SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sharp* [2012] QCA 342
PARTIES:	**R** **v** **SHARP, Aaron Lachlan** (appellant/applicant)
FILE NO/S:	CA No 196 of 2011 DC No 113 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Mount Isa
DELIVERED ON:	Orders delivered ex tempore on 30 November 2012 Reasons delivered on 7 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2012
JUDGES:	Muir, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 30 November 2012:** **1. Leave granted to amend notice of appeal in accordance with appellant's outline.** **2. Appeal against conviction allowed.** **3. Verdict of guilty on count 2 in the indictment set aside.** **4. New trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where appellant convicted after jury trial of unlawfully attempting to strike complainant with vehicle with intent to do grievous bodily harm and sentenced to five years imprisonment, suspended after two and a half years, with operational period of five years – where appellant and complainant on fishing trip together – where complainant shook and abused appellant whilst asleep and punched appellant after he woke up – where appellant asked caravan park caretaker to call police and made threats against complainant after caretaker refused to call police – where

complainant went to nearby telephone box to call partner – where appellant gained access to a vehicle, sped off from caravan park and drove vehicle into telephone box complainant had been using – where appellant argued trial judge failed to give directions as in *Shepherd v The Queen* and *R v Perera* as to use of circumstantial evidence – where appellant argued trial judge misdirected jury as to elements of charge – whether trial judge erred in failing to direct or misdirecting jury

Criminal Code 1899 (Qld), s 23

Douglass v The Queen (2012) 86 ALJR 1086; [2012] HCA 34, cited
Grant v The Queen (1975) 11 ALR 503, cited
Kaporonovski v The Queen (1973) 133 CLR 209; [1973] HCA 35, cited
Murray v The Queen (2002) 211 CLR 193; [2002] HCA 26, cited
R v Dolley (2003) 138 A Crim R 346; [2003] QCA 108, considered
R v Perera [1986] 1 Qd R 211, considered
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, considered
Stevens v The Queen (2007) 227 CLR 319; [2005] HCA 65, considered

COUNSEL: R A East for the appellant/applicant
D C Boyle for the respondent

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

[1] **MUIR JA**: I agree with the reasons of Fraser JA.

[2] **FRASER JA:** The appellant appealed against his conviction that he unlawfully attempted to strike the complainant with a vehicle with intent to do grievous bodily harm. After hearing argument on 30 November 2012, the Court ordered that the appeal against conviction be allowed, the verdict of guilty be set aside on count 2 in the indictment, and there be a new trial. These are my reasons for joining in those orders.

[3] The appellant pleaded guilty to wilful and unlawful destruction of payphone cabinets and equipment and dangerous operation of a vehicle. At a Supreme Court trial in March 2010 the appellant was acquitted of charges of attempted murder and unlawful use of a motor vehicle. That jury were discharged after they were unable to agree on the remaining count in the indictment (count 2), that on 10 April 2009, with intent to do some grievous bodily harm to Michael John Neal, the appellant unlawfully attempted to strike him with a vehicle. After a second trial, in the District Court, the appellant was found guilty of that offence by a jury on 2 February 2011. On 29 March 2011, the trial judge sentenced the appellant for that

offence to five years imprisonment, to be suspended after two and a half years, with an operational period of five years. It was declared that 60 days which the appellant had spent in pre-sentence custody was time served under the sentence. The appellant was sentenced to a concurrent term of six months imprisonment for the wilful damage offence and he was convicted but not further punished for the offence of dangerous operation of a motor vehicle.

[4] The appellant filed a notice of appeal against conviction and an application for leave to appeal against sentence on 8 July 2011. On 6 September 2011, the Court granted the appellant the necessary extension of time for his appeal and application.

[5] At the hearing of the appeal the appellant abandoned the grounds stated in his original notice of appeal and was granted leave to substitute the grounds that:

1. "The failure to give a circumstantial evidence direction resulted in a miscarriage of justice."
2. "The jury were misdirected regarding the elements of the charge."

The appellant abandoned the sentence application.

[6] In order to appreciate the arguments advanced for the appellant and respondent under those grounds of appeal it is necessary first to summarise the evidence at the trial. The appellant, the complainant, and Mr Denton travelled from Newcastle to Burketown in the Gulf for a fishing trip. They camped together at a caravan park from late March 2009 until the time of the alleged offence on 10 April 2009. During that period friction developed between the appellant and the complainant. In the evening of 9 April 2009 the three men drank beer together at a hotel. The appellant left the hotel before his companions, at about 9 pm, taking with him a carton of beer which the complainant had bought. When the complainant and Denton later returned to the campsite the appellant was asleep. The complainant gave evidence that he opened a fridge door and all the beer cans fell out. The complainant decided that the appellant had stacked too many cans into the fridge. The complainant gave evidence that he went to the tent, grabbed the appellant by the ankles, shook him, and abused him for putting all the beer in the fridge. The complainant also admitted that he threw three or four punches at the appellant after the appellant woke up and jumped to his feet. (The complainant subsequently pleaded guilty to assaulting the appellant.) The complainant gave evidence that after those events he left the caravan park to walk to public telephone boxes, which were about 200 to 300 metres away.

[7] The caretaker of the caravan park, Mr Thomas, gave evidence that the appellant woke him at about 12.30 am and asked him to ring the police. Thomas could not see any disturbance taking place and refused to ring the police. Thomas gave evidence that the appellant stated that his mate had dragged him out of bed and roughed him up and he was unhappy about it. The appellant was agitated and asked Thomas for a gun because he wanted to "kill the bastard". Thomas refused to give the appellant a gun and offered him a room for the night to calm him down. The appellant stormed off after saying that "I know where there's a knife laying around, I'm going to kill the bastard".

[8] Denton gave evidence that he heard an altercation between the complainant and the appellant in the tent, after which the complainant came out of the tent and said that

he was going to the phone box to ring his partner. Some time later the appellant asked Denton where his keys to the car were. Denton replied that the car was open. Denton gave evidence that the car reversed, with the wheels spinning, and then headed towards the caravan park entrance with the wheels spinning and gravel flying everywhere. Thomas gave evidence that he heard the car being started and "revving its guts out". He also saw it drive out of the caravan park. Thomas said that when the car hit the road, which was only about 30 metres from where it had been parked, it was travelling as fast as a car could go in that short period of time, perhaps 60 or 70 kilometres per hour. Thomas and Denton both gave evidence that they shortly afterwards heard the sound of a collision.

[9] The complainant gave evidence that after he had telephoned his partner and was standing in one of the telephone boxes he heard a car "screaming up the road". When he saw the car come around the corner he dropped the phone and stepped back. As he stepped back the car hit the phone boxes and "…like crushed my leg and foot and basically, yeah, destroyed it. The car sort of stood up on end and back down." The complainant described the phone box as going "sort of through the top of me toes and the front of [the] box…sort of scrapped [sic] across the front of me leg". He said that a bolt "[r]ipped the top of me big toe". (The respondent accepted, however, that the complainant did not in fact suffer any significant injury.) The complainant gave evidence that the phone boxes were destroyed and the car hit a tree trunk. Once the complainant realised it was Denton's car, the complainant ran to the car, pulled the door open and asked the appellant what he was doing. The appellant screamed a threat to kill the complainant, and the complainant pushed the door shut and ran away.

[10] Photographic exhibits showed the phone boxes destroyed by the impact and damage to the front of Denton's car on the driver's side. It was admitted on behalf of the appellant that the car was mechanically sound.

[11] The appellant gave evidence in his defence. His description of the events of the evening before the complainant left the camp largely tallied with the evidence in the Crown case. One exception was the appellant's evidence that the complainant's assault upon him extended to the complainant kicking and stomping him. In cross-examination the appellant said that in this assault he sustained six or seven bruises on his back, a similar number of bruises on his stomach going up to his chest, bruised kidneys, fractured ribs and concussion. There was no independent evidence of these injuries.

[12] Returning to the appellant's evidence in chief, the appellant gave evidence that the complainant told him that he needed to learn his lesson. The appellant said that he also heard the complainant later tell Denton to "Go back and finish him. Get him. Learn him – learn him – make him learn his place." The appellant gave evidence that he went to the manager's house and asked the manager to call the police. That was consistent with the evidence given by Thomas but, inconsistently with Thomas' evidence, the appellant gave evidence that he did not say anything about a gun or a knife and he did not make any threat to kill. The appellant gave evidence that when he returned to the camp he took Denton's car for the purpose of driving to one of the phone boxes to ring police. The appellant agreed that he drove the car out of the caravan park at a fairly rapid pace. He said, however, that when he drove around the corner into the street where the phone boxes were located he was not revving the engine loudly, the car was in second gear, and it was in the centre of the road. He

could not estimate the speed the car was travelling at as he drove towards the phone box but said that it was "[p]robably too fast". The appellant said that he did not then know where the complainant was.

[13] The appellant gave evidence that at this time he was not functioning properly, he was under a great deal of stress, he was crying, and he was in a lot of pain. He was not using the clutch because, as he put it, he "[j]ust couldn't function" and he "…couldn't operate." The appellant said that he could not see very far ahead in the car. The appellant gave evidence that he pulled the car over to park. The appellant acknowledged that he was driving too fast, probably at a speed of 40 to 50 kilometres per hour. He just wanted to get to the phone box to ring the police and his wife. The appellant saw the complainant standing on the footpath some metres from the telephone box. He tried to turn the car to avoid the complainant, the car clipped the phone box, the airbags deployed, the windscreen went white, and the car struck the telephone box. The appellant gave evidence that after the collision he heard the complainant abusing him. The complainant came over to the car, smashed the window, and opened the door. The complainant grabbed him by the scruff of his collar and started to drag him from the car, threatening to kill him and trying to hit him with one hand. The appellant said that he managed to engage the accelerator and reverse out into the middle of the road whilst the complainant was still holding him. The appellant attributed heavy tyre marks on the road, of which a police officer gave evidence, to that reversing of the car. The appellant said that the complainant eventually let him go and disappeared.

[14] I turn now to consider the grounds of appeal. Under ground 1 the appellant argued that the trial miscarried because the trial judge failed to give a "*Shepherd* direction":[1]

> "To bring in a verdict of guilty based entirely or substantially on circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances."

[15] The appellant also pointed out there was no direction along the lines of the direction described in *R v Perera*[2]:

> "If there is any reasonable hypothesis consistent with innocence, it is your duty to find the defendant not guilty. This follows from the requirement that guilt must be established beyond reasonable doubt."

[16] There being no admission by the appellant that he intended to do grievous bodily harm to the complainant by attempting to strike the complainant with the car, the prosecution case upon those elements of the offence was necessarily a circumstantial one. The case was dependent upon inferences drawn from the appellant's alleged conduct (particularly his alleged conduct in driving the vehicle at speed into the phone box in or near which the complainant was standing) and the appellant's alleged words (particularly his alleged threats, both before and after the collision, to kill the complainant). The Crown case was quite strong, but the facts upon which the Crown case was based, and the inferences which the Crown submitted should be drawn from those facts, were in contest. Importantly, the

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1 Supreme and District Courts Benchbook No. 46 – circumstantial evidence; *Shepherd v The Queen* (1990) 170 CLR 573 at 578.

2 Supreme and District Courts Benchbook No. 46 – circumstantial evidence; [1986] 1 Qd R 211 at 217.

appellant gave evidence in which he denied having attempted to strike the complainant with the car and he denied having intended to do any grievous bodily harm to the complainant.

[17] In these circumstances, it would have been prudent for the trial judge to have given "the customary direction" that "guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances…".[3] As the respondent pointed out, Dawson J went on to observe that, although such a direction is customarily given in cases turning upon circumstantial evidence, it is merely an "…amplification of the rule that the prosecution must prove its case beyond reasonable doubt", and that there is "…no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence." The question which ground 1 raises is whether, in the particular circumstances of this case, and having regard to other aspects of the summing up, the failure to give the direction resulted in the summing up as a whole being inadequate.[4] That approach was adopted by de Jersey CJ with whose reasons McMurdo P and White J (as her Honour then was) agreed, in *R v Dolley*.[5] de Jersey CJ regarded a direction concerning the need to exclude other rational hypotheses consistent with innocence as "…but a logical elaboration upon the Crown's obligation to establish guilt". The Chief Justice continued:

> "Certainly that is an essential direction where what is sought to be inferred involves a matrix of facts and circumstances, as, for example, how or whether a murder has been committed in a case where no body has been found. That is but one example, but in a case like this, where the fact to be inferred is itself but one element of the offence, a direction that, in order to convict, that fact must be inferred beyond reasonable doubt, adequately directs the jury to the test to be applied, because obviously, if the inference is drawn beyond reasonable doubt, then, ipso facto, all other reasonable possibilities must have been excluded."

[18] The question whether a *Shepherd* direction is required must be considered on a case by case basis. In considering the significance of the omission to give a *Shepherd* direction in this case, it is relevant that the trial judge's directions given towards the start of the summing up communicated to the jury that proof beyond reasonable doubt was necessary for a verdict of guilty. It may first be noticed in this respect that the simple terms of the charge itself, which was read out to the jury more than once, expressed those elements of the offence. At the beginning of the summing up, the trial judge read out the charge and explained to the jury that there seemed to be an agreement that the "…real issues in the case are the question of intent to do some grievous bodily harm, an attempt to strike Michael John Neal with a motor vehicle, and the question of accident." Shortly after the summing up commenced, the trial judge explained the process of drawing inferences, adopting the conventional explanation given in the Benchbook. After the trial judge directed the jury that inferences that they drew from facts must be logical and that there must be a rational connection between the facts found by the jury and their deductions or conclusions, the trial judge directed the jury that the burden rested upon the prosecution to prove the defendant's guilt and that it was required to prove beyond reasonable doubt that

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3 *Shepherd v The Queen* (1990) 170 CLR 573 per Dawson J at 578.

4 *Grant v The Queen* (1975) 11 ALR 503 per Barwick CJ (speaking for the Court) at 504, quoted by Dawson J in *Shepherd v The Queen* (1990) 170 CLR 573 at 578.

5 (2003) 138 A Crim R 346 at 349.

the defendant was guilty. The trial judge explained that this meant, "…that in order to convict you must be satisfied beyond reasonable doubt of every element that goes to make up the offence charged." The trial judge substantially repeated that direction some six times, in the course of giving other directions, before returning to describe the elements of the offence.

[19] The trial judge's following directions concerning the elements of the offence are the subject of ground 2, but they also bear upon ground 1. In the course of the summing up, the trial judge supplied the jury with a document setting out the elements of the charge. Unfortunately, the document was not kept on the file and the parties were unable to supply the Court with a copy. The Court has on previous occasion made it clear that any document of this kind which is supplied to the jury should be marked as an exhibit in case its content becomes relevant in a subsequent appeal or other proceeding. However, the trial judge's summing up indicates that the document appropriately described "intent" as carrying its ordinary meaning and that "[i]n ascertaining the defendant's intention you are drawing an inference from facts which you find established by the evidence concerning his state of mind…". The trial judge went on to direct the jury that the intention might be inferred from the circumstances in which the incident occurred and from the defendant's conduct before, at, or after the specified act. Similarly, it appears from the summing up that the document defined "grievous bodily harm" in accordance with the definition in the *Code*. Those directions about the elements of the offence did not evidence the error for which ground 2 contends.

[20] After telling the jury that the injury in fact suffered by the complainant was, as the prosecutor had submitted, nothing like grievous bodily harm and that was not required to be proved, the trial judge directed the jury that what they had to concentrate upon was "…whether Mr Sharp intended to do grievous bodily harm to Mr Neal by unlawfully attempting to strike him with the vehicle." The appellant disclaimed any complaint about that direction. It was an accurate statement of the elements of the offence. The appellant submitted, however, that subsequent directions misstated the elements of the offence. The effect of the submission was that the subsequent directions conveyed that it might be sufficient for the jury to find that the appellant had deliberately driven the car at the phone box, intending to do grievous bodily harm, whereas proof of the offence required the jury to be satisfied beyond reasonable doubt that the appellant had tried to strike the complainant with the car. This was submitted to be significant because there was an available inference that the appellant drove the car into the phone box with the intention of striking fear in the complainant rather than striking the complainant with the car. It was also submitted that another inference, which was raised for the jury's consideration in the previous trial, was that the appellant might have changed his mind at the last minute and swerved away to avoid the phone box, but unintentionally struck it a glancing blow before crashing into the tree.

[21] Neither possibility accords with the appellant's evidence to the effect that he did not at any time intend to cause any injury to the complainant or intend to drive the car at the complainant or at the phone box. Both possibilities were also inconsistent with the correct direction already quoted, that the jury was required to concentrate on the question whether the appellant intended to do grievous bodily harm to the complainant "…by unlawfully attempting to strike **him** with the vehicle." (emphasis added) The trial judge repeated that direction immediately afterwards by identifying the question as coming down to whether or not the destruction of the phone box by the car "…was done with intent to do grievous bodily harm by

Mr Neal unlawfully attempting – sorry, Mr – the document you've been given, I think, has a typo in the end of the third line/beginning of the fourth. It says, "Aaron Leslie Sharp, with intent to do grievous bodily harm" – no, I'm sorry, it's correct – "Michael John Neal, unlawfully attempted to strike Michael John Neal." Okay? So they're the elements. I'm sorry, I got confused myself then." That direction accurately conveyed that the question was whether the appellant unlawfully attempted to strike the complainant with the intention of doing grievous bodily harm, although the impact of the direction may have been reduced by the trial judge's mistake in thinking that the document he had supplied to the jury described the defendant by the complainant's name.

[22] In following passages in the summing up the trial judge directed the jury about what was required for the jury to determine whether the defendant "intended to do grievous bodily harm". The trial judge told the jury that they had to have regard to the "nature of the intended injury", and "in the circumstances of this case…you have to conclude whether, if you think that he deliberately drove the vehicle at the phone box, he was intending to do grievous bodily harm…". This direction concerned the element of intent to do grievous bodily harm, not the element of attempting to strike the complainant with the car, but the reference to deliberate driving "at the phone box", instead of attempting to strike the complainant with the car, was potentially confusing.

[23] Nevertheless, whilst the trial judge's directions up to this point might have been clearer, taken as a whole they were adequate to explain the elements of the offence. Furthermore, despite the absence of a *Shepherd* direction, the summing up to this point might have been regarded as adequate to explain the burden upon the prosecution to prove the necessary intent beyond reasonable doubt. Unfortunately, the clarity of the directions on both topics was undermined by what followed.

[24] Immediately following the directions so far summarised, the trial judge commented that the jury would probably agree with the trial judge and with defence counsel, although it was a matter for the jury, "that the real issue is that to which the defendant swore; that is, is this a case that occurred by accident[?]" The jury's mind having been focussed upon that as potentially the real issue, the trial judge went on to explain that, under the *Criminal Code*:

> "An event can only be regarded as an accident if neither – the defendant neither intended it to happen, nor foresaw that it could happen – there's those two elements, didn't intend it or didn't foresee that it could happen – and if an ordinary person in the defendant's position at the time would not reasonably have foreseen that it could happen."

[25] The impression that the "real issue" might be not merely whether the prosecution proved that the defendant intended "the event" to happen, but whether the appellant did not foresee that it could happen or an ordinary person in the defendant's position would not reasonably have foreseen that it could happen, was reinforced by the next direction:

> "So the question of accident goes beyond intention. It could be that the defendant did not intend it to happen, or it could be that he didn't foresee that it could happen, and if an ordinary person in the defendant's position at the time wouldn't reasonably have foreseen that it could happen. It's settled law that an event occurs by accident within the meaning of the section if it's a consequence which was not

> in fact intended or foreseen by the defendant and would not - reasonably have been foreseen by an ordinary person. The prosecution must prove that he intended that the incident occur, that is intended that the motor vehicle strike the phone box causing him grievous bodily harm, or foresaw it as a possible outcome of the manner in which he drove the vehicle, or that an ordinary person in the position of the defendant would reasonably have foreseen the event as a possible outcome. …"

The last sentence wrongly described the subject matter of the necessary intent as the car striking the phone box rather than the complainant, and its references to what was foreseeable are also of concern, as I will explain.

[26] After directing the jury that the evidence raised those possibilities for the jury's consideration, and reminding the jury that it was not for the defendant to prove anything, the trial judge directed the jury that:

> "Unless the prosecution prove beyond reasonable doubt that an ordinary person in the position of the defendant would reasonably have foreseen the possible grievous bodily harm to Mr Neal as a result of the striking of him with a motor vehicle as a possible outcome of the actions, or that the defendant intended or himself foresaw that, you've got to find him not guilty."

The trial judge went on to again refer to the three possibilities already mentioned and to repeat that "…it's more than just the question of intent. It also goes to those questions of foreseeability that I've described."

[27] The charge against the appellant was brought under s 317 of the *Code*, which, so far as is presently relevant, provides:

> "Any person who, with intent –
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> …
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> (b) to do some grievous bodily harm…to any person…
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> …
>
> (f) …attempts in any way to strike, any person with any kind of projectile or anything else capable of achieving the intention…
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> …
>
> is guilty of a crime, and is liable to imprisonment for life."

[28] The prosecution bore the onus of proving beyond reasonable doubt that the appellant unlawfully attempted to strike the complainant with the car driven by the appellant with the intention of causing grievous some bodily harm to the complainant, but the directions about accident conveyed the wrong impression that it was sufficient for the prosecution to prove beyond reasonable doubt that the appellant foresaw the motor vehicle striking the complainant or the phone box and causing the complainant grievous bodily harm "as a possible outcome of the manner in which he drove the vehicle", or that an ordinary person in the defendant's position "would reasonably have foreseen the event as a possible outcome…".

[29] In relation to accident, s 23 of the *Criminal Code*, in the form applicable at the trial,[6] provided:

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[6] The amendment made by s 4 of the *Criminal Code* and *Other Legislation Amendment Act* 2011 (Act 7 of 2011) did not apply because the proceedings for this offence were started before the commencement of s 4: see *Criminal Code* 728(1), inserted by s 11 of Act 7 of 2011.

> "(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for –
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
> (b) an event that occurs by accident."

[30] The section conveys that the relevant act, omission, or event is one of the circumstances the combination of which is alleged to render the accused criminally responsible for the offence.[7] An "event" within (b), which must be distinguished from the "act" or "omission" within (a),[8] is "a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person".[9] As to (a), the appellant's driving of the car might have involved a relevant "act" or "omission" on the basis that it formed part of the alleged attempt by the appellant to strike the complainant with the car, but no issue concerning any unwilled act or omission was mentioned in the summing up. It was not submitted that the summing up was defective on that account.[10] As to (b), the "possibility of grievous harm for the complainant" to which the trial judge referred could not be described as an "event". The only matters mentioned in the summing up which might be described as "events" were the striking of the phone box, the destruction of the phone box, and the striking of the complainant, but none of those matters was an "event" in relation to which s 23(1)(b) might operate to excuse the appellant from criminal responsibility for the offence which was alleged against him. That offence did not involve the attribution to the appellant of criminal responsibility for any such matter. It was established by proof merely of an attempt (an attempt by the appellant to strike the complainant with the car) with the intention of doing grievous bodily harm to the complainant, without reference to any of the consequences mentioned by the trial judge.[11]

[31] For present purposes the relevant point is not that the directions about an event occurring by accident were wrong and unnecessary. Rather, the point is that the directions might have confused the jury both about the prosecution's burden of proving intent and the elements of the offence. A criminal lawyer would readily understand that the trial judge's directions on accident were not meant to contradict his Honour's earlier directions about the elements of the offence and the burden of proof of establishing intent. But the jury might have understood the directions about accident as suggesting that the real issue was whether the prosecution had proved beyond reasonable doubt that the appellant intended to cause grievous bodily harm to the complainant by striking him (or the phone box) with the car or

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7 *Kaporonovski v The Queen* (1973) 133 CLR 209 per Gibbs J at 231.

8 See *Murray v The Queen* (2002) 211 CLR 193 at [7], [44], [78](3).

9 *Kaporonovski v The Queen* (1973) 133 CLR 209 per Gibbs J at 231; *Stevens v The Queen* (2005) 227 CLR 319 at [16], [66]; cf at [155] – [156].

10 Compare *Murray v The Queen* (2002) 211 CLR 193 per Kirby J at [82] – [88] and per Callinan J at [146] – [153].

11 Compare, for example, the offence of murder, which involves both acts or omissions and the event of death. In relation to murder, a majority of the High Court held in *Stevens v The Queen* (2007) 227 CLR 319 that directions about accident should be given where warranted by the evidence, despite the "logical force" (per Kirby J at [80]) of the argument that accident is not available if the jury is satisfied that the intention element of the offence is established; see per McHugh J at [31], per Kirby J at [70] – [82], per Callinan J at [155] – [161], and per Gleeson CJ and Heydon J (dissenting) at [17] – [19].

that the appellant foresaw grievous bodily harm to the complainant resulting from the complainant (or the phone box) being struck by the car, or that an ordinary person in the appellant's position would have foreseen grievous bodily harm to the complainant resulting from the complainant (or the phone box) being struck by the car. Only proof beyond reasonable doubt of the first alternative - that the appellant intended to cause grievous bodily harm to the complainant by striking him with the car - amounted to sufficient proof of the offence charged against the appellant.

[32] The trial judge subsequently directed the jury that, "the primary [facts] being those that you have to decide, namely was the collision between the motor vehicle and the phone box an accident, as I've explained it, and did Mr Sharp intend to cause grievous bodily harm to Mr Neal by attempting to strike him with the motor vehicle." That direction suggested that the jury was obliged to decide both whether the collision with the phone box was an accident and whether the appellant intended to cause grievous bodily harm by attempting to strike the complainant with the motor vehicle. The first limb of that direction was unnecessary, but that did not detract from the accuracy of the second limb. Furthermore the trial judge reminded the jury that the prosecutor's response to defence counsel's submission about accident was that the appellant's evidence of how the events occurred was "so unlikely" that, "the circumstances inevitably would cause you to conclude that at all relevant times Mr Sharp had the relevant intention to do grievous bodily harm to Mr Neal, because why else would you drive the vehicle at a phone box in which a person was standing, and then in doing so he deliberately unlawfully attempted to strike him with the vehicle, and that this was no accident, it was an act of revenge." Those aspects of the summing up and the earlier, correct directions, support the respondent's argument that the summing up as a whole was adequate and not productive of a miscarriage of justice. That defence counsel did not seek any redirection also suggests that the wrong direction did not produce a miscarriage of justice.

[33] Ultimately, however, the difficulty remains that the jury was wrongly directed that it might consider that the "real issue" was accident and the directions on that topic communicated that it was sufficient for the prosecution to prove that the appellant foresaw, or an ordinary person in the appellant's position would reasonably have foreseen, the possibility of grievous bodily harm to the complainant resulting from the car striking the complainant or the phone box. Considerable emphasis was given to those directions. This was a trial in which there were disputed questions of fact for the jury to resolve. The jury could not find the appellant guilty unless satisfied that his evidence of his innocent state of mind was not reasonably possibly true.[12] Clear directions about the elements of the offence and the burden upon the prosecution were essential, but the summing up as a whole had the potential to confuse the jury about those matters to the disadvantage of the appellant. Taking into account also the omission to give a *Shepherd* direction and some lack of clarity in the earlier directions, a real risk of a miscarriage of justice cannot be excluded.

[34] It is most unfortunate that the trial miscarried in this way, particularly because it was a second trial on this charge, but the verdict must be set aside and a new trial ordered. Whether or not there should be a third trial is a matter for the Director of Public Prosecutions to decide.

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12 *Douglass v The Queen* [2012] HCA 34 at [13] (French CJ, Hayne, Crennan, Kiefel And Bell JJ).

[35] **WHITE JA:** I have read Fraser JA's reasons for joining in the orders made by the court on 30 November 2012. With respect they express my reasons for doing so and there is nothing further that I need add.