SUPREME COURT OF QUEENSLAND

CITATION:	*R v Irwin* [2017] QCA 2
PARTIES:	**R** **v** **IRWIN, Michael James** (appellant)
FILE NO/S:	CA No 135 of 2016 DC No 218 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 6 May 2016
DELIVERED ON:	3 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by jury of one count of grievous bodily harm – where the defences of accident under s 23(1)(b) and self-defence under s 271(1) *Criminal Code* 1899 (Qld) were raised on the evidence – where the appellant contends that the prosecution did not negative those defences beyond reasonable doubt – where the appellant contends that the complainant's evidence was inconsistent or irreconcilable with the evidence of other witnesses at trial – where the appellant contends that the verdict was unsafe and unsatisfactory – whether a verdict of guilty was reasonably open to the jury on the whole of the evidence *Criminal Code* 1899 (Qld), s 23(1)(b), s 271(1) *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, followed *R v Condon* [2010] QCA 117, cited *R v Coomer* [2010] QCA 6, cited *R v Stuart* [2005] QCA 138, cited *R v Taiters; Ex parte Attorney-General (Qld)* [1997] 1 Qd R 333; [1996] QCA 232, cited

SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed

COUNSEL:	S Holt QC for the appellant M B Lehane for the respondent
SOLICITORS:	Nyst Legal for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Michael James Irwin, was charged with unlawfully doing grievous bodily harm and assault occasioning bodily harm on 28 July 2012 of Lloyd Reginald Ross. After a four day jury trial he was convicted of doing grievous bodily harm and acquitted of assault occasioning bodily harm. He has appealed against his conviction contending that it is unsafe, unsatisfactory and unreasonable, and against the weight of the evidence.

[2] A consideration of that ground of appeal requires this Court to review the whole of the evidence and to determine whether it was reasonably open for the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[1]

The prosecution particulars of the offences

[3] The Crown particularised the offence of grievous bodily harm as:

> "The 'act' by the [appellant] was:
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> - a kick; or
> - an application for force which caused the complainant to fall.
>
> The injury (consequence) resulted directly from the kick/force itself, the subsequent fall to the ground, or a combination of the two.
>
> The bodily injury was a fracture of the complainant's left neck of femur...".

[4] The assault occasioning bodily harm was particularised as "[o]nce the complainant was on the ground the [appellant] kicked him one or more times, causing a laceration to the complainant's ear."[2]

[5] It was common ground that self-defence under s 271(1) *Criminal Code* 1899 (Qld) was raised on the evidence. The prosecution conceded in writing that, in respect of the charge of grievous bodily harm, if the jury accepted the appellant was unlawfully assaulted by the complainant in the way the appellant described in evidence, or if they were left with a reasonable doubt that he was unlawfully assaulted in that way, and that he then pushed the complainant causing him to fall and fracture his hip, the defence of self-defence would be successful and the jury should acquit.[3]

The evidence at trial

[6] The complainant gave the following evidence. He had known the appellant since 1985 when they met at a mutual friend's wedding. The appellant worked for him in

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1 *M v The Queen* (1994) 181 CLR 487, 493 – 495; *SKA v The Queen* (2011) 243 CLR 400 [12].
2 MFI A, AB 818.
3 MFI F, AB 820

Tamworth in insurance sales from about 1987 until about 1993. He then worked for the complainant selling homes. In about 2007 they worked together in a new building company with the appellant as builder and the complainant as sales consultant. In about 2008 the appellant took over the company. By late 2009 or early 2010 they stopped doing business together. Throughout this period they were, on the whole, very good friends and remained so until 2012. The complainant was godfather to one of the appellant's children.[4]

[7] On Saturday 28 July 2012, Mr Ross was in his office in Cavill Avenue, Surfers Paradise, from about 8.00 am until about 10.00 am. He left to collect the newspaper, cigarettes and put in a lotto ticket at the Circle on Cavill Shopping Centre. He walked up a slight ramp past the Perle Nightclub. By reference to three photographs,[5] he described how he saw the appellant as he reached the second lot of railings, just to the left of an orange-red post. The appellant was angry, seething and frothing at the mouth, and with glazed eyes.[6] He was wearing jogger-type gym shoes. He said, "I've been waiting for this effing time for a long time." With his left hand, he pushed the complainant who took a few steps back. The appellant's right fist came across but the complainant turned his head and the blow grazed across his left ear and cheek. The push and the swing were at the same time. This left him a little off-balance and moving backwards. The next minute he felt "this almighty pain" in his left leg near his hip and he collapsed. He felt the pain before he connected with the ground.[7] After feeling the pain in his left thigh, he "just crashed down onto the ground".[8] He did not see what caused the leg pain which was excruciating and caused him to collapse "like a sack of potatoes." He was pretty sure he landed on his "butt". He rolled away while the appellant kicked him and yelled at him to get up. He felt his leg was broken and could not get up. The appellant kicked him in the back and around the thigh, on the right-hand side towards his waist and kidney area, between six to eight times.[9] As he tried to roll away, the appellant kept coming for him, calling him a dog and yelling and screaming. The complainant was asking him to stop and said four or five times that his leg was broken and he could not get up. Eventually the attack stopped and the appellant walked away. The complainant pulled himself along the ground to the wire fencing and slowly pulled himself up on a little post. The pain was excruciating and he could not walk.[10]

[8] A few minutes later the appellant returned. He felt a kick followed by another kick to his back above the kidneys and he fell back, first onto one knee and then backwards onto the ground. The appellant tried to choke him and continued to scream at him, frothing at the mouth, spitting and yelling. The complainant was close to the fence and the appellant was on his right side. The appellant called him a dog and told him to get up. He said, "[Y]ou have told somebody that you're effing my wife". He could not remember much after that but the appellant was yelling, screaming and choking him.[11] He said something like the complainant was lucky that it was in a public place and that next time it would not be so public. All this time the appellant was kneeling beside him with his hands around his throat, choking and shaking him and spitting at

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4 T1-31 – T1-34, AB 37 – 40.
5 Exhibit 1, photographs 1 – 3.
6 T1-39, AB 45.
7 T1-41, AB 47.
8 T1-42, AB 48.
9 T1-44 – T1-45, AB 50 – 51.
10 T1-46 – T1-47, AB 52 – 53.
11 T1-48, AB 54.

him; "his face was angry and evil."[12] The complainant kept saying that he was hurt, his leg was broken and he could not get up. A lady told him to stop and a man said he would call the police. This altercation occurred on a raised platform near the fence.[13] There were people on the other side of the fence.[14] The appellant stood up and started yelling at the onlookers, saying, "this bloke is the biggest crook on the Gold Coast. He's a fraudster."[15] The appellant stopped assaulting him and walked off in the direction of his nearby apartment.

[9] The complainant pulled himself up again on the fencing, standing on his right leg with his left leg hanging. Some onlookers assisted him. He phoned his son and a work colleague who were nearby in his office and asked them to assist him. With a great deal of effort he was able to reach hospital. A couple of days later he had an operation and a slow and painful recovery followed. He was left with a permanent limp and suffered discomfort when sitting for long periods. He also suffered an injury to his ear, which he first noticed in hospital. The appellant had kicked him a couple of times in the head when he was on the ground. He could not recall whether the kicks to the head were on the first or second occasion he fell to the ground.[16]

[10] In cross-examination he agreed that he was on blood-thinning medication which made him prone to bruise more easily and that he suffered no bruises to his back.[17] During the second assault, the appellant kicked him twice to his back and twice to his head, followed by the strangling and shaking. Apart from the small graze to his ear he had no other injuries. There were no marks on the back of his head or his neck.[18] He did not complain of being strangled or kicked to the head to the ambulance officer, his son, his treating doctor or nurse, or police. The complainant was focussed on his painful leg injury. The ambulance officer gave him morphine for the pain.[19]

[11] He agreed that in January 2013 he put in a claim against the appellant under the *Personal Injuries Proceedings Act* 2002 (Qld) for $112,686.90. Nowhere did he mention in that claim that he had been strangled or choked. He thought the claim was about his leg.[20] When he was on the ground the first time, the appellant kicked him twice to the butt. A woman with blonde hair wearing a red top yelled out to the appellant to stop. The appellant kicked him another two or three times. These kicks did not leave any mark or injury. He agreed he told police that the appellant kicked him to his right ear on the first occasion he was on the ground. He agreed that at the committal hearing he said the only time he was kicked to the head was when he was on the ground on the second occasion.[21]

[12] He agreed he was a salesman and that his "LinkedIn" profile featured his photograph next to a Rossair[22] plane, although he had no connection to Rossair. He completed a trade as a plant mechanic. Although he sold superannuation investment properties and financial services, he did not hold a financial services licence and had no formal

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12 T1-49, AB 55.
13 T1-50, AB 56.
14 T1-50, AB 56.
15 T1-51, AB 57.
16 T1-52 – T1-54, AB 58 – 61.
17 T1-57, AB 63.
18 T1-59, AB 65.
19 T1-60, AB 66.
20 T1-61 – T1-62, AB 67 – 68.
21 T1-66 – T1-67, AB 72 – 73.
22 A regional South Australian airline.

qualifications other than some diplomas.[23] He was declared bankrupt in 2010 and was released from the bankruptcy in May 2012. He claimed the appellant had "ripped him off" for a large amount of money.[24] He texted the appellant stating that he was disappointed in him for ripping him off. He agreed that at the time of the incident he had never made any formal demand for payment, had not instituted legal proceedings and had not seen the appellant for over a year. He sent him a text message on 26 June 2012, about a month before the incident, probably after he had been drinking.[25] He felt the appellant had taken his share of the building company without compensation and that he had not received the commissions he was owed. He agreed he had been sentenced for tax evasion and served 12 weeks imprisonment.[26] He denied that he was looking forward to getting his revenge on the appellant. He considered he had given the appellant an opportunity in life. He suggested in the text message that they might have a fight at the Sea World car park because of the appellant's unpaid business debts to him.[27]

[13] He did not see the appellant until he was "in his face", pushing him. He did not see the kick to his hip but he felt it. When he was on the ground the appellant was "kicking the crap out of" him.[28] He agreed a woman approached saying something like "Stop. Leave him alone." A man also approached. He agreed the appellant left for a few minutes but came back when he was leaning against the wire fence where he had fallen.[29] He denied that the appellant did not further assault him at the wire fence. At the time of the appellant's second assault on him, when he was on the ground and trying to roll away, he saw the woman to his left.[30] He thought she was there for the second assault and that other people came up to him during the first assault. He agreed that, in his statement to police, he said the women was there when he was on the ground during the first assault. He then accepted that she was also there when the appellant returned and then assaulted him a second time.[31] He maintained that the first and second assaults occurred as he had outlined in his evidence in chief.

[14] Ms Jodie Broad gave evidence that she was withdrawing money from an ATM at Circle on Cavill sometime between 8.00 am and 10.00 am one morning in July 2012 when she heard a lot of angry yelling near the Perle Nightclub. She pointed out the location of the ATM in a photograph.[32] She saw one man on the ground (the complainant) and one man standing about 50 metres away, just to the right of the orange-red post and behind the wire fence depicted in photograph 3 of Exhibit 1 (the appellant). The appellant was doing most of the yelling. She walked across to see what had happened. As she got closer she saw the appellant kick the complainant. When she first heard the yelling she saw the appellant make an initial kicking action. She did not know if this kick connected. As she got close he gave a second kick. She did not see where this kick connected. There was a wire-type fence separating her from them, just to the left of the steps depicted in photograph 2 of Exhibit 1. She could tell they knew each other because of what they were saying.

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23 T1-73, AB 79.
24 T1-74, AB 80.
25 T1-75 – T1-82, AB 37 – 40.
26 T1-90, AB 96.
27 T1-87, AB 93.
28 T1-105, AB 111.
29 T1-106, AB 112.
30 T1-107, AB 113.
31 T1-113, AB 119.
32 Exhibit 4.

[15] She told the appellant that it was not good to kick someone while they were on the ground. He then said something about his relationship issue with the complainant; he had ripped him off; something about a marriage breakdown, business deals gone wrong and text messages to prove it. The appellant did not fully calm down but he ceased all physical contact with the complainant. The appellant probably continued to yell as he spoke to her and the complainant, who was still moving but not saying much. She was concerned that he had some blood on his right ear. After more yelling at the complainant, the appellant walked away. Other people had gathered around. The complainant pulled himself up using the fence. He was very "wobbly".[33]

[16] The appellant then returned from the direction of the newsagent. He came within a metre of the complainant and yelled some more but there was no more physical contact. There was a lot of yelling; "general hatred...and animosity". The appellant walked past her. She said something to him but she could not remember what. The complainant told her his phone was working and he was able to call for assistance.[34]

[17] In cross-examination she agreed that she did not know either protagonist. She confirmed that after she saw the appellant kick the complainant, the appellant walked away, returned shortly afterwards and continued to yell at the complainant but there was no further physical contact. He certainly did not kick him twice in the back, knocking him to the ground. Nor did he place his hands around his throat and squeeze. When he returned, the appellant was carrying a bottle of water.[35]

[18] The complainant's son, Lloyd Ronald James Ross, gave evidence that he answered a call for assistance from his father at about 10.00 am on 28 July 2012. His father was bleeding from one ear and was trying to stand on one leg. He had dirt marks on the back of the shoulder of his jacket.[36]

[19] Shamus Bradley gave evidence by videolink from Ireland. He said that he had known the complainant since 2006. The complainant introduced him to the appellant in mid to late 2007.

[20] On Thursday, 2 August 2012 about 1.00 pm or 1.30 pm, he was returning to his office when he met the appellant in the lift. He went into the appellant's office for a chat and a coffee. The appellant was carrying a pharmacy bag and was limping. He said that obviously Mr Bradley had heard what had happened to the complainant. Mr Bradley said he had. When asked to relay their exact conversation Mr Bradley, "God, it's four – nearly four years ago". Mr Bradley asked the appellant what happened. He said he got into a confrontation with the complainant. Mr Bradley said, "You broke his fucking leg". The appellant said he tried "to break the other leg and put him in a wheelchair" and to choke him. Mr Bradley said, "That's a bit harsh, isn't it" and asked how it happened.[37]

[21] The appellant said, "Well, you know, [the complainant], he's a creature of habit. You know, at the start of the morning light, he goes to get some cigarettes and his paper at Circle on Cavill." Mr Bradley asked if the appellant was waiting for him. He said he was waiting for him and then, "Just got stuck into him". Mr Bradley said, "You know, you're two grownup guys....You're business guys". The appellant asked if he

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33 T1-124 – T1-125, AB 130 – 131.
34 T1-126 – T1-127, AB 132 – 133.
35 T1-130, AB 136.
36 T1-134, AB 140.
37 T2-5 – T2-7, AB 153 – 155.

saw the text the complainant sent him. Mr Bradley said, "Yes, I got it by mistake." It was a demand from the complainant for money. Mr Bradley asked him if that was why he was waiting for the complainant and got stuck into him. The appellant said it was. Mr Bradley again said he was doing his best to remember the conversation but it was nearly four years ago. The appellant was still angry about what happened. Mr Bradley did not want to go into it too much more because he felt uncomfortable and returned to his office.[38] He repeated that the appellant said, "I tried to break his leg – to break his other, put him in a wheelchair." He said the appellant "didn't give a fuck".[39]

[22] In cross-examination he agreed he was a good friend of the complainant. His company had a lease over property owned by the complainant's wife and in March 2013 when the property was being sold he was released from paying at least the last 12 months rental as part of an arrangement for entering into a fresh lease for an extra five years. He said he thought he was released from three years of the lease which he thought was with the complainant's company. The rental was between $18,000 to $20,000 per month, between $200,000 to $240,000 per year. On the Tuesday before he met with the appellant, he spoke to the complainant's wife about what happened to the complainant. He gave his statement to police about his conversation with the appellant some weeks later on 30 August 2012. He did not discuss his statement to police with the complainant or his wife before he went to the police. He maintained that his evidence of the conversation with the appellant on Thursday, 2 August 2012 was accurate.

[23] Dr Angus Nicoll, an orthopaedic surgeon, examined the 55 year old complainant on 28 July 2012. His left hip was broken in three places. He had bruising about the hip area consistent with the fracture.[40] There was no boot print and no obvious point of impact. He had no notes about bruising elsewhere. He operated using a metal device to fix the broken bones in position on 30 July 2012. Without surgery the complainant would have had a significant disability of the hip and could have eventually succumbed to pneumonia, embolus or dehydration. He recovered from the surgery quite well after about nine months but he had lost about 25 to 50 per cent of the range of motion of the hip. His impression was the injury was a high-energy fracture, most likely when he fell on his side onto the ground. The fracture required a high degree of force. It was likely to have been from a fall from a height (for example, from a step ladder onto a hard surface) or while moving quickly (for example, moving or stumbling backwards and hitting the ground at speed) or in a motor vehicle accident. It was consistent with someone being pushed and then falling onto a hard concrete tiled surface.

[24] Dr Nicoll agreed that the complainant was taking anti-blood clotting medication and could therefore bruise more easily than others. He also had a slightly lower than normal haemoglobin count which also may have rendered him slightly more liable to bruising than others. Fractures of this kind were more common in old people over 70 with osteoporosis. Much more force was required to cause a fracture of this type on a younger person like the complainant. There was no evidence that the complainant had any osteoporosis. A normal 55 year old male would not be expected to sustain this fracture by a direct kick to the hip area from someone wearing a sand shoe. The injury required a very high and concentrated application of force. It was consistent with falling directly onto the left side onto a very hard surface with some speed. It

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38 T2-7 – T2-9, AB 155 – 157.
39 T2-10, AB 158.
40 T2-25, AB 173.

was conceivable that the injury could have been suffered from a direct blow but it was quite unlikely.[41]

[25] Dr Sarjit Singh gave evidence that he was the emergency physician who attended on the complainant on 28 July 2012 at about 3.30 pm. He thoroughly examined him. His main injury was to his left hip. There was a very minor skin tear on his left ear but otherwise he had no injuries. Dr Singh referred him to Dr Nicoll. In cross-examination he noted that there was no evidence of head injury, loss of consciousness, or any other injury however slight to any other part of his body, apart from the minor tear to the left ear. In re-examination he stated that bruising can sometimes take a few days to develop.[42]

[26] Police officer Suzanne Whitaker, the investigating officer, obtained footage from closed circuit television cameras at Circle on Cavill.[43] Defence counsel admitted that it depicted the appellant leaving his apartment building at 10.02.45 am on 28 July 2012 and returning about seven minutes later that same morning at 10.10.03 am. Stills were taken from that CCTV footage.[44]

[27] The appellant gave evidence that he was 55 years old and had operated a construction company for the past 10 years. He had never been charged with or convicted of any criminal offences. He met the complainant in 1986 and worked for him as an insurance agent for about two years.[45] He and the complainant were then 'head-hunted' by an insurance company. They became directors in a company which later went into receivership after a dispute with the insurance company. This ultimately caused the appellant to become bankrupt in 1993. The complainant also became bankrupt. The appellant then worked as a real estate agent for three years until 1996 when he was discharged from his bankruptcy. He has not been bankrupt since. He operated his own real estate company until 2001. He then worked as a property consultant until 2006 when he began his own construction company. He had very little contact with the complainant between 1993 and 2006. The complainant's company received a $22,000 plus GST commission for each client who purchased a house from the appellant's company. In 2007 the complainant's company shares were transferred to him. It was agreed that referrals from the complainant would result in a higher commission, $35,000 plus GST. The complainant and the appellant continued doing business on this basis until about late 2009 when the complainant's wife commenced her own building company. From that point the complainant and the appellant had little or no contact. In the early hours of one morning in June 2012 the complainant sent him a text message accusing him of owing the complainant a lot of money, and suggesting he had stolen from him. This was not true and it upset the appellant.[46]

[28] He denied that he was waiting for the complainant on 28 July 2012 or that he ever told Mr Bradley this. The appellant lived in a residential apartment in Circle on Cavill. The complainant worked nearby and went everyday to Melba's at Circle on Cavill. The appellant would have had no difficulty locating him there had he wished to.

[29] On Saturday, 28 July 2012 he left his apartment at about 7.30 am and drove to the gym returning at about 9.30 am. He dropped his gym bag and towel at his apartment

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41 T2-33, AB 181.
42 T2-43 – T2-47, AB 191 – 195.
43 Exhibit 5.
44 Exhibit 6.
45 T2-43 – T2-47, AB 191 – 195.
46 T2-65 – T2-66, AB 213 – 214.

and was carrying a bottle of water on his way for a walk on the beach at about 10.00 am. He saw the complainant about four or five metres away. The complainant approached him and said, "Irwin, where's my fucking money?". The appellant told him to "fuck off". The complainant continued to follow and push him on his right shoulder saying, "I'm going to get my money". The appellant was feeling "really angry...really cranky". He was heading down a ramp towards Cavill Avenue on his way to the beach trying to avoid the complainant but he pushed him again. The appellant stumbled down onto one knee. The complainant again said, "I'm going to get my fucking money". As the appellant stood up the complainant was in front of him on the downside of the ramp.

[30] The appellant was angry because he had paid the complainant everything that he was entitled to and more and he had said things about the appellant's wife to the appellant's eldest daughter, claiming to have had a relationship with her. He was also really cranky about the complainant pushing him. As a result, the appellant stood up and pushed the complainant in the chest. He stumbled back three or four metres and fell to the ground reasonably hard.[47] He walked over and told him to get up adding that if he wanted to have a fight, they would have a fight. He did not kick him before he fell to the ground. He kicked him twice in the right buttock. He used about 40 to 50 per cent of his strength and they were not hard kicks. He told the complainant to get up and if he wanted to have a fight they could have one. The complainant did not say that he had broken his leg and did not get up. A woman he now knew was Ms Broad was "singing" out to him to stop. He was furious with the complainant and told Ms Broad why.

[31] After he spoke to her for about 30 seconds, he left as he could see that the complainant was not going to get up.[48] He continued towards the beach. As he had finished his bottle of water he went to the newsagency to buy another. He was thinking about all the things the complainant had done to him and returned to see the complainant leaning up against the wire fence where Ms Broad was talking to him. He had no further physical contact with the complainant but continued to tell him in angry terms that he had repaid everything he owed and more and to keep away from him and his family. He did not again kick the complainant. Nor did he put his hands around his neck to strangle him. When he finished yelling at the complainant he was too upset to go for his walk and returned to his apartment.[49]

[32] He denied ever having a meeting of the kind referred to by Mr Bradley and stated that he did not say the things Mr Bradley attributed to him. He claimed that he pushed the complainant only after he was assaulted. He felt intimidated and threatened and pushed him away in defence. He kicked him when he was on the ground to prompt him to get up to have a fight because he was really angry with him.[50]

[33] He agreed in cross-examination that there was no written documentation of the contracts and agreements with the appellant about which he gave evidence. Although he and the appellant had previously confronted each other at Melba's when the complainant was drunk, they never previously came to blows. He agreed that back in 1992 he had called the complainant out to a fight in Sea World after the complainant had pushed him against the wall in the garage in front of the complainant's wife and

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47 T2-68 – T2-69, AB 216 – 217.
48 T2-73, AB 221.
49 T2-74 – T2-75, AB 222 – 223.
50 T2-78, AB 226.

children, one of whom was the appellant's godson.[51] It was in that context that the appellant said if the complainant wanted a fight they could do it in the car park at Sea World. The incident passed and their relationship continued as normal. He agreed he was very angry about the text message and that when he saw the appellant that July morning he was furious and frothing at the mouth. He denied, however, that he was waiting for the appellant or that he knew he went to the newsagent every Saturday morning.[52] He admitted that he told onlookers, including Ms Broad, that the complainant had ripped off hundreds of people on the Gold Coast and he had the text messages to prove it when, in truth, he did not have those text messages. He maintained, however, that the complainant had ripped off a lot of people and one of his former clients was at the stage of committing suicide.[53] He was not aware that his spittle got on the complainant's face. He maintained his account of the incident with the complainant.

The appellant's contentions

[34] The appellant submits that the complainant's credibility was irretrievably destroyed by his description of the appellant's conduct during the second part of the incident relating to the alleged assault occasioning bodily harm. His evidence was irreconcilable with the observations of Ms Broad. There was no rational basis to doubt her evidence as she was entirely independent and gave a reliable and precise recollection. The only rational conclusion was that the complainant had embellished his account and was not reliable. The appellant emphasises that it was unlikely the complainant would have had no bruises, scratches, or marks around his neck had he been assaulted in the way he claimed.

[35] The medical evidence as to complainant's hip fracture, the appellant submits, was inconsistent with the complainant's evidence as to how his hip was injured. On the medical evidence, the most likely explanation was that he broke his hip having fallen, after being pushed at some speed, onto the hard surface of the shopping centre.

[36] As to self-defence, the appellant contends in his written submissions that the jury could not have rationally excluded his evidence that the complainant assaulted him first; that he then pushed the complainant who, as a result, fractured his hip when he hit the ground. In light of the prosecution's concession set out at [5] of these reasons, the appellant submits that the defence of self-defence was raised and not negatived and the jury should have acquitted on this basis.

[37] In oral submissions, the appellant placed emphasis on the defence of "accident" under s 23(1)(b) *Criminal Code* rather than self-defence. In both written and oral submissions he pointed out that the trial was conducted on the basis that the prosecution had to establish beyond reasonable doubt that the kind of injury sustained was a reasonably foreseeable possibility.[54] It did not need to prove the precise nature of the injury.[55] The jury could not rationally conclude beyond reasonable doubt that an ordinary person would reasonably foresee the possibility of a broken hip as the result of a push of the kind described by the appellant. The injury to the appellant was no more than a theoretical and remote possibility.[56]

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51 T2-87, AB 235.
52 T2-95, AB 243.
53 T2-106, AB 254.
54 *R v Stuart* [2005] QCA 138; *R v Condon* [2010] QCA 117.
55 *Stuart* [2005] QCA 138; *R v Coomer* [2010] QCA 6.
56 *R v Taiters; Ex parte Attorney-General (Qld)* [1997] 1 Qd R 333.

[38] The jury, the appellant submits, should have rejected Mr Bradley's evidence as he was a friend of the complainant; the complainant's wife had told him about what the complainant said happened; and he received a significant financial benefit from the complainant before he gave his evidence. In any case, the appellant contends, the alleged confession was at odds with Ms Broad's independent evidence that there was no choking.

[39] The appellant also emphasises that after the verdict the judge stated that in his view the guilty verdict was not consistent with the evidence and he was happy to put that on the record.[57] His Honour later stated that he considered that complainant's evidence was grossly inconsistent with other significant independent evidence.[58]

[40] For all these reasons the appellant contends that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

The respondent's contentions

[41] The respondent contends that it was open for the jury to reject the appellant's account that the complainant was the instigator and to use other aspects of his evidence to support the prosecution particulars. The appellant held a deep-seated animosity towards the complainant. He was furious and angry with him on the day of the incident. It was implausible that when he saw the complainant he would have remained passive and non-confrontational. The manner in which the complainant must have hit the ground was consistent with the appellant attacking him in a sudden, unexpected and violent way. Ms Broad's evidence did not support the appellant's account raising self-defence. The respondent emphasises that the appellant admitted in cross-examination that he had lied to onlookers at the scene by claiming to have had text messages proving the complainant had ripped off hundreds of people.

[42] The respondent also emphasises that the appellant admitted pushing the complainant in the chest with enough force to cause him to stumble backwards three or four metres on the downward slope of the tiled ramp. Whilst not accepting the complainant was the instigator, it was open for the jury to conclude that the appellant pushed him to the ground when positioned above him on the tiled ramp. It was then open for them to conclude that a push involving the degree of force described by the appellant negated the defence of accident. The medical evidence, the respondent submits, supported the use of a high degree of force and included the possibility of a forceful kick causing a fracture.

[43] The respondent places weight on Mr Bradley's account which, it submits, the jury were entitled to accept. There were no significant inconsistencies between his statement made to police on 30 August 2012 and his evidence in court. There was no suggestion that Mr Bradley was on unfriendly terms with the appellant. He volunteered in cross-examination that there was about three years rather than 12 months to run on the lease from which the complainant had released him. In any event, as the complainant was seeking to sell the property the arrangement may have been mutually convenient. It was no reason to reject his evidence. The release also occurred well after Mr Bradley gave his statement to police. The jury were entitled to accept Mr Bradley's evidence.

[44] It was unsurprising, the respondent submits, that the complainant's evidence had some difficulties. He was describing events after having suffered excruciating pain.

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57 Sentence (6 May 2016), T1-4, l 6 – l 9, AB 482.

58 Above, T1-9, l 26 – l 40, AB 487.

His memory of the events before the injury, however, could be relied upon. Ms Broad did not observe the initial stages of the incident. The fact that the appellant kicked the complainant when he was on the ground provided some support for the notion that he also kicked him whilst he was upright. This was consistent with the high degree of animosity he had towards the complainant. Ms Broad's description of the appellant's behaviour was inconsistent with his claim of initially being non-confrontational. The complainant's version, the respondent contends, was supported by the medical evidence. Alternatively, the complainant may have been mistaken as to precisely when the injury occurred because of the trauma associated with the painful hip break. Even if the complainant's evidence was rejected, the jury was still entitled to conclude that the appellant instigated an unlawful assault upon the complainant and was criminally responsible for his actions.

[45] The respondent points out that the judge emphasised the conflicts between the evidence of Ms Broad and the medical evidence on the one hand and that of the complainant on the other. But, the respondent contends, when regard is had to the advantages enjoyed by the jury, a review of the whole of the evidence shows that it was open for them to be satisfied beyond reasonable doubt as to the appellant's guilt.

Conclusion

[46] I can understand the trial judge's concern about the jury verdict in that the reliability of the complainant's evidence was starkly brought into question by the medical evidence and was inconsistent with Ms Broad's independent and apparently reliable account. Like the primary judge, I do not consider the jury could rely on the evidence of the complainant. Indeed, the jury's verdict of acquittal on the count of assault occasioning bodily harm suggests they also rejected the complainant's evidence, at least in part. The question for this Court then becomes, on the evidence which the jury could accept, was it rationally open to be satisfied beyond reasonable doubt of the appellant's guilt.

[47] There is no doubt the complainant suffered grievous bodily harm when he broke his hip in this altercation with the appellant. Given the medical evidence, which is not inconsistent with the appellant's account, it is most likely that the complainant broke his hip after the appellant pushed him with a considerable degree of force, causing him to fall heavily onto the tiled shopping centre surface.

[48] Given Ms Broad's evidence, the jury were entitled to reject the appellant's account that the complainant was the instigator and aggressor. This accorded with the appellant's evidence that he was so angry with the complainant he was frothing at the mouth. Ms Broad, who admittedly did not see how the incident began, observed no act of aggression from the complainant. For good reason, the appellant's counsel did not enthusiastically pursue the contention that the jury could not be satisfied beyond reasonable doubt that self-defence was not disproved by the prosecution. The jury were entitled to reject the notion of self-defence beyond reasonable doubt.

[49] The question of accident under s 23(1)(b) is, however, more nuanced. With the concurrence of trial counsel, the judge directed the jury:

> "The prosecution must prove that the [appellant] intended that an injury like the fracture of the complainant's hip should occur, or foresaw it as a possible consequence, or that an ordinary person in his position would reasonably have foreseen the event as a possible consequence. In considering whether the [appellant] did foresee it or an ordinary

> person would have, you should focus on whether an injury like the hip fracture here was foreseeable as something which could happen, disregarding possibilities that are no more than remote or speculative.
>
> I referred, already, to the medical evidence about the force required to cause a fracture of that – of this kind and to the evidence of – about what occurred given by [the complainant and the appellant]. The evidence of the doctors and of [the appellant], in my view, clearly raises for your consideration, the possibility that neither the [appellant] nor an ordinary person could reasonably have foreseen that the complainant would suffer an injury such as here occurred, a fracture of his hip.
>
> If the [appellant] did not intend or foresee a serious injury of that sort to the complainant as a possible consequence of his action as you find them to be, and if an ordinary person in the position of the [appellant] would not have foreseen that as a possible consequence of those actions, then the [appellant] would be excused by law and you would have to find him not guilty."[59]

[50] Like the primary judge, I consider that the jury could not safely act on the evidence of the complainant. Nor could they safely accept the evidence of Mr Bradley, given his friendship with the complainant; the implausibility of the appellant making such admissions to the complainant's friend; that he made no contemporaneous notes and did not give a statement to police for several weeks; that he had spoken to the complainant's wife about the July 2012 incident before the alleged conversation; and that in March 2013 he was released from obligations to the complainant totalling hundreds of thousands of dollars. What is clear is that the appellant was extremely angry with the complainant when he pushed him. The medical evidence makes it most likely that the complainant broke his hip after the appellant pushed him with a considerable degree of force, causing him to fall heavily on a ramp[60] in a tiled shopping centre. This conclusion receives support from the appellant's own evidence.

[51] A jury may well have considered that an ordinary person in the position of the appellant could not have reasonably foreseen the complainant would in those circumstances suffer a fractured hip. That, it seems, was the trial judge's view. But that is not the test for this Court. It was equally open to the jury on the evidence to reach the contrary conclusion, that an ordinary person in the position of the appellant could have foreseen that the complainant might suffer a serious injury such as a fractured hip from such a forceful push. The resolution of the issue was a matter for the jury. They had the advantage of seeing the height and build of the 55 year old complainant and appellant. Assuming they were of average build and height, the appellant's push of the complainant, necessarily on the medical evidence forceful, on a slight downward sloped tiled ramp, could foreseeably result in the complainant falling badly and seriously injuring himself, even breaking his hip. Such a result was not theoretical or remote.

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59 Transcript, redirections page 28, l 24 – l 46. It was common ground in this appeal that it should be decided on the basis that this direction was according to law, although counsel for the respondent raised the possibility that it may be more favourable than necessary to the appellant. For these reasons, this Court should not be seen as either endorsing or criticising the correctness of that direction which was not addressed in argument.

60 The appellant's evidence was that the complainant was on the downside of the tiled ramp but the photographic evidence suggests any slope was very gradual.

[52] After reviewing the whole of the evidence, I am satisfied that the jury verdict of guilty of grievous bodily harm was not unreasonable and against the weight of the evidence. It was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. It follows that I would dismiss the appeal against conviction.

[53] **GOTTERSON JA:** I agree with the order proposed by McMurdo P and with the reasons given by her Honour.

[54] **MULLINS J:** I agree with the President.