SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ogbourne* [2003] QCA 84
PARTIES:	**R** **v** **OGBOURNE, William James** (appellant)
FILE NO/S:	CA No 334 of 2002 DC No 1460 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2003
JUDGES:	McMurdo P, McPherson JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - SUMMING-UP – defence to GBH charge was that some unknown person assaulted the victim as well -- whether trial Judge erred in failing to instruct jury that they could convict only if all hypotheses inconsistent with guilt were excluded – where no redirection was requested at trial *R v Sherrington v Kuchler* [2001] QCR 105, referred to
COUNSEL:	M J Byrne QC for the appellant D L Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of McPherson JA and with the order proposed.

[2] **McPHERSON JA:** The appellant appeals against his conviction after a trial in the District Court of one count of doing grievous bodily harm to Jason Hestor on 21 March 2001. He was also convicted of entering Hestor's dwelling with intent to commit that offence, but that conviction is not now being challenged.

[3] One night in March 2001 the appellant parked his 10-speed white racing bicycle in the yard of the Manly Hotel. Someone stole it from there, which made him angry. He told Leanne Ruhanen, who was at the hotel playing the pokies that night, that the person who had taken the bike would be sorry for his actions. Leanne had at one time lived with the appellant by whom she had a child. He and she still saw something of each other because he came to stay with her from time to time and helped her with the children.

[4] A few days later Denise Evans was introduced to the appellant at Lloyd Dover's place on Wednesday 21 March 2001. It was on the night of that day that the offences were alleged to have been committed. She had previously been living with the complainant at a flat at 70 Florence Street, Wynnum, but an argument had taken place on the Monday of that week (which would have been 19 March) and she had left him. At Lloyd Dover's place she had a conversation with the appellant and another man named Jim McLean. In the course of it the appellant mentioned that his bike had been stolen. From his description of it, she realised that it was the bike she had seen at 70 Florence Street, which the complainant informed her he had stolen from Manly. She told the appellant where it was, and suggested he go and get it back. The appellant left soon afterwards.

[5] Denise Evans did not see the appellant again until the following day, which was the Thursday 22nd March. In answer to her question, he said he had been to the complainant's place at 70 Florence Street, where he had retrieved the bike. He did not give her any detail of what had happened, but he said "I think I hurt him" or "he wasn't moving when I left", or something like that. The appellant mentioned that the complainant had been assaulted and said that he was going to see how he was. He left shortly after that.

[6] Tracy Shannon also saw the appellant at Leanne Ruhanen's place on Thursday 22nd March. She had known him for about eight or nine years. She had borrowed some money from Leanne and had come to pay it back. She arrived at about 9.30 am and saw the appellant sitting on the verandah with his head in his hands. He looked really worried. She asked him how he was. He said he did not want to talk about it. She asked if it was over the pushbike she had heard about, and he said yes. She said "Well, it can't be that bad". He said "I think I might have killed this bloke". She repeated, "It can't be that bad. Is there any way you can find out?"; he just shook his head and looked really worried and dejected.

[7] Leanne Ruhanen, who was the one who had first been told about the theft of the bicycle at the Manly Hotel, saw the appellant on the verandah of her house speaking to Tracy Shannon on the morning of Thursday 22nd March. She joined the conversation with the appellant after it had begun. The appellant said he had found his pushbike and had bashed the guy "pretty severely". He was concerned about what the police would do. The victim was "hurt fairly bad" or was "not in a good way", which was why the appellant was worried about the police. He was arrested about two weeks later in April, just when he and Leanne were preparing to go away together at Easter.

[8] That conversation took place on the morning of Thursday 22nd March. At about 2.00 pm Denise Evans went round to the flat at 70 Florence Street. She saw an eviction notice on the table and she found the complainant lying on the bed in the bedroom. She claimed she did not see his face, but noticed he was having trouble

sitting up. She said "It hurts, doesn't it?". She was still feeling angry with him, and she yelled at him and told him to get out. She said she would be back within the hour by which time he was to be out. When she came back at about 4.00 or 4.30 in the afternoon, the complainant had gone.

[9] The complainant had first been found in an injured condition in bed by Mrs Yvonne Merriman at about 8.00 am on Thursday 22nd March. She was his landlady, who had gone to deliver the eviction notice which Denise Evans later saw there. Mrs Merriman gave evidence that a man named Mick was at the flat the day before the complainant was attacked. He said he was trying to collect money from the complainant and suggested that Mrs Merriman accompany him at 8.00 am on Thursday to "get the money" owed to each of them. According to her evidence Mick did not arrive at the flat the next day as he suggested, so it was she alone who discovered the complainant. As can be seen on the photographic exhibits, there was blood around the place. She saw the complainant lying in bed and noticed that he had been injured. His face and eyes were bruised and he was not in a "healthy" condition. He was very much in pain. She asked who had done this to him, but he said he did not know. She suggested a doctor be sent for, but he did not respond to the suggestion. Later, while driving her car in the evening of that day, she saw the complainant on the footpath near the chemist's place in Edith Street.

[10] The chemist who worked there was a Mr Corcoran. Someone reported to him that there was an injured man trying to use the telephone. It was the complainant. He was trying to phone his grandmother. Mr Corcoran realised he was badly injured. He borrowed a wheel chair and took him to the doctor's rooms nearby. Dr Finden said the complainant was brought to him at about 8.00 pm on Thursday 22 March 2001. He examined him while the complainant was seated in the wheel chair. Partly because of this, he does not appear to have realised the nature or extent of his injuries. The doctor gave him some painkillers and let him go.

[11] The complainant made his way by train to where his grandmother lived, arriving there at about 1.00 am on Friday 23 March. She was shocked at his appearance. The next morning she and a friend took him to the Camp Hill Medical Centre. Dr Kristin Soda, who examined him there, said he had to be taken to hospital as soon as possible. Dr Ramsay at the Mater Hospital said that on examination the complainant was found to have traumatic pancreatitis, fractured cheekbones, fractures of the transverse processors of two lumbar vertebrae, together with bruising, abrasions and black eyes. He suffered renal failure and has since lost the use of a kidney. These injuries were consistent with assault and kicks to the abdomen and loin, and punches to the face. The complainant was placed in intensive care and is now partly disabled. Without treatment at the hospital, he would have died.

[12] It was plain from the evidence at the trial that the complainant had sustained grievous bodily harm as the result of a physical assault which had taken place on the night of Wednesday 21st March 2001 at the flat where he lived at 70 Florence Street. The only question was whether it was the appellant who had inflicted the injuries, or had inflicted all of them. The complainant's evidence at the trial was that he had met the appellant on the afternoon of Wednesday 21 March at the Waterloo Hotel where he was drinking with a friend, who was having a counter lunch. They were sitting at a table when the appellant "just rocked up at the pub", sat at their table and "started talking to us". He said he did not have a place to stay and the complainant

offered to let him stay at his flat. After about an hour they left the hotel. The appellant went to buy some beer, and then joined the complainant later at the flat where they continued drinking and listening to music into the night

[13] The complainant was intoxicated and passed out. The next thing he remembered was being on the floor of the kitchen and being kicked. It was the appellant who was doing this to him. He said something to the complainant like "you son of bitch. I should fucking kill you. You owe me two points". He claimed to have recognised his voice. In evidence, he then recounted going to the chemist and the doctor, and catching the train to his grandmother's place. He did not recall being assaulted more than once by the appellant. He admitted stealing the bicycle. A person named Michael Pearson had come to the flat looking to collect some money that was owing to him. The complainant denied owing any money or "points", which he understood to be amphetamines valued at about $100.

[14] The relevance of some of this and the cross-examination which followed was that the complainant had initially given to several different persons a somewhat different account of the assault. He told his grandmother when he saw her that three blokes had broken down the door of his flat and beaten him severely. He also told the police who visited him in hospital that three people had broken into the flat and attacked him. There was no evidence at the trial that the door had been broken down. At the committal he said that all he could remember was being assaulted twice. The only witness called for the defence was Joe Selina Ward. She had known the complainant for about 10 years. She said she had met him again in about March 2001. He told her he had met the appellant at the pub; the appellant had come to his flat; they had a fight; and then three blokes came and gave it to him; one was jumping on him, and said he should kill him as he owed him three points. In cross-examination, she said that the complainant had told her different things at different times. He had first said it was the appellant who had done it; but he also said it was "all Bill (the appellant), and he just wants a payment", meaning a criminal compensation payment.

[15] The complainant denied having told Joe Selina Ward these things. She was his "ex-girlfriend" with whom he had started going round about three months before the trial. His explanation for saying to his grandmother and others, as he admitted he had, that three men had assaulted him was that, at the time he said it, he was disoriented and in hospital and suffering from the effects of morphine. He did not owe money for amphetamines. It was true that a Michael Pearson had previously come to the flat to collect some money; but it was Denise Evans he was looking for as it was she who owed him the money. In her evidence Denise confirmed she had owed him $50, which she said she had paid back to him.

[16] The suggestion was made to the complainant in cross-examination that Denise Evans had gone to the flat on Thursday 22nd March accompanied by three men, and that they had beaten him up. The complainant denied this. Denise, he said, had come on the Thursday with Jim McLean, and another bloke, and a young girl, a teenager. Ms Evans confirmed that she had gone to the flat on Thursday with McLean and another girl, whose name she did not know. On the second occasion on the Thursday, she had gone alone. It was not put to her that she or any of those with her had assaulted the complainant.

[17] On the evidence at the trial, there can be no doubt that the complainant sustained grievous bodily harm, and that it was the result of an assault or assaults by someone. There is no reasonable doubt that the appellant assaulted the complainant on the night of Wednesday 21 March 2001, nor that he went to the complainant's flat with that intention in mind. Indeed, it was open to the jury to infer that his approach to the complainant at the Waterloo Hotel at lunch time on Wednesday was all part of a plan to get himself invited to the complainant's flat in order to recover his bicycle and teach the complainant a lesson, as he had foreshadowed in speaking about his bicycle to Leanne Ruhanen at the Manly Hotel. When the police first approached the appellant on 6 April 2001, he admitted that the had given the complainant "a bit of a touch-up", but said he did not think he had hurt him badly. When advised of his right to be silent and to seek legal advice, he spoke to his solicitor and then refused to be interviewed.

[18] If the complainant's injuries had been caused by the appellant with the assistance of others, he would still have been criminally responsible under s 7(1) of the Code for the grievous bodily harm that was sustained. See *R v Sherrington v Kuchler* [2001] QCR 105. Rationally, it is only if there had been a further assault committed independently of the appellant that the appellant could avoid responsibility for the ensuing injuries. The question for the jury was whether they were left in any reasonable doubt that the injuries had been inflicted by the appellant's admitted assault on him; or, conversely, whether they were satisfied beyond reasonable doubt that no other assault had taken place. The evidence against the appellant was strong. It consisted of his original threat uttered in the presence of Leanne Ruhanen at the Manly Hotel; his departure on Wednesday from Leanne's place and his return with the bike; his statements to Denise Evans, Tracy Shannon; and Leanne Ruhanen that he had hurt the complainant badly, to the point perhaps of killing him; and his concern about what would happen when the police traced him. All of this was inconsistent with his subsequent claim to the police that he did not think he had hurt him badly.

[19] The jury would have been justified on the evidence at the trial in finding the appellant guilty as charged. As against this, there was the evidence about Michael Pearson, although his debt-collecting attempt was, on the evidence of Denise Evans and of the complainant, directed to her and not to the complainant. There was also the complainant's statement to his grandmother and the police concerning the second assault by three men. However, it would on the evidence have been open to the jury to reject the hypothesis of a second assault by persons unknown. Mrs Merriman's evidence about the blood she observed in the flat, and the condition in which she saw the complainant at 8.00 am on Thursday 22nd March 2001, showed that he had been assaulted during the Wednesday night. It would have been a remarkable coincidence if, besides the appellant, three other persons had chosen to set upon the complainant on the same Wednesday night. There was no one apart from the appellant who appeared to have a motive for doing so. The jury were entitled to reject the complainant's references to a second assault as the product of a confused mind, and to reject as unreliable Ms Ward's evidence about what the complainant had told her only three weeks before the trial. His Honour directed the jury that that should allow little weight to the appellant's evidence.

[20] It was submitted on appeal that the trial judge ought to have directed the jury to approach the case on the footing that they could convict the appellant only if they could exclude all hypotheses inconsistent with his guilt. No direction to that effect

was sought at the trial. His Honour stressed that the defence case was that the prosecution could not exclude the possibility that a second assault had occurred. There was no application for a re-direction on that question. His Honour canvassed the evidence thoroughly in the summing up, making it clear that it was for the jury to determine whether or not they were satisfied that there was only one assault during the night in question. Their verdict shows that they were left in no doubt about it.

[21] There is no reason for concluding that the verdict was unsafe or unsatisfactory. The appeal against conviction should be dismissed.

[22] **PHILIPPIDES J:** I agree with the reasons of McPherson JA and with the order proposed.