SUPREME COURT OF QUEENSLAND

CITATION:	*R v Yow-Yeh* [2019] QCA 17
PARTIES:	**R** **v** **YOW-YEH, Cedrick Peter Jason** (appellant)
FILE NO/S:	CA No 178 of 2018 DC No 44 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bundaberg – Date of Conviction: 14 June 2018 (Clare SC DCJ)
DELIVERED ON:	12 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2018
JUDGES:	Morrison and Philippides JJA and Boddice J
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted after a trial of one count of assault occasioning bodily harm – where the assault was alleged to have occurred when the appellant was drinking in a park with the complainant and two others – where there was no physical or photographic evidence – where only the complainant and one eyewitness gave evidence – where the complainant initially told medical staff he had fallen onto a rock – where there were inconsistencies in the evidence given by the complainant and the other eyewitness – whether the verdict was unreasonable having regard to the evidence CRIMINAL LAW – PROCEDURE – VERDICT – OTHER MATTERS – where the taking of the verdict occurred in an irregular manner – whether the form in which the verdict was taken caused a miscarriage of justice *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *Milgate v The Queen* (1964) 38 ALJR 162, cited *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, cited *R v Conway* (2005) 157 A Crim R 474; [2005] QCA 194, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: The appellant appeared on his own behalf
C N Marco for the respondent

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

[1] **MORRISON JA:** The appellant was convicted after a trial of one count of assault occasioning bodily harm. The appellant appeals his conviction on the basis that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence.

[2] The general circumstances of the offence are as follows. On 4 November 2016 at about 6.00 pm, the appellant was drinking in a park in Bundaberg with several other individuals, including the complainant, Laurie Howe, Mr Howe's girlfriend Lisa James and a person named Lincoln Saunders. The next day, an ambulance was called for Mr Howe. Dr Bee Ang, a doctor at Bundaberg Base Hospital, gave evidence that Mr Howe was admitted with multiple rib fractures. Mr Howe then developed pneumonia and he was admitted to the intensive care unit on 9 November 2016.

[3] Dr Ang gave evidence at trial that Mr Howe's patient records indicated that upon the ambulance arriving, Mr Howe stated that his injuries had been caused by tripping whilst drunk. It was not until 11 December that Mr Howe informed a social worker that he had been assaulted and police were called to investigate. The issues at trial were how Mr Howe came to receive his injuries, and whether it was the appellant who inflicted them, in circumstances where the two eyewitnesses[1] were intoxicated at the time.

Submissions

[4] The appellant is self-represented and his submissions, both written and oral, were succinct. His central submission is there was a lack of evidence to support his conviction, as there were no photographs of the injuries suffered by the complainant and only the evidence of two eyewitnesses. The appellant also submits that his legal representative failed to lead evidence at trial concerning police harassment of the appellant.

[5] The Crown submits it was open to the jury to accept the evidence of the complainant, that his injuries were caused by the appellant, particularly with the corroboration of eyewitness testimony. The jury were directed by the learned primary judge in accordance with law. Constable Ramsey was cross-examined concerning deficiencies in his preparation of the brief of evidence but those deficiencies were of little relevance.

Evidence at trial

[6] *Ska v The Queen*[2] requires this Court perform an independent examination of the whole of the evidence to determine whether it was open to the jury to be satisfied of

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1 The complainant and Ms James; Mr Saunders did not give evidence.

2 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494; [1994] HCA 63.

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. *M v The Queen* held that:[3]

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

[7] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[4]

[8] The appellant did not call or give evidence.

Evidence of the complainant

[9] The complainant gave evidence that on 4 November he had been drinking in the park with his fiancée (Ms James), the appellant, and another friend (Mr Saunders). He described his state of intoxication as "I was pretty drunk, yes",[5] and continued:[6]

> "… [the appellant] got up and walked round the right side of me like that and slapped me in the face with an open hand first up. … Twice. Both open-handed, that one. … I said, 'What the fuck was that for?' The next thing, bang, bang with his fist … Well, fists – one to the left side, one to the right side. And I fell backwards onto the cement off my chair. The next thing I'm getting jumped all over. … like a big bull jumping all over me, on my chest. And then I sort of … blacked out for a split second. And then I felt the jumping all over my ribs and everything. I felt all the pain there, as well."

[10] The complainant was homeless at the time and slept in the park overnight, along with his fiancé. At around six o'clock in the morning, Mr Saunders woke him and eventually called an ambulance. The complainant further gave evidence that before the ambulance arrived, he spoke to the appellant. The appellant said to him, "Did you learn anything by that flogging I gave you last night?"[7] and "Just tell them you fell over a rock".[8] When the ambulance arrived, the complainant "told them I fell

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3 (1994) 181 CLR 487 at 494.
4 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.
5 AB2 14.
6 AB2 14-15.
7 AB2 15 ll 39-40.
8 AB2 15 l 45.

over a rock, only because [the appellant] was still there. But, later on, when I got to the hospital, I explained to them properly and told them what really happened".[9]

[11] In cross-examination, the complainant said that the group had been drinking since the early morning. He said that he "would have had one cask myself that day … but I still remember everything that happened that night, what he done to me."[10] It was put to the complainant that: (i) the appellant had not been drinking with them all day, but had left and come back to find the complainant very drunk, lying on the ground in the garden; (ii) the appellant picked him up and sat him at a table, where the complainant then fell backwards off the table; and (iii) the complainant tripped over the seat when he was heading to bed. The complainant denied all these suggestions and explained that he had initially lied to the medical staff because he was scared of the complainant.

[12] In cross-examination the complainant acknowledged that Ms James had assaulted him in the past but did not agree that she had threatened to bash him whilst he was in hospital.

The complainant's fiancé, Ms James

[13] Ms James had been in a relationship with the complainant for six years. She gave evidence that the group had been drinking in the park and "I think at one part [the complainant] said something wrong to [the appellant] … The next thing I remember [the appellant] got up and grabbed [the complainant] at the barbeque area. And then he started kicking him. The only part I remember … is where the other bloke, when he was on the ground – the other fellow grabbed him and dragged him by the hair".[11] The other fellow was identified to be Mr Saunders, the fourth member of the group.

[14] When asked again what she saw happen to the complainant, she elaborated: "I've seen [the appellant] pulled him up where we were sitting then at the table, pulled him – dropped him down on the cement. And he started … on the floor … He started kicking [the complainant] on the cement. … he was, like, punching him, kicking him on the cement. … And then the other fellow walked over and dragged him by the hair."[12]

[15] Ms James gave evidence that it was the appellant who called the ambulance. In cross-examination, she couldn't remember if the appellant had stayed in the park all night. Her responses to this line of questioning are set out below:[13]

> "What I'm suggesting to you, though, is that [the appellant] came back later that night, that he was away in the afternoon but that he came back at 7.30 that night?---I can't remember that.
>
> …
>
> … was [the appellant] there in the afternoon, or was he not there in the afternoon, or you can't say?---He came back in the afternoon. Yeah.

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9 AB2 16 ll 2-5.
10 AB2 24 ll 35-45.
11 AB2 32 ll 30-45.
12 AB2 34 ll 22-32.
13 AB2 42-43.

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HER HONOUR: Do you remember if [the appellant] was there that night or for the whole night or whether he was gone for a long time?---I can't remember that, but I was – I had too much myself. And I've been drunk for three or four days.

MR ZWOERNER: Yeah?---Yeah.

Do you think, Ms James, that having been drunk for three or four days affected your memory on the 4th of November?---The only part I remember is what happened to [the complainant]."

[16] Ms James denied making threats to the complainant while he was in hospital but acknowledged that she had assaulted him in the past.[14] She denied seeing the complainant fall over by himself,[15] but then the following exchange occurred:[16]

"… I'm going to suggest to you, Ms James, that on the night of the 5th you pushed [the complainant] over and he fell into the garden?---I pushed him?

Yes. Do you agree or disagree?---No, I didn't. I didn't push him.

Okay. I'm going to suggest to you that he fell onto a rock?---He fell. Yeah.

Yes?---When he went … you know - - -

HER HONOUR: When what?---Around the rock.

MR ZWOERNER: When he went - - -?---He was drunk.

Yep. So he - - -?---He fell.

And he fell?---Yeah.

But that didn't have anything to do with [the appellant]?---No.

No?---Not even me.

And he fell and he hit a rock; is that true?---What's that?

He fell and he hit a rock?---Yeah. He did. Yeah."

[17] In re-examination, Ms James clarified that the complainant's fall onto the rock was on the same day as what happened with the appellant.[17]

Evidence of the investigating police officer

[18] Constable Ramsay was involved in investigating the matter. He met the complainant on 11 December in the intensive care unit at Bundaberg Base Hospital. He described the complainant's injuries as "He looked like he had been in a fight. ... he had bruising around his face and arms – top half of his arms around the bicep

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14 AB2 44 ll 42-43.
15 AB2 43 ll 33.
16 AB2 45-46.
17 AB2 46.

area and shoulders … [the bruising to his face] … was on the right side, around the cheeks and lip area."[18]

[19] In cross-examination, it was established that Constable Ramsay had taken no notes whilst at the hospital, nor taken any photographs of the complainant's injuries. He explained the lack of photos as "Due to the situation he was in, being in intensive care. It was quite difficult for him to move, talk …"[19] and stated that he relied upon "doctors' notes of injuries".[20]

Evidence of the doctor

[20] Dr Ang was a senior medical officer at Bundaberg Base Hospital and had been a doctor for thirty years. Her evidence as to the complainant's injuries was:

> "The injuries we documented was that he had multiple right rib fractures from number 3 to number 7. That's all. … He was treated initially in the ward with pain relief and physiotherapy for about three days, but he did not get any better. In fact, he got worse. He found it too painful to comply with the physiotherapist. And, therefore, he developed some degree of pneumonia, which complicated his recovery. And he had to go to intensive care from the 9th to the 12th of November 2016. … And down there he was given continuous positive pressure ventilation to – in order to help with his recovery. He got better, then he came out to the ward and was subsequently rehabilitated and sent home."

[21] Dr Ang further added:[21]

> "It was likely that he developed pneumonia because of the rib fractures making it too painful for him to breathe properly and, therefore, because he was also a heavy smoker, that would likely predispose him to getting pneumonia."

[22] The doctor gave evidence that the complainant did not tell anyone that he had been assaulted until 11 December. In the surgical admission notes of 5 November, at 10.40 pm, there was a note made that there was bruising to the legs and back and an injury to the right knee of the complainant, and Dr Ang agreed that if bruising was found on his arms or neck, it would have been noted.[22] In cross-examination, Dr Ang described the complainant's level of pain as "such severe pain they were giving him patient-control anaesthesia, the one where … the patient press for his own pain, but even that – that didn't control his pain".[23] In relation to any other injuries, she added:[24]

> "…But no other injuries were stated? Were they?---No. There were other – I would say no other significant injuries – you know? He might have a bit of bruising here and there, but they didn't really cause him much – they weren't of any significance.

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18 AB2 51 ll 40-43.
19 AB2 55 ll 32-33.
20 AB2 56 l 22.
21 AB2 59 ll 43-46.
22 AB2 63.
23 AB2 65 ll 23-25.
24 AB2 66-67.

> …
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> The initial x-ray, though, did show that he had previously had rib fractures?---Yes. Yes. The old rib fractures were all healed and did not contribute to this current problem.
>
> …
>
> And that was something that's – that was self-reported by the patient?---Yes.
>
> Yes. Based on your summary of the … medical records and taking into account … the discharge report – well, the discharge report, for a start, doesn't mention anything about an assault, does it?---No, it doesn't.
>
> No. Based on your summary of the records, is it your opinion that Mr Howe could have sustained the injuries to his ribs by falling on a rock whilst intoxicated?---Yeah. Certainly there was no reason for us to doubt his explanation. It's possible."

[23] Dr Ang also accepted in cross-examination that the complainant's medical records note that his partner visited him in hospital several times. One note stated "The patient told his partner to go away, because she was drunk",[25] another said that she had verbally threatened the patient, and another stating "Lisa (partner) continued her rant, stating, 'There's one door out of here. I'm going to get all my family to come and bash you.'"[26]

Discussion

[24] The defence case was summarised in the summing up by the learned trial judge as:

> "The defence argument is that you could not be satisfied that any injury that Mr Howe suffered were not the result of a fall or a push by Ms James, that you could not convict the accused unless you were satisfied beyond – and, of course, you cannot convict the accused of anything unless you were satisfied [the appellant] assaulted [the complainant]. That is the starting point.
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> …
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> If you're not satisfied that the accused did assault [the complainant], then you would find him not guilty. He cannot be guilty of anything if the evidence proves that the accused assaulted [the complainant], but does not prove beyond reasonable doubt that the assault caused a bodily injury. If the evidence doesn't exclude a reasonable possibility, for example, that the injuries were the result of a fall, then he could only be guilty of common assault. The third possibility is that you are satisfied that the evidence proves that [the appellant] did assault [the complainant] and … that evidence proves that that assault caused bodily harm to [the complainant]."

[25] The appellant submits the lack of evidence, including the lack of photographs of the injuries, other than the statements of the witnesses, was such that the verdict of

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25 AB2 67.

26 AB2 68 ll 16-18.

guilty could not be supported. It is true that the key issue before the jury was the reliability of the evidence given by the complainant and Ms James, in light of the fact that they had been drinking the entire day. The learned primary judge directed the jury to consider carefully the evidence of these witnesses:[27]

> "… you need to be mindful of the dangers of accepting Ms James as a truthful witness for a number of reasons. The first is that she had previously assaulted [the complainant], that she was present when he was injured on this occasion, that they were both very drunk and that [the complainant] originally said that he had fallen over before making that allegation against [the appellant].
>
> … and there's also the hospital notes of the drunken threats, so you should keep in mind the danger that those matters pose to accepting [the complainant] and Ms James as truthful witnesses. You have to exercise caution before you act on their evidence. It's a matter for you what weight you give to the fact that Lisa James had previously assaulted [the complainant]. The fact that this couple had a volatile history with physical violence does not necessarily mean that they would be lying about this occasion when [the complainant] was hurt, but you do need to examine all of the evidence carefully, including the nature of [their] relationship, including what [the complainant] originally told the ambulance and the people at the hospital, and the changed version when he went into the intensive care unit."

[26] Both the complainant and Ms James gave descriptions of an assault where the appellant was "jumping all over"[28] and "kicking"[29] the complainant. It was submitted at trial by the Crown that these were credible descriptions of the same assault, drawn from independent memories. Ms James' evidence differed to the extent that she remembered the fourth member of the group, Mr Saunders, dragging the complainant by his hair. The complainant had no memory of that occurring.[30]

[27] The complainant stated that despite drinking one cask of wine to himself that day he remembered the entire incident clearly, as he was used to consuming significant amounts of alcohol. Ms James accepted that her memory had been affected by the alcohol she had consumed, describing herself as "really drunk". She could not remember speaking to the police at all about the incident.[31] A direction was given to the jury by the learned trial judge concerning the intoxication of the complainant and Ms James:[32]

> "The two eyewitnesses were very intoxicated. We know, and you would know, that intoxication can affect a person's perception, ability to perceive and interpret things that are happening, ability to remember, and you would know that different people may have different levels of tolerance for alcohol and react in different ways to it."

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27 AB1 35 ll 12-29.
28 From the evidence of the complainant.
29 Per Ms James' evidence.
30 AB2 30 l 27.
31 AB2 38.
32 AB1 31 ll 40-43.

[28] That direction was given in the context of directing the jury to consider the impressions they had formed whilst watching the witnesses give evidence:[33]

> "You have had the opportunity to observe the witnesses, the way they gave their evidence, the way they answered the questions put to them, particularly in cross-examination which is the testing of their evidence …
>
> …
>
> It's up to you how you assess the evidence and what weight, if any, you give to a witness's testimony, but you need to apply your experience of people and your common sense."

[29] This was particularly important in light of the inconsistencies between the evidence of the witnesses and the prior statements made by the complainant to medical staff.

[30] It was put to the complainant that his injuries occurred in the context of a fall, as he had initially reported to medical staff. He denied that he had fallen over that night. Ms James accepted that he had fallen, but that had been early in the night, and he had returned to the table and that is where he was attacked by the appellant. Dr Ang acknowledged that it was possible the complainant's injuries were consistent with a fall. However, the extent of the pain suffered by the complainant and the extensive damage to his ribs could have been accepted by the jury as evidence of bodily injury more consistent with an assault. Whilst no photographs of the injuries were tendered, the investigating police officer gave evidence that the complainant had "looked like he had been in a fight". It is true that Constable Ramsay particularly noted bruising and yet, as Dr Ang accepted, there was no mention of bruising within the medical records. Her evidence as to bruising was limited to "He might have a bit of bruising here and there, but they didn't really cause him much – they weren't of any significance".[34]

[31] As raised in the part of the summing up reproduced in paragraph [24] above, it was for the jury to consider whether there was a possibility that any assault that had occurred had in fact been perpetrated by Ms James, rather than the appellant. The complainant accepted that she had assaulted him in the past but denied that she had made threats when she was visiting him in hospital. She said she had only visited him twice in hospital. The complainant, in cross-examination, said that she had visited him every day and no threats had been made by her to him.

[32] This evidence was in contrast to that of Dr Ang, who said Ms James "actually came a few times" and accepted that notes taken by the social worker who had visited the complainant in hospital stated that on 13 November, the day the complainant came out of intensive care, Ms James attended the hospital intoxicated and was verbally abusive to the complainant. Dr Ang accepted there was a note stating that "the partner verbally threatened to have him bashed again when he gets out".[35]

[33] Ms James denied pushing the complainant into the garden on 5 November.[36]

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33 AB1 32 ll 1-25.
34 AB2 66 ll 7-9.
35 AB2 67 ll 40-41.
36 AB2 45 ll 29-32.

[34] The complainant readily admitted that he initially told medical staff that he had fallen over a rock. His explanation as to why he did this was "only because [the appellant] was still here" and "I was scared of him. And I didn't want another flogging like I just copped". It is true that the complainant did not come forward with the allegation of assault for a period of about a week. Another inconsistency was also raised with him in cross-examination:[37]

> "When you gave police your statement, you didn't mention anything about being kicked or stomped or anything like that around your neck, did you?---No, not – no.
>
> No?---Not at that stage, but then it came back to me. That was his last jump.
>
> Would you agree that your memory would have been better about the incident at the 6th of December 2016?---No. I wouldn't say it was better. I remember every God damned thing that happened, except that last jump. And then when my voice – I realised about my voice. Then it – that dawned on me."

[35] I reject the contention that the complainant's evidence was uncorroborated. Here the description of the assault differed only in minor respects between the complainant and the eyewitness. Accepting that without photographs or further notes it may have been hard to match injuries with explanations, it was open to the jury to accept that the appellant may have come and gone from the park at times but that he was there at the relevant moment, and that he assaulted the complainant.

[36] It was open to the jury to accept the explanations put forward by the complainant as to the changes in his description of the assault. The jury were warned about the dangers of acting on the evidence of both the complainant and Ms James, in light of their intoxication and the inconsistencies in their evidence. Acknowledging the extent of the deficiencies in the evidence given by Ms James, and the possibilities raised on the defence case, this case rests solely on the jury's acceptance of the two witnesses as truthful and accurate. Particular deficiencies, particularly in the evidence of Ms James, may have been considered attributable to her level of intoxication at the time, and it was open for the jury to accept or reject the whole of what a witness said, or only part of it, or none of it.[38] The complainant's and Ms James' frank appraisal of the state of their relationship and the past violence perpetrated by Ms James upon the complainant, may have served to support them as honest witnesses, or at the very least, explained the threats made by Ms James at the hospital.

[37] As the High Court said in *R v Baden-Clay*,[39] 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 an appellate court which has not seen or heard the witnesses called at trial. This Court has not seen the complainant and Ms James give evidence and as such, cannot draw an accurate conclusion as to the reliability of their evidence. Once the jury had drawn such a conclusion, it was open for them to be satisfied beyond reasonable doubt of the appellant's guilt.

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37 AB2 25 ll 34-42.

38 Directions were given to that effect.

39 (2016) 258 CLR 308 at 330.

[38] Having considered the whole of the evidence, this ground fails.

[39] The appellant contended that his legal representative failed to lead evidence regarding the conduct of police in investigating the matter, and their alleged harassment of the appellant. A defendant is not obliged to adduce evidence. Here the decision not to do so was made by the defendant on advice from his legal representative. The appellant made that decision of his own accord.[40] Regarding the deficiencies in the preparation of the brief of evidence by the investigating police officer, defence Counsel cross-examined Constable Ramsay extensively as to his failure to observe police procedure. Constable Ramsay gave a limited explanation as to the difficulties of obtaining statements from transient persons and acknowledged his failure to take photographs of the complainant's injuries and a statement from a fellow officer who had attended the hospital with him. Defence Counsel's contention that the police investigation was not thorough was referred to in the learned trial judge's summing up[41] and was a consideration for the jury. There is nothing in this point.

[40] One last matter remains. At the hearing of this appeal, this Court invited submissions from the Crown as to the irregular form in which the verdict in this case was taken.[42] The manner in which the taking of the verdict would occur was referred to by the learned trial judge in the summing up, in a way that conformed with the Benchbook direction:[43]

> "…When you have reached a verdict you will be brought into court and my associate will ask you a number of questions. She will say, 'Members of the jury, have you agreed upon your verdict', and you can answer that you have. She will say, 'How do you find the accused: guilty or not guilty of assault occasioning bodily harm?' At that point your speaker can give the verdict, and it will be a verdict of one of those choices on your paper.
>
> So whatever that verdict is, whether it's guilty of one of the two charges or not guilty full stop, your speaker will give that verdict, then my associate will say, 'So says your speaker, so say you all', which really means is it unanimous, are you all agreed and you can all answer."

[41] The reference to the "paper" was to a handout that was given to the jury, listing the elements of the offence charged and that of an alternative offence, common assault.[44] At the bottom of the page, under a heading POSSIBLE VERDICTS, three options were listed:

A. GUILTY OF ASSAULT OCCASSIONING BODILY HARM

B. GUILTY OF COMMON ASSAULT

C. NOT GUILTY

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40 AB2 71 ll 1-14.
41 AB1 37 l 33.
42 Appeal transcript 1-7 l 7 to 1-8 l 30.
43 Supreme and District Court Benchbook, No 23.7.
44 AB2 83.

[42] No objection was made to this handout by either party after significant discussion was had as to whether the alternative ought to be left.[45]

[43] The taking of the verdict was transcribed in this manner:

> "ASSOCIATE: Do you find the defendant … guilty or not guilty of assault occasioning bodily harm?
>
> HER HONOUR: Now, your verdict can be guilty of assault occasioning bodily harm, guilty of common assault, or not guilty. Guilty of what offence?
>
> SPEAKER: [indistinct] occasioning bodily harm.
>
> HER HONOUR: Assault occasioning bodily harm. So that is your verdict.
>
> SPEAKER: Yes, that is.
>
> ASSOCIATE: Guilty of assault occasioning - - -
>
> HER HONOUR: No, no. So says your - - -
>
> ASSOCIATE: So says your speaker, so say you all?
>
> JURY: Yes."

[44] The questioning of the jury at the time of taking the verdict assumes significance in light of the fact that the formal requirements surrounding the taking of the verdict have been designed to ensure that it is a unanimous verdict of the members of the jury and that it is correctly recorded.[46] The manner in which the verdict was taken was considered in *R v Conway*.[47] The appellant had been convicted of assaulting a police officer in execution of his duty and this Court found:[48]

> "Although nothing is recorded in the transcript, it can be inferred that the members of the jury here assented to their unanimity. Neither the judge nor the lawyers present referred to the irregular form of words used in taking the verdict. …When the jury returned to the court, they all indicated that they had reached their verdict. It follows that the irregular questions resulting in the delivery of their verdict cannot have had any effect on the verdict."

[45] As was established in *Weiss v The Queen*,[49] the question is whether there was a miscarriage of justice in this matter caused by the irregular manner of the taking of the verdict. Upon listening to the recording, the learned trial judge's interjection was merely a clarification that of those options that had been presented to the jury, one must be announced at that particular time. On appeal, the Crown submitted that no miscarriage of justice had occurred by way of the manner in which the verdict was taken.

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45 AB2 73-78.
46 *Evan v Davies* (1991) 2 Qd R 498 at 501-502; 528.
47 (2005) 157 A Crim R 474; [2005] QCA 194.
48 At [40] and [42].
49 (2005) 224 CLR 300; [2005] HCA 81; *Kalbasi v Western Australia* (2018) 92 ALJR 305; [2018] HCA 7 at [16].

[46] Despite the variance in procedure, as in *Conway*, the passage above records the speaker of the jury confirming the verdict of guilty of assault occasioning bodily harm. It follows there has been no miscarriage of justice.

[47] I would dismiss the appeal.

[48] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Morrison JA.

[49] **BODDICE J:** Having considered the evidence as a whole, I agree with Morrison JA that it was open to the jury, on the whole of the evidence, to be satisfied of the appellant's guilt of the count of assault occasioning bodily harm, beyond reasonable doubt.

[50] The taking of the verdict of the jury was irregular in its form. The appellant was charged with one count of assault occasioning bodily harm. An alternate verdict of guilty of common assault arose if, and only if, the jury first delivered a verdict of not guilty of the offence of assault occasioning bodily harm.

[51] The irregularity did not only arise by the intervention of the trial judge in her associate's attempt to take the verdict in the time honoured manner. The trial judge further added the question "guilty of what offence" before the jury is recorded as delivering any verdict. The question "guilty of what offence" was arguably premised on the jury having a verdict of guilty only in contemplation.

[52] The need for great care in the taking of a verdict, includes ensuring the formula "on the taking of a verdict should not be expressed in a perfunctory way, nor allowed to appear as a mere statement of an assumed or concluded state of affairs, but should be clearly interrogative of the members of the jury".[50]

[53] The manner in which the verdict was taken had the potential to confuse the jury from the task at hand. However the jury's response supports a conclusion that the irregularity in the delivery of their verdict did not have any effect on the jury's verdict. The jury were unanimous in their verdict of the appellant's guilt beyond reasonable doubt of the offence of assault occasioning bodily harm. That conclusion is supported by the jury's unanimous confirmation of their verdict of guilty of assault occasioning bodily harm.

[54] In those circumstances it cannot be said the appellant can possibly have been deprived of the chance of an acquittal by those irregularities.

[55] I agree that the appeal be dismissed.

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[50] *Milgate v The Queen* (1964) 38 ALJR 162 per Barwick CJ, approved by McMurdo P in *R v Conway* [2005] QCA 194; 157 A Crim R 474 at 485.