

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Smith* [2011] QCA 375

PARTIES: **R**  
**v**  
**SMITH, David Anthony**  
(appellant)

FILE NO/S: CA No 124 of 2011  
DC No 129 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 16 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 3 November 2011

JUDGES: Fraser and White JJA and Margaret Wilson AJA  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Appeal against conviction dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –  
MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL  
WHERE NO SUBSTANTIAL MISCARRIAGE OF  
JUSTICE – where the appellant was convicted of unlawfully  
doing grievous bodily harm – where the appellant argued  
there was inconsistency of evidence between witnesses –  
where the appellant argued that he could not have caused the  
injury – where the appellant said that he was dissatisfied with  
his counsel – whether the jury could be satisfied beyond  
reasonable doubt of the appellant’s guilt – whether the verdict  
was unsafe and unsatisfactory and could not be supported  
having regard to the evidence  
*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited  
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53,  
cited  
*R v Handley* [\[2011\] QCA 361](#), cited  
*TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46,  
cited

COUNSEL: The appellant appeared on his own behalf  
S P Vasta for the respondent

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

- [1] **FRASER JA:** I agree with the reasons for judgment of Margaret Wilson AJA and the order proposed by her Honour.
- [2] **WHITE JA:** I have the reasons for judgment of Margaret Wilson AJA and agree with her Honour's reasons and the order that she proposes.
- [3] **MARGARET WILSON AJA:** The appellant was convicted of unlawfully doing grievous bodily harm. He has appealed against his conviction on the ground it is unsafe and unsatisfactory and not according to law. He appeared before this court self represented, by video link from the prison.
- [4] In the early hours of 14 May 2010 the complainant Gavin Brian Heron was admitted to the Accident and Emergency Department of the Ipswich General Hospital with a large open wound to his right upper arm above the elbow and below the shoulder. The wound was about 10 to 11 centimetres long, running down the inner and back aspect of the upper arm approaching the elbow. It was a slicing injury, through the muscle, exposing bone and nerve tissue. Surgery was required: without it the severed nerve would not have healed and the complainant would have been left with permanent loss of function in his wrist and hand.
- [5] The prosecution case was the appellant inflicted the injury in a dark alleyway in Ipswich. The alleyway ran between Brisbane Street and Limestone Street. Entered from Brisbane Street, it was about four to five metres wide with buildings on either side. It led to a rear carpark and eventually through to Limestone Street. From the Limestone Street exit of the alleyway, it was a short walk to an Autobarn.
- [6] The prosecution case was that the appellant caused the injury by hitting the complainant in the arm with some type of sharp object directly after the complainant had swung at him and missed and then stumbled to the ground. Its case was circumstantial. The trial judge gave orthodox directions about circumstantial evidence. Her Honour told the jury that it was not the prosecution case that he was injured in the fall by hitting something or falling on to something, and that if the possibility he may have fallen on to glass or something sharp when he stumbled gave them reasonable doubt about how the injury was caused, they must acquit.
- [7] There was no witness who actually saw the injury being inflicted. After being injured, the complainant made his way to the Autobarn, as did the appellant. There was a trail of blood from the alleyway to the Autobarn, most of it being found where he stopped en route to the Autobarn. There was no forensic evidence as to whose blood it was. No weapon was found.
- [8] The defence case was that the appellant did not stab the complainant. In his police interview he admitted being "the big guy" the complainant and his brothers said was at the end of the alleyway, but he denied any responsibility for the injury.
- [9] Notwithstanding the basis on which the defence case was conducted, the trial judge directed the jury about self-defence. Her Honour instructed them that if they were satisfied that the appellant had caused the injury in the manner alleged, they should then consider whether he acted in self-defence. The directions she gave were in orthodox terms.
- [10] To determine the appeal this Court must undertake its own independent assessment of the evidence, and assess whether, on the whole of the evidence, it was open to the

jury to be satisfied beyond reasonable doubt that the appellant was guilty.<sup>1</sup> As counsel for the respondent observed, the complaints raised in the appellant's outline can be put into four groups –

- (i) Inconsistency of, and between, witnesses;
- (ii) The possibility that someone else stabbed the complainant;
- (iii) The mechanism of the injury; and
- (iv) Dissatisfaction with his counsel.

### **The evidence**

- [11] On 13 May 2010 in the evening the complainant and two of his brothers (Rowan and Steven Shorter<sup>2</sup>) consumed a bottle of rum at the complainant's house in suburban Ipswich. Sometime between 9.30 and 10.00 pm the three of them set out on foot to walk into town to buy more alcohol at the Squealing Pig in Brisbane Street. There were various groups of young men and women roaming the streets, and several altercations between the complainant and his brothers and other people erupted.
- [12] The appellant and two young women, Chloe Vaughan and Tania Ward, were in a motor vehicle "lapping through Ipswich" – "just driving around Ipswich from Limestone to Brisbane Street, like everyone does on Thursday – Friday night," as Ms Vaughan put it.<sup>3</sup> Both young women said they were intoxicated. The appellant was driving. They stopped in Brisbane Street where they saw people fighting, and got out of the vehicle.
- [13] The complainant and his brothers were involved in a physical altercation with some of the appellant's mates. To that point the complainant and his brothers on the one hand and the appellant and his companions on the other did not know each other. Near the entrance to the alleyway the appellant became involved. He was a much bigger man than the complainant and his brothers.
- [14] *The complainant* told the court of various fights during the night, and, in effect, that he and his brothers retreated to the alleyway. When they were about a metre and a half to two metres into the alleyway, "a big guy" (the appellant) stepped out. He was standing "on the edge like where the alley starts"<sup>4</sup> with some girls. The complainant could hear the fighting continuing and people coming down the alleyway from its Limestone Street end. The girls were shouting abuse, and the appellant said –
- "You are fucked now."<sup>5</sup>
- [15] He looked at his brother Steven, who ran at the appellant and fly-kicked him on the chest. The appellant stumbled back a bit. The complainant threw a punch at the appellant, but it did not connect. The complainant slipped in some loose gravel, and

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<sup>1</sup> *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53; *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63.

<sup>2</sup> Spelt Steven and Stephen at various times in the Appeal Record.

<sup>3</sup> AR 123.

<sup>4</sup> AR 34.

<sup>5</sup> AR 35.

landed with his two knees and his two hands on the ground. He gave this evidence in chief –

“Okay, so you had two hands and two knees on the ground. And what happened then?-- On the way out I felt - I felt like a in the back of my arm. Felt like a punch when I hit the ground. I could feel it tingling in the arm when I got up. And as I was getting up he sort of went for me again. And I.

And which - when you say you felt something to your arm, which arm was that?-- My right arm.

And whereabouts did you feel that?-- Here.

Okay. And at what point did that happen?-- At the time when I threw the punch, it sort of happened like in that time that I fell right down.

So, do you recall exactly when? Was it as you were going down, when you were already down?-- No. Yeah, as I was going down.

As you were going down. Okay. And then you said there was a second - you felt a second blow?-- Yes, as I was getting - getting up, I think he felt went for me again. I sort of jumped to the side of it, like away from him.

Okay. So when you're saying he went for you, you're gesturing with your arm in an - in an upward?-- Yeah, punching, yeah.

Is that like a punch, or how you?-- Yeah, a punch, yeah, I guess.

Okay. And whereabouts was that aimed towards?-- My guts.

And did that connect at all?-- Yeah.

Okay, and that was as you were getting up?-- Yeah.

And who was it that was throwing those blows?-- The big guy.

Now the time that that happened, was there anyone else in the alleyway?-- Yeah, Rowan and Ste[v]en.

Mmm-hmm. Was there anyone else there at all?-- Only the girls behind him.

Okay, so you could see the girls still there? And what happened after that?-- I - I could feel a tingling and I could feel a warm – a warmness running down my arm.

Mmm-hmm?-- I sort of got in a bit of light and I could see it was bleeding. I said to Rowan, ‘I think I got stabbed.’”<sup>6</sup>

[16] By this time, the people he had heard approaching the alleyway from Limestone Street had arrived. His brother threw rocks at them, and he made his way through them to Limestone Street towards the Autobarn, followed by his brothers.

[17] *Steven Shorter* said that he and his brothers went into the alleyway to get away from what was going on in Brisbane Street. They had gone about halfway when they

<sup>6</sup> AR 37-38.

stopped because there were people coming round from the other side of the alleyway (that is, from Limestone street), closing in on them. He and the complainant turned round and saw “a big guy” (the appellant) standing there saying –

“Youse got nowhere to go now. Come through me if youse can.”<sup>7</sup>

By then, there were people on both sides of the alleyway. Their brother Rowan stayed at one end to stop people coming from that direction, (there were three or four coming down to fight). Steven and the complainant turned towards the appellant who walked towards them saying –

“You think youse are good, come and get through me. Try and make it past me.”<sup>8</sup>

Steven was wearing joggers or ugg boots; he fly-kicked the appellant in the stomach area and bounced back off him. The complainant threw a punch at the appellant, that did not connect. He gave the following evidence in chief –

“Okay. And where were you at the time that Gavin did that?-- I was to the right of Gavin.

Yes. And what happened after he threw that punch?-- Sort of he's missed and Dave's come towards Gav and I didn't get involved after that then. I've sort of like - they didn't really fight, it was just a he's gone for him, he's gone for him, then that's it, they've sort of both - well, Gavin and I have backed up because we were like oh, I don't think we can go this way, like sort of, and then yeah, that's when he's like something's wrong with my arm at that same time.

Okay. Did you see any blows connect at all between-----?-- Between the two, no.

Between the two. No. Were you watching them the whole time?-- Yeah, I was watching them, but like I've seen Gav go for him and I've seen him go back for Gav and then they sort of - as - they've got a distance like that, I've done a quick glancer behind me to see what's happening or if anyone's coming behind, and then in that same time-----

Yes. What did you see when you glanced behind you?-- I've seen Rowan still fighting people off that were coming from behind.

Okay. And how many people were coming; could you see at that point?-- Yeah, at point [sic] there was probably a good eight people. He wasn't fighting them all at once, it was just a couple that were coming up and half of them were going back and some of them was coming forward more.

When you say he was fighting, can you remember what he was doing at that point?-- Yeah, throwing punches. Trying to hold him back.

Yes. Okay. And what's happened after you've glanced around to see that?-- I've had a quick glance and then seen that I've turned towards

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<sup>7</sup> AR 73.

<sup>8</sup> AR 73-74.

– back towards Gav and Dave and - and that was it, like we've had the distance between him and we were probably two or three metres ahead of my other brother that was behind us and then Gavin's turned around and something's wrong with my arm. He's like what do you mean? He's like something's wrong, it just feels dead and all that, like because there's a light coming in off the street and like we quickly had a look at his arm and noticed that he was bleeding quite bad.

Okay?-- And we were like oh, he's been stabbed and all that.

Could you see where he was bleeding from?-- Yeah, from his right arm.

Could you see whereabouts on his right arm?-- Yes, around here and it was coming - blood was right - right down his hand dripping on the ground and it was bleeding pretty bad.

Okay. So during that altercation there, did you ever fall on the ground at all?-- No.

Did you see Gavin ever fall on the ground at all?-- No, I don't recall him falling.

Okay. And what happened after Gavin said that to you?-- We were just like stunned for a second and Rowan's heard what we've said and then we've just been yelling out, "Just leave is" and that, "he's been stabbed" and all that. Like, "Let us go" and that and then that wasn't working so we just sort of - I've gone up with Rowan and Gav's still beside me at this time and we've just forced our way out of the crowd."<sup>9</sup>

- [18] *Rowan Shorter* said he first caught a glimpse of the appellant on the road when they were fighting there, but then he seemed to disappear. Rowan and the complainant entered the alleyway: there were people running down from the top, and their brother Steven ran over to help them because they were getting outnumbered. The appellant came out of nowhere and up the alleyway, the girls standing behind him yelling abuse. As he entered the alleyway, the appellant said –

“It’s fucking on now.”<sup>10</sup>

Rowan was wrestling with a few other people. He said in his evidence-in-chief that he saw Steven fly-kick the appellant, knocking him off balance, although in cross-examination he said he did not see the kick but he saw Steven fall over.<sup>11</sup> He continued –

“And my other brother, Gavin [the complainant], went to punch him and they both stumbled into the wall and then he just grabbed his arm, looked back at me and I seen a bit of a glint, but didn’t think anything of it. It looked like he just went to punch him.

...And my brother grabbed his arm and he’s like ‘Fuck, I think I’ve been stabbed.’”<sup>12</sup>

<sup>9</sup> AR 75-77.

<sup>10</sup> AR 99.

<sup>11</sup> AR 113.

<sup>12</sup> AR 99-100.

[19] Rowan was questioned further about the glint –

“Now, when you say you say [sic] a little bit of a glint?-- It could have been anything. As I said, it could have been a glass bottle, it could have been a knife, it could have been a watch on his wrist. I wouldn't have a clue.

So whereabouts did you see that glint though?-- In his right hand.

Okay. And whose right hand are you talking about there?-- David Anthony Smith's.

Sorry?-- David Anthony Smith's.

Okay. Did you know his name at the time this happened?-- No.

Okay. And what did you see when you saw this glint in his right hand? Did you see his right hand doing anything at that time?-- I seen him swing, like an uppercut.

Can you describe that? Can you show us what you mean?-- He's just gone like that. Up underneath.

Mmm-hmm?-- And my brother got a little nick on his stomach and he got stabbed in the arm.

Okay. So when you've seen what you have described as an uppercut, did you see that connect?-- Yeah, well, I didn't know he had been stabbed. I just thought he - I seen it hit him in the arm.

Mmm-hmm?-- I didn't think anything of it - anything of it and then Gav's grabbed his arm and he's like, ‘Fuck, I think I've been stabbed.’

So at the time that you saw this uppercut that connected with Gavin's arm?-- Yeah.

What position was Gavin in at that time?-- They were both still confronting each other.

Mmm-hmm?-- Leaning against the wall.

Okay, and there was just the one blow at that time?-- Yes.

And what happened after that?-- Grabbed his arm, looked back at me and said, ‘Fuck, I think I've been stabbed.’”<sup>13</sup>

[20] *Chloe Vaughan* said that the appellant tried to intervene in the street fight. She saw him grab someone and -

“That's when they started on Dave [the appellant] and like were trying to punch him and stuff.”<sup>14</sup>

She said that the appellant did not punch back until it started to get out of hand. The men ran up the alleyway and came back with bottles and stones which they threw at everyone.

“And then the – one of the guys fly kicked Dave and Dave just grabbed his leg and put it – like dropped him to try and stop him, and

<sup>13</sup> AR 100-101.

<sup>14</sup> AR 126.

then they started again, and that's when the fight carried away in the alley way."<sup>15</sup>

She said the appellant was only a couple of steps into the alleyway when this happened.

[21] CCTV footage of the Autobarn showed the appellant handing Ms Vaughan (one of his companions) something shiny – she said the car keys.<sup>16</sup>

[22] According to *Tania Ward*, when they got out of the motor vehicle, she and Ms Vaughan yelled at the people who were fighting. The appellant just stood on the footpath between the two young women and those who were involved in the fracas. One of the men ran towards the appellant, ripped at his shirt and tried to punch him. The appellant pushed him away, and the three men ran into the alleyway, from where they threw bottles and rocks. One of the men tried to fly-kick the appellant, but the appellant “got his leg and pushed him over.” There was yelling to and fro.

“And the other two guys had come down and tried to attack Dave when this guy had fly-kicked him.

...They come running down trying to get to Dave as well but when he pushed this guy over they kind of backed off a bit.”<sup>17</sup>

Someone chased them up the alleyway. There was no one else in the alleyway at the time. Police arrived and drove up the alleyway after them. At no stage did she see the appellant with a knife or any sort of weapon in his hand.

[23] *In his record of interview* the appellant said that he tried to get in between the attackers and his friends, that he tried to stop them fighting by standing in the way. He continued –

“I can't remember exactly but there was a lot of yelling done. They went up the laneway and then they went to – they went to go to attack the girls that I was with and I got in between them and then I don't exactly remember but I remember one of them karate-kicking me or they said they were martial arts experts rah rah rah. One of them karate-kicked me. I grabbed him – his leg when he kicked me and I think one of the other guys grabbed my shirt and I pulled his leg and he's fallen on the ground. He's got up and just slowly broke free and taken back to the laneway looking for beer bottles and stuff, throwing them at us. I got hit in the back and that and then I tried to get the girls out of the way throwing beer bottles and I spoke to a person I've known of Aboriginal appearance, I spoke to him, asked him what had happened, the police rocked up and the police asked us what happened.”<sup>18</sup>

[24] *Dr Stephanie Wan* who attended to the complainant in the Accident and Emergency Department of the hospital was asked to comment on what may have caused the injury. She said –

“...We would assume that it was a sharp object as opposed to a blunt object, probably with an edge that was able to cut.

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<sup>15</sup> AR 127.

<sup>16</sup> AR 130.

<sup>17</sup> AR 137.

<sup>18</sup> AR 262-263.

Okay. And Dr, are you able to comment at all whether that injury was consistent with perhaps falling on some glass?—It would be a difficult injury to sustain by falling on glass, not impossible. There were no other surrounding wounds that were suggestive of an arm going through glass and other pieces of glass hitting it. There was no glass in the wound, so while it would be possible that glass is sharp enough and - and edged enough when broken to - or even just the edge of a sharp glass would be sharp enough to - to make a wound like this, it would be an unusual way to sustain this wound.”

### Submissions

[25] The trial judge properly instructed the jury that in deciding what evidence they accepted they should consider any inconsistencies between a witness’s testimony and what he or she may have said on an earlier occasion. Her Honour also said –

“In a case such as this where we're talking about, in effect, a fight, that took place over a short period of time where a number of people were involved in different capacities, at different times, of course you're going to expect that some of the witnesses are going to give different evidence from others. But it's a matter to - matter for you to weigh up their testimony compared with other testimony that you accept or perhaps the Safe City cameras if you think they are of use, and decide who you think is giving honest evidence and whether their evidence is reliable.”

[26] In his written submission the appellant said –

“8.1 **Circumstances of Offences in Respect of Which Appeal Is Brought:**

8.2 The prosecution state that the fight was basically over by the time I arrived viewing the CCTV.

8.3 That in the laneway off of Brisbane St that Rowan Shorter saw [sic] a glimmer of metal in my hands from the other end of the laneway in darkness.

8.4 That the drops of blood in the laneway were Gavin Heron’s even though the blood was not tested.

8.5 There is no other way that the police could work out how the injury happened.”

[27] Footage taken by a number of differently placed CCTV cameras was played. It was of little real value in determining what happened, as it was necessarily somewhat disjointed, and none of it captured what occurred in the alleyway.

[28] The appellant challenges the evidence of the complainant and his brothers that they went into the laneway because of the number of people fighting with them. He says that the CCTV footage shows otherwise. It was for the jury to make what they could of the footage, and in so far as it was inconsistent with this aspect of the evidence of the complainant and his brothers, that was an inconsistency to be taken into account in deciding how much of that evidence they accepted.

[29] The appellant complained that the brothers claimed not to have seen him on the street, while the CCTV footage showed one of them attacking a male who turned to

run at the appellant and then running across the road to help his brother attack another male, and showed the appellant walking across the road to get between the girls and the brothers. He says that the brothers would have had to pass him to enter the alleyway, that the footage showed him walking to get between them and Tania Ward.

- [30] The appellant has overlooked Rowan Shorter's evidence that he first caught a glimpse of him on the road when they were fighting there. Moreover, the street brawling was heated and ongoing, with not all participants being continuously involved. The brothers may not have realised just when the appellant first arrived on the scene. These were matters for the jury to assess.
- [31] The appellant pointed to some inconsistencies between Rowan Shorter's evidence and what he said on a voir dire and in his police statement.
- (a) On the voir dire he said that in the alleyway he had his back turned to the complainant, Steven and the appellant when he heard the complainant say that he had been stabbed. He turned around and saw that blood "was pissing out everywhere".<sup>19</sup> But in his evidence in chief he said that he saw the appellant throw a punch at his brother, and that he saw a glint of metal in the appellant's right hand. What Rowan said on the voir dire was not put to him in cross-examination, but he was challenged about seeing the glint from a distance of five metres. He seemed to accept that he did not see anything in the appellant's hand, but maintained that he saw a reflection.<sup>20</sup>
- (b) In cross-examination Rowan Shorter agreed that in his police statement he said that he saw the appellant fighting with the complainant when he was on the street. The trial judge addressed this fully in her summing up.<sup>21</sup> In cross-examination he suggested that the police had misinterpreted what he had said. He said he ran across the road to assist Steven, who was fighting with someone else. At that stage the complainant was walking up the alleyway; he first saw the complainant and the appellant wrestling in the alleyway, when he went over to help the complainant and stop people approaching from the other end of the alleyway.

These were matters for the jury to assess.

- [32] The appellant submitted –

“9.5 In Tania Ward, Chloe Vaughan, Gavin Heron, Rowan Shorter and David Smith's Police Statements Rowan was standing right behind his brother not at the end of the laneway fighting.

9.5.1 At court Rowan Changes his statement to put himself as far away from the incident maybe to stop from being pointed at for the stabbing himself.”

- [33] Both Rowan and Steven Shorter gave evidence that Rowan was trying to stop people approaching from the other end of the alleyway. This was in contrast to the evidence of the others, that he was with the complainant.

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<sup>19</sup> AR 13.

<sup>20</sup> AR 113.

<sup>21</sup> AR 250-252.

[34] That part of Rowan Shorter's police statement was not put to him in cross-examination. He said in cross-examination –

“My attention is on everything, my brothers, and trying to stop them.”<sup>22</sup>

He maintained that he did see the complainant swing a punch at the appellant, and that he saw the complainant and the appellant wrestling. He said that the complainant did not go down to the floor, that he did not go down on his hands and knees.<sup>23</sup>

[35] This inconsistency between Rowan and Steven Shorter's evidence on the one hand and that of the others was something for the jury to assess.

[36] The appellant continued in his written submissions –

“9.6 The doctor[']s report only states that there was an injury and about it but does not say how it could have been done.

9.6.1 Someone standing behind the victim could have thrown a jab at me but not counting on Gavin swinging a punch towards me at the same time.

9.6.2 The injury does not match the way the three brothers claim it to of happened if I upper cut him I would have got the inner of his arm. If I had of thrown a punch it would have got the outer arm. But the injury was to the back of his arm more likely to of been caused by someone behind him.”

[37] The appellant has overlooked the doctor's evidence set out in paragraph 23. And it was not put to either Rowan or Steven Shorter that he had inflicted the injury.

[38] According to the medical evidence, the track of the wound was down the inner and back aspect of the complainant's arm. A photograph of the wound after it had been stitched was consistent with that description. This was not inconsistent with the evidence of the appellant's striking the complainant.

[39] The appellant complained that the blood in the alleyway was not tested. He submitted that it could have belonged to someone else injured that night. There was evidence from the complainant's brothers, as well as the complainant himself, that he was bleeding. And there was police evidence that the jumper he was wearing was soaked in blood and that there was blood on his t-shirt.<sup>24</sup> It was not necessary that there be forensic testing of the blood in the alleyway before the jury could conclude that it was the complainant's.

[40] Finally, the appellant complained about his counsel Mr Seaholme. He said –

“9.8 I don't believe Mr. Seaholme was working in my best intentions during this trail [sic] and not giving this case his full attention, I have stated heaps of mistakes that he did not follow up at all.

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<sup>22</sup> AR 112.

<sup>23</sup> AR 113.

<sup>24</sup> AR 212.

9.9 The prosecution was willing to contradict them self in this case to get a conviction even if there [sic] case didn't make sense or had no solid evidence.

9.10 In the committal hearing the judges closing statement was even if Mr Heron did fall over while trying to attack Mr Smith, and Mr Smith did not touch him Mr Smith is partically [sic] responsible for the injury.”

[41] A conviction will not be set aside because of the incompetence of defence counsel at trial unless that incompetence is shown to have resulted in a miscarriage of justice.<sup>25</sup> The appellant orally submitted to this court –

“...Your Honour, I was told at committal and trial to keep my mouth shut and let my lawyer do my argument because the prosecution - the Judge believed that I would not be a - capable of keeping my cool. My barrister was given all my instructions and did not follow one bit; did not cross-examine them properly; did not do anything; just asked really stupid questions that when I asked him, every time I asked him why he didn't cross-examine, all I got in return was "trust me" and due to the fact that I was on quite a bit of medication to keep me calm during the trial I was not in a proper state to say anything. I was probably not even a state to even remember what the case was about. I was kept in a thingo. I couldn't testify due to the fact that I was highly under the influence of prescription to keep me calm.”<sup>26</sup>

[42] It is for counsel to make forensic decisions as to questions to be put in cross-examination. As counsel for the respondent submitted, a perusal of the trial transcript reveals that the defence was competently conducted. The appellant did not place before this court the committal transcript or the police statements which he said contained evidence inconsistent with that given at trial. He did not establish that the way his counsel conducted his defence resulted in a miscarriage of justice.

### **Conclusion**

[43] There was a strong circumstantial case against the appellant. The complainant sustained an injury to his upper arm in the alleyway, and the appellant was the only person in close proximity to him when the injury occurred. The complainant said he had gone down on all fours – which would have made it easy for him to be cut from behind by the appellant. There was no evidence of glass being found or any pieces of steel jutting out in the area where the altercation occurred. The complainant said he did not know how it happened – that he felt a punch to his right arm, then tingling and warmth down his arm pretty much straight away. His jumper was blood soaked and his t-shirt stained. There was a trail of blood from the alleyway to the Autobarn, most of it being found where he stopped en route. CCTV footage showed the applicant handing something to Chloe Vaughan.

[44] As Muir JA said in *R v Handley*,<sup>27</sup> another case involving an appeal against conviction on the ground that the conviction was unsafe and unsatisfactory and could not be supported having regard to the evidence:

<sup>25</sup> *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46.

<sup>26</sup> Appeal Transcript page 1-12.

<sup>27</sup> *R v Handley* [2011] QCA 361 at [56].

“The question to be determined on appeal is whether it was open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt of the appellant’s guilt. In answering that question, this Court must have regard to the advantage enjoyed by the jury as a result of seeing and hearing the witnesses and thus being able to evaluate what they had seen and heard as part of a continuing process supplemented by addresses and the summing up.” (Footnote omitted).

In the present case, I am unpersuaded that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.

[45] I would order that the appeal be dismissed.