SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mazza* [2017] QCA 136
PARTIES:	**R** **v** **MAZZA, Fabio Armando** (appellant)
FILE NO/S:	CA No 335 of 2016 DC No 11 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Roma – Date of Conviction: 24 November 2016
DELIVERED ON:	20 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2017
JUDGES:	Gotterson and McMurdo JJA and Douglas J 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 – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of dangerous operation of a vehicle causing death and grievous bodily harm – where the appellant was an on-duty police officer who executed a U-turn on a highway to pursue a speeding vehicle – where, at the time the appellant made the U-turn, a motorcycle travelling behind braked heavily, skidded and flipped, causing the grievous bodily harm of the driver and the death of the pillion passenger – where the motorcycle driver had no recollection of the incident – where a number of witnesses provided conflicting accounts of the offending – where the appellant submits that the heavy braking of the motorcycle driver did not necessarily mean that he did so in order to avoid a dangerous situation created by the appellant – where the appellant further submits that the jury could not have excluded the possibility that what happened had been an overreaction by the motorcycle driver – whether it was open to the jury to have been satisfied beyond reasonable doubt of the appellant's guilt – whether the verdict was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL –

PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – MATTERS AVAILABLE TO JURY IN JURY ROOM – where the learned trial judge instructed the jury at the beginning of the trial not to conduct their own investigations and to inform the bailiff if any member were to bring in "external information" – where on the last day of the trial, after verdict had been delivered and after the jury had been discharged, the bailiff located printed pages in the jury room from legal resources websites concerning serious traffic offences and the concept of reasonable doubt – where, although the material relating to reasonable doubt referenced United States jurisprudence, the information accorded with orthodox principles – where the material concerning dangerous driving referenced Queensland legislative provisions, but did not refer to conduct going "beyond mere want of care" – where, after the jury retired to consider their verdict, they asked the learned trial judge for a written definition of the charge, which was provided after consultation with counsel – where the appellant contends that it cannot be assumed that the jury gave greater weight to the document provided by the learned trial judge than to the documents brought in by a juror – where the appellant further contends that the presence of the external material in the jury room called into question the jury's willingness to adhere to other directions given by the learned trial judge – whether the information in the documents was prejudicial to the appellant – whether the jury would have returned the same verdict had the irregularity not occurred – whether there was a miscarriage of justice

Criminal Code (Qld), s 328A

BCM v The Queen (2013) 88 ALJR 101; (2013) 303 ALR 387; [2013] HCA 48, cited
McBride v The Queen (1966) 115 CLR 44; [1966] HCA 22, cited
R v Baden-Clay (2016) 258 CLR 308; (2016) 334 ALR 234; [2016] HCA 35, cited
R v Martinez [2016] 2 Qd R 54; [2015] QCA 169, cited

COUNSEL: J Hunter QC for the appellant
J A Wooldridge for the respondent

SOLICITORS: Gilshenan & Luton for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA**: The appellant, Fabio Armando Mazza, was charged with an offence against s 328A(4) of the *Criminal Code* (Qld). He was tried before a judge and jury over four days in the District Court at Roma on a count which alleged that on 5 May 2014 at Wallumbilla he dangerously operated a vehicle and caused the death of Gail Mairee Smith and caused grievous bodily harm to Steven Michael Smith.

[2] On 24 November 2016, the appellant was found guilty of the offence. That day he was sentenced to two years' imprisonment wholly suspended for an operational period of two years. He filed a notice of appeal against his conviction on 5 December 2016.[1]

Circumstances of the alleged offending

[3] In May 2014, the appellant was a police constable stationed at Roma. At about midday on Monday 5 May, he was on-duty and driving a police vehicle in a westerly direction along the Warrego Highway near Wallumbilla which is east of Roma. An oncoming vehicle was detected speeding. The appellant decided to execute a U-turn in order to pursue the speeding vehicle.

[4] At that time, Steven Smith was riding a motorcycle in a westerly direction along the Warrego Highway. His wife, Gail, was his pillion passenger. The police vehicle driven by the appellant had been travelling ahead of them for some time.

[5] The appellant activated the flashing light on top of his vehicle. He slowed, veered his vehicle to the left and then in one continuous movement, pulled to the right in order to execute the U-turn. As he was executing the turn, Mr Smith braked heavily. The motorcycle skidded. It tipped to the side. Some of its metal parts made contact with the road surface causing it to flip.

[6] Although there was no collision between it and the police vehicle, Mrs Smith fell to the roadway and sustained fatal injuries. Mr Smith suffered grievous bodily harm. He had no recollection of the incident.

[7] In that vicinity, the highway was sealed. It had one lane for traffic in each direction. The roadway was generally straight and flat and ran roughly east to west. The westbound lane was bounded by an unbroken centreline and a fog line along the southern margin. The eastbound lane was bounded by a broken centreline and a fog line along the northern margin. For vehicles travelling in a westerly direction, there was clear visibility of the incident scene from about 760 metres. Both the police vehicle and Mr Smith's motorcycle were in satisfactory mechanical conditions.

[8] The Crown case was that the appellant's manner of driving was dangerous because it created a hazard for other road users and, in particular, Mr Smith and his passenger. The hazard arose from the appellant's crossing the path of travel of Mr Smith's motorcycle suddenly and at a time when the motorcycle was sufficiently close that Mr Smith had to brake heavily to avoid a collision. If the appellant had not known of the presence of Mr Smith's motorcycle, his driving was the more dangerous for his having failed to check for traffic to his rear.

The appellant's trial

[9] The witnesses called in the Crown case included road users who were travelling in each direction at the time. Those who were travelling behind Mr Smith's motorcycle were Mr Allen Bell who was riding a motorcycle behind it, Mr Jeffrey Davidson who was driving a vehicle behind Mr Bell's motorcycle, and Mr Joseph Winch, a passenger in Mr Davidson's vehicle. Those who were approaching from the opposite direction were Mr Darren Thrupp who was driving a vehicle, his wife, Kerian, a passenger in the vehicle, Mr Jason Powell who was driving alone in

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1 AB222-225.

a vehicle behind Mr Thrupp's vehicle, and Mr Ralph Hadfield who was also driving a vehicle eastbound.[2]

[10] Evidence was also given by Senior Constable Shane Gillett who did not witness the incident but had spoken to the appellant at the scene not long after it. Investigative evidence was given by Sergeant Sherryn Klump who was then assigned to the Brisbane Forensic Crash Unit. She travelled to the scene from Brisbane and arrived there at about 6.30 pm on the Monday evening.

[11] The appellant did not give or call evidence in his trial.

[12] On the last day of the trial and after the verdict had been delivered and the jury discharged, it was brought to the attention of the learned trial judge that the bailiff had located several papers in the jury room. They contained printed matter which had been accessed from a legal resources website on 23 November 2016. The matter concerned the subject of serious traffic offences including dangerous driving and the concept of reasonable doubt.

[13] I mention these aspects of the appellant's trial because of their relevance to the grounds of appeal.

Grounds of appeal

[14] The appellant relies on the following grounds of appeal:[3]

1. That the verdict was unreasonable or cannot be supported having regard to the whole of the evidence.

2. That there has been a miscarriage of justice by reason of the jury's breach of their duty and the directions given to them by the trial judge (in that internet searches were conducted, and internet material produced, in relation to serious traffic offences and the definition of "reasonable doubt").

It is convenient to consider each ground separately.

Ground 1

[15] **The evidence at trial**: Mr Bell, who was 87 years old at the time when the incident took place, gave evidence by telephone. He said that he knew the Smiths and that he was travelling with them to Alice Springs. They had left Dalby that morning. They passed through Yuleba and were travelling towards Wallumbilla. He was following Mr Smith's motorcycle at a distance of about 40 to 50 metres. According to Mr Bell, he first saw the police vehicle that the appellant was driving when it was "parked off the road [and] on the left". It was about "60 centimetres below the road level" and facing in the same direction of travel as he was. He was about 60 or 70 metres from the police vehicle when he first saw it. He did not pay much attention to the police vehicle because he was watching Mr Smith and the traffic coming the other way and behind him. At the time he first saw the police vehicle, he was travelling behind Mr Smith and had caught up a little to be about 30 to 35 metres behind him.[4]

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2 Mr Hadfield said that he thought that there were two vehicles in front of him and that they all pulled over to the left: AB102 Tr3-5 l12-13. It would appear that he was following Mr Powell's vehicle.

3 AB223.

4 AB21 Tr2-5 l37 – AB22 Tr2-6 l40.

[16] Next, he saw the police vehicle across the lane in which he and the Smiths were travelling. He estimated that, at that time, Mr Smith's motorcycle was about three or four metres away from the police vehicle. The motorcycle braked and skidded. Mrs Smith suddenly went into the air and the motorcycle went sharply to the right across the roadway. In all, no more than 10 or fifteen seconds elapsed between when he first saw the police vehicle stationary on the left and when it was across the lane. He skidded to a halt to render assistance to Mrs Smith.[5]

[17] Mr Bell said that he had not been in a position to observe the front wheel of the motorcycle and hence did not know if there had been any contact between it and the police vehicle. However, he was sure that the motorcycle was going to hit the police vehicle.[6] The police vehicle completed the U-turn, travelled for about 70 or 80 metres in an easterly direction and then stopped. He did not see any flashing lights on the police vehicle.[7]

[18] In cross-examination, Mr Bell did not accept a proposition that the police vehicle, the Smiths and he had been travelling "in convoy" at the same speed and the same distance apart "over quite some kilometres" before the incident.[8] Nor did he accept a proposition that the police vehicle was at no time stationary beside the road or below the road level.[9] He maintained that Mr Smith's motorcycle was three to four metres from the police vehicle when he saw the brake lights on the motorcycle illuminate,[10] and rejected a suggestion that Mr Smith's motorcycle skidded for about 30 metres before Mrs Smith came off it.[11] He also maintained that his motorcycle had made skid marks on the road surface which he saw,[12] and that he had not seen any flashing lights on the police vehicle.[13]

[19] Mr Davidson remembered following two motorcycles. He first saw the police vehicle driven by the appellant when they were in an 80 kph zone west of Yuleba. He thought that there was about 40 to 50 metres between the police vehicle and the motorcycles and another 40 to 50 metres from them to his vehicle. They travelled in that formation for about 10 kilometres.[14] He saw the emergency lights on the police vehicle activate. It veered to the left, straddled the bitumen and the dirt verge, and then made a U-turn "in front of the motorcycles". The time interval between the activation of the emergency lights and the turn was "seconds". He did not see any brake lights or turning indicators on the police vehicle illuminate.[15]

[20] At that time, they were in a 100 kph zone. Mr Davidson thought that his vehicle, the motorcycles and the police vehicle were all travelling at about 95 to 100 kph when the emergency lights came on. By then, the distance between the motorcycles

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5 AB22 Tr2-6 l45 – AB24 Tr2-8 l8.
6 AB24 Tr2-8 ll10-17.
7 AB24 Tr2-8 l33 – AB25 Tr2-9 l20.
8 AB26 Tr2-10 lll5-34.
9 AB27 Tr2-11 ll42-45. Later, he conceded that he had told police on an earlier occasion that the police vehicle was about 90 cms below road level but said that he realised later that it was less than that: AB29 Tr2-13 ll7-26.
10 AB28 Tr2-12 ll7-15.
11 Ibid ll31-37.
12 AB29 Tr2-13 ll1-5.
13 AB30 Tr2-14 ll1-2.
14 AB33 Tr2-17 ll7-36.
15 AB33 Tr2-17 l43 – AB34 Tr2-18 l2.

and the police vehicle had reduced to "possibly five car lengths".[16] He first saw smoke from the rear wheel of the motorcycle when the police vehicle was "perpendicular to the highway" and "halfway through its U-turn". The lead motorcycle "actually flipped up in the air slightly" and then skidded for at least 10 metres along the bitumen. It slid sideways and out of control.[17]

[21] In cross-examination, Mr Donaldson acknowledged that he had been able to see the police vehicle as he drove west from Yuleba,[18] and that just before the emergency lights on it illuminated, an oncoming vehicle passed it in the other direction.[19] He accepted that the police vehicle travelled at least 100 metres after its emergency lights illuminated, slowed and travelled to the left at a slight angle before executing the U-turn.[20] He also accepted that the police vehicle did not stop but slowed to a very slow speed before executing the U-turn "in one fluid motion".[21] He acknowledged that his vision of the police vehicle's brake lights and indicators was obscured by the motorcycles.[22] He agreed that he was about 100 metres behind Mr Bell's motorcycle when he first saw smoke from the rear tyre of Mr Smith's motorcycle.[23]

[22] Mr Winch recalled following the police vehicle for about 10 to 15 minutes from Yuleba. Mr Davidson's vehicle was 100 to 150 metres behind the motorcycles. He was unsure of the distance from them to the police vehicle. He saw the police vehicle "stop, brake fast and pull off to the side". The two left-hand tyres of the police vehicle left the bitumen. Dust was thrown up. The police vehicle made a U-turn. At that point, he saw Mr Smith's motorcycle brake and smoke come from it. It slid one way and then the other, causing it to flip over.[24]

[23] Mr Winch gave evidence that he saw the emergency lights on the police vehicle activate. The slowing, movement to the left and activation of the lights happened "simultaneously". He described the police vehicle's movement into the U-turn as "continuous" and its speed when it began the U-turn as "Haste. Hastily".[25]

[24] In cross-examination, Mr Winch agreed that it seemed that the motorcycles were travelling at a safe distance behind the police vehicle,[26] and that he saw both the emergency lights and the brake lights of the police vehicle activate at about the same time and as an eastbound vehicle passed the police vehicle.[27]

[25] He was prepared to accept as "fair enough" a suggestion that the police vehicle then travelled about 100 metres before beginning the U-turn.[28] He accepted that the dust thrown up by the police vehicle was not blinding or dangerous.[29] However, he rejected a suggestion that the police vehicle had completed the U-turn before Mr Smith lost control of his motorcycle.[30]

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16 AB34 Tr2-18 ll16-23.
17 Ibid l34 – AB35 Tr2-19 l23.
18 AB39 Tr2-23 ll10-14.
19 Ibid ll38-39.
20 AB40 Tr2-24 ll15-18.
21 AB41 Tr2-25 ll30-32.
22 AB40 Tr2-24 ll24-33.
23 AB41 Tr2-25 ll4-23.
24 AB45 Tr2-29 l18 – AB46 Tr2-30 l8.
25 AB46 Tr2-30 ll10-27.
26 AB50 Tr2-34 ll5-7.
27 Ibid ll9-18.
28 Ibid l45 - AB51 Tr2-35 l3.
29 AB51 Tr2-35 ll9-12.
30 Ibid ll40-42.

[26] Mr Thrupp described his memory of the events as not great. A police car followed by two motorcycles were approaching in the other lane. He had forgotten the distance between them. He saw the police vehicle "chuck a U-ey" and the two motorcyclists "try and brake and avoid the police car". He could not recall any lights on the police vehicle. He was not sure if the motorcycles hit the police vehicle.[31] He thought that he was about 100 metres away at the time.[32]

[27] In cross-examination, Mr Thrupp said that he vaguely remembered an eastbound vehicle ahead of his and that the emergency lights of the police vehicle activated as the other vehicle passed it.[33] He accepted that two days after the incident, he had told police that the police vehicle began to slow when the flashing emergency lights activated.[34] He also agreed that, at the appellant's committal hearing, he had given evidence that when Mr Smith's motorcycle "flipped", the police vehicle "had completed the turn and was basically heading in the opposite direction, but beside the bike".[35]

[28] Mrs Thrupp recalled seeing a police vehicle travelling in the other direction about six or seven kilometres east of Wallumbilla. Two motorcycles were a "fair distance" behind it. She was not wearing her glasses at the time.[36] She saw the emergency lights on the police vehicle come on. It did a U-turn from its lane across both lanes. The lead motorcycle braked. When the police vehicle was "perpendicular across the road", the motorcycle flipped up over the boot of the police vehicle. The police vehicle then swung to complete the U-turn manoeuvre. The pillion passenger on the motorcycle was catapulted off the back of it. Only a "nanosecond" elapsed between the activation of the emergency lights and the commencement of the U-turn.[37]

[29] In cross-examination, Mrs Thrupp conceded that, without glasses, her vision became "fuzzy" at a distance over 100 metres and that she must have been more than 100 metres away from the incident because her vision of it was fuzzy.[38] She maintained that the lead motorcycle was "a bit more than a car-length" behind the police vehicle and that the motorcycle had rotated over the boot of the police vehicle. She rejected as incorrect a suggestion that the police vehicle had completed the U-turn and was headed in an easterly direction by the time the motorcycle "went over". She denied that the motorcycle skidded before it flipped.[39]

[30] In re-examination, Mrs Thrupp said that the police vehicle was blocking her view of the motorcycle during the U-turn manoeuvre until the latter tried to go around the former. She believed that, at that point, the motorcycle hit the police vehicle and then flipped over.[40]

[31] Mr Powell was travelling behind the Thrupps' vehicle and was preparing to overtake it. He noticed a police vehicle facing the other direction of travel. When

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31 AB53 Tr2-37 l26 – AB54 Tr2-38 l20.
32 AB55 Tr2-39 ll6-7.
33 Ibid l31 – AB56 Tr2-40 l16.
34 AB56 Tr2-40 l22 – AB57 Tr2-41 l7.
35 AB58 Tr2-42 ll5-22.
36 AB61 Tr2-45 ll29 – AB62 Tr2-46 l28.
37 AB63 Tr2-47 l2 – AB64 Tr2-48 l41.
38 AB65 Tr2-49 ll19-42.
39 AB68 Tr2-52 ll20-42.
40 AB69 Tr2-53 ll29-32.

he first saw it, it was pulling off to its left and was "half on the road, half off the road". He could not remember whether it was stationary or moving at the time. At that stage, he did not notice any activated lights on the police vehicle.[41]

[32] The police vehicle then did a U-turn "in front of everyone". He was unsure if there was any pause between the pulling over to the left and the commencement of the U-turn. The police vehicle accelerated into the U-turn. When it started the turn, two motorcycles travelling behind it began to brake heavily. He saw the lead motorcycle strike the police vehicle and then flip. It seemed to him that the motorcycle hit the right rear panel of the police vehicle because, after he had stopped, he noticed that it was damaged.[42] He thought that the impact occurred when the police vehicle was "sort of halfway through the U-turn".[43]

[33] In cross-examination, Mr Powell agreed that he first saw the police vehicle from a distance of 200 to 300 metres. His attention was drawn to it by its pulling off to the left. He was unable to say whether or not its emergency lights had been activated at that time.[44] He conceded that he did not actually look at the police vehicle after the incident and was not sure that its right rear panel was damaged.[45] He did not accept a suggestion that the police vehicle had completed the U-turn and was facing east by the time the motorcycle crashed.[46]

[34] Mr Hadfield gave evidence from New Zealand via a video link. He said that from about one kilometre away he saw a police vehicle heading towards him with its lights flashing. It pulled over to the left, "sort of went halfway up the road", and then did a U-turn in one continuous movement. After the police vehicle had done the U-turn and was facing the same direction of travel as his, he saw a motorcycle flying through the air doing cartwheels.[47]

[35] In cross-examination, Mr Hadfield agreed that, in his statement to police, he had said that he was 400 to 500 metres away at the time of the incident and could have been closer than one kilometre.[48] He also agreed that at the appellant's committal hearing, he had given evidence that at the time he first saw the motorcycle, the police vehicle had completed its turn.[49] He accepted that the police vehicle had travelled "a fair way" from the point when its emergency lights activated to the point of commencement of the U-turn.[50]

[36] Senior Constable Gillett did not witness the incident, nor did he investigate it. His evidence does not have relevance for this ground of appeal.

[37] Sergeant Klump gave evidence of her investigations that evening (by floodlight) and on the following day. She said that the bitumen surface of the highway was 9.3 metres wide at the incident scene. The police vehicle had a turning circle of

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41 AB71 Tr2-55 l5 – AB72 Tr2-56 l7.
42 AB72 Tr2-56 l16 – AB73 Tr2-57 l29.
43 AB74 Tr2-58 ll3-6.
44 Ibid ll26-36.
45 AB75 Tr2-59 ll5-16.
46 Ibid ll18-25.
47 AB101 Tr3-4 ll4 – AB102 Tr3-5 l2.
48 AB102 Tr3-5 ll35-38.
49 AB104 Tr3-7 ll20-31.
50 AB105 Tr3-8 ll41-43.

11.6 metres.[51] She observed markings on the road surface which she depicted on a plan tendered during her evidence.[52] There was a skid mark in the westbound lane of an overall length of 36.69 metres. From its eastern end, the skid mark was straight for 21.28 metres and tended towards the centre line. It then diverted slightly to the left and continued in a broad curve for another 15.41 metres. Beyond the western end of the skid mark, there were gouge marks in the bitumen surface. They continued to the point where a black Kawasaki motorcycle (Mr Smith's motorcycle) had come to rest close to the centreline and in the eastbound lane.[53] The distance over which there were gouge marks was not measured.

[38] In Sergeant Klump's opinion, the motorcycle had skidded when both front and rear brakes were engaged. The rear wheel slid out to the left and the motorcycle fell on to its right side so that its metal parts made contact with the bitumen. This contact caused the motorcycle to flip laterally in a dynamic known as a "lowside".[54]

[39] As to speed, Sergeant Klump said that a vehicle travelling at 100 kph takes 3.6 seconds to travel 100 metres. She had calculated that the motorcycle was travelling at a minimum of 94 kph at the commencement of the skid mark. At that speed, it would have taken between 0.89 and 1.1 seconds to travel the length of the skid mark and, all up, between 1.7 and 2 seconds to travel the entire distance from the commencement of the skid mark to where the motorcycle came to rest. Based on published research showing an average human reaction time of between 1.5 and 2 seconds for a rural road and adopting a speed of 94 kph, the motorcycle would have travelled between 39.5 and 52.7 metres before the commencement of the skid.[55]

[40] Sergeant Klump had been unable to identify any tyre marks in the dirt on the verge which she could attribute to the police vehicle.[56] The Kawasaki motorcycle had a "hard-wired" headlight which would be on whenever its motor was operating.[57] The police vehicle was fitted with a speed detection device which contained data showing that it had last locked on to a vehicle which had been travelling at 110 kph and that the police vehicle at that time was travelling at 98 kph.[58] According to Sergeant Klump, there were no signs of damage to the police vehicle.[59]

[41] In cross-examination, Sergeant Klump acknowledged that it was not possible to determine where the U-turn was undertaken. Her estimate of reaction time for the motorcyclist was based on bell curve data which showed that older people tend to react more slowly than others. She accepted that if Mr Smith, at 60 years of age, was placed "in the slower part" of the bell curve, his reaction time would have been 2 seconds in which he would have travelled 54 metres.[60] Sergeant Klump also acknowledged that it was impossible to determine whether Mr Smith had braked without causing a skid mark before braking heavily.[61] She agreed that Mr Bell's

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51 AB118 Tr3-21 ll40-47.
52 Exhibit 9; AB186.
53 AB120 Tr3-23 l29 – AB121 Tr3-24 l30.
54 AB125 Tr3-28 l36 – AB127 Tr3-30 l33.
55 AB128 Tr3-31 l17 – AB130 Tr3-33 l20.
56 AB118 Tr3-21 ll27-35.
57 AB122 Tr3-25 ll8-11.
58 AB130 Tr3-33 l31 – AB131 Tr3-34 l4.
59 AB117 Tr3-20 ll33-34.
60 AB135 Tr3-38 l1 – AB136 Tr3-39 l23.
61 AB137 Tr3-40 ll1-6.

motorcycle had not left a skid mark and that its wheels had not locked up.[62] She also agreed that the camber of the road could have been a factor that caused Mr Smith's motorcycle to divert to the left during the skid.[63]

[42] **Appellant's submissions**: The appellant submitted that the Crown case involved impermissible reverse reasoning that because there had been an accident, the appellant must have caused a danger by hastily executing the U-turn. To the contrary, that Mr Smith braked heavily did not mean that he did so in order to avoid a dangerous situation created by the appellant.[64]

[43] On the evidence of Sergeant Klump, Mr Smith's motorcycle must have been at least 90 metres behind the police vehicle when the U-turn was commenced. Neither Mr Bell's evidence of a distance of three metres nor Mr Davidson's evidence of "five car lengths" could be correct. On Mr Winch's evidence, the police vehicle slowed over about 100 metres with its emergency lights activated. However, Mr Smith did not react to either. He began to slow his motorcycle only when he saw the U-turn begin.[65]

[44] Mr Smith's motorcycle was travelling at least 94 kph when he began to brake. At that speed, some 3.7 to 4 seconds would have elapsed between the time when he first saw the police vehicle begin the U-turn and the time when the motorcycle came to rest. It was comprised of 2 seconds reaction time and then 1.7 to 2 seconds of skidding and gouging.[66]

[45] The appellant submitted that that period of time was sufficient for the U-turn to have been undertaken safely by the appellant. That that was so, it was argued, was confirmed by the evidence of Mr Thrupp and of Mr Hadfield that the police vehicle had finished the U-turn by the time Mr Smith lost control of his motorcycle.[67]

[46] The appellant further submitted that, in the circumstances, it was not open to the jury to have been satisfied beyond reasonable doubt of the appellant's guilt.[68] The jury could not have excluded the possibility that what happened had been an overreaction by Mr Smith.[69]

[47] **Respondent's submissions**: The respondent disputed that its case was dependent upon reverse reasoning. It submitted that, independently of any such reasoning, the evidence of the braking by Mr Smith was relevant in deciding what had occurred and whether the appellant's driving was objectively dangerous.[70]

[48] The respondents further submitted that the evidence overall justified a conclusion by the jury that the manner in which the appellant executed the U-turn across the path of traffic to the rear of his vehicle was dangerous in the circumstances. Factors to which the jury might properly have had regard for such a conclusion included:[71]

(i) the absence of any evidence that Mr Smith's motorcycle was speeding;

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62 AB138 Tr3-41 ll14-16.
63 AB139 Tr3-42 ll8-21.
64 Appellant's Outline of Submissions, para 42.
65 Ibid para 43.
66 Ibid para 44.
67 Ibid para 45.
68 Ibid para 46.
69 Appeal Transcript ("AT") 1-5 l47 – AT 1-6 l2.
70 Respondent's Outline of Submissions, para 2.3.
71 Ibid para 2.6.

(ii) whether or not the appellant was aware of the motorcycles behind him, it was incumbent upon him to have ensured that there was sufficient time to execute the U-turn without creating a danger for those road users;

(iii) neither the slowing and veering to the left of the police vehicle nor the activation of the emergency lights signalled that a U-turn was to be undertaken forthwith;

(iv) the absence of any evidence that the right hand turn indicator on the police vehicle was activated;

(v) the evidence of witnesses as to the distance between Mr Smith's motorcycle and the police vehicle when the emergency lights were activated, and that the police vehicle was midway through the U-turn when Mr Smith braked heavily; and

(vi) the very short time span within which the events happened as described by the witnesses and as illustrated by Sergeant Klump's calculations.

[49] As well, the respondent challenged the appellant's contention that Mr Thrupp and Mr Hadfield had given reliable evidence that the police vehicle had completed the U-turn by the time Mr Smith's motorcycle went out of control.[72]

[50] **Discussion**: The task for this Court when an "unreasonable verdict" ground of appeal is invoked is to make an independent assessment of the sufficiency and quality of the evidence at trial and to 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.[73] The starting point is that the jury is the body entrusted with primary responsibility for determining guilt or innocence, they having had the benefit of having seen and heard the witnesses. However, when an appellate court experiences doubt, it will, in most cases, be a doubt that the jury ought also to have experienced. It is only where a jury's advantage in seeing or hearing the evidence is capable of resolving a doubt experienced by the appellate court that the latter may conclude that no miscarriage of justice has occurred.[74]

[51] In the recent decision of *R v Baden-Clay*,[75] the High Court emphasised the jury's role as the constitutional tribunal for deciding factual issues and, in an "unreasonable verdict" appeal, the need for an appellate court to have particular regard for the advantage enjoyed by it, but not available to the appellate court itself. The appellate court is not to substitute trial by it for trial by jury.[76]

[52] In both oral and written submissions, the appellant sought to disparage the reliability of Mr Bell's evidence concerning important aspects of the incident. His description of the police vehicle as parked on the left hand side of the road for 10 to 15 seconds at 60 centimetres below road level was contradicted by the evidence of other witnesses. He failed to notice the flashing emergency lights seen by other witnesses. His estimate that Mr Smith's motorcycle was three metres away from the police vehicle when the latter was across his lane of travel did not accord with the absence

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72 Ibid.

73 *BCM v The Queen* [2013] HCA 48; (2013) 303 ALR 387 per the Court at [31], referring to *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 per French CJ, Gummow and Kiefel JJ at [11]-[14].

74 *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 at [13], quoting *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 493-4.

75 [2016] HCA 35; (2016) 334 ALR 234.

76 Ibid per the Court at [65]-[66].

of evidence of damage to the police vehicle. Moreover, his rejection of a suggestion that Mr Smith's motorcycle skidded for more than 30 metres was at odds with the skid marks measured by Sergeant Klump. In light of these discrepancies, Mr Bell's evidence did not provide the jury with a sound foundation for drawing reliable conclusions as to what had occurred.

[53] There was, however, significant consistency in the evidence of Mr Davidson and Mr Winch who were travelling in the same direction as the police vehicle and the motorcyclists. According to them, both vehicles and both motorcycles were travelling at 95 to 100 kph along the highway. Both witnesses saw the emergency lights activate and the police vehicle then slow down. It travelled over about 100 metres veering to the left so that the passenger side wheels were on the dirt verge. Neither saw the police vehicle stop before it began the U-turn. Each described its course of travel into the U-turn as continuous.

[54] On the evidence of Sergeant Klump, Mr Smith's motorcycle would have been about 90 metres from the police vehicle when it began the U-turn. Had it continued at the same speed, it would have been level with the police vehicle in three seconds or so.

[55] Mr Davidson and Mr Winch saw the police vehicle undertake the U-turn. When it was halfway through the turn and perpendicular to the line of travel, they each saw Mr Smith's motorcycle brake and smoke coming from its tyres. Mr Powell, who was travelling in the opposite direction, placed the police vehicle in a similar location at that time. Significantly, Mr Winch and Mr Powell both rejected a suggestion that the police vehicle had completed the U-turn before the motorcycle went out of control. A like suggestion was not put to Mr Davidson in cross-examination although his evidence-in-chief implicitly rejected it.

[56] It was open to the jury to have accepted the evidence of Mr Davidson, Mr Winch and Mr Powell to which I have referred in the immediately preceding paragraph. It is true that both Mr Thrupp and Mr Hadfield gave evidence that suggested that the motorcycle flipped after the police vehicle had completed the U-turn. However, the jury might well have regarded their evidence as not being of much assistance. Mr Thrupp confessed to a poor memory of the incident. Both he and Mr Hadfield described the location of the police vehicle when the motorcycle flipped, and not at an earlier time when the motorcycle began to brake and skid.

[57] There was abundant evidence before the jury that the police vehicle slowed, veered to the left and straddled the bitumen surface and dirt verge of the highway. Without stopping, it changed direction and commenced a U-turn. It was open to the jury to infer that by the commencement of the U-turn, the police vehicle had reduced speed sufficiently to execute a U-turn comfortably on a two lane road; that is to say, that at that point it was travelling very slowly and much more slowly than the other highway traffic.

[58] It was also open to the jury to reason that to move into a U-turn from a slow speed across a traffic lane could create a hazard for road users travelling at highway speed in the same direction. They would be placed in a situation that would require them in a very short period of time to take a number of steps: to observe that their path of travel was being crossed, to make an assessment of what precaution, if any, they might need to take in order to avoid impact with the vehicle crossing their path, and then to implement such precaution.

[59] Sergeant Klump's evidence indicates that Mr Smith had, in all likelihood, four seconds or less from when the U-turn was commenced to take all of these steps. At

that point, he was travelling at at least 94 kph. He evidently reacted by braking heavily over about 36 metres and, according to Sergeant Klump, for a duration of about one second. On the evidence of Mr Davidson, Mr Winch and Mr Powell, the police vehicle was only halfway through the turn and still partially across Mr Smith's path of travel when the heavy braking began. That was so notwithstanding that the appellant may have accelerated or driven "hastily" into the turn.

[60] On the evidence as a whole, it was, in my view, well open to the jury to have been satisfied beyond reasonable doubt that the appellant's driving was dangerous. It created a perilous hazard for Mr Smith, his passenger and his motorcycle, at least. The jury would have been entitled to regard the appellant's case in attributing responsibility for the tragic incident to overreaction on the part of Mr Smith as unrealistic and improbable.

[61] For these reasons, I conclude that this ground of appeal has not been established.

Ground 2

[62] At the first day of the trial and after the jury had been empanelled, the learned trial judge instructed them that if they had a legal question, they were to ask him about it.[77] The prosecutor did not open the Crown case until the second day of the trial. Before he did that, his Honour gave a further and more explicit instruction to the jury that they were to decide the case solely on the evidence.[78]

[63] The learned trial judge stressed the importance of not conducting their own investigations and of not using the internet or communicating by Facebook or any other social media for that purpose.[79] His Honour explained that "external information" could not be tested as the evidence of witnesses could be tested; that such information could be inaccurate; and that resort to it could undermine the fairness of the trial.[80] He instructed that if any member of the jury were to bring in "external information", they must tell the bailiff about it.[81]

[64] The material found in the jury room consisted of a single page titled "Reasonable doubt legal definition of reasonable doubt" apparently sourced from an online legal dictionary which contained references to United States jurisprudence.[82] The rest of the material comprised a two page document titled "Traffic Law" sourced from an online provider "gotocourt" which focused upon Queensland legislative traffic provisions including s 328A(4).[83]

[65] The latter document purported to explain the law under the headings "Serious Traffic Offences", "Circumstances of Aggravation", "Causing Death or Grievous Bodily Harm" and "Indictable or Summary Offence". The following passages from this document had been underlined by someone:[84]

> "It is important to note that you do not have to be purposely driving dangerously to be convicted.

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77 AB14 Tr1-6 ll13-14.
78 Transcript of Proceedings 2-4 l38 (Supplementary to Appeal Book).
79 Transcript of Proceedings 2-5 ll8-16 (Supplementary to Appeal Book).
80 Ibid ll22-25.
81 Ibid ll40-41.
82 AB220.
83 AB219, 221.
84 Ibid.

> You may have had no intention of driving in a dangerous manner but due to the speed you were travelling, or an action you have taken which has placed the public at risk, the Courts may deem it so.
>
> …
>
> If you are charged with causing death, or grievous bodily harm, due to the dangerous operation of a motor vehicle, the courts do not have to prove that your driving was the sole cause of the death or injury, but merely that is (sic) was a substantial or significant cause."

[66] After the jury had retired to consider their verdict, they passed a note to the learned trial judge which asked for a written definition of the charge. After discussion with counsel, his Honour prepared two typed versions of a written direction that might be given to the jury in answer to their question. One was a more full direction than the other. Both were drawn largely from the Benchbook direction for s 328A(4).

[67] His Honour provided the drafts to counsel.[85] Both submitted that if a written direction was to be given, the more full version was to be preferred.[86] It was a document of two pages in length. The jury were recalled. The document, amended in accordance with discussions with counsel, was given to them with some explanation of it by his Honour.[87] The jury then resumed their deliberations.

[68] **Appellant's submissions**: The appellant acknowledged that the exposition of the difference between the criminal and civil standards of proof in the single page document found in the jury room accorded with orthodox principles. It was submitted, however, that the presence of it in the jury room indicated a "direct contravention of an express instruction" of the learned trial judge. That, the appellant argued, called into question the jury's willingness to adhere to other directions given by his Honour.[88]

[69] The two page document found in the jury room was, it was further submitted, more problematic. The observation in it that absence of an intention to drive in a dangerous manner does not preclude a conviction for dangerous driving, was not balanced by an identification of the requirement that there be conduct that goes "beyond mere want of care" and which involves "some serious breach of the proper conduct of the vehicle." It, too, was accessed online and brought into the jury room in contravention of the express instruction.[89]

[70] The appellant contended that it could not be assumed that the jury gave greater weight to the document that the learned trial judge had provided to them than to the documents brought into the jury room by a juror.[90]

[71] In submitting that a miscarriage of justice had occurred, the appellant argued that it was not a strong Crown case; that the dangerousness of the appellant's driving was something about which reasonable minds might differ; and that this Court was not in a position to resolve issues of credibility of witnesses. It was therefore not

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85 AB174 ll1-3.
86 Ibid ll14-16, AB175 l5.
87 MFI "E"; AB217-218, AB179 l25 – AB180 l38.
88 Appellant's Outline of Submissions, para 50.
89 Ibid paras 51, 57.
90 Ibid para 58.

possible for this Court to conclude that the jury would have reached the same verdict had the irregularity not occurred.[91]

[72] **Respondent's submissions**: The respondent noted that markings on the documents accessed online indicated that they were printed at 9.52 pm and 10.19 pm respectively on 23 November 2016. The jury's request for the definition of the charge was made afterwards during their deliberations on the morning of 24 November 2016. Given this time sequence, there was no reason to conclude that the jury did not have primary, if not exclusive, regard to his Honour's direction on the topic.[92]

[73] In any event, the respondent argued, the information in either of the documents brought in by the juror was not wrong. Any incompleteness in the discussion of dangerous driving in the two page document was overcome by the completeness of the discussion of the topic in the document given by the learned trial judge to the jury.[93]

[74] As to the directions given by his Honour to the jury with respect to independent enquiries, the respondent submitted that, in context, they were directed to factual aspects of the case; that is to say, independent enquiries about facts of which witnesses had given evidence in the trial. A juror could well have understood his Honour's directions to relate only to that context.[94] Further, as to the instruction to direct questions about the law to him as the trial judge, it was followed insofar as the jury as a whole did make the request for a written definition of the charge.[95]

[75] The respondent submitted that, in this case, this Court would be satisfied that the jury would have returned the same verdict if the identified irregularity had not occurred. No miscarriage of justice resulted from it.[96]

[76] **Discussion**: It is not in issue here that the accessing by the juror of information on questions of law, that is to say, the meaning of reasonable doubt and the elements of traffic offences including s 328A(4), and the bringing of the documents containing that information into the jury room was an irregularity.

[77] The respective submissions by both the appellant and the respondent correctly apprehend that, here, the question for this Court is whether it can be satisfied that the irregularity has not affected the verdict and that the jury would have returned the same verdict if the irregularity had not occurred.[97] The materiality of an irregularity in this context is assessed by reference to its nature, relevance to the issues before the jury, whether its content was prejudicial and, if so, the extent of the prejudice.[98]

[78] The content of the documents brought into the jury room was plainly relevant to the issues before the jury. The live issues here are whether the information in the documents was prejudicial to the appellant and, if so, what the extent of the prejudice was. In developing an argument in favour of prejudice, counsel for the appellant referred to

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91 Ibid para 59.
92 Respondent's Outline of Submissions, para 3.5.
93 Ibid paras 3.5, 3.6.
94 Ibid para 3.7.
95 Ibid para 3.8.
96 Ibid para 3.9.
97 *R v Martinez* [2015] QCA 169; [2016] 2 Qd R 54 per Gotterson J at [32] (Morrison JA and McMeekin J agreeing).
98 Ibid at [31].

the exposition by Barwick CJ of the concept of dangerous driving in *McBride v The Queen*[99] and, in particular, to his Honour's description of it in contradistinction to negligence, as requiring "some serious breach of the proper conduct of a vehicle".[100] I accept that the two page document did not contain a description of dangerous driving to that effect. In that respect, the document was deficient.

[79] The deficiency was potentially prejudicial to the appellant in that a member of the jury who read and considered it only might not have realised that a serious breach of the proper conduct of a vehicle was required in order to commit the offence charged. However, during the course of his summing up, the learned trial judge twice spoke of the requirement for the Crown to prove a "serious breach of the proper conduct of the vehicle upon the roadway".[101] His Honour added: "so serious as to be in reality, and not speculatively, potentially dangerous to others".[102] Words to the same effect were included in the two page direction given to the jury at their request. Those words were read out by his Honour at that time.[103]

[80] Thus, there were clear oral and written directions given by the learned trial judge as to the seriousness of the breach required. In light of that, I am unpersuaded that their omission from the two page document accessed online caused any measurable prejudice to the appellant. I am satisfied that the jury would have reached the same verdict notwithstanding the identified irregularity. This ground of appeal therefore cannot succeed.

Disposition

[81] As neither ground of appeal has succeeded, this appeal must be dismissed.

Order

[82] I would propose the following order:

1. Appeal dismissed.

[83] **McMURDO JA:** I agree with Gotterson JA.

[84] **DOUGLAS J:** I agree with Gotterson JA's reasons and proposed order.

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99 [1966] HCA 22; (1966) 115 CLR 44 at 49-51.

100 Ibid at 50. See also *Jiminez v The Queen* [1992] HCA 14; (1992) 173 CLR 572 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ at 579.

101 AB160 l46.

102 Ibid – AB161 ll28-29.

103 AB180 ll13-15.