SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mackay* [2018] QCA 313
PARTIES:	**R** **v** **MACKAY, Matthew Kevin** (appellant)
FILE NO/S:	CA No 158 of 2018 DC No 2585 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 6 June 2018 (Jarro DCJ)
DELIVERED ON:	Date of Orders: 11 September 2018 Date of Publication of Reasons: 13 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	11 September 2018
JUDGES:	Holmes CJ and Philippides JA and Henry J
ORDERS:	**Orders delivered 11 September 2018:** **1. Appeal against conviction allowed.** **2. Acquittal verdict entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – TEST TO BE APPLIED – where the appellant was convicted of one count of assault occasioning bodily harm arising from an incident where the complainant was "sucker-punched" at a nightclub he attended with two of his friends and his brother-in-law – where the central issue at trial was the identity of the assailant – where the complainant gave evidence that he saw men "hassling" his brother-in-law and that he recognised one of the men from the gym and tapped him on the shoulder and that he was then "sucker-punched" on his right cheek from the side by another man – where the complainant gave evidence that the assailant was someone who he had seen on numerous occasions at the gym but not previously spoken to and had seen on Facebook as "Matty A" – where the evidence included a prior inconsistent statement by the complainant of the colour of the t-shirt worn by the person who attacked him – where in the complainant's statement to police he described the person who attacked him as having blonde hair but it was common ground at trial the appellant had dark hair – where CCTV footage of the

complainant being punched was obscured, not the focus of the camera shot, and in black and white – where the prosecution invited the jury to resolve the case based on the CCTV footage and the trial judge failed to warn the jury that it would be dangerous for them to do so – whether the verdict was unreasonable or cannot be supported having regard to the evidence – whether the verdict should be set aside and a verdict of acquittal be entered

Criminal Code (Qld), s 668E

Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, cited
Douglass v The Queen (2012) 86 ALJR 1068; [2012] HCA 34, applied
GAX v The Queen (2017) 91 ALJR 698; [2017] HCA 25, applied
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, applied
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied
R v Kajackas [2012] QCA 328, applied
R v TAI [2018] QCA 282, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: B J Power for the appellant
M Lehane for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Philippides JA.

[2] **PHILIPPIDES JA:** On 6 June 2018, after a two day trial, the appellant was convicted of one count of assault occasioning bodily harm against the complainant, Maricio Arias, on 25 September 2016. The trial centred on whether the prosecution had established beyond reasonable doubt that the person who assaulted the complainant was the appellant.

[3] The appellant has appealed against his conviction. Ground 1 of the Notice of Appeal is that the verdict was unreasonable and not supported by the evidence, such that the verdict should be set aside and a verdict of acquittal be entered. Ground 2 as stated in the Notice of Appeal was abandoned and leave was granted to amend the Notice of Appeal to add the following grounds:

- Ground 2: A miscarriage of justice was occasioned by the failure of the trial judge to direct the jury that the prior inconsistent statements of the complainant and the other witness were admissible as evidence of the facts contained in the prior inconsistent statements (s 101 of the *Evidence Act* 1977 (Qld) (the Act)) and instructing the jury in the use of such statements (s 102 of the Act).

- Ground 3: A miscarriage of justice was occasioned by the failure of the trial judge to warn the jury against attempting to make a positive identification of the appellant as the offender from their own review of the CCTV footage, or by a failure to provide appropriate directions in relation to this evidence.

[4] Grounds 2 and 3 were pursued on the basis that, while an appropriate *Domican*[1] direction was given about the dangers of identification by witnesses, the evidence and the way the prosecution approached the case required that the jury be directed about the use they could make of prior inconsistent statements by the complainant as representing the earliest direct evidence by the complainant on the subject. It was also contended that it was necessary for the jury to be warned that it would be dangerous for them to attempt to resolve the case solely based on the CCTV footage, as they were invited to do by the prosecution. Although these directions were not sought at trial, it was contended that the failure to give the directions resulted in a miscarriage of justice.

[5] On 11 September 2018, the appellant's appeal against conviction was heard by this Court, which allowed the appeal against conviction on the basis of ground 1 and ordered that an acquittal verdict be entered with reasons to be published. These are my reasons for joining in those orders.

The evidence

The complainant's evidence

[6] The complainant gave evidence that on Saturday 24 September 2016 he went out drinking with friends and his brother-in-law, Mr Henao. He had been drinking before going out. He had been to one nightclub before arriving at Blackbirds nightclub.[2] He said that at that nightclub he "noticed that there were a few guys that were hassling [his] brother-in-law".[3] The complainant said that he had recognised one of the men as being "Amin", who he knew from the gym. He went over and in a friendly manner tapped that person on the shoulder. The man reacted by telling him not to touch him. The complainant told him to relax and tapped him again. He said he was then "sucker-punched" on his right cheek from the side.[4] The complainant said that he had not seen the punch coming, but was able to see who punched him "moments after the incident had happened"[5] before the person ran off into the crowd.

[7] The complainant gave evidence that the assailant was Matty Mackay, who he also referred to as "Matty A", a person he recognised from the same gym he went to.[6] The complainant said he came to know that his nickname was "Matty A" from Facebook. He said he had first accessed the Facebook profile before the incident.[7] The complainant described the assailant as Caucasian with tattoos and wearing a dark shirt. He said he had seen him at the gym over 50 times as well as at clubs and bars,[8] but had not spoken to him previously.[9]

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1 *Domican v The Queen* (1992) 173 CLR 555.
2 AB2 at 37.
3 AB2 at 38.08-38.18.
4 AB2 at 38.25 and AB2 at 38.28-38.29.
5 AB2 at 39.08-39.09.
6 AB2 at 38.31-38.42. The name "Matty Aye" is referred to in parts of the transcript while in other parts it is recorded as "Matty A". The references are to the same individual.
7 AB2 at 39.46-40.01.
8 AB2 at 39.35 and 39.37.

[8] The complainant was shown the CCTV footage taken from the bar area at the time of the incident and identified both himself and his brother-in-law in the footage. The complainant was not asked to point out on the CCTV footage:

- the man he claimed to identify as "Matty A";
- the man he claimed to identify as "Amin";
- the incident where he claimed to have tapped "Amin" twice on the shoulder;
- the moment when he was struck;
- the direction from which he was struck; or
- the person who he said delivered the blow.

[9] The complainant was cross examined about his police statement made on 27 September 2016, two days after the assault. The complainant agreed that in the statement he had endeavoured to give police all the details he could. The complainant agreed that in that statement he had referred to a man named "Mehran" as well as a man named "Amin" as both present. The complainant was asked why there was no mention of the name "Matty A" or Matt Mackay in his statement. The complainant answered variously that it was because "that was… a different assault altogether", that he "was running through who was there at the time"[10] and claimed that the description, given in his police statement, of the person who assaulted him, as being "Caucasian, white shirt with tattoo, blonde hair", was a reference to "Matty A".[11] It was common ground at trial that the appellant had dark hair.[12]

[10] The complainant maintained that, although he had not named "Matty A" in his police statements, he had told police on the night in question that "Matty A" had been the one who punched him in the face.[13] He denied the proposition put to him that when speaking to Senior Constable Currey soon after the incident, he said that he did not know the male who had assaulted him, but that he had seen him with "Matty A" previously.[14]

[11] The complainant was cross examined about his opportunity to have seen the person who punched him.[15] The complainant agreed that he had not had a chance to see the face of the person who struck him before the blow was struck.[16] He said that the person "ran behind to punch [him], and then sort of to the side of [him] and looked directly at [him]".[17] The complainant accepted that the time he had to observe the person's face was very brief and that the only time he had had to observe his face was when he turned around for that brief period, before the person ran off into the crowd.[18]

[12] The complainant was reminded that in his evidence in chief he had said that the person who assaulted him was wearing a dark shirt. He accepted that he had done so,

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9 AB2 at 39.39-39.45.
10 AB2 at 46.10-46.15.
11 AB2 at 46.34 and 47.05.
12 AB1 at 45.10-45.11.
13 AB2 at 48.20-48.30 and 52.17-52.24.
14 AB2 at 48.36-48.40.
15 AB2 at 53.05-54.45.
16 AB2 at 53.15-53.16.
17 AB2 at 54.21-54.22.
18 AB2 at 54.27-54.42.

and that "probably" his initial description in his police statement of the shirt as being white was wrong.[19]

[13] The complainant agreed that he had looked up "Matty A" on Facebook the morning after the assault and that he had looked at the profile of "Matty A" prior to giving his statement to police on 27 September 2016.[20] The complainant also agreed that he showed his brother-in-law the Facebook image of "Matty A" prior to any photo board identification process and when he showed it to him he had said words to the effect of "this is the guy that punched me".[21] The complainant agreed that that occurred before he and his brother-in-law participated in a photo board identification process on 12 October 2016,[22] when the complainant identified the photo of "Matty A".[23]

Evidence of Mr Henao

[14] Mr Henao gave evidence that he had been present with others at the Blackbird nightclub for about 20 minutes before the complainant was assaulted.[24] Mr Henao's evidence was that he saw the complainant saying hello to someone when the complainant was punched by another person.[25] He saw the complainant punched in the face from someone who came from behind. He described that the person as, "white" Australian and "blonde". He also said that he saw the person's face, but that he had never seen the person before.[26] After the person punched the complainant, he also assaulted Mr Henao.[27] The prosecution did not show Mr Henao the CCTV footage and he was not asked to identify himself or the person he said punched the complainant on the CCTV footage.

[15] Mr Henao was cross examined about his police statement given on 27 September 2016.[28] He agreed that the description he gave police of the person he believed punched the complainant was of a male Caucasian with blonde hair, tattoos and wearing a white shirt. He also agreed that, when he met with the prosecution on 16 February 2018, he again confirmed then that the person who had punched the complainant had been wearing a white shirt.[29] Mr Henao was questioned and answered as follows:[30]

> "Well, as you sit here today do you remember the person wearing a white shirt? --- Yes, because I saw his face.
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> …
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> And that's your memory of it, isn't it? It was a white shirt? --- I can get confused, but that was in that date that I told it was white."

[16] Mr Henao accepted in cross examination that the opportunity to see the assailant's face was for a very brief period before the person ran away.[31] He agreed that he

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19 AB2 at 47.07-47.45.
20 AB2 at 55.13-55.24.
21 AB2 at 56.06.
22 AB2 at 56.10-56.11.
23 AB2 at 55.41-56.14.
24 AB2 at 59.22.
25 AB2 at 71.16-71.23.
26 AB2 at 60.14-60.16.
27 AB2 at 59.37-59.38 and 60.08-60.21.
28 See statement at AB2 at 109-112.
29 AB2 at 65-67.
30 AB2 at 66.29-30 and 67.07-67.08.
31 AB2 at 73.01-73.02.

spoke to Senior Constable Kelly about 20 minutes after the incident. He said that he could not remember if he had told the police officer that the same person who had struck him in the head had been the person who had punched the complainant.[32]

[17] In relation to the photo board identification on 12 October 2016, he denied having previously been shown a Facebook profile of "Matty A" by the complainant before participating and identifying the appellant.[33]

Evidence of Senior Constable Kelly

[18] Senior Constable Kelly gave evidence of attending the Blackbird Bar at 2.10 am on 25 September 2016 and speaking with the complainant and Mr Henao. He said that the complainant had given him a description of "two sort of offenders". One was a man wearing a black, long sleeved shirt and black pants with tattoos who he understood was involved in the other incident.[34] The second person was someone he knew as "Matty A", and recognised from a gym that he attended and could pull up a Facebook profile.[35] Senior Constable Kelly said that he had also spoken with Mr Henao, but only briefly as he was quite dizzy and was complaining of a cut to the back of his head.[36] He said that Mr Henao told him that the same person who had punched the complainant had then assaulted him.[37]

[19] In cross examination, Senior Constable Kelly confirmed that he came away from the conversation understanding the complainant to be talking about two people, one who he referred to as "Matty A" and another person who wore a black shirt.[38] He said that it was very loud at the club at the time. He also said that the complainant was very jittery and speaking very quickly.[39]

Evidence of Senior Constable Currey

[20] Senior Constable Currey also gave evidence of his attendance at the Blackbird nightclub at 2.10 am on 25 September 2016. He said that by the time he spoke with the complainant it was about 2.20 am. He said the complainant "reeked of alcohol, eyes – eyes were bloodshot, and he was quite belligerent on the night", but that he was able to speak clearly and was not slurring his words.[40] Senior Constable Currey said that the complainant told him:[41]

> "He couldn't identify the exact person who - who punched him. He told me that a person that he saw there with - with - within the party of Mars was a person called Matty A. He didn't know his full name. He said that was just what he saw on this guy's Facebook profile, and he said he was with another guy who he believed assaulted him on that night."

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32 AB2 at 74.29-74.35.
33 AB2 at 75.09-76.39.
34 AB2 at 81.15-81.20.
35 AB2 at 81.22-82.24.
36 AB2 at 81.40-81.43.
37 AB2 at 82.45-82.47.
38 AB2 at 82.16 and 82.09-82.10.
39 AB2 at 83.24-83.30.
40 AB2 at 85.18-85.22.
41 AB2 at 85.08-85.13.

[21] In cross examination, Senior Constable Currey also agreed that he had recorded his memory of his conversation with the complainant in his statement which represented an accurate recollection of the conversation, as follows:[42]

> "I had a brief conversation with the [complainant]. He told me that he knows one of the involved males as Matty A, but doesn't believe that it is his real name. This is the name on his Facebook profile. Matty A attends the same gym as [the complainant]. [The complainant] did not know the male who assaulted him, but has seen him with Matty A previously."

Other evidence

[22] The appellant did not give or call evidence. Formal admissions were made that the complainant suffered an injury to his right cheek and jaw from a punch which had interfered with his health and comfort.

Ground 1 – that the verdict was unreasonable or cannot be supported having regard to the evidence

Principles

[23] The ground of appeal against conviction agitated before this Court is to be regarded as a contention pursuant to s 668E of the *Criminal Code* (Qld) that the verdicts of guilty of the counts of which the appellant was convicted were unreasonable and cannot be supported by the evidence.

[24] The approach of an appellate court where such a ground is raised may be summarised having regard to the High Court authorities as follows:[43]

1. The question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty: *M v The Queen*[44] and *MFA v The Queen*.[45]

2. Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is "unreasonable" is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. The boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way: *R v Baden-Clay*.[46]

3. In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such a case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain

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42 AB2 at 86.24-86.28.
43 *R v TAI* [2018] QCA 282 at [37].
44 (1994) 181 CLR 487 at 493.
45 (2002) 213 CLR 606 at 615.
46 (2016) 258 CLR 308 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See also *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606.

the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred: *MFA v The Queen*.[47]

4. If the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence: *M v The Queen*[48] and *MFA v The Queen*.[49]

5. The ultimate question for the appellate court must always be whether the 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: *R v Baden-Clay*.[50] In determining that question, this Court must undertake its own independent assessment of the evidence, both as to its sufficiency and quality: *Morris v The Queen*[51] and *SKA v The Queen*.[52] In doing so, the Court must disclose the manner of that assessment: *GAX v The Queen*.[53]

Consideration

[25] The critical issue in this case concerned the reliability of the identification of the appellant assailant. The matter that the jury had to be satisfied beyond reasonable doubt about was that the appellant referred to by the complainant as "Matty A" was not only present but also was the person who, in fact, punched the complainant.

[26] A key aspect of the Crown case was that the jury could be satisfied beyond reasonable doubt that it was the appellant who punched him because he was able to see the assailant's face and that he recognised the assailant as "Matty A", a person he had seen over 50 times at his gym.

[27] As the respondent accepted, there were undoubted weaknesses in the identification evidence given by the complainant. His identification of the appellant as the assailant was inconsistent with Senior Constable Currey's evidence that the complainant had told them that he had recognised the appellant as a person present who he knew, but that it had been a person in the appellant's group, and not the appellant, who had struck him.

[28] At trial, the complainant gave evidence that the assailant was wearing a black shirt and that was what Senior Constable Kelly recorded the complainant as recounting when he attended the bar soon after the incident. The prosecution drew the jury's attention to a person wearing a black shirt in the CCTV footage. However, two days after the incident, when providing a police statement, the complainant gave a contradictory description of the assailant as wearing a white shirt. That accorded with the description given by Mr Henao when also interviewed by police on 27 September 2016. Mr Henao continued to maintain that the assailant wore a white shirt prior to

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47 (2002) 213 CLR 606 at 623.
48 (1994) 181 CLR 487 at 494-495.
49 (2002) 213 CLR 606 at 623.
50 (2016) 258 CLR 308 at [65]-[66] per French CJ, Kiefel, Bell, Keane and Gordon JJ. See also *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606.
51 (1987) 163 CLR 454 at 473.
52 (2011) 243 CLR 400 at 406.
53 (2017) 91 ALJR 698 at [25].

trial and did not alter that position, unlike the complainant. The complainant also told police that the assailant was blonde, whereas there was no dispute that the appellant was not blonde. These inconsistencies are matters of significant concern.

[29] They are compounded by the fact that, while the underlying proposition in the Crown case was that the complainant was able to identify the appellant as the assailant because he knew the appellant reasonably well and was able to see and recognise the face of the person who punched him as the appellant,[54] the complainant did not name the appellant as his assailant when he had an opportunity to do so in his police statement made within days of the incident. Furthermore, when providing his police statement, the complainant did not state, that he had been assaulted by a person he recognised, nor did he name the appellant as even being present and made no mention of the appellant's name, "Matty A" or Matt Mackay, notwithstanding that he specifically named two others as having been present. While the complainant explained that he had mentioned "Matty A" to police when they attended after the incident, he did not provide a persuasive explanation of his failure to name the assailant in his statement.

[30] These matters raised serious deficiencies in the quality of the evidence given by the complainant of having recognised the appellant as his assailant.

[31] Counsel for the appellant referred to the prosecution opening to the jury that, from a viewing of the CCTV footage of the incident, the Facebook profile of Matty A, a police photograph of the appellant and his appearance in court, the jury would be able to make their own identification of the appellant, as being a person wearing a black shirt shown in that footage, and as being the person who could be seen to assault the complainant.[55] The prosecution's closing address also emphasised these issues.[56] The appellant argued that the quality of the CCTV footage was poor.

[32] The appellant submitted that the footage was far from clear; it was grainy, and that part where the complainant was assaulted was partially obscured by hanging pot plants and was not the focus of the camera shot. The appellant's counsel argued that, based on the CCTV alone, it would have been dangerous for the jury to have concluded beyond reasonable doubt of either that the person in the black shirt was the appellant or that the footage showed the person in the black shirt striking the complainant in the head causing bodily harm, rather than being a person involved in the melee. The appellant submitted that it was not open therefore to a jury to conclude on the basis of the footage alone that the CCTV showed the appellant delivering the critical blow to the complainant, rather than simply being involved in a melee. The footage was at least as consistent with the complainant's first account to police that the person who assaulted him was not the appellant, but another person who had been in the company of the appellant. It was accepted, however, that, given the CCTV footage and the complainant's evidence that the appellant was present, it was open to a jury to have concluded that the appellant was present at the bar, and even that the man wearing a black shirt was the appellant.

[33] Reference was made to *R v Kajackas*[57] as an example where this Court having reviewed evidence based on CCTV footage, determined that it had not been open to the jury

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54 AB1 at 11-13.
55 AB1 at 12-13.
56 AB1 at 16-22.
57 [2012] QCA 328.

to find beyond reasonable doubt that the appellant was the offender shown in the relevant footage. While it was accepted that that decision turned on its own facts, it was submitted that the following statements of that decision applied with equal force to the present case:[58]

> "The jury had the advantage of being able to compare images of the man identified by Mrs Olsson as the offender with the appellant in the dock. For reasons already given, and having regard to the relatively poor quality of those images, the Court was not persuaded that this advantage was sufficient to overcome the reasonable doubt created by the weaknesses in the identification evidence in the Crown case. The identification evidence '...upon the record itself contains discrepancies, displays inadequacies, [and] ...otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted...'[59]
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> The criminal standard of proof is 'designedly exacting'.[60] In the absence of convincing evidence that the appellant was the man who kicked the complainant, it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. The Court's duty in those circumstances was to set aside the verdict and order the entry of a verdict of acquittal. It was therefore not necessary to adjudicate upon the second ground of appeal or upon the application for leave to appeal against sentence."

[34] It was submitted that for similar reasons to those articulated in *Kajackas*, this Court should allow the appeal on ground 1 and enter an acquittal.

[35] Having viewed the footage a number of times, the appellant's submissions as to the quality of the footage have great force. From my own viewing of the CCTV footage, I agree that the footage showed the melee in which the complainant was struck, that it involved a number of people swinging blows and moving around and that a number were in white shirts and in black shirts. However, not only was the footage grainy, but, as the Crown had accepted at trial, the actual moment of the assault was obscured. Neither the complainant nor Mr Henao identified from the CCTV footage the person who they claimed struck the complainant. The serious deficiencies with respect to the CCTV footage diminished its probative value in identifying the appellant as the assailant. I would accept the appellant's submission that that it was incapable to having the probative value contended for at trial by the prosecution. Indeed, given its deficiencies, it was of no real assistance in respect of the critical matter for determination by the jury.

[36] Having considered the whole of the evidence, and making full allowance for the advantages enjoyed by a jury, the deficiencies in the evidence both as to its quality and sufficiency, as outlined, are such that there is, in my view, a significant possibility that an innocent person has been convicted.[61] In those circumstances, it is not necessary to deal with the other grounds of appeal.

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58 *R v Kajackas* [2012] QCA 328 at [22] to [23].
59 *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 494.
60 *Douglass v The Queen* [2012] HCA 34 at [48].
61 *M v The Queen* (1994) 181 CLR 487 at 494.

Order

[37] On the above basis, I considered that the conviction should be set aside and a verdict of acquittal entered.

[38] **HENRY J:** I have read the reasons of Philippides JA. I agree with those reasons and the order proposed.