SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBL* [2017] QCA 71
PARTIES:	**R** **v** **DBL** (appellant)
FILE NO/S:	CA No 250 of 2016 DC No 1594 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 29 August 2016
DELIVERED ON:	24 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2017
JUDGES:	Morrison JA and Boddice and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was charged with five counts of assault following an episode of domestic violence – where the appellant was convicted at trial of three counts and acquitted on two counts – where the trial judge directed the jury to consider each verdict individually – where a *Markuleski* direction was given – where the test of inconsistency is a test of logic and reasonableness – where the appellant contended that the guilty verdicts could not be reconciled with the acquittal on two counts – whether the verdicts were not supported by evidence and were inconsistent CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the defence case was that one assault occurred and the prosecution's case was that five assaults occurred – where the appellant did not give evidence at trial but a contemporaneous field recording was tendered – where the appellant contended that there was insufficient evidence for the jury to conclude that three assaults occurred – where the respondent submitted that the victim's injuries were consistent with her having been hit more than once –

where the appellant made admissions consistent with the jury's verdict on the field tape – where counsel at trial argued those admissions were mistakes – whether a guilty verdict was open to the jury on counts 1, 3 and 5

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISDIRECTION AND NON-DIRECTION – where the defence of provocation was raised early in the trial as being applicable to count one or count five – where counsel identified the alleged provocation and formal directions were given – where the jury asked for a clarification of the definition of provocation – where the trial judge refused to answer that question and asked for a more precise question – where the jury returned a verdict before asking a more precise question – where the jury's question demonstrates misunderstanding of the defence of provocation – whether provocation was an issue going to the heart of the offence – whether the previous directions were adequate – whether the trial judge's failure to further explain provocation caused a miscarriage of justice

Criminal Code (Qld), s 668E(1A)

Alameddine v R [2012] NSWCCA 63, considered
Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, followed
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, followed
R v Andreassen [2005] QCA 107, followed
R v Corry [2005] QCA 87, followed
R v Hickey (2002) 137 A Crim R 62; [2002] NSWCCA 474, cited
R v JX [2016] QCA 240, followed
R v Lapins [2007] SASC 281, considered
R v Salama [1999] NSWCCA 105, considered
R v TAB [2002] NSWCCA 274, considered

COUNSEL: The appellant appeared on his own behalf
T A Fuller QC for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** Mr DBL was tried on five charges concerning domestic violence offences. He was convicted on three, and acquitted on two. All of the counts arose out of the same course of conduct on one day and concerned assaults on Mr DBL's ex-wife (**KB**). The counts were as follows:

(a) count 1 – unlawful assault – whilst in the living room, Mr DBL struck the complainant's head with an open hand and/or kicked KB in the stomach;

(b) count 2 – unlawful assault – whilst in the bedroom of one of the children (**P**), Mr DBL struck KB's head with an open hand or hands;

(c) count 3 – unlawful assault causing bodily harm – whilst in the hallway Mr DBL struck KB's head with an open hand, causing bodily harm to the complainant's lip or lips;

(d) count 4 – unlawful assault – whilst in the bedroom of another child (**C**), Mr DBL kicked KB's torso; and

(e) count 5 – unlawful assault – whilst in the ensuite bathroom Mr DBL struck KB's head with his hand or hands, and/or forced the complainant's head into the bathroom counter.

[2] Mr DBL was found guilty on counts 1, 3 and 5, and acquitted on counts 2 and 4.

[3] He appeals against his convictions on the following grounds:

(a) the jury, having asked for clarification of the defence of provocation, were not given a further direction, and before one could be given the jury brought in their verdicts;

(b) the acquittals on counts 2 and 4 are inconsistent with the verdicts of guilty on counts 1, 3 and 5;

(c) the indictments were amended in the course of the trial so that in respect of counts 4 and 5, the element of "occasioning bodily harm" was deleted; the jury having already read the original indictments, there must was a real risk of confusion on the part of the jury because they had already read the original indictments;

(d) an inadequate direction on provocation was given;

(e) the verdicts cannot be supported by the evidence and are unreasonable; and

(f) notwithstanding an undertaking that there would be no mention of "domestic violence", those phrases were used on several occasions and would have impacted upon the jury's consideration.

Circumstances of the offending

Evidence of KB

[4] KB was Mr DBL's ex-wife. They had been in a de-facto partnership for some 13 years, but they separated on 2 February 2014. They had four children together, ranging in age (at the time of the offences) from three to ten years. Mr DBL and KB separated because he had an affair. In the intervening year between separation and when the offences occurred, Mr DBL had moved away interstate pursuing work of one kind or another. In the meantime KB remained with the four children. Mr DBL came back to see the children from time-to-time.

[5] On 10 February 2015, Mr DBL and a friend had gone to the house in order to mow the lawn. Having finished that KB, Mr DBL and the friend were drinking together. Mr DBL went to bed early with one of his children, and KB and the friend continued to drink.[1] At about 10.30 that night, KB and the friend were engaged in sexual intercourse on the top of a deep freezer in the garage when they were discovered by Mr DBL.[2] Mr DBL wanted the friend to leave, but KB resisted that. Eventually the friend left,

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1 AB 57.

2 AB 57, 66 and 109.

but Mr DBL stayed. At that time he was angry, but there was no physical altercation.[3]

[6] As to the events on 11 February 2015, KB said that Mr DBL had come over for dinner. They ended up on the outdoor patio talking about their relationship and the conversation became heated.[4] At the time the children were inside, but their eight year old child P came to the door to ask Mr DBL if he was still angry with his friend.

[7] The conversation on the patio had become heated and KB said that Mr DBL was using "horrible words, and he was calling me a whore, and he was swearing", which she found inappropriate given that an eight year old child was present.[5] Mr DBL went inside with the child and they were on the couch in the lounge room. She walked in around the back of the couch and could hear Mr DBL saying to the child that she was a whore and about "a big dick up my arse".[6]

[8] KB wanted the children in bed and walked around to get P. That was when Mr DBL swung at her with his right hand, hitting her in the face with his open hand.[7] His hand came in contact with the left side of her head. He also kicked her with his right foot, in the stomach. These events were the subject of count 1.[8]

[9] By then the children were screaming and KB attempted to get P again, only to be hit again so that she fell over a chest or coffee table.[9]

[10] KB took another of the children to bed and then took C to bed. Having done that, she wanted to get down to see P who was in his bedroom. She was lying on the bed with him, trying to talk to him when Mr DBL came in. He stood over the top of her and "was hitting me on either side of my head with his open hands".[10] During this time she was lying on the bed next to P, on her back. She put up both hands to block the hits and was screaming for him to stop. These events were the subject of count 2.

[11] She could hear the other children shouting and went out to ask Mr DBL to stop. She was in the hallway when "he came at me again", so she crouched on the ground against the wall and he hit her with his right hand, in the jaw and nose area. That caused her to bite her lip and she could taste blood. These events were the subject of count 3

[12] At that point she could hear C in her room, and Mr DBL was in there. C was on the bed and Mr DBL was standing next to it. Mr DBL attacked her again and she fell to the floor. Whilst in that position he was kicking her in the lower back.[11] He kicked hard, and she curled up in a foetal position.[12] These events were the subject of count 4.

[13] Following that, KB took C to the ensuite attached to her bedroom. The other children were in the bedroom. Mr DBL hit her in the side of the head and the stomach more than once. He used his hand to hit her in the stomach and an open hand to the head. He was pushing her head into the bathroom counter multiple

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3 AB 58.
4 AB 47.
5 AB 48.
6 AB 49 and 111.
7 AB 50.
8 AB 50.
9 AB 51.
10 AB 52.
11 AB 53.
12 AB 54.

times, to the point that KB thought she might black out or that she was going to die.[13] Her head was aching all over.[14] These events were the subject of count 5.

[14] KB texted a friend who called the police, and the ambulance service was also called. KB did not go to hospital, but had a cut on her bottom and top lip, pain to the jaw, bruises on her shoulder, and aches in her stomach and back.[15]

[15] In cross-examination KB expanded on her evidence:

(a) Mr DBL had been having relationships with other women, both before and after the separation with KB; KB was hurt by that;[16]

(b) during the separation Mr DBL had been paying various weekly or monthly payments, as well as the bills on the house; that stopped in September 2014 because he had lost a particular contract and did not have the money to pay;[17]

(c) during the separation he had been seeing his children, at one time proposing to fly up from Victoria;[18] however, he had not seen them a lot between September and late January;[19]

(d) on 10 February Mr DBL and his friend offered to mow the lawn and in response KB was to cook them dinner; when questioned why she had sex with Mr DBL's friend in the garage, she said "I'd been separated for a year. I was single. I hadn't been with anyone before [Mr DBL]. He'd been my only partner. I hadn't been with anyone since … it was a man telling me nice things and … I'm not proud of myself";[20]

(e) when they were on the patio they were discussing what had happened the night before between KB and the friend;[21]

(f) she said when Mr DBL took P into the lounge room, he was making derogatory comments about her; he was saying to P that she was a "whore" and using other "rude obscenities" to P; it was put to her that she "kept berating him", and she answered by saying: "I was protecting my child, because no child should have to listen to that";[22]

(g) it was put to her that Mr DBL got a cut on his hand somewhere and she agreed, saying that she did not know where it was, but "there was blood all over the bathroom counter, and I know there was blood on my slidey door going out to the patio";[23]

(h) it was put to her that Mr DBL was not irate nor swearing, but she "got in his face and continued the verbal abuse against him"; she denied both things, saying that she was trying to get her son to bed, but Mr DBL would not let go of him; in the course of trying to get P up, Mr DBL hit her;[24]

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13 AB 54.
14 These events were the subject of count 5.
15 AB 56.
16 AB 59.
17 AB 59, 64.
18 AB 65.
19 AB 69 line 10.
20 AB 66 lines 17-21.
21 AB 69 line 44. In re-examination she said that Mr DBL wanted her to "kind of walk him through what had happened with the other guy in an aggressive tone": AB 111 line 12.
22 AB 70.
23 AB 71.
24 AB 71-72.

(i) KB could not say how much blood was on the ensuite, but said "a fair bit", but the blood in the ensuite had nothing to do with her cut lip;[25]

(j) it was put to her that when the police arrived, Mr DBL was asleep in the lounge, and had to be woken up; KB denied that saying that she was still near the couch in the lounge room;[26]

(k) KB texted a friend to tell her that Mr DBL "was losing it and … he was beating me up";[27]

(l) it was put to her that she did not have any abrasions or scratches or anything like that, but KB said that she had a cut lip on the inside, a bruise to her right shoulder, but she could not say about her back because she did not look at it;[28] and

(m) KB said she was aching all over her body, including her head, back, jaw, ligaments and stomach.[29]

[16] Towards the end of the cross-examination it was put to KB that "after you got in his face in the lounge … nothing further took place. He didn't hit you or kick you or do anything else after the initial slap".[30] It was also put to her, and denied, that Mr DBL had not done anything to cause any injury to her back or anywhere else. Shortly after that it was put to KB that she "didn't suffer any injuries whatsoever from either the slap … when you got into his face at the lounge or anywhere else".[31]

[17] Those questions made it plain that the defence case accepted that Mr DBL had hit KB in the face, in the lounge room. Of course the defence case denied that any further contact had happened, but that evidence was important to count 1 which was particularised as Mr DBL having struck KB with an open hand and/or kicked the complainant in the stomach.

Evidence of KB's friend

[18] KB's friend had known KB since 1992 (when her friend was about 11 years old) and had known Mr DBL since she was about 21. She recalled sending a text message to KB on 11 February 2015, probably around dinner time, asking if she was okay. Sometime later she got a text back saying that KB was not okay, and she telephoned KB. As a result of what she was told in that phone conversation, the friend called the police. Having done that she texted KB to say that she had called the police. KB replied by text: "I don't think that's a good idea".[32]

Evidence of the ambulance officer

[19] An ambulance officer who attended the house on 11 February 2015, gave evidence. He made an assessment of KB, checking for injuries. KB told him "that she was punched by the male person and kicked and apparently her head was slammed against a wall".[33]

[20] At the end of his assessment he could find no abrasions, bruising or haematoma, but said that KB did have "a bit of a fat … bottom lip". KB was complaining of some

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25 AB 73.
26 AB 75.
27 AB 83 line 13.
28 AB 90-91.
29 AB 108-109.
30 AB 108 lines 9-11.
31 AB 110 line 4.
32 AB 114.
33 AB 115 line 46.

pain in the left cheek, but was able to open and close her mouth, chew and talk freely without too much trouble.[34] In cross-examination the officer referred to a comment he made in his report, that KB had no serious injuries. He answered: "no serious injuries that I could ascertain, but that's why we do offer … as I said in the report there, I can't see what's behind the skin."[35]

Evidence of police officers

[21] Constable Douglas was one of two police officers who attended at the home that night. He recorded a field interview with Mr DBL. He said that Mr DBL was emotional, upset and appeared to be intoxicated.[36] From his observations, KB had "some swelling to her face", which he passed on to the ambulance officer.[37] The recording of the interview was played to the jury, and thus what was said in it became part of the evidence.

[22] Constable Mills was the second officer on the scene. She also observed that KB "had some swelling to her lip".[38]

Evidence of Dr Randall

[23] Dr Randall was KB's medical practitioner. She saw KB on 13 February 2015. Her description of what she found was that KB had some abrasions to her lip, some bruising on the upper right arm and a swelling to the nostril. She also complained of pain in the jaw and lower back pain.[39]

[24] In cross-examination Dr Randall said that the abrasions she found would satisfy the definition of bodily harm,[40] as would the injuries to the jaw, bruising to the upper arm and to the lower back.[41]

Statements in the police interview

[25] During the police interview, Mr DBL admitted that he hit KB with his hand on the side of her face.[42] The police officer had found some blood and asked who was bleeding. KB evidently said she was. It transpired that Mr DBL had received a cut to his finger, but not of such a scale that it called for medical treatment. He was unable to say how it was that he hurt his finger.[43]

[26] Aspects of what was said in the interview included:

(a) he thought they were getting back together so he had been "camping here for the last week or so";[44]

(b) he and KB had been in contact and "she was supporting me, she said my head wasn't right";[45]

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34 AB 116.
35 AB 118 line 45.
36 AB 120.
37 AB 121.
38 AB 122.
39 AB 98.
40 AB 102.
41 AB 102-103.
42 AB 360.
43 AB 356 lines 59 to AB 357 line 3, AB 363 line 50.
44 AB 358.
45 AB 359.

(c) he had had a "lot to drink", about three or four full wine glasses;[46] that was amended to about five glasses;[47]

(d) during the night he discovered KB and his friend having sexual intercourse in the garage;[48] he explained that was followed by a "heated discussion" in which he asked the friend to leave but he would not do so, and KB supported the friend; the friend waited until a taxi came, then left;[49]

(e) the next morning he was talking to her and she started to "say things to me, like how your dad didn't want to see you kids";[50]

(f) he hit her on the side of the face with his left hand;[51]

(g) he was asked: "And what was the reason for that?", he said "I was so enraged from last night", a reference to discovering KB and his friend having sex in the garage;[52]

(h) he was then asked: "And what, what led up to that happening?", he said "Her just carrying on as if last night was just a joke";[53]

(i) when asked a third time: "And what brought, what brought you to that point where you've hit her? What was the discussion or the argument or what was happening?", he said: "She said Daddy's sick in the head";[54] he then followed that with "How sick in the head can you be. You walked out in the garage and you see somebody stuck in somebody who you want";[55] and

(j) when asked where the hit happened, he said "I think it happened in the bathroom", and in response to the question "In the bathroom?", said "Yeah in there"; and it "happened in front of the kids".[56]

Discussion

[27] It is convenient to discuss each ground separately, and within them any relevant contentions.

The jury's question about the definition of provocation

[28] The question of provocation arose early in the trial. Its first mention was well before any evidence was called and at a point where defence counsel applied for a "no case" ruling and other matters concerning the conduct of the trial. In the process of submissions on that application, defence counsel made it clear that there was no dispute that "as far as count 1 goes, my client will admit that he did hit her".[57] At the same time, counsel said that they were raising the defence of provocation in

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46 AB 359.
47 AB 365.
48 AB 359.
49 AB 362.
50 AB 360.
51 AB 360.
52 AB 361.
53 AB 361. In context this was a reference to KB and the friend having sex in the garage the night before.
54 The transcript reveals that the original audio recording had been edited to delete a number of matters, by agreement between the prosecution and the defence: AB 15 line 36 to AB 16 line 6. No objection was taken to any part of the edited version of the recorded interview being played, and the recording became Ex 1. That meant that Mr DBL's statement to the police officer, that KB had said various things including that relevant to the provocation argument ("Daddy's sick in the head"), was admitted without objection to the fact that it was unsworn and hearsay.
55 AB 363.
56 AB 361-362.
57 AB 13 line 32.

respect of count 1.[58] At a later point in the trial, and during the course of evidence, defence counsel made it clear again that provocation was being raised in respect of count 1.[59]

[29] Later again, counsel for both sides were engaged in submissions with the learned trial judge over the question of whether, at that point, there was any evidence of provocation.[60] By then the Crown case had ended. Defence counsel made it plain that the contended provocation arose out of events inside the house on the night of 11 February 2015, when the events of count 1 occurred.[61] At that point the learned trial judge was evidently of the view that the evidence was insufficient.[62] However, the one caveat put on that was what might be heard in the police field tape.

[30] The following day, and still in the course of debate about directions, attention returned to the police field tape.[63] When the learned trial judge expressed some concern that the discussions might be premature because Mr DBL might give evidence, his counsel assured her that was not the case.[64] Defence counsel then identified that part of the tape which it was said gave rise to the defence of provocation.[65] What was relied upon was that part of the transcript at AB 363 where Mr DBL twice attributed to KB the words "Daddy's sick in the head". As debate progressed, defence counsel again made it clear that the provocation only went to count 1.[66] Defence counsel frankly acknowledged that if the jury decided that the first hit was in the bathroom, then provocation would not apply to count 1, but rather to count 5.[67] As the submissions on that issue concluded at that time, the prosecutor sought clarification that provocation would be specifically confined to the statement that "Daddy's sick in the head", and count 1 or count 5, depending on the jury's determination as to where the first hit was. That was affirmed by the judge and by defence counsel.[68]

[31] The addresses to the jury proceeded on the basis that the statement "Daddy's sick in the head" was the act giving rise to provocation.[69] The learned trial judge's summing up on this issue also directed the jury that provocation arose only in respect of count 1 or count 5, depending upon their resolution of where the hit was, but also arising out of the "Daddy's sick in the head" comment.[70] Formal directions on the defence of provocation commenced at AB 229 line 25 and continued to AB 233 line 40. The summing up consisted of a statement of the defence itself, then a breaking down into its elements including the wrongful act or insult, whether it might be likely to provoke, and whether it would deprive an ordinary person of the power of self-control. The direction then turned to the need to be satisfied that Mr DBL in fact lost his self-control as a result of the particular insult, and then whether the force used was disproportionate. The jury were reminded that the defence was only

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58 AB 13.
59 AB 93 line 35 to AB 94 line 4.
60 AB 131.
61 AB 132 line 15 to AB 133 line 2.
62 AB 133 lines 13-18.
63 AB 150.
64 AB 152 line 1.
65 AB 152 lines 10-35.
66 AB 155 lines 1-12.
67 AB 155 lines 17-39.
68 AB 159 lines 1-17. See also AB 160 lines 17-33.
69 Prosecutor's address at AB 195 lines 37-43; defence address AB 202 line 5.
70 AB 228 line 38 to AB 229 line 23.

available in respect of count 1 if the jury decided that Mr DBL was mistaken about the location of where he slapped KB when he said "I think it was in the bathroom" to the police officer. The directions then moved to the onus on the Crown to exclude provocation, and how that might be achieved.

[32] The jury retired at 3.52 pm on the third day of the trial. At about midday the next day, the trial judge received a note from the jury which contained two questions. The second question concerned the issue of provocation. According to the transcript the learned trial judge referred to it as "can we have clarification of defence of provocation".[71] A copy of the actual question shows it was "Can we have a clarification of the definition of provocation?" Plainly it was a request for clarification of the definition, as the learned trial judge referred to that shortly thereafter.[72]

[33] In the course of discussions with counsel in respect of that question, the learned trial judge quickly indicated that she was not prepared to even answer it until the jury told her what it is that they would like clarification on. Defence counsel was seemingly in agreement with that course.[73] Her Honour repeated that view a short time later with the agreement of both counsel.[74]

[34] When the jury were brought back, the learned trial judge said this:

> "Now, in respect of … question 2, I can't answer that for you because it's so broad. It's a difficult area of law, and as you saw, I broke it up for you and went through the evidence in relation to what it is you have to understand to come to a decision about the defence of provocation. So what I'll need for you to do, is you're going to have to go back and write it out what it is that you'd like clarification on, as it relates to that second question, because to be honest, I'm not sure what it is you would like to actually have me direct you on further in relation to it. Okay.
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> So if you would like to do that, or if you need any further clarification in respect of question 1, if you could write that down and I'm happy to help you further with it. Okay. All right. So I'll have you return and see that you wish to sort of make further attempt at letting me know, particularly in relation to question 2, what it is you'd like clarification on the defence of – as you put, of the definition of provocation, so that I can know what it is that you'd like to ask me. And once you tell me that, I'm more than happy to help you …"[75]

[35] The jury retired again at 12.38 pm on day four, following the learned trial judge's response. At 4.30 pm the same day, the jury returned with their verdicts, and delivered them. Nothing further was said by either counsel or the learned trial judge on the topic of question two and whether the jury needed further clarification.

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71 AB 249 line 3.
72 AB 251 lines22-23, 34; AB 261 line 17.
73 AB 249 lines 3-7; AB 257 lines 34-42.
74 AB 251 line 20 to AB 257 line 44, AB 258 line 9 to AB 260 line 10.
75 AB 261 lines 5-19.

[36] In *R v JX*[76] this Court recently examined some of the issues which arise when a jury asks for directions and those directions are not given before the verdict is taken. It was held that: (i) as a general rule, a trial judge should not take a verdict until any requests from the jury for direction have been answered as fully as possible; (ii) however, as *R v Hickey*[77] identifies, that does not mean, where a guilty verdict is taken before a jury question has been answered, it will inevitably be set aside on appeal; the question for the appellate court is whether it would be a miscarriage of justice to allow the guilty verdict to stand in the particular circumstances of that case.[78]

[37] A quick synopsis of the authorities considered in *JX* will assist the consideration of this ground.

[38] In *R v TAB*[79] the jury asked for the transcript of where the offence had occurred. The trial judge asked them whether they needed the evidence in chief, or the cross-examination as well. The jury said they wanted both. About 40 minutes later the jury let it be known they had reached a verdict. It was not known whether they had received the transcripts they asked for. On appeal the Court held that the jury had merely asked to be reminded of evidence and therefore the verdict should be respected.[80]

[39] In *Hickey* the jury considered offences involving a joint criminal enterprise. They asked this question:

> "Can we have a copy of the judge's directions given on Thursday 16 March 2000?
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> If the facts presented do not support the proposed scenario but we find that the facts support a variation of the scenario is there any point of law preventing a conviction, if the end result of both scenarios is the same?"[81]

[40] The trial judge was concerned that the questions be dealt with in the presence of the accused, even though he was legally represented. Because the accused had absented himself from the trial at that point, there was a delay in answering the jury question. The judge proposed, and counsel agreed, that the jury should clarify each of the questions asked. The jury were brought in and as to the first question they were asked to "retire to the jury room and just focus on what in particular you want to be redirected about, what area or areas that you particularly want me to direct you again on".

[41] As to the second question, the judge asked the jury to clarify the question, because she was not entirely sure what the jury were seeking clarification on. The jury then returned to the jury room.

[42] The jury sent a third question: "Can the judge please explain joint criminal enterprise?" In the absence of the jury, and still in the absence of the accused, the judge proposed redirection on that issue, with which there was no disagreement

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76 [2016] QCA 240. See also *R v Lyall* [2016] QCA 350 at [94].
77 (2002) 137 A Crim R 62; [2002] NSWCCA 474.
78 *JX* at [33] per McMurdo P, Morrison and Philippides JJA.
79 [2002] NSWCCA 274.
80 *TAB* at [72]-[73] per Levine J, Mason P and Sully J concurring.
81 *Hickey* at [22].

from the lawyers for the parties. By then, the accused still being absent, the judge had the jury informed that Court would resume the following day. Then the jury sent another note: "Three of the jurors do not want to come back tomorrow", and shortly after that yet another note: "After further discussion we have now reached a verdict". The verdicts were taken.

[43] On appeal the Court[82] held there was a miscarriage of justice because of the fact that the question asked that the judge explain principles of law that went to the heart of the offence, and also the combination of the delay in answering the questions, the failure to answer the question asked by way of clarification of the earlier questions and the return of a verdict only minutes after members of the jury had been asked to state in writing why they did not want to come back the following day.[83]

[44] In *R v Salama*[84] the jury asked "The charge on the indictment states 'Did fire a firearm with disregard for safety of Alice Salama.' Does this include accidentally?" Then, while that question was being debated between the trial judge and counsel, the jury sent a second note: "Your Honour, we have reached a verdict. Please disregard the question previously sent in." The trial judge decided to take the verdict over the objection of counsel, who asked that the question be answered first. However, having received the verdicts the trial judge then said that "before accep(ting) this verdict from you I should deal with the questions which you have put to me...". The questions were then read, answered, and the verdicts taken a second time.

[45] On appeal the Court[85] held that the first note betrayed confusion which went to the heart of the charge and should have been dealt with before the verdicts were delivered.[86]

[46] *R v Lapins*[87] involved a jury requesting a "transcript of the judge's directions to the jury". The judge informed them that it was not the practice to give a transcript but they were asked to retire again and frame the specific directions they would like re-read. Nothing more was heard from the jury and several hours later they returned a verdict without more being done. On appeal the Court[88] held that there was no breach of the general principle,[89] and that it had not been established that there was any unanswered or unresolved issue with respect to which the jury wished to have assistance.[90]

[47] *Alameddine v R*[91] involved questions of joint criminal enterprise. The central issue was identity. The jury sent a note indicating that they were having difficulty in reaching a unanimous agreement. A Black direction was given. A second note was sent, in much the same terms as the first. After that a third note was sent asking: "How much weight can be given in reference to joint criminal enterprise in regard

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82 James J, Spigelman CJ and Sully J concurring.
83 *Hickey* at [49]-[51].
84 [1999] NSWCCA 105.
85 Wood CJ at CL, Ireland and Kirby JJ.
86 *Salama* at [71].
87 (2007) 250 LSJS 136; [2007] SASC 281.
88 Gray J and Vanstone J, Duggan J concurring with each.
89 That a trial judge should not take a verdict until any requests from the jury for direction have been answered as fully as possible.
90 *Lapins* at [37]-[38], [61].
91 [2012] NSWCCA 63.

to using the DNA evidence from the interior door handle of the car to implicate the accused for robbery?"[92]

[48] The jury were asked to redraft the question to clarify what it was they were seeking. They did not do that but told the judge they "had finished deliberating", which meant, it was revealed, that they could not reach a unanimous verdict. A majority verdict was permitted and given. Ultimately no answer was given to the third question.

[49] On appeal, the Court[93] held that there had been a miscarriage of justice, essentially as the questions evidenced confusion on the part of the jury that required redirection.[94]

[50] *Salama*, *Hickey* and *Alameddine* were cases where the jury's note revealed some uncertainty in the corporate state of mind of that tribunal or confusion that went to the heart of the charge or understanding of the offences. By contrast the notes in *TAB* and *Lapins* did not ask for anything more complicated than provision of the transcript (to one degree or another).

[51] Here, the note asked for further directions on the definition of provocation, a matter which (as provocation had been left to the jury) went to the heart of the charges on counts 1 or 5 (depending on the jury's conclusion as to the occasion of the first hit). The jury were asked to clarify just what they desired in the definition of provocation. They did not do so and several hours later they brought in their verdicts, which were taken without more being said by counsel or the learned trial judge.

[52] In my respectful view, the note evidenced the possibility of uncertainty in the corporate state of mind of the jury or confusion that went to the heart of the charge or understanding of the offences. The failure to respond to the jury's request by giving the further directions sought before the acceptance of the verdicts, breached the general principle referred to in *JX*.

[53] However, that conclusion does not necessarily determine the appeal. The question remains whether there was a substantial miscarriage of justice as a result, namely whether the proviso to s 668E(1A) of the *Criminal Code* 1899 (Qld) applies. That question turns on whether the jury, acting reasonably, would have inevitably convicted.

[54] In *R v Andreassen*[95] this Court referred to the principles involved in that exercise, and adopted a passage from *Festa v The Queen*,[96] where McHugh J (Hayne J relevantly concurring) said:

> "[121] The question whether a jury, acting reasonably, would inevitably have convicted an accused ultimately falls to be determined by the relevant court according to its assessment of the facts of the case. [*Wilde v The Queen* (1988) 164 CLR 365 at 372.] The prevalence of dissenting views in cases dealing with the application of the proviso [See, eg, *R v Miller* (1980) 25 SASR 170; *Liberato v The Queen* (1985) 159 CLR 507;

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92 *Alameddine* at [36].
93 Grove AJ (McClellan CJ at CL and Johnson J agreeing).
94 *Alameddine* at [45]-[46].
95 [2005] QCA 107, at [31] per Keane J, Williams JA and Fryberg J concurring.
96 (2001) 208 CLR 593 at 631-633, [121]-[123].

Green v The Queen (1997) 191 CLR 334; *Farrell v The Queen* (1998) 194 CLR 286.] illustrates the largely subjective nature of the inquiry, resting as it does on factors such as the error alleged, the relative strength of the prosecution and defence cases and the court's characterisation of the hypothetical jury, 'acting reasonably' and properly directed. As Brennan, Dawson and Toohey JJ stated in *Wilde* [(1988) 164 CLR 365 at 373. See also *Simic v The Queen* (1980) 144 CLR 319 at 331.]:

'In the end no mechanical approach can be adopted and each case must be determined upon its own circumstances.'

[122] But one important development has occurred since this Court decided *Mraz*, *Storey*, *Driscoll* and *Wilde*. Courts of criminal appeal are now required to examine and analyse the evidence in criminal trials to a much greater extent than previously. This Court has interpreted the 'miscarriage of justice' ground of appeal as entitling a court of criminal appeal to examine the whole of the evidence and form its own opinion as to whether there is a reasonable doubt as to the accused's guilt. Even thirty years ago, such an approach would not have been contemplated. In *M* v *The Queen* [(1994) 181 CLR 487 at 494, cited and applied by Gaudron, McHugh and Gummow JJ in *Jones v The Queen* (1997) 191 CLR 439 at 451.] Mason CJ, Deane, Dawson and Toohey JJ said:

'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.'

[123] Although the term 'miscarriage of justice' appears both as ground of appeal and as part of the criterion for determining whether a conviction should stand, the issue under each provision is different. In one, the issue is whether the jury must have had a reasonable doubt; in the other, it is whether the jury must have convicted. But that said, there is no reason why the role of a court of criminal appeal should differ in deciding these issues. In examining the evidence for the purpose of applying the proviso, the court should assume that ordinarily if it thinks that the accused must be convicted, so would a reasonable jury. Speaking generally, the court's view of the evidence should prevail except where the error has so affected issues of credibility that the court cannot determine what are the primary facts of the case."

[55] Thus this Court must assess the whole of the evidence and form its own opinion on the question whether provocation was open to the jury to deny a verdict of guilt on counts 1 or 5.

[56] I am of the view that there was no substantial miscarriage of justice because the defence of provocation was not open to the jury. That is for a number of reasons.

[57] First, the case fits into the second category referred to by Keane J in *R v Corry* (there dealing with self-defence):[97]

> "…it is well-established that once it is accepted that there is evidence, however weak or tenuous it may be, on which the jury **might** find the plea of self-defence to be made out, it is for the jury to resolve any questions of fact arising in relation to that evidence. This is in contrast to cases in which there is no evidence which might establish a foundation for a reasonable apprehension of death or bodily harm in the appellant or for the proposition that the force used by the appellant was reasonably necessary for his preservation from death or bodily harm."

[58] The statements by Mr DBL to the police were not, in my respectful opinion, a sufficient evidentiary foundation upon which a jury might possibly conclude that the comment "Daddy's sick in the head" was such as to deprive an ordinary person of the power of self-control, or that it did deprive Mr DBL of self-control. The defence was based on KB's saying "Daddy's sick in the head", and nothing else. Even if that was said, and even if it was said in the course of acrimonious statements to that point as between Mr DBL and KB, and when (at least for part of the time) P was present, that statement does not qualify to deprive an ordinary person of the power of self-control.

[59] The statement has to be understood in light of what else was said. When he was asked the reason why he hit KB, Mr DBL responded "I was so enraged from last night", then almost immediately he was asked what led to the hitting and he said "Her just carrying on as if last night was just a joke". The statement relied upon was given in answer to a question "What was the discussion or the argument or what was happening?" In those circumstances the triggering event for any loss of self-control was his anger, ongoing from the night before, that his ex-partner had sex with his friend. Seen in context Mr DBL's reference to "Daddy's sick in the head" does not say anything at all, expressly or by implication, about his loss of control.

[60] Secondly, the defence was put squarely on the footing that the provocation was KB's saying "Daddy's sick in the head", and nothing else. There was no controversy that the sequence of events was that: (i) KB and Mr DBL were outside on the patio, having a heated discussion about their relationship, and what had happened between KB and the friend the night before; (ii) they then moved inside; (iii) Mr DBL made accusations against KB, including that she was a whore, and something about "a big dick up [her] arse";[98] (iv) KB and Mr DBL were close

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97 [2005] QCA 87 at [28]; adopted in *Andreassen* at [27].

98 Given his evident disgust at finding KB and his friend the previous night, having sexual intercourse in the garage, and the statement to the police that he was "so enraged from the night before", the jury may well have accepted that he made comments of the nature KB described.

enough to be in striking range;[99] (v) P was there; and (vi) at that point Mr DBL hit her.[100] In the circumstances, including that Mr DBL was evidently adversely affected by alcohol and enraged from the night before, it is impossible to accept that the words "Daddy's sick in the head" would have deprived him of self-control.

[61] When Mr DBL was first asked for the reason why he hit KB he said "I was just so enraged from the night before", a reference to when he discovered KB and his friend having sex in the garage. That rage was expressed a number of times during the interview, suggesting that it was that, if anything, which led to the hitting. Thus, when asked the second time, about "what led to [the hit]", he said "Her just carrying on as if last night was just a joke". Then the third time, asked about what was occurring beforehand in the sense of what brought him to the point where he hit KB, he said "She said Daddy's sick in the head", but the context then was referrable to the events of the night before.[101] That series of responses suggests that the real trigger for the hitting was Mr DBL's reaction to discovering KB and his friend having sex the night before.

[62] Thirdly, in her evidence KB said nothing akin to saying "Daddy's sick in the head", and it was not put to her that she did. Indeed, the only thing close to that in the police interview was that she had previously said to him that his "heads not right",[102] and that was not put to her either.

[63] Fourthly, the jury had to grapple with the admission made by Mr DBL, as to the first time he hit KB. That admission was made in respect of count 1, the hitting in the lounge, on the basis that he was mistaken when he told the police that it was "in the bathroom". But it was accepted that the jury might reject that and find that the first hit was in the bathroom.

[64] However, the only evidence to support a positive conclusion that he might have made a mistake was derived from KB's account, in that she said the first hit was in the lounge. Of course, the jury could have rejected her evidence on that point but still formed the view that Mr DBL's account was mistaken, for example because his memory was affected by intoxication. So, there were two paths to the jury's accepting that Mr DBL made a mistake. One was by accepting KB's evidence as to where the first hit was made. The other was by attributing a mistake to Mr DBL on the basis of faulty recall. Either way would only serve to erode the jury's ability to rationally conclude that Mr DBL lost control in the same way an ordinary person would.

[65] Fifthly, part of the consideration of provocation required that the response be proportionate to the provoking conduct. On no rational view could it be concluded that hitting KB at all, let alone repeatedly in several locations in the house, was a proportionate response to her saying "Daddy's sick in the head".

[66] Whilst provocation was left to the jury, that that was, in my respectful opinion, an error in favour of Mr DBL. It did not lead to a miscarriage of justice.

Adequacy of the direction on provocation

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99 Mr DBL's case was that KB was "in his face".

100 The only point at which the defence case put that that KB was "in his face" was in the lounge room after they had moved inside.

101 See paragraph [26](d)-(i) above.

102 See paragraph [26](b) above.

[67] Mr DBL contends that the direction given on provocation was too narrow for this particular case. The submission is that whilst the Judge directed that provocation had to be strong enough for the average person to lose control and the reaction had to be immediate, reference should have been made to the build-up of circumstances over the previous 12 months, and the complications of children spending time with Mr DBL, because those matters may well have lowered his threshold of self-control.

[68] Consideration of this ground must be undertaken while bearing in mind that KB's evidence did not suggest that there were more than the usual difficulties between separated couples in the 12 months leading up to this particular night. Mr DBL had gone interstate searching for work once the couple separated, and whilst he had not seen his children as much as he would have liked, her evidence did not suggest that she was putting particular obstacles in his way. Further, Mr DBL chose not to give evidence himself. That meant that such complaints as there were about the pressures of the previous 12 months were made by him in an unsworn State interview, and whilst intoxicated and enraged by the discovery of KB having sexual intercourse with his friend. Those circumstances may well have led to the jury to view the complaints with a degree of scepticism.

[69] In the course of the direction on provocation, the learned trial judge was careful to identify a number of specific matters that the jury were required to observe:

(a) whilst they had to consider whether the particular act or insult was such as likely to provoke an ordinary person, with ordinary human weaknesses and emotions common to all members of the community, they must, in addition, consider whether that act or insult induced Mr DBL himself to assault the complainant;[103]

(b) the jury were specifically told that they were not to look at that matter in isolation; "you have to consider the gravity of the provocation that's given to the particular defendant";[104]

(c) the jury were reminded about the points made by counsel for Mr DBL, which included reference to what had taken place immediately before on the patio, what had happened in the garage the night before and the need to view the words "Daddy's sick in the head", not in isolation, but "look at the relationship between the parties; conduct that might not be insulting to one particular person, for example, may be extremely insulting to another person, simply because of personal relationships, past history between the parties, the circumstances of what happened in the past";[105] and

(d) if that were not clear enough, the learned sentencing judge went on to direct the jury that they must "look at it in light of any history of disputation that had been happening between the defendant, Mr DBL, and the complainant …".[106]

[70] In my view, those directions were sufficient to adequately instruct the jury in respect of Mr DBL's particular position on the issue of provocation. I do not consider there is any merit in this point.

Inconsistent verdicts

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103 AB 230 lines 7-24.
104 AB 230 line 25.
105 AB 231 lines 19-26.
106 AB 231 lines 30-31.

[71] The learned trial judge gave careful directions that each count was to be considered separately, and the jury were entitled to reach different verdicts on different counts. In addition, a Markuleski direction was given.[107]

[72] In *MacKenzie v The Queen*[108], Gaudron, Gummow and Kirby JJ held that the test where inconsistency is alleged is one of "logic and reasonableness":

> "… if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury."[109]

[73] Various matters of principle have been settled about the assessment by an appellate court of the issue of inconsistent verdicts. They include:[110]

(a) the appellate court needs to be persuaded that the different verdicts are an affront to logic and common sense which is unacceptable, and which strongly suggests a compromise in the performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or an uncertainty about legal differences between the offences, or a lack of clarity in the instruction on the applicable law;

(b) as the test is one of logic and reasonableness, the question is whether the court is satisfied that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts;

(c) appellate courts should be reluctant to accept a submission that verdicts are inconsistent if there is a proper way by which an appellate court can reconcile the verdicts, allowing the court to conclude that the jury performed its function;

(d) different verdicts, claimed to be inconsistent, may reveal only that a jury followed instructions to consider each count separately, and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt;

(e) verdicts of guilty and acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict of guilty, which they did;

(f) a jury might find the quality of a crucial witness's evidence variable, even though it is accepted as generally truthful; some aspect of the evidence might point to faulty recollection on some points, or exaggeration on others, or an inherent unlikelihood about some aspect of the evidence, all of which casts doubt on the accuracy in those respects, but not of the witness's general honesty;

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107 AB 224.

108 (1996) 190 CLR 348; [1996] HCA 35.

109 *MacKenzie* at 367; internal footnotes omitted.

110 *R v CX* [2006] QCA 409 at [33]; *R v Smillie* (2002) 134 A Crim R 100; [2002] QCA 341 at [28]; *R v SBL* [2009] QCA 130 at [28]-[34].

(g) in some cases it is possible that in respect of some counts there might be contradictory evidence which does not apply to other counts, and thus explains the variation in the verdicts; and

(h) it may be in some cases that the different verdicts are explicable on the basis that there was corroboration in respect of some counts, but not others.

[74] In this particular case, there were obvious reasons why counts 1, 3 and 5 might have resulted in a guilty verdict, whereas counts 2 and 4 did not. First, the defence case was run on the basis that there was an admission of KB being hit in respect of count 1. No such admission was made in respect of any other count. However, the case was conducted by the defence on the basis that Mr DBL's reference to where the first hit occurred, namely in the bathroom, was a mistake. If the jury came to the view that the first hit was in the bathroom, then the admission applied to count 5.

[75] Secondly, there was evidence of blood stains in the ensuite bathroom, and therefore potential corroboration for count 5. No such evidence applied to counts 2 and 4.

[76] Thirdly, counts 2 and 4 were the only counts where the particulars had a violent attack occurring in a child's bathroom. In the case of count 2, KB's evidence was that it occurred while she was lying next to P, and on P's bed. In the case of count 4, her evidence was that Mr DBL was standing beside the bed while he was kicking her. The jury may well have had some doubt as to whether, whatever Mr DBL's motivation on the night, he was likely to have perpetrated an attack in such close proximity to individual children, and in their bedroom.

[77] Fourthly, insofar as count 4 was concerned, KB's evidence was that she was repeatedly kicked in her lower back whilst she lay in a foetal position. Yet there was no evidence to support the level of bruising that one might expect had a violent kicking episode occurred in that way. The jury might well have thought that the absence of that evidence told against KB's account of this particular event.

[78] Fifthly, so far as count 3 is concerned, there was objective evidence of injuries supporting acceptance of KB's version of events. She complained of cuts to her lips, and both the police officer and ambulance officer noticed that her lip was swollen. In addition, Dr Randall found several lip abrasions, bruising to the upper right arm and a swelling to the nostril. That evidence supported count 3 as well as count 5, but less so count 4.

[79] In my view, there is no merit in this ground.

Unreasonable verdicts

[80] Mr DBL contends that the convictions are unreasonable and cannot be supported by having regard to the evidence. Given that contention, *SKA v The Queen*[111] requires that this Court perform an independent examination of the whole of the evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any of the counts, beyond reasonable doubt. It is also clear that in performing that exercise, this Court must have proper regard for the pre-eminent position that the jury holds, as arbiter of fact.[112]

[81] In *M v The Queen* the High Court held:

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111 (2011) 243 CLR 400, at [20]-[22].

112 *M v The Queen* (1994) 181 CLR 487, at 493; *The Queen v Baden-Clay* [2016] HCA 35, at [65]-[66].

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks of probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."[113]

[82] In this case, Mr DBL's defence was that one hit[114] was all that occurred, and there was no assault otherwise. KB's evidence was to the contrary, and there was a body of evidence which supported acceptance of her version of events. First, there was evidence of blood smears in the ensuite, and an injury to Mr DBL's thumb. It was not suggested that the acrimonious interaction between KB and Mr DBL started anywhere but in the lounge room. Indeed, the defence case was that when Mr DBL nominated the bathroom, in the course of his police interview, as the first point of hitting KB, he was mistaken in that regard. Plainly, a jury could have come to the view that there was an assault in the lounge room (count 1) as well as an assault in the bathroom (count 5), given the fact that blood was found in the bathroom.

[83] Secondly, KB had injuries which were consistent with her recitation of events. Those injuries were seen by the police officer and ambulance officer, and detected by Dr Randall. They included abrasions to her lip, bruising on the upper right arm and a swelling to the nostril. The jury may well have concluded that those injuries, and the extent of them, were inconsistent with a single slap in the lounge room, and therefore supportive of the credibility and reliability of KB's evidence.

[84] Thirdly, the jury knew that KB's friend had called the police, based upon what KB had told her. Although more tenuous than the evidence of injury, the jury could have reasoned that whatever was said went beyond a single slap.

[85] Fourthly, the jury had admissions from Mr DBL in the police field interview. They were that he had hit her to the side of the face. When first asked the reason for doing so he did not mention any contemporaneous conduct on the part of KB, but rather "I was so enraged from last night", a reference to having discovered KB and his friend having sexual intercourse in the garage the night before. When asked a second time as to what led to the assault, his answer was "her just carrying on as if last night was a joke". Finally, when Mr DBL referred to the assault as happening in the ensuite, he volunteered that it "happened in front of the kids". The jury may well have considered those matters were ones which supported acceptance of KB's evidence that she was assaulted in front of the children, in more than one place, as being credible and reliable.

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113 *M v The Queen* at 494.

114 Whether that was in the lounge as per count 1, or in the bathroom as per count 5.

[86] It needs to be mentioned, of course, that the jury had the considerable benefit of seeing and hearing KB give evidence, which this Court has not enjoyed. That is the very aspect which requires this Court to give due consideration to the pre-eminent position of the jury as arbiter of fact. When one examines KB's evidence, there is nothing upon the record itself which suggests that the evidence is tainted or lacks probative force. Even in the face of what must have been embarrassing personal revelations,[115] KB maintained her composure and gave her evidence (at least so far as the record reveals) in a measured and consistent way. Except where it was not supported by injuries sustained or medical evidence,[116] I can discern no reason why it was not open to the jury to accept it.

[87] In my view, it was open to the jury to accept KB's evidence, supported as it was in material ways, and thereby conclude that Mr DBL was guilty on counts 1, 3 and 5. I do not consider that there is a significant possibility that an innocent person has been convicted.

Altering the indictments

[88] Mr DBL's complaint here is that the indictments were amended in respect of counts 4 and 5 to remove the element of "occasioning bodily harm". The amendment was the consequence of a ruling by the learned trial judge that there was insufficient evidence, on those counts, to consider the element of bodily harm.[117] That ruling was to Mr DBL's benefit.

[89] The jury were informed of the amendment and what it meant in terms of their deliberations.[118] Then, at the commencement of the summing up, the jury were cautioned that they should not speculate as to why that element was removed from counts 4 and 5. When it came to count 3, the one remaining count that included the element of bodily harm, the jury were specifically directed that they needed to be satisfied as to all of the elements of that count, beyond a reasonable doubt.[119] I do not consider that the jury would have misunderstood their task or been confused, given the clear directions they received from the learned trial judge. There is no reason to conclude that the jury would not have followed the directions they were given.

[90] There is no merit in this ground.

Undertaking re domestic violence and ambulance report

[91] An undertaking was given that there would be no mention of domestic violence. It seems that phrase was used in the prosecution's opening, but by reference to the police officers who attended at the scene.[120] When Constable Douglas was called, his evidence was that they were directed to attend the house "in relation to a domestic disturbance", and that upon entry to the house he advised the people inside that "we were there investigating domestic violence … that the persons were detained under the *Domestic Family Violence Act* …"[121]. Similar evidence was given by

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115 Being caught having sexual intercourse on a deep freezer in the garage.
116 Such as to support the allegation of having been kicked in the stomach or multiple times in the back.
117 AB 143-144, 148 and 168.
118 AB 192.
119 AB 291 line 25-AB 221 line 6.
120 AB 43 lines 9-22.
121 AB 120 lines 16-27.

Constable Mills, who said they had received a call out to a domestic violence incident.[122]

[92] Objection was not taken to that evidence. That position was consistent with the stance taken by defence counsel when he raised the issue after the opening by the prosecution. Counsel was content if any references to domestic violence were limited to the understanding of the attending police officers as reflected in the field recording. That is, the case as revealed by the evidence of the police officers themselves.

[93] The phrase "domestic violence" was used in the prosecution's address,[123] and also by counsel for the defence.[124] Similarly, it was used by the learned trial judge in the summing up.[125]

[94] The circumstances revealed by the evidence in the case were plainly ones of domestic violence. In the context of the evidence, it is no surprise that the phrase was used in the way it was. There cannot be any credible suggestion that the jury was somehow influenced by the use of that phrase as opposed to a rational assessment of the evidence.

[95] As for the ambulance report, Mr DBL contended that there was an undertaking that the report would be tendered into evidence. His submission was that this would have been a very important tool for the jury to assess KB's injuries on the actual night, rather than having to rely on their memory.

[96] There is no merit in this point. The ambulance officer was called and in the course of cross-examination, was asked to answer by reference to the report.[126] The report did not deal with anything of a complicated medical nature. In my view, the jury lost nothing by the process which was followed, as opposed to having the report itself tendered as an exhibit, and no miscarriage of justice resulted.

[97] These grounds are without merit.

Disposition of the appeal

[98] For the reasons given above I would dismiss the appeal.

[99] **BODDICE J:** I agree with Morrison JA that the appeal should be dismissed.

[100] **DALTON J:** I agree with the order proposed by Morrison JA.

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122 AB 122.
123 AB 194, AB 197.
124 AB 204.
125 AB 218.
126 AB 117-118.