SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lawrence* [2017] QCA 106
PARTIES:	**R** **v** **LAWRENCE, Michael Jason** (appellant/applicant)
FILE NO/S:	CA No 301 of 2016 CA No 21 of 2017 DC No 166 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Rockhampton – Date of Conviction & Sentence: 14 October 2016
DELIVERED ON:	Orders delivered ex tempore 19 May 2017 Reasons delivered 30 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2017
JUDGES:	Fraser and Philippides JJA and Boddice J Joint reasons for judgment of Fraser JA and Boddice J; separate reasons of Philippides JA, concurring as to the orders made
ORDERS:	**Delivered ex tempore on 19 May 2017:** **1. The appeal against conviction is dismissed.** **2. An extension of time in which to seek leave to appeal the sentence is granted.** **3. Leave to appeal against the sentence is granted.** **4. The sentence imposed is altered to the extent that the word "eligibility" is deleted and the word "release" inserted in lieu thereof.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after trial by jury of one count of serious assault – where the appellant spat on a police officer – where the appellant had been acting violently and verbally abused ambulance and police officers – where the complainant officer, two additional police officers and one ambulance officer gave evidence – where the only evidence of the appellant spitting came from the complainant officer – whether there were significant discrepancies in the evidence –

whether on the evidence as a whole it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted after trial of one count of serious assault – where the appellant spat on a police officer – where the appellant submitted that the police officer was not acting in the execution of his duty as he had consented to a fight with the appellant – where the trial judge directed the jury as to the absence of consent being an element of an assault – where the trial judge directed that the jury must be satisfied beyond reasonable doubt that the complainant officer was acting lawfully in the execution of his duty – where the trial judge did not specifically direct the jury as to consent in relation to whether the complainant officer was acting in the execution of his duty – whether the trial judge erred in not directing the jury on consent

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was restrained on the ground during an altercation with police – where a police officer gave evidence that the appellant was not arrested but was "detained" under the *Mental Health Act* 2016 (Qld) – where the appellant was arrested for serious assault the following day – where the appellant submitted that the trial judge erred in leaving the jury to consider s 365 *Police Powers and Responsibilities Act* 2000 (Qld) (PPRA) as the appellant could not have been arrested during the altercation as he was arrested the following day – where the jury may have used s 365 PPRA to justify the use of force by police – whether the jury could be satisfied that the appellant was under arrest – whether the trial judge erred by directing the jury in relation to s 365 PPRA

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – where the appellant was sentenced to 12 months imprisonment with a parole eligibility date fixed at 11 April 2017 – where the offence was not a sexual offence or a serious violent offence – where it was unclear why the sentencing judge imposed a parole eligibility date rather than a parole release date – where the respondent accepted that a fixed parole release date ought to have been given – whether the Court can correct the error

Criminal Code (Qld), s 668E(1)
Penalties and Sentences Act 1992 (Qld), s 160D, s 161A, s 161B, s 188
Police Powers and Responsibilities Act 2000 (Qld), s 52, s 365

Horan v F [1995] 2 Qd R 490; [1994] QCA 375, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied

Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, cited
R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, applied
R v Clapham [2017] QCA 99, cited
R v SCH [2015] QCA 38, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: L C Falcongreen for the appellant/applicant
D R Balic for the respondent

SOLICITORS: Legal Aid Queensland for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA and BODDICE J:** On 14 October 2016, a jury found the appellant guilty of serious assault with a circumstance of aggravation, namely that he had assaulted a police officer whilst that officer was acting in the execution of his duty. The assault involved spitting upon the police officer. The appellant was sentenced to 12 months imprisonment with a parole eligibility date after serving six months of that sentence.

[2] The appellant appealed his conviction and seeks an extension of time within which to bring an application for leave to appeal his sentence. On 19 May 2017, the Court pronounced orders dismissing the appeal against conviction, granting the extension and allowing the appeal against sentence to the extent that the appellant was granted a parole release date after six months.

[3] We have had the advantage of reading in draft the reasons of Philippides JA. These are our reasons for agreeing in the orders.

Conviction

[4] Three grounds of appeal were relied upon in respect of the appeal against conviction. First, the verdict was unreasonable and not supported by the evidence. Second, the trial Judge erred in failing to direct the jury about consent to fight. Third, the trial Judge erred by directing the jury in relation to a police officer's power to arrest without warrant pursuant to s 365 of the *Police Powers and Responsibilities Act* 2000 (Qld).

[5] The principles applicable under the first ground were recently re-stated in *R v Clapham*:[1]

> "The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted.

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1 [2017] QCA 99 at [4]-[5].

> In considering this ground of appeal the "starting point … is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses", but:
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> > "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."
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> In *R v Baden-Clay* the High Court emphasised that the jury is "the constitutional tribunal for deciding issues of fact" and observed that, "the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial", "a court of criminal appeal is not to substitute trial by an appeal court for trial by jury", and "the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'." (citations omitted)

[6] Whilst there were inconsistencies in the accounts given by the ambulance officer, Eaton, and the various police officers who attended the incident, there was evidence given by the complainant officer that he heard the appellant "hark" before seeing the appellant turn towards him and blow air and spit toward the complainant officer's mouth.[2] The complainant officer did not resile from that evidence in cross-examination.[3]

[7] Further, although the other officers present at the time did not give evidence of seeing the appellant spit at the complainant officer, one of the officers, Fitzpatrick, gave evidence of hearing a hocking sound coming from the appellant,[4] and that immediately thereafter he heard the complainant officer say he had been spat upon.[5] Two other officers, Jackson and Houseman, also gave evidence of hearing the complainant officer say that the appellant had spat upon him.[6] That evidence, if accepted by the jury, amply supported the appellant's conviction of the offence.

[8] The inconsistencies referred to by the appellant were no more than the general discrepancies you would expect would occur between witnesses giving evidence of a heated altercation which had occurred some time previously. Further, there was a specific explanation for the failure of the ambulance officer, Eaton, to observe such an incident. He was obtaining equipment from the ambulance.[7]

[9] The resolution of any inconsistencies was appropriately a matter for the jury, given its central place in the administration of criminal justice.[8] Nothing in those inconsistencies

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2 AB 91/35.
3 AB 120/5-30.
4 AB 56/15.
5 AB 72/25.
6 AB 140/5 (Jackson); 159/15 (Houseman).
7 AB 40/5-25.
8 *R v Baden-Clay* (2016) 334 ALR 234 at [65]-[66].

prevented the jury from properly being able to accept the reliability and credibility of those witnesses' evidence in respect of the allegation that the appellant had spat upon the complainant officer.

[10] Once the jury accepted the reliability and credibility of that evidence, it was reasonably open to the jury, upon the whole of the evidence to be satisfied beyond reasonable doubt that the appellant was guilty of the offence. The first ground therefore is not made out.

[11] We agree with the conclusions reached by Philippides JA in relation to the remaining grounds of appeal against conviction.

Sentence

[12] The application for leave to appeal against sentence related to a legal error made by the sentencing Judge, by reason of incorrect submissions in relation to an inability to impose a parole release date as opposed to a parole eligibility date.

[13] For the reasons given by Philippides JA, we agree the appellant should be granted an extension of time within which to seek leave to appeal the sentence, that leave to appeal the sentence should be granted, and the sentence imposed be altered to insert the word "release" in lieu of the word "eligibility".

[14] **PHILIPPIDES JA:** The following are my reasons for joining in the orders made on 19 May 2017.

[15] The appellant appeals against his conviction on one count of serious assault with a circumstance of aggravation; namely, that on 19 May 2015 the appellant assaulted police officer Alexander McBroom (the complainant officer), while he was acting in the execution of his duty, and that, during the course of that assault, the appellant spat upon him.

[16] At the hearing, the appellant was granted leave to amend the Notice of Appeal to substitute the following grounds of appeal:

1. The verdict was unreasonable and cannot be supported by evidence.
2. The trial judge erred by failing to direct the jury about consent to fight.
3. The trial judge erred by directing the jury in relation to s 365 of the *Police Powers and Responsibilities Act* Qld (2000) (the PPRA) (as to the power to arrest without warrant).

Circumstances of the offending

[17] On the morning of 19 May 2015, two ambulance officers were called to attend to the appellant who had reportedly taken a large quantity of antidepressant medication and was in an agitated state. Mr Eaton, an attending paramedic, wanted to give the appellant benzodiazepine to calm him down and assist in his management.

[18] Police officer Fitzpatrick initially also attended and was later joined by police officers McBroom, Jackson and Houseman who attended to assist after his call for backup. They dealt with the appellant at the scene. The appellant was variously described by the police officers as disorientated, walking around, confrontational, agitated and argumentative. After a period of time, the appellant agreed to allow the benzodiazepine to be administered. After the drug was administered, a physical altercation broke out

between the appellant and the complainant officer. Other officers became involved during this altercation.

[19] The case against the appellant was that at some point before the appellant was handcuffed, the appellant spat on the complainant officer. Once he was effectively restrained, the appellant was transported by ambulance to the Biloela Hospital. The next day, after he was released from hospital, he was arrested for the offence of which he was convicted.

The evidence

[20] The appellant's submissions contained a recital of the evidence, none of which was disputed by the respondent who referred to some additional uncontroversial evidence in its submissions. The appellant neither gave nor called any evidence in his defence.

Mr Eaton

[21] The ambulance officer, Mr Eaton, gave evidence that the call to the ambulance was coded "drug overdose". When he and a fellow officer attended, the woman who had called the ambulance gave him a packet which contained antidepressant medication. Mr Eaton went to the back of the house where the appellant was sitting down. The appellant was agitated upon seeing them. He got up immediately and walked towards the ambulance officers "very, very quickly". This startled Mr Eaton and caused him to drop his equipment and step back. Once the ambulance officers had moved back, the appellant walked past to the front of the property. The appellant was very argumentative. Police officers also arrived at the property.

[22] The ambulance officers became concerned about the appellant's state of agitation and made a decision to administer a drug to calm the appellant and assist in managing him. After initial resistance, the appellant complied and was injected. Mr Eaton gave evidence that, after administering the medication (by intramuscular injection to the left upper arm), he retracted the needle and "moved away hastily" towards the ambulance. He did not recall the appellant saying anything to him or making any action toward him after the injection.

[23] Mr Eaton returned to the ambulance to draw up a second dosage. Mr Eaton heard a scuffle and yelling going on behind him, but did not recall any of the words that were said. He walked back to find the appellant handcuffed on the ground. There was a five minute time interval between the first injection and his return with the second injection. The appellant was placed onto a stretcher. He had an insignificant graze on his forehead. He had become calmer and compliant. Mr Eaton could not say whether that was because of the effect of the drug or being handcuffed. In any event, the second injection was not administered and the appellant was put inside the ambulance and transported to hospital.

[24] According to Mr Eaton, the appellant became more agitated when the police arrived. He and the police officers were trying to assure the appellant that they were all trying to help him. Mr Eaton's evidence was that the police officers were trying to calm the situation. Mr Eaton recalled that the appellant did speak to him but he could not recall specifically what was said.

Officer Fitzpatrick

[25] Officer Fitzpatrick's evidence was that when he arrived, the appellant was standing in the middle of the road, looking disorientated and was swaying. He was obstructing

traffic, with cars swerving to avoid him. Officer Fitzpatrick went towards him and told him to get off the road. It was clear he wanted to escape from police. The appellant was argumentative and confrontational and had to be physically removed from the roadway.

[26] Officer Fitzpatrick then detained the appellant for the purposes of transportation to hospital but he continued to be verbally aggressive. The police officers had formed the view that the appellant should go to hospital because of the concern over a prescription medicine overdose. The appellant was verbally abusive and asked the officer whether or not he was under arrest. Officer Fitzpatrick was trying to reason with the appellant who was yelling and shouting and pacing up and down the footpath. Quite often he tried to leave the scene which required the Officer Fitzpatrick to block his path. The ambulance officers were trying to negotiate with the appellant to be injected to assist with calming him down. The appellant informed them prior to the injection that benzodiazepines do not calm him down but have the opposite effect. Officer Fitzpatrick called for some back up. He estimated that the exchanges took place for up to 40 minutes.

[27] Police officers McBroom, Jackson and Housman attended in response to Officer Fitzpatrick's call for assistance. The appellant became more agitated after they arrived. Officer Jackson indicated that police information revealed that the appellant may have had hepatitis C. The officers moved around the appellant and positioned themselves so that the appellant was contained between them and the ambulance vehicle. A point was reached when Mr Eaton was able to convince the appellant to accept the benzodiazepine injection.

[28] Officer Fitzpatrick's evidence was that after Mr Eaton injected the appellant, the ambulance officer stood with an uncapped syringe and the appellant said to Mr Eaton, "Did I scare you cunt?" Officer Fitzpatrick said that at that stage, the complainant officer intervened and stood between Mr Eaton and the appellant and had words with him, basically as to the appellant's behaviour and how nicely he had been treated by the ambulance officer. The appellant then said to the complainant officer, "Do you want to have a go" and "Take your gun and your badge off and we'll see how good you are". The complainant officer responded by saying, "Well I don't have one" and put his hands up. Officer Fitzpatrick described the intervention as the complainant officer taking a "high risk position". Officer Fitzpatrick said both the appellant and the complainant officer were in a sort of boxing stance towards each other. Both parties were swearing at each other.

[29] After about 10 seconds, the complainant officer then moved forward and grabbed the appellant by the base of the neck or throat and drove him back towards a fence. Punches were thrown between the two. They both fell to the ground, where they continued to throw punches.

[30] The appellant had his hands up first in a boxing stance. It was not clear that the complainant officer in fact grabbed him as opposed to moving forward to grab him. He recalled the officer put his hand at the base of the appellant's neck, probably around his collarbone. It took all of the police officers to restrain the appellant.

[31] At some time on the ground, whilst punches were being thrown, Officer Fitzpatrick recalled hearing a hocking sound. Immediately after this, the complainant officer yelled, "spit at fucking me" and maybe "you fucking cunt". Officer Fitzpatrick said

he did not see a spit and gave no evidence of being able to see or hear a spit (other than a hocking sound). The hocking sound he heard in fact was in the context of the struggle. He heard that it came from the appellant; immediately after that, he heard the officer talk about the spit. He himself put his knee to the side of the appellant's cheek as he was concerned that he was going to be spat upon.

[32] When the appellant and the complainant officer were on the ground, Officers Houseman and Fitzpatrick assisted in restraining the appellant. Officer Fitzpatrick, whilst applying handcuffs, noticed that the appellant had blood in his mouth.

[33] Officer Fitzpatrick's evidence was that there was no accompanying gesture by the appellant towards Mr Eaton when the appellant said the words "Did I scare you cunt?" but that the appellant did pull back when the needle was inserted, like a reaction to a pin prick, which then caused the ambulance officer to pull back or flinch. He observed the injection from no more than a couple of metres away.

[34] Officer Fitzpatrick stated that the appellant was not arrested whilst handcuffed on the ground; rather, he was detained under the *Mental Health Act* 2016 (Qld) (the MHA). The appellant asked if he was under arrest and Officer Fitzpatrick said "not at this stage" and informed the appellant that if he needed to arrest him that it would be for public nuisance. The arrest took place the following day at the appellant's solicitor's office.

The complainant officer

[35] The complainant officer gave evidence that he had attended the scene to assist Officer Fitzpatrick who had called for backup in relation to an aggressive male person.

[36] Upon attendance the appellant seemed very agitated and aggressive and was assuming confrontational or fighting-type stances. He noticed that the appellant appeared agitated and very angry. Mr Eaton was telling the appellant to calm down and that he was there to help him.

[37] The complainant officer did not have a baton, capsicum spray, handcuffs or a firearm with him. He had a badge affixed to his belt which was visible.

[38] He spoke to the appellant and told him that as soon as the paramedic had administered the injection, the appellant could go. After he agreed to be injected, the appellant stated, "wait and see what happens now". The appellant was then injected inside the forearm/elbow area. The complainant officer stated that at the point the syringe was retracted, the appellant raised and pulled back his right clenched fist to beside his shoulder and feigned a punch to the paramedic and said, "You want to have a go cunt?" The complainant officer said he was standing very close to Mr Eaton and that Mr Eaton visibly flinched. There was an exposed syringe in Mr Eaton's right hand and his hand "was certainly being waved around, and he was visibly scared". The complainant officer gave evidence that he could still see both the needle and the syringe. He believed Mr Eaton felt threatened and he was mindful of the appellant coming into possession of the syringe. He stated that Mr Eaton seemed frozen in his position.

[39] The complainant officer said, "That's enough" and walked towards the appellant. The appellant said, "Do you want to have a go cunt?" The complainant officer pushed him back towards the fence with two open palmed hands to the chest. The appellant then took a fighting stance and said, "You're boxing me in, you're caging me in". He

then formed what the complainant officer thought was spit in his mouth, by pursing his lips, and he formed the belief that he would spit on him. He placed both hands around the appellant's jaw and neck and tried to turn him to the left. He tried to propel the appellant to the ground but that did not occur. Whilst they were both standing with the complainant officer's hand behind the appellant's neck, he heard the appellant "hark" what he thought was phlegm from his throat.

[40] The reason the complainant officer placed his hands on the appellant was his belief that he was going to be spat upon. He continued being mindful of his face and his ability to spit, even in the context of the physical altercation.

[41] As the complainant officer was still looking down, he saw the appellant turn his face towards him and he heard a blow of air and felt warm spit go across the side of his face down the jawline towards his mouth.

[42] The complainant officer said, "you spat on me you piece of shit" and he continued to try and put the appellant on the ground. Numerous punches were exchanged and then both parties fell to the grass.

[43] Officer Fitzpatrick assisted to restrain the appellant. The complainant officer stated that the appellant was "detained, arrested, at that point in time". He stated that he was aware that it was necessary to advise a person as soon as practical that he was under arrest and of the nature of the arrest; however, he was not the investigating officer so he never said the words to the appellant. He stated that he believed the appellant was being arrested for the assault on him.

[44] The complainant officer stated in cross-examination that when he first intervened following the injection, he believed the appellant was going to strike the paramedic and that he could therefore intervene and arrest him at that point. The complainant officer's evidence was that he only punched the appellant in response to an uppercut by the appellant. The intention was to place him on the ground and remove him as a threat. He denied that he had said to the appellant words to the effect, "Do you want to have a go, Mick? Fucking hit me, cunt".

Officer Jackson

[45] Officer Jackson gave evidence that, when he arrived at the scene, the appellant seemed quite agitated. The appellant eventually agreed to receive an injection and extended his left arm. He saw the appellant quickly pull back his injected left arm (probably not past his body) after the needle went in and saw that Mr Eaton got a bit of a fright from this and withdrew really quickly to the ambulance. Then the appellant said, "Did I scare you cunt?" He stated that he was standing quite close to where Mr Eaton was at the relevant time.

[46] Officer Jackson stated that, following this, the complainant officer approached the appellant and said, "Settle down mate". The appellant raised his clenched fists up in a fighting stance and said something to the effect of, "do you want to have a go" or "take off your gun and your badge and we'll have a go". The complainant officer put his arms up and approached the appellant and pushed him in the upper chest/neck/shoulder area.

[47] After the complainant officer pushed the appellant away, the latter hit the officer in the chest area, striking him a couple of times. He heard the officers telling the appellant to stop resisting and to settle down and that the appellant was being abusive and was yelling.

[48] The appellant then started to struggle and Officer Jackson started to move back towards the appellant. He observed a female person at this stage come running across the road. From this point on his attention was solely focused upon dealing with this female person. The next time he saw the appellant was when he was on the stretcher being put into the back of the ambulance.

[49] Whilst observing the struggle, he recalled hearing the complainant officer say, "you piece of shit you spat on me". He did not hear anything specific before or after that point. He did not hear the appellant make any other sounds.

Officer Houseman

[50] Officer Houseman gave evidence that when he attended the scene the appellant appeared agitated and aggressive. He spoke to Mr Eaton and was advised by him that Mr Eaton wished to do an involuntary mental health assessment of the appellant. In reference to the administering of the sedative, he recalled the appellant saying, "go ahead give it to me and see what happens cunt". The appellant presented his arm for the injection but still appeared aggressive. As the paramedic withdrew the syringe, the appellant flinched and Mr Eaton flinched backwards. The flinch towards the paramedic was described as an aggressive move. He was concerned for the paramedic's safety.

[51] The appellant stated, "look at you mate, you're scared, you want a fucking go". Officer Houseman was, at this stage, six metres away in the vicinity of the complainant officer. He believed an assault upon Mr Eaton was imminent, so he commenced moving forward. He heard the complainant officer say, "that's enough". The appellant replied, "who the fuck are you, do you want a fucking go". The appellant was in a boxing stance.

[52] As the complainant officer and Officer Houseman approached, Mr Eaton had slowly started retreating back towards the ambulance, getting a bit more distance between himself and the appellant. He looked up and saw the complainant officer had his left hand up around the jaw/face area of the appellant and his right hand close to the appellant's chest.

[53] A physical struggle then ensued that quickly went to ground where striking from both parties took place. He noticed the appellant striking the complainant officer with a fist in the torso and using his knee against the officer's back. He became concerned and went to assist in the restraint of the appellant. At this point, Officers Fitzgerald and Housman also moved in to restrain the appellant.

[54] Whilst the complainant officer and the appellant were on the ground, Officer Houseman recalls the complainant officer saying something similar to, "you fucking spat at me". He did not see or hear anything about the spit other than this.

[55] After the appellant was taken away, back at the police station, Officer Houseman seized the complainant officer's white polo shirt that had some stains on the front and attended to correspondence and paperwork in relation to the matter. The next day, he arrested the appellant at his solicitor's office for serious assault, possibly obstructing police, but not public nuisance.

Ground 1 – unreasonable verdict

Relevant principles

[56] This ground of appeal against conviction is to be regarded as a contention pursuant to s 668E(1) of the *Criminal Code* (Qld) that the jury's verdicts were "unreasonable, or

cannot be supported having regard to the evidence". That ground requires this Court to review the appeal record and determine whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt. In *MFA v The Queen*,[9] McHugh, Gummow and Kirby JJ noted that a review of this kind:

> "… involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials."

[57] The relevant principles were summarised by this Court in *R v SCH*:[10]

> "In such a case, the question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty.[11] In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred.[12] However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court 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.[13]"

[58] This Court must, therefore, undertake "an independent assessment of the evidence, both as to its sufficiency and its quality"[14] in accordance with the principles and always mindful of the primacy of the jury in criminal trials as recently reiterated in *R v Baden-Clay*:[15]

> "It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact.' Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of

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9 (2002) 213 CLR 606 at 624 [59] per McHugh, Gummow and Kirby JJ.

10 [2015] QCA 38 at [7]-[8] per Philippides JA, Holmes JA (as she was then) and Douglas J agreeing; see also *R v RAU* [2015] QCA 217 at [5]-[6] per Philippides JA, Gotterson JA and Martin J agreeing; *R v Agius* [2015] QCA 277 at [6] per the Court; *R v Thomson* [2016] QCA 259 at [5] per Boddice J, Gotterson JA and Douglas J agreeing; *R v Vlies* [2016] QCA 276 at [37]-[38] per Philippides JA, Gotterson JA and Douglas J agreeing; *R v Maddison* [2016] QCA 279 at [12]-[13] per Philippides JA, Gotterson and Morrison JJA agreeing.

11 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ; *MFA v The Queen* (2002) 213 CLR 606 at 615 [26] per Gleeson CJ, Hayne and Callinan JJ.

12 *MFA v The Queen* (2002) 213 CLR 606 at 623 [56] per McHugh, Gummow and Kirby JJ.

13 *M v The Queen* (1994) 181 CLR 487 at 494-494 per Mason CJ, Deane, Dawson and Toohey JJ; *MFA v The Queen* (2002) 213 CLR 606 at 623 per McHugh, Gummow and Kirby JJ.

14 *Morris v The Queen* (1987) 163 CLR 454 at 473 per Deane, Gaudron and Toohey JJ; *SKA v The Queen* (2011) 243 CLR 400 at 406 per French CJ, Gummow and Kiefel JJ.

15 (2016) 334 ALR 234 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See also *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606.

> a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way …
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> With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'"

Appellant's submissions

[59] Counsel for the appellant submitted that, although discrepancies within the evidence are usual at any trial, particularly in volatile situations such as violent incidents, the discrepancies in this trial went beyond the norm so as to make the verdict unreasonable. The evidence was of such poor quality that it was not open to the jury to be satisfied to the requisite standard of the appellant's guilt. A reasonable assessment of the evidence left a doubt as to the truthfulness of the complainant officer's allegation and a concern that a real possibility existed that the appellant had been wrongly convicted of a serious criminal offence.

[60] In advancing that submission, the appellant's counsel argued that Mr Eaton did not give evidence of being threatened by the appellant either verbally or physically around the time of the injection. While Officers Jackson and Fitzpatrick gave evidence of the appellant (and subsequently Mr Eaton) flinching and saying, "Did I scare you cunt?", only the complainant officer and Officer Houseman gave evidence that the appellant said, "Do you want to have a go" to Mr Eaton. The complainant officer went further by indicating that the appellant pulled back his fist to his shoulder and feigned a punch. It was submitted that it was hard to imagine that the other witnesses in the vicinity could have missed the physical action referred to by the complainant officer. This was said to be significant, as it was submitted that "[the complainant officer] used that as the trigger that justified his intervention". Further, the complainant officer gave the only evidence about Mr Eaton being frozen to the spot. If the evidence did not support the feigning of a punch by the appellant, then the basis for the intervention by the complainant officer was not available on the evidence and, it followed, that he could not be seen to be acting in the execution of his duty.

[61] The following additional points were made to support the appellant's contention that the verdict was unreasonable:

- Only two witnesses gave evidence of hearing a hocking sound (the complainant officer and Officer Fitzgerald). It was submitted that the significance of that evidence related to the deliberateness of the spitting, particularly in circumstances where spittle was not observed on the face by any witness. Despite there being corroboration, it was of a limited nature. Officer Fitzgerald stated he heard this whilst the parties were on the ground, whereas the complainant officer stated he heard this whilst wrestling with the appellant on their feet.

- Although, all the police officers corroborated that the complainant officer said to the appellant words to the effect of "you spat at me", the complainant officer stated this was said to have occurred when they were standing. Officer Jackson did not specify when this occurred and the two other officers stated this occurred when they were on the ground.

- Officer Fitzpatrick stated that the appellant challenged the complainant officer to a fight if he took off his badge and gun, which was corroborated by Officer Jackson. Officer Fitzpatrick stated that the complainant officer replied "that he didn't have one" and then they swore at each other for about 10 seconds. It was submitted that it was unlikely Officer Fitzpatrick created this assertion from nothing.

- The complainant officer was the only witness who saw the appellant pursing his lips and collecting spit in his mouth. It was submitted that there was no alleged hocking prior to this collection of spit. He was the only person to hear the spit itself. He was the only witness that saw the appellant turn his face to spit. No witnesses saw the spit on the face of the complainant officer.

[62] It was submitted that, in the circumstances, the evidence presented, particularly as it related to the threat posed to Mr Eaton, was such that it was insufficient to sustain a conviction.

Consideration

[63] It is correct that Mr Eaton did not give evidence regarding the "flinching incident" as described by the complainant officer, however, Mr Eaton's evidence was quite short and focused on the administration of the injection. His evidence regarding his interaction with the appellant was limited. Even so, the complainant officer's evidence received support from the evidence of Officer Houseman who described the relevant move to Mr Eaton as "aggressive":

> "So I watched as the [appellant] did present his arm and the paramedic administered the injection, and then as the paramedic withdrew the injection from the [appellant's] arm, I noticed that the [appellant] flinched towards the paramedic, and if I could describe that, it would be the top half of his body pivoted and his shoulder came forward, and I took that to be a very aggressive move, and the result was that the paramedic flinched backwards."

[64] Further, as the respondent submitted, the jury did not need to find that Mr Eaton was in fact threatened by a feigned punch. What the jury needed to determine was whether or not, at the time of the assault, the complainant officer was acting in the execution of his duty. In that regard, the trial judge drew the jury's attention to the sequence of events. But, as the respondent argued, the jury was equally entitled to reason and be satisfied that the complainant officer's perspective was that the appellant was aggressive which required his intervention. The evidence as to the circumstances of the entire event lead, as the respondent submitted, to the irresistible conclusion that the appellant was uncooperative, aggressive and agitated. The complainant officer's intervention could not, in those circumstances, result in his acting unlawfully.

[65] As to the contention that the jury could not have found the spitting to have occurred in circumstances where the only evidence of that came from the complainant officer,

the respondent submitted that it would be quite unlikely that the other officers would have been able to observe the appellant spit at the complainant officer. That submission is persuasive, particularly given that they did not give evidence of completely observing the whole event unfolding between the appellant and the complainant officer. Additionally, I accept the respondent's argument that, while there may be discrepancies in the evidence as to the circumstances of the complainant officer's utterance regarding the spit, the jury were entitled to view the statement as reflecting a spontaneity inconsistent with fabrication and thus having credibility. They were entitled also to have strong regard to the utterance and its content to determine the veracity of the spit allegation by the complainant officer.

[66] This was a case where the jury's advantage in seeing and hearing the evidence was particularly significant. However, I am satisfied on my own assessment of the evidence as a whole that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

Ground 2 - The trial judge erred by failing to direct upon consent to fight

Appellant's submissions

[67] The appellant argued that consent should have been left to the jury regarding the interaction between the complainant officer and the appellant. It was submitted that the failure to direct the jury on this particular issue deprived the appellant of a real prospect of acquittal. The appellant's counsel referred to authority that consent to engage in a fight can be implied or express.[16] The appellant's submission was premised on the proposition that a police officer is not acting in the execution of his duty if he is elects to engage in a consensual fight, regardless of whether or not at the time he is on duty.

[68] The submission was that there was a consensual fight and, although the complainant officer could not have been said to consent to being spat upon, that occurred while he had agreed to fight the appellant and so was already not acting in the course of his duty. It was argued that the evidence that the fight was initially consensual was found in the evidence of Officers Fitzpatrick and Jackson. In that regard, particular reliance was placed on Officer Fitzgerald's evidence that the appellant challenged the complainant officer to a fight if he took off his badge and gun (which was corroborated by Officer Jackson) and Officer Fitzgerald's evidence that the complainant officer replied "that he didn't have one" and put up his hands. It was submitted that that evidence supported the argument that the fight occurred when the complainant officer said those words and his conduct implied his agreeing to engage in a fight. It was contended that the evidence of Officer Fitzpatrick was capable of raising that the complainant officer's response to the appellant's challenge should properly be seen as an acceptance of the invitation to fight.

[69] During the trial, in the absence of the jury, the issue of consent to fight was raised on a few occasions. After the trial judge had intimated that he had not intended directing upon consent to fight, defence counsel stated that he did not require for his Honour to do so. It was submitted that it was, nevertheless, incumbent upon the trial judge to address consent to fight regardless of the intimation by defence counsel.[17] It was

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16 *Horan v F* [1995] 2 Qd R 490.

17 *Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34 at [83] per McHugh J.

submitted that there was no forensic advantage to the defence by not addressing upon this issue and that it was squarely raised on the evidence.

Consideration

[70] The issue of consent was considered in the context of the assault and the jury were directed as to that facet, as is evident from the handout which contained a reference to needing to be satisfied as to an assault on the basis that it was done without consent. The appellant did not give evidence and thus there was no direct evidence as to his belief regarding consent.

[71] It was never put to the complainant officer that he was agreeing to engage in a consensual fight by indicating that he did not have a gun or badge. Defence counsel put consent to fight to Officer Fitzpatrick and the complainant officer during cross-examination, on the basis that the complainant officer had challenged the appellant to hit him. It was rejected by both officers. Given the lack of factual basis for the contention that the complainant officer had impliedly agreed or indicated that he was "ready for a consensual fight" it is not surprising that counsel for the appellant did not pursue a direction as to whether an indication by the complainant officer that he did not have a gun or badge was capable of amounting to a consent or agreement to engage in a fight.

[72] The jury was entitled to be satisfied on the evidence (including the evidence of Officer Fitzpatrick who stated the appellant raised his fists first) that the complainant officer was intending to arrest an unruly and offensive individual for a lawful purpose in the execution of his duty and for that purpose intervened placing himself in a high risk position.

[73] Further, in my view, the jury were adequately directed as to having to be satisfied beyond a reasonable doubt that the police officer was lawfully acting in the execution of his duty. As the respondent submitted, once they found that the complainant officer acted in the execution of his lawful duty, the issue of consent was irrelevant; it is an offence to assault a police officer who is lawfully acting in the execution of his duty. In those circumstances, the directions given were adequate.

Ground 3 - The trial judge erred by directing the jury in relation to s 365 of the PPRA

Appellant's submissions

[74] The appellant's last ground of appeal was that s 365 of the PPRA sets out the circumstances whereby a police officer may arrest somebody without warrant. It was submitted that the complainant officer did not give any evidence that initially he was arresting the appellant. Rather, he merely stated that he intervened as he thought Mr Eaton felt threatened. The complainant officer did say that once the appellant was restrained, he was detained/arrested for the assault upon him.

[75] Officer Fitzgerald stated that after the appellant was restrained by police, he was arrested, but corrected himself, stating that the appellant was probably more "detained" under the MHA. The appellant argued that the evidence was that the appellant was arrested the next day for the offence of serious assault.

[76] Chapter 14 part 4 of the PPRA deals with discontinuing arrest. Section 381 states:

> "(1) A person arrested for an offence and released under this part cannot be rearrested for the offence unless because of new evidence a police officer forms a reasonable suspicion that the person is responsible for the offence."

[77] As the appellant was arrested the following day, it was submitted that he could not have been arrested under s 365. It would thus seem that the police intervention, if lawful, was based upon s 52 of the PPRA. Since the jury was left to consider s 365, it was possible that they could have used this section to justify the police use of force in circumstances where it was not available. The consideration of the use of force was directly relevant to whether the officer was acting in the execution of his duty.

Discussion

[78] As the respondent pointed out, the complainant officer in fact gave evidence that his intention was to place him on the ground in order to remove him as a risk to safety. It was open to the jury to conclude that implied an arrest. Officer Houseman's evidence was also that he attended so as to assist in the restraint of the appellant once he witnessed part of the assault upon the complainant officer. That additionally was capable of implying an arrest. In those circumstances, it was a matter properly left for the jury's assessment.

[79] The jury were directed, as the respondent submitted, that they had to answer the question factually whether or not the complainant officer was lawfully arresting the appellant. The section provided a context to be determined by the jury as to whether or not, if there was an arrest, it was able to be brought lawfully in the circumstances. The section itself did not speak as to the available lawful use of force by a police officer. It cannot be assumed that they inferred the same from the section. This ground should be dismissed.

Sentence appeal

Application for extension of time to apply for leave to appeal sentence

[80] An extension was sought to apply for leave to appeal the sentence. It was only upon reviewing the appeal book, whilst determining whether aid should be granted to appeal the conviction, that it was noted that a parole eligibility date was ordered rather than a parole release date. It was unclear as to why the Court had ordered an eligibility date. The sentencing remarks were ordered in December 2016. They became available on 8 February 2017. Upon receipt of the remarks, a decision was made to grant aid for an application to seek leave to appeal the sentence. Clearly, an extension of time to apply for leave to appeal should be granted.

The imposition of a parole eligibility date rather than parole release date

[81] No issue was taken with the head sentence imposed or the parole date generally. Rather it was submitted that the sentencing judge was led astray by counsel submissions in relation to the imposition of a parole eligibility date. The sentencing judge erred in imposing a parole eligibility date, rather than a parole release date.

[82] Section 160B of the *Penalties and Sentences Act* 1992 (Qld) (the PSA) provides that where the sentence is less than three years, and the offence is not a "sexual offence" or a "serious violent offence" and the offender has not had a court ordered parole

cancelled, the Court must fix a parole release date. During the sentencing procedure, it was submitted by counsel that a parole eligibility date must be set due to the considerations of s 160D as the appellant's offending satisfied the definition of "serious violent offence under s 160D(1). "Serious violent offence" is defined by s 4 of the PSA to mean "a serious violent offence of which an offender is convicted under section 161A." Under s 161A, to be a "serious violent offence", it is necessary that the serious assault be mentioned in schedule 1 and the appellant be sentenced to more than 10 years, or alternatively, that the offender is convicted on indictment and declared to be convicted of a serious violent offence under s 161B(3) or s 161B(4). The sentencing judge did not declare the appellant to be convicted of a serious violent offence under s 161B(3) or s 161B(4) and, as such, s 160D does not apply. Accordingly, the appellant did not come within either of the criteria in s 161B(3) or s 161B(4).

[83] The respondent accepts that a fixed parole release date ought to have been given for reasons outlined by the appellant. Although the matter was equally able to be addressed through s 188 of the PSA by way of a sentence reopening, it is appropriate to now correct the error.

Orders

[84] The orders of the Court are:

1. The appeal against conviction is dismissed.
2. An extension of time in which to seek leave to appeal the sentence is granted.
3. Leave to appeal against the sentence is granted.
4. The sentence imposed is altered to the extent that the word "eligibility" is deleted and the word "release" inserted in lieu thereof.