SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hooker & Solomon* [2015] QCA 182
PARTIES:	**In CA No 313 of 2014:** **R** **v** **HOOKER, Ean James** (appellant) **In CA No 322 of 2014:** **R** **v** **SOLOMON, Jacob Jia** (appellant)
FILE NOS:	CA No 313 of 2014 CA No 322 of 2014 DC No 188 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court at Townsville – Unreported, 24 November 2014
DELIVERED ON:	2 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2015
JUDGES:	Holmes CJ and Henry and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction of the appellant, Hooker, is allowed.** **2. The verdict of guilty for the appellant, Hooker, is set aside, and a verdict of acquittal is entered on Count 1.** **3. The appeal against conviction of the appellant, Solomon, is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant Hooker was convicted of one count of grievous bodily harm – where the only evidence of his assaulting the complainant came from a witness who, under cross examination, volunteered that Hooker might merely have been a bystander – where another

witness gave evidence that Hooker was standing beside her during the incident – whether the verdict was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant Solomon was convicted of one count of grievous bodily harm – where the complainant gave evidence that he thought his jaw had been broken by punches delivered by a short, round Aboriginal man – where the complainant identified a picture of Solomon from a photo board as the man who had punched him – where Solomon contended that the complainant's identification of him was equivocal and that no other witness described the assault as the complainant did – where Solomon contended that there was a reasonable possibility that a different assault broke the complainant's jaw – whether the verdict was unreasonable

CRIMINAL LAW – EVIDENCE – IDENTIFICATION EVIDENCE – WARNING ADVISABLE OR REQUIRED – ADEQUACY OF WARNING – GENERALLY – where the appellant Solomon was convicted of one count of grievous bodily harm – where the complainant identified a picture of Solomon from a photo board as the man who had punched him – where Solomon argues that the identification direction given by the trial judge was inadequate as it did not conform to the requirements identified in *Domican v The Queen* (1992) 173 CLR 555 – where the defence case at trial was not put on the basis of wrong identification, but raised an issue as to whether Solomon's assault was such as to cause the grievous bodily harm – whether the direction was inadequate – whether there was a miscarriage of justice

CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – AVERMENTS – UNCERTAINTY, DUPLICITY AND AMBIGUITY – where the appellant, Solomon, was convicted of one count of grievous bodily harm – where, in response to a question from the jury, the trial judge directed that although there were different incidents involving different people, there was an ongoing course of violent conduct – where the appellant argues that the charge was latently duplicitous because the Crown case was capable of establishing more than one assault on the complainant – where the respondent Crown at trial identified the initial assault on the complainant as the one which caused grievous bodily harm – whether the charge involved latent duplicity – whether there was a miscarriage of justice

Criminal Code (Qld), s 7

Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, considered
Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, considered

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Clapson [2004] QCA 488, considered
R v Evan, Robu and Bivolaru (2006) 175 A Crim R 1; [2006] QCA 527, cited
R v Fowler; R v Aplin (2012) 225 A Crim R 226; [2012] QCA 258, considered
R v Razzak [2004] NSWCCA 62, considered
R v Rich (No 2) (2002) 4 VR 155; [2002] VSCA 17, considered
R v Spero (2006) 13 VR 225; [2006] VSCA 58, considered
R v Trifyllis [1998] QCA 416, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, applied
Skaf v The Queen [2008] NSWCCA 303, considered

COUNSEL: F Richards for the appellant, Hooker
J Trevino for the appellant, Solomon
J Robson for the respondent

SOLICITORS: Legal Aid Queensland for the appellants
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The appellants were convicted by a jury of unlawfully doing grievous bodily harm to Damien Hebbard. A co-accused, Aaron Taiters, who was also charged with grievous bodily harm as well as a further count of unlawfully assaulting Hebbard while armed, occasioning him bodily harm, pleaded guilty. There was no dispute as to the relevant grievous bodily harm, the fracture of Mr Hebbard's lower jaw in two places; the issue at trial was whether the appellants were the perpetrators of it. Each appellant appeals against his conviction on the ground that the verdict against him was unreasonable. Solomon relies on a further two grounds: that directions on identification were inadequate to ensure a fair trial and that the count of grievous bodily harm contained a latent duplicity in that it was capable of relating to more than one assault.

The Crown case

[2] The relevant events occurred in the early hours of 23 March 2013. Mr Hebbard and a companion, Trent Robertson, had been at an Ayr hotel where they had spent the night drinking. They set out for Mr Hebbard's residence. On the way, Mr Robertson called in to a flat in a set of units where Hooker, Solomon and Taiters, all of whom he knew, were present. Approaching the flat, he passed two women and made an obscene comment to one of them. Once he was inside, Solomon entered and asked what Robertson had said to his "missus", to which he replied, "Nothing". Solomon told him to come outside. Robertson did so, but decamped, astutely anticipating that Solomon wanted to fight him. He passed Mr Hebbard, whom he told to come with him. The latter, oblivious to the impending problem, was slow in reacting.

[3] Mr Hebbard said that at some stage while the two were walking home, he lost Mr Robertson, but believed he was walking ahead of him. He heard voices, including Robertson's, before Robertson ran past him "flat out", yelling at him to run. Mr Hebbard, at a loss as to what was happening, was confronted by people chasing Robertson. There was a group of people, he thought about five, of whom one, a short round Aboriginal man, directly approached him. He was repeatedly hit hard in the head by that man. In the initial punches, he had the sensation of his jaw breaking; it was "crunching and groaning". He fell to the ground, where he was beaten and kicked

by a number of people. He attempted to get to his feet, but fell once again; he was unsure whether he had been brought down or simply fallen.

[4] Mr Hebbard managed to get up and run about 200 metres, chased by a man with a steel bar while the others in the group yelled "Get him". That individual struck him until he fell to the ground outside what was described as a paint shop. He was hit with the bar on the back of the arms and the back of the head. (That incident gave rise to one of the charges to which Taiters pleaded guilty, of assault occasioning bodily harm while armed.) Mr Hebbard managed to bring his assailant to the ground and get to his feet. There was another person in his vicinity telling him to "Come back here". Mr Hebbard was unsure whether that man was offering help or threatening to fight him again; he did not stay to find out. He ran behind a block of flats, where he lay on the ground in a foetal position. In the initial assault, some of the group had filmed him with their mobile phones; now some women again approached and filmed him while he lay on the ground. Eventually, Mr Hebbard was able to get up and make his way to the hospital.

[5] Mr Hebbard said in evidence that he had identified a picture of the man who "approached [him] flat-out and punched [him]". That identification occurred on 16 September 2013, when he was shown photo boards including photos of the appellants in a procedure recorded on videotape. The photo board containing the photograph of Solomon was well compiled; it contained photographs of 12 solidly built men, all of whom bore a strong physical resemblance to each other (and, accordingly, to Solomon). It is apparent that Mr Hebbard was cautious, taking four minutes examining the photographs before arriving at his conclusion. He said at the outset that he was "trying to picture their face". He observed that it was a "few months ago". Among the photos there were two which drew Mr Hebbard's attention. He pointed out some difficulties: the incident was a "flurry" and fast; he had looked at his attacker for less than five seconds and it was in the dark; he had never seen the man again. Looking at the photograph of Solomon (which was no 3), he said that his hair looked different, there had been stubble on his attacker's chin, and he was not wearing a chain (as Solomon was in the photograph). Another fellow in the photographs was "really similar", but, he said, he kept focusing on no 3; if there were anyone else, his "brain would be focusing on them". He concluded

> "I am going to put my finger on no 3 as the fella who initially bashed me, but it was a flurry, short, quick".

In a second photo board, Mr Hebbard identified Hooker, as the man telling him to "Come back here".

[6] Under cross-examination at the trial, Mr Hebbard conceded that he was drunk when he left the hotel that morning, although not to any great degree. He could not legally have driven a car. He had had a smoke of something earlier that night which could have been "ice" (crystal methamphetamine); he was not familiar with any drug but cannabis. It could possibly have had some effect on him. Mr Hebbard agreed that in his police statement he did not mention the breaking of his jaw until a point after he had described being struck with an iron bar. Counsel for Solomon suggested to him that Robertson had been chased from the driveway of the units by a "large" man; he accepted that Robertson had been pursued by a man who was "bigger than me". He went on to say that that man had turned his aggression on him and punched him twenty times. Counsel put to him that the individual might have punched him once, but had then left, and that he, Hebbard, had then got into a verbal altercation with

a "skinny" man. Mr Hebbard rejected both of those propositions. He agreed, though, that the "skinny" man" (presumably Taiters) had chased him for 200 metres.

[7] Mr Robertson, who had run from the altercation, returned after about five minutes to see what was going on. He saw Solomon, Hooker and Taiters swinging punches. Mr Hebbard was lying on the ground. No one else was present. He yelled something and Solomon and Hooker approached him. There was a struggle between him and Hooker before he managed to get away.

[8] Under cross-examination by counsel for Hooker, Mr Robertson admitted that he had smoked some ice before going to the hotel. He agreed that by the time he left the hotel, he was "fairly well" intoxicated, and conceded that he had told a police officer that he could "hardly see straight due to being so drunk". He volunteered that Hooker might have been a bystander to the fight involving Mr Hebbard. Counsel for Solomon, having no cause to leave well alone, explored the subject further. She put to Robertson that his evidence of seeing three people assaulting Mr Hebbard was not correct, to which he replied, ambiguously, "No". Robertson agreed that he had been chased by Solomon and Hooker, and it was suggested that at that stage he was not paying attention to what was happening to Mr Hebbard. He answered,

> "I could see what was happening when I come and to divert them two from him, yes"

which might suggest that Hooker was engaged in something from which he required diversion.

[9] In re-examination, Mr Robertson was reminded of his evidence that he had seen three men standing over Mr Hebbard and punching him. He agreed that that was his statement. The prosecutor continued:

> "And those three people, I understand from your evidence earlier, that you identified them as Ian (sic) Hooker, Jacob Solomon and Aaron Taiters; is that correct? – Yes".

The prosecutor, perhaps not surprisingly, did not pursue the matter further to establish which version Robertson now adhered to – the involvement of the three accused or the subsequent acknowledgment that Hooker might have been a bystander.

[10] Three other witnesses gave evidence in the Crown case: Karl Solomon, who was a brother-in-law of Hooker and a cousin of the appellant Solomon; Marina Rupena, Karl Solomon's partner; and Lettisha Mooney, the appellant Solomon's partner. Ms Mooney said that Robertson had insulted her; Solomon had "offered" him to come outside and fight; and at some other time she recalled seeing Taiters in the vicinity of the units hitting another person, who was not Robertson. Later she saw the man whom Taiters had struck at a different block of units in a nearby street; he was holding his jaw.

[11] Karl Solomon said that he was at the flat when Robertson arrived. After the confrontation about the insult to Ms Mooney, Robertson walked out, followed by the appellant Solomon and the others who had been in the flat, including Karl Solomon. In the carport, he saw a man to whom he referred as "the other bloke". The appellant Solomon hit that man who, according to Karl Solomon, "gave a bit of lip", although he did not hear what words were used. There was then an exchange of words between the "other bloke" and Taiters; Karl Solomon saw the "other bloke" spitting blood in Taiters' face. They fought, the two of them ending up on the ground and then getting

up and continuing to fight. Robertson and the appellant Solomon also had a fight while Taiters and the other man were engaged with each other. Counsel for the appellant Solomon cross-examined him to confirm that after Solomon had hit the "other bloke", the latter had given Taiters "lip" and they had started to fight.

[12] Ms Rupena said that she recalled walking out to the front of the unit with Hooker and Karl Solomon and seeing Taiters arguing with another man who was spitting blood on Taiters' face. They were punching each other and then the other man ran away. In cross-examination, she said that while that was going on, Hooker was beside her.

[13] Neither appellant gave evidence. The Crown put its case against them under s 7 of the *Criminal Code*, on the basis that one or both of them inflicted the violence causing the grievous bodily harm, or that each of them aided the other or Taiters in the commission of the offence.

The contentions on the unreasonable verdict ground

[14] On this appeal, it was submitted for Hooker that the evidence was not sufficient for the jury to convict. Mr Hebbard did not know whether the man he identified as Hooker wanted to help him or harm him. Mr Robertson had identified Hooker as being with Solomon and Taiters as they swung punches at Hebbard, but then said that he might have been a bystander. Robertson had conceded he was extremely drunk that night and had used ice before going to the hotel. Ms Rupena said that Hooker was with her.

[15] For Solomon, it was submitted that the evidence was not sufficient to establish beyond reasonable doubt that he broke Mr Hebbard's jaw. Mr Hebbard's identification of him in the photo board process was said to be equivocal. It was pointed out that no one else described Solomon as punching Mr Hebbard in the way he recounted. There was a reasonable possibility that the initial assailant was somebody other than Solomon and also a reasonable possibility that a different assault broke Mr Hebbard's jaw. If in fact the injury was suffered in the initial assault, there was no evidence establishing that Solomon aided in it or anticipated what occurred.

Conclusions - the unreasonable verdict ground

[16] The submission that the verdict of guilty against Hooker was unreasonable must be accepted. The advantages enjoyed by the jury in seeing the witnesses cannot negate the "significant possibility that an innocent person has been convicted".[1] The only evidence of Hooker's taking any part in an assault on Mr Hebbard was that of Robertson, and its probative force was dramatically undercut by his volunteering, not merely making a concession under cross-examination, that Hooker might have been a mere bystander; which accorded with Ms Rupena's evidence. The attempts in re-examination to retrieve the situation by reiterating the effect of his initial evidence did nothing to resolve that conflict. The nature of Hooker's involvement, if any, was then left uncertain. A reasonable jury could not, on the whole of the evidence, have been satisfied beyond reasonable doubt that Hooker committed or aided in the assault on Mr Hebbard. His appeal against conviction should be allowed.

[17] The situation is not the same in respect of Solomon. Mr Hebbard's identification of him as the man who had struck him, breaking his jaw, was not equivocal; it was cautious and considered, and in my view, all the more convincing for that circumspection. The

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1 *M v The Queen* (1994) 181 CLR 487 at 494.

jury was entitled to accept it and act on it. It was supported by Karl Solomon's account of seeing his cousin initiate the events by hitting a man who could only have been Hebbard. The fact that there was some difference in his account of the confrontation from Hebbard's is unsurprising in the context of the events, and did not mean the evidence was without probative value. The evidence of Solomon's involvement in the assault was reinforced by other evidence of his anger and aggression after the insult to his partner. It was open to the jury to find him guilty beyond reasonable doubt on the whole of that evidence.

The identification directions

[18] The trial judge warned the jury generally of the potential for identification evidence to result in injustice. His Honour pointed to some significant features: Robertson was affected by alcohol and ice and Hebbard by alcohol and some other drug, probably ice; the incident occurred around 3 am in the morning, so that it was not in daylight; it was a confusing and terrifying series of events; and while Robertson knew the attackers, Mr Hebbard did not.

[19] At that point, the trial judge turned to matters supporting the identifications:

> "Now, there are – what I would like to do is just touch on some other matters but there are some matters which support the complainant's and Robertson's identification of these two defendants. The first is that you would recall that the complainant picked both defendants from the photo-board and, as it turns out, both of those two defendants were present in the Queen Street flat that evening. Also, you have the evidence of Karl Solomon that he saw the defendant Jacob Solomon hitting the complainant – I think his term was "having a blue" with the complainant. And also Lettisha Mooney gave evidence that she heard Solomon – I think her terminology was "offer – offer Robertson out" meaning to go outside and have a fight and, of course, that is then where the complainant was.
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> Also, you have Robertson's evidence who put both of these defendants in the vicinity of the complainant when – and clearly in the context of a fight. So there are these factors and you might think that there are other matters which, if you like, bolstered the complainant's and Robertson's identification of these witnesses, that they are just some of the matters that – of the defendants – they are just some of the matters that occurred to me".

[20] His Honour then reiterated the weaknesses in the evidence, commencing by saying it was necessary for him to do so "on the other side of the equation": the witnesses' taking of intoxicating substances, the confusion, the frightening situation, the fact that it occurred in the early hours of the morning; to that, he said, could be added that the photographs in the photo boards, being two-dimensional, were not entirely lifelike. The jury should consider how confident or otherwise Mr Hebbard was when he chose the two appellants' photographs. So far as Robertson was concerned, Mr Hebbard had described him as so intoxicated that before they left the hotel he was "half passed out" on a chair. When Mr Hebbard had identified Hooker, he did not say the latter struck him, but that he was pretty sure he was there that morning and could have been the person who called out to him. He took a considerable amount of time before he chose Solomon's photograph and appeared to display some hesitance.

[21] No re-direction was sought.

The contentions as to the adequacy of the identification directions

[22] It may be seen that the trial judge's directions moved from pointing out matters which might undermine the identification of the appellants to some matters which might support it, before repeating the deficiencies and adding some further concerns. The argument for Solomon was that because of that format, the direction did not conform to the requirements of *Domican v The Queen*.[2] It was necessary, counsel submitted, that the identification direction should not only warn the jury about the dangers of convicting on identification of evidence alone, but be given in a discrete form. It was an error to invite the jury to consider other evidence in assessing the strength of the identification evidence in the course of giving the *Domican* warning, although it would have been permissible to remind the jury of the other evidence once the warning had been given. The force of the warning given was nullified by the invitation to consider other evidence that could support the identification.

Discussion - the identification directions ground

[23] In the first of the relevant passages from *Domican*, the High Court stipulated that the trial judge

> "must warn the jury as to the dangers of convicting on [identification] evidence where its reliability is disputed".[3]

The identification warning must be specific and authoritative; it must

> "…isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence".[4]

The second passage relevant to the appeal point here concerns assessment at appellate level of the adequacy of a warning:

> "…the adequacy of a warning in an identification case must be evaluated in the context of the evidence in the case. But its adequacy is evaluated by reference to the identification evidence and not the other evidence in the case. The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified, the opportunity to observe the person subsequently identified, the length of time between the incident and the identification, and the nature and circumstances of the first identification - not by reference to other evidence which implicates the accused. A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence."[5]
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> (Citations omitted)

[24] It can be accepted that identification evidence, even of questionable quality, may be sufficient in conjunction with other circumstantial evidence to arrive at a conclusion

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2 (1992) 173 CLR 555.
3 At 561.
4 At 562.
5 At 565.

of guilt,[6] and that a trial judge may properly direct to that effect. The more difficult question is whether the jury can properly be told to consider other evidence in considering whether the identification itself is correct. In *R v Evan, Robu and Bivolaru*,[7] the trial judge observed that although the quality of photo board identification might be poor, other evidence might support its correctness, so that the jury's decision as to the identification should be based on all the evidence. This Court expressed the view that the direction did not conform with the *Domican* requirements. *R v Urbano*[8] contains dicta to similar effect. However, in *R v Clapson*,[9] to which the court in *Evan* does not seem to have been referred, the Court held that the *Domican* requirement, that warnings must "isolate and identify" any significant matter which could undermine the reliability of the identification evidence, did not mean that the jury had to consider the reliability of the evidence in isolation:

> "The assessment of the reliability of identification evidence ought, like any other part of the evidence, be considered having regard to the whole of the evidence which was open to the jury to accept".[10]

[25] In two South Australian cases, *R v Coxon*[11] and *R v Bennett and Ors*,[12] different members of the Court of Criminal Appeal reached different views on the question without resolving it. In *R v Rich (No 2)*[13] and *R v Spero*,[14] the Victorian Court of Appeal, in considering directions to the effect that other evidence may confirm the accuracy of identification evidence, focussed its attention on whether the directions had any tendency to mislead the jury where a full *Domican* warning had been given. The New South Wales Court of Criminal Appeal considered directions of the kind in *Skaf v The Queen*[15] and *R v Razzak*.[16] In *Skaf*, the court observed that poor quality identification evidence could not be improved by other evidence, although, notwithstanding its poor quality, it might combine with other evidence to support the Crown case; however, the evidence which was the subject of direction in that case was not circumstantial evidence, but part of the process of identification. In *Razzak*, the Court considered that it was an error for the trial to refer to surveillance video footage as supporting the correctness of a stabbing victim's identification of the accused as his assailant, but it had not deprived the applicant of the opportunity of an acquittal.

[26] I do not think one should be unduly prescriptive about the form of identification directions; what is necessary, in my view, is to consider their adequacy as a whole to establish whether they are such as to produce a fair trial. That was the approach of the Court in *Evan*, and it is consistent with the approach in *Rich (No 2)* and *Spero* of examining the effect of the directions to determine whether they have any tendency to mislead or detract from the *Domican* warning. It would generally be preferable for a trial judge to give the jury the *Domican* warning in full without reference to other evidence as supporting the accuracy of the identification, to avoid any risk of distracting from the warning. It is certainly permissible, once the *Domican* direction is given, to

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6 See e.g. *Festa v The Queen* (2001) 208 CLR 593 per Gleeson CJ at 600.
7 (2006) 175 A Crim R 1.
8 [2011] QCA 96 at [79].
9 [2004] QCA 488.
10 At [19].
11 [2002] SASC 165 at [33], [63].
12 (2004) 144 A Crim R 215 at [80], [102] and [132].
13 [2002] VSCA 17 at [77] – [78].
14 (2006) 13 VR 225.
15 [2008] NSWCCA 303.
16 [2004] NSWCCA 62.

identify counsel's competing contentions as to evidence supporting and detracting from the reliability of the identification. And of course other evidence may supplement, or be supplemented by, the identification evidence in arriving at a conclusion of guilt.

Conclusions - the identification directions ground

[27] The direction in the present case was flawed insofar as it gave the jury to understand that Mr Hebbard's identification of the man who attacked him as the appellant Solomon was more likely to be right because it accorded with other evidence. But there was no real issue at trial about Mr Hebbard's identification of Solomon as striking him; the question was whether he had done so more than once and caused the jaw fracture. The cross-examination of Mr Hebbard and Karl Solomon was put on that basis. The defence case as put in address was that while there was evidence (from Karl Solomon) that the appellant Solomon initially punched Mr Hebbard, it did not show that his jaw was broken then. Reliance was placed on the fact that in his police statement, Mr Hebbard had referred to the jaw fracture only after describing being hit with the iron bar. There was no suggestion in the address that Mr Hebbard was wrong in identifying Solomon from the photo board as the man who had "initially bashed" him; the criticism was that he had not during the identification process made any reference to Solomon as breaking his jaw. In circumstances where the defence did not challenge Mr Hebbard's evidence that it was Solomon who first confronted him, I do not consider that the *Domican* warning was actually required. There was certainly no miscarriage of justice; there was no reason for the jury to question Mr Hebbard's identification of Solomon, however the directions were framed.

[28] Similarly, the defence did not suggest that Robertson was wrong in his recognition of Solomon or in placing him at the scene of the altercations. The only challenge made was to his evidence that he had seen Mr Hebbard assaulted; and indeed it was put to him that he was diverted from seeing what had happened to Mr Hebbard because he was himself running away from an angry Solomon. In those circumstances, there was no need for a *Domican* warning in respect of his evidence; the directions given were more than was required.

The judge's direction about the course of conduct involved in the offending

[29] During its deliberations, the jury asked this question:

> "Is the incident one entire incident or separate incidents outside the flat and paint shop?"

The trial judge gave this direction in response:

> "In this particular case you have heard that the complainant gave evidence – and no doubt this is the cause for the note – that the complainant has given evidence about a series of separate incidents involving different persons in the early hours of that morning, but for the purposes of this case you should proceed on the following bases. The first is that, notwithstanding the fact that there were a series of separate incidents involving the complainant and different people, for the purposes of this case you should proceed on the basis that it was one, if you like, ongoing course of violent conduct commencing outside the Queen Street flats and concluding at or near that paint shop some 200 metres away with the assault with the iron bar. So different incidents involving different people but one overall course of violent conduct. Does that make sense? All right.

> Now, but there is a significant other factor that you have to bear in mind in proceeding on that basis, and that concerns the Crown's, if you like, alternate case that if these two defendants were not the perpetrators of the actual – did not actually personally cause the grievous bodily harm they could still be found guilty as parties. Insofar as the incident outside or near that paint shop where Taiters was assaulting the complainant with the iron bar, there is no evidence at all that places either of these two defendants at the scene of that incident. So if you were to conclude that the complainant suffered the grievous bodily harm as a consequence of the assault with the iron bar outside or at or near the paint shop, it would not be open on the evidence to conclude that either of these two defendants were a party to that act of violence."

The contentions on the latent duplicity ground

[30] The appellant Solomon relied on *R v Fowler; R v Aplin*[17] to argue latent duplicity in the count of grievous bodily harm. In *Fowler and Aplin*, both appellants were charged with assault occasioning bodily harm in company. The prosecutor particularised the charge as consisting of various applications of force which were said to be alternatives, consisting of punches, kicks, stomps and striking the complainant with a bottle. When the indictment was challenged at trial for duplicity, the prosecutor argued that the events constituted one transaction. The trial judge ruled against the challenge, saying that it was open to the jury to conclude that the events entailed only a single activity and he directed the jury that the prosecution must prove that there was one assault entailing a number of applications of force committed jointly by both appellants. This Court noted that it was not a case in which blows were delivered in quick succession. There was a clear demarcation between the various acts and, effectively, the Crown case was that each appellant committed three separate assaults. The indictment was, in consequence, duplicitous.

[31] The appellant complained that the evidence in the Crown case here was capable of establishing a number of different assaults upon Mr Hebbard. Hebbard had recounted an initial assault involving hard punches to his head and face; a further assault where he was hit by two or three people on the ground; and a different assault in which he was hit by an iron bar. Robertson described an assault in which Taiters punched Mr Hebbard, and Karl Solomon a single punch in the carport and a further assault by Taiters outside the unit. The direction made it possible that the jury could have convicted him on the basis that he was a party to one of the assaults, but not that which caused the relevant injury. The trial judge should have required the prosecutor to elect which of the incidents was to be left to the jury.

[32] For the Crown, it was submitted that, as in *R v Trifyllis*,[18] the appeal in fact concerned "one episode described a little differently by various witnesses". There was no latent duplicity in the indictment.

Conclusions on the latent duplicity ground

[33] There were, it is true, distinct assaults on Mr Hebbard, as in *Fowler and Aplin*; but there the resemblance ends. The Crown had identified the assault on which it relied to found the grievous bodily harm count. Its case, on the strength of Mr Hebbard's

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17 [2012] QCA 258.
18 [1998] QCA 416.

own evidence about feeling the damage, was that his jaw was broken in the initial assault on him, and there was no evidence to the contrary. The fact that the defence suggested to the jury that that injury might have been caused by the assault with the iron bar (or now suggests that it might have occurred as he lay on the ground and was beaten and kicked) did not lead to some latent ambiguity in the charge. It merely constituted an endeavour to persuade the jury that the assault relied upon by the Crown as causing the grievous bodily harm, had not, in fact, done so.

[34] It was suggested that the jury might have taken the reference in the trial judge's directions to an "ongoing course of violent conduct" as meaning that if the appellant Solomon, had taken part in any aspect of it, he was guilty of occasioning grievous bodily harm. But his Honour went on to point out that Solomon was not involved in the assault with the iron bar, so that if it had been the cause of the grievous bodily harm, it would not be open to conclude that he was a party.

[35] The reasons for the rule against duplicity were set out by Gaudron and McHugh JJ in *S v The Queen*.[19] They were: to enable the accused to know what case he had to meet; to ensure that the court knew what charge it was dealing with so that it could make proper rulings on evidence and instruct the jury as to the law, and in the event of conviction know the offence for which the defendant was to be punished; and to ensure that the record would show the offence of which a person had been acquitted or convicted should he or she wish to raise a plea of *autrefois acquit* or *autrefois convict*. In the present case, all of those requirements were met. It was made clear to the jury that the Crown had to prove that the grievous bodily harm occurred in the initial assault on Mr Hebbard; there was no risk that they might convict Solomon on the basis of some other incident, and there was no room for confusion about what their verdict meant.

Orders

[36] I would:

1. Allow the appeal against conviction of the appellant, Hooker, set aside the verdict of guilty and enter a verdict of acquittal.

2. Dismiss the appeal of the appellant, Solomon.

[37] **NORTH J:** I have read the reasons for judgment in draft of Holmes CJ. For the reasons given by her Honour I agree with the orders proposed.

[38] **HENRY J:** I have reviewed the whole of the evidence and agree with the conclusions of Holmes CJ in respect of the unreasonable verdict ground for the reasons given by her Honour. I also agree with the balance of her Honour's reasons and the orders proposed.

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19 (1989) 168 CLR 266 at 284-5.