SUPREME COURT OF QUEENSLAND

CITATION:	*R v Franco* [2008] QCA 342
PARTIES:	**R** **v** **FRANCO, Ramiro** (applicant/appellant)
FILE NO/S:	CA No 180 of 2008 DC No 575 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	31 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2008
JUDGES:	Keane and Holmes JJA and White AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application to extend time to appeal** **2. Dismiss the application for leave to appeal against sentence** **3. Dismiss the appeal against conviction**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – POWER TO DISMISS APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – PARTICULAR MATTERS – the appellant was convicted by a jury of unlawfully wounding the complainant – the wounds were inflicted by an unknown sharp instrument – there is evidence that the wounding occurred only after the complainant aggressively punched the appellant – the learned trial judge did not direct the jury about the defence under s 271 of the Criminal Code of self-defence against unprovoked assault – whether the use of the sharp instrument was "reasonably necessary" within the meaning of the term in s 271 – whether there has been a miscarriage of justice *Criminal Code* 1899 (Qld), s 271, s 668E *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited

Glennon v The Queen (1994) 179 CLR 1; [1994] HCA 7, cited
R v Ellis [2007] QCA 219, cited
R v McNamara [1998] QCA 405, cited
R v Ollis and Andersen (1986) 21 A Crim R 256, cited
R v Trieu [2008] QCA 28, cited
Van Den Hoek v The Queen (1986) 161 CLR 158; [1986] HCA 76, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, cited

COUNSEL: R A East for the applicant/appellant
M R Byrne for the respondent

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

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by White AJA. I agree with her Honour's reasons and with the orders proposed by her Honour.

[2] **HOLMES JA:** I agree with the reasons of White AJA and the orders she proposes.

[3] **WHITE AJA**: The appellant was convicted on 4 June 2008 of one count of wounding on 11 May 2007 at Spring Hill in Brisbane. He was sentenced to two years imprisonment with a parole release date on 4 June 2009.

[4] The appellant appeals his conviction and applied for leave to appeal against sentence. He has abandoned the application for leave to appeal against sentence. The original Notice of Appeal did not contain any grounds of appeal although filed within time. Subsequently the appellant filed his grounds of appeal but out of time on 10 September 2008. A notice of appeal which does not specify a ground of appeal is invalid.[1] It seems that the appellant, who was then self represented, did attempt to file a form of grounds which was rejected. The original grounds of appeal, all save one, have been abandoned. The respondent does not oppose an extension of time being granted.

[5] The appellant, now represented by counsel, argues as his sole ground of appeal that the learned trial judge erred in not directing the jury about self-defence pursuant to s 271(1) of the *Criminal Code*. Defence counsel at trial expressly did not seek a direction about self-defence agreeing with the learned trial judge that it was not raised on the evidence[2] and was not seeking some forensic advantage.[3] On this appeal, Mr M Byrne for the respondent, concedes that there was evidence which raised a defence under s 271(1) but that there was no miscarriage of justice in not

---

1 *R v Ollis and Andersen* (1986) 21 A Crim R 256.
2 Record 96.
3 *R v Trieu* [2008] QCA 28.

directing the jury on it, or, alternatively, that the proviso to s 668E is properly engaged.[4]

[6] The complainant suffered three wounds to his back during a struggle with the appellant of about one centimetre in depth. The evidence suggested, they were made with a sharp instrument. He also suffered a number of injuries to his face which did not give rise to any charges. Notwithstanding that there were two eyewitnesses in addition to the complainant, no one saw any instrument which might have caused the wounds.

[7] The appellant did not give evidence but in his interviews with police, whilst admitting to being in a physical altercation with the complainant, denied causing the wounds deliberately or using any implement in the course of the struggle which might have caused the wounds. He suggested that the complainant's injuries may have been caused accidentally whilst they were struggling and the complainant pressed up against a car.

[8] The Crown case was straightforward, namely, that the jury could infer from all the evidence that the appellant, in the course of his struggle with the complainant, had in his hand some type of piercing instrument which was hidden by his long-sleeved jacket and deliberately used it to inflict the three wounds in the complainant's back. After the close of the Crown case and after the learned trial judge had commented that self-defence was not raised on the evidence, the prosecutor drew his Honour's attention to an answer in the appellant's record of interview that he was defending himself. His Honour suggested that that answer related to injuries sustained by the complainant to his head which were not the subject of charge and defence counsel agreed.

[9] There were, nonetheless, other answers in the several records of interview which raised self-defence more generally. The appellant said that the complainant had started the physical part of the fight by punching him in the chest and his back and neck. None of the evidence from the two eyewitnesses nor from the complainant supported that account. That defence counsel does not seek a direction in terms of a particular defence will not absolve a trial judge from the necessity of leaving that issue to the jury if there is evidence which, if believed, might reasonably lead the jury to return a verdict of not guilty.[5]

[10] The complainant, who was a young man of 29, said that he had known the appellant for a number of years and at some stage they had lived in the same share house until the complainant told him that he was not welcome to remain and he left.

[11] The complainant was planning to move to Darwin the next day and had packed up his possessions at the house in which he had lived in Sedgebrook Street, Spring Hill. He was planning to spend the night that he sustained his injuries at a house of friends at 43 Hill Street, Spring Hill where there was to be a small farewell party. That morning he went to retrieve his new mobile telephone from his former bedroom which was otherwise empty and found it gone. As a result of information relayed to him by others, he formed the view that the appellant had taken his

---

4 *Dhanhoa v R* (2003) 217 CLR 1 at para 60.

5 *Van Den Hoek v R* (1986) 161 CLR 158 per Mason J at 163 and 169.

telephone. At about 9.00 pm that evening he joined about six to eight friends at 43 Hill Street.

[12] The house, as the photographs reveal, is a typical Spring Hill cottage with an enclosed veranda, described in the evidence as a balcony, on the footpath with a door opening onto the footpath and another front door into the house. Pablo Henao Navas was at 43 Hill Street for the party. He had arrived on his motorbike which he parked in front of a white car owed by Hector Feliciano, one of the occupants of the house, parked directly outside the house. About midnight Mr Navas heard knocking on the front door opening onto the footpath and through the lattice saw the appellant. He told him to go away because he was not welcome at the party. The complainant heard that the appellant was at the front outside the house and walked towards the door and went outside. Mr Navas said that the complainant seemed a "bit angry" and walked fast. The complainant asked the appellant for the return of his telephone. The appellant denied that he had it. The complainant then told him that he was not welcome and should leave.

[13] According to the complainant the appellant tried to kick him to which the complainant responded:

> "What are you doing? It's crazy."[6]

He said the appellant came at him and they grabbed each other. The complainant next recalled hitting his head on the bonnet of the white car parked outside the house, falling to the ground and noticing a lot of blood. He thought that he and the appellant were only a few seconds in the grapple. When the complaint's face hit the bonnet he sustained cuts to his forehead, nose and on his ear. He observed that the appellant was wearing a long-sleeved jumper which covered his hands. (In fact the evidence revealed that it was a grey long-sleeved jacket). The complainant said he was looking the appellant in the eye and not looking at his hands. In cross-examination he denied that he had punched the appellant as the appellant had asserted in his record of interview. Neither could he recall being punched. This was consistent with other eyewitness evidence. Contact ceased after the complainant fell.

[14] The complainant, seeing the blood and feeling shocked went inside the house to the bathroom to wash the blood from his face. Others of his friends were present and it was noted that the back of his singlet had blood seeping onto it in several places. When he removed the singlet the three wounds on his back were revealed and he became aware, for the first time, that he had sustained penetrating injuries to his back. An ambulance was called but the complainant's condition deteriorated and Mr Feliciano decided to take him to the Royal Brisbane Hospital in his car immediately.

[15] Mr Navas knew both the appellant and the complainant. He arrived at the party at about 11.00 pm after work. Between arriving and the altercation he had drunk, he thought, a six pack of beer. He recalled the complainant walking to the front of the house and demanding his phone from the appellant. He said that the appellant and the complainant started arguing, "they both looked like they about to fight"[7] and the

---

6 Record 6.

7 Record 18.

appellant kicked out at the complainant once or twice. They then went into a bear hug wrestling and the complainant went down hitting his head on the bonnet of the car. The appellant let go and stood up. The complainant walked inside the house. Mr Navas estimated the physical engagement lasted about two minutes. Photographs showed a number of droplets of blood on the passenger side of Mr Feliciano's car between the windscreen and the front wheel. Mr Navas was about a metre or so away from the combatants standing on the step at the front door immediately adjacent to them. He said he had an excellent view. He saw nothing in the appellant's hands. In cross-examination he denied seeing any punches by the combatants, neither did he observe the complainant hitting or falling on anything other than the bonnet of the car. The photographs did not reveal any protuberances on the car which could account for the wounds on the complainant's back. Mr Feliciano said, as the photographs revealed, that the aerial on his car was located on the driver's side pillar. Mr Navas followed the complainant into the house but when he saw the wounds in his back he walked out of the house, saw the appellant running down the street, and lost him.

[16] As the complainant was walking to Mr Feliciano's car to go to the hospital he vomited into the gutter.

[17] Mr Juan Ramriez was living in the house at 43 Hill Street on the evening of 11 May 2006. He knew who the appellant was and had shared a house with the complainant. He went to the front door when he heard that someone had arrived and saw that it was the appellant. He went back into the house and after the complainant had gone outside he heard them arguing and then:

> "Saw they were going to start fighting"[8]

and went inside. He said they had been pushing each other "or something" but he did not see much of the fight.

[18] Mr Feliciano went to the front door with the complainant behind him. He heard him demand his telephone from the appellant. The appellant said he did not have the telephone and the complainant responded with further accusations. This conversation took place between the front door and Mr Feliciano's motor vehicle parked directly outside, a distance the width of a fairly narrow footpath about one to two metres wide. He said they started pushing and grabbing each other as in a bear hug. He said that events happened very fast and then the complainant was on his back on the car. He saw the complainant with blood on his hands and his face, the combatants separated and the complainant went inside. To Mr Feliciano he looked pale and as if he were in shock. He heard the complainant say before he left the scene:

> "I'm fucked."

He heard the appellant say:

> ""Do you want more" something like that."[9]

He did not see the appellant with anything in his hands.

---

8 Record 34.

9 Record 75.

[19] Mr Feliciano noted blood "everywhere" on the complainant and called an ambulance.[10] He then decided, in view of the complainant's condition, to take him immediately to hospital without waiting for the ambulance.

[20] At the hospital the complainant was seen to have three puncture wounds which penetrated the full thickness of his skin. The edges of each of the wounds were described as clean and precise. The wounds were about one centimetre in depth and two centimetres in width located in his upper back. No weapons were found at the scene. The appellant's long-sleeved jacket had blood on it which matched the complainant's DNA and a formal admission was made at the trial to that effect.

[21] The appellant did not give evidence but, somewhat surprisingly, since they contain no admissions, his interviews with police were played to the jury in the prosecution case. They were three in number, the first two on 13 May were very brief, the third on 14 June about three hours in duration but had many responses by the appellant that were indistinct. In the first, when asked by police about the complainant's injuries, the appellant responded:

> "He came up here throwing punches at my head... [H]e came at me, was punching, throwing at me, throwing punches..."[11]

Later, when the interview resumed, the appellant responded to questions about the complaint's injuries again:

> "FRANCO: But that was before, before I, be -, we even touched each other, or, or, or had a, had a go at each other he jumped at me and he kept going and going and going. And didn't, wouldn't stop. He would not, he would not stop having a go at me but I - -
>
> SCON WINDOW: What do you mean by that?
>
> FRANCO: Like throwing punches, trying to punch me, punch me in my, back of my head, in my, in my back, in my neck. And then, and then gro -, ah grappling - -
>
> SCON WINDOW: How do you explain no, very little injury on yourself after this incident?
>
> FRANCO: I know some martial arts."[12]

[22] In the interview on 14 June 2007 the following was recorded:[13]

> "FRANCO: And, and um he um he's [INDISTINCT] um and where we come out [INDISTINCT] you know, throwing blows to my head.
>
> SCON ROLLESTON: He's throwing blows at your head?

---

10 Record 75.
11 Record 160.
12 Record 163.
13 Exhibit 1 to Affidavit of Kylie Michelle Hillard.

FRANCO: Yes. He, I was, I knocked on the door and he, those two, two people that came out, that, that came out. And he was one of them and he [INDISTINCT].

SCON ROLLESTON: Why was he doing that?

FRANCO: Ah sorry?

SCON ROLLESTON: Why was he doing that?

FRANCO: [INDISTINCT]

SCON WINDOW: Yeah just relax a bit like against the wall - -

FRANCO: [INDISTINCT]

SCON WINDOW: So I can just see you.

FRANCO: [INDISTINCT]

SCON WINDOW: Just relax.

FRANCO: He was screaming at me.

SCON WINDOW: Yeah.

FRANCO: He was screaming at me. I, I knocked on the door [INDISTINCT].

SCON WINDOW: Yeah.

FRANCO: Um he, he, he started yelling at me and, and abuse and, and accusing me that that I [INDISTINCT] his phone.

SCON WINDOW: Oh that you stole his phone?

FRANCO: Yes and, and he came, he came back [INDISTINCT].

SCON WINDOW: Oh yeah. Okay, all right. Now ah what happened after that? Where were you? You were outside [INDISTINCT]?

FRANCO: Yes, yes.

SCON WINDOW: You were outside.

FRANCO: [INDISTINCT].

SCON ROLLESTON: Yeah, yeah, yeah, yeah. Okay. What, what happened next?

FRANCO: And that's what happened.

SCON WINDOW: Okay.

FRANCO: He came out fighting and [INDISTINCT] and she came and [INDISTINCT].

SCON WINDOW: [INDISTINCT]

FRANCO: Yeah.

SCON WINDOW: Where'd the knife come from?

FRANCO: I don't know.

SCON WINDOW: Okay. How, how did get the marks on his back?

FRANCO: Mm, mm. Like I said he came out, throwing punches at me and he broke my head. And we, we wrestle and then, and then he got smashed against this, this, this car that was parked outside. And [INDISTINCT] parked outside [INDISTINCT].

SCON WINDOW: Yellow car?

FRANCO: Yeah. And he was, was, we were wrestling there. And [INDISTINCT].

SCON WINDOW: Did the glass break at all?

FRANCO: Down, I think down at the edges there, the edges of the car.

SCON WINDOW: [INDISTINCT] of the car?

FRANCO: [INDISTINCT] of the door [INDISTINCT].

SCON WINDOW: Mm [INDISTINCT].

FRANCO: [INDISTINCT]

SCON WINDOW: On?

FRANCO : [INDISTINCT]

SCON WINDOW: Yeah. Yeah he has got a couple of ah wounds to his back, sharp wounds to his back.

FRANCO: [INDISTINCT] he um he ended up against the car [INDISTINCT] smashing through, just smashing through [INDISTINCT]. But I, I turned him around and, and well, you know, you know, he was still punching and, you know [INDISTINCT]."

[23] The appellant denied any knowledge of a knife.

[24] Section 271(1) of the *Criminal Code* provides:

"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."

Even if the jury accepted the account of the appellant that the complainant came at him aggressively punching him, he faces an insuperable impediment in getting over the second limb of s 271(1), namely, that the force used to repel the attack must be reasonably necessary to make effectual defence against the assault. The evidence is incontrovertible that the complainant's wounds were inflicted by a sharp instrument. An accidental encounter with a sharp protuberance on the car was excluded. The appellant's reference to "another" yellow car in his interview with police was fanciful. The irresistible conclusion, despite the appellant's denial and that no witness saw anything in his hand, is that the appellant carried with him on his person an implement capable of causing the wounds which the complainant sustained, which was hidden, either deliberately or fortuitously, by the long-sleeves of his jacket and that he used it deliberately on the complainant in the course of the struggle.

[25] There was nothing in the situation to suggest to a jury that the appellant needed to use an implement to defend himself from the assault. Police noted the appellant's lack of relevant injury. Whatever the implement was, it was and must have been known to be capable of inflicting the cutting wounds sustained by the complainant.

[26] Accordingly, there can have been no miscarriage of justice in failing to leave the issue of self-defence to the jury because the appellant did not, thereby, lose a chance that was fairly open to him of being acquitted.[14] Further, this is an appropriate case for the application of the proviso to s 668E. On a consideration of the whole of the relevant evidence,[15] the appellant's guilt to the requisite standard is proved. The witnesses were not challenged that their evidence was untruthful when they denied that the complainant "threw punches" at the appellant and said it was the appellant who initiated the physical attack by kicking the complainant. There was nothing in how the struggle unfolded to cause the jury to suppose that a response with a piercing instrument was called for.

[27] I would dismiss the appeal.

[28] The orders are:

1. Grant the application to extend time to appeal;

2. Dismiss the application for leave to appeal against sentence;

3. Dismiss the appeal against conviction.

---

[14] *Wilde v R* (1988) 164 CLR 365; *Glennon v R* (1994) 179 CLR 1; *R v McNamara* [1998] QCA 405.

[15] *Weiss v R* (2005) 224 CLR 300; *R v Ellis* [2007] QCA 219.