SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wardle* [2011] QCA 339
PARTIES:	**R** **v** **WARDLE, Colin Edward** (appellant)
FILE NO/S:	CA No 28 of 2011 DC No 1893 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2011
JUDGES:	Fraser JA, Margaret Wilson AJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The conviction and sentence are set aside.** **3. A new trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted after a trial of one count of doing grievous bodily harm – where the appellant's property backed onto the complainant's back yard and the boundary was a steep embankment – where there was enmity between the appellant and the complainant – where the injury occurred during a disagreement on top of the embankment – where the complainant alleged the appellant pushed him off the embankment – where there was evidence supporting both the Crown case and the appellant's case – whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the defence of accident under s 23(1)(b) of the *Criminal Code* 1899 (Qld) was open on the evidence – where in response to a question from the jury as to

the formal definition of 'accident', the trial judge directed the jury that there was no formal definition of the word and it was meant to be given its natural and ordinary meaning – where this direction was wrong in law, but there were other conventional directions given – where in giving the redirections, the trial judge did not identify the factual issues and relate them to the directions – whether a miscarriage of justice occurred as a result of the misdirections

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where a number of the Crown witnesses had made prior inconsistent statements which were the subject of cross-examination by defence counsel – where, in response to a question from the jury, the trial judge directed the jury that only the witness' oral testimony was evidence, and the documents containing the statements themselves were not evidence – where the appellant argued this direction was incorrect as a result of s 101 of the *Evidence Act* 1977 (Qld) – where the appellant also argued that the trial judge erred in failing to leave self-defence to the jury – where there was some evidence which supported self-defence, but no evidence as to the appellant's belief that it was necessary to use force to defend himself against any assault by the complainant – whether the misdirection and non-direction alleged by the appellant caused a miscarriage of justice

Criminal Code 1899 (Qld), s 23(1)(b), s 271, s 272, s 277(1), s 668E(1)
Criminal Code and Other Legislation Amendment Act 2011 (Qld), s 4
Evidence Act 1977 (Qld), s 101

Hargraves v The Queen; Stoten v The Queen [2011] HCA 44, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
R v Cannell [2009] QCA 94, cited
R v Perera [1986] 2 Qd R 431, cited
R v Stuart [2005] QCA 138, cited
R v Taiters; ex parte Attorney-General [1997] 1 Qd R 333; [1996] QCA 232, cited

COUNSEL: P E Smith, with K M Hillard, for the appellant
D C Boyle for the respondent

SOLICITORS: Jones & Company on behalf of the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** Following a three day trial in the District Court the appellant was convicted of unlawfully doing grievous bodily harm. The appellant was sentenced to 12 months imprisonment, wholly suspended for an operational period of 12 months. He has appealed against his conviction. At the hearing of the appeal the Court gave the appellant leave to rely on the following grounds of appeal instead of the ground originally stated in the notice of appeal:

> "Ground (a): An independent review of the evidence would lead the Court to the conclusion that the verdict was unsafe and unsatisfactory
>
> Ground (b): The learned trial Judge erred in giving a direction of the use the jury could make of previous inconsistent statements
>
> Ground (c): The learned trial Judge failed to adequately direct the jury as to how accident might apply in this case.
>
> Ground (d): The learned trial Judge erred in failing to leave self-defence to the jury as raised on the evidence."

The evidence at the trial

[2] I will outline the evidence adduced at the trial.

[3] The appellant's property adjoined the back yard of a two storey block of six units. The complainant, Mr Meckstroth, and his wife lived in a unit on the top floor. Mr Woodward, who also gave evidence in the prosecution case, lived in a ground floor unit below the Meckstroths' unit. Those units overlooked a grassed back yard. The yard sloped away from the units up to the base of a steep embankment which faced the unit block. A fence running along the top of the embankment appeared to divide the appellant's property from the unit block land, but in fact the appellant's land included the embankment on the unit block side of the fence. (There was no challenge to the investigating police officer's evidence to that effect, although the complainant gave evidence that the appellant once claimed to own only part of the embankment.) The embankment was quite uneven ground, comprised mainly of dirt, rocks and roots. From the perspective of the units, the height of the embankment above the yard increased from left to right. At a point towards the left, where there was a raised manhole in the yard adjacent to the embankment, the embankment was only about half a metre high. At that point the complainant could step up from the grass onto the top of the embankment onto a reasonably flat strip of land next to and parallel with the fence.

[4] The events which led to the charge against the appellant occurred on that strip of land. The complainant could walk along it up to the right hand end of the embankment, which was about two and half metres above the yard. At that point the fence formed a corner with a different boundary fence. Just before that corner there was a gate in the appellant's fence which gave him access between the embankment and the rest of his back yard. Although the strip of land on the top of the embankment trended upwards, was uneven, and was littered by rocks and timber, it was relatively flat along its width between the fence and the edge of the steep embankment down to the unit block yard. There was no precise evidence of that width, but it seems to have been sufficient for the appellant and the complainant to stand abreast, at least at one point.

[5] There had earlier been a number of neighbourhood disputes between the Meckstroths and the appellant. The complainant gave evidence that, at about

5.00 pm on 20 July 2009, he and his wife saw the appellant pouring white liquid out of a container on to the top of the embankment near the gate into the appellant's property. They found that objectionable. The complainant stepped up onto the top of the embankment, walked up the slope parallel to the fence to within about three feet of the appellant, and complained about what the appellant was doing. The appellant replied that it was his property and that he could do whatever he wanted. He continued to pour the white liquid onto the ground. The complainant said that the appellant then "provoked" the complainant by saying that he, the appellant, had earlier taken photographs of the complainant removing material from the embankment to surround an exposed manhole at the base of the embankment, but had not yet taken the photographs to the police. At the complainant's request, his wife gave him a camera and he started "documenting for the Body Corporate". The complainant said that he did this "so we have a history to present to the Body Corporate meeting, what's going on there, and just to get evidence about all that" and that Mrs Meckstroth "was voicing her opinion about how he should go home, you know, turn around, go back through the gate and leave us alone, quit bullying us."

[6] The complainant took photographs of the white liquid the appellant dumped on the embankment and the bucket. He took five or six photographs because, he said, the appellant "had a very aggressive look on his face and I documented that." After the complainant took the photographs he was about to leave, "and that's when I was pushed off." He had turned to climb back down the embankment "and then next thing I know I felt two hands on my side and back and I went flying through the air …". The complainant gave evidence that when he was pushed he was facing in a direction parallel to the fence and towards the lower part of the embankment, and the appellant was behind him and closer to the gate. The complainant described an awkward fall in which his ankle was injured. He estimated that he landed four to five feet out from the base of the embankment. Mrs Meckstroth subsequently took a photograph of the injured complainant lying on his back on the grass.

[7] In cross-examination the complainant agreed that the appellant had asked him a number of times to get off the appellant's land. The complainant said that he took that "with a grain of salt because I didn't consider it his land." He agreed that instead of getting off the appellant's land he walked past the appellant and up to the gate leading into the appellant's yard. The complainant acknowledged that whilst he was by that gate he took a photograph of the appellant. That photograph, which was in evidence, confirms that the complainant was then between the appellant and the gate. The complainant acknowledged that he may also have taken photographs of the appellant's house through the gate between the properties. He could not remember whether, immediately after that, the appellant turned round to face him. He denied that the appellant put his hands on the complainant's shoulder at that point and he denied that the appellant moved the complainant from right to left (down the slope parallel to the fence) away from the gate. He denied that the appellant then let him go, that the complainant started to walk down the embankment, and that as he was walking down the embankment he tripped, fell, or stepped awkwardly, hurting his ankle at that point and causing him to fall from the top of the embankment to the yard below. The complainant denied that he had rolled to the point shown in Mrs Meckstroth's photograph of him.

[8] The complainant agreed that his version was that, after he went up to the gate he walked back down to the middle of the embankment, and when the appellant pushed

him in the back he was facing parallel to the embankment and turning to disembark from the embankment. When he was pushed he was facing parallel to the embankment, not perpendicular to the embankment, because he intended to walk to the point where the embankment was lower so that he could step back down onto the yard. The complainant said that he was pushed when he had got halfway to the point where he would step down off the embankment. He felt a "very fast, violent push, right in my side and back." The appellant's hands were towards the bottom of the complainant's ribcage, with one hand on the complainant's back and the other hand on the complainant's side. The complainant, who then weighed about 220 pounds, said that he was "flying through the air" whilst he was upright. When defence counsel put to the complainant that he had stated to police that he had landed eight feet away from the mound area, he first responded that it "felt like 8 feet" but that was a wrong estimate. He also said that it "might still be 8 feet", that he did not know, but that it was "probably closer to 5 feet."

[9] Mrs Meckstroth gave evidence that, after the complainant took the photographs near the appellant's gate and whilst she was yelling at the appellant, the complainant turned "to step down off the mound and in the instant that his back was turned Mr Wardle lunged forward … and he pushed [the complainant] on the back, really shoved him hard". She said that the complainant then "just became legless all of a sudden" and he had to "try and look down to see where he was going to land". Mrs Meckstroth said that she "actually saw him sailing through the air almost up, up and over to here he landed." He only moved for "half a roll", whilst trying to untangle his leg which had ended up in an awkward position.

[10] In cross-examination Mrs Meckstroth said that the appellant "propelled himself forward to shove [the complainant]" from a distance of at least two metres away. The complainant was not walking down the embankment but was in the process of turning away from the appellant when he was pushed. Mrs Meckstroth said that the complainant had only taken a couple of steps parallel to the fence to turn and "[h]e had only gotten to his turn". She said that the complainant was in a turn when he was pushed. The complainant "was walking parallel to the fence or he had turned parallel to the fence" and he was "facing forward with his head down looking at the ground to make sure he was still on even ground." He was not facing into the unit block property but was "still going parallel to the fence." Mrs Meckstroth said that the appellant was facing in the same direction when he pushed the complainant. In response to defence counsel's question about the direction in which the complainant was propelled, Mrs Meckstroth said:

> "Because he was in a-half a turn and he was actually moving, the force of it pushed him in that direction and what I saw was actually … flaying in the air because he was trying to correct his body to land. He was trying to find a position to land in, because he was pushed off at an angle. It was - he had come off the bank almost in that angle and I felt like I seen his body do almost a-half a turn before he even landed. It was - it was the force and the direction that, as I said, he was already in movement and that really basically pushed him to that - to the side like that."

[11] Mrs Meckstroth said that the complainant was lifted up into the air by the force of the push and that he sailed through the air for some distance: "To me it was up and down. Up, over and down." She said that the appellant pushed with his hands on the complainant's back just below the shoulder line.

[12] Mr Woodward gave evidence that, after hearing a commotion, he went on to his balcony. He saw the complainant and the appellant verbally abusing each other and the complainant taking pictures of the appellant after Mrs Meckstroth gave a camera to the complainant. Mr Woodward said that he saw the complainant get on top of the embankment and "bypass [the appellant] and as he went bypass [the appellant], [the appellant] chucked a U-turn and followed [the complainant] …". The appellant "chucked a U turn, went after [the complainant] and got behind that gateway, back there …". Mr Woodward saw the appellant grab the complainant with one hand on the back of the complainant's shirt and the other hand on the back of his shorts and "he was around trying to rush him back down there." Mr Woodward agreed that the appellant attempted to move the complainant down the embankment, parallel to the fence towards about halfway, where there was a rock and a tree root system, and the complainant "come rolling down" the embankment and landed, perhaps, towards the end of the mound. The following exchange occurred after the prosecutor asked Mr Woodward what he saw happen from the point of the rock he had mentioned:

> "Well, it was from that point that, um - I just know that they fell from that point about there just fell down to here.
>
> So the point you are pointing to there is again that area where the right pole is?-- Where the black pole is, that's when [the complainant] slapped [the appellant] and must have let go and [the complainant] came rolling down there.
>
> [It appears from the photographic exhibits that this pole was near the gate in the fence.]
>
> …
>
> Okay. So you've – he's pulled into that area near where that pole is and you say that's when you saw [the appellant] let him go?-- Yes.
>
> And he's fallen to the area towards the bottom of the mound?-- That's correct.
>
> Did you see him hit anything on the way down?-- There would have been kind of a sleeper around about there.
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> When you say there would have been a sleeper, are you saying that you saw him hit that or you just know that-----?-- Well, I did see him coming down and hit that sleeper, then start rolling down, but around about there he had his feet bounce up in the air."

[13] In cross-examination, Mr Woodward agreed that he saw the appellant move the complainant away from the gate area up the top of the embankment. He said:

> "because he was walking up towards that embankment … and as he was walking to bypass it he went into his – kind of the gate on the corner … and somehow Colin just went around and followed him up there … and grabbed him from the shirt and the shorts and as he's coming back down … he had his right leg sticking out … and he's been pushed down the hill, the embankment … and somehow that's from between that rock up point, it's in that part, that's where he rolled."

He agreed that the complainant was "pushed down parallel with the fence line". Mr Woodward also agreed that it was not his evidence that he saw the appellant push the complainant off the embankment down to the lower part of the ground.

[14] A police officer gave evidence that he arrived at the scene at about 5.35 pm. The complainant was lying on the ground holding his foot and the appellant was standing on top of the embankment. When the police officer asked the appellant for his version, the appellant said that he had told the complainant to get off his property three times and "that he pushed him that way and he fell over there". The police officer was unable to recall the direction or place identified by the appellant.

[15] A record of interview conducted by police with the appellant on 17 August 2009 was tendered in the prosecution case. The appellant's version in the recorded police interview was that, after washing out acrylic paint on some paint brushes in a tin of water, he went through the gate in the fence and poured the water out into his back yard. The complainant approached him and asked him what he was doing and started yelling at him. After Mrs Meckstroth gave the complainant a camera, the complainant started taking photographs of the appellant emptying the water out of the tin. The appellant informed the complainant that he (the appellant) had earlier taken photographs of where the complainant had taken some wood away, but that the appellant would not go to the police. The appellant told the complainant three times that he was trespassing and to get off the appellant's property.

[16] After the appellant finished pouring the water out of the tin, he proceeded to return to his house, but the complainant was standing with his back to the appellant at his gate where the appellant wanted to walk. The appellant said that he then "grabbed away from the gate and [the complainant] um, ah then he moved aside and then he turned around and as he turned around he proceeded to go down onto his property and that's when he landed on his wrong foot I think he, he went foot first and that's when I think he hurt his ankle." The appellant said that when he wanted to go back into the gate the complainant was in front of him so the appellant "just grab him out the way so I could walk through" and "guided him … I think it was just down below his shoulders or elbows there I just grabbed him so I could go through." The appellant said that "there's no intent to be rough at all I was … just trying to get through to my gate." The appellant disagreed with the version given to the police officer by Mr Woodward that the appellant had shoved the complainant. When asked how the complainant had fallen over and broken his ankle, the appellant said that "as he turned around in the motion to face his own property I think that's when … he probably just walk, just take one step down and … the height was just too high for him I don't know."

[17] An orthopaedic surgeon gave evidence in the Crown case that it was necessary to conduct surgery upon the complainant's fractured right ankle to insert a plate and screws to put the bone back into position. Without that surgery the ankle would not have healed correctly, causing pain, swelling, stiffness, accelerated arthritis, and it may have resulted in deformity. In cross-examination, the surgeon agreed that the injury was consistent either with a person stumbling down an incline or with a person being pushed off a height of one metre.

[18] The appellant did not give or call evidence.

Ground (a): An independent review of the evidence would lead the Court to the conclusion that the verdict was unsafe and unsatisfactory

[19] Ground (a) raises the question whether, in terms of s 668E(1) of the *Criminal Code* 1899 (Qld), the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. The test is

whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[1] The Court must conduct an independent review of the evidence, but it must also bear in mind that the jury had the benefit of seeing and hearing the witnesses give their evidence and it must accord respect to the jury's resolution of the contested factual questions reflected in the guilty verdict.[2]

[20] The appellant did not contend that the jury could not reasonably find that the complainant suffered grievous bodily harm as a result of falling off the embankment. The appellant's arguments instead focused upon the questions whether the prosecution proved beyond reasonable doubt that: the appellant caused the complainant to fall off the embankment in the way alleged; and the complainant's injury was not the result of an accident.

[21] It was submitted for the appellant that on the whole of the evidence there was a reasonable doubt whether the appellant pushed the complainant off the embankment away from the fence and directly onto the yard below. That submission assumed that the prosecution case did not comprehend an allegation that the appellant pushed the complainant down the more gently sloping aspect of the embankment parallel to the fence, from where the complainant subsequently fell down the steep face of the embankment onto the grass. Counsel for the appellant submitted that such a restriction upon the prosecution case should be inferred from the trial judge's summary of one of the prosecutor's submissions to the jury. That submission was that the evidence of the complainant, Mrs Meckstroth, and Mr Woodward, whilst differing about exactly what had occurred, was consistent in referring to the appellant having pushed the complainant in the vicinity of his back with sufficient force for him to be pushed off and over the embankment.

[22] The transcript of the prosecutor's opening and final addresses demonstrate that the prosecution case was not so restricted. The prosecutor opened the case as being that the complainant "turned and went to go back down the embankment when he was physically forced off by [the appellant]." That encompassed both a push off the embankment directly onto the grass below and the complainant falling onto the grass as an indirect result of the appellant dragging or pushing the complainant parallel to the fence along the rough surface at the top of the embankment. Whilst the prosecutor opened the evidence as being that the appellant was pushed off the embankment, she also opened Mr Woodward's evidence that the appellant pushed or dragged the complainant along the fence line before the appellant let him go. In the prosecutor's address to the jury she referred to Mr Woodward's evidence and submitted that the jury might be satisfied that it was the appellant's physical force that caused the complainant to fall off the embankment. The prosecutor submitted that it was then up to the jury to decide whether the complainant's broken ankle was a foreseeable consequence of what happened. The prosecution was bound by the case made at trial,[3] but that case was not confined to an allegation that the appellant pushed the complainant away from the embankment towards the unit block and directly onto the grass below.

[23] The appellant's counsel submitted that the reliability of the evidence of the complainant and Mrs Meckstroth and their credibility were affected by their non-

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1 *M v The Queen* (1994) 181 CLR 487 at 493 - 495.

2 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 624 [59].

3 See, for example, *R v Cannell* [2009] QCA 94 at [54] per McMurdo P.

responsive and argumentative answers to questions. The enmity of both witnesses towards the appellant and their advocacy of their own versions of events were apparent. I accept that there were many irrelevant, derogatory and non-responsive answers by both witnesses. For example: the complainant volunteered his opinions that the appellant was guilty of "dishonesty", that the area on the embankment was "full of unbelievable stuff with rats and all that", and that the water which the appellant tipped out looked "very nasty". Mrs Meckstroth gave many similar non-responsive answers, including that she and the complainant had to put up with the appellant's "nastiness", she did not like being in court "to face lies and deceit", and she objected to having to get out of her bed to do so.

[24] The appellant's counsel referred also to the improbability of the evidence of the complainant and Mrs Meckstroth about the manner of the complainant's fall. The effect of the complainant's evidence was that the appellant pushed him from behind with one hand on his back and one hand on his side whilst the complainant was facing towards the lower end of the embankment and the appellant must have been moving approximately parallel to the fence. Yet the complainant, who on his evidence weighed about 220 pounds at the time, said that the push propelled him through the air away from the embankment so far that he landed five or eight feet out from the base of the embankment. Mrs Meckstroth described the complainant as sailing through the air initially in an upward trajectory. Both versions are improbable, to say the least. It is much more likely that the complainant first hit the ground on the embankment, and rolled or bounced (as Mr Woodward said) before coming to a rest on the grass.

[25] I also accept the appellant's contention that the complainant's evidence that he was pushed directly out from and off the embankment was inconsistent with the evidence of Mrs Meckstroth and Mr Woodward that the appellant pushed or dragged him parallel to the fence, and Mr Woodward's evidence that the complainant fell upon being released by the appellant.

[26] It does not follow from those matters that the verdict was unreasonable. It was the jury's task to assess that evidence. There is no reason to think that the jury did not take into account the enmity of the complainant and Mrs Meckstroth towards the appellant, which was clearly evident in their non-responsive and derogatory remarks. The objective improbability of their descriptions of how the complainant fell from the embankment was highlighted by defence counsel. That too cannot have escaped the jury's attention. Similarly, the inconsistencies between the different versions of the witnesses were clearly apparent and the trial judge drew the important inconsistencies to the jury's attention in the course of summarising the rival contentions of the parties. The trial judge also directed the jury to take inconsistencies into account in assessing the evidence.

[27] In performing their task, the jury might perhaps have discounted the version most favourable to the appellant in Mr Woodward's evidence on the grounds that (as he said in evidence) he had consumed about three or four mid-strength beers that afternoon, the light would have been fading at the time, and Mr Woodward observed the events from his position on his balcony where he was much further away from the complainant than was Mrs Meckstroth. Mr Woodward's statements quoted in [12] that "I just know that they fell" and that the appellant "must have let go" might have conveyed that he was unsure about the cause of the complainant's fall. The jury might also have placed weight on the investigating police officer's

evidence that the appellant's nearly contemporaneous version of events was that he pushed the complainant and the complainant fell. Contrary to one of the submissions for the appellant, the medical evidence did not support this ground of appeal; it was consistent both with a heavy fall off the embankment and with the complainant simply tripping and rolling down the embankment. Despite the inconsistencies and the grounds for concern about the accuracy of at least aspects of the evidence of the complainant and Mrs Meckstroth, it would not have been unreasonable for the jury to accept that the appellant caused the complaint to fall off the embankment and break his ankle by forcefully pushing him.

[28] According to the appellant's record of interview, the complainant fell and injured himself because he took a false step which was unrelated and subsequent to the appellant's admitted conduct in forcing the complainant away from the gate. On that version, accident was irrelevant; the appellant was not guilty because he did not cause the complainant's injury. As I have indicated, however, it was reasonably open to the jury to find that the appellant did cause the complainant to fall and suffer his broken ankle by forcefully pushing him.

[29] It was also necessary for the jury to consider whether the appellant was not criminally responsible on the ground that the complainant's injury was an event that occurred by "accident" within the meaning of s 23(1)(b) of the *Criminal Code*. As s 23(1)(b) now stands,[4] it does not refer to "accident". It excludes criminal responsibility for an event that "(i) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence." The current provision is not applicable in this case because it commenced after proceedings were begun against the appellant, but the current provision practically re-states the established judicial interpretation of the original provision.[5] Consistently with that interpretation, the trial judge directed the jury that they must find the appellant not guilty unless the prosecution proved beyond reasonable doubt that the appellant foresaw, or an ordinary person in the position of the appellant would reasonably have foreseen, the broken ankle suffered by the complainant as a possible outcome of the appellant's actions. (Arguably it would have been sufficient for the direction to have referred to an injury of the kind in fact suffered rather than to the injury which the complainant did suffer,[6] but the difference is not significant in this case.)

[30] Accident was open on the evidence given by the complainant and Mrs Meckstroth, particularly if the jury rejected the improbable conclusion that the complainant was pushed away from the fence with such force that he did not touch the ground until he landed on the grass five or eight feet out from the base of the embankment. However on their evidence, or their evidence combined with other evidence in the prosecution case, it was also reasonably open to the jury to find that accident was excluded beyond reasonable doubt. Such a finding seems quite likely if the jury found that the appellant had pushed the complainant forcefully away from the fence, since in that direction the complainant would encounter a substantial drop down the steepest part of the embankment. But, depending upon the degree of force used by the appellant, it was also open to the jury to find that an ordinary person in the position of the appellant would reasonably have foreseen the broken ankle suffered

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4 As amended by the *Criminal Code and Other Legislation Amendment Act* 2011 (Qld), s 4.

5 See *R v Taiters; ex parte Attorney-General* [1997] 1 Qd R 333.

6 See *R v Stuart* [2005] QCA 138 and *R v Peachey* [2006] QCA 162; but cf *R v Condon* [2010] QCA 117.

by the complainant as a possible outcome of the appellant's actions in pushing the complainant parallel to the fence, especially because that strip of land was rough ground encumbered by rocks and timber and it was not far from the edge of the steep embankment.

[31] Upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

Ground (c): The learned trial judge failed to adequately direct the jury as to how accident might apply in this case

[32] It was submitted for the appellant that the trial judge erred by directing the jury that:

> "[u]nless the prosecution has proved beyond reasonable doubt that an ordinary person in the position of the defendant would reasonably have foreseen the broken ankle or the bodily harm as a possible outcome of the actions, or that the defendant himself indeed foresaw that, then you must find him not guilty."

The appellant's counsel cited *R v Stuart*[7] for the proposition that it was necessary at least that the kind of injury that was suffered, not merely "bodily harm", should be foreseeable.

[33] Reference to the context in which this direction was given confirms the impression that the expression "the bodily harm" was simply another description of "the broken ankle" mentioned in the same passage. Immediately before the quoted passage the trial judge directed the jury that they should find him not guilty:

> "[i]f the defendant did not intend or foresee **the bodily harm** of Mr Meckstroth as a possible outcome of his actions – that is touching, pushing – and if an ordinary person in that position would not have foreseen that as a possible outcome of those actions …". (emphasis added)

Furthermore, immediately after the quoted passage, the trial judge directed the jury that before they could convict the appellant they must be satisfied by the prosecution beyond reasonable doubt that:

> "**the bodily harm** was not an accident, that is not an event which was unintended and unforeseen, or would not have been able to be reasonably foreseen by an ordinary person in the defendant's position …". (emphasis added)

[34] The expression "the bodily harm" in the direction challenged for the appellant was clearly a reference to the particular injury suffered by the complainant. The jury would not have thought that it was sufficient to exclude accident that any other form of bodily harm was intended, foreseen, or reasonably foreseeable.

[35] That conclusion derives further support from redirections given by the trial judge in response to a question asked by the jury, but the appellant's counsel submitted that the redirections misled the jury in a different way. After the jury had retired to consider their verdict on the third day of the trial, they sought further directions by the trial judge, including a "formal definition of an accident". The trial judge gave

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7 [2005] QCA 138 at [22].

the following further directions (I have changed the paragraphing in the transcript and added numbers for ease of reference):

> "(1) The second dot point is a little bit more difficult to deal with because the Code does not provide a formal definition of the meaning of an 'accident'. Certain words, and 'accident' is one, are meant to be given their natural and ordinary meaning. That is, what would be seen by reasonable members of the public as being an accident, as opposed to for example being an intentional act or an act of reckless indifference. So there is no formal definition, but if I could remind you then that the section of the Code which provides the defence of accident is section 23, which – and I am quoting here – relevantly says, 'Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an event that occurs by accident.'
>
> (2) There being no formal definition of that word, as I have said, it is meant to be used in its natural and ordinary way, but if I could remind you of that part of the direction that I gave you before you retired, that an event, relevantly here the breaking of the ankle, could only be regarded as an accident if the defendant neither intended it to happen, nor foresaw that it could happen, and if an ordinary person in the defendant's position at the time also would not have reasonably foreseen that it could have happened.
>
> (3) I think as I said in my direction, it is settled law in our State that an event occurs by accident within the meaning of the section to which I have just referred you to, if it was a consequence which was not in fact intended or foreseen by the defendant, and would not reasonably have been foreseen by an ordinary person in the position of the defendant at the time.
>
> (4) That means that the prosecution must prove that he intended that the event in question should occur, or foresaw it as a possible outcome, or that an ordinary person in the position of the defendant at the time would reasonably have foreseen the event as a possible outcome, and in considering the possibility of an outcome you must exclude possibilities that are really no more than remote or speculative.
>
> (5) Now, as I say, there being no formal definition of what is meant by an accident, I don't think I can take it any further than that."

[36] The appellant's counsel argued that the trial judge's redirections wrongly conveyed the impression that the meaning of "accident" in s 23(1)(b) reflected the natural and ordinary meaning of that word. In my respectful opinion, that submission must be accepted. The direction in (1), that "accident" is "meant to be given [its] natural and ordinary meaning … [t]hat is, what would be seen by reasonable members of the public as being an accident, as opposed to for example being an intentional act or an

act of reckless indifference", was wrong in law. The jury presumably understood the trial judge's reference to an "intentional act" as a reference to an act by the appellant of applying force to the complainant, but the presence or absence of an intentional act by the accused is not a criterion of the operation of s 23(1)(b). As I mentioned in [29] of these reasons, the accepted interpretation of s 23(1)(b), even before it was confirmed in the current provision, was that criminal responsibility was excluded in relation to an event (relevantly, grievous bodily harm) which the defendant did not intend or foresee as a possible consequence and which an ordinary person in the defendant's position would not reasonably have foreseen as a possible consequence.

[37] If the jury applied the misdirection in (1), they might have reasoned that accident was excluded merely by a finding that the appellant caused the complainant's injury by intentionally pushing or grabbing the complainant, even if the complainant's injury was not intended or foreseen by the appellant as a possible outcome, or reasonably foreseeable as a possible outcome by an ordinary person in the appellant's position. If the jury did reason in that way, the appellant was deprived of a chance of acquittal that was fairly open on the evidence.

[38] The argument for the respondent that the conventional directions in the summing up and in (2), (3), and (4) of the redirections were sufficient to overcome any mistaken impression conveyed by the misdirection in (1) is not without force, but the particular circumstances of this case persuade me that there remained a real risk of a miscarriage of justice. Importantly, there was support for accident in the evidence of Mr Woodward, a witness who was apparently independent of the complainant and appellant. Whilst the jury might rationally have discounted Mr Woodward's evidence on grounds such as those summarised in [27] of these reasons, it is not possible for the Court to know whether the jury instead wrongly excluded accident merely on the ground, for example, that the complainant's injury resulted indirectly from the appellant's intentional acts in grabbing the complainant and pushing him in a direction parallel with the fence.

[39] Furthermore, the jury's question itself suggests that they might have thought that the word "accident" had some work to do beyond the conventional directions clearly given by the trial judge in summing up. The misdirection in (1) of the redirections was capable of reinforcing any such impression. Whilst the trial judge went on to give conventional directions, the first such direction (in (2)) was prefaced by the remark that the relevant event "could only be regarded as an accident" in the described circumstances. That remark was consistent with a view that the following directions concerned requirements which were additional to the first direction that the act not be intentional. Furthermore, the trial judge's repetition of the statement (twice in (1), once in (2), and once again in (5)) that there was no "formal definition" of accident tended to reinforce his Honour's directions in (1) and (2) that accident should be given its "natural and ordinary" meaning. The jury presumably understood that to mean, as the trial judge expressly directed in (1), that an "accident" was what would be seen by reasonable members of the public as being an accident. If so, the jury might have applied an idiosyncratic view of the application of s 23(1)(b), possibly to the appellant's disadvantage.

[40] The concern that the appellant might have suffered a miscarriage of justice is not allayed by the other directions. The trial judge was obliged to identify the real issues in the case, to tell the jury what those issues were, and to instruct the jury on

so much of the law as the jury needed to know to decide those issues.[8] In giving the redirections, the trial judge did not identify the factual issues or relate those issues to his Honour's directions about accident. As was submitted for the respondent, the redirections were given in response to a specific question about the meaning of "accident", but reference to the original directions suggests that the jury required more guidance.

[41] In summing up, the trial judge summarised the parties' rival contentions about the effect of the evidence with reference to the inconsistencies between the complainant's version and the versions given by Mrs Meckstroth and Mr Woodward. His Honour concluded that section of the summing up with a general direction to the jury that it "is up to you to weigh up all of those inconsistencies" and to decide whether "they're so inconsistent as to make the Crown's case unreliable, or whether they're so littered with exaggeration and untruthfulness that they make the Crown's case unreliable, or whether there is sufficient degree of consistency that one witness tends to corroborate the other." There was no direction in that section which related the law of accident to the factual issues.

[42] Immediately before that part of the summing up, the trial judge gave the conventional directions about s 23(1)(b) summarised earlier. In those directions, the trial judge related the evidence about the appellant pushing or grabbing the complainant to the law of accident only in one direction, namely, in the statement quoted in [33] of these reasons that the jury should find the appellant not guilty if he "did not intend or foresee the bodily harm of Mr Meckstroth as a possible outcome of his actions – **that is touching, pushing** – and if an ordinary person in that position would not have foreseen that as a possible outcome of those actions". (emphasis added)

[43] That was potentially misleading. As the appellant's counsel submitted, the evidence allowed of findings that the complainant persisted in trespassing on the appellant's land despite the appellant's repeated requests for him to leave. In such a situation, it was lawful for the appellant to use such force as was reasonably necessary to move the complainant away from the gate, provided that the appellant did not thereby do grievous bodily harm to the complainant.[9] Depending on the degree and direction of the force used by the appellant, on one view of the evidence the appellant might have acted lawfully by forcing the appellant away from the gate and the complainant's injury might instead have resulted from some subsequent act of the appellant (for example, releasing the complainant) for which s 23(1)(b) excused him of criminal responsibility. But because the trial judge's reference to "touching, pushing" comprehended the appellant's initial use of force to move the complainant away from the gate, the jury might wrongly have ruled out accident merely on the ground that the complainant's injury was a possible and foreseeable outcome, albeit an indirect outcome, of that initial use of force.

[44] Having regard to Mr Woodward's evidence in particular, it would not be surprising if the jury were troubled about how s 23(1)(b) applied in this case. The jury's question suggests that they would have been assisted by directions about the effect of s 23(1)(b) which were related to the different versions in evidence. No such directions were given and, for the reasons I have given, the jury might have been

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8 *Hargraves v The Queen; Stoten v The Queen* [2011] HCA 44 at [42].

9 *Criminal Code*, s 277(1).

misled by the redirections. It is not possible to rule out the prospect that the appellant suffered a miscarriage of justice as a result.

[45] I would hold that the appeal should succeed on this ground.

[46] For that reason, it is not strictly necessary to consider grounds (b) and (d), but I will express my views about those grounds.

Ground (b): The learned trial judge erred in giving a direction of the use the jury could make of previous inconsistent statements

[47] After the jury retired to consider their verdict, they asked the following question:

> "Are documents mentioned by the defense during a cross-exam evidence to be considered by the jury or is it just the testimony?
>
> We have not sighted these documents so are we to believe that the content of these documents is as described by the defence barrister?"

[48] The trial judge directed the jury that the documents to which counsel referred in the course of cross-examination were not in evidence, that the documents were not the evidence but that the answers to the questions put by counsel are what must be considered, and that the propositions put by defence counsel correctly reflected the contents of the documents. The appellant's counsel submitted that this was a misdirection because, when the witnesses accepted that they had made statements about which they were cross-examined, those statements became evidence of their truth pursuant to s 101 of the *Evidence Act* 1977 (Qld). It was submitted that the trial judge should have directed the jury that: those previous statements made by the witnesses were evidence of the facts stated in them; it was a question for the jury whether or not they accepted the evidence, and if so, what weight they attached to it; and in estimating the weight to be attached to those statements the jury should have regard to all of the circumstances from which an inference could reasonably be drawn as to their accuracy or otherwise.

[49] There is academic merit in that argument,[10] but the absence of the suggested directions had no adverse consequences for the appellant. In order to explain that conclusion it is necessary to refer to the particular statements upon which the appellant's counsel relied for his submission.

[50] The appellant's counsel referred to the complainant's agreement in cross-examination that he made handwritten notes about what had occurred on the night of 20 July 2009 and he gave a copy of those handwritten notes to one of the investigating police officers. In cross-examination, the complainant did not agree that he had stated in those handwritten notes that he had been spending more than 20 hours per week maintaining a standard of excellence about the yard, but his zealous pursuit of the state of the yard was perfectly clear from his evidence that he confronted the appellant on the embankment in the way I described earlier. The complainant also did not agree that he stated in his notes that as the body corporate chairperson it was his responsibility to ensure the safety, security and protection for all the owners and tenants and that he took that responsibility very seriously, but he gave direct evidence that he held that belief. In the result, the suggested misdirection about the use to which the jury could put the complainant's statements in the notes was immaterial.

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[10] See *R v Perera* [1986] 2 Qd R 431.

[51] The appellant's counsel also referred to the complainant's agreement in cross-examination that he wrote in his handwritten notes that he "went to speak to [the appellant] as he was in the act of emptying out his bucket and to take evidential pictures of him in the act that we might by some means have recourse down the track to address this matter further and to document and add to the concerns we have spoken and written to our Body Corporate about and also have approached Brisbane City Council and aired our concerns to Brisbane City Council regarding this matter to no avail." The appellant's counsel also referred to a question, in which defence counsel read from the complainant's statement to police that the complainant had "then landed 8 feet away from the mound area", and the complainant's answer that it "felt like 8 feet" but that "was a wrong estimation." That answer conveyed the complainant's agreement that he had made the quoted statement. The appellant's counsel also referred to Mrs Meckstroth's agreement that in a statement to police she said that, after the ambulance officers had put the complainant in the ambulance, she had gone into the unit to get his glasses. In each of those cases the witness acknowledged making the statement, so that the jury would have understood the trial judge's direction to mean that the statement was part of the evidence and to be taken into account. Again, the suggested misdirection was immaterial.

[52] Defence counsel did not ask the trial judge to give the directions which the appellant now contends should have been given. That reinforces my conclusion that the absence of those directions did not prejudice the appellant.

Ground (d): The learned trial judge erred in failing to leave self-defence to the jury as raised on the evidence

[53] The appellant's counsel submitted that either s 271 or s 272 of the *Criminal Code* was raised by the evidence. He submitted that self-defence was raised either by the evidence that the complainant harassed or intimidated the appellant or, if the jury found that the appellant pushed the complainant, by the slap by the complainant of which Mr Woodward gave evidence. The appellant's counsel referred to: the evidence given by Mr Woodward and in the appellant's record of interview that the complainant and his wife called the appellant names and made derogatory remarks; the appellant's comments in his record of interview that he felt harassed and "hassled" and wanted to go back through the gate into the other part of his property; the complainant's evidence in cross-examination that the complainant took photographs of the appellant whilst they were standing face to face and within three feet of each other; and Mr Woodward's evidence of the release of the complainant after the complainant slapped the appellant.

[54] A difficulty with the submission is that the appellant's statement to police did not refer to any assault by the complainant. The only evidence that the complainant assaulted the appellant was given by Mr Woodward. There was no evidence that the appellant believed that it was necessary to use force or that he in fact used force to defend himself against any assault by the complainant. Rather, Mr Woodward's evidence was that after the slap the appellant released the complainant's shorts and shirt. The jury might have constructed a factual scenario which combined Mr Woodward's evidence with other evidence that the appellant pushed the complainant, but the jury could not conjure up evidence, where none was given, about the force of the slap or its effect upon the appellant. In the absence of any such evidence or any basis for an inference on those topics, the jury could not find

that any push by the appellant might have been necessary or reasonably necessary for his defence. The evidence therefore did not raise self-defence under s 271(1) of the *Criminal Code*. It is even clearer that the evidence did not allow a finding that any slap by the complainant might have caused the appellant a "reasonable apprehension of death or grievous bodily harm" so as to raise the application of s 271(2) or s 272 of the *Criminal Code*.

Orders

[55] I would allow the appeal, set aside the conviction and sentence, and order a new trial.

[56] **MARGARET WILSON AJA:** I agree with the orders proposed by Fraser JA and with his Honour's reasons for judgment.

[57] **McMEEKIN J:** I agree, for the reasons given by Fraser JA, that the orders should be as he has proposed.