

SUPREME COURT OF QUEENSLAND

CITATION: *R v Thomson* [2016] QCA 259

PARTIES: **R**
v
THOMSON, Kevin David
(appellant)

FILE NO/S: CA No 208 of 2016
DC No 5089 of 2015

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Mackay – Date of Conviction: 28 July 2016

DELIVERED ON: Orders delivered ex tempore 14 October 2016
Reasons delivered 18 October 2016

DELIVERED AT: Brisbane

HEARING DATE: 4 October 2016

JUDGES: Gotterson JA and Douglas and Boddice JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **Orders delivered ex tempore on 14 October 2016:**

- 1. The appeal be allowed.**
- 2. The conviction be set aside.**
- 3. A verdict of acquittal be entered.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO ALL THE EVIDENCE – where the appellant was convicted of committing grievous bodily harm upon the complainant – where the complainant was assaulted in the toilets of a bar – where one witness found the complainant in the toilets, after he had been assaulted – where that witness said he saw a male leaving the toilets as the witness entered the toilets – where the witness said the male was wearing a blue dress shirt – where that same witness later identified to police a man standing across the road as the same man who was leaving the toilets – where that man was the appellant and was wearing a black T-shirt – where it could not be reasonably inferred from the evidence the appellant had been previously wearing a blue dress shirt, but had subsequently disposed of it – where the sole issue is whether the evidence identifying the appellant as the offender was sufficient to

satisfy the jury beyond reasonable doubt of the appellant's guilt – whether the verdict is unreasonable or insupportable having regard to all the evidence

R v RAU [2015] QCA 217, cited
The Queen v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, cited

COUNSEL: M J Copley QC for the appellant
 M T Whitbread for the respondent

SOLICITORS: Taylors Solicitors for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.
- [2] **DOUGLAS J:** I agree with the reasons of Boddice J and the orders proposed by his Honour.
- [3] **BODDICE J:** On 28 July 2016, a jury found the appellant guilty of grievous bodily harm. The primary judge sentenced the appellant to 30 months imprisonment, suspended after 12 months, for an operational period of three years.
- [4] The appellant appeals his conviction. The sole ground of appeal is that the verdict is unreasonable or cannot be supported having regard to the whole of the evidence. At issue is whether the evidence identifying the appellant as the offender was sufficient to satisfy the jury beyond reasonable doubt that he was the assailant who committed grievous bodily harm upon the complainant.

Applicable principles

- [5] The relevant principles in the assessment of such a ground are not in dispute. They were summarised in *R v RAU*¹:

“[5] ...In *MFA v The Queen*, McHugh, Gummow and Kirby JJ noted that a review of this kind:

‘... involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials.’

- [6] In *R v SCH*, the relevant principles were summarised as follows:

‘In such a case, the question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty. In most cases, a doubt experienced by an

¹ [2015] QCA 217 at [5]-[6].

appellate court will be a doubt which a jury ought also to have experienced. In such a case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred. However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.'

This Court must, therefore, undertake 'an independent assessment of the evidence, both as to its sufficiency and its quality' in accordance with the principles to which I have referred." (footnotes omitted)

- [6] In undertaking this task, the Court must also have regard to the role of the jury:²

"It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact'. Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages. ...

With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'." (footnotes omitted)

Evidence

- [7] On the evening of 24 July 2014, the complainant and a friend attended a bar in Mackay. The complainant consumed alcohol prior to attending that bar and whilst at the bar. Sometime after midnight the complainant sat on a long bench seat. A male he did not know approached him and said it was that man's seat. The complainant told the man to "fuck off". The male did not reply and left the area. The

² *The Queen v Baden-Clay* (2016) 90 ALJR 1013; [2016] HCA 35 at [65]-[66].

complainant's description of the man was "sort of tall and solid built". The complainant was not able to describe the man's clothing.

- [8] Following this incident, the complainant consumed two further alcoholic drinks and then danced. Approximately 20 minutes later, he went into the bar's men's toilet. It contained one cubicle and two urinals. The complainant used one of those urinals. Whilst doing so another male entered the toilet area. The complainant next recalled being struck to the left side of his face. He received further blows before dropping to the floor and crawling to the cubicle. The assault continued whilst he was in the cubicle.
- [9] The complainant was not able to describe his assailant. He did not see the assailant when he came into the toilet area or after being struck by him. The complainant also did not recall details of the assault. At one point, he recalled someone else entering the toilet area. His assailant left the toilet area at this time. The complainant's next recollection was sitting outside the bar talking to the police.
- [10] The complainant was taken to the Mackay Base Hospital. The complainant gave an account of multiple punches in the face. He denied being punched anywhere else. Examination revealed a bilateral fracture of the jaw. The jaw fracture, if left untreated, could cause a risk of infection and jaw dysfunction. That dysfunction included instability of the jaw which can cause difficulty with chewing and biting food. A breath analysis revealed he had a breath alcohol level of 0.13.
- [11] Rothie Douglas was also a patron at the bar that night. He had approximately six premixed drinks of rum. He was drinking in the bar when he heard noises from the toilet area. He thought it was boys "playing, mucking around in there". At one point, Douglas went into the toilet area. He could not see anyone but could hear noises. He realised something violent was occurring and left the area to obtain a security guard.
- [12] Douglas obtained the assistance of a security guard, Tige Conway. Douglas said he walked across the bar to the main door to attract Conway's attention. He told Conway something was going on in the toilet. They both returned to the toilet area. Initially, the complainant would not open the door to the cubicle. He did not trust them. He only opened the door after Conway showed the complainant his badge. Douglas said when they returned to the toilet area the altercation had ceased. The complainant remained in the cubicle.
- [13] Douglas said when he re-entered the toilet area he observed a male washing his hands. The male said something like "he got his just deserves". The male also said "that'll teach the young – young fellow or something to run his mouth or something".³ This male was the only other person in the toilet area. Douglas was unable to describe the male's build or what he was wearing. The male washing his hands left the toilet area when Douglas and Conway tried to enter the cubicle.
- [14] Douglas did not see any actual altercation involving the complainant. He did not know if the person washing his hands was involved in any altercation with the complainant. Douglas agreed it was possible someone left the toilet area whilst he was out collecting Conway. Whilst the man washing his hands said something like "he got what he deserved", he never said anything like "I punched him" or "I did it".

³ AB52/5.

- [15] Tige Conway said on the evening of 24 July 2014 he was working as a security guard at the front door of the bar. At about 2.30 in the morning he saw Douglas indicating from a position next to the toilets. Conway walked over to Douglas who said there was a commotion in the male toilets. As Conway entered the toilet area he saw “a big guy” walking out of the toilet area. Conway could not recall whether the big guy had said “he deserved it” or “I’ve sorted something out” when he was leaving the toilet area. He did, however, recall that he responded “next time, come and see me”. He agreed it was only a brief conversation.
- [16] Conway described the male who was leaving the toilet area as “about six foot two, six foot three. Real big, like, on steroids. Well-dressed ... Well-groomed ...”.⁴ The man was wearing jeans and a well dressed shirt. He describes the shirt as a “dress shirt”. It was blue in colour. Conway agreed that his description of a dress shirt was like “a button-up, collared, long-sleeved shirt”.⁵ He did not notice whether he was wearing a watch or any jewellery. Conway agreed his identification was based on his observations during his brief conversation on the way into the toilet area.⁶
- [17] Conway said when he went into the toilet area he saw a male using the urinal. The cubicle door was shut. Conway spoke to the man at the urinal and then went to the toilet cubicle. He banged on the door and found the complainant inside “all bashed up”.⁷ Conway spoke to the complainant and took him outside onto the street. He gave him some ice and water. Conway waited outside with the complainant for about 20 minutes before police arrived at the scene.
- [18] Conway said whilst he was waiting outside he saw the “big guy” he had spoken to as he entered the toilet area over the road at the Night Owl. The big guy had been in that area for the whole 20 minutes he was outside prior to the arrival of police. The male was just standing there. He was not talking to anybody for the entire 20 minutes. Conway could see him the whole time. There were 10 to 20 people outside. At one point, the male entered the Night Owl and came out again a few minutes later.
- [19] Conway said when police arrived they called the ambulance. It took another five to ten minutes. The male remained watching from across the street throughout this time. Conway estimated the man was standing about 30 metres away. There were street lights in the area. Conway could not tell what the man standing across the road was wearing.
- [20] After the ambulance left, Conway then told the police the male involved in the altercation was over the other side of the road at the Night Owl. He pointed the person out to the four police officers present at that time. He did not have any trouble identifying that person. It was about 3 o’clock in the morning. Conway said when he pointed the male out across the road to the police officers, police had been in the area about 30 minutes.
- [21] Constable Trent Johnston and Constable Ben Wilson attended the bar in the early hours of 25 July 2014 in response to a report of a disturbance. Shortly after his

⁴ AB61/15.

⁵ AB70/25.

⁶ AB69/30.

⁷ AB63/25.

arrival, Constable Morris and Constable Tyrrell arrived at the scene. His Sergeant, Anthony Cowan, also attended the scene but only in a supervisory role.

- [22] Upon arrival, Johnston saw the complainant sitting on a chair outside the bar. He was bleeding from the mouth. He had an ice pack to his face. Johnston only had a brief conversation with the complainant as the complainant was having difficulty speaking and was being attended by ambulance officers. Shortly afterwards, the complainant left the scene with the ambulance officers.
- [23] Johnston then spoke to people in the surrounding area to ascertain if there were any witnesses. Johnston said after speaking to different people, including Douglas, he spoke to Conway. During his conversation with Conway, Conway identified a man standing across the street outside the Night Owl. Conway said words to the effect “that’s the guy over there”.⁸ Conway only pointed out the person across the road after the five police officers and two ambulance officers had arrived at the scene.
- [24] Johnston described the person Conway pointed out as “quite tall and he was very broad and that was quite a significant feature as he was quite a large – not – by no means fat. He’s just definitely a very – a proportionate – not proportionate, sorry ... a very generous sort of sized man. He had dark hair. I placed him in his late 30s. Caucasian.”⁹
- [25] Johnston said the male was “across the road at the Night Owl”.¹⁰ The man was not over near any alleyway. When he next saw the man he was walking away into an alleyway. Johnston said when police started moving towards the male identified by Conway there was a small group of people across the road, maybe eight to 12. Johnston momentarily lost sight of the male after he saw him go into the alleyway. He again momentarily lost sight of him when he left the alleyway at the other end for approximately 10 to 15 seconds. He then saw him entering a hotel.
- [26] Johnston said the other police had commenced to run and were five to 10 metres in front of Johnston so they arrived at the hotel before Johnston. Johnston estimated he arrived at the hotel five to 10 seconds later. Johnston said police spoke to the male and he identified himself as the appellant. Johnston said it was definitely the same person Conway pointed out to him who ran down the alleyway “100 per cent”.¹¹
- [27] Johnston said he told the appellant he was investigating an assault at the bar. The appellant offered Johnston the opportunity to check his knuckles and elbows. Johnston examined them and found no trauma to his hands. The appellant also provided his driver’s licence. The details were recorded in the police notebook. The licence contained the appellant’s address. The appellant told police his hotel room number. He probably also gave Johnston his mobile phone number. The appellant told police he was in Mackay for a mining exhibition which had ended that day, and he was booked on a flight at 7 o’clock the next morning.
- [28] Johnston then returned to the bar. A statement was taken from Conway. Johnston then resumed normal duties. Later that morning he was asked to re-attend at the hotel. Police gained entry into the room used by the appellant via security. They had knocked on the door for a good 10 to 15 minutes. When they were allowed entry

⁸ AB126/1.

⁹ AB126/40.

¹⁰ AB133/10.

¹¹ AB127/1.

- the room was packed up, “completely clean”.¹² Johnston subsequently returned to the station.
- [29] Johnston said after he had again returned to the station, he received a telephone call from Morris. Morris said he had seen the appellant on a street in West Mackay. Johnston and Wilson attended the area. They followed footprints into a back street and located the appellant hiding behind a tree with his packed suitcase.
- [30] Johnston agreed he never saw the appellant run into the alleyway but as the appellant had disappeared when they got to the alleyway, the only explanation was that the appellant had run. Conway definitely pointed to the appellant. Whilst it was early in the morning, the Mackay city centre was quite well lit. Johnston said when he first spoke to the appellant outside the hotel the appellant was definitely puffing but was quite calm.¹³
- [31] Wilson attended the bar at around 2.00 am with Johnston in response to a disturbance. They were the first police officers on the scene. An ambulance arrived shortly after their arrival. Wilson spoke to the complainant before ambulance officers began treating him. Constables Morris and Tyrrell arrived at the scene shortly after Wilson’s arrival.
- [32] Wilson was later told the offender had been identified by Conway as being across the road at the Night Owl. Wilson looked across the road and saw a male standing at the entrance of an alleyway. He was “quite a tall, Caucasian man with dark hair”.¹⁴ Wilson believed he had a black t-shirt on and was wearing denim jeans. Wilson said the male looked towards the police, looked away, looked back again and then walked into the alleyway.
- [33] Wilson said he and the other police crossed the road and entered the alleyway. They caught sight of the male at the other end of the alleyway. Once they realised how far he had “gotten in the short period of time”¹⁵ police began running down the alleyway. They located the male before he entered a hotel. Wilson never saw the appellant break into a jog.
- [34] Constables Johnston and Morris spoke to the male who provided identification. Wilson said it was the same male he had seen enter the alleyway. The appellant was quite compliant but gave minimal details. The appellant told police he was flying out the next morning back to New South Wales.
- [35] Wilson then left the area with Johnston and returned to the bar. A short time later they returned to the hotel to again speak to the appellant. The police went to the appellant’s room with hotel security. At this point, Wilson activated his personal body worn camera. Police found the room was empty. Police then left the hotel.
- [36] Wilson said at around 5.00 am, after Johnston and he had returned to the police station, a message was received from Morris. Johnston and Wilson attended an address in West Mackay. They followed some footprints in the dew and located the appellant in the front yard of a house behind a tall garden bed.

¹² AB129/1.

¹³ AB137/25.

¹⁴ AB152/35.

¹⁵ AB153/3.

- [37] Morris said he attended the bar with Tyrrell following a request from police communications. Constables Johnston and Wilson and another officer were already at the location. It was approximately 2 o'clock in the morning. The complainant was being treated by ambulance officers. After about five minutes, the complainant was taken away from the scene by ambulance.
- [38] Morris said after the ambulance left, Conway pointed out a male across the street. Conway said he was the assailant. Morris said the male identified by Conway was walking along the footpath. Morris and three other officers walked across the street towards the male person who turned into an alleyway. They lost sight of him for "maybe five seconds".¹⁶ Morris activated his bodycam as he approached the laneway.
- [39] When Morris arrived at the alleyway entrance, the male was at the far end. It was the same person Morris had seen in the street. He described the male as a large set male in a black shirt and black or dark coloured jeans. Morris observed no other person in the alleyway. As the male turned out of the alleyway, Morris and another officer started to jog and then run as they briefly lost sight of the male. Morris said they ran for "maybe" 15 seconds. Morris never saw the appellant jog at any point. From what he saw, the appellant was always walking.
- [40] Morris said as he exited the alleyway he observed a male, who fitted the description of the male they had seen earlier, walking up a wheelchair access ramp into a hotel. Morris could see no other persons on the street at that time. Morris and other police approached the male. The male provided his identification details. He was the appellant. During this discussion, the appellant offered police the opportunity to check his knuckles. There was no evidence of any injury to the hands consistent with having been involved in an assault. Police then left the area.
- [41] Approximately 30 minutes later, Morris was asked to go back to the hotel with Tyrrell. They met Johnston, Wilson and Sergeant Cowan. Johnston advised Morris they had identified the person they had spoken to as the assailant in the earlier incident. They approached the appellant's hotel room. There was no answer when they knocked on the door. Security let them into the room where they found the bed had been made and there was no sign anyone was staying in the room. There were no bags. The room was empty. Wilson was operating his body camera at this time.
- [42] Morris and Tyrrell left the hotel and undertook patrols in the surrounding area. They then travelled to the airport as the appellant had told them he was from New South Wales. They conducted a foot patrol but did not locate the appellant. They then left the airport. Later that morning, whilst undertaking patrols at about 4.45 am, Morris observed a male walking along a street in the direction of the airport. The male fitted the description of the appellant. They performed a U-turn and returned to the area but were unable to locate that male. However, they observed footprints in the dew on the grass and drag marks that looked like a suitcase kind of drag mark on the wet grass.
- [43] Morris spoke to Johnston who attended the location. They subsequently followed the footprints and located the appellant standing behind a tree in the front yard of a residence. The appellant was sweating profusely and looked quite agitated. He was

¹⁶ AB88/34.

arrested for the assault of the complainant. Morris activated his body camera shortly prior to that arrest.

- [44] Tyrrell said it took them approximately 10 minutes from being called to arrive at the bar. When they arrived Constables Wilson and Johnston were already at the front of the bar. Ambulance officers were treating the complainant.
- [45] Tyrrell spoke to Conway who told him the male involved in the disturbance was standing directly opposite them. Conway “actually pointed him out to me”.¹⁷ The person was on the street, directly across from where they were standing, towards the Night Owl. The male was approximately five metres from an alleyway entrance when he first saw him.¹⁸ Tyrrell described the male as an older male, late thirties, early forties, large build, wearing a black shirt and blue jeans. When Tyrrell first looked across the road, there were 10 to 12 people in front of the Night Owl.
- [46] Tyrrell and the other police walked across the road to take up with the male. As they began to do so, the male entered the alleyway. Tyrrell lost sight of the male for a short time, approximately 20 to 30 seconds.¹⁹ When police approached the beginning of the alleyway, Tyrrell observed the male was already at its end. Tyrrell and the police ran down the alleyway. They took up with the male outside a hotel. The male gave his name to police. Tyrrell said the male appeared to be out of breath and a little bit nervous.²⁰ Tyrrell agreed he never saw the appellant running at any time.
- [47] Tyrrell then left with Morris to perform general duties. They were asked to re-attend the hotel approximately 20 minutes later. They attempted to gain entrance into the appellant’s room but found it had been vacated. Morris and he then left the hotel. Later that morning, at approximately 4.45 am, whilst Morris and he were conducting patrols, Tyrrell observed a male walking against traffic on the other side of the road. The male was wearing a black shirt and dark jeans and had the same “strong large build”.²¹ The male was dragging two suitcases.
- [48] Tyrrell said Morris and he performed a U-turn approximately 20 metres down the road. When they returned the male was no longer on the roadway. A subsequent foot patrol identified footprints on the wet grass. Tyrrell activated his body worn camera. The appellant was subsequently located standing underneath trees behind a garden bed in a yard.

Appellant’s submissions

- [49] The appellant submits the jury’s verdict of guilty was unreasonable because the jury was unable to be satisfied on the whole of the evidence that the complainant’s assailant was the appellant. The complainant was unable to identify his assailant beyond his description of the person he had exchanged words with about the seat approximately 20 minutes before. That description was limited to “sort of” tall and solidly built.

¹⁷ AB159/32.

¹⁸ AB163/40.

¹⁹ AB160/15.

²⁰ AB160/35.

²¹ AB161/20.

- [50] Douglas also was not able to identify the complainant's assailant. He did not see anyone at all when he first entered the toilet area. Further, the complainant said the assault ended when another person entered the toilet. Douglas accepted he was away from the toilet area whilst obtaining Conway for a period long enough for someone to have left it which meant he was away long enough for someone to have entered it.
- [51] The appellant further submits Conway's evidence conflicted with Douglas's evidence in three respects. First, as to how Douglas attracted his attention. Second, as to who was in the toilet area when Douglas and Conway first entered the area. Third, where the male made the remark. Further, the presence of a male at the urinal left open the possibility that man was responsible for the assault on the complainant rather than the big guy who was coming out as Conway entered the area. Mere presence was insufficient to have satisfied the jury beyond reasonable doubt that the appellant was the assailant.
- [52] The appellant submits Douglas's evidence of what the male at the sink said was consistent with an observation not an admission. Douglas could offer no description of that male. Conway's description of the male was based on a fleeting observation during their brief interchange. Further, even if his recollection was accurate it was not a remark capable of constituting an admission. It was equally consistent with a remark that another person's actions warranted that response.
- [53] The appellant submits the correctness of Conway's identification of the male across the road as the assailant also was insufficient. It depended upon a correspondence between the height and build of the man Conway saw leaving the toilet and the man he saw outside the Night Owl. A coincidence between height and build, when both were described in general terms, was not a satisfactory basis for a finding of guilt beyond reasonable doubt. Conway could not tell what the man at the Night Owl was wearing so there was no reliance on a correlation in clothing. Conway's recognition of the male over the road as the big guy also was not an act of identification of the appellant as the big guy. Conway did not see whether the male he pointed to was the male police later spoke to at the hotel.
- [54] Finally, the appellant submits the appellant's conduct after police spoke to him, whilst adding some indication the appellant was the assailant, was insufficient to permit the jury to return a verdict of guilty. The jury were so directed by the trial judge. That direction was clearly correct.

Respondent's submissions

- [55] The respondent submits the jury reached its verdict after conscientiously and carefully considering the evidence, having been given the necessary and appropriate instructions and warnings regarding identification evidence on more than one occasion. The jury were also properly instructed on the use of flight as consciousness of guilt.
- [56] The respondent submits the only reasonable conclusion on the evidence as a whole was that the assailant was the male observed by Douglas and Conway when they arrived in the toilet area. Only a short period of time had elapsed when Douglas first looked into the toilet and returned with Conway. Whilst Conway's observations of the male who made the remark was fleeting, Conway was an experienced security guard. Conway suspected the male had been involved in something because of the nature of the remark the male made to him and Conway's response. The lack of marks on the appellant's hands did not exclude the appellant

as the assailant. The limited description of the assault did not exclude the possibility the complainant was struck by an object being held by the offender.

- [57] The respondent submits Conway's reference to the assailant wearing a dress shirt did not render unreliable his later identification of the appellant, who was then wearing a black T-shirt. Conway's identification centred on the size of the appellant, a significant feature, not his clothing. The identification by Conway was also made promptly whilst still at the scene. There was no benefit in having Conway attempt a photoboard identification in the circumstances as his identification was recognition identification.
- [58] The appellant's flight from the area and subsequently from the hotel room also provided significant evidence of consciousness of guilt, confirmatory of a proper identification. The evidence, when considered as a whole, justified a conclusion the appellant was the male who had exchanged words with the complainant over the seat and then assaulted the complainant in the toilet area. The verdict was not unreasonable.

Discussion

- [59] The evidence placed before the jury established beyond reasonable doubt that in the early hours of 25 July 2014 the complainant sustained grievous bodily harm. The injury sustained by the complainant, according to the medical evidence, was a bodily injury of such a nature that if left untreated would be likely to cause permanent injury to the complainant's health. The evidence placed before the jury also established beyond reasonable doubt that the grievous bodily harm was sustained by the complainant unlawfully. There was no evidence supportive of any lawful justification or excuse. The only remaining issue was whether the offender who caused that grievous bodily harm was the appellant.
- [60] A determination of whether the appellant was identified beyond reasonable doubt as the complainant's assailant required consideration of four questions. First, whether the male Conway spoke to whilst entering the toilet area was the complainant's assailant. Second, whether the male Conway saw standing across the street was the same person as the male Conway spoke to whilst entering the toilet area. Third, whether the male police identified as walking into the alleyway was the same person Conway pointed out to police on the street. Four, whether the male police spoke to outside the hotel, being the appellant, was the person police observed enter the alleyway.
- [61] As the complainant was not able to identify his assailant, the jury could only be satisfied beyond reasonable doubt that the appellant was that assailant if the jury's assessment of the evidence established beyond reasonable doubt that the male Conway spoke to when first entering the toilet area was the complainant's assailant, that the male Conway identified to police as standing across the street was the same male Conway spoke to whilst entering the toilet area and that the male police spoke to outside the hotel, who was clearly the appellant, was the male Conway had identified to police whilst out on the roadway.
- [62] It is convenient to first deal with the third and fourth questions. The evidence established Conway was approximately 30 metres away from the male he identified on the other side of the street when he was speaking to police. He pointed that person out to police. Each officer gave evidence the person they subsequently spoke to was the same person pointed out by Conway. Further, the descriptions of that male given by

each officer, matched the appellant's build and the clothing he was wearing when he was spoken to outside the hotel.

- [63] Whilst the officers gave evidence there were other people in the area, the numbers in the area were in the order of 10 to 12 people. Those numbers were not of a magnitude which would give rise to a reasonable doubt as to whether the police correctly identified the person pointed out to them by Conway. Further, whilst police lost sight of that male for a short time whilst in the alleyway and after leaving the alleyway, neither of these occasions was of a sufficient duration to give rise to a reasonable doubt that the person spoken to by police outside the hotel was the person they had followed into the alleyway subsequent to Conway's identification of that person. The person spoken to by police was clearly the appellant.
- [64] In the circumstances, a consideration of the evidence as a whole rendered it open to a jury to be satisfied beyond reasonable doubt that the person Conway pointed out to the police was the same person police followed into the alleyway and subsequently spoke to outside the hotel. It was open to the jury to be satisfied beyond reasonable doubt that person was the appellant.
- [65] As to the first question, whilst there were differences in the evidence of Douglas and Conway as to the points at which Douglas obtained Conway's assistance and at which the male in the toilet area spoke words to Conway, Conway's evidence was definitive as to the effect of the words spoken by that male. Conway consistently said his reply to what was said by the man was "next time come and see me".
- [66] Whilst the appellant submits the words attributed to the "big guy" were equivocal as to an involvement in the assault of the complainant, Conway's response provides context for the words uttered by the "big guy". Such a response is only consistent with the male having indicated he had taken active steps in relation to a person in the toilet area.
- [67] Having considered the evidence as a whole, and allowing for the differences in the versions given by Douglas and Conway, it was open to the jury to be satisfied beyond reasonable doubt that the purport of the conversation Conway had with the male leaving the toilet area was only consistent with one reasonable inference, namely that he was the complainant's assailant. Any other rational inference, such as the person at the urinal was the assailant, was excluded by a consideration of the evidence as a whole.
- [68] A determination of the second question is central to whether the verdict of the jury was unreasonable. It requires consideration of Conway's evidence as to the description of the male he spoke to on entering the toilet area and of the appellant's description as given by the four police officers. This is central as Conway was unable to describe what the male across the street was wearing when he identified that male to police officers.
- [69] Conway described the male leaving the toilet area as a "big guy", about six foot two or six foot three, wearing a blue "dress shirt". The dress shirt had a collar and buttons. The person identified by Conway to police as the assailant was wearing dark jeans and a black or blue T-shirt. Wilson and Tyrrell each described the male identified by Conway as wearing a black T-shirt. A viewing of the body camera footage taken by the officers also reveals the male was wearing a black T-shirt. On no reasonable basis could that shirt be described as a "dress shirt".
- [70] Conway gave evidence that the assailant had been standing across the street the whole time he was outside with the complainant. He gave evidence the person kept

looking in their direction. Conway said he had him under observation throughout this period. In those circumstances, the difference in attire is very significant. Unless the appellant had changed his clothing or at the very least removed the dress shirt to reveal a dark T-shirt underneath, there must be a significant doubt the appellant was the complainant's assailant. On the evidence, it would be pure speculation for the jury to find the appellant had removed his dress shirt. On Conway's evidence, there was little opportunity for the appellant to have done so in any event. On the police evidence, it could not have happened in the alleyway as when police looked across the roadway the person was already wearing a dark coloured T-shirt.

- [71] Whilst the appellant fitted Conway's description in terms of height and build, that description was not so specific as to render the appellant uniquely likely to meet Conway's description. The fleeting nature of the observation would render that description alone insufficient to satisfy a jury beyond reasonable doubt that the appellant was the complainant's assailant.
- [72] The significant difference in clothing gives rise to a reasonable doubt that the appellant was the same person Conway spoke to when entering the toilet area. Such a reasonable doubt ought to have been held by the jury in all the circumstances. It is sufficient to render the jury's conclusion that the appellant was the complainant's assailant unreasonable.
- [73] It was accepted at trial²² and on appeal²³ that the evidence of flight, whilst indicative of a consciousness of guilt, was insufficient to establish beyond reasonable doubt the appellant was the complainant's assailant if there was a reasonable doubt as to the reliability of Conway's identification of the male across the street as the complainant's assailant.

Conclusions

- [74] Once a conclusion is reached that the evidence was insufficient to satisfy a jury beyond reasonable doubt that the appellant was the assailant, the jury's verdict must be set aside. As the evidence will always give rise to such a doubt, there is no basis to conclude the appellant ought to be the subject of a re-trial. A verdict of acquittal ought to be entered.

Orders

- [75] I would order:
1. The appeal be allowed.
 2. The conviction be set aside.
 3. A verdict of acquittal be entered.

²² AB191/20.

²³ T1-20/34 – 47.