

***R v ABB* [2019] QCA 22 (19 February 2019) – Queensland Court of Appeal**

‘Evidence’ – ‘Evidence issues’ – ‘Expert or opinion evidence’ – ‘Physical violence and harm’ – ‘Propensity evidence’ – ‘Self-represented litigants’

Charges: Assault, constituting a domestic offence x 4.

Case type: Appeal against conviction. Application for extension of time.

Facts: The applicant was convicted on four counts of assault, each of which constituted a domestic offence. All four counts were committed against the applicant’s wife on the same day. The applicant grabbed the complainant’s hair and pulled her to the ground, put his hands around her throat and choked her, and punched her on the jaw with both fists, which resulted in a fracture and required her teeth to be wired together and the fracture closed with a plate and screws ([4]). At the trial, Dr Webster gave evidence, based on the complainant’s medical records, that the injury had been caused by a blunt force trauma to a significant extent ([30]). The applicant lodged a notice of appeal against his conviction when the time for lodging an appeal had expired over three weeks prior. As a result, the applicant also filed an application for extension of time within which to appeal.

The applicant appealed on the ground that the verdicts were unsafe and unsatisfactory ([32]). He also raised a number of specific grounds, including that

- The prosecution led propensity evidence, the prejudicial effect of which outweighed any probative force, and created an unfair trial ([33]-[36]);
- The evidence of Dr Webster was fabricated, causing a miscarriage of justice ([37]-[43]);
- The complainant at trial had previously practiced her evidence and amended the part of the evidence that would have been harmful to the prosecution case ([44]-[45]);
- A prejudicial answer was given by the complainant during the trial and there was no direction given to the jury to disregard it ([46]-[51]);
- There was discrepancy in the complainant’s evidence as to how she was punched;
- Dr Webster was not qualified to give an opinion that the injury constituted grievous bodily harm as he was merely a trainee as an oral and maxillofacial surgeon ([54]).

Issues: Whether the grounds of the applicant’s proposed appeal had reasonable prospects of success to justify granting an extension of time.

Decision and reasoning: When considering an application for extension of time, the court will examine whether there is good reason for the delay and whether it is in the interests of justice to grant the extension. Length of delay is also a relevant consideration ([7]). Although the length of the delay was not significant, the applicant was well aware of the time limit for filing and allowed the time to pass without taking steps to file a notice of appeal. The Court was inclined to grant the extension of time if the matter had been confined to these considerations; however as the merits of the proposed appeal could not be substantiated, the court refused the application ([22]-[23]).

The applicant's grounds of appeal failed for several reasons. First, the jury was expressly directed that the evidence was not led as propensity evidence and therefore the trial did not miscarry on the basis that the prosecution led such evidence ([36]). Second, the applicant's contention that Dr Webster's alteration of his opinion constituted some sort of fabrication of his evidence, causing a miscarriage of justice, was misconceived ([37]). Third, any suggestion that the complainant was able to rehearse or practice her evidence at the first trial was simply the result of the fact that the first trial was aborted. Whatever benefit she got from giving evidence on that occasion was balanced by the fact that the defence counsel had the opportunity to cross-examine her more than once, and so no prejudice was caused ([45]). Fourth, the Court found that an answer by the complainant, which the applicant argued caused him prejudice as it revealed his infidelity, was unlikely to have carried much weight with the jury and did not deprive the applicant of a fair chance of acquittal ([51]). Fifth, the applicant contended that there were discrepancies in the complainant's evidence because in her evidence in chief, she said that she was punched after she fell; however in cross-examination, she said she did not scream when she was punched, but when she fell. The Court held that there was no real inconsistency as the first piece of evidence related to when she was punched and the second to when she screamed ([52])-(53]). Sixth, it was admitted at the trial that the injury constituted grievous bodily harm. The fact that Dr Webster was a trainee did not mean that he was not a relevant expert ([54]-[58]).

In reviewing the evidence ([94]-[107]), the Court held that it was open to the jury to be satisfied of the applicant's guilt. As all the grounds of the applicant's appeal lacked merit, the appeal had no reasonable prospect of succeeding and the application for an extension of time was refused ([108]). The Court also took into account the fact that the applicant was self-represented ([59]).