SUPREME COURT OF QUEENSLAND

CITATION:	*R v Davidson* [2014] QCA 348
PARTIES:	**R** **v** **DAVIDSON, Alan** (appellant/applicant)
FILE NO/S:	CA No 301 of 2013 DC No 32 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2014
JUDGES:	Fraser and Morrison JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant was found guilty after trial of assault occasioning bodily harm and grievous bodily harm – where the Crown contended the appellant punched and repeatedly kicked the complainant – where the appellant contended the complainant was aggressive and had a weapon, the assault occasioning bodily harm was done in self defence, and the grievous bodily harm was from the respondent causing herself to fall down stairs – where the appellant seeks to adduce new evidence to show the complainant's injuries did not amount to grievous bodily harm, and to show that she was an aggressive and regularly intoxicated person – whether having regard to all the evidence, including the new evidence, the guilty verdicts were reasonably open CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where defence counsel informed the trial judge it conceded the complainant's injuries amounted to grievous bodily harm, and that the issue

at trial was how those injuries were caused – where the jury was directed that the parties agreed the injuries were grievous bodily harm – whether the jury was misdirected about an element of grievous bodily harm, causing a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant received a head sentence of five years imprisonment with parole eligibility after serving two and a half years – where the appellant argues the trial judge mischaracterised the complainant's injuries – where the appellant argues the offence is better understood as an excessive response to the complainant's provocative conduct – whether the sentence was manifestly excessive

COUNSEL: C W Heaton QC for the appellant/applicant
V A Loury for the respondent

SOLICITORS: Robertson O'Gorman Solicitors for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant was found guilty by a jury following a three day trial in the District Court of assault occasioning bodily harm (count 1) and grievous bodily harm (count 2). He was sentenced to two years imprisonment on count 1 and five years imprisonment on count 2. A parole eligibility date was fixed on 6 May 2016, after the appellant will have served two and a half years in prison. The appellant has appealed against his conviction and he has applied for leave to appeal against sentence.

Appeal against conviction

[2] The grounds of appeal against conviction are that (1) having regard to all the evidence, including the new evidence, doubt about the guilt of Mr Davidson is raised such that the guilty verdicts cannot stand and (2) the learned trial judge misdirected the jury in relation to the element of grievous bodily harm causing a miscarriage of justice.

[3] The first ground of appeal replaced an abandoned ground that the conviction should be set aside because the verdict was unreasonable and could not be supported having regard to the evidence.

The evidence at the trial

[4] The charges against the appellant were based upon the complainant's version of events on 6 November 2011 at the home she shared with the appellant at Moranbah. They had been in a relationship for about nine years and had three children. On 6 November 2011 they celebrated the appellant's birthday at their home with one of the appellant's friends, Mr Gibson. The complainant gave evidence that it could have been between 5.00 and 6.00 pm when Gibson arrived at the house. By the time he arrived the complainant might have been drinking the third of her six rums. She said that she had "been known to drink a six pack of them and…it's like…binge drinking"

and she "wouldn't mind another six pack…".[1] The complainant referred to her medical advice to be careful about anti-depressant medication she was taking because it could double the impact of the alcohol, but she said that she was "fine" and "wasn't falling over or anything like that".[2] The complainant thought that the appellant had consumed four or five drinks out of a big bottle of homebrew rum by the time Gibson arrived. After he arrived the three of them sat around a table drinking. The complainant said that over the next couple of hours she finished her six rums. The appellant seemed to be getting drunk. The conversation turned to sex. After some discussion of intimate matters, the appellant suggested to the complainant that she engage in a particular sexual activity with Gibson. The complainant was a bit shocked but agreed to do it because it was the appellant's birthday. In response to a question whether she was intoxicated at this time, the complainant responded that she could walk and talk and knew what was happening. She knew what the appellant was asking her to do and was prepared to let him watch her engage in sexual activity with Gibson.

[5] The three of them got into the shower together and the complainant commenced to engage in the suggested sexual activity with Gibson. The complainant became upset when she saw the appellant perform a sexual act upon Gibson. The complainant accused the appellant of being homosexual and, after further words were exchanged, the appellant appeared to be angry with the complainant. She left the shower. About 10 minutes later after she had lit a cigarette and had a drink, she notice that the shower was not running. She went up the first flight of stairs and found that the appellant and Gibson were not in the kitchen or in the lounge room. From there she went up the next flight of stairs and discovered that they were in the main bedroom with the door locked. The complainant knocked on the door and asked to be let in and the appellant told her to go away. The complainant was initially quite calm but after a while began to bang very hard on the door with her fist demanding to be let in. She started crying and became upset. In the end she was screaming and yelling. This woke her children up, two of whom started knocking on the door with her. At that point the complainant stopped banging and screaming. The door opened after she had screamed for about 15 minutes. The appellant came out naked and put the children back in their beds.

[6] The complainant went back down the stairs to the kitchen. She felt hurt and shocked but she did not feel intoxicated. She was not stumbling and she had all of her balance. She did not fall down the stairs. After a short time the appellant came down stairs and felled the complainant with a very hard punch to her head. The appellant started kicking her with his bare feet, telling her that she was no good, nothing, and worthless, whilst the complainant begged him to stop. The appellant kicked the complainant mainly in her back and ribs. She lay in a foetal position with her arms crossed across her chest in an attempt to protect her ribs. She felt that the kicking lasted for a long time. It felt like an hour. She stopped begging the appellant to stop after a while because she could not talk. She found it hard to breathe and she was in much pain all over. The appellant circled her taking turns to kick her from the back and from the front. She passed out a couple of times. The kicks were very hard. The complainant identified a bundle of photographs taken on 12 November 2011 which showed extensive bruising on her body, including on her face. Whilst the complainant was lying on the floor in the kitchen and the appellant had started kicking her, the complainant saw Gibson from the corner of her eyes running down the stairs out of the house.

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1 Transcript, 19 June 2014, at 1-7; AB 21.

2 Transcript, 19 June 2014, at 1-7; AB 21.

[7] After the kicking stopped the complainant continued to lie on the floor for about 10 or 15 minutes. She could not hear anything. She somehow found a way to get up and get to her mobile phone to ring for help. Ms Strother answered the phone when she rang. The complainant told her that she needed help and to get to the hospital. Ms Strother said that she would not come. The complainant rang Gibson and asked him to come back and take her to the hospital. The complainant told him that the appellant was not there. Gibson arrived and took the complainant to the hospital.

[8] The complainant rang the appellant on 7 November 2011 when she was in hospital at Moranbah and asked whether the children were alright. The appellant asked her where she was and she told him that she at the hospital. The appellant asked why she was at the hospital and she hung up on him. She spoke to the appellant again later that day and told him that the police were involved. She said that she had not told the police anything. The complainant gave evidence of a previous occasion in 2005 when the appellant punched and kicked her in the ribs and her vagina repeatedly, as a result of which she went to hospital with a bruised hip, rib and shoulder. The Magistrates Court made a Domestic Violence Order naming the appellant as the respondent and the complainant as the aggrieved victim.

[9] In cross-examination the complainant denied that she had previously sustained an injury from passing out as a result of drinking. She agreed that about a month or six weeks before the night of the appellant's birthday she had been to a party at Ms Lewer's house, that those at the party had gone out drinking, and that they had afterwards returned to that house. The complainant denied that when her demands for more alcohol were not met she became aggressive towards Ms Lewer and her daughter and women present at the house locked themselves in a room. The complainant agreed that Ms Lewer's daughter had told her to leave. She denied that she had started screaming a lot. She agreed that the police were called. The complainant agreed that the police had offered or given her a lift home. She agreed that she was intoxicated but said that she was still fine; she explained that she was still talking and walking. The complainant denied that there was an occasion when she had stayed out all night and had to organise the appellant to pick her up and she denied that she was then highly intoxicated. The complainant denied that she was an alcoholic. She denied that she downplayed the amount of alcohol she consumed. She agreed that after the death of her mother she had turned into a binge drinker and had gone into rehabilitation at the age of 29. The complainant denied that on 6 November 2011 she was drinking very heavily. She explained that she had three children to look after and an alcoholic could not do that. The complainant denied that she had attempted to portray herself as a "sexual babe in the woods" and that she was in truth "sexually adventurous". She volunteered that the only reason she did what she did for the appellant was because she wanted to please him.[3]

[10] The complainant denied that she was the one who started the discussion about intimate information with Mr Gibson and maintained her account that the appellant initiated that discussion. She agreed that she was willing to go into the shower with the appellant and Gibson. She agreed that she had performed a particular sexual act on Gibson. The complainant agreed with some other details about the sexual activity in the shower which were put to her by defence counsel and disagreed with others. She denied that she had left the bathroom with Gibson and sat with him and had a drink where they had previously been drinking. She maintained her account that she found the appellant and Gibson in the bedroom upstairs. The complainant agreed with suggestions that when the appellant was with Gibson in the bedroom upstairs she was outside

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[3] Transcript, 5 November 2013, at 1-52; AB 66.

banging on the door and screaming. In the course of cross-examination about the complainant's evidence of the appellant's attack upon her, the complainant said that she felt "unbearable pain" whilst he kicked her.[4] She said that the kicking got a lot worse after Gibson left, and that he left more towards the commencement of the kicking.

[11] The complainant denied suggestions in cross-examination that: she had opened the bedroom door with keys; she had a knife in her right hand; she cut the appellant on the face; she got into the room; the appellant had pushed her out of the room; the appellant punched her on the right arm where she was holding a knife; she had continued to throw herself against the door; and the appellant had grabbed her from behind and pushed her outside the bedroom. The complainant denied that she had made a hole in the bathroom door and said that the appellant put many holes in the walls in the houses over the years. The complainant denied that: the appellant came out of the bedroom and fell on top of her; she was hit again on the right arm where she had the knife; and the appellant tripped and fell on top of her outside the bedroom door. She denied that she had ever been on the floor outside the bedroom. She denied that the last thing that happened outside the bedroom was that the appellant had hit her with a hammer fist to her right arm. She suggested that the interaction had all occurred in the kitchen. The complainant denied that she had fallen down the stairs from the kitchen to the patio area where they had been drinking and broken a rib and punctured her lung. She denied that she might have suffered the injuries sustained on her arm when she fell down the stairs or when she was grabbed by the appellant in circumstances in which she was holding a knife in her right hand.

[12] Gibson gave evidence that after he had been drinking at a hotel after work for two or two and a half hours he went to the appellant's house in response to an invitation by the complainant to have a couple of drinks for the appellant's birthday. He took at least six pre-mixed cans or stubbies of rum and coke. He was well and truly inebriated when he arrived. He drank in the downstairs area with the appellant and the complainant over an hour or so and finished all of the alcohol he had brought. Gibson recalled that the appellant suggested that the three of them get involved together, with the complainant performing sexual acts on Gibson. They ended up in the shower naked. Gibson said that he could not particularly remember what happened. He liked to block things out things with which he was not comfortable. Gibson recalled the three of them leaving the shower and going into the house to the master bedroom, where the complainant left the appellant and Gibson alone. The complainant was yelling out and banging on the door telling the appellant to open the door and to let her in. She was screaming and yelling for about 10 or 15 minutes. The appellant left the room two or three times to talk to the complainant to calm her down. At other times he was angry with her. Gibson thought that the complainant was wanting to get into the room.

[13] The last time that the appellant left the room to talk to the complainant she was outside not making a lot of noise. After an altercation between the appellant and the complainant, Gibson thought that he heard the complainant moaning as though she was in pain. He saw the complainant lying on the ground and the appellant standing over her with a foot on either side of the complainant's leg. The complainant was moaning as though she was in constant pain. Gibson, who described himself as a coward and not liking altercations, ran out of the house. He thought he ran over the top of the complainant who was lying in the hallway. He went down to the garage and drove home. He did not see the appellant as he left the house. Gibson later found that the complainant had left messages on his phone. He rang her back and at her request

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4 Transcript, 5 November 2013, at 1-58; AB 72.

returned and took the complainant to the hospital. On the following day Gibson received a text message from the appellant in the afternoon telling him to say nothing and that he might be questioned.

[14] In cross-examination Gibson agreed that the complainant sounded quite aggressive when she was yelling outside the bedroom door whilst Gibson was in the room with the appellant. He agreed that he did not see the appellant punch or kick the complainant. He added that he did see movement but could not be sure whether or not the appellant was stomping on the complainant or just re-positioning himself. He confirmed that when he left the house the complainant was in the hallway outside the bedroom and the appellant was not visible. It was put to Gibson that when he left, the appellant was not kicking the complainant on the floor of the kitchen. He responded, "…[n]ot that I'm aware of. No."[5] From his recollection the altercation was upstairs outside the bedroom. He subsequently agreed that the complainant was not in the kitchen. Gibson denied that he and the complainant had sat down in the patio area for a short time after they were in the shower before going upstairs.

[15] A neighbour, Mr Mackie, gave evidence that on 6 November 2011 he saw the complainant and the appellant at around 5.00 or 6.00 pm. They were drinking. The appellant was not drunk and the complainant appeared a bit drunker. Subsequently a friend appeared with a six pack and the appellant said that it was his birthday. The three of them then went to the garage to drink. Later that night Mackie heard what sounded like frustrated screams in a woman's voice. He heard banging which sounded like doors slamming and the screams got a little bit louder before dying off. Mrs Mackie gave evidence to similar effect. She also heard really loud bangs which sounded to her like somebody hitting a wall.

[16] A police officer, Pownell, gave evidence that he spoke to the appellant on the afternoon of 7 November 2011. Pownell told the appellant that he understood there had been an incident between the appellant and the complainant on the previous day. The appellant responded, "Nope". Pownell told the appellant that the complainant was being treated for serious injuries in Mackay. The appellant said that he did not know what had happened and had gone to bed early the previous night. A recording of the conversation was admitted in evidence and played to the jury.

[17] Ms Strother gave evidence that at about 11.15 pm on 6 November 2011 she received a call from the complainant but could not understand what she was saying because she was slurring her words. Ms Strother could not contact her ex-husband so she sent a text message to the complainant and went to bed. During the night she missed a number of phone calls from the complainant. The next day the appellant told Ms Strother that when he woke up the complainant was not home so he had rung and found out that she was in hospital.

[18] In cross-examination Ms Strother agreed that over the previous 12 months she had observed that the complainant was a heavy drinker who drank every day and got very drunk. Ms Strother gave evidence about the party at Ms Lewer's house in October 2011. She agreed that the complainant was aggressive. She said that she had been told about the complainant being aggressive to the point that some people locked themselves in the bedroom to get away from her, but Ms Strother was not there at that time. In the complainant's phone call on 6 November she did not tell Ms Strother that she had been assaulted by anyone. On the next day in hospital the complainant did not tell Ms Strother how she received her injuries.

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5 Transcript 6 November 2013 at p 104.

[19] Dr Scholtz gave evidence that he had been practising medicine since 1981 and had been the medical superintendent part-time at the Moranbah Hospital since 1997. He examined the complainant from 1.05 am on 7 November. The complainant had widespread injuries to her scalp, face, both upper limbs, both lower limbs and trunk. She had severe bruising with multiple bruises all over her body. She had blood in her urine and signs of an acute abdomen. Dr Scholtz suspected that the complainant had a few rib fractures and reduced air entry into her lungs, which was the possibility of a pneumothorax (a collapsed lung).

[20] Dr Scholtz said that if someone had a pneumothorax the pain would be very discomforting and debilitating, it would affect most people in a very profound way, the person would feel short of breath, and the ability to speak would more than likely be affected if it was a significant pneumothorax. Dr Scholtz said that chest x-rays "showed that she did have a pneumothorax which necessitated an intercostal drain, which I inserted, and due to the nature of her injuries, she was then transferred to Mackay Base Hospital." The complainant had suffered rib fractures which punctured her lung, which "led to air escaping into the chest cavity which, because of the pressure, then collapses the lung, and so that lung doesn't function in terms of breathing and giving oxygen to the patient."[6] The pneumothorax was life threatening. With one lung a person functions less well, and if left untreated it could lead to infection, blood clots, and a "whole raft of complication[s]".[7] The complainant was treated with an intercostal drain, which was a tube put in between the ribs into the chest cavity and connected to a bowl of water. Excess pressure in the chest cavity drained out through the tube and the water acted as a one-way valve to prevent air going back into the chest cavity. Dr Scholtz expressed the opinion that if the complainant had not been treated she would have lost at least 50 to 70 per cent of the function of that lung. The complainant's injuries amounted to grievous bodily harm because they were life threatening and, if untreated, would be likely to cause a permanent injury to the complainant's health; the nature of the injury affecting one lung, together with other potential complications arising from that, could lead to mortality.

[21] There was no objection to the prosecutor adducing hearsay evidence from Dr Scholtz about the complainant's transfer to the Mackay Base Hospital on the morning of 7 November and what was found at that hospital. The CT scan at Mackay Base Hospital confirmed what Dr Scholtz had seen on the X-rays, that the complainant had fractured ribs. The reason for the scan in Mackay was to investigate the chest and the abdomen to make sure there was no organ damage or life threatening conditions in the abdomen. The CT scan revealed that the complainant had a fracture to the lumbar vertebrae on the right side transverse process (in the lower lumbar area, more or less where the kidneys are). The complainant was treated at the Mackay Base Hospital until being discharged on 15 November. The complainant was treated conservatively at Mackay Base Hospital, meaning that there was no active intervention, and when the time was right the intercostal tube was removed.

[22] Dr Scholtz expressed the opinion that the injuries the complainant sustained were consistent with the history she gave of having been kicked multiple times by a person. Significant force would have been required to fracture the ribs. A kick to the ribs would be sufficient force. To fracture the lumbar area would also require significant force. Dr Scholtz was shown a photographic exhibit of stairs and expressed the opinion that the injuries were not consistent with someone falling down a set of

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6 Transcript, 5 November 2013, at 1-41; AB 55.

7 Transcript, 5 November 2013, at 1-14; AB 55.

stairs of that length. The injuries sustained by the complainant were too widespread and severe to have been caused by falling down that flight of stairs. Significantly severe and sustained force would have been required to cause the complainant's bruises. A person falling on the complainant would not have caused the extent of the bruising sustained by the complainant.

[23] In cross-examination defence counsel showed Dr Scholtz a photographic exhibit depicting a different set of stairs to the ones shown to him by the prosecutor. These stairs appeared to have a sharper edge. Dr Scholtz agreed that he could not rule out a rib fracture resulting from a fall down those stairs on to the concrete below. Defence counsel did not cross-examine Dr Scholtz upon his evidence that the injuries sustained by the complainant amounted to grievous bodily harm.

[24] The appellant gave evidence in his defence. He denied having punched the complainant or having any interaction of a physical nature like that in the kitchen of their house on 6 November 2011. The appellant said that it was the complainant who had initiated discussion about sexual matters. He agreed that he had suggested that the complainant engage in sexual activity with Gibson. During the sexual activity in the shower the complainant became aggressive and abusive. The appellant left the bathroom and went upstairs to the bedroom. After putting on a pair of shorts the appellant went back downstairs. Gibson and the complainant were sitting at the table in an area a few steps down from the kitchen. The appellant asked Gibson to go back up to the bedroom with him. When they were sitting on the bed together the complainant started to smash the door and scream abuse at the appellant. After attempting to calm the complainant down, the appellant heard one of his children speak and he heard the complainant abusing the appellant to the child. The appellant opened the door a little and encouraged the child to return to bed. The appellant shut the door. He heard keys in the lock. The complainant started to abuse him again and threaten to cut his throat. Whilst the appellant was holding the door handle, the appellant saw the complainant's arm come through. She was holding a knife. The appellant referred to a photographic exhibit which showed a mark on the left hand side of his face and said that the knife glanced his face as he attempted to get out of the way. The appellant hit the complainant's right arm between her shoulder and her elbow to try to knock the knife out of her hand. He grabbed her in the same area and attempted to push her out through the doorway while she was pushing back on the door. He lost his balance. The complainant came through the door so he grabbed her other shoulder and tried to push her out of the room. The complainant kicked a hole in the bathroom door. The appellant pushed back through the doorway and fell on top of the complainant after he clipped the door jamb with his foot. The appellant was trying to avoid the complainant getting him with the knife. As he got back onto his feet, he hit the complainant's right arm with a hammer fist because he did not know if the complainant still had the knife. The appellant then told the complainant to get out of his house and he went down stairs and into the lounge room.

[25] The appellant subsequently heard someone coming down the stairs and he saw a leg. He heard whoever it was go towards the kitchen. The appellant waited briefly and went back up the stairs into the main bedroom. He left the bedroom to look down the staircase. Everything was quiet and he returned to the bedroom. After about 10 or 15 minutes he heard a loud thumping or banging noise around the staircase. He looked down the staircase towards the lounge room and the kitchen but there was nothing there. He walked down and looked down the stairs that lead to the entertainment area. The complainant was lying on her back with her head to one side of the stairs.

She was moaning. The appellant saw her roll over on to her side. The complainant mumbled something. The appellant shook his head and abused the complainant. Because the complainant was still conscious, there was no sign of blood, and he was then not sympathetic towards her, he went back upstairs to bed.

[26] The appellant said that he rang the complainant at about 6.00 am the following morning. She told him that she was in hospital. The appellant asked her why and the complainant said that she was injured and had hurt herself. The appellant explained the text message he sent to Gibson as being about their sexual activities. He said there was no other meaning to the text.

[27] The appellant gave evidence that the complainant was a heavy drinker and she was drunk when he got home from work on his birthday. He denied that he had assaulted the complainant in 2005. He referred to another occasion when the complainant had been drinking and did not return home overnight.

[28] In cross-examination the appellant agreed that he was six feet eight inches and about 138 kilograms in weight, and that the complainant was small in comparison to him. The appellant agreed that he had not mentioned to police that the complainant had nicked his face with a knife. He agreed that after the fight with the complainant he had gone downstairs into the lounge room leaving her in a hallway upstairs even though his children were upstairs and at that time he considered that the complainant was a schizophrenic with a knife. He did not check on his children because the complainant was always good with the children. He did not feel that she was going to behave as a schizophrenic towards the children. The appellant agreed that, on his evidence, his response to hearing the complainant moaning and groaning after she had tumbled down the stairs was to go back to bed. He said that was because of the knife and because he was not feeling sympathetic towards her.

[29] The appellant agreed that when he was talking to police, instead of asking how the complainant was he said that he guessed that he was being blamed for it. The appellant agreed that he had lied to police when he told them that he was in bed at 9.30 pm the night before because he had to get up early for work. He said that the reason why he did not tell police about the complainant using a knife, about the altercation in the hallway, and about him having seen the complainant at the bottom of the stairs after what he assumed was a fall, was that he was exercising his rights. The appellant agreed that he sent the text message to Gibson whilst he was with the police. He said that he sent it because he thought the police were going to ask Gibson questions about the night before. He denied that he sent the text message because he did not want Gibson to talk to the police about what the appellant did to the complainant. He said that it was because he did not want Gibson to say anything embarrassing about their sexual activities. The appellant had no idea how the complainant got the bruise in her eye, the bruise under her jaw, the bruise on the underside of her right arm, or the bruises on her back.

Assessment of the case at trial

[30] As was submitted for the appellant, the Crown case depended essentially upon the evidence of the complainant. Her credibility and reliability were in issue and the jury could not convict unless satisfied beyond reasonable doubt of the appellant's guilt notwithstanding his evidence. Nevertheless, the appellant did not contend, and it could not be accepted, that it was not reasonably open to the jury to be satisfied of

the appellant's guilt of both offences beyond reasonable doubt. Gibson did not support the appellant's evidence that the complainant was armed with a knife, an event which seems very unlikely to have passed unnoticed and unremarked upon at the time if it did occur. Gibson's evidence of seeing the complainant moaning and lying on the floor with the appellant standing over her whilst he ran out of the house was consistent with the complainant's evidence that she saw him run out of the house towards the start of the kicking. The nature and extent of the injuries suffered by the complainant were consistent with her evidence of the appellant's assaults upon her. Dr Scholtz's evidence about the difficulty of attributing the complainant's injuries to the events described by the appellant was consistent with the appellant's own inability to reconcile many of the complainant's injuries shown in the photographic exhibits with his evidence of what had occurred. Whilst the heightened emotions and frenetic activity at the house might explain some discrepancies in the evidence, there appears to be little force in the appellant's argument that this factor could explain this particular weakness in the appellant's detailed version of how the complainant sustained her numerous injuries. The appellant's explanation of how the complainant sustained her injuries, his explanation of his purpose in sending the text message to Gibson, and his explanation of why he lied to police about going to bed early, strain credulity.

[31] There was an inconsistency between the evidence of the complainant and the evidence of Gibson about the place in the house where the complainant was on the floor with the appellant standing over her, but Gibson expressed some uncertainty about his recollection and also a desire to forget events which made him feel uncomfortable. The appellant identified other minor inconsistencies in the evidence, particularly as between the complainant's evidence about precisely when the relevant events occurred and the evidence upon the same topic given by the Mackies and Ms Strother. It is commonplace for witnesses to give different accounts of the timing of events of this kind. In light of the fraught situation at the house and the extent and severity of the complainant's injuries, those inconsistencies did not require the jury to harbour a doubt about the reliability of the complainant's evidence of the offences. The same is true of points made by the appellant about the amount of alcohol consumed by the complainant and its effect upon her and of suggestions that she had downplayed the extent of her drinking. On the complainant's own evidence she must have consumed a good deal of alcohol, with its effect possibly aggravated by prescription drugs, and she had become very upset and angry with the appellant. That did not preclude the jury from finding beyond reasonable doubt that her evidence of the appellant's assaults was credible and reliable notwithstanding the appellant's contrary evidence.

[32] As to the element of grievous bodily harm in the second count, Dr Scholtz's evidence was plainly sufficient to justify a finding beyond reasonable doubt that the complainant's injuries amounted to grievous bodily harm. That evidence appears persuasive upon the face of the transcript, it was not challenged in cross-examination, and defence counsel encouraged the trial judge to direct the jury that this element of the second count was not in issue.

[33] Upon the evidence at the trial there was a strong case that the appellant was guilty of both counts.

Ground 1: having regard to all the evidence, including the new evidence, is a doubt about the guilt of the appellant raised such that the guilty verdicts cannot stand?

[34] All of the new evidence upon which the appellant sought leave to rely in the appeal was available to the appellant at the time of the trial. Senior counsel for the appellant acknowledged, as is reflected in the terms of this ground of appeal, that in the

particular circumstances of this case it is not sufficient for the appellant to establish only a significant possibility that if the new evidence had been adduced at the trial the jury would have reached a different verdict; if a conclusion of guilt is reasonably open notwithstanding the new evidence, the failure to adduce the new evidence at the trial did not result in a miscarriage of justice.[8]

New medical evidence

[35] The appellant applied for leave to adduce evidence in the appeal in the form of three reports by Dr Heiner, which address the question whether the complainant's pneumothorax amounted to grievous bodily harm. The respondent did not oppose leave to adduce the first two reports but did oppose leave to adduce the third report in evidence, upon the ground that it was served only in the morning of the hearing of the appeal and that it was largely argumentative. Notwithstanding the force of the respondent's opposition to the admission of the third report, it is in the interest of justice to grant leave for that evidence to be adduced. There was no objection to leave being granted for the other evidence upon which the appellant relied in the appeal.

[36] The new evidence revealed that the police brief of evidence included witness statements of Dr Scholtz, Dr Wagner and Dr Valena. (Only Dr Valena's statement was not adduced in evidence in the appeal. The respondent did not suggest that it was material.) The new evidence included a letter from the solicitor (Ms Morton) who instructed defence counsel at the trial. The letter referred to enquiries Ms Morton had made of the a general surgeon about the nature of the complainant's injury and Ms Morton's knowledge of Dr Wagner's qualifications. There was also a letter from defence counsel explaining the basis of her decision not to challenge the medical evidence that the complainant's injury amounted to grievous bodily harm.

[37] Dr Scholtz's witness statement dated 7 December 2011 included statements that when the complainant presented at the Moranbah Hospital she had multiple bruises and rib fractures leading to pneumothorax and acute abdomen pain; she told Dr Scholtz that she had been assaulted by her partner; her injuries were consistent with "the history of the alleged punches and kicks" and were life threatening had they not been treated promptly. Dr Wagner was the Director of Surgery at the Mackay Health Service District and had been since 2006. He gave a report based upon a chart review: the complainant had multiple bruises, a fracture of the fifth and fourth rib in the posterior aspect, generalised abdominal pain and multiple bruising on arms, legs, pelvis without bone tenderness, a bruise around the left eye, the right side of the head as well as the left jaw, bruises around the abdominal wall and the back; a CT scan showed a fracture of the lumbar vertebrae on the right transverse processes, which was a fracture typically seen with exertion of very heavy force to the spine. Dr Wagner considered that the injuries were consistent with the alleged assault. The patient was treated conservatively and discharged on 15 November 2011. Dr Wagner expressed the opinion that the injuries left untreated, "especially the pneumothorax (ruptured lung) could have led to the death of the patient." After treatment the patient would probably be left with some continuous back pain and the other injuries should heal with no significant loss to function of any organ or serious disfigurement apart from a scar where the chest drain was inserted.

[38] Ms Morton referred to knowing that Dr Wagner's qualifications included specialisation in trauma surgery and that he taught doctors in the early management of severe trauma. Ms Morton also stated that she had made informal enquiries of a general

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[8] See *R v Katsidis; ex parte Attorney-General (Qld)* [2005] QCA 229 at [19].

surgeon about the nature of the injury which "confirmed that the injury suffered by the complainant was within the definition of Grievous Bodily Harm, specifically the pneumothorax, which if untreated would endanger or be likely to endanger life, or be likely to cause permanent injury to health." Defence counsel confirmed that she gave advice to the appellant that a punctured lung was an injury which met the definition of grievous bodily harm and she stated that the appellant was at all times aware after that advice was given that no issue was being taken about the injury amounting to grievous bodily harm. Because in defence counsel's opinion the medical evidence was clear, she did not advise the appellant to obtain a further expert opinion to ascertain whether there was any prospect of challenging whether the injury did fit within the definition of grievous bodily harm or about challenging Dr Scholtz on that point. That evidence is consistent with defence counsel's statement to the trial judge in the course of discussions about a jury request for a re-direction about the legal definition of grievous bodily harm that "I could have made an admission about the punctured lung being – constituting GBH but the doctor had to be spoken to anyway so there was no point."[9]

[39] The appellant argued that the statement obtained from Dr Scholtz was only "anticipatory and potential rather than actual" and that the statement by Dr Wagner, who was not a treating doctor, did not mention pneumothorax until he expressed his "bland opinion". The appellant argued that this evidence was not a sound foundation for defence counsel to concede that grievous bodily harm was not an issue. However, the statements of Dr Scholtz and Dr Wagner were quite clear that the injury sustained by the complainant met the criteria in the definition of grievous bodily harm and Dr Scholtz confirmed as much in his evidence at the trial. Furthermore, defence counsel explained that she spoke to Dr Scholtz at the courthouse before he gave evidence and he told defence counsel that there was "no way the totality of the complainant's injuries could have been suffered in a fall because of their wide spread nature" and that "they were more consistent with a sustained kicking event". Understandably, defence counsel formed the view that his evidence could be very damaging to the appellant's case if she cross-examined him at any length. Thus she made a forensic decision to limit her cross-examination to the bare minimum. She obtained instructions upon the point and this appellant did not oppose that approach.

[40] I have referred to defence counsel's reasons for her approach only because that was the subject of submissions at the hearing of the appeal. Upon the more appropriate objective analysis,[10] defence counsel's decision not to challenge Dr Scholtz's evidence in any detail is readily explicable as a justifiable forensic decision.

[41] The reports of Dr Heiner express opinions which are to a different effect from the opinions expressed by Dr Scholtz, Dr Wagner and the general surgeon mentioned by Ms Morton. In Dr Heiner's first report (27 March 2014), he concluded that the complainant presented with multiple soft tissue injuries, fractured ribs and a pneumothorax but she did not have a tension pneumothorax. She made a relatively quick recovery and she had "no other dangerous, life threatening injury". (The word "other" may have been intended to distinguish her injuries from a tension pneumothorax, rather than implying that the complainant did have any life threatening injury.) A tension pneumothorax occurs sometimes after a traumatic pneumothorax (which the complainant sustained). It is present when the intrapleural pressure is greater than the

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9 Transcript, 7 November 2013; AB 198.

10 See *TKWJ v The Queen* (2002) 212 CLR 124; *Ali v The Queen* (2005) 79 ALJR 662 at 666 [25]; *Nudd v The Queen* (2006) 80 ALJR 614 at 644 [157].

atmospheric pressure during expiration and often during inspiration. A tension pneumothorax will develop with each breath. It leads to increasing respiratory distress and decomposition in the patient's cardiovascular status. Dr Heiner was well qualified to express his opinions, but it does not follow that the jury were bound to accept them or to harbour a reasonable doubt about the accuracy of Dr Scholtz's contrary opinion.

[42] Dr Heiner's referred to a medical imaging report from Moranbah Hospital at 7.18 am on 7 November 2011 which referred to the presence of a large pneumothorax associated with a rib fracture and noted that there was a "slight mediastinal shift towards the left suggesting that this is a tension pneumothorax requiring urgent treatment". Dr Scholtz did not give evidence that he relied upon the radiologist's report or even read it. Dr Scholtz gave evidence that the chest x-rays "showed that she did have a pneumothorax, which necessitated an intercostal drain" and that the pneumothorax was potentially life threatening because "you will function less – less well with one lung, and if it is left untreated, and it can lead to complications down the track… all kinds of problems, infection, blood clots, a whole raft of complication can ensue due to the pneumothorax"; in the absence of treatment the complainant "would have lost at least 50 to 70 per cent of the function of that one particular lung".[11]

[43] In Dr Heiner's second report dated 9 April 2014, he repeated his opinion that the complainant had a pneumothorax but not a tension pneumothorax, and explained his reasons for that opinion. Notably, he also expressed an opinion that the rib fractures did not cause the pneumothorax. (If the jury accepted that opinion, then the appellant would presumably have faced a case that the pneumothorax was an injury which was additional to and separate from the other injuries inflicted upon the complainant.) In Dr Heiner's third report he referred to a report that the complainant had fallen down stairs during or after the incident and observed that it was possible that this might have resulted in a pneumothorax. (However, the verdict of the jury must reflect a finding that the complainant's injuries were caused by the appellant punching and kicking her rather than by her falling down stairs.)

[44] It appears that the conflict in the opinions then was between Dr Scholtz's opinion concerning the life threatening character of the pneumothorax and Dr Heiner's opinion that "the pneumothorax would have been reabsorbed, the lung would have re-expanded and once her pain had resolved her lung capacity would have returned to normal".[12] In Dr Heiner's third report he referred to the absence of a report that the tube was reported to be bubbling when the complainant was admitted to Mackay Hospital and that an x-ray at that institution revealed that the lung was fully expanded. He concluded that the pneumothorax had been drained, the lung had expanded, and the leak which caused the original pneumothorax had closed spontaneously. He also expressed the opinion that the report from the Mackay Hospital that a pneumothorax recurred and the lung "collapsed" some days later was not related to the original event or to a tension pneumothorax.

[45] Acknowledging that Dr Heiner's opinions are expressed in persuasive terms and supported by detailed reasoning, he was not the treating doctor. The jury might nonetheless have been persuaded by the evidence of the treating doctor, Dr Scholtz, that the treatment he ordered after examining the complainant was necessary to avoid the loss of lung function which he described. Had the appellant adduced evidence from Dr Heiner at the trial the issues raised by his reports presumably would have

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11 Transcript, 5 November 2013, at 1-41 – 1-42; AB 55 – 56.

12 Dr Heiner's Report, 9 April 2014, at p 4.

been explored in detail and in cross-examination. Having regard to defence counsel's justifiable forensic decision not to challenge Dr Scholtz's evidence and also to Dr Scholtz's advantage as the treating doctor, the new evidence does not reveal that the appellant has suffered a miscarriage of justice in being found guilty of assault occasioning grievous bodily harm.

Evidence of the complainant's intoxication and aggression on other occasions

[46] The appellant's primary argument on appeal concerned new evidence from witnesses which was submitted to supply a platform for challenging the complainant's credit. It was submitted that this evidence might have been used not only in cross-examination but also adduced at the trial under an exception to the general rule that a party may not impeach the credit of the other party's witnesses by calling witnesses to contradict the party about matters of credit.[13]

[47] Angel Lewer, Kylie Lawn, and the latter's daughter, Kyla Lawn, gave evidence of a party at Ms Lewer's house about which the complainant and Ms Strother were cross-examined at the trial. The new evidence was to the effect that the complainant became extremely intoxicated at the party and continued to drink at a local hotel, she was promiscuous at the hotel, and upon returning to Ms Lewer's house the complainant was extremely intoxicated, violent, and abusive; she assaulted Kyla Lawn, refused to leave, kicked a hole in a door, and was eventually required to be taken home by police. Ms Lewer gave evidence that on other occasions the complainant was intoxicated and abusive towards the appellant, that she was frequently intoxicated to the extent that she could not care for her children, and that shortly before November 2011 the complainant told Ms Lewer that she had fallen down the stairs of her house whilst intoxicated and had injured herself, sustaining bruises on her ribs, elbows, arms and back which she showed Ms Lewer. Ms Strother supplied an affidavit in which she spoke about that same event shortly before November 2011. Ms Strother deposed that the complainant told her that she had fallen down those stairs a few times earlier. She said that the complainant had frequently injured herself whilst intoxicated. Ms Strother referred to other occasions when the complainant was intoxicated, extremely agitated, aggressive, and sexually provocative. Ms Strother also elaborated upon her evidence at the trial, observing in particular that when she spoke with the complainant on 6 November 2011 the complainant sounded extremely intoxicated and was slurring her words. Mr Abdoo gave evidence by affidavit to similar effect, including referring to particular occasions when the complainant became very intoxicated and attacked the appellant for no reason and, on one occasion also attacked Mr Abdoo.

[48] One point made by the appellant about this evidence was that it showed that defence counsel's suggestion to the complainant that she was aggressive towards Ms Lewer and her daughter was a mistake because the new evidence was that the complainant was aggressive towards Ms Lawn and her daughter. That is not significant in the present context.

[49] More generally, the main submission for the appellant was that the cross-examination did not explore the rich detail supplied by the new evidence; the evidence went directly to the credibility and reliability of the complainant and, in a general way, was consistent with and supported the evidence given by the appellant about the complainant's conduct

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13 See *R v Lawrence* [2002] 2 Qd R 400 (McPherson JA) and *Nicholls v The Queen* (2005) 219 CLR 196 at 223 [56] (McHugh J).

on 6 November 2011. The appellant did not make it a ground of the appeal or contend in this appeal that the conduct of defence counsel was incompetent such as to cause a miscarriage of justice. Rather, the contention was that the new evidence, considered in the context of the evidence in the trial, established a miscarriage of justice. From an objective perspective, however, the limited extent of the cross-examination of the complainant upon these issues, and the omission to call the deponents of these affidavits to give evidence, is readily explicable as a forensic decision. The significant issues at trial were whether the appellant acted in self-defence and whether he caused the pneumothorax diagnosed by Dr Scholtz by kicking the complainant. As was submitted for the respondent, the inability of the appellant to account for the extent of the complainant's injuries objectively would have informed defence counsel's decision to limit the attack upon the complainant's credit to that which was necessary to justify the argument that the complainant became aggressive when drunk. The complainant's own explanation of the effect of her consumption of alcohol – in substance, that she was not so intoxicated that she could not walk or talk – must have persuaded the jury that she was very drunk. For defence counsel to persist in an extensive attack upon the complainant's credit, including to the extent of calling witnesses, would have risked alienating the jury against the appellant. Furthermore, it would have risked the prospect of a successful application by the prosecutor under s 15 of the *Evidence Act* 1977 to cross-examine the appellant upon his previous criminal convictions, which included a conviction in 1993 for maliciously inflicting grievous bodily harm (for which he was sentenced to three years imprisonment with release after nine months), other convictions for assault in New South Wales, and a conviction for assault occasioning bodily harm in 2006 (for which he was sentenced to 172 days imprisonment followed by nine months probation).

[50] The appellant also relied upon an affidavit by Mr Michael White in which he referred to an occasion in early January 2010, nearly two years before the events the subject of the trial. Mr White deposed that the complainant became intoxicated and sexually aggressive towards him. She persisted despite being asked to stop by Mr White and the appellant. Eventually the appellant carried her to her bedroom. The complainant was abusive and aggressive towards the appellant. The appellant again carried the complainant to her bedroom on two more occasions. The complainant was in a rage, picked up items in the kitchen, and hit the appellant with something. Mr White said that the complainant threatened to stab the appellant with a knife, although he deposed that he did not see her grab a knife.

[51] If it were the case that the complainant had threatened the appellant with a knife, the appellant could have given those instructions at the trial. Had he done so, defence counsel might have sought to adduce that evidence at the trial. However, defence counsel and Ms Morton stated in their letters that the appellant gave instructions only that Mr White was a witness on one occasion to the complainant being drunk and aggressive. The appellant deposed that he provided the name and contact details of Mr White to his solicitors and instructed them to contact Mr White, but he did not contradict the statements by defence counsel and Ms Morton. He did not depose that he informed defence counsel or instructing solicitors of the matters to which Mr White deposed after the trial. Nor did the appellant himself give evidence of those matters. There is also no evidence before the Court that upon the occasion to which Mr White referred the complainant in fact picked up a knife. In these circumstances the evidence does not justify a conclusion that a miscarriage of justice was occasioned by the failure to call Mr White to give evidence.

Alleged inconsistencies between the complainant's evidence and her statements to police

[52] The appellant argued that the complainant's initial statement to police dated 11 November 2011 described the events in a manner which was remarkably consistent with the evidence of the appellant and Mr Gibson, yet this statement was not put to the complainant in cross-examination. In that statement the complainant described the lead up to the events outside the bedroom in terms which were generally consistent with the evidence which she and Mr Gibson gave at the trial. After referring to being upset by what was happening in the bedroom and continuing to yell and bang on the bedroom door, and to the appellant coming outside, the complainant deposed:

> "I'm not clear on what happened next but I remember [the appellant] looking very angry. I remember him hitting me. I remember being on the floor. I also remember seeing [Gibson] come running out of the bedroom and leaving the house.
>
> I can't remember how I got down the stairs into the kitchen area. I do remember [the appellant] just kept on kicking me again and again while I was on the floor in the kitchen. I remember not being able to move and I think I passed out a few times. I remember telling him to stop but he just kept kicking me in the body. He would sometimes stop for a moment and walk away. Then he would come back and yell at me before kicking me again. I can't remember much of what he said but I remember him saying that I thought I was too good for him. I just wanted him to stop."

[53] Thereafter the complainant related events in a way which was generally consistent with her evidence at the trial. The statement concluded with a paragraph in which the complainant referred to having been asked whether she remembered holding or carrying anything when she was standing and banging on the bedroom door and that she did not remember whether she had anything in her hands or not.

[54] The quoted paragraphs create the impression that the appellant first hit the complainant while she was outside the bedroom and thereafter went downstairs to the kitchen. To that extent, the statement was consistent with the evidence of the appellant and Gibson. It must be borne in mind, however, that if the jury accepted that version the jury could rely upon the consistency between it and Gibson's evidence and accept the complainant's evidence of the offence notwithstanding her different version at trial concerning the precise location of the first assault. The evidence in the second quoted paragraph, upon which the prosecution relied to prove the assault occasioning grievous bodily harm, was entirely consistent with the complainant's evidence at the trial. As to the concluding paragraph of the statement, it appears that the complainant was not asked whether she remembered holding or carrying a knife (as opposed to merely 'something'). That part of her statement does not have the significance attributed to it in the argument for the appellant.

[55] Defence counsel might reasonably have concluded that cross-examination upon the earlier parts of the statement would create a risk that the detailed evidence in the second quoted paragraph would be admitted in evidence. It was objectively justifiable for defence counsel not to take that risk.

New evidence: conclusion

[56] Upon the necessary objective analyses, defence counsel's omissions to adduce at the trial the new evidence which the appellant adduced in this appeal were justifiable as

rational forensic decisions. Even taking all of the new evidence into account, the verdicts returned by the jury are reasonably open. This ground of appeal fails.

Ground 2: was the jury misdirected in relation to the element of grievous bodily harm, causing a miscarriage of justice?

[57] The trial judge gave conventional directions about the prosecution's requirement to prove that the injuries sustained by the complainant amounted to grievous bodily harm. No criticism was made of those directions. After the jury had retired to consider their verdict, they sent a note asking to be told the legal definition of grievous bodily harm again. After the prosecutor obtained permission to speak to defence counsel, defence counsel informed the trial judge that no issue had been raised by defence that pneumothorax was not grievous bodily harm.[14] Defence counsel explained that the issue was how it was caused. Defence counsel agreed that the trial judge should re-direct the jury that it was not in dispute that the punctured lung constituted grievous bodily harm. Defence counsel observed that she could have made an admission about that, but did not do so because it was necessary to speak to the doctor anyway. The trial judge then re-directed the jury that there was no issue between the Crown and the defence that the punctured lung caused by the fractured rib was grievous bodily harm. The issue was how it was caused. The jury did not need to concern itself with whether or not that injury was or was not grievous bodily harm, but could take it that it was.

[58] The appellant argued that those directions impermissibly took the determination of the issue from the jury's consideration in the absence of any formal admission by defence counsel, and that it was necessary for the issue to be put to the jury.[15] The re-direction was made in terms which accorded with defence counsel's submission to the trial judge, a submission which reflected the manner in which defence counsel had conducted the trial. Consistently with that approach, there was no criticism of the re-direction. Also bearing in mind that the manner in which defence counsel conducted the trial involved justifiable forensic decisions, that Dr Scholtz's evidence met the definition of grievous bodily harm, and that there was no apparent reason why the jury should not accept his unchallenged evidence, no miscarriage of justice resulted from the trial judge's re-direction. This ground of appeal also fails.

Sentence application

[59] In imposing the effective sentence of five years imprisonment with parole eligibility after half of that period, the trial judge referred to: the brutal and sustained character of the appellant's assault upon his partner of nine years and mother of their three children in the family home whilst the children were in the house; the very marked disparity in the sizes of the appellant and the complainant; and the appellant's conduct in leaving the complainant moaning on the floor after the attack without offering her assistance and showing extraordinarily indifference to her. The trial judge found that the appellant was not remorseful but had concocted a wild story about how the complainant suffered her injuries. The trial judge referred to the complainant's victim impact statement, in which the complainant spoke of her shocked, scared and helpless state at the time of the offence, her heightened vigilance, anxiety, depression, feelings of loneliness and defencelessness, and her inability to come to terms with the fact that her partner had left her in such a state. Their sons had required counselling to cope. The complainant was still under the care of counsellors

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14 Transcript, 7 November 2013; AB 196.

15 See *R v M* [1994] QCA 3 at pp 5 – 6.

and occupational therapists, and she was on anti-depressants and anti-anxiety tablets. She had left the home and moved to a women's refuge in Mackay with the boys.

[60] At the time of the sentence the appellant was 43 years old. He had previously been sentenced to three years imprisonment with release after nine months for a grievous bodily harm offence in 1993. More recently he had been convicted of breaching a domestic violence protection order and of an assault occasioning bodily harm. For the latter offence the appellant was sentenced to 172 days imprisonment (he had served 173 days in pre-sentence custody) followed by probation for nine months. He had also been convicted of drug offences. The appellant had a good work history and was a contributing member of the community. A result of his present offences was that he was denied contact to his three children.

[61] It was submitted for the appellant that the trial judge made a material error in referring to "four" ribs in describing the complainant's injuries as including "a fracture of four ribs, the puncturing of the complainant's lung, multiple bruising all over the body…". It was pointed out that Dr Wagner's statement referred to fractures only of the fifth and fourth rib. As was submitted for the respondent, however, the evidence did not establish precisely the number of fractures which the complainant sustained and nor did the trial judge refer to all of the complainant's injuries in the sentencing remarks. The trial judge's reference to four ribs, rather than to at least two ribs and other injuries including a fractured vertebrae, does not justify a conclusion that the sentencing discretion miscarried. Nor is that a ground of appeal.

[62] It was submitted for the appellant that the complainant did not suffer permanent injury or require active treatment or medical intervention and she made a full recovery. In fact, the complainant was hospitalised for nine days and twice required the insertion of the intercostal catheter. Whilst the evidence did not show that the complainant sustained permanent physical disabilities, the trial judge found that at the time of sentence she still required therapy and medication to cope with the consequences of the appellant's assaults upon her.

[63] It was also submitted for the appellant that his offending should be characterised as an excessive response to provocative conduct by the complainant. Accepting that the events preceding the offending were quite remarkable and that the offences occurred in an emotionally fraught atmosphere, the trial judge was not obliged to sentence the appellant on the footing that he had been provoked. The trial judge could proceed on the footing that the appellant had no sensible basis for complaining about the complainant's conduct in circumstances in which he had apparently initiated sexual activity with another man in the bedroom of the family house and had persisted despite the complainant's attempts to persuade him to desist. It is also a vast understatement to describe the appellant's assault upon the complainant as amounting merely to an excessive response to the complainant's conduct. The appellant embarked upon a sustained and extremely violent attack upon his much smaller and vulnerable partner in a place where she was entitled instead to expect his protection. He prolonged his attack to the point of kicking the complainant repeatedly whilst she lay on the floor moaning. The nature and extent of the complainant's injuries reflect the vicious character of the assault. The trial judge was right to take general deterrence and personal deterrence into account in the sentence. General deterrence was particularly relevant because of the appalling prevalence of domestic violence in our society. Personal deterrence was particularly relevant because of the appellant's relevant criminal history.

[64] For the appellant it was emphasised that the assault was relatively spontaneous, it was of a relatively short duration, the appellant did not use a weapon, and the appellant did not attempt to prevent the complainant from seeking medical attention. As to the last point, the trial judge appropriately took into account the appellant's callous conduct in leaving the complainant injured on the floor, but the matters to which the appellant referred were relevant considerations. There is no basis for thinking the trial judge did not take them into account.

[65] The only ground of the application for leave to appeal against sentence is that the sentence is manifestly excessive. It was argued for the appellant that the trial judge was wrong in considering, based on *R v Creagh* [1995] QCA 286 and *R v Collins* [2005] QCA 172 alone, that the applicable range of penalty was confined to four to five years imprisonment. That is not how the trial judge reasoned. Rather, the trial judge mentioned that those cases had been referred to him and had been of assistance. That was a conventional approach. In any event, the appellant's contention that the sentence is manifestly excessive must be rejected. In *Collins* at [36] the Court (McMurdo P, Keane JA and Mullins J) observed that decisions of the Court suggested that "about five years imprisonment was within the appropriate range for an offence of this type of grievous bodily harm, even without any further penalty for the applicant's other offending" and endorsed the statement by Pincus JA (Fitzgerald P and McPherson JA agreeing) in *Creagh* which rejected as "plainly wrong" a submission that five years imprisonment after a trial for grievous bodily harm for injuries inflicted to a similar level in *Collins* was outside the appropriate range. There are of course points of distinction between this case and each of *Collins* and *Creagh*, but the analyses in those cases confirm my own conclusion that the appellant's sentence was not excessive.

Proposed orders

[66] The appeal should be dismissed and the application for leave to appeal against sentence should be refused.

[67] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

[68] **PHILIPPIDES J:** I agree with the reasons for judgment of Fraser JA and the orders proposed.