

## ***Brown v The Queen* [2020] VSCA 26 (20 February 2020) – Victorian Court of Appeal**

‘Credibility’ – ‘Fair trial’ – ‘Fresh evidence’ – ‘Lack of disclosure’ – ‘Physical violence and harm’ – ‘Retrial’

Charges: Charges 1 and 2 (intentionally causing injury and alternatively recklessly causing injury – acquitted following trial); Charges 3 and 4 (intentionally causing injury – acquitted - and alternatively recklessly causing injury - convicted); Charge 5 (common law assault - acquitted)

Case Type: Application for leave to appeal against conviction on charge 4

Facts: The charges related to two occasions on which the applicant man was alleged to have assaulted the complainant woman, with whom he was then in a de facto relationship. Charges 1 and 2 (intentionally causing injury and alternatively recklessly causing injury) concerned an allegation that the applicant threw the complainant, causing her to hit her head. Charges 3 and 4 (intentionally causing injury and alternatively recklessly causing injury) related to an allegation that the applicant, on a different day, grabbed the complainant’s arms and held her down, causing bruising to her arms and back. It was alleged that immediately after that incident, the applicant also pushed her, constituting the basis of Charge 5 (common law assault). The applicant was found guilty of Charge 4, acquitted on the other charges and, following a plea, was convicted and fined \$4,000 ([1]-[4]).

After verdict, the prosecution served a victim impact statement from the complainant, to which a document called ‘Initial report - Recommendation for more than five hours of counselling’ was attached. The report noted that the complainant consulted a psychologist and recounted events the subject of Charges 3 and 4. The appellant submitted that this was the first occasion, known to him, that the complainant had given a different account in which it was suggested that he had thrown her across the room against the wall ([9]-[10]). Applying the principles in *R v Nguyen and Tran* to the relevant evidence, the appellant submitted that although the report existed at the time of trial, he exercised reasonable diligence in obtaining relevant records and this had failed to result in the production of the report. It was argued that his legal representatives sought disclosure of various documents which would have included the report; that he sought production of the victim impact statement during committal proceedings and the complainant refused to provide it at that time; and that he obtained a subpoena to compel the complainant to produce the victim impact statement. The appellant contended that as he was acquitted on Charges 1, 2 and 5 and given the case largely turned on the complainant’s evidence, the existence of a different version of events as evidenced in the report potentially further undermined the complainant’s credibility ([12]-[13]).

Grounds of appeal:

1. The prosecution failed to disclose relevant information in its possession; and
2. fresh evidence that is now available since the time of conviction 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.

The respondent conceded Ground 2, and in light of this, the applicant did not press Ground 1 ([5]-[6])  
Held: Having decided Ground 2 was established, the Court was required to determine whether to order a new trial or enter a judgment of acquittal. The report met the threshold for fresh evidence and, had the evidence been before the jury, there was a significant possibility that the appellant would have been acquitted on Charge 4 ([18]).

In determining whether to order a new trial, the Court considered that the appellant would be compromised in his ability to test the complainant's evidence on Charge 4 by reference to the inconsistencies in the complainant's account of events which underpinned Charges 1, 2 and 5. Any disadvantage to the appellant would be particularly acute in relation to Charge 5 which was so closely tied in time and context to Charge 4 ([35]). The Court drew an analogy with *R v Bartlett* ([37]), and held that a retrial of Charge 4 alone would be 'unfair'. Consequently, the Court allowed the appeal, set aside the conviction on Charge 4 and entered judgment of acquittal on that charge ([39]).

The Court emphasised the public interest in seeing allegations of domestic violence, where there is sufficient evidence to sustain a conviction, being prosecuted in accordance with the law ([25]). The gravity of domestic violence is not solely measured by the extent of the physical injury. Women and children 'who suffer the brunt of domestic violence' are entitled to feel safe and secure in their own homes. Other 'very important factors' the Court will consider in assessing the severity of a particular offence include the breach of trust reposed in a domestic partner and the compromising of the security of the home ([26]).