SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fowler; R v Aplin* [2012] QCA 258
PARTIES:	**R** **v** **FOWLER, Ronnie** (appellant/applicant) **R** **v** **APLIN, Learna Irene** (appellant/applicant)
FILE NO/S:	CA No 23 of 2012 CA No 24 of 2012 DC No 8 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction & Sentence
ORIGINATING COURT:	District Court at Mount Isa
DELIVERED ON:	25 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2012
JUDGES:	Chief Justice, Fraser JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In each appeal:** **1. Appeal allowed.** **2. Conviction and sentence set aside.** **3. New trial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where each appellant found guilty by jury after trial of unlawful assault occasioning bodily harm with circumstance of aggravation for being in company with one another and sentenced to 18 months each with parole fixed – where each appellant released on appeal bail – where appellants argued trial judge should have found there was latent ambiguity or duplicity in indictment because it charged several separate offences in a single count – where appellants argued evidence supported contention that there were separate offences – where appellants argued trial judge

erred in leaving jury to determine whether indictment was latently duplicitous – where appellants argued trial judge should have directed verdicts of not guilty or required prosecutor to elect which of the alleged assaults was to be left to jury – whether indictment was duplicitous – whether trial judge erred in leaving question to jury – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where appellants argued that verdict was unreasonable because prosecution confined Crown case to reliance upon s 7(1)(a) *Criminal Code* and prosecution could not prove beyond reasonable doubt that either appellant was individually responsible for an assault which itself occasioned bodily harm – whether it was reasonably open on the whole of the evidence for jury to find beyond reasonable doubt that each appellant did an act which caused bodily harm to the complainant

Criminal Code 1899 (Qld), s 1, s 7(1)(a), s 7(1)(c), s 245, s 246, s 269, s 271, s 273, s 339(1), s 567

Director of Public Prosecutions v Merriman [1973] AC 584, considered
Johnson v Miller (1937) 59 CLR 467; [1937] HCA 77, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Chen [1997] QCA 355, considered
R v Melling & Baldwin [2010] QCA 307, considered
R v Morrow and Flynn [1991] 2 Qd R 309, considered
R v Sobey [2001] QCA 367, distinguished
R v Trifyllis [1998] QCA 416, distinguished
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited
Walsh v Tattersall (1996) 188 CLR 77; [1996] HCA 26, cited

COUNSEL: J Allen for the appellant, Fowler
C L Morgan for the appellant, Aplin
D Meredith for the respondents

SOLICITORS: Legal Aid Queensland for the appellants
Director of Public Prosecutions (Queensland) for the respondents

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **FRASER JA:** Each appellant was found guilty by a jury after a trial in the District Court of unlawfully assaulting Elaine O'Keefe and doing her bodily harm, with the

circumstance of aggravation that the appellants were in company with one another. On 6 February 2012, the appellant Aplin was sentenced to imprisonment for 18 months with an order that she be released on parole fixed at 6 November 2012. The appellant Fowler was sentenced to imprisonment for 18 months with an order that he be released on parole fixed at 20 June 2012. A few days later each appellant was released on appeal bail.

[3] The appellants have appealed against their convictions and sentences. The appellants rely upon the same grounds of appeal against conviction.

Ground 1: That was [sic] I was deprived of my right to a fair trial according to law because the charge which I was convicted of was latently duplicitous in that it alleged more than one offence.

[4] The indictment charged that on 15 October 2009 at Mount Isa in the State of Queensland, Aplin and Fowler unlawfully assaulted Elaine O'Keefe and did her bodily harm, and it charged the circumstance of aggravation that Aplin and Fowler were in company with one another. The prosecutor gave the following particulars of the charge:

> "**Learna Irene APLIN**
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> That the defendant assaulted, and caused bodily harm to, the complainant by:
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> - a punch or punches to the complainant's head; and/or
> - a kick or kicks to the complainant's head; and/or
> - a stomp or stomps on the complainant's head; and/or
> - lifting the complainant's head and banging it on the ground; and/or
> - hitting the complainant's head with a bottle
>
> and that the defendant was in company with Ronnie FOWLER during the course of the assault.
>
> **Ronnie Fowler**
>
> That the defendant assaulted, and caused bodily harm to, the complainant by:
>
> - a punch or punches to the complainant's head; and/or
> - a kick or kicks to the complainant's head; and/or
> - a stomp or stomps on the complainant's head
>
> and that the defendant was in company with Learna Irene APLIN during the course of the assault." [1]

[5] In the course of argument upon applications for the trial judge to rule that the indictment was duplicitous, the prosecutor stated that each alleged application of force was alleged in the alternative.

[6] In opening the case, the prosecutor referred to the complainant inviting Aplin to have a fight and continued:

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1 Transcript 3-98.

> "At this point Ronnie Fowler came up to Elaine O'Keefe and punched her in the head and knocked her to the ground. Elaine O'Keefe's recollection of what happened next is fairly hazy, however she remembers being kicked and punched whilst she was on the ground.
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> Clarence Major and Rowena Major were living in a house on the comer of Walton Street and Martin Street, which was across the road from the Food For Less. They were in a bedroom of their house when they heard the argument develop between Learna Aplin and the complainant. They looked out the window of their bedroom, which looked onto Martin Street. They saw Ronnie Fowler punch Elaine O'Keefe in the head and saw her go down. They knew - they also knew and recognised the defendants through various family connections. They saw the defendants punching and kicking the head of Elaine O'Keefe while she was on the ground. They saw the defendants stomp on Elaine O'Keefe's head while she was on the ground. They saw Learna Aplin lift Elaine O'Keefe's head up and bash it into the ground. And Clarence Major saw Learna Aplin walk away, return with two bottles, and hit Elaine O'Keefe in the head with the bottles a number of times."

[7] On the basis of the particulars and the opening, counsel for both accused made various applications. Relevantly, Aplin challenged the indictment on the ground that it was bad for duplicity. Aplin's counsel argued that the allegation that she used the bottle to assault the complainant involved an assault which was separated from the earlier alleged events by time and by the circumstance that Aplin allegedly left the complainant, subsequently returned to assault the complainant, and used bottles only in that assault. Fowler's counsel made the different but related submission that the prosecutor's particulars, understood in the context of absence of any allegation that Fowler aided Aplin in the commission of her alleged offence, meant that Fowler could not be convicted of an offence involving the use of the bottles. The prosecutor argued that there was one "transaction"[2] and it would be artificial to separate the events.

[8] The trial judge ruled that he was not prepared to say that the prosecution contention that there was only one assault was wrong, that the prosecution should be permitted to proceed, that the evidence to be given by Mr Major concerning Aplin's use of the bottles to strike the complainant was admissible on the present charge, and that the defence counsel could make further submissions about these matters at the end of the prosecution case.[3]

[9] The evidence in the Crown case departed from the prosecutor's opening in some respects. The prosecutor called the complainant, Elaine O'Keefe, Clarence Major, Rowena Major, and a police officer, Bryant. The complainant gave evidence that in the early hours of 15 October 2009 she was walking down Abel Smith Parade in Mount Isa where she saw both appellants, who she knew, and another man and woman. The complainant argued with Aplin about what she described as an old family argument. After they had been arguing face to face, Aplin punched the complainant in the face and the complainant then felt a second punch on the side of

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2 Transcript 2-42.

3 Transcript 2-46.

her jaw. The second punch knocked her out. The complainant did not see who threw the second punch. She had seen Fowler run from behind Aplin when the complainant and Aplin were arguing. When the complainant came to her senses she found that she was sitting on the ground about 10 metres from where she had been knocked down. She was pleading for help and someone was slapping her. She then felt a big bang in her left eye and lost consciousness. The complainant did not see who kicked her but her evidence was that "…he kicked me in the eye". She was unconscious until about 6.00 am. No one else was then around. The complainant walked to her niece's house and was taken home.

[10] Each appellant formally admitted at the trial that the injuries to the complainant's face constituted bodily harm. The complainant gave evidence that she went to hospital. She gave evidence that she was told to go back in the morning for an x-ray and CT scan. "[T]hey" told her that her jaw was alright and her eye socket was broken in three places and "they" told her that she would have to go to Townsville. She went to Townsville three times and "they" said that it was badly bruised. On the last occasion "they" said that "some eye socket heal itself", she did not have to have an operation, but if the eye played up she might need an operation. Bryant gave evidence identifying photographs of the complainant, which he said he suspected would have been taken within a couple of days of the incident occurring, as showing "…the injuries she sustained as a result of this matter."[4] In cross-examination by Aplin's counsel, Bryant agreed that the photographs were taken shortly after the incident occurred on 15th October.

[11] In cross-examination, the complainant agreed that she had seen Aplin and Fowler with a group which included Kylie Coulton and possibly Andrew Coulton and that she did not get along with the Coultons. The complainant knew that Aplin was staying with the Coultons. The complainant agreed that she had sworn at Aplin. She denied that she had punched Aplin first and gave evidence that Aplin punched her first. The complainant agreed she was quite drunk at the time. The complainant agreed that she gave a statement to the police in which she did not tell the police that she had been kicked but told police that someone had hit her really hard around her left eye and she was seeing stars and blacked out. The complainant said that she "…meant by kick instead of, yeah, hit." The complainant disagreed with the suggestion that she had told police that, when she was on the ground after the initial punch up with Aplin, it was Kylie Coulton who was punching into her. The complainant responded "Kylie, no, not Kylie"; but in response to subsequent questions she agreed that Kylie was there and she said "yeah" and "yep" to the suggestion that she told police that Kylie "was punching down … on you". She subsequently agreed that she had said that Kylie Coulton was punching down on her.

[12] Mr Major gave evidence that he awoke in bed at his nearby house in the early hours of the morning when he heard a girl yelling. He looked out of his window and saw the complainant asking Aplin to come over so that the complainant could fight her. He saw the two women walking towards each other. They were swearing at each other and at each other's parents. Mr Major saw Fowler run up alongside the fence in front of the street and hit the complainant. Fowler punched the complainant on the side of her jaw. Mr Major did not see any blows before that point. When Fowler hit the complainant, she fell to the ground, where Aplin punched her in the

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4 Transcript 2-111.

face and kicked her in the body. Mr Major gave evidence that after Aplin had finished punching, kicking, and dragging the complainant, Fowler kicked her once in the head. Fowler and Aplin then walked some distance away from the complainant. (In cross examination Mr Major estimated that they walked for about ten paces.) After remaining away for a couple of minutes, Aplin returned alone to the complainant, who was still lying on the ground, and beat her a few times about her body with two bottles. Aplin grabbed the complainant by the hair and started punching and kicking her again, saying, "don't fuck with me". Aplin dragged the complainant by her hair and banged her head on the cement a few times. Fowler then returned and stomped on the complainant's head with one foot and Aplin then tried to take off the complainant's shirt. Mr Major gave evidence that his wife called out to leave the complainant alone and he went outside and also told Aplin and Fowler to leave the complainant alone. Aplin and Fowler walked away. Another girl was trying to help the complainant. Mr Major adhered to his evidence during cross-examination.

[13] Mrs Major gave evidence that in the early hours of the morning on 15 October 2009 she looked out of her bedroom window. She heard the complainant calling for a fight and yelling and swearing at Aplin. She had seen the complainant driving past in a white car earlier that night yelling out. (The complainant had agreed in cross-examination that she had driven past in a white car but she denied having yelled out.) Mrs Major gave evidence that the complainant walked up to Aplin and asked her if she wanted to fight and Aplin did not respond. Fowler then walked up behind the complainant, punched her in the face, the complainant fell to the ground, and "[t]hey started kicking her head and bashing her, punching her". Mrs Major clarified that evidence in answers to following questions. She said that whilst the complainant was on the ground, Aplin kicked and punched her in the face and Fowler kicked and punched her on her body. She estimated that Fowler hit the complainant about 20 times and that Aplin hit the complainant about eight times. They stopped when Mrs Major went outside and told them to leave the complainant alone. Mrs Major went back to her bedroom and saw another girl come and sit beside the complainant, eventually taking her home. In cross-examination she denied that the complainant and Aplin punched each other. She adhered to her evidence in cross-examination.

[14] After the close of the Crown case, the trial judge entertained a further application by Aplin's counsel that the trial should not proceed because the charge was defective for duplicity. The application was put as a "no case" submission, but the argument made it clear that Aplin challenged the indictment on the ground that it was duplicitous. Fowler's counsel adopted the submissions made by Aplin's counsel. The argument in support of duplicity was substantially the same as that advanced earlier, with additional reliance on the evidence, most notably Mr Major's evidence that there was a gap of about two minutes before the commencement of the final series of assaults.

[15] The trial judge ruled against the applications. His Honour referred to *R v Morrow and Flynn*,[5] observed that he adopted "[c]ommonsense and fairness" as his approach, and held, citing *R v Sobey*,[6] that the issue was whether the blows were so separate and distinct in time or circumstance that they should be the subject of

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5 [1991] 2 Qd R 309.

6 [2001] QCA 367 per Wilson J.

separate counts. The trial judge did not decide whether that test was satisfied but ruled that it was "open for the jury to say, and I express this opinion as a matter of law, that there was one activity and thus no requirement in the present case for separate counts, and it follows in my opinion that there is no duplicity …"[7] The trial judge foreshadowed that he would give the jury directions on the topic.

[16] Consistently with that ruling, at the commencement of the summing up, the trial judge twice directed the jury that the prosecution must prove beyond reasonable doubt that there was one assault by the accused persons, that the complainant suffered bodily harm to her face, that the applications of force by each accused were not authorised, justified or excused by law, that is to say they were not unlawful, and that the accused, Aplin, and the accused, Fowler, were in company. The trial judge returned to that topic after commenting upon some of the evidence and then gave a different direction about what the prosecution must prove to establish the particularised case that there was one assault. The trial judge directed the jury (and he twice repeated this direction later in the summing up) that the requirements were:

> "(1) that each of the accused, Aplin, and the accused, Fowler, actually did one or more of the applications of force in the series which constitutes the one assault, the subject of the indictment;
> (2) that each of the accused, Aplin and Fowler, did one or more applications of force that combined to cause, or contribute to, the bodily harm to the complainant's face;
> (3) that the applications of force directly caused, or contributed to, the bodily harm to the complainant's face."

[17] Shortly afterwards, the trial judge directed the jury that it was for them to say whether they were "…satisfied beyond reasonable doubt that the allegation in the indictment about the one assault…" was made out and that, in so deciding, the jury should "…have regard to the timing of relevant events, the nature of the blows referred to in the evidence, the fact, if you so find, of the accused Aplin and the accused Fowler being together or otherwise at different times and the circumstances generally."

[18] The trial judge gave a related direction that, whilst it was possible for the jury to find each accused guilty and it was possible for the jury to find each accused not guilty, it was not possible for the jury to find one accused not guilty and the other accused guilty. The trial judge directed the jury that if they "…were not satisfied beyond reasonable doubt that one of the accused was guilty [the jury] would find that accused and the other accused not guilty". The trial judge explained that the reason for this was that "it is central to the prosecution case that the forces of the accused persons combined", this involved both accused, and if the prosecution could not prove that beyond reasonable doubt, then both accused were entitled to not guilty verdicts. The trial judge told the jury that this direction was consistent with the direction he had given about the nature of the prosecution's allegation in the indictment. Those directions were given early in the summing up. The trial judge returned to the topic after mentioning defences raised in the evidence, reminding the jury that "you may find both accused guilty or both accused not guilty, but you cannot find one accused guilty and the other accused not guilty". (The appellants contended under ground 2A that the instructions to the jury that

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[7] Transcript 3-113.

they could not return different verdicts with respect of each defendant were misdirections.)

[19] Other significant issues upon which the trial judge gave directions were whether the complainant, by inviting a fight, gave her consent to any striking by Aplin, whether Aplin was not criminally responsible on the basis that the complainant provoked any assault by Aplin (s 269), whether Aplin's striking of the complainant was lawful as self-defence (s 271), and whether Fowler's striking of the complainant was done for the purpose of aiding Aplin's defence (s 273). An important aspect of the Crown case was that none of those matters were open in light of the evidence that each appellant assaulted the complainant with very substantial force after she was defenceless on the ground.

[20] The appellants argued that the trial judge should have found that there was latent ambiguity or duplicity in the indictment because it charged several separate offences in a single count: *R v Morrow and Flynn*[8] and *R v Chen*.[9] They argued that the form of the indictment infringed the rule that one count in an indictment should not charge an accused with committing two or more separate offences because the law required that there be certainty as to the particular offence with which an accused is charged: *Johnson v Miller*[10]; *Walsh v Tattersall*.[11] The appellants argued that the evidence of Mr Major in particular was not that there was one assault, but that there were several different assaults, comprising an initial assault by Fowler acting alone (in circumstances in which there was a verbal argument between the complainant and Aplin, initiated by the complainant), then an assault involving kicking and punching by Aplin and Fowler more or less simultaneously, then an assault by Aplin when Fowler was not present, then a further assault by Fowler in the presence of Aplin. The appellants argued that the trial judge erred in leaving the jury to determine this issue as a question of fact and should instead have ruled that, as a question of law, the indictment was latently duplicitous. The trial judge should have directed verdicts of not guilty or required the prosecutor to elect which of the alleged assaults was to be left to the jury.

[21] The respondent argued that there was no latent ambiguity because the case was put to the jury as one in which there was one continuing assault in company by each appellant acting independently and when neither appellant had a defence of provocation or self-defence. It was submitted that the issues in relation to each of the several alleged applications of force were the same in relation to provocation and self defence because the complainant was knocked to the ground at the beginning of the incident and there was no relevant change thereafter.

[22] The issue turns upon the application of s 567 of the *Criminal Code*, which provides:

> (1) Except as otherwise expressly provided, an indictment must charge 1 offence only and not 2 or more offences.
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> (2) Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.

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8 [1991] 2 Qd R 309 at 313 per Connolly J.

9 [1997] QCA 355.

10 (1937) 59 CLR 467.

11 (1996) 188 CLR 77 at 104 per Kirby J.

(3) Where more than 1 offence is charged in the same indictment, each offence charged shall be set out in the indictment in a separate paragraph called a count and the several statements of the offences may be made in the same form as in other cases without any allegation of connection between the offences.

(4) Counts shall be numbered consecutively.

[23] Unless the whole course of conduct might be regarded as one offence committed jointly by both appellants, s 567(3) was necessarily contravened because the single count charged at least one offence against each appellant. Since the prosecution did not attribute responsibility for the same offence to both appellants under s 8, it seems that the indictment could be regarded as charging one offence only if the prosecution invoked accessorial liability under one of paragraphs (b)-(d) of s 7(1)[12] (an issue to which I will return). However, each appellant could have been charged with a separate offence which arose out of closely related facts all of which were relevant to the charges, so that the several charges could have been joined in the same indictment against both appellants.[13] Any application for separate trials would properly have been refused because all of the evidence in the Crown case was admissible against each appellant. Thus any technical defect in the indictment arising from the joinder of charges against each appellant in one count did not produce a substantial miscarriage of justice.[14] Presumably for these reasons, the appellants did not contend for duplicity on the basis that each appellant must have committed a different offence, but rather on the basis that more than one offence was alleged against each appellant.

[24] As to that contention, the offence was created by s 339(1), which provides that a person who unlawfully assaults another and thereby does the other bodily harm is guilty of a crime. The term "bodily harm" is defined in s 1 of the *Criminal Code* to mean "…any bodily injury which interferes with health or comfort". Under s 245(1), "[a] person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent… is said to assault that other person…". Under s 246 an assault is unlawful unless it is authorised or justified or excused by law. Accordingly, the applications to the trial judge required a decision whether, despite the form of the indictment, the prosecution alleged that each appellant was guilty of unlawfully striking the complainant and thereby occasioning her facial bodily harm, as defined, on more than one separate occasion.[15] This did not involve a jury assessment of the evidence. Rather, it required a judicial decision whether the prosecution's allegations amounted to more than one charge against each appellant contrary to s 567(3). If a fair trial was put at risk by duplicity in the indictment, the trial judge was obliged to remedy that defect by, for example, ordering the prosecution to particularise the assault charged, or to elect among the different assaults comprehended by the indictment.[16]

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12 cf *R v Morrow & Flynn* [1991] 2 Qd R 309 at 311 per Connolly J.

13 *Criminal Code*, s 568(12).

14 See *Mackay v The Queen* (1977) 136 CLR 465 at 469-470.

15 The alleged circumstance that each appellant was in company with the other is a circumstance of aggravation which, if established, increases the maximum penalty but it is not an element of the offence: *Herpich v Martin* [1995] 1 Qd R 359.

16 *Johnson v Miller* (1937) 59 CLR 467 at 490, per Dixon J; *S v The Queen* (1989) 168 CLR 266 at 276.

[25] The trial judge therefore erred in leaving it to the jury to decide whether, despite the form of the indictment, the prosecution alleged more than one offence. It follows that, pursuant to s 668E(1), the appeal must be allowed if the indictment was duplicitous, subject to the proviso in s 668E(1A) that the appeal may be dismissed if no substantial miscarriage of justice actually occurred.

[26] So far as the indictment concerns acts which might have occasioned an aspect of the admitted bodily harm to the complainant's face, the Crown case was that the appellants struck the complainant in any one or more of the follow ways:

(a) Aplin punched the complainant in the initial exchange (the complainant's evidence).

(b) Whilst the complainant was exchanging punches with Aplin, or shouting and swearing at Aplin and inviting her to fight, Fowler came from behind or from the side and punched the complainant in her face, felling the complainant and rendering her unconscious or semi-conscious during the following events (the Majors' evidence, which was consistent with the complainant's evidence about Fowler's conduct).

(c) Aplin repeatedly struck the complainant by punching her in the face or punching and kicking her in the face (the Majors' evidence).

(d) At about the same time, Fowler struck the complainant by kicking her once in the head or by repeatedly kicking and punching her in the body (the Majors' evidence).

On Mr Major's evidence, after Fowler and Aplin had walked away from the complainant and remained some distance away for a couple of minutes:

(e) Aplin alone returned to the complainant and after beating the complainant with two bottles in or around the body,[17] grabbed her by the hair, punched and kicked her, dragged her by the hair, and banged her face on the concrete a few times.

(f) Fowler then went to the complainant and stomped with one foot on her head.

[27] Some of those sub-paragraphs refer to more than one act. In *R v Morrow and Flynn*[18] and *R v Chen*[19] indictments were held to be defective where the evidence established a series of incidents which should have been separately charged, some of which involved only one or other of the two accused and others involved both of them in company with each other. However, in some cases a number of applications of force may properly be regarded as constituting only one assault. In *R v Sobey*, it was found that there was no duplicity where the case put to the jury was that the accused delivered two blows to the complainant in quick succession and the trial judge gave directions in relation to provocation and self defence which, favourably to the accused, did not distinguish between the two blows. Wilson J, with whose reasons Davies and Williams JJA agreed, distinguished *R v Morrow and*

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17 Mr Major's evidence in that respect departed from the allegation in the particulars that Aplin struck the complainant's head with the bottles.

18 [1991] 2 Qd R 309.

19 [1997] QCA 355.

Flynn and held that the alleged blows were "composite parts of the one assault".[20] In *R v Trifyllis*,[21] the prosecution case was that the appellant delivered a flurry of punches to the complainant whilst the complainant was unable to defend himself because he was supporting his brother who had stumbled on the footpath.[22] Chesterman J (with whose reasons the Chief Justice and McPherson JA agreed) said of the Crown case that it was "not one of a series of violent acts one or more of which might have caused the bodily harm specified" but "was of one assault, one episode in which the complainant was punched and suffered bodily harm", and that the "number of blows which landed and the particular pose of the appellant and his juxtaposition to the complainant at the time of delivering the blows were evidentiary details which did not affect the essential aspects of the described offence".[23]

[28] Similarly, in *R v Morrow & Flynn*,[24] Connolly J (which whose reasons Macrossan CJ and Kelly SPJ agreed) remarked that he saw no difficulty with the approach approved in *Director of Public Prosecutions v Merriman*[25] of charging as one offence a series of stabbings by two persons acting in concert in respect of the totality of which each was responsible as a principal offender or as accessory or by reason of pre-concert. Furthermore, in *R v Chen*[26] the Court (Davies JA, Shepherdson and White JJ) referred to cases in which, although offences could be charged separately it was permissible and even appropriate to prefer one charge, referring to examples "…where there are a number of similar acts, each constituting a separate offence, but in a short space of time – a flurry of blows, whether with or without a weapon or a succession of shots…". In the same passage their Honours observed that "in most cases", there was "little practical advantage in separating [the separate offences] and no loss of fairness to an accused in failing to do so".

[29] This is not a case like *R v Sobey* and *R v Trifyllis*, in which the blows were delivered in quick succession and apparently over a period measured in seconds and where distinguishing between the different blows had no effect upon the criminal responsibility of the defendants. Whilst it was legitimate to group series of acts within one allegation of assault, it was not permissible to charge every such series as one offence. The alleged assault by each appellant constituted by the acts described in (a) and (b) (in [26] of these reasons) was differentiated from the subsequent assaults by the circumstance that the complainant was on the ground and unconscious or semi-conscious for the subsequent events; obviously enough, the grounds of exculpation upon which the appellants relied would have less, if any, scope for application in relation to the subsequent assaults. There was also a clear demarcation between the assault by each appellant constituted by the acts in (c) and (d) and the assault by each appellant constituted by the acts in (e) and (f). The alleged assaults in (e) and (f) are based only upon Mr Major's evidence. It is arguable that Mrs Major's evidence that Aplin and Fowler punched and kicked the complainant many times ((c) and (d)) was merely a different version of some of the events in (e) and (f) of which Mr Major gave evidence, but that is unlikely because Mrs Major made no reference to the appellants retreating from the scene, Aplin returning with and using bottles, Aplin banging the complainant's face on the

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20 [2001] QCA 367 at 6-7.
21 [1998] QCA 416.
22 See per Chesterman J at [10] – [11].
23 [1998] QCA 416 at [26].
24 [1991] 2 Qd R 309 at 312.
25 [1973] AC 584.
26 [1997] QCA 355 at [4].

concrete, or Fowler using one foot to stomp on the complainant's head. The better view is that, despite the form of the indictment, the Crown case was that (e) and (f) were assaults in addition to the assaults in (a) and (b) and the assaults in (c) and (d). Even allowing for the amalgamation of closely related acts within one charge of assault, the Crown case was that each appellant committed three separate assaults.

[30] In deciding whether the indictment was duplicitous it is also necessary to take into account the element of the offence that the assault occasioned bodily harm, but the particulars alleged that each appellant "assaulted, and caused bodily harm to, the complainant by" various acts or series of acts which, the prosecutor submitted to the trial judge, were alleged in the alternative. The Crown case therefore included allegations that each alleged act occasioned bodily harm. Whilst the trial judge gave directions which reflected the prosecution case advanced at trial that the alleged bodily harm was caused by a combination of assaults by the appellants, no direction precluded the jury from finding that each combination of the appellants' alleged acts in (a) and (b), (c) and (d), and (e) and (f) occasioned bodily harm.

[31] This was not a case in which the alleged bodily injury was alleged to be produced only by the cumulative effect of all of the alleged blows by both appellants. The photographs of the complainant's facial injuries showed at least four separate and apparently heavy bruises with accompanying abrasions, including extensive bruising over each eye. The effect of Mr and Mrs Major's evidence and the complainant's evidence was that Fowler initially punched the complainant in the face with such force as to render her unconscious. In addressing the jury, the prosecutor described this as a "king-hit".[27] The jury could safely infer that this punch by Fowler must have caused at least one of the complainant's serious bruises and an injury which resulted in her losing consciousness, thereby interfering both with the complainant's comfort and with her health. The jury could also safely draw inferences that the combination of the assaults in (c) and (d) and the combination of assaults in (e) and (f) each occasioned some of the complainant's heavy facial bruising and abrasions, which must have interfered with her health or comfort.

[32] The indictment was duplicitous. There is no room for the application of the proviso because it cannot be known whether the jury verdicts in relation to either appellant were unanimous in relation to each appellant's three alleged assaults occasioning bodily harm. For example, the jury might unanimously have agreed that each appellant was guilty of the charged assault on the basis of a majority finding that the appellants were guilty of the alleged assaults in (e) and (f) and a different majority finding that the appellants were guilty of the alleged assaults in (a) and (b) or in (c) and (d); some jurors might have harboured a doubt about the appellants' guilt of the final alleged assaults because Mrs Major did not corroborate Mr Major's evidence of those assaults, whilst the other jurors might have harboured a doubt about the appellants' guilt of earlier alleged assaults in relation to provocation, self-defence and aiding in self-defence. The trial judge's directions did not preclude such an approach.

[33] The verdicts must be set aside. Subject to consideration of the other grounds of appeal, there should be a retrial in which the prosecution should be required to elect which assault occasioning bodily harm is comprehended within the charge against each appellant.

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[27] Transcript 4-59.

Ground 2B: The trial miscarried as a result of the admission of inadmissible hearsay and opinion evidence from the complainant and the investigating police officer as to injuries suffered by the complainant and the failure of the learned trial judge to direct the jury with regard to such evidence

[34] The prosecution alleged that the bodily harm comprised injuries to the complainant's face. In summing up to the jury, the trial judge put the case that way, directing the jury that it was incumbent upon the prosecution to prove beyond reasonable doubt "that the applications of force directly caused or contributed to the bodily harm to the complainant's face." The appellants argued that there was no medical evidence or any other evidence about the injuries caused in the assault or the type or degree of force which would be required to inflict such injuries. They argued that the only evidence given by the complainant about bodily harm was inadmissible hearsay evidence about a fractured eye socket, that she was not asked to look at the photographs to relate any of the injuries apparently shown on the photographs to the assault, and that there was no medical evidence or other evidence about the injuries caused or the kind or degree of force required to inflict such injuries. Aplin argued that there was an absence of evidence of bodily harm to the complainant's face being caused by any of the blows allegedly struck by her. Fowler argued that there was an absence of evidence that the initial punch to the jaw of the complainant attributed in evidence to him resulted in any bodily harm to the complainant's face, and that any subsequent assaults by him to the complainant's body could not constitute proof of the offence because the prosecution had confined the alleged bodily harm to bodily harm to the face.

[35] There was no objection to the hearsay evidence of the facial injuries given by the complainant and Bryant. Nor did either defence counsel object that the photographs depicting the complainant's injuries were inadmissible in the absence of evidence proving when the photographs were taken or relating them to the complainant's injuries which the photographs were said to describe. Defence counsel were evidently content not to raise such points, a stance which is readily explicable on the bases that the necessary evidence would have been readily available to the prosecutor and to require it to be adduced might work to the appellants' disadvantage. That the absence of objection is objectively explicable as a justifiable forensic decision in the interests of the appellants tends to rebut their contention that the inadmissible evidence produced a miscarriage of justice.[28] This aspect of the present ground of appeal is not established.

[36] In the view I take that there should be a new trial, it is not necessary to consider whether the trial judge's omission to give the jury directions about the inadmissible evidence contributed to a miscarriage of justice.

Ground 2: The verdict is unreasonable and cannot be supported having regard to the evidence

[37] Under this ground of appeal, the court must review the record of the trial and determine whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence.[29]

[38] There were some inconsistencies within the evidence in the Crown case. Most significantly, the complainant's evidence of an exchange of blows between her and

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28 *TKWJ v The Queen* (2002) 212 CLR 124, Gleeson CJ at [16], Gaudron J at [31]-[33], McHugh J at [79], Hayne J at [107]-[108].

29 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.

Aplin, like her confusing answers in cross-examination about Kylie Coulton, was not reflected in the Majors' evidence, and Mrs Major's evidence was not consistent with Mr Major's evidence that both appellants walked off and stayed some distance away from the complainant for a couple of minutes before they returned and again assaulted the complainant. Such inconsistencies are not unusual in evidence about fraught situations of this kind. The jury might have thought that the inconsistencies were explicable by the evidence that the complainant was drunk, the effect of her injuries upon her recollection, the evidence that the Majors were awoken by the noisy dispute, the speed and violence of the events they then witnessed, and the possibility that they did not constantly watch all that occurred. The inconsistencies did not require the jury to harbour any reasonable doubt that the appellants had assaulted the complainant in the ways described by Mr Major or according to a combination of aspects of the Majors' evidence and the evidence of the complainant.

[39] The appellants argued that the verdict was unreasonable because the prosecution confined the Crown case to reliance upon s 7(1)(a) of the *Criminal Code* and the prosecution could not prove beyond reasonable doubt that either appellant was individually responsible for an assault which itself occasioned the facial bodily harm. Section 7 provides:

> "(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
>
> (2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.
>
> (3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> (4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission."

[40] The appellants argued that, because the prosecutor confined the Crown case to reliance on paragraph (a) of s 7(1), it was necessary for the prosecution to establish that each appellant did an act which caused the complainant an injury amounting to

bodily harm. The appellants relied upon *R v Melling & Baldwin*,[30] in which Holmes JA accepted that in a case in which the Crown proceeds under s 7(1)(a) in a charge of grievous bodily harm with intent to do grievous bodily harm, it is necessary for the Crown to prove that each of the accused persons did an act causing injuries amounting to grievous bodily harm as well as the necessary intent. Holmes JA concluded that there was no evidence as to which of the two accused had inflicted the complainant's skull fracture, which plainly amounted to grievous bodily harm, and there was no evidence that the facial injuries suffered by that complainant met the definition of "grievous bodily harm". It followed that, whilst the evidence justified a case pursuant to a combination of s 7(1)(a) and s 7(1)(c), the evidence did not support guilty verdicts in the Crown case that each man was criminally responsible on the basis of having committed an act constituting the offence.[31]

[41] It is not easy to see how the evidence could justify Fowler being held responsible under s 7(1)(c) for any assault Aplin committed during the initial exchange, there being no evidence that he anticipated any such assault or that he aided in its commission by his presence or otherwise. In any event, the case against Aplin in relation to any such assault was weak in light of the Majors' evidence, the complainant's evidence of her own provocative conduct, and the absence of persuasive evidence that any such assault occasioned bodily harm. There was a case against Fowler in relation to the initial assault alleged against him, but Aplin could not be held responsible as a party to that assault unless the evidence justified an inference that she was aware that Fowler would assault the complainant and intentionally aided him in committing that offence. The respondent did not submit that there was any such evidence. Understandably, the respondent's argument that the verdicts were reasonable focussed on the subsequent assaults.

[42] In relation to the alleged subsequent assaults whilst the complainant was on the ground, the evidence justified a finding that each appellant was criminally responsible for each subsequent assault alleged against the other on the basis that each appellant was responsible either as a principal offender under s 7(1)(a) or as an aider under 7(1)(c); that is so because the evidence allowed the jury to find beyond reasonable doubt that each appellant then knew that the other appellant was causing bodily harm by inflicting blows upon the complainant and intentionally assisted the other appellant in doing so by also inflicting blows upon the complainant at about the same time. It is true that the prosecutor identified s 7(1)(a) as the only relevant provision of s 7,[32] but she did so only after repeated remarks by the trial judge to the effect that s 7(1)(a) encompassed a case in which persons who acted in concert were liable as having committed the offence.[33] In the course of debate about a request by the jury for re-directions, the prosecutor confirmed that the Crown case was that the appellants "acted in concert"… but "not as a team with a common purpose…",[34] and there followed a confusing debate about what directions should be given to the jury about that issue.[35] However, whether or not the complainant's bodily harm was occasioned only by the combined effect of the blows, it was not necessary for the

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30 [2010] QCA 307.

31 [2010] QCA 307 at [25] – [29].

32 Transcript 2-5, 2-22, 2-23.

33 Transcript 1- 77 (referring to *R v Wyles, ex parte Attorney General* [1977] Qd R 169), 1-81, 1-82, 2-8, 2-10.

34 Transcript 5-6, 5-7.

35 Transcript 5-6 – 5-22.

prosecution to allege that defendants acted "in concert"; each appellant could be held criminally responsible for each assault causing bodily harm by a combination of ss 7(1)(a) and (c).[36] That case was open on the evidence in relation to all alleged assaults except for the initial assaults alleged against each appellant.

[43] In any event, it was open to the jury to find beyond reasonable doubt that each appellant was responsible for the offence as principal under s 7(1)(a). On that footing, the ultimate question is whether it was reasonably open on the whole of the evidence for the jury to find beyond reasonable doubt that each appellant did an act which caused bodily harm to the complainant's face. I explained in [31] of these reasons why I consider that the evidence was sufficient to satisfy that test. The absence of medical evidence relating the alleged blows to the facial injuries which the complainant admittedly sustained in the assaults did not render it unreasonable for the jury to find beyond reasonable doubt that each appellant caused bodily harm to the complainant's face.

[44] This ground of appeal is not established. It is appropriate to order a new trial.

Disposition and proposed orders

[45] It is not necessary to discuss the remaining ground of appeal, ground 2A ("The learned trial judge misdirected the jury that they could not return different verdicts with respect to each defendant") or the applications for leave to appeal against sentence.

[46] In each of the appellants' appeals, I would allow the appeal, set aside the conviction and sentence, and order a new trial.

[47] **MULLINS J:** I agree with Fraser JA.

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[36] See *R v Sherrington & Kuchler* [2001] QCA 105 per McPherson JA (Wilson J agreeing) at [8]-[14], especially [11]. See also *R v Melling & Baldwin* [2010] QCA 307 at [28], per Holmes JA, McMurdo P and Applegarth J agreeing.