SUPREME COURT OF QUEENSLAND

CITATION:	*R v Richards* [2023] QCA 7
PARTIES:	**R** **v** **RICHARDS, Joshua James** (appellant)
FILE NO/S:	CA No 120 of 2021 SC No 86 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 25 May 2021 (Henry J)
DELIVERED ON:	7 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2022
JUDGES:	McMurdo and Flanagan JJA and Freeburn J
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OTHER MATTERS – where the appellant was convicted by a jury of one count of murder – where the charge arose from an incident in which the victim approached the appellant's house, and the appellant, upon exiting the house, shot the victim with a bow and arrow – where at the time of the killing the victim was standing on a concrete slab situated between the appellant's house and another structure on the property – where the appellant contends that the concrete slab was part of a "dwelling" for the purpose of the defence of dwelling provision, s 267 *Criminal Code* – whether a structure must be a building to be a "dwelling" within s 267 – whether a structure must be capable of being entered or being remained within to be a "dwelling" within s 267 – whether the judge wrongly decided a question of law in deciding the concrete slab was not part of the dwelling CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted by a jury of one count of murder – where at trial the prosecutor argued that lies told by the appellant after the killing demonstrated a consciousness of guilt and were thereby probative of the appellant's guilt of the offence charged – where the appellant made confessions – whether the evidence of the confessions was relevant to the

issue of the appellant's lies because it supported the alternative inference that the appellant was lying out of panic or confusion – whether the trial judge needed to again remind the jury of the evidence of the confessions when directing the jury as to possible competing inferences about the lies – whether the judge wrongly directed the jury

Criminal Code (Qld), s 267

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
R v Bartram [2013] QCA 361, cited
R v Dixon (1885) 2 QLJ 81, cited
R v Halloran and Reynolds [1967] QWN 34, cited
R v Rose [1965] QWN 35, cited

COUNSEL: H L Blattman, with J R Morris and I J MacNicol, for the appellant (pro bono)
M Green for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO JA:** On 17 October 2018, Mr Dennis Beattie came to the appellant's house at Killaloe which is just south of Mossman in North Queensland. He demanded that the appellant come out of the house, which the appellant did, at the same time pointing a bow and arrow at Mr Beattie and telling him to stay back. According to a witness,[1] Mr Beattie then "jolted" towards the appellant and the appellant shot an arrow into his chest. Mr Beattie then pulled out the arrow and then collapsed. He died at the scene. On the same day, the appellant moved the body to a nearby cane farm, where it was later found by police. The day after the killing, the appellant drove what had been Mr Beattie's car from the appellant's house to a location at the side of a mountain road. Four days later, a witness saw the appellant standing next to the car in that location. On the following day, the car was found at the bottom of the ridge where it had been seen. It was then on fire.

[2] The appellant was indicted on charges of murder, arson and interfering with a corpse. He pleaded not guilty to the charge of murder but guilty to the other charges. After a seven day trial by jury at Cairns, he was convicted of murder.

[3] He appeals against that conviction upon two grounds. The first is that the trial judge wrongly decided a question of law, or alternatively, a miscarriage of justice was occasioned by his direction as to the application of s 267 of the *Criminal Code 1899* (Qld). The second ground is that there was a miscarriage of justice occasioned by the judge's directions to the jury about lies by the appellant which were said to have been probative of his guilt.

The first ground

[4] Section 267 of the Code provides:

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1 Ms Hibberd.

"Defence of dwelling

> It is lawful for a person who is in peaceable possession of a dwelling, and any person lawfully assisting him or her or acting by his or her authority, to use force to prevent or repel another person from unlawfully entering or remaining in the dwelling, if the person using the force believes on reasonable grounds—
>
> (a) the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling; and
>
> (b) it is necessary to use that force."

[5] Section 1 of the Code defines a dwelling as follows:

> "*dwelling* includes any building or structure, or part of a building or structure, which is for the time being kept by the owner or occupier for the residence therein of himself or herself, his or her family, or servants, or any of them, and it is immaterial that it is from time to time uninhabited.
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> A building or structure adjacent to, and occupied with a dwelling is deemed to be part of the dwelling if there is a communication between such building or structure and the dwelling, either immediate or by means of a covered and enclosed passage leading from one to the other, but not otherwise."

[6] On the appellant's property there was a single storey house with a carport attached to one side of it. The carport had a roof and a block wall on one side of it but was otherwise unenclosed. A door led from the carport to the house. Behind the house, and not attached to it, was a shed. Between the shed and the carport was a concrete slab on which nothing was constructed.

[7] The witness to the killing gave evidence that Mr Beattie approached the house through the carport, as he yelled for the appellant to come out. She saw Mr Beattie then walk out of the carport with his arms outstretched and palms facing up. She heard him say to the appellant "like, what are you doing?". At the same time, the appellant emerged from the house, pointing the bow and arrow at Mr Beattie and telling him to stay back. She said that Mr Beattie then jolted towards the appellant, as if he were "teasing him, or something". Her next recollection was that Mr Beattie had an arrow in his chest. It is submitted for the appellant that on this evidence, Mr Beattie must have been standing on the concrete slab, between the carport and the shed, when he was struck by the arrow.[2]

[8] After the evidence and before the final addresses by counsel, the trial judge ruled that for the operation of s 267, the concrete slab between the house and the shed was not part of a dwelling house, "but that, by virtue of the degree of connection as between the house and the shed", the shed came within the definition of dwelling house.

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2 Appellant's outline, paragraph 9.

[9] The judge directed the jury as to the possible operation of s 267. There could be no complaint that the judge misdescribed the effect, in general terms, of s 267. He then related that to the evidence, by saying, amongst other things:

> "What is a dwelling? Well, a dwelling is a building or part of it kept by the owner or occupier for his residence and that of his family or servants. That includes a part of a dwelling which is immediately connected to it. So here, that would include the carport and, by reason of the general proximity, the rear sheds, though it would not include the open area, the concrete pad and the grass nearby between those two zones. They are the dwelling structures, then.
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> On the evidence the defendant was living in these premises which he rented as his place of residence, so there is no dispute about his entitlement to be there.
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> The next consideration on the words of the section is was the force used for the purpose of repelling the deceased from unlawfully entering or remaining in the house, carport or shed. Was it? Was that his purpose?
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> If the Prosecution has satisfied you beyond reasonable doubt that the force was used not to repel the deceased but as a form of vengeance or selfish indulgence in anger then this particular defence is not open. The Prosecution contends the defendant could not have believed on reasonable grounds that the deceased was attempting to enter or to remain in the house, carport or shed with intent to commit an indictable offence in any of those structures.
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> In other words, the question here is whether the defendant genuinely believed Mr Beattie had the intention of committing an indictment offence in those structures, that is to say, one of sufficient seriousness to require it to be dealt with by a higher Court. In this case it is argued for the defendant that he may have believed the deceased meant to steal or assault or rob in one of these structures."[3]

[10] The judge reminded the jury of the prosecutor's argument that if the appellant did not believe that Mr Beattie was trying to enter the dwelling constituted by the carport and the shed, and instead believed that Mr Beattie was moving to confront him "outside", then s 267 did not avail the appellant. The judge posed the question as follows:

> "So you must ask yourself, at the time he released the arrow, was it done to prevent or repel Mr Beattie from entering or remaining in the dwelling – by which I include house, carport and shed – and was it done in the belief, on reasonable grounds, that Mr Beattie was attempting to enter or remain in any of those structures, with intent to commit an indictable offence in any of those structures. If the accused only believed Mr Beattie was moving at him to assault him outside the dwelling, then section 267 would not apply."

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3 AR 145.

[11] The question raised by the first ground of appeal is whether the concrete slab situated between the house/carport and the shed was part of the dwelling as defined by s 1 of the Code. If the judge was correct in holding that it was not part of the dwelling, there is no criticism of his directions on this defence. If the judge was incorrect, then the directions involved an error of law for which the appellant says the appropriate remedy is a re-trial.

[12] The appellant's argument contains three alternatives, namely:

(a) the dwelling comprised the house, the carport, the shed and the concrete slab, those places together forming the appellant's place of residence;

(b) the concrete slab was part of the dwelling because it was part of the shed, it being an extension of the slab which was the floor of the shed; or

(c) the concrete slab was part of the dwelling because it was a structure, and there was an immediate communication between it and the house, by the carport (as well as an immediate communication between it and the shed).

[13] It is convenient to discuss first the submission that the concrete slab was itself a structure. This is said to be supported by cases in which it was held that a dwelling, as defined in the Code or a legislative predecessor, included a tent, a caravan, a motel room and the underneath of a highset house.

[14] In *R v Dixon*,[4] Lilley CJ directed a jury that a tent from which property was stolen was the dwelling house of the complainant who had for months been living there. The tent had four sides, through one of which ingress and egress were effected by a flap which could be tied down or otherwise secured. The tent was on the complainant's own land. Lilley CJ said:

> "It is material that it should be closed, and that it should be the place where a man dwells for the time being. … It appears to me that if a man on his own land puts up a structure of canvas, and goes there to eat, sleep, and dwell, it is essentially, under the statute, his dwelling house."[5]

[15] The decision involving a caravan was *R v Rose*,[6] a judgment of Sir Harry Gibbs. Two accused pleaded guilty to a charge of breaking and entering a dwelling house, namely a caravan, which they admitted had been used as a residence by its occupier. Before passing sentence, Gibbs J considered whether a caravan could be a dwelling house within the definition contained in s 1 of the Code. He said:

> "This caravan was undoubtedly for the time being kept by the occupier for the residence of himself. The question is whether it is a structure. The word 'structure' in its most and natural and ordinary meaning is a building, but the word is capable of having the wider meaning of anything constructed out of material parts, and in that sense undoubtedly would include a machine and a caravan. Since the section of the *Code* uses the expression 'building or structure' it must be concluded that the use of the word 'structure' was intended to add something to the meaning of the section, and if it were

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4 (1885) 2 QLJ 81.

5 Applied by Lilley CJ in *R v Hamilton* (1888) 3 QLJ 78.

6 [1965] QWN 35.

> construed simply to mean 'building' it would add nothing. It seems to me therefore that the use of the words 'or structure' has an enlarging effect and includes material constructions which do not come within the description of buildings."

[16] In *R v Halloran and Reynolds*,[7] the accused were charged under s 419 of the Code with breaking and entering a dwelling house with an intent to commit a crime therein, by stealing money from a motel unit which had occupied by the complainant for a period of one week. Hanger J (as he then was) held that the complainant occupied the motel unit as a dwelling house for the purpose of s 419. The note of the case does not reveal his Honour's reasoning, except by a statement made in the course of argument that "the definition in s 1 of the *Code* does not mean that a building not included in the definition may not be a dwelling-house."

[17] In *R v Bartram*,[8] it was held that the trial judge had erred in failing to direct the jury on the application of s 267 having ruled that the underneath of a highset house resting on stumps did not constitute a dwelling as defined. Muir JA, with whom Gotterson JA and Daubney J agreed, said:

> "[19] … [the definition] in fact, extends the meaning of dwelling to include 'part of a building or structure'. In everyday speech, reference to a highset 'dwelling', at least as a general proposition, includes reference to the whole of the relevant structure from the top of the roof to the ground.
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> [20] In this case, a normal, and perhaps integral, part of a dwelling, the laundry, was located under the house and linked to the living area by external stairs. The laundry and the rest of the underneath of the house, part of which was accessible and useable for storage and other purposes, were part of the relevant residential 'building' or 'structure'."

[18] These authorities are instructive but ultimately provide little assistance to the appellant's argument. A dwelling as defined must be a building or structure and it must be accepted that a structure in this context need not be a building.[9] However the definition must be applied according to the context or subject matter of s 267.[10]

[19] Section 267 makes it lawful for a person to use force "to prevent or repel another person from unlawfully *entering or remaining in* the dwelling", if the person using the force believes on reasonable grounds that the other person is attempting "*to enter or to remain in* the dwelling with intent to commit an indictable offence *in* the dwelling …". A structure which is not a building could be a dwelling within s 267 only if, nevertheless, it was a structure which could be entered or in which a person might remain and commit an offence. The open concrete slab in this case could not constitute a structure which was a dwelling under s 267.

[20] The submission that the concrete slab was part of the building or structure constituted by the shed cannot be accepted. A concrete driveway (of two parallel concrete tracks) extended from the property boundary to the slab. The concrete slab was useful for the parking of vehicles, and for the movement of vehicles between

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7 [1967] QWN 34.
8 [2013] QCA 361.
9 *R v Rose* [1965] QWN 35.
10 *Acts Interpretation Act 1954* (Qld), s 32A.

the shed and the driveway. But the slab was no more part of the shed than was the driveway to it.

[21] As to the other alternative argument, it might be accepted that there was some "communication" between the shed and the house/carport. But that did not make the slab a *structure* within the second paragraph of the definition of dwelling.

[22] For these reasons, the trial judge was correct in ruling that the concrete slab was not within the appellant's dwelling for the purposes of s 267. The first ground of appeal fails.

The second ground

[23] The prosecutor argued that there were lies told by the appellant which demonstrated a consciousness of guilt and were thereby probative of his guilt of the offence charged. The prosecution case also relied upon other evidence of post-offence conduct as probative of guilt, but it is the evidence of certain lies by the appellant, after he had killed Mr Beattie, which is relevant to this ground.

[24] The lies in question were as follows. There was evidence from a Ms Finlay that on the day after the killing, the appellant told her that Mr Beattie had been at his place on the previous day but that Mr Beattie had then gone to Cairns. She testified also that in a conversation with the appellant on the following day, he told her that Mr Beattie had telephoned him from Cairns. Further, there were text messages from the appellant to her which conveyed the same meaning about Mr Beattie being in Cairns.

[25] The prosecution alleged that the appellant had lied in a conversation he had with another witness, Mr Finlay, five days after the killing when the appellant told Mr Finlay that Mr Beattie had been at his place a couple of nights earlier.

[26] It was alleged that the appellant had lied in his conversation with a police officer in saying that Mr Beattie's car had been at the appellant's place and that Mr Beattie must have got a lift and gone to Cairns. And it was alleged that he had lied in a conversation with another police officer, when he said that Mr Beattie's car had been at his place but Mr Beattie was not there.

[27] The judge summarised the prosecution argument as follows:

> "In summary, then, it is said that the accused lied in representing not seeing the deceased at the accused's premises on the Wednesday afternoon, when he well knew he had and there had been a fatal confrontation. And it is said the accused lied in representing the deceased was still alive at times, when he well knew he was dead, because he had killed him. The Prosecution submits these lies were told out of a consciousness of guilt. That is to say, more specifically, a consciousness of the accused's guilt of murder.
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> It is, in effect, submitted that if the true position is the accused had killed accidently, without intention to kill or do grievous bodily harm, or killed defensively, then he had no reason to lie and deflect suspicion from what he had, in fact, done. From this, it is said you should conclude he must have killed intending to cause death or grievous bodily harm without any lawful excuse."

[28] The judge directed the jury according to *Edwards v The Queen*.[11] The judge's directions explained other possible explanations for these lies which the jury should consider as consistent with the appellant's innocence. He said:

> "There may be reasons for the lie apart from a realisation of guilt. Bear in mind, people sometimes have innocent explanations for lying. A lie may be told in an attempt to bolster up a just cause or out of shame or out of a wish to conceal embarrassing or disgraceful behaviour. A lie may be told out of panic or confusion; or to escape an unjust accusation; or to protect some other person; or to avoid a consequence extraneous to the offence; or to conceal involvement in a lesser offence. If you accept that a reason of this kind is the explanation for the lie, then you cannot use it against the defendant. You can only use it against the defendant if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence of murder and, I repeat, not of some lesser offence such as manslaughter, interfering with a corpse or arson.
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> So, in thinking of other possible inferences, you should ask yourself, were his lies the result of (1) panic; (2) shame; (3) a desire to conceal embarrassing or disgraceful behaviour; (4) a desire to protect Ms Hibberd; (5) fear of wrongful accusation; (6) ignorance of the law and a failure to appreciate he had lawful defences for what occurred; (7) his realisation his post-event conduct in cleaning up and getting rid of the body and car would make him look bad; (8) consciousness of guilt of a lesser offence than murder, including manslaughter, interfering with a corpse, and arson.
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> These are all potential competing inferences which – depending on your view of the facts, it is a matter for you – may compete with the inference that he lied because he had murdered the deceased. Remember, sometimes the cover-up becomes worse than what you are covering up. In the course of human affairs, I am sure you are aware of that phenomenon."

[29] There is no criticism of those directions, or of anything else which was said by the judge on the subject. The complaint is that the judge should have added, in this part of his summing up, a specific reference to certain other evidence. This included evidence of confessions made by the appellant to a Mr Healey that he had been in a confrontation with Mr Beattie during which Mr Beattie had been killed and that he had disposed of Mr Beattie's body "in a hole out the back". There was also evidence given by a Mr Evans that the appellant had told him that he had been "playing around with his [bow]", and that when Mr Beattie had approached him in a confrontational manner, the bow "accidentally went off". The appellant told Mr Evans that Mr Beattie was dead.

[30] The appellant's statements to Mr Healey were referred to in the summing up, but only in relation to the directions as to self defence[12] and a defence of accident.[13]

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11 (1993) 178 CLR 193.
12 AR 135-136.
13 AR 165.

The evidence of Mr Evans was also referred to, but in relation to the issue of accident.

[31] The appellant's argument, as ultimately advanced, is that the evidence of Mr Healey and Mr Evans was relevant to the issue of the appellant's lies, because it supported the alternative inference that the appellant was lying out of panic or confusion. It is said that the evidence of Mr Healey and Mr Evans was relevant, not to dispute that he had told lies (as he clearly had) but instead to reveal his state of mind when he told those lies.

[32] I accept that the evidence of Mr Healey and Mr Evans was relevant in that way. However the question is whether there was a miscarriage of justice by the jury not being reminded again of that evidence when the judge was directing the jury as to possible competing inferences about the lies. In my conclusion, although the judge might have mentioned the evidence again when summing up on this issue, there was no miscarriage of justice by his not doing so. More than once the jury was told that they should consider the competing inference that the lies were told out of panic or confusion. That could not have been overlooked by the jury. There was further evidence that the appellant was in a state of panic and perhaps confusion from his futile attempts to dispose of the corpse and of the deceased's car. The jury could not have overlooked the evidence of what he had said to Mr Healey and Mr Evans when considering his state of mind after the killing. Ground two fails.

Order

[33] I would order that the appeal against conviction be dismissed.

[34] **FLANAGAN JA:** I agree with McMurdo JA.

[35] **FREEBURN J:** I agree with the reasons for judgment of McMurdo JA and the order proposed by his Honour.