and the evidence of both men that they saw no sign of injury to the complainant at that stage, doubt that there was a first offence at all, was not allowed as a possibility.

[25] The learned trial judge offered no similar disparagement of the complainant's evidence, notwithstanding apparent failures of recollection in it. Of the discrepancies in her account, he suggested that she might have been in error, but that it was open for the jury to be satisfied about the remaining evidence as to the head-butt and the use of the club. He said that a defence suggestion that the left eye injury might not have been the result of a head-butt, as opposed to contact with some other hard object, was correct, but went on to say:

> "But on the evidence what other cause is open? Nothing indicates the manner in which the complainant received that injury other that what she has claimed."

Again, that statement disregards Mr Owens' evidence, which in fact did provide some indication against the complainant's receiving the injury in the manner she had claimed, that is to say, a head-butt delivered in his immediate presence.

[26] After the jury retired, the judge was asked to, and did, give a re-direction which drew the jury's attention to Mr Owens' evidence of seeing no physical contact. Having reminded the jury that Mr Owens did not see the head-butt, and going further to say that, if accepted, that evidence would reflect on the complainant's evidence, he reminded them of his earlier comments on Mr Owens' reliability, and added another: that Mr Owens had said in his statement that the events occurred in the morning, had in his evidence in chief said 12 o'clock, and in cross-examination said that it could have been as late as two o'clock. That was, he told the jury, another matter they could take into account in determining Mr Owens' reliability.

[27] That criticism arises from these passages in Mr Owens' evidence: on being asked when he had seen the complainant at the residence, he said,

> "It's going back a couple of years ago. I thought it was – when I gave a statement I thought it was in the morning, but after I thought about it it might have been - it might have been early afternoon, just after 12."

In cross-examination he was asked if the complainant had arrived "[s]ome time just after lunch, around 2 o'clock, something like that?" and he answered "Yes".

[28] Again, in my view, this hardly warranted an attack on his reliability as a witness.

[29] As to the count of assault occasioning bodily harm whilst armed, his Honour repeated the elements of assault and referred to the medical evidence as to the injury to the complainant's head, as well as the evidence of Mr Owens and Mr Dunne as to the bleeding. He did not, in this context, criticise their powers of observation. He continued:

> "If you find there was an assault, in the manner described by the complainant, was it unlawful? Again, it is unlawful, if you find that the assault was committed in the way that the complainant says. The

> accused argues that you should have such a reasonable doubt about the credibility of the complainant you should reject her evidence and find there was no such assault."

The last part of the direction no doubt reflects what the appellant's counsel said in his address. But framed merely as a contention by defence counsel, and taken in the context of the direction given on the first count, it tends to echo that direction, with the suggestion that it was up to the appellant to convince the jury that it should have a reasonable doubt about the complainant's credibility before it could acquit on this assault.

[30] The learned trial judge then reminded the jury of the complainant's account of the second incident and how it ended with the complainant's sitting on the accused, holding her arms while the accused had her hands in the complainant's hair. That situation, he said, was described by Mr Owens, although he had it in reverse. He did not then mention Mr Dunne's evidence that the scuffle at this stage was mutual, with each pulling the others hair, but did so later, in a re-direction at the request of the appellant's counsel. And while at this point he told the jury that "the Crown has to prove that version of events beyond reasonable doubt", he followed that direction by another reminder that the complainant's evidence was the only direct evidence in relation to this incident, there being none from the male witnesses who were not present, and none from the accused.

[31] In this context, his Honour referred to a defence suggestion that the injury to the complainant's head could have been caused by contact with a hard object, but pointed out there was no such contact alleged on the evidence. Of a defence submission that there was no blood on the club, he said that there was no scientific evidence to that effect and the submission could not be accepted. He ended the summing up by reminding the jury that the Crown must prove the case beyond reasonable doubt, proving the elements of each charge on the indictment to that standard, and then warned them that their decision had to be based on the evidence in the trial. He told them that if they were considering any argument put by counsel, their duty was to reject it unless there was some basis for it in the evidence.

The errors in the summing up and their effect

[32] The tenor of the summing up was that the complainant's evidence was the only evidence to which the jury could look in considering the counts, except where there was the odd detail supporting it. It was certainly the case that the jury could not convict if it did not accept the complainant's evidence. It was of utmost importance, therefore, that the jury be properly directed about it. Unfortunately, it was invited, in effect, to dismiss the evidence which directly contradicted the complainant. The learned trial judge's directions urging the jury to disregard the evidence of Mr Owens and Mr Dunne, of whom there was no reason to suppose that they were other than independent witnesses, constituted a significant defect in the summing up.

[33] The excursion into what constituted reasonable doubt was undesirable, an undertaking of a sort consistently discouraged by the higher courts.[1] The mischief of it is that it was liable to divert the jury from its real task of applying the standard of

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[1] *Green v the Queen* (1971) 126 CLR 28; *R v Sterling* (unreported, CA No 205 of 1996, 17 September 1996); *R v McNamara* (unreported, CA No 261 of 1998 1 December 1998); *R v Punj* [2002] QCA 333.

proof beyond reasonable doubt to the evidence, inviting its members instead to assess the quality of their doubts against an introduced measure, what was "light" or "fanciful" or "imaginary".[2]

[34] But the most serious error lay in the directions on onus. Mr Copley, for the Crown, argued that his Honour's reversal of the onus of proof in directing on the first count was cured by other instances in which the jury was directed in terms of an onus on the Crown to prove guilt beyond reasonable doubt. I have already adverted to each of those instances. The first, towards the beginning of the summing up, included the gloss on the meaning of "reasonable doubt", and preceded the direction reversing the onus; the second was the direction given in the context of the second count, that the Crown had to prove the complainant's version beyond reasonable doubt, followed by a reminder that there was no evidence from the appellant; and the third was at the conclusion of the summing up.

[35] I do not think it cures the defect that at these points the jury members were told they had to be satisfied beyond reasonable doubt of the elements of the offence, when they had been given a specific direction that they could not be satisfied that the assault had not occurred, unless they rejected the complainant's evidence entirely as to the elements of the offence; and had been told more than once that they should confine their attention to the evidence of the complainant as the only evidence as to the assaults. One cannot assume that the jury members knew which of the competing versions of where the onus lay they should adopt; and there is a real risk that they were left with the impression that the Crown succeeded in proving its case beyond reasonable doubt if the defence failed to convince them to the contrary. It is, in my view, a case, similar to those in *R v Hildebrandt*[3] and *Thomas v the Queen*[4], in which a specific error is not rescued by a general, correct statement.

[36] Counsel at the trial sought re-directions, which included a direction as to whether there was consent to physical contact. I should say that I do not think there is any substance in the argument that the learned trial judge should have explained the concept of implied consent; there was no evidence which required that direction. But counsel did not seek any re-direction as to the onus of proof. That is a consideration, but it is not of great significance. The error in the direction given to the jury on the first count is fundamental. Correct directions on onus and standard of proof are vital.[5] While it is not inevitable that a misdirection as to onus of proof will go to the root of the trial[6], in this case the reversal of the onus meant that the appellant did not have a proper trial, and there is no occasion for the application of the proviso[7].

[37] Even if that were not so, it seems to me quite impossible to be satisfied that the jury would have reached the same verdict on count one had the learned trial judge not given the misdirection on the onus and made the comments dismissive of the other

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2 *Thomas v R* (1960) 102 CLR 584 at 606; *Green v the Queen* (1971) 126 CLR 28 at 33; *R v Wilston, Tchorz and Young* (1986) 42 SASR 203 at 207; *R v Dan* (1986) 43 SASR 422 at 430; *R v Britten* (1989) 51 SASR 567 at 570.

3 (1963) 81 WN (Pt 1) NSW 143.

4 (1960) 102 CLR 584.

5 *Murray v the Queen* [2002] HCA 26; *Krakouer v the Queen* (1998) 194 CLR 202 per McHugh J at 224; *Hembury v Chief of the General Staff* (1998) 193 CLR 641 per Kirby J at 665.

6 *Krakouer v the Queen* (1998) 194 CLR 202.

7 *Wilde v the Queen* (1988) 164 CLR 365 at 373.

Crown witnesses' evidence where it contradicted the complainant. As to count two, the evidence was stronger because the weapon was seen by Mr Owens, and the complainant undeniably had a cut on her scalp consistent with being struck with it. However, it was still necessary for the jury to be satisfied beyond reasonable doubt that the weapon had been used by the accused in the manner described by the complainant. If the jury had been properly instructed in its approach to the complainant's evidence, and had not been discouraged from considering the evidence contradictory of it, it is possible that it would not have been prepared to act on the complainant's account. Matters are not improved by its having been led into unnecessary bypaths on the concept of reasonable doubt. It cannot, it seems to me, be said that the verdict on the second count must have been the same in the absence of these errors.

[38] I would allow the appeal and set aside the convictions on both counts. The ordinary course would be to order a re-trial; but given that the appellant has already served three months of the four month period of imprisonment required under her sentence, and having regard to the general circumstances of the alleged offences and their nature it would be inappropriate to order any re-trial.