SUPREME COURT OF QUEENSLAND

CITATION:	*R v Da Costa* [2005] QCA 385
PARTIES:	**R** **v** **DA COSTA, Rui Michael** (appellant)
FILE NO/S:	CA No 142 of 2005 DC No 1795 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2005
JUDGES:	McPherson and Keane JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – GENERALLY – where appellant convicted of unlawful wounding – where offence was committed in company – where no evidence as to which of the accused had done the actual wounding – where Crown case was that the appellant was either directly responsible for the wounding or was a guilty party to it – where appellant argued that the verdict was unsafe and unsatisfactory on the grounds that there was impermissible speculation on the part of the jury – whether verdict safe *Criminal Code 1899* (Qld), s 2, s 7(1)(a), s 7(1)(b), s 7(1)(c) *Edwards v The Queen* (1993) 178 CLR 193, referred to *R v Ancuta* [1991] 2 Qd R 413, followed *R v Bainbridge* [1960] 1 QB 129, cited *R v Barlow* (1997) 188 CLR 1, followed *R v Beck* [1990] 1 Qd R 30, cited *R v Jeffrey* [2003] 2 Qd R 306, [1997] QCA 460, referred to

R v Jervis [1993] 1 Qd R 643, cited
R v Lowrie and Ross [2000] 2 Qd R 529, [1999] QCA 305, referred to
R v Powell [1999] 1 AC 1, applied
R v Sherrington and Kuchler [2001] QCA 105; CA No 239 and CA No 245 of 2000, 6 April 2001, cited
R v Smith (1837) 8 C & P 160; 173 ER 441, referred to

COUNSEL: C W Heaton for the appellant
M R Byrne for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: I have read and I agree with the reasons of Douglas J in dismissing the appeal against conviction in this matter.

[2] The criminal responsibility of the appellant depended on the evidence against him at the trial establishing the requirements of one or more of the subparagraphs (a), (b) or (c) of s 7(1) of the Criminal Code. Whether or not it was under s 7(1)(a) open to the jury to conclude that the appellant was the person who "actually does the act" constituting the offence of wounding in this case, I am satisfied that the jury were entitled on the evidence to find him guilty as a party under either s 7(1)(b) or s 7(1)(c) of the Code.

[3] Section 7(1)(c) applied if the appellant was proved to have "aided" another in committing the offence. In this context, aiding means assisting, and the question for the jury therefore was whether the appellant was "aware at least of what is being done or perhaps will be done by the other actor": *R v Sherrington and Kuchler* [2001] QCA 105, at [13]. Apart from the appellant, the only other actor present when the offence was committed and who might have caused the wounding was his co-accused Shepherd. He pleaded guilty to the charge at or before the trial of the appellant. The appellant is proved to have known that Shepherd was striking the complainant with a sword or was about to do so. Swords, even if they are blunt, are notoriously capable of causing wounding, meaning breaking or penetration of the true skin. Even a hammer may do so: *R v Smith* (1837) 8 C & P 160; 173 ER 441. The appellant therefore knew that Shepherd was or was about to wound the complainant when he took part by aiding or assisting him.

[4] There may be circumstances in which the primary actor or person committing the offence goes well beyond anything that the assistant is aiding him in doing. In that event, s 7(1)(c) would cease to apply because the assistant would no longer be assisting the primary actor in the offence committed. The "offence" in s 7(1)(c) bears the meaning ascribed to it in s 2 of the Code as the act or omission which renders the person doing it liable to punishment: *R v Barlow* (1997) 188 CLR 1, 9. Here, as I have said, that act was wounding the complainant, which, on the hypothesis that he did not do it himself, was what the appellant was aiding Shepherd in doing to the complainant.

[5] **KEANE JA**: I have had the advantage of reading the reasons of McPherson JA and Douglas J. I agree with their reasons and the order proposed by Douglas J.

[6] **DOUGLAS J:** The appellant was found guilty of unlawful wounding on 4 May 2005. The charge arose out of events that occurred at about 4.15am on the morning of 15 July 2001. The appellant and a Mr Shepherd had visited the complainant's unit which was next door to the appellant's. An altercation developed there, during which the complainant received four lacerations to the face and ear. His top lip was cut, his forehead was lacerated, he received a cut about his left eye and a linear cut at the front of his right ear.

[7] The complainant remembered the beginning of the altercation, but could not remember how he received his injuries. His version of the events was that he was set upon by his two visitors for no apparent reason. He said that Mr Shepherd walked to his, the complainant's, bedroom and then returned with an ornamental sword belonging to the complainant which had been in the bedroom. At that point the appellant stood up and punched him and "it was all on".[1] The complainant said that Mr Shepherd then swung the sword down past the complainant's left shoulder towards the chair that the appellant had been sitting on.[2] After that, the complainant said that the three men fought for a time to a point when his memory failed, although he did recall the sword being held against his neck by Mr Shepherd.[3]

[8] The appellant did not give evidence at the trial but an interview he had with police on 15 July 2001 was played to the jury. In that interview, the appellant described the complainant ordering him out of his unit and said the complainant then swung the sword down upon the chair in which the appellant was sitting. Thereafter a struggle ensued in which both the appellant and Mr Shepherd managed to overpower the complainant and take the sword from him. The appellant also described taking a knife from the complainant during the struggle after the complainant had tried to stab him. The appellant told police that it was the sword which must have been responsible for the injury suffered by the complainant.

[9] There was, however, medical evidence from a Dr Christensen who said that three of the complainant's injuries were most likely to have been caused by an instrument such as the filleting knife that was found in the complainant's unit when police arrived to investigate. That knife belonged to the complainant, who was a chef, and was ordinarily kept in a basket on a coffee table in his lounge room. The sword which featured in the altercation was taken from the scene by Mr Shepherd. Dr Christensen considered it to be too blunt to have caused the three injuries mentioned. The injury above his left eye could have been caused either by a sharp object or by blunt trauma.[4] The blade of the filleting knife was also later discovered to have the blood of the complainant on it and was considered to be sufficiently sharp to have caused the injuries: they were remarkable for the cleanness of the edges of the wounds.

[10] Only the complainant's blood was found within his unit. It was also on the handle to the bathroom door in the appellant's unit. Other swabs were taken from the appellant's unit and they were consistent with being the blood of the appellant. They were taken from the bathroom sink, a laundry tub, a belt buckle on the laundry floor, a door jamb and the door of a bedroom, a denim jacket and a towel located in that bedroom as well as the inside doorknob of the front door to the unit.

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1 R.30/20-21.
2 R.44/35-50
3 R.30/24-26.
4 R.181/16-24, R.182/43-45.

[11] The only other witness to give evidence of the altercation was a Mr Hickling, who also lived in the same block of units. From his unit, across the hallway from the complainant's, he heard sounds consistent with the appellant and Mr Shepherd entering the complainant's unit. After a short time the silence was broken by a man shouting "get the fuck out" and then he heard what sounded like a struggle between men and furniture being knocked over. Further, during what he thought sounded like a commotion, he heard a man yell: "Get off me". The sound of the struggle lasted for a few minutes and when the noise stopped, within the matter of a few seconds, he heard what sounded like the door to the complainant's unit being opened and closed again.

[12] After the altercation, the appellant and Mr Shepherd left the complainant's unit, taking the sword with them. The appellant then showered and washed his clothes in his own unit. Mr Shepherd was in the appellant's unit while he was showering and washing his clothes. The appellant was located by the police later that day at his brother's house and was interviewed subsequently.

The appellant's submissions

[13] The appellant's argument is that his conviction is unsafe and unsatisfactory as the product of impermissible speculation on the part of the jury. The submission is that there is insufficient evidence upon which the prosecution could rely to exclude as a reasonable hypothesis that Mr Shepherd, acting independently of the appellant, was the one who did the actual cutting of the complainant. The submission is, therefore, that the evidence is incapable of proving that the appellant is criminally responsible for the wounding to the necessary standard so that the verdict should be set aside and a verdict of not guilty should be entered.

[14] There is no direct evidence of who wounded the complainant. The prosecution relied upon circumstantial evidence to establish that the appellant was criminally responsible for the wounding. The argument was that the injuries suffered by the complainant were caused by the deliberate cutting of the complainant's face with a filleting knife by the appellant, or by Mr Shepherd with the appellant acting as a party under s. 7 of the *Criminal Code*, while the complainant was incapacitated on the floor of his unit.

The prosecution case at the trial and on the appeal

[15] There was no direct evidence as to who had the knife at the time the wounds were inflicted, what the intention of that person was nor what the other person was doing at that time and what his intention was. The first basis upon which the prosecution submitted the appellant could be convicted was that it was he who actually inflicted the knife wounds to the complainant directly. The evidence that the prosecution relied upon to prove that case beyond a reasonable doubt is summarised, partly by reference to the learned trial judge's summing up,[5] in the following paragraphs.

[16] The prosecution relied on the evidence from the complainant that he was assaulted by the appellant and Mr Shepherd. The complainant was able to give an account of that assault up to the point of his being on the ground with the appellant on top of him. He did not say that he had suffered the cuts to his face and head up to that point. The state of the complainant's unit, including the presence of his blood and

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5 R.308-310.

the location of the knife on the floor, was said to be relevant, as was the medical evidence relating to the injuries to the effect that at least three of the four cuts to the complainant were more likely to have been caused by the filleting knife rather than the sword. The knife also had the complainant's blood on it. There was also evidence of statements by the appellant to the police that he and Mr Shepherd fought with the complainant and subdued him in the unit. In those statements the appellant claimed that the complainant attacked him with the decorative sword but was overpowered and disarmed in a relatively brief struggle. That is, the appellant's version did not account for the injuries that the complainant suffered.

[17] The actions of the appellant and Mr Shepherd after the incident, namely that Mr Shepherd took the sword, the appellant showered and washed his clothes, they left the appellant's unit and decided to avoid returning when they saw the police in attendance, were also said to be relevant. The evidence of Mr Hickling confirmed the time of the incident and his observations were consistent with there having been a brief struggle in the unit.

[18] On this appeal the respondent also drew attention to injuries to the appellant's hands, which he claimed were caused when he grabbed the sword as it was swung at him by the complainant, the apparent lack of sharpness of the sword blade, the presence of the complainant's blood on the doorknob of the appellant's bathroom and the lack of injuries to the hands or forearms of the complainant. In other words there were no injuries that might have been suffered by defensive action taken by the complainant.

The respondent's submissions

[19] Mr Byrne for the respondent argued his case by describing a limited number of scenarios that could have given rise to the complainant's injuries on what he submitted was the only reasonable interpretation of the evidence, that the wounds were caused by the knife and not the sword:

1. That they were deliberately self-inflicted by him;

2. That they were accidentally self-inflicted during the course of the struggle;

3. That they were inflicted by either the appellant or Mr Shepherd in the act of self-defence;

4. That they were deliberately inflicted by Mr Shepherd acting alone and not in the act of self-defence;

5. That they were deliberately inflicted by the appellant, either personally or with liability attaching by virtue of s. 7 of the *Criminal Code* and not in the act of self-defence.

[20] It seems clear that the jury was entitled to discard the possibility that the wounds were deliberately self-inflicted. The number and placement of the injuries made that unlikely. The presence of the complainant's blood on the appellant's bathroom door knob also made it likely that the appellant was present when they were inflicted. If he had been present, and they were self-inflicted, Mr Byrne submitted that one would expect that the appellant would have mentioned that to the police when he was questioned.

[21] The second possibility, accidental self-infliction in the course of the struggle, was inconsistent with the appellant's statement to the police that he knocked the knife from the complainant's hand, did not use the knife against him and that the sword caused the injuries both to the complainant and to him.

[22] The jury clearly was entitled to reject self-defence on the evidence led before them, which included the evidence of the neighbour of a male voice or voices saying words including "get off me" and the inferences from the nature of the cuts to the appellant's hands, that they were consistent with his having handled the knife rather than having been caused by his attempting to block a blow or blows from the sword.

[23] Mr Byrne's submissions in respect of his fourth possible scenario, that the wounds were deliberately inflicted by Mr Shepherd acting alone and not in the act of self-defence, deserve consideration. He drew attention to the actions of the appellant after the wounds were inflicted: his awareness that Mr Shepherd had removed the sword from the unit; the appellant's washing of himself and laundering of his clothes; his leaving the unit block and not stopping when he observed police there when he drove past on his way back. His submission was that this evidence supported the conclusion that the appellant had guilty knowledge of the offence. He also argued that, if the wounds had been inflicted deliberately by Mr Shepherd without the appellant's involvement, one would expect that he would have disassociated himself immediately from Mr Shepherd.

[24] Mr Byrne also relied on the evidence from the appellant's statement to the police to the effect that the complainant's wounds were caused by the sword and contrasted it with the evidence that they were most probably caused by the knife. His submission was that this could be treated as a lie by the appellant arising from his own consciousness of his guilt, knowing that the truth of the matter would implicate him in the commission of the offence.[6] This was not a submission made to the jury nor dealt with by the trial judge in his summing-up, which makes me cautious about relying on it for the purposes of the appeal. The statement by the appellant was relevant, however, at least to the extent that it showed that he knew the complainant had been wounded.

[25] The fifth scenario, Mr Byrne submitted, was the only other possibility left open after the others were discounted. He also drew attention to the argument that the absence of defensive injuries on the complainant supported the contention that the complainant's injuries occurred after he had been subdued and controlled. Mr Byrne's submission in that context was that the evidence supported the conclusion that both the appellant and Mr Shepherd had assisted in subduing the complainant, a process which began as soon as Mr Shepherd appeared with the sword, when the appellant started to punch the complainant. That evidence, he submitted, was enough to support the conclusion that they had an evolving plan encompassing an unlawful wounding.[7]

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6 *Edwards v. The Queen* (1993) 178 CLR 193.

7 See, e.g., R *v Jeffrey* [2003] 2 Qd R 306, 326-327 and *R. v. Lowrie and Ross* [2000] 2 Qd R 529, 535-536 at [13].

Criminal liability of the appellant

[26] It could not be said beyond a reasonable doubt, on the evidence to which I have referred, that it was the appellant personally who wounded the complainant. The evidence of the blood on his clothes and of the sharp cuts to his hands may suggest that he was closely involved in the crime but it fails to exclude the possibility that Mr Shepherd actually inflicted the wounds. The question then becomes whether the evidence was sufficient to permit the jury to attribute criminal responsibility to the appellant by either of two alternatives based upon the operation of s. 7 of the *Criminal Code*.

***Criminal Code* s. 7(1)(b)**

[27] The argument put to the jury under s. 7(1)(b) was that the appellant and Mr Shepherd were acting in concert in the sense that they were acting for the purpose of enabling or aiding each other to commit the offence of unlawful wounding. The prosecution case on that issue was that the knife caused the injuries.[8] It was most probable that three of the four wounds were caused by the knife; as well as possessing a keen blade it had the complainant's blood on it. It may have been possible on the evidence that the fourth wound, above the left eye, was caused by the sword or by a punch as well as by the knife but the argument advanced was that it was caused by the knife.

[28] The actions of the appellant, on the complainant's evidence, in commencing to punch him when Mr Shepherd appeared armed with the sword are, however, capable of supporting a finding of criminal liability under s. 7(1)(b) even if the offence was actually committed with the knife. The jury was entitled to conclude from that evidence that the appellant knew that the type of offence which was in fact committed was intended.[9] His punching of the complainant, where Mr Shepherd was using a sword, is able to be described readily as an action for the purpose of enabling or aiding each of him and Mr Shepherd to commit the offence of unlawful wounding. Even a blunt sword is capable of wounding; indeed the appellant, in his statement to the police, attributed the complainant's wounds to the use of the sword.

[29] Mr Heaton's submission for the appellant was that any cutting of the complainant with the knife had not been shown to be in accordance with any agreement between the appellant and Mr Shepherd. To absolve the appellant from liability on the basis that it had not been shown that he acted for the purpose of enabling an attack involving a sharp knife, although it had been shown that he acted for the purpose of an attack with a blunt sword, and, therefore, should not be held responsible for the wounds caused by the knife, is an inappropriate distinction. It is inconsistent with the approach in *R v Ancuta* [1991] 2 Qd R 413, 417-419 that the appellant should be shown to have known that the type of offence which was in fact committed was intended.

[30] Here the evidence was that the attack occurred in one brief episode in the presence of both the appellant and Mr Shepherd. The situation might be different had it been open on the evidence to conclude that the attack with the sword had concluded and Mr Shepherd later returned with the knife independently to wound the complainant.

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8 R.8/40-47.

9 See *R v Bainbridge* [1960] 1 QB 129 applied in *R v Ancuta* [1991] 2 Qd R 413, 417-419.

On these facts the jury was entitled to reach the conclusion that the appellant was guilty.

***Criminal Code* s. 7(1)(c)**

[31] The second basis of criminal liability was put to the jury under s. 7(1)(c), that each of the appellant and Mr Shepherd were aiding each other in the commission of the offence. The offence is unlawful wounding; see s. 2 of the *Criminal Code*. The elements of that offence may well focus the inquiry into what each of the participants in the attack on the complainant knew of the other's involvement. As McPherson JA said in *R v Sherrington and Kuchler* [2001] QCA 105 at [13]: "it is either explicit or implicit in s. 7(1)(c) that the assistance must be given to another 'in' committing the offence, which must mean that the participant is aware at least of what is being done or perhaps will be done by the other actor".[10]

[32] In this context I have also had the advantage of reading McPherson JA's reasons for judgment in this matter. I agree that the approach in *R v Barlow* (1997) 188 CLR 1, 9 to the meaning of "offence" in these sections of the *Criminal Code*, including s. 7(1)(c), requires the Court to focus on the act or omission which renders the person doing it liable to punishment. That leads to the conclusion that the knowledge required by the participant is of the wounding of the complainant or, in my view also, the foresight that wounding may occur. It does not require foresight that the wounding will be committed with a particular weapon. As Lord Hutton said in *R v Powell* [1999] 1 AC 1, 30:

> "However I would wish to make this observation: if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa."

[33] It was open to the jury to conclude that each of the appellant and Mr Shepherd was knowingly assisting the other to attack the complainant, one with his fists and the other, at least initially, with a sword. The jurors were entitled to be satisfied that each of the appellant and Mr Shepherd knew of the injuries. The appellant's police interview made it clear that he was aware of them. The complainant's blood on the bathroom door of his unit suggests that the appellant was there when the complainant was wounded. Where one of the parties is armed, even with a blunt, ornamental sword, and the other uses his fists to assault the complainant there is every likelihood that both the person punching and the person wielding the sword will be assisting to commit the offence of unlawful wounding, which merely requires the "true skin" of the victim to be penetrated or broken.[11]

[34] That the injuries were most probably inflicted by the knife does not affect the conclusion on these facts. That the appellant may not have known at first that the knife was to be used to wound does not prevent his earlier assistance from being relevant. Where two people have assisted each other in a course of conduct that they know is likely to result in unlawful wounding it is not a factor excluding criminal

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10 See also *R v Beck* [1990] 1 Qd R 30, 37-38, 44.

11 *R v Jervis* [1993] 1 Qd R 643 per McPherson ACJ at 645.

liability that the wound was eventually caused by an unanticipated weapon; cf *R v Barlow* at 10-11.

[35] As I said earlier, in respect of s. 7(1)(b), the conclusion would be different if there had been a separate attack on the complainant without the appellant's knowledge; the evidence in such a case might not be sufficient to establish aid in committing the offence constituted by the second attack. Again, however, on these facts the jury was entitled to reach the conclusion of guilt.

Lies as evidence of guilt

[36] If the law required the appellant's assistance to have been given with knowledge of the precise weapon used to wound, the respondent's submission on this appeal was that the appellant's statement to the police that the complainant had been wounded, even if his assertion was that the blunt sword had caused the injuries, could be relied on by the respondent as evidence against him. The submission was that it showed that he knew of the wounds. Where the other evidence established that it was most probable that at least three of the wounds were caused by the knife the argument was, as I have said, that he was lying in his statement to the police out of a consciousness of his guilt and to protect himself or Mr Shepherd. That theory was not put to the jury but that can only have worked to the advantage of the appellant.

[37] The theory does assist in analysing the appellant's knowledge of what was done to the complainant and to assist with the conclusion that he knew the knife was used to wound. It would still be open to the argument, however, that he lied to protect Mr Shepherd, even if Mr Shepherd wounded the complainant without the appellant's involvement or earlier knowledge that he would do so. The appellant's later behaviour in leaving the scene, washing his clothes and avoiding the police is also ambivalent. It can be portrayed as conduct consistent with guilt or merely with a wish to clean himself and later anxiety about the fact that the police were involved. Where the other evidence was sufficient for the jury to reach the verdict of guilty it is not necessary to decide whether the verdict may also be supported in reliance on this analysis.

Disposition of the appeal

[38] For those reasons it is my view that the jury was entitled to be satisfied beyond reasonable doubt that the appellant was aware of what was proposed to be done to the complainant and what was done to him, after the appellant had assisted at least in assaulting and subduing the complainant for the purpose of wounding him. In those circumstances the jury was entitled to be satisfied of the guilt of the appellant. It was a question properly left to the jury to decide and a result that it was entitled to reach.

[39] Accordingly the appeal should be dismissed.