

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Toohey* [2011] QCA 354

PARTIES: **R**  
**v**  
**TOOHEY, Brendan Michael**  
(appellant)

FILE NO/S: CA No 190 of 2011  
DC No 400 of 2010

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 9 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 23 November 2011

JUDGES: Margaret McMurdo P, Muir JA and Douglas J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDERS: **1. Appeal against conviction allowed.**  
**2. Convictions and verdicts on counts 2 and 4 are set aside.**  
**3. Verdicts of acquittal are entered on counts 2 and 4.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted after trial of grievous bodily harm and assault occasioning bodily harm, whilst armed and in company – where a number of witnesses did not implicate the appellant in the offences – where the evidence of three witnesses implicating the appellant in the offences was of limited weight – whether on the whole of the evidence is was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty – whether the jury verdicts are unreasonable and not supported by the evidence

*Evidence Act 1977 (Qld), s 93A*  
*Penalties and Sentences Act 1992 (Qld), s 13A*  
*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63,  
applied  
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53,  
applied

COUNSEL: M J Byrne QC, with H Walters, for the appellant  
B G Campbell for the respondent

SOLICITORS: Arthur Browne & Associates for the appellant  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MARGARET McMURDO P:** The appellant, Brendan Michael Toohey, pleaded not guilty in the District Court at Townsville on 23 May 2011 to five offences which were said to have occurred in a fracas in Townsville on 13 November 2009. Count 1 was an assault occasioning bodily harm of LA in company on which the appellant was jointly charged with Cahal Smith. Count 2 was unlawfully doing grievous bodily harm to Alan Cooper on which the appellant was jointly charged with Smith, Vincent Barton and Luke Lenoy. Count 3 was common assault of KA on which the appellant was jointly charged with Smith, Barton and Lenoy. Count 4 was assault occasioning bodily harm of JG whilst armed and in company on which the appellant was jointly charged with Smith, Barton and Lenoy. Count 5 was assault occasioning bodily harm of KA on which the appellant was jointly charged with Smith, Barton and Lenoy.
- [2] Smith pleaded guilty to all charges at the commencement of the trial on 23 May. Barton and Lenoy, like the appellant, pleaded not guilty.
- [3] On the eighth day of the trial after the prosecution witness BJ gave evidence in chief, the prosecutor endorsed the indictment that the Crown would not proceed further against the appellant on count 1.
- [4] On the eleventh day of the trial after the close of the evidence, the judge ruled there was sufficient evidence to allow counts 2 and 4 to be left for the jury's determination, but insufficient evidence on counts 3 and 5. As a result, the prosecutor endorsed the indictment that the Crown would not proceed against Barton, Lenoy and the appellant on counts 3 and 5.
- [5] On the fourteenth day of the trial, the jury convicted the appellant on counts 2 and 4. They also convicted Barton on count 2 but found him not guilty on count 4. They found Lenoy not guilty of both counts 2 and 4.
- [6] The appellant appeals against both convictions contending that the jury verdicts were unreasonable and not supported by the evidence. This Court is required to review the evidence at trial and determine whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty: *M v The Queen*<sup>1</sup> and *MFA v The Queen*.<sup>2</sup>

### **The relevant particulars**

- [7] The prosecution particulars concerning the appellant on count 2 were:  
"... on 13 November 2009, at Townsville, Alan Mason Cooper suffered grievous bodily harm.

The grievous bodily harm alleged is compound fractures of the jaw.

<sup>1</sup> (1994) 181 CLR 487, 493-495; [1994] HCA 63.

<sup>2</sup> (2002) 213 CLR 606, [25], [59]; [2002] HCA 53.

Criminal liability with respect to [the appellant] arises upon proof of any one or more of the following in respect of Count 2 of the indictment:

- The [appellant] directly participated in the assault by punching and or kicking the complainant.
- The [appellant] aided the assault upon the complainant by encouraging and/or assisting another person or persons to assault the complainant."

[8] The prosecution particulars concerning the appellant on count 4 were:

"... on 13 November 2009, at Townsville, [JG] was assaulted by two [or] more persons and suffered bodily harm. It is further alleged that one of the offenders was armed with an offensive instrument, namely a bottle.

The bodily harm alleged includes any one or more of the following injuries: swelling and bruising and graze to face, laceration on the scalp, right subconjunctival haemorrhage, grazed left shoulder, grazed right upper abdomen.

Criminal liability with respect to [the appellant] arises upon proof of the following in respect of Count 4 of the indictment:

- The [appellant] directly participated in the assault by punching and/or kicking the complainant
- The [appellant] aided the assault upon the complainant by encouraging and/or assisting another person or persons to assault the complainant."

### **The evidence at trial**

[9] The offences were said to have occurred at a party hosted by LA in suburban Townsville on 13 November 2009. A number of young people attended, including LA (the complainant in count 1); KA (the complainant in counts 3 and 5); Alan Cooper (the complainant in count 2) and JG (the complainant in count 4). It was uncontroversial that Cooper suffered grievous bodily harm by way of a badly broken jaw and that JG suffered bodily harm in attacks on them by others attending the party. The appellant arrived at the party with a group in a maxi-taxi, including Smith, Barton, Lenoy, Shane Holland, SK, SW and BJ. The issue at trial and in this appeal was whether there was sufficient evidence to establish beyond reasonable doubt that the appellant was directly involved in the assault on either complainant, or whether he aided another person to commit the assault on either complainant, causing the grievous bodily harm to Cooper in count 2, or the bodily harm to JG in count 4.

[10] SW was a 17 year old school student at trial. She was 16 at the time of the fracas. She arrived at the party in the maxi-taxi with others including the appellant who was wearing a blue "hoodie". She was drinking alcohol before and at the party. She did not see him involved in any fighting. She saw Smith, Barton, Lenoy, Holland and BJ fighting.

[11] BJ was 15 at the time of the fracas. When he gave evidence at trial he was 17 and for his role in the fracas he had been sentenced as a juvenile to detention but

released on a conditional order. He gave a statement to police and his sentence was mitigated under s 13A *Penalties and Sentences Act* 1992 (Qld). He also had convictions for dishonesty offences. He was drunk when he arrived at the party with the group in the maxi-taxi. He and Smith agreed to start a fight. He punched Cooper to the head and then punched him again, causing him to fall to the ground. He continued to punch and kick Cooper. Smith, Barton, Lenoy and the appellant were around him.

- [12] LA was 18 at trial and 16 at the time of the fracas. He was quite intoxicated at the party and took one ecstasy tablet before the fracas broke out. He was unable or unwilling to identify anyone involved in the incidents surrounding counts 2 and 4.
- [13] Alan Cooper was 18 at trial and 17 at the time of the fracas. He drank about four bottles of beer and took an ecstasy tablet before the fracas. He was standing near the front gate when BJ hit him hard to the top left of his forehead. Cooper retaliated with right hooks and BJ fell backwards. Barton then tackled Cooper. Cooper held him in a headlock so that he could not be punched. Cooper recalled a few more guys rushing towards him but could not remember what happened other than he was "pretty much thrown and forced over to the main part of the ... front yard, then just being surrounded". He felt dazed and dizzy while they kept hitting him. He lay flat on the ground on his chest with his hands over his head and hoped for the best as he was kicked and punched. He felt blows to his legs, ribs, the back of his head, everywhere. This continued until KA said, "[g]et away from him" and he was able to stand up. He walked to the other corner of the yard. He heard someone behind him, turned and saw Barton and Lenoy. Barton said, "Why the hell did you swing at me?" and hit him again to the cheek. He remembered receiving a few hits and then blacked out. Lenoy was behind Barton, slightly to the left of him. He was "[p]uffed chested, like he was angry". The next thing he could remember was waking up at the top of the stairs. He realised his jaw was broken; it was hanging and he could not close his mouth.
- [14] KA was 18 at trial and 16 at the time of the fracas. She had one tall glass of sambucca and lemonade at the party. The "maxi-taxi group" punched Cooper and JG who punched back. Cooper fell onto his hands and knees. She saw a group of guys, including Smith, attacking Cooper by kicking and stomping whilst he was on the ground in the foetal position. There were too many kicks and stomps to count. She stood over the top of Cooper and told his assailants to "fuck off", threatening to break the bottles she was holding over their heads. Smith punched her to the side of the head. JG grabbed Smith. The other four guys followed and threw punches. She was unsure whether the punches were aimed at JG or Smith. Cooper was lying very, very still. She looked up and saw that "they were doing the same thing" to JG.
- [15] JG was 18 at trial and 16 at the time of the fracas. He was intoxicated at the party. When asked whether he had taken drugs that evening, he claimed privilege. LA was attacked and JG and Cooper ran to his assistance. A guy with short hair punched Cooper in the face and he retaliated. About six guys joined in. KA came over with the beer bottles and told them to stop, threatening to break the beer bottles over their heads. A guy in a green shirt with a Southern Cross tattoo pushed KA. (It is common ground that this was Smith.) He put Smith in a headlock and they both fell to the ground. Smith got up first and kicked JG in the head. The rest of the group came over and started kicking him.

- [16] Leah Winning was a registered nurse on maternity leave and a neighbour. The owners of the premises where the fracas occurred, LA's grandparents, were overseas. She had not taken any alcohol or drugs that evening. Her attention was attracted by the loud music and she went into the party and asked LA to turn down the music. He complied and she returned home to bed. At about midnight she heard aggressive noises and girls' voices calling out "[s]top" and "[d]on't". She dressed and went outside. She saw two separate altercations. Cooper was being punched many times very hard and was quickly overpowered onto the ground where he was kicked and punched several times. JG was also overpowered quite quickly and was being brutally kicked and punched. Cooper was unconscious and his jaw was clearly broken. The person assaulting Cooper continued to hit him after Ms Winning told him to stop several times. She saw only one person attacking Cooper. A group of young men were punching and kicking JG. She ran back to the house to arrange for an ambulance to be called. She put on surgical gloves because she thought she would need to administer first aid. By the time she returned, the fighting had ceased.
- [17] SE was 17 at trial and 15 at the time of the fracas. She was interviewed by police shortly afterwards and her evidence in chief was largely by way of that video recorded statement tendered under s 93A *Evidence Act 1977* (Qld). She thought that the appellant stayed with LB across the road from the incident until the fighting was all over. She drank one or two beers and was a little affected by alcohol. She is short-sighted and was not wearing glasses.
- [18] KM was 17 at trial and 16 at the time of the fracas. She attended the party from about 7.00 pm. She was not drinking and did not take drugs that evening. The appellant was at the party. He was wearing jeans and a blue shirt. She saw BJ attack LA. JG and Cooper went to LA's aid. When BJ saw this he ran towards them. She saw that Cooper was on the ground with BJ, Smith and the appellant around him, punching and kicking Cooper. Cooper had his arms up beside his face and was getting kicked to the ribs and face. KA was trying to protect him. Smith picked up KA by the throat and punched her with a king hit to the back of the head. JG came up behind Smith and put him in a headlock. The appellant hit JG with an esky lid and JG fell to the ground. JG tried to protect himself as the appellant and "the other two guys" kicked and punched into him. Smith threw a bottle at JG's head. The fracas ceased when someone said, "[s]top" because "the cops were coming". Smith, BJ and the appellant went under the house to collect their belongings.
- [19] In cross-examination, she again described the appellant as wearing a blue shirt and jeans. When shown the clothing the appellant was in fact wearing that evening (shorts and a blue hoodie), she said she did not know who was wearing that clothing. She agreed that she had not met the appellant before that evening. Only one person at the party was wearing a short sleeved blue hoodie and she had no recollection of that person being involved in the fracas. After the incident she talked to her friends about the identities of those involved in the fighting and what they each did.
- [20] David Rowbottom was 18 at the time of the fracas and 19 at trial. He had been drinking and took half a tablet. He was unsure what the tablet contained. He was not part of the group that arrived in the maxi-taxi. He saw JG attacked by a group of males whom he described to police shortly afterwards. None of those descriptions matched the appellant.

- [21] JR was 15 at the time of the fracas and 16 at trial. He gave evidence that he "didn't really see any of the fights".
- [22] LB was 15 at the time of the fracas and was then the girlfriend of the appellant. At trial she was 17 and no longer in a relationship with him. Her evidence in chief was largely by way of a recorded statement to police made shortly afterwards and tendered under s 93A *Evidence Act*. She arrived at the party at about 8.30 pm. She expected the appellant to come to the party but by about 10.00 or 10.30 pm he had not arrived and she decided to go home. He then arrived in a maxi-taxi with others. She was talking to him when a big fight broke out between Smith and LA. The appellant ran in to help Smith who was his "brother". That was pretty much all she knew. The fight broke up and they left. Police asked about the fighting, and she responded:
- "I wouldn't know, I was far back I didn't go over to check what was happening but I know that two, two boys were on the ground, I think [JG] and Cooper on the ground and then the other boys were just crowded around punching them and kicking them."
- [23] Police asked her who was punching and kicking them and she responded that it was Smith and the appellant. She did not know some of the other boys involved. She confirmed that Smith and the appellant were punching and kicking Cooper and JG. Police asked if she saw the appellant punch or kick any one particular person. She said the appellant ran into the fight to help Smith. Police asked her if she saw the appellant punch or kick any one particular person. She responded: "[N]o, I think it was just who ever was in front of him because he was just annoyed so it was who ever was in front of him really." Police asked how many times she saw the appellant punch and kick towards someone. She responded: "[O]nly a couple of times coz I was like I only walked over near the end of the fight when it was getting broken up and I only saw a little bit but I didn't see a lot of it." Police asked her who broke up the fight. She responded: "[the appellant] coz he was stopped his brother from fighting coz he saw what was happening to the boy's (sic) on the floor." She was asked what was happening to the boys on the floor and responded that they were:
- "[J]ust bleeding in a bad way and just looking terrible so he stopped his brother tell him to get out of there ... he bashed into him to like coz his brother has schizophrenia, I think and um so he was trying to bring him out from his trance or something so he bashed into him and told him to just get out of there just leave them like there in a bad way." (errors as in the original)
- [24] Police asked her what the appellant did when he ran across the road. She responded, "[T]ook off his shirt and just started seeing where like who his friends were and then just started laying into people." She confirmed that he was involved in the fight. She agreed with police that Cooper and JG were on the ground and she could see people punching and kicking them and she saw the appellant punch and kick at them a number of times. Smith's behaviour was frightening. He was "just out of it". The appellant "bashed into [Smith] told him to go it's like he calmed down a whole lot."
- [25] In cross-examination, she described herself as tipsy. She agreed that she talked to her friends about the fights at the time and when they were walking away from the party, but they did not really want to talk about it afterwards. She agreed that some

of the things she told police were things she had been told had happened and her impressions. She did not really know how the fighting all started. She heard it might have started from a headlock. There were a few bushes blocking her view of the front of the house but she "could see like quite a bit of it" through a little gap. She "couldn't see too much" of "where the fight was broken out". She could not see the driveway. She did not have a complete picture of what was happening. Where she was standing it was pretty dark and the area where the fighting took place was "like half lit". She did not know how many people were in the front yard. She maintained, however, that she did actually see the appellant in a fight. The person whom she considered as the appellant was not wearing a shirt. He took it off when he ran across the road and she did not know when he put it back on. Smith may also have been shirtless but she was unsure. She was worried about the appellant, not anybody else.

[26] She gave the following account:

"Because I was talking to my friend, I'd had three drinks, I wasn't really sort of worried what - you know, [the appellant] was probably going off talking to a friend, mucking around with a friend. I didn't know. I didn't want to stop him. He can do what he wants. Turned around, looked at him, he was running over, took his shirt off. I was like, all right, turned back around, started talking to [S]<sup>3</sup>, and I went, 'Oh, hang on, shit, he's gone'; turned back around. There was screaming and all that sort of stuff. I saw [SK] saying, 'Stop.' Walked over there, and then I saw that there was this fight. And then I'm like, 'Stop, baby, stop.' And then that's when [the appellant] looked - like, looked around and then bashed into [Smith], told him to stop, and then that's when we heard police cars. Then we started walking off. I said, 'Hang on, I need to get my shoes and my necklace.' So [the appellant] walked back inside, got my shoes, got my necklace, and then we pissed off."

[27] She agreed she did not know how the fighting started; that it happened very quickly; she was tipsy; her recollection was "a bit hazy" after 19 months; the appellant broke up the fight by knocking into Smith; and she did not see all the fight, only the end of it. She did not know how many people were involved in the incident. From where she was standing, she could not see whether people were throwing punches. As she walked towards the fight, she was watching her feet as she was not wearing shoes and did not want to fall. Although conceding that some details were a bit hazy, she repeatedly said "I know what I saw." She maintained that the appellant had his shirt off and was punching and kicking in the fight.

[28] SK was 17 at trial and 15 at the time of the fracas. She was interviewed and video-recorded by police shortly after the offences. The recording was tendered as her evidence under s 93A *Evidence Act*. At trial she gave evidence that her answers in that interview were true. She had only one alcoholic drink that evening. Her account to police was scattered and confusing. Sometime after her group arrived at the party in a taxi, she heard screaming. The appellant was trying to pull BJ off another guy and a number of people became involved in a big fight. A neighbour said she was ringing the police. BJ got a baseball bat and told everyone to leave them alone. SK's group waited out the front of the premises for Smith, who was

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<sup>3</sup> It is unclear from the evidence whether this is SW or SE.

pulling the appellant and BJ "off of the guys". One of the youths who lived at the party house hit Smith with an esky lid. Smith grabbed the esky lid and hit this person over the head with it. SK's group left, went through the school and were phoning for a taxi when the police arrived. They told the police where Barton and Lenoy were and again phoned for a taxi.

- [29] When her group first arrived at the party the appellant and his girlfriend, LB, went out the back near an old car. After SK heard screaming, Smith got the appellant from out the back and they all went out the front where BJ was fighting a guy on the front lawn. Smith was pulling BJ off. The appellant then got into a fight and Barton and Lenoy followed. She described the appellant "pulling them off". LB was standing on the footpath calling out to him. BJ came back with a baseball bat. Another male friend of those having the party arrived by taxi. He tried to start a fight but BJ confronted him with a baseball bat and he left.
- [30] She described the appellant fighting with one male and Barton and Lenoy trying to pull the appellant off. She said the appellant would not stop and he "ended up hitting the guy in the black shorts shirt" (apparently Cooper). Cooper and the appellant punched each other. Barton and Lenoy continued to try to pull the appellant off. Cooper hit Barton who retaliated to help the appellant. She then described a fight between Smith and "the other guy" (apparently JG). JG grabbed the esky lid off Holland and hit Smith with it. Holland tried to grab his esky lid from JG. JG hit Holland with the lid and Holland "got stuck into the guy" and grabbed the lid and put it back on the esky. Smith stood up and kicked JG in the stomach. Smith walked out the front. The appellant and Barton were the only ones still fighting with JG. Lenoy managed to calm Smith. Police asked her if she saw BJ, Barton and the appellant fighting JG. She responded: "[N]o I seen them like go over to fight them but I didn't actually see them fighting". She then described the appellant fighting with JG. She went over and pulled him and told him to leave. He kept fighting. His girlfriend, LB, called out to him. SK went over again and told him to go out the front. He "gave his last punch and kick or what ever". BJ came out with the baseball bat. That was when the person in the taxi arrived and BJ told him to leave. SK's group then left the party.
- [31] In cross-examination, she agreed that her recollection of what happened that night was now poor, but it was not when she gave her statement to police. She did not know the people at the party who were involved in the fighting other than those in her group. She did not give the police a description of the clothes the appellant was wearing that night although she gave descriptions of the clothes worn by Smith, BJ, Barton, Holland and JR. She did not know how many fights were going on when the female neighbour (Ms Winning) arrived. She did not see people knocked out and did not know whether she saw anyone unconscious on the ground. When the fighting started, the appellant's girlfriend, LB, was out the front. She thought the appellant was wearing a white t-shirt and she agreed that every time she saw the person she named to police as the appellant, this person was wearing a white shirt. She agreed that the appellant and JR were often mistaken for each other because they looked alike and had similar hairstyles. She did not think they looked similar but everybody else did. She did not know whether she saw the appellant at any time without a shirt on. Defence counsel asked: "Well, you have no recollection of that, do you?" She responded, "No, I can't remember anything." In response to defence counsel's proposition that she really did not know how any of these fights started or finished, she responded: "No, I can't remember them now." She maintained

however that she "said what [she] remembered back then ... whatever [she] said then was what happened". She denied that her version of events was fictional.

- [32] The investigating police officer agreed in cross-examination that the appellant had no criminal convictions.
- [33] The appellant gave the following evidence. He was 19 years old at trial and worked as a labourer tiler. He was 17 when he attended the party through his then girlfriend, LB. He had two standard 30 ml shots of rum beforehand, as well as a beer in the taxi on the way to the party. He was wearing a short sleeved blue shirt with a hood, shorts and thongs. When he and his friends arrived at the party, he met up with LB. Her father had recently told him that if he got her into trouble or hurt her in any way, he would come after the appellant. He took this warning seriously. LB was standing on the footpath with SE. They went under the house where he drank a Jim Beam and LB had a beer. They then went out the back and sat on a trailer before moving to the bonnet of the car. LA asked them if they wanted to go somewhere private but they were happy where they were. A couple of minutes later the appellant heard a heated argument under the house. He grabbed LB and took her out the front as he did not want her involved in any trouble and was conscious of the warning from her father. LB was "[p]retty intoxicated... stumbling a little bit but she was all right". He took her over the fence in the front yard so as to avoid the people at the party and they crossed the road to join SE, JR and SK.
- [34] He then returned to the party as he could hear noises which sounded like a fight. He was concerned about what was happening in the front yard. Smith was punching JG in the head and BJ was hitting JG over the back and head with an esky lid. He jumped the fence, went over to the fight and screamed at Smith to stop. Smith would not stop. The appellant heard sirens and screamed that "the cops were coming". Smith then stopped. The appellant was wearing his hoodie, shorts and thongs. At no stage did he take off his hoodie. Smith had his shirt off. Holland had taken the esky lid from BJ. The appellant did not see any other fights. He did not see the neighbour, Ms Winning. At no time did he assault anybody or hear LB yelling out to him. He was not affected by alcohol.
- [35] He and Smith left the premises by the front gate and met up with LB about 100 metres down the road towards the church. She had left her shoes at the party so they returned to collect them. He left LB on the footpath and went to the car in the backyard, collected her shoes and returned to her. They then caught up with the rest of their group down the street. They went through a church or school yard heading towards a mate's house. Police pulled them up and spoke to them. They continued to his mate's place where they waited for LB's mother to collect her.
- [36] In cross-examination, he said that he did not see BJ arming himself with a baseball bat. BJ and Holland left with Smith and him. He did not see Barton and Lenoy until the appellant's group was pulled up by police a couple of streets away. He then realised that Barton and Lenoy were behind him. He did not discuss the giving of his evidence with Barton or Lenoy and denied he was trying to protect them. He did not see Barton or Lenoy in the front yard of the party. He denied that he was trying to discredit LB's evidence by exaggerating her level of intoxication. On a scale of 1 to 10 he described her level of drunkenness as 6. He denied helping his mates in a fight, either by arming himself with an esky lid, or by punching or

kicking people. At no stage did he hear any bottles break or see any broken glass. He did not get closer than one metre to JG.

- [37] No complaint is made in this appeal of the judge's directions to the jury. After some brief re-directions, the jury retired to consider their verdicts at 11.31 am on the 14th day of the trial. After asking for "more clarification on party provisions as they relate to both the charges" they were given further re-directions and retired again at 12.56 pm.<sup>4</sup> The jury also requested to hear SK's evidence about the fight and KM's second video-recorded identifications from photo boards in which she identified people involved in the fracas, including the appellant. After the luncheon adjournment, the jury watched the vide-recorded evidence and had the cross-examination of SK read to them. They retired again at 4.31 pm and returned with their verdicts at 5.33 pm.

### **The contentions of the parties in this appeal**

- [38] The appellant's counsel emphasises that the only sober adult prosecution witness, Ms Winning, did not implicate the appellant in the commission of either offence. Counsel also emphasises that the appellant gave sworn evidence that he was not involved in either offence. In light of those matters, counsel contends that the evidence from the few prosecution witnesses who did implicate the appellant in counts 2 and 4 was so unreliable that a jury could not be satisfied beyond reasonable doubt of his guilt on either count.
- [39] The reliability of LB's evidence was questionable because she was the only witness to describe him as having his shirt off during the fighting. There was ample evidence that Smith had his shirt off during the fighting. As the whole episode happened quickly and in circumstances and conditions where it was difficult to see accurately, her evidence could not be relied upon. The appellant also contended that SK's evidence could not be relied upon because she described the appellant as the person wearing a white t-shirt when it was clear that he was wearing a blue hoodie.
- [40] Counsel for the respondent contended that the evidence of LB, supported by the evidence of SK, did implicate the appellant in both offences and supported the reasonableness of the jury verdicts. Counsel particularly emphasised that LB was the appellant's girlfriend at the time and had a particular reason to be watching his activities at the party with some interest.

### **Conclusion**

- [41] In *M v The Queen*,<sup>5</sup> the plurality<sup>6</sup> discussed the task of an appellate court when asked to set aside guilty verdicts on the grounds that they are unreasonable or cannot be supported having regard to the evidence. As I noted at the commencement of these reasons, the question is whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.<sup>7</sup> That question is a factual one. The court must answer it by making its own independent assessment of the evidence.<sup>8</sup> The appellate court must determine whether, despite there being evidence upon which a jury might convict, it

<sup>4</sup> The transcript 14-57, 14-59 records 12.56 pm but it also records the jury entering the court for the re-direction at 12.58 pm.

<sup>5</sup> (1994) 181 CLR 487; [1994] HCA 63.

<sup>6</sup> Mason CJ, Deane, Dawson and Toohey JJ.

<sup>7</sup> Above, 493.

<sup>8</sup> Above, 492.

would be dangerous in all the circumstances to allow the guilty verdict to stand.<sup>9</sup> The court must give appropriate respect and weight to the jury verdict, the jury having had the benefit of observing the witnesses.<sup>10</sup> The plurality observed:

"In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. ... 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."<sup>11</sup> (footnotes omitted)

- [42] I have found it particularly difficult to answer the question of whether the jury verdicts in this case are unreasonable. There is evidence from KM, LB and SK which supports those verdicts and the jury seemed to place some weight on the evidence of KM and SK.<sup>12</sup>
- [43] The fracas in which Cooper and JG were injured occurred very quickly. Many protagonists were involved. The lighting was poor. None of the witnesses JR, SW, BJ, LA, Cooper, KA, JG, Winning, Rowbottom or SE implicated the appellant in either count. What can be said is that KA implicated the appellant's group in counts 2 and 4; JG implicated the appellant's group in counts 2 and 4; and BJ gave evidence that the appellant was present when count 2 occurred. The appellant, who had no previous convictions, gave evidence that he was not involved in counts 2 or 4 and only verbally participated in the fracas involving JG to persuade the principal troublemaker, Smith, to desist and to bring it to an end.
- [44] It is true that the 16 year old KM, who had not been drinking or taking drugs that night, did implicate the appellant in both counts 2 and 4. But she was clear that the person whom she described as the appellant and did not know prior to that evening was wearing jeans and a blue shirt, not shorts and a blue hoodie. She talked to her friends about the identity and actions of those involved in the fracas. It seems probable that the person whom she described as the appellant wearing jeans and a blue shirt, was not the appellant who was wearing shorts and a distinctive blue hoodie. Her evidence cannot safely be relied on to convict the appellant on either count 2 or count 4.
- [45] It is also true that the evidence of LB and SK implicated the appellant in both counts 2 and 4. But LB and SK were only 15 years old at the time and had been drinking.
- [46] Of particular concern was SK's evidence that the appellant was wearing a white shirt and her concession that, when she described the actions of the appellant to police, she was describing the actions of the person wearing a white shirt. It was clear that the appellant was not wearing a white shirt but a blue hoodie that evening.

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<sup>9</sup> Above, 492-493.

<sup>10</sup> Above, 493-494.

<sup>11</sup> Above, 494.

<sup>12</sup> See [37] of these reasons.

I do not think her evidence can safely be relied on to convict the appellant on either count.

- [47] LB initially told police that she saw the appellant run to help Smith; that was pretty much all she knew; and then the fight broke up. Only when police pressed her for more details did she claim to see the appellant involved in the fighting. She conceded that she only walked over to the fight at the end and did not see much of it. Her evidence was broadly consistent with the appellant's account that he became involved only at the end of the fracas when JG was involved (count 2) for the purpose of breaking it up and removing a central protagonist, Smith. She conceded that her vision of the fighting was considerably obscured by trees. It is significant that she was the only witness who said the appellant removed his shirt in the fracas. It seems probable she was wrong about this. It is possible that in the confusion she mistook the actions of the appellant in attempting to break up the fight with the actions of Smith who probably was fighting with his shirt removed. Further, she agreed she had discussed the fights with others on the night. There was a danger that her version to police was tainted by what others had told her and that she elevated what she was told by others into what she conveyed to police as her eyewitness account of events. I do not consider much weight can be placed on LB's evidence implicating the appellant in counts 2 and 4.
- [48] As the evidence implicating the appellant in counts 2 and 4 from each of KM, SK and LB was of little weight, it cannot be used to strengthen the evidence of each other.
- [49] It is true that there was evidence from KM, SK and LB on which a jury could convict the appellant on both counts 2 and 4 but, in my opinion, after reviewing the whole of the evidence, that evidence was so confusing, tenuous and uncertain that it was unsafe to rely upon it to prove criminal charges beyond reasonable doubt. Whilst according special respect and legitimacy to the jury's decisions, in the end I consider there is a significant possibility that an innocent person has been convicted. I am satisfied that the guilty verdicts are unreasonable and unsupported by the evidence. I would set aside the guilty verdicts.
- [50] I would allow the appeal against conviction, set aside the guilty verdicts on counts 2 and 4, and direct verdicts of acquittal.

**ORDERS:**

1. Appeal against conviction allowed.
  2. Convictions and verdicts on counts 2 and 4 are set aside.
  3. Verdicts of acquittal are entered on counts 2 and 4.
- [51] **MUIR JA:** I agree that the appeal against conviction should be allowed, that the convictions and guilty verdicts on counts 2 and 4 should be set aside and that verdicts of acquittal should be directed for the reasons given by the President.
- [52] **DOUGLAS J:** I have had the advantage of reading the reasons of the President and agree with them and with the orders her Honour proposes.