

SUPREME COURT OF QUEENSLAND

CITATION: *R v English* [2004] QCA 378

PARTIES: **R**
v
ENGLISH, Paul Matthew
(appellant/applicant)

FILE NO/S: CA No 197 of 2004
DC No 188 of 2004

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction and Sentence

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 15 October 2004

DELIVERED AT: Brisbane

HEARING DATE: 5 October 2004

JUDGES: de Jersey CJ, Jerrard JA and Jones J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal against conviction dismissed**
2. Application for leave to appeal against sentence dismissed

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – OTHER MATTERS – where appellant convicted after a trial of one count of grievous bodily harm – where trial judge directed jury to return a verdict of not guilty with respect to appellant’s co-accused – whether trial judge erred in not directing the jury as to what evidence could be considered against the appellant and not warning the jury to disregard the remaining or other evidence – where no request for redirection – whether appellant lost a chance of acquittal reasonably open to him

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted after a trial of one count of grievous bodily harm – where sentenced to 12 months imprisonment – where no evident remorse – whether sentence manifestly

excessive

Amituanai (1995) 78 A Crim R 588, considered
Dhanhoa v R (2003) 199 ALR 547, applied
R v Barry [2004] QCA 105; CA No 66 of 2004, 8 April 2004,
 considered
R v Craske [2002] QCA 49; CA No 11 of 2002, 1 March
 2002, considered
R v Dodd [1998] QCA 323; CA No 241 of 1998, 17
 September 1998, considered
R v Harvey [2003] QCA 286; CA No 112 of 2003, 10 July
 2003, considered

COUNSEL: J D Henry for the appellant/applicant
 R G Martin for the respondent

SOLICITORS: Philip Bovey & Co Lawyers for the appellant/applicant
 Director of Public Prosecutions (Queensland) for the
 respondent

- [1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Jerrard JA. I agree with those reasons, and with the orders proposed by his Honour.
- [2] **JERRARD JA:** Paul Matthew English has appealed against his conviction on 8 June 2004 on a charge of having unlawfully done grievous bodily harm to his brother Michael George English, for which offence he was sentenced to 12 months imprisonment. Mr English, when sentenced, was aged 49, had no prior convictions, was described by the learned trial judge as having led a respectable, law abiding life until the commission of that offence, and the learned judge accepted that the violence Paul English had used on Michael English was out of character and motivated by an obviously consuming dislike for his brother; as well as resentment and animosity harboured by Paul English over an incident occurring in early April 2003 in which Michael English had used a degree of physical violence towards Paul English. Paul English has also applied for leave to appeal against the sentence imposed upon him. His counsel submits that this court should order the 12 months imprisonment be suspended after Paul English has served four months, for an operational period of three years.

Circumstances of the offence

- [3] At the relevant time Paul English was employed in or managing the bottle shop of the Malanda Hotel, owned by his father, and Michael English was the manager of the Five Star Fresh Mart at Malanda, also owned by their parents. Their brother Kevin worked at the Malanda Hotel, owned too by their parents. All three premises are part of the one block in Malanda. On 27 June 2003 Michael English was watching football and drinking alcohol at the bar at the Malanda Hotel, when Kevin English came out from behind it and asked to talk to Michael “out the back about something”. Michael’s evidence was that Kevin seemed a bit agitated, and Michael followed Kevin outside into a car park area behind the hotel.

- [4] An argument developed there between those two brothers, in which Kevin remonstrated with Michael for the latter's conduct in whatever had occurred between Michael and Paul. Kevin said *inter alia* "While I was away you broke three of my brother's ribs", which Michael denied doing. Kevin said further "We've got three sisters down south, and they won't come back up here because of you" (there are eight siblings in the family). Those two brothers exchanged insulting remarks about each other's sexual conduct, and on Michael's account in evidence in chief Kevin continually gesticulated as if wanting a fist fight.
- [5] Michael attempted to end the developing argument by saying "well, fuck off", and began walking back into the hotel. He heard Kevin coming up behind him, and turned; as he did so Kevin pushed Michael from behind and Michael, who had recently had a hip replacement, fell down onto his knees and elbows. As he attempted to regain his feet he saw Paul, who had been standing in the back door way of the bottle shop, "racing out" and Michael swore that Paul "just raced and kicked me in the head". On Michael's account, he had seen Paul standing in that bottle shop doorway when Michael walked out of the hotel, and Paul had stood there observing the developing argument. Michael's evidence was that that kick from Paul was delivered to Michael's left temple area, and that after that both of his brothers then kicked him.
- [6] He was unable to say how often each kicked, describing the kicking as "just like a frenzied little attack", and when it ended he regained his feet and walked away through the bottle shop. He recalled that one of the other kicks he received had landed behind his left eye, distinguishing that from the first kick delivered to his left temple, and he was quite categorical that that first kick had been delivered by Paul and to that temple area. He described it as the kick that did most of the "damage" to that part of his face, and it was not suggested that any subsequent kicks from either Kevin or Paul were delivered to that left temple area.
- [7] Kevin had originally been indicted too, both on the count of unlawfully doing grievous bodily harm to Michael, and Kevin and Paul were also charged in the alternative with unlawfully assaulting Michael and doing him bodily harm while in company with each other. A joint trial was conducted, and at the end of the Crown case the learned trial judge directed the jury to acquit Kevin. That result followed from the prosecution having particularised the grievous bodily harm as the wound to the left temple area, upon which wound the prosecution also relied for the alternative count of assault occasioning bodily harm, and from the absence of evidence upon which the jury could find Kevin English criminally responsible for the kick which caused that injury. Michael English's evidence was that the injury had resulted from only one kick received in that area, delivered by Paul English.
- [8] The prosecution called a Dr Symonds, who described examining Michael English at the Atherton Hospital Casualty Department on 27 June, and observing five discrete areas of injury. Mr English had a bruise over the left loin or kidney area, a graze with some blood on the right side of his face, a substantial cut and bruising behind the left ear over the mastoid bone, a superficial cut under the left eye, and what the Doctor described as a very nasty wound on the left side of the face just behind the eye socket. Michael English's left eye was completely closed with swellings of both the upper and lower lid, and there was a "very nasty" deep laceration that was exposed and went right down to the bone behind the left eye socket. Dr Symonds described that wound to the left temple as a very deep one which was very difficult

to stop bleeding; it necessitated 20 superficial sutures and 16 other ones. The torn arteries which were so difficult to stop bleeding, because they were down near the bone, were such that in the Doctor's opinion Michael English could have bled to death had there be no intervening medical treatment; and had the wound not been stitched there would have been both a lot of scarring, and a high likelihood that the wound would have become infected. Dr Symonds considered that for a kick to have caused the injury, it would have to have been a very, very hard one.

- [9] Paul English neither called nor gave evidence, and the learned trial judge specifically directed the jury that they were to consider whether the prosecution had proved that on that night Paul English kicked Michael English in the head, causing the injury to the left temple area, and whether that amounted to grievous bodily harm. The directions given followed the evidence from both Michael English and Dr Symonds, isolating for their consideration as grievous bodily harm the specific wound to the left temple area and the one identified kick from Paul English. The directions given did not suggest that any other kicks or blows, perhaps delivered by Kevin in circumstances rendering Paul criminally responsible for those kicks or blows, could have caused or contributed to that injury.

Appeal against conviction

- [10] Paul English originally relied upon two grounds of appeal which were that:
- (a) there was insufficient evidence that the grievous bodily harm was occasioned by the alleged kick;
 - (b) the conviction is "unsafe and unsatisfactory".¹
- [11] His counsel elected not to argue ground (a), but maintained the appeal on ground (b), and as well on a ground added by leave. That last ground was that the learned trial judge had erred in not directing the jury as to what evidence could be considered against Paul English, and in not warning the jury to disregard the remaining or other evidence. That ground identified three items of evidence said to have been admissible only against Kevin English but not Paul English.
- [12] Regarding ground (b), that ground requires that this court itself assess whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that Paul English was guilty of causing that very nasty wound to his brother's left temple by a deliberate kick to it.² As to that, counsel for Mr English submitted that there was an obvious possibility that the temple injury could have occurred in consequence of one of the other kicks delivered, and thus perhaps by Kevin English, and there may have also been a later kick to that same temple area which actually caused the grievous bodily harm, also possibly done by Kevin English.
- [13] Once counsel conceded, as abandoning ground (a) did, that there was sufficient evidence from which the jury could properly conclude that the prosecution had established beyond reasonable doubt that a kick Paul English deliberately delivered had caused what the jury were satisfied was grievous bodily harm, then there was

¹ This should be understood in accordance with the provisions of s 668E(1) of the *Criminal Code* as meaning that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. See *Gipp v R* (1998) 194 CLR 106 and *MFA v R* (2002) 193 ALR 184 at 195

² See *M v R* (1994) 181 CLR 487 at 493

little room for the submission that there was a possibility that the grievous bodily harm could have occurred in consequence of some other kick. There was no evidence of any other kicks to the temple area. It was not put to Michael that either brother delivered any kick or blow to the temple other than the one Michael English described. What was put was that all Paul English had done was to crash tackle Michael English from the side, at a stage when Michael English was getting the better of a fist fight with Kevin English. That was specifically put by counsel for Paul English, and further that Paul English had not kicked Michael at all. Michael denied both propositions. Counsel for Kevin put that his client had in fact punched Michael English in the face, which suggestion Michael English rejected, and Kevin's counsel also put that Paul had crash tackled Michael. Michael rejected both the proposition that had occurred, and that he had struck his head when he fell. The common position advanced in cross-examination by the two accused brothers denied any kicks by either. The jurors were entitled to the view that the brothers' common position gave no sensible explanation at all of how Michael's injuries occurred, and that, as Michael swore, there was one kick to the temple, from Paul. That remains the position even though, as Paul's counsel pointed out at the appeal, an examination of Paul's shoes worn by him that night failed to detect any traces of blood (the evidence did not disclose the actual nature of the forensic examination undertaken, nor whether the presence of blood would have been anticipated).

[14] Regarding the ground added by leave, the evidence said to be admissible only against Kevin, and which the learned judge was alleged erroneously to have not withdrawn from the jury's consideration, was:

- evidence of the conversations between Kevin and Michael after Kevin first approached Michael inside the hotel;
- evidence of what Kevin told police officers at the scene prior to Paul joining Kevin and those police;
- the contents of a letter of apology Kevin wrote to Michael, which had been put in evidence.

[15] The evidence led was completed in one and a half days, and the learned trial judge did not attempt to specify in the directions to the jury which portions if any were inadmissible against Paul English. The judge dealt with that topic in this fashion, by directing the jury as follows:

“You understand from what I have said to you, you only have to consider Paul's conduct. The only matter you have to consider, as far as Kevin is concerned, is whether Kevin pushed Michael over just before Paul came in and kicked Michael. Whether you think it is unfair Paul should be here on his own has got nothing to do with it. Whether you fully understand the reason why I directed you to return a verdict of not guilty has nothing to do with it all. You have to consider the evidence as it relates to Paul's conduct, and, as I say, it is his guilt of these offences that you have to consider, and the only relevance of Kevin's conduct is whether Kevin pushed Michael over.”

[16] The learned judge was not asked to give any other directions on that topic by any counsel. The three pieces of evidence, about the non-withdrawal of which

complaint is now made, were the only three items said on the appeal to be admissible in the trial of Kevin English and not in that of Paul. The lack of any request for a redirection by any counsel means that this matter falls within that class of appeal identified in the judgment of McHugh and Gummow JJ in *Dhanhoa v R* (2003) 199 ALR 547 at [38], where their Honours wrote:

“When no redirection concerning evidence is sought at a criminal trial, the appellant can only rely on a failure to direct the jury on the evidence if he or she establishes that that failure constituted a miscarriage of justice. No miscarriage of justice will have occurred in such a case unless the appellant demonstrates that the direction should have been given and it is ‘reasonably possible’ that the failure to direct the jury ‘may have affected the verdict.’”

[17] As to the first matter of complaint, that evidence was not led to prove the truth of anything said by Kevin and Michael to each other, as Paul’s counsel readily agreed on the appeal. Evidence of those conversations was led as evidence of how the incident began and to explain why those two brothers were outside arguing at the back of the hotel. Paul’s counsel on the appeal may be correct in the submission that it would have been sufficient for the prosecution simply to lead evidence that Michael had gone outside at Kevin’s request, and that an argument had begun between them; but the subject of the argument, the alleged assault by Michael on Paul some months earlier, and which led to further and other arguments on 27 June 2003 between Kevin and Michael, was raised by Paul’s counsel at the trial when cross-examining Michael. It was put in cross-examination that Michael had reproved Paul because Paul had dismissed a female employee of the bottle shop, in whom Michael had some interest, and that Michael had punched Paul a number of times in the ribs and fractured one; Michael admitted jabbing Paul in the rib and that Paul had claimed to have a fractured rib. It was also established that following Michael’s complaint to the police after 27 June, Paul had withdrawn a complaint he had made earlier about that earlier asserted assault. Although the topic of the conversation between Kevin and Michael had the potential capacity, as Paul’s counsel on appeal submitted, to damage Paul’s defence by suggesting a possible motive for an assault upon Michael, Paul himself advanced that same information as part of his defence.

[18] The evidence of what Kevin said to the police after the incident was obviously inadmissible in Paul’s trial, but did not implicate Paul at all. Kevin was recorded saying:

“While I was away on holidays Michael attacked my brother Paul and broke his ribs....made nothing of it. I asked Michael tonight what it was all about. He had a glass in his hand. I had to walk from the back of the bar up to the supermarket to keep him away from me because he had a glass in his hand. And then he started all his lies about me taking 16 year old boys to my room and fucking them. I said ‘No Michael’ I’ve never done that. You can listen to the scandalmongers in town you can listen to all the stories you want, but you can never say that to me. And he kept going on and he kept abusing me and then I hit him. One hit and blood came out.”

That was all Kevin English said about the incident, and to which objection is now taken. I do not consider that Paul English lost any possibility of acquittal reasonably open to him because of the chance that the jury had regard to those

statements when considering the case against Paul English. On that account Kevin English was the physical aggressor, who hit Michael on an unidentified part of the body, which resulted in blood coming out. That account was in accordance with the case made for Kevin English before the jury.

- [19] The contents of Kevin’s letter of apology were consistent with Kevin’s statements to the police, and with the propositions put to Michael English by counsel for each of Kevin and Paul. The letter relevantly read:

“It was never my intention to get into a fight with you – my purpose [of] speaking to you was to stop the large rift between yourself and Paul.

You had had a few drinks by then, and when I asked for an explanation, you completely lost it. I evaded your physical attack for quite some time. There was no alternative for me but to hit you. In the melee Paul delivered a classical football tackle. Your severe injuries were the result of your falling heavily. Nobody kicked your head at any time. There is no way your brothers beat you senseless, or desired the injury you sustained.”

- [20] That letter too was inadmissible in the case against Paul, but its admission in the trial of Kevin, and the lack of any direction by the trial judge not to consider its contents when determining whether the Crown had proven beyond reasonable doubt that Paul English caused the grievous bodily harm, did not result in Paul English losing any chance of acquittal otherwise open to him. The letter was entirely consistent with Paul English’s defence, and raised the possibility for the jury’s consideration that either a blow from Kevin or a fall Michael experienced had caused the relevant harm. The jury were entitled to reject those possibilities, and the appeal against conviction should be dismissed.

Appeal against sentence

- [21] The prosecution drew a number of comparative sentences to the learned sentencing judge’s attention. One was a matter of *Craske* [2002] QCA 49, one a matter of *Dodd* [1998] QCA 323, one the matter of *Barry* [2004] QCA 105, and a matter of *Amituanai* (1995) 78 A Crim R 588. In that latter matter a complainant had been kicked to the head and received a brain injury with ongoing effects, and that applicant was sentenced to three years imprisonment with a recommendation that he be released on parole after serving nine months. In the matter of *Dodd* there was a guilty plea, where that applicant had punched the complainant, resulting in a fractured jaw. The sentence imposed was one of 18 months imprisonment with a recommendation for parole after six months had been served. In *Craske* that applicant pleaded guilty to an ex-officio indictment charging him with doing grievous bodily harm, and was sentenced to 18 months imprisonment to be suspended after a period of four months. That matter involved an argument between patrons at a curb side restaurant, and the appellant had chased that complainant and kicked him once to the head, causing some fractures. That complainant had instigated or brought about the events of that night. Finally, in the matter of *Barry*, that applicant was one of two co-accused who had assaulted a Chef at a hotel, who had been assaulted for no better reason than the Chef was an employee at those premises; Barry was sentenced to two years imprisonment to be suspended after a period of six months. On the appeal the prosecution relied on a matter of *Harvey* [2003] QCA 286, in which that applicant had punched the

complainant on the jaw. That applicant was a barman, and the complainant had been evicted from a hotel but had attempted to re-enter. The complainant was intoxicated and not defending himself when, then looking elsewhere, the applicant punched him, knocking him unconscious and causing a broken jaw and teeth and a loss of sensation to the face. That applicant was sentenced to two years imprisonment, to be suspended after 12 months.

- [22] Regarding those other penalties upheld by this court it does appear that only the applicants *Harvey* and *Amituanai* were sentenced to longer terms of actual imprisonment than this applicant. Paul English would be eligible for conditional release pursuant to s 76 of the *Corrective Services Act 2000* after he has served two thirds of those 12 months, whereas Mr Craske was ordered to serve only four months, Mr Dodd was recommended for parole after six, and Mr Barry's term was suspended after he had served six months. As against that in the instant case there was a trial and no evident remorse. In those circumstances a sentence of eight months actual imprisonment is not manifestly excessive.
- [23] Accordingly, I would dismiss both the appeal and the application for leave to appeal against sentence.
- [24] **JONES J:** I have had the advantage of reading the reasons for judgment of Jerrard JA and I agree with those reasons and the orders proposed.