SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lothian* [2018] QCA 207
PARTIES:	**R** **v** **LOTHIAN, Adam Keith Borge** (appellant/applicant)
FILE NO/S:	CA No 36 of 2018 DC No 1837 of 2017
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 2 February 2018; Date of Sentence: 9 February 2018 (Jones DCJ)
DELIVERED ON:	Date of Orders: 10 May 2018 Date of Publication of Reasons: 4 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2018
JUDGES:	Sofronoff P and Morrison and Philippides JJA
ORDERS:	**Date of Orders: 10 May 2018** **1. Appeal against conviction and sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant/applicant was convicted after a trial of one count of sexual assault and one count of assault occasioning bodily harm – where the complainant and the appellant/applicant had previously been in a relationship and happened to attend the same nightclub one night by pure coincidence – where the complainant gave evidence that the appellant/applicant lifted her dress on two occasions that night and grabbed her on the vagina – where after the complainant left the nightclub the appellant/applicant approached her and pushed her sideways into a taxi – where it was submitted that CCTV camera footage contradicted the complainant's account and rendered it virtually impossible that the offences could have occurred – whether the verdicts were unreasonable or cannot be supported having regard to the whole of the evidence APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the appellant/applicant was sentenced to concurrent periods of 12 months' imprisonment – where on count 1 that

was suspended after four months, with an operational period of 12 months, and on count 2 a fixed parole release date was set after serving four months – where when the appeal was heard the appellant/applicant had served three months – where it was submitted by the appellant/applicant that the sentence ought to have reflected the marginal evidence justifying the case – where it was submitted by the Crown that the offending occurred against the background of persistent harassment of the complainant – whether the sentence was manifestly excessive

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v AQ [2003] QCA 479, considered
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v Bradford [2007] QCA 293, considered
R v Mazza [2017] QCA 136, cited
R v Murray [2005] QCA 188, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed

COUNSEL: J S Shepley for the appellant/applicant
T A Fuller QC for the respondent

SOLICITORS: O'Sullivans Law Firm for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I am of the view that, for the reasons given by Morrison JA, the appeal and application should be dismissed.

[2] **MORRISON JA:** The appellant was convicted after a trial on two counts:

(a) sexual assault; and

(b) assault occasioning bodily harm.

[3] On each count he was sentenced to concurrent periods of 12 months' imprisonment. On count 1 that was suspended after four months, for an operational period of 12 months.[1] On count 2 a fixed parole release date was set after serving four months, namely on 2 June 2018.

[4] The appellant challenged his convictions on the ground that the verdicts were unreasonable or cannot be supported having regard to the whole of the evidence. As will become apparent, the mainstay of that argument was that CCTV camera footage contradicted the complainant's account, and rendered it virtually impossible that the offences could have occurred.

[5] The appellant also sought leave to appeal against his sentence on the ground that the sentences were manifestly excessive in all the circumstances.

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1 That was the sentence after a reopening on 9 February 2018.

[6] At the conclusion of the appeal on 10 May 2018 the Court dismissed the appeal against conviction, and refused the application for leave to appeal against sentence. These reasons explain why I joined in those orders.

Circumstances of the offending

[7] The general context of the offences can be summarised fairly shortly. The complainant and appellant had been in a relationship in 2015 and after they ceased dating in August of that year they remained in contact, both by phone and in person. That contact included an exchange of intimate photographs at one point. The complainant sought to bring that contact to an end in 2016, but the appellant continued to contact her.

[8] By pure coincidence, on 27 March 2016 the complainant and appellant attended the same nightclub in Fortitude Valley. The appellant approached the complainant a number of times during the evening, but she asked to be left alone. The last interaction in the nightclub between them ended with the complainant slapping the appellant and him throwing a drink on her. The complainant said that he lifted her dress on two occasions on that night and grabbed her on the vagina. That formed the basis of the sexual assault count. The defence case was that the assault did not occur at all.

[9] The complainant left the nightclub in the company of a male friend. Whilst they were talking outside the nightclub the appellant approached them, causing her to run towards the nearby taxi rank. The appellant followed her and pushed her sideways into a taxi, causing her to fall to the roadway. He then ran off as others came to the complainant's aid. That formed the basis of count 2, the assault occasioning bodily harm. The defence case was that the appellant did not cause the complainant to fall.

The complainant's evidence

[10] The complainant met the appellant in February 2015 and they dated until August 2015. During that time they were in a proper relationship, but after that they contacted each other only on occasions, and were not together anymore. Until March 2016 that contact consisted of phone calls or texts, the sending of some explicit photographs from one to the other, and on occasions seeing one another.[2]

[11] In March 2016 the complainant broke it off saying that she did not want to see or talk with him anymore. At first he agreed, but then continued to contact her.[3]

[12] On 27 March 2016 she went to a nightclub where she saw the appellant. She ignored him and went to the opposite side of the room. He tried to initiate a conversation, but she declined, asking to be left alone.

[13] At a later point he initiated contact again and pushed her. She pushed him back and slapped him, asking to be left alone. As she walked away he threw a drink on the back of her dress.[4]

[14] Some time later, in the area near the toilets, the appellant came up to her and "he grabs my vagina very hard – squeeze it very hard and – to hurt me".[5] The complainant said he did it two times, that time and then another time later. As well,

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2 Appeal Book (**AB**) 47.
3 AB 47 l 45.
4 AB 48 l 30 to AB 49 l 2.
5 AB 49 l 14.

he was lifting her dress, which she characterised as being to shame her or mock her.[6]

[15] The complainant said that some time later she was talking to another person when the appellant came up and showed that person a picture of her vagina. It was a picture she had sent a couple of days before. She decided she had had enough, so she went to the bouncers and told them and eventually they kicked him out.[7]

[16] The complainant said she left the club at about 2.00 am. She left with a male friend called Andrew. As they were outside the appellant approached Andrew and "then he shows him my picture of my vagina again, saying that that's me".[8] She described the appellant as being "really aggressive". She started to run to the taxi rank "because I … was scared so I thought I had better take advantage of this and run, so I just ran and I went to the cab rank and I was nearly going to get into the cab".[9] She said that the appellant chased her and then pushed her hard against the taxi. He then ran off.[10]

[17] Photographs of her injuries that night were admitted as exhibit 1. The complainant was shown CCTV footage and identified various people in it, including herself and the appellant.

[18] On a couple of occasions the complainant responded to things shown in the CCTV footage saying that she could not now remember some of the things that it displayed as it had been two years since the events. As to some she said that she could not remember exactly when everything happened and she was trying to ignore the appellant on the night.[11]

[19] The complainant identified that part of the CCTV recording which showed the back of her dress being wet from the appellant's drink.[12] She also identified the footage of her speaking to the bouncer, and asking the bouncer to tell the appellant to leave.[13]

[20] The complainant then identified in the CCTV footage a point at about 2.19 am when the appellant and his friend, Jarrod, were outside the nightclub.[14] She said she could recall Jarrod trying to hold the appellant back and telling him to leave the complainant alone.[15] She was able to identify herself in the footage at the place where she was pushed into the taxi, and reiterated that the appellant had run off, with other people trying to chase and stop him.[16]

Cross-examination of the complainant

[21] In cross-examination the complainant was taken back through the CCTV footage. It was suggested to her that the footage revealed another person who grabbed hold of her arm before the appellant intervened.[17] The complainant agreed that it "looks

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6 AB 49 ll 19-29.
7 AB 50 ll 19-26.
8 AB 51 l 17.
9 AB 51 ll 30-33.
10 AB 51 ll 34-45.
11 For example, AB 58 ll 1-4, AB 62 ll 28-35 and AB 63 ll 1-7.
12 AB 71 l 44.
13 AB 73 ll 8-11.
14 AB 76.
15 AB 77 l 7.
16 AB 77 ll 14-25.
17 AB 81 l 46 to AB 82 l 16.

like it",[18] but she could not remember whether that interaction was the subject of her complaint to the bouncers.[19]

[22] The complainant responded to some of the footage which showed the appellant near her or talking to her, and said that whilst he was doing that she was "always turning … the other way".[20]

[23] The complainant said that she could not remember whether she complained to the bouncers about the appellant grabbing her vagina, but reiterated that she went out and told the bouncers about him and that he was harassing her.[21]

[24] The complainant said she could not recall what time elapsed between the first time he grabbed her vagina and the second. However, she reiterated that she was talking to a friend next to the toilets when it happened, and she had pain in that area the next day.[22]

[25] The complainant was confronted with the fact that the grabbing of the vagina was not shown on the CCTV footage, but she said that there were many times when she and the appellant were off camera.[23]

[26] The complainant reiterated her account that the appellant came up to her and Andrew while they were talking, and he showed Andrew the picture of her vagina, at which time he was acting aggressively.[24] She repeated that she ran away from the appellant to the taxi cab rank, and that the appellant chased her.[25]

[27] The complainant was shown some of the CCTV footage which showed a taxi cab.[26] She identified the appellant and Jarrod, but said she could not see herself in that footage. However, she said she should be somewhere in the footage because that was the taxi cab.[27] On subsequent footage from those cameras she identified herself, though she had difficulty with just which street the footage was showing.[28]

[28] The complainant was cross-examined about whether, on her account, the incident occurred in a two-minute period between 2.16 am and 2.18 am, being a period shown on one CCTV recording. She resisted that suggestion, saying that she went out from the club, was talking to Andrew when the appellant started to confront him, and she then ran to the taxi. She repeated that the appellant chased her and it was "really quick". She said she was with Andrew outside the club for a little while, and if she had said that it was two minutes, it might have been five minutes. She then repeated her account that the appellant had confronted Andrew, she ran off, and the appellant chased her and pushed her against the cab. She responded that she knew the facts: "That's what they are. I didn't make them up, and I don't know the minutes because I cannot remember them".[29]

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18 AB 82 l 16.
19 AB 83 ll 8-15.
20 AB 85 ll 25-29.
21 AB 86 l 43 to AB 87 l 10.
22 AB 87 ll 35-47.
23 AB 88 ll 4-12.
24 AB 90 ll 24-28 and AB 91 ll 1-12.
25 AB 91 ll 18-28.
26 Identified as Citysafe cameras 1 and 2.
27 AB 92 ll 11-22.
28 AB 93 ll 21-46.
29 AB 95.

[29] When cross-examined on the time sequence shown on some of the CCTV recordings, and shown that the time period between some events was shorter than she had said, she explained that she could not remember the details and that her memory was more accurate when she gave her first statement soon after the events.[30] An example of an item she could not really remember was seeing the appellant across the road with Jarrod, his friend, trying to hold the appellant back and telling him to leave the complainant alone.[31]

[30] The complainant said that she did have an independent recollection of the events of that night and that it did not come from re-reading her statement:

> "Exactly not. … I know that it happened. Of course details, though, I can't remember. It's been two years. I know everything because it happened to me and … I know 100 per cent that I came out of the club. I don't know the minutes. I don't know how many times I walked back and forth. I don't know because I can't remember now. I started talking to my friend. Maybe it took even 10 minutes, you say. I don't know. I can't remember. Eventually, [the appellant] came to me … did what I already said, and that's when I run. Like, but I can't remember the times and the minutes and its two year – I can't remember, you know."[32]

[31] The complainant was cross-examined as to whether she had gone back to the bouncers after having been pushed into the taxi. She responded that the occasion (shown on the CCTV footage) when she spoke to the bouncers again outside the nightclub happened before the appellant approached her.[33]

[32] It was put to the complainant that the appellant did not grab her vagina, lift her skirt or show naked photographs of her. She denied those suggestions, saying:

> "Everything I said from word 1 to finish, it was all true. And he did grab my vagina. He did lift my dress. And he did all of those things to me … because I can't … make it all up. I can't make up half of the bloody things on here".[34]

[33] It was also put to her that the appellant did not push her into a taxi cab, which she denied. It was then put to her that her account to the court was given by her because of the break up of her relationship with the appellant. She denied that saying that it was she who broke off the relationship with the appellant, and the appellant would not leave her alone.[35]

Evidence of Khosla

[34] Mr Khosla gave evidence that he was at the nightclub on 27 March 2016. He described seeing a man there who was bald, decently built and over six foot. He described what he saw:[36]

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30 AB 97 ll 1-14.
31 AB 97 ll 1-14.
32 AB 97 ll 33-41.
33 AB 98 ll 16-24.
34 AB 98 ll 33-41.
35 AB 99 ll 1-4.
36 AB 32-33.

(a) the man tried to grab "this tanned, South American lady – had an accent kinda, kind of skinny";

(b) he kept trying to grab her "and she was just not having a bar of it, she was trying to push him away";

(c) she exited the club and shortly after the man exited the club; he thought it was just after midnight when that happened;

(d) he saw the woman walk along the roadside to hail a cab, having turned right outside the nightclub;

(e) he saw the same man sprint after the woman and "throw her into a cab";

(f) the man then ran away;

(g) Mr Khosla's friend's girlfriend consoled the woman and they waited for the police to arrive.

[35] Mr Khosla said that he could not remember the finer details of the events, but did remember the man throwing the woman into the cab. When he spoke to that woman she seemed quite scared and was quite traumatised and she was crying.[37]

[36] In cross-examination he was asked whether the woman ended up on the ground when she hit the taxi. He said that it happened quickly but that he could remember her hitting the taxi, the man sprinting away and his friends picking her up off the road.[38]

[37] He reaffirmed several times that he saw the man sprint towards that specific woman and push her into the taxi, and that his friends helped her to the side of the road and consoled her.[39]

Evidence of Ms Haddow

[38] Ms Haddow was at the nightclub on the particular night with Mr Khosla. She described seeing a man who was "quite a strong build, bald or little to no hair … wearing a tight shirt, long pants; appeared Caucasian".[40] She said that as they left the nightclub she saw that man as he "shoved a lady who was … tall, Italian, dark long hair, slim built, into the side of a Maxi Taxi that was parked at the rank".[41] She said that the man ran across the road, and she and Mr Khosla stayed with the woman until the police arrived. The woman had a strong accent, and was really upset.

[39] Under cross-examination she affirmed that the man who she encountered in the nightclub was the man who pushed the woman into the taxi cab.[42] However, she said the first time she saw the woman was when she had rebounded from the cab and that she did not see her pushed into the cab.[43]

Defence evidence

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37 AB 33.
38 AB 35 ll 15-20.
39 AB 36-37.
40 AB 40 l 18.
41 AB 40 l 29.
42 AB 41 ll 34-41.
43 AB 42 ll 4-7.

[40] The appellant neither gave nor called evidence at the trial.

CCTV footage

[41] The appellant's outline on the appeal contained a detailed chronology of the CCTV footage. The court was urged to watch that footage, excerpts of which were also shown to the court during the course of the hearing. Because it was at the heart of the appellant's submissions I have watched it again.

[42] There is no need to set out a full chronology of what the CCTV footage reveals. It is sufficient for present purposes to note the following:

(a) for a considerable period one can observe intervals at which both the complainant and the appellant are visible, and on occasions the appellant looking towards or speaking to the complainant; however, it is evident that the complainant was avoiding contact with the appellant, maintaining some distance or turning away;

(b) there are occasions when one or other of the complainant and appellant are off camera, or both are off camera;

(c) at one point, as the complainant was moving away from the appellant, he reached out and touched her on the bottom or possibly flicked her dress up; she spun around, stepped forward and slapped him;[44]

(d) the complainant slapped him again, seven seconds later;[45]

(e) as the complainant walked away from him, the appellant reached out and touched her again on the bottom, or possibly flicked her dress;[46]

(f) the complainant turned around, stepped towards the appellant, and apparently remonstrated with him;[47]

(g) the appellant then touched her a third time;[48]

(h) the complainant went back to confront the appellant;[49] he backed away;[50]

(i) the appellant then pushed the complainant in the chest, and she slapped him again;[51]

(j) as the complainant walked away the appellant threw a drink on her;[52]

(k) she then moved off camera, returning just over one minute later;[53]

(l) 35 seconds after she moved off camera, the appellant moved off camera, and remained off camera for about two and a half minutes;[54]

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44 Recorded timing 1.19.29 (CCTV video C, camera 3).
45 1.19.36.
46 1.19.43.
47 1.19.45.
48 1.19.53.
49 1.19.56.
50 1.20.04.
51 1.20.07.
52 1.20.11.
53 1.20.11-1.20.14.
54 1.20.46-1.23.25.

(m) subsequently the appellant interacted with several females, hip-bumping one who was passing, backing into and bumping another, and then as the complainant walked behind him, the appellant backed into her and bumped her;[55] and

(n) at that point the complainant's wet dress is clearly visible.

[43] Some time later the complainant can be seen talking to a security guard at the front door.[56] Some five minutes later the appellant can be seen escorted off the premises by a security guard. About five minutes later the appellant joined a queue at the front door, in an unsuccessful attempt to re-enter the nightclub.

[44] The appellant must have gained re-entry at some point because the CCTV footage shows the complainant leaving the nightclub at 2.16 am and the appellant leaving about one minute later. Two minutes later again the CCTV footage shows the appellant with Jarrod and, across the Brunswick Street Mall, the complainant at the corner of Ann and Brunswick Streets. One minute and 20 seconds later the footage shows the complainant in a distressed state, being comforted.

Submissions

[45] Mr Shepley, appearing for the appellant, submitted that the Crown's evidence was contradicted by the CCTV footage. That footage did not show an occasion when the appellant might have grabbed her vagina, nor did it show the appellant revealing a photograph of her to Andrew. Further, no evidence was adduced to show where or at which time count 1 might have occurred, nor was anyone produced who said they were shown the photograph. None of the bouncers were called to give evidence.

[46] Further as to count 1, it was submitted that there were no times when the appellant and complainant were not visible on the CCTV cameras. The complainant's evidence was that the assault occurred after the drink was thrown upon her, but the CCTV footage covers the entire period after that time and one or other of the complainant and appellant were always on camera.

[47] It was further submitted that in respect of count 2, the CCTV footage was inconsistent with the complainant's account. No other witness was called to say that it was the appellant who pushed her. The complainant's evidence was so implausible that a verdict of guilty could not have been reached. It was submitted that the evidence was that the appellant left the nightclub after the complainant. The witnesses called as to the events outside did not identify that it was the appellant who was involved. The CCTV footage showed that two minutes after the complainant left the nightclub, she returned and could be seen at the entrance complaining to the bouncers. She was not accompanied by any person at that time. The inconsistency between the CCTV footage and the complainant's account was such that a verdict of guilty could not be reached.

[48] Mr Fuller QC, appearing for the Crown, submitted that the complainant's narrative was supported by the CCTV footage, and by the accounts of the two independent witnesses.[57] The CCTV footage disclosed interaction between the complainant and the appellant inside the nightclub, with the appellant pushing or slapping the

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55 1.33.23-1.35.13.

56 1.41 am.

57 Mr Khosla and Ms Haddow.

appellant on at least one occasion, and the wet patch on her dress which supported her claim that a drink was thrown in her direction. Further, the CCTV footage identified the appellant as a thick set man with a shaven head and a goatee.

[49] It was submitted that the footage from 2.16 am onwards supported the complainant's account. It showed the appellant leaving and a short time later his companion pulling the appellant back from the roadway. The footage depicted a figure running down the footpath pursued by two persons in orange work shirts, and shortly after that the complainant is visible, being comforted by a group of people to the right of a yellow maxi taxi on the Ann Street footpath. All of that was consistent with the complainant's account.

[50] There was a period, it was submitted, when both the complainant and appellant were off camera for a period of about 25 seconds. Further, the footage contained periods where interaction between the appellant and the complainant, such as grabbing her vagina, might be undetected.

[51] It is submitted that whilst there were inconsistencies in the complainant's evidence[58] they were not such as would prevent the jury from reaching a verdict of guilty. In particular, count 2 was supported by the evidence of the two witnesses who saw the incident with the taxi cab.

Discussion

[52] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[59] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact. *SKA* adopted a passage from *M v The Queen*,[60] which said:[61]

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'."

[53] In *M v The Queen* the High Court said:[62]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable

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58 Such as to when the photographs of her were shown to her companion.
59 (2011) 243 CLR 400, [2011] HCA 13 at [20]-[22] per French CJ, Gummow and Kiefel JJ.
60 (1994) 181 CLR 487; [1994] HCA 63.
61 *SKA* at 406; *M v The Queen* at 492-493.
62 *M v The Queen* at 493. Internal citations omitted. Reaffirmed in *SKA v The Queen*.

> doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[54] More recently the High Court has restated the pre-eminence of the jury and the role of a criminal appellate court, in *R v Baden-Clay*:[63]

> "[65] It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact'. Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
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> [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'."

[55] As was said recently in *R v Mazza*:[64]

> "The starting point is that the jury is the body entrusted with primary responsibility for determining guilt or innocence, they having had the benefit of having seen and heard the witnesses. However, when an appellate court experiences doubt, it will, in most cases, be a doubt that the jury ought also to have experienced. It is only where a jury's advantage in seeing or hearing the evidence is capable of resolving a doubt experienced by the appellate court that the latter may conclude that no miscarriage of justice has occurred."

[56] Contrary to the submissions advanced on behalf of the appellant, there was a deal of support for the complainant's account.

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63 (2016) 258 CLR 308; [2016] HCA 35 at 329-330. Internal citations omitted.

64 *R v Mazza* [2017] QCA 136 at [50], referring to *SKA* and *M v The Queen*.

[57] First, there was the CCTV footage itself. The complainant's evidence was that the appellant persisted in contacting her whilst in the nightclub when she did not welcome his attention and told him so. The CCTV footage supports that. Throughout most of the footage showing the dance floor inside the nightclub it is evident that the appellant constantly moved towards the complainant, speaking and touching her and being in close proximity to her even if not then touching her, when she made it plain that she did not welcome that attention. As the complainant said in her evidence, the appellant appeared on three occasions to reach out and touch the complainant in a way that was either a touch on the bottom or perhaps to flick her dress. Looking at the CCTV footage, it seems to me the former is correct. That he repeated that contact notwithstanding that she plainly resented it, signified by slapping him, supports the complainant's account that the appellant was a persistent pest towards her throughout the night.

[58] Shortly after those events was the confrontation where the appellant pushed her in the chest when the complainant confronted him. On that occasion she slapped him again and as she walked away he threw a drink on the back of her dress. The complainant gave evidence of such an incident, and the wet dress is plainly visible on a number of the CCTV recordings.

[59] Notably, the CCTV footage does not reveal any other person behaving that way towards the complainant. The jury may well have considered that fact supported the evidence of Mr Khosla and Ms Haddow.

[60] Just as the complainant said in her evidence, the CCTV footage reveals that she did go to the front door of the nightclub to speak to the security guards, and was accompanied by one such guard when she went back inside.[65] Her gestures on that occasion suggest strongly that she was complaining to the security about the fact that he had thrown a drink on her. The wet dress is clearly visible.

[61] About five minutes later the complainant was seen to be at the front door, once again talking to security.[66] This is the occasion upon which she indicates a pushing motion with her arms. Cross-referencing of the CCTV footage suggests that this was related to a point where there was some physical interaction between the appellant and the complainant on the dance floor, after which she is seen to head to the exit.[67] About four minutes later the CCTV footage reveals that the security guards had a discussion at the front door, the end result of which was that the appellant left the nightclub.[68]

[62] That the appellant was ejected from the nightclub seems to be also confirmed by the CCTV footage, which shows him at 1.50 am standing in a queue to get back in, and not being permitted to do so. Two security guards spoke to the appellant on that occasion, and the result was that he left.[69]

[63] Secondly, the complainant's evidence in relation to count 2 (the assault occasioning bodily harm) received fairly compelling support from the independent witnesses, Mr Khosla and Ms Haddow. Each of them identified a person whose description

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65 Footage CCTV videos E and F, cameras 1 and 2, at about 1.35 am to 1.36 am.
66 CCTV video H, camera 2, 1.41.13-1.42.24.
67 CCTV video G, 1.41.00.
68 CCTV video J, cameras 1 and 2.
69 CCTV video L, camera 1, 1.50.08-1.51.37.

and behaviour matched that of the appellant. They gave evidence that that person was the one who pushed the complainant into the taxi, before running off. It was certainly open to the jury to conclude on their evidence that the appellant did push the complainant into the taxi.

[64] Thirdly, the complainant's evidence drew some support from the injuries which were depicted in photographs tendered before the jury, and the fact that CCTV footage shows her, evidently distressed, being consoled on the edge of the street next to a taxi rank.

[65] The main contention advanced on behalf of the appellant was that the CCTV footage was simply contradictory of her account, to the extent that the jury should have rejected it. It was put that the time periods were very clear from the CCTV and there was no support for that part of the complainant's evidence which was that the appellant accosted her and Andrew, showing him a picture of her, or that it was the appellant who pushed her into the taxi.

[66] The point, as developed in oral submissions, was that the cameras showed the complainant leaving and then returning to the security guards two minutes later. It was submitted that there was no evidence from the independent witnesses of the complainant ever going past them to get back to the nightclub.[70]

[67] As the submissions were developed, the thrust was that the CCTV footage put the lie to the complainant's evidence, to the extent that it was illogical of the jury to convict. Mr Shepley referred to the period during which the complainant claims she was assaulted inside the venue in respect of count 1, which he said was not supported by the CCTV footage. He submitted that the footage did not support that part of her evidence where it was said the appellant behaved aggressively to Andrew and showed the photograph.[71] The submission went so far as to say that it was impossible that the events could have occurred as the complainant said.[72]

[68] I am unpersuaded by those submissions. Some short reference to what the cameras reveal will assist in understanding why the submissions should be rejected.

[69] At 2.16 am the cameras reveal the complainant leaving with Andrew.[73] About a minute later the footage reveals the appellant leaving with his friend Jarrod, being ushered out by security.[74]

[70] A little over two minutes after she left, the complainant is seen on the CCTV footage at the entrance to the nightclub, returning to talk to one of the security guards. During that discussion she points down the road in the direction she left.[75]

[71] The next thing in sequence comes from the Citysafe cameras. At 2.19 am they show Jarrod physically pulling the appellant away from the edge of the road near the head of a taxi rank. About a minute later on an opposite section of the street the video footage shows men running on the footpath and being chased by security guards in high-vis vests. The camera footage then reveals, fairly proximate to that

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70 Appeal Transcript T1-16.
71 T1-17.
72 T1-17 l 35.
73 CCTV video M, camera 2, 2.16.19.
74 CCTV video M, camera 1, 2.17.35.
75 CCTV video N, camera 1, 2.18.33.

event, the complainant, evidently distressed, being consoled on the edge of the street next to a Yellow Cabs maxi-taxi.

[72] It is true to say that the complainant did not refer to having gone back to speak to the security guards after she left. Yet it is plainly shown on the CCTV footage. The consequence is that the CCTV footage was inconsistent with her evidence in that respect. Further, she was evidently wrong in her evidence that the assault at the taxi occurred immediately after she left. There is a two minute gap between when she leaves the nightclub and then returns to speak to security. But on any view her conversation with the security guards at 2.18.33 was before the incident at the taxi. The video showing her being consoled next to the maxi-taxi is at 2.20.51.

[73] However, in my view, that does not mean that those inconsistencies rendered it impossible or illogical for the jury to have accepted her evidence. Those inconsistencies were highlighted to the jury, both in address and in the summing up. They were matters for the jury to weigh, having had the benefit of seeing and hearing the witnesses. There is no doubt the jury had the benefit of the independent witnesses as well as the fact that the video footage certainly shows the complainant in a distressed state, being consoled by others next to a taxi, just as she said. Further, it does not follow that because there was a two minute gap, between when she left and when she returned to speak to the security, that she must have necessarily passed by the independent witnesses on her return. Each of those witnesses said that the complainant left, then the appellant. The timing of when those witnesses left is not made certain by CCTV footage.

[74] The jury also had the benefit of knowing that the only person trying to grab the complainant, as shown in the video footage of the interior of the nightclub, was the appellant. The footage does not reveal any other person doing something similar. Therefore it was open to the jury to conclude that the person described by the independent witnesses, both in pestering the complainant inside and pushing her into a taxi outside, was the appellant.

[75] The jury were not compelled to reject the complainant's evidence just because the independent witnesses said nothing about her friend Andrew or the incident with the photograph. The fact that they did not see that is explained by the possible time gap between when the others left and when the independent witnesses left. Further, when the complainant went back to the security guards at 2.18.33, two minutes after having left, it may well have been to complain to the security about that very incident.

[76] The matters raised on the appellant's part certainly point to some contradictions and some inconsistencies between the CCTV footage and the complainant's version. However, none of it rose so high that the jury were bound to reject the substantive parts of the complainant's evidence relating to the sexual assault and to the assault occasioning bodily harm. There was a deal of support for that evidence, particularly from what might be described as the neutral evidence of the CCTV footage.

[77] And, it must be borne in mind that the defence case was not that the complainant had not been pushed into a taxi, but simply that it was not the appellant who did it.

[78] In my view, it was open to the jury to accept the substantive parts of the complainant's evidence, even if they accepted that some of her evidence was inconsistent with the CCTV footage. Given that the appellant did not challenge that

the complainant was assaulted by somebody by being pushed into the taxi[76] then the main discrepancy they had to deal with was the fact that the complainant said it happened after she left and did not refer to having come back. The fact that she did come back two minutes after leaving would not, in my view, have given the jury a reason to reject the complainant's evidence on a wholesale basis. Entirely more probable is the fact that she had forgotten that she had returned to speak to the security guards, and that was, in any event, self-evidently before she was assaulted.

[79] Having reviewed the whole of the evidence I was unpersuaded that it was not open to the jury to come to the conclusion that the appellant was guilty of both assaults. I am unpersuaded that an innocent person has been convicted.[77]

Application for leave to appeal against the sentence

[80] The circumstances of the relevant offending have been dealt with above. The appellant[78] was 29 at the time of the offence and 31 at the time of sentencing. He had a criminal history commencing in 2004 when he was 17. The offences between then and 2015 were not concerned with violence or sexual assault but rather, relatively minor street and property offences. In December 2015 he was convicted of common assault; no conviction was recorded but he was fined. On 9 February 2017 he was convicted of a contravention of a Domestic Violence Order, at which time a conviction was recorded and he was fined.

[81] The learned sentencing judge was told something of the background of the offences in the appellant's criminal history. The assault offence in December 2015 was perpetrated on the appellant's then de facto partner.[79] The appellant got into an argument with the ex de facto and her new partner, and he knocked her down a set of stairs, causing minor injuries. After being advised that police were on the way a second struggle ensued when he threw her to the ground. The injuries were minor bruising and lacerations. The defence case contested those facts, saying that he held her by the wrist only.

[82] The entry for breach of a Domestic Violence Order post-dated the day on which the present offences were committed. It was submitted that the breach of the Domestic Violence Order occurred whilst the appellant was on bail for the present offences. He contacted the complainant over a period of time and for a time during which the contact was mutual. However, the appellant asked her to drop the assault charges, at which point she said she did not want any more contact. After that the contact became abusive including one where the appellant sent a message saying "a DVO does nothing".

[83] The ultimate submission for the Crown at the sentencing hearing was a sentence in the order of nine to 12 months and with the appellant to serve 50 per cent of that. It was submitted that such a sentence was warranted by the fact that the appellant was a mature man who had exhibited no remorse, the offence occurred in a public place with the potential for serious injury, and involved the use of violence.

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76 T1-29 ll 38-47.

77 *SKA v The Queen*; *M v The Queen*.

78 For ease of reference I shall refer to him as "the appellant" rather than "the applicant".

79 Not the complainant in the present case.

[84] The learned sentencing judge indicated that he had also looked at *R v Murray*[80], *R v Bradford*[81], *R v AQ*[82] and *R v Demmery*[83]. His Honour's view was that they tended to be in support of the range of nine to 12 months on count 1.[84]

[85] The learned sentencing judge was informed by the appellant's counsel that the appellant was actively engaged in employment doing fly-in fly-out contract work in Mackay. The ultimate submission made was that a sentence in the order of nine to 12 months advocated by the Crown was appropriate, but either suspended for an operational period or with immediate parole release.[85]

Approach of the sentencing judge

[86] The learned sentencing judge briefly reviewed the circumstances of the offending highlighting the persistent nature of the appellant's conduct during the course of that night, that the conduct for count 1 was abusive and would have been distressing to the complainant, and that it was more likely than not to have been intended to offend or humiliate as it was a brazen assault carried out in a public place. As for count 2, the learned sentencing judge noted that the assault was impetuous and did not seem to involve any serious level of premeditation or planning. However, it could have resulted in far more serious injuries than was sustained.

[87] Factors taking into account by the learned sentencing judge included:

(a) the appellant fled the scene;

(b) there was no co-operation with authorities;

(c) there was no indication of any remorse;

(d) most of the criminal history was of no relevance, with the exception of the common assault in December 2015, which was indicative of the appellant having difficulty in controlling his anger when dealing with persons with whom he was in a relationship;

(e) his Honour noted that the contravention of the Domestic Violence Order in 2017 was concerning because it occurred whilst he was on bail;

(f) the Victim Impact Statement accurately recorded the pain and suffering suffered by the complainant, as well as the shame and hurt she felt by the sexual assault;

(g) there was a need for general and personal deterrence because the offence involved an assault on a woman in a public place, particularly in a domestic violence situation; denunciation was also called for;

(h) the appellant's personal circumstances, including his good employment history and work ethic; and

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80 [2005] QCA 188.
81 [2007] QCA 293.
82 [2003] QCA 479.
83 [2005] QCA 462.
84 AB 150 l 10.
85 AB 153 ll 43-47.

(i) that counsel on each side had contended for the same general sentence, namely nine to 12 months, but different as to whether the appellant should be required to serve actual time in custody.

[88] His Honour concluded that a wholly suspended sentence or immediate parole release was not appropriate because, notwithstanding his good work history, he had previous convictions indicating an inability to be able to cope with the breakdown of relationships. Further, the offences were brazen and in public. As a consequence his Honour imposed 12 months' imprisonment on both counts. However, even though that was after a trial, when it would normally be the case that no parole release date was set, his Honour took into account the appellant's good work history and the relatively minor criminal history and set a parole release date at four months.

Submissions

[89] For the appellant Mr Shepley submitted that by the time of the hearing of the appeal the appellant would have served three months' jail out of the four months' custodial sentence. Given that the case presented by the Crown, and the evidence justifying the case, was marginal, three months was the appropriate term to be served.

[90] For the Crown it was submitted that the offending occurred against the background of persistent harassment of the complainant, and the sexual assault was clearly demeaning. The appellant had a level of aggression in his conduct on the night and lashed out violently at her in retribution for what had occurred earlier. Count 2 placed her at real risk of serious injury. When coupled with the earlier assault it was inevitable that there would be an actual term of imprisonment. It was submitted that the authorities referred to by the learned sentencing judge warranted the sentence imposed.

Discussion

[91] In my respectful view the authorities referred to do not demonstrate that the sentence is manifestly excessive. It is not necessary to refer to them all.

[92] *R v AQ*[86] involved the imposition of a 12 month period of imprisonment, to be wholly served with no suspension or partial suspension. There were two counts of indecent assault each of which consisted of the offender holding the complainant's hands above her head and stroking her, and rubbing his penis in the area of her vagina. The background was that the parties had been in a relationship which the complainant had decided to end, but she had not told him. On the first count the offender had persuaded her, after initial reluctance, to agree to the sexual activity. On the second count it occurred without her consent, and culminated in simulated sexual intercourse without penetration. On appeal this Court held that the offender, having served about three months of actual custody, and three days in pre-sentence custody, should have the sentence immediately suspended. The central reasons for that was the plea of guilty, the absence of any previous criminal history, the fact that there was no violence involved, and the offender's generally good character and history.

[93] The fact that the offending in *R v AQ* involved no violence, was carried out in the privacy of a home, and engaged no risk of serious injury distinguish the offending

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86 [2003] QCA 479.

as less serious than that in the present case. Added to that is the fact that the sentence of 12 months was imposed on a plea of guilty. In my view *R v AQ* supports the sentence imposed in this case.

[94] *Bradford*[87] involved a plea of guilty to three counts of unlawful and indecent assault, for which the offender was sentenced to 12 months' imprisonment, with parole eligibility fixed after five months. The complainant was the offender's step-sister. The offending included one occasion when he reached across and placed his hand inside her shirt, touching her left breast with skin on skin contact. The second involved him putting his hand between her legs and rubbing in the area of her vulva, but outside her pants. At the same time he made sexually suggestive remarks. Nine months later the offender engaged in sexual banter directed at the complainant, then wrestled her to the bed saying "we could fuck in here" to which she said "no". He followed her into the bathroom, continuing the sexual banter, then picked up an electric razor and placed it against her left breast outside the clothes.

[95] The offender had no criminal history and did not reoffend while on bail for an extended period. He had a good work history and the care of his four year old son. This Court reviewed various authorities including *Murray*, *Demmery* and *R v AQ*. The Court took the view that the conduct in *R v AQ* was more serious than in *Bradford*. Whilst the offending in *Bradford* was reprehensible and distressing, it did not involve the same degree or extent of coercion and physical contact as that in *R v AQ*. As a consequence the sentence was varied to immediate suspension. By then the offender had served four months' imprisonment.

[96] The offending in *Bradford* was different from that in the present case and arguably not as serious. It was not in a public place, nor designed to humiliate, nor did it involve the degree of violence present here. Notably the Court in *Bradford* did not interfere with the 12 month period, and whilst it acknowledged that immediate suspension might have been open, the eventual orders were to suspend after three months. In my view, *Bradford* does not support the contention that the sentence imposed here is manifestly excessive.

[97] *Murray*[88] involved a worse sexual assault where the offender placed his hand against the complainant's vagina, rubbing it on the outside of her jeans, but then slid his hand up her top and squeezed her left breast quite forcibly. He had a lengthy criminal history which included offences committed whilst on probation or on a suspended sentence. On appeal a head sentence of 15 months was imposed.

[98] The greater level of offending conduct, and the fact that *Murray* involved a plea of guilty, means that it offers no support for the proposition that the appellant's sentence was manifestly excessive.

[99] In my view the proper characterisation of the offending conduct in this case means that it was almost inevitable that a custodial sentence would be applied, given that it was after a trial and not on a plea of guilty. The sexual assault was brazen as it was carried out in a public place, and even with the prior history of a relationship for a period of time, it seems likely that it was done in a way meant to demean or humiliate the complainant. Count 2 could be said to be more serious given its potential for harm. It certainly occurred in the context where the appellant evidently resented the complainant ending their previous relationship, and after the

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87 [2007] QCA 293.
88 [2005] QCA 188.

complainant rejecting his repeated attempts to interact with her at the nightclub. Count 2 effectively involved the complainant being pushed on to the roadway and against a taxi which may or may not have been moving at the time. The potential for serious injury was obvious.

[100] Further, the learned sentencing judge gave the appellant the benefit of a period of custody reduced from that which would normally apply to a sentence imposed at the end of a trial. Instead of serving six months (50 per cent of the head sentence) the period of actual custody was reduced to four months. That was a substantial benefit given the fact that his behaviour and the trial meant that there was no sign of remorse.

[101] In my view it cannot be demonstrated that the sentence imposed was manifestly excessive.

[102] **PHILIPPIDES JA:** The reasons of Morrison JA reflect the basis for my joining in the orders made on 10 May 2018.