

DISTRICT COURT OF QUEENSLAND

CITATION: *Nevell v Commissioner of Police* [2019] QDC 175

PARTIES: **JAMES KEVIN NEVELL**
(appellant)

v

COMMISSIONER OF POLICE
(respondent)

FILE NO/S: 4374/18

DIVISION:

PROCEEDING: s 222 Appeal

ORIGINATING COURT: Beaudesert Magistrates Court

DELIVERED ON: 20 September 2019

DELIVERED AT: Brisbane

HEARING DATE: 6 September 2019

JUDGE: Dearden DCJ

ORDER: **1. Appeal dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED - where the appellant was convicted after trial in the magistrates court of one charge of assault occasioning bodily harm – where there was car dash camera footage of the alleged incident – whether the learned magistrate failed to give adequate reasons for Her Honour’s decisions – whether the learned magistrate failed to consider relevant evidence – whether the conviction was unsafe and unsatisfactory with respect to the evidence

LEGISLATION: *Criminal Code* 1899 (Qld) s 23, s 245, s 277
Justices Act 1886 (Qld) s 222(1), s 223
Penalties and Sentences Act 1992 (Qld) s 32

CASES: *Forrest v Commissioner of Police* [2017] QCA 132
McDonald v Holeszko [2018] QDC 204
McDonald v Queensland Police Service [2017] QCA 255

COUNSEL: A S McDougall for the appellant
M A Andronicus for the respondent

SOLICITORS: TWC Lawyers for the appellant
Office of the Director of Public Prosecutions for the respondent

Introduction

- [1] The appellant, James Kevin Nevell, was convicted of one charge of assault occasioning bodily harm by the learned magistrate at Beaudesert after a trial which was conducted on 26 and 27 November 2018. The appellant was sentenced to a recognisance order pursuant to *Penalties and Sentences Act 1992 (Qld)* s 32 in the sum of \$500.00 being conditioned that:
- (i) The defendant pay \$850.00 compensation to the complainant;
 - (ii) The defendant enrol and participate in an anger management course; and
 - (iii) The defendant be of good behaviour and not commit another offence during the period of the recognisance (12 months).¹
- [2] No conviction was recorded.

Grounds of appeal

- [3] The appellant's grounds of appeal are:
1. The learned magistrate failed to give adequate reasons for Her Honour's decisions;
 2. The learned magistrate failed to consider relevant evidence;
 3. The conviction was unsafe and unsatisfactory with respect to the evidence.²
- [4] The Outline of Submissions for the Appellant more specifically articulates the appellant's grounds of appeal as follows:
- "3. [The appellant] primarily contends that Her Honour made findings of fact which were not supported by evidence. The [appellant] contends Her Honour erred by not enunciating any decision, if considered, relating to causation, i.e. section 23(1)(a) *Criminal Code 1899*. ...[That] Her Honour did not address this issue at all in the decision, permits this court to make its own determination.
4. Secondly, the [appellant] contends Her Honour erroneously found against the application of the defence of s 277 *Criminal Code 1899*.
5. The [appellant] seeks, in making its own determination of the issue, this honourable court view the dash cam footage [trial exhibit 2]."³

The law

- [5] I refer to and adopt my exposition of the relevant statutory provisions (*Justices Act 1886 (Qld)* s 222(1) and s 223) and statements of principle from *McDonald v Queensland Police Service* [2017] QCA 255 and *Forrest v Commissioner of Police*

¹ Notice of Appeal filed 6 December 2018, p. 1.

² Notice of Appeal filed 6 December 2018.

³ Outline of Submissions on behalf of the [Appellant], filed 21 January 2019, [3]-[5].

[2017] QCA 132, as set out in my decision in *McDonald v Holeszko* [2018] QDC 204 [6]-[9].

Trial proceedings

- [6] The trial commenced on 26 November 2018 with the complainant, Robert Toby Luke Griffith, and a medical witness, Dr Vivienne Fok, called for the prosecution. In addition, the prosecution produced and played a dash camera audio and video recording of the incident,⁴ as well as a police bodycam recording.⁵ The bodycam footage was played by consent, and the defendant made a series of admissions which shortened the trial and obviated the need to call any other prosecution witnesses. The defendant gave, but did not call, evidence.
- [7] The prosecution particularised at the start of the trial that the assault occasioning bodily harm was constituted by that part of the interaction when the defendant pushed the complainant to the ground, landing on his right elbow and causing immediate pain and discomfort.⁶
- [8] The complainant gave evidence that on 20 March 2018,⁷ he attended at the defendant's address, which was identified, by admission, as 320/344 Stockleigh Road, Stockleigh.⁸
- [9] The complainant gave evidence that he attended at the address at around 6.54am to serve a QCAT document on the defendant. The complainant stated he could see a ute at the gate, and saw the defendant getting into the ute, but when the complainant drove up with the document, the defendant "instantly drove off". The complainant got out of his car and called out, "You've been served, Jim, you've been served," then walked up to the gate where he could see dogs, saw that the gate was padlocked and turned to leave. The complainant then saw the defendant's ute coming back. The defendant came over to the complainant and was yelling, then grabbed the document off the complainant and threw it on the ground and pushed the complainant over.⁹ The complainant gave evidence that the defendant pushed him on the ground and was assaulting him, saying things like "I'm gonna bash your face in".¹⁰ The complainant gave evidence that he was grabbed by the throat at one stage.¹¹ The complainant stood up and told the defendant, "My elbow's stuffed" and gave evidence that his right elbow was in a lot of pain.¹² The complainant recalled picking up some documents that were on the ground and throwing them in his car before leaving.¹³ The complainant recalls driving back to the defendant's residence and putting the document in the letter box.¹⁴

⁴ Trial Exhibit 2.

⁵ Trial exhibit 4.

⁶ Trial Transcript dated 26 November 2018, 1-4 l 28 to 1-5, l 7.

⁷ Trial Transcript dated 26 November 2018, 1-5, ll 45-46.

⁸ Trial Transcript dated 26 November 2018, 1-46, l 8. It should be noted the transcript of the admissions identifies the date of the complainant's attendance at the defendant's address as 28 March 2018, whereas the Bench Charge Sheet and the complainant's evidence identify the relevant date as 20 March 2018.

⁹ Trial transcript dated 26 November 2018, 1-6 to 1-8.

¹⁰ Trial transcript dated 26 November 2018, 1-8, l 17.

¹¹ Trial transcript dated 26 November 2018, 1-8, ll 25-30.

¹² Trial transcript dated 26 November 2018, 1-8, ll 19-21.

¹³ Trial transcript dated 26 November 2018, 1-8, ll 36-38.

¹⁴ Trial transcript dated 26 November 2018, 1-8, l 46.

- [10] Subsequently, when the complainant returned home, he realised that the events at the defendant's front gate had been recorded on an SD card in the dash camera of his car.¹⁵
- [11] The complainant attended at the Logan Hospital emergency department where photographs were taken which indicated a bloodied abrasion to his right elbow and a mark on the top of his right fist.¹⁶
- [12] The dash camera footage¹⁷ was played at the trial and, with the exception of the final fall by the complainant in front of his car (which was obscured by the car's bonnet), it otherwise fully captured the interaction between the complainant and the defendant.
- [13] The cross-examination of the complainant identified that he had mental health issues and was on medication,¹⁸ that the complainant used to live next door to the defendant,¹⁹ and still lived next door to a house owned by the defendant,²⁰ that the complainant had made complaints to the council about aspects of the defendant's side fence, granny flat,²¹ the defendant's deck,²² the defendant's tenant,²³ and the bamboo along the fence line,²⁴ and that the complainant had lodged QCAT proceedings in respect of the bamboo.²⁵
- [14] The complainant accepted that he pulled his vehicle up in front of the defendant's vehicle (at the defendant's address).²⁶ The complainant denied trying to open the gate at the defendant's premises but stated that he did put his hand down to see if the defendant's dog would calm down and sniff him.²⁷ The complainant stated that he didn't know the incident was being taped by his dash camera at the time it occurred.²⁸
- [15] The complainant denied doing "an over-the-top exaggerated fall that had nothing to do with the force... actually applied"²⁹ because he knew it was being filmed.³⁰ The complainant denied not receiving a cut to the elbow in the incident,³¹ and specifically denied causing the bleeding to his own elbow.³²
- [16] Medical practitioner Dr Vivienne Fok gave evidence of attending on the complainant at "around 9ish" on 20 March 2018³³ where she observed the following injuries:

¹⁵ Trial transcript dated 26 November 2018, 1-9, ll 11-20.

¹⁶ Trial transcript dated 26 November 2018, 1-9, ll 23-29; Trial exhibit 1.

¹⁷ Trial exhibit 2.

¹⁸ Trial transcript dated 26 November 2018, 1-15, l 45 to 1-16, l 34.

¹⁹ Trial transcript dated 26 November 2018, 1-16, l 39

²⁰ Trial transcript dated 26 November 2018, 1-16, l 41.

²¹ Trial transcript dated 26 November 2018, 1-17.

²² Trial transcript dated 26 November 2018, 1-9, 1-18.

²³ Trial transcript dated 26 November 2018, 1-19.

²⁴ Trial transcript dated 26 November 2018, 1-19 to 1-20.

²⁵ Trial transcript dated 26 November 2018, 1-27, ll 4-5.

²⁶ Trial transcript dated 26 November 2018, 1-32, ll 38-43.

²⁷ Trial transcript dated 26 November 2018, 1-34, ll 35-40.

²⁸ Trial transcript dated 26 November 2018, 1-35, ll 38-43.

²⁹ Trial transcript dated 26 November 2018, 1-36, ll 35-37.

³⁰ Trial transcript dated 26 November 2018, 1-37, ll 26-28.

³¹ Trial transcript dated 26 November 2018, 1-37, ll 36-37.

³² Trial transcript dated 26 November 2018, 1-38, ll 1-3.

³³ Trial transcript dated 26 November 2018, 1-43, ll 38-39.

“... Some superficial abrasions on his right hand... some minor bleeding, redness and swelling to his right elbow, mainly in the posterior [indistinct]... some reduced range of movements in his right elbow, but only minor. And he’s tender in the area. But x-rays had not shown any fractures. So he was treated for superficial abrasion. His wounds were cleaned and washed and dressed.”³⁴

- [17] When asked whether in the doctor’s medical opinion “the injuries sustained would cause pain and discomfort to the patient”, Dr Fok said, “Yes there will be pain. There will be discomfort. But it should be temporary”.³⁵ On cross-examination, Dr Fok confirmed that the injuries that the complainant presented with did not break the true skin but were “superficial abrasions”.³⁶
- [18] The defendant participated in an interview with police which was captured by byocam footage and was played in the prosecution case.³⁷
- [19] The defendant gave evidence and confirmed that he resided at 320/344 Stockleigh Road, Stockleigh, the residence where the events the subject of the charge took place, but that he had previously lived next door to the complainant at an address at Daisy Hill.³⁸ The defendant gave evidence of various complaints made by the complainant including in respect of the defendant’s fence, granny flat, drainage, patio and bamboo.³⁹ In respect of the events of 20 March 2018, the defendant gave evidence that the complainant parked him in, then the defendant saw the complainant at the chain to the defendant’s gate while driving off, so turned around and came back.⁴⁰ The footage of the incident was played to the defendant.⁴¹ The defendant accepted that he grabbed the complainant by the chin and said “just go” although he claimed he didn’t choke him,⁴² that the first push was “like pushing that cup over...I hardly touched him”,⁴³ that the second push “was like flicking a piece of paper”⁴⁴ and that the defendant’s intention was “to get [the complainant] to leave...because he was at [the defendant’s] family home.”⁴⁵
- [20] In cross-examination, the defendant admitted that he pushed the complainant, who fell over, and when the complainant got up, pushed him again.⁴⁶ The defendant accepted that the incident did not take place on the defendant’s property but on Council property.⁴⁷
- [21] The defendant accepted that he pushed the complainant in the chest with two hands⁴⁸ and the complainant then fell over,⁴⁹ and that the defendant had [pushed the complainant over] a second time because “I wanted him to go”.⁵⁰

³⁴ Trial transcript dated 26 November 2018, 1-44, ll 6-11.

³⁵ Trial transcript dated 26 November 2018, 1-44, ll 27-30.

³⁶ Trial transcript dated 26 November 2018, 1-45, ll 1-3.

³⁷ Trial Exhibit 4.

³⁸ Trial Transcript dated 26 November 2018, 1-51.

³⁹ Trial Transcript dated 26 November 2018, 1-52 to 1-53.

⁴⁰ Trial Transcript dated 26 November 2018, 1-59, l 5; ll 18-20.

⁴¹ Trial Transcript dated 26 November 2018, 1-60, l 25; Trial Exhibit 2.

⁴² Trial Transcript dated 26 November 2018, 1-61, ll 9-16.

⁴³ Trial Transcript dated 26 November 2018, 1-62, ll 11-12.

⁴⁴ Trial Transcript dated 26 November 2018, 1-61, ll 2-3.

⁴⁵ Trial Transcript dated 26 November 2018, 1-63, ll 1-12.

⁴⁶ Trial Transcript dated 26 November 2018, 1-65, ll 41-46.

⁴⁷ Trial Transcript dated 26 November 2018, 1-66, ll 3-12.

⁴⁸ Trial Transcript dated 26 November 2018, 1-68, ll 44-45.

Discussion

- [22] The appellant did not, before me, pursue the ground that the learned magistrate failed to give adequate reasons for her decision. In my view it was clearly appropriate to abandon this ground of appeal, given that the learned magistrate's reasons were detailed, comprehensive and addressed both the factual issues and the relevant legal issues.
- [23] The learned magistrate in her decision gave consideration to whether there was any provocation for the defendant's assault and, correctly in my view, concluded "there was no act or insult that was such to deprive an ordinary person of the power of self-control."⁵¹ This was undoubtedly correct given that the complainant attended at the defendant's premises to serve QCAT documents. The defence of provocation was therefore properly excluded.
- [24] The learned magistrate considered the defence under *Criminal Code* 1899 (Qld) s 277 (defence of premise against trespassers – removal of disorderly persons). This section provides:-
- (1) It is lawful for a person who is in peaceable possession of any land, structure, vessel, or place, or who is entitled to the control or management of any land, structure, vessel, or place, and for any person lawfully assisting him or her or acting by his or her authority, to use such force as is reasonably necessary in order to prevent any person from wrongfully entering upon such land, structure, vessel, or place, or in order to remove therefrom a person who wrongfully remains therein, provided that he or she does not do grievous bodily harm to such person.
 - (2) It is lawful for a person who is in peaceable possession of any land, structure, vessel, or place, or who is entitled to the control or management of any land, structure, vessel, or place, and for any person acting by his or her authority, to use the force that is reasonably necessary in order to remove therefrom any person who conducts himself or herself in a disorderly manner therein, provided that he or she does not do the person grievous bodily harm.
 - (3) In this section—
place includes any part of an enclosure or structure, whether separated from the rest of the enclosure or structure by a partition, fence, rope, or any other means, or not."
- [25] The learned magistrate concluded, in respect of this defence, that there was "no wrongful act of the complainant or any attempted unlawful entry."⁵² The learned magistrate was undoubtedly correct in this conclusion. My examination of the dash camera footage⁵³ clearly indicates that the entirety of the confrontation occurred some distance from the closed gates which were the boundary to the defendant's premises, in the area between the public highway and those gates. In those

⁴⁹ Trial Transcript dated 26 November 2018, 1-69 l 1.

⁵⁰ Trial Transcript dated 26 November 2018, 1-69 l 3.

⁵¹ Decision transcript dated 27 November 2018, p. 9, ll 17-18.

⁵² Decision transcript dated 27 November 2018, p. 10 ll 41-42.

⁵³ Trial Exhibit 2.

circumstances, it could not possibly be argued that the defendant was using “such force as is reasonably necessary in order to prevent any person from wrongfully entering upon such land” (of which the defendant was in peaceful possession), nor removing a person who wrongfully remained on that land.⁵⁴ For similar reasons, *Criminal Code* 1899 (Qld) s 277(2) is also not available to the defendant in these proceedings. Clearly the learned magistrate’s conclusion that *Criminal Code* 1899 (Qld) s 277 was excluded, is correct.

- [26] The final issue pressed by the appellant’s counsel before me, was the issue of causation i.e. whether the push by the defendant of the complainant, as particularised by the prosecution in opening the case before the learned magistrate, constituted an assault occasioning bodily harm, or in the alternative, the offence of common assault.
- [27] The learned magistrate concluded (in respect of causation) that “bodily harm has been proven to the elbow of the complainant from an assault committed by [the appellant], namely, the second push as part of the sequence of assaults in pushing and grabbing the complainant.”⁵⁵
- [28] With respect, that conclusion by the learned magistrate was clearly open, particularly in the light of a careful viewing of the dash camera footage,⁵⁶ which shows the complainant falling to the ground after a push by the defendant; returning to his feet, giving evidence (which the magistrate clearly accepted, and was entitled to accept) that he then attended the hospital having bled from the abrasion to his right elbow, and upon examination by Dr Fok, was identified as having a superficial abrasion which (in the opinion of Dr Fok) would have caused pain and discomfort, albeit temporary.⁵⁷
- [29] It follows that the learned magistrate considered all of the relevant evidence, came to an appropriate conclusion on causation (i.e. that it was the defendant’s particularised push of the complainant which caused him to fall to the ground, and, as a consequence suffered superficial abrasion to his right elbow), which on Dr Fok’s evidence, was sufficient to satisfy the definition of bodily harm.⁵⁸ The bodily harm suffered was, in my view, a foreseeable consequence⁵⁹ of the assault constituted by the particularised push by the defendant of the complainant.⁶⁰

Conclusion

- [30] The learned magistrate has not erred in the fact finding exercise, nor in concluding that the defences of provocation and defence of premises against trespassers – removal of disorderly persons, had been appropriately excluded, nor in finding that the defendant assaulted the complainant and caused him bodily harm. It follows that the appeal must fail.

Order

1. Appeal dismissed.

⁵⁴ *Criminal Code* 1899 (Qld) s 277(1).

⁵⁵ Decision transcript dated 27 November 2018, p. 11, ll 8-10.

⁵⁶ Trial Exhibit 2.

⁵⁷ Trial Transcript dated 26 November 2018, 1-44, ll 27-30.

⁵⁸ Trial Transcript dated 26 November 2018, 1-44, ll 27-30.

⁵⁹ *Criminal Code* 1899 (Qld) s 23(1)(b).

⁶⁰ *Criminal Code* 1899 (Qld) s 245(1).

Costs

[31] I will hear the parties on costs.