SUPREME COURT OF QUEENSLAND

CITATION:	*R v Edwards* [2018] QCA 304
PARTIES:	**R** **v** **EDWARDS, Bradley John** (appellant/applicant)
FILE NO/S:	CA No 244 of 2017 DC No 2255 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction and Sentence: 9 October 2017 (Rosengren DCJ)
DELIVERED ON:	6 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2018
JUDGES:	Sofronoff P and Gotterson JA and Boddice J
ORDERS:	**1. Leave to adduce further evidence is refused.** **2. The appeal against the conviction is dismissed.** **3. Leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – ASSAULT – CIRCUMSTANCES OF AGGRAVATION AND AGGRAVATED ASSAULTS – where the appellant was convicted by a jury of two counts of grievous bodily harm, one count of assault occasioning bodily harm whilst armed and in company, and one count of wilful damage – where the appellant had attended, during the early hours of the morning, the complainant's house with others on two occasions – where the appellant, on the first occasion, damaged a motor vehicle in the driveway of a neighbour's property – where the appellant, on the second occasion, and his associates were involved in a melee with the complainants and their associates – where the appellant was armed with a knife – where the appellant was hit during the melee – where, during that melee, each of the complainants was stabbed – where the appellant was found criminally liable for those stabbings, pursuant to s 8 of the *Criminal Code* 1899 (Qld) CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE

HAVING REGARD TO EVIDENCE – where the melee occurred during the early hours of the morning – where witnesses could not identify the person that stabbed either complainant – whether it was reasonably open to the jury, on the evidence, to be satisfied of the appellant's guilty beyond reasonable doubt – whether further evidence, sought to be adduced by the appellant, would have altered the jury's determination

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – whether self-defence, pursuant to s 271(1) of the *Criminal Code* 1899 (Qld), was open on the evidence – whether the trial judge erred by failing to direct the jury with respect to the availability of the s 271(1) defence – whether the appellant was denied a fair chance of acquittal

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to an effective head sentence of five years and six months imprisonment, with parole eligibility after serving 50 per cent of that sentence – whether the sentence was manifestly excessive or inadequate, considering the applicant's mitigating and aggravating circumstances – where the applicant lost custody of his young daughter, and his health, employment, and family has been negatively affected – where the applicant was a mature offender with a past criminal history, including violent offences – whether the sentence imposed aligns with comparative case authorities

Criminal Code 1899 (Qld), s 8, s 271(1), s 271(2), s 272
Penalties and Sentences Act 1992 (Qld)

BRS v The Queen (1997) 191 CLR 275; [1997] HCA 47, applied
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, applied
R v Beetham [2014] QCA 131, applied
R v Coker [2013] QCA 315, cited
R v Compton [2017] 2 Qd R 586; [2017] QCA 55, cited
R v Dancey [2013] QCA 135, cited
R v Johnson [2012] QCA 141, cited
R v Price [2006] QCA 180, cited
R v Sargent [2016] QCA 32, cited

COUNSEL: S J Hamlyn-Harris for the applicant/appellant
The appellant/applicant also appeared on his own behalf
C N Marco for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Boddice J and the orders his Honour proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.

[3] **BODDICE J:** On 9 October 2017, the appellant was convicted by a jury of two counts of grievous bodily harm, one count of assault occasioning bodily harm whilst armed and in company and one count of wilful damage. The appellant was sentenced to an effective head sentence of five years, six months imprisonment, with parole eligibility fixed after serving 50 per cent of that sentence.

[4] The appellant appeals those convictions and seeks leave to appeal his sentences. The grounds of appeal against conviction are: (1) that the verdicts were unreasonable and could not be supported, having regard to the evidence, and (2) that a miscarriage of justice occurred as the trial judge failed to direct the jury on self-defence against an unprovoked assault, in respect of counts 3 and 4. The ground of appeal against sentence, should leave be granted, is that the sentences imposed were manifestly excessive.

Background

[5] The appellant was born on 7 August 1986. At the time of all of the offences, he was in a relationship with his female partner who lived at Zillmere. Across the road from her lived Raymond Smith. Smith was living with his partner, Nicole Patterson, his brother, Scott Friend, and another male, Chance Stabe.

[6] The offences were all committed at Smith's residence. The wilful damage count (Count 1) was committed in the early hours of 9 January 2016. A blue vehicle, parked in Smith's driveway, suffered significant damage after the appellant and two other men were observed at Smith's residence.

[7] The remaining counts on the indictment were committed in the early hours of 10 January 2016. The appellant had attended Smith's residence with four or five other men. The appellant had in his possession a pocket knife. Smith and other occupants of the house, including Matthew Rosman and Friend went outside Smith's residence. A melee ensued, during which Rosman and Friend suffered significant injuries.

[8] Rosman was stabbed in the chest, resulting in a pneumothorax. Without treatment, it would likely have resulted in death. It represented the first count of grievous bodily harm (Count 2). Friend sustained a skull fracture, a puncture wound to the chest and cuts to his head and body, as well as bruising, constituting the assault occasioning bodily harm count (Count 3). Friend also suffered a deep stab wound to his shoulder, which without treatment would be likely to have resulted in permanent injury, being the other count of grievous bodily harm (Count 4).

[9] The Crown case was that the appellant was the principal offender in Counts 1, 3 and 4. The Crown relied on s 8 of the *Criminal Code* 1899 (Qld) to establish the appellant's liability for Count 2. The Crown case on that count, was that the appellant and his friends formed a common intention to unlawfully assault the occupants of Smith's residence and in the prosecution of that unlawful purpose, the grievous bodily harm suffered by Rosman was committed and that offence was a probable consequence of the prosecution of that common purpose.

Evidence

[10] At approximately 2.00 am on 9 January 2016, Smith heard an engine revving in his street. He observed the appellant driving a red convertible. He asked him to leave the street. The appellant did so by screeching the wheels before returning down the street, forcing Smith to move off the roadway.

[11] At about 2.30 or 3.00 am on 9 January 2016, Smith was awoken by banging on his house. The banging sounded like a piece of steel hitting the side of the house. Smith heard three people asking him to come outside and sort it out. He recognised one of the voices as the appellant's voice. Smith observed the appellant and two other males in his front yard, standing in the middle of the driveway. The appellant was in front of a blue vehicle, parked in Smith's driveway. Smith immediately decamped, running down the footpath, away from the house. He was only wearing his underwear. The two other men chased him. The appellant remained at Smith's residence.

[12] When Smith returned to his residence, the blue vehicle had significant damage. It did not have that damage when he left his residence. The blue vehicle had smashed windows, as well as damage to the front driver's side door and the side mirror. The back windscreen had been broken and there was damage to the tail lights. The appellant was not at Smith's residence at that time. Smith did not know what had happened to the two men who had pursued him down the street. Smith rang his family and the police.

[13] In the early hours of 10 January 2016, the appellant and several other males returned to Smith's residence. Prior to their arrival, Smith received messages from an unknown number, stating they were coming back to sort out what had not been sorted out. Smith had "a fair idea" who was sending those messages.[1] Smith became aware the appellant was at his residence, when he observed four or five people alight from a red commodore and run towards the front entrance of his driveway. The appellant was one of those men.

[14] Smith went outside with Friend, Stabe, Rosman, Patterson and other people who Friend had invited to stay at Smith's residence. An altercation occurred outside. Smith described a lot of yelling and screaming. Rosman went to run down the driveway but was stabbed in the back of his shoulder. Smith could not say who inflicted the stab wound. Smith did not recall seeing any of the people, including the appellant, carrying anything. Friend also was stabbed in the top of his shoulder. Smith did not see Friend sustain that injury.

[15] There was yelling and screaming of threats before the appellant and the other men left the area. Smith recognised one of the screaming voices as the appellant's voice.

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1 AB 46/22.

Stabe was also yelling and screaming from the front fence "get off my property". Smith estimated the entire episode took less than 30 minutes. At one point, Smith heard some form of gunshot or bangs from the side of the house. He did not see what caused those noises.

[16] After the appellant and his friends left, Smith reported the matter to police. An ambulance attended to treat Rosman and Friend, who were transported to hospital. Smith said whilst he had surveillance cameras installed at the front of his residence, the memory card was full at the time of both the incident on 9 January 2016 and the incident on 10 January 2016. Accordingly, neither incident was recorded by the surveillance camera, even though he pressed the record button.

[17] In cross examination, Smith denied that when the appellant first left the area in the early hours of 9 January 2016, Smith was throwing rocks towards the appellant's motor vehicle. He also denied attending the appellant's residence on 9 January 2016, and damaging the house and some of the appellant's motor vehicles. Smith denied that the only damage to the blue vehicle was to one side mirror.

[18] Smith accepted that in the early hours of 10 January 2016, everyone from his residence had run out of the house. Some were armed with bats and weapons. Smith was unable to say which people from his residence were armed when they ran outside. It happened quickly. There was a firearm at his residence that night. It was an air rifle or a BB gun.

[19] Scott Friend had previously spoken to the appellant about his manner of driving in the street. He and Smith had yelled at the appellant when he was doing burnouts on the street. Friend arrived home at Smith's residence at about 4.30 or 5.00 am on 9 January 2016. He had been telephoned by Smith, who informed him about an incident earlier that morning. Friend observed a blue vehicle parked in the driveway had its windows smashed, front door kicked in and mirror pulled off the vehicle.

[20] As a result of a conversation with Smith, Friend invited a number of his friends to the house. One, was Rosman. Friend went to bed at about 10.30 pm on 9 January 2016. He had had a few quiet drinks during that day. Friend was awoken in the early hours of 10 January 2016 by Smith, who told him "people from the other night were back at the house."[2] Friend understood one of those people was the appellant.

[21] Friend walked outside in his underwear. He observed the appellant and two other people standing outside the verandah side door. He observed the flick of a knife blade in the appellant's left hand. The blade was about 10 centimetres. Friend saw the reflection of the light coming through the side glass door on the blade. Friend had a fight or wrestle with the appellant. At that time, one of the two other people were standing to the left of the appellant. The other was to his right. Friend was unsure where the other people in Smith's house were at that time.

[22] Friend said when he saw the flick of the knife he went to grab the appellant because he was on his property. There was a commotion. Friend was hit in the side with something really hard. As Friend turned to see what was hitting him, he suffered another hit to the shoulder and the back of the head. Friend was hit quite a few times in the head, shoulders, arm and ribs. Friend was hit in the shoulder and chest

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2 AB 71/44.

by the appellant. Friend did not know who was hitting him in the ribs and the back of the head. He was being struck by multiple people simultaneously.

[23] Friend was holding the appellant in front of him and was being hit from behind by someone else. Friend turned to see who was hitting him from behind but could not make that person out. Friend then felt a really hard hit to his shoulder come from behind. The appellant was standing behind him at that time. He did not see blood at the time he felt a hard hit to his shoulder. It was only after the ambulance officers told Friend he was bleeding that he realised he had been stabbed in the shoulder.

[24] After he felt the hit to his shoulder, Friend turned and grabbed the appellant. He threw him against the side of the house. Friend then was hit in the head a further two times. Friend was dazed. He turned around, stopped and walked back inside the house. Friend did not take any further part in the physical altercation at that point. He passed out on the couch. He was awoken by ambulance officers. He was transported to the Royal Brisbane Hospital where he received treatment.

[25] As a result of the stab wound in his shoulder, Friend had a piece of bone removed from that shoulder. He did not have full range of that arm anymore. He also sustained a stab wound to the chest. The back of his head was split open. He had four broken ribs and bruises all over him. He did not consent to any of those injuries being inflicted upon him.

[26] In cross examination, Friend denied ever throwing rocks at the appellant's motor vehicle. He denied damaging the appellant's house and motor vehicle on 9 January 2016. He accepted he was intoxicated on the night of 8 January 2016. He stopped drinking after he received a telephone call from Smith telling him of an incident at the house. Friend tried to find his way home. He was unable to do so until the first train, arriving home at about 5.00 am. During the day he drank about a six pack of beer. He was not intoxicated when he went to bed about at 10.30 pm on 9 January 2016.

[27] When Friend observed the blue vehicle in the driveway of Smith's residence on 9 January 2016, one of the mirrors was completely taken off the side of the car. The other mirror had the glass in it broken. The front and rear windscreens was smashed, and every window on all the doors was completely gone. He did not see anyone do that damage.

[28] Friend was aware Smith's residence had CCTV surveillance systems. The CCTV system was installed on the property because a car had been stolen out of its driveway. He accepted that at an earlier hearing he had given, as the reason for its installation, that he had heard it was a bad area.

[29] Friend said when he was awoken by Smith in the early hours of 10 January 2016, it was dark, with the only light coming from inside the house. He ran straight out of the house, with the intention of removing the appellant from the property. He was in an aggressive state and upset the appellant was on the property. There was already a physical altercation going on outside. People were yelling and screaming. That was one of the reasons he got out of his bed.

[30] Friend accepted he went straight down to the appellant. He pushed the appellant and they scuffled. His memory of the specifics were hazy. It had been some time and he had ended up in hospital for about a week. He sustained severe concussions at the time. Friend did not recall seeing anyone from his house outside. He walked

out bare handed in his underwear. He does not know whether any of his friends from the house had armed themselves with weapons.

[31] Friend denied the appellant did not have anything in his hands. He saw the flick of the blade of a knife. He denied the appellant attempted to run away from him out of the yard. Friend denied chasing the appellant. When Friend took the appellant to the ground, the appellant was already hitting Friend. That was the reason he took him to the ground.

[32] Friend had a BB gun in the house. When fired, it made a popping noise. He did not have a licence to possess that firearm. It stayed under his bed the whole time. He was later charged with possession of that firearm. Friend had previously been convicted of a number of property related offences, traffic offences, and possessing a dangerous drug. He denied the CCTV surveillance system was related to drugs at the residence.

[33] Nicole Patterson was having a shower on the evening of 8 January 2016, when she heard yelling and screaming and cars skidding in the street. She ran out of the shower, half naked and found Smith in an agitated state. At around 2.00 am on 9 January 2016, Patterson was in bed with Smith when she heard "bang, bang, bang," up and down the side of their residence.[3] She looked out the window and saw the appellant and his friends walking up and down the side of the house punching it and hitting it with metal poles. They were saying "come out, scum" and "come play".[4] She described them as screaming to try and get them out of the house.

[34] Patterson then heard the side sliding door "get jimmied".[5] Smith told her to run. He ran out the front door of the house and down the street, while two of the appellant's friends chased him. Patterson remained inside the house. The appellant walked from one side to the other side of the front yard threatening her. Patterson said she could not see facial features clearly because it was dark, but she recognised the shoes and voice, as that of the appellant.

[35] At the time of this incident, there was a blue vehicle parked at the front of their residence. The vehicle belonged to a friend who had dropped off the car to have some mechanical work undertaken. Patterson said when the appellant and his friends could not get their attention, they started smashing up the car in the yard. She could hear windows shattering. After the incident, she observed damage to the blue car. It was not in that state when the friend dropped it off to them.

[36] Patterson said when Smith ran from the residence and was pursued by the two other men, the appellant was standing in the front yard begging her to come out. He said it will all be over. When Patterson said "I don't even know you", the appellant said "I'm going to make sure you know who I am, slut". [6] At that point, the appellant's two friends came running back to the house. They said "he's called the pigs, he's called the pigs, we've got to go". They then left the residence.[7]

[37] Patterson called Stabe. He arrived at the residence about 20 minutes later. They drove around Zillmere for approximately a half an hour, looking for Smith. They

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3 AB87/43.
4 AB 88/12.
5 AB 88/18.
6 AB 91/9.
7 AB 91/13.

found him sitting in someone's yard, in his underwear. Eventually, they returned to the residence. Later that morning, when it was light, Friend returned to the residence. He had been out celebrating a birthday with one of his friends. Others came to the house that day to continue the birthday celebration. One of those people was Rosman.

[38] At about 2.00 or 3.00 am on the morning of 10 January 2016, the appellant returned to the residence. Patterson heard a voice scream "it's on", whilst she was in her bedroom. She ran out of the bedroom to the sliding door on the side of the house. Patterson stood at the top of the stairs. She observed "A whole bunch of kerfuffle. There was quite a few people there, swinging bats, throwing fists. I even heard gunshots at one point".[8] Patterson grabbed Friend, who was asleep in his bed. Friend ran outside, half asleep. Patterson remained inside and called the police.

[39] At one point, she noticed that both Rosman and Friend were covered head to toe in blood. Patterson called an ambulance for Rosman, who collapsed in her arms from bleeding.

[40] Patterson estimated there were up to 10 people involved in the kerfuffle. Half of them were Patterson's friends, the other half were the appellant and his friends. Patterson saw someone holding a little baseball bat. She also thought she saw what may have been the flicker of a blade. She observed fists being thrown. She saw the appellant on the ground being restrained by Friend. Friend had jumped from the top step after he saw the appellant swinging his fist. Friend bear hugged the appellant and threw him face first into the garden. Patterson did not see anybody else involved in a physical altercation.

[41] Later, when Patterson was pacing up and down the hallway inside the house, she noticed that her bathroom "was a lovely shade of red".[9] Rosman was sitting on the edge of the bath, quite pale. She noticed he had a stab wound. Eventually, the appellant and his friends left the residence. Patterson estimated the whole incident was all over in about 10 minutes. It took about 20 minutes for police to arrive at the residence. The ambulance arrived before police. Both Friend and Rosman were taken to hospital.

[42] Patterson did not leave the house at any time during the altercation. Her observations were made from standing at the sliding door. There was a spot light set up at that door which was turning on and off with the movement of everybody in the driveway. At one point Patterson heard something that sounded similar to gunshots. Patterson did not ever see anybody with a gun. She could not recall the sequence of events, in terms of when she heard the gunshots. They sounded like they were standing directly in front of the sliding door. She thought she heard three or four shots.

[43] In cross examination, Patterson agreed the gunshots sounded like an air rifle gun. It was a popping noise. Patterson was not aware there was an air rifle at the house on that night. She only discovered there was an air rifle after everything had been seized and one of the police officers told her. Patterson agreed at one point she heard a male voice say "just shoot him, cunt".[10] She did not recognise the voice.

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8 AB 93/1.
9 AB 94/45.
10 AB 97/8.

[44] Patterson said when Friend arrived home early the next morning he did not look intoxicated and he was not physically incoherent. She agreed that in her statement to police, given on the same day, she did not mention seeing the flicker of a blade. Patterson said the fact she did not put it in her statement, did not mean it was not true. She had been up for two or three days constantly because she was petrified of the way the appellant was going to treat her. She accepted the only physical altercation she observed was Friend restraining the appellant.

[45] Chance Stabe was also living at Patterson's residence at Zillmere in January 2016. He had lived at that address for about seven months. Stabe was aware there had been disagreements between people living at his residence and the appellant, about the way people were driving on the street on occasions. The disagreement was in relation to burnouts and causing noise.

[46] Stabe was out with friends on the evening of 8 January 2016. In the early hours of 9 January 2016, Patterson telephoned asking him to return to the residence. When he arrived, he saw a blue motor vehicle parked out the front had been destroyed. The windows had been broken as had the tail light. Panels had also been damaged.

[47] Stabe drove around the streets looking for Smith. He was unable to locate him. Shortly after Stabe returned back to the residence, Smith returned to the residence. Later that morning, Friend returned to the residence. A number of other people attended the residence, including Rosman.

[48] In the early hours of 10 January 2016, Stabe became aware the appellant had returned to the residence. Stabe had been standing on the driveway when he observed a red commodore drive slowly past the residence. Stabe was looking at the vehicle going slowly up the street and thought "that's a bit suss",[11] having regard to the events leading up to it. About five or 10 minutes later the same vehicle came past the residence again. The vehicle did a U-turn and pulled up directly across the road. Five or six people alighted from the vehicle. The appellant was one of those people.

[49] The five or six people came straight through the front gate and over the fence. Stabe recognised the appellant. He came up the side of the car and the house. At that point Rosman walked past Stabe, towards the vehicle. Stabe tried to call out to Rosman. It looked like he did not understand what was going on and was casually strolling down the driveway. Stabe observed a shadow and a swing that hit Rosman in the head. Rosman fell to the ground. The person then jumped on Rosman and began to attack him. Another person jumped on top of him and kept going. Stabe called out and went down to help.

[50] As Stabe did so, he also "ran into trouble". He had a torch shone in his eyes. He was head-butted with what felt like the end of a barrel, a sort of air rifle shape. He heard a strong English accent say "come on, let's go, if you want to do this, let's do it". Stabe backed up. He heard people coming from inside the house. At that point, the appellant came towards Stabe and said "you don't know who I am and you don't know what I can do".[12] As the appellant was coming towards him, Stabe saw the appellant was carrying a three to six inch sort of blade and a torch.

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11 AB 105/17.

12 AB 107/30.

[51] As the appellant moved towards Stabe, Friend walked out of the house. Stabe said to the appellant "turn around" and Friend grabbed the appellant from behind. They began to tussle. Friend grabbed the appellant in a sort of headlock. As Friend stepped back, the two fell to the ground. Two other men jumped on top of them. Stabe went in to help and heard a voice say "yeah, cunt, you want to have a crack",[13] before a light was shone in Stabe's eyes. Those men kept Stabe at bay from helping Friend. The two men had come from the vehicle. Stabe could not see what they were doing to Friend.

[52] When the torch was shone in his eyes, Stabe observed the man had something in his hand. It looked like a gun. Stabe said "get the torch out of my eyes". The man said "go on, have a crack".[14] At that point, Stabe swung a trolley jack handle he had picked up from the backyard, at the torch. He hit the torch. The man stumbled and let off a round towards the backyard. Stabe saw a muzzle flash. It was not directed at Stabe. Stabe swung the trolley jack again and the man stepped back and moved towards the front yard.

[53] At that point, Stabe looked over and observed the appellant and Friend on the ground. Stabe pulled the appellant off Friend. Friend had blood on his chest and left shoulder. The appellant turned, looked at Stabe and said "come on".[15] The appellant came towards Stabe with the three to six inch knife he had seen earlier. Stabe struck the appellant's arm with the trolley jack. The appellant dropped the knife, picked it up again and came towards Stabe. Stabe swung at him again, hitting him in the shoulder and then the bottom of the jaw or the neck.

[54] The appellant stumbled towards the front yard. As he moved closer towards the front yard, the appellant tripped and landed on the fence, before rolling himself over the fence. Stabe jumped the fence after him. At that point, a man with an English accent, who was out in front on the road, said "stop, don't move". He pointed a red laser at Stabe. The man said it was done. Another man said "yeah, it's done, we are even". That man threw a small baseball bat he was holding over the fence. The men all went back into the car. As they hopped into the vehicle, Smith threw a breaker bar. It bounced off the ground and hit the rear driver's door of the red commodore. The car then drove off. About five or ten minutes later, police arrived at the scene.

[55] Stabe said he did not have any difficulty recognising the appellant. There was an ambient light from the neighbour's front porch, which shined towards the appellant. There was also a street light at the front of the residence. Stabe could not see the others because of a shadow the tree cast over the street light.

[56] After they left, Stabe walked back inside the residence. Friend was sitting in the lounge room with blood just covered everywhere. He was told Rosman was in the bathroom. Stabe followed a blood trail to the bathroom. He found Rosman sitting on the edge of the bathtub. There was blood smeared everywhere. He was bleeding from his head and back. Stabe had seen Rosman get hit to the head by a shadow, before he dropped to the ground and was hit again. He recalled two people around him at that time.

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13 AB 109/30.
14 AB 110/10.
15 AB 110/27.

[57] In cross examination, Stabe said as far as he was aware, the blue car was damaged as he was on the telephone to Patterson in the early hours of 9 January 2016. It was probably 40 minutes before he arrived home. He disagreed that the only damage to the vehicle was to one of the side mirrors.

[58] Stabe said he was awake at around 2.00 or 3.00 am on the morning of 10 January 2016. He had been out with friends. He had not been drinking alcohol. He accepted the altercation in the front yard turned into a bit of a melee between two different groups of people. Some areas of the yard were dark, while others were lit by lights. The only time he saw the appellant involved in an altercation was with Friend and himself. Stabe accepted that after the appellant had entered the yard, he and his friends armed themselves with weapons. They were not armed with weapons before the appellant walked into the yard. Stabe was not aware of any gun being in the residence that night.

[59] Stabe was certain he saw the appellant with a weapon in his hand. Stabe did not accept Friend "pretty much launched himself" at the appellant from the top step. Friend walked up behind and grabbed the appellant.[16] He denied the appellant tried to run out of the yard at that point. He denied the appellant was chased by Friend and the other men from the residence. He denied Friend started laying into the appellant when he was on the ground and that others joined in with Friend. The only time the appellant hit the ground was after he got hit and then fell over the fence.

[60] John Nye, a police officer, was property officer for the investigation of this incident. In that role, he seized CCTV equipment from Smith's residence. The cameras were wireless and would stream live. They would record by motion activation onto an external micro SD card. The unit could record in three ways: it could be scheduled, you could press record, or you could set it for motion activation. Nye's examination revealed the SD card had data on it. However, it was full. Approximately a week prior to the actual events, there was no capacity for any more footage to be recorded onto it. Whilst it had a loop setting function, which would have allowed it to record over the old file, that function was not operating at the time.

[61] Keesha McDonnell, was living across the road from Smith's residence in January 2016, next door to the appellant's partner. McDonnell was awoken by a commotion in the early hours of 10 January 2016. She heard people yelling and arguing from Smith's residence, across the road. She looked out the window but could not see much because of two trees in the front of her house. She could see eight or ten people running around. McDonnell could not make out faces or identify the people. She heard the people yelling "get out" and "drop your weapon" and "stay away from the house", or "stay away from the street".

[62] The people were on the road or inside the yard of Smith's residence, coming out of the house driveway onto the road. She saw someone carrying a baseball bat. The only lighting at the time was from one street light in the area. At one point, one of the groups that were fighting left the address in a a small red car. It had been parked on her side of the street. She saw four or five people get into the motor vehicle. After that car left the street, police arrived at the scene and an ambulance came thereafter.

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16 AB 116/27.

[63] In cross examination, McDonnell accepted that during the altercation she heard something along the lines of "drop your weapons, we are even".[17] She agreed that in her statement to police, she said she heard words "drop your weapons, we've dropped ours." McDonnell confirmed she also heard people say "we're even". When she looked across the street, most of the people were level with the house and running in front of the property. Some were still coming out of the house.

[64] Rosman arrived at Smith's residence in the afternoon of 10 January 2016. He was invited by one of his friends, who had spoken to Friend. Friend asked if they wanted to stay the night. There were a number of other people at the house that evening. At around 3.00 am on the morning of 10 January 2016, Rosman was awoken by loud noises and yelling. He went to the door and heard yelling on the side of the driveway. He looked over and saw four or five people. The lights were behind them, so he could only make out the silhouettes. He then heard yelling coming from his right side. He turned around and saw a whole group of people from the residence. They were standing huddled in a group. They looked scared, anxious. They looked ready for a fight.

[65] Rosman blacked out at that point. When he woke up, he was laying either on or in front of the steps at the side of the house. He remembers getting up and stumbling into the house with blood coming down the side of his head. He went into the bathroom to cover it up. He could not stop the bleeding. He took his shirt off and had it up against his head. At that point, his finger started to throb. There was blood coming down his hand and his finger was split. Rosman went back into the lounge room. Friend was brought in and placed on the lounge room floor. He was very pale and look like he was going to pass out. Rosman then remembered police and ambulance arriving at the residence. A police officer asked him what was on his back. Rosman did not know he had been stabbed at that point. Rosman was then taken to hospital by ambulance.

[66] In cross examination, Rosman agreed that when he came outside of the house, the group of silhouettes and the group of his friends were looking directly at each other. The two groups were facing off at each other in the driveway. Rosman could not recall any of the people from the residence holding weapons like baseball bats or knives. He accepted his memory was affected by his injuries. He had not drunk very much at all that day. He had only had two or three drinks that night.

[67] Dr Kowsalya Murugappan treated Rosman on the morning of 10 January 2016, at the Royal Brisbane and Women's Hospital. He found Rosman had a multiple stab injury to the left posterior chest wall, and a few smaller lacerations around the face on the left side and on the right ring finger. A chest x-ray revealed a left side pneumothorax due to a puncture within the lung. The pneumothorax was associated with the stab wound to the posterior chest. If the pneumothorax is not medically treated, a patient can develop significant respiratory distress, which can eventually lead to death. The stab wound had a clean edge, about two and a half centimetres or so. It was in the form of a sharp object penetrating through the skin and the muscle between the ribs. That injury is very likely to be have been caused by an instrument, such as a knife.

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17 AB 125/35.

[68] Dr Joshua Piercey, treated Friend at the same hospital on the morning of 10 January 2016. Friend had a two centimetre long penetrating left shoulder wound as well as a puncture to the left anterior chest between rib 3 and 4, 0.5 centimetres long. There was a one centimetre wound on the back of the skull, some small abrasions to the toe of his left foot, some right arm bruising, an abrasion to the mid left back adjacent to the spine, tenderness to the rear of the neck and a haematoma to the right forehead. Friend had sustained skull fractures to the right anterior frontal sinus wall of the right forehead. There were scratches to the chest and abdomen, bruising and contusion to the right abdomen and right lung lower lobe contusion. The deep shoulder wound required surgical intervention. Without that intervention, there was a risk of decreased function of the joint, with reduced strength and decreased range of movement.

[69] At the conclusion of the Crown case, the appellant elected neither to give, nor call evidence. However, as part of the Crown case, the jury was played an interview. Thomas Hess, the police investigator in this incident had conducted an interview with the appellant on 14 January 2016. In that interview the appellant said that on the afternoon of Friday, 8 January 2016 he dropped his partner off at her residence at Zillmere. He was driving his father's restored MG. Stones were pelted at the vehicle. This was not the first time this had happened to the appellant.

[70] The appellant had a friend with a "pommie" accent, as well as another friend who owned a red commodore, come to the house with him to speak to the people across the road. There was no intention to hurt anybody. He took some friends because he was worried the people in the house were the "big like hero" type. The appellant was not a big person and not really a fighter. The appellant said rather than go to the police and be called a "dog and a dobber", he wanted to resolve it himself.

[71] The people refused to come out of the house, so the appellant broke the side mirror off a blue car in the front yard. The next minute a male came out of the house and ran down the street yelling out "dogs, I've called the cops". The appellant said he did not need to get into any trouble with the police. They left the residence. As he drove away, he heard smashing in the background, but they did not stop.

[72] The appellant said a man who shared the house with his partner rang to tell him there were "a heap of guys over at their house". That person started relaying messages through to the appellant's partner, who started to get a little bit worried.[18] The people from the house across the road had been throwing stones at his car and had threatened to burn his house down. The appellant did not know why they had started throwing stones at his car. He did not know if it was jealousy. The appellant had a collector's car. He was in two minds whether to go to the police, but with the thought of being burnt, especially with things being tight at the time, and no insurance on the house, he was fearful of what was going to happen and fearful for his life.

[73] The appellant, and a group of his friends, went over to talk to the people at Smith's house. All they wanted to do was talk. The appellant stressed that to the people in the house. When they arrived at the residence all of the lights were out in the house. They did not know if anybody was home. They proceeded over the fence, because the people were not on the footpath as they said they would be. The appellant did

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18 AB 274/20.

not want to go into their yard. The next minute, there were people coming from everywhere.

[74] The appellant "couldn't say how many people there were actually, but there were a lot of people. I, I know I counted 15 or so people and I–, [sic] steel bar, bowls and everything. When I fell down I had four guys coming for me. I feared for my life. I really did. I had a small pocket knife in my pocket. I'm not one for knives or anything like that either. I've never used one ever before you know? I was scared of actually having to pull it out of my pocket you know. If that needed be, you know? I never took it for that, but I took it just in case something did happen, I suppose. And this did happen. I haven't got the knife now. I, I was so frantic about this all happening to me. I was [indistinct] like this. I, I was just trying to save my face from being whacked and banged. I crawled out from under like, when I was going like this, and I, I don't know honestly if I actually [harmed] anybody or stabbed anybody at all. I'm, I'm not sure but I know that I did have my knife, so I'm accountable for that."[19]

[75] The appellant said they all stood on the footpath. The appellant said "We said, righto. It's over now then isn't it? And they all said 'yes, that's it. There's gonna be no more problems. No police. No nothing. This is it, over.' So I proceeded home."[20]

[76] The appellant said when he went over to the residence in the early hours of 9 January 2016, they did not take any weapons with them. The appellant did not even have a pocket knife.[21] The next day, the appellant heard "bang, bang, bang" at his house. Steel bars were hitting every windscreen, window and panel on the cars in his yard. There were at least five people with jumpers or something wrapped around their head. He believed they were in a white commodore. It had a pretty loud exhaust. They smashed pretty much anything they could smash. The appellant knew they were on their way because his partner's house mate had rung and said he thought they were heading to the appellant's residence. The housemate had heard them talking on the telephone to their mates. The appellant thought it would all be over by that stage.

[77] On the following day, the appellant was at his friend's house, repairing his car. His friends were drinking and talking about how things were getting out of hand. He was told there were a lot of people at the house across the road from his partner. They were hiding in trees. The appellant said that did not sound good. The appellant came up with the idea that they meet in a public place because he did not want trouble. The appellant's friends took the car for a test drive. They later returned with two of their mates. The appellant did not know who they were and was not even introduced to them.

[78] They decided they would meet on his partner's footpath, with the idea they go to a public place as that would be easier to control. On the way over the appellant "had a real bad gut feeling about something was gonna go wrong".[22] The appellant had been told there were 15 plus people at the house across the road. It was decided

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19 AB 276/20-35.
20 AB 276/40.
21 AB 283/55.
22 AB 294/6.

they would stop out the front, go in and see what they had to say and that's it. The appellant drove to the house across the road.

[79] They could not see anything in the dark. That worried him, because he did not know whether people from the house may come out. His partner had told them there were a few men in trees. The appellant, at that point, did not want to pull up and had a feeling it was not going to be a good situation. He did not voice his concerns to his friends because they were bigger than him and he honestly wanted to get the matter resolved because his vehicles were being damaged all the time.

[80] The appellant did not want to go into their yard, because it was their space, but the people in the house were not anywhere to be seen. The appellant decided to go over the fence so that the light would come on. No light came on. The appellant could not see a thing in front of him. It was just black. The appellant said "I got very worried at this stage, you know? And I was sort of backing back a bit here because I don't, and then I seen all these people mate, and they all were wielding big, big objects…I had this bad feeling in my tummy that something wasn't going to go right here so I started going to get back to the car because this wasn't a good situation to be in. If it was just a couple of guys there that you know, if anything got out of hand, we maybe could be able to handle ourselves you know? Um [it] was getting worse. So I, I, [indistinct] and I tripped over the fence… And that's when I got like people went upon me… And I feared for my life. I really did… And that's the only time that I pulled the pocket knife. It's only a small pocket knife I use for paring a bit of wire and stuff like that when I need to on cars, you know what I mean? And yeah I don't even know where that is. So that, that sort of got left there. I don't know… I just left."[23]

[81] The appellant could not recall any of his friends carrying any other weapons. The appellant had been told by his partner earlier that day, that the people across the road said they had guns. He only pulled the knife out of his pocket, out of fear of being hurt badly. When he pulled it out, he was "just like I was covering my head so that I wouldn't get hurt basically. You could say I was cowering… I feared, I feared for my life. I didn't know what I was [going to] be seeing my kids again [sic]… I pulled the knife out, through last resort and I just went like this, up in the air, I don't know if I'd cut anybody, or anything, I don't honestly know. I had no blood on me or anything like that."[24]

[82] The appellant pulled the knife out, when he was being attacked, as he could not see any of his friends near him. The appellant yelled out and one of his friends must have pulled the people off, as the appellant was freed enough to get out and run to the car. The appellant started it up. By that stage all of his friends were at the car. As they were about to leave, one of the people from the house was yelling "don't ever come back here again". The appellant said "well, don't ever come back to my place again". The appellant then said "well that's it now, no more. We've had enough."[25] The appellant said "this is the end of it". The people said "yes, this is the end of it. No police or anything be involved." At that point the people from the house were all on the footpath. There were a lot of guys.

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23 AB 295/19-50.
24 AB 296/36-50.
25 AB 297/10.

[83] The appellant tripped over the fence, as he left and received a few abrasions to his back. He showed the police scratches on his back that he thought were from the tree or the fence. The appellant also had a sore jaw from where one of the bars got him, but no other bruising as his friends pulled him out really quickly. The appellant said he kept stressing all the time that he did not want the police to be involved at all.

[84] The appellant said he did not know one of his friends had sent a number of text messages to Smith, on the evening of 9 January 2016. In those text messages, the friend told Smith he "just made a big mistake" and later requested Smith meet them somewhere. The appellant was not listening to the messages or phone calls. The appellant did not know anything about a trolley jack being taken from Smith's residence. He denied he used the trolley jack to smash up the blue car, the night before. The appellant was not someone who would go out and get revenge. He only ever wanted to resolve it nice and easily.

[85] The appellant said on the first occasion he and two of his friends went around to the house, in the early hours of 9 January 2016, they knocked on the glass door. They did not try and smash down the front door. They went there without intent to hurt anything or anybody. They went there to talk and ask why they had threatened and smashed up his place in the past. The appellant smashed the side mirror of the blue car because it was the easiest one and he was angry they did not come out to talk to him.

[86] The appellant accepted that when they first came to the residence, in the early hours of 10 January 2016, they initially drove around the block, before parking at his partner's residence. The appellant denied there were six people in the vehicle. There were only five. He does not know whether any of them were armed with weapons. The appellant did not have a torch, it was pitch black. He denied anyone had a taser, or a firearm. The appellant had been told by his partner that the people across the road had guns.

[87] The appellant said the threats to burn his house down were made face to face, not in text messages. His shed door had been forcibly opened and he was scared that his family was going to get hurt.[26] He wanted to meet in a public place so as not to cause harm. He thought there was a chance it would become violent because his partner had once said that one of the people from across the road was known for fighting. That was why he had friends come with him to sort it out. The appellant did not want to die.[27] He took his friends as bargaining power because if he had enough man power, people would be more inclined to sit and talk, rather than fight with him.[28]

[88] The appellant did not think he got a hit in, himself. Once the people in the house recognised it was him, they all went for him. They wanted to kill him. They had wanted to do that since day one.[29] It was self-defence for him when he was on the ground. They were trying to hurt him. He thought he was going to die. The appellant was the victim. The knife was only a pocket knife. It had a black handle and a short blade. It was not a big, intimidating knife. It was used for pairing fruit or stripping wires when fixing motor cars. He did not have the knife with him when he left the residence.

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26 AB 321/53.
27 AB 323/15.
28 AB 324/36-47.
29 AG 326/13.

Conviction Appeal

Appellant's Submissions

[89] The appellant was represented at the appeal only in respect of the advancement of the second ground of the appeal against conviction, namely that there was a miscarriage of justice by reason of the failure to direct the jury on self-defence under section 271(1) the *Criminal Code* 1899 (Qld) ('the Code') in relation to Counts 3 and 4. The appellant represented himself for the purposes of advancing the first ground of appeal against conviction and the grounds for the application for leave to appeal against the sentence.

[90] In respect of the first ground of appeal against conviction, the appellant contended the evidence given by the witnesses at trial was incorrect. He always intended to resolve the matter in a mature and calm way, as evidenced by his desire to meet in a public place. The attack was staged and he never harmed or stabbed anyone during the attack. Further, crucial steps were missed by the investigating police, including examination of CCTV footage, telephone and other records, which would have established inconsistencies, such that the verdict was unreasonable and not supported by the evidence. The appellant seeks leave to adduce further evidence to establish the alleged deficiencies in the police investigation and the inconsistencies in the witnesses' accounts.

[91] In respect of the second ground of appeal against conviction, the appellant submits that whilst the trial judge correctly directed the jury in respect of self-defence under s 271(2) and s 272 of the *Code*, the jury was not directed on the defence of self-defence against an unprovoked assault, pursuant to s 271(1) of the *Code*. The failure to do so gave rise to a miscarriage of justice, as the account given by the appellant to police, as well as other evidence at trial, specifically raised that the appellant had not provoked his assault by Friend, who initiated physical contact with the appellant. Whilst there was no request by defence counsel for s 271(1) to be left by the trial judge, there was an obligation to do so. It is open for both s 271(1) and 271(2) to arise on the facts of a particular case. The fact the force used, in fact caused grievous bodily harm, does not preclude a defence under s 271(1) of the *Code*.

[92] Further, the fact that the jury rejected a defence under s 271(2), does not mean the jury were bound to reject a defence under s 271(1) of the *Code*. The acceptance by the jury that s 271(2) of the *Code* was excluded beyond reasonable doubt, was consistent with a finding that the jury were satisfied that although there was an unprovoked assault by Friend upon the appellant, the nature of the assault was not such as to the cause reasonable apprehension of death or grievous bodily harm. That reasoning did not mean the jury must also have been satisfied beyond reasonable doubt, that the Crown had excluded the operation of s 271(1) of the *Code*. Its requirements were simply that the force used not be intended, or be likely to cause death or grievous bodily harm.

[93] The failure to direct the jury on the defence under s 271(1) gave rise to a miscarriage of justice, as it was reasonably possible that the absence of such a direction may have affected the jury's verdict on the basis that self-defence was not available, unless Friend's assault was such as to cause reasonable apprehension of death or grievous bodily harm and that the appellant believed on reasonable grounds

that he could preserve himself from death or grievous bodily harm, other than by the force used against Friend. The convictions on counts 3 and 4 should be set aside and a new trial ordered on those counts.

Respondent's submissions

[94] The respondent submits leave ought not to be given to the appellant to adduce further evidence in support of ground 1 of the appeal against conviction as the further evidence contended for by the appellant amounts to no more than an assertion that Crown witnesses were not credible and that a more detailed narrative of the appellant's version of events could have been adduced at trial, if his partner had been called to give evidence. The appellant gave an account to police, which was played at trial. The appellant otherwise had the opportunity to give or call evidence at trial. He declined to do so. There is no evidence the appellant's partner was not able to have been called at trial. The complained of deficiencies in the police investigation were matters which could have been pursued by the appellant at trial. None of the material satisfies the requirements justifying the admission of fresh or new evidence on appeal.

[95] As to ground 1 of the appeal against conviction, the respondent submits it was open to the jury on the whole of the evidence, to convict the appellant of each of the counts on the indictment. The count of wilful damage was supported by the appellant's admissions to police, as well as the evidence of Smith and Patterson. The count of grievous bodily harm occasioned to Rosman, for which the appellant was liable pursuant to s 8 of the *Code*, was supported by the evidence of Smith, Patterson, Friend, Rosman and Stabe, as to what had taken place at that residence. Whilst the appellant denied any intention to harm anybody when he attended Smith's residence in the early hours of 10 January 2016, it was open to the jury having regard to that evidence, in the context of the earlier events, to be satisfied that the appellant and a group of his friends attended Smith's residence when the appellant was armed with a knife and the friends were armed with other weapons, in circumstances where the commission of the offence of grievous bodily harm against Rosman was a probable consequence of the appellant and his group of friends carrying out a common intention to prosecute an unlawful purpose, namely, to assault the occupants of Smith's residence.

[96] The evidence relied upon by the jury in support of the finding of guilty in respect of that count, also rendered it open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of each of Count 3, assault occasioning bodily harm whilst armed in company, and Count 4, grievous bodily harm occasioned to Friend. The jury were properly directed in relation to self-defence pursuant to s 271(2) and s 272 of the *Code*. It was open to the jury to reject the appellant's account of the circumstances in which he produced the knife, and to accept Friend's account of the observation of the knife blade and the subsequent infliction of a stabbing wound to Friend. The jury were favourably directed that there was no dispute that Friend had initiated physical contact with the appellant and thereby unlawfully assaulted the appellant.

[97] It remained open to the jury to conclude that self-defence was not available under s 271(2) on the basis the prosecution had established beyond reasonable doubt that the appellant had given provocation for that assault, or that the nature of Friend's assault was not such as to cause reasonable apprehension of death or grievous bodily harm, or that the appellant did not actually believe on reasonable grounds

that he could not otherwise save himself from death or grievous bodily harm. Similarly, in relation to s 272, the jury could exclude beyond reasonable doubt that Friend's assault was not of such violence as to cause a reasonable apprehension on the part of the appellant, of death or grievous bodily harm, or did not induce the appellant to believe on reasonable grounds that it was necessary for his own preservation to use the force used, or that the force used was more than was reasonably necessary to save the appellant from death or grievous bodily harm.

[98] As to ground 2 of the appeal against conviction, the respondent submits the trial judge was not requested to direct the jury in relation to section 271(1) of the *Code* and properly did not do so, having regard to the evidence as to the circumstances of the infliction of grievous bodily harm on Friend. Alternatively, if it was the responsibility of the trial judge to direct the jury in respect of s 271(1), and as a consequence of the non-direction, the appellant has been deprived of a real chance of acquittal, a miscarriage of justice will have been occasioned, such as to found a setting aside of the guilty verdict on Count 3, and the ordering of a re-trial on that count. That conclusion would not impact upon the jury's verdict in respect of Count 4 on the indictment.

Discussion

Unreasonable Verdicts

[99] Count 1 on the indictment related to damage to the blue vehicle parked in Smith's driveway in the early hours of 9 January 2016. Apart from the evidence of damage by Smith and Friend, the jury had the appellant's admissions to police that he had deliberately dislodged the side mirror from that vehicle. That admission alone supported a finding the appellant was guilty of wilful damage to that motor vehicle. Accordingly, it was open to the jury, on a consideration of the whole of the evidence, to be satisfied beyond reasonable doubt that the appellant was guilty of Count 1. That verdict was not unreasonable.

[100] Count 2 related to the injuries sustained by Rosman in the early hours of 10 January 2016. The unchallenged medical evidence was that Rosman had sustained stabbing injuries in the early hours of 10 January 2016 and that the consequence of those injuries was life threatening in the absence of medical treatment. That evidence was sufficient to satisfy the jury beyond reasonable doubt that Rosman had suffered grievous bodily harm.

[101] Rosman gave evidence of having observed the blade of a knife in the appellant's hand as he emerged from the residence early that morning. Shortly thereafter, Rosman said he was struck by a number of blows and felt significant pain in the chest area. He staggered back inside and observed he was bleeding from the chest area. In addition to that evidence, the appellant's admissions to police included that he was in possession of a small flick knife at the time of the altercation in the early hours of 10 January 2016.

[102] Whilst there was no direct evidence that the appellant had stabbed Rosman, the Crown case was that Rosman's grievous bodily harm was a probable consequence of a common unlawful purpose of the appellant and his friends to assault the occupants of Smith's residence. The appellant's admission, in combination with Rosman's evidence, was sufficient to establish beyond reasonable doubt that the grievous bodily harm inflicted upon Rosman was a probable consequence of a

common unlawful purpose of the applicant and his friends in attending Smith's residence, namely, the unlawful assault of its occupants.

[103] The evidence of Smith, Rosman, Friend and Patterson provided ample basis for the jury to reject the appellant's denials of any such purpose. Once that denial was rejected, their evidence supported a verdict of guilty of Count 2. Having considered the evidence as a whole, it was open to a jury to be satisfied beyond reasonable doubt that the appellant was guilty of Count 2. That verdict was not unreasonable.

[104] Counts 3 and 4 related to the injuries sustained by Friend in the early hours of 10 January 2016. Count 4 pertained to the stabbing injury sustained by Friend in his left shoulder. Friend gave evidence he sustained this injury whilst he was in the midst of an altercation with the appellant. Others came to the appellant's assistance. Friend then felt a hard blow to the left shoulder. He was unaware he had sustained a stabbing injury until he was told by ambulance officers.

[105] The jury heard evidence from a medical practitioner that Friend had sustained multiple injuries including a wound to the left shoulder. That injury, without medical treatment, was likely to result in a permanent impairment, such as to constitute grievous bodily harm. There was further medical evidence that the injury was likely to have been caused by a sharp object, such as a knife. The opinions as to the permanent effect of the injuries and the likely mechanism of the injury, were not the subject of contest at trial. Further, the jury heard medical evidence that Friend sustained other injuries sufficient to constitute bodily harm. Again, that medical evidence was not contested at trial.

[106] The evidence of Smith, Friend and Rosman was supported, to an extent, by the appellant's interview with police. In that interview, the appellant confirmed he and a group of friends attended Smith's residence in the early hours of 10 January 2016. The appellant also confirmed he was carrying a knife and there was a physical altercation between the appellant and his group, and persons inside the residence. Whilst the appellant said he did not recall any of his group being armed with weapons, and that they had attended the residence with the intention not to hurt anyone, it was open to a jury to reject that account having regard to the events leading up to the appellant's attendance at that residence, including text messages from the appellant's friend and the stabbing injuries sustained by Rosman and Friend in the altercation. There was no evidence to suggest any person, other than the appellant, possessed a knife during the incident.

[107] Once the jury rejected the appellant's stated intention, it was open to the jury to also reject the appellant's account that he had produced the knife only in self-defence. Instead, it was open to the jury to accept the evidence of Smith, Rosman, Stabe and Friend, that the appellant and the members of his group had aggressively attacked members of the residence as they emerged from it in the early hours of 10 January 2016. This conclusion was open, notwithstanding Friend's evidence that he had grabbed the appellant.

[108] That evidence must be viewed in the context of Stabe's evidence that the appellant was at the time in a physical altercation with Stabe, and Friend restrained the appellant. The location of the stabbing wounds to Friend were entirely consistent with Friend's account, that after he had grabbed the appellant, the appellant and his group attacked him, in the course of which Friend was hit in the shoulder and chest

by the appellant. Friend subsequently discovered they were stabbing injuries. Significantly, Friend gave evidence that at the time he felt the hard hit to his shoulder from behind, he turned and the appellant was standing behind him.

[109] That account was consistent with the appellant having stabbed Friend with his knife and inconsistent with the appellant's account of the knife being used in self-defence. It was, accordingly, open to the jury to reject the appellant's account of acting in self-defence and to be satisfied beyond reasonable doubt that the prosecution had negatived that Friend's injuries were sustained in self-defence.

[110] Having considered the evidence, it was open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of the appellant's guilt of Counts 3 and 4 on the indictment. Those verdicts were also not unreasonable.

[111] The further evidence sought to be adduced by the appellant does not materially alter the evidence led at trial. It is no more than additional context, consistent with the appellant's account placed before the jury. There is no basis to conclude the admission of that evidence would have altered the jury's obvious rejection of the appellant's account of events that evening, and, in particular, his purpose of attending Smith's residence. In any event, that further evidence is neither fresh nor new. Leave to adduce that evidence should be refused on those grounds.

Misdirection

[112] At trial, directions were only sought in relation to defences pursuant to s 271(2) and s 272 of the *Code*. Those directions were given by the trial judge. There is no suggestion those directions were inadequate in any respect. The appellant's trial counsel did not seek a direction in respect of a defence pursuant to s 271(1) of the *Code*. There were good tactical reasons for that course of action. The appellant's use of a knife rendered it likely grievous bodily harm would be occasioned and as a consequence a defence pursuant to s 271(1) of the *Code* would not be open.

[113] That tactical decision did not relieve the trial judge of the obligation to direct in relation to s 271(1) of the *Code*, if that defence were fairly raised on the evidence.[30] The defence is a separate defence to s 271(2). Both limbs of s 271 may properly arise on the same factual circumstance.[31] In the present case, the Crown properly concedes there was a basis for a jury to conclude, if it accepted the appellant's account, that the appellant had been the subject of an unprovoked assault by Friend. Accordingly, s 271(1) of the *Code* ought properly to have been left to the jury.

[114] The failure to leave this defence to the jury may be a basis to set aside the jury's verdicts on Counts 3 and 4, notwithstanding trial counsel's tactical decision, if it be established that the failure to direct the jury in accordance to s 271(1) of the *Code* constituted a miscarriage of justice, as it deprived the appellant of a fair chance of acquittal.[32]

[115] In the particular circumstances of the present case, the failure of the trial judge to direct the jury, in respect of a defence under s 271(1) of the *Code*, did not deprive the appellant of a fair chance of acquittal on Counts 3 and 4. There was no basis

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30 *BRS v The Queen* (1997) 191 CLR 275.
31 *R v Beetham* [2014] QCA 131 at [19].
32 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 12-13 [37]-[38]; [2003] HCA 40.

upon which the jury, properly instructed, could have concluded that the use of a knife by the appellant, in defence of an unprovoked assault by Friend, was not likely to cause Friend grievous bodily harm. Had the defence been left to the jury, the Crown would have negatived an essential element of the defence, by establishing the appellant's actions in self-defence were likely to cause grievous bodily harm.

[116] As the appellant was not denied a fair chance of acquittal, there has been no miscarriage of justice by reason of the trial judge not directing the jury in accordance with s 271(1) of the *Code*. This ground of appeal also fails.

Sentence

Applicant's submissions

[117] The applicant submits the sentences imposed were manifestly excessive, having regard to the previous threats to the applicant's life and to his family, and the consequences of a conviction, including the loss of custody of his 13 year daughter and the impact on his ability to continue in gainful employment. His incarceration has also placed a massive strain on the family unit and diminished his health.

Respondent's submission

[118] The respondent submits the sentences imposed were not manifestly excessive. The applicant was a mature offender with a past criminal history, including for offences of violence. The applicant had previously been sentenced to terms of imprisonment and had breached court orders in the past.

[119] The applicant was properly to be sentenced on the basis he had caused substantial damage to the blue vehicle and had attended Smith's residence in the early hours of 10 January 2016, whilst armed and with the intention of assaulting its occupants in circumstances where self-defence was properly rejected by the jury and where the victims had ongoing difficulties. The appellant had also attempted to downplay his role to police.

[120] The appellant's own counsel submitted at sentence for a head sentence of between five and six years imprisonment and did not contend that an earlier eligibility date than half of that head sentence ought to be set. Against that background, there would need to be exceptional circumstances to warrant relieving the applicant of responsibility for the conduct of his case at first instance. There are no such circumstances in the present case. Further, the sentence imposed was consistent with comparable authority.

Discussion

[121] The effective head sentence of five years six months imprisonment, with parole eligibility as provided for by the *Penalties and Sentences Act* 1992 (Qld), was in accordance with the effective sentence contended for by the applicant's own counsel on sentence. The applicant has identified no factors justifying a conclusion that there exists exceptional circumstances warranting relieving the applicant from responsibility for the conduct of his case below.[33]

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[33] *R v Compton* [2017] QCA 55 at [28]-[30]; [2017] 2 Qd R 586 at [28]-[30].

[122] In any event, the authorities referred to at sentence[34] and on appeal,[35] amply support a conclusion that an overall effective head sentence of five years, six months imprisonment was not manifestly excessive.

[123] The offences for which the applicant was sentenced, involved the infliction of grievous bodily harm on two separate complainants, as part of a course of conduct in which the applicant attended the residence of a neighbour with a group of friends, armed with weapons, including, in the appellant's case, a knife. The applicant was properly to be sentenced as the aggressor in a vigilante style attack. The injuries sustained by the two victims of the grievous bodily harm offences were significant. One continues to have ongoing reduced function as a consequence of that injury.

[124] These serious offences were committed by a mature aged man, with a lengthy prior criminal history, including for offences of violence. The applicant exhibited no remorse. Indeed, he maintained to police in his interview, that he was the victim.

[125] The consequences of imprisonment to the applicant could not outweigh the need for general and personal deterrence and the imposition of a sentence which indicated the community's denunciation for such vigilante style behaviour and ensured the continuing protection of the public.

[126] The application for leave to appeal against sentence should be refused.

Orders

[127] I would order:

1. Leave to adduce further evidence be refused.
2. The appeal against the conviction be dismissed.
3. Leave to appeal against sentence be refused.

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34 *R v Sargent* [2016] QCA 32; *R v Price* [2006] QCA 180.

35 *R v Johnson* [2012] QCA 141; *R v Coker* [2013] QCA 315; *R v Dancey* [2013] QCA 135.