SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bobart* [2012] QCA 33
PARTIES:	**R** **v** **BOBART, Lynette Brodwyn** (appellant)
FILE NO/S:	CA No 130 of 2011 DC No 315 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	6 October 2011
JUDGES:	Fraser and White JJA, and McMeekin J 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 – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant found guilty of one count of dangerous operation of a vehicle causing death while adversely affected by an intoxicating substance – where sentenced to six years imprisonment and disqualified from holding or obtaining driver's licence for four years – where driver of vehicle hit and killed another motorist – where driving on wrong side of road – where driving whilst intoxicated – where identity of driver in question – where CCTV viewed clearer at police station – where CCTV inconclusive – where eyewitness evidence available – whether, upon whole of evidence, it was open to the jury to be satisfied beyond reasonable doubt of guilt *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, applied *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, applied *R v PAH* [2008] QCA 265, applied
COUNSEL:	M J Byrne QC, with M Van der Walt, for the appellant G P Cash for the respondent

SOLICITORS: Fowler Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On 26 May 2011 the appellant was found guilty by a jury of one count of dangerous operation of a vehicle causing death while adversely affected by an intoxicating substance. She was sentenced to six years imprisonment and it was ordered that she be disqualified from holding or obtaining a driver's licence for four years.

[2] The appellant contends that the verdict of the jury was against the whole of the evidence, thereby rendering the verdict unsafe and unsatisfactory. That invokes the ground of appeal in s 668E(1) of the *Criminal Code* that the verdict of the jury is unreasonable. Consideration of that ground of appeal requires the Court to determine whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[1] So far as is presently relevant, the approach to the Court's task was described by Mackenzie AJA in *R v PAH* [2008] QCA 265 at [29]-[30] as follows:

> "The relevant principles for determining whether the conviction is unsafe and unsatisfactory, to use the former terminology, are set out in *M v R and MFA v R. M v R* establishes a number of propositions about the exercise by appellate courts of the powers conferred by s 668E of the *Criminal Code* 1899 (Qld) and like provisions. 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. In most cases, a doubt experienced by an appellate court will be a doubt the jury ought also to have experienced. Where a jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by the appellate court, the court may conclude that no miscarriage of justice occurred. Where the evidence lacks credibility for reasons which are not explicable by the manner in which the evidence was given, the reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.
>
> If the evidence, on the record itself, contains discrepancies, inadequacies, is tainted, or otherwise lacks probative force in such a way to lead the court to conclude that, even allowing for the advantage enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, the court is bound to act and set aside a verdict based on that evidence. In doing so, the court is not substituting trial by the Court of Appeal for trial by jury, for the ultimate question must always be whether the court thinks that, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

Summary of the evidence

[3] The appellant admitted at the trial that Mr Bray died on 25 April 2009 as a result of injuries received in a collision between the motorcycle he was riding and the

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1 *M v The Queen* (1994) 181 CLR 487 at 493-494; *MFA v The Queen* (2002) 213 CLR 606 at [25].

appellant's car. The evidence in the Crown case, if accepted by the jury, established that the appellant and Mr Ball, who had been drinking together for some hours, got into the appellant's car (a red four-wheel drive), which was parked at a service station at Beachmere; the car was then driven along Beachmere Road to a nearby roundabout, where it turned right into Moreton Terrace; and the car then crossed onto the wrong side of Moreton Terrace and collided head on with the motorcycle, which was being ridden on the correct side of Moreton Terrace towards the roundabout.

[4] There was a compelling case that the driver of the car dangerously operated that car by driving on the wrong side of the road, thereby causing the death of the motorcycle rider. The real issue at trial was whether the prosecution proved beyond reasonable doubt that the appellant was the driver of the car. The defence case was that Mr Ball was the driver.

[5] Mr Johnson, who was 19 years old when he gave evidence, said that on 25 April 2009 he and Mr Hannah had left a shop on the corner of Beachmere Road and Moreton Terrace and started to walk along the road away from the roundabout. He saw a man and a woman get off a bus on the opposite side of Moreton Terrace, diagonally to Mr Johnson's left. He and Mr Hannah were looking across Moreton Terrace at the woman who had left the bus when he heard "this big crack smack sound". A motorbike had come from Mr Johnson's right, on the same side of Moreton Terrace as him, heading towards the nearby roundabout on his left. He said that it looked like the car had "cut" the roundabout, but he agreed that he had not seen the car when it was on the roundabout. He first saw the car just after the collision. It was on the wrong side of the road. After the collision the car reversed back a bit. The distance between where he was standing and where the vehicles were was about the width of the court room.

[6] Mr Johnson gave the following evidence:

> "And then, yeah, the lady hopped out of the driver's seat and stood near the building - the unit, house thing.
>
> …
>
> Okay and you say - who did you see in the vehicle - in the red four-wheel drive?-- I seen a female driving.
>
> And what did you see her do? She hopped out and walked straight across to the building.
>
> …
>
> Did you see anyone else in the four-wheel drive? Not at that very point of time until a guy hopped out.
>
> Where did the guy hop out of?-- From the passenger seat.
>
> Is that the front or the back passenger seat?-- Front.
>
> Mmm-hmm. And where did he go to?-- He went over to her.
>
> …
>
> Could you hear anything said between the two of them?-- The only thing I ever heard was something about, 'Don't worry about it.'
>
> And who said that? The guy said it to the lady."

[7] In cross-examination Mr Johnson denied that he could be mistaken about his evidence that he saw the lady get out of the driver's side of the car. He said, "I seen

her with my own eyes get out of the driver's seat." The following exchange occurred in cross-examination about Mr Johnson's evidence at the committal hearing:

> "Okay. You were being asked questions about this very thing and you pointed out, when you were asked the questions, that the lady getting out of the passenger side of the vehicle, didn't you?-- Yeah. I made a mistake, yes.
>
> You pointed it out on two occasions to him, that you indicated that she got out of the passenger side?-- Yes, I know.
>
> Okay. Well-----?-- Yes, those mind games.
>
> -----I understand that, but-----?-- Yes.
>
> -----you do agree that that's what happened on two separate occasions. When you were giving evidence in October of 2009, you indicated that she got out of the passenger side of the red four-wheel drive?-- I made - there was one mistake I made.
>
> …
>
> I suggest that on two separate occasions when you were being asked questions, you indicated the side of the pen which you were meaning the car-----?-- Yeah. I made the mistake for the fact is I live next door to a guy with a left-hand drive Mustang and he drives me around everywhere.
>
> I understand?—That's why I made that mistake.
>
> I understand what you're saying and I'll come to that. But what I'm suggesting to you is that on two separate occasions, just a couple of questions apart-----?-- Yeah.
>
> -----but two times, you pointed out in Court what you were saying was the passenger side of the door is where she got out?-- Both times I fixed it up too.
>
> …
>
> And you indicated -and I'd suggest you just listen to this, you were asked - I'll go back to make sure you fully understand. I'll go back a little way to about line 20 of page 17. You were giving a description of what you'd seen of the man and the woman who got out of the car and walked towards the units. All right. You said firstly that the lady walked behind that car and then to the unit. You said that she hopped out of the driver's seat. She hopped out. The guy hopped out. The guy walked across. She walked around the back. That might mean - have been meaning 'of the units'?-- Mmm.
>
> Does that make sense?-- Yeah.
>
> Is that what you were trying to say?-- Yes.
>
> Okay. You indicated the units were on the corner there and you then were using a pen and you were asked this. This is at about line 30. 'Which way is the car facing?' and you said, 'It was facing up

towards the hallway.' I presume you're using the Court as a bit of a description?-- I can't remember.

All right. You said that the lady got out first, and you said, 'Yes.' Question: 'Do you realise that when you said 'the lady got out', you actually had your finger on the left side on the pen closest to the paper there' and your answer was, 'The lady hopped out of this side of the car' and you said, 'Yeah. And the car was facing that way.' Now, those are the words you used but you had a pen at the time and

that's what you were using; is that correct-----?-- Yes.

-----as a description?-- Yes.

Okay. Question: 'Okay. All right. You're quite sure about that.' Answer: 'Yes, I am. You've got the roundabout there. The car was facing that way' and then - I'll come back to it, but the questioner went on. My instructing solicitor here was asking the questions. 'If you - if I just get you to put the map down for me, do you understand that that would be the passenger side of the vehicle?' and you answered, quote, 'That side' and you said, 'Shouldn't be if the car's facing that way it'll be' and then the transcript is not able to be read any more?-- Yeah. And that's what I fixed up where I made a mistake.

Okay. Questioned further, 'Do you accept from me that your point, you're using the pen as you - as if you just follow this through.' 'Sorry. Yeah.' 'You're using the pen as the car.' 'Yes.' 'You said, the car's facing' - sorry. The question, 'The car's facing towards you?' Answer: 'Yes.'?-- Yes.

Okay. And this question, 'And you've said that the lady got out on the left-hand side of the car. That's what - do you agree that's what you've just illustrated?' Your answer, 'And' - sorry – 'Yes. And I've just messed that up, too.'?-- Yes.

All right. Now, it might have been a little disjointed, but do you recall that type of questioning and that answers - those answers-----?-- Yes.

-----you gave? I'm reading from the transcript-----?-- Yep.

-----and the Prosecutor here's got that, too. And the questioner then went on, 'Do you say it was in fact something else?' and your answer was, 'No. I was - yes, down in Melbourne. All my mates have left-hand drive cars.'?-- Yep.

Is that what you said? Okay. And then you apologised for-----?-- Yeah.

-----saying what you said was a mistake?-- Yes.

Okay. Now, you said a little earlier that a chap who used to live next door to you had a left-hand drive vehicle and drove it around-----?-- Steve.

-----all the time. At the committal hearing in October of '09, you said all your mates have left-hand drive cars?-- Yeah. It wasn't meant to come out as 'all my mates'.

> Okay. That was your explanation for making the mistake; wasn't it?-- Yeah, but it's still the same thing if my mate next door's got a left-hand drive car.
>
> Okay?-- I know a lot of people down in Melbourne with left-hand drive cars."

[8] Mr Hannah, who was 20 when he gave evidence, said that whilst he and Mr Johnson were looking at women walking past them "we saw a bang crash wallop…". He saw a motorbike slowly come down the road, heading towards the roundabout, and slowing down to make a left turn. The motorbike was on the correct side of the road. Mr Hannah saw a car coming at a "good speed" from the other side of the roundabout. It turned right, "American style", onto the incorrect side of the road as, or after it, drove through the roundabout. Mr Hannah saw the car collide with the motorbike. He gave the following evidence:

> "A lady hopped out of a driver's seat car pretty frantic, pretty shooken up, angry-----
>
> …
>
> Is that the red four-wheel drive you're talking about?-- Yes.
>
> Yes?-- Pretty shooken up, pretty wild. Who wouldn't be? And some words were said and everything. Her husband was trying to calm her down.
>
> Where did he come from?-- Out of the passenger side of the car.
>
> Yes?-- And then came around, I think - I can't - I think he came around the front, took her over to the side near the units near that house, the units there.
>
> …
>
> All right?-- Yeah, calming her down and everything and everyone is messing around saying to the - everyone, 'Take his helmet off', 'Don't take his helmet off', 'Don't touch him', 'Touch him.'
>
> All right. Did you hear any of the words said between the man and the woman who got out of the four-wheel drive?-- It was something like, 'Woops, I killed a person.'
>
> And who said that?-- The lady."

[9] Ms Cameron was working at the shop near the roundabout. After she heard a motorbike she heard a screech and saw a car drive on the wrong side of the road and then saw a body fly. At the time she was on the telephone talking to her mother. Her mother told her to ask her cousin, Ms Krystal Coupe, to call the ambulance. Ms Cameron went back into the shop and did so. She then stayed in the shop, from which she could see the scene of the collision. Ms Cameron gave evidence that she "saw a blonde woman go to the red four-wheel drive and to the back of the car and then to the boot and then I saw a lady with brown hair run across the street to grab a blanket." In cross-examination, Ms Cameron said that when she saw the man with brown hair at the driver's side of the car, the door was open. Ms Cameron did not know whether he was the driver or a concerned citizen trying to help out. She saw

one of his legs in the vehicle. She agreed that this was probably within five seconds of the sound of the accident. Ms Cameron agreed that it was the front driver's side door which was open. She gave the following evidence:

> "Do you think that from the timing, the sound of the accident and when you saw this person who you think is a male, leg inside the driver's door, that that must have been the driver?—I'm not quite sure. I couldn't tell you either way.
>
> All right?-- There was a lot of people around at that time, because everybody from the park and the units rushed.
>
> Well they would've taken a few seconds to get there as well wouldn't they at least?-- Everybody was swarmed everywhere by the time I told Krystal.
>
> I fully understand, but what you're talking about really is but a few seconds after the sound of the accident?-- Mmm.
>
> Is a person who, you're rally [sic] saying, as far as you're concerned was a male at the driver's door-----?-- Mmm.
>
> -----with his foot - sorry - with his leg inside the vehicle?-- Yeah.
>
> That's what you're really saying, isn't it?-- Yes."

[10] Ms Coupe, was working as a shop assistant at the shop at the time of the accident. She vaguely recalled hearing tyres squeal and that her cousin then yelled out that somebody had been hit on a bike. When she ran out to the scene, she saw the car on an angle on the wrong side of the road and the smashed motorbike with the man lying on the side of the footpath. When she asked whether "the drivers" of the car were okay, a blonde haired lady in denim jeans and white top, who was sitting at the back of a block of units nearby, said, "Do you have a problem; do you want a go?". She later saw the same lady in the back of the police car, kicking, screaming, and upset.

[11] Mr Bowe gave evidence that he was standing on the footpath near the shop when he noticed a motorbike riding on Moreton Terrace towards the roundabout. The motorbike was in the centre of the correct lane. He saw a car drive around the roundabout into Moreton Terrace and onto the wrong side of the road, straight into the motorbike. The car then reversed some eight to 10 feet off the motorbike. He went to help the rider and did not pay any attention to the driver of the car. Subsequently, he saw a lady speaking to the young girl who worked in the fish and chip shop in what seemed like a heated discussion. He heard the lady say, "It wasn't my fault. He came out of nowhere." In cross-examination Mr Bowe agreed that no statement to that effect was included in the account he gave to the police 14 months earlier (about 11 months after the accident). He had first remembered those words in the last few months before the trial.

[12] Mr Korhecz gave evidence that after hearing the sound of a crash he saw a car on the wrong side of the road and the rider of the motorbike in the gutter. He saw a male and a female get out of the car. He was not aware of who was behind the steering wheel and could not say who was driving. He heard an argument between them but not what was said.

[13] Four police officers gave evidence to the effect that, at the scene of the accident, again when Mr Ball and the appellant were taken to the police station in a police vehicle, and also on a later occasion, Mr Ball told police that he had been driving and the appellant denied that she had been driving. Constable Woodman gave evidence that the appellant was argumentative, aggressive and agitated when told that both she and Mr Ball were to be detained. She "didn't understand why she had to be breath-tested". She kept repeating "I wasn't driving". Constable Seddon gave evidence that the appellant repeated over and over again the words to the effect of "I haven't done anything. I didn't do anything". She screamed, "I wasn't even driving". Constable Johnson gave evidence to the same effect. She heard Mr Ball repeatedly say that he was the driver and the appellant repeatedly say that she was not the driver. Sergeant Price heard Mr Ball say the same thing on a number of occasions.

[14] Sergeant Price gave evidence that he obtained CCTV footage from the nearby service station which included images of a car. Sergeant Price had the footage enhanced "to give the best picture of a red four-wheel drive". The CCTV footage shows a car reversing out of a carpark and driving out of the service station towards the roundabout. Sergeant Price gave evidence that the part of the footage in which the car is seen to reverse out of the carpark and drive out of the service station was "…the best enhancement of the CCTV footage that was available…". In cross-examination, Sergeant Price gave evidence that he had viewed the CCTV footage "…on our systems in the electronic recording system in police headquarters. They've got specialised computers there and it does show a little bit clearer, but not much clearer than what's on there." He was still unable to determine from the CCTV footage which person was driving the car when it left the service station; whilst there were "…probably more pixels…" it was "…not much clearer…", he "…still can't clearly see", and "…it doesn't show up anything in that area any better than what that [the exhibit tendered at trial] is". It is apparent from the evidence and addresses at the trial that the CCTV footage in evidence shed no light upon the question whether the appellant or Mr Ball was the driver.

[15] Breath analysis certificates tendered in the Crown case recorded that the appellant's blood alcohol concentration at 4.46 pm (nearly two and a half hours after the accident) was .253 and Mr Ball's blood alcohol concentration at 4.22 pm (two hours after the accident) was .197. Dr Griffin, a medical practitioner with relevant expertise in the effect of alcohol, expressed the opinions that the blood alcohol concentration of the appellant and Mr Ball at about 2.20 pm would have exceeded .2, and that at a blood alcohol concentration in excess of .15, all aspects of a person's functioning, including the ability to control a car, would be severely affected.

[16] The appellant did not give evidence. She called evidence from Mr Ball. Mr Ball was warned that his evidence might incriminate him and he confirmed that he had obtained independent legal advice. Mr Ball then gave evidence that he was the driver of the car at the time of the accident. He gave evidence that he had then been in a relationship with the appellant for three months. He had driven the appellant in her red four-wheel drive car to a carpark at a shop. (The shop was at the service station where the CCTV images were later recorded). They later went to the Beachmere Tavern, where they had breakfast and consumed liquor. At 1.30 pm they left the Tavern and they returned at about 2.00 pm. Mr Ball then had another drink. They then left the Tavern and got into the car. He had the car keys and

started driving them home. He gave evidence that he turned right at the roundabout and collided with the motorbike. After the accident he got out of the car and embraced the appellant. He said words to the effect, "[w]hat have I done? What's happened?" He and the appellant then sat near some units until police arrived. When the police arrived Mr Ball told them that he was driver. He repeated that at the police station. He again confirmed that he was the driver in a recorded police interview on October 2010, which Mr Ball attended with his solicitor. Mr Ball gave evidence that his solicitor advised him that this was a serious charge and that by making admissions he exposed himself to eight years imprisonment.

New evidence

[17] Counsel for the appellant, who had not appeared at the trial, informed the Court that he had viewed the CCTV footage from the service station on the computers at police headquarters. He submitted that the Court might conclude that the images were noticeably clearer when viewed on that equipment than when viewed using the equipment available in the District Court. It was submitted that the jury was thus deprived of the best evidence, and that the Court should form its own opinion about the significance of this evidence by viewing the CCTV footage using the equipment in police headquarters. The appellant's counsel submitted that the Court might find that the CCTV images threw doubt upon the Crown case that the appellant was the driver.

[18] The respondent did not oppose the application that the Court view the CCTV images itself. After being advised that the equipment available in the Court could not improve the clarity of the CCTV footage shown to the jury, the Court viewed the CCTV footage using the equipment at police headquarters.

[19] That exercise confirmed the accuracy of the evidence given by Sergeant Price in cross-examination. The CCTV footage did not shed any light upon the identity of the driver. The quality of the images was too poor to make any reliable determination about identifying features, including the length of the driver's hair or the colour of the driver's clothing.

Consideration

[20] I will discuss those aspects of Mr Johnson's evidence which were emphasised in the appellant's submissions:

(a) Mr Johnson gave conflicting evidence about distances between himself and the car and motorcycle and he gave an obviously incorrect estimate of a dimension in the court room. He volunteered in cross-examination about the distances that, "I don't know distance. I could take you to exactly where I was standing if I was standing there."

In the absence of any suggestion that Mr Johnson was not close enough to have the clear view of the appellant and Mr Ball of which he gave evidence, the quality of his estimates of distances is not significant.

(b) Mr Johnson agreed in cross-examination that at the committal hearing he had twice indicated that the lady got out of the passenger's side of the vehicle.

When that was put to Mr Johnson, he answered that he had made a mistake and "[b]oth times I fixed it up too." He attributed his mistake to his familiarity with a left hand drive car in which he had been driven. There was no evidence that Mr Hannah was in a position to know whether that was the case. It was open to the jury to regard Mr Johnson's explanation as reasonable and credible.

(c) Mr Johnson agreed that he gave evidence at the committal hearing that, after the lady got out of the car, she "walked around the back", and that he meant that she walked around the back "of the units". Because the car was on the incorrect side of the road, the person in the passenger seat could readily step onto the footpath without walking either in front of or behind the car. The appellant submitted that the appellant would only have had to walk behind the car if she had got out of the passenger side.

Whatever meaning was to be attributed to this evidence, it did not detract from Mr Johnson's clear evidence that he saw the lady leave the car through the driver's door and he saw the man leave the car through the front passenger door. Furthermore, Miss Cameron gave evidence in cross-examination that she "saw a blonde woman go to the red four-wheel drive and to the back of the car and then to the boot …". If Ms Cameron saw the appellant going to the back of the car, it may be that Mr Johnson saw her do that after she had left the car through the driver's door.

(d) The cross-examination established that Mr Johnson had assumed, rather than seen, that the car had "cut" the roundabout.

That did not necessarily affect the reliability of his evidence about the identity of the driver. His acknowledgement that he didn't know how the accident happened and his concessions that he had not seen the car on or near the roundabout might reasonably have been treated by the jury as indications of honesty and reliability.

[21] Mr Hannah also assumed, in his evidence-in-chief, that the car had turned right "American style" at the roundabout. The jury no doubt took into account that aspect of his evidence and its coincidence with Mr Johnson's evidence, but that did not require the jury to harbour a reasonable doubt about their evidence concerning the identification of the driver. In cross-examination Mr Hannah denied the possibility of a mistake in his evidence that it was the woman who got out of the driver's side of the car.

[22] The appellant made the point that Mr Johnson agreed in evidence that the lady had walked behind the car whereas Mr Hannah gave evidence that "I think he [Mr Ball] came around the front, took her over to the side near the units near that house …". There was no necessary inconsistency between those accounts. The events might have occurred at different times.

[23] The appellant submitted that Mr Hannah's evidence that the lady had admitted killing the motorbike rider was unreliable, particularly in light of his evidence at the committal hearing. In cross-examination Mr Hannah first said that he did not hear the lady say and repeat, "I didn't do it", but when his evidence at the committal was quoted to him, he agreed that he had given evidence that the lady said "I didn't do

it. I didn't do it", and then, subsequently, she said, "[o]ops I just killed another person." In this context Mr Hannah also volunteered that he had a "really bad memory". The jury might have concluded that Mr Hannah's version of the admission in his evidence at the trial did not substantially depart from the evidence he had given at the committal. However that issue was resolved, it was not of such importance as to require the jury to doubt Mr Hannah's evidence identifying the woman as the driver.

[24] The appellant also relied upon inconsistencies between the evidence of Mr Hannah and Mr Johnson upon the topic of whether one of them had made a phone call or sent a text message before, or at about, the time of the collision. Minor discrepancies of that kind are to be expected. They had no substantial bearing upon the reliability of the evidence of either witness that the woman got out of the driver's side door and the man got out of the passenger's side door.

[25] As to Miss Cameron's evidence that she saw a man at the driver's door with one foot inside the car, although she agreed this probably happened within five seconds of the accident, she qualified that by her evidence that, "I'm not quite sure about the time …". Furthermore, she said in evidence that she did not know whether the man was the driver or a concerned citizen attempting to help. It is possible that Mr Ball, having left the car from the passenger's side, had moved around to the driver's side. Miss Cameron might also have underestimated the time. She said that she saw the man near the driver's side at the time when she asked Ms Coupe to help and by then "[e]verybody was swarmed everywhere…". That suggests that there had been time for the appellant and Mr Ball to move away from the car and then for Mr Ball, or a bystander, to move to the driver's side door.

[26] In relation to Mr Bowe, his delay in mentioning his recollection that the appellant denied being at fault in the accident and claimed that the motorcycle rider "came out of nowhere" justified treating his evidence with caution. But the jury might, nonetheless, have accepted the evidence. If the jury rejected it, that would not have borne upon the reliability of Mr Johnson's and Mr Hannah's evidence.

[27] The appellant submitted that the evidence that the appellant behaved argumentatively, aggressively, and in an upset way at the scene was consistent with her not having been the driver of the car and having been unjustly detained by police, whereas Mr Ball's calm demeanour was consistent with him being the driver and in shock. The significance of these emotional reactions was for the jury to consider, but the jury might reasonably have placed more weight upon the apparently persuasive evidence of the independent witnesses.

[28] The jury was obliged to take into account Mr Ball's evidence in determining whether the appellant's guilt had been proved beyond reasonable doubt, but there is no reason to believe that the jury did not conscientiously fulfil that task. The verdict reveals that the jury did not accept Mr Ball's evidence.

[29] In my opinion that course was open to the jury. Mr Ball's evidence fell to be assessed in the context of the eyewitness evidence and the evidence of the appellant's implicit admissions that she was the driver. The jury was also entitled to take into account that Mr Ball was in a relationship with the appellant. Furthermore, Mr Ball agreed in cross-examination that his account was not communicated to the police until after the committal hearing. His evidence-in-chief

also lacked the advantage of persuasive detail. When asked what he remembered of the accident Mr Ball said "I started just driving home, turned the roundabout and out of nowhere the accident just happened". When asked whether Mr Ball recalled what happened immediately after the accident he said, "[n]o, not really". He added that he asked the appellant what he had done and what had happened, and then they just went and sat at the nearby flats on the side of the road to wait for the police to arrive.

[30] The effect of alcohol might explain the absence of detail, but the jury was nonetheless entitled to regard Mr Ball's evidence as unconvincing. The jury could also be satisfied that the appellant and Mr Ball were not too drunk to make and maintain their simple assertions that it was Mr Ball rather than the appellant who was the driver. Mr Ball's account was also inconsistent with Mr Bowe's evidence that Mr Ball had grabbed the shoulder of the deceased bike rider whilst he lay on the road and asked whether he was alright. The respondent also pointed to the inconsistency between Mr Ball's evidence-in-chief that he had the keys to the car when he and the appellant returned to it after they left the hotel and his evidence in cross-examination that the keys were in the appellant's bag.

[31] The Crown case that the appellant was the driver derived powerful support from the eyewitness evidence of Mr Johnson and Mr Hannah. The jury might have found some further support for that case in Mr Hannah's and Mr Bowe's evidence of an implicit admission by the appellant that she was the driver. There was no criticism of the trial judge's directions or of the summing up generally. Notwithstanding Mr Ball's evidence to the contrary, I am persuaded that, upon the whole of the evidence, it was reasonably open to this properly directed jury, who had the advantage of seeing and hearing the evidence unfold as it was given, to be satisfied beyond reasonable doubt that the appellant was the driver and was guilty of the offence.

Proposed order

[32] I would dismiss the appeal.

[33] **WHITE JA:** This appeal has raised an interesting factual conundrum – the assessment of evidence when the person charged with a criminal offence implicates another and that other gives sworn evidence that he is the offender. In such a case the approach on appeal is no different from any other when the contention is that the verdict of the jury is unreasonable.[2] The appellate court must make "an independent assessment of the evidence both as it its sufficiency and its quality".[3]

[34] As Fraser JA, with whose analysis of the evidence I respectfully agree, has demonstrated, the evidence of the two eyewitnesses, Messrs Johnson and Hannah, that each saw the appellant leave the driver's seat of the car immediately following the collision with the deceased's motorcycle, strongly supported the prosecution case. No other evidence, apart from that of the would be driver, contradicted that evidence.

[35] The quality of the CCTV footage which the court was able to view was such that no determination could be made about the identity of the driver as the car left the petrol

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2 *Criminal Code*, s 668E(1).

3 *Morris v The Queen* (1987) 163 CLR 454 at 473; [1987] HCA 50 per Deane, Gaudron and Toohey JJ quoted with approval by French CJ, Gummow and Hayne JJ in *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13 at [14].

station, keeping in mind the evidence of the witnesses about what the appellant and her companion were wearing on the day and what the jury might have understood from seeing both of them in the court room.

[36] Accordingly, the evidence was both sufficient and of a quality to conclude that the jury could be satisfied beyond reasonable doubt that the appellant was guilty.

[37] I agree with Fraser JA's reasons and the order which he proposes.

[38] **McMEEKIN J:** I have had the advantage of reading the reasons of both Fraser and White JJA.

[39] I record that I too have had the advantage of viewing the CCTV footage and I too found it unhelpful. There was, as Fraser JA has pointed out, a reason why an innocent man may have wished to accept the blame for this offence. And against his evidence there was the evidence of two eyewitnesses the accuracy of whose testimony the jury were in the best position to assess.

[40] I agree with the reasons expressed by Fraser and White JJA and with the orders proposed by Fraser JA.