SUPREME COURT OF QUEENSLAND

CITATION:	*R v ABB* [2019] QCA 22
PARTIES:	**R** **v** **ABB** (applicant)
FILE NO/S:	CA No 194 of 2018 DC No 748 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 23 May 2018 (Farr SC DCJ)
DELIVERED ON:	19 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2019
JUDGES:	Sofronoff P and Gotterson and Morrison JJA
ORDER:	**The application for an extension of time is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted on four counts of assault, each of which constituted a domestic offence – where the applicant lodged a notice of appeal against his conviction on 18 July 2018 when the time for lodging an appeal had expired on 25 June 2018 – where the applicant contends that the prosecution led propensity evidence – where the applicant relied upon *Pfennig v The Queen* (1995) 182 CLR 461; *Perry v The Queen* (1982) 150 CLR 580 and *HML v The Queen* (2008) 235 CLR 344 – where the applicant contends that there has been a miscarriage of justice – whether the grounds of the applicant's proposed appeal has a reasonable prospect of succeeding to warrant the granting of an extension *Craig v The Queen* (2018) 92 ALJR 390; (2018) 353 ALR 177; [2018] HCA 13, cited *HML v The Queen* (2008) 235 CLR 344; [2008] HCA 16, mentioned *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *Nudd v The Queen* (2006) 80 ALJR 614; (2006) 225 ALR 161; [2006] HCA 9, cited *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7, mentioned *R v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35, cited

R v Genrich [2001] QCA 466, mentioned
Perry v The Queen (1982) 150 CLR 580; [1982] HCA 75, mentioned
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, mentioned
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: The applicant appeared on his own behalf
C N Marco for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Morrison JA.

[2] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** On 23 May 2018 the applicant was convicted, after a trial, on four counts of assault, each of which constituted a domestic offence. All four counts occurred on the one day and were committed against the applicant's wife.

[4] Count 1 (common assault) involved grabbing the complainant's hair and pulling her to the ground. Count 2 (common assault) involved the applicant putting his hands around his wife's throat and choking her. Count 3 (assault causing grievous bodily harm) involved the applicant punching his wife on the jaw with both fists, resulting in a fracture to her jaw requiring surgery to wire the jaw together. Count 4 (common assault) again involved placing his hands around his wife's throat and choking her.

[5] The applicant lodged a notice of appeal against his conviction on 18 July 2018. The time for lodging such an appeal expired on 25 June 2018 and it was therefore just over three weeks out of time. Because of that the applicant also filed an application for extension of time within which to appeal.

[6] For the reasons which follow I would refuse the extension of time as the proposed appeal lacks merit.

Extension of time – delay and explanation

[7] *R v Tait*[1] establishes the proper approach when considering an application for extension of time. The court will examine whether there is good reason shown to account for the delay, and whether it is in the interests of justice to grant the extension. The length of the delay is a factor to be considered. If possible the court will make an assessment of the merits of the appeal, at least on a provisional basis. In this case the merits have been argued in full, so the assessment need not be provisional.

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1 *R v Tait* [1999] 2 Qd R 667.

[8] The sequence of events relating to the filing of the notice of appeal is as follows.[2]

[9] On 29 May 2018, six days after his conviction, the applicant contacted Legal Aid Queensland (**LAQ**) seeking advice about lodging an appeal. Due to an in-house conflict LAQ could not provide the advice. Instead, on 30 May LAQ referred the "conflict advice" to an outside firm to provide advice to the applicant about his appeal.

[10] About the end of May the firm spoke to the applicant by video link. The applicant explained his intention to appeal and (possibly) his "reasons for appeal". The firm's lawyer said she would discuss the matter with the applicant's defence counsel and get back to him.

[11] According to LAQ, on 4 June that firm provided advice about an appeal to the applicant. The content of that advice is not known, but LAQ say that the firm claimed payment for it on 11 June. The applicant disputes that the advice was other than in respect of family law matters. There is no way to determine that disputed fact.

[12] On 16 June the applicant sent a letter to the court registry. It was received on 22 June. The applicant says he set out his grounds in that letter. That is not quite accurate. The letter was in the form of a handwritten submission. It explained various complaints about the way the trial was conducted and inconsistencies in the complainant's evidence, and then set out a version of background events, and what occurred in the Family Court proceedings. The letter then turned to the contact he had with the outside firm brought in by LAQ. The applicant then said:

> "I have till Wednesday next week for my 28 days to expire for appeal. Being scared of receiving higher sentence I have come to a decision that I write to appeals court directly."

[13] The letter then referred to: (i) the change in Dr Webster's opinion as to the cause of the fractured jaw;[3] (ii) the discrepancies in the complainant's evidence; (iii) a case where a broken jaw was held to be bodily harm, not grievous bodily harm; and (iv) Dr Cannon's report.[4] He continued with what he called his "prisoner's plea":

> "These are the reasons I put before you, the reader. I do apologise that I'm using the term "reader" as I'm unaware who will be reading this letter. It is my final attempt in seeking for a fair consideration. I am requesting an advise (sic) if there are chances for an appeal based on the whole circumstances leading to trial. I have gone through four trials and every time was a miserable experience therefore I would avoid going to re-trial. … If the possible solution is re-trial then I would probably accept being here and serve my time. Just requesting for an answer at least saying the decision during sentence is fair …"

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2 It is derived from the material filed on the application for extension: affidavit of Ms Gillies filed 22 January 2019, application for extension of time, affidavit of the applicant, the applicant's outline and the applicant's letter to the registry dated 16 June 2018.

3 Dr Webster gave evidence at the trial, including as to the mechanism by which the fracture may have occurred.

4 Dr Cannon had been retained by the defence and made a report which critiqued various aspects of the evidence, including Dr Webster's report.

[14] According to the registry's records, on 22 June the registry replied to the applicant, informing him that: (i) the time for filing was 25 June 2018; (ii) what forms to use; and (iii) how to file. Not surprisingly it did not provide advice as to the prospects of appeal.

[15] On 22 June, at 3.20 pm, the registry emailed the corrective services authority, explaining that the appeal had to be lodged by 25 June, attaching the relevant documents (including the letter to the applicant), and asking that they be given urgently to the applicant.

[16] The registry's reply was sent to the applicant via the corrective services authority, by email. However, the applicant says he heard nothing back from the court. It is possible that the answer went astray after reaching corrective services, but there is no other evidence to show that. Again, notwithstanding my reservations as to the applicant's account on this point, the dispute cannot be resolved.

[17] The applicant did nothing between 16 June and 25 June to file an appeal.

[18] On 9 July the applicant called LAQ saying he believed he had filed his appeal paperwork but had heard nothing back from the court. In so far as he said he believed he had filed his appeal paperwork, that response was misleading, given that (i) the applicant says the outside firm did not advise him on his appeal; (ii) he had not been given appeal documents by that firm; (iii) when he wrote to the registry on 16 June he had filed nothing; (iv) his letter to the registry did not purport to be the filing of an appeal, which the applicant then knew was due by 20 June on his reckoning; and (v) he says that he did not get the registry's response.

[19] On 13 July LAQ's Prison Advice Service (**PAS**) spoke with the applicant. He said the outside firm had spoken with him on 4 June 2018 and told him they would arrange for appeal, but nothing had happened when he assumed it had. So, as he had not heard, he rang LAQ on 9 July. (That response conflicts with what the applicant now says about the firm's response: see paragraph [11] above.) PAS told the applicant that as a notice of appeal had not been filed in time he would have to lodge an application for extension of time. Further, as there was a conflict PAS could not provide legal advice regarding his appeal but would refer him to the Prisoners Legal Service (**PLS**) and let them know he wanted the necessary forms to appeal out of time.

[20] On 16 July 2018 the PLS was asked by LAQ to provide assistance with appeal forms.

[21] The applicant's letter to the registry on 16 June shows that he was aware that there was a time limit and of the applicable time limit. That letter effectively amounted to a request for advice about prospects, rather than an attempt to lodge the right documents. The registry responded to him on 22 June 2018, which was still within the time limited for appeal.[5] According to the applicant he did not receive that response and over three weeks passed before he contacted LAQ again, which contact eventually resulted in the applications being filed.

[22] Plainly the applicant was aware of the time limit for filing. He believed it was 20 June whereas the registry said it was 25 June. Either way he let the time pass without taking steps to file a notice of appeal. From his letter it appears that was a deliberate decision, the applicant having decided not to run the risk of a higher

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5 The applicant believed it was 20 June, but the registry's calculations had it as 25 June.

sentence, but instead to ask for advice about the prospects of an appeal from the court registry. Obviously that was misguided.

[23] Whilst the explanation for the delay after contacting the registry is not satisfactory, nonetheless it appears that the applicant was intent upon appealing if he had grounds to do so, and made efforts to do so, even though those efforts were misguided. The overall length of the delay is not great, being 25 June to 19 July. If matters were confined to those considerations I would be inclined to grant the necessary extension of time. However, the merits of the proposed appeal are another matter.

Background

[24] The applicant and the complainant were married on 17 November 2013. The complainant had a daughter from a previous relationship, but together they had a son born in 2014. The marriage was, even on the applicant's material before this Court, an unhappy one. The complainant's evidence at the trial was that the applicant was controlling and demanding, and physically abusive towards her. That abuse escalated over time, with a number of incidents being described by the complainant in the passage of time leading to 5 April 2015, when the four offences were committed. The applicant's own submissions described the marriage as "unhealthy … from the start", and being accompanied by a lot of arguments concerning family ties, particularly with the applicant's brother and sister-in-law. The applicant had an affair with his sister-in-law prior to marrying the complainant, and told her before they married, but that relationship was obviously the source of continuing agitation between them.

[25] Evidence was given at the trial of a number of instances of physical abuse in the two or three years prior to the offences. They included:

1. December 2013: pushing the complainant's head against a car window several times;
2. May 2014: dragging the complainant by her hair and pushing her head towards the wall;
3. November 2014: chastising the complainant because of her dress, and then punching her in the back of the head several times;
4. December 2014: slapping the complainant a few times;
5. February 2015: threatening to kill the complainant and her family, wrestling with her in an attempt to get her phone, and then pulling the complainant's hair to the point where she nearly fell over; later pushing and slapping the complainant and threatening her with a knife; and
6. March 2015: pushing her head against the car window while they were travelling in the car.

[26] On the day of the offences, 5 April 2015, the applicant and complainant argued over when her daughter would be dropped off at her mother's place. The applicant pulled the complainant by her hair and pushed her onto the floor.[6] He sat on top of her and chastised her for screaming. He then put both of his hands on her neck and choked her.[7] He threatened to kill her and then punched her twice in her face,

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6 Count 1.
7 Count 2.

causing her to taste blood in her mouth.[8] He then put his hands around her neck again and choked her.[9]

[27] The complainant asked to be taken to the hospital and though they drove there the applicant stopped her from getting out of the car. He took her to a service station where he bought her a bottle of water. While he was inside at the service station the complainant photographed her injuries. He then took her back to their unit, saying he could treat her. After securing the complainant's agreement to provide a false account for how she sustained the injuries, the applicant then took her to the hospital. Before they did so he made her change her clothes and put some makeup on to cover the marks on her neck.

[28] The complainant underwent surgery on 7 April 2015, during which her fractured jaw was wired. She was interviewed by police two days later. Shortly thereafter proceedings were instituted in the Family Court in relation to the custody of their son.

[29] In her first police statement the complainant accepted that she had agreed to tell those at the hospital that she had fallen by herself. She did tell hospital staff that she fell and hit her chin, and that that had occurred two hours prior to her attendance at the hospital. However, in her evidence she said she agreed to tell the story so that the applicant would take her to the hospital, and she denied that what she had said to the hospital staff was true. It was also the fact that the complainant told her work supervisor that she had fallen, but she said she did so because she did not want to be the source of workplace gossip.

[30] At the trial Dr Webster gave evidence based upon the complainant's medical records. There was a mid-line fracture to the complainant's jaw with malocclusion, bilateral joint pain and an inability to open the mouth. The fracture was repaired in surgery, by wiring the teeth together and closing the fracture with a plate and screws. Dr Webster was of the view that the injury had been caused by a blunt force trauma, and by a significant amount of force. The injury could have been caused by either a punch or a fall.

[31] The applicant's trial counsel admitted that the injury constituted grievous bodily harm.

Grounds of the proposed appeal

[32] The applicant's first ground of appeal was that the verdicts were unsafe and unsatisfactory. He also raised a number of specific grounds in the course of his submissions before this Court. It is convenient to deal with each of those in turn, and then the overall ground.

Abuse of process – propensity evidence

[33] The applicant contended that the prosecution led propensity evidence, the prejudicial effect of which exceeded any probative force.[10] In this respect the applicant was referring to the evidence concerning other incidents of domestic violence, summarised in paragraph [25] above. It was contended that the leading of the

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8 Count 3.

9 Count 4.

10 In that respect the applicant relied upon *Pfennig v The Queen* (1995) 182 CLR 461, [1995] HCA 7, *Perry v The Queen* (1982) 150 CLR 580, [1982] HCA 75, and *HML v The Queen* (2008) 235 CLR 344, [2008] HCA 16.

evidence of those alleged incidents created an unfair trial, and a fundamental defect in the trial process because of its prejudicial effect.

[34] The first difficulty that contention confronts is that, as the applicant accepted, there was no objection by his trial counsel in respect of that evidence, nor any request for a direction other than was given in respect of it, as set out below. Given that the same evidence had been given at the first aborted trial, defence counsel knew full well that the evidence was to be adduced.

[35] The second difficulty is that the evidence was not adduced as propensity evidence at all. It was the subject of a specific aspect of the summing up by the learned trial judge in a passage designed to ensure that the jury did not treat the evidence as propensity evidence:[11]

> "Now, the defendant is, of course, only charged with the four offences set out in the indictment. And as I've said, you must consider each of those charges separately. The prosecution has also placed before you evidence of other conduct that is alleged to have been committed by the defendant, which the prosecution says properly contextualises the charged events. That, of course, is the evidence of other acts of alleged violence that occurred on the dates that were nominated in the course of evidence. And the prosecution says that that's placed before you so that you can understand the true nature of the relationship that existed between the defendant and the complainant and that that evidence gives you the full and proper context of the relationship, such that it makes it easier to understand the nature of the allegations the subject of the charges.
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> Now, you should, of course have regard to the evidence of the incidents which are not the subject of the indictment only if you find that evidence reliable. If you accept it, you must not use it to conclude that the defendant is someone who has a tendency to commit the type of offence with which he is charged. So it would be quite wrong for you to reason that you're satisfied he did those acts on other occasions and, therefore, it is likely that he committed one of the charged offences. You must not reason in that way. That evidence has been led only for that limited purpose that I've identified to you.
>
> Furthermore, you should not reason that the defendant had done things equivalent or similar to the offences charged on other occasions and, on that basis, could be convicted of the offences charged even though the particular offences charged are not proved beyond a reasonable doubt. Remember that the evidence of the incident not the subject of the charges comes before you only for the limited purpose that I've identified. If you do not accept the complainant's evidence relating to the incidents not the subject of the charges, you should, however, take that into account when considering her evidence relating to the alleged events the subject of the charges before you."

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11 Summing up Transcript p 6 line 40 to p 7 line 22.

[36] The jury having been expressly directed that the evidence was not led as evidence of propensity, nor could it be used that way, there is no reasonable basis to contend that the trial miscarried for that reason.

Fabrication of evidence and incompetent advice by defence counsel

[37] The applicant contended that Dr Webster's alteration of his opinion from one report to another constitute some sort of fabrication of his evidence, such that there had been a miscarriage of justice. The point is misconceived. Dr Webster produced a report which was to be used in the first trial.[12] In that report Dr Webster suggested that the injury could have occurred by a fall or by an assault. On the morning of the second trial an amended report was provided in which Dr Webster suggested the injury was more consistent with an assault rather than by a fall. That change in his report resulted in the second trial being aborted, and another trial date being set. At the final trial Dr Webster no longer pressed his view that the injury was more consistent with an assault than a fall. In essence he had reverted to the view expressed in his original report, whereby he claimed that the injury could be caused by either an assault or a fall.

[38] The lawyers representing the applicant at the trial had obtained a report from Dr Cannon. That report criticised the first two statements of Dr Webster, dated 17 June 2016 and 19 March 2018. One of the points of criticism was that Dr Webster was a maxillofacial registrar, namely a trainee in that specialty, and was therefore not qualified to give the opinion that the injury satisfied the definition of grievous bodily harm. The second was critical of Dr Webster's change of opinion, attributing the injury to an assault rather than neutrally as between and assault and a fall.

[39] Dr Cannon's report was not used at the final trial. That is not surprising. It was conceded that the injury constituted grievous bodily harm and therefore his criticism of Dr Webster's position as an expert in that respect was pointless. Further, Dr Webster had altered his changed opinion[13] and had reverted to the view that the injury could have been caused either by an assault or a fall. That meant that the second major criticism advanced by Dr Cannon was, again, pointless.

[40] That being the case, the alteration in Dr Webster's opinion as to the likely cause of the injury does not bespeak of fabrication. It is simply a change of opinion, which was probably the result of his reading the report of Dr Cannon.

[41] The allied contention advanced was that defence counsel gave incompetent advice, in that the applicant was told that Dr Cannon's testimony was not required because Dr Webster had changed his view as to the cause of the injury back to his original opinion. That advice was not incompetent. If Dr Webster gave evidence that either an assault or a fall could have caused the injury that was simply in line with what Dr Cannon would have said in any event. That evidence was, in fact, better than the opinion of Dr Cannon. His expressed view was that the injuries "may have occurred as a result of a fall onto a hard surface" but were "likely to have occurred from application of one punch to the right side of the jaw".[14]

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12 The first trial was aborted for procedural reasons. The second trial commenced the next day with a new jury. It was terminated because of a change foreshadowed in the evidence of Dr Webster. A new trial date was set and that trial was completed.

13 Perhaps, as a result of reading Dr Cannon's report.

14 Dr Cannon's report, section 5.

[42] Further, given the admission that the injury constituted grievous bodily harm, there was no point in calling Dr Cannon in order to criticise that opinion given by Dr Webster. Significantly, Dr Cannon's report did not express the view that the injury would not come within the definition of grievous bodily harm. It would be surprising if he expressed such a view. The injury was a fracture to the jaw which required surgery and wiring. It was plainly within the definition of grievous bodily harm.

[43] Finally, the applicant's letter to the registry confirms what would be inferred in any case, namely that he relied upon the advice of his lawyers as to how to run the trial. The election not to call Dr Cannon was a tactical decision made by his lawyers and accepted by the applicant. There was a perfectly rational reason to take that course, and the applicant was not thereby deprived of a chance of acquittal that was fairly open. There is no miscarriage of justice.[15]

Rehearsal of evidence in the first trial

[44] The applicant contended that there was relevant unfairness, leading to a miscarriage of justice, because in the first trial the complainant "had previously practised her evidence" and had "even rectified part of her evidence which would have been 'harmful' to the prosecution case".

[45] It is true that the first trial was one where the complainant gave her evidence before the point at which the trial was aborted. But it is also true, as the applicant conceded, that she was cross-examined at that trial by the applicant's trial counsel. Any suggestion that she was able to rehearse her evidence or practise it at the first trial is simply the product of the fact that the trial was abandoned. Whatever benefit she got from giving evidence on that occasion was balanced by the fact that the defence counsel got to cross-examine her more than once. Any change in her evidence that might have been useful to the defence would have been obvious to the applicant's defence counsel at the final trial and available for use. There is no suggestion that the applicant's defence counsel did not make full use of whatever advantages were available. There is no relevant prejudice by the process.

Prejudicial answers and no direction

[46] The applicant contends that a prejudicial answer was given by the complainant during the trial and there was no direction given to the jury to disregard it. The relevant part of the question and answer are as follows:[16]

> "Q: You found some documents in his email account that you believed proved that he was having an affair with his sister-in-law; is that right?
>
> A: Well, his sister-in-law blamed him passed STD to her, so I mean, I think that's very clear what's that mean."

[47] The applicant's contention was that the infidelity revealed in that question and answer, namely his having an affair with his sister-in-law, and the reference to an STD (sexually transmitted disease) caused him prejudice. In that respect it was said to have created a fundamental defect in the trial process.[17]

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15 *TKWJ v The Queen* (2002) 212 CLR 124, [2002] HCA 46; *Nudd v The Queen* [2006] HCA 9, (2006) 225 ALR 161; *Craig v The Queen* (2018) 353 ALR 177, [2018] HCA 13.

16 T1-36 line 45.

17 Reliance was placed on *R v Genrich* [2001] QCA 466.

[48] I do not accept the applicant's contentions in this respect. First, the suggestion that he was having an affair with his sister-in-law came in a question put by his own counsel in cross-examination of the complainant. It was uncontroversial that he had had such an affair, and that it was the source of friction between them. Secondly, there is no reasonable basis to conclude that the fact of his affair would have caused prejudice to him in the eyes of the jury. If the complainant's evidence was accepted by the jury, as seems likely that it was, then there was evidence of repeated physical abuse over a period of time, as well as the evidence of the offences themselves. In the face of that the evidence that he had an affair with his sister-in-law prior to being married to the complainant was relatively inconsequential.

[49] Thirdly, when the answer was given referring to the STD, the jury were immediately sent out at the request of defence counsel. In the absence of the jury defence counsel for the applicant raised with the learned trial judge the fact that the reference to STD treatment was a non-responsive answer not given at the previous trial and that counsel was concerned that if the non-responsive questions continued, or prejudicial and inflammatory material continued, "We'll end up bombing the trial". The learned trial judge then asked defence counsel "What are you asking for?", and the response was:

> "Well, I'm not asking for anything at the moment, but perhaps she could be simply told to answer the question because that answer wasn't responsive to my question."[18]

[50] The learned trial judge proposed directing that the answers be responsive, and that was done when the trial resumed. No further application was made by defence counsel in respect of the reference to the STD, nor was anything said of it in addresses or the summing up.

[51] In the face of that deliberate decision by his own counsel the applicant's complaint falls away.[19] The reference was passing, not repeated, and was not likely to have carried much weight with the jury. I do not accept that it deprived the applicant of a chance of acquittal that was fairly open.[20]

Discrepancies in the complainant's evidence

[52] Various discrepancies were referred to in general terms, but one particular one was the subject of the applicant's submissions before this Court. It was that in her evidence in chief the complainant had said that she was punched after she fell.[21] However, in cross-examination the complainant said she did not scream when she got punched, but when she fell.[22] The contention was that that discrepancy cast a doubt upon the complainant's truthfulness.

[53] Properly understood there was no real inconsistency. The first piece of evidence relates to when she was punched, and the second relates to when she screamed. However, even if there was an inconsistency, it was a matter for the jury. The applicant's counsel at the trial cross-examined on that inconsistency and others.

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18 T1-38 lines 15-19.

19 *TKWJ v The Queen* (2002) 212 CLR 124, [2002] HCA 46; *Nudd v The Queen* [2006] HCA 9, (2006) 225 ALR 161; *Craig v The Queen* (2018) 353 ALR 177, [2018] HCA 13.

20 *TKWJ v The Queen* (2002) 212 CLR 124, at 135; [2002] HCA 46.

21 T1-20.

22 T1-58 line 20.

The inconsistency was not of such weight as to lead a jury to reject the complainant's evidence entirely. The jury may well have taken the view that her ability to remember precisely how the events unfolded, in a traumatic event which occurred some years ago, may well have varied in terms of detail. That does not mean that she was an unreliable witness or one who lacked credibility. Further, that evidence was not of great weight when put against the defence's main points:

(a) the complainant told the hospital staff that the injuries were caused when she fell upstairs and therefore her evidence at the trial was an opportunistic response to that accident, to use it to her advantage;

(b) there was no forensic evidence to support that the marks on the neck were consistent with throttling;

(c) the complainant made threats in text messages which suggested that the custody of their child was the reason why she might have given the evidence she did; and

(d) she had told others a different version of events.

Wrongful admission of evidence as to grievous bodily harm

[54] The applicant's contention in this respect was that Dr Webster was not qualified to give an opinion that the injury constituted grievous bodily harm. It was admitted at the trial that the injury constituted grievous bodily harm. One can infer from what the applicant said in his letter to the registry that he followed his lawyers' advice in that respect.

Errors in the summing up

[55] The complainant's point here was that the learned trial judge referred to Dr Webster as an expert when in fact he was a trainee as an oral and maxillofacial surgeon. There is nothing in this criticism. The fact that he was a trainee does not mean he was not a relevant expert for the purposes of the evidence he gave. Further, there was no objection to his evidence being given on the basis that he was an expert. Given that Dr Webster had not examined the complainant or been part of her treatment, his evidence could only have been given in an expert capacity.

[56] The applicant also complained that the learned trial judge erred in his summing up by using the term "a nurse" when referring to the fact that the complainant's account of how the injury occurred was that she "fell upstairs". What the learned trial judge said was:[23]

> "It was submitted to you that, the defence are not suggesting that this was a (sic) elaborately planned falsity on the part of the complainant. Rather, an opportunistic response to this accidental injury, to use it to her advantage. That they had been arguing that day over washing. That there was a set of stairs between the laundry and the unit. She told a nurse that she fell upstairs. It's not known what the marks on the neck were from, because no one at the hospital seemed to notice them, and including doctors and nurses."

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[23] Summing up, p 10 lines 20-25.

[57] The applicant's contention was that the trial judge should have reminded the jury that not only was the triage nurse told that account, but so too was the surgeon and a friend.

[58] There is nothing in the point. The relevant passage to which objection is taken was in the course of summarising the submissions by the applicant's counsel rather than the learned trial judge's own summary of the evidence.

Unsafe and unsatisfactory verdicts

[59] This ground was the original ground before the applicant formulated his outline in which the points above were articulated. Because he is self-represented and cannot be taken to have abandoned this ground, I will now deal with it.

Legal principles

[60] The principles governing how this task must be approached are not in doubt. 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*[24] 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.

[61] In *M v The Queen* the High Court said:[25]

> "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 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."

[62] *M v The Queen* also held that:[26]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains

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24 (2011) 243 CLR 400 at [20]-[22]; see also *M v The Queen* (1994) 181 CLR 487 at 493-494.

25 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.

26 *M v The Queen* at 494.

> discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

[63] The High Court restated the pre-eminence of the jury in *R v Baden-Clay*.[27]

The evidence

[64] The applicant's contentions here were as to the quality of evidence given by the complainant, including discrepancies between her evidence and earlier accounts given to the police or others and her ability to speak or understand English.

Complainant's evidence

[65] The complainant's evidence referred to when she met the applicant, when they married and the fact that she had a daughter from a previous relationship, and they had a son together. She gave evidence that the relationship changed after their marriage, he became very demanding and controlling, and applied physical force to her.[28] She described that it started with minimal actions such as a push or a squeeze on her arm, that commencing within the first month of their marriage. She said it got worse over time. She was asked about some specific occasions and referred to those which are set out in paragraph [25] above.[29]

[66] Her evidence in this respect was quite detailed, both as to precisely what happened and what was said by each of them. The details also included contextual matters such as surrounding events at the time of the violence. For example, in May 2014 they were watching a movie and it was the applicant's instance that she repeat some of the words said by one of the actors that led to her being dragged by her hair. Similarly, the incident in November 2014 occurred in the context of an argument over whether she was wearing a long enough dress to cover her feet, whilst in a shopping centre. Further, it was that occasion, the complainant said, which caused her to say she wanted a divorce, because "his behaviour is getting worse and more frequent".[30]

[67] The complainant's evidence also included reference to the fact that she found emails on the applicant's phone suggesting that he had had an affair.[31] There was no objection to that evidence.

[68] The complainant's details of the physical abuse included events on 17 February 2015 when some neighbours had to intervene and stop him.[32] In respect of that event the complainant gave evidence that when they returned to their unit the confrontations continued and she took a knife from the cutlery drawer and held it facing towards him as he approached.[33] He kept approaching to the point where the knife touched his chest, at which point she dropped it. He then took a knife from

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27 (2016) 258 CLR 308 at [65]-[66]; internal citations omitted.
28 T1-6.
29 T1-7 – T1-17.
30 T1-9 line 38.
31 T1-11 line 22.
32 T1-13 – T1-14.
33 T1-15 – T1-16.

the cutlery drawer, dragged her hair down and put the knife towards her neck.[34] A few seconds later he put down the knife and acted as though nothing had happened.

[69] The complainant also gave detailed evidence concerning the alleged offences on 5 April 2015.[35] That evidence included contextual matters, the sequence of events, and what was said as between them. What is evident from the complainant's evidence on those matters, as well as the earlier ones, is that her method of expression conveyed the fact that English was not her first language. However, her method of expression left little to doubt. An example is in the following passage:[36]

> "All right. When he grabbed your hair, what happened to you?---He pulled – he pulled my hair.
>
> Yes?---And pushed me down and he's sitting on top of me because it's happened so sudden and I scream, well, because I was suddenly I fall.
>
> Yes?---And I scream. And then he said, 'Why you scream? You want me in trouble again.'"

[70] In the course of describing the events the subject of Counts 2 and 3, the complainant explained that she was on the floor with the applicant sitting on her and he was choking her neck. She then said "He release his hand, he put his hands in the fist and then punched my face twice."[37] When asked to explain where it was that she was punched, she said "It's here twice together".[38] She was then asked to explain what she meant by the phrase "twice together" and particularly whether it was both hands punching her at the same time. Her answer was: "It's both come together, like, 'Boom, boom' twice."[39]

[71] The complainant gave evidence that after she was punched she asked to be taken to the hospital and the applicant drove her there. He parked outside the emergency department but prevented her from going in, saying that he needed to talk to her because he was already in trouble and the doctors might question her about the marks on her neck.[40] She said he then drove her to a petrol station and bought her a bottle of water because she had lost a lot of blood. While he was inside at the petrol station she "put down the mirror of … the car and then I took a few photo".[41] Those photographs became Exhibits 2-4.

[72] The complainant said that the applicant did not drive her back to the hospital, but rather back to their unit because he said the blood had already stopped and he could treat her.[42] Because she asked him to take her back to the hospital he eventually did so after he dropped the children off. The applicant told her that they would "have to tell the hospital something else" because of the marks on her neck. He told her to tell the hospital that she fell, and she agreed.[43]

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34 T1-16.
35 T1-17 – T1-22.
36 T1-19 lines 26-33.
37 T1-20 line 39.
38 T1-20 line 46.
39 T1-21 line 4.
40 T1-23 line 5.
41 T1-23 line 18.
42 T1-25.
43 T1-26 lines 19-23.

[73] He asked her to put on clothes that covered the marks, as well as some makeup to cover it. After that she was driven to the hospital. The complainant then gave evidence about her treatment, her going to the police and what followed.

[74] In cross-examination the complainant agreed she was frightened of the applicant when he was angry. She was cross-examined about the fact that on 17 February 2015 she had recorded a conversation between the two of them. It was suggested that in that conversation she was mocking the applicant, and her recording was done for use in later Family Court proceedings. The complainant said she did not understand what the word "mocking" meant and denied that she had recorded it with a specific purpose in mind. She said it was done because the applicant did not admit what he did and what he said.[44]

[75] She agreed that in that recorded telephone conversation she called the applicant a "motherfuck" and denied that she was trying to provoke him by using that term. When asked why she used that term she answered:[45]

> "Why he cheat me? Why he bring his sister-in-law in our house? Why he keep affair with his brother's wife for so many years? I are human – I'm human. I'm not perfect. I feel angry. I have emotions [indistinct] when I find out the truth.
>
> So you were very angry because you thought that your brother (sic) was having an affair with his sister-in-law?---It's not what I saw, it's what I see.
>
> All right. Were you very angry because you feel that he was having an affair with his sister-in-law?---I feel betrayed and disappointed."

[76] The complainant agreed that she was feeling angry in that conversation, but denied that she was the person who became angry first. She denied that she was laughing at him or mocking him, or trying to stir him up by insulting him.[46] The complainant explained that she had no intention of insulting him by using the word "motherfuck", but that was "just a good word to describe his behaviour".[47]

[77] The cross-examination as to the lead up to the recorded telephone call continued with this passage:[48]

> "Okay. So what had happened leading up to this was that in about December of 2014, you believed – or you thought that he was having an affair with his sister-in-law, didn't you?---I submit all the document, the email between himself and his sister-in-law and a video photo to the police. So I presume you already saw that.
>
> You found some documents in his email account that you believed proved that he was having an affair with his sister-in-law; is that right?---Well, his sister-in-law blamed him passed the STD to her, so I mean, I think that's very clear what's that mean."

[78] Cross-examination of the complainant focussed, at least in part, on the contention that the complainant's anger over the fact that the applicant had an affair with his

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44 T1-31 line 34.
45 T1-32 lines 30-39.
46 T1-34.
47 T1-35 lines 22-27, and T1-36 line 2.
48 T1-36 line 41 – T1-37 line 2.

sister-in-law affected the relationship.[49] The complainant accepted that it was one part of the strain in their relationship, but said "the main problem is about his violence behaviour towards me".[50] The complainant also accepted that on about 11 February 2015 she was looking through the emails on his phone for evidence of the affair, and it made her very angry.[51] Some six days later she found some emails referring to the affair, and rang the applicant to tell him, threatening to send the emails to his brother, though she did not follow through with that threat.[52] She agreed that it was in that context that the physical exchange on 17 February 2015 occurred, when they were tussling and grappling over the phone in the street. She agreed that she wanted to keep copies of the emails so she could prove the affair, but pointed out there was then no court proceedings on foot.

[79] The complainant agreed that the tussle over the phone in the street was because he wanted to get her phone, but questioned whether that meant it was reasonable that he could abuse her on the street.[53] The cross-examination did not challenge her evidence that she was pushed by him in that altercation.

[80] The complainant was confronted with the fact that in her police statement on 9 April 2015 she did not mention that part of the incident concerning the use of knives. She explained it was because "at that stage the police didn't even ask for that".[54] She went on to explain that mentioning the knife was "not the police process", because "they only ask the things happen … 5th April 2015".[55]

[81] The complainant also agreed that in her later affidavit in the Family Court proceedings she did not refer to the fact that the applicant had held a kitchen knife to her throat.[56] She denied that it was omitted because it wasn't true, saying "when the people ask you question in different way, it's where we remind you different things".[57]

[82] She said that it was first mentioned in a further police statement in August 2016, but she said that was because "That detective is very professional and the way he ask the question is help me remember everything – more detail".[58]

[83] The complainant also agreed that she had not previously referred to the fact that the applicant had told her to wear particular clothing and put some makeup on her neck prior to going to the hospital.[59] Her explanation was that she had mentioned it to a detective but was told that they couldn't amend an existing statement.[60] She also accepted that at the first trial she had indicated that it was only probably the case that the police officer had told her that and she could not remember telling the police officer that.[61]

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49 T1-39 – T1-40.
50 T1-40 line 18.
51 T1-41.
52 T1-42.
53 T1-44 – T1-45.
54 T1-45 line 37.
55 T1-46 lines 5-20.
56 T1-47 line 18.
57 T1-47 line 22.
58 T1-48 line 15.
59 T1-49.
60 T1-49 line 42.
61 T1-51 – T152.

[84] It was put to the complainant, and denied by her, that she had invented the evidence concerning being told to put makeup on the marks on her neck, and she also denied the proposition that no one at the hospital saw or questioned her about those marks.[62]

[85] The cross-examination turned to her failure on previous occasions to mention some of the individual incidents of domestic violence, particularly that on 20 March 2015 where, according to the complainant, the applicant pushed her head against the car window. She explained that at the start the police and the prosecutor did not ask for her to give more details of incidents, but that later they told her the law had changed for domestic violence cases and she was allowed to give evidence of related incidents.[63] She also accepted that she had said in the first trial that the incident on 20 March 2015 included her being punched. She did not recall giving the evidence, but accepted that she did, and she also accepted that there was a difference between that evidence and the evidence she gave in the present trial.[64] Her explanation was that she was confused.[65]

[86] As to the alleged offences, in cross-examination she accepted that they had an argument in the afternoon and the applicant mentioned as one thing that she had not done the washing.[66] She denied the proposition that she had hurt her own chin, maintaining that she was punched twice.[67] She said that she did not know whether it was the first or second blow that broke her jaw. Also, she said she did not scream when she was punched, but when she fell.[68] She explained not screaming when she was punched by saying "How can you scream when he punch you?".

[87] The complainant denied that it was her idea to say that she had fallen and hit her own chin.[69] The complainant accepted that in her initial statement it did not expressly say that the applicant had told her to say she fell and hit her chin, but said that the statement did not record the full conversation.[70] She agreed that she had told the personnel at the hospital that she had fallen and hit her chin, and that she had not told anyone that the applicant had caused the injury until she spoke later to a social worker.[71]

[88] The complainant was confronted with the evidence given at a previous trial, as to what she told the social worker. Her evidence on that occasion was that she was planning to leave the applicant and that if he did not consent to it she would consent to making a statement to police about alleged domestic violence. Whilst the complainant accepted that she gave that evidence she maintained that the context of her discussion with the social worker was somewhat different and that it was the social worker who was urging her to go to the police.

[89] It was put to the complainant, and denied, that her complaints were based in a desire to get custody of her son. She also denied that the reason she told hospital staff she

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62 T1-53.
63 T1-54.
64 T1-55.
65 T1-55 line 45.
66 T1-57.
67 T1-58.
68 T1-58 lines 22-27.
69 T1-58 line 40.
70 T1-59 – T1-60.
71 T1-60 – T1-61.

had fallen on and hit her own chin was because it was the truth.[72] She agreed that she had told the false account to various people, including her work supervisor because she did not want to be the subject of gossiping at the workplace.[73] She also denied the suggestion that none of the incidents to which she referred had occurred, except the tussle over the phone on 17 February 2015.[74]

[90] In re-examination she was asked to explain to the jury why it was she told the false account at the hospital, and she answered: "Because of that situation, what's [indistinct] is to get into the hospital, to get proper medical treatments. That's what the defendant refused to do at the beginning, so I will agree, whatever he said, lie to the – I mean, it is quite abnormal. I got jaw injury. The bone was broken. … It is hard for me to talk, and then you can imagine, every movement of your mouth, it will cause you pain, but in the hospital, I have to follow what he suggested me to do. My children and my family are still outside."[75]

Evidence of Dr Webster

[91] Dr Webster's evidence was based upon reviewing the reports from the hospital. His evidence identified the fracture to the jaw, the pain and limitation of movement that was observed in the neck, changes in sensation, the inability to put the teeth together and then what was done to treat those injuries. The procedure involved surgery under a local anaesthetic, the jaws being wired together and then the insertion of plates and screws to bring the fracture together. As to the mechanism of the injury Dr Webster said it was the application of blunt force, as in someone getting hit from the front or from slightly to the side. His opinion was that the fracture was more consistent with force being applied from the front and slightly to the side than from any other direction. In his view the injuries could have been caused by an assault involving punches or kicks, or by a fall.

Evidence of the social worker

[92] The social worker to whom the complainant spoke was called and made available for cross-examination. By reference to her file notes she confirmed that when she discussed matters with the complainant she was told that the applicant had not been abusive towards the children but that the complainant and the applicant had been arguing about parenting. The complainant had told her that she intended to leave the applicant permanently and return to live with her mother. The complainant also told her that she believed the applicant would not let her take her eight month old son. She also told the social worker that she was planning to leave the applicant permanently and that if he did not consent to this she would consider making a statement to the police about the alleged domestic violence.

[93] In cross-examination the social worker said she could only go by what was on the file note as she could not remember exactly what was said because of the lapse of time. She agreed that she explained to the complainant what her options were about providing a statement to the police and was cross-examined about the context in which her note about the complainant leaving permanently and making a statement about the domestic violence was made.

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72 T1-67.
73 T1-68.
74 T1-69.
75 T1-70 lines 13-29.

Discussion

[94] The prosecution case plainly stood or fell on the complainant's evidence. True it is that there were inconsistencies and discrepancies in that evidence, both internally and when compared with what she told the social worker, the police and what she said in her evidence at the first trial. However, there was a deal of support for her version of events, such that it was open to the jury, in my respectful view, to accept her evidence as to the alleged offences.

[95] First, Exhibits 2-4 were very difficult to reconcile with what was put to the complainant, namely that the applicant did not punch her or choke her, but she simply fell on the stairs and injured her jaw in that fashion. Each of Exhibits 2-4 show red marks or bruising on the complainant's neck. There was no challenge to the fact that those photographs were taken in the afternoon following the injury to her jaw. The injured jaw is evident on the photographs themselves. It was not put to the complainant that the photographs were taken at some other time or in some other circumstance. Further, there was no credible suggestion that the complainant put the marks on her neck herself.[76] That being so, there was clear support for her evidence that the applicant choked her in the altercations on the day in question.

[96] Secondly, the evidence of Dr Webster and Exhibit 8[77] fairly plainly show the point of impact being directly from the front or slightly to the side of the complainant's face. When that is combined with what is evident from Exhibits 2-4, namely that there was no external mark on the chin, there is evidence that a jury might accept that was directly contrary to the postulated mechanism of a fall. The jury might well have thought that if the complainant fell in such a way as to create that fracture to her jaw, more would likely be seen by way of external injury on the chin.

[97] Thirdly, there is the disparity between the time when Exhibits 2-4 were taken, self-evidently in broad daylight, and the time when the complainant first attended the hospital, namely 7.55 pm. The jury might well have considered that if, in truth, the complainant had simply fallen and injured her jaw that way, why would she delay going to the hospital, and why would the applicant delay taking her?

[98] Fourthly, the fact that the complainant told the hospital staff that she fell was explained by the complainant in two ways. The first was the applicant's insistence on telling a lie to the hospital. The applicant was present with her when she was first assessed by the triage nurse. The second, however, may well have weighed with the jury's deliberation. That was the explanation from the complainant that she had to assist with that story at the hospital because of an apparent fear or concern at least that her children and family were still outside, as was the applicant. Implicit in her explanation was the suggestion that she was fearful of what the applicant might do if she did not obey his desire to obscure the real cause of her injury. That he had not harmed the children before does not mean he could not start, especially at such a time of heightened physical abuse. The complainant's frankness in admitting that she lied to the hospital staff and her work colleague, may well have been seen by the jury as going to her credit, rather than the opposite.

[99] Similarly, the jury could well accept her explanation for telling her work supervisor the same story. It was to avoid being the topic of workplace gossip. The jury could

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76 What was put was that the notes of the hospital staff did not record such marks or bruising.

77 The x-rays of the complainant's face.

well have thought, drawing on common experience, that a victim of domestic violence is not necessarily willing to have that made known in the workplace.

[100] The evidence referred to above is to be seen in the context in which the jury would have been assessing the complainant's evidence about the offences, namely the admitted animosity between the complainant and the applicant over his having had an affair with his sister-in-law, the evidence about the arguments over divorce, and the admitted struggle on the street over her phone. It must be recalled that the defence case was that none of the physical events happened, with the exception of that struggle over her phone. The jury's acceptance of the reliability and credibility of the complainant's evidence in that respect was made easier by the Exhibits to which I have referred above. There was no credible explanation for the marks on the complainant's neck but that the applicant caused them in the way the complainant said.

[101] Once the discrepancy between the version told to the hospital staff and the version given in evidence (about being punched) is put to one side, other inconsistencies and discrepancies fall away. The jury would have been well aware that whilst the complainant was reasonably proficient in English, it was not her first language and her method of expression was sometimes lacking. Yet for all that she was very clear as to what occurred, especially as to the punching.

[102] Her earlier failure to refer to the knife incident and the other occasions of domestic violence was explained by the complainant, namely that (i) the police concentrated on the events constituting the offence on 5 April 2015, (ii) she revealed when questioned more closely at a later time; and (iii) she was later told there had been a change in the law which permitted those matters to be brought up. That explanation could be accepted given the complainant did not reveal the other incidents of physical abuse in her first police statement.

[103] The suggested inconsistency over whether she screamed when she was punched, or screamed after she was hit when she was on the ground is, in my respectful view, neither here nor there. When one reads the two passages in context it is evident that the complainant was consistently saying she screamed, and the interval of time between when she was pushed over and when she was hit is so small as to be not likely to trouble the jury in terms of whether they accept her evidence or not.

[104] It is true that the complainant not disclose that the applicant told her to change her clothes and put on make-up following the assault on 5 April 2015 until the first trial but she maintained that it was the truth. The complainant said that she mentioned it to a police officer but he said that she could not amend her statement. The complainant accepted that at a previous trial she said she "probably" told the police officer and she could not recall when that occurred.

[105] In my view, such a discrepancy does not compel rejection of the complainant's evidence as a whole. Once again the jury would likely have focussed on the core of her evidence, namely the punching and choking that were at the heart of the offending. In that respect the fractured jaw, evidence of Dr Webster and the marks on her neck in Exhibits 2-4, were powerful reasons to accept her evidence.

[106] It is the case that defence counsel for the applicant relied upon the inconsistencies and discrepancies in the evidence as a reason for the jury to reject the complainant's evidence wholesale. The jury therefore had to grapple with the proposition that they

might reject all or part of the complainant's evidence because of those inconsistencies and discrepancies. In my view, the photographic evidence provided a very compelling reason why they would accept her evidence, notwithstanding the inevitable inconsistencies that come from a witness trying to remember events happening quickly, some years down the track. Added to that is the level of detail consistently apparent in the complainant's account of the dealings between her and the applicant. That there was animosity between them, particularly over the fact that he had an affair with his sister-in-law prior to the marriage, was not really in contention at the trial, and was supported by the various text messages to which reference was made. That the tension extended to concerns over custody of their only child was also not really in contention. The jury's assessment of the credibility and reliability of the complainant fell to be considered in that context, and her evidence was supported by the empirical evidence to which I have referred. And it must be recalled that the jury had the unquestioned advantage of seeing and hearing that evidence, whereas this court does not have the same benefit.

[107] In my view, on a review of the whole of the evidence, it was open to the jury to be satisfied of the applicant's guilt of the alleged offences. I am quite unpersuaded that an innocent person has been convicted.

Conclusion

[108] As all the grounds of the applicant's proposed appeal lack merit that appeal has no reasonable prospect of succeeding. The applicant's application for an extension of time within which to appeal should be refused.