

SUPREME COURT OF QUEENSLAND

CITATION: *R v Gulbis-Paris* [2012] QCA 348

PARTIES: **R**
v
GULBIS-PARIS, Hakim
(appellant)

FILE NO/S: CA No 187 of 2011
DC No 2324 of 2010

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 7 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 30 July 2012

JUDGES: Margaret McMurdo P and White JA and Douglas J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **Appeal against conviction granted. Guilty verdict set aside and instead a verdict of not guilty is entered.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where appellant was convicted of doing grievous bodily harm by throwing a glass which hit and shattered against the complainant's face – where a fight had broken out at a hotel in which numerous people were involved – where scene was crowded and dimly lit – where broken glass allegedly causing injury never found – where only one heavily intoxicated witness testified to seeing the appellant hit the complainant with the glass – where other witnesses gave differing accounts of when and how the glass broke, and how the complainant suffered injuries – where no medical evidence was led at trial as to the likely cause of the complainant's eye injury – whether the verdict was unreasonable or not supported by the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where reasonable hypotheses consistent with innocence not excluded – where the appellant may have responded to being punched by releasing the glass in the direction of the complainant in a reflex action – where complainant may have

injured eye on furniture on floor – whether the trial judge erred in not leaving s 23(1)(a) *Criminal Code* 1899 (Qld) to the jury

Criminal Code 1899 (Qld), s 23(1)(a)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited

COUNSEL: S Di Carlo for the appellant (pro bono)
B J Merrin for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MARGARET McMURDO P:** The appellant, Hakim Gulbis-Paris, was convicted in the District Court at Brisbane after a nine day trial of doing grievous bodily harm to Aaron Townsend at Brisbane on 31 October 2009. He was sentenced to a four year term of imprisonment with parole eligibility after serving 50 per cent of that term. He has appealed against his conviction on the following grounds. The verdict was unreasonable or cannot be supported by the evidence. The trial judge erred in respect of the directions as to criminal negligence. The trial judge erred in respect of the directions as to accident in failing to leave s 23(1)(a) *Criminal Code* 1899 (Qld) to the jury. The trial judge erred in admitting into evidence the news footage concerning the appellant and, if admissible, in respect of the directions concerning it. He has also applied for leave to appeal against his sentence on the ground that it is manifestly excessive.

The appeal against conviction

The evidence at trial

- [2] Discussion of the first ground of appeal requires a review of the relevant evidence. The complainant was injured at the Chalk Hotel in the early hours of 31 October 2009 where he was with his friends, Phillip Cooper, Susan Andrews and Allan Sandeman. The appellant was at the hotel with his friends, David Lewis, Sylvester Christensen and Jaymie Millar. The appellant admitted the complainant suffered grievous bodily harm by way of "a penetrating eye injury to his right eye with laceration to the sclera (white outer layer of the eyeball) and the eye was completely full of blood. He also had a laceration through the full thickness of his lower eyelid".¹ The prosecution case was that the appellant caused these injuries by throwing a glass which hit and shattered against the complainant's face. The appellant either deliberately threw the glass in an effort to strike the complainant or was so grossly negligent in the way he dealt with the glass that he was criminally responsible for the resulting injury.
- [3] The prosecutor formally admitted that on the evening of Sunday, 2 November 2009 Channels 7, 9 and 10 carried news articles concerning these events which referred to the appellant by name and showed video footage of him where a tattoo on his left arm could easily be seen.²

¹ Exhibit 11.

² Transcript 2-14.

- [4] The complainant gave evidence that he drank about 15 shots of Wild Turkey bourbon during the evening prior to the incident. He had also had some speed or amphetamine at about 5.00 pm. He was at the hotel with his friends, Sandeman, Cooper and Ms Andrews, when they walked past a table. A man said, "Are you having a good night?" and put out his hand which the complainant shook. He remembered nothing more until he was being restrained on the ground outside the hotel. He described the man who shook his hand as having black, short hair wearing a black shirt and with a tattoo on his left bicep. He could not describe the tattoo as it was "pretty dark" but it was "more or less an armband". On 3 November 2009, he selected a photograph of the appellant from a group of photos on a photo board. He was almost sure this was the person with whom he shook hands. He would not have selected this photo if he was not sure.
- [5] In cross-examination, the complainant stated that he did not see any television news reports or read any articles prior to making the identification. He was in bed "pretty much 24/7" for the first three months after the incident and could not watch TV because his vision was poor. He agreed that there were other people present in the hotel that night who looked similar to the appellant and to the appellant's friend, Christensen. The complainant maintained, however, that he had not mistaken the appellant for Christensen, who was also wearing a black shirt and had a tattoo on his arm. Christensen's tattoo was not an arm band. He was not mistaken that the man who shook his hand was the appellant. He agreed that when he woke up in hospital his friends were present and he asked them what had happened. They told him that the person who shook his hand was the person who glassed him. He had no memory of anyone glassing him and was unaware that he had been glassed. Before he identified the appellant as the man who shook his hand, he scanned the photo board up to five times because he wanted to be sure; he knew people could look similar, for example, brothers. He could not say if he was injured whilst being restrained on the ground outside the hotel. About a month after the incident, with the assistance of his mother, he made a claim against the hotel's insurers for damages for the injuries he received.
- [6] Ms Andrews gave evidence that she finished work at about 1.00 am on 30 October 2009 and went to the hotel to meet her boyfriend, Cooper, the complainant and Sandeman. She was sober but they were drunk. They were not so affected that they would be removed from the premises nor slurring their words. They were "happy drunk" and enjoying the night. She had one drink before she and Cooper decided to go home. He and the complainant finished their drinks. Sandeman was dancing. She was leading the way out but Cooper was lagging behind waiting for the complainant to finish his drink. Cooper spoke to a group of people and shook hands. The music was really loud. The mood changed when the complainant got to the group. He shook one man's hand and they "started having like a to and fro and pushing each other and pulling each other and it just escalated from there to fight". Cooper jumped back and Sandeman came over and broke up the fight. The complainant ended up next to her on her right. She felt something coming towards her, went to block it and then saw blood down her arm. The complainant was on the ground with his whole face covered in blood. She was shocked but he did not seem to know what had happened. She tried to get him to stay still and calm down. She explained to the bouncers what had happened. She could not say from where the object which hit the complainant had come. She was unable to identify anyone involved from a photo board. She saw the complainant shake hands with only one

person. A number of the men in the hotel that night looked similar in build and stature but Millar stood out because of his blond hair.

- [7] Cooper's evidence was as follows. He was not sure how much he had to drink that evening but it was about 15 alcoholic drinks and he was drunk. He did not take any drugs. As he was preparing to leave the hotel, he looked to his left and saw three people sitting at a table staring at the complainant. One was wearing a black shirt with white trim. Another was wearing a black shirt. The third was wearing a white shirt with a red trim and had lightish hair. They were all of fairly big build. He asked them how they were and shook their hands. The complainant then shook their hands. When he shook hands with the last man, they started pushing and pulling whilst their hands were linked. The complainant threw a punch at this man which Cooper thought missed, perhaps grazing the top of his head. This man then stood back and threw a beer glass which hit the complainant's face. Cooper said he saw blood when the glass hit the complainant's face but did not describe the location of any injury. Things descended into a "big all in brawl" in which Cooper became involved. Everyone jumped on the complainant. He was trying to pull people off the complainant. He punched the man with the white shirt once. The third man with the black shirt was also involved. Bouncers broke up the fight and took the complainant out the back. The person who threw the glass at the complainant was wearing the black shirt with the white trim. He used an underarm motion. Cooper went in search of this man but could not find him. Later, he was shown a photo board which contained a photograph of the appellant but he was unable to identify the person who threw the glass. When shown a video of the evening, he identified Millar and Christensen as being with the appellant but he said they did not throw the glass at the complainant.
- [8] In cross-examination he agreed that when he went looking for the person who threw the glass he saw two people on the level above where the incident occurred who were acting strangely. One looked similar to the man who threw the glass. He told the police this man could be the offender and to check him out. He was asked whether the complainant's punch may have connected with the man holding the glass so that "the glass flew out of his hand". He responded that was not the way he saw it. He agreed that he saw a newspaper clipping containing a photograph of the appellant but he did not read anything about the incident. He was unsure whether this was before or after the photo board identification. He did not see any television footage of the appellant leaving the watch house.
- [9] Sandeman gave evidence that, like the complainant and Cooper, he had consumed about 14 or 15 shots of bourbon prior to the incident. He saw the complainant shaking hands and having a bit of a tug of war with a black haired stocky man wearing a black shirt. He could not hear if he said anything. The complainant took a swing at the man but he did not think the punch connected. Sandeman, who was about five steps away, walked over. By the time he arrived, the complainant was on the floor with two men on top of him. Sandeman pushed one man off and Cooper pushed off the other. Sandeman helped the complainant off the floor and said "Let's just go man." He heard "like a clap noise" and got sprayed with liquid. The man in the black shirt was backing off. He saw blood all over the complainant. Sandeman said, "I think you've been glassed." He did not see the glass before or after. The complainant walked into the function room wiping his eye and Sandeman followed. The man in the black shirt was near the balcony. The complainant walked towards this man and started swinging at him. (The evidence does not suggest the appellant

was near the balcony at this time.) The bouncers arrived and put the complainant in a bear hug. Sandeman subsequently identified the appellant's photo from a photo board as being the man in the tug of war with the complainant.

- [10] In cross-examination, Sandeman agreed that immediately after the glassing he indicated to the complainant the person whom he believed was responsible. The man in the tug of war was completely clean shaven. (In fact, the appellant had a very thin, fine trimmed beard at the time.) The bouncers restrained the complainant who struggled wildly with them. The complainant told them they were hurting him and pleaded with them to get off him. They were holding him face down and his already damaged eye was being pushed into the concrete.
- [11] There were inconsistencies between Sandeman's initial statement to police on the night of the incident and a later statement. At first, he did not mention the shaking of hands and the tug of war, or that the complainant threw a punch at the man in the tug of war. Initially, he said he was walking out with the complainant when the incident commenced; he did not say he was on the dance floor. By way of explanation, he stated that he had been drinking and was in shock because of what had happened and was keen to get to the hospital to see his friend.
- [12] Diane Auda was at the hotel at the time of the incident. She did not know the complainant or the appellant and did not see the incident. Afterwards she noticed bouncers place a man in a blood stained white shirt on a couch. (It was common ground that this was Millar.)
- [13] Dodie Eggmoss attended the hotel with Ms Auda. He saw a fight break out in the dance floor area. The fight moved to where three men were standing drinking in front of him. One had blonde hair and was wearing jeans and a white shirt. Later he saw blood on his shirt. (Again, it was common ground that this was Millar.) These three men became involved in a scuffle.
- [14] Andrew White was working as a security officer at the hotel that evening. His duties included collecting glasses. At about 2.40 am he was in the area near the dance floor known as platform 3 when he heard glass breaking in the entrance to the function room. There were between 75 and 100 people in the vicinity. He saw four people fighting, two against two. He broke up the fight and called in other security guards to assist. To get to them he had to move overturned furniture. Only later did he notice a fifth person lying on the ground, apparently unconscious (the complainant). He stayed with the complainant until the ambulance arrived. One protagonist was wearing a white shirt with blood on it (Millar). Another protagonist was a male with medium skin and short black hair, 5'9" tall, wearing a black t-shirt and dark pants (Christensen). The other two involved in the fight later gave their names as Cooper and Sandeman. The complainant was holding his hand over his right eye. Once he regained consciousness, he was aggressive, spitting and bleeding profusely. He entered the function room from the dance floor and chased, swore angrily at and tried to fight Millar. He was taken outside by three security officers. He struggled with them so much that two policemen had to help the security guards restrain him. The lighting was very dim and it was difficult to see but it was light enough to make out people's tattoos.
- [15] White stated that glasses frequently broke in this area and workers regularly swept up broken glass. As he heard glass breaking that night there probably was glass on

the floor in the vicinity and at the time of the fight. He was unable to find any broken glass in the vicinity after the fight. The broken beer glass which apparently injured the complainant was never found.

- [16] Pradeep Hamal was working at the hotel at the time of the incident. He heard a noise from the dance floor area and saw two people. One was a Caucasian male about 23 years old, 5'9" tall, big build with white skin, short spiked white hair and a white t-shirt (Millar). The other was a male with medium coloured skin, about 23 years old with a big build, 5'9" tall, with black short hair wearing a black shirt and dark pants (Christensen). He saw another Caucasian man also about 23 years old holding his hand over his right eye (the complainant). The lighting was dim and he was not sure if he saw blood. The complainant moved from the dance floor to the function room chasing the other two. Another 25 year old man, about 5'4" in height, seemed to be assisting the injured complainant who was very angry. The bartender told Hamal to clear the glasses near the fight and he collected unbroken glasses from the table. He did not collect any broken glass from the floor. His supervisor had a sweeper but Hamal did not know if he swept the floor.
- [17] In cross-examination, he said he saw the man in the white t-shirt (Millar) fighting with the injured man (the complainant) on the floor. They were throwing punches at each other after which Millar had blood on his shirt. Tables and chairs were thrown all around. The chairs were stainless steel and had sharp corners. Photographs of the chairs and tables confirmed their sharp corners.³ The complainant was so angry and struggling so much that it took two or three security people to calm him down and he was still kicking at them.
- [18] Police officer Paul Mackenroth was one of the first police officers at the scene. He made enquiries about the broken glass but was advised it had already been cleared away. A bin containing broken glass was searched by a scenes of crime officer who located nothing of interest. Sandeman told him that one of either Christensen or Millar was involved in the incident.
- [19] A DVD containing footage of the appellant leaving the watch house with his father and being chased and questioned by journalists whilst he covered his face was tendered and played.⁴ One journalist asked if the appellant had anything to say to the victim's family and he responded, after prompting from his father, "I'm sorry." The journalist asked whether glasses should be banned in hotels. He responded that, if this had been done, the present situation would have been avoided. He added that he would definitely be fighting the charges. A journalist asked if he intended to apologise to the victim and he responded, "When I get a chance." When asked whether that was a "yes", he responded affirmatively. The judge told the jury that these answers were not a direct admission that he had thrown a glass at the complainant but may be:
- "consistent with someone who has had a greater involvement than merely being a pure bystander at the hotel on the night of this incident, that he has a greater knowledge than a mere bystander would have."
- [20] Police officer Jonathan Birt attended the appellant's home on the afternoon following the incident. He took possession of the clothes and shoes the appellant

³ Ex 9F.

⁴ Ex 25.

had been wearing the previous evening. His clothes had been washed. His shoes and clothing tested negative for blood. Birt tape-recorded his conversation with the appellant in which he denied assaulting anyone at the hotel. The conversation included:

"I was at the Chalk last night and there was an incident. There was a girl. She came up to me and told me to this other girl and then I got punched

...

No, what I said was there was a guy. A guy, he came up to me ... randomly and told me he was just pushing me to ... go get a girl. A guy that I don't know pushing me, pushing me, telling me to go to a girl and I'm saying 'No, I'm not interested. I don't know her.', and he's just forcing me, forcing me five, six times, and then I got punched on the nose."

- [21] Police officer Lee Unsworth was the principal investigating officer. He arranged for photographs to be taken for the photo board identifications later undertaken by Ms Andrews, Cooper and Sandeman. He also interviewed many witnesses including Christensen on 1 November 2009. He took Christensen's statement by asking what had happened and typing a paragraph. When he finished he then read the paragraph back so that Christensen could say if it was accurate. He then asked him what happened next, repeating this process paragraph by paragraph until the statement was completed. At the end of the statement, he printed out three copies and asked Christensen to read and then sign it once he was happy with it.
- [22] Photographs were taken of Christensen,⁵ Millar⁶ and the appellant.⁷ Christensen and the appellant were of similar height and build with dark hair cut in a similar style and with Islander-type tattoos on their left arms. The appellant's tattoo was an armband and he was Caucasian with a thin, light trimmed beard whereas Christensen was of Islander descent and his arm tattoos were not armbands. A photograph of the repaired injury to the complainant's eye was tendered.⁸ It is not possible to conclude from this photo whether broken glass caused the injury to the eye.
- [23] No medical evidence was led at trial as to the likely cause of the complainant's eye injury.
- [24] David Lewis attended the hotel with the appellant, Christensen, and Millar some time after 1.30 am. He was having his first drink of the evening seated at a table with Christensen and Millar whilst the appellant was on the dance floor. He saw the appellant move backwards and his friends asked him what had happened. A man got off the floor and seemed to have blood on his eye. The appellant disappeared. (It was not suggested at trial that the appellant had fled). Other men began to yell and scream and were blaming Christensen and Millar for glassing someone. Before the incident he had seen the complainant sitting on his own in a corner. He approached Lewis's group, shook their hands and gave a high five. No-one else was with him. The appellant was at their table for only a short time; he was mostly on the dance floor.

⁵ Ex 18 A and B.

⁶ Ex 17.

⁷ Ex 1.

⁸ Ex 10B.

- [25] Millar attended the hotel with the appellant, Christensen and Lewis at about 1.30 or 2.00 am. He had two or three drinks. He, Christensen and Lewis moved to a table near the dance floor and he thought the appellant was following. Two or three people came, shook their hands and walked away. He saw someone, the appellant he thought, falling or moving backwards. The man with blood on his face then accused the appellant of glassing him and they began to fight. In cross-examination, Millar said that he punched the complainant in the face a couple of times and the complainant punched him in the head. He was not sure if he pushed the complainant's face into the floor during their fight. He thought it more than likely that he injured the complainant during that fight. There were tables and chairs going everywhere. He was unsure if glasses smashed, but he thought they probably did because their drinks had been on the table before the fight and they were gone after the fight. When the complainant first came towards him he had a bit of blood on his face but when he got off the floor later he was bleeding much more heavily. He did not hit anyone with a glass or cause a glass to hit anybody that night.
- [26] In October 2009, Christensen shared rented premises with Lewis and Millar who worked with the appellant. On Friday, 30 October 2009, they finished their shift at about 11.00 pm. He had two drinks before going to the Chalk Bar some time after midnight. He was wearing a plain black shirt and jeans. The appellant was also wearing a black shirt. Millar was wearing a white shirt. They bought drinks and walked upstairs to the smoking area. The dance floor was busy. He was with Millar, and Lewis was behind them. He thought the appellant was on the dance floor holding a drink. There was pushing and shoving but it was all too quick. He could not remember much of what happened; it was crowded and he could not see much. He saw the appellant fall over backwards and did not remember seeing him again. People stormed into the room and suddenly he and his friends were involved in a fight. Music was playing loudly but he could not remember hearing other noise. Later, a couple of men accused Millar and him and pushed and shoved them. Millar's shirt had blood on it. Christensen was not bleeding and he did not see Millar bleeding. He did not strike anybody with the glass or cause a glass to hit anybody at the hotel that evening.
- [27] The prosecutor successfully applied to have Christensen declared an adverse witness and cross-examined him. He gave a statement to police on 1 November 2009 in which he said the following. The appellant walked onto the dance floor holding a glass of beer and was about five metres from him. A group of four people, three males and one female, approached Christensen's group and introduced themselves. As they were walking through, the complainant brushed past the appellant and they became involved in a verbal argument. The appellant pushed the complainant with his right open hand while holding his beer in his left hand. The complainant came back with a punch but he was unsure if it connected. He heard smashing glass and the complainant fell to the ground. Some of the broken glass flew into the room where Christensen was seated. The two men with the complainant (Cooper and Sandeman) pulled the appellant and the complainant apart. The appellant no longer had his beer. Cooper and Sandeman attacked the appellant. Christensen and Millar tried to break up the fight. Everyone was pushing each other. The complainant, whose face was covered in blood, came back and blamed Millar for what had happened and tried to attack him.

- [28] Under cross-examination by the appellant's counsel, Christensen said that he could not recall giving that statement to police. He did not think the statement was expressed in his words. He agreed he signed it, but he did not think he read it properly beforehand. He just acted as though he had read it so that he could get out of the police station. He was very tired because he had been working and looking after his young son for the weekend. He was asked to read a paragraph of his statement but he declined, saying he did not like reading and could not really read.
- [29] The appellant did not give or call evidence.

Was the verdict unreasonable or not supported by the evidence?

- [30] The appellant contends that the prosecution evidence did not establish that the appellant caused the complainant's injury. Ms Andrews and Sandeman saw the security people holding the complainant's face to the ground outside the hotel. No-one other than Cooper saw the appellant strike the complainant with a glass or throw a glass at him. Cooper's evidence could not be relied on because of his intoxication. The prosecution could not exclude the following reasonable hypotheses. Someone other than the appellant could have thrown the glass. The appellant may have simply lost control of the glass after being punched. The complainant's injury may have been received while he was fighting and was on the ground face down, or from a punch during the fight or from hitting broken glass on the ground.
- [31] The appellant further contends that there was insufficient evidence to prove criminal negligence. Even if the appellant threw the glass, the prosecution case could not exclude the possibility that the appellant intended to throw the liquid in the glass at the complainant and not the glass.
- [32] The respondent contends that the evidence of Cooper, the complainant, Sandeman and Christensen, together with the appellant's statements to police and journalists which indicated his involvement in the altercation support the guilty verdict. Cooper's consumption of alcohol does not mean his evidence must be rejected. The jury were warned to consider the consumption of alcohol in assessing reliability and of the dangers of mistaken identification. Despite the weaknesses in the evidence, it was open to the jury to convict the appellant.
- [33] The question for this Court is whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. This Court must give proper weight to the jury verdict but a real doubt held by this Court is a doubt the jury should have had: *M v The Queen*.⁹ Answering that question is no easy task.
- [34] It is common in scenarios like this for different witnesses to give differing accounts. The incident happened quickly in crowded circumstances and with dim lighting. Testimony of witnesses can be tainted by conversations with other witnesses and reconstruction after the event. Friends can be subconsciously influenced in their apprehension and interpretation of events by their relationship with either the complainant or appellant.
- [35] The independent witnesses in this case, hotel patrons Auda and Eggmoesse, and employees White and Hamal, did not see any incident between the appellant and the complainant.

⁹ (1994) 181 CLR 487, 493-495.

- [36] The combined evidence of the protagonists (the complainant, Millar, Christensen, Cooper and Sandeman) together with that of Ms Andrews and Lewis establishes that the appellant was holding a glass of beer when he became involved in a physical altercation with the complainant. During the altercation, the complainant punched at the appellant's head and may have made contact. Christensen and White heard breaking glass at about this time. Cooper gave evidence that he saw the person who shook hands with the complainant, that is, the appellant, throw a beer glass at the complainant's face. Cooper was the only person who gave evidence that the appellant threw the glass at the complainant. It follows that his evidence must be accepted beyond reasonable doubt as reliable to convict the appellant. Cooper was grossly intoxicated. The scene was dimly lit, noisy and crowded and the incident occurred quickly. There was a danger that Cooper reconstructed events, given his friendship with the complainant and his understandable distress at the complainant's grievous injury. For these reasons, I am not prepared to accept this aspect of his evidence as reliable beyond reasonable doubt without other supporting evidence.
- [37] Indeed, there is a body of evidence that throws doubt on it. It is significant that although Sandeman saw the complainant punch the appellant he did not see the appellant throw the glass. Sandeman's evidence is more consistent with the glass breaking during or after the subsequent fracas on the floor in which the complainant, Christensen, Millar, Sandeman and Cooper were involved. The evidence does not suggest the appellant was part of the fight at this stage. This also seems to be the scenario described by Ms Andrews.
- [38] Christensen's statement to police shortly after the incident recorded that the appellant, whilst holding a beer glass, was involved in an altercation with the complainant and he heard smashing glass as the complainant fell to the floor. After the complainant and the appellant were pulled apart the appellant was no longer holding his beer glass and the complainant's face was covered in blood. As Christensen was illiterate, the accuracy of his statement is questionable, especially as he was also a suspect who some associated with the glassing. He may have had an interest in distancing himself from any glassing injury to the complainant. Even so, his account does not support Cooper's or Ms Andrews' and Sandeman's. Christensen's version to police was that he heard smashing glass as he saw the complainant and the appellant fall to the ground; Cooper and Sandeman attacked the appellant and Christensen and Millar intervened to break up the fight.
- [39] Millar gave evidence that during the struggle on the floor he punched the complainant several times. White's evidence suggests the broken beer glass was very probably on the floor during this struggle. Millar had blood on his shirt after it. The evidence established that the complainant's face, which may have been bleeding a little before the fracas on the floor involving Millar and Christensen, was bleeding profusely after it. Immediately after the fracas the complainant and Sandeman wanted to fight Millar and Christensen and it seems that the complainant and his friends believed that Millar or Christensen or both were responsible for his injury.
- [40] The complainant's blood was not found on the appellant's clothes (which admittedly had been washed by the following afternoon when police requested them) or on his shoes. No blood was found on any broken glass at the premises. There was no medical evidence as to the probable cause of the complainant's eye injury. During the fracas tables and chairs with sharp corners were thrown around. After the

complainant injured his eye he was held firmly by security staff with his eye hard against the ground outside.

- [41] The appellant denied to police that he had committed the offence. His statements to the media pack outside the watch house were, as the judge clearly instructed the jury, to be used only to show that he was "more than a mere bystander". They were not led as direct admissions of guilt.
- [42] After reviewing the whole of the evidence, I am unpersuaded that the prosecution established beyond reasonable doubt that the appellant threw the glass at the complainant causing grievous bodily harm to his eye. The prosecution has not excluded beyond reasonable doubt that the unfortunate complainant's eye was not injured by broken glass on the floor during the fracas, either with the appellant or later with Christensen, Millar, Cooper and Sandeman. It is reasonably possible the beer glass first broke during the fracas, either with the appellant or with the others resulting in the injury. Even if the appellant may have caused some injury to the eye by throwing the beer glass at the complainant, the grievous bodily harm may have been done during the subsequent fight or whilst he was held aggressively face down on the ground outside by security staff. There is also a possibility that the injury could have occurred by the complainant hitting a corner of an upturned table or chair during the fracas. Yet another possibility, wrongly not left to the jury, was that of an unwilling act under s 23(1)(a) *Criminal Code*. It was possible the appellant released the glass towards the complainant when the complainant punched him, or that he moved his arm holding the beer glass towards the complainant in reflex action to being punched.
- [43] After reviewing the whole of the evidence, I consider the prosecution has not disproved any of these reasonably possible scenarios beyond reasonable doubt. It follows that the guilty verdict is unreasonable and not supported by the evidence. The appeal against conviction must be allowed, the guilty verdict set aside and a verdict of acquittal entered.
- [44] It is unnecessary to consider the remaining grounds of appeal against conviction or the application for leave to appeal against sentence. It is, however, clear from my reasons that I consider the primary judge erred in not leaving s 23(1)(a) *Criminal Code* to the jury.

ORDERS:

Appeal against conviction granted. Guilty verdict set aside and instead a verdict of not guilty is entered.

- [45] **WHITE JA:** I have read the reasons for judgment of the President. I agree with her Honour for those reasons that the verdict is unsafe and cannot be supported in light of the weaknesses in the evidence which she has identified. I agree with the orders which she proposes.
- [46] **DOUGLAS J:** I agree with the reasons of the President and with the orders proposed by her Honour.