SUPREME COURT OF QUEENSLAND

CITATION:	*R v Greenwood* [2017] QCA 217
PARTIES:	**R** **v** **GREENWOOD, Mark** (appellant)
FILE NO/S:	CA No 231 of 2015 DC No 35 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bowen – Date of Conviction: 21 August 2015 (Baulch SC DCJ)
DELIVERED ON:	29 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 July 2017
JUDGES:	Sofronoff P and Morrison JA and Atkinson J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted after trial of causing grievous bodily harm – where the appellant appeals that conviction on the ground that the verdict was unreasonable or cannot be supported having regard to the evidence – where the ground is supported by four submissions: the jury were left to speculate about causation, the complainant's evidence was a confabulation, a number of factual submissions and the forensic evidence did not support the complainant's account – where this Court must review the evidence in its entirety having regard for the points of appeal and the pre-eminent position of the jury as an arbiter of fact – where it was common ground that the complainant had fallen and suffered tetraplegia as the result of the fall – where the appellant's case at trial was that the complainant fell down the stairs and then off a stool – where the Crown case was that the injury was directly or indirectly caused by an assault, and that allowed for the possibility of a fall – where the jury were therefore not required to consider causation – whether the jury were left to speculate on the issue of causation – where the quality of the evidence was affected by the fact that the complainant and appellant had been drinking at the time of the assault, the complainant was semi-conscious when

attended to by paramedics and hospital staff and in intensive care when first interviewed by police – where the appellant submitted that the complainant's state made his version of events more likely a confabulation and called expert evidence to support that argument at the trial – where the complainant's version of events was supported by the evidence of two friends – where the appellant contested their reliability and credibility as well as that of the respondent's expert witnesses – whether the verdict is supported by the evidence – whether it was open to the jury to convict the appellant of causing grievous bodily harm

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed

COUNSEL: D R Edwards for the appellant (pro bono)
D Meredith for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and with the order his Honour proposes.

[2] **MORRISON JA:** The appellant (**Greenwood**) and one McQuarters were friends, having known each other for about three years. On 12 August 2013 they met at Greenwood's house, and drank some beer while discussing a boat that Greenwood was building. Having agreed that they would meet later that night, McQuarters went home, drank a couple more beers and fell asleep. He woke when Greenwood arrived at about 8 pm.

[3] They drank a few more beers and some shots of spirits in McQuarters' downstairs bar. Greenwood became angry when McQuarters declined his invitation to go fishing with him in his boat, and struck McQuarters in the face several times. McQuarters retaliated and Greenwood then left.

[4] Shortly afterwards, Greenwood returned and struck McQuarters to the side of the head, and then on the top of the head. McQuarters did not see what he had been struck with, and fell down, probably unconscious. The injuries were severe, including fractures to McQuarters' cervical spine and a spinal contusion, which left him with C5 tetraplegia.

[5] Arising out of those events Greenwood was charged with causing grievous bodily harm, and was convicted after a four-day trial.

[6] He appeals that conviction on the ground that the verdict was unreasonable or cannot be supported having regard to the evidence. Within that general ground were the following: ground 1: the jury were impermissibly left to speculate about causation; ground 2: McQuarters' evidence of the events was a confabulation with others and therefore unreliable, and ground 3: a miscellany of points including, the injuries were caused by McQuarters' falling down the stairs and hitting his head on

a stainless steel plate, and the forensic evidence did not support McQuarters' account.[1]

[7] Greenwood's contentions on appeal were developed by Mr Edwards of Counsel, who commendably appeared pro-bono. Greenwood addressed his own grounds himself.

The legal principles

[8] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[2] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact. *SKA* adopted a passage from *M v The Queen*,[3] which said:[4]

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'."

[9] In *M v The Queen* the High Court said:[5]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it 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. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[10] Recently the High Court has restated the pre-eminence of the jury and the role of a criminal appellate court, in *R v Baden-Clay*:[6]

> "[65] 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

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1 Grounds 2 and 3 were advanced by Greenwood, appearing on his own behalf in that respect.
2 (2011) 243 CLR 400, [2011] HCA 13, at [20]-[22] per French CJ, Gummow and Kiefel JJ.
3 (1994) 181 CLR 487; [1994] HCA 63.
4 *SKA* at [14]; *M v The Queen* at 492-493.
5 *M v The Queen* at 493. Internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.
6 (2016) 258 CLR 308; [2016] HCA 35, at [65]-[66]. Internal citations omitted.

> 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 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 by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
>
> [66] 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."

Evidence at the trial

[11] The evidence at the trial came from a number of sources: (i) McQuarters; (ii) Clark and Trott, who were called to the scene shortly after the assault; (iii) paramedics, Rose and Cramb; (iv) medical evidence from Dr Reinke and Dr Tsai; (v) police and scientific examiners; and (vi) Dr Jha, a psychiatrist called by the defence.

McQuarters' evidence

[12] McQuarters gave evidence that he and Greenwood were friends, having known each other as co-workers for about three years. After work on 12 August 2013 he drove to Greenwood's house where they drank about three beers while discussing the work being done on Greenwood's boat. He stayed about 30 minutes and they arranged to meet again later at McQuarters' house. McQuarters went home, walked the dog, ate something, had a "couple of mid strength beers" and fell asleep while watching television.

[13] At about 8 pm Greenwood arrived. They went downstairs into a bar area, where they had "possibly two beers" and "two shots of a whiskey that he brought with him".[7] He said he "didn't think [he] was particularly drunk", and he felt okay.[8] He then described a mood change and the start of the assault:[9]

> "It was probably after three quarters of hour, I'd say. Something like that. We were talking about the boat at the time. … and he said he just couldn't wait to go fishing and get it in the water and such. And I said, to be honest, I didn't want to go fishing with him, because … [he reacted] [v]ery angrily. … when I said that he just walked around

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7 Appeal Book (**AB**) 22.
8 AB 26 line 27.
9 AB 26 lines 33-48, AB 63 lines 34-36.

> in a sort of couple of tight circles. Like one or two – sort of working himself up. He was sort of looking at the ground, and then he just turned around and … just hit me in the face…. [w]ith his fist…"

[14] He described defending himself by hitting him back, in the process of which he said he must have hit Greenwood because he "got a tooth mark on one of my knuckles". Then Greenwood "just cut it off and sort of … quickly walked outside". McQuarters lent on the bar for a short time. Then Greenwood "walked in through that side door, just walked quickly up to me and I thought no. That's what I said. I said no and then he hit me."[10] He indicated that he was hit on the side of the head, above the ear and going backwards. He did not see what he was hit with. Greenwood's hand "was down by his side as he walked up … to me". McQuarters said he had "never felt anything like it in my life. It was incredible pain".[11]

[15] He recalled that he was hit again on the top of his head. Again he did not see what he was hit with. The time interval between being hit on the side of the head and then on the top was "very quick".[12] By then Greenwood had been at his house for about 45 minutes.[13]

[16] He described what happened upon being hit: "I remember going over, but I don't remember anything after that. That's it."[14] His next memory was being in the ambulance, but he remembered looking up and seeing Trott there.[15]

[17] McQuarters identified various photographs as being of injuries on himself, but had no idea how he got them, except that they were not there before the assault by Greenwood.[16] They included marks on his back, back of the neck, right side of the body (a boot mark), and right shoulder.

[18] McQuarters said that his memory at trial was substantially better than at the time he was receiving medical treatment.[17]

[19] In cross-examination McQuarters adhered to the account he had given. Matters arising from the cross-examination were:

(a) he accepted that he had been a heavy drinker at times;[18] that night he had two or three beers at home before Greenwood arrived;[19] it was put, and he denied, that a lot of beer and two-thirds of a bottle of whiskey was drunk that night;[20] it was put and denied that he had three beers and six shots of whiskey;[21]

(b) he had no recollection of things he had told the medical staff;

(c) he disagreed that on the night in question he was very drunk;[22] he accepted that he drunk so much on occasions that it affected his memory of what he

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10 AB 27 lines 33-36.
11 AB 27 line 48.
12 AB 28 line 20.
13 AB 28 line 31.
14 AB 28 line 13.
15 AB 28 line 46.
16 AB 31-32, Exhibits 16-21.
17 AB 33 lines 9-12.
18 AB 33 line 31.
19 AB 41 line 39-47, AB 61 lines 16-18, AB 62 lines 21-28.
20 AB 42 lines 20-24, AB 43 lines 31-45.
21 AB 45 lines 22-25.
22 AB 35 line 15.

had done, but said that was on weekends because "During the week, you've got to work, man";[23]

(d) he disagreed that he had told an occupational therapist that he initially had no recollection of what occurred at the house; he also denied telling her that a friend of his had told him he was assaulted;[24]

(e) he could recall that a police officer came to see him in hospital, but he could not recall that a police officer came to the hospital in Brisbane to take a statement, and read a typed statement to him;[25] he could recall that the police came and a photographer was there, but "It wasn't a good day";[26] he could not recall a statement made by him while in the Intensive Care Unit;[27]

(f) it was put, and denied, that he had changed his statement after talking to people;[28]

(g) the beers they drank at the Greenwood house were heavy beers;[29]

(h) it was put, and denied, that Greenwood got to his house at about 6 pm, McQuarters saying he was annoyed that he came at about 8 pm because he was supposed to be there earlier;[30]

(i) his phone was upstairs;[31] later he amended that to "it could've been upstairs";[32] later again he said he did not think he went upstairs to get it as it was always in his pocket;[33] it was put, and denied, that he spilled a beer on the phone and took it upstairs to put it on a charger;[34]

(j) it was put, and denied, that a wooden barrier (intended to keep the dog from entering) was in place at the top of the stairs leading to the bar area;[35]

(k) he could not recall whether he smoked any marijuana that evening, but it was possible;[36] he also denied that Greenwood had refused a smoke and said the music was loud on his ears;[37]

(l) it was put, and denied, that he and Greenwood talked about McQuarters' past and that his father had beaten him, and was now dead;[38]

(m) it was put, and denied, that Greenwood had lost his phone and McQuarters went upstairs to get his; he said it was Greenwood's phone that was plugged into the music player;[39]

(n) he could not recall the contents of the first statement he made to police;[40]

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23 AB 45 lines 1-9.
24 AB 35 lines 35-46, AB 36 line 7, AB 64 line 36.
25 AB 36 lines 16-33.
26 AB 36 line 21.
27 AB 37 lines 27-43, AB 41 lines 9-11, AB 44 lines 24-29, AB 53 lines 14-17, AB 56-58.
28 AB 38 line 30.
29 AB 39 line 17.
30 AB 40 lines 10-39, AB 44 line 18.
31 AB 44 line 15, AB 51 line 20.
32 AB 53 line 40.
33 AB 64 line 44.
34 AB 47 line 40 to AB 48 line 3.
35 AB 46 line 34 to AB 47 line 35, AB 54 line 1, AB 65 lines 4-30.
36 AB 48 lines 13-26, AB 50 lines 31-35, AB 53 line 42.
37 AB 48 lines 32-36.
38 AB 49 lines 33-46.
39 AB 51 lines 12-26.
40 AB 51 line 33 to AB 52 line 16.

(o) it was put, and denied, that while in ICU he spoke to friends who "were telling you their theories about what happened that night";[41]

(p) he accepted that he spoke to his brother about the contents of his first statement; that arose because his brother pointed out that the version he had been told did not match the statement; McQuarters did not know the contents of the statement as he had not seen it at that point;[42]

(q) it was put, and denied, that he was concerned, when at hospital in rehabilitation, that his statement would not assist him in litigation;[43] he denied that he wanted to be able to blame someone for what happened so he could sue them, saying "That is bullshit. That is nonsense. Amazing. Sue a man with no money";[44] he agreed that he possibly told a rehabilitation specialist that he was "exploring his options to sue the perpetrator involved in the assault";[45]

(r) it was put, and denied, that he had no memory of what happened, or of how he received his injuries; he responded "I know exactly how I received my injuries. It's still bloody in my head. I still seen it"; [46]

(s) it was put, and denied, that he did not want the police there that night as they might find his drugs;[47]

(t) he repeated that he had been hit by Greenwood twice before he retaliated, and then Greenwood walked out the door;[48]

(u) it was put, and denied, that the fight he described did not happen;[49]

(v) he said he could not recall arriving at or leaving Bowen Hospital, and he had "pretty vague" recollections of the time at Townsville Hospital, nor could he remember much of the time in ICU;[50] it was put, and denied, that he had spoken to friends and his brother, trying to work out what happened;[51]

(w) it was put, and denied, that: (i) he went upstairs and fell when coming back down the stairs, then sat on a bar stool; (ii) by then he had injured his head, and Greenwood asked what had happened;[52] (iii) then Greenwood gave McQuarters a T-shirt to put on his head;[53] (iv) he fell off the bar stool and was lying on the ground;[54]

(x) he was questioned about a piece of steel shown in Exhibit 24; he denied it was under the bar stools or proximate to the bar; it was in the corner;[55] and

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41 AB 53 lines 31-37.
42 AB 55 lines 12-43.
43 AB 56.
44 AB 58 lines 30-34.
45 AB 58 lines 36-40.
46 AB 59 lines 4-8.
47 AB 60 lines 10-15.
48 AB 62 line 43 to AB 63 line 13.
49 AB 63 line 25.
50 AB 63 lines 8-22.
51 AB 64 line 25.
52 AB 65 lines 34 to AB 66 line 18.
53 AB 66 line 20.
54 AB 67 lines 1-4.
55 AB 68-69.

(y) it was put, and denied, that he was not punched or struck by Greenwood that night, but fell down the stairs and then fell off a bar stool.[56]

[20] In re-examination he said that when in ICU he was heavily sedated and hallucinating. He first found out that he had given a statement to police when he returned from New Zealand.

Evidence of Clark

[21] As at 12 August 2013, Ms Clark and her partner, Mr Trott, had known McQuarters for about three months. She had met Greenwood once. At about 9.30 pm, Trott received a call on his phone and told her that they better go to McQuarters as "something's not right". They drove down there and walked in the gate. She went in the door under the house where the bar is. She said she saw McQuarters "lying on the floor next to the pole and there was blood everywhere and it was floating out the door to meet me".[57]

[22] She described the scene: "[McQuarters] just laying down and his face was all swollen. His right eye was swollen. He … looked like he'd been in and out of consciousness and he was – forehead was blue. [asked if he was conscious she said:] Not then. He didn't say anything. His eyes was open and one eye was really swollen. [She] Just about slipped over in [the blood]. [Trott] came in around the other door and … looked up and said what the fuck have you done [to Greenwood] who was there mopping the floor and looking very agitated… [and he] kept mopping and mopping."[58]

[23] She said Greenwood was "near the bar, mopping and mopping, pacing backwards and forwards".[59] When Trott said what have you done Greenwood said: "I haven't done anything. He fell over. And then … [Trott] said why didn't you call the ambulance. And he said I couldn't find my phone and I couldn't find [McQuarters'] and then I raced upstairs and found one on the charger and then that's when I rang you and I didn't know what else to do and I tried to get him back up and I put him on the chair and he fell off again."[60]

[24] Clark was asked about the blood, which she described: "There was blood everywhere. Everywhere. I mean all over the place. There was just pools of it. It was splattered up the wall, up the fridge. … It was just like there'd been a massacre."[61] Greenwood leant over McQuarters and said to him "remember, I didn't do anything".[62] Greenwood whispered it but it was loud enough for her to hear.[63]

[25] In cross-examination Clark adhered to her account of the events she saw. Relevant matters arising out of the cross-examination were:

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56 AB 70 lines 30-47.
57 AB 81 line 37.
58 AB 82 lines 26-44.
59 AB 83 line 1.
60 AB 83 lines 15-20.
61 AB 83 lines 33-36.
62 AB 83 line 44.
63 AB 84 line 25.

(a) she was there when the ambulance was there, at which time there was no dog present;[64]

(b) McQuarters was lying with his legs touching the pole;

(c) when the ambulance arrived she went near the door where she came in; she agreed that at that time the dog could have come in but she did not remember seeing it;

(d) she denied that it was untrue that Greenwood was whispering to McQuarters; she denied when it was put to her that those words were not said by Greenwood;[65] and

(e) there was blood on the fridge and up the wall.[66]

Evidence of Trott

[26] Trott had known McQuarters for about three months and Greenwood for about six weeks. On 12 August 2013, at about 10.05 pm he received some text messages on his phone and then two calls which rang out. The first was from McQuarters' phone and the second from Greenwood. When it rang again it was Greenwood. He sounded "a bit distressed and said he had a problem with [McQuarters], that he'd fallen off a chair". Trott told him to pick him up but Greenwood said "look, he's really bad, he's hurt himself, he's got blood".[67]

[27] Trott checked his texts and there was one from McQuarters' phone which said "can you help me, can you help me".[68] He and Clark then drove to McQuarters' house. He went in. He described the scene:[69]

> "I went over through to the right entrance and [Greenwood] was standing at the right entrance with his arms crossed and I said what's going on and he looked at me and he said let me explain, let me explain. I said where's [McQuarters] and he pointed around the corner. At that time, [Clark] had sang out and said he's in here, darling and I walked in and couldn't see him because there's a bar that [McQuarters] has under his house and I thought it strange because usually [he is] sitting up at the bar and as I walked into the light, I saw … there was three or four big spurts of blood up on one wall. There was congealed blood all around the floor and … I saw what I believed to be [McQuarters] lying in a pool of blood, sir."

[28] He then asked Greenwood what he had done, but got no response. Greenwood had a couple of grazes to one side of his eye; it looked like they had been in a fight.[70] He asked Greenwood why he had not called an ambulance but got no response. Then Greenwood started mopping up the blood, including congealed blood around McQuarters' head,[71] which he did continuously.[72]

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64 AB 85 lines 23-25.
65 AB 87 lines 34-42.
66 AB 89 lines 29-33.
67 AB 106 lines 15-22.
68 AB 107 line 3.
69 AB 107 lines 19-47.
70 AB 109 line 15.
71 AB 109 line 35.

[29] Trott asked McQuarters if he wanted the police but McQuarters and Greenwood did not want that to happen.[73]

[30] In cross-examination Trott said:

(a) he saw two pieces of congealed blood on either side of McQuarters' head;[74]

(b) he did not notice the dog, but it was there when the ambulance was there;

(c) he agreed that his statement did not mention mopping being done in his presence, but said the police did not ask that;[75] and

(d) he agreed that his statement recorded him telling Greenwood to tidy the place up, but his recollection was that he actually told Greenwood to tidy himself up.[76]

Evidence of the police

[31] The officer who interviewed McQuarters in hospital was called for cross-examination. He said he went to Princess Alexandria Hospital to take a typed statement that had been prepared from a recording between himself and McQuarters. He read it to him, tape recording that too. That recording became Exhibit 28 and the statement Exhibit 29.

[32] He said that McQuarters was able to communicate quite well even though in ICU.

Evidence of Dr Tsai

[33] Dr Tsai was the rehabilitation physician who had care of McQuarters when he was in the spinal unit at Princess Alexandra Hospital. She said McQuarters had a C5 tetraplegia which meant spinal cord injuries which caused impaired movement and sensation below the fifth cervical vertebrae in the neck. He had fractures to the C4, C6 and C7 vertebrae with spinal contusions between C4 and C7. He had undergone a spinal fusion. With other complications he suffered, he would likely have died from the injuries.

[34] In cross-examination Dr Tsai referred to medication to assist with the withdrawal symptoms he had because of alcohol abuse.[77] She was asked about the possible causes of cervical fractures. As her answers assumed some significance in the submissions for Greenwood I will set out the full passage:[78]

> "Doctor, there are many different causes of cervical fractures. You'd agree with that?---Yes. That's correct.
>
> A common cause, or the most common causes, are motor vehicle accidents?---Yes. That's correct.
>
> Falls. Did you hear me?---Yes. Sorry. Was there a question?
>
> Yes. A second cause if falls – when – injuries from falls?---Yes. That's correct. Yes.
>
> Another significant cause are dives into shallow water?---Yes.

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72 AB 111 line 7.
73 AB 110 line 1, AB 110 line 36 to AB 111 line 2.
74 AB 113 line 44.
75 AB 114 lines 14-25.
76 AB 114 line 31 to AB 115 line 14.
77 AB 97.
78 AB 98 lines 22-38.

> Injuries from contact sports?---Yes. That's right.
>
> And a sport that has a – also a considerable number of injuries, although not a contact sport, is skateboarding?---Yes."

Evidence of Dr Reinke

[35] Dr Reinke was in the emergency department at Bowen Hospital and treated McQuarters when he was first brought in. He said he smelled of alcohol, was slurring his speech and McQuarters said he had been drinking.[79] When he was spoken to McQuarters opened his eyes and responded, but closed them again when he was not spoken to.

[36] He found a laceration on the top of his head, "almost at the top" on the left side. It was 12 cm long and went all the way to the skull, which had a shiny area that looked like it had been cut by something sharp. The doctor thought the cut had been made with something sharp like a sword.[80] As well, he had multiple small bruises over his face where he had been hit with something blunt.[81]

[37] Dr Reinke described his responsiveness: "He was oriented. He could answer questions. But he – at that time he didn't want to answer questions. When I asked him he said he didn't want to talk about it. For the first hour or so he was sleepy, but after that he was alert and talking and saying that he wanted to go home."[82]

[38] In cross-examination, Dr Reinke was referred to a letter he wrote while in emergency, for the retrieval team, where he wrote that McQuarters "had drunk very heavy, and had no recollection of events". He said that would be correct.[83] As to the laceration he said that it was very sharp because of the way it had cut the edge of the lining of the skull off.

Evidence of the paramedics

[39] Rose was one of two paramedics who attended at the scene. He described the scene: "there was a bar stool fallen over. There's broken beer stubbies. Looked like blood on the floor around the patient. The patient was lying on his back with his head away from the bar. And there was a black dog there that was quite concerned about the person on the ground".[84]

[40] After tending to McQuarters, he heard one of the men say to the other something like "we'll have words or something like that about it tomorrow morning".[85] Greenwood moved a piece of aluminium out of the way to get the stretcher out.[86]

[41] In cross-examination, he was taken to his statement in which he referred to a piece of cold room insulation which he moved out of the way. He said he vaguely remembered that it was there and he had to move it. He said the sheeting in Exhibit 24 was not what he referred to as the cold room sheeting.[87]

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79 AB 100 line 11.
80 AB 100 lines 24-41.
81 AB 101 line 10.
82 AB 101 lines 20-24.
83 AB 102 line 38.
84 AB 120 lines 11-14.
85 AB 120 line 43.
86 AB 121 lines 1-6.
87 AB 122-123.

[42] Cramb was the second paramedic. He described his recollection of the initial scene: "my recollection is walking in the back door there was a male patient lying on the floor covered in blood. … I do … remember that it looked like there had been some attempt to clean up blood off the floor, so smeared. And there was also a gentleman who was also in that room at the time. And there was a dog as well."[88]

[43] He started treatment. McQuarters was covered in a lot of blood, had lacerations to his head and a lot of bruising to his face. His eyes were closed, and he was "not much" conscious.[89] He asked Greenwood what had happened:[90]

> "… it was just a very vague conversation. It was very difficult to get any information out of what happened to the patient, how he had fallen. So it was along the lines of I believe, you know, I helped him get up onto the stool. I then said so you helped him get up onto the stool, but did you see what he fell on, or did he hit anything, and he said no, I wasn't there at that time."

[44] McQuarters was covered in blood but, there was no active bleeding on his body at that time. He had lacerations to his head and also to his back.[91] He was asked if McQuarters said anything:[92]

> "He said very little at all. So that's why it was still difficult to get information. Laughed a few times, and then on the way out he said something along the lines of I'll sort this out when I get back. … It was just – like, it was a short burst of laughter just every now and again. So every time we tried to ask him something there was a bit of a laugh or a chuckle-type laugh."

[45] In cross-examination he said that McQuarters appeared intoxicated, and occasionally was laughing and smiling. He was taken to a statement he had done and agreed he had said that Greenwood told him:[93]

(a) when asked what happened: "I don't know. I didn't see him fall. I didn't notice any blood anywhere. I sat him on the bar stool. He fell off the stool."

(b) when asked how did he fall or what did he hit?: "I don't know."

(c) when asked did he hit anything?: "I don't know. He could have hit the table. He could have hit the fridge."

(d) when asked did you put him back on the chair, but you didn't see him fall?: "I wasn't there. I don't know. I just put him on the stool."

[46] In re-examination he said that his deduction that McQuarters was intoxicated was because of the way he presented, not saying much and laughing, and the smelling of alcohol. But, he added, that he had a lot of bruising to the head so "there may have been other factors there as well".[94]

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88 AB 124 lines 38-42.
89 AB 125.
90 AB 125 line 45 to AB 126 line 2.
91 AB 126 lines 15-20.
92 AB 126 lines 37-45.
93 AB 127 line 41 to AB 128 line 35.
94 AB 129 lines 15-25.

Police scientific evidence

[47] Officer Padget gave evidence about the examination of the bar area, including blood deposition and presumptive tests for blood. He identified various objects and areas that were tested in one way or another. He described the basis of the tests done and what conclusions could be drawn from blood deposition. His conclusions were:

(a) tests showed blood on the walls, bar, middle of the bar, fridge, floor, seat, and skirting board;

(b) some of the blood spatter on the bar and fridge went downwards;[95]

(c) there was "virtually zero" blood on the metal object;[96]

(d) the blood on the wall was projected upwards and the source was about 80 to 95 cm from the ground level; that was about two metres away from the blood on the fridge and meant that the events that caused the two deposits were not the same cause;[97]

(e) the blood on the front of the fridge low down had travelled sideways and the source would have been low down;[98] and

(f) it appeared that blood had been wiped off the wall.[99]

[48] In cross-examination he accepted as a general proposition that there can be transfers of blood from one surface to another in a variety of circumstances.

[49] Evidence was given by Sgt Maguire, who took photographs of the area on 14 August 2013.

Evidence of Dr Jha

[50] Dr Jha, a psychiatrist, was called by the defence. He had reviewed much of the evidence in the trial, including witness statements. In his opinion the evidence revealed that there was a session of binge drinking (classified as more than four drinks) which can lead memory impairment or anterograde amnesia. The latter term refers to a lack of new memory being formed during the drinking session. In common parlance it is known as alcoholic blackouts, and usually lasts for about eight to 16 hours, which is the half-life of alcohol. Such patients who are admitted in that state have no recollection of how they were brought in, a state known as en bloc amnesia or en bloc blackouts. Such people, despite trying their best, will find it near impossible to recollect what happened during that time.[100]

[51] He said that McQuarters seemed fully oriented at the Bowen Hospital, being conscious, talking, opening his eyes on command and verbally responding. However, he suspected that McQuarters was not able to follow all the motor commands.

[52] Dr Jha said that patients with alcohol are slow healers. If they undergo surgical procedures and are affected by powerful painkillers, that further affects their

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95 AB 141.
96 AB 141, Exhibit 62.
97 AB 154.
98 AB 154.
99 AB 146.
100 AB 191.

memory and healing process. In such cases it is not uncommon for such people to fill in memory with confabulation, or making up memories to fill in the void.[101] Asked to explain that concept Dr Jha said:[102]

> " … powerful drugs which have properties to cause amnesia, they are alcohol, cannabis, benzodiazepines and opiates, which are very common painkillers. So when people have memory gaps because of these powerful agents – and later down the track it's very difficult for the brain to understand those memory gaps, so it tries and accommodates those gaps by what they believe would have happened, and that's what is medically known as confabulation. So it's not deliberate lying; it's just what they believe is true, and it can be helped by cues or their past experiences or by suggestions if they are a very suggestible individual. Most people in a vulnerable state can be, and that can lead to the memory gaps being filled up. … Based mostly on their past experiences and cues. … cues are from their social surrounding, what they – things that remind them of their past. It could be verbal cues from suggestion from friend and family. It could be olfactory cues, which are smells and – so it can be cues in any of the five sensation modalities that we have."

[53] He explained that confabulation was not deliberate lying but the subconscious trying to work out what happened. Dr Jha opined, based on a review of the evidence of drinking that day, that "it does appear to me that with the different opinions expressed and the initial expression of first recollection of this actual incident, it looks to me that he must have suffered a case of – it's likely – [e]n bloc amnesia, which means there would be absence of any memory being formed for that eight hour session".[103]

[54] Dr Jha went on to express the opinion, based on reading the evidence, that there were, in fact, two different episodes of amnesia, the first related to alcohol and covering the time from the assault to being in hospital at Bowen, and the second later when he was under the influence of drugs in ICU and under surgery.[104] His experience was that in such cases of en bloc alcohol-induced amnesia the memory "doesn't usually come back", but is replaced with confabulation.[105]

[55] In cross-examination Dr Jha:

(a) conceded that confabulation is rare, being seen "more on the sides when we see people with alcohol-induced dementia";[106]

(b) accepted that a person given morphine and endone (both strong painkillers) would exhibit disorientation;[107]

(c) said that it was "quite likely" in his opinion that McQuarters had an alcohol related blackout at the time;[108] but his conclusion was based on witness

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101 AB 191-192.
102 AB 192 lines 6-22.
103 AB 193 lines 6-10.
104 AB 193 lines 16-26.
105 AB 193 lines 29-37.
106 AB 194 line 8.
107 AB 195 lines 30-38.
108 AB 196 lines 29-37.

statements showing he had more than five drinks, and it "would have been helpful if I was provided with serum alcohol levels" and "in the absence of serum alcohol levels I can only extrapolate"; his opinion could be stated with certainty if he had those serum alcohol levels;[109]

(d) there was some equivocation in the strength of his opinion, saying it was certain, likely and possible;[110]

(e) finally his opinion was expressed as that it was possible that he had alcohol-induced amnesia:[111]

> "In medical sciences, we make a diagnosis and we make a differential diagnosis. So that's the next possibility. Given that – the limited information I have, given the limited information about his past history of alcohol use, given his past medical comorbidities that he might have, which I'm not privy to, so I don't know what his medical comorbidities are which might have affected, so it is quite possible that he had alcohol-induced amnesia.
>
> Right. So - - -?---Or en bloc.
>
> So now we're getting there. It's possible that he did. Is that – is that your evidence to the jury?---Yes."

(f) in his experience the most common causes of cervical fractures were motor vehicle accidents and falls, in that order;[112]

(g) the level of toleration of alcohol affects a conclusion about alcohol-induced amnesia; he did not know the level of McQuarters' toleration of alcohol;[113]

(h) where someone has sustained a significant traumatic event, the way they react varies significantly; post-traumatic stress disorder affects different people differently; he did not know for certain the amount of alcohol involved, the amount of food he had eaten, whether he was unconscious and for what period of time, how McQuarters reacted to trauma, the force applied to his head, or what medication he was given at what stages;[114] and

(i) McQuarters' inability to recall the interview with the police while in ICU could be attributable to the drug regime he was on;[115] how he spoke to the paramedic and then the doctor had two possible explanations, one was alcohol and the other was the medication regime.[116]

[56] In re-examination Dr Jha said that people with longstanding alcohol use, or alcohol dependence, have a higher tolerance to alcohol, and can appear a lot more conscious even at very high concentrations. With that blackouts would happen at a higher level.[117]

Discussion

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109 AB 197 lines 4-18.
110 AB 197 lines 33-43.
111 AB 198 lines 1-11.
112 AB 199 lines 9-14.
113 AB 201 lines 4-13.
114 AB 201 line 44 to AB 202 line 30.
115 AB 203 lines 1-9.
116 AB 203 lines 15-20.
117 AB 205 lines 16-26.

[57] I intend to deal with the submissions as each relevant aspect arises

Ground 1 – unreasonable verdict

Submissions

[58] The first contention centres on the main injury sustained by McQuarters, that is, fractures to his cervical vertebrae. Counsel for Greenwood submitted that it was unfair to expect the jury to speculate upon fundamental issues such as how and in what possible circumstances the neck injury might have occurred. In that respect attention was drawn to the following aspects:[118]

(a) the jury were directed that a guilty verdict required that they be satisfied that the injury was caused by a blow or blows to the head, and the relevant event was not the head laceration or other head injury, but rather the neck and spinal injury;

(b) Dr Reinke's view was that the mechanism was something very sharp, like a sword; his examination did not include bruising, laceration or injury to the neck;

(c) Dr Tsai's explanations of the mechanisms for neck injuries were, in descending order, motor vehicle accidents, falls, diving into shallow water, contact sports and skateboarding;

(d) the summing up referred to the inadequacy of the medical evidence; and

(e) there no evidence of how blows to the head, and not the neck, could cause the injuries; such evidence was vital but missing.

[59] In oral address that contention was amplified. It was said that the failure to adduce evidence of whether a fall off the bar stool (the account of Greenwood) could cause the injuries left the jury to impermissibly speculate. There was no evidence that blows to the head, which might have caused the bruising to the face, could have caused the neck fractures. There was no evidence of the degree of severity of the facial injuries.

[60] For the Crown it was submitted that the case was that there were two alternate versions of events, which both accepted that McQuarters suffered tetraplegia. The alternate versions both proceeded on the basis that the event ended with a fall, because McQuarters ended up on the ground. There had to be a cause for the fall because the evidence was clear that McQuarters was well beforehand. The evidence from Dr Tsai was that he suffered C5 tetraplegia as a result of the alleged physical assault. Of the other possible causes she postulated for such an injury three are relevant. They are: injury from a fall, diving into shallow water, and injuries from contact sport. All three involve the head impacting on a solid object.

[61] The defence case was that McQuarters could not be accepted because of his lack of true memory and the change from his first statement to his evidence at trial. However, those differences are in matters of detail; in each the central theme is an assault by Greenwood. The jury could have been in no doubt as to the competing versions, and accepted that of McQuarters. It was open to them to do so.

Discussion

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118 Appellant's outline, section 1.

[62] The contention for Greenwood confronts a considerable hurdle, in the form of the way the case was conducted below. The Crown case was that reflected in McQuarters' evidence, namely that Greenwood struck him on the head with such force that the blows, or a resultant fall to the ground, caused the cervical fractures and consequent tetraplegia. By contrast, the defence case was that McQuarters somehow fell down the stairs, then when Greenwood assisted him onto a stool, he fell again. Somewhere in that process one of the falls resulted in the cervical fractures and consequent tetraplegia. An essential part of this case was that Greenwood never struck McQuarters, whether with a weapon or not.

[63] There was no dispute about some matters:

(a) McQuarters was in good health when Greenwood arrived that night; McQuarters had to that point sustained no injuries and was not bleeding;

(b) following the events that night McQuarters suffered cervical fractures and other injuries including the laceration through his scalp to the skull; and

(c) whatever happened, whether blows or a fall, caused the cervical fractures; there was no other suggested cause.

[64] No case was put to the jury that if they accepted that an assault had occurred, they would nonetheless be left in doubt about whether the assault could have caused the fractures. There was a reasonable basis for not raising that. First, if the jury was satisfied that an assault took place, it was a simple matter to conclude that such an assault could cause McQuarters to fall to the ground and injure his head and neck. Thus the fall might be the proximate cause of the injuries, but nonetheless the assault led to the fall.

[65] That this was a real prospect can be seen from the question asked by the jury, and the learned trial judge's answer to it. The question was:[119]

> "If a fall is a direct result of being struck or pushed, and that fall results in a spinal injury, is that action, the strike or push, deemed to have caused the grievous bodily harm?"

[66] The learned trial judge's answer, given after the appropriate response was debated with Counsel, was:[120]

> "No evidence about a pushing, so it's a striking. That's what the Crown relies on is a striking to the head. But if a striking to the head directly causes a fall, and that directly causes the neck and spinal injury [indistinct] that is a striking that causes grievous bodily harm."

[67] Secondly, there was some evidence from Dr Tsai as to causation. She was asked to say what McQuarters' injuries were. She answered: "At that time, Mr McQuarters suffered C5 tetraplegia as a result of the alleged physical assault."[121] It was not put to Dr Tsai that the tetraplegia could not have been suffered as a result of the assault.

[68] Thirdly, to do so would run counter to the simple approach taken in the defence case, namely McQuarters fell without any involvement of Greenwood. Defence Counsel may well have considered that to raise such a causation issue would be to

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119 AB 252 line 7.
120 AB 254 line 15.
121 AB 92 line 43.

flirt with the jury's acceptance of McQuarters' evidence, when there were powerful arguments as to why the jury should disbelieve him, or at least have such doubts about his reliability as to acquit.

[69] Defence Counsel at the trial raised the issue of causation with the learned trial judge. He commenced with a submission that there was "an inherent difficulty here in relation to the Crown case question of causation".[122] As argument progressed the learned trial judge asked if it was a "no case" submission.[123] Ultimately the issue was left on the basis that the question of causation was one for the jury, but to be raised in the summing up. That is what occurred.[124]

[70] The learned trial judge's summing up reflected the way the case was conducted. The jury were told that the defence case was that McQuarters was:[125]

> "Placed on the stool after apparently having a fall, and he fell from that onto the floor. If you cannot exclude it as being a cause, then, Mr Walters rightly says to you, the man should be acquitted."

[71] Then when the learned trial judge directed the jury as to how they might go about their deliberations, he said:[126]

> "How will you start? Well, you might ask yourselves first, 'Can I be satisfied that the injuries, neck injuries, are the result of a blow or blows to the head struck by the accused man?' That's a good starting point, because if you can't be satisfied of that, then your task is over."

[72] The defence case was that McQuarters fell off a chair, and that led to his tetraplegia. McQuarters denied that account of the events. The jury, therefore, had two alternatives: (i) he was injured by reason of an assault; on the prosecution case there was no other possibility; (ii) the defence case was that there was no fight at all, and McQuarters must have fallen. There was no case put at the trial that if it was an assault, the Crown had not explained how the assault might have caused the injury. Rather, it was a case where there were two versions put, both of which assumed that the events asserted in the respective versions caused the injury.

[73] The jury must have been satisfied that Greenwood assaulted McQuarters. The assault actually caused the injury, because there was no other cause and the jury must be taken to have rejected the fall theory. But even if they did not, and considered that McQuarters fell off the chair, that fall might well have occurred because of the assault. If so, the assault directly, or indirectly, caused the injury. Therefore, as a matter of fact, the blow led to the injury.

[74] Thus the jury were not confronted, as a consequence of the way the respective cases were conducted, with the need to grapple with causation. There were only two possible agencies at work to change an uninjured McQuarters into a tetraplegic. One was a fall unaided by Greenwood, followed by a fall off the stool. The other was an assault which led to head injuries and a fall (in either order). The injuries were

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122 AB 179 line 46.
123 AB 180 line 24.
124 AB 237 line 33.
125 AB 238 line 40; this was in the review of the cases as put.
126 AB 240 line 8.

caused by one or the other. There was no need to call or deal with medical evidence on that issue.

[75] Further, one needs to bear in mind that there was no direct evidence of the defence's alternative agency, the unaided falls. The suggestion came from what Greenwood said to Trott and the paramedic, Cramb. In each case he said that McQuarters must have fallen because he found him on the floor, and then after he helped him onto the bar stool, he fell again. The first part was supposition or inference on Greenwood's part as, according to his own account, he did not see the first fall.

[76] The jury had to consider the question whether a reasonable person would have foreseen that a neck injury of that kind was a possible consequence of the assault. In my view, that question was something about which the jury could be satisfied. When they did so they had the unchallenged evidence of Dr Tsai, that falls were a mechanism for cervical fractures. She said, in answer to the question of the injuries: "At that time, Mr McQuarters suffered C5 tetraplegia **as a result of** the alleged physical assault."[127] It was not put to her that he could not have suffered the C5 tetraplegia as a result of the alleged assault. As against that is merely the identification of possible causes of such injures, none of which is said to be a probable cause in this case. Indeed, some of them are automatically discounted: there were no motor vehicle accidents, diving into shallow water, or skateboarding in this case. That left falls and contact sports.

[77] But that confuses the issue. None of those causes were true causes in themselves. That is, they are only possible causes because of the damaging impact on the cervical spine that accompanies the event. Thus a motor vehicle accident can cause the injury because of the impact on the cervical vertebrae. Likewise the others in the list. Once that is understood, the evidence of Dr Tsai as to possible causes does not carry the case far at all.

[78] Similar evidence came from Dr Jha, who said that falls were the second most common cause of such fractures, after motor vehicle accidents. Having accepted that there was an assault and a fall, there was a solid foundation to conclude that the neck injury was a foreseeable consequence of the assault.

[79] The case went to the jury on the basis that the injury was directly or indirectly caused by the assault, and that allowed for the possibility of a fall. Consequently, the way the case was left to the jury allowed for a proper decision by it.

Dr Reinke and the broken stubby

[80] It was submitted that unfairness arose because Dr Reinke was not recalled by the Crown to give evidence as to the significance, if any, of the broken stubby seen by Rose (paramedic). The submission was based on Dr Reinke's evidence that the laceration on the head was caused by something sharp, like a sword. It was submitted that Dr Reinke could have commenced on the potential relevance of the broken glass to the injury.

[81] For several reasons I consider this submission should be rejected.

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127 AB 92 line 43.

[82] First, there was no evidence that blood or potential for blood was found on any broken glass. Had it been the cause of a 12 cm, deep laceration to the head, it is hard to believe that traces of blood would not have been evident.

[83] Secondly, there was no evidence tending to establish when and how the broken stubby came to be where it was. The jury would have been unable to decide if it was broken before the assault, during, or later. Absent some connection with the events its presence signifies little.

[84] Thirdly, defence Counsel did not seek to have Dr Reinke recalled.

[85] Fourthly, in light of the discussion of Ground 1 above, the presence of a broken glass was inconsequential. The jury accepted there was an assault that led, directly or indirectly, to the cervical fractures. That the laceration was from one sharp object as opposed to another is of little moment once the assault was accepted.

[86] This ground lacks merit.

Ground 2 - confabulation

Submissions

[87] On this ground Greenwood appeared for himself. He submitted that McQuarters' account was the product of confabulation. That was said to be supported by: (i) the fact that McQuarters had spoken to his friends, Clark, Trott, and his brother; (ii) Dr Jha's opinion; and (iii) the evidence of his inability to recall how he sustained the injuries.

[88] The Crown submitted that the injuries, loss of consciousness and medication while in hospital, all affected whether the jury could conclude that McQuarters' account was the product of confabulation. The jury could have rejected Dr Jha's evidence because of the modification from alcohol-induced amnesia being "likely" to "possible", and also the limitations on the factual basis for it.

[89] The Crown contended that a comparison of McQuarters' first statement, 10 days after the event and while in ICU and under heavy medication, with his trial evidence revealed such similarity as to dispel a finding of confabulation. To that they added that Dr Reinke's evidence was of a reluctance to talk, rather than inability due to lack of recall. Finally, it was submitted that the various pieces of post-offence conduct had to be taken into account, and they point away from confabulation.

Discussion

[90] In my view, the jury were not compelled to conclude that McQuarters' account was the product of confabulation, and therefore reject it.

[91] First, an examination of McQuarters' first statement shows a consistency in his evidence such that the jury could accept it. The statement was taken from McQuarters in August 2013[128] and contains these features: (i) on the day in question they met, drank beers, discussed the boat and arranged to meet later; (ii) Greenwood arrived about 6.30 pm with beer and whiskey, of which they drank some;

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128 AB 267.

(iii) McQuarters rebuffed the invitation to go fishing; (iv) after that he was struck a few times, and remembered nothing more; (v) it was Greenwood who started the assault; he was the only other person in the house; (vi) McQuarters did not know what he was hit with; and (vii) on the first hit "he just swung around and went wack".

[92] The similarities with his evidence at the trial are obvious. The main difference concerns the recollection of details of the events. Given that the statement was taken 10 days after the assault, while McQuarters was in intensive care, and on medication, it is not surprising that his recollection might have been adversely affected then. Nor is it surprising that he may have had no real memory of having given it.

[93] However, even in that state he recalled the sequence as he did later, but importantly: (i) he said it was Greenwood who started the assault; (ii) that was after McQuarters turned down the fishing invitation; (iii) he said Greenwood hit him suddenly; and (iv) he did not see what he was hit with. Those are all central features of his later evidence. The defence case was that the confabulation was that Greenwood was the perpetrator of an assault, whereas the truth was that there was no fight at all, merely a fall down the stairs, followed by another fall off the stool. The first statement does not suggest anything other than consistent memory.

[94] Secondly, there were, in my view, sufficient qualifications to Dr Jha's evidence that the jury could reject it. There was not just the downgrading of certainty from "likely" to "possible", but also the factors which Dr Jha said he did not know (alcohol tolerance, amount of food eaten, medication regime, periods of unconsciousness) as well those he would have liked to have had, but did not (serum alcohol levels).

[95] Further, Dr Jha's opinion did not seem to give weight to McQuarters' first statement and its consistency with his later evidence. Had that been properly taken into account, one wonders if Dr Jha could still have opined that McQuarters' inability to remember the first statement was an indicator of confabulation.

[96] Thirdly, the evidence of post-offence conduct may well have given the jury some support in rejecting confabulation. Greenwood delayed calling the ambulance until told to do so by Trott. The delay was considerable. Greenwood was seen by Trott and Clark to be mopping up continuously. Greenwood did not want the police involved. And his whispered words, "remember, I didn't do anything", may well have been seen by the jury as pointing to an incident in which he was centrally involved, not just peripherally.

[97] Fourthly, the evidence from the forensic examiner could well have been accepted by the jury as contrary to the only alternative advanced to counter McQuarters' account of an assault by Greenwood. The blood spatters which were upward near the wall and horizontal near the fridge, and which were not caused by the same event, puts the lie to suggestion of one fall followed by a fall off a stool. That the upward spatter originated at about 80 to 95 cm above the floor is, the jury could have accepted, consistent only with McQuarters' account.

[98] Finally, it is noteworthy that Greenwood's own submissions to this Court[129] are contrary to a conclusion based on confabulation. He said:[130]

> "… I can tell you now, he's been foxing since that day that he has no memory. He knows exactly what happened, and he's foxing."

[99] Therefore Greenwood's case, at least before this Court, was that there was no confabulation, but rather, deliberate misleading.

[100] I consider this ground lacks merit.

Ground 3 – various points - unreasonable verdict

[101] Greenwood addressed the Court on the grounds he propounded and which were not advanced by Mr Edwards. That included submissions going to the contention that the verdict was unreasonable and was not supported by the evidence.

[102] Matters submitted by Greenwood included:

(a) he did not strike McQuarters on the head with a weapon; McQuarters' height made it impossible that he could have hit him on top of his head;

(b) the post-offence conduct was disproven by the forensic evidence; there was no DNA or blood on the mop;

(c) the forensic evidence did not support that McQuarters was standing at the bar when he was hit; there was no blood dispersed at the bar;

(d) the blow to the head only arose in statements 18 months after the event, and Dr Reinke altered[131] his statement to propound a sharp instrument as the cause of the laceration;

(e) there was no injury inside the skull or at the base of the skull; it was a hyperextension injury; a blow to the top of the head could not cause fractures classed as being from hyperextension; the evidence established that McQuarters fell down the stairs and then off the bar stool, hitting his head on the steel plate; that cut his head and possibly bent it awkwardly;

(f) the description of McQuarters laughing and joking with the paramedics was wholly inconsistent with the conduct of someone who had just been assaulted in the way he described;

(g) McQuarters made up his evidence in conjunction with his brother;

(h) the 000 call by Greenwood revealed that it was Trott, not Greenwood, who resisted police involvement; but the 000 call was not put in evidence at the trial;

(i) it was implausible that he would have stayed there if he carried out the assault as McQuarters said;

(j) when he was lying on the floor McQuarters was laughing and joking with Greenwood; McQuarters was aware of the situation and "he's been foxing since that day that he has no memory. He knows exactly what happened, and he's foxing";[132] and

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129 When he was arguing his own grounds of appeal.
130 Appeal Transcript T1-26 line 36.
131 Greenwood used the word "tailored".
132 Appeal transcript T1-26 line 37.

(k) the fact that he had no injuries himself showed he had not been in a fight; this was confirmed by police and a doctor he went to for a report; the doctor was supposed to give evidence, but did not do so.

[103] For the Crown it was submitted that the jury was best placed to properly assess the evidence, and take account of inconsistencies and improbabilities. Dr Reinke did not alter his evidence, as is apparent from the letter he prepared when McQuarters was to be retrieved.[133]

[104] The Crown submitted that the evidence of Trott, Clark and the paramedics was contrary to Greenwood's contention that he was not engaged in post-offence conduct such as mopping. The fact that Greenwood called Trott a number of times before he called the ambulance was strange. As for the suggestion that certain evidence was not led at the trial, there was no ground based on incompetence of Counsel.

Discussion

[105] It is apparent that some of the submissions by Greenwood depend on his account of what occurred: see paragraphs [102](h) and (j) and parts of paragraph [102](a) and (k). He did not give evidence at the trial, and those matters should not be received now.

The forensic evidence

[106] I do not accept the submission that the forensic evidence disproved the suggested post-offence conduct, particularly the mopping. Direct evidence of the mopping was given by three witnesses. When the forensic examiners arrived on the scene, a couple of days after the event, the mop was in a bucket, in water. That may well have accounted for the lack of a positive test for blood on it.

[107] That there was not much blood in the bar area says little. The precise way in which the assault happened, and where it started, was not certain. And Greenwood had certainly done some cleaning up. The luminal testing revealed a presumptive test for blood on the bar, and there was a projection of blood upwards on the wall next to the bar.

Nature of the injury - hyperextension

[108] Greenwood's contention that the fractures were caused by a hypertension injury must be rejected. No medical expert said so, and there was ample opportunity to cross-examine to that effect, if it were so.

Implausibilities

[109] The implausibility of certain events were matters raised at the trial. The jury were addressed by defence Counsel, and then the learned trial judge summed up. The jury would have been well aware of the fact that McQuarters was said to be laughing at times when the paramedics were there, as that was a fact relied upon by Dr Jha. I am also sure that the jury would have considered why it was that Greenwood was there after the assault.

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133 AB 295-296.

[110] The two contended implausibilities do not, in my view, rise to such a level as to compel rejection of McQuarters' account. That is especially so, given that it is generally consistent with his statement given only 10 days later.

[111] I do not accept the submission that the blows to the top of the head could not have occurred as McQuarters said because he was too tall, and if he had been standing at the bar there would have been no room. McQuarters could not say precisely what happened beyond being hit on the side of the face then the top of the head, when he went over. The Crown's case did not depend on McQuarters being fully upright at the point when the blow to the top of the head was struck. His evidence was that he leant on the bar. In any event the presence of an upwards spray of blood on the walls near the bar from a height about 80-95 cm from the ground, is wholly inconsistent with a blow while standing up at full height. That is because the wound that would have led to the blood spray was the laceration to the top of the head. The jury could conclude that the injury was not inflicted while McQuarters was standing upright, or even leaning on the bar.

[112] The submission that the account of a blow to the head only arose 18 months later, and that Dr Reinke tailored his evidence, should be rejected. As I have set out earlier, there is quite a degree of consistency between the first statement by McQuarters, and his later evidence. Crucially the first statement said that he was attacked suddenly, and hit by Greenwood. There was no other cause mentioned.

[113] There is no basis to conclude that Dr Reinke materially altered his evidence, let alone "tailored" it. The letter he wrote for the retrieval team shows no relevant inconsistency with his later evidence.

[114] The discrepancies in McQuarters' first statement and what was said to medical witnesses (including the paramedics) were all highlighted to the jury, and the subject of the learned trial judge's summing up. It was, in my view, open to the jury to accept McQuarters' evidence as credible and reliable.

[115] I do not accept Greenwood's contention that the post-event conduct of McQuarters was inconsistent with someone who had been recently assaulted. That contention relies on no scientific or logical analysis. It would not be beyond human experience to find that different people react in different ways to stressful situations, particularly if they have been injured and suffered significant blood loss.

[116] Given that the evidence supports the conclusion that some time elapsed between the assault and when the paramedics arrived, it would also not be surprising if McQuarters was in shock at the time they spoke to him, at least from the loss of blood.

[117] In so far as that submission was that McQuarters' reactions were odd given that his attacker was present, the same answers apply. He had been struck violently, lost a lot of blood, and was likely unconscious for a time. In such circumstances the jury were not compelled to conclude that McQuarters' behaviour signified anything in relation to what had transpired.

[118] Greenwood also contended that his lack of injuries told against the jury's acceptance of McQuarters' account. I am not persuaded of that. First, there was some evidence that he had been injured, in that Trott said he had grazes in the area of an eye. Secondly, McQuarters supposed that he had hit Greenwood in the mouth,

because he had a cut on a finger. But he may have been mistaken about that. In the end the only evidence that Greenwood was not injured came from the policeman, McGuire, who simply said he did not see any. That state of evidence by no means leads inevitably to the conclusion that Greenwood sustained no injury.

[119] As I have said above, there was a degree of consistency about McQuarters' evidence that could well have led the jury to conclude that it was credible and reliable, and that they could be satisfied beyond reasonable doubt that the injuries were sustained because of an assault by Greenwood. There was support for that conclusion in other evidence:

(a) the forensic evidence did not reveal traces of blood on any sharp instrument in the room, upon which (as the defence case theorised) McQuarters may have fallen;

(b) the forensic evidence revealed two particular blood sprays which were caused by separate events; one was upwards, originating from a height about 80-95 cm from the floor, on the walls; the other was horizontal, from a lower source, near the fridge; the upwards spray was, the jury might have concluded, wholly inconsistent with the fall theory, either down the stairs or off the stool;

(c) the evidence from Trott and Clark, as to Greenwood's delay in calling, his responses, mopping, and his parting comment to McQuarters, could well have been viewed as conduct from which they could infer that McQuarters' account was true; and

(d) in the absence of corroborating forensic evidence as to an alternative sharp surface, the evidence of Dr Reinke supported the conclusion that McQuarters had been hit with a severe blow to the head, using a sharp implement; the blow went through to the skull itself.

[120] In the course of his submissions to this Court, Greenwood referred to the address by each of the prosecutor and defence Counsel, contending that the prosecutor had told the jury that there was no medical evidence to the effect that the kind of assault which had been alleged, namely a blow with a sharp object to the top of the head, could have caused the broken neck. Having reviewed the transcript of the addresses, Greenwood is mistaken in relation to this aspect. It was, in fact, his defence Counsel who made that point.[134]

[121] An additional point was that the prosecutor addressed on the basis that Greenwood struck McQuarters but the jury rejected that account. As Greenwood put it: [135]

> "Because [the Prosecutor] said that to the jury, and then the jury came out and said, 'What if it was something else?', I put it to you people now, your Honours, that they rejected this blow with this weapon the Crown stated occurred because they asked, well, could there have been another mechanism, and then the judge turns around and said, well, okay, if he did fall off the stool, well, okay, why wasn't the Crown's case stating he was on the stool at the bar and

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134 Transcript of Addresses, T1-10 lines 38-47, and T1-28 line 24.

135 Appeal Transcript 1-33 lines 3-28.

> said … well, if you think he was on the bar stool and fell off, and Greenwood did it, then he's guilty."

[122] Greenwood is, once again, mistaken in respect of this aspect. The question that the jury asked was the one referred to in paragraph [65] above. The question was directed to whether an indirect cause could nonetheless be sufficient for the purpose of establishing guilt. It is not the case that it signified that the jury rejected the Crown's case that the means of a blow to the head, caused the injuries sustained.

[123] Upon a review of the whole of the evidence at the trial, and being careful not to substitute trial by this Court for trial by the jury appointed that task, it is my view that it was open to the jury to accept McQuarters' evidence and be satisfied of Greenwood's guilt beyond reasonable doubt.

[124] This ground fails.

Disposition

[125] All grounds of the appeal having failed, the appeal should be dismissed. That is the order I propose.

[126] **ATKINSON J:** I agree with the order proposed by Morrison JA and with his Honour's reasons.