SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rose* [2003] QCA 534
PARTIES:	**R** **v** **ROSE, Scott Andrew** (appellant)
FILE NO/S:	CA No 292 of 2003 DC No 116 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED EX TEMPORE ON:	1 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2003
JUDGES:	Davies and Williams JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of serious assault – where appellant spat in face of police officer – where two police officers who were present at the scene provided written statements – where statements had similarities – whether there was such similarity that the jury ought to have had doubts about police officers' reliability – whether factual inconsistencies in statements made verdict unsafe and unsatisfactory *M v The Queen* (1994) 181 CLR 487, cited
COUNSEL:	D R Lynch for the appellant D L Meredith for the respondent
SOLICITORS:	Clewett Corser & Drummond for the appellant Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: The appellant was convicted in the District Court at Toowoomba on two counts of serious assault. He appeals against the conviction on the ground that the verdicts of guilty should be set aside as unsafe and unsatisfactory in the application of principles enunciated by the High Court in M v. The Queen (1994) 181 CLR 487.

The background to the charges is as follows. Police Officers Deacon and McKinnon had occasion to visit premises in the early afternoon of 17 November 2002. They there saw the appellant and a group of persons drinking in the front yard. Whilst those police officers were speaking to some members of the group the appellant became abusive. He swore at them and it is clear that he used abusive and obscene language. The police warned him to mind his language but he replied with another outburst of obscene language. He then walked towards the back of the house. The police officers followed him intending to arrest him for using insulting language.

The appellant was ultimately apprehended at the rear of the house and after some minor struggling began to walk, with a police officer on either side, towards the front of the house and the roadway. It is sufficient to say that as the group of three - the two police officers and the appellant - approached a small opening between the side fence and a fence running at right angles to it, the appellant caused himself and McKinnon to fall to the ground and there was some further struggling. The appellant's physical contact with McKinnon constituted the first count of assault. I have used that rather neutral

language to describe what happened because one of the submissions by counsel for the appellant is that there was an inconsistency in the police evidence as to precisely what occurred. I will return to that in a moment.

Whilst the appellant and McKinnon were on the ground, and Deacon was over the appellant, the appellant spat in Deacon's face. That was the second of the assault charges on the indictment. At trial the only evidence was given by officers Deacon and McKinnon and another police officer who arrived at the scene after the main incident was completed.

The principal particular of the ground of appeal relied on by counsel for the appellant is that there was such similarity in the statements of the police officers prepared subsequent to the events that the jury ought to have had serious doubts about the credibility and reliability of the evidence of McKinnon. The evidence was that Deacon prepared his statement first. McKinnon gave evidence that he did not read Deacon's statement before preparing his own. Under cross-examination it was established that there were remarkable similarities, even in the construction of paragraphs, between the statements making it reasonably obvious that there had been some copying by McKinnon of Deacon's statement. He was extensively cross-examined on that and indeed the cross-examination of McKinnon with respect to the preparation of his statement was more extensive than the cross-examination of him and Deacon as to the actual events giving rise to the charges.

The learned trial Judge in his summing-up dealt again extensively with that issue and indicated in clear and accurate terms to the jury that it was an issue of credibility and one for them.

The other matters relied on to establish the ground of appeal were inconsistencies that it was submitted existed between the evidence of Deacon and McKinnon; it was submitted those inconsistencies made the verdict unsafe and unsatisfactory. Deacon claimed that as the three approached the small gap between the fences to which I have referred the appellant pushed his foot against the timber fence and charged his shoulder into McKinnon which caused himself, the appellant and McKinnon to fall to the ground. That occasioned a minor injury to McKinnon's elbow.

McKinnon's evidence was that the appellant pushed his foot against the chain mesh fence and it was that act with the charging which caused only he and the appellant to fall to the ground occasioning the injury to his elbow. I should say that the police caused a video to be taken of the area in question and the jury would have had the advantage of seeing the relationship between the wooden fence and the mesh fence when evaluating the evidence. In any event what transpired occurred in a very short space of time and, in my view, those inconsistencies, whilst a matter to be taken into account by the jury, were in no way decisive.

Another alleged inconsistency was that McKinnon had the injury to his elbow photographed but did not have an injury to his back photographed. In evidence he mentioned some soreness to his back and said that he forgot to have that area photographed.

Of more significance is the alleged inconsistency in relation to the spitting and the question whether or not the jury could be satisfied beyond reasonable doubt that it had been done intentionally. It was put to the police officers that in the course of falling to the ground the appellant's face was in the dust and that he was merely clearing dirt from his mouth by spitting. It was contended that it was accidental that the spit came into contact with Deacon's face. It is true that at committal the police officers indicated that the appellant may have had his face in the dirt and may possibly have been clearing his mouth of dust when he spat but again that is not decisive. The evidence of Deacon was that the appellant was looking at him and was about 50 to 70 centimetres away when he spat. Even if he was clearing dirt from his mouth the appellant nevertheless could have intentionally spat in Deacon's face. The two accounts were not mutually exclusive.

All of those inconsistencies were referred to by the learned trial Judge in his summing-up and were left to the jury as matters to be considered when deliberating whether or not they were satisfied beyond reasonable doubt that the appellant was guilty of either or both of the counts on the indictment.

There was no significant challenge to Deacon's evidence; there was no evidence to the contrary. The injury to McKinnon could have been regarded as corroborating the account of being shoulder charged so that he went back into the fence.

All the matters raised in support of the appeal were essentially matters for the jury and the summing up with respect to those issues was full and not challenged. There was ample evidence which, if accepted by the jury, supported the convictions.

In the circumstances I am not satisfied that the verdicts of guilty should be regarded as unsafe and unsatisfactory. The appeal against conviction should be dismissed.

DAVIES JA: I agree.

McMURDO J: I agree.

DAVIES JA: The appeal is dismissed.
