SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dunn* [2009] QCA 325
PARTIES:	**R** **v** **DUNN, Jeffrey Aelian** (appellant)
FILE NO/S:	CA No 151 of 2009 DC No 33 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Innisfail
DELIVERED ON:	27 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2009
JUDGES:	Muir and Chesterman JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST CONVICTION AND SENTENCE – where appellant convicted of entering with intent in company with threats of violence – where appellant sentenced to 15 months' imprisonment with a parole release date of 25 January 2010 – whether there were impermissible inconsistencies in the verdicts returned which require the setting aside of the appellant's conviction – whether the sentence imposed was manifestly excessive *Director of Public Prosecutions v Merriman* [1973] AC 584, cited *MacKenzie v The Queen* (1997) 190 CLR 348; [1996] HCA 35, cited
COUNSEL:	M J Byrne QC, with H Walters, for the appellant M J Copley SC for the respondent
SOLICITORS:	Arthur Browne & Associates for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree with the reasons of Cullinane J and with his proposed orders.

[2] **CHESTERMAN JA**: I agree with the orders proposed by Cullinane J for the reasons given by his Honour.

[3] **CULLINANE J**: The appellant appeals against his conviction in the District Court at Innisfail on 12 June 2009 for the offence of entering with intent in company with threats of violence. He also seeks leave to appeal against the sentence of 15 months' imprisonment with a parole release date of 25 January 2010.

[4] The appellant and a co-accused, one Heffernan, were charged with one count of breaking and entering a dwelling with intent with two circumstances of aggravation. The first of these was being in company and the second was that the breaking and entering was accompanied by threat of violence (Count 1). They were also charged with an offence of assault occasioning bodily harm in company (Count 2).

[5] On this appeal, the appellant contended that there were impermissible inconsistencies in the verdicts returned which require the setting aside of the appellant's conviction.

[6] Both the appellant and Heffernan were acquitted of Count 2. So far as Count 1 is concerned, Heffernan was acquitted of that count and the alternatives to it. The appellant was acquitted of that count but convicted of an alternative namely the offence of entering with intent in company and with threats of violence. It is clear there was no breaking.

[7] It is argued that there is impermissible inconsistency between the acquittal of the appellant on Count 2 and his conviction on the alternative to Count 1. It is also claimed that there is an impermissible inconsistency between the acquittal of Heffernan on Count 1 and its alternatives and the conviction of the appellant.

[8] The prosecution had particularised the relevant intent for the purposes of Count 1 as being "to assault". Both the appellant and Heffernan were said in the particulars provided to be principal offenders in respect of that count.

[9] The relevant events had their genesis on 8 November 2007 when the appellant's girlfriend who operated a shop at a caravan park on the outskirts of Innisfail asked the complainant's girlfriend if she would drop a newspaper off at the house of an elderly woman who lived nearby. The complainant's girlfriend said that she did not speak to that person so the appellant's girlfriend asked her to deliver it to a neighbouring house. She took the newspaper and left. A short time later the complainant drove up to the shop, opened the door and threw the newspaper inside and yelled and screamed. Later that day his girlfriend came back to the shop and there was an exchange between them in which the appellant's girlfriend was called "a dumb slut" by the complainant's girlfriend who threatened the appellant's girlfriend she would have her sacked.

[10] On the following day the complainant's girlfriend and the appellant's girlfriend came across each other and the complainant's girlfriend abused the appellant's girlfriend saying that she "to go back and lay down on down on the fucking pool table like she used to at the fucking pub." She called her "a hopeless stupid dumb slut."

[11] The appellant was away from Innisfail for some time attending a relative's funeral and arrived back on the 9 November some time after the exchange referred to above. He was told generally what had happened. The appellant went to the home of the complainant and his girlfriend. He was with the co-accused, Heffernan and another man against whom no charges were pursued.

[12] When the appellant arrived the complainant said he called out to him to come out saying he was going to kill him. As he turned around to talk to his girlfriend he then turned back and saw the appellant coming through an open doorway separating two rooms in his house. The appellant, after an exchange with the complainant about what had been said to his girlfriend said "I'm going to bash you, you cunt". The complainant retreated but the appellant followed him, again repeating threats to him. He pushed the complainant who responded by pushing him and told him to get out of the house. The appellant hit the complainant in the side of the face. At this time Heffernan was nearby within the house. The appellant hit the complainant again on the side of the face. When the appellant tried to strike him again, the complainant apparently managed to block the blow and succeeded in striking the appellant and knocking him backwards into a door. The altercation finished with the complainant getting the better of the appellant and Heffernan pulling the complainant off the appellant.

[13] The acquittal of the appellant on Count 2 is readily reconcilable with the verdict on Count 1 upon the basis that whatever his intention may have been when he entered justification for the assault which he committed arose as a result of the provocation of the complainant after the appellant's entry.

[14] So far as Count 1 is concerned the appellant and Heffernan were charged jointly. In *Director of Public Prosecutions v Merriman,*[1] Lord Morris of Borth-y-gest pointed out the various ways in which persons charged jointly might be convicted:

> *"The offences charged in the present case were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to have been guilty. The fact that in one count of an indictment it is set out that A and B wounded C does not warrant the conviction of either A or B unless individual guilt is established. It might be established in different ways. A's guilt might be proved by showing that with his own hand he wounded C. A's guilt might be proved by showing that though he did not himself touch C he caused and directed B to do so: or it might be shown that A and B joined together with a common purpose of wounding C so that in effecting that common purpose each was but the accepted agent of the other. So, unless there is some special statutory provision, there is no magic in speaking of a joint charge."*

[15] In this case as has already been said the appellant and Heffernan were alleged to be principal offenders. The guilt of the appellant as a principal would be established by proving that he entered the dwelling with the necessary intent and by establishing the circumstances of aggravation. In this case he was convicted of entering rather than breaking and entering.

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1 [1973] AC 584 at 592.

[16] There is of course no difficulty in such a case in the jury returning a verdict of guilty of one of the principal offenders and not guilty of the other if the prosecution did not establish each element of the offence and the relevant circumstances of aggravation against each.

[17] It is said however that in his summing up to the jury the learned trial judge informed the jury that it was necessary to establish in respect of Count 1, that there was a shared or common intent.

[18] This is said to appear in the following passages:

> *"I'm going to come to the elements of the two offences now. We'll deal with count 1, the burglary. The prosecution must prove, firstly, that the accused - and I'm using the expression 'accused' to apply to both of them - that the accused entered the dwelling of Creffield. That was the place that Creffield rented. It was his place, his dwelling. And, secondly, that at the time the accused entered the dwelling the accused intended to commit an indictable offence and that indictable offence is said to be an unlawful assault. An unlawful assault is an indictable offence.*[2]
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> …
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> *What about intention? An intention to commit an indictable offence, that is the unlawful assault. Well, intention can be inferred from words or conduct and all of the circumstances; before, during or immediately after the entry. But the intention must be found to have existed in the minds of the accused at the moment of entry of the dwelling. In other words, it is not something that can be said to have been formed after entry was made. It must be at the time of entry."* [3]

[19] I am not convinced that His Honour's directions would necessarily have left the jury with the understanding that there could be no conviction of either unless each was party to the common intention of committing the offence of assault at the time of entry.

[20] However senior counsel for the respondent was inclined to accept this was the case.

[21] Assuming that it was, it does not in my view follow that there is an inconsistency which requires the setting aside of the conviction of the appellant.

[22] There was plainly evidence which would have justified the conclusion that the appellant entered the premises and that he did so intending to assault the complainant and that at the time he was in company and the entry was accompanied by threats of violence. These findings were open whether the jury approached the question of intention upon the basis of the appellant's intention alone or on the basis of a common intention.

[23] In *MacKenzie v The Queen,*[4] Gaudron, Gummow and Kirby JJ in their joint judgment stated a number of general propositions relating to inconsistent verdicts.

[24] Here the inconsistency is said to be a factual rather than a legal inconsistency.

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2 RB 287, transcript 3-94, lines 26-48.
3 RB 288, transcript 3-95, lines 19-38.
4 [1997] 190 CLR 348.

[25] The fourth of the propositions stated was in the following terms:

> *"4. Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense (33). Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted (34). If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury (35). In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt (36). Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries (37). The early history of New South Wales was affected by English juries which, in the face of clear evidence, declined to find the value of goods stolen sufficient to attract the punishment of death, thereby affording to the offender the alternative punishment of transportation (38). Australian decisions have acknowledged that the role of the jury continues to be ameliorative in this respect. In* R v Kirkman *(39), in the Supreme Court of South Australia, King CJ (with the concurrence of Olsson and O'Loughlin JJ) observed:*
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> > *'[J]uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty.'*
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> *We agree with these practical and sensible remarks."*

[26] If His Honour's directions are accepted as instructing the jury that a common intention was necessary, this it seems to me placed the bar too high for the respondent.

[27] It is in my view readily understandable if the jury proceeded upon this basis why the jury might have taken (to use the language of the High Court in the passage set out above) a merciful view in his case. The appellant was very much the principal involved pursuing a grievance which he had with the complainant and his girlfriend because of the events of the previous days. Heffernan played very much a secondary role in the events that occurred with his only physical involvement being to pull the complainant (who had got the better of the appellant) away, thus bringing the incident to an end.

[28] There is no reason to believe that this matter falls into the residue of cases where the verdicts concerned constitute an affront to logic common sense, and which is unacceptable and calls for the setting aside of the verdict.

[29] The appeal should be dismissed.

[30] So far as the application for leave to appeal against sentence is concerned considerable emphasis was placed upon the abuse and provocative behaviour of the complainant and his girlfriend in the period preceding the relevant events and during them. Reference was also made to the fact that he had an IQ of 59 and had himself been on the receiving end of violence from the complainant after he had got the better of the applicant.

[31] As against this the applicant has a significant criminal history which includes five offences of breaking and entering premises as well as other offences of dishonesty or violence.

[32] Given this background it is in my view not possible to conclude that the sentence imposed was manifestly excessive.

[33] I would refuse the application for leave to appeal against sentence.

[34] The orders of the Court should be:

(a) Appeal against conviction dismissed.

(b) Application for leave to appeal against sentence refused.