# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Young* [2020] QCA 140 |
| PARTIES: | **R**<br>**v**<br>**YOUNG, James Justin Bradford**<br>**(appellant)** |
| FILE NO/S: | CA No 54 of 2019<br>DC No 2210 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Brisbane – Date of Conviction: 15 February 2019 (Jarro DCJ) |
| DELIVERED ON: | 26 June 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 6 May 2020 |
| JUDGES: | Mullins JA, Lyons SJA and Ryan J |
| ORDERS: | **1. The appellant's application for leave to adduce further evidence is refused.**<br>**2. The appeal against conviction is dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was charged on indictment with one count of assault occasioning bodily harm, while armed (Count 1), one count of common assault (Count 2) and one count of choking in a domestic setting (Count 3) – where all three counts on the indictment were domestic violence offences alleged to have occurred on 2 September 2017 and to have been committed against the appellant's domestic partner with whom he was living at the time – where the Crown entered a *nolle prosequi* in respect of Count 1 – where the allegations in relation to Count 2 were that the appellant had kicked the complainant on the legs causing her to fall and, with respect to Count 3, that he had grabbed the complainant around the throat – where after a three day trial in the District Court, the appellant was found not guilty of Count 2 of common assault, and guilty of Count 3 of choking in a domestic setting – where the appellant now seeks leave to adduce further evidence and appeals his conviction on the basis that the verdict was unreasonable or could not be supported having regard to the whole of the evidence – where the appellant argues that the evidence |

against him is unreliable, inconsistent and not capable of supporting a verdict of guilty on Count 3, and argues that there is no corroborative evidence in relation to the complainant's allegations as to how the strangulation the subject of that count happened – where the Crown argues that although there are weaknesses in the complainant's evidence in terms of her reliability, those factors were fairly outlined by the learned trial judge in the summing up and that the complainant's evidence was capable of being supported by a number of other pieces of evidence – whether the verdict of the jury was unreasonable and insupportable having regard to the evidence

*Criminal Code* (Qld), s 315A(1)(a), s 668E(1A)
*District Court of Queensland Act* 1967 (Qld), s 27
*Evidence Act* 1977 (Qld), s 132B

*Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12, considered

COUNSEL: The appellant appeared on his own behalf
D Balic for the respondent

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

[1] **MULLINS JA:** I agree with Lyons SJA.

[2] **LYONS SJA:** The appellant was charged on a three count indictment. Count 1 charged assault occasioning bodily harm, while armed (domestic violence offence), Count 2 charged common assault (domestic violence offence) and Count 3 charged choking in a domestic setting (domestic violence offence). All of the offences were alleged to have occurred on 2 September 2017 and to have been committed against his domestic partner with whom he was living at the time.

[3] On 11 February 2019, the Crown entered a *nolle prosequi* in respect of Count 1 on the indictment, and accordingly the defendant was discharged in respect of that charge of assault occasioning bodily harm, while armed (domestic violence offence).

[4] The allegations in relation to Count 2 were that the appellant had kicked the complainant on the legs causing her to fall and, with respect to Count 3, it was alleged that he had grabbed the complainant around the throat.

[5] On 15 February 2019, after a three day trial in the District Court, the appellant was found not guilty of Count 2 of common assault, and guilty of Count 3 of choking in a domestic setting.

[6] On 8 March 2019, he was sentenced to two years imprisonment, with the conviction recorded as a domestic violence offence pursuant to s 12A of the *Penalties and Sentences Act* 1992 (Qld) (PSA). Pursuant to s 159A of the PSA, 154 days of pre-sentence custody were declared as days served towards the sentence.

[7] The appellant now seeks leave to adduce evidence at the hearing of his appeal and appeals his conviction on the basis that the verdict was unreasonable or could not be supported having regard to the whole of the evidence.

**Application for Leave to Adduce Further Evidence**

[8] At the hearing of the appeal, the appellant sought the Court's leave to adduce further evidence, namely:

1. An affidavit of the appellant sworn on 27 April 2020;
2. Two affidavits of Mr Damien Bruton affirmed on 14 April 2020 and sworn on 30 April 2020 respectively; and
3. A statement by Dr Saifullah Akram dated 21 April 2020.

[9] During the course of the hearing, the affidavit of Mr Bruton sworn on 30 April 2020 was held to be irrelevant in respect of paragraphs 1 to 4, as it related to events alleged to have occurred in 2019 between the deponent and the complainant and not the charges against the appellant. The content of paragraph 5 is scandalous. The affidavit was not admitted into evidence and the Court ordered that the affidavit be placed in a sealed envelope.

[10] The question of whether to grant leave to adduce into evidence the three remaining affidavits was reserved. The affidavit of the appellant sworn on 27 April 2020 contains allegations about the complainant's behaviour prior to the making of a temporary protection order in May 2017 or after the date of the offence on 2 September 2017 and as such is either information which would have been available to the appellant and his counsel at the time of the trial or is simply irrelevant.

[11] The affidavit of Mr Bruton affirmed on 14 April 2020 also refers to information that would have been available at trial or contains his inadmissible opinion evidence about the complainant's drinking habits, credibility, reputation and character. I also note that all of those issues were fully explored by counsel at trial and accepted in the main by the Crown and the complainant herself. The affidavit also contains statements about Mr Bruton's subsequent, failed relationship with the complainant which are irrelevant.

[12] The document headed affidavit and signed by Dr Saifullah Akram on 21 April 2020 has not been witnessed. It states that Dr Akram does not consider himself an expert in strangulation and did not realise he was being called as an expert at the trial. He also referred to injuries the appellant sustained in August 2017 and medication he prescribed for him. The evidence about the injuries before the offence and the medication prescribed is clearly irrelevant to any issue in contention in this appeal and once again would have been available at the time of trial. Furthermore, the transcript of Dr Akram's evidence at the trial does not reveal that he was called as an expert in strangulation but rather as the medical practitioner who treated the complainant after 2 September 2017. He was however asked to consider the Queensland Ambulance Report and photographs taken on 2 September 2017 and to give his medical opinion about the nature of injuries he could see in the photos. That opinion was well within his area of expertise as a General Medical Practitioner. His opinion was then thoroughly tested under cross-examination. The statements contained in this new document contain no further or additional information which would warrant this Court granting leave.

[13] Having considered the contents of the affidavits and Dr Akram's statement, I am not satisfied that any of them bear upon any of the issues in contention in this appeal and they are therefore irrelevant.

[14] Accordingly, the application for leave to adduce further evidence is refused.

[15] In order to appreciate the grounds of appeal it is necessary to consider the essential elements of the Crown case at trial.

**The Factual Background – the Choking Count**

*The Complainant's Evidence*

[16] The appellant and the complainant were domestic partners at the time of the offence in September 2017 and had lived together since December of 2016 at various addresses. They had been living together in an upstairs unit (the unit) at Windsor, for about four weeks. The complainant's evidence at trial made it plain that it was a mutually abusive relationship against a background of excessive drinking.

[17] The complainant stated that on 1 September 2017, she had been playing chess and drinking at the unit with a neighbour, Mr Damien Bruton. She stated that she did not recall going to the Crown Hotel with him earlier in the day. She gave evidence that the appellant had been, she thought, to the pub. She recalled him returning in the evening at around 6 pm and said that "[w]ords were spoken"[1] and that the appellant insulted Mr Bruton, to which she responded. She alleged that following that verbal exchange, she and the appellant moved inside and she was then hit with "a painting or something" from behind.[2] She was not able to identify who had hit her. She gave evidence that she was then found by Mr Bruton on the floor in the hallway at the front of the house.

[18] The police attended at the unit and the appellant was removed from the residence. The complainant could not recall what time the police came but said it was after dark. She stated that she did not have any memory that the appellant had returned at 2.00 am and gave evidence that she recalled sitting at the coffee table on the front deck smoking a cigarette when the appellant returned to the house at between 8.30 am and 9.00 am on 2 September 2017. She said that she was distressed by the fact that the appellant had arrived in her vehicle and described an argument that occurred between her and the appellant outside the house where she said that they were "both frustrated with each other".[3] The complainant accepted that there was verbal abuse by her as well although she cannot recall the details as her memory of the day is not clear. However, she specifically denied being the one who was violent towards the appellant.[4] She accepted under cross-examination that she could remember some things about the day but not others. She also agreed that during the course of the relationship she had physically abused the appellant and that she had punched him previously.

[19] The complainant gave evidence about an argument in the kitchen at the rear of the property at about 9.00 am that day and stated that it was then that the appellant grabbed her by the throat and pushed her to the wall in the kitchen where she "felt

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1 Appeal Record Book (ARB), page 99, line 28.
2 ARB, page 99, lines 33-41.
3 ARB, page 102, line 10.
4 ARB, page 146, line 29.

pinned".[5] She said she was not lifted off the ground but could feel the weight of her body hanging from under her ears. She described feeling "a lift" and pressure being applied to the centre of her throat and around to the sides of her neck below her ears,[6] up to the back part of her jaw. She described being frozen, feeling constricted, having a limited ability to breathe and said that she was unable to speak. She could not recall how long she was held in this position, but said she could recall screaming out and that her next clear memory was the sound of her hitting the ground.

[20] It was put to the complainant under cross-examination that she was the one who was being violent. She stated:

> "---I was strangled at approximately 9 am on the morning. I'm very clear with that. That is very clear. When you go through something that is extreme in trauma physically, those are the things that have stuck in my mind of that morning, not so many details of what I said to the police. When I went to a doctor, in that moment, I have a very clear memory when you are frightened to the point that you cannot respond physically or verbally to the point where you have to run out of the house and – there – that sticks in your mind.
>
> So it sticks in your mind and you're very - - -?---Yes, very - - -
>
> - - - clear - - -?--- - - - much so.
>
> - - - you were very clear that you were strangled at 9.30 in the morning?---Not 9.30, I said approximately 9 am.
>
> So approximately 9 am now?---Yes.
>
> All right, and that's something you're sure of?---Absolutely, yes."[7]

[21] Her evidence was that she then left the kitchen via the back door and went downstairs to their neighbour's unit and one of the occupants called the police. She stated that she did not ring the police from her own phone, and could not recall talking to the police or a triple zero operator over the telephone. Police and the Queensland Ambulance Service (QAS) attended at the residence, however she was not taken to hospital that day as she "was waiting for forensics to take photos of [her] neck and [she] remained in the premises until the police had left that morning".[8] The ambulance officer who attended noted that there was no obvious bruising at the time they attended immediately after the incident. Photos taken at the time were admitted into evidence.

[22] In relation to the facts regarding the alleged kick to her legs which was the factual basis for the count of common assault, the complainant accepted that her recollection may have been confused and that she did not recall a great level of detail about that event.[9] She was asked at trial by counsel for the appellant the following questions:

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5 ARB, page 105, line 30.
6 ARB, page 105, lines 33-35.
7 ARB, page 149, lines 20-37.
8 ARB, page 107, lines 10-11.
9 ARB, page 150, lines 17-20.

> "… He never kicked you this day, Ms KN, I suggest? ---That's fine. I believe that he did. Like I said, there are things that are very clear that I'm – I'm comfortable in – in exactly what's clear in my mind. I don't – I – things I'm not – that – that are fractured, I've been very transparent with you that – that I don't have that recollection of that level of detail.
>
> Do you specifically remember him kicking you in the back of the legs, or are you - - -?---No.
>
> - - - confused about - - -?---No.
>
> - - - it happening on an earlier altercation?---I don't specific – I don't remember the specifics.
>
> Right. So you don't remember - - -?---I do remember being swiped and dropped to the ground.
>
> Right?---Yep.
>
> That never happened, is what I'm suggesting. You either agree or disagree?---Okay. That's fine. I – I disagree.
>
> Okay. He never put his hands around your throat?---Strongly disagree with that."[10]

[23] The complainant stated that early in the morning on 3 September 2017 she woke up in a panic as she was having trouble breathing and she called an ambulance. She was having difficulties with her throat and felt pressure or swelling in her neck. She was taken to hospital but left as she thought it was taking too long. She later saw two doctors – Dr Wong and Dr Akram. Dr Wong prescribed anti-inflammatory tablets to deal with the swelling of her neck which she took for two weeks, and Dr Akram prescribed sleeping tablets as she "wasn't sleeping very well at all afterwards…".[11] She stated that her voice was deepened and a little husky in the period after the offence occurred.

[24] At the trial she accepted under cross-examination that she had a history of excessive consumption of alcohol and that her alcoholism was a result of anxiety and depression. She also acknowledged that she had on occasions been drinking about four bottles of wine a day and had been admitted to rehab. She also accepted that she had also on about five previous occasions tried to harm herself.

*The Evidence of Police and Ambulance Officers*

[25] Police officers from the Stafford Police Station attended the unit on 1 September 2017 at around 6.30 pm when the appellant was removed from the unit to de-escalate a situation where both the appellant and the complainant were heavily intoxicated. The evidence of Sergeant Russell was that he attended that evening when the appellant was removed. He stated that he had no recollection of the complainant saying anything about a painting but stated that she had said that the appellant had picked her up and thrown her on the ground.[12] He was involved again on 2 September 2017 when he located the appellant at the Crown Hotel.

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10 ARB, page 150, lines 16-38.
11 ARB, page 108, line 19.
12 ARB, page 186, line 35.

[26] Senior Constable Bennett gave evidence that he attended on 2 September 2017 at around 2.30 pm. The complainant was upset and making allegations of assault. He organised for photographs to be taken and that was done at around 2.45 pm. He also saw the appellant that afternoon and said that he was too intoxicated to be interviewed. He also gave evidence that the watch house notes that afternoon indicate that the appellant had swelling and bruising to his right eye, that he had a seizure from alcohol withdrawal in the police vehicle and that he had a "torn ligament in [his] right foot".[13]

[27] Constable Yang's evidence was that he attended on 1 September 2017 as well as the following day with Constable Bennett. He stated that he saw the complainant and that "[s]he looks obviously upset by crying and I can see some visible injury on her leg. Also, I can see some red marks on her – around her neck area."[14]

[28] The evidence of ambulance officer Polino was that he had a poor recollection of the incident and did not complete his report until three and a half hours after the incident given a high workload at the time. The notes indicate that at 2.25 pm on 2 September 2017 the QAS were called to the unit and it was noted that the complainant had "nil obvious bruising".[15] When he was shown photographs that were taken by police that afternoon he stated that he was able to identify some mild and minor bruising. The QAS records of the attendance on 3 September 2017 were also the subject of an admission which will be referred to shortly.

*The Evidence of Damien Bruton*

[29] Mr Bruton gave evidence at the trial that he had been drinking with the complainant on 1 September 2017 at the Crown Hotel and then remembers playing chess with the appellant that evening when an argument developed. He also recalled an argument that evening between the complainant and the appellant which led to the complainant ending up face-down in the unit with a painting on her back. He stated that the police were called and the appellant was taken away.

[30] His evidence was that in the early morning, around 2.00 am or 3.00 am, on 2 September 2017 a noise woke him and he went upstairs to investigate and saw the appellant had returned. He saw both the complainant and the appellant the following morning at around 9.00 am or 10.00 am when he had a conversation with them before they returned to the unit. Subsequently at around 1.00 pm or 2.00 pm he heard a thump from the appellant and complainant's kitchen followed by silence. He then heard the complainant yelling for police. She then appeared at his door in distress and he noticed she had some scratches on her legs and some red marks around her neck. He had not noticed the red marks on her neck the day before or earlier that day.

[31] Under cross-examination he accepted that he and the complainant decided to leave the Crown Hotel on 1 September 2017 at around 4.00 pm or 5.00 pm and had walked home. He said however that he had no recollection whatsoever of walking back from the hotel with his arm around the complainant's neck. He also accepted that the appellant was sick of him and the complainant drinking together and had said so. He also agreed that he had had a romantic relationship with the complainant at one stage and that he "would do anything to help [her]".[16]

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13 ARB, page 235, line 22.
14 ARB, page 229, lines 22-24.
15 ARB, page 189, line 37.
16 ARB, page 227, line 3.

*The Evidence of Daniel Martin*

[32] Mr Martin's evidence was that he arrived home on the evening of 1 September 2017 and saw police with the appellant. He then said he heard a noise of glass breaking at around 2.30 am on 2 September 2017 and when he investigated he saw that the appellant had returned to the property. When he checked on the complainant she confirmed she was all right. He then saw her again around 10 in the morning with the appellant who said that that she and Mr Bruton would not be spending any more time together drinking.

[33] He gave evidence that the appellant and the complainant went back to their unit and at roughly 2.30 in the afternoon he again heard raised voices and the sound of glass or ceramics breaking with the complainant yelling "[g]et out".[17] The argument went on for about 20 minutes but stopped at one point. He said "[e]ventually, there was a very large thud noise from upstairs and things went quiet".[18] He then heard the complainant "calling out for help and police".[19] The complainant then came down to their unit and was clearly distressed. He stated that he observed marks on her arms and legs including a cut on her leg and called triple zero.

[34] Under cross-examination, Mr Martin stated that when he saw the complainant at that point "there had obviously been something going on and she had red marks around her neck"[20] as well as bruising on her arm and a cut on her leg. He also stated that he took photos but was told by police to delete them as they would take their own photos. He accepted however that those observations were not included in his sworn police statement taken at the time.

*The Evidence of Dr Wong and Dr Akram*

[35] Dr Akram gave evidence that he saw the complainant at 10.38am on 4 September 2017 when she referred to some neck pain and swelling. He treated her anxiety as a result of the event with counselling and the prescription of Diazepam. She was referred to a psychologist and also given analgesia for her neck pain. He also stated that she was referred for an ultrasound for the purpose of further assessment. He stated that whilst he noted in the record the words "attempted strangulation" he thought she used the word strangulation.

[36] Dr Akram was also shown photographs taken by police and gave evidence about what he considered they showed. He stated that there was "a slight prominence of the – her right sternocleidomastoid" (the muscle which runs from the jawline down to the collarbone and into the sternum).[21] He gave the following evidence in relation to a photograph of the right side of her neck:

> "Now, this is a photograph of the side of her neck. It's her right side that we can see. Is there anything of clinical significance in that photograph?---I note – it's [indistinct] three specific red marks that appear to be petechiae in nature on the lateral right neck. There's also an area of redness in – more towards the centre of the neck as well.

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17 ARB, page 198, line 26.
18 ARB, page 199, lines 13-14.
19 ARB, page 199, line 38.
20 ARB, page 206, lines 11-12.
21 ARB, page 239, lines 6-19.

> So you say that there's some petechiae. When we say petechiae, can you please explain for the – to the jury what that means?---So that could be a – potentially, a rash with – with, perhaps, a little bit of bleeding under the skin.
>
> And what is the cause of petechiae?---So – so there is medical causes but also – also, it can happen to pressure being applied to a certain area of skin."[22]

[37] He also referred to red marks down the middle of the back of the complainant's neck on the right side of the same photo. In relation to the clinical significance of a photo of the left side of her neck he said:

> "So again, I can see the scratch marks that I mentioned in the previous photo off in the left, medial clavicle above that. Also, there's an area of discolouration that appears to be a bruising – appears to be some bruising."[23]

[38] He also gave the following evidence:

> "Now, in terms of this scenario, if we look at all of the photos and all of the documents that you've had a look at, the scenario of a person grabbing her around the neck, putting the palm of the hand across the front of the larynx and wrapping the thumb and the fingers on either side of the neck in a grabbing motion that causes difficulty breathing or difficulty speaking, are these injuries consistent with that type of mechanism?---So can be, especially in relation to the bruising that has – that appeared on one of the photos to the left of the neck. So it can't be. So I can't rule that out – that possibility out."[24]

[39] Another scenario was put to him as follows:

> "Okay. Now, there's also then a couple of other scenarios that have been put forward in cross-examination. And I'll just address a couple of those, if I can. Now, there has also been a suggestion of having a person walking along beside Ms KN, having an arm around the back of the neck, that person's intoxicated and they're being support [sic] while walking along. The injuries that you've seen and all the documents that you've seen: are they consistent with that or not?---No, it'd be unlikely that something like – would – could cause such an injury.
>
> Okay. And can you say why that's unlikely?---Because of the level or pressure. Because the – because the injuries appear to be more directed pressure rather than just supporting.
>
> Now, there was also some reference to a ligature or a dog chain or a dog collar perhaps being used around the neck. Can you say, having regard to all of the documents and the photographs, whether or not these injuries you've seen are consistent with that or not?---So the [indistinct] forward pressure being put on the neck could cause

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22 ARB, page 239, lines 34-45.
23 ARB, page 241, lines 37-41.
24 ARB, page 242, lines 35-42.

> a petechial rash going around the back of the neck so I can't rule that possibility out.
>
> Doctor, may I ask you in terms of a ligature, if a ligature is all the way around the entire neck, does that affect your opinion?---If it's – if the pressure's being put across the whole circumference of the neck, I would expect marks across the front of the neck. I mean, there are scratch marks on – just below the clavicle. But I would've expected them to be a bit more higher up.
>
> And if the ligature is applied on only part of the neck, have you got – does that change your opinion?---Then – then there's a possibility that the marks on the back of the neck could be from such a injury.
>
> Now, there was also a general proposition about there was just self-inflicted. And there is no mode of how that has occurred. In your experience, can you say whether or not you've seen injuries like this that have been self-inflicted?---Not the bruising of the petechial – rash across the back – the redness on the back of the neck.
>
> So – sorry, did you finish your answer there or did I cut you off?---It is possible to cause a scratch across [indistinct] it does – it is possible to cause a scratch on yourself. As we noted, the scratch on the right, medial clavicle. But the other injuries would be – would not be consistent with that."[25]

[40] Dr Wong stated that he saw the complainant on 4 September 2017 but was unsure at what time although his notes indicate he completed his file notes at 4.40 pm which may have been well after seeing the complainant. She told him that she had suffered an assault and asked him to document the injuries. He observed tenderness over the cricoid region (cartilage which sits directly below the Adam's apple) as well as tenderness over both sides of the sternomastoids. He also noted pain on cervical extension and tenderness on the spinous process at the junction between the neck and the thoracic vertebrae as well as superficial fingernail marks on her arm and lower limbs. He was shown the photographs and considered that they were "broadly consistent"[26] with the injuries he observed. He prescribed analgesia and Valium as required.

*Admissions*

[41] At the trial, an admissions document containing a number of admissions made pursuant to section 644 of the *Criminal Code* (Qld) was tendered by the parties as an exhibit.[27] The contents of that document were read to the jury on day two of the trial, and the jury were permitted to take the document into the jury room with them during their deliberations.

[42] Of the four admissions, the first three relate to a temporary protection order made against the appellant in favour of the complainant on 16 May 2017. Admission 2 refers to an application for a Police Protection Notice naming the complainant as the aggrieved and the appellant as the respondent, and details that the application included the following information in relation to an incident on 11 May 2017:

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25 ARB, page 243, line 16 – page 244, line 7.
26 ARB, page 256, line 18.
27 ARB, pages 294-295.

"'On the 11th May 2017 at approximately 20.00hrs police have attended XX Street, Albion regarding a domestic violence incident. Police attended address and spoke with a KN, the aggrieved in this incident. Police observed that the [aggrieved] was very intoxicated and slurring her words. She was unable to give police a coherent version of events stating that the respondent James Justin Young hit himself over the head with a lamp and called QAS and he was taken to the RBH. Police observed a smashed lamp on the ground. Police also observed the [aggrieved's] phone was smashed stating that the respondent had done it. Police stopped conversations as unable to get a version. Police attended RBH and spoke with the [respondent] who stated he didn't want to talk to police and nothing happened. He denied he hurt himself. Police observed the respondent was heavily intoxicated and cuts above left eyebrow and cut on top of head'

'Police believe the aggrieved needs to be protected against further acts of DV. Police believe an incident has occurred but as neither the [aggrieved] or [respondent] are able to give a coherent version or willing to provide a version an order should be taken out.'"[28]

[43] The fourth admission pertains to a record produced by a member of the QAS following the officer's attendance at the unit on 3 September 2017. It is in the following terms:

"4. On 3 September 2017 the Queensland Ambulance Service attended the complainant's address and saw her. That record provides:

a. Case description - c/o sore throat, lump sensation, tingling and hoarse voice. c/o sore throat, bruising appearing around throat, Pt states can feel lump in throat, and voice feels hoarse, and also states has had some difficulty swallowing. Faint bruising noted to throat, redness on back of neck noted. Pt states has mild headache, has felt dizzy today, had nausea this morning when she woke, has also had diarrhoea since incident. Pt states has had a couple of wines today, has not eaten today. Nil [shortness of breath]. Slightly hypotensive, denies dizzy now. Pt transported to RBWH for further assessment.

b. Secondary survey – throat altered sensation tingling; throat bruising / haematoma – mild bruising to throat area; dry cough – from irritated throat; diarrhoea – since incident; dizzy; normal movement head; headache – mild; hoarse voice; speech normal; sore throat; swelling – Pt states she feels throat has swollen internally; neck stiffness – Pt state; No altered conscious state; anxiety; facial droop; short of breath; vomiting."[29]

**Grounds of Appeal**

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28 ARB, page 294, paragraph 2.

29 ARB, pages 294-295, paragraph 4.

[44] In his notice of appeal, the appellant sought to appeal his conviction on the basis that the verdict was unreasonable or could not be supported having regard to the whole of the evidence.

[45] One of the major arguments advanced by the appellant is that the evidence against him is unreliable and inconsistent and was not capable of supporting a verdict of guilty on Count 3. He also argues that there is no evidence from any witness that they saw bruising on the complainant's neck and there is therefore no corroboration of the complainant's allegations as to how the strangulation happened. In his outline of submissions,[30] the appellant categorises the "[principle] evidence" against him as:

1. Testimony of the aggrieved party in a temporary protection order;
2. Testimony of two witnesses who were on site at the time;
3. Testimony from Police and Ambulance staff;
4. A police 000 call recording;
5. Testimony from Doctors; and
6. Photos and medical records of the aggrieved.

[46] In advancing the unreasonable verdict ground the appellant, both in his written outline and in oral submissions, also addressed multiple aspects of the trial including the conduct of the trial, the evidence tendered and the directions given by the learned trial judge. In his written outline,[31] the appellant advanced submissions in relation to numerous aspects of the trial as follows:

1. Civilian Witnesses' Statements and Deceased Witness;
2. Inadmissible Evidence;
3. Manner of Alleged Strangulation Inconsistent with Evidence Given;
4. Capability of Attacking in Manner Described;
5. Admissions;
6. Inconsistent Verdicts;
7. Lack of Explanation for Change of Presiding Judge;
8. Evidence of Relationship;
9. Directions;
10. Majority Verdict and Hung Jury Directions;
11. Invalid Jury Verdict;
12. Expert Witnesses;
13. Trial Conduct;
14. Evidence differed from Original Statements;
15. Proper Respondent to Original Domestic Violence Order;
16. Complainant Adamant about Timing of Alleged Offences;
17. Counsel's Argument inconsistent with Appellant's Directions / Appellant Coerced into not giving Evidence;
18. Evidence of Similar Facts; and
19. Application of Sexual Assault Benchbook Directions.

I will endeavour to address the substance of the appellant's submission although some aspects of his arguments are essentially the same and other aspects can be dealt with quite quickly.

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30 Page 1, paragraph (A)(2).

31 Pages 1-2, paragraphs D.1. – D.19.

*Civilian Witnesses' Statements and Deceased Witness*

[47] This aspect of the appellant's submissions relates to the further affidavit material which he sought leave to adduce. For the reasons outlined above, that application was refused and accordingly this ground warrants no further consideration.

[48] In his written outline the appellant also makes various assertions in relation to the complainant and Mr Bruton which amount to either hearsay evidence or evidence which was available but was not before the jury in the original proceedings. Similarly, those assertions warrant no further consideration.

*Inadmissible Evidence*

[49] The appellant submitted that during the Crown's opening address to the jury the Crown prosecutor specifically stated she was going to prove a number of matters which she proceeded to outline. The appellant argues that some specific passages in the opening were inadmissible. In particular, it was argued there was a plethora of evidence about other assaults that he was not charged with and which was therefore strictly inadmissible.[32] This would seem to be a general reference to the volatile nature of their relationship and the specific reference to the domestic incident on 11 May 2017 which triggered the Temporary Protection Order and the incident when police were called on 1 September 2017. There can be no doubt that the facts of those incidents were admissible as evidence of their domestic relationship.

[50] The appellant also submitted that "the evidence of the witnesses trespassed into other unrelated assaults and there was an unresolved stop to proceedings and then no direction to ignore evidence given".[33] This would seem to be a reference to the *voir dire* when counsel for the appellant was given the opportunity to hear Mr Bruton's evidence about the events of 1 September 2017 which had not been included in his original statement. This step was taken in fairness to the appellant and gave his counsel a full opportunity to subsequently cross-examine him on any issues that were raised in that testimony. Accordingly there can be no complaint about the reference to the incidents on 11 May 2017 and 1 September 2017 and the conduct of the *voir dire*.

[51] It was also submitted that there was evidence of various witnesses giving evidence of unrelated matters which should have been objected to by his barrister. I note that the appellant specifically objected in his submissions to the evidence of the complainant's assaults on him. There can be no unfairness to the appellant in this regard as the complainant accepted that she would be physically abusive to the appellant and it gave a context to the charges and outlined the true nature of the relationship between them. He also objected to evidence about the incident with the painting being given by the witnesses and submitted that it should be noted that "the supposed incident with a painting has nothing to do with any charges".[34] There can be no doubt that the incident referred to was the basis for the police being called to the unit on 1 September 2017 and was the reason for his removal that night. The evidence was directly relevant to the evolution of the whole dispute as it was so closely linked in time to the offences charged that it is essentially part of the context of the dispute.

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32 Appellant's Outline, page 3, paragraph (2)(I).
33 Appellant's Outline, page 1, paragraph D.2.
34 Appellant's Outline, page 3, paragraph (2)(III).

[52] Furthermore there is no basis for the appellant's submission about the prosecutor's opening address as it was made clear that all the prosecutor was doing was giving an outline or an overview of what evidence would be called and that it was not itself the evidence. In his summing up the learned trial judge also made it clear that neither the opening by the Crown prosecutor nor the final address was evidence.

[53] There is no substance to this aspect of the appellant's submissions.

*Inadmissibility of the Admissions Document*

[54] The appellant also argues that the admissions document should not have been admitted into evidence and makes the following submissions in relation to the admissions presented to the jury at the trial:[35]

1. The admissions presented to the jury made it an impossible case;
2. There was no consultation prior to trial about the admissions document;
3. The admissions should have been explained to the jury in some detail;
4. The admissions "came into being without prior consultation with me other than telling me these are the admissions you have to sign and without any reason why I should admit evidence from a witness who can't appear or any other matter in that document"; and
5. The admissions given effectively made the case impossible to win and he "do[es] not understand how in law they were submitted to the jury or why they would be conceded by [his] Barrister".[36]

[55] The transcript of the trial makes it clear that there was a specific adjournment for the purpose of finalising the admissions document. As the appellant's own submissions make clear, he signed the admissions document. He obviously agreed to that course at trial. In any event except for one paragraph, which I shall refer to shortly, the document contained evidence that was otherwise relevant and admissible and would have gone into evidence in any event in some other way. There is no substance to those arguments in relation to most of the admissions.

[56] There is however some substance to this submission insofar as it relates to the second paragraph of admission 2 because it contains inadmissible opinion evidence of a police officer concerning who he considered was in need of protection. Section 132B of the *Evidence Act* 1977 (Qld) provides that in proceedings against a person for an offence defined in chapters 28 to 30 of the *Criminal Code*, relevant evidence of the history of the domestic relationship between a defendant and the person against whom the offence was committed is admissible. The offence of choking is contained in s 315A(1)(a) of the *Criminal Code* which is in Chapter 29 and accordingly there was a basis for the evidence about the circumstances surrounding the making of the Temporary Protection Order to be admitted into evidence. In particular, paragraph one of admission 2 makes it clear that injuries, including a cut above his eyebrow and on the top of his head, had been sustained by the appellant and that the complainant was "very intoxicated and slurring her words".[37] The admission made it clear that police could not get a reliable version of events but that they had observed not only the injuries to the appellant but also a broken lamp. That should have been the extent of admission 2.

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35 Appellant's Outline, page 2, paragraph D.5.
36 Appellant's Outline, page 4, paragraph (5).
37 ARB, page 294, paragraph 2.

[57] Paragraph 2 of admission 2 should not have been admitted as it contained inadmissible opinion evidence from the police officer that it was the complainant who "needs to be protected".[38] Such a conclusion in my view contained an inference that the officer believed the complainant to be more credible than the appellant. Such an opinion should not have been admitted. Accordingly the point raised by the appellant in this regard should be decided in his favour.

[58] Section 668E(1A) of the *Criminal Code* provides however that where the Court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, the Court may nonetheless dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.

[59] In the circumstances of this case I do not consider that there has been a substantial miscarriage of justice. In particular I note that the officer's opinion, coming as it did after the recitation of facts which really indicated the complainant had been the aggressor who had hit the appellant with the lamp, would seem to have been illogical and may well have been disregarded by the jury. There may indeed have been a forensic decision to include this statement given prima facie it does not appear to have a factual basis. Be that as it may it should not have been included.

[60] More importantly the question of the complainant's credibility was a very real focus in the trial. Counsel for the appellant at trial had made it very clear in his cross-examination and in his address to the jury that they needed to examine her evidence very carefully. A fundamental tenet of the appellant's counsel's address to the jury was that the complainant had lied and that the whole incident "just didn't happen".[39] Counsel continued:

> "They never happened and it's made up. It's not true and it's only made up for reasons that only KN knows. She is the one who's come and told the story. She's the one who knows why she has made up the story and the reasons of the – are only known to her. I'm sure you're thinking to yourself, "Well, why would she make it up?" And that's a reasonable question to ask yourselves, members of the jury. You're human. But at the end of the day, I can't answer the question for you. I don't know why she makes things up or why she made it up. No one will be in a position to tell you why. Is it because of a simple state of intoxication that she honestly believes a non-event occurred? Believe is different from reality."[40]

[61] Counsel for the defendant then referred in some detail to the discrepancies or inaccuracies between the complainant's account of events and that of the witnesses. He also referred to her gross intoxication on the day and argued that on that basis her evidence was unreliable. In particular the complainant's belief that the incident occurred at around 9.00am when the other evidence indicated it was closer to 2.30pm was also referred to in detail. Counsel concluded:

> "So, members of the jury, what you have there is really just a quick list of what I say would lead to you – would lead you coming to the only conclusion that KN is not a witness who can be accepted as

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38 ARB, page 294, paragraph 2.
39 ARB, page 32, lines 6-7.
40 ARB, page 32, lines 7-16.

> honest and reliable. There are simply too many inaccuracies, poor or no memory for you that would cause concern.
>
> She is the crux of the Crown's case. It is her evidence that matters. It is her evidence that the Crown are asking you to find James Young guilty of very serious crimes. How possibly – how can you possibly be satisfied beyond a reasonable doubt and convict a man on lies, memory gaps, inconsistencies, changes to the evidence and intoxication."[41]

[62] I am accordingly satisfied that the issue of the complainant's credibility was thoroughly explored before the jury and the inadmissible opinion evidence from the police officer would not have assumed any significance given the extent to which the issue was explored.

[63] There can be no complaint about the other aspects of the admissions document and in particular paragraph 4 was simply a convenient way of putting the notes of the ambulance officer into evidence. It was admissible evidence.

*Manner of Alleged Strangulation Inconsistent with Evidence Given*

[64] The crux of the appellant's argument on this point is that the complainant's evidence at trial in relation to the choking incident was inconsistent with photographic evidence, the evidence of Dr Akram and testimony from other witnesses including ambulance drivers. The appellant asserts that the injuries to the complainant's neck were "consistent with [her] and Mr Bruton carrying each other home whilst heavily drunk and probably falling over several times".[42]

[65] There is no doubt that the QAS notes stated that there was no visible bruising when they attended at around 2.30 pm on 2 September 2017. As the Crown prosecutor observed in her address, that was hardly surprising given it is a matter of common experience that bruising takes some time to appear. In any event, that issue was extensively covered by the appellant's counsel in his cross-examination and the evidence was that the injuries to the neck by that mechanism argued by the appellant were "unlikely",[43] because the "injuries appear to be more directed pressure rather than just supporting".[44]

[66] In relation to whether the injuries could have been caused by the use of a ligature such as a dog collar, Dr Akram stated that "forward pressure being put on the neck could cause a petechial rash going around the back of the neck so I can't rule that possibility out".[45] However when asked about whether the injuries could have been self-inflicted, he stated "[n]ot the bruising of the petechial – rash across the back – the redness on the back of the neck".[46]

[67] There can be no doubt therefore that the issues the appellant now raises were the subject of thorough cross-examination and all the medical evidence in this regard was before the jury for its assessment. As the Crown prosecutor noted, the time

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41 ARB, page 39, lines 18-26.
42 Appellant's Outline, page 4, paragraph 3.
43 ARB, page 243, line 22.
44 ARB, page 243, lines 25-26.
45 ARB, page 243, lines 31-33.
46 ARB, page 244, lines 1-2.

period available for the infliction of such injuries was fairly limited given the appellant's presence in the unit at the relevant time.

[68] Furthermore the evidence of Constable Wong, Damien Bruton and Daniel Martin was that they had all observed redness or marks around the complainant's neck around 2.30 pm on 2 September 2017. The complainant gave very clear evidence of the appellant placing his hand around her neck. Dr Akram stated in his evidence there were observable injuries to the complainant's neck including swelling, bruising and petechial rash which were consistent with a hand being placed around her neck and pressure being applied. Dr Wong gave similar evidence. The jury saw the photos taken at the time and also heard the evidence of the complainant, the ambulance officers, the police and her neighbours which supported the complainant's account that the appellant had attacked her by applying pressure to her neck.

[69] Whilst the complainant had a very poor memory of some parts of the day she gave graphic and detailed evidence of the precise mechanism of the attack to her neck. The complainant specifically accepted that her memory of being kicked to the legs that day was not detailed and that she could have been confused about that. She made it very clear however that she could remember these details about the appellant's hand being placed around her neck and that those memories were able to be clearly recalled.

[70] There was therefore evidence upon which the jury could be satisfied beyond reasonable doubt that the injuries had been inflicted in the manner described and that it amounted to choking.

*Capability of Attacking in the Manner Described*

[71] The appellant submitted on the appeal that his leg injury made it "impossible for [him] to stand on that leg or stand on the other and use a sweeping motion of [the complainant's] legs"[47] and impossible for him "to lift [the complainant] with [his] right hand and apply excessive pressure to [his] right leg".[48]

[72] The appellant's reference to a sweeping motion relates to the charge of assault by kicking the complainant in the legs. The complainant acknowledged that the appellant had been limping in the days before and the evidence of the appellant's injury at the time he was taken into custody was clearly before the jury. The appellant was ultimately acquitted on this count and I will therefore make no further comment in relation to that submission in relation to that count.

[73] In terms of the appellant's argument whether it would have been possible for him to lift the complainant with his right hand and apply excessive pressure to his right leg, a close consideration of the complainant's evidence makes it clear that she does not actually state that she was lifted off the ground but rather she felt a lifting feeling and excessive pressure being applied to her throat.

[74] The arguments now made here were made before the jury and the jury clearly took them into account.

*Inconsistent Verdicts*

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47 Appellant's Outline, page 4, paragraph 4.

48 Appellant's Outline, page 4, paragraph 4.

[75] The appellant submits that the jury's verdicts at trial were inconsistent, stating:

> "How can the jury conclude that I was not guilty of a lesser charge and then find me guilty of the more damaging charge unless there was overt pressure to arrive at a verdict. This is particularly evident in the twice hung jury and the swift change after His Honour erred in his directions relating to majority verdicts".[49]

[76] Leaving aside the appellant's submission as to the trial judge's directions relating to majority verdicts (which is discussed later in these reasons), the appellant's assertion of inconsistent verdicts is misconstrued.

[77] At trial, the jury found the appellant not guilty of one count of common assault, and guilty of one count of choking in a domestic setting.

[78] The particulars of the common assault charge were relatively vague because, as was conceded by the Crown at trial, the complainant "couldn't remember all of the details".[50] In closing, the prosecutor summarised the complainant's evidence in relation to this count as being that she recalled the appellant moving his leg in a circular motion from left to right to swipe her legs out from underneath her.[51] There was no independent corroboration of this event. Furthermore, there was evidence about the injury to the appellant's leg which did cast doubt on his ability to take such a decisive step as swinging his leg with any real force given the nature of his injury.

[79] Conversely, the evidence presented at trial in relation to the choking charge was far more fulsome and came from a number of witnesses in addition to the complainant.

[80] Given the vast disparity in the level of detail of the evidence of each count, it was well open to the jury to return a verdict of not guilty in relation to the assault and guilty in relation to the choking count – the fact that the jury did so in this context does not render the verdicts inconsistent.

*Lack of Explanation for Change of Presiding Judge*

[81] On the final day of the trial, 14 February 2019, Jarro DCJ concluded his summing up and, following a discussion with counsel, had redirected the jury about a minor matter of evidence.[52]

[82] The Court was then convened later that afternoon and the parties were advised that Jarro DCJ sent a written memorandum requesting that Rafter SC DCJ act for him in the appellant's trial "pursuant to s 27 of the *District Court of Queensland Act* 1967 and in light of an emergency having this day arisen".[53] Judge Rafter SC advised that he would be taking over, and discussions had been entered into in relation to the appellant's bail situation. A note was then received from the jury which stated:

> "We have reached a verdict on one of the counts. The other count is not unanimous and we don't seem to be able to reach a unanimous verdict."[54]

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49 Appellant's Outline page 5, paragraph 6.
50 ARB, page 22, line 19.
51 ARB, page 22, lines 17-32.
52 ARB, pages 56-60.
53 ARB, page 308.
54 ARB, page 64, lines 44-45.

[83] The jury were returned, and Rafter SC DCJ, prior to responding to the jury's note, said as follows:

> "Members of the jury, the first thing I should say is that you are in the right courtroom and you are probably wondering why I am here. Members of the jury, I have been asked by Judge Jarro to take over the case for reasons that need not concern you. So a situation arose that necessitated that. You need not be concerned about it, but I have taken over. So you are in the right place and for the time being so am I."[55]

[84] In relation to this series of events, the appellant submits that the jury was "given no explanation about why there was a substitution" and that his Honour "was unfamiliar with the evidence given".[56] He further asserts that, in relation to the substitution:

1. The jury should have been told why;
2. His counsel should have objected; and
3. There was no consultation.

[85] Section 27(1) of the *District Court of Queensland Act* 1967 (Qld) provides:

> "**27 Judge may perform the duties of another judge**
>
> (1) In the case of absence or disability of a judge, or on an emergency, another judge may, at the request in writing of the firstmentioned judge or of the Chief Justice, act for the first mentioned judge, and may exercise all the powers and perform all the duties which that judge might have exercised or performed."

[86] There can be no doubt that Jarro DCJ's written request was entirely appropriate and was specifically provided for by legislation. In the circumstances it was not necessary for the request to have been preceded by consultation with counsel and if such consultation had occurred counsel would have had no basis upon which to object. I consider that it was unnecessary to provide a more detailed explanation than that given by Rafter SC DCJ. The reason for the substitution did not concern the jury and may have in fact distracted them from the relevant issues related to the trial that they were tasked with considering.

*Directions*

[87] The appellant's argument in this regard is essentially that Rafter DCJ gave a Black Direction which he argues meant that a guilty verdict would inevitably follow. It is also argued that the direction in relation to majority verdicts was unclear. The appellant argues that his submissions are evidenced by the fact that the jury returned verdicts shortly after the directions were given. He argues that:

> "After being told they would have a majority verdict of 11 jurors in four hours and possible [sic] even into the next day, the jurors could

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55 ARB, page 66, lines 22-27.
56 Appellant's Outline, page 5, paragraph 7.

> have retired and said we have six of 11 and that isn't going to change. Let's call it unanimous and get out of here."[57]

[88] There is no basis for this submission. The directions given were standard directions given in accordance with the Benchbook and were entirely appropriate in response to the jury note. The Black Direction was in fact given the day before the jury returned its verdict when the learned judge noted that the jury had reached a verdict on one count but could not reach a unanimous verdict on the other count. He told the jury that they could take as long as they liked to reach a verdict and that they should calmly consider the evidence and listen to the opinions of the other jurors. The jurors were then allowed to separate for the evening. The following morning the jury sent another note in the same terms as the note on the previous day indicating that the verdict on one count was unanimous but that on the other count they "were unlikely to reach a unanimous decision".[58]

[89] A discussion then ensued between the judge and counsel as to the appropriate course in circumstances where the jury had only been deliberating for four hours and the time had not yet been reached to allow a majority verdict to be taken. Counsel for the appellant at trial agreed with the course proposed which was for the judge to indicate to the jury that the point had not as yet been reached where a majority verdict could be taken. As soon as the judge completed his remarks in those terms the speaker indicated that the he did not think the positions of the jurors would change but that there was a prospect of a majority verdict. The judge then asked the jury to retire once again. The jury then returned a short time later with a verdict of not guilty to the assault charge but guilty to the choking charge.

[90] There is no basis for this ground of appeal. The appellant's submission in relation to the reasoning of the jury is completely speculative and entirely without foundation. Both verdicts delivered by the jury were unanimous.

*Expert Witnesses*

[91] This argument has already been referred to in some detail but the appellant argues that Dr Akram was not only treated as an expert on strangulation but that as he was Dr Akram's patient, he cannot understand how Dr Akram could give evidence against him. In this regard the submission is misconceived. Dr Akram is a medical practitioner and as such was a person duly qualified to give evidence about the injuries he observed on the complainant or in the photographs. The evidence given about injury to the complainant was obviously a matter within his area of expertise. Significantly he was not called to give evidence about the appellant. The injuries to him and specifically to his leg and the bruising to his eye on the days in question were the subject of evidence from others including police and the complainant. There is no basis for this complaint.

[92] The appellant argues that the trial was messy because sometimes witnesses were interspersed and because there was a replacement judge. He submits that because of these factors the jury was confused and could not reach a verdict. There is once again no basis for this argument. The jury was able to return verdicts on both charges.

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57 Appellant's Outline, page 6, paragraph 10.

58 ARB, page 70, lines 15-16.

*Invalid Jury Verdict*

[93] The appellant has argued in a variety of different ways that there was no basis upon which the jury could have convicted. He argues that the number of lies, lack of clear evidence, poor, inconsistent or non-existent memory of the complainant together with what he terms "collusion with motives",[59] means the jury could not reasonably reach a verdict. Furthermore, he submits that the issues with respect to the evidence should also be taken in light of other issues with the trial conduct which he argues were confused and that there was pressure for a verdict.

[94] The appellant then set out a long list of arguments about inconsistencies in the complainant's evidence and the evidence allegedly in support of her evidence. In particular he points to the lack of any observable bruising on the complainant. His argument was entirely directed in this regard to his basic submission that the choking charge was entirely based on insufficient and inconsistent evidence such that it was not open to the jury to conclude that he was guilty beyond reasonable doubt of the charge of choking.

[95] I have already referred to the appellant's argument that the incident described was impossible as he had an injury to his right leg at the time and was limping badly. That was clearly referred to in the evidence and was clearly a basis for the not guilty verdict on the assault involving the appellant kicking the complainant's legs. His argument in relation to the admissions has already been referred to. He also argued that the complainant had been shopping for Valium and had lied about detox programs. Once again this information was clearly put to the complainant during cross-examination. The appellant relies in particular on the complainant's lack of memory and confusion about the day as she cannot remember going to hospital at all or being seen despite saying to both doctors she had a discharge report. Neither could she recall going to the police station.

[96] The appellant also argued that the complainant's previous suicide attempts and self-harm made her evidence suspect and unreliable. As previously indicated these matters were thoroughly explored by counsel for the appellant. The issue of the complainant's credibility was a matter which was squarely before the jury and was a matter which they needed to weigh up in light of the other evidence.

[97] I note the appellant raises issues about the complainant having a sore leg as a result of her kicking over the table rather than from him kicking her. This evidence and the appellant's arguments in this regard were explored by counsel and were also before the jury. Given the appellant was found not guilty of this charge I do not consider it necessary to consider this submission any further.

[98] Whilst the appellant makes some reference to the *voir dire* I cannot discern that the argument that he wishes to advance is any different to the one he has previously made and which I have already considered.

[99] As the appellant in his outline of argument specifically recognises, it is clear that his counsel made a summary of all of the inconsistencies in his address to the jury particularly the issue about drinking at the Crown Hotel, the fact that Dr Wong's notes do not note bruising or a lump in the complainant's throat, and that the QAS notes do not refer to bruising to the front of the complainant's neck. There can be no doubt that the jury were fully aware of all the inconsistencies referred to.

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[59] Appellant's Outline, page 7, paragraph 11.

**Was the Verdict of the Jury Unreasonable?**

[100] As has been outlined above, for the reasons already referred to, the appellant argues that the verdict of the jury was unreasonable and simply cannot be supported by the evidence.

[101] The relevant test was most recently reiterated by the High Court in *Pell v The Queen*,[60] where the High Court noted the Victorian Court of Appeal's approach to the appeal on the ground of unreasonable verdict:

> "43 At the commencement of their reasons the Court of Appeal majority correctly noted that the approach that an appellate court must take when addressing 'the unreasonableness ground' was authoritatively stated in the joint reasons of Mason CJ, Deane, Dawson and Toohey JJ in *M*. The court must ask itself:
>
> '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'.
>
> 44 The Court of Appeal majority went on to note that in *Libke v The Queen*, Hayne J (with whom Gleeson CJ and Heydon J agreed) elucidated the *M* test in these terms:
>
> 'But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must* as distinct from *might*, have entertained a doubt about the appellant's guilt.' (Footnote omitted; emphasis in original)
>
> 45 As their Honours observed, to say that a jury 'must have had a doubt' is another way of saying that it was 'not reasonably open' to the jury to be satisfied beyond reasonable doubt of the commission of the offence. *Libke* did not depart from *M*.
>
> 46 When it came to applying the *M* test, their Honours' subjective assessment, that A was a compellingly truthful witness, drove their analysis of the consistency and cogency of his evidence and the capacity of the evidence of the opportunity witnesses to engender a reasonable doubt as to his allegations. Their Honours reasoned, with respect to largely unchallenged evidence that was inconsistent with those allegations (the 'solid obstacles' to conviction), that notwithstanding each obstacle it remained *possible* that A's account was correct. The analysis failed to engage with whether, against this body of evidence, it was reasonably possible that A's account was not correct, such that there was a reasonable doubt as to the applicant's guilt."

[102] Having considered all of the appellant's arguments, there is nothing in the record or the matters raised by the appellant which should cause me to experience doubt about the guilt of the appellant. Having considered the evidence adduced in the trial

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60 (2020) 94 ALJR 394 (citations omitted).

it was open to the jury on the whole of the evidence to be satisfied of the guilt of the appellant beyond reasonable doubt. The complainant's account of the choking after a sustained argument in the kitchen was compelling:

> "So he pushed you back. Where did he touch you when he pushed you back?---James' back was to the fridge. He moved forward with his right hand. It – to my throat, I was pushed back, went back to – next to the doorway is the wall, and as I said, cabinetry. There's a small gap between the cabinets and the actual opening to the kitchen itself. I was pushed – the force – I was pushed back onto that, onto the wall, so my back ended up on the wall next to the open doorway.
>
> Now, you indicated that he pushed you back and you moved your arm forward. You've used your right arm when you've pointed that forward?---Yes.
>
> What hand was Mr Young using that you can recall that he touched you with when he pushed you?---His right arm. That's the mirror image of how I saw – see him, how he came towards me.
>
> Okay. So his right arm. And whereabouts on your body did he touch you with his right hand?---Directly here ... on my throat.
>
> So you're indicating that it went around your throat?---Yes.
>
> Can you recall which part of your throat? Was it down on your chest area or was it up - - -?---No.
>
> - - - higher on your - - -?---Pretty much dead central here ...
>
> Okay. So I just have to make – put it on the transcript. So - - -?---Yeah.
>
> - - - you're indicating sort of across – is it your Adam's apple [indistinct] - - -?---Yes.
>
> - - - [indistinct]?---It was. And I could feel – yeah, I could feel the – when I was pushed back, I could feel almost a lift so quite heavy feeling across here ... in – into here ...
>
> So when you said that, you've indicated a heavy feeling across here ... you've pointed to a section about an inch under your Adam's apple?---Yeah.
>
> Is that right?---Yeah. Pretty much dead on the Adam's apple.
>
> Okay?---That's where I felt the - - -
>
> And - - -?--- - - - force.
>
> Yes. And so you felt pressure as well across the front is what you've said and you've - - -?---Yeah.
>
> - - - indicated across the front part of your throat; is that right?---And the sides here on my neck and my ears.
>
> Okay?---So pretty much all around there ...

All right. And so just for the purpose of the transcript, you're indicating that you felt around the sides and you've pointed around underneath your ears on both sides of- - -?---Yeah.

- - - your neck?---Higher – higher feeling when hand was there. So here ... and here...

Okay. So higher - - -?---That's the most - - -

- - - higher up - - -?--- - - - force that I felt.

- - - around – you felt it was up around the back part of your jaw; is that right?---Yes.

Okay. Now, you say that he pushed you into the wall and he grabbed you. Do you know how long it was that he was holding you like that?---I – I know I had enough time – I – I recall screaming out – but I don't know how much time – it – the next memory I have is the – the sound of me hitting the ground. So the thump really sort of – was the next clear memory I have.

Now, you speak about how he grabbed you and he pushed you back up into the wall and you were held up onto the wall; is that correct?---Yes, I felt pinned.

All right. Now, what did you feel in your throat when that was happening?---I could feel the – the – the push and more of a lift. I could feel like I was – I wasn't off the ground. I know that I wa – I didn't feel off the ground but I felt like the weight of my body was hanging from under my ears - - -

So - - -?---?--- - - - basically.

- - - you described the feeling of the pressure and the push. What about your feeling of – in your throat and your ability to breathe?---Yeah, limited. Limited.

What - - -?---I couldn't make noise. I – I – I – I – I believe I froze.

So you said you were limited and you couldn't make noise?---Yeah.

I need you to just provide a little bit of detail about what you mean by that and to- - -?---Well, my - - -

- - - describe - - -?--- - - - breathing - - -

- - - for the jury?--- - - - was con – I was constricted so just – I could feel this – all I could feel was that and the pressure and not – no ability to struggle or make noise.

Okay. So I just want to clarify. You had no ability, you said, to make noise. Is that because you weren't able to speak?---Correct.

And I just want to be clear. Do you mean that you weren't able to speak because of the pressure?---Yes. Yes."[61]

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61 ARB, page 104, line 6 – page 106, line 10.

[103] That account of the attack and the pressure she felt was then essentially substantiated by the medical evidence. Both doctors described their examination of the complainant and both referred to the contemporaneous photographs. The medical evidence was that the injuries were consistent with a choking.

[104] Furthermore the evidence of both Mr Bruton and Mr Martin was in substantial accord with the complainant's account. There was reference to hearing the argument, then hearing nothing and then a thump on the floor above their unit, which was where the appellant and complainant's kitchen was located. They then both described the complainant screaming for police and arriving at their unit in distress. The police and the QAS were then called. Whilst the complainant was insistent that the choking event occurred in the morning at around 9.00 am, she was clearly mistaken about the time. Given her level of distress at the time and indeed her acceptance during the course of her evidence that her memory of some of the events of that day were not clear, a mistake as to the time a clearly remembered event occurred was understandable. There is no doubt that the time of the incident that Mr Bruton and Mr Martin referred to was in accord with the attendance times of both the QAS and the police.

[105] As the High Court noted in *Pell*,[62] there is "no requirement that a complainant's evidence be corroborated before a jury may return a verdict of guilty upon it". In this case however there was in fact strong corroborative evidence. The evidence against the appellant in relation to the charge of choking did not come entirely from the complainant. In my view, whilst there were some inconsistencies, particularly in relation to the time of the choking, I am nonetheless satisfied that the jury acting rationally would not have entertained a reasonable doubt as to proof of guilt.

**Orders**

[106] Accordingly, I would make the following orders:

1. The appellant's application for leave to adduce further evidence is refused.

2. The appeal against conviction is dismissed.

[107] **RYAN J:** I agree with Lyons SJA.

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62 At [53].