

IN THE PRESENCE OF THE JURY

5 HIS HONOUR: Now members of the jury thank you for your
note. If I just take you to this second count. While in
Collaroy in the company of persons unknown did assault
Shane Bullock thereby causing occasioning actual bodily
harm. Now the words unknown or persons unknown are used
in a rather unusual legal sense here. It doesn't mean
there's a group of people that no-one could identify that
10 was in the place. What it means is simply this. On the
Crown case Mr Bullock came into confrontation with a
number of the bouncers upstairs. Now a very tall man
called Bennett, Richard Bennett is supposed to be six foot
eight tall was one of them and he was an Islander and
15 there was another man described as the Home and Away man
who was apparently an out of work actor who'd been in the
Home and Away series and he was described as a rather
small man, nuggetty sort of man. Now those two were
described in the Crown case, identified.

20 Mr Nierop has said he was on the top floor with three
people, Mr Bennett was one of them, he stood near the
stairs and there were three others - two others, there was
Mr Nierop standing on his milk crate, Mr Bennett standing
25 near the stairway and two others and that at the door
checking on people coming in on the outer door were two
people, two men, Maguire and--

30 LAVAC: Maguire and Phillip Purcell.

35 HIS HONOUR: Now when the Crown uses the expression in the
company of persons unknown, the Crown case is that the
complainant was grabbed by the accused and a number of
other bouncers. Mr Bennet was one of them at the top of
the stairs. But then there's evidence that the four
people who had him were coming down the stairs, or five
people, one of the witnesses at least saw five people, and
then they trip and they fall, the Crown says it's the
40 bouncers and possibly the barman who came up from
downstairs, who was part of this group, but the Crown
cannot be sure which one of them, which ones of them were
in this group. Was it the two people from the outer door
as well? Did they join in, or did they stay at the outer
door? Now there seems to be evidence in the video
45 suggesting that one of the people on the outer door did
come in but perhaps not get much further than the landing
at the bottom of the bottom stairs. So the Crown says we
don't know. It was the accused and a number of people he
was in company with.

50 Now in company with means that they were helping him in
some way. On the Crown case it wasn't just the accused
who struck Mr Bullock on the landing downstairs, it was
other people, other men, but the Crown hasn't said which
55 other men. Only one has been charged. The only other men
that could be identified as being other men who might
have been doing it were the other bouncers and the barman
from downstairs. No other person has been identified.

The accused could be regarded as being in company of persons unknown only if it could be shown that he assaulted Mr Bullock with these people around helping him. If in fact there's a reasonable possibility that he was going to the aid of one man, namely the barman downstairs who was being attacked it could not be said that Mr Nierop was in his company, that they were both doing something of a criminal nature to the complainant. If you go to assist somebody else in distress, someone who is being attacked - you know you are walking down the street and somebody for some reason attacks your wife and you attack them it couldn't be said that you were assaulting someone in company with your wife because you and your wife aren't in some sort of enterprise to assault anyone. She is being assaulted and you're trying to help.

So the assault claim is basically based on the notion that there were a number of people working together and that Mr Nierop, with this group of people, with their agreement and their assistance, in some way was assaulting Mr Bullock. Now if that happened, if Mr Nierop with a number of others was punching him, then he would be just as liable for the punches they threw as the ones he threw himself. To come to the conclusion that he is guilty of assault in company as I say you have got to be satisfied beyond reasonable doubt that he was in the company of other people, that is he was accompanied by other people and was assaulting other people with them there to assist him or you can't find him guilty of being in their company.

It is possible to find that he assaulted him as a sole act. That would be just assault occasioning actual bodily harm, simply. But in reality what you are driven back to all the time is a claim on the Crown case of assault and a claim on his case of self defence. Unless the Crown can prove he wasn't doing something in self defence he has to be acquitted. If the Crown proved beyond reasonable doubt he was not doing to assist the barman or that even if he was doing something to assist him he was using more force than was reasonably necessary, okay, the negative self defence. But they have got to prove that. They have got to show those factors. They must disprove self defence. Unless they disprove self defence you must find him not guilty.

Please go away and consider it, but as I say, you have not received the benefit of all the other evidence which I think will be another six days or so, and you haven't got the benefit of addresses from counsel, careful analysis of evidence from both counsel, and I haven't summed up to you in any way, I'm just giving you a very brief sketch of all this. Now you have to be satisfied, if you decide to acquit someone you have to be happy with that verdict. You have to be able to walk away and say that was correct, we found him not guilty because we are satisfied he was not guilty. There's no point in him staying any longer,

we're clearly of the view he was not guilty. Now unless you are unanimously agreed and comfortable with that then you should say the trial should go on. If you are comfortable with that then you should say not guilty and the trial will stop following your verdicts.

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The trial will go on unless you find him not guilty on both counts, so please think about it carefully, and as I say I am not trying to pressure you into coming to a decision. Telling you you have got a right to do something doesn't mean the judge is saying you must go and exercise it. I am saying you have a right at any time after the conclusion of the Crown case to say 'we've heard enough we want to acquit him now'. But you are not compelled to do anything. You can sit there and listen to all the evidence, listen to the addresses and listen to the summing up and then decide. That is your absolute entitlement. I suggest you go away and think about it again, members of the jury.

JURY LEFT COURT AT 11.50AM

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: I can only suggest gentlemen that you don't go too far, they might come back and say 'we want the case to go on'.

10 LAVAC: Your Honour, In the event that they do want the trial to go on, did you say to us that we won't be sitting this afternoon, you've got other matters?

HIS HONOUR: We can't. So if they say they want the trial to on I would have to adjourn it till Monday.

15 LAVAC: Certainly, your Honour, I just wanted to make that--

20 HIS HONOUR: Because I have got a part heard matter at 2 o'clock that involves a child, it will be a closed court and I am told it will go for a couple of hours, so I really can't. It is regrettable but we'll just have to start again on Monday, and of course I told them that they wouldn't be here this afternoon.

25 CROWN PROSECUTOR: Was it 12 o'clock or was there now mention of time, I can't remember now?

30 HIS HONOUR: I think I said 12 o'clock but I've asked that lunch be got for them because they may wish to keep deliberating. On the other hand we might get a word back in five minutes that they don't want to continue any longer.

35 LAVAC: Your Honour, if they come back in five minutes and they want to go on with the trial I have got a doctor here who has been here since 10 o'clock this morning. His evidence will be very short and it would avoid him having to come back next Monday.

40 HIS HONOUR: That's all right if you want to do that. I thought you didn't want to do anything.

LAVAC: Sorry?

45 HIS HONOUR: I thought you didn't want to call any other evidence today?

LAVAC: Only to avoid the doctor having to come back on Monday/

50 HIS HONOUR: We can do that.

LAVAC: And then we can continue with the rest of the evidence on Monday.

55 HIS HONOUR: When you say very short, I don't think anything in this trial is very short.

LAVAC: He will certainly be short in-chief, your Honour,

I don't know how long my friend will spend with him.

CROWN PROSECUTOR: I hope I'm not being passed the burden of being too lengthy your Honour.

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HIS HONOUR: I'm not accusing either of you of time wasting, please understand. I am certainly not doing that. I am merely saying it's not a trial in which any evidence is what could be called short evidence. I think the two police officers came closest to it. They just gave evidence to explain why the Crown wasn't calling all these other people essentially, identified that photos had been taken. Their evidence was short.

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LAVAC: Your Honour in the light of your rulings about that there was nothing I could ask them.

HIS HONOUR: Yes, I know, that's short evidence. A note already. "Please let's continue". Bring the jury in.

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MFI #G NOTE FROM JURY

CROWN PROSECUTOR: Your Honour, are we expecting the jury in straight away?

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HIS HONOUR: Yes. I think so, I think that note was given before they would have got very far down the corridor.

IN THE PRESENCE OF THE JURY

LAVAC: I call my next witness Dr Magarey.

5 HIS HONOUR: And that's McGarry?

LAVAC: I think it's Magarey your Honour, I'll confirm that with the doctor.

10 <DR MAGAREY, SWORN(11.55AM)

HIS HONOUR

Q. Thank you doctor, is your name Magarey?

15 A. Yes.

<EXAMINATION-IN-CHIEF BY MR LAVAC

Q. Doctor, you're a qualified medical practitioner, a GP, is that correct?

20 A. Yes.

Q. And you obtained your qualifications at Sydney University, is that correct?

25 A. Yes.

Q. I understand you've been practising medicine for some thirty-nine years?

30 A. Yes.

Q. And as at April of last year were you engaged in your practice at the Vale Medical Centre?

A. Certainly.

Q. And had you been practising at that location for some six years?

35 A. Yes.

Q. Doctor, on 12 April of last year 2006 did you see a patient by the name of Troy Guilfoyle?

40 A. Yes.

Q. And did you see him on that occasion for, among other things, an injury above his left ear?

45 A. Yes.

Q. A head injury above his left ear?

A. Yes.

Q. And did that consist of a hematoma, a lump?

50 A. A bruise.

Q. A hematoma I think--

55 A. A hematoma, a swelling involving bruising, yes.

Q. In layman's language that's a lump on the scalp, is that right?

A. Yes, a small lump.

Q. Did he complain to you at that time when he gave you the history, did he say that that--

5 CROWN PROSECUTOR: I'd ask my friend not to lead, I appreciate it's a doctor your Honour but perhaps if he has his notes he can--

LAVAC

10 Q. Could you tell us from your notes what he told you in relation to sustaining this hematoma that you detected?

A. Well I have written in my notes, if that's what you'd like - would you like me to read what I've got written in my notes?

15 Q. Yes please.

A. I have "a small hematoma above the left ear - following an altercation at work four days ago".

20 Q. Doctor, what you saw above his left ear which you've described as a hematoma is that consistent with the complaint that he made?

A. Well I'm not absolutely sure whether he made the complaint that he'd been struck but it's certainly
25 consistent with a blow.

Q. During an altercation?

A. During an altercation, probably with either a fist or a blunt object.
30

Q. Or striking his head on something?

A. Or striking his head on the floor or a corner.

Q. From what you saw was that consistent with that being
35 sustained four days earlier?

A. Yes.

Q. The late evening of 8 April, in the early hours of
40 9 April?

A. It's consistent with that, yes.

<CROSS-EXAMINATION BY CROWN PROSECUTOR

45 Q. Doctor, to your recollection did the patient give you any reasons for why he was reporting to you on 12 April?

A. My recollection unfortunately is not that good.

Q. Did it require any treatment, the small lump?

A. No.
50

Q. And whereabouts above the left ear, are you able to indicate using your own head as a guide or you're not able to--

A. Well if I've written above the left ear I'm going to
55 presume that it was in the temporal area across this way.

HIS HONOUR: Perhaps you could just turn to the jury so they can see doctor.

WITNESS: Just over here somewhere.

CROWN PROSECUTOR

5 Q. Do I take it so far as your notes and your
recollection are concerned you're unable to say precisely
what you were told by the patient about how they'd got the
lump other than that it resulted from an altercation at
work?

10 A. An altercation at work, I can't say any more than what
I have written, my memory of that particular time - I
don't remember seeing him but I have to rely on my notes.

15 Q. Doctor, can I ask you a couple of questions of some
scenarios and tell me if you are able to answer or not.
If I suggest to you that the patient has fallen from about
half way down a set of stairs being about twelve or
thirteen steps in height--

20 A. Are they carpeted stairs or cement?

Q. No, they're of a glass or--

A. Hard.

25 Q. --fibreglass material but the stairs themselves aren't
important, what I want you to assume is that there is no
striking of the staircase itself but that the patient has
flown through the air horizontal to the ground about a
foot in the air above the stairs and the head has then
30 in height standing on the corner of a landing about two
metres square at the bottom of those stairs--

A. Fifteen stairs?

35 Q. No, half that length, half the length of twelve
stairs, about six stairs.

A. Six stairs, a foot off the--

40 Q. Six stairs, a foot off the ground, horizontal to the
ground, head first and ploughing into a pot plant two
metres away from the very foot of the stairs. Would you
expect to find a lump, that having occurred in the early
hours of 9 April, that is the 8 April after midnight? Do
you understand the date?

45 A. Yes, what is your question?

Q. The question is would you expect to find an injury of
the type that you observed given that history?

50 A. Well I'm not absolutely certain, I would have expected
you'd find a little bit more than that from what you
described but he didn't point anything other than that out
to me at the time.

Q. I take it there was no report of loss of consciousness
to you?

55 A. No.

Q. And if there had been would you noted that in your
record?

A. I certainly would have noted that and possibly suggested that we might continue with some other investigations.

5 Q. Was there any report to you to your knowledge of headaches or anything of that nature?

A. No.

10 Q. Again would that be something you would have noted, had there been?

A. I certainly would have.

Q. Was there any report to you about any other abrasion or bruising or injury to any other part of the body?

15 A. Not that I can recall, I think in these particular type of consultations I would make note of them if it had been mentioned.

Q. In relation to the lump that you observed you said earlier that you believed that it's something that could have resulted from being struck by a fist or a blunt object?

A. I did say that.

25 Q. And would you agree with this scenario, if a patient had been lying on the ground or crouching--

A. Yes.

Q. Or something of that nature and had been struck a glancing blow from a fist that was coming in a downward direction, would you expect to find a lump like this--

30 A. A fist or a boot coming from up one way, or a boot or a fist. Look I don't think I can be any more specific than I have been really.

35 CROWN PROSECUTOR: Thank you doctor. That is the cross-examination your Honour.

NO RE-EXAMINATION

40 <WITNESS WITHDREW

HIS HONOUR: Members of the jury I said to you that we would sit until about twelve. You've been considering matters, we have heard the doctor. Unfortunately I have to deal with some other matters now and I think I promised I'd let you go early anyway. So I will let you go now until Monday morning. I take it the CD player is working? Yes, thank you.

IN THE ABSENCE OF THE JURY

5 HIS HONOUR: We will resume this trial on Monday morning
and we will just continue on. I won't give them any
further Prasad directions. If at any time they decide
they want to stop, they can stop. I would be surprised if
they did, but there you are, I've never known it to
10 happen. But I don't propose to say any more to them. We
will just assume we will go from witness to witness until
we get to an end. I will adjourn. I will say the same to
the accused, as I said previously, just to be careful on
the weekend that he doesn't run into any of the jury.

15 ADJOURNED TO MONDAY 19 FEBRUARY 2007

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