SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hyatt* [2019] QCA 106
PARTIES:	**R** **v** **HYATT, Martin Leigh** (appellant/applicant)
FILE NO/S:	CA No 200 of 2018 DC No 359 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Rockhampton – Date of Conviction: 19 June 2018; Date of Sentence: 27 June 2018 (Burnett DCJ)
DELIVERED ON:	Date of Orders: 13 May 2019 Date of Publication of Reasons: 31 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2019
JUDGES:	Sofronoff P and Morrison JA and Davis J
ORDERS:	**Date of Orders: 14 May 2019** **1. Appeal allowed.** **2. Conviction quashed.** **3. Sentence set aside.** **4. Order that there be a retrial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – where the appellant was convicted by jury of one count of assault occasioning bodily harm with a circumstance of aggravation – where the alleged offence occurred in prison – where it was alleged in cross-examination that the complainant had fabricated the allegations against the accused with a view to obtaining compensation – where it was alleged that this amounted to an imputation as to the complainant's character – where the learned trial judge intimated that cross-examination of the accused on his prior convictions would be allowed if he gave evidence – whether the learned trial judge erred in exercising the discretion to allow the accused to be cross-examined on his prior convictions if called and the extent to which the prior convictions could be put to the

defendant if he gave evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – where the learned trial judge failed to give a warning to the jury against acting on evidence – whether the trial judge's failure to give a warning caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – GENERAL PRINCIPLES CRIMINAL LAW – where the accused was charged with a circumstance of aggravation namely being armed with a "dangerous instrument" – where the learned trial judge misdirected the jury on the circumstance of aggravation by failing to draw a distinction between a "weapon" and an "instrument" and between the thing being "dangerous" or "offensive" – whether a "shiv" was proved to be a "dangerous instrument"

Criminal Code (Qld), s 1, s 339, s 644, s 668E
Evidence Act 1977 (Qld), s 15, s 18, s 19, s 101

Ali v The Queen (2005) 79 ALJR 662; [2005] HCA 8, cited
Crampton v The Queen (2000) 206 CLR 161; [2000] HCA 60, cited
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 4, cited
Dixon v Seears (1982) 16 NTR 20, cited
JJB v The Queen (2006) 161 A Crim R 187; [2006] NSWCCA 126, cited
Harrison v Thornton (1966) 68 Cr App R 28, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Makin v Attorney General for New South Wales [1894] AC 57; [1893] UKPC 56, cited
Miller v Hrvojevic [1972] VR 305; [1972] VicRp 31, cited
Nudd v The Queen (2006) 80 ALJR 614; [2006] HCA 9, cited
P v The Queen (1993) 61 SASR 75, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
Phillips v The Queen (1985) 159 CLR 45; [1985] HCA 79, cited
Pollitt v The Queen (1992) 174 CLR 558; [1992] HCA 35, cited
R v Bauer (2018) 92 ALJR 846; [2018] HCA 40, cited
R v Collins [2018] 1 Qd R 364; [2017] QCA 113, cited
R v Day (2005) 115 A Crim R 80; [2000] QCA 313, cited
R v Glennon (No 2) (2001) 7 VR 631; [2001] VSCA 17, cited
R v SCA [2002] 2 Qd R 70; [2001] QCA 199, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited
Smaje v Balmer [1965] 2 All ER 248, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
R v Standley (1996) 90 A Crim R 67, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56, cited

COUNSEL: The appellant/applicant appeared on his own behalf
D Balic for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Davis J.

[2] **MORRISON JA:** I have read the reasons of Davis J and agree with those reasons.

[3] **DAVIS J:** On 19 June 2018 the appellant was convicted by a jury in the District Court sitting in Rockhampton of one count of assault occasioning bodily harm with a circumstance of aggravation. The count was in these terms:

> "[T]hat on the fifth day of October, 2013 at Etna Creek in the State of Queensland, MARTIN LEIGH HYATT unlawfully assaulted CLINTON DAVID WILLIAMS and did him bodily harm.
>
> And MARTIN LEIGH HYATT was armed with a dangerous instrument."

[4] On 27 June 2018 the appellant was sentenced to imprisonment for a period of three years and three months. A period of 217 days, during which the appellant was held in pre-sentence custody (between 22 November 2017 and 26 June 2018), was declared as time served on the sentence. The appellant was ordered to be eligible for parole on 21 May 2019.

[5] When the appellant was sentenced on the count on the indictment he was also sentenced in relation to four charges which had been transferred from the Magistrates Court.[1] They were two charges of stealing,[2] one charge of driving a motor vehicle without a licence and while disqualified,[3] and one charge of unlawful use of a motor vehicle.[4] On each of those charges he was convicted, a conviction was recorded and he was not further punished, except in relation to the disqualified driving charge where he was disqualified from holding or obtaining a drivers licence for a period of five years.[5]

[6] The appellant appealed his conviction on the count on the indictment and seeks leave to appeal against the sentence imposed on that count. No complaint was raised concerning the summary offences.

[7] On 13 May 2019 I joined in the making of the following orders:

(i) appeal allowed;

---

1 Pursuant to the *Criminal Code*, s 651.

2 *Criminal Code*, s 398.

3 *Transport Operations (Road Use Management) Act* 1995 (Qld) (*TORUM*) s 78.

4 *Criminal Code*, s 408A.

5 The *TORUM* mandated disqualification.

(ii) conviction quashed;

(iii) sentence set aside;

(iv) order that there be a retrial.

[8] I joined in the orders for the reasons which follow.

The course of the trial and the evidence

[9] On 5 October 2013 both the appellant and the complainant, Mr Williams, were inmates in the Capricornia Correctional Centre at Etna Creek near Rockhampton. The offence was alleged to have been committed within the prison.

[10] Mr Williams gave evidence that he had heard through the prison grapevine that the appellant had some issue with him. He approached the appellant and had a discussion with him in a laneway near the residential unit in the prison. At that point another prisoner, Ben Carey, was present.[6]

[11] Mr Williams explained that during that conversation the appellant told Mr Williams that he, Mr Williams, owed a person known as Mick Rogers $15,000.00 and that the money had to be repaid. The appellant also said that when Mr Williams and a woman named Chantelle Barnett were co-habiting (it seems in 2010 or 2011)[7] Mr Williams assaulted her. Mr Williams gave evidence that he denied to the appellant that he had assaulted Ms Barnett. It was put to Mr Williams by defence counsel that the appellant had been in a sexual relationship with Ms Barnett between 2009 and 2012. Mr Williams denied knowledge of that[8] and the appellant gave no evidence to support the suggestion.

[12] Mr Williams said that he suggested to the appellant that the conversation be continued on the prison oval. The appellant agreed but said that he needed to firstly return to the residential unit and change his clothes. The three men then separated.

[13] Shortly thereafter, according to Mr Williams, he met up with the appellant and Mr Carey at the oval. Mr Williams and the appellant walked around the oval conversing while Mr Carey remained at the entrance to the oval.

[14] Mr Williams gave evidence that the pair discussed the debt to Mr Rogers and how it would be repaid. Then the conversation turned to Chantelle Barnett. When the appellant repeated his earlier accusation that Mr Williams had assaulted Ms Barnett, Mr Williams again denied wrongdoing towards her. This, according to Mr Williams, led to the appellant inviting him to fight. Mr Williams then turned around, fearing that someone was approaching him from behind. As he looked back he was struck a blow to the head and he fell to his knees. When he turned back to face the appellant he saw that the appellant had

---

6 Appeal Record Book (ARB) 78-79.

7 ARB 86.

8 ARB 87.

"a steel metal thing" in his fist and the object had a sock wrapped around it.[9] The appellant attempted to strike Mr Williams but he walked away and sought medical assistance.

[15] There is no doubt that Mr Williams was involved in some incident in the prison on 5 October 2013 and was injured. He was hospitalised and the nature of the injuries was admitted in these terms:

> "There was 5 cm v-shaped mildly deep laceration around the left back region of his skull, with blood shooting from the wound, which turned out to be an arterial bleed. CT scans showed the complainant had the following:
>
> (a) a depressed ("pushed in") fracture with a small subdural haematoma ("bleeding inside the skull");
>
> (b) bruising over the areas of impact; and
>
> (c) an excess of fluid gathering inside the skull."[10]

[16] Of course those injuries constitute "bodily harm".[11]

[17] Mr Williams was cross-examined on various topics and:

(i) he accepted that when he reported his injuries to prison authorities he said that he fell over on the oval and that is how the injuries were sustained;[12]

(ii) he accepted that he first provided a statement to police on 9 October 2014, a little over twelve months after he was injured;[13]

(iii) he also accepted that he had signed a withdrawal of the complaint concerning the incident;[14]

(iv) he also accepted that he had received advice from a solicitor to sue the managers of the Capricornia Correctional Centre for damages for the injuries he sustained.[15]

[18] In the finale to the cross-examination counsel put to Mr Williams:

---

9 ARB 80.

10 ARB 166.

11 *Criminal Code*, s 1.

12 ARB 89.

13 ARB 88.

14 ARB 90.

15 ARB 92.

> "Isn't it the case, sir, that you're merely trying to implicate my client so that you can achieve some form of criminal compensation? ... No, it's got nothing to do with it."[16]

[19] After a short re-examination of Mr Williams, the jury were sent from the Court and the Crown prosecutor informed the trial judge as follows:

> "PROSECUTOR: --- pursuit of a payout, amounts to an imputation under section 15 of the Evidence Act as to the complainant's credibility, and although he has – the defendant obviously is a little distance from having to elect whether or not to give evidence, your Honour would have been conscious of the fact that my learned friend did not cross-examine the complainant on what might otherwise be quite fertile ground, that is to say, his criminal record. That was done expressly on the basis of avoiding putting – or putting credibility in issue of the credit of the complainant in issue.
>
> So, in one sense, it's – what is being sought of your Honour is an advisory ruling or an intimation, I suppose, whether or not, based on what your Honour knows presently – because, of course, the cross-examination's at an end – whether or not that is sufficient to amount to an imputation as to credit of the complainant, which Mr Ahlstrand and I agree is the only real issue under this topic, and if your Honour intimates that the court's view is that it is sufficient to amount to an imputation as to the complainant's credibility, then there'll be an application, which is unopposed, for the complainant to be recalled for the purpose of stepping through his criminal history with him. I've confirmed with the guards that he is here until Wednesday."[17]

[20] As can be seen, the Crown prosecutor referred to s 15 of the *Evidence Act* 1977. That section is in these terms:

> "**15 Questioning a person charged in a criminal proceeding**
>
> (1) Where in a criminal proceeding a person charged gives evidence, the person shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged.
>
> (2) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character, unless—

---

16 ARB 91 lines 15-20.

17 ARB 94.

(a) the question is directed to showing a matter of which the proof is admissible evidence to show that the person is guilty of the offence with which the person is there charged;

(b) the question is directed to showing a matter of which the proof is admissible evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged;

(c) the person has personally or by counsel asked questions of any witness with a view to establishing the person's own good character, or has given evidence of the person's good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceeding;

(d) the person has given evidence against any other person charged in that criminal proceeding.

(3) A question of a kind mentioned in subsection (2)(a), (b) or (c) may be asked only with the court's permission.

(4) If the proceeding is a trial by jury, an application for the court's permission under subsection (3) must be made in the absence of the jury."

[21] At this point defence counsel had not cross-examined Mr Williams on his prior criminal convictions but he had suggested that Mr Williams had fabricated the allegations against the appellant to support a fraudulent claim for monetary compensation. His Honour was being invited to give an indication as to whether the precondition in subsection 15(2)(c) had been fulfilled, namely, whether the cross-examination had raised imputations on the character of Mr Williams. It seems to have been defence counsel's intention that if his Honour's intimation was that no imputation had been raised, then there would be no further cross-examination of Mr Williams. Defence counsel probably thought (erroneously) that if there had been no imputation arising from the cross-examination then there was no danger of the appellant being cross-examined on his prior convictions if he gave evidence. On the other hand, if the judge said that the pre-condition in subsection 15(2)(c) had been satisfied, then the prosecutor would recall Mr Williams so that he could be cross-examined by defence counsel on his prior criminal history.

[22] The logic seemed to be that if the condition in subsection 15(2)(c) was satisfied, then he would be cross-examined on his prior convictions if he elected to give evidence. Therefore, if the intimation was to that effect, a tactical decision would be made not to call the appellant. There would then be nothing for the appellant to lose by his counsel cross-examining Mr Williams on his criminal history.

[23] For reasons which later appear, this was an ill-conceived plan.

[24] His Honour accepted the invitation, heard argument and then told the parties this:

> "HIS HONOUR: Well, you've [indistinct] cross-examination have put the matter in plain contest. This [indistinct] more than just putting a case. It was cross-examination which, on my view of it, was designed to put his credit clearly in issue beyond merely the – a credit related to his assessment or his evidence as to the case.
>
> So at the end of the day, the jury can either accept or reject matters that are put to him in respect of what your client says happened, as opposed to what he says happened, and it's just a – it's a standard matter for the jury to work out themselves, but you've gone that step further by putting a motive to lie, and that's what I think, the section's directed to addressing, in part. You've put his credit fairly and squarely in the line of fire, and so I think it is an imputation which invites the response the Crown propose. So I'm going to accede – well, I'll ultimately – I'll allow [the prosecutor] to take up with the witness his previous history, if he chooses to do so."[18]

[25] Defence counsel then made an application to recall Mr Williams for further cross-examination. This application was not opposed by the Crown. Defence counsel put to Mr Williams a string of convictions which mainly involved offences of dishonesty and drug offences but included a conviction for robbery with actual violence.[19] That conviction occurred in Rockhampton on 16 September 2014,[20] after the events the subject of the present charge against the appellant.

[26] Philip John Story is a Corrective Services officer. He was called by the Crown and gave evidence that closed circuit television cameras are positioned in various parts of the prison but the recordings are not automatically preserved.[21] No footage of any relevant incident was tendered in evidence. In cross-examination defence counsel established that there are cameras in the vicinity of the oval.[22]

[27] The last witness proposed to be called by the Crown was Detective Steven Peake, a police officer who had investigated the incident. He was called, gave evidence, and in cross-examination defence counsel established that Detective Peake began to investigate the incident on 5 October 2013 but shortly thereafter Mr Williams withdrew his complaint. Then counsel identified an incident report dated 5 October 2013 which formed part of Corrective Services records. This cross-examination proceeded:

> "Well, so this incident report – I don't know if it'll refresh your memory if I read some passages from it. Just tell me if you remember reading this. This is, as I said, incident 128163 on the 5th of October 2013. It is said there:

---

18 ARB 96.

19 ARB 98-104.

20 Or perhaps 6 September 2014, the record is not clear.

21 ARB 106.

22 ARB 107.

> 'After further questioning, prisoner Williams stated he was hit in the back of the head with a sharp object, believed to be a rock in a sock.'
>
> Do you recall reading ---? --- Yeah, I do recall that."[23]

[28] The Crown prosecutor objected to further cross-examination on the incident report. This exchange occurred:

> "PROSECUTOR: Your Honour, my – the issue I wanted to raise was this: firstly, it's not the proper way, I say, to elicit the evidence that is being elicited not by asking this witness about a document that is not his.
>
> HIS HONOUR: No.
>
> MR PHILLIPS: There is, I would say the groundwork already laid. If I took the view that the tender of that out of court document was otherwise justified, I don't – I'm not asking my learned friend to tender the document now but my complaint is about announcing its contents to the jury. And secondly, what has come out of the out of court document, which appears to relate an account given by the complainant about is being a rock in a sock, could only legitimately be to identify an inconsistency with the complainant and if that's its purpose and its design, that's a matter that really ought to have been raised with the complainant when he was in the witness box so that he might accept and perhaps explain or refuse it."[24]

[29] Defence counsel was attempting to prove that Mr Williams had made a prior statement that was inconsistent with his evidence that the appellant was holding a metal object at the time of the assault, because the incident report records Mr Williams as saying that he was hit with a rock in a sock.

[30] Proof of the inconsistent statement could theoretically be relied upon in one of two ways. Firstly, it could be relied upon simply to attack the credit of Mr Williams.[25] Secondly, and highly unlikely in this case, defence counsel could prove the prior inconsistent statement and have that statement admitted as proof of the facts stated.[26] The appropriate procedure to adopt where the second purpose is sought to be achieved was explained by Burns J in *R v Collins*.[27] In either case the starting point was to put the prior inconsistent statement to Mr Williams.

[31] Defence counsel then informed the trial judge that he wished to put to Detective Peake a further statement within the incident report namely:

---

23 ARB 112.

24 ARB 112.

25 *Evidence Act* 1977 (Qld) s 19.

26 *Evidence Act* 1977 (Qld) ss 18 and 101.

27 [2018] 1 Qd R 364, reversed on appeal on other grounds in *Collins v The Queen* (2018) 92 ALJR 517.

> "DEFENCE COUNSEL: There are other matters that I was intending to put to this witness with respect to what is particularised in that incident report, your Honour, as well:
>
> > 'Prisoners Hooper, Glen; and Hyatt, Martin were brought to supervisor's office and interviewed by Correctional Service – Corrections Supervisor Smithwick about the incident.'"[28]

[32] This raised other issues. The mere fact that prisoners were interviewed by Corrections Supervisor Smithwick was unlikely to take the matter far without some explanation of the underlying reasons why that occurred. Detective Peake was unlikely to know much about an investigation conducted by Corrective Services. Mr Williams may have no knowledge of which prisoners were interviewed or why they were interviewed. An adjournment was granted so that the parties could consider their respective positions.

[33] The next day Mr Williams was recalled for further cross-examination. The totality of that further cross-examination was as follows:

> "DEFENCE COUNSEL: Yes. Thank you, your Honour.
>
> Mr Williams, Just a few additional quick questions for you. Do you know a man by the name of Mr Glen Hooper? --- Yeah, I do.
>
> Do you accept, sir, that he was an inmate at the time of your assault on the 5th of October 2013, an inmate at the Capricornia Correctional Centre? --- No, he wasn't.
>
> Pardon me? --- What was – what was the question?
>
> Do you accept – so you know a Mr Glen Hooper. Do you accept ---? --- I know Glen Hooper, yeah.
>
> Yep. Do you accept that Mr Hooper was also an inmate at the Capricornia Correctional Centre at the time you were assaulted on the 5th of October 2013? --- Yes, he was.
>
> Thank you. Is it possible that Mr Glen Hooper assaulted you, sir? --- No.
>
> Sir, one final question, did you ever tell a Corrective Services officer that a rock was placed in the sock that was used to strike you? --- Yes.
>
> Thank you. Okay. No further questions. Thank you."[29]

[34] It is easy to imagine further lines of cross-examination which were not pursued. Presumably there were tactical reasons why these lines were not followed.

[35] The Crown prosecutor then made an admission in these terms:

> "… that at 9 am on the 6th of October 2013, so the day following the assault, a full lockdown search of all residential units and surrounding areas was conducted. No items were found. The second further

---

28 ARB 114.

29 ARB 128.

admission is that on an unknown time on the 5th of October 2013 the defendant and another prisoner called Glen Hooper were escorted to the supervisor's office and interviewed about the incident."[30]

[36] The Crown prosecutor closed his case, and the appellant elected not to give or call evidence. Both counsel then addressed the jury. His Honour heard argument on an application by the Crown prosecutor arising from defence counsel's address but it is unnecessary to consider that. In due course his Honour summed up the case to the jury who then convicted the appellant.

The grounds of appeal

[37] The appellant represented himself on the appeal. The grounds appearing in the notice of appeal are:

(a) that the presiding judge erred in law to allow evidence of criminal history;

(b) that the sentence was manifestly excessive.

[38] Ground (a) relates closely enough to the trial judge's intimation concerning s 15 of the *Evidence Act* and ground (b) only concerns sentence.

[39] A detailed written submission was filed by the appellant which raised two complaints:

(i) his counsel incompetently conducted his defence;

(ii) there was no basis upon which the jury could have convicted him.

[40] No point concerning s 15 of the *Evidence Act* was made in the written submission.

[41] During the hearing of the appeal the Court raised various issues with the respondent. These included:

(i) the learned trial judge giving the intimation concerning s 15 of the *Evidence Act* and the content of that intimation;

(ii) the failure of the judge to give any warning concerning the evidence of Mr Williams;

(iii) an apparent misdirection in relation to the circumstance of aggravation.

[42] Once raised, these matters were the subject of submissions by Ms Balic who appeared on the appeal. While obviously taken by surprise by these issues, Ms Balic handled them comprehensively and helpfully.

"Incompetence of counsel"

[43] There were some steps taken by defence counsel which might raise concern: the approach to the s 15 issue; the cross-examination of Detective Peake about the Corrective Services records; and the limited cross-examination of Mr Williams when he was recalled for the second time. However, counsel's discretion in the conduct of a defence to a criminal

---

30 ARB 129; *Criminal Code* s 644(2).

charge is a broad one. There are often factors driving counsel's tactical decisions which will not be apparent to either the trial court or an appeal court.

[44] An appeal based on defence counsel's conduct of the trial will only succeed where, taking into account the wide discretion already identified, a miscarriage has resulted.[31]

[45] There is nothing in the case from which it could be concluded that defence counsel's conduct of the appellant's defence has resulted in a miscarriage of justice.

[46] This ground should be dismissed.

No basis upon which the jury could have convicted the appellant

[47] This raises the principles explained by the High Court in *M v The Queen*[32] that when a ground of appeal is raised that the verdict is unreasonable,[33] the function of an intermediate court of appeal is to review the whole of the evidence and independently assess whether it was open to the jury to conclude guilt of an appellant beyond reasonable doubt.[34]

[48] The jury could not convict the appellant without accepting the evidence of Mr Williams beyond reasonable doubt on critical issues. There were reasons to doubt him.[35] However his version was to a point corroborated; he was injured for instance. The only real issue in the case[36] was whether the assailant was the appellant. There was no evidence which was capable of corroborating Mr Williams' identification of the appellant as the offender.

[49] However, there was nothing which suggested that it was not open to a properly directed jury to conclude beyond reasonable doubt that the appellant assaulted Mr Williams. The appellant, during argument, candidly and correctly conceded that this was so.[37]

[50] This second ground of appeal is not made out.

The giving of the intimation under s 15 of the Evidence Act

[51] It is subsection 15(2) which is the relevant subsection. That subsection contains a prohibition against cross-examination of an accused on his prior convictions. Prior convictions are of course generally irrelevant to prove a criminal charge. This principle

---

31 *TKWJ v The Queen* (2002) 212 CLR 124, *Ali v The Queen* (2005) 79 ALJR 662 and *Nudd v The Queen* (2006) 80 ALJR 614 at [9].

32 (1994) 181 CLR 487 and see also *MFA v The Queen* (2002) 213 CLR 606 and *SKA v The Queen* (2011) 243 CLR 400.

33 *Criminal Code* s 668E(1).

34 *SKA* at [14].

35 These are considered when considering the failure of the trial judge to give a warning.

36 Apart from the circumstance of aggravation: discussed later.

37 Transcript of the appeal 1-27.

was part of the common law even before *Makin v Attorney General for New South Wales*.[38]

[52] An accused may be cross-examined on prior criminal history with the court's leave,[39] but only where one of the conditions in subsections 15(2)(a), (b) or (c) are established. Here the Crown relied on subsection 15(c). Therefore, before the Crown prosecutor could cross-examine the appellant on his prior criminal history, the Crown was required to make out the condition in subsection 15(2)(c) and then obtain a favourable exercise of discretion under subsection 15(3) to permit the cross-examination.

[53] The learned trial judge was asked by both counsel to express a view on the first point; whether the cross-examination of Mr Williams had impugned his character. His Honour was not asked to decide or intimate how the discretion would be exercised if it did arise.

[54] There were dangers with the trial judge accepting the invitation of counsel to indicate whether the cross-examination of Mr Williams enlivened the discretion.[40] Any intimation given was unlikely to be of any real assistance in this case. If his Honour formed and expressed the view that the cross-examination had impugned the character of Mr Williams then it did not follow that the Crown prosecutor would be allowed to cross-examine the appellant on his prior convictions. That was a matter of discretion which could not possibly be exercised before the appellant had given his evidence. Even if that discretion was exercised against the appellant then other issues arose. Should cross-examination be allowed on all prior convictions? Should the cross-examination be limited?[41]

[55] If his Honour held that the cross-examination had not impugned Mr Williams' credit then defence counsel could not safely assume that if the appellant gave evidence no application under s 15 would be made. That is because the appellant might when giving evidence impugn Mr Williams' character. Surely the Crown prosecutor in this case did not agree with defence counsel that if his Honour intimated that subsection 15(c) was not satisfied by the cross-examination then no application under s 15 would be made even if the appellant impugned Mr Williams' character when giving evidence.

[56] The learned trial judge heard argument on whether subsection 15(2)(c) had been engaged and whether the discretion had arisen, but did not hear argument as to how the discretion ought to be exercised. However, his Honour seems to have ruled that the discretion should be exercised in favour of the Crown: "I'll allow [the prosecutor] to take up with the witness his prior history if he chooses to do so."[42]

[57] Neither counsel upon hearing the intimation:

---

38 [1894] AC 57 at 65, *Phillips v The Queen* (1985) 159 CLR 45 at 57.

39 *Evidence Act* 1977 (Qld) s 15(3).

40 Sometimes it may be appropriate for an intimation to be given; see *R v Robinson* (2000) 111 A Crim R 388 at [40]–[41].

41 *P v The Queen* (1993) 61 SASR 75 and *R v Day* (2005) 115 A Crim R 80.

42 ARB 96.

(i) told the judge that he was not being invited to exercise the discretion at that point;[43]

(ii) directed submissions to the exercise of discretion; or

(iii) assisted his Honour with reference to authorities which bear on the question of the exercise of the discretion.

[58] Even if the discretion was enlivened by the cross-examination, serious questions arose in this case as to whether, if the appellant gave evidence, the discretion ought to be exercised in favour of allowing him to be cross-examined on his prior convictions. Further, the appellant's criminal history is very serious and long. It seemed to be assumed that if the discretion was exercised against the appellant then the only possible result was that the Crown prosecutor would be given leave to cross-examine the appellant on all his prior convictions. That should not have been assumed.[44]

[59] Section 15 was considered by the High Court in *Phillips v The Queen*[45] and the principles which emerged from that case were summarised by Thomas JA in *R v SCA*,[46] where his Honour said, of those principles:

> "[4] The principles are not in doubt, but their application to particular cases is by no means easy. For convenience, whilst not purporting to present a comprehensive summary, I shall commence by identifying the main criteria that emerge in *Phillips* as relevant to the exercise of the discretion. Although identifying the discretion as an entirely unfettered one, the judgment of Mason, Wilson, Brennan and Dawson JJ identifies the first four of the following considerations as a "valuable guide", and the fifth as a consideration "to be weighed in the scales when considering the exercise of the discretion".
>
> 1. The legislation is not intended to make the introduction of an accused's previous convictions other than exceptional;
>
> 2. The prejudicial effect on the defence of questions relating to the accused's criminal record needs to be weighed against such damage as the trial judge might think had been done to the Crown case by the imputations;
>
> 3. On the issue of credibility it might be unfair to the Crown to leave the Crown witnesses under an imputation while preventing the Crown from bringing out the accused's record;

---

43 Obviously it had not even arisen.

44 *P v The Queen* (1993) 61 SASR 75 and *R v Day* (2005) 115 A Crim R 80.

45 (1985) 159 CLR 45.

46 [2002] 2 Qd R 70.

4. The actual prejudicial effect of the cross-examination, if allowed, might far exceed its legitimate evidentiary effect upon credit;

5. The fact that an accused, in making imputations against the prosecution witnesses, is not doing anything more than presenting his defence, should tend against allowing cross-examination as to previous convictions. But if the accused makes quite gratuitous imputations that are not necessarily involved in the proper conduct of the defence, the court will be more ready to exercise its discretion in favour of the Crown.

[5] Extrapolations of each of those particular considerations can be found in other parts of the judgment. On a more general level the judgment also includes the following statement:

> 'It is right to stress the exceptional character of a case in which the credibility of an accused person is open to be attacked by reference to his bad character or previous convictions and it is undoubtedly right that the discretion of a trial judge to permit such an attack be sparingly and cautiously exercised.'

[6] The court also emphasised that 'the essential thing is a fair trial'."[47]

[60] When the discretion arises because of an imputation against the character of a Crown witness, cross-examination is allowed in order to redress any imbalance which would exist if the Crown witness' prior convictions were exposed to the jury but the accused's were not, thus enabling him to present himself as conviction free and thereby of superior character to the witness. Here the alleged offence occurred in prison while both the appellant and Mr Williams were inmates. Apart from a possibility that the appellant was being held on remand, the jury would necessarily know that the appellant is a person who has been convicted of criminal offences. In those circumstances it may be completely unnecessary to allow cross-examination of the appellant on his prior convictions. It might, alternatively, be necessary only to allow cross-examination to the extent of establishing that the appellant was not a prisoner held on remand. It might be necessary to allow more extensive cross-examination. None of this was considered by the learned trial judge. His Honour was not asked to consider such matters.

[61] It could hardly be thought necessary to cross-examine the appellant on his complete criminal history which includes some serious acts of violence. Cross-examination on those convictions would inevitably invite propensity reasoning[48] by the jury and a danger that a direction as to the limited use to which the cross-examination could be put may not be fully appreciated and followed.

---

47 At [4] – [6] references omitted, followed in various cases including *R v Johnston* [2013] QCA 257 at [20].

48 *Pfennig v The Queen* (1995) 182 CLR 461; *HML v The Queen* (2008) 235 CLR 334; *R v Bauer* (2018) ALJR 846.

[62] None of these issues were raised before his Honour and it is evident that none were considered by him. The appellant, before the Crown case closed, was in a position in which the judge had wrongly foreshadowed that he would allow the Crown prosecutor to cross-examine at large on the entirety of his criminal history. He was not then in a proper position to make a free election to give or not give evidence. He could not but have been intimidated in his decision whether to give evidence by the judge's mistaken prophecy.

[63] Undoubtedly, his Honour acceded to this course in the belief this his intimation would benefit the accused. Unfortunately, the intimation made by his Honour that cross-examination would be allowed of the appellant on his criminal convictions, apparently without limit, rendered the trial unfair.

Absence of warning

[64] There was no evidence that identified the appellant as the assailant apart from the evidence of Mr Williams. As to Mr Williams' evidence:

(i) he was at the time of the offence and at the time of the appellant's trial a prisoner serving a sentence;

(ii) he had a lengthy criminal history including convictions for fraud[49] and other offences of dishonesty;

(iii) he told authorities that the injuries which he now says were caused by the appellant's assault were caused by a fall. Even though Mr Williams sought to explain his prior statement as one made from fear, the fact remains that was a deliberate falsehood;

(iv) Mr Williams withdrew his complaint and then later remade it;

(v) Mr Williams did not nominate the appellant as the person who attacked him for over a year after the incident;

(vi) no complaint nominating the appellant was made until after the prospect of a legal claim for compensation arose;

(vii) there was what might be thought to be a significant inconsistency between his evidence at trial that he was stabbed with a metal object and his prior statement that he was struck with a rock in a sock.

[65] All these matters were pointed out to the jury by defence counsel. However, a warning must be given to the jury against acting on evidence where a warning is necessary "to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case".[50] If those circumstances arise it is not sufficient for the judge to simply remind the jury of counsel's arguments. The warning must be given by the judge with the authority of the court.[51] The warning must identify the features of the evidence which warrant the

---

49 ARB 103.

50 *Longman v The Queen* (1989) 168 CLR 79 at 86 and *Robinson v The Queen* (1999) 197 CLR 162 at [20].

51 *JJB v The Queen* (2006) 161 A Crim R 187 at 195.

warning and must explain the reasons for it and why it is necessary to scrutinise the evidence of the particular witness with great care.[52]

[66] Here, a warning was clearly called for. Mr Williams had a criminal past and as both he and the appellant were in prison together at the same time, fabrication implicating the appellant was difficult to disprove.[53] Added to that were the circumstances of the delay in making the complaint, the fact that he intended to pursue compensation (that seemed to have triggered the complaint) and the prior inconsistent statement in relation to the weapon allegedly used.

[67] Not only was no warning given, but the learned trial judge said things which may have encouraged the jury to accept Mr Williams' evidence, namely:

(i) as to Mr Williams' evidence "… you also have a duty to be fair to him and the fact that he is a prisoner must be put to one side";[54]

(ii) the explanation given by Mr Williams for the delay in naming the appellant as his assailant (fear of reprisal) was described by his Honour as "quite reasonable".

[68] Therefore, rather than warning the jury of the dangers of accepting Mr Williams' evidence, the judge lent his authority to the evidence.

[69] No warning was sought by defence counsel. Therefore the trial judge's failure to give a warning will only lead to a re-trial where the appellant establishes that the failure to give the warning caused a miscarriage of justice.[55]

[70] Here, the Crown case depended totally upon the evidence of Mr Williams. The failure to give a warning in appropriate terms was a significant deficit in the trial process. The trial miscarried.

The misdirection as to the circumstance of aggravation

[71] The count on the indictment charges an offence against s 339 of the *Criminal Code*. That section is, relevantly here, as follows:

> "**339 Assaults occasioning bodily harm**
>
> (1) Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime, and is liable to imprisonment for 7 years.[56]
>
> (3) If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument or

---

52 *Crampton v The Queen* (2000) 206 CLR 161 at [142] and [143], *R v Glennon (No 2)* (2001) 7 VR 631 at [91] and *Tully v The Queen* (2006) 230 CLR 234 at [181]-[182].

53 *Pollitt v The Queen* (1992) 174 CLR 558.

54 ARB 39.

55 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38] and [49].

56 Subsection (2) has been repealed.

> is in company with 1 or more other person or persons, the offender is liable to imprisonment for 10 years…"

[72] Subsection 339(3) provides the circumstance of aggravation. That will be proved where an offender is either "armed" or "pretends to be armed" with any of the following:

(i) a dangerous weapon;

(ii) a dangerous instrument;

(iii) an offensive weapon; or

(iv) an offensive instrument.

[73] The indictment charged only one of these four; namely, that the appellant was armed with a "dangerous instrument".

[74] There is a legal distinction between a "weapon" and an "instrument" and a legal distinction between the adjectives "dangerous" and "offensive".[57] This was apparently not appreciated by the learned trial judge. His Honour directed the jury on the circumstance of aggravation in these terms:

> "Then finally, of course, you then have the circumstance of aggravation, namely, the defendant was armed with a dangerous or offensive weapon or instrument. Now, you have his evidence-in-chief that he saw a steel metal thing in his fist and it had a sock wrapped around it, and you might – if you accept that piece of evidence you might distil from that piece of evidence the fact that the defendant had in his possession a metal shiv. If you conclude that he had a shiv, well, then you would be satisfied of that circumstance of aggravation.
>
> So that is the process. Now, let me emphasise I have just taken you to part of the evidence. You need to consider all the evidence. You heard all the arguments. Obviously the Defence raised different arguments about some of the issues that are alive here, for instance, whether there was a rock or a shiv. They are all matters for you to consider, but that is the process you adopt. You make a finding of fact, you see whether the fact addresses one of the elements and if it does then you are able then to progress on to determine one by one whether the Crown has determined its case beyond reasonable doubt."[58] (emphasis added)

[75] The learned trial judge invited the jury to find the circumstance of aggravation if they found any of the four alternatives prescribed by subsection 339(3) even though three of those alternatives had not been charged.

---

57 *R v Standley* (1996) 90 A Crim R 67.

58 ARB 45.

[76] It is unnecessary to consider whether a rock is a "dangerous instrument"[59] as the judge only left for the jury's consideration the question of whether the appellant was in possession of a "shiv".[60] However, questions arise as to whether the "shiv" which was really described as nothing more than a piece of metal was proved to be a "dangerous instrument".

[77] The only evidence capable of identifying the instrument came from Mr Williams. In evidence in chief he said this:

> "Just bear with me a moment. So you didn't see how you were struck? --- No, not – not the initial first one, no.
>
> Did you – well, what happened after the initial first one? --- He tried to go – go me again, but ---
>
> What do you mean? --- He tried to get me again with his fist with – with the thing in his fist.
>
> What did he have in his fist? --- It was a steel metal thing in his fist and it had like a sock wrapped around it, but he was holding onto it."[61]

[78] Mr Williams on several occasions said that he had been "stabbed" and the injuries sustained by him might suggest that he was attacked with something sharp.

[79] When the Crown prosecutor opened the case late on the afternoon of 18 June 2018 he introduced the notion of a "shiv". He said:

> "The defendant kept looking behind the complainant as if to suggest to him that he was about to be attacked from behind, and as Mr Williams turned to see what it was the defendant was looking at, he was, in fact struck to the back of his head by the defendant using a shiv of a makeshift weapon of a metallic nature. So he struck the complainant to the top of his head, and that fractured his skull. So that's the case in broad terms."[62]

[80] The only mention of a "shiv" during the evidence was during the cross-examination of Mr Story. This cross-examination occurred as follows:

> "And, Mr Story, you don't know if any shiv or metal-like implement was found in my client's prison cell? --- No.
>
> Do you know if any search of his prison cell occurred, sir? --- I – I'm not aware of any."[63]

---

59 It probably is if the possession is coupled with an intent to cause injury with it; see *Harrison v Thornton* (1966) 68 Cr App R 28 at 31.

60 Although his Honour reminded the jury of the Crown prosecutor's suggestion that the instrument may have been a rock – ARB 45.

61 ARB 80.

62 ARB 14.

63 ARB 108.

[81] In his closing address the Crown prosecutor said this:

> "Also no contest, it's common ground, that the assailant was armed with something, whatever it might have been. A shiv is the word that I think I used at the start of the case yesterday, and you heard mentioned yesterday afternoon and this morning of a rock and a sock. Although, there's an explanation for you from Mr Williams about that. It probably doesn't matter to you, I'd suggest, what it was, what implement he was assaulted with because there's no contest that he was assaulted, assaulted seriously, and assaulted with an instrument that was offensive."[64]

[82] A "shiv" is no doubt a "weapon" if the shiv is understood to be a homemade blade. It is then something that is in common use for no purpose other than as a weapon.[65] However, although the term "instrument" is wider than "weapon", if the thing is not offensive per se then an accused is "armed" with an "offensive instrument" if there is evidence from which an intention to use it for the purpose of causing injury can be inferred.[66]

[83] There was evidence from which such an intention might have been inferred. However,

(i) the issue left to the jury was not in accordance with the terms of the indictment which only charges possession of a "dangerous instrument";

(ii) the jury were given no directions as to the distinction between an instrument which is offensive per se and an instrument which is only offensive if possessed with the relevant intention;

(iii) the jury were not directed as to the necessity to find any necessary intention;

(iv) the jury were not given any direction at all as to whether and how a rock in a sock may be found to be an offensive instrument notwithstanding that the prosecutor clearly invited them to do so.

[84] I draw no final conclusions as to the effect upon the verdict of these issues, but on a retrial these issues ought to be considered.

Conclusions

[85] The failure to give an appropriate warning in relation to the evidence of Mr Williams, and the comments made by the judge after considering the application of s 15 of the *Evidence Act* have caused the trial to miscarry. For those reasons it was necessary to quash the

---

64 ARB 16.

65 *R v Standley* (1996) 90 A Crim R 67 at 72–73; *Miller v Hrvojevic* [1972] VR 305; *Dixon v Seears* (1982) 16 NTR 20.

66 *Smaje v Balmer* [1965] 2 All ER 248 at 249.

conviction. As there is obviously a case for the appellant to answer, and as there are no reasons why there will not be a retrial,[67] a retrial was ordered.

[86] As the conviction has fallen there is no need to consider the appeal against sentence.

---

[67] Subject of course to the Director's discretion.