29/07; [2007] VSC 163

SUPREME COURT OF VICTORIA

ENGEBRETSON v BARTLETT

Bell J

13 March, 25 May 2007 — (2007) 16 VR 417; (2007) 172 A Crim R 304

EVIDENCE – CRIMINAL PROSECUTION – ASSAULT ON PERSON IN HOTEL – VICTIM STRUCK WITH BEER GLASS – DEFENDANT CHARGED WITH RECKLESSLY CAUSING SERIOUS INJURY – DEFENDANT CLAIMED THAT HE STRUCK VICTIM IN SELF DEFENCE – VICTIM SWORE THAT DEFENDANT WAS THE AGGRESSOR – EVIDENCE PROPOSED TO BE GIVEN BY WITNESS THAT VICTIM ADMITTED THROWING THE FIRST PUNCH – SUCH EVIDENCE SAID TO BE ADMISSIBLE AS COLLATERAL EVIDENCE – SUBMISSION REJECTED – MAGISTRATE NOT IN ERROR IN SUCH RULING – SUCH EVIDENCE NOT GIVEN – EVIDENCE ADMISSIBLE AS A PRIOR INCONSISTENT STATEMENT – MAGISTRATE IN ERROR IN REJECTING WITNESS' EVIDENCE.

E. and T. were involved in a pub fight whereby E. "glassed" T. causing T. serious injury. E. was charged with causing serious injury to T. At the subsequent hearing, E. called a witness H. who would say under oath that T. had previously said he threw the first punch in the fight between him and E. When H. came to give evidence, the prosecution correctly objected to it on the grounds of hearsay. E. submitted that the evidence was admissible as collateral evidence on the substantive issue of who threw the first punch. The magistrate correctly rejected this submission. However, the evidence of H. was admissible as a prior inconsistent statement going to T's credit which was not considered by the magistrate. H's evidence as to whether T. had previously said he threw the first punch was not considered by the magistrate. E. was convicted and sentenced to a term of imprisonment. Upon appeal—

HELD: Appeal allowed. Conviction and sentence set aside. Remitted to the magistrate for rehearing.
1. Where evidence is put on an untenable basis and rejected, an appeal may be brought if the evidence is admissible on an alternative basis. Excluding evidence in such circumstances can be an error of law. One example of that principle is the case of evidence going to an issue being put on one basis when it is only admissible on another.

2. Whilst the evidence of H. was not admissible on the basis put forward by E. to the magistrate, the evidence was admissible as a prior inconsistent statement going to the principal witness for the prosecution. Accordingly, the magistrate was in error in rejecting H's evidence. In the present case, H's evidence of T's prior inconsistent statement could only be relevant to T's credit as a witness. If the prior inconsistent statement was proved, the Magistrate would have been required to take it into account when deciding whether to accept T's evidence that he did not throw the first punch. When objection is raised to a question about a prior inconsistent statement in a case like the present, counsel would normally say that the evidence went to the credit of the witness who made the inconsistent statement. Such evidence would of course be admissible as an exception to the hearsay rule, but only as to the issue of that witness's credit. In the present case, there was no other issue as to which H's evidence could be relevant.

3. Self-defence having been raised, the prosecution had to prove beyond reasonable doubt that E. believed it was necessary to do what he did, and that it was objectively reasonable to do so. As E. alone had a weapon and used it to cause serious injury, the critical question was whether the degree of force used was out of all proportion to any perceived threat. It was impossible to decide who threw the first punch without dealing with H's evidence that, contrary to T's testimony, he previously admitted throwing the first punch. The exclusion of H's evidence meant that E's defence of self-defence never received full and proper consideration and E's defence was not done justice in the hearing.

BELL J:
INTRODUCTION
1. Michael Engebretson was involved in a pub-fight with Robert Toms. He "glassed" Mr Toms, leaving him facially scarred for life, and was charged with a number of criminal offences, including recklessly causing serious injury. The charges were heard by the Magistrates' Court of Victoria at Sunshine. To be sure, the accused had caused serious injury to Mr Toms. The question was, did Mr Engebretson act in self-defence?

2. The two men gave conflicting evidence about who started the fight. Mr Toms swore the

accused was the aggressor. Mr Engebretson swore Mr Toms threw the first punch to which, in a split second, he made an unfortunate reaction.

3. The Magistrate convicted the accused of the charge I specified and dismissed the others. Her Honour sentenced him to imprisonment for six months. This appeal from that conviction arises from a ruling made by the Magistrate. The accused wanted to lead evidence from Troy Holt that Mr Toms had admitted throwing the first punch. The Magistrate rejected the evidence; it was not considered.

4. The accused concedes the evidence was not admissible on the basis put forward to the Magistrate. But, he submits, it was plainly admissible as a prior inconsistent statement going to Mr Toms' credit as a witness, which means it was an error of law to reject it.

5. The prosecution agrees the evidence was admissible on this alternative basis. But, it submits, it is too late for the accused to rely on it now. That is the question of law in this appeal, and it throws up an interesting side-issue about the precedential authority of very old decisions of this Court.

6. The prosecution also submits it does not matter that the evidence was rejected. The accused was clearly convicted on the other evidence and, therefore, the conviction should stand. The accused says that, without the rejected evidence, I cannot decide he was clearly convicted and, therefore, the conviction must be quashed and he retried.

CAN REJECTION OF EVIDENCE ALTERNATIVELY ADMISSIBLE BE AN ERROR OF LAW?

7. Section 92(1) of the *Magistrates' Court Act* 1989 permits an appeal to this Court from a final order of a Magistrate on a question of law and only on a question of law. The question of law specified in the notice of appeal is this: "Did the Magistrate err in ruling that the evidence of Troy Holt was inadmissible?"

8. Whether a ruling to admit or reject evidence is correct raises a question of law. Generally speaking, if inadmissible evidence is admitted[1] or admissible evidence is rejected[2] in a criminal trial, the ruling will constitute an error of law. As we shall see, the question may then arise whether it can be concluded, clearly, that the ruling made no difference to the result.

9. The special problem that arises in this appeal is that the accused sought to have the evidence admitted on an untenable basis. For reasons to which I will come, I think the Magistrate was plainly right to reject the evidence tendered on that basis. In this appeal, Mr Engebretson submits the Magistrate should have admitted the evidence because it was legally admissible on an alternative basis, the one now put forward. I will consider the merits of that submission presently. The immediate question is whether it is open to the accused to bring an appeal on such a ground.

10. The prosecution submits it is not an error of law correctly to reject evidence on one basis when it was legally admissible on another.

11. This submission is based mainly on the decision of Madden CJ in *Honeybone v Glass.*[3] That case concerned the prosecution of a ratepayer for improper conduct at a local council meeting. When it came on for hearing before the Bendigo justices, the defence sought to lead evidence to show the accused's conduct was justified by the Mayor's prior criticism of him. The justices asked whether the evidence was put forward on the issue of mitigation of penalty, which would have made it admissible. The defence said no. The evidence was then rejected on the issue of justification, which was not a defence to the charge brought.

12. Madden CJ held it was not an error of law for the justices to have rejected the evidence. He cited English authorities to support his conclusion and criticised the judgment of a'Beckett J in *Sanderson v Nicholson*[4] which, on this question, was to the contrary. Let me first deal with the English authorities. *[His Honour dealt with this question and continued...]*

36. In summary, for reasons I will soon give, I think *Beedle v Thomas and Crispin*[30] has the status of a judgment of the Full Court. I am bound to follow it. With respect, I agree with the judgment of the majority. The decisions of a'Beckett J in *Sanderson v Nicholson*[31] and Lowe J in

Butcher[32] are consistent with *Beedle v Thomas and Crispin* and should be followed. The judgment of Madden CJ in *Honeybone v Glass*[33] is clearly wrong and, with respect, should not be followed.

37. I think the law is that where evidence is put on an untenable basis and rejected, an appeal may be brought if the evidence is admissible on an alternative basis.[34] Excluding evidence in such circumstances can be an error of law within the scope of s92(1) of the *Magistrates' Court Act* 1989. One example of that principle is the case of evidence going to an issue being put on one basis when it is only admissible on another.[35] I would hold, because I am bound to do so, and because I think it is right, that the principle can include cases where evidence is tendered as going to one issue when it is only admissible on another.[36] In many cases, including, perhaps, this one, the outcome of the appeal will then turn on whether it is possible clearly to say that the wrongful exclusion of the evidence made no difference to the result (see below).

38. That being the general position, I must turn to the case at hand. Before doing so, I will give my reasons for thinking that old decisions given by a Full Court sitting in Banc bind single judges. *[His Honour considered this question in detail and continued...]*

WAS THE REJECTION OF MR HOLT'S EVIDENCE AN ERROR OF LAW?

66. You will recall that the accused was charged with a number of offences that arose out of the serious injury that he caused to Mr Toms. His defence was self-defence. That defence having legitimately been raised, the prosecution had to disprove beyond reasonable doubt that the accused believed he had to use the force that he did to defend himself, and that such force was reasonable.

67. On the admitted facts, the accused "glassed" Mr Toms, causing him serious facial injuries. The success or failure of the defence of self-defence was always going to turn on the Court's findings about what led the accused to cause that injury.

68. During the examination in chief of Mr Toms, he said that, some time before the incident, he had spoken abusively towards the accused. He said to the accused "You're fucked, you fucked with the wrong person", which was a reference to the accused allegedly throwing a coffee table at Mr Toms' girlfriend the night before. Thus, at least once, Mr Toms had made a verbal threat towards the accused. This plainly supported the accused's case of self-defence.

69. During the course of Mr Toms' cross-examination by counsel for the defence, it was put to him that he, Mr Toms, had thrown the first punch. This question raised against Mr Toms evidence to be given by the accused that he struck Mr Toms with the glass to defend himself against Mr Toms. Mr Toms denied throwing the first punch, or at least said he could not remember doing so.

70. Counsel for the accused then asked Mr Toms if he knew a person with the nickname Cuz. He said yes. Mr Toms was asked if he spoke with Cuz after the incident. A latter question made clear that counsel was suggesting Mr Toms had spoken to Cuz in these terms at the hotel some days after he had got out of hospital. Mr Toms said no. Then counsel for the accused asked this question, to which Mr Toms gave this reply:

> No, so if I suggest to you that you'd told him that you'd thrown the first punch, you wouldn't be, you don't recall any conversation with him at all about that?
> ---No.

It may have been a diffident way for counsel to do it, but Mr Toms was plainly being asked to comment on evidence to be given that he had stated to Cuz that he had thrown the first punch. The prosecution did not object to this questioning. Nor was any objection to be expected.

71. In this criminal trial I would have thought that such questioning would be understood as laying the foundation for evidence to be given on behalf of the defence by Cuz in the substance put. Such evidence would have been admissible as a prior inconsistent statement going to Mr Toms' credit, especially on the question whether his evidence that he did not throw the first punch was to be accepted. This is not exactly how matters turned out.

72. The accused gave evidence in his own defence. Among other things, he said the accused

threw the first punch, indeed the first two. He said he struck Mr Toms with the glass in a split second reaction to Mr Toms' attack upon him.

73. Counsel for the accused next led evidence from Troy Holt, who identified himself as Cuz. Mr Holt was about to give evidence concerning what Mr Toms had said to him at the hotel when the prosecution objected. He said it was hearsay, which it plainly was. The witness was ordered out of court while the matter was debated before the Magistrate.

74. Counsel for the accused told the Magistrate the evidence from Cuz would be –

> of a conversation that he had with Mr Toms after the incident and he will, we would say that what he would say in that conversation he had with him is something along the lines that, "I shouldn't have thrown a punch, I shouldn't have thrown the first punch" or something along those lines, he, he will give that evidence in relation to that.

Counsel submitted the evidence was admissible –

> it's an admission against interests of Mr Toms, we say it's relevant because it's obviously a fact in issue, in relation to the question of self-defence, to whether that occurred, and it's put in exactly the same, it's put in the same category as gaol admissions or anything of that nature where somebody in prison makes an admission to a fellow prisoner, the Crown will often call those people to give evidence, it's the collateral evidence rule, there's a decision of the High Court of Australia in *Nicholls v R*, which I can refer you.

75. The prosecution submitted the evidence did not come within the common law exception to the hearsay rule which covered admissions against interest because Mr Toms was not the accused. The prosecution also submitted that it did come within the *res gestae* exception, although counsel for the accused had not raised that possibility.

76. The Magistrate asked counsel for the accused to respond to the submission that the admission was that of Mr Toms as a witness and not that of the accused as a party. This is what counsel said:

> Well we say that, that *Nicholls* covers that situation your Honour because the evidence is relevant we say, it's admissible only when it is relevant and that is an attempt to prove a fact in issue or a fact relevant to a fact in issue. A fact is relevant to another fact and so relates to that fact that according to the ordinary course of events otherwise [inaudible] it proves or makes it probable that past present or future existence or no existence. ...

77. There was then a brief adjournment to allow time for the judgment in *Nicholls v R*[78] to be further consulted, after which the Magistrate received further submissions. During these submissions, it became clear that, unlike in *Nicholls v R*, counsel for the accused had put evidence of the prior inconsistent statement to the relevant witness.

78. At this point, I think counsel for the accused made clear to the Magistrate that he was beginning to doubt the basis on which he was putting Mr Holt's evidence forward. Whereas previously he was saying it was admissible as collateral evidence, he said here that "I'm not sure whether it is a collateral evidence rule, I mean ..." He went on to say this:

> There is a [inaudible] we say it's a fact in issue, it's a relevant issue that's why, it's, the evidence is admissible rather than we're not attacking Mr Toms' credit as such, as may be the case with collateral evidence, I suppose it's intertwined in a sense because ...

79. The prosecution fell back on their main point – the admissions against interest exception to the rule against hearsay did not apply to admissions by mere witnesses. The Magistrate went off the bench and returned to rule on the issue in these terms:

> Generally the rules of evidence provide that hearsay evidence is of course not admissible in court in cases other than where there is defined by Common Law certain exceptions to that rule. One such exception is where an admission is made against one's own interest generally, by an accused person in proceedings before the court, Mr Metcalfe has sought to convince me to allow here, hearsay evidence from a witness relating to a conversation between him and the victim in this case and Mr Toms. He cites as authority for that proposition that I ought to allow the material in, the case of *The Queen and*

> *Nicholls*, case which just has previously been cited in these proceedings, I have read that decision I'm familiar with that decision, the decision relates to amongst other things the collateral evidence rule which has also been discussed, but within the case itself there is discussion of admissibility or otherwise of certain admissions made by the appellant and in that instance and of course being a party to charges laid by the Crown. There is nothing that I can see unless I'm convinced otherwise Mr Metcalfe in that decision which supports the premise which you make to me and so at this point I am not allowing the evidence, thank you.

80. That ruling was plainly correct as regards the reliance by counsel for the accused on *Nicholls v R* in relation to the rule against collateral evidence. Mr Holt's proposed evidence went to what Mr Toms said to him at the hotel, not to who threw the first punch, and therefore concerned a collateral matter. The evidence did not come within any of the exceptions to the collateral evidence rule stated in *Nicholls v R*.

81. However, the judgments in *Nicholls v R* dealt extensively with the related subject of proof of prior inconsistent statements. For example, McHugh J made this statement of the common law principle in relation to that subject:

> At common law, if a witness does not admit the making of a prior statement, the cross-examiner must identify that statement to the witness. Only if the witness still refuses to admit making the statement may the opposing party prove the oral statement.[79]

His Honour then referred to s21 of the *Evidence Act* 1906 (WA), which is in similar terms to s35 of the *Evidence Act* 1958 (Vic). He said this in reference to s21 (which may equally be said of s35):

> Section 21 is essentially declaratory of the common law. It does not abrogate the common law principles. Proof or admission that the prior inconsistent statement does not constitute evidence of the facts stated unless the witness is a party (in which case the statement may amount to an admission). Section 21 prescribes the requirement that must be met before proof of a previous inconsistent statement may be tendered. That requirement is that the circumstances of the statement must be identified to the witness sufficient to designate the particular occasion. In other words, the circumstances in which the prior inconsistent statement was allegedly made must be identified to the witness in sufficient detail so that the witness has the opportunity to admit or fail to "distinctly admit" that he or she made the statement. Only if the witness fails to "distinctly admit" that he or she made the statement can evidence be led of the making of the inconsistent statement.[80]

82. In the present case, Mr Holt's evidence of Mr Toms' prior inconsistent statement could only be relevant to Mr Toms' credit as a witness. If the prior inconsistent statement was proved, the Magistrate would have been required to take it into account when deciding whether to accept Mr Toms' evidence that he did not throw the first punch. When objection is raised to a question about a prior inconsistent statement in a case like the present, counsel would normally say that the evidence went to the credit of the witness who made the inconsistent statement. Such evidence would of course be admissible as an exception to the hearsay rule, but only as to the issue of that witness's credit. In the present case, there was no other issue as to which Mr Holt's evidence could be relevant.

83. If counsel for the accused had taken Mr Toms' credit out of the issues in the case, this would have given rise to difficulty, or at least different considerations. Some of the language used by that counsel suggests that this is what he did. However much counsel's submissions leave to be desired, I cannot read them fairly as having done so.

84. I refer particularly to the submissions made by counsel for the accused that he was not sure that this was a case of collateral evidence, that he was not attacking Mr Toms' credit "as such" and that he supposed that the issue of credit was "intertwined in a sense". When I connect those submissions with the foundation laid in the questions asked of Mr Toms, the evidence proposed to be elicited from Mr Holt and the discussion in *Nicholls v R* of both the collateral evidence and the prior inconsistent statement rules, I think counsel for the accused left the question of Mr Toms' credit open. If there was any doubt about this issue, I would give the benefit of that doubt to the accused.

85. While counsel left the issue of Mr Toms' credit open, he did not submit the evidence was admissible as a prior inconsistent statement going to that issue. He wrongly submitted it was

admissible as an admission against interest that was itself relevant to a fact in issue. If he had submitted the former, the Magistrate would have been bound to admit the evidence.

86. The subject of the proposed evidence was Mr Toms' prior inconsistent statement to Mr Holt. This was evidence of relevance to an issue in the trial (Mr Toms' credit) and, if it came within an exception of the rule against hearsay, it would have been admissible. Counsel put an untenable basis for admitting the evidence – that it came within the admission against interest exception to the rule. There was a tenable basis available – the prior inconsistent statement exception. With respect, the Magistrate made an error of law by excluding the evidence on the untenable basis when the tenable basis was available. She was led into it by counsel for the accused and not led away from it by the prosecution, but it was an error of law nonetheless.

87. I have said the submissions of counsel for the accused left much to be desired. He should have put Mr Holt's evidence on the tenable basis. However, I cannot see that his failure to do so was a deliberate tactical decision that bound the accused whatever the consequences.[81] Nor is this the kind of case in which the conduct of the trial by counsel should otherwise bind the accused, again, whatever the consequences.[82]

88. I do not think I can determine whether the rejection of the evidence was an error of law by reference to the distinction drawn by Lowe J in *Butcher*.[83] Indeed, the present case is a good example of the inherent limitations in the distinction.

89. To remind you, the distinction is the one between "tendering evidence upon an issue upon which it is not admissible and tendering it upon an issue upon which it is admissible and supporting it by an incorrect reason."[84] In the present case counsel for the accused tendered Mr Holt's evidence of Mr Toms' statement on the issue whether Mr Toms threw the first punch. Counsel for the accused submitted Mr Holt's evidence was admissible collateral evidence going to that issue, although, I have noted, I think he put the matter more broadly at the end. The evidence was not admissible on this basis.

90. On appeal, counsel for the accused has submitted that the evidence was admissible on the issue of Mr Toms' credit, which it plainly was. The ultimate issue for the Magistrate to determine was whether the accused had acted in self defence, on the basis that he reacted to Mr Toms punching him. The accused was seeking to lead from Mr Holt evidence of a statement that Mr Toms had indeed thrown that first punch. To decide whether an error of law was involved in the rejection of this evidence, I do not think it assists to draw a distinction between the issue of whether Mr Toms threw the first punch and the issue of Mr Toms' credit as regards his denial of having done so. It is enough to know that the evidence was admissible on the credit of a witness who was giving evidence about a fundamental and well-understood issue of fact.

91. Consistently with the Magistrate's obligation to ensure that the accused received a fair trial, there were several instances where she intervened on her own initiative in the course of questioning or argument to clarify certain matters. In case there is any doubt about it, if the Magistrate appreciated that Mr Holt's evidence was admissible as a prior inconsistent statement of Mr Toms', there was likewise nothing to prevent her from bringing this to the attention of counsel for the accused in an appropriate way, indeed it would have been prudent to do so.

92. The prosecution submits I should exercise my discretion to decline to set aside the conviction and order a retrial. This submission raises two issues: the scope of the discretion and whether it should be exercised in this case. *[His Honour then examined the scope of the discretion to decline to set aside a conviction or order a retrial and continued...]*

WAS THE ACCUSED CLEARLY CONVICTED ON THE ADMISSIBLE EVIDENCE?
The record
114. To decide whether the accused was clearly convicted on the admissible evidence, I think I must consider the entire record of the proceedings before the Magistrate. This is the approach adopted in cases decided under the criminal proviso.[105] The exercise of the discretion conferred by s92(7) of the *Magistrates' Court Act*, in a case like the present, seems to me to require consideration of similar materials, remembering that the trial was conducted before a magistrate not a jury.

115. The proceedings before the Magistrate in this case were tape-recorded. I think the record of the proceedings consists of:

- the transcript of the evidence
- the submissions of the prosecution and the defence
- the findings of the Magistrate and the reasons given for those findings
- the exhibits, including the photographic evidence of the injuries inflicted on Mr Toms and the accused's record of interview the police

[His Honour examined the evidence in detail and continued...]

The submissions

Defence

203. The submissions made by the defence focused on the obligation of the prosecution to prove beyond reasonable doubt that the accused had not acted in self-defence.

204. Counsel asked the Magistrate to take into account the crowded circumstances of the hotel and the fact that these circumstances did not allow the accused any opportunity calmly to weigh the degree of force required to defend himself. It was submitted that the prosecution had to establish that the response of the accused was out of all proportion to the attack made upon him. The proportionality of the attack was only one of the considerations that went to the reasonableness of the accused's actions.

205. The defence submitted the evidence established that there was a scuffle with pushing and shoving before the use of the glass.

206. As to recklessness, counsel submitted the prosecution had to establish the accused was aware of the risks that his behaviour involved but consciously decided to go ahead anyway.

207. Counsel did not submit that the Magistrate should find that Mr Toms threw the first punch, even though this was the thrust of the accused's evidence. He did not submit Mr Toms was not a witness of credit. He did not address the conflict in the evidence between Mr Toms and the accused about who threw the first punch. I think he treated these issues as having been effectively removed from contention by the Magistrate's ruling on Mr Holt's evidence.

Prosecution

208. The prosecution submitted that the accused had ample opportunity to retreat on several occasions yet did not do so. It was submitted that the accused could have stayed away from Mr Toms at the hotel but did not do so.

209. The prosecution relied on the objective element of the test of self-defence. He said a reasonable person would not have acted in the manner that the accused did in all of the circumstances. The use of the beer glass was in no way whatsoever proportionate to the force allegedly used by Mr Toms (which the evidence did not confirm anyway).

210. It was submitted that the evidence easily established the offence of recklessly causing serious injury.

The findings

211. The Magistrate found the charge of recklessly causing serious injury proven. These are her reasons as recorded in the transcript:

> HER HONOUR: In this matter the facts which are common between the parties are that on the 23rd of September 2005 the victim Robert Toms and the defendant Michael Engebretson were involved in an altercation, the result of which was a serious injury it is conceded to Mr Toms, cuts to his face resulting in some two hundred stitches being applied and a result in hospital stay for three days. It is conceded by the defendant those injuries resulted in a blow which was struck by him when he held a glass in his hand and struck the defendant to the face. The issue for the court to determine in this case is whether the defendant's blow was an act of self defence as he claims or as is claimed by the victim himself in evidence before the court was an unprovoked attack.
>
> I've heard from various witnesses about the events leading up to the incident, much of it I must say I did not find to be relevant, however in particular, I found matters concerning the state in which the

defendant has been described as relevant. He has been described in various terms as agitated and on his own concession as agitated and by others as aggressive. I've considered all of the evidence before me and I have listened to the taped record of interview. I find from all of the evidence that the defendant and the victim were involved in a scuffle of sorts immediately prior to the injury occurring. I find that they were slapping and pushing between them. I find that the injuries described earlier resulted in a blow which landed considerable force by the defendant, who at the time carried in their hand a pot with a small amount of beer in it.

Applying the tests outlined in the decision in the decision of the *Director of Public Prosecutions v Zecevic* a case found at volume 162 of the Commonwealth Law Reports page 645, I'm unable to find that the defendant acted in self-defence. I accept the prosecutor's submission that the striking of the victim with the glass was deliberate and forceful and out of proportion to any force which may have been used by the victim who I accept and I've said I accept was involved in pushing or indeed slapping the defendant. I find the first charge proved. Each of the other charges is to be marked struck out...

Why the accused was not clearly convicted

212. There was strong support in the evidence I have summarised for the prosecution case against the accused.

213. Thus, on the prosecution side, there was evidence that:

- The accused was angry with Mr Toms over what happened the night before.
- He came to the hotel, left and came back again with a friend.
- As he lived close to the hotel, he easily could have come later to pick up his girlfriend, if that was his true intention.
- He intended to do something to Mr Toms, but, on his account, not at the hotel.
- He was seeking Mr Toms out at the hotel and trying to provoke him.
- He was behaving in a loud and aggressive manner towards Mr Toms, who was trying to avoid a confrontation.
- He approached the bar near where Mr Toms was sitting to buy a drink when he could easily have approached another part of the bar.
- On Mr Toms' account, which was broadly supported by the other evidence, the accused's attack was not provoked by a punch or punches from Mr Toms.
- On the accused's account, which was not exactly contradicted by the other evidence except that of Mr Toms, he struck Mr Toms with the glass after Mr Toms threw two ineffectual punches at the accused.
- He used a glass as a weapon, which he bashed into Mr Toms' face, when the latter had no weapon.

214. On the other hand, despite the injuries inflicted by the accused, it could not be said his defence of self-defence was hopeless. The prosecution and the Magistrate rightly accepted self-defence was properly raised, and they evaluated the evidence in that respect.

215. This, in summary, was the evidence of self-defence:

- There was mutual antagonism between the two men.
- When Mr Toms entered the hotel, he approached the accused and made a threatening and abusive remark towards him.
- On the accused's account, he brought somebody back to the hotel for self-protection.
- Mr Toms was agitated and asked by a bouncer to calm down.
- The fight was, in any event, one-on-one.
- The accused approached the bar to buy a drink at a point where a till was located.
- When the incident happened, the accused's glass was nearly but not quite empty, suggesting that he had reason to be at the bar, was not intending to bash Mr Toms and reacted spontaneously when he did so.
- On the accused's account, he reacted to Mr Toms' punching him twice, not realising he would seriously hurt him, but in self-defence.
- There was definite evidence of a scuffle between the two men, involving slapping at the least, and, according to at least one witness, punching.

216. Self-defence having been so raised, the prosecution had to disprove beyond reasonable doubt that the accused believed it was necessary to do what he did, and that it was objectively reasonable to do so, in self-defence. As he alone had a weapon, and used it to cause serious injury, the critical question was whether the degree of force used was out of all proportion to any perceived threat.

217. The accused did not use a gun or a knife. He used a glass that he had at the time, one that was not quite empty. The two men were in close proximity in a crowded hotel, and were mutually antagonistic. The accused's case, supported by his own evidence, was that he reacted spontaneously to Mr Toms throwing the first punch, indeed the first two. If Mr Toms did throw the first punch, that potentially placed the accused's reaction in a more favourable light than if he were the initial aggressor. I do not suggest for a moment that the accused's defence had to succeed on this basis, but it does affect the evaluation of the defence case, and in a possibly significant manner.

218. The question whether the force used by the accused was out of all proportion to the threat posed could only be decided by making a proper finding about what the degree of that threat was. In a case such as the present, that could be done in two ways.

219. First, the matter could be approached by putting the threat against the accused at its highest. You might say in this case that it did not matter if Mr Toms punched the accused first because thrusting a glass into someone's face could never be a reasonable response to a punch. The Magistrate did not approach the matter in this way. Her Honour found Mr Toms got into a scuffle with the accused, one involving pushing and slapping. She did not find it did not matter if Mr Toms threw the first punch.

220. Should I do so? That depends entirely on the circumstances. Especially as this case involves a pub-fight in which the accused has given evidence, I would not be prepared to decide his conviction was clearly correct on this basis. That course may be open to a magistrate who has seen and heard the evidence, but I do not think it is open to me as a judge of appeal.

221. Second, you could consider the defence case on its merits. This involves accepting, as reasonably possible, the difference between reacting in a split-second to punches being thrown and reacting to a scuffle involving no more than pushing and slapping. Depending on your view of the circumstances, the former may be more threatening than the latter. This approach requires a finding to be made, beyond reasonable doubt, about what happened. Not having adopted the first approach, the Magistrate was bound to adopt the second.

222. If the Magistrate failed to decide whether the prosecution had excluded the reasonable possibility that Mr Toms threw the first punch, she would have made an error of law. However, I think her Honour did resolve that question, and against the accused. The finding that Mr Toms was involved in a scuffle with pushing and slapping contains an implicit finding that Mr Toms did not throw the first punch. I will proceed on this basis.

223. It is here, I think, that the trial miscarried. Mr Toms and the accused were oath-against-oath on the question of who threw the first punch. The other evidence tended to support the prosecution case but it was not conclusive on that question. Mr Holt's evidence of Mr Toms' prior inconsistent statement was relevant to the strength of Mr Tom's evidence in this regard. It was impossible to decide who threw the first punch without dealing with Mr Holt's evidence that, contrary to Mr Toms' testimony, he previously had admitted throwing the first punch.

224. The exclusion of Mr Holt's evidence meant that the accused's defence of self-defence never received full and proper consideration. I cannot on appeal give the defence that consideration. I do not know how persuasive Mr Holt's evidence would have been because he did not give it. I cannot assess how much weight to give Mr Toms' evidence on this question because I do not have the excluded evidence going to his credit. In the absence of that excluded evidence, I am not prepared to decide that the accused was clearly convicted. He will have to be retried.

CONCLUSION

225. Michael Engebretson was tried before a magistrate on charges of causing serious injury to Robert Toms. His defence was self-defence. For that defence to succeed, he had to establish – or at least raise a reasonable doubt – that it was not he, but Mr Toms, who was the initial aggressor.

226. The accused had a witness, Troy Holt, who was apparently independent, and would say under oath that Mr Toms had previously said he threw the first punch in the fight between him and the accused. Mr Toms was the principal witness for the prosecution. His evidence was that

the accused started the fight, not him. When he was being cross-examined by counsel for the accused, the evidence of Mr Holt was put to him. Mr Toms said he could not remember saying that to Mr Holt, but he did not expressly deny it.

227. The fight occurred in a crowded hotel and there were many witnesses, most of whom gave evidence. However, the critical events happened quickly and, for the witnesses at least, unexpectedly. While the evidence of these witnesses tended to support the prosecution case against the accused, it did not wholly foreclose the defence of self-defence.

228. When it came time for Mr Holt to give his evidence about Mr Toms' statement, the prosecution objected on the grounds of hearsay. That the evidence was hearsay is beyond dispute. But it was admissible as a prior inconsistent statement going to Mr Toms' credit. Instead of relying on that exception to the hearsay rule, counsel for the accused submitted the evidence was admissible as collateral evidence on the substantive issue of who threw the first punch. That submission was untenable and correctly rejected.

229. The Magistrate convicted the accused and sentenced him to be imprisoned for six months. Mr Holt's evidence was not considered.

230. The accused has now appealed to this Court under s92(1) of the *Magistrates' Court Act* 1989 on a question of law. He has contended the Magistrate erred in law in rejecting the evidence of Mr Holt. The question is whether it is an error of law to reject evidence put on an untenable basis when it was admissible on an alternative one not put.

231. I have answered that question in the affirmative. With respect, the Magistrate made an error of law in rejecting Mr Holt's evidence as it was admissible as a prior inconsistent statement going to Mr Toms' credit. Her Honour was led into that error by counsel for the accused and not led away from it by the prosecution.

232. There is a conflict of authority on this question. But the weight of authority and my own independent analysis support the answer I have given. One authority that supports the affirmative answer is a decision of this Court given in 1862 by the Full Court sitting in Banc. After examining the history and nature of decisions of the Full Court sitting in Banc, I have come to the view that such decisions have the precedential authority of decisions of a statutory Full Court or the Court of Appeal and therefore bind a judge sitting alone.

233. The prosecution submitted the Magistrate's error was not material to the result. It submitted I should exercise the discretion conferred by s92(7) of the *Magistrates' Court Act* to decline to set aside the conviction and order a retrial.

234. That I possess a discretion of this kind is undoubted. The discretion can be exercised in cases where the judge on review is clearly satisfied, after considering the whole of the record of the proceedings before the Magistrate, that the accused was clearly convicted on the admissible evidence. I have examined the transcript of the evidence, the submissions of the defence and the prosecution, the Magistrate's findings, as well as the exhibits, which include photographs of the injuries inflicted on Mr Toms and the accused's record of interview with the police. I am not so satisfied.

235. The problem in this case is that, even though the prosecution case against the accused seems strong, important evidence has been excluded. It is impossible to know, clearly, what the result may have been had the evidence been admitted. I do not know how persuasive Mr Holt's evidence of Mr Toms' prior inconsistent statement would have been, or how adversely, if at all, it would have affected Mr Toms' credit, because Mr Holt was not allowed to give that evidence. I think the accused's defence of self-defence was not done justice in the hearing which I can neither correct nor overlook on appeal.

236. The conviction of the accused for recklessly causing serious injury to Mr Toms must be set aside and the matter remitting to the Magistrates' Court for rehearing.

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[1] *Walsh v R* (1976) 50 ALJR 533.
[2] *R v McCready* [1967] VicRp 36; [1967] VR 325, 327-328.
[3] [1908] VicLawRp 68; [1908] VLR 466; 14 ALR 345; 30 ALT 54.

[4] [1906] VicLawRp 60; [1906] VLR 371; 12 ALR 208; 27 ALT 215.
[30] [1862] 2 W&W (L) 89.
[31] [1906] VicLawRp 60; [1906] VLR 371; 12 ALR 208; 27 ALT 215.
[32] [1939] VicLawRp 39; [1939] VLR 263; [1939] ALR 329.
[33] [1908] VicLawRp 68; [1908] VLR 466; 14 ALR 345; 30 ALT 54.
[34] *Beedle v Thomas and Crispin* [1862] 2 W&W (L) 89, 95; *Sanderson v Nicholson* [1906] VicLawRp 60; [1906] VLR 371, 374-375; 12 ALR 208; 27 ALT 215; *Butcher v Longwarry & District Dairymen's Co-operative Association Ltd* [1939] VicLawRp 39; [1939] VLR 263, 271-273; [1939] ALR 329; see also *R v Tonkin and Montgomery* [1975] Qd R 1, 40; but see *Honeybone v Glass* [1908] VicLawRp 68; [1908] VLR 466, 476-478; 14 ALR 345; 30 ALT 54.
[35] *Sanderson v Nicholson* [1906] VicLawRp 60; [1906] VLR 371, 374-375; 12 ALR 208; 27 ALT 215; *Butcher v Longwarry & District Dairymen's Co-operative Association Ltd* [1939] VicLawRp 39; [1939] VLR 263, 271-273; [1939] ALR 329; see also *R v Tonkin and Montgomery* [1975] Qd R 1, 40; see *Honeybone v Glass* [1908] VicLawRp 68; [1908] VLR 466, 476-478; 14 ALR 345; 30 ALT 54.
[36] *Beedle v Thomas and Crispin* [1862] 2 W&W (L) 89, 95.
[78] [2005] HCA 1; (2005) 219 CLR 196; (2005) 213 ALR 1; 79 ALJR 468.
[79] Ibid 232 (footnotes omitted).
[80] Ibid 232-233 (footnotes omitted).
[81] See *R v Wakim* [1998] 2 VR 46, 53; *R v Brown* [2002] VSCA 207, [41]; (2002) 5 VR 463; (2002) 135 A Crim R 582.
[82] See *R v Scott* (1996) 137 ALR 347, 362; *TKWJ v R* [2002] HCA 46; (2002) 212 CLR 124; (2002) 193 ALR 7; (2002) 76 ALJR 1579; (2002) 133 A Crim R 574; (2002) 23 Leg Rep C8 and *R v Portelli* [2001] VSCA 183, [21].
[83] [1939] VicLawRp 39; [1939] VLR 263, 272; [1939] ALR 329.
[84] Ibid.
[105] See, eg, *Weiss v R* [2005] HCA 81; (2005) 224 CLR 300, 317; (2005) 223 ALR 662; (2005) 80 ALJR 444; 158 A Crim R 133; *R v Weiss (No 2)* [2006] VSCA 161; (2006) 164 A Crim R 454, 475.

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