SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lowe* [2001] QCA 270
PARTIES:	**R** **v** **LOWE, Peter Anthony** (applicant/appellant)
FILE NO/S:	CA No 350 of 2000 DC No 64 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction and sentence
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	20 July 2001
DELIVERED AT:	Brisbane
HEARING DATE:	25 June 2001
JUDGES:	McPherson JA, Thomas JA, Williams JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Appeal against conviction dismissed.** **2. Application and appeal against sentence allowed reducing the term of imprisonment from 8 years to 6 years** **3. Declare that the appellant was in pre-sentence custody for a period of 240 days, which is to count as time served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE OF JUSTICE – MISDIRECTION AND NON-DIRECTION - appellant convicted of doing grievous bodily harm with intent - whether a formal accomplice warning was necessary – whether accomplice warning given in relation to another witness was adequate CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – GENERALLY – whether in summing up the trial judge treated Crown submissions more favourably than defence submissions

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY – where appellant was aged 30 with no prior convictions for violence – where trial judge attributed more of the complainant's injuries to the appellant than was justified – whether sentence of 8 years manifestly excessive

Criminal Code s 632

Brown CA No 155 of 1996, 26 July 1996, considered
Pollitt v The Queen (1992) 174 CLR 558, cited
R v Beer [2000] QCA 193; CA No 404 of 1999, 26 May 2000, considered
R v Button [1992] 1 Qd R 552, considered
R v Dempsey [2001] QCA 141; CA No 356 of 2000, 17 April 2001, considered
R v S [1993] 2 Qd R 322, applied

COUNSEL: C Callaghan (*sol.*) for the applicant/appellant
P Rutledge for the respondent

SOLICITORS: Boe & Callaghan for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: I agree with what Williams JA has written in his reasons on this appeal and application.

[2] The critical evidence was that of Mr Kelly, who was quite independent of the others at the football ground. He saw a man belabouring the complainant with a piece of 4 x 2 timber, and another man kicking him. The evidence of Dawson at the trial supported the conclusion that the man with the piece of wood was the appellant, and inferentially that it was Jacobs who did the kicking. That accorded with the testimony of Jacobs at the trial. He, however, was an accomplice, but his evidence was corroborated by Dawson's evidence. It was put to Dawson in cross-examination that he too had participated in the assault on the complainant. He denied it. There was consequently no evidence of any kind to show that Dawson was an accomplice. I agree with what Williams JA has said on this and other matters. I also agree that the sentence should be reduced to the extent proposed by his Honour.

[3] **THOMAS JA:** I agree.

[4] **WILLIAMS JA:** The appellant was convicted after a trial of the offence of doing grievous bodily harm with intent. He was sentenced to 8 years imprisonment and now appeals against his conviction and seeks leave to appeal against his sentence. The charge arises out of events which occurred early on the morning of 17 March

2000 at a Gympie football ground. The appellant had been in the company of three other men (Jacobs, Dawson and Mason) for some considerable time prior to the events in question.

[5] The previous afternoon the four set out on a fishing expedition. They spent some time on the late afternoon of 16 March at the Australian Rules Football Ground at Gympie and there a considerable quantity of alcohol was consumed. The group spoke to persons named Phil and Monica, and those two persons made an allegation to the effect that a man named Cole (the complainant), had taken their motor vehicle. Subsequently the group of four went to a house at Glenwood; they had something to eat and went to bed. Shortly thereafter the complainant arrived in a motor vehicle. It is sufficient to record that some, if not all, of the group of four thereafter assaulted the complainant in some way; there was evidence that the appellant was involved in that assault. That incident is relevant for present purposes only insofar as it provides some background to what happened the following morning.

[6] The incident at Glenwood ended with the group of four putting the complainant in a motor vehicle and all returning to the football ground in Gympie in two motor vehicles. More alcohol was consumed there. The complainant was there put in a truck with a blanket; blood was noticed around his mouth area.

[7] The incident giving rise to the present charge occurred early in the morning of 17 March. There was some evidence to the effect that the complainant said to the appellant that he was going to kill him and rape his child. Jacobs gave evidence that the appellant said something to that effect, but, interestingly, counsel for the appellant in cross-examination put it to Jacobs that the appellant never said that the complainant had threatened to kill him and have sex with his kids. That proposition was rejected by Jacobs. Of course one does not know whether or not the jury accepted that such a statement was made; in the end that matter is of no consequence.

[8] The complainant has little recollection of the events of that morning. He has some recall of being on the ground, of coming to, and then being kicked "right fucking high" by the appellant. He said, "That's the only time I remember anyone touching me". It was put to him in cross-examination that he had not been kicked by the appellant, but he responded: "How can you forget a face when he kicked me right in the fucking eye and knocked me out".

[9] Dawson and Jacobs gave evidence of the assault on the complainant that morning. Dawson said he grabbed an axe off the appellant who was "like ranting and raving" and saying, "that arsehole is going to kill my kids". Thereafter Dawson again lay down but a little later saw the appellant run past the tent with a piece of wood. His evidence was that he then saw the appellant bashing the complainant with the wood; he saw three or four blows struck. Jacobs was in the immediate vicinity of where that assault occurred. He denied under cross-examination that he and Jacobs had kicked the complainant in the course of the assault that morning.

[10] Jacobs gave evidence that he was woken up by the appellant yelling. His evidence was that the appellant told him that the complainant said he was going to kill him and rape his kids. Jacobs reacted by "fly kicking" the complainant. Thereafter he saw the appellant strike the complainant with a piece of 4 x 2 a few times – "five

times perhaps". He said that "fair force" was used and the blows were delivered mainly to the leg area; but he did also say: "I think a couple in his ribs". Under cross-examination he denied that he was kicking the complainant and that the appellant shouted to him to leave the complainant alone.

[11] There was an independent witness, a man named Kelly. He was driving a truck collecting rubbish from locations in the football ground area. He stopped his vehicle some 120 to 150 metres away from where the incident occurred. Photographs of the location were before the jury and Kelly drew a mud map of the area. There were possibly some trees and bushes between where Kelly was and where the incident occurred, but it was not seriously disputed that Kelly had a reasonable view of events. His immediate reaction to what he saw was to contact the police using his mobile phone. The police received a message to go to the grounds at about 7.10 a.m.

[12] Kelly's evidence was that he saw two men near a man who was lying on the ground. One of the men was hitting the person on the ground with a paling or guide post or "something like that". The blows, about four or five in number, were to the lower part of the body. The man with the piece of wood then walked away. The other man then started kicking the person on the ground around the head; he described the kicks as being "very hard". The only description he gave of the attackers was that both were young, around 20, wearing faded jeans, tall and thin.

[13] There was no dispute at the trial that the appellant was one of the group at the football ground in the vicinity of the complainant at the relevant time. He did not give evidence.

[14] Later medical examination established that the complainant was suffering the following injuries:

(i) compound fracture of the right tibia;
(ii) closed fracture of the left tibia;
(iii) flail left chest with pneumothorax (fracture of several ribs creating a segment which moved with respiration);
(iv) bruising of the lung;
(v) undisplaced fracture of the right cheek bone;
(vi) subdural haemorrhage at front and back of skull.

Those injuries were such that if left unattended the complainant could have died. The medical evidence was that to produce the injuries "significant force would need to be applied by a very fit and strong individual".

[15] The only ground stated in the formal notice of appeal against conviction was that the verdict was "unsafe and unsatisfactory and contrary to law". That ground was abandoned, and with the leave of the Court the solicitor appearing for the appellant made submissions on the five following grounds:

"1. The learned trial judge erred in the exercise of his discretion in failing to direct the jury as to the danger of convicting the appellant on the uncorroborated evidence of Dawson;

2. The learned trial judge erred in law in failing to adequately direct the jury as to the danger of convicting the appellant on the uncorroborated evidence of Jacobs;

3. The learned trial judge erred in law in directing the jury that the evidence of Dawson was capable as a matter of law of corroborating Jacobs;
4. The learned trial judge erred in law in directing the jury that as a matter of law the evidence of the injuries to Cole was capable of corroborating the evidence of Jacobs;
5. The summing-up to the jury was unbalanced, unfair and considerably slanted against the appellant."

[16] **Ground 1**

The submission on behalf of the appellant here was essentially based on the proposition that Dawson was an accomplice, or at least akin to an accomplice. There was evidence that Dawson and Jacobs lived together and were best mates. Dawson was involved in the assault on the complainant at Glenwood the previous evening. Dawson pleaded guilty to a charge of assaulting the complainant at Glenwood and indicated to that sentencing court that he was going to make a statement to police with respect to the assault at the football ground. Finally, reference was made to the fact that Dawson had a criminal record. Dawson was not charged with any offence relating to the incident at the football ground.

[17] There was no evidence at the trial that Dawson had participated in the attack on the complainant at the football ground. It was put to him in cross-examination that he had kicked the complainant, but he denied that; the putting of that proposition in those circumstances did not constitute evidence. There was therefore no basis for regarding Dawson as an accomplice in the strict sense. There is nothing in s 632 of the *Criminal Code* which required as a matter of law that the learned trial judge should give some warning to the jury about relying on the evidence of Dawson.

[18] The argument on behalf of the appellant was developed along the lines that there was a distinct possibility of Dawson and Jacobs fabricating evidence each minimising the involvement of the other. Such a consideration could well have justified the trial judge cautioning the jury about acting on the evidence of Dawson where it was uncorroborated. Against that background the following extracts from the summing-up are relevant:

> "As [the Crown prosecutor] says, and you might think there was some force in it, they are not a particularly attractive bunch of human beings, and you might conclude that all of them were prepared to acknowledge that to some extent. Dawson had some criminal history. You might have wondered why his criminal history is being brought out. Presumably, as [defence counsel] has said to you it suggests that he is a dishonest person that is prepared to tell lies. Again use your commonsense. Just because a person has committed a criminal offence in the past, does it necessarily follow that they are going to come along and tell lies? They are all matters for you to consider.
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> . . .
>
> As a proposition of common human experience, when you come to consider the evidence of these witnesses, there may be parts of their evidence that you do not accept because it does not fit with some evidence you do accept . . .
>
> . . .

> You might ask yourself this question: see, the defence says they are all liars – that Jacobs is a liar and that he has falsely implicated the accused; Dawson is a liar and he has falsely implicated the accused; that Mason is a liar in saying what he says. In fact, I think [defence counsel] put it to all those witnesses that, in effect, they largely told you lies.
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> The Crown case, on the other hand, is that, yes, these are not particularly attractive characters but look at their evidence, look at their accounts. The Crown says that their accounts mesh in a very persuasive way; that their account of what occurred has a ring of truth about it. The defence says it does not have that character".

In those passages the learned trial judge although in the main supportive of the Crown case was clearly indicating to the jury that it was for them to decide what weight, if any, they should attach to the evidence of Dawson and that in assessing Dawson's evidence they should have regard to the unsavoury aspects of his character.

[19] I am satisfied that the evidence did not establish a sufficient basis for regarding Dawson as an accomplice and that there was no error on the part of the learned trial judge in not giving the jury a formal "accomplice warning" with respect to his evidence.

[20] **Ground 2**

Given the evidence that Jacobs assaulted the complainant by delivering the "flying kick" which immediately preceded the attack with the piece of wood, the learned trial judge told the jury that they may well think he was an accomplice. He told them that that was "a question of fact for you to decide". The learned trial judge then went on to say:

> "An accomplice, of course, is a person who just by that very characterisation has, as a matter of common experience in human knowledge, a reason not to tell the truth, and therefore you have to be careful and scrutinise his evidence very carefully before you are prepared to act on it. Unless there is some evidence that supports his evidence in a material way, then it would be dangerous for you to convict on the basis of Jacob's evidence alone".

[21] That direction was attacked as being inadequate because it failed to identify to the jury the reason why Jacobs may be an unreliable witness because it also failed to identify that Jacobs may have had other reasons to lie to the jury such as the preservation of his friend Dawson. That submission was largely based on observations made in *R v Button* [1992] 1 Qd R 552 especially at 553 and 560. However counsel for the respondent referred to the later decision of this Court in *R v S* [1993] 2 Qd R 322 especially at 324. *S* was a sexual case, one of the charges being rape. After referring to *Button* the court in *S* said at 324:

> "That case was concerned with directions concerning corroboration of an accomplice. Although that situation is analogous, the reasons for such directions in such cases are differently based. No doubt a summing-up will always be strengthened if a judge not only directs a jury of the need to approach a case in a certain way, but also tells them why the law considers such directions to be appropriate. This seems to be so whether one is concerned with a sexual case such as the present, or a case involving an accomplice (as in *Button*) or in a

> case involving the need to scrutinise evidence of identification (as in *Sainsbury* [1993] 1 Qd R 305 . . .). These decisions underline the requirement that summings-up must be tailored to the needs of the particular case and that a slavish insistence upon a formula or a statement of reasons for the rule, is not necessary".

That states the present law in this State. Given the variety of factual situations in which the warning may be called for, it is more important that the warning be tailored to meet the facts of the case rather than it slavishly follow a set formula. Considered in that light the warning given here was adequate. The learned trial judge then went on in his summing-up to deal with evidence which the jury might regard as corroborating the evidence of Jacobs; those passages are the subject of later grounds of appeal.

[22] **Ground 3**

In the summing-up the learned trial judge indicated to the jury that they could regard the evidence of Dawson as corroborating that of Jacobs. That was said in the context of the other observations referred to above about the evidence of Dawson. The point taken by the appellant now is that Jacobs and Dawson had a common interest in minimising their involvement, that in those circumstances one could not corroborate the other. That submission was based on the principle that one accomplice cannot corroborate another (see for example, *Pollitt v The Queen* (1992) 174 CLR 558 at 600 per Dawson and Gaudron JJ). But that principle has no direct application where, as here, the court is not concerned with two witnesses who are accomplices. As noted above, Dawson was not an accomplice and if the jury accepted his evidence then it could be used to corroborate that given by Jacobs.

[23] **Ground 4**

Under this ground the appellant challenges the statement in the summing-up to the following effect –

> "On the Crown case the injuries to the ribs and the injuries to both legs support the evidence of Jacobs as to what he saw the accused doing with the 4 x 2. So keep that in mind when you are considering Jacobs' evidence".

The contention of the appellant is that the injuries are consistent with the complainant having been struck around the lower part of his body with a piece of 4 x 2, but the injuries do not corroborate the evidence of Jacobs that it was the appellant who delivered those blows. There is some force in that submission. However the passage in the summing-up must be taken in the context of the evidence of Kelly that he saw a man hitting the complainant with a piece of wood around the lower body, the evidence of Dawson that the appellant had a piece of wood and bashed the complainant with it and the accepted fact that the appellant was in the immediate vicinity. In the absence of any evidence to the effect that some other person at the material time had a piece of wood in his hands, the injuries to the complainant are capable of providing some support to the evidence of Jacobs that it was the appellant who delivered the blows with the piece of wood to the legs of the complainant.

[24] In the circumstances I am not persuaded that the learned trial judge erred in making the statement in his summing-up quoted above.

[25] **Ground 5**

The contention here on behalf of the appellant is that submissions of the Crown prosecutor attracted favourable comment from the learned trial judge in his summing-up whereas submissions of defence counsel were not accorded similar treatment. The defence case at trial was essentially that the jury ought not be satisfied beyond reasonable doubt on the evidence that it was the appellant who inflicted the injuries in question on the complainant. The difficulty for the appellant, and indeed the difficulty for the learned trial judge in formulating his summing-up, was that all the evidence pointed to the fact that it was the appellant who struck the blows with the piece of wood. As already noted, the appellant was, at the very least, in the immediate vicinity when the attack witnessed by Kelly occurred. Mason was apparently asleep and saw nothing. The only other two people present, Jacobs and Dawson, gave evidence that it was the appellant who struck the blows with the piece of wood. Against that background the only defence case could be that the jury ought not be satisfied beyond reasonable doubt on the evidence of either or both Dawson and Jacobs that it was the appellant who delivered the blows in question. As already noted, the trial judge in his summing-up did indicate to the jury the matters they may well have regard to in determining whether or not to accept all or any of the evidence of those two witnesses.

[26] It is true that at one point in dealing with arguments put to the jury by defence counsel the learned trial judge observed:

> "Well that is a straight out invitation to speculate. You do not speculate . . .".

That was a perfectly proper observation to make; it would appear that at lease some of the defence arguments invited the jury to speculate on what might have happened. A reading of the summing-up, in the light of the evidence, does not indicate that it was unbalanced. The position may well have been very different if, for example, there was some evidence suggesting that some person other than the appellant was holding the piece of wood at the material time. In his summing-up the learned trial judge was constrained by the evidence, and the only evidence was to the effect that the appellant was the person with the piece of wood in his hands.

[27] It follows that there is no substance in any of the grounds against conviction and the appeal against conviction should be dismissed.

[28] **Sentence**

I turn now to the application for leave to appeal against sentence. In the formal notice of appeal the ground specified was that the sentence was "manifestly excessive in all of the circumstances". With the leave of the Court the appellant also relied on an additional ground, namely:

> "The learned sentencing judge erred in the sentence by taking into account injuries sustained by the complainant that he ought not to have been satisfied were caused or contributed to by the applicant".

[29] The appellant was 30 at the time of the commission of the offence. He was in a defacto relationship and supporting some children. He had a criminal history which included a number of convictions between 1987 and 1997 but significantly he had no previous convictions for an offence involving violence. The learned sentencing judge accepted the incident in question as a "one-off act of callous violence by a man who previously has not been convicted of offences of violence".

[30] The appellant was sentenced on the basis that he attacked the semi-conscious complainant with a piece of wood. The judge appears to have accepted that Jacobs was the other person, witnessed by Kelly, who delivered kicks to the complainant after the assault with the piece of wood. In his sentencing remarks the learned judge described the blows to the lower part of the body and legs as being "extremely vicious and callous". He detailed the very serious nature of the fractures to the legs occasioned by that attack.

[31] The learned sentencing judge then went on to say:

> "He also suffered multiple broken ribs causing flail chest, an extremely dangerous condition; that is, where broken ribs are as one when breathing, and not surprising as a result he suffered a pneumothorax and was required to be placed on a respirator in intensive care before his orthopaedic injuries could be attended to".

The point taken by the solicitor for the appellant is that there is no direct evidence that it was the appellant who caused the broken ribs. The broken ribs could well have been occasioned by the kicking, and as already noted the learned trial judge appears to have accepted that it was Jacobs who was seen by Kelly to be kicking the complainant in the upper part of the body. In the circumstances there is force in that submission on behalf of the appellant. One also has to bear in mind that some of the injuries (and indeed on sentence the learned judge did not refer to all the injuries from which the complainant was suffering) could have been caused by the assault the previous evening. The appellant was only to be sentenced for his attack on the morning in question. The observation was also made that the incident was "a very serious example of the offence" and the appellant had "shown no remorse".

[32] A sentence of 8 years imprisonment was imposed, but the learned judge declined to make a declaration that the appellant was a serious violent offender. In this Court counsel for the respondent conceded that a sentence of 8 years was a "heavy sentence" and "if it's not at the top it is very, very close to it". Counsel for the respondent put a schedule of sentences for the offence of grievous bodily harm with intent before the Court, and the solicitor for the appellant relied in particular on *Dempsey* [2001] QCA 141; CA No 356 of 2000, 17 April 2001, *Beer* [2000] QCA 193; CA No 404 of 1999, 26 May 2000 and *Brown*, CA No 155 1996, 26 July 1996. *Beer* involved a stabbing with one wound to the throat and two to the abdomen. The appellant there was aged 60 and had previous convictions for offences of dishonesty. The sentence at first instance was 8 years imprisonment with a declaration that it was a serious violent offence. On appeal a sentence of 7 years imprisonment without a declaration was substituted. *Dempsey* was also a stabbing case; the complainant there was stabbed 8 times. The offender had a serious criminal history including violence on a former girlfriend. A sentence of 7 years imprisonment was not disturbed on appeal. The facts of *Brown* were somewhat similar to those in issue here. The offender and the complainant were each in a relationship with the same woman. That resulted in the complainant being attacked with a large metal spanner on the back of his head and on his legs. The injuries included a compound fracture of the right leg caused by repeated blows with the spanner. It was described as a totally unprovoked attack and a particularly vicious crime. The offender was convicted after a trial and sentenced to 6 years imprisonment.

[33] Whilst the offence in the present case was a particularly serious one and deserving of severe punishment I am concerned that the learned sentencing judge might have

attributed some of the injuries sustained by the complainant to the appellant's attack when the evidence did not clearly establish that such was the case. Certainly all the injuries to the lower part of the complainant's body were occasioned by the attack with the piece of wood. Having regard to the sentences imposed in the matters of *Dempsey*, *Beer* and *Brown*, and taking into account the fact that the learned sentencing judge may well have erred in attributing more of the complainant's injuries to the appellant's attack than was justified, I have come to the conclusion that a sentence of 8 years imprisonment was manifestly excessive. In all of the circumstances a sentence of 6 years imprisonment was appropriate and that should be substituted.

[34] The orders of the Court will therefore be:

1. Appeal against conviction dismissed.
2. Application and appeal against sentence allowed by reducing the term of imprisonment from 8 years to 6 years.
3. Declare that the appellant was in pre-sentence custody for a period of 240 days, which is to count as time served under the sentence.