SUPREME COURT OF QUEENSLAND

CITATION:	*R v Anderson* [2004] QCA 287
PARTIES:	**R** **v** **ANDERSON, Kelvin John** (appellant)
FILE NO/S:	CA No 64 of 2004 SC No 40 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	6 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 July 2004
JUDGES:	Davies JA and Mackenzie and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal against conviction in respect of count 4** **2. Quash the conviction for attempted murder and substitute a verdict of guilty of doing grievous bodily harm to Daniel Dunnett with intent to do grievous bodily harm** **3. Impose a sentence of 11 years 7 months imprisonment with one day spent in custody to be taken as time already served**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – INCONSISTENCY BETWEEN FINDINGS OF JURY – INCONSISTENCY BETWEEN DIFFERENT FINDINGS – GENERALLY – whether a differentiation between verdict of acquittal of attempted murder in the case of one victim and verdict of guilty of attempted murder in relation to the other could be supported – where appellant acquitted of entering premises with intent to commit an indictable offence – where attacks violent – where intent accompanying each attack by inference only – where no detailed evidence of events – where no admissions or statements as to intent by the appellant APPEAL AND NEW TRIAL – NEW TRIAL - IN

GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – IMMATERIALITY OF MISDIRECTION OR NON-DIRECTION – whether trial judge gave appropriate directions on the medical and factual issues

Gilbert v The Queen (2000) 201 CLR 414, applied
MFA v The Queen (2002) 213 CLR 606, applied

COUNSEL: The appellant/applicant appeared on his own behalf
B G Campbell for the respondent

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

[1] **DAVIES JA:** I agree with the reasons for judgment of Mackenzie J and with the orders he proposes.

[2] **MACKENZIE J:** The appellant was tried on five counts arising from an incident on 15 September 2001 in which his estranged partner Ms Dunnett and her son Daniel Dunnett received serious injuries. The counts were as follows:

1. Aggravated burglary of Ms Dunnett's dwelling.
2. Attempted murder of her.
3. (Alternatively) doing grievous bodily harm to her with intent to do grievous bodily harm.
4. Attempted murder of Daniel Dunnett, and
5. (Alternatively) doing grievous bodily harm to him with intent to do grievous bodily harm.

[3] The jury acquitted the appellant on counts 1 and 2 but convicted him of counts 3 and 4. Although the endorsement on the indictment records a verdict of not guilty of count 5, the appeal record shows that, correctly, the learned trial judge discharged the jury without taking a verdict on that count which was an alternative to attempted murder. The grounds of appeal in the notice of appeal are that the verdict of guilty (on count 4) of attempted murder of Daniel Dunnett is unsafe and unsatisfactory having regard to the whole of the evidence and is inconsistent with the verdicts of not guilty of burglary and attempted murder of Ms Dunnett. Notwithstanding this, the oral and written submissions by the appellant, who appeared in person, challenged the verdicts in respect of both complainants.

[4] The appellant's brief written outline raises issues, relevant to the unsafe and unsatisfactory ground, concerning the reliability of the victims' memories, inconsistencies in the evidence of and doubts about the truthfulness or reliability of relevant witnesses, evidence of unidentified vehicles seen near the premises on two occasions and of a woman seen there during the day of the attack, and the absence of scientific evidence of blood in the appellant's car or on his clothes or knife steel.

[5] The appellant and Ms Dunnett met as a result of each having a child at the same school. They formed a relationship in 1997 but after some months it came under strain. In July 2001 Ms Dunnett and her son moved out without telling the appellant in advance. No forwarding address was left and Ms Dunnett obtained a silent telephone number. After the separation, the appellant began leaving letters at her

place of work asking her to come back, using the affection Ms Dunnett felt for his daughter as one means of persuasion. After a time, the appellant obtained her telephone number and called her on a number of occasions. After that, there was some contact which included Ms Dunnett minding the appellant's daughter, but no resumption of an intimate relationship. The appellant tried to persuade her to resume the relationship but she was disinclined to do so, although she did not directly tell him so.

[6] Shortly before 15 September 2001, Ms Dunnett had developed an attraction towards a bus driver named Williams whom she often encountered. On the evening before the attack upon her and her son, she had spent time with him and an arrangement had been made that he would take her son, who got on well with him, to the Botanical Gardens the following day. Mr Williams went home at about 10:30pm to 11pm. The relationship had not developed beyond friendship but, according to Ms Dunnett, in the vicinity of 5.30am to 6.30am on the morning of the attack, the appellant rang her about going out with the other man. Telephone records show that a call was made from his phone to hers at 5.36am. According to her, the conversation was not friendly and she told him, amongst other things, that they were finished and that it was none of his business with whom she went out. She denied that the conversation was an amicable one about the possibility of her renting another house she had inspected near where the appellant lived and about a school concert his child had attended the previous night.

[7] She said she went about household tasks including putting on a load of washing, (which was found still in the machine after the victims were discovered) and went to the bathroom to wash her hands. After that, her recollection of what happened is very limited. She gave evidence that she remembered the accused standing behind her when she was in the bathroom. She came out and a further heated argument developed, and, after that, she recalled seeing her son curled up under a small table. She remembered him screaming out. She remembered being kicked, after which she became unconscious.

[8] Daniel Dunnett gave evidence that on the morning when the incident occurred, he heard a screech of car brakes in front of the house. He looked out and saw the appellant's vehicle. He dropped off to sleep again but was woken by the sound of his mother and the appellant arguing. He saw the appellant push his mother over. He ran out to protect his mother and the appellant held up a knife steel. The boy ran around the table and curled up underneath it. He said he could not remember anything after that.

[9] The victims were not discovered until about 6pm on the day of the incident. Mr Williams, who drove an old model LTD, said he next went to the victims' home with his landlady when they were out shopping at about 9.30am to 10.00am on the day of the incident. He knocked and called the victims' names but got no answer. He put a card advertising his bus company in the door jamb. After he finished shopping he went past without going in since the card was still where he had put it. He went back alone about 1.30pm but the card was still in place, and calling out elicited no response. Although the back door was open, he did not go in. He said that he heard a sound like a tap running.

[10] It had been arranged to include the victims in a regular visit that Mr Williams, his landlady and her daughter made to a club for dinner later that day and to pick them

up at about 6.00pm. Mr Williams and the two women went there in his landlady's white Commodore wagon at about 6.00pm. On this occasion Mr Williams entered the house through the open back door, found the victims and called 000. Ms Dunnett was lying with her head towards the bathroom, where a tap was running slightly into the hand basin. Her son was lying nearby.

[11] Both victims suffered serious injuries. Ms Dunnett suffered several fractures to the skull, including to the base of the skull, and bruising of the brain. There was haemorrhaging around the outside of the brain. She was in danger of death as a result of the injuries and remained in intensive care for about a fortnight. She required a tracheotomy to assist her breathing. The medical evidence suggested that there had been more than one blow to the head, although the precise number was not established. She has been left with permanent visual and physical impairment.

[12] The injuries to Daniel Dunnett were potentially life threatening. He had complex facial fractures, including to the forehead. He had lacerations and bruising. There were subdural, extradural and intracerebral haematomas. There was medical evidence that several blows with quite significant force were probably involved.

[13] There was no dispute that each of the victims suffered grievous bodily harm. There was also evidence that they had suffered amnesia in the period following the attack, although they both said that some memory of the incident had eventually returned. Since the only direct evidence that the assailant was the appellant came from them, the truth and reliability of their recollections were critical issues. The jury was told that if they did not accept the evidence either of Ms Dunnett or Daniel that the appellant was in the house as truthful and reliable they must find him not guilty of all charges because there was no other evidence or combination of evidence capable of proving he was present.

[14] There was other evidence before the jury. Two witnesses who lived in the neighbourhood of the victims' home gave evidence that they heard a scream or screams consistent with having come from those premises. One fixed the time, by reference to a clock in the room, at about 7.30am. The other was not as definite but reconstructed it as being in the range of 7.10am to 7.30am. Neither witness investigated the matter further, except to the extent that the former said that he saw a white Falcon, similar in colour to appellant's but different in appearance, in the street close to the victims' house. Another witness gave evidence of seeing a white station wagon outside the premises at about 11.50am. She said that there was a woman who appeared to be agitated on the steps of the premises at that time.

[15] There was also evidence from a neighbour of the appellant and her granddaughter that the appellant's vehicle was away from his home that morning. The neighbour thought it was gone by about 7.00am but that estimate was not necessarily precise. Her granddaughter said it was not there when she arrived about 7.30am. By the time she left, probably some time after 8.00am, she saw the vehicle had returned and the appellant was washing an area under and around the front wheel well. The neighbour also saw him doing this although she was not aware of the time at which the vehicle returned.

[16] There was also evidence that the appellant who usually went to a nearby service station to buy a newspaper and sometimes cigarettes at about 6.00am to 6.30am did

not come in that morning until an estimated 8.30am to 9.00am. On that occasion he did not drive, as was his habit, but came on foot, accompanied by his daughter.

[17] There was also evidence from Ms Dunnett that the appellant had made threats that she would be killed if she left him at various times in their relationship but she said that she did not take those threats seriously. There was evidence of intimidating phone calls by a male person from the appellant's phone to people who had assisted or were friendly towards Ms Dunnett after the separation, usually shortly after the act of assistance or friendship.

[18] There was medical evidence relating specifically to each victim and generally as to the effects of the injuries upon the reliability or otherwise of evidence that they might give and on the issue of memory recovered after the kind of injuries they suffered. Dr Pugh gave evidence that periodical neuropsychological assessments of Ms Dunnett had shown progressive improvement in her short term memory. Improvement of retrograde amnesia often occurred as improvement of short term memory occurred. There was no medical reason to consider that memory leading up to an incident would be unreliable. When she was given examples, from the evidence, of Ms Dunnett's ability to carry out every day functions and relating to her ability to recall, refer back to and qualify answers given in cross-examination she said that that was consistent with her retrograde amnesia being resolved and with the absence of significant remaining deficit.

[19] Dr Hazleton who was also involved in her treatment gave evidence in general terms that assessing improvement in short term memory correlated with improvement in retrograde amnesia. He accepted the possibility of false memory being created as a result of information being given to the person by another or of memories being out of sequence. However, he said that if there was a strong emotional content to the memory it was usually more reliable. He said that the recovery he observed in Ms Dunnett's short term memory, supplemented by the evidence of her ability to cope with everyday functions and to give evidence, was consistent with the retrograde amnesia being minimal and memory having been significantly recovered. He agreed that the only way of testing the accuracy of recovered memory was by corroboration of the account by other sources.

[20] Dr Edwards who treated Daniel Dunnett gave evidence that "… because of the fact that he has had a severe brain injury that his memory during that period in terms of the time of the injury would be unreliable. It is possible that he has an accurate memory or parts of that memory are accurate, however, I could not say with 100 per cent certainty that it is completely reliable." She said it was difficult to test for the accuracy of memory recovered after retrograde amnesia and therefore virtually impossible to determine whether someone's retrograde memory is accurate.

[21] In cross-examination, Ms Dunnett was taken through a number of conversations she had with the police before the version given in evidence emerged. It was apparent from those conversations that her memory was largely non-existent or very limited for a lengthy period, but later she gave the version given in evidence. Daniel Dunnett gave evidence that his memory of what he gave in evidence returned after he suffered an episode in August 2003 where he said his brain "started flicking". He described what happened as follows: "the words flick around. My head gets dizzy and all the words and letters seem to scatter. It is like it spins around caught in a blender and then it stops." There was medical evidence from Dr Edwards that

memory may come back "in flashes or small bits of a puzzle may come back at different times".

[22] Daniel Dunnett was cross-examined relatively briefly about the process by which his memory returned, and with a view to exploring the extent to which the memory was genuine or derived from information he had received from other people. Ms Dunnett was in the witness box for over a day, the vast majority of which was occupied by cross-examination. She was taken through the various conversations she had had with the investigating police in which she had no or poor memory, and also tested as to what extent her recollection may have been the result of information given to her by others. She was cross-examined in detail about many aspects of and events during the relationship between her and the appellant. The cross-examination was in many instances robust but within proper limits. The jury therefore had an extended opportunity to assess the credibility and reliability of her evidence that it was the appellant who had attacked her.

[23] The learned trial judge, after telling the jury that if they did not accept either Ms Dunnett's or Daniel's evidence as being truthful and reliable they must find the appellant not guilty of all charges, reviewed specific aspects of the evidence which might be used to assess the reliability of their evidence. He then summarised the medical evidence and told the jury that it was for them to assess it and decide whether and to what extent they accepted the recollections of the complainants as reliable.

[24] The learned trial judge gave appropriate directions on the medical and factual issues. He reminded the jury of discrepancies in and between the accounts given by the two victims and as to other matters which bore upon the question of whether the appellant was at their home on the morning of the incident. These included the sighting of the white vehicle at about 7.30am and another sighting of a white vehicle at about 11.50am and a woman apparently associated with it, the absence of any forensic evidence connecting the appellant with the offence, evidence of clothing the appellant was said to be wearing on the day and whether it corresponded with clothing he was wearing at the time he was arrested, (which depended on comparing a description given by his neighbour with a police photograph after he was taken into custody) and the imprecision of times given by various witnesses, which may have left insufficient time for the appellant to have committed the offence if they were erroneous. These issues and others arising from the evidence were identified for consideration by the jury and explained in detail by the learned trial judge.

[25] In my opinion the verdicts of guilty in so far as they were based on the critical conclusion that the appellant was the assailant were open to the jury. It was open to the jury to be satisfied beyond reasonable doubt on the available evidence that this was so. However, there is some relationship between the issues of whether it was open to the jury to find that the appellant had an intent to kill Daniel and whether the verdicts in respect of the attack on Ms Dunnett and on him were inconsistent.

[26] This involves considering whether there is a logical and reasonable basis for sustaining the differentiation the jury drew in this case and, if such a basis can be identified, whether the jury could have found that it was made out on the available evidence. Where the issue is whether a jury can conclude beyond reasonable doubt

that a particular intent was formed, the test is as stated by Gleeson CJ and Gummow J in *Gilbert v The Queen* (2000) 201 CLR 414 at 422-423:

> "The question would be whether they had a doubt about which of two possibilities reflected the appellant's state of mind."

With regard to inconsistent verdicts, in *MFA v The Queen* (2002) 213 CLR 606, McHugh, Gummow and Kirby JJ said the following at 631:

> "**[85]** … In judging suggested inconsistency, this Court said in *MacKenzie* that 'if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted.' …
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> **[86]** Nevertheless, cases do arise where different verdicts returned by a jury represent 'an affront to logic and commonsense' and suggest a compromise in the performance of the jury's duty. Such a conclusion 'depends upon the facts of the case'. There can be no 'hard and fast rules' except that the obligation to demonstrate inconsistency in jury verdicts rests upon the person making the submission."

[27] The acquittal on count 1 is plainly explicable on the basis that the jury either accepted that, at the time the appellant entered the premises, he did not have an intent to commit an indictable offence or that the jury had a reasonable doubt whether he did. The version that he went there initially only to discuss relationship issues with Ms Dunnett was one possible explanation of his presence, which the jury was entitled to adopt. It was quite consistent with Ms Dunnett's and Daniel's evidence that there was an argument before the violence began. Viewed in insolation from the facts, differentiation between a verdict of acquittal of attempted murder in the case of one victim and a verdict of guilty of attempted murder in relation to another would be uncommon. In the present case, both attacks were very violent; the intent accompanying each attack was a matter for inference only, since there was no detailed evidence of what actually occurred and there were no admissions or other statements as to intent by the appellant.

[28] In addressing the question whether the discrimination between verdicts in this case was legitimate on the facts of the case, the acquittal on count 1 in my view plays a significant part. That verdict is consistent with the jury acting on the basis that the appellant did not initially have an intention to commit an indictable offence when he entered the premises. If the jury acted on the basis that the extreme violence that occurred after he had entered the house was precipitated by something that occurred between Ms Dunnett and him after he entered the house and before he assaulted the occupants, it was, in my view, open for the jury to conclude that when the appellant reacted to whatever had happened, he intended to seriously injure Ms Dunnett, but not necessarily to kill her.

[29] However, a conclusion that the appellant had an intent to kill Daniel could only be reached, as a matter of logic, on the basis of an hypothesis to the effect that, having seen the effect of what he had done to Ms Dunnett in the heat of the moment, and having realised that there was a potential witness, he attacked him with intent to kill. The flaw in this hypothesis, in my view, is that it requires satisfaction, beyond reasonable doubt, that the attack on Ms Dunnett was complete, or so far advanced by the time he began the attack on Daniel that it provided a reason to attack him

with intent to kill. On the limited evidence about the sequence of events during the attacks, it was, in my view not open to so conclude.

[30] The problem is that there is evidence from Daniel that when he saw the appellant push his mother over, he ran to protect her. After he was threatened with the knife steel, he curled up under the table and remembered no more of what happened. Ms Dunnett's evidence was that she saw Daniel curled up under the table, screaming out. She was then kicked and became unconscious. In my view, the jury could not have been satisfied beyond reasonable doubt that the necessary hypothesis to support the differention had been made out. In other words, it was equally open that the attacks on the two victims overlapped rather than occurred sequentially. The evidence was insufficient to establish a basis upon which the jury could properly differentiate between the two cases.

[31] On the facts as they stood at the end of the trial, it was a case where the jury should have had a reasonable doubt that the sequence of events upon which the differentiation in verdicts and the finding of an intent to kill Daniel depended occurred and therefore should have had a reasonable doubt that the appellant intended to kill Daniel. On the verdicts returned, they must have had no doubt of an intent to do grievous bodily harm to him.

[32] I would therefore allow the appeal against conviction in respect of count 4, quash the conviction for attempted murder and substitute a verdict of guilty of doing grievous bodily harm to Daniel Dunnett with intent to do grievous bodily harm. I would order that the appellant be sentenced to imprisonment for 11 years 7 months for the offence, with 1 day spent in custody, 15 September 2001, to be taken into account as time already served. The length of the sentence reflects the fact that the appellant is being sentenced in respect of a substituted verdict and has served 140 days in custody under the sentence for attempted murder.

[33] **MULLINS J:** I agree with the reasons for judgment of Mackenzie J and the orders which he proposes.