# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229 |
| PARTIES: | **R**<br>**v**<br>**KATSIDIS, Michael Alan**<br>(petitioner/appellant)<br><br>**EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** |
| FILE NO/S: | CA No 47 of 2005<br>DC No 401 of 2002 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Reference under s 672A *Criminal Code* |
| ORIGINATING COURT: | District Court at Ipswich |
| DELIVERED ON: | 24 June 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8 June 2005 |
| JUDGES: | McMurdo P, Jerrard JA and White J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal dismissed** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – appellant convicted of doing grievous bodily harm – doctor giving evidence based on hospital notes stated that it was unlikely the complainant's injuries were caused by a fall – appeal against conviction dismissed – new evidence of doctor who performed complainant's surgery describing an abrasion on the complainant's jaw consistent with a fall – whether evidence was fresh – whether evidence raised significant possibility that the jury would reasonably have acquitted the appellant on the grounds of accident or self-defence<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – AVAILABILITY AT TRIAL; MATERIALITY AND COGENCY – appellant sought to admit new evidence of the complainant's involvement in another fight that evening – such |

evidence was available at trial – test for non-fresh evidence requires that the verdict of guilty could not stand if the evidence was admitted – whether this evidence considered with both the evidence at trial and fresh evidence raised such a doubt about guilt that the conviction could not be allowed to stand

*Criminal Code* 1899 (Qld), s 672A

*Beamish v The Queen* [2005] WASCA 62, CCA No 130 of 2002, 1 April 2005 applied
*Gallagher v The Queen* (1986) 160 CLR 392, cited
*Lawless v The Queen* (1979) 142 CLR 659, applied
*Mickelberg v The Queen* (1989) 167 CLR 259, cited
*R v Condren; ex parte A-G (Qld)* [1991] 1 Qd R 574, cited
*R v Daley; ex parte A-G (Qld)* [2005] QCA 162; CA No 336 of 2004, 12 May 2005, cited
*R v Main* [1999] QCA 148; (1999) 105 A Crim R 412, cited
*R v Young (No 2)* [1969] Qd R 566, cited
*Ratten v The Queen* (1974) 131 CLR 510, applied

COUNSEL: A J Glynn SC for the appellant
M J Copley for the respondent

SOLICITORS: Kym Flehr Legal Solutions for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The relevant facts and issues are set out in the reasons for judgment of Jerrard JA. I agree with Jerrard JA that the appeal should be dismissed.

[2] Australian courts have long recognised a distinction between admitting fresh evidence and new evidence on the hearing of an appeal. Fresh evidence is evidence which either did not exist at the time of trial or which could not then with reasonable diligence have been discovered.[1] New or further evidence is evidence on which a party seeks to rely in an appeal which was available at the trial or which could with reasonable diligence then have been discovered. The distinction between fresh and new evidence remains important not only in civil trials but also in criminal trials.[2]

[3] Where an appellant in a criminal appeal relies on fresh evidence, the test is whether the appellant has established that there is a significant possibility (or that it is likely) that, in the light of all the admissible evidence, including the evidence at trial, a jury acting reasonably would have acquitted the appellant: *Gallagher v The Queen*[3] and *Mickelberg v The Queen*.[4] The courts, however, also recognise that there is a residual discretion in exceptional cases to receive on appeal new or further evidence which is not fresh evidence if to refuse to do so would lead to a miscarriage of

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1 *Ratten v The Queen* (1974) 131 CLR 510, 516-517; *Lawless v The Queen* (1979) 142 CLR 659, 674-676; *Mallard v The Queen* (2003) 28 WAR 1, 6-9; *Beamish v The Queen* [2005] WASCA 62, [8]-[9].

2 See *Mallard v The Queen*, above.

3 (1986) 160 CLR 392, 397, 407.

4 (1989) 167 CLR 259, 273, 292, 301-302.

justice: *R v Condren; ex parte Attorney-General*;[5] *R v Young (No 2)*;[6] *R v Daly; ex parte A-G (Qld)*[7] and *R v Main*.[8]

[4] In determining an appeal which turns on new or further evidence there are strictly two questions: first, whether the court should receive the evidence and second, whether that evidence, if received, when combined with the evidence at trial requires that the conviction be set aside to avoid a miscarriage of justice. Frequently the two questions will conveniently merge.[9]

[5] The respondent was prepared to concede that Dr Houston's evidence was within the category of fresh evidence. Despite that concession, in my view Dr Houston's evidence was not strictly fresh evidence because it could have been obtained by reasonably diligent defence lawyers at the time of Mr Katsidis' trial; had the trial date conflicted with Dr Houston's interstate or overseas commitments, a different and suitable trial date could have been obtained or the doctor may have been able to give his evidence by video link. Dr Houston's evidence was new or further evidence not fresh evidence. The guilty verdict at the completion of the trial meant that the jury was satisfied beyond reasonable doubt on the evidence before them that the defences of accident and self-defence raised on the evidence at trial were disproved by the prosecution. As Jerrard JA demonstrates in his reasons, the new and further evidence from Dr Houston, Mr Gollan and Mr Kennedy when combined with the evidence at the trial was still consistent with that guilty verdict; it would remain open to the jury on the whole of that combined evidence to be satisfied of Mr Katsidis' guilt beyond reasonable doubt.[10] There has been no miscarriage of justice. It follows that this Court should not receive the new and further evidence from Dr Houston, Mr Gollan and Mr Kennedy and that the appeal should be dismissed.

[6] **JERRARD JA:** Michael Katsidis was convicted in the Ipswich District Court on 1 November 2002 of the offence of doing grievous bodily harm to Jamie Halpin on or about 3 November 2001, and sentenced to two years imprisonment to be suspended after he had served eight months of that imprisonment. On 7 March 2003 his appeal against his conviction, and his application for leave to appeal against his sentence, were dismissed, and he was only released after serving the eight months. The Attorney-General has now referred to this Court for its consideration pursuant to s 672A of the *Criminal Code* a petition by Mr Katsidis for a pardon submitted to the Governor, that petition being on the basis of further evidence now available to Mr Katsidis. Some of that evidence is fresh evidence[11] and some is not.

[7] The evidence at the trial, in brief summary, was that Mr Halpin, who was heavily intoxicated at the time of the relevant events, had been drinking with a companion Adam Tighe, who was also quite drunk at the relevant time. Mr Halpin came to be outside the Toowoomba Sports Club when he urinated on a car belonging to a club employee, Christian Ellis. A group which included Mr Katsidis went to where Mr

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5 [1991] 1 Qd R 574, 579.
6 [1969] Qd R 566.
7 [2005] QCA 162; CA No 336 of 2004, 12 May 2005.
8 (1999) 105 A Crim R 412, McMurdo P, at 416-417, [16]-[17]; Pincus JA, at 417-418, [22]-[24].
9 *Main*, above, see the observations of Pincus JA, at 417-418, [22]–[23].
10 See *M v The Queen* (1994) 181 CLR 487, 493.
11 I use the term "fresh evidence" to describe evidence not reasonably available for Mr Katsidis to call at his trial

Tighe and Mr Halpin were, near Mr Ellis' car, and Mr Halpin responded in an aggressive fashion to questioning by Mr Katsidis about his having urinated on the vehicle. The jurors could conclude that Mr Halpin threw a punch or punches towards Mr Katsidis, and that Mr Katsidis easily avoided it or them, and punched Mr Halpin. Mr Halpin may have made more than one attempt to assault Mr Katsidis, who successfully evaded the assault or assaults, and Mr Katsidis responded on either the one, or on the more than one, occasion of the assault on him with a number of punches of his own, which did connect. Mr Katsidis was then a successful amateur boxer, who was working at the Sports Club, and who had turned professional by the date of his sentence.

[8] Mr Halpin stumbled back when Mr Katsidis punched him and fell to the ground; his head may have landed on a cement kerb. The evidence of Mr Ellis was that Mr Halpin did not attempt to break his fall with his hands, but took the full brunt of that fall on his face. Mr Halpin was admitted to the Toowoomba Base Hospital on 4 November 2001, and had surgery on 8 November 2001 performed by a Dr Houston. Opinion evidence was called by the Crown from a Dr Broadhurst, whose opinion was based on the available medical notes kept at the hospital. Dr Broadhurst described Mr Halpin as suffering from bruising and swelling to the jaw, with two fractures to it, one being in the right side right-angled corner of the jaw (towards the ear), and the other being just to the left of the centre of the jaw. He saw no report of grazing or abrasions or breaches of the skin on the face, and expressed the opinion that the reported injuries (not seen by him) were unlikely to have been caused by a fall. This was because with a fall "you usually get abrasions" to the skin where the face has been struck by the ground.[12] He also swore that severe force would have been required to cause those described injuries, and that it was unlikely they were caused by simply one blow from a fist.

[9] Issues at the trial included the force with which Mr Katsidis had punched Mr Halpin, and whether Mr Katsidis threw more than one punch. He relied, unsuccessfully, on the defences of self-defence and accidental injury. The judgment of this Court on his equally unsuccessful appeal, written by Davies JA, records that Mr Halpin was described in the evidence as "paralytic" at the time, meaning plainly incompetently drunk; and that he was never a physical danger to anyone except possibly by falling over on top of them.[13] Davies JA described the punches Mr Katsidis threw as a rather clinically executed beating of Mr Halpin when he was plainly hopelessly drunk.

**The applicable law on a pardon petition**

[10] The Attorney-General's reference[14] refers to this Court the whole of Mr Katsidis' case, in accordance with s 672A(a) of the *Code*, which provides that in that situation "the case shall be heard and determined by the Court as in the case of an appeal by a person convicted". Mr Glynn SC, for Mr Katsidis, showed some uncertainty in his submissions as to what was necessary for a petitioner relying on further evidence to establish, to show the miscarriage of justice required by s 668E(1). Thomas J held in *R v Condren; ex parte Attorney-General*[15] that a reference under that subsection from the Attorney-General is in the nature of an appeal on any ground available,

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12 At AR 78

13 At AR 275 in [6]-[7]; the judgment (*R v Katsidis* [2003] QCA 82) is reproduced at AR 273-283

14 At AR 303

15 [1991] 1 Qd R 574 at 578

having regard to all of the evidence that may properly be considered by the Court of Appeal on that reference. However, His Honour held that there was some difficulty in articulating the proper approach that should be taken to the reception and use of new evidence during such a reference, referring to *R v Young (No 2)* [1969] Qd R 566, wherein it was recognised that upon such a reference this Court sits judicially and accordingly only admissible evidence should be considered. In *R v Young (No 2)* it was also held that the principles governing the admissibility of fresh evidence should not be treated as inflexible rules strictly binding the Court; and that the Court hearing a reference had a discretion to depart from the ordinary rules of admissibility if there was a reason to think that to be bound by them might lead to injustice or the appearance of injustice. Thomas J in *R v Condren* then referred to what he described as a stricter approach in the judgment of Toohey and Gaudron JJ in *Mickelberg v The Queen* (1989) 167 CLR 259, citing from their Honours' joint judgment at CLR 301; but again referred to the existence of a conceded "latitude" (in *R v Young*), and held in *R v Condren* that prima facie the usual rules governing the reception of fresh evidence should be followed, but that there was a residual discretion in the court to receive new evidence failing to satisfy the usual test as to fresh evidence, where to refuse to do so would lead to a miscarriage of justice. He wrote that the latter cases would be exceptional, although *R v Young (No 2)* afforded an illustration of that sort of case.

[11] I respectfully agree that *R v Young (No 2)* was such a case, in which the Court of Criminal Appeal held that had the new evidence been offered at the trial, the jury must have had a reasonable doubt as to that appellant's guilt.[16] That decision was given some five years before the seminal decision in *Ratten v The Queen*[17] in which the High Court distinguished between the approach taken on an appeal (or a petition for a pardon) according to whether or not the appellant (or petitioner) relied on fresh evidence - that is, evidence not reasonably available to that person at the trial - or on new evidence, the existence of which was known to the person at the time of the trial, or which could have been obtained by reasonable endeavours, but which simply had not been called. That distinction, described in the judgment of Barwick CJ, appears to have been maintained ever since, in both conventional appeals and in pardon applications.[18] A recent discussion of it can be seen in *Beamish v The Queen* [2005] WASCA 62 at [4]-[13], where the West Australian Court of Appeal, hearing that successful application for a pardon, concluded that the distinction between fresh and new evidence was one which was soundly based in principle and which continued to be recognised, although a greater latitude had been suggested in the case of criminal appeals than in the case of civil appeals.[19]

[12] In *Ratten v The Queen* (1974) 131 CLR 510 Barwick CJ wrote[20] to the effect that a trial does not become unfair because a defendant of his or her own choice has not called evidence which was available at the time of the trial, and of which the

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16 At Qd R 573

17 (1974) 131 CLR 510

18 See *Saunders v The Queen* (2004) 149 A Crim R 174 at [14] ([2004] TASSC 95); *Mickelberg v R* (2004) 29 WAR 13 at [413-416]; *R v Bikic* NSWCCA 227 at [281]-[283]; and *R v O'Neill* (2002) 81 SASR 359 at [68]-[74]. I am indebted to Mr Copley, of the DPP, for these references

19 Application of the requirement that evidence be fresh can be seen in that judgment at [147], in the discussion at [385]-[390], and at [422]. Much of the judgment is devoted to a description of evidence held not to be fresh, and ultimately relied on only to assist in the evaluation of the cogency and credibility of the fresh evidence

20 At CLR 517. McTiernan, Stephen and Jacobs JJ agreed with Barwick CJ's reasons; Menzies J wrote a separate judgment

defendant knew or could reasonably have been expected to have been aware. He held there would be no miscarriage of justice simply because that evidence, actually or constructively available, was not called by the defendant, even though it might appear that if that evidence had been called and been believed a different verdict would most likely have resulted. Despite that possibility, the defendant would have had a fair trial.

[13] Barwick CJ then held that if the evidence not previously called does qualify as fresh evidence, it can be said that the trial was not fair[21] where, if that fresh evidence were heard and accepted by the jury, it is likely that a verdict of guilty would not have been returned. The requirement the fresh evidence be credible will be satisfied if the Court of Appeal is of the opinion that the evidence is capable of belief and is likely to be believed. He also wrote that:

> "Of course, if by reason of new evidence accepted by [a Court of Appeal] though it may not be fresh evidence, the [Court of Appeal] is either satisfied of innocence or entertains such a doubt that the verdict of guilty cannot stand, the fact that the trial itself has been fair would not prevent the [Court of Appeal] upon that evidence quashing the conviction."

[14] I suggest that a good example of a Court of Appeal being persuaded of innocence would be when it had before it evidence, available at a trial but not called by the defendant, which unmistakably established an alibi that the jury had rejected when it relied only on the unsupported evidence of the (innocent) defendant. That evidence would not be fresh, in the sense that it was always available, but it would show that the verdict of guilty could not stand. A good example of non-fresh evidence which raised such a doubt about guilt that a guilty verdict could not stand, but which new evidence did not prove innocence, might be the new evidence led in the successful petition for a pardon in *R v Daley; ex parte A-G (Qld)* [2005] QCA 162, summarised by Keane JA in these terms:

> "The new evidence, if believed, makes seriously arguable the case that Mr and Mrs Burgess set out to frame Mr Daley and that they achieved that end by perjured evidence and by misleading the police investigators."

[15] Barwick CJ wrote in *Ratten* that in every situation the court must decide on the relevance, credibility (that is, whether or not it is capable of belief both as to veracity and competence), and cogency, of new evidence. If the court is considering whether the verdict of guilty should be set aside outright because innocence is shown or the existence of an appropriate doubt established, the Court of Appeal will consider all of the material itself, forming and acting upon its own beliefs.[22] If satisfied of a miscarriage of justice in the sense of being persuaded of innocence or entertaining a reasonable doubt as to guilt, there will be no question of a new trial; the verdict of guilty will be quashed and the appellant discharged.

[16] He explained that until the court decides that there is no miscarriage of the kind just described, it will not need to consider whether or not any part of the new evidence relied on satisfied the criterion of fresh evidence. If not persuaded of innocence or the establishment of a reasonable doubt, the court will then go on to consider

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21 At CLR 519

22 Gibbs CJ later questioned, if not restated, that particular point in *Gallagher v The Queen* (1986) 160 CLR 392 at 398, 99

whether the new evidence is fresh; and if it is, whether it is likely that a jury considering that evidence would not have returned a verdict of guilty. The Chief Justice (at CLR 520) wrote that a new trial will be ordered where there is fresh evidence, capable of acceptance and likely to be accepted by a jury, and so cogent that, if believed, it is likely to have produced a different result. It will be ordered to remedy the miscarriage of justice which has happened because it was not available. If the new material is not fresh, and the court has not been convinced on its own view of that material that there has been a miscarriage of justice in the sense that the verdict of guilty could not be allowed to stand, then no miscarriage of justice will be found.

[17] In *Lawless v The Queen* (1979) 142 CLR 659 at 674-6, Mason J restated the significance of the difference between evidence which is fresh and evidence which, although not heard by a jury or trial court, was available to be called by the party now seeking a different result and now relying on that previously uncalled evidence. I remark that the difference in the approach appeal courts take, based on that distinction, may seem harsh to non lawyers and to unsuccessful appellants, but it is based amongst other things upon the public interest in not having a multiplicity of trials re-hearing the one charge or dispute, and held until a party repeatedly seeking to lead more previously available evidence finally achieves a successful outcome. Mason J, in a lengthy passage worth quoting in full, explained the position (when referring to the judgment by Barwick CJ in *Ratten v The Queen*) as follows:

> "His Honour observed that when the evidence not called at the trial, whether or not it be fresh evidence in the strict sense of that expression, when taken in conjunction with the other evidence tendered at the trial, shows the accused to be innocent or when it raises a reasonable doubt as to his guilt, the conviction must be set aside outright. The Chief Justice went on to point out that when the evidence not called at the trial, though it fails to show that the accused is innocent or fails to raise a doubt as to his guilt, none the less shows that it is likely that a verdict of not guilty would have been returned by the jury had it had the benefit of the fresh evidence, the court should set aside the conviction and order a new trial, if and only if the evidence in question is fresh evidence properly so called, that is if it is evidence of which the accused was unaware at the time of his trial and it is evidence which he could not have discovered with reasonable diligence.
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> In both these cases the newly adduced evidence, considered in conjunction with the evidence tendered at the trial, reveals a miscarriage of justice showing, as it does, that it would be unsound or unsatisfactory to allow the conviction to stand, in the one case because the appellant should be acquitted, and in the other because there is a likelihood that the accused would be acquitted on a re-trial based on the fresh evidence. The quashing of the conviction by a court of criminal appeal in these cases is based, not on the existence of any irregularity in the conduct of the trial, but on the perceived injustice or unfairness in allowing the conviction to stand when it is viewed against the totality of the evidence including the newly adduced evidence.

> However, it is not permissible for a court of criminal appeal to set aside a conviction if the newly adduced evidence, not being fresh evidence strictly so called, reveals no more than a likelihood that the jury would have returned a verdict of not guilty. Two considerations operate to bring about this result. The first is that in a criminal trial the accused is entitled to decide how his case will be conducted, in particular, what evidence he will call. He makes this decision in the light of the knowledge that he is tried but once, unless error or miscarriage of justice results in a successful appeal. He cannot therefore conduct his defence by keeping certain evidence back in the expectation that, if he is convicted, the existence of the uncalled evidence will provide a ground for a second trial at which a different or refurbished defence may be presented. Accordingly, an accused person, if convicted, generally cannot complain of a miscarriage of justice if he deliberately chooses not to call material evidence, it being actually available to him at the time of the trial, or if he fails to exercise reasonable diligence in seeking out material evidence.
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> The second consideration is that there must be powerful reasons for disturbing a conviction obtained after a trial which has been regularly conducted. No such reason for disturbing a conviction presents itself if all that emerges is that the accused has deliberately chosen not to call evidence or that he has failed to search out evidence with reasonable diligence, unless the evidence not called at the trial demonstrates that the accused should not have been convicted of the offence charged. If the evidence newly adduced falls short of establishing that the accused should not have been convicted, there is no overwhelming reason why the conviction, regularly obtained after a fair trial should not be allowed to stand. After all, in a criminal appeal uncomplicated by the existence of newly adduced evidence it is not a ground for the setting aside of a conviction and the ordering of a new trial that the appellate court itself considers that it was unlikely on the evidence that the jury would have convicted. If there was evidence on which the jury could reasonably convict, the verdict must stand, for in such a case there is no miscarriage of justice. So it is when evidence not called at the trial, not being fresh evidence when considered with the evidence given at the trial, leads to the conclusion that the jury could reasonably convict, though it appears to the appellate court that it would be unlikely to do so. There is then no miscarriage of justice because the jury has arrived at a verdict which is unimpeachable and the new evidence produced on the appeal falls short of establishing that the accused should not have been convicted, it being the fault of the accused that the new evidence was unavailable at the trial."

[18] That judgment by Mason J in *Lawless v The Queen* shows that an appeal court can properly give a different answer to the question whether a miscarriage of justice has been shown, depending on whether new evidence is fresh or not; and the expression "miscarriage of justice" in s 668E(1) of the *Code* should accordingly be construed in that light in the context of the particular appeal. When considering fresh evidence in *Mickelberg v The Queen* (1989) 167 CLR 259, at 301, Toohey and Gaudron JJ

wrote that in essence, fresh evidence must be such that, when viewed in combination with the evidence at trial, it can be said that the jury would have been likely to entertain a reasonable doubt about the guilt of the accused if all the evidence had been before it, or that there is a significant possibility that the jury, acting reasonably, would have acquitted the accused. The latter formulation was expressly adopted by Mason CJ in that case, at CLR 273, on the ground four of the five judges in *Gallagher v The Queen* had endorsed it. It is the test commonly applied to fresh evidence in this State. In *R v Main* (1999) 105 A Crim R 412 at 416, McMurdo P wrote that the principal question for consideration was whether there was a significant possibility (or whether it was likely that) a reasonable jury would have acquitted the petitioner if the fresh evidence had been before it at the trial, so that a "miscarriage of justice", within the meaning of those words in s 668E(1) of the *Criminal Code,* had resulted.

[19] It is clear from the reasoning in the authoritative judgments cited that it is considered or assumed harder to satisfy an appeal court hearing new evidence of innocence, or cause it to have such a doubt that a verdict of guilty cannot stand, than it is to show that there is a significant possibility that a jury hearing that new evidence would have reached a different verdict. It is also clear that a Court of Appeal considering the effect of new evidence, which is not fresh, must consider the trial, not as a contest between adversaries, but (in a criminal proceeding) as the only accepted method of proving actual guilt beyond reasonable doubt, namely, by a properly conducted trial hearing admissible evidence. If a conclusion of guilt is still reasonably open, even accepting non-fresh evidence as true, a miscarriage of justice has not been shown. On the other hand, a Court of Appeal considering the potential effect of fresh evidence on a jury verdict must consider the trial as a contest between adversaries of whom one has had to compete with a weapon hidden from her or his view and grasp when there is a significant possibility that, had it been available, using it would be likely to have changed the result. It is no answer to say, where there is credible fresh evidence, that it would still have been reasonably open to the jury to convict; the contest has not been fair.

**The fresh evidence**

[20] The first item of new evidence was from a Dr Houston, a maxillofacial surgeon, which the Crown conceded was fresh evidence. Dr Houston swore an affidavit and was cross-examined before this Court. His evidence was that Mr Halpin had an abrasion on his left sub-mandibular region, consistent with a fall, and that the left mandibular body fracture, and the right angle fracture of the right side of the jaw were consistent with his body falling heavily, as a drunken person would, and striking his face on something (AR 295). The abrasion would suggest a fall hitting a hard object being the more likely cause of this injury than a punch or punches, because punches do not cause abrasions; only swelling and bruising. That abrasion was in the area below where Dr Houston made his incision on the left sub-mandibular region. It was not noted on the hospital records, and therefore was not something that Dr Broadhurst could have commented on, having not seen the patient. Dr Houston said in cross-examination that he would not expect an abrasion to be noted. What he said was the abrasion does appear in photographs 3 and 4 taken on 12 November 2001 (AR 297 and 298), and Dr Houston was adamant in cross-examination that what was depicted was an abrasion and not a rash.

[21] Dr Houston's opinion evidence was that the considerable displacement of fragments of jaw bone, particularly of the right angle fracture, which he found on operation was consistent with an initial fracture from a punch, followed by more trauma to the jaw, caused by Mr Halpin falling onto it. He specified that the most likely cause of the condition of the jaw that he operated on was a fall onto an already cracked or fractured jaw. He also explained that Mr Halpin's jaw bone was actually flawed and weakened at both places where it fractured; on the right side by an impacted wisdom tooth, and on the left by a canine tooth. He considered the degree of displacement of bone fragments he found is normally seen only as a the result of a high velocity trauma, such as a 100 kph incident. Alternatively, there had to be multiple traumas to produce injury of that severity (such as a person being kicked repeatedly on the ground; the degree of displacement was unlikely to be from a fist-induced trauma.)

[22] That evidence does disagree significantly with the evidence given by Dr Broadhurst, who had not assisted in the operation on Mr Halpin, and who had given opinion evidence based on his reading the hospital records and notes. Dr Broadhurst did agree in cross-examination that an intoxicated person could lose the protective mechanism of using the hands to break a fall that a sober person would have, and that if Mr Halpin had fallen without putting his hand out to break the fall, and had struck his face on a corner of a gutter, that would be sufficient force to cause a break to his jaw. He could not say that that had not happened. He accepted that was a possibility, although he said in re-examination that he thought it was unlikely. He also said in re-examination he thought that the possibility of the injury as being caused by one blow was unlikely, although he had agreed in cross-examination that a blow at a certain angle could break a jaw at more than one point.

[23] If the jurors had heard from both doctors and not just from Dr Broadhurst, they would have regarded it as at least possible, if not likely, that Mr Halpin had received at least one of his fractures to the jaw, or had substantially aggravated an existing fracture or fractures to the jaw, by a fall. Mr Glynn SC contended for the petitioner that Dr Houston's evidence raised issues as to causation of the grievous bodily harm (constituted by the condition of the jaw bone), which were not dealt with in the directions to the jury. He also submitted that it was highly likely that if the jury had heard Dr Houston's evidence, it would have acquitted Mr Katsidis on the basis that the Crown had not excluded a defence of accident; he argued the evidence satisfied the test of a significant possibility of a different result.

[24] However, the learned judge had directed the jurors in these terms:

> "Unless the prosecution proves beyond reasonable doubt that an ordinary person in the position of the accused would have foreseen a fractured jaw as a possible outcome of his actions, you must find him not guilty. With respect to the accident defence, just briefly, the Crown submits that the punch or the punches delivered by someone who at the time was a professional boxer, you'll be satisfied that they were delivered with such force that it was foreseeable that when the complainant went to the ground he would hit the ground with such force that grievous bodily harm was foreseeable." (AR 131)

[25] The learned judge had already directed the jurors, with respect to the suggestion that Mr Halpin had perhaps hit a pole when falling down after being punched by Mr Katsidis, that:

> "If an ordinary person in the position of the accused would not have foreseen the fractured jaw amounting to grievous bodily harm sustained by the complainant as a possible outcome of his actions, that is, punching the complainant in response to a threat and punch from the complainant, and the complainant's falling to the ground against a post and thereby fracturing his jaw, then that person would be excused by law, and you would have to find him not guilty."

The judge had accordingly given the jurors both a more specific direction first, and a more general direction immediately after, as to how a defence of accident would be excluded, and the judge also directed the jurors (at AR 132) that:

> "So, at the end of the day, if you are satisfied beyond reasonable doubt, the complainant's injuries were caused by the accused punching the complainant on the jaw, then the defence of accident would fail."

The judge then directed the jurors on self-defence at pages AR 132-136. The judge also re-directed the jurors, at their request, on self-defence at AR 156-163; and again at AR 166-169. Those latter directions concerned the degree of force which could lawfully be used, and the jurors were further directed on that at AR 170-171. There were no directions on provocation.

[26] Mr Glynn SC submitted that the jurors had rejected the defence of accident because they had heard only Dr Broadhurst's opinion contradicting the possibility of the grievous bodily harm resulting in combination from punches and a fall, or solely from a fall; whereas had they heard Dr Houston's evidence they would have been unable to reject the latter's firmly expressed opinion that a fall significantly contributed to the extent of grievous bodily harm. But the precise mechanism of injury described by Dr Houston was the subject of the quoted direction given to the jury, namely reminding them that the Crown argued it was foreseeable that when Mr Halpin fell to the ground from the punches Mr Katsidis administered, that he would do so with such force that grievous bodily harm would occur to Mr Halpin. The direction made it clear enough that if the jurors accepted that submission, the defence of accident was negated by the Crown. Mr Glynn's submissions did not challenge that Mr Katsidis would be criminally responsible for doing grievous bodily harm if his punches were a substantial or significant cause of the grievous bodily harm suffered,[23] and on the directions given to the jury that conclusion necessarily followed if they considered it possible that some or all of the grievous bodily harm was caused by the fall. Accordingly calling Dr Houston could not have affected the jury's rejection of the defence of accident, which defence was not in any way raised by Dr Houston's evidence. That evidence only confirmed as a fact, if the opinion was accurate, the possibility dismissed by Dr Broadhurst but dealt with by the learned trial judge in those directions. The Crown had put its case to the jury in two ways, and the directions given dealt with the view Dr Houston put forward. Accordingly there is no significant possibility of a different verdict dependent on the defence of accident.

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23 *Royall v The Queen* (1991) 172 CLR 378 at 411, 423.

[27] The jurors were apparently concerned as to the degree of force Mr Katsidis was proved to have used in his punches on Mr Halpin. Those concerns led to the re-directions at AR 166-169. Dr Houston's evidence, if put before the jury, would increase the probability of the conclusion that some of the force applied to Mr Halpin's face came from contact with the ground and not from punches by Mr Katsidis. That conclusion would make no difference to the availability of defence of accident, but its effect on the defence of self defence must be considered.

[28] Dr Houston's evidence increases the probability that Mr Halpin's injuries were caused at least partly by a fall, and therefore reduces the extent to which the punches Mr Katsidis threw necessarily caused direct injury to the jaw, although Dr Houston's evidence certainly assumed or preferred the view that at least an initial fracture to (probably) each side of the jaw was caused by punches, before the fall aggravating the damage caused by the punches. The Crown case, on Dr Broadhurst's evidence, was that all of the damage to the jaw resulted from punches and none from a fall, and the necessary inference from that was that the punches were delivered with considerable force and skill. Dr Houston's evidence reduced the necessary force to be inferred from the punches, and the less the necessary degree of force used by Mr Katsidis, the less likely that force was to cause grievous bodily harm. The *Code* in s 271(1) makes it lawful for a person who has been unlawfully assaulted, and who has not provoked the assault, to use such force as is reasonably necessary to make effectual defence against that assault, if the force used is not intended and is not such as is likely to cause (death or) grievous bodily harm.

[29] The issues at the trial included whether it was reasonably necessary for Mr Katsidis to use any force at all to make effectual defence against the ineffective assaults attempted upon him by Mr Halpin. It appeared common ground that Mr Katsidis had not provoked the assaults by Mr Halpin, which were unlawful. Another issue was whether the Crown had established that Mr Katsidis used force which was likely to cause grievous bodily harm. Dr Broadhurst's evidence necessarily supported that proposition, which was considerably challenged by Dr Houston's evidence. But even accepting Dr Houston's evidence, his preferred view that Mr Halpin's jaw bone had probably been fractured or damaged by punches before he fell to the ground still leads inevitably to the firm conclusion previously expressed by this Court on the original appeal by Mr Katsidis[24], wherein Davies JA wrote that:

> "As to self-defence it was plain that the degree of force used by the appellant was well beyond what was reasonably necessary to make effectual defence against an assault by a "paralytically" drunk man such as the complainant. The appellant did not need to confront the complainant in the way in which several of the witnesses said he did. He could have avoided the complainant's swings without attempting to hit him back. He could have walked away. What he did was plainly unnecessary."

That description is applicable whatever the medical evidence accepted by the jury, and accordingly Dr Houston's evidence does not raise any significant possibility that the jury, acting reasonably, would have acquitted him on the grounds of either self defence or accident had they heard the fresh evidence.

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[24] In paragraph [9]

**The non-fresh evidence**

[30] There remains the evidence which Mr Glynn SC conceded was not fresh, namely evidence from Mr Tony Gollan and Mr Michael Kennedy. Mr Gollan's evidence was that on Saturday, 3 November 2001 he was leaving the Gladstone Hotel at around 11.30 pm that night, when he met Mr Halpin and Mr Tighe in the doorway. Both were known to him. Both appeared intoxicated, and Mr Halpin was aggressive and wanted to fight Mr Gollan. Mr Gollan at first declined the invitation, but then Mr Halpin appeared about to punch Mr Gollan, and they struggled together. In the course of the struggle Mr Halpin swung a punch at Mr Gollan, and Mr Gollan punched Mr Halpin a couple of times, on either side of the jaw. Those were not "full blown" punches, and Mr Kennedy separated them. Mr Halpin was still calling out abuse and inviting Mr Gollan to fight when Mr Gollan's taxi arrived and Mr Gollan left. Mr Kennedy supported Mr Gollan's account of what happened; neither man noticed any obvious injury to Mr Halpin's face after the two punches by Mr Gollan.

[31] The Crown did not seek to cross-examine either Mr Gollan or Mr Kennedy on the hearing of the petition. Mr Glynn SC readily conceded that their evidence was not fresh, and he annexed a copy of a portion of the transcript of the committal proceedings to his written outline of submissions, which transcript portion shows that at that committal hearing counsel for Mr Katsidis had received instructions about a possible altercation between Mr Halpin and Mr Gollan that night at the Gladstone Hotel. However, Mr Halpin could not remember any fight and the matter was not pursued further in cross-examination. Because the Crown did not ask to cross-examine either witness, the petition should therefore be considered on the basis that that evidence was accepted by the Crown.

[32] It is probable that the incident they describe occurred before Mr Katsidis punched Mr Halpin, because Mr Halpin's evidence was that he had gone to the Gladstone Hotel, where Mr Gollan says that he punched Mr Halpin, before going onto the Toowoomba Sports Club, where he was punched by Mr Katsidis. Assuming that Mr Gollan was the first person that night to punch Mr Halpin on both sides of the jaw, once the jurors accepted that he had done that, it would be very difficult for the prosecution to prove beyond reasonable doubt that Mr Halpin's grievous bodily harm constituted by his combination of fractures to his jaw had resulted either solely from punches by Mr Katsidis which were likely to cause grievous bodily harm, or in combination from punches of that sort and from a foreseeable fall caused by those punches.

[33] The jurors were not directed as to the criminal responsibility of Mr Katsidis for grievous bodily harm resulting from the combination of a foreseeably heavy fall, caused by his punches, onto a jaw already fractured by another person's punches. Mr Glynn SC submitted that the non-fresh evidence raised the issue of causation of the grievous bodily harm, but I consider that submission overlooks s 23(1A) of the *Code.* It provides that a person is not excused from criminal responsibility for, relevantly, grievous bodily harm that results to a victim because of a "defect, weakness, or abnormality", even though the offender does not intend or foresee or cannot reasonably foresee the grievous bodily harm. That is, if Mr Halpin had a pathologically fragile jaw such that tapping it would cause displaced fractures, Mr Katsidis would be criminally responsible for grievous bodily harm caused by a light (unlawful) blow to that jaw which fractured it in numerous places. In my opinion

the result is the same where the weakness or defect in Mr Halpin's jaw resulted from earlier punches by another person; but Mr Katsidis would only be criminally responsible for the grievous bodily harm Mr Halpin suffered if a heavy fall by Mr Halpin, in which injury to his jaw was foreseeable, was foreseeable from the use of the force Mr Katsidis had used on Mr Halpin. The jurors were actually directed about that, albeit on the assumption that Mr Katsidis was the only person who had punched Mr Halpin's jaw that night. As a matter of law the directions given in the trial were sufficient and correct; and Mr Katsidis was criminally responsible for the grievous bodily harm resulting from any foreseeably heavy fall resulting from his use of force. Dr Houston's evidence actually assists the Crown on this point, by providing a description of how the grievous bodily harm happened, which allowed for punches (by another) causing a lesser fracture, and a heavy fall, caused unlawfully by Mr Katsidis, which resulted in more serious fracturing.

[34] It follows that I do not consider the non-fresh evidence of Mr Gollan and Mr Kennedy, considered with the evidence led at the trial and the fresh evidence, raises such a doubt about the guilt of Mr Katsidis that the verdict cannot stand. It would have been readily open to the jury hearing all of the fresh and non-fresh evidence, and properly directed, to conclude that the punches delivered by Mr Katsidis, a competent boxer, were a substantial and significant cause of the grievous bodily harm Mr Halpin suffered after a foreseeably heavy fall caused by those punches. Nor do I consider that Dr Houston's evidence, considered with the evidence at the trial and the new evidence,[25] raises any such doubt or a significant possibility that the jury, (properly directed and) acting reasonably, would have acquitted Mr Katsidis.

[35] I would dismiss the appeal constituted by the reference.[26]

[36] **WHITE J:** I agree with the order proposed by Jerrard JA for the reasons which he gives.

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25 In *Beamish v The Queen,* the W.A. Court of Appeal held at [388]-[390], and I respectfully agree, that fresh evidence should be considered in the light of all evidence including new, non-fresh evidence

26 This reflects the order in *R v Young (No 2)*