

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Walsh* [2010] QCA 193

PARTIES: **R**  
v  
**WALSH, Lucas James**  
(appellant)

FILE NO/S: CA No 295 of 2009  
SC No 105 of 2009

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 July 2010

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2010

JUDGES: Chief Justice and Fraser and Chesterman JJA  
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 –  
VERDICT UNREASONABLE OR INSUPPORTABLE  
HAVING REGARD TO EVIDENCE – APPEAL  
DISMISSED – where the appellant and a co-accused were  
charged with manslaughter – where the jury found the  
appellant guilty and his co-accused not guilty – where the  
appellant argued it was not open to the jury on the whole of  
the evidence to be satisfied of his guilt beyond reasonable  
doubt – where the appellant contended that there was a  
reasonable possibility on the whole of the evidence that the  
deceased died as a result of a blow delivered by his  
co-accused – whether it was reasonably open to the jury to  
exclude the possibility that the appellant’s co-accused  
delivered the blow which caused the death of the deceased –  
whether upon the whole of the evidence it was open to the  
jury to be satisfied beyond reasonable doubt of the  
appellant’s guilt

*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63,  
applied

COUNSEL: P Callaghan SC, with E Gass, for the appellant  
M B Lehane for the respondent

SOLICITORS: Legal Aid Queensland for the appellant  
 Department of Public Prosecutions (Queensland) for the  
 respondent

- [1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree that for those reasons the appeal should be dismissed.
- [2] **FRASER JA:** The appellant and Gregory Lynam were charged with the manslaughter of Joshua Mill, who died in the early hours of 20 October 2007 as a result of a blow to his head during an altercation on a road near a taxi rank in Caloundra. Following a thirteen day trial a jury returned verdicts that the appellant was guilty and Lynam was not guilty. On 24 November 2009 the appellant was sentenced to imprisonment for a period of nine years. It was declared that 305 days in presentence custody, between 21 October 2007 and 15 August 2008 and between 19 November 2009 and 24 November 2009, constituted time already served under the sentence.
- [3] The appellant has appealed against his conviction on the ground that it was not open to the jury on the whole of the evidence to be satisfied of his guilt beyond reasonable doubt. Under that ground of appeal the question is whether, notwithstanding that as a matter of law there was evidence to sustain the verdict, upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty:
- “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.”<sup>1</sup>
- [4] The Crown case was that there was sufficient evidence for the jury to be persuaded beyond a reasonable doubt that one of the appellant and Lynam punched or in some way inflicted a blow upon the deceased that caused his death. The Crown contended that if the jury found that the appellant struck the fatal blow the jury might also find that Lynam was guilty of manslaughter because he aided, assisted, or enabled the appellant to deliver the fatal blow. However the obverse was not true. At the close of the Crown case the trial judge ruled, and his Honour subsequently directed the jury, that the appellant could not be found guilty on the basis of being a party.
- [5] The appellant and Lynam did not give or call evidence. Their versions were contained in police interviews tendered in the Crown case. The appellant’s account, that he was forced to defend himself when he was attacked by a couple of men, included no reference to the events near the taxi rank where the deceased was struck. There were numerous people in the area at the time, many of whom, like the deceased, had recently left a nearby nightclub. The evidence in the Crown case included eyewitness accounts that the deceased crumpled to the ground, became unconscious and died shortly after a man in a white T-shirt landed a heavy punch to the deceased’s head. The appellant’s DNA was found on the deceased.

---

<sup>1</sup> *M v The Queen* (1994) 181 CLR 487 at 494.

- [6] It was open to the jury to accept that evidence and the evidence which identified the appellant as the man wearing the white T-shirt who struck the deceased. The appellant did not contend to the contrary. The argument for the appellant was instead that such a punch was not necessarily the cause of death. The appellant argued that there was a reasonable possibility on the whole of the evidence that the deceased died as a result of a blow delivered by Lynam shortly before the appellant punched the deceased. If it was not reasonably open to the jury to exclude that possibility beyond reasonable doubt the appellant was entitled to be acquitted.
- [7] A specialist forensic pathologist employed by the Queensland Health Scientific Services gave evidence that she examined the body and performed an autopsy of the deceased. In her opinion the deceased died as a result of a subarachnoid haemorrhage which indirectly arose from a blunt force applied just below his right ear. She thought it was most likely that the deceased was upright when he sustained the fatal injury. A scenario such as the application of force (for example, by a punch) to the neck following which the deceased fell to the ground, did not move after that, and a short time later was noted to be not breathing, was exactly the sort of scenario she would expect to see. It was possible that a blow to the front of the face might have caused the fatal injury but that was unlikely. The blow could have been delivered from behind or to the side and it could have been delivered by a fist or by an elbow. The time between the application of the force and the collapse would be measured in seconds or up to a minute or so. Loss of consciousness was likely to have been accelerated if (as other evidence demonstrated) the deceased was then involved in physical activity and had the dangerous drug MDMA (methylenedioxyamphetamine) in his system. It was possible that the deceased might have continued to fight, with decreasing effectiveness, for 10 or 20 seconds after the blow was delivered, but it was most likely that he crumpled to the ground immediately upon receiving the fatal blow.
- [8] There was a persuasive body of evidence that the appellant struck such a blow and thereby caused the death. In addition to the evidence of eyewitnesses that they saw the deceased lying motionless on the ground immediately after the appellant punched him in the head, photographic evidence also clearly showed physical contact between the appellant and the deceased and it did not show any physical contact between Lynam and the deceased. The photographs were taken from two taxis. Cameras were mounted above the rear vision mirror (capturing images inside the car) and above the driver's side door (capturing images outside the car on the driver's side, including the road and footpath across the road from the driver's side, extending some distance to the front and the rear of the car). Most of the photographs were taken at intervals of about three seconds. Numerous photographs were admitted in evidence and mentioned by the witnesses. For present purposes it is necessary to refer only to a few of the photographs taken from the taxi driven by Cooper.
- [9] According to the date and time stamps on one such photograph, at shortly after 2.42 am on 20 October 2007 the deceased was seated in the front passenger seat of that taxi. Lahz was in the middle of the back seat and Davies sat behind the driver. Norman sat behind the deceased. Photographs depict a person wearing a white T-shirt (the appellant) approach the rear door of the taxi on the driver's side and apparently make or attempt to make physical contact with one of the passengers in the back seat. Cooper gave evidence that after the four passengers got into his taxi a man came from the direction of a nearby nightclub, peered into the driver's side

window of the taxi, looked into the back passenger side window and then opened the back door and punched the person in the back seat behind him (Davies). Cooper saw the taxi marshal (Brady) pull the man back from the taxi. The appellant's counsel accepted in his written submissions that the appellant was the man wearing the white T-shirt who was the aggressor in this fracas.

- [10] The attribution of identities to the persons shown in the subsequent photographs was largely uncontentious. The significant information these photographs apparently convey (subject to limitations which I will mention) may be summarised as follows:

- |              |   |
|--------------|---|
| 02:43:07.210 | The deceased standing on the road outside the taxi and facing the appellant, who is in an apparently aggressive stance. Brady, the taxi marshal, is shown partially obscured standing on the right side of the deceased.  |
| 02:43:10.270 | The deceased facing the appellant (obscured) near the centre of the road. Richardson walking towards the deceased and the appellant. Brady looking back towards the taxi, away from the deceased and the appellant.   |
| 02:43:13.330 | Davies pushing the appellant, who is off balance. The deceased walking towards Davies and the appellant. Richardson to the left of and behind the deceased. Lynam metres to the right of the deceased. Lynam's arms raised to the level of his shoulders and his elbows bent, apparently facing and walking towards Davies in a trajectory which might intercept the path the deceased might be taking.               |
| 02:43:16.390 | The deceased and the appellant in physical contact in the middle of the road. Richardson watching them from the roadway some metres away. A bystander (possibly Davies) leaning against a column or wall on the footpath on the far side of the road Lynam also standing on that footpath.  |
| 02:43:19.450 | The deceased and the appellant in physical contact in the middle of the road. Lahn close to them, apparently walking in their direction. Three people on the footpath and some distance to the left of the appellant and the deceased: Richardson facing away from the appellant and the deceased and towards Lynam, Lynam walking away from Richardson, and a bystander facing Lynam and possibly blocking his path. |

02:43:22.510

The deceased on the road with his upper body on the footpath and his legs bent up. The appellant and Lahz close to the deceased. Richardson facing and walking towards that group. Davies on the far left side of the photograph. Lynam is not shown in this photograph.

- [11] In all subsequent photographs the deceased is shown in the same position on the ground. The appellant's argument emphasised the photographs 02:43:13.330 and 02:43:16.390. The argument postulated that in the three second interval between those images Lynam might have moved diagonally across the road, elbowed the deceased in the head, and then continued on to the footpath. On the medical evidence, after the deceased had received his fatal blow he might have remained upright for the short period of time before the first of the photographs (02:43:22.510) showed the deceased lying prone on the road. In this scenario the deceased might have fallen immediately after the appellant punched him but the cause of his death might have been a blow administered by Lynam some seconds beforehand. The appellant sought support for this scenario in the evidence of a number of eyewitnesses that Lynam punched and kicked other people in the vicinity but appeared distressed and remorseful, and expressed his remorse, when he saw the deceased lying motionless on the ground. The appellant also contended that Lynam's version to police, which included false assertions that he had not punched or kicked anyone and had not appreciated that anyone was injured, revealed a consciousness of his guilt.
- [12] It may be accepted that the scenario postulated by the appellant is consistent with the evidence of the photographs, even though the medical evidence suggested that it was more likely that the deceased crumpled to the ground immediately after the fatal blow was delivered. There are, however, significant limitations upon the nature and reliability of the information conveyed by the photographs. They were snapshots taken at three second intervals. During those intervals a great deal of movement might have occurred in the volatile situation suggested by the photographs and described by the eyewitnesses. The photographs also significantly distorted what they purported to depict. What are known to have been straight kerbs and buildings are shown on the photographs as markedly curved. In assessing the reasonableness of the jury's verdict both those significant limitations and the other evidence incriminating the appellant must be borne in mind.
- [13] The photographic evidence, which clearly showed physical contact between the appellant and the deceased only seconds before the deceased was on the ground, was consistent with the statements of eyewitnesses that the appellant alone struck the blow which rendered the deceased unconscious. Cooper's evidence painted the appellant as the aggressor. He said that the "individual in the white shirt" (the appellant) overpowered "the individual in the back of the taxi" (Davies) by one or two punches. He gave evidence that the confrontation between the appellant and the "individual who was sitting beside me in the front passenger seat" (the deceased) then occurred about a metre and a half from where he, Cooper, was sitting in his taxi. After the appellant had felled Davies and walked towards the deceased, the deceased "shaped up with his fists". The appellant landed punches to the head of the deceased. The deceased did not do anything to the appellant. Cooper saw the appellant throw a punch to the deceased's head and, "virtually it hit

him really hard in the front of the face, you could hear the crack in the night, and at that stage that individual went limp like and fell to the ground.” Cooper said that he did not see the deceased move after that. Cooper saw a man in a white singlet (Lynam) subsequently appear on the scene and punch the deceased.

- [14] Cooper also described the appellant fighting with each of the other occupants of the taxi. He agreed in cross examination by the appellant’s counsel that the effect of his evidence was that the appellant had assaulted each of the four men who got out of his taxi in turn on three distinct occasions. As the trial judge reminded the jury, no other witness gave evidence to that effect. Cooper also agreed with the suggestion put to him by the appellant’s counsel that it was possible that, contrary to his evidence in chief, Lynam was present where the fighting occurred and may have run diagonally across Cooper’s field of vision, thus bringing Lynam into a position where he could have made contact with the deceased. Cooper repeated, however, that Lynam did not appear in the immediate vicinity of the deceased until after the deceased was already on the ground. Cooper made concessions about his difficulty in estimating times and some discrepancies between his evidence and that of other witnesses were also emphasised in the cross examination. Nevertheless, the jury might reasonably have thought that Cooper, an apparently sober and disinterested witness, was well placed to observe and accurately recall the essence of the events involving his passengers that had unfolded within his field of vision only a couple of metres away. On the medical evidence such a punch to the face as Cooper described might have resulted in the death of the deceased. It would also be unsurprising if Cooper had not noticed the deceased turning away immediately before the punch landed so that the blow hit the deceased just below his ear in the way the pathologist thought was more likely to cause death.
- [15] There was evidence to similar effect by other apparently sober and disinterested witnesses: Brady (the taxi marshal), Roberts (a security officer), and Cullen (another taxi driver). Similar evidence was given by other witnesses who were under the influence of alcohol in varying degrees. MacDonald and his friend Turner met the appellant earlier in the night and drank with him in a hotel and later at the nightclub. MacDonald gave evidence that he saw the appellant throw a punch which knocked the deceased to the ground. The deceased did not get up. It was then that Lynam came over and punched the deceased in the head. Turner gave evidence that he saw the appellant fighting with someone and he saw another man in a white singlet who wasn’t involved in the fight, although he acknowledged that his view was obscured, his attention was focussed elsewhere, and he did not see anyone on the ground.
- [16] Both MacDonald and Turner also gave evidence that very shortly after they left the scene the appellant joined them and said that he had just knocked the man out.
- [17] There is then the evidence of the occupants of Cooper’s taxi from which the deceased had emerged. I will defer consideration of Norman’s evidence, which the appellant emphasised. Davies did not see or could not recollect seeing what caused the deceased to fall to the ground. The remaining occupant of the taxi, Lahz, said that he was intoxicated at the time. He gave evidence that he saw the appellant hit the deceased in the face with a solid punch and the deceased then fell to the ground. The appellant lifted up the deceased and punched him again in the face. Lahz ran over, pushed the appellant out of the way, and cradled the deceased’s head in his lap but could not wake him up. He said that he remained with the deceased until the ambulance arrived and that no one else struck the deceased. He was shown in that position in the later photographs.

- [18] Two witnesses gave evidence which pointed to Lynam rather than the appellant as being the person responsible for the death of the deceased, but the jury might have placed little weight on their evidence. A bystander, Dufficy, gave evidence that he saw a man in a white singlet move from the taxi rank towards the centre of the road and hit “a gentleman in a navy T-shirt” (the deceased) and subsequently kick and punch him in the head whilst he lay on the ground. He said that Lynam said “Sorry” to the deceased. In cross examination by the appellant’s counsel Dufficy said that he did not see a man in a white T-shirt go anywhere near the deceased. That is difficult to reconcile with the photographic evidence and the evidence of other eye witnesses that the appellant came into physical contact with the deceased. Furthermore, in cross examination by Lynam’s counsel, Dufficy acknowledged that he had given evidence at the committal to the effect that although he had given a statement describing the person in the white singlet as being the person who punched the deceased, each time he referred to a person with a white singlet in his statement doing something aggressive or violent he should be taken to have referred to the person in the white shirt. It seems that at the committal hearing Dufficy maintained that the person in the white singlet did behave aggressively, but he ultimately accepted in cross examination at the trial that the person he saw getting knocked to the ground by the person in the white singlet was not the one who ended up in a gutter (as the deceased did).
- [19] Another bystander, Fleming, described a fight between a man in a white singlet and the deceased. He said that he saw the man in the white singlet punch the deceased heavily in the face. After the deceased fell to the ground he saw the man in the white singlet hit the deceased again. In cross examination by the appellant’s counsel Fleming said that he had made statements to similar effect in his initial statement to police. He was shown the photograph 02:43:30.330 but said he could not recollect what was there depicted. In cross examination by Lynam’s counsel, Fleming acknowledged that he had not mentioned a person in a white shirt being involved or in the area of the violence. He accepted that in his evidence at the committal he had conceded that he might have been mistaken in attributing the violence towards the deceased to the person in the white singlet (Lynam) and that where he had referred to the man in the white singlet it was more likely that the man he intended to describe was wearing the white T-shirt (the appellant). He might have been confused because he had seen the man in the white singlet on the footpath at about the same time. When Fleming was taken through the photographs at the trial, he professed to having no particular recollection of having seen the persons depicted, including the appellant and Lynam. Although Fleming maintained that a man in a white singlet did strike the deceased, he acknowledged that his belief in his evidence in chief was shaken by the photographs.
- [20] It is apparent that there were substantial grounds for rejecting as unreliable the versions of the critical events given in evidence by Dufficy and Fleming. As one would expect in a case of this kind there were differences in the evidence of the witnesses as to precisely what had occurred and when it had occurred, but on the evidence I have so far mentioned the Crown presented a strong case that the appellant was the aggressor in the altercation in which he threw a punch in the direction of the deceased’s head which rendered the deceased unconscious and resulted in his death.
- [21] Norman’s evidence at the trial provided no support for the scenario postulated by the appellant. In his evidence in chief Norman said that he saw an altercation in

which the person in the white shirt (the appellant) threw punches and the deceased retaliated. He saw them scuffling and walking backwards. Norman said that he then turned away and ran to an underground carpark to see whether he could find something which he could use to assist the deceased. He could not find anything useful and returned to the road after about 30 or 40 seconds. He found the deceased lying on the ground. He saw the appellant, Lynam, Richardson and a security guard. His evidence was that the appellant was kneeling over the deceased and punching him, aiming at his head. Lynam was walking around the area trying to keep other people away.

- [22] The appellant submitted, however, that *prima facie* proof that the deceased's death was instead caused by Lynam was in Norman's statement to the police a few hours after the incident. Norman agreed in cross examination by the appellant's counsel that his statement to police included the following:

“The fella wrestling with Millsie looked to be shorter than Millsie, but he was solid and looked to be about 20 to 25 years old. The next thing I heard was someone yelling something like, ‘Behind you Millsie’. Then I saw a second fella came in from nowhere. He was wearing a white singlet, shaved or bald head. He also looked between 20 and 25 years old. He was pretty tall and was white and had a medium build. I’m pretty sure he had blue denim jeans on. When the second fella ran in I saw him elbow Millsie in the back of the head whilst he wrestled with the other male. Then Millsie was wrestling with the two of them by himself across to the other side of the road. Both of them were punching into Millsie and he was trying to block the punches and defend himself against two people. Then only seconds later Millsie was laying in the gutter on the other side of the road.”

- [23] In cross examination by the appellant's counsel Norman agreed that his memory was better when he was talking to police than it was at the trial and at the committal hearing. The appellant emphasised the contemporaneity of Norman's police statement and its apparent consistency with the photographic evidence. As was submitted for the appellant, if it were accepted that the man wrestling with the deceased was the appellant, then Norman had given a clear and contemporaneous account of Lynam elbowing the back of the deceased's head only very shortly before the deceased fell to the ground. There was also some force in the observation by the appellant's counsel that Norman's evidence that he heard someone say, “behind you, Millsie” seemed persuasive, auditory hallucinations not being a common feature of evidence in similar situations.

- [24] On the other hand, none of the many other witnesses in close proximity to the events gave evidence of hearing any similar statement or of seeing Lynam elbow the deceased. Furthermore, immediately before the passage in his statement to police quoted above Norman stated:

“The fellow Millsy was wrestling with at that stage was wearing, like, a denim blue jeans and had no T-shirt on. He was a solid build, had sandy blond hair which was like a scruffy or surfie style which was wavy, I think. He had a similar hairstyle to the fellow I saw in the first scuffle at the ANZ Bank, but that fellow had a shirt on then. I can't be sure if it was the same person or not.”

- [25] Norman's statement that the man with whom the deceased was wrestling at the relevant time had no T-shirt on was inconsistent with the evidence of many eye witnesses. Norman gave evidence that he was pretty drunk at the time - six and a half to seven on "the completely drunk scale" - and that he was tired and hung over when he made his statement. In cross examination by Lynam's counsel Norman accepted that at the committal he conceded that he could not say that he saw someone's elbow hit someone's head but only that he had seen "an elbow like raised". He agreed that he had attributed a blow to the second man, "cause there was Josh and the person in the white shirt wrestling and then it looked like the person in the white singlet like was there for a second and then gone like he could have been him pass - him passing by and walking around him, but I did see an elbow like go up like that". He acknowledged that the elbow he saw go up could have been the person in the white shirt's elbow or it could have been the deceased's elbow going up, or it could have been anyone's elbow.
- [26] The scenario upon which the appellant now relies was put to the jury by the appellant's counsel and the trial judge reminded the jury of that submission in summing up. It is evident that the jury rejected it. In view of the inconsistencies between Norman's various versions and between his statement and other eyewitness accounts, that was reasonably open to the jury, which had the advantage of seeing and hearing Norman and the other witnesses give evidence.
- [27] The appellant referred to the conduct of the Crown in charging Lynam with manslaughter, either as a party or as the person who had delivered the fatal blow. The appellant argued that if there was a body of evidence capable of establishing Lynam's exclusive responsibility beyond a reasonable doubt it necessarily followed that his exclusive responsibility was at least a reasonable possibility, so that the verdict was necessarily unreasonable.
- [28] The function of this Court, however, is to examine the whole record and to determine whether or not the evidence against the appellant lacked such probative force that, after making allowance for the advantages of the jury, there is a significant possibility that the appellant was innocent of the offence. There was direct, persuasive evidence which the jury were entitled to regard as excluding any hypothesis that Lynam delivered the blow which caused the death of the deceased. I am persuaded that the verdict of the jury was reasonably open on the whole of the evidence.
- [29] I would dismiss the appeal.
- [30] **CHESTERMAN JA:** I agree that the appeal should be dismissed for the reasons given by Fraser JA.