SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lewis* [2019] QCA 192
PARTIES:	**R** **v** **LEWIS, Brae Taylor** (appellant/applicant)
FILE NO/S:	CA No 162 of 2018 DC No 32 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Beenleigh – Date of Conviction: 31 May 2018 (Williamson QC DCJ)
DELIVERED ON:	17 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2019
JUDGES:	Gotterson and Philippides JJA and Burns J
ORDERS:	**1. Appeal against conviction on count 3 of the indictment allowed.** **2. Verdict of guilty on count 3 of the indictment is set aside.** **3. Re-trial on count 3 of the indictment ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NONDIRECTION – PARTICULAR CASES – where appellant was found guilty of grievous bodily harm with intent – where the only issue at trial was whether the appellant intended to cause grievous bodily harm to the complainant – where the Crown case on intent was substantially based on circumstantial evidence – where the trial judge gave directions to the jury regarding the element of intent as well as the drawing of inferences – where the trial judge did not direct the jury that, before they could find the appellant guilty, they needed to be satisfied beyond reasonable doubt that guilt was the only rational inference that the circumstances would enable them to draw – where there was no application for re-directions – whether the failure to do so resulted in a summing up that was, in the circumstances of the case, inadequate – whether there was a miscarriage of justice – whether the conviction should be

quashed – whether a re-trial should be ordered

Criminal Code (Qld), s 620

Barca v The Queen (1975) 133 CLR 82; [1975] HCA 42, cited
Peacock v The King (1911) 13 CLR 619; [1911] HCA 66, followed
Pemble v the Queen (1971) 124 CLR 107; [1971] HCA 20, followed
Plomp v The Queen (1963) 110 CLR 234; [1963] HCA 44, followed
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Dolley (2003) 138 A Crim R 346; [2003] QCA 108, cited
R v Hillier (2007) 228 CLR 618; [2007] HCA 13, followed
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v Perera [1986] 1 Qd R 211; [1985] QSCCCA 98, followed
R v Sharp [2012] QCA 342, followed
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, followed

COUNSEL: A M Hoare with T R Morgans for the appellant/applicant (*pro bono*)
C N Marco for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant/applicant (*pro bono*)
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Burns J and with the reasons given by his Honour.

[2] **PHILIPPIDES JA:** For the reasons given by Burns J, I agree with the orders proposed by his Honour.

[3] **BURNS J:** At the commencement of his trial in the District Court at Beenleigh on 29 May 2018, the appellant faced an indictment containing four counts: assault (**count 1**); assault occasioning bodily harm whilst armed with an offensive weapon (**count 2**); grievous bodily harm with intent (**count 3**); and, in the alternative to count 3, grievous bodily harm simpliciter (**count 4**). He pleaded not guilty to count 3 but guilty to the other counts. Because the Crown did not accept his plea to the lesser alternative charged by count 4, the trial proceeded on count 3, with the sole issue being the appellant's intention at the time when he caused grievous bodily harm to the complainant.

[4] Three days later, the appellant was found guilty by the jury of count 3. He was sentenced on 8 June 2018 to imprisonment for 11 years on count 3 and to lesser terms of imprisonment with respect to the other counts as well as a number of summary offences to which he had pleaded guilty. A period of 729 days of presentence custody was declared to be time served with respect to the terms of imprisonment that were imposed.

[5] The appellant appeals against his conviction on count 3 on various grounds and also seeks leave to appeal against the sentence that was imposed for that count but, for the reasons that follow, it is my view that the conviction cannot stand and a retrial must be ordered. It is therefore unnecessary to consider all but the one ground on which this appeal should succeed. However, before discussing that ground, it is useful to set out some of the evidence in the case.

[6] Each of the offences on the indictment was alleged to be a domestic violence offence arising out of a relationship between the appellant and the complainant when they were both 17 years of age. They had been living together at an address in Marsden for "about a year". Their relationship was marked by frequent verbal abuse, regular outbursts of aggression and, on occasion, actual violence. When giving evidence, the complainant recalled that they "would hit each other, kick, choke [and] throw things at each other". She agreed in cross-examination that they "were just as violent towards each other" although she said that, at "certain points, [the appellant] would take it that step further".

[7] In addition to the complainant and a scenes of crime officer, three witnesses gave evidence at the trial: a neighbour who heard and saw the lead-up to the incident about which count 3 was concerned and two friends of the appellant who witnessed the actual incident but volunteered when giving evidence that, at the relevant time, they were affected by the consumption of drugs. The Crown led evidence from the complainant regarding the incident as well as the assaults constituting counts 2 and 3 and she was cross-examined about all three events.

[8] As to count 1, the appellant threw a jerry can containing petrol at the complainant during an argument in early 2016. When the can hit her, the lid came loose and, in consequence, a quantity of fuel splashed onto the complainant in the area of her chest. The appellant then took hold of a disposable lighter and motioned to put his thumb on the flint but, on seeing this, the complainant "pushed [herself] out of the way". The appellant then turned the flint with his thumb and this produced a flame, but he does not appear to have moved any closer to the complainant. When the appellant did this, he said, "I'll set you on fire".

[9] The offence constituting count 2 occurred in early May 2016. The pair were again in the midst of an argument when the appellant threw a screwdriver at the complainant. The tip struck the complainant on her left hip and remained in place. When it was removed, the resulting wound bled profusely for a time. The complainant did not seek medical treatment but was left with a scar.

[10] Turning to the contested count, on the afternoon of 27 May 2016, the appellant was in the carport at their residence stripping paint from a motor vehicle. He was using a rag that had been dipped in petrol from a beer bottle. The complainant asked the appellant to hand over a mobile telephone they shared at the time because she needed to use it. The appellant refused because he was waiting on a call. As the complainant put it, "that's when the anger started"; they started "yelling at each other" and "it escalated from there". The appellant told the complainant to "go away" and to "stop coming near" him. She pushed him in the chest and he responded by shoving her away. The appellant then sat down in the driver's seat of the vehicle. He was positioned sideways, with his legs protruding out of the open door, and holding the bottle containing the petrol in one of his hands. According to the neighbour who gave evidence, the appellant had just given her a cigarette and,

when approached by the complainant, he had an unlit cigarette in his mouth and a lighter in one of his hands.

[11] After being shoved away, the complainant returned and the argument continued. She gave this account in evidence regarding what happened next:

> "I was standing at the end of the door and he was sitting down and then he – we were arguing. **He had threatened me** and then he had [sic] thrown the petrol – like, the beer bottle towards me and as he's done it he's brung [sic] his left hand around with the lighter and lit it." [Emphasis added]

Asked whether she saw what was in the appellant's left hand, the complainant said:

> "No, I didn't see it, not until I had seen the flame and then I saw a fire build from just in front of my – like in front of me. I watched it build up and it just went straight up in my face."

[12] As for the threat, the complainant said it was delivered when the appellant was sitting down and was in similar terms to the threat he made in connection with the assault constituting count 1 ("that he would set [her] on fire") but, she added, "this time he said that he will do it". However, the complainant did not take the threat seriously:

> "I thought, yeah, he may have thrown it on me to scare me, but I never believed that he was ever going to go that extra step and actually set me on fire."

Her belief in this regard, the complainant agreed, was "entirely consistent" with their interactions in the past – "nasty things" would be said without either of them ever "really [going] through with it". Indeed, the complainant told investigating police that she did not think that the appellant "actually meant" to set her alight; rather, she thought that the appellant "just got a little bit too close with the lighter". She also told them that the appellant "didn't light it" but "just flicked" the lighter and that "a little bit of flame kind of went up". However, at trial, the complainant said that she made those statements to the police because, at the time, she still loved the appellant and did not want him to be "in trouble in any way". Be that as it may, the complainant did agree when giving evidence that the time between the throwing of the fuel and the ignition of the "fumes" was "really quick", that the flame from the lighter was never applied to her clothes or body, that the "fumes" between them ignited and that this in turn caused the petrol on her clothes to catch fire. The two witnesses to the incident also confirmed that the "fumes" ignited. One said that the appellant "just flipped the lighter" after he threw the fuel. The other agreed that he provided a signed version to the police in which the following appeared:

> "She started coming towards him again, to push him. I saw [the appellant] flick the lighter near his face, about the level of his chin, about 10 centimetres away from his body.
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> I saw that as soon as he flicked the lighter, his face lit up on fire on the right side of his cheek.
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> I saw a big fireball go around [the appellant's] head.
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> The complainant was about 40 centimetres away, and I saw the flames reach her, and she caught on fire."

[13] The petrol from the bottle landed on the complainant predominantly in the areas of

her chest and abdomen. Her clothing caught fire and she dropped to the ground. The appellant immediately jumped up and attempted to smother the flames but the complainant pushed him away before running towards the rear of the property. She was asked when giving evidence at the trial whether he said anything to her. The complainant replied:

> "After the fire was off me he started crying and screaming that he was sorry and that he would never intentionally mean to hurt me."

[14] An ambulance was summonsed along with the police. The complainant suffered serious burns to her upper limbs (including her hands), neck, chest, abdomen and left thigh. She told one of the police officers who arrived on the scene that what occurred was "an accident" but she again explained when giving evidence that she said this because she "didn't want to hurt" the appellant.

[15] In their addresses to the jury, the Crown prosecutor and counsel for the defence (neither of whom appeared on the hearing of this appeal) of course focussed on the issue of intent. The Crown prosecutor referred to what he described as "a pattern of escalating behaviour" and argued that the appellant "knew exactly what he was doing". He emphasised that very little time elapsed between the throwing of the petrol and the use of the lighter. He invited the jury to accept that the threat which the appellant uttered beforehand was a serious threat and that his claim immediately afterwards to the effect that he did not "intentionally mean to hurt" the complainant should be rejected as untruthful. Defence counsel submitted that, when proper regard was had to the evidence of their past relationship and to what was said and done by the appellant and the complainant before, during and (in the case of the appellant) after she was set alight, the compelling inference was that the appellant was doing no more than trying to make the complainant "go away" and "leave him alone" in circumstances where he was seated in the motor vehicle and could not retreat any further. It was argued that he had "no intent to harm" the complainant and that what actually occurred was a "threatening flick of the lighter" without appreciating when doing so that the "fumes" between them could ignite. The point was made that, when that happened, the lighter was in close proximity to the appellant's own face.

[16] In summing up the case to the jury, the learned trial judge gave directions on the elements of the offence in contest before saying this regarding the element of intent:

> "As you have heard, what is important for you to consider in this case is the second component, and that is the prosecution must prove that the defendant actually had a subjective intent to achieve the result, that is, to do grievous bodily harm to the complainant. Accordingly, the prosecution must prove beyond reasonable doubt that the defendant meant to produce that result by his conduct. Intent or intention are familiar words. In this legal context, they carry their ordinary meaning. In ascertaining the defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning his state of mind. Intention may be inferred or deduced from the circumstances in which the grievous bodily harm eventuated, and from the conduct of the defendant before, at the time of or after he did the specific act which caused the – the grievous bodily harm.
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> And, of course, whatever a person has said about his intention may be looked at for the purposes of deciding what that intention was at the

relevant time."

[17] Earlier, his Honour gave these directions regarding the drawing of inferences:

> "If you are satisfied that a certain thing happened, it might be right to infer that something else occurred. That will be the process of drawing an inference from facts. An example that is sometimes given to demonstrate that reasoning is, for example, suppose that when you went to sleep it had not been raining and when you woke up you saw rainwater around. The inference, that is, the deduction, the conclusion, would be that it had rained while you were asleep. You may only draw reasonable inferences and your inferences must be based on facts you find proved by the evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or guessing."

[18] Later, when summarising the rival contentions, his Honour made these observations about the defence case:

> "To bring the matter into sharp focus, the defence case is that the threat relied upon by the Crown to prove the requisite state of mind was made in a particular context. That context was a long-term volatile relationship between two young people aged 17 years. It was impulsive and threats were routinely made but were not treated seriously. It was conduct that was par for the course. The threat, in that context, is not evidence of intent. The par for the course was said to involve the defendant throwing things at the complainant and making threats to make her go away to bring an argument to an end. This is said to be conduct which is common to counts 1, 2 and 3. The conduct was not evidence of escalating violence, nor is it evidence of a controlling relationship. Again, it was urged upon you that is not evidence of intent.
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> As to the critical moment, when the lighter was sparked, the defence case is that there is no evidence of any intention to cause what followed, being the lighting of the fumes with the consequential fireball. As to such evidence, it's urged upon you there is no basis upon which you'd be satisfied beyond reasonable doubt to find the defendant guilty of the offence charged."

[19] Among the amended grounds of appeal is the complaint that the "trial process miscarried because the jury were not properly directed on the issue of intent in that the trial judge did not tell the jurors before they could convict the appellant they must exclude beyond a reasonable doubt that the appellant acted only to frighten the complainant into leaving him alone" (ground 2.2). Although different reasons were advanced on behalf of the appellant in support of this ground, the directions given to the jury on the element of intention (extracted at paragraph [16]) were unremarkable and closely followed the guide directions on that topic in the Benchbook.[1] However, on the hearing of the appeal, the Court invited submissions from the parties as to the adequacy of the directions the trial judge gave regarding the drawing of inferences (extracted at paragraph [17]), it being obvious that proper directions on that task would have been essential to the jury's consideration of the appellant's state of mind at the time of the act causing grievous bodily harm. In this regard it may be observed that, if the directions were deficient in this way, ground 2.2 is in terms that are sufficient to capture such a complaint.

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1 Benchbook – Intention, No 59.1.

[20] The Crown case to prove that the appellant intended to cause grievous bodily harm to the complainant rested substantially on circumstantial evidence. The only direct evidence consisted of the statements made by the appellant before and after the relevant act. However, as to those, the Crown invited the jury to rely on the prior statement as a true reflection of the appellant's intention but to reject as untrue the subsequent statement whereas the defence urged the jury to rely on the subsequent statement for the same purpose but to treat the prior statement as an idle threat. Further, the available evidence when taken as a whole supported at least one reasonable hypothesis consistent with innocence: that the relevant act (the production of a flame through use of the lighter) was intended only to "frighten the complainant into leaving [the appellant] alone". Such an hypothesis arose not only from what the appellant said immediately after that act but also from the evidence regarding the nature of his relationship with the complainant including the history of unfulfilled threats to do harm to each other, the undisputed evidence that the appellant did not apply the flame to the complainant's shirt or body but, instead, turned the flint on the lighter when he was some appreciable distance from her and the undisputed feature that, in doing so, this caused the petrol "fumes" to combust.

[21] Where, as here, the Crown case is based substantially on circumstantial evidence, the jury must acquit unless the proven circumstances are "such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused".[2] Moreover, not only must guilt be a rational inference, it must be "the only rational inference that the circumstances would enable them to draw".[3] It follows that, if there is any reasonable hypothesis consistent with innocence, it is the jury's duty to acquit.[4] Of course, for an inference to be reasonable, it "must rest on something more than mere conjecture"[5] and "all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence".[6] But where such an inference does reasonably arise on the proven circumstances, consideration should always be given by the trial judge to the provision of directions along the lines I have just summarised. As Dawson J observed in *Shepherd v The Queen*,[7] such directions are "no more than an amplification of the rule that the prosecution must prove its case reasonable doubt". His Honour continued:

> "In many, if not most, cases involving substantial circumstantial evidence, it will be a helpful direction. In other cases, particularly where the amount of circumstantial evidence involved is slight, a direction in those terms may be confusing rather than helpful. Sometimes such a direction may be necessary to enable the jury to go about their task properly. But there is no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence. It will be for the trial judge in the first instance to determine whether it should be given. As Barwick CJ, speaking for the Court, observed in *Grant v The Queen*:[8]

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2 *Peacock v The King* (1911) 13 CLR 619, 634. And see *Barca v The Queen* (1975) 133 CLR 82, 104; *R v Baden-Clay* (2016) CLR 258 CLR 308, 323-4.

3 *Plomp v The Queen* (1963) 110 CLR 234, 252. And see *Shepherd v The Queen* (1990) 170 CLR 573, 578; *R v Baden-Clay*, ibid.

4 *R v Perera* [1986] 1 Qd R 211, 217.

5 *Peacock v The King*, supra fn 2, 661; *R v Baden-Clay*, supra fn 2.

6 *R v Hillier* (2007) 228 CLR 618, 637.

7 Ibid., fn 3. And see *R v Dolley* (2003) 138 A Crim R 346, 349 per de Jersey CJ (describing directions of this type as "but a logical elaboration upon the Crown's obligation to establish guilt").

8 (1975) 11 ALR 503, 504.

> 'Where the circumstances of the case seem to require that some such direction be given, the summing up regarded as a whole may prove to be, and generally may be likely to be, inadequate. On the other hand, having regard to the circumstances of the case and the nature of the summing up, the failure to give the special direction may not in a particular case result in an inadequacy of the summing up as a whole. It may none the less be concluded from the terms of the summing up that the jury were fully instructed.'"

[22] Thus, the question in the end is not whether directions along these lines were given in a case resting substantially on circumstantial evidence but, rather, whether the failure to do so in such a case resulted in a summing up that was, in the circumstances of the case, inadequate.[9] In this regard, it is well to remember that the trial judge is under a "duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused".[10]

[23] In this case, the trial judge did not give any such directions and his Honour should in my respectful opinion have done so. The whole case was about intent. Before the jury could find the appellant guilty, they needed to be satisfied beyond reasonable doubt that the appellant intended to cause grievous bodily harm to the complainant when he did the relevant act. Such a conclusion regarding the appellant's state of mind could only be drawn as a matter of inference from the proven circumstances including, in particular, what the appellant said and did before, during and after that act. Although it was open to the jury to infer from those circumstances that the appellant was possessed of the requisite intent at the relevant time, the hypothesis that the appellant acted only to "frighten the complainant into leaving [him] alone" was also open. Unless the jury were satisfied that any such hypothesis had been excluded beyond reasonable doubt, their duty was to acquit, and that is something that ought to have been the subject of explicit directions. Without them, the summing up as a whole was inadequate.

[24] Like what the trial judge said to the jury about the issue of intent, the directions his Honour gave regarding the drawing of inferences (extracted at paragraph [17]) also closely followed the guide directions on that topic in the Benchbook.[11] However, in this case, his Honour should in my respectful view have gone further (as the Benchbook prompts[12]) to direct the jury along these lines:

> "Importantly, if more than one inference is reasonably open on the facts you find proved, that is, an inference adverse to the defendant – i.e., one pointing to his guilt – and an inference in his favour – i.e., one pointing to his innocence – you must give the defendant the benefit of the inference in his favour.
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> This is because, to bring in a verdict of guilty in a case such as this which is based substantially upon 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 can be drawn from the circumstances.
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> It follows that, if there is any reasonable possibility consistent with

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9 *R v Sharp* [2012] QCA 342, [17] – [18].
10 *Pemble v the Queen* (1971) 124 CLR 107, 118; *R v Baden-Clay*, supra fn 2, 328.
11 Benchbook – General summing up directions – Primary facts and inferences – No 23.3.
12 Ibid, footnote 8.

innocence, it is your duty to find the defendant not guilty."[13]

Then, to relate those directions to the facts of the case,[14] the following could perhaps have been added to the trial judge's summary of the defence case (extracted at paragraph [18]):

> "Keep in mind what I said earlier about the drawing of inferences and the necessity of giving the defendant the benefit of any inference that is reasonably open on the facts you find proved. Unless you are satisfied beyond reasonable doubt that the only rational inference that can be drawn from those facts is that, at the time when the defendant used the lighter to produce the flame that lit the fumes between the complainant and him, he intended to cause grievous bodily harm to the complainant, you must find him not guilty.
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> To the point, the defence case is that the defendant had no intention to cause any harm to the complainant but, instead, that he acted only to frighten her into leaving him alone. If you accept such an inference as a reasonable possibility on the facts you find proved then you must find him not guilty."

[25] Although there was no application for re-directions on any of this, given the significance of the issue to the appellant's chance of acquittal, the inadequacy of the summing up in the respects identified led to a miscarriage of justice and, on that account, the conviction on count 3 must be quashed and a retrial on that count must be ordered.

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13 The second and third paragraphs of this suggested direction are adapted from the Benchbook directions on circumstantial evidence – No 48.1.

14 See *RPS v The Queen* (2000) 199 CLR 620, [41] and [42]; *R v Mogg* (2000) 112 A Crim R 417, [54]. And see *Criminal Code* (Qld), s 620.