SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dales* [2011] QCA 315
PARTIES:	**R** **v** **DALES, Christopher John** (appellant)
FILE NO/S:	CA No 83 of 2011 SC No 11 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	8 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2011
JUDGES:	Muir JA, Margaret Wilson AJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction of doing grievous bodily harm with intent allowed;** **2. Conviction and verdict set aside;** **3. Verdict of acquittal entered on charge of doing grievous bodily harm with intent;** **4. Proceeding remitted to the District Court for determination according to law whether the appellant should be convicted of doing grievous bodily harm, and if so, for sentencing.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the prosecutor made comments about a witness in closing address – where the appellant argues it was an unanticipated attack on credit after the close of the prosecution case – where the appellant argues that the trial was rendered unfair and that there was a miscarriage of justice – whether the comments could have improperly influenced the jury – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where inferences that there were closer relationships than the evidence suggested between the appellant and two witnesses were open on the evidence –

where the evidence allowed room for reasonable doubt that the appellant aimed the weapon at the complainant and caused it to discharge before slamming it on the vanity bench – where there is limited scope to set aside a verdict and substitute a verdict of guilty of a lesser charge pursuant to s 668F(2) of the *Criminal Code* – whether s 668F(2) is applicable in the instant case – whether the matter should be remitted to a primary court

Criminal Appeal Act 1912 (NSW), s 6(1)
Criminal Code 1899 (Qld), s 320, s 579, s 668E(1), s 668F(2)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered
R v Collins, ex parte Attorney-General [1996] 1 Qd R 631; [1994] QCA 467, cited
R v DAX [2010] QCA 221, considered
R v Jones [1993] 1 Qd R 676; [1992] QCA 173, cited
R v Melling & Baldwin [2010] QCA 307, cited
R v PAH [2008] QCA 265, considered
R v Smith (2007) 179 A Crim R 453; [2007] QCA 447, considered
SKA v The Queen (2011) 85 ALJR 571; [2011] HCA 13, cited
Spies v The Queen (2000) 201 CLR 603; [2000] HCA 43, cited

COUNSEL: M J Copley SC for the appellant
B J Power for the respondent

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

[1] **MUIR JA:** I agree with the orders proposed by Margaret Wilson AJA and her reasons for them.

[2] **MARGARET WILSON AJA**: In the Trial Division of the Supreme Court, Christopher John Dales was found guilty by a jury of two offences committed on 8 December 2009 –

(i) assault occasioning bodily harm with circumstances of aggravation; and

(ii) doing grievous bodily harm with intent.

He was convicted and sentenced to nine years imprisonment for the offence of doing grievous bodily harm with intent and to a concurrent term of four years imprisonment for the assault occasioning bodily harm.

[3] He has appealed against his conviction of doing grievous bodily harm with intent on two grounds –

(i) that the verdict was unreasonable or cannot be supported having regard to the evidence; and

(ii) that a miscarriage of justice was occasioned by comments by the Crown prosecutor in his closing address.

See s 668E(1) of the *Criminal Code* (Qld).

The charges and the appellant's pleas

[4] On 8 December 2009 the complainant Ernest Neville Wilson was at home when the appellant and his co-accused Cook arrived there by car. Hearing a car stop outside his house, the complainant entered the bathroom, which provided access between the rest of the house and the garage. The appellant and Cook burst into the garage, and then into the bathroom, the appellant carrying a firearm.

[5] The appellant struck the complainant in the left side of his head with the firearm. This conduct resulted in the charge of assault occasioning bodily harm with circumstances of aggravation. The appellant pleaded not guilty to this charge, but the jury found him guilty.

[6] Subsequently the complainant was shot in the stomach. The appellant was charged with attempted murder or alternatively doing grievous bodily harm with intent. He pleaded not guilty to the attempted murder charge, and "not guilty to doing grievous bodily harm with intent … but guilty to causing grievous bodily harm by negligence".[1] The Crown did not accept that plea. Ultimately the jury found him not guilty of attempted murder, but guilty of doing grievous bodily harm with intent.[2]

Dramatis personae

[7] According to the complainant he and the appellant were mates, who had known each other for about 12 years.

[8] The appellant had a daughter Moira, who was aged three or four. He was not living with Moira's mother, Patty.

[9] The complainant lived in a house at Erakala, which was about a ten minute drive from Mackay. He shared the house with Belinda Peters. Ms Peters had first met the appellant a few years before, and knew him pretty well.

[10] According to Jacqueline Primrose, she and the complainant were friends: she said that as at 8 December 2009 she had known the complainant for 20 years. Ms Primrose said she had never met the appellant or his daughter before that day. Ms Primrose was deaf: she had no hearing in one ear and only about 25 per cent hearing in the other.

[11] Brian Turner and his wife Ngaire were friends of Ms Primrose. They had not met the appellant before 8 December 2009.

Accounts of events leading up to the incident

[12] At the time the incident occurred, Moira was with Ms Primrose. The complainant's evidence as to how the child came to be with Ms Primrose was quite different from Ms Primrose's evidence.

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1 AR 10.

2 There is no offence of "causing grievous bodily harm by negligence". But had the jury found the appellant not guilty of doing grievous bodily harm with intent, they would then have had to consider whether they found him guilty or not guilty of doing grievous bodily harm *simpliciter*. See *Criminal Code* (Qld) s 320 and s 579.

[13] According to the complainant, Ms Primrose called at his house at around 8.30 to 9.00 am, and drove him to the appellant's house at Slade Point, where they spent about half an hour. Inside the house, Ms Primrose and the appellant had a conversation, while the complainant was with the child. Ms Primrose offered to mind Moira for a couple of hours. The three of them (Ms Primrose, Moira and the complainant) left the appellant's place. They went to a shopping centre at Andergrove, where they bought a drink, *et cetera* for Moira. At about 10.30 am Ms Primrose dropped the complainant off at his house, and left with Moira, saying she would be back to pick him up later. The complainant knew Ms Peters was asleep in her room at his house, although he did not see her. At about 11.15 or 11.20 am he heard a car pull up in a bit of a hurry on the gravel at the front of his property.

[14] According to Ms Primrose, she was driving towards town at about 9.00 am when she saw the complainant walking on the road where he lived towards town. She gave him a lift to Slade Point, where she dropped him off near the Mobil service station, and she parked outside a newsagency which she entered. About 20 minutes later, the complainant returned to the car with Moira. At the time, she did not know who the child's parents were. The complainant and Moira got into the car. She drove him to his place, where she dropped him off at between 10.00 and 10.15 am. Moira remained in the car with her. She drove to her own house, and after about 10 minutes decided to take Moira to Lifeline to buy her shoes and clothes.

The evidence of the complainant and Ms Peters

[15] According to the complainant, he went to see who had arrived. He proceeded from the back room of the house, through the lounge, to the veranda, and then to the bathroom. There were two doors to the bathroom – one leading into the house and the other leading into the garage. The complainant was about halfway through the bathroom when the door between it and the garage burst open. He said –

> "Chris Dales [the appellant] come [sic] in. He was mad as hell."

There was a man behind the appellant, but the complainant did not know who it was. The appellant came through the door yelling –

> "Why won't she answer my phone calls?"

The appellant was carrying a gun in his right hand. It was a double barrelled 12 gauge shotgun. One barrel was on top of the other. The barrels had been sawn off. The gun was about one and a half to two feet long.

[16] According to the complainant, the appellant grabbed him and "clocked" him with the gun straight away. At this stage the complainant was in about the middle of the bathroom.[3] Then the appellant pushed him back to a position near the sink beside the washing machine,[4] and from a distance of about one and a half feet, pointed the gun at his head, while continuing to ask in a very angry tone why she would not answer his phone calls. The other man (Cook) was on the other side of the washing machine.[5] The complainant was feeling "a bit dizzy", "bit dazed". He heard a noise, turned and saw Ms Peters walking out of her room. The appellant left him and went straight to Ms Peters whom he told to get back in her room. While this

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3 EW 1 on the diagram Exhibit 2.

4 EW 2.

5 UM 2.

was happening, Cook turned and looked at the complainant, his expression saying to the complainant –

> "Don't run."

[17] Ms Peters said she had been asleep. She woke up to hear what she thought was the appellant's voice saying –

> "Oh, where is she? Why won't she answer her phone?"

Thinking he might have been referring to her, she checked her phone but did not find any missed calls, and then opened the door. Upon being told to "put her head back", she shut her door.

[18] The appellant returned to the bathroom, still asking why she would not answer his phone calls. The complainant thought he was talking about Ms Primrose. He said to the appellant –

> "I'll ring her. You know she's deaf, she might not have heard the phone."

He said he would ring her, and moved – in order to get reception on his mobile phone. The bath tub and a vanity bench were both positioned along the same wall of the room, some distance apart. There was a mirror behind the vanity, facing the bath tub. The complainant moved to a position in the corner between the end of the bath tub and the wall.[6] He tried to call Ms Primrose twice, but she did not answer. He said to the appellant –

> "She didn't answer, so I'll try her again, you know, she's deaf, she might not have heard it."

[19] The complainant told the Court he was attempting to call Ms Primrose a third time when he was shot. Before he was shot, he was standing on the corner tile closest to the wall and the bath tub. He saw the gun in the appellant's right hand, beside the appellant's right leg, the barrels pointing down towards the floor. His evidence in chief was as follows –

> "Now, did you see any movement of the gun before you became aware that it - that you'd been shot?-- No.
>
> What was the next thing that you heard or saw following - or - well, before you heard the glass break? Did you hear or see anything before you heard the glass break?-- I heard a big bang boom and went back a bit and the mirror was smashing and I felt cold on my side and that's when I noticed my belt had gone in half and I had a big white hole in the side and my bowels and some part of my intestine was coming out, and I put my hand on it, and then the gun was placed on the bench, and he said, 'You're coming with us.'
>
> All right. Now, you say you saw the gun placed on the bench; is that right?-- Yes.
>
> Where was the gun before you saw it placed on the bench?-- In his hand down beside his leg.

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6 EW 3.

All right. And what about at the time you heard the bang, could you say anything about how the gun was positioned at that point in time?-- No. I was looking at Chris' face and ringing Jackie for a third time.

All right. So, you're ringing Jackie for the third time; is that what you said?-- Yes.

All right. You - you heard the explosion; is that right?-- Yes.

How long after the explosion was it that you heard glass breaking?-- Oh, it was immediately.

Immediately?-- Yeah.

How many explosions did you hear?-- I only heard the one.

Now, after the - after the explosion and the glass breaking-----?-- Yeah.

-----you say you became aware of an injury to yourself?-- Yes.

How long was it after you heard the glass breaking that you became - you became aware of that injury to yourself?-- Straight away 'cause it felt cold.

Cold?-- Yeah-----

And-----?-- -----and that's-----

-----can you just tell us where on your body it was that you noticed that injury?-- On my left hip at the height of my belt.

And you've got a scar there?-- Yes.

And about - can you stand up for us, move out again - I don't want you to show it, but I just want you to indicate on the outside of your shirt, about where it is on your body-----?-- There.

-----that that scarring is?-- Scarring. Here.

All right. So, you're indicating around your left hip bone; is that right? Now, what was the next thing - well, firstly, what happened - what happened with you immediately after you felt this coldness about your hip? Did your body position change in any way?-- Yes. I - I moved over to the - 'cause glass had broken, I moved over like that. I felt cold on the side here and I looked down. My belt had gone in half and there was a big white hole and intestines started coming out. I put my hand straight over it to stop it coming out further.

Right. Now, you said something about seeing the gun go down on - on a bench?-- Yep.

Is that right?-- Yeah.

Perhaps if I can have access to Exhibit 1 please, your Honour? That's Exhibit 1, '35 MO'. Do you see the bench in that photograph?--Yes.

And that - and that's on the right-hand side there of that photograph where the sink is; yes?-- Yes.

> Can you - can you perhaps - there's a pointer there beside you. Do you see that? Do you want to point to us on that photograph - don't say anything, but just point to us on that photograph where you saw the gun was put. All right. So, you've indicated on the bench on the side closest to the photograph between the edge of the bench and the sink; is that right?-- Yes.
>
> And who did you see put it there?-- Chris Dales.
>
> And before that, where had the gun been?-- In his hand beside his leg.
>
> All right. At any time prior to seeing him - seeing him put the gun down on the bench on that occasion, had you seen the gun out of his possession?-- No.
>
> What was the next thing that happened after that?-- Chris had placed the gun on the bench and he said, 'You're coming with us.' I said, excuse my language, 'Get fucked, cunt. You just shot me.'
>
> All right?-- And I walked past him out to the back room.
>
> All right. Now, I should clarify. At any - at all times did you remain on your feet-----?-- Yes.
>
> -----in that room, and can you use that pointer and just show us on that photograph about where you were when you were shot?-- I was standing here.
>
> All right. So, on the - on the corner tile closest to the south wall and also closest to the bathtub?-- Yes.
>
> Now, when you told Mr Dales that you weren't going with him, you say you moved out - you walked - you walked out towards the lounge room; is that right?-- Yes.
>
> What did you see Mr Dales do?-- I don't know. Didn't see him. I just - was holding my hands on there as I walked past him and started ringing triple O.
>
> All right. And where were you when you rang triple O?-- I was out on the back room, but I didn't quite get connected 'cause I started to feel faint so I just switched it off and laid down on the floor.
>
> And when you say 'the back room'-----?-- Yeah.
>
> -----obviously there's a room which adjoins the - the bathroom in the main part of the house-----?-- Yeah.
>
> -----is that the room you're talking about?-- No. It's a verandah. You've got a lounge room, then a back room."

[20] In cross-examination the complainant maintained that he did not see how the appellant was holding the gun when it discharged. He said he heard only one shot. Ms Peters, too, said she heard only one shot, and Clinton Palmer, who was working on a bobcat over the road, recalled hearing "a loud bang". (emphasis added).

The complainant's injuries

[21] The complainant was taken by ambulance to the Mackay Base Hospital. He had sustained a gunshot wound which tracked from entry at the pelvic bone in an upward direction from the lower left side of the body about 330 to 350 mm to the right upper side of the body. There were burn marks on the skin at the entry point, but no suggestion in the evidence that the pellets travelled through his body and exited on the other side from the entry point. On the day of his admission, the wound was surgically explored, and about 100 to 150 pellets looking like bird shot were found together with plastic casing. The surgeon removed the plastic casing and as many of the pellets as he could, and had to remove some of the small bowel which had been damaged.

[22] The complainant was given antibiotics and painkillers. The surgeon saw him in the ward at about 7.30 am the next day. The surgeon described him as having come through the anaesthetic fairly well; he seemed reasonably recovered with no altered sensation; and the surgeon had no recall of his being particularly under the influence of any drugs.

[23] Further surgery was performed on 13 December, and he was discharged on 18 December.

[24] The surgeon was cross-examined about the track of the wound, which he agreed travelled upwards at a fairly acute angle. He said he could not see how the complainant and the person who shot him could have been standing at the same level – but that he could only speculate on how the shooting might have happened.

The appellant's conduct after the incident

[25] Ms Primrose gave evidence of missing four calls on her mobile phone – which she attributed to her deafness. At about 11.00 am she was at Lifeline with Moira when she received a call from a male person inquiring whether she had Moira with her and where she was. She replied that she had Moira and that they were at Lifeline at Creek Street, North Mackay. About 10 or 15 minutes later, the appellant arrived at Lifeline in a car driven by another man. She had never met him before, and she did not know the other man. The appellant walked into the shop. She described him thus –

> "When he came in he was just – wasn't himself, you know what I mean, like. … How do you put it, he was all sweaty and it wasn't him."

She said she was "a bit scared".

[26] When Ms Primrose and Moira were leaving Lifeline in her car, the appellant jumped into her car, bringing one or two "bags of stuff" (recyclable shopping bags) which he had brought from the other car. He said to Ms Primrose –

> "Take me somewhere."

She made a phone call and took him to Mr and Mrs Turner's place, arriving at about midday according to Mr Turner. They all went inside, the appellant taking the shopping bags with him. The appellant said that he wanted to "chill out for

a while". After some time,[7] Ms Primrose left, but the appellant and Moira remained. While he was there, a story about the shooting came on the local television news. Mrs Turner asked him if he knew anything about it. Mr Turner gave the following evidence –

> "What did he say when your wife asked him?-- He said that he knew something about it.
>
> Right. Did he say what he knew about it?-- He - yeah, he said that he knew something about it, it had been an accident, and that the gun had been slammed down on the table and gone off. That's all.
>
> What else did he say to you at that time?-- Nothing, I asked him if the gun was at my house.
>
> And what did he say to that?-- He said, 'No, it wasn't.'
>
> What did he say about the gun?-- He said that it wasn't there and it had been melted down."

About 20 minutes later, at about 6.30 pm, the appellant left with Moira. He returned about an hour later, collected his bags, and left, without saying where he was going.

[27] Two days later, the appellant and Moira returned to the Turners', a car dropping them off. He stayed about an hour, before Ms Primrose arrived and picked him up. He left Moira with the Turners.

[28] Ms Primrose drove him to collect his mail, and then to a shopping centre, where he was arrested.

What the complainant told the police

[29] The complainant spoke with police on three occasions –

(i) shortly after the incident, at about 11.45 am, he spoke with Snr Constable Barnard;

(ii) at the hospital, at about 4.00 or 5.00 pm on 9 December 2009, he spoke with Snr Constable Lamb; and

(iii) at the hospital, on 18 December 2009, he provided a written statement to Snr Constable Karl Verri, the officer in charge of the investigation.

[30] Snr Constable Barnard described the complainant as conscious, in a great deal of pain, sweating profusely and apparently going into shock, but capable of knowing what was going on around him. The conversation between the police officer and the complainant was recorded, although the recording was not played to the jury. According to the police officer, the complainant said –

> "Yeah, he slammed it on [indistinct] – and it went off. He was just looking for his daughter. [Indistinct] We just, um, seen him this morning."

When this was put to the complainant in cross-examination, he responded –

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[7] According to Ms Primrose, after about half an hour. According to Mr Turner, at about 3.00 pm.

"I don't know – I was in a lot of pain."

[31] The conversation with Snr Constable Lamb was also recorded, but again the recording was not played to the jury. According to the police officer, the complainant said that the shotgun had been slammed down next to the wash basin. The following occurred in cross-examination –

> "MR FONG: All right. So can you tell the Court what Mr Wilson said to you starting with the words, 'So he slams it down.'?-- Well they were my words. I said, 'So he slammed it down? So he's holding it on hand and slams it down.' To which Mr Replied [sic], 'Yeah.' And I asked, 'On the basin or on the vanity next to the wash basin?' And Mr Wilson replies, 'Yep.' And I asked, 'Are you saying it just goes off?' Mr Wilson replies, 'Yeah. It just went off and like he didn't point it at me or anything like that; he just - um, fling it down, like you know, in a fit of rage, you know, like fuckin' where's my daughter? Why the fuck won't she answer the phone? Pissed off - and so he just slammed it down.'"

[32] When this version was put to the complainant in cross-examination, he responded that he could not remember the conversation – and explained that he had been on antibiotic and painkilling medication. It was inconsistent with his evidence at trial. He clearly told Snr Constable Lamb that the weapon was not aimed at him when it discharged, but at trial he said that he saw the gun in the appellant's right hand, pointing towards the floor, that he was watching the appellant's face and trying to ring Ms Primrose, and that he did not notice any movement of the gun before he became aware that he had been shot.

[33] In paragraph 18 of his written statement the complainant said –

> "I then heard a loud bang and I saw the mirror break. At the same time I saw him swinging the gun down and striking the table. I then looked down and saw my belt was swaying and it was blown in half. I then saw a bulge and my stomach coming out the side. I knew that I'd been shot."

[34] I do not accept the submission of counsel for the respondent that the description in the signed statement inferentially placed the shotgun blast prior to the shotgun being placed on the vanity. On the contrary, in the written statement he said that the shotgun blast and the breaking of the mirror occurred "at the same time" as he saw the appellant swinging the gun down and striking the vanity. At trial he maintained that the appellant placed the gun on the vanity after it had discharged and fractured the mirror and after he realised he had been shot.

The forensic evidence

[35] The ballistics evidence was inconclusive, as the weapon was not found.

[36] The co-accused Cook told the police that he had destroyed the firearm. Police attended at his residence, where they found the sawn-off barrels of a shotgun. These were examined by a ballistics expert, Michael Clark. In his opinion, they had been removed from a 12 gauge double-barrel side-by-side shotgun.[8] Mr Clark was

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[8] The complainant's evidence was that one barrel was on top of the other.

also shown a 12 gauge plastic combination wad and some size 4 or 5 pellets (known as "bird shot") recovered from the scene, which he said appeared to have been fired from a shotgun. He said that a gun slammed against a hard surface could possibly discharge on its own: this could not be negatived in the absence of the weapon. A double discharge was possible from a double-barrel shotgun if it had a faulty mechanism, possibly in a split second one after the other. A double discharge might sound like one loud discharge.

[37] There was no evidence of pellet damage in the walls or fittings near where the complainant said he was when he was shot. Some wadding was found in the bath tub.

[38] The damage to the mirror was about 1,400 mm above the tiled floor. The top of the vanity was about 830 mm above the floor. The distance from the floor to the wound area on the complainant was 1,050 mm.

Discussion

[39] In *M v The Queen*[9] Mason CJ, Deane, Dawson and Toohey JJ said –

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.
>
> ...
>
> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."

Referring to s 6(1) of the *Criminal Appeal Act* 1912 (NSW), which contains the same test as that in s 668E(1) of the *Criminal Code* (Qld), their Honours said[10] -

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'." (Footnotes omitted).

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9 (1994) 181 CLR 487 at 493, 494; [1994] HCA 63.

10 At 492 – 493.

[40] These principles were recently reaffirmed by the High Court in *SKA v The Queen.*[11]

[41] The evidence of what occurred should be assessed in the context of the erstwhile friendship between the appellant and the complainant, and the appellant's concern to establish his young daughter's whereabouts. The appellant and Cook committed a home invasion with a loaded shotgun, and the jury was satisfied that the appellant struck the complainant on the side of the head with the firearm.

[42] The mere fact the wound tracked upwards through the complainant's body could not cast much light on how the weapon was discharged, because there was no evidence as to how the complainant was standing at the precise moment he was injured. He was using his mobile phone to call Ms Primrose for a third time, and may well not have been standing upright. The surgeon's evidence did not exclude the possibility of the wound being the result of a discharge occasioned when the appellant slammed the weapon on the vanity.

[43] The ballistics expert recognised the possibility of accidental discharge. As counsel for the appellant submitted, given the heights above the floor of the vanity and the complainant's wound, accidental discharge when the weapon was slammed on the vanity was a plausible explanation of what happened.

[44] Apart from the injury inflicted on the complainant, the only damage was to the mirror, which was on the wall some distance from the complainant. Wadding was found in the bath tub as well as in the complainant's body. The prosecutor put it to the jury that the weapon discharged twice – that there were two pulls at the trigger, one after the other. However, neither the complainant nor any of the other witnesses asserted that there were two discharges.

[45] The appellant's conduct in leaving the scene soon after the complainant was injured was equivocal. He still did not know where his daughter was. He knew that the complainant had been injured by the firearm he had brought to his house, but he also knew that Ms Peters was in the house.

[46] The inconsistencies between the complainant's evidence at trial on the one hand and his prior statements on the other seriously undermined the Crown case. The three statements made in December 2009 were consistent in that he maintained that the weapon was slammed down on to the vanity before its discharge.

[47] The version the complainant gave Snr Constable Lamb was quite cogent and sensible. In light of the surgeon's evidence about the complainant's condition when he saw him at about 7.30 am on 9 December 2009, the complainant's assertion that he was suffering from confusion as a result of his medication when he spoke with the police officer that afternoon was an unlikely one.

[48] There was also consistency between what the complainant told Snr Constable Lamb and the appellant's response to Mrs Turner's inquiry. The complainant told the police officer that the weapon discharged when it was slammed down on to the vanity –

> "It just went off and like he didn't point it at me or anything like that; he just – um, fling it down like you know, in a fit of rage, you know, like fuckin' where's my daughter?"

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[11] (2011) 85 ALJR 571 at 575; [2011] HCA 13.

The appellant told the Turners –

> "… [that] it had been an accident, and that the gun had been slammed down on the table and gone off."

[49] By the time the appellant reached the Turners' place, he knew that the weapon had been destroyed. The jury may reasonably have inferred that he was privy to its destruction. However, there was a number of possible explanations for his doing so. He may have been conscious of having behaved badly in bursting into his friend the complainant's home with a loaded shotgun and of having been in charge of the weapon when it discharged accidentally and injured the complainant. On the other hand, he may have been conscious of having intentionally caused grievous bodily harm to the complainant.

[50] There were odd aspects of the evidence. Ms Primrose and Mr Turner claimed never to have met the appellant before the day in question. She and the complainant gave quite different accounts of how Moira came to be in her care that day. On his version she had earlier driven the complainant to the appellant's house, where it had been arranged that she should care for the child for a couple of hours. On her version she did not meet him until he arrived at Lifeline after the complainant had been injured.

[51] The inference that the appellant knew Moira was with Ms Primrose was open. He burst into the complainant's garage yelling –

> "Why won't she answer my phone calls?"

That there were four missed calls on her phone but the complainant had made only two of them was consistent with the appellant's having tried to call her. And he called her successfully after the shooting, when she was at Lifeline with Moira.

[52] Then Ms Primrose took the appellant to the Turners' place. He took two bags "of stuff" with him. They had never met him before, but they took him in to "chill out". After some time, Ms Primrose left, but he and Moira stayed until about 6.30 pm, apparently some time after the news report of the shooting and Mrs Turner's asking him if he knew anything about it. He returned, without Moira, to collect the bags. Two days later he and Moira returned arrived there again, unannounced. Then Ms Primrose arrived and picked him up, but he left Moira with the Turners.

[53] Inferences that there were more extensive relationships between the appellant and Ms Primrose and between the appellant and the Turners than the testimony of Ms Primrose and Mr Turner suggested were open. Mr Turner's evidence of the version the appellant gave them may well have been spurious. On the other hand, it was not inconsistent with what the complainant told police, especially on 8, 9, and 18 December 2009.

[54] In all the circumstances I do not think it was open to the jury to be satisfied beyond reasonable doubt that the appellant aimed the weapon at the complainant and caused it to discharge before slamming it on the vanity bench. The verdict cannot be supported having regard to the evidence.

The prosecutor's address

[55] During his closing address to the jury, the prosecutor said –

> "My learned friends will no doubt point to the evidence of Brian Turner as being corroborative of the alternative sequence of events; that Turner says that Dales told him that it was an accident and he slammed the gun down on the vanity.
>
> Well, can I - do you remember at the beginning of this trial when I first addressed you I said it was my job to present to you all the evidence that police had collected in relation to this matter. Not just the evidence that supports the prosecution case but all the evidence that's been collected. Both the good for the prosecution case and the evidence that's against the prosecution case.
>
> And you heard evidence of Turner that he was a man who was he said, was prepared to take a total stranger into his house. He asked no questions of that total stranger as to why that total stranger was coming to his house, bringing his daughter, bringing two bags of possessions with him. When Turner became aware of that total stranger's involvement in a serious act of violence - do you remember when he was watching the – they were watching the TV that night, he doesn't report the matter to the authorities. In fact what's he do, he welcomes that man back into his house a couple of days later, he looks after that man's child while that man goes out and does whatever business that man's going to do on that day.
>
> So you might well come to the conclusion that that's pretty suspicious behaviour on the part of Turner. Pretty unusual behaviour on the part of Turner. And that might well cause you to form a few [sic] about the weight that you're prepared to attribute to the evidence of Turner. Because that's your job.
>
> My job is to present the evidence to you. It's as his Honour said, his job is to explain the law to you but your job is to judge the facts and to place what weight on the evidence you hear that you think appropriate from your experiences as ordinary people in the community.
>
> So what I'm suggesting to you is you're going to have some real concerns about Turner's involvement in this matter and you're not going to place any or very little, if any, weight on it whatsoever."

[56] There were two aspects to Mr Turner's evidence: that he gave the appellant refuge when he sought it, and his relating a version of the shooting which assisted the appellant.

[57] Senior counsel for the appellant submitted that it was implicit in the prosecutor's comments to the jury that Mr Turner had concocted an exculpatory version for the appellant. There had been no direct challenge to his evidence before the close of the prosecution case, and, in his submission, the trial was rendered unfair by the unanticipated attack on his credit and there was a miscarriage of justice.

[58] It would not have been open to the prosecutor to attack the credit of Mr Turner by cross-examining him. But as Fraser JA said in *R v DAX*[12]-

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12 [2010] QCA 221 at [24].

> "There was no prohibition upon the Crown contradicting … [his] evidence by the evidence of the complainant. So much is confirmed by the provision in s 17(1) of the *Evidence Act* 1977 (Qld) that a party producing a witness 'may contradict the witness by other evidence'. Nor was it improper for the prosecutor to urge the jury to prefer the evidence of one of the Crown witnesses to the evidence of other Crown witnesses.[13] The authorities are also clear that in an appropriate case a prosecutor may go further and, where the submission is justifiable on the evidence, invite the jury to conclude that the evidence of a Crown witness is unreliable or should be rejected on credibility grounds. In *R v Mark & Elmazovski*,[14] where there was a direct conflict between the evidence of the complainants and the evidence of another Crown witness, the Victorian Court of Appeal rejected a contention that the prosecutor acted improperly by inviting the jury to resolve the conflict by concluding that the other Crown witness was biased and that the jury should take her evidence 'with a grain of salt':
>
> Maxwell P held that the prosecutor was entitled to invite the jury to prefer one version over another and to advance reasons for the suggested preference. Similarly, in *R v Goncalves*[15] the Western Australian Court of Criminal Appeal rejected the contention that unfairness to the accused was created by the conduct of the Crown in calling a witness whose evidence the Crown always intended to challenge in final address or in inviting the jury to disbelieve part of that evidence when the Crown was not in a position to cross-examine the witness and did not in fact cross-examine the witness."

[59] Ultimately the question is whether the prosecutor's comments might have improperly influenced the jury so as to cause a miscarriage of justice. In *R v Smith*[16] McMurdo P (with whom Keane JA and Daubney J agreed) said –

> "The role of prosecuting counsel is one of institutional significance in the criminal justice system. It differs from that of an advocate representing an accused person in a criminal matter or a party in civil litigation. A prosecutor represents the state. They should make any evidence which could be in the interests of an accused person available to the accused person or their counsel. Their duty is not to obtain a conviction by all or any means. It is to fairly and impartially place before the jury all relevant reliable evidence. They should then address the jury as to how to use this evidence according to law when they deliberate to consider their verdict so that the jury can carry out their function of administering justice according to law and

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13 See *R v Welden* (1977) 16 SASR 421 per Bright J at 435, and per Zelling J at 442; *R v Goncalves* (1997) 99 A Crim R 193 per Wheeler J at 216, with Malcolm CJ and Heenan J agreeing at 200; *R v Macfie (No 2)* (2004) 11 VR 215 per Eames JA at 230, [60]-[61], with Callaway and Buchanan JJA agreeing; *R v Mark & Elmazovski* [2006] VSCA 251 per Maxwell P at [69]-[70], Vincent JA and Bongiorno AJA agreeing; *R v Colquhoun* [2009] SASC 138 per David J at [30], Vanstone and Anderson JJ agreeing.

14 [2006] VSCA 251 at [68]-[70].

15 (1997) 99 A Crim R 193 at 215-217.

16 (2007) 179 A Crim R 453; [2007] QCA 447 at [38].

> reaching a true verdict on the evidence: see *R v Hay*;[17] cited more recently with approval by this Court in *R v M*.[18] Prosecuting counsel must not adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon the accused person. That does not mean that in properly carrying out the role the prosecutor's cross-examination and jury address must be bland, colourless and lacking in the advocate's flourish: *R v Roulston;*[19] *R v M,*[20] and *R v Day*.[21]
>
> In determining whether to allow an appeal on the basis of an inflammatory jury address by a prosecutor, the critical question is not whether the prosecutor's remarks were improper but whether they may have improperly influenced the jury so as to cause a miscarriage of justice: *R v M* and *R v McCullough*.[22] Central to that question is the underlying right of an accused person to a fair trial according to law. As Cooper J noted in *R v M*:
>
> > 'If procedural unfairness of this type is demonstrated, this may mean a conviction which might otherwise be perfectly proper on the evidence will be set aside.' "

[60] It was for the jury to assess Mr Turner's evidence, and to decide how much of it, if any, they accepted.

[61] This case was distinguishable from *R v Smith* in that here the prosecutor did not go so far as to suggest that Ms Primrose and Mr Turner had conspired to protect the appellant by giving false testimony, or that the appellant was inferentially a part of such a conspiracy. In my view there was no impropriety in the prosecutor's comments, and they did not unfairly prejudice the appellant. Those comments did not lead to a miscarriage of justice.

Disposition

[62] The jury's verdict cannot be supported having regard to the evidence.

[63] Had the jury found the appellant not guilty of doing grievous bodily harm with intent, they would then have had to consider whether they found him guilty or not guilty of doing grievous bodily harm *simpliciter*. That he pleaded guilty to doing grievous bodily harm by negligence was evidence which the jury could take into account on the lesser charge, attaching such weight to it as they saw fit.[23]

[64] Section 668F(2) of the *Criminal Code* (Qld) provides –

> "(2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it

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17 [1968] Qd R 459 at 476 per WB Campbell J; *Kenny's Outline of Criminal Law* 17th ed, p 569.
18 [1991] 2 Qd R 68 at 79 – 80 per Cooper J, Kneipp and Shepherdson JJ agreeing.
19 [1976] 2 NZLR 644.
20 At 81 – 82.
21 (2000) 115 A Crim R 80 at 87.
22 (1982) 6 A Crim R 274 at 286.
23 *R v Collins, ex parte Attorney-General* [1996] 1 Qd R 631 at 640 per McPherson JA and Lee J; [1994] QCA 467.

> appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity." (Emphasis added.)

[65] The application of this provision was considered by this court in *R v Melling & Baldwin*,[24] and a provision in similar terms was considered by the High Court in *Spies v The Queen*.[25]

[66] There is limited scope for its application where the jury's verdict is set aside because it was unreasonable or cannot be supported having regard to the evidence. Before substituting a verdict of guilty of a lesser charge (in this case, doing grievous bodily harm *simpliciter*) the court would have to be satisfied that, given the evidence at trial and anything that was common ground, the conviction verdict demonstrated that the jury were affirmatively satisfied of those facts which constituted the lesser offence.

[67] As senior counsel for the appellant submitted, the jury's verdict of guilty of doing grievous bodily harm with intent must have been based upon their being satisfied beyond reasonable doubt that the appellant discharged the weapon intentionally. That is quite a different factual scenario from its being slammed on the vanity bench and thereupon discharging. It follows that this is not an appropriate case for the application of s 668F(2).

[68] The appeal against the conviction of doing grievous bodily harm with intent should be allowed, and a verdict of acquittal of that offence should be entered.

[69] The proceeding should be remitted to a trial court for it to determine, either by accepting the appellant's plea of guilty or by trial, whether the appellant should be convicted of doing grievous bodily harm *simpliciter*, and if he is convicted, to sentence him for that offence.

[70] The indictment was necessarily presented in the Trial Division of this court, given that the first count was attempted murder. The only remaining charge is one that may be dealt with in the District Court. In the circumstances, the remittal should be to the District Court.[26]

[71] I would make the following orders:

1. Appeal against conviction of doing grievous bodily harm with intent allowed;

2. Conviction and verdict set aside;

3. Verdict of acquittal entered on charge of doing grievous bodily harm with intent;

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24 [2010] QCA 307.

25 (2000) 201 CLR 603: see particularly [27] and [43]; [2000] HCA 43.

26 *District Court of Queensland Act* 1967 (Qld) s 64; Supreme Court of Queensland, *Practice Direction No 31 of 1999 – Criminal jurisdiction: remittal to District Court* [2000] 1 Qd R 283.

4. Proceeding remitted to the District Court for determination according to law whether the appellant should be convicted of doing grievous bodily harm, and if so, for sentencing.

[72] **McMEEKIN J:** I have read the judgment of Wilson AJA and am indebted to her for her careful analysis of the facts and the law applicable. I will refer to the relevant facts and law only to the extent necessary to explain my views. I will limit my remarks to the first and principal ground argued. I agree with Wilson AJA's remarks in relation to the second ground.

[73] The question for the jury was whether they could be satisfied beyond reasonable doubt that the appellant intentionally discharged a shotgun intending to cause grievous bodily harm. The appellant contends that the evidence is such that the jury could not have been satisfied beyond reasonable doubt that he did so with the relevant intent.

[74] There was a substantial body of evidence that supported an intentional discharge.

[75] First, the appellant went to the home of the complainant and it is clear enough with the intention that he cause him some harm. I say that because he went in company with another man who was a stranger to the complainant ("the co-accused"), invaded the home, and on first seeing the complainant, struck his forehead with some force. He was plainly very upset. On arrival at the home he was described as looking as if he was "mad as hell". His anger was directed at the complainant.

[76] Secondly, there was a possible motive. From what was said at the scene the appellant was concerned to find his three or four year old daughter and was possibly concerned about her welfare as well as her whereabouts. He evidently blamed the complainant for the situation.

[77] Thirdly, he went to the home with a loaded sawn off shotgun. This is inconsistent with an intention to menace only and not shoot.

[78] Fourthly, the evidence of the complainant was that the appellant menaced him with the gun when only two feet from him and the gun four inches from his head. A preparedness to so position a loaded weapon is consistent with an intent to use it.

[79] Fifthly, after the discharge of the weapon, and when the complainant was obviously seriously wounded, the appellant left the home and without calling for aid. A lack of concern that one's conduct has caused serious injury is consistent with an intention to cause that injury.

[80] Sixthly, an out of court statement by the appellant indicates that the weapon was melted down after the shooting and by the co-accused. An accidental discharge was an obvious excuse. If the statement was true, that action protected them from any prospect of the theory being disproved. If false, the same conclusion results – the appellant or his co-accused concealed the weapon and so ensured that it could not be tested. Destruction of the weapon removed the best chance of proving the event was an accident. Such an action was inconsistent with an accidental discharge.

[81] Seventhly, the path of the wound within the complainant's body was consistent with the account that the complainant gave in his evidence to the jury. The path of the wound was described as at an acute angle and commencing at the pelvic bone

heading upwards. That path requires that the barrels of the gun be at or about the pelvic area of the complainant's body at discharge and pointing towards his upper body not towards his lower body. That seems to me consistent with the complainant's account of the gun being brought up from a position beside the appellant's leg, where the complainant said he last saw the appellant holding it, and then discharging. I note that the complainant said that the butt had been altered so that it could be held like a pistol.

[82] This assumes that the complainant was standing when shot. This appears to be a matter of some importance. Wilson AJA points out that there is no evidence as to how the complainant was standing. But if it be assumed that he was standing then it is difficult to imagine the posture adopted that would serve to discredit the point that I have made. The complainant said in cross examination that when attempting to make the phone calls to Ms Primrose immediately before he was shot he was standing beside the bathtub.[27] The parties were no doubt alive to the potential significance of the path of the wound. If he was not standing upright then one might expect that would have been put to him. In fact it was put to him that it was the appellant who was crouching and slamming the gun first onto the floor and then onto the vanity and it then discharged. All this was denied.[28] That would put the appellant below the position of the complainant and perhaps explain the barrels pointing acutely upwards. Not only was there no evidence of this but it seems extraordinary that the appellant would slam a loaded gun repeatedly into the floor with the barrels pointing upwards. But the relevant point for present purposes is that if the complainant was not standing upright one would expect that his response to the proposition that the appellant was crouching would have made that plain.

[83] Further I note that in his evidence the complainant said that when shot he felt a coldness in his hip area and he was asked if his "body position" changed immediately after he felt that coldness and replied "I moved over like that".[29] What he indicated to the jury is not clear from the record. This evidence may be inconsequential but given our ignorance of what occurred and the jury's finding I am reluctant to make any assumption that the evidence ran in some way counter to the prosecution theory of the case.

[84] In assessing this point it must be acknowledged that the wound could have been caused by an accidental discharge brought about by bringing the gun down onto the vanity. If the complainant was standing upright at the time of discharge, as his evidence suggests, then the barrels had to be pointing in an upwards direction at the moment of discharge. In every out of court version that he gave the complainant asserted that the gun had been brought down onto the table. He used words such as "slammed" and "fling". In the complainant's out of court versions there was no assertion that the gun left the appellant's hand. In the course of his evidence he said that the gun was "placed on the bench" after discharge. This theory therefore requires either an assumption that there was sufficient time for the barrels to be pointing in an upwards direction and at a reasonably acute angle as a result of a rebound, by the time of discharge, or alternatively that when slammed down the gun was held and happened to be pointing upwards at an acute angle at discharge. That strikes me as a very odd way to hold a loaded gun when slamming it against

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27 AR 59/50.
28 AR 47/30.
29 AR 39/45.

a vanity or bench. The complainant did not claim to see the gun at the moment of discharge. It might be said that either form of this possibility has an air of improbability about it but it was not shown to be an impossibility.

[85] An alternative possibility is that the complaint was not standing upright but adopted some other posture so that, as the gun struck the vanity, the barrels were aligned in the same plane as his torso. This theory is not in accord with any evidence led and seems to involve an assumption of a very improbable posture.

[86] Eighthly, the evidence suggests that the complainant was not struck by a ricochet. The men were in a confined area and over 100 pellets entered the complainant's body. The barrels were plainly pointing directly at the complainant at the moment of discharge.

[87] Ninthly, the appellant's behaviour after the event was to go to place where he was unlikely to be found – the home of a man that he had never met before. That assumes Turner's statements to that effect to be true.

[88] Finally the complainant gave sworn testimony that the gun was discharged without being slammed onto the vanity by the appellant.

[89] Wilson AJA has referred to *M v The Queen*,[30] the authority that binds our approach. Mason CJ, Deane, Dawson and Toohey JJ emphasised that "the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses". Their Honours explained the principles that this Court is to apply on an appeal under provisions such as s 668E(1) in the following terms:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."[31]

[90] It is useful too to refer to *R v PAH* [2008] QCA 265 where Mackenzie AJA in his review of the applicable principles concluded:

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30 (1994) 181 CLR 487; [1994] HCA 63.

31 (1994) 181 CLR 487 at 493, 494.

> "In *MFA v R*,[32] it is reiterated that, given the jury's role, sometimes described as a constitutional role, as the tribunal for deciding contested facts, setting aside a jury's verdict, is, on any view, a serious step…. The function of s 668E of the *Criminal Code* and like provisions is to afford a mechanism against a prospect that an innocent person has been wrongly convicted upon unreasonable and unsupportable evidence and has therefore suffered a miscarriage of justice, while operating in a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual issues concerning the guilt of an accused in serious criminal trials."[33]

[91] I turn then to the ultimate question.

[92] Putting to one side the complainant's evidence, it is true, as the appellant submitted, that none of the various circumstances that I have summarised, taken individually, compels any particular finding on the crucial issue. It is also true that, taken individually, they could be said to be equivocal and an explanation consistent with an accidental discharge could be imagined. However the circumstances that the prosecution point to are to be taken as a whole, not considered separately and individually. To the extent that the prosecution rely on circumstances this is "not a chain case but a rope case": *R v Jones* [1993] 1 Qd R 676 at 679 per Macrossan CJ, Pincus and McPherson JJA. Of course, if the prosecution case is restricted to circumstantial evidence the only rational inference open must be one of guilt.

[93] The matter that has troubled me is that the appellant's behaviour, before the shooting, was what one would expect from a person intending to do serious harm to another and, after the shooting, what one would expect from a person who had intentionally done serious harm to another. He had a potential motive to do serious harm. Taken together the circumstances surrounding the shooting all point in the same direction.

[94] The precise question then that the appellant raises is whether the evidence of the circumstances that I have identified in the context of the complainant's various versions and Turner's evidence of the appellant's statement after the event "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".

[95] That lack of probative force cannot come about because of the altered versions of the complainant alone. That, to my mind, can be explained. It is not just the explanation proffered as to the giving of a version in an injured state. To my mind the jury could have reasonably accepted that.

[96] But there are other possibilities. One is that he may have deliberately misled the police initially. Another is that he does not really know what happened in terms of the timing of any striking of the vanity and the discharge.

[97] As Wilson AJA has said, sight should not be lost of the relationship between the complainant and the accused. They had been friends for about 12 years. That might suggest that the appellant would be unlikely to deliberately shoot the complainant.

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32 (2002) 193 ALR 184; 77 ALJR 139; [2002] HCA 53.

33 At [31].

However it would also suggest that he would be unlikely to invade the complainant's home, with a stranger, whilst armed with a loaded weapon, and strike him, and then leave him wounded, the complainant says with his intestines visibly emerging from his body, without summoning aid.

[98] But the relationship might be relevant in another way. That relationship might explain a reluctance on the part of the complainant to give a version implicating his friend, particularly when in a wounded and confused state. Having once given that version he might have been equally reluctant to admit to misleading the police.

[99] The jury had some advantage in assessing the various witnesses and the rather odd tale that they had to relate. This could impact on what they thought of the complainant's various accounts, and as to whether he was doing his best to relate what he knew, whether he was lying, or whether he was totally confused.

[100] If that was all that there was I would not interfere with the jury's verdict.

[101] What is more difficult to explain away, however, than the altered versions of the complainant is the fact of the coincidence between the complainant's first two accounts and the appellant's explanation to Turner, if the jury was prepared to accept that explanation as probably made. There are considerations that could go some way to justifying the jury's approach. First, that accidental discharge was an obvious excuse for the accused to advance in all the circumstances. His only alternative was to deny he was present which he must have realised would be a difficult position to maintain with potentially two identification witnesses. Secondly, the jury may have rejected Turner's version as credible. In assessing Turner the jury have some advantage over this Court.

[102] But there remains the question: how is it that Turner not only has the appellant stating that it was an accidental discharge, but that the accidental discharge came about by reason of the gun being "slammed down on the table"? The complainant said when at his home and being treated by ambulance officers not long after the appellant had left his home "[h]e slammed it on [indecipherable] and it went off" and again at the hospital the following day after surgery the officer asked in a leading way "he slams it down" and "on the basin or on the vanity next to the wash basin" and to each proposition the complainant assented. There is no suggestion that either the appellant or Turner were aware of the version that the complainant had given to the police by the time that Turner provided his information to the police. Short of collusion between the complainant and the appellant, and there is no evidence of that, I cannot conceive of a satisfactory explanation for them seizing on the same mechanism of accident. It may be coincidence but it is a remarkable one.

[103] I am very conscious that the jury retain "the primary responsibility of determining guilt or innocence" and they have that responsibility because they have the advantage of their collective wisdom and experience in weighing up how people behave in our society and the conclusions that it is safe to draw from their behaviour. As I have said all the surrounding circumstances point in the same direction. Absent the complainant's earlier versions or the coincidence and no complaint could be made about the verdict. And I can well imagine that the jury may have felt, and felt strongly, that they were not hearing the full story of what occurred between the complainant and the appellant and perhaps Turner. But it

seems to me that an impermissible element of speculation must be introduced to explain away this coincidence.

[104] Despite the advantages that the jury plainly had in assessing the evidence I have decided that I entertain a reasonable doubt about the appellant's guilt.

[105] I agree with orders that Wilson AJA has proposed.