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SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2018 0286

DARREN BROWN — Applicant

v

THE QUEEN — Respondent

JUDGES:	KYROU, NIALL and EMERTON JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	6 February 2020
DATE OF JUDGMENT:	20 February 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 26
JUDGMENT APPEALED FROM:	*DPP v Brown* (Unreported, County Court of Victoria, Judge Mullaly, 16 November 2018)

CRIMINAL LAW – Appeal – Conviction – Recklessly causing injury – Miscarriage of justice – Failure to disclose relevant information – Fresh evidence available since conviction – Prior inconsistent account – Appeal allowed – Whether new trial ordered or judgment of acquittal entered – *Criminal Procedure Act 2009* s 277 – Difficulties associated with retrial – Admissibility of evidence of prior acquittals – Judgment of acquittal entered.

APPEARANCES:	Counsel	Solicitors
For the Applicant:	Mr M H Thomas	Tony Hargreaves & Partners Lawyers
For the Respondent:	Ms M Mahady	Ms A Hogan, Solicitor for Public Prosecutions

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KYROU JA
NIALL JA
EMERTON JA:

Introduction

1 The applicant was arraigned in the County Court on an indictment containing five charges. The charges related to two occasions on which the applicant was alleged to have assaulted the complainant, with whom he was then in a de facto relationship.

2 Charges 1 and 2 (intentionally causing injury and alternatively recklessly causing injury, respectively) concerned an allegation that on 9 May 2015 the applicant grabbed the complainant and threw her into a bathroom, causing her to hit her head on the tiles of a shower wall.

3 Charges 3 and 4 (intentionally causing injury and alternatively recklessly causing injury, respectively) related to an allegation that on a different day (27 March 2016), the applicant had grabbed the complainant's arms while pushing her into a bedroom and holding her down over a wooden bed end railing, causing bruising to her arms and back. It was alleged that immediately after that incident, the complainant moved to the lounge room where the applicant pushed her and sent her 'flying' across the room into a 'tub' chair (charge 5 — common law assault).

4 The applicant was found guilty of charge 4, acquitted on the other charges and, following a plea, was convicted and fined $4,000.

Grounds of appeal

5 There are two proposed grounds of appeal. The first contends that the prosecution failed to disclose relevant information in its possession. The second is that fresh evidence has become available since the time of conviction which, had it been before the jury, would have led the jury to hold a reasonable doubt as to the applicant's guilt or would have given rise to a significant possibility that the jury would have held such doubt.

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6 The respondent has properly conceded ground 2, and it is convenient to address it immediately. In light of the respondent's concession, the applicant did not press ground 1.

Ground 2

7 In her statement and in evidence at the committal and at trial, the complainant was consistent in her account that the two assaults on 27 March 2016 involved first, the applicant grabbing the complainant and forcing her over the bed end railing and second, pushing her across the lounge room, causing her to land in a tub chair. The complainant was examined both at committal and trial on this account. The applicant, who gave evidence at his trial, denied that he had assaulted the complainant as alleged. The applicant said that he grabbed the complainant who had been kicking him and that she fell backwards onto the bed end railing when he released her and suffered bruising as a result. He denied throwing her into the tub chair.

8 There was photographic evidence that the complainant had suffered bruising to her arms and back which she said was caused by the applicant forcing her down across the bed rail. There was no independent evidence of injury in respect of the first incident or in relation to the allegation of being thrown into the tub chair.

9 After verdict, the prosecution served a victim impact statement from the complainant dated 8 November 2018. Attached to that statement was a document entitled 'Initial report — Recommendation for more than five hours of counselling' dated 11 April 2017. The report was signed by the complainant's psychologist. The report noted that the complainant had consulted the psychologist on two occasions after 28 March 2017 and, in the course of that consultation, the complainant had recounted the following with respect to the events on 27 March 2016:

> [the complainant] said that on Sunday 27th March 2016 her husband started yelling at her, pushed her onto the bed, then picked her up and threw her across room against wall. He was yelling at her while he assaulted her. He pursued her into a living area and assaulted her further.

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10 The applicant submits that this was the first occasion, known to him, that the complainant had given a different account, which did not refer to being thrown and landing in the tub chair and in which it was suggested that the applicant had thrown her across the room against a wall.

Principles on fresh evidence

11 This Court has the power to receive evidence that was not before the jury on an application for leave to appeal against conviction, but only in confined circumstances. In *R v Nguyen and Tran*,[1] this Court adopted the following statement of principle governing fresh evidence:

> An appellate court cannot set aside a verdict on a 'fresh evidence' ground unless it is satisfied that there has been a miscarriage of justice because the fresh evidence was not put before the jury at the trial ... If this ground is made out, the verdict of guilty will be quashed and, depending on the evidence considered as a whole, the appellate court may direct a retrial or discharge the appellant ... Ordinarily a court will not be satisfied that the 'fresh evidence' ground is made out unless:
>
> (a) the evidence was not available, or could not with reasonable diligence have become available, at the trial;
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> (b) the evidence is relevant and otherwise admissible;
>
> (c) the evidence is apparently credible (or at least capable of belief); and
>
> (d) there is a significant possibility (or maybe a likelihood) that the evidence, if believed, would have led the jury, acting reasonably, to acquit the applicant if the evidence had been before it at the trial ... If there is any practical difference between a test expressed in terms of 'a significant possibility' and a test expressed in terms of 'a likelihood', none has thus far been suggested; for it has been said that 'likelihood' is no more than 'a substantial — a 'real and not remote' — chance regardless of whether it is less or more than 50 per cent' ... .[2]

Applicant's submissions

12 Applying those principles to the relevant evidence, the applicant submits that although the report was in existence at the time of trial, he exercised reasonable

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1 [1998] 4 VR 394.

2 Ibid 400–1 (Kenny JA, with Winneke P and Callaway JA agreeing).

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diligence in obtaining relevant records and this had failed to result in the production of the report. The applicant relies on the following. First, his legal representatives sought disclosure of a number of classes of documents which would have included the report. Second, during the committal proceedings the applicant sought production of the victim impact statement that had been prepared by the complainant by that time. During the committal, the complainant refused to undertake to provide it. Third, the applicant obtained a subpoena to compel the complainant to produce the victim impact statement, including all notes created and/or relied upon for the purpose of compiling it.

13 The applicant submits that given the case against him turned largely on the complainant's evidence and that he was acquitted on charges 1, 2 and 5, the existence of a different version of what occurred on 27 March 2016 had the real potential to further undermine the complainant's credibility.

Respondent's submissions

14 The respondent accepts that the applicant exercised appropriate diligence in seeking to obtain a copy of relevant documents. The respondent noted that at the committal the defence filed a Case Direction Notice pursuant to the *Criminal Procedure Act 2009* ('CPA'), calling for the production of various materials, including a copy of any application made by the applicant to the Victims of Crime Assistance Tribunal ('VOCAT') and any documents filed in support. The report was not produced.

15 At the committal, the applicant was cross-examined about her VOCAT application and consultations with the psychologist. She was asked to produce a copy of the draft victim impact statement that she had prepared, but she refused to do so. A draft was subsequently produced under subpoena, but it did not contain the report.

16 The respondent accepted that the fresh evidence is both credible and plausible,

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noting that it is contained in a report prepared by a psychologist for VOCAT and supported by a statutory declaration made by the complainant.

17 The respondent further accepts that, had the report been available and tendered at the trial, the jury, acting reasonably, might have acquitted the applicant. In making that concession, the respondent accepts that the credibility of the complainant's account was central to the prosecution case on all charges and the fact that the applicant was acquitted on some of the charges, which themselves depended on the complainant's account, revealed that there was a significant possibility that the fresh evidence may have affected the jury's assessment of the incident in respect of which the applicant was convicted.

The ground is made out

18 The submissions of the parties on ground 2 should be accepted. The report meets the threshold for fresh evidence and, had the evidence been before the jury, there is a significant possibility that the applicant would have been acquitted on charge 4, that is, acquitted on all charges.

Disposition

19 The application for leave to appeal against conviction is brought under s 274 of the CPA. Despite the applicant's diligence in the preparation of his case for trial, an important item of evidence was not available to him at or before the trial. For that reason there has been a substantial miscarriage of justice and this Court must allow the appeal.[3]

20 Section 277 of the CPA provides that if this Court allows an appeal under s 274 it must set aside the conviction and, relevantly, must either order a new trial or enter a judgment of acquittal.

21 This Court has a discretion as to which of the two alternative orders should be

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3 CPA s 276(1)(c).

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made. In *Spies v The Queen*,[4] the High Court said that unless the interests of justice require the entry of an acquittal, an appellate court should ordinarily order a new trial of a charge where a conviction on that charge has been set aside but there is evidence to support the charge.[5] In assessing the sufficiency of the evidence, it is appropriate, at least in the first instance, to apply the approach taken in *Doney v The Queen*.[6] That is, whether upon the whole of the evidence, including any fresh evidence that might be adduced on a new trial, it would be open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

22 In the present case, the applicant accepts that this condition is satisfied.

23 However, sufficiency of evidence is not the only relevant consideration in the exercise of the discretion. Whether accused persons should have to undergo the ordeal of a criminal trial for a second time, through no fault of their own, depends upon whether the interests of justice require it.[7]

24 The factors that inform the interests of justice have not been exhaustively defined. An examination of the many authorities reveals that the following factors have been found to be relevant, although none of them are determinative:

(a) the public interest in the due prosecution and conviction of offenders and the desirability of having guilt or innocence determined by a jury;

(b) the seriousness of the alleged crime(s);

(c) the strength of the Crown case;

(d) whether the grant of a new trial would impermissibly give the prosecution an opportunity to supplement a defective case or to present a different case to that presented to the jury in the previous trial;

(e) the interest of the individual accused and, in particular, whether it would

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4 (2000) 201 CLR 603.

5 Ibid 638 [104].

6 (1990) 171 CLR 207.

7 *Reid v The Queen* [1980] AC 343, 350.

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be unduly oppressive to put the accused to the expense and worry of a further trial;

(f) the expense and length of a further trial;

(g) whether a significant part of the sentence has already been served or the accused has been released from custody; and

(h) whether an acquittal would usurp the functions of the properly constituted prosecutorial authorities, which are entrusted with responsibilities and discretions to act in the public interest in the commencement and conduct of prosecutions.[8]

25 The prosecution of charges arising from allegations of domestic violence is a matter of pressing public importance. Where there is sufficient evidence to sustain a conviction, there is a strong public interest in the trial of such charges being completed in accordance with the law.

26 However, it is relevant to this Court's discretion that, consistent with the punishment imposed by the judge and our assessment of the evidence of injury, the alleged conduct was at the lower level of seriousness for an offence of this kind. That said, the seriousness of domestic violence is not measured solely by the physical manifestation of injury. Individuals, and it is most often women and children who suffer the brunt of domestic violence, are entitled to be safe in their own homes. The compromising of the security of the home and the breach of trust reposed in a domestic partner are very important factors when assessing the severity of a particular offence. There is a strong public interest in the due prosecution of charges of this kind where there is evidence to sustain a conviction.

27 However, the prosecution case as presented at the trial was not, in our assessment, a strong one. There were inconsistencies in the complainant's account and aspects of her evidence appeared to be embellished or exaggerated. In that

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8 See *JB v The Queen [No 2]* [2016] NSWCCA 67 [71]; *Gilham v The Queen* [2012] NSWCCA 131 [649].

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context, it is relevant that the applicant was acquitted in respect of the charges arising from the first and third incidents (charges 1, 2 and 5).

28 Assessing the strength of the Crown case on charge 4, standing alone on a retrial, is not an easy task. To explain why that is so, and why any retrial would present significant forensic challenges to the applicant, it is necessary to describe some features of the trial.

29 The outcome of the trial turned on the jury's assessment of the complainant. In cross-examination, the applicant mounted a sustained attack focusing on the inconsistencies in the complainant's evidence. The fact that the applicant was acquitted on charges 1, 2 and 5 suggests that he was partially successful in that endeavour.

30 In relation to the first incident (charges 1 and 2), the complainant gave evidence that the applicant had thrown her across the bathroom, causing her to strike her head which resulted in an egg shaped swelling. However, medical records of a consultation with a GP the following day, which the complainant had resisted being provided to police, did not reveal any record of injury. The complainant gave evidence that the swelling was concealed by her hair and that she did not want to tell the GP about the assault that had occurred the previous day.

31 In relation to charge 5, the applicant submitted that the complainant's account of events — that he had, in effect, picked her up and thrown her several metres across the room and that she had landed squarely in the tub chair as if she had fallen into it from the ceiling — was exaggerated and unbelievable.

32 Although the verdict of the jury is inscrutable in relation to charge 4, it is likely, having regard to the acquittals on the other charges, that the jury was heavily influenced by the photographic evidence of injury and, on that basis, accepted the complainant's account as to how she sustained those injuries.

33 On any retrial, the assessment of the complainant's credibility would again be a

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central factor. The applicant would be placed in a very difficult position. He could expose inconsistencies or infirmities in the complainant's account in relation to the first incident, and the allegation concerning the tub chair, but only by putting the facts surrounding those matters before the jury.

34 In argument before us the respondent accepted that on a retrial the prosecution would not be entitled to adduce evidence of the alleged assault involving the tub chair (unless the defence agreed to this) because of the acquittal on charge 5. On the other hand, the applicant would be placed in the invidious position of using that account as evidence of the complainant's exaggeration, but only at the expense of adducing evidence of another alleged assault in respect of which the jury had acquitted him. Even if evidence of the acquittal on charge 5 was admitted, and the prosecution was foreclosed from traversing the acquittal, that evidence would be problematic for the applicant: it would put uncharged acts before the jury; directions concerning the use of the acquittal would be complex;[9] and the jury might also be tempted to speculate that perhaps the applicant had been previously found guilty of charge 4.

35 As a result, on the retrial, the applicant would be faced with the complainant's account of the bedroom incident (charge 4) and the photographs of injury, but compromised in his ability to test that evidence by reference to the infirmities and inconsistences that attended the complainant's account of the events which underpinned charges 1, 2 and 5. The disadvantage to the applicant is particularly acute in relation to charge 5, which was so closely tied in time and context to the events caught by charge 4. It may be commonplace for an accused to have to decide whether or not to attack a witness' credibility by introducing uncharged acts, but here those acts were the subject of charges that resulted in acquittals.

36 The applicant originally submitted that s 91 of the *Evidence Act 2008* precluded him from adducing evidence of the acquittals in order to establish that the

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9 *Washer v Western Australia* (2007) 234 CLR 492; *Garrett v The Queen* (1977) 139 CLR 437.

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complainant's evidence in relation to charges 1, 2 and 5 was not credible. In submissions filed with leave after the hearing, the applicant accepted that s 91 is not an absolute bar to the admission of the evidence of the acquittals. However, even allowing that evidence of the acquittals might be admissible and the applicant should be entitled to the 'full benefit' of that evidence, in the circumstances of this case the introduction of the 'tub chair' evidence carries significant risk for the applicant and, as noted, any direction given by the trial judge would draw attention to the evidence and introduce complexity in the trial.

37 The position is somewhat similar to that considered by this Court in *R v Bartlett*.[10] In that case the accused was charged with multiple serious sexual offences, including a number of counts of rape, and was convicted of a count of indecent assault and a count of false imprisonment. The evidence against the accused turned largely on the credibility of the complainant's evidence. An appeal succeeded on the basis that the judge had wrongfully excluded certain evidence.

38 Having recited the relevant principles and noting that in normal circumstances it would be proper to direct a new trial if there is evidence upon which a reasonable jury could, assuming a trial in accordance with law, convict, Winneke P concluded that an acquittal should be ordered. In that respect, the President observed that it would not be easy, upon a retrial, to excise from the complainant's evidence those aspects which were relevant to the indecent assault without running the risk of infecting those aspects of the evidence with other material in respect of which the applicant had been exculpated by virtue of the jury's verdict on the other counts.[11] That reasoning applies with equal force to the present application.

39 The prospect of facing a second trial arises through no fault of the applicant. In our view, a retrial on charge 4 alone would be unfair to the applicant. In the result, we are persuaded that leave to appeal should be given, the appeal allowed, the

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10 [1996] 2 VR 687.

11 Ibid 699.

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conviction on charge 4 set aside and a judgment of acquittal be entered on that charge.

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