SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBG* [2013] QCA 370
PARTIES:	**R** **v** **DBG** (appellant/applicant)
FILE NO/S:	CA No 177 of 2013 DC No 195 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	10 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2013
JUDGES:	Muir and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted of assault occasioning bodily harm of his daughter – where a publication of the Queensland Government Department of Communities titled "Stopping abuse and violence" was found in the jury room following the verdict – where the appellant contends that with the presence of a document in the jury room, a miscarriage of justice occurred – where it was argued that accessing the document amounted to undertaking independent research which the learned trial judge had directed the jury not to do – where the appellant contended that there was a real risk that the jury, or one or some of the members of it, had been influenced to a view of what was reasonable in terms of s 280 of the *Criminal Code* (Qld) by the content of the document – where it is accepted that an irregularity occurred – where it is appropriate to have regard not only to the text of the publication but also to the directions given by the trial judge – whether the jury would have returned the same verdict if this irregularity had not occurred – whether a miscarriage of justice occurred

Criminal Code 1899 (Qld), s 280, s 339(1), s 339(3), s 668E(1)

R v Brown [2012] QCA 155, applied
R v Marsland, unreported, NSWCCA No 60263 of 1990, 17 July 1991
R v Rudkowsky, unreported, NSWCCA, No 60646 of 1992, 15 December 1992

COUNSEL: The appellant/applicant appeared on his own behalf
P J McCarthy for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **GOTTERSON JA:** After a trial over four days in the District Court at Maroochydore, the appellant, DBG, was convicted on 17 June 2013 on one count of assault occasioning bodily harm. The count alleged an offence against ss 339(1) and (3) of the *Criminal Code* (Qld) in that on 20 November 2011, the appellant unlawfully assaulted the complainant, his 14 year old daughter, DL, in the aggravating circumstance that he was armed with an offensive instrument.

[3] By way of sentence, the appellant was ordered to perform 120 hours of unpaid community service. The learned trial judge also ordered that no conviction be recorded.

[4] On 11 July 2013 the appellant filed a Notice of Appeal against conviction. The single ground of appeal set out in this document was based upon circumstances which occurred after the jury had been discharged. They were brought to the attention of the appellant by the learned trial judge in open court on 19 June 2013. They relate to a document found in the jury room by the bailiff after the trial. The relevant details of this document are set out in the discussion of this ground of appeal.

[5] The Notice of Appeal, which was prepared by the appellant, also stated that he was seeking leave to appeal against sentence. The reason given for the sentence appeal was that the appellant considered himself "not guilty". No identifiable ground of appeal against the sentence itself was set out in the document. The appellant did not address the topic of sentence in the course of his oral submissions to this Court. Any submissions would have had to confront the evident moderation in sentencing exercised by the learned trial judge.

The circumstances of the offending

[6] The complainant is one of four children of the appellant and his ex-wife. Under shared care arrangements, the children would stay week on, week off, with each parent. The 20th of November 2011 was a Sunday and the day preceding the return of the children to their mother.

[7] The appellant had a habit of disciplining the children with a stick of bamboo which he called a "training stick". When they were little, he would administer three taps on their buttocks with the stick. However, according to the complainant's evidence,

by the time of the offending he "belts us with it around a minimum of fifteen times just for the smallest things and it's more like anger".[1]

[8] The complainant's evidence was that she was sitting on a couch at the appellant's house using her iPod to access Facebook. She hid it under a blanket because she knew that her use of an iPod for that purpose would anger her father. The appellant challenged her about her using an iPod. He demanded that she give it to him. She refused, placing it in her back pocket.

[9] The appellant became angry. The complainant "accidentally" swore at him, using the words "fucking hell". That visibly annoyed the appellant. He left the house to retrieve a stick from a bamboo plant near the driveway. Whilst he was doing that, the complainant re-dressed herself in eight pairs of underpants under her shorts. Upon his return, the appellant instructed the complainant to place her hands against a bedroom wall. He then struck her "really hard", "maybe five times" across the buttocks. Although it did not hurt her much, the complainant pretended that it had. The stick broke.

[10] The complainant told the appellant that she was wearing multiple layers of underpants. He instructed her to remove her shorts and all but one pair of underpants. While the appellant retrieved another bamboo stick the complainant "stripped down" to five pairs of underpants, including a larger pair which she hoped would conceal the others underneath. Also, she sat on a bag of frozen peas for the evident purpose of numbing her buttock region.

[11] On the appellant's return, the complainant resumed her position against the wall. The appellant struck her a further 10 times "a lot harder" than before. Notwithstanding that she then apologised to him at his insistence, the appellant maintained that the complainant was still defying him. She was told to place her hands against the wall and again she was struck with a stick across the buttocks several more times.

[12] According to the complainant, she then turned around and told the appellant to leave her alone. She thought she may have slapped him on the arm. She kicked the appellant away from her. She fell to the floor and continued to kick him away as the appellant continued to grab at her. There was more yelling and screaming before matters quietened down.

[13] The complainant could not sleep because of pain that evening. The appellant gave her some Panadol to relieve the pain. Evidence from a medical examination conducted several days later, and after a complaint had been made to police, confirmed linear bruising across both buttocks consistent with striking by a stick. According to this evidence, soft tissue pain would have been associated with the bruising.[2]

[14] The appellant gave evidence at his trial. His version of the sequence of events was broadly consistent with that of the complainant's.[3] However, there were some differences.

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1 AB 306-307; Exhibit 1, Record of Interview 23 November 2011.

2 AB 150-151; evidence of Dr D N Tedman.

3 AB 192-196.

[15] On his account, he reacted to the complainant's defiance after the apology, with two or three more smacks at which point the complainant kicked him four or five times using Jujitsu front kicks. He blocked them in front of his chest. She lost balance and fell. She kicked at his legs with sweep kicks. He fell to the floor. She was "squealing and kicking and screaming on the floor". He was across her legs. He described the situation as "challenging"; but he was not angry. The appellant's evidence was that he told the complainant to stand up and put her hands against the wall. He then gave her two or three more smacks. She turned around and threw punches at him. Again, he told her to put her hands against the wall and gave her two or three further smacks. Then, "things subsided" and he told her, "That'll do."

The issue at trial and jury directions

[16] In the course of summing up to the jury, the learned trial judge concisely described the case as "focussed on whether the prosecution has proved beyond a reasonable doubt that what [the appellant] did on the second occasion[4] when he struck [the complainant] with the stick was not discipline or correction or control and secondly that it was not reasonable force in the circumstances".[5] This description encapsulated both an important aspect of the offence with which the appellant was charged, namely, that the assault have been done "unlawfully" and the statutory defence under s 280 of the *Code* invoked by the appellant. By virtue of that provision, it is lawful for a parent to use, by way of correction, discipline, management or control, towards a child, such force is reasonable under the circumstances.

[17] His Honour then observed that there was "no dispute that [the appellant] applied force by using the cane to [the complainant's] bottom" on the second occasion;[6] and that the jury "probably won't have much trouble with finding that [the complainant] suffered bodily harm".[7] He instructed the jury that it was a matter for them to determine whether the application of force on the second occasion caused the bodily harm.[8]

[18] Returning to the concept of "unlawfully", his Honour directed the jury in the following terms:

> "The prosecution have to satisfy you beyond reasonable doubt that any assault is unlawful. And as I said that means not authorised, justified or excused by the law. The law provides that it is lawful for a parent to use, by way of correction, discipline or control towards a child under the person's care, such force as is reasonable under the circumstances. It is accepted here that [the complainant] was in her father's care at the time. It's for the prosecution to satisfy you beyond reasonable doubt that what the [appellant] did was not by way of correction, discipline or control, or that the force used by him was not reasonable under the circumstances. The circumstances are the facts and circumstances surrounding and involving the incident

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4 That is, the occasion on which the complainant was struck numerous times immediately after she had re-dressed herself.

5 AB 257 LL24-27.

6 AB 259 LL16-17.

7 AB 259 LL25-26.

8 AB 259 LL27-29.

> that you accept based on your assessment of the evidence. If the prosecution can satisfy you beyond reasonable doubt of either (a) the [appellant's] actions in hitting his daughter on the bottom with a bamboo stick in her room on the second occasion was not by way of correction, discipline or control of her or (b) the force he used was not reasonable not have the benefit of this part of the law. As to what is reasonable under the circumstances, it would satisfy the onus upon it and the [appellant] would not have the benefit of this part of the law. As to what is reasonable is for you to decide as reasonable people, viewing the circumstances as determined by you on the evidence objectively. That is, if hypothetically you had been there at the time and observed what happened with knowledge of the antecedent relationship between [the complainant] and her father and by application of the community standards of which you aree (sic) a member prevailing as at November 2011, that is, the test for reasonableness. Keep in mind that the [the appellant] does not have to prove that he was disciplining his daughter and or that the force used was reasonable under the circumstances. It is for the prosecution to prove that he was not disciplining her and or that the force he used was not reasonable under the circumstances. If it does not, then [appellant] is entitled to be acquitted. Now, members of the jury I will hand to you a number of copies of that part of my summing up, which, I've committed to writing, which, you can have with you when you retire to consider your verdict and I'll mark a copy as exhibit G for identification."[9]

[19] The written direction which his Honour marked as Exhibit G was given to the jury. It contained the following statement with respect to what is reasonable:

> "As to what is reasonable is for you to decide as reasonable people viewing the circumstances as determined by you on the evidence objectively ie if hypothetically you had been there at the time and observed what happened, with knowledge of the antecedent relationship between [the complainant] and her father, and by application of standards prevailing in the community as at November 2011."

[20] The jury retired to consider its verdict at about 1 pm on the third day of the trial. During that afternoon, it requested a further direction in answer to the following question:

> "In terms of what is reasonable, do we need to be convinced that the [appellant's] actions were reasonable according to our own personal standards or prevailing community views. Is the prevailing community view the majority community view?"[10]

[21] His Honour discussed with the prosecutor and the appellant the form of the answer he would give to the question. He then redirected the jury as follows:

> "Now ladies and gentlemen I've got your question. It's self evident that there's no evidence in the case before you of what the general

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9 AB 260 L24-AB 261 L5.

10 AB 273 LL10-14.

> community think about this question of reasonableness and that's – that's because as I directed you this morning, it's you the jury that have got to decide whether the force used was reasonable in the circumstances bearing in mind that it's not for [the appellant] to prove that it's for the prosecution to prove that it was not reasonable. So, as I have said this morning and it's in my written direction, you decide all the facts and circumstances and then you ask yourself as reasonable people, hypothetically considering the position if you were there at the time, would you think that what he did was reasonable under the circumstances. So, you set the standard, it's not a question of going out into some amorphous community because that's not – that's not part of the evidence.
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> So you look at the evidence, you look at the circumstances and facts as you find them to be and then focussing on this issue, on this issue of reasonableness, you ask yourself whether the prosecution have satisfied you as reasonable people, looking at the circumstances and facts objectively, that is as if you were there watching it, have the prosecution satisfied me beyond a reasonable doubt the force was not reasonable. If the answer for you is they have not, you acquit, if the answer is they have proved that it was not reasonable, well providing you're satisfied about the first element relating to the question of discipline, then that would mean [the appellant] wouldn't have the advantage of this provision of the law as I've said in my written direction. Now, I hope that helps, I don't know if I can take it any further so can I ask you to try again?"[11]

[22] At 6 pm that evening, the learned trial judge gave a *Black direction* to the jury immediately before adjourning for the day. In the mid afternoon of the fourth day of the trial, the preconditions for a majority verdict were met. Once the jury was so instructed, they delivered a majority verdict of guilty.

The stated ground of appeal

[23] The document found in the jury room was a 20 page publication of the Queensland Government Department of Communities titled "Stopping abuse and violence". His Honour marked this document "Exhibit G".[12] He commented that copies of this document were on display and available free of charge to the public at the Maroochydore courthouse registry.[13]

[24] The stated ground of appeal is that by virtue of the presence of the document in the jury room, a miscarriage of justice occurred which engaged s 668E(1) of the *Code*. There are two aspects to this ground. Both of them depend upon the justifiable assumption that a member of the appellant's jury brought the document into the jury room at some point during the trial. First, it was argued that accessing the document amounted to undertaking independent research which the learned trial judge had directed the jury not to do.[14]

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11 AB 276 L26-AB 277 L2.

12 Thus, there were two documents marked Exhibit G: the written direction and the document.

13 AB 298 LL30-31.

14 AB 142 L46- AB 143 L14.

[25] Secondly, it was argued that there was a real risk that the jury, or one or some of the members of it, had been influenced to a view of what was reasonable in terms of s 280 by the content of the document. Specifically, reference was made to the following passage at page 4 of the document:

> "If you use abuse and violence in your relationship(s) then you may be using a variety of tactics to maintain power and control over the other person in the relationship, for example:
>
> - **Physical abuse** such as pushing, shoving, slapping, hitting, punching, biting or pinching; …"

[26] I accept the first argument as validly establishing that an irregularity occurred during the trial. The document should not have been accessed or brought into the jury room.

[27] As to the second argument, in *R v Brown*,[15] this Court accepted that, for an irregularity discovered after a verdict, as occurred here, the test for determining whether the irregularity resulted in a miscarriage of justice is that stated by Gleeson CJ in *R v Marsland*,[16] and reiterated by his Honour in *R v Rudkowsky*,[17] namely:

> "… the question we must ask ourselves is whether we can be satisfied that the irregularity has not affected the verdicts, and that the jury would have returned the same verdicts if the irregularity had not occurred."

[28] In applying this test, it is appropriate to have regard not only to the text of the publication but also to the directions given by the trial judge. Here, the appellant suggests that a reader of the document might infer from the passage to which I have referred, that from a community standpoint, any slapping or hitting at all in a domestic situation, such as the one in which the complainant found herself, is not reasonable.

[29] It must be said that the text of the document does not lend firm support for such an inference. For one thing, in the passage the auxiliary "may" is used to express a possibility, and not a certainty, that behaviour listed in it amounts to abuse or violence. For another, the likelihood of such an inference having been drawn by a reader needs to be assessed having regard for a note in bold type at page 11 of the document which indicates that it is not directed to the situation of children who are under 18 years of age in family relationships.

[30] In any event, taking into account the directions to the jury, I consider it most unlikely that any member of the jury here was influenced by what was in the document, including the passage in question, in deciding whether the appellant was guilty. In my view, the careful question posed by the jury and the equally careful and correct answer to it given by the learned trial judge strongly suggest that the members of the jury did not resort to the document for guidance in their decision making.

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15 [2012] QCA 155 at [25], [34] which concerned computer printout material explaining the difference between summary and indictable offences found in a jury room.

16 Unreported, Court of Criminal Appeal, NSW, No 60263 of 1990, 17 July 1991.

17 Unreported, Court of Criminal Appeal, NSW, No 60646 of 1992, 15 December 1992.

[31] The question revealed that the jury had engaged intelligently with the directions that they had been given on the topic of reasonableness. The answer made it clear that it was for each juror to consider whether he or she was satisfied that the prosecution had proved beyond reasonable doubt that the force used was not reasonable. The jurors were to do so by reference to their own assessment of reasonableness. They were not required to make an assessment of an abstract community standard of reasonableness and then adopt it as the measure against which the reasonableness of the appellant's conduct was to be adjudged. It is most unlikely that a jury member, conscious of this direction, would then resort to the document in order to gain an impression of what a community standard of reasonableness might be.

[32] I am therefore persuaded that the jury would have returned the same verdict if this irregularity had not occurred. I consider that that outcome is confirmed by the promptness with which the jury delivered its guilty verdict once it had been informed that a majority verdict could be taken.

[33] This ground of appeal cannot succeed.

Other submissions by the appellant

[34] During the course of oral submissions on the appeal, the appellant stated that he wished to rely on a range of matters:

- that the case "should never have come before the courts";
- that it arose out of a "domestic matter";
- that he considered that there had been "poor police work" with respect to locating the bamboo stick; and
- that his ex-wife had motivated the complaint.

None of these matters could substantiate a viable ground of appeal and the appellant was told as much by the court during the course of the hearing.

[35] The appellant also made a complaint with respect to the conduct of counsel who represented him at the pre-recording of the complainant's evidence. His complaint was that she was not cross-examined about targeting him with Jujitsu front kicks, falling to the floor, and then kicking his legs from under him.

[36] During the course of the appellant's evidence-in-chief, the learned trial judge observed that those matters had not been put to the complainant.[18] In the course of summing up his Honour told the jury that the prosecution was entitled to point to the absence of cross-examination on them as it reflected upon the reliability of the appellant's evidence.[19]

[37] It is a truism that a party is bound by the conduct of their counsel at trial. That applies here. Furthermore, whatever may have been the reason for the omission to cross-examine on these matters, it is difficult to see how the appellant was prejudiced in his defence by it to any significant degree. In the end, he did give this evidence. However, its relevance to the reasonableness of the force used by the appellant **before** any of the alleged Jujitsu kicks were delivered is highly problematic. Nor could it have conceivably founded a defence of self-defence as the appellant in submissions appeared to suggest that it might have. In summary, this complaint, too, could not substantiate a viable ground of appeal.

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18 AB 196 L36.

19 AB 263 LL32-36.

Disposition

[38] The stated ground of appeal having failed, this appeal must be dismissed.

Orders

[39] I would propose the following orders:

1. Appeal dismissed.
2. Application for leave to appeal against sentence refused.

[40] **DAUBNEY J:** I concur.