SUPREME COURT OF QUEENSLAND

CITATION:	*R v Willett* [2005] QCA 339
PARTIES:	**R** **v** **WILLETT, Kurt** (applicant/appellant)
FILE NO/S:	CA No 100 of 2005 SC No 170 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2005
JUDGES:	McMurdo P, McPherson JA and Fryberg 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 refused**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – CORROBORATION – WARNING REQUIRED OR ADVISABLE – ACCOMPLICES – GENERALLY – where prosecution witness alleged to be accomplice and had prior criminal convictions – whether trial judge failed to give adequate warning concerning the evidence of a prosecution witness CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – SELF-DEFENCE – whether self-defence under s 271(1) *Criminal Code* 1899 (Qld) erroneously left to jury – whether direction on self-defence unnecessary and misleading CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF DEFENCE CASE AND REVIEW OF EVIDENCE – whether judge adequately put defence case to jury

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – NON-PAROLE PERIOD OR MINIMUM TERM – sentence of ten years imposed for attempted murder – whether sentence manifestly excessive given non-parole period of 80 per cent

Criminal Code 1899 (Qld), s 7(1)(b), s 7(1)(c), s 271(1), s 620(1), s 632
Penalties and Sentences Act 1992 (Qld), s 161A(a), s 161C

Festa v The Queen (2001) 208 CLR 593, cited
R v Baskerville [1916] 2 KB 658, considered
R v Laus [2005] QCA 33; CA No 347 of 2004, 18 February 2005, considered
R v Reeves [2001] QCA 91; CA No 276 of 2000, 13 March 2001, cited
R v Stubbs (1855) Dears 555; 169 ER 843, considered
Robinson v The Queen (1999) 197 CLR 162, considered
Viro v The Queen (1978) 141 CLR 88, cited

COUNSEL: B G Devereaux 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] **McMURDO P:** I agree with McPherson JA's reasons for concluding that the appeal against conviction should be dismissed and the application for leave to appeal against sentence refused.

[2] **McPHERSON JA**: The appellant Kurt Willett was convicted at his trial of having attempted to kill Brett Lloyd on 24 December 2003. He was sentenced to imprisonment for 10 years. On appeal, Mr Devereaux for the appellant was given leave to amend the notice of appeal to raise three grounds (1) that the trial judge had failed to give the jury an adequate warning concerning the evidence of prosecution witness Michael Evernden; (2) that the trial had miscarried because the judge had erroneously left self defence under s 271(1) of the Criminal Code in circumstances in which such a direction was unnecessary and misleading; and (3) the judge had failed adequately to put the defence case to the jury.

[3] The indictment was the outcome of events that took place at the Durack Gardens Caravan Park in the night time or the early hours of the morning of 24 December 2003. The appellant said he went there at about midnight after finishing shift work at the bakery that night. At that stage he was living at home with his parents, but he had previously resided at the caravan park and knew those involved in the events of that night, who later gave evidence at the trial. The complainant Brett Lloyd lived at the park in a caravan with Johanna Peterson and their young daughter; but, some time before, Johanna and their daughter had moved out and they were then staying with Evernden in his caravan at the Park. The appellant was in the process of initiating a relationship with Johanna, after a previous relationship had come to an end. On the evening in question there had been an altercation

between the complainant Lloyd and Evernden (who was referred to in the evidence by his nickname Grouch), which ended in a scuffle.

[4] After he arrived at the caravan park that night, the appellant was, for reasons which are not entirely clear, drawn into the dispute. He was driving his mother's car around the caravan park, with Evernden and Johanna Peterson in it, when Lloyd approached the car, opened the door and tried to pull the appellant out of the car. Before the vehicle drove off, Lloyd noticed that there was an axe in the car. The appellant later admitted that he had grabbed for the axe, which was tucked down the side of the door.

[5] The car was driven round and back again and stopped outside Lloyd's caravan. Lloyd came outside and saw the appellant put his head and arm out of the driver's door window with a pistol in his hand. He pointed it at Lloyd, who said he heard a clicking sound as if the trigger had been activated, after which the car was driven off. There was evidence that the firearm had jammed. Lloyd decided to arm himself with a long steel bar in case the car came back. He hid himself in some nearby bushes. When the vehicle came round again, he jumped out and hit it with the bar in the area of the front pillar. He then ran and dived into the bushes. He heard the pistol being fired and heard bullets whizzing past his head. This was what constituted the attempt to kill with which the appellant was charged and tried.

[6] The prosecution evidence against the appellant included a record of an interview (ex 13) conducted by the police on the afternoon of 24 December after the shooting. In the course of it the appellant confirmed that he had fired four shots from the pistol in the direction of Lloyd. By that stage, he said, Evernden was driving the car and the appellant was in the right hand rear seat leaning out of the window when he fired the shots. The various prosecution witnesses including Johanna Peterson were not entirely at one in their accounts of the precise sequence of events; but it is clear from the record of interview that the appellant and Evernden had earlier driven to the appellant's parents' house where the appellant obtained the gun and some ammunition for Evernden to use against Lloyd. After Lloyd tried to pull the appellant out of the driver's seat, the appellant had driven off to get away from Lloyd, with the door of the car still open. Evernden had been planning to shoot Lloyd, but, the appellant said, "we couldn't find him". He said he was "a bit hazy" about what happened next; but Evernden ended up behind the wheel of the car with the appellant with the pistol in the rear seat "looking for this fellow", when all of a sudden Lloyd jumped out and smashed the car with "this big steel pole". The next thing he remembered was leaning out of the rear window of the car discharging four shots in Lloyd's direction.

[7] According to the evidence of Evernden, what happened earlier after Lloyd tried to pull the appellant out of the car was that the appellant said "Oh, pass me the gun. I want to get this bastard". We were "all … pretty angry", Evernden said, but the appellant "seemed a lot more angry than us". Evernden gave the appellant the gun and a clip of ammunition which they had previously obtained from his parents' place. Knowing that the appellant planned to fire the gun at Lloyd had the consequence that Evernden was thus a party to the offence under s 7(1)(b) or (c) of the Code and, Mr Devereaux submitted for the appellant, therefore an accomplice of the appellant. Accordingly, it was submitted, his evidence required corroboration at common law; but the trial judge had failed to warn the jury of the need for it.

[8] There is no doubting the common law rule requiring corroboration of accomplices. The question is what was meant by that requirement in this context. In *R v Baskerville* [1916] 2 KB 658, Lord Reading CJ cited with approval a passage from the judgment of Parke B in *R v Stubbs* (1855) Dears 555, 557; 169 ER 843, 844, to the effect that the practice was to direct the jury not to convict "unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner". The reference to identity shows the question on that occasion was whether there was independent evidence "implicating" the accused in the crime, as Lord Reading described it in *R v Baskerville* at 665, by "connecting" him with it. No such evidence was called for here, because it was admitted by the appellant in the police interview, and accepted by counsel on appeal, that the appellant had fired four shots in the direction of Lloyd. However, accepting that the requirement of corroboration of accomplices was not limited to the matter of identity, what was required here was "some additional evidence" independent of the accomplice himself "rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it": *R v Baskerville* [1916] 2 KB 658, 665. It was never the rule that there had to be independent evidence of the whole of the accomplice's account. "Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony": *R v Baskerville* [1916] 2 KB 658, 664.

[9] Mr Devereaux submitted here that Evernden's testimony about the appellant's frame of mind at the time and that he wanted to "get this bastard" required corroboration because it was relevant or material to an element of the offence, namely the intention on the appellant's part to kill Lloyd. This, in my respectful view, amounts to an attempt to resurrect the fallacy long since laid to rest in rape cases that evidence is incapable of amounting to corroboration unless it confirmed *both* the identity of the wrongdoer *and* the absence of consent on the part of the complainant. In the present case, there was, as I have said, no question that the appellant fired the shots at Lloyd. Whether he did so in an attempt and with intent to kill was a question of fact for the jury, to be determined principally by drawing inferences from the circumstances disclosed in evidence about the appellant's state of mind including what was said by him at the time. There was, as *R v Baskerville* itself decided, no requirement that the testimony of Evernden, should, if he was an accomplice, be corroborated "in every detail" by independent evidence from other sources. It was enough that his account of it, or "story", as Lord Reading CJ called it, was probably true and it was reasonably safe to act upon it. Here it was confirmed by the appellant's own admission in the record of interview.

[10] In any event, the requirement of corroboration at common law, or the practice of warning a jury that it is unsafe to convict without it, has now been partly displaced by s 632(1) and (2) of the Code, as amended in 1997 and 2000. What is provided in s 632(3) is that the two preceding subsections (1) and (2) do not prevent a judge "from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice"; but the judge must not warn or suggest to the jury in any way that the law regards any class of persons as unreliable witnesses. Section 632 was considered by the High Court in *Robinson v The Queen* (1999) 197 CLR 162 at a time when s 632(3) referred only to "complainant" and not, as now, to any "persons" as witnesses. On the footing that it extends to accomplice witnesses, the observations of the High Court in *Robinson v The Queen* (1999) 197 CLR 162, 171, are relevant here. Speaking of a case in which the

complainant witness was a child victim of sexual offences charged against the accused, their Honours said:

> "Taken together with the absence of corroboration, these matters created a perceptible risk of a miscarriage of justice which required a warning of a kind which brought home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt."

[11] In the present case it was not precisely a direction in those terms that was sought from the trial judge but rather, as it was expressed, a "dangerous to convict direction". Counsel for defence at trial did, however, submit that the judge had not given "a warning about scrutinising the evidence with care", which may be taken as a request for redirection in the relevant terms. On appeal, such a warning was said to be called for here, not only because Evernden was an accomplice, but because he had admitted in cross-examination that in 2003 he had breached a bail undertaking on a drink driving charge, and that in 2001 he had been convicted of possession of cannabis. In cross-examination at the trial, he had declined to answer on grounds of possible incrimination whether he was dealing in drugs at the caravan park; and he admitted to having drunk up to 18 cans of bourbon and cola earlier on the night in question.

[12] In giving the jury general directions about the credibility, honesty and reliability of witnesses, the judge told them they were entitled to take into account that Grouch (Evernden) had consumed a considerable quantity of alcohol, which was something they could take into account in evaluating his evidence and determining whether it was reliable. He also said that Johanna Peterson and the complainant Lloyd had prior criminal convictions, in her case in New Zealand when she was young; and also in his case, that Lloyd may have been a violent man. His Honour did not specifically mention Evernden in this context; but he did add the comment that "previous convictions or disreputable conduct don't necessarily mean that a witness is not credible".

[13] These comments were well within the ambit of "observations" on the evidence, which under s 620(1) of the Code a judge has a discretion to make. It is difficult to see why he was bound to go further and give the direction that it was dangerous to convict which was sought by counsel at the trial or on appeal. Nothing in the decision in *Robinson v The Queen* (1999) 197 CLR 162 required it in this case. I have already concluded that the circumstances were not such as, at common law, to call for corroboration of Evernden's testimony in the respects sought on appeal. The appellant's own admissions to the police for the most part tallied with the evidence of the other witnesses concerning essential matters on the night in question. It was not a case of the unsupported word of one witness against that of another on any critical issue at the trial. On the contrary, the witnesses, although to some extent confused about matters of detail or sequence, were pretty much at one with each other and with the appellant about who did what on the night in question. It was not an occasion on which there was "a perceptible risk of a miscarriage of justice" if the jury were not warned to "scrutinise with great care" the evidence of Evernden or, indeed, any of the witnesses. I therefore do not consider that the appellant is entitled to succeed on this ground.

[14] The second ground is, as I have said, that the judge was wrong in leaving to this jury the matter of self defence under s 271 of the Code. In this instance his

Honour was expressly asked to do so. Counsel for the defence at the trial argued that "even where a person is killed, the first limb can still be left to the jury". He was referring there to s 271(1), which, before being redrafted, was the first "limb" of s 271. A difficulty is that s 271(1) is limited to cases in which the force used in self defence "is not intended, and is not such as is likely, to cause death or grievous bodily harm". The essential ingredient in the offence of attempted murder charged against the appellant was that he intended to kill. Counsel for the defence at the trial nevertheless urged that the jury "still have to consider whether the force used was *likely* to cause death or grievous bodily harm even though … death or grievous bodily harm may [in fact] have resulted".

[15] In the result, his Honour directed the jury on self defence as he was requested to do. It is now said that he was wrong in doing so, essentially because, in view of the explicit provisions of s 271, that defence was doomed to fail in this case; and that, being so, it tended to confuse and distract the jury from their real task of determining whether there was an intention to kill by leading them to think that, if they found against self defence, they had resolved the question of the appellant's guilt.

[16] It is true that, objectively speaking, there was little or no real prospect that self defence would succeed in this case. But, as Gibbs J said of self defence in *Viro v The Queen* (1978) 141 CLR 88, 118, "a judge, if in any doubt as to whether there is sufficient material to raise such an issue, should leave the issue to the jury". In the record of interview the appellant claimed he had heard that Lloyd was "going to cave my fucking skull in". Lloyd, he said, was a big man "three, four times my size", a Kiwi and "fucking psycho". He had "half pulled [the appellant] out of the car" and had "jumped out in the middle of fucking nowhere with his big steel pole and smashed my mum's car". "I have to admit", he told the police, "I was a little scared". In the circumstances, it would have been a bold judge who, when specifically asked to do so by defence counsel, refused to direct on self defence because it might confuse the jury. Moreover, the dangers of not doing so were increased rather than diminished here by the presence of an area of common ground between self defence and attempted murder. Under the provisions of s 271(1) self defence was excluded "if the force used is not intended … to cause death". The prosecution bore the burden of establishing that such an intention existed; if successful in discharging that onus, it might logically have established the intention needed to prove the offence of attempted murder; but juries do not necessarily approach such matters in a completely logical way, and on appeal a court is not always in a position to say whether they had rejected self defence on this or on some other ground.

[17] I consider that the trial judge was correct in leaving self defence to the jury in the circumstances of this case. In any event, the complaint on appeal is that, by doing so, the jury were or would have become confused or distracted from their duty of considering whether the appellant harboured an intent to kill. This is, in the end, largely a matter of impression on appeal; but there is nothing to show that they went about their task in a confused way. They retired at 11.12 am and returned with their verdict at 6.08 pm on the same day, without asking for redirections in relation to any of the matters contained in the summing up or otherwise.

[18] The question raised by this second ground of appeal to some extent merges in the third. This is the complaint that the judge failed to put the defence case

adequately before the jury. It was said that in summing up he did not refer to defence counsel's submissions in support of the defence case. The problem is to know what those submissions were. The addresses were not recorded, or, if they were, they are not included in the appeal record. This is perhaps surprising in a case in which the ground of inadequacy in the summing up is now taken on appeal. If something was left out of the summing up that ought to have been said by the judge in his directions to the jury and no record was made of it, one would expect that it would have been demonstrated by affidavit, if necessary, what it was.

[19] The final address of prosecuting counsel occupied 46 minutes from 3.03 pm to 3.49 pm on the third day. Defence counsel addressed from 4.00 pm to 4.30 pm, and then continued from 10.00 am to 10.13 am on the following (or fourth) day. The summing up began at 10.13 am and concluded at 11.12 am. There was no application by experienced counsel at the trial for redirections on this ground. That is relevant in considering whether there has been a miscarriage of justice in the respect now contended for. See *Dhanhoa v The Queen* (2003) 77 ALJR 1433, 1439; (2003) 217 CLR 1.

[20] Once self defence is put aside, the issues for the jury at the trial in this case were few and simple. One was whether what was done by the appellant amounted to an attempt. The other was whether it was done with the intention of killing Lloyd. The judge directed the jury on several occasions in the summing up that it was for the prosecution to prove beyond reasonable doubt that when he discharged the gun the appellant was intending to kill Lloyd. From the beginning the Crown case was that he had that intention, whereas the defence case was that he did not.

[21] Although only a young man at the date of the alleged offence (he was 21), the applicant had considerable experience in the use of firearms especially pistols. His parents were interested in pistol shooting as a pastime and he had been brought up from the age of 12 to take part in that sport at clubs where he had won many trophies before he left home at age 17. He described himself to police as an "exceptionally" good shot. The weapon used on the evening, which he removed from his parents' place where it was kept locked, was a .22 calibre Benello pistol. On the night in question, it was loaded with ammunition, also taken from his parents' home, along with the axe. The pistol was left-handed and specially moulded to fit his hand. After the incident, some four spent cartridge cases were discovered in the vicinity, together with two bullets or slugs, one of which had penetrated the bole of a palm tree, and the other the structure of a nearby caravan. It does not appear that any definite inference could be drawn from their presence, except perhaps that the area over which the shots ranged was reasonably confined in terms of space.

[22] In the interview with the police, the appellant said that he had never intended to "hurt" Lloyd, or actually inflict harm on anyone. He had not aimed at him, otherwise "he'd now be dead", even though it was night time and he was not wearing his glasses. It is not clear from the evidence whether or not the car was in motion at the time he fired the shots. Lloyd said he was only about 4 metres away when the shooting started. The appellant said it was 20 to 30 metres and "pitch black" except for the headlights of the car. At the same time he had "a fair indication" from the illumination provided by the brake lights of the car where Lloyd was. "Had I known exactly where he was fucking standing, man, I could have aimed in that spot, and I probably would have hit him". As it was, he shot in "the

general direction" of Lloyd and "had to squeeze the trigger like fucking crazy", which is no doubt why four shots were fired.

[23] It was for the jury to make what they could of all of these statements by the appellant together with the relatively slight additional evidence about his state of mind given by Evernden at the trial in deciding, if they could, what the appellant's intention really was. It is to my mind very doubtful whether it would have materially assisted the defence if the trial judge had gone in detail through the record of interview, reminding them that one line of it might, and another might not, support the hypothesis of an intention to kill on the part of the appellant. Section 620(1) of the Code expressly leaves it to the discretion of the judge to decide what observations he or she will make about the evidence in the case. In many probably most cases, it would not be enough for the judge to give directions on the law without explaining how they applied to the facts as they might find them to be. The trial judge has the responsibility (1) of deciding what the real issues are in the particular case, and (2) of telling the jury in the light of the law, what those issues are. See *Alford v Magee* (1952) 85 CLR 437, 466. But here the facts on which an inference of intention to kill were based were contained in the contents of the appellant's record of interview with the police after the event. In those circumstances there was no occasion for the judge to do more than explain what in law had to be found before they could arrive at a verdict of guilty of attempting to kill. As McHugh J said in *Festa v The Queen* (2001) 208 CLR 593, at 626:

> "A trial judge is in a unique position to determine what should be incorporated into the summing up in a given case. The judge hears the addresses of counsel and observes the reactions of the jury, if any, to the evidence, the addresses, and the summing up. The judge is therefore in a better position than an appellate court to appreciate how much assistance the jury needs on particular issues."

Counsel on both sides evidently thought the same as the trial judge, as can be seen from the fact that no directions or redirections on the issue of inadequacy in summing up were sought by either of them from his Honour.

[24] I would therefore dismiss this ground, as well as the appeal against conviction. On the question of sentence against which the appellant seeks leave to appeal, the sentence imposed was 10 years imprisonment. That has the consequence of attracting under s 161A(a) of the *Penalties and Sentences Act 1992* a conviction carrying a declaration of the commission of a serious violent offence in terms of s 161C of the Act, with the result that the offender will not be considered for parole until he has served 80% of the sentence imposed, or 8 years in the case of the appellant. It is said that a sentence of that duration is excessive having regard among other matters to the appellant's youth and the fact that no injury to anyone was in fact caused by the offence on this occasion.

[25] The appellant is one of two children of what appears to be a well-to-do family living in suburban Brisbane. Despite this, he seems to have had a troubled upbringing. He did not fit in with his peers at the grammar school which he first attended, from which he was later transferred to a state high school. Although having some athletic prowess, his academic record there suffered a decline, and he began to use cannabis at about the age of 16. He did not get on with his father, and disclosed symptoms consistent with depression, anxiety and paranoia. He left home at age 17 and formed a relationship with a young woman with whom he had two

children. This relationship had broken up a few weeks before the offence, after which he moved back to his parents' home where he was living at the time. At the age of about 18 he began to use amphetamines, which he applied intravenously, and which he used to offset his anxieties and periods of depression.

[26] The psychologist who interviewed him said that the appellant appeared to have a history of relationship dysfunction and social isolation and that it was likely that he had experienced mental health problems in the past. He presented with a "low average intelligence". Despite this and a history of conflict in the workplace, he appears to have made efforts to secure employment, and at the time in question he was working as an apprentice pastry cook. The sentencing judge noticed that the psychologist recommended that the appellant be referred to the mental health services "for assessment and adjustment", and envisaged that the prison authorities would take account of his Honour's remarks.

[27] The appellant has a record of prior convictions. They include convictions beginning in the magistrates court in 2001 for breaking and entering, followed in the same year by convictions in the District Court for various offences of entering and stealing and fraud. On that occasion he was committed to probation for 18 months, but was back in court in February 2002 for entering premises with intent to commit an offence and again in June 2002 for offences of fraud and attempted fraud. In that instance he was sentenced to imprisonment for six months, wholly suspended. The period of suspension had expired before his conviction for committing the subject offence on 24 December 2003. In September 2002 he was convicted for behaving in a threatening manner.

[28] The appellant presents a picture of a troubled young man who has now committed a serious offence attracting a lengthy period of imprisonment. There is authority in this Court for the view that sentences for the offence of attempted murder commonly vary along the general range of 10 to 17 years imprisonment: see *R v Reeves* [2001] QCA 91. It is certainly possible to locate cases of sentences that are longer or shorter than that, depending on the circumstances. The judge took account of the appellant's history saying that, were it not for the appellant's personal characteristics, he would have been inclined to impose a sentence of 11 or 12 years imprisonment. Some remorse is discernible, but it was not open to the judge to reduce the sentence on account of a plea of guilty because the appellant chose to go to trial. On the evidence it was well within the province of the jury to find him guilty of attempted murder as they did.

[29] The substantial burden of complaint against the sentence is that it was fixed at a level that attracted the automatic consequence mandated by statute that a serious violent offence had been committed. It was said that the sentence should have been pitched at the level of imprisonment for 8 or 9 years. That would have avoided the automatic outcome imposed by the statute, leaving it instead to judicial discretion whether or not to make such a declaration.

[30] The problem for the appellant is that the offence in this case was in fact both serious and violent. It involved the surreptitious taking of a pistol and ammunition from places at his home where the appellant knew that the pistol was kept by his father under lock and key to prevent its misuse. It is said that this step was procured by the intervention of Evernden, who is an older man. There may be some doubt about Evernden's being the author of the idea, but at all events it was the appellant

who drove home in the night knowing where and how to obtain the pistol and to load it and then to fire it with lethal intent. He was no doubt provoked by the threats which he believed Lloyd had made against him and by Lloyd's action in smashing his mother's car with the pipe. But he insisted on taking the firearm from Evernden and positioning himself with a view to using his acknowledged ability as a marksman to get even with a man who was physically more powerful than he. As a result, he blazed away with the firearm in the dark in a place crowded with others, with the intention, as the jury found, of killing his opponent.

[31] The appellant was fortunate that his attempt was, as it turned out, unsuccessful, or he would have been facing a more serious charge carrying a much more severe penalty. The judge in sentencing is not shown to have erred in his discretion in imposing the sentence he did. The duration of the sentence here corresponds in duration to that fixed in *R v Laus* [2005] QCA 33, in the case of an equally determined attempt by a 74 year old man to kill, using a rifle from which the offender in the end, failed to discharge a single shot.

[32] In my opinion, the appeal against conviction should be dismissed and the application for leave to appeal against sentence should be refused.

[33] **FRYBERG J:** In relation to the first and third grounds of appeal (as amended), I respectfully agree with the reasons for judgment of McPherson JA.

[34] The second amended ground of appeal was that the trial miscarried because Moynihan J, the trial judge, erroneously left self-defence under s 271(1) of the *Criminal Code* to the jury in circumstances "where such direction was unnecessary and misleading". That amendment was made at the outset of argument on the appeal. At the same time the appellant abandoned a number of other grounds originally contained in the notice of appeal. Among those abandoned was, "The learned trial judge failed to direct as to s 271(2) of the *Criminal Code*."

[35] The first count in the indictment alleged "that on the twenty-fourth day of December, 2003 at Brisbane in the State of Queensland, KURT WILLETT attempted unlawfully to kill BRETT JACK LLOYD".[1] To return a verdict of guilty the jury had to be satisfied beyond reasonable doubt that the appellant attempted to kill Mr Lloyd and as to the element of unlawfulness.[2] In relation to the acts constituting the attempt Moynihan J directed the jury in terms of s 4 of the *Criminal Code* and there is no complaint in relation to that.[3] In relation to the mental element he directed the jury in emphatic terms that in order to convict they had to be satisfied beyond reasonable doubt of the existence of an intent to kill and there is no complaint in relation to that.[4] The verdict demonstrates that the jury were so satisfied on both elements.

[36] As to the element of unlawfulness, counsel for the accused submitted to the judge that the evidence was sufficient to raise self-defence under each of the sub sections of s 271 of the *Criminal Code*. His Honour directed the jury only under s 271(1). The appellant now submits, "It was effectively impossible for the first limb of s 271

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1 There was an alternative count of unlawfully attempting to strike with a projectile with intent to do grievous bodily harm. Nothing now turns on that.

2 It is unnecessary to consider whether "unlawfully" modifies "attempted" or "to kill".

3 Compare *R v O'Neill* [1996] 2 Qd R 326 at p 432.

4 Compare *Knight v the Queen* (1992) 175 CLR 495.

to apply, given the common element of an intention to kill by which the Crown would prove the charge of attempted murder and disapprove the defence. If subsection 271(2) was not open, no issue of self-defence should have been left." In my judgment that submission is correct. Proof beyond reasonable doubt that the appellant intended the force which he used to cause death excludes the operation of s 271(1). It is impossible to distinguish between the intent to kill which accompanied the conduct constituting the attempt and an intent that the force used should cause death. The point is not whether there was sufficient material to raise the issue of self-defence. It is whether it was open to the jury to consider that defence once they were satisfied beyond reasonable doubt of the existence of the necessary intent. At least in the circumstances of this case, if the jury were not satisfied beyond reasonable doubt of the intent to kill, they had to acquit of attempted murder. If they were so satisfied there was no scope for s 271(1) to apply.

[37] That conclusion is not inconsistent with the numerous statements of high authority that a trial judge must leave to the jury any defence properly raised by the evidence. Nor in my judgment does it conflict with the obligation to permit the jury to "organize their individual processes of reasoning, or their discussions as a group, in whatever manner appears to them to be convenient."[5] A trial judge should instruct the jury on so much of the law as is necessary for them to determine their verdict, but no more. Unfortunately, in the present case, neither counsel drew his Honour's attention to the point made in the previous paragraph. The result was the inclusion of surplusage in the directions on law.

[38] However that does not mean that this appeal should be allowed. The error was made at the behest of counsel for the appellant and was one in the appellant's favour. I reject the appellant's submission that the direction gave rise "to the possibility that, in dismissing the defence because the Crown had satisfied one of the elements other than an intention to kill, the jury may have converted such a finding into one of guilt of the offence charged." In my judgment no such possibility is open on any fair reading of the summing up, and I agree with McPherson JA that there is nothing to show that they went about their task in a confused way.

[39] For those reasons I reject the second ground of the appeal.

[40] In relation to sentence I agree with the reasons for judgment of McPherson JA.

[41] It follows that I concur in the orders proposed by his Honour.

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5 *Stanton v The Queen* (2003) 77 ALJR 1151 at p 1157.