# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Young* [2004] QCA 84 |
| PARTIES: | **R**<br>**v**<br>**YOUNG, Christine Lorraine**<br>(appellant/applicant) |
| FILE NO/S: | CA No 361 of 2003<br>CA No 382 of 2003<br>SC No 410 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 26 March 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 18 March 2004 |
| JUDGES: | McPherson and Williams JJA and Philippides J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made. |
| ORDERS: | **1. Appeal allowed**<br>**2. Conviction and verdict set aside**<br>**3. New trial ordered**<br>**4. Application for leave to appeal against sentence dismissed** |
| CATCHWORDS: | CRIMINAL LAW – DEFENCE MATTERS – SELF-DEFENCE AND OTHER FORMS OF DEFENCE – whether trial judge gave adequate directions to jury on self defence under s 271(1) & 271(2) of Criminal Code - whether trial judge erred by directing the jury that it was bound to accept either the complainants' or the appellant's version of who initiated the assault<br><br>*Criminal Code* 1899 (Qld), s 24, s 271(1), s 271(2)<br><br>*R v Gray* (1998) 98 A Crim R 589, referred to<br>*R v Julian* (1998) 100 A Crim R 430, referred to<br>*Marwey v R* (1977) 138 CLR 630, applied<br>*R v Muratovic* [1967] Qd R 15, referred to<br>*Murray v R* (2002) 76 ALJR 899, applied |

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| COUNSEL: | P Callaghan for the appellant<br>D L Meredith for the respondent |
| SOLICITORS: | Legal Aid Queensland for the appellant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **McPHERSON JA:** The appellant was found guilty in the Supreme Court of attempting to murder Christina Christova (count 1), and of doing bodily harm to John Williams while armed with an offensive weapon (count 3), the offences being committed on 12 June 2002. She was sentenced to imprisonment for 10 years on count 1 and to a concurrent term of three years on count 3. She appeals against these convictions and applies for leave to appeal against her sentence.

[2] For a period of four years ending late in 2001, the appellant and John Williams had been living together. Their parting was not amicable, and the physical separation was followed by disputes over money and property, which were not resolved until a deed of separation was signed late in May 2002. The final amount of $17,500 under it was paid by Williams as requested into the bank account of the appellant's sister on 12 June 2002. He was unable to inform the appellant of his doing so because on the night of 11 June she was driving from Sydney to Brisbane, where she arrived early on the morning of the day on which the offences took place. There was evidence, which was disputed by the appellant, that by then she knew that Williams had formed a new relationship with Ms Christova, who is the complainant in count 1.

[3] Ms Christova was staying at Williams' unit in Brisbane when she heard the front door bell ring. She stepped outside the door to look, and, in her evidence at the trial, said she was attacked by a woman wielding a knife, who pushed her back inside the unit. She did not know the woman, who was in fact the appellant. According to her account, she realised she had been stabbed in the stomach, the wound penetrating her liver, and she was then stabbed a further eight times. In the course of the attack, the appellant exclaimed that this was what the complainant was "getting for sleeping with my boyfriend", and, at another stage, "No, bitch, you are going to die here". These statements were part of the evidence relied on to prove that the appellant harboured the intention to kill. She also bit the complainant and placed the knife at her throat. It was while these events were taking place that Williams arrived home from work to find the two women struggling. He tried to pull the appellant off Ms Christova and wrestled her to the floor. She "flicked" at him with the knife inflicting some minor cuts, and she bit him on the arm and the shoulder. She only stopped struggling with him when the police arrived and ordered her to drop the knife.

[4] The appellant gave evidence at the trial saying that she had gone to the unit, arriving after 5 pm in the afternoon, to see Williams about the money that was to have been paid that day. She rang the doorbell and, through the glass of the door, she saw the shape of a figure inside coming towards it. When the door opened, a hand with a knife suddenly came out into her face. She was grabbed and dragged inside sustaining knife cuts on her hands; but she managed to wrest the knife from her attacker, and it fell to the floor. She did not remember Williams coming on the

scene, but she recalled a policeman arriving. She was confused and suffering from shock and her body had gone weak.

[5] At the trial, she relied on self defence under s 271 of the Code. It is necessary to set out both parts of the section:

> "**Self-defence against unprovoked assault**
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> **271 (1)** When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
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> **(2)** If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

[6] Both sub-sections of s 271 are predicated upon the happening of an unlawful assault, and both make it "lawful" (and as such not criminal) to use force as a defence against the assailant, although the extent of the force that is authorised under s 271(1) differs from that permitted under s 271(2). In the case of the former, it is limited to such force "as is reasonably necessary to make effectual defence against the assault", and the force used must not be intended or likely to cause death or bodily harm. The standard adopted is objective and does not depend on the impression formed by the person assaulted about the degree of force needed to ward off the assailant. If an honest and reasonable mistake is made about it, the exculpatory provisions of s 24 of the Code are doubtless available in appropriate circumstances.

[7] Section 271(2), on the other hand, is concerned with a different state of affairs. It authorises the use of more extreme force by way of defence extending even to the infliction of death or grievous bodily harm on the assailant. It is available where the person using such force cannot otherwise save himself or herself from death or grievous bodily harm, or believes that he or she is unable to do so except by acting in that way. The belief must be based on reasonable grounds; but, subject to that requirement, it is the defender's belief that is the definitive circumstance. See *R v Muratovic* [1967] Qd R 15, 19 (Gibbs J); *Marwey v The Queen* (1977) 138 CLR 630, 637; *Gray* (1998) 98 A Crim R 589, 593.

[8] In the present case, it was for the jury to determine whether on the facts any case arose for the application of s 271 in either of its sub-sections. That depended in the first place on whether the appellant had been subjected to an assault by Ms Christova that was not provoked. If the jury concluded that there had been no such assault, no question of self defence was capable of arising under either part of s 271. If, on the other hand, they were left with a doubt as to whether the appellant had in fact been assaulted, it was their duty to consider s 271. And if, after considering that question, they were for that or some other reason still left with a reasonable doubt about the appellant's guilt of the charge or charges, they were bound to acquit her of the offence or offences as to which that doubt remained.

[9] It was at the preliminary stage of the inquiry concerning the existence of an assault by Ms Christova that the summing up began to go astray. Speaking of the wounds sustained by Ms Christova and Mr Williams, his Honour said that the issue:

> "is really whether they were inflicted in the circumstances deposed to by Christova and Williams, *or* those deposed to by the accused, and that is very much a matter of fact for you to consider."

Then, a little later on, he said:

> "So, let me recapitulate shortly in respect of the question of self defence. It arises for consideration if you take a certain view of the factual situation. That view of the factual situation essentially involves *accepting* the accused's version of the events. On the evidence of Christova and Williams, no question of self defence arises."

And then again:

> "The considerations essentially are what version of the events do you accept? If you *accept* the version of events that the accused gave you, you consider self defence."

[10] The defect in these directions is that they speak of accepting one version or the other, but fail to address the further possibility that the jury might not be disposed to accept either the version given by the complainants or that given by the appellant. They might simply be left with a doubt whether events at the unit had in fact taken the course described by either of them. Because the onus of displacing the application of s 271, once it is fairly raised, rests throughout on the prosecution, it was therefore also necessary to direct the jury appropriately in relation to the elements of self defence under the section. At summing up, it was not possible to predict which if either version of events the jury would accept.

[11] His Honour did in fact give directions concerning self defence, about which more will be said later; but the effect of what he said in the passages set out from the summing up was to remove from the jury consideration of the possibility that they might not be persuaded of either version of what had happened. In that event, the appellant would have been entitled to the benefit of any reasonable doubt that remained as to whether she had been the target of an unprovoked assault capable of giving rise to a claim on her part of having, in inflicting the injuries on the two complainants, been using force to defend herself. In that respect, the present appeal resembles *Murray v The Queen* (2002) 76 ALJR 899, where the trial judge directed the jury to acquit or convict according to whether they "accepted" the accused's version of events or the version put forward by the prosecution, without adverting to the possibility that neither version might be accepted, in which case the accused would have been entitled to an acquittal. In that instance, like this, the learned trial judge had given the conventional directions about burden of proof, and at some points had correctly stated the issue to the jury; but elsewhere had misstated it in a way that relieved the prosecution of the duty of proving its case beyond reasonable doubt (76 ALJR 899, at 904 §23; 910 §57; 921 §132). Here the Crown was bound to establish beyond reasonable doubt that the facts did not give rise to a claim of self defence, which was for the jury to determine.

[12] In what I have said already, there has been an element of over-simplification. The defence under s 271 to the two charges was potentially more complex than I

have made it appear. It may have called for separate directions to the jury about self defence under s 271(1) and under s 271(2). That is because the appellant's claim to have been defending herself from attack by Ms Christova involved the use of such force as to inflict grievous bodily harm on that complainant, which, if it was to attract a claim of self defence at all, could do so only under s 271(2). On the other hand, the force used by her against Williams does not appear to have been intended or likely to cause death or grievous bodily harm, and in fact did not do so. As such, it fell to be considered, if at all, under s 271(1). Some of the essential differences between the two provisions have already been adverted to. They are discussed in more detail in *Gray* (1998) 98 A Crim R 589, 592-593, and by Dowsett J in *Julian* (1998) 100 A Crim R 430, 447-448.

[13] The judge was therefore required to direct the jury about self defence in relation to the assaults on each of the two complainants separately, and to do so in terms of s 271(2) or s 271(1) according to which of them was applicable to the particular charge or offence being considered. He did in fact direct on both sets of provisions, but without relating what he said about s 271(2) specifically to the assault on Ms Christova, or what he said about s 271(1) to the assault on Mr Williams. In fact, what he said in relation to s 271(2) was added only in redirections after a request by defence counsel. His Honour's original direction was framed in terms of and confined to s 271(1), which was not the provision relevant to the force used against Ms Christova. Nor did his direction concerning s 271(2) refer at all to the element that makes the actual belief of the accused, if based on reasonable grounds, the "definitive circumstance" as Barwick CJ called it in *Marwey v The Queen* (1977) 138 CLR 630, 637.

[14] The appellant had another complaint about the trial. After considering their verdict for some hours, the jury returned and asked the following question:

> "… if proof cannot be found in one's mind who initiated the attack, is that a reasonable doubt of attempted murder?"

It seems likely that the jury were there concerned about whether there had been an unprovoked assault on the appellant, so as to generate a right of self defence under s 271; and they wished to know if it necessarily also followed that there was a reasonable doubt whether the charge of attempted murder was proved. On one view of it, their question should have been answered in the affirmative. His Honour, and it would seem counsel at the trial, appear to have understood the question to be asking whether, if they entertained a reasonable doubt about the charge of attempted murder, that charge had not been proved; and he re-directed them only in that sense.

[15] Technically, it may be that what was involved was more a matter of non-direction than misdirection; but the fact that the question was asked itself suggests that the jury were puzzled by some aspects of the summing up. If they had a reasonable doubt as to who initiated the assault, it would appear to follow that they were not satisfied to the requisite standard that the appellant was the aggressor; or, expressing it another way, that it was not Ms Christova but the appellant who was, as she claimed, the one confronted by an unprovoked assault. I refrain from considering, because it was not debated before us, whether in that event s 272 of the Code had any relevant application. It is impossible to avoid the impression that these provisions of the Code, which were copied from the English draft Bill of 1880, are in urgent need of simplification.

[16] In the end, it is enough to say that, for the reasons given earlier, I consider that the verdict cannot stand. The appeal should be allowed; the conviction and verdict set aside; and a new trial ordered. Because of that, the application for leave to appeal loses its relevance, and must be dismissed.

[17] **WILLIAMS JA**: Whilst I agree with all that has been said by McPherson JA in his reasons, I would add some further observations.

[18] During the course of the appellant's evidence her counsel, the prosecutor, and the learned trial judge all became concerned as to her mental state, specifically whether she was fit to stand trial. Because of that an opinion from a psychiatrist was obtained during an adjournment. The medical report established that, applying the appropriate test, the appellant was fit to stand trial.

[19] Thereafter, no doubt because of the impression the appellant had created whilst in the witness box, her counsel addressed the jury more on the basis that the appellant believed a certain state of affairs existed rather than that she swore positively to the existence of that state of affairs. Specifically when dealing with s 271 of the Criminal Code his submission, incorporating s 24 thereof, was predicated upon a mistaken belief as to the factual situation. That resulted in the learned trial judge in his summing up telling the jury that "the self-defence consideration only arises, or arises if you take a view that the accused honestly and reasonably, but mistakenly believed that she was being subjected to an attack ...". It was largely because of that approach that the overall summing up with respect to self-defence was confusing. That was compounded by the fact that reference to s 271(2) was only made in the course of re-directions. As McPherson JA has pointed out it was only s 271(2) that could have afforded the appellant a defence to count one.

[20] The deficiency in the summing up was then highlighted by the question from the jury as to the position "if proof cannot be found in one's mind who initiated the attack". With respect to count one, if the complainant's evidence was accepted beyond reasonable doubt then self-defence did not arise. If the jury accepted the appellant's evidence on count one, or was left in a state of uncertainty as to how the incident began, they were obliged to consider her defence based on s 271(2). That is, the jury had to proceed upon the basis that the complainant unlawfully assaulted the appellant to initiate the incident, and the appellant's response thereto became the focal point for further consideration. The question was whether or not the appellant's subsequent conduct was made lawful by that provision.

[21] The onus was on the prosecution of negativing that defence. The summing up did not adequately address that approach to the evidence.

[22] The confusion in the summing up between the two paragraphs of s 271 also necessitates setting aside the conviction on count three. As McPherson JA has pointed out s 271(1) was the relevant provision here, and the summing up did not adequately distinguish between the two paragraphs and clearly indicate that paragraph (1) alone applied to the issue of self-defence on count three.

[23] It follows that there must be a re-trial. I agree with the orders proposed.

[24] **PHILIPPIDES J**: I agree with the reasons for judgment of McPherson JA and with the orders proposed.