SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rickards; R v Turner* [2020] QCA 21
PARTIES:	**In CA No 180 of 2018:** **R** **v** **RICKARDS, Nathan John** (appellant) **In CA No 185 of 2018:** **R** **v** **TURNER, Tobias John Anthony** (appellant)
FILE NO/S:	CA No 180 of 2018 CA No 185 of 2018 DC No 1829 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 15 June 2018 (Moynihan QC DCJ)
DELIVERED ON:	18 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2019
JUDGE:	Fraser and McMurdo JJA and Boddice J
ORDERS:	**In CA No 180 of 2018:** **The appeal against conviction be dismissed.** **In CA No 185 of 2018:** **The appeal against conviction be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellants were each found guilty of one count of armed robbery, in company, with personal violence, three counts of deprivation of liberty, two counts of grievous bodily harm and one count of assault occasioning bodily harm, while armed, in company – where the appellants were sentenced to eight years imprisonment (Rickards) and nine years imprisonment (Turner) on the offence of armed robbery, in company, with personal violence and lesser concurrent terms of imprisonment on the

remaining counts, and the convictions on the count of armed robbery, in company, with personal violence were declared serious violent offences – where the issue at trial was whether the appellants committed the armed robbery and other offences, which occurred at a jewellery store – where the appellants appeal their convictions – where the appellant (Rickards) appeals on the ground that the trial Judge failed to direct the jury regarding negative identification evidence – whether the trial Judge was required to give a specific direction regarding negative identification evidence – whether there was a miscarriage of justice by reason of the failure to give such a direction

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant (Rickards) appeals on the ground that the trial Judge inadequately directed the jury regarding the use of DNA evidence – whether the directions given by the trial Judge properly apprised the jury of the relevant matters to be considered in assessing the DNA evidence – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant (Turner) appeals on the ground that the verdict of the jury was unreasonable and could not be supported having regard to the evidence – whether a consideration of the evidence admissible supports the conclusion that it was open to the jury to be satisfied that the appellant was guilty of each of the offences beyond reasonable doubt

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant (Turner) appeals on the ground that there was a fundamental irregularity with a juror and the juror's subsequent discharge caused a miscarriage of justice – whether the trial Judge's determination to discharge a particular juror was appropriate – whether there was a miscarriage of justice

Jury Act 1995 (Qld), s 57

Kanaan v The Queen [2006] NSWCCA 109, cited
Lane v The Queen (2018) 92 ALJR 689; [2018] HCA 28, cited
Mule v The Queen [2002] WASCA 101, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v IG [2019] QCA 208, cited

COUNSEL: M Horvath, with S F Lamb, for the appellant, Rickards (pro bono)
The appellant, Turner, appeared on his own behalf

D Balic for the respondent

SOLICITORS: Clarity Law for the appellant, Rickards (pro bono)
The appellant, Turner, appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the orders proposed by his Honour.

[2] **McMURDO JA**: I agree with Boddice J.

[3] **BODDICE J:** On 15 June 2018, a jury found each of Nathan John Rickards (***"Rickards"***) and Tobias John Anthony Turner (***"Turner"***) guilty of one count of armed robbery, in company, with personal violence, three counts of deprivation of liberty, two counts of grievous bodily harm and one count of assault occasioning bodily harm, while armed, in company.

[4] On 18 June 2018, Rickards was sentenced to imprisonment for eight years on the offence of armed robbery, in company, with personal violence and lesser concurrent terms of imprisonment on the remaining counts. His conviction on the count of armed robbery, in company, with personal violence was declared a conviction of a serious violent offence.

[5] On the same date, Turner was sentenced to imprisonment for nine years on the count of armed robbery, in company, with personal violence and lesser concurrent terms of imprisonment on the remaining counts. His conviction on the count of armed robbery, in company, with personal violence was declared a conviction of a serious violent offence.

[6] Rickards and Turner each appeal their convictions of those offences.

[7] Rickards relies on two grounds of appeal. First, that the trial Judge failed to direct the jury regarding negative identification evidence. Second, that the trial Judge inadequately directed the jury regarding the use of DNA evidence.

[8] Turner also relies on two grounds of appeal. First, that the verdict of the jury was unreasonable and could not be supported having regard to the evidence. Second, that there was a fundamental irregularity with a juror and the juror's subsequent discharge caused a miscarriage of justice.

Background

[9] The offences arose out of events at a jewellery store at Albion on 15 July 2016. Three men were working in the store at the time. The owner, Zsolt Kovacs (***"Kovacs"***), and two employees, Justin Tawse (***"Tawse"***) and George Furlonger (***"Furlonger"***).

[10] At trial, it was not in dispute that an armed robbery had taken place on that day. At issue was whether Rickards and Turner committed that armed robbery and the other offences.

[11] Kovacs, Tawse and Furlonger each spoke of two males entering the store. One male was described as wearing a hi-vis shirt variously described by the eye

witnesses as yellow/green. The other male was described as wearing an orange hi-vis shirt.

[12] The Crown case was that Rickards was the male wearing the orange hi-vis shirt and Turner was the male wearing the yellow/green hi-vis shirt. The Crown relied on eyewitness accounts and other pieces of evidence. Some of the evidence was only admissible in the case against Rickards. Other pieces were only admissible in the case against Turner.

Evidence

[13] At around 3-3.30 pm on the afternoon of 15 July 2016, Kovacs left the store through its front door and walked to an adjacent building. As he did so, he noticed two males about 20 metres or more further down the street. Both were wearing tracksuit pants, runners, straw hats and sunglasses. One was wearing a bright green hi-vis shirt. The other was wearing an orange hi-vis shirt. Each had backpacks. One was carrying a spray bottle.

[14] Kovacs had them under observation for five to ten seconds. They were directly in front of him for the whole of that time. He thought their location was strange.

[15] As Kovacs returned to the store, he observed these two males had travelled closer to his store. They were standing side by side. The male in the green hi-vis shirt appeared to be instructing the other male, who had the pump spray, making gestures towards areas of the footpath. Kovacs observed them for five to fifteen seconds before re-entering the store.

[16] Kovacs described the male in the green hi-vis shirt as Caucasian, approximately five feet ten inches tall and quite athletic. He had medium to light brown hair and was well-groomed. He was wearing Ray-Ban style sunglasses.

[17] Kovacs described the male in the orange hi-vis shirt as Caucasian, of medium, athletic build, approximately six feet tall, maybe a little taller. He had a lot darker hair, which was a bit scruffy looking. He was wearing the same Ray-Ban style sunglasses.

[18] Shortly after returning to the workshop area of the store, Kovacs heard the deadlock door switch click and open before there was a loud crash, like something had fallen over. The male wearing the green hi-vis shirt appeared in the doorway of the workshop. He had a tomahawk in his hand and a handkerchief over his face. Kovacs heard other noises, indicating there was someone else in the store. Kovacs then saw the male wearing the orange hi-vis shirt. He, too, was wearing a handkerchief on his face. He was holding a baton. That male still had the pump spray. Both were wearing backpacks.

[19] Furlonger was ushered into the workshop area by the male wearing the green hi-vis shirt. That male told Kovacs, Furlonger and Tawse to get down. Tawse and Furlonger lay on the floor. Kovacs initially remained in his seat but was threatened by the male wearing the green hi-vis shirt if he did not get on the floor. That male was standing over Kovacs, with the tomahawk in his hand.

[20] The male in the green hi-vis shirt told the male in the orange hi-vis shirt to restrain them. Metal cable ties were used to tie the wrists of Tawse and Furlonger. The

male wearing the green hi-vis shirt used those ties to tie up Kovacs. After all three had been secured with ties, the male in the green hi-vis shirt started to break up the counter cabinets, without much success. The male wearing the orange hi-vis shirt started striking Tawse with the extended baton. He was demanding cash. That male also started ransacking the area.

[21] At one point, the male wearing the green hi-vis shirt travelled to a safe in the workshop. He searched its compartments. Whilst he was doing so, Kovacs broke free and grabbed the male in the orange hi-vis shirt by the throat. He threw him into the corner of the workshop. As he was choking him, Kovacs felt the male in the green hi-vis shirt strike the back of his head with the tomahawk. Kovacs was also struck on his foot, severing his foot. In the course of this struggle, Kovacs saw Tawse exit the workshop. Furlonger remained on the ground.

[22] As Kovacs tried to stem his bleeding wounds, he heard his shopfront being "smashed to bits". He could see the male in the orange hi-vis shirt. He was still holding the baton. At one point, the male wearing the green hi-vis shirt returned to the workshop and struck Kovacs in the face. The man in the orange hi-vis shirt also attacked Kovacs with the baton. The two males then left the store. A subsequent inventory revealed that a large number of jewellery items had been taken without Kovacs' consent.

[23] In cross-examination, Kovacs accepted that, at all times when he was observing the men, their hands were covered with gloves and they were wearing long-sleeved shirts. Their faces were also covered with a handkerchief when they entered the store and they were both wearing sunglasses. Whilst that left only a small amount of visible skin, Kovacs did not accept the skin colour of either of the men could have been darker than what would ordinarily be described as Caucasian.

[24] Kovacs accepted that, whilst in hospital, he gave a description of the males to police. He did not recall giving police an age estimate of late 30s to early 40s. He estimated they were in their late 20s or early 30s.[1] Kovacs had a good look at them outside. He also observed them in his store. He was never asked to identify faces from photographs.

[25] Furlonger said he observed two males approaching the front door shortly after Kovacs returned to the store. One was wearing a bright green hi-vis shirt. That male was carrying a spray pack and had gloves on his hands. The other was wearing an orange hi-vis shirt. Both had large straw hats. Both males were approximately 180 cm tall, fairly tanned and fit.

[26] As they opened the front door, they covered their faces. Both had sunglasses on at that point. The male in the orange hi-vis shirt wielded a small type of axe, similar to a hatchet. The male in the bright green hi-vis shirt carried a baton and a pump spray. The male wielding the axe told Furlonger to get down. Furlonger backed into the workshop area, where Kovacs and Tawse were located before getting down on his hands and knees.

[27] The male in the green hi-vis shirt started to tie their wrists, using a small cable tie or zip tie. He asked Furlonger if the cable tie was too tight on his wrists. The male in

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1 AB 36/35.

the orange hi-vis shirt asked where the money and jewellery were in the shop. That male was holding the hatchet in a threatening pose.

[28] Furlonger said Kovacs started wrestling with the male in the orange hi-vis shirt. At one point, both males were wrestling with Kovacs, who was pushing back against them. He heard Kovacs being hit in the head with the axe. He described the sound of bone fracturing as an "iconic, unforgettable sound".[2] Kovacs' foot was dripping blood badly. Kovacs continued to wrestle with the male wearing the orange hi-vis shirt. They moved around the workshop area, knocking over multiple artefacts.

[29] The male wearing the green hi-vis shirt asked Furlonger how to open the older style wooden till. That conversation occurred after Kovacs had been struck with the axe. By that stage, Tawse had managed to escape. Furlonger heard the smashing of glass, before the males exited the store. He estimated they were in the store for around ten minutes.

[30] In cross-examination, Furlonger accepted he had given police a description of the male person wearing the green hi-vis shirt as "tanned, Caucasian" with an Indigenous type of accent. Furlonger could not confirm that both males had the same coloured skin. He could not tell their age from their skin as they were wearing long-sleeved shirts and jeans. He only saw part of their faces. He accepted he had previously described both males as well aged by the sun. Their skin was quite tanned.

[31] Tawse remembered hearing a loud crashing sound before seeing two men in the doorway of the workshop. The taller male was wearing what Tawse described as a yellow hi-vis shirt.[3] He told them to get on the floor. That male had his face covered and was wearing sunglasses and a straw hat. He was brandishing a tomahawk. The other male, who was wearing an orange hi-vis shirt, was told by the male wearing the yellow hi-vis shirt to tie up Kovacs first. He used cable ties around Kovacs' wrists. That male tied Furlonger's wrists, then Tawse's wrists.

[32] Tawse described the male wearing the yellow shirt as slim faced, with brown hair and brown eyes. His hair was short on the sides. The top part of his hair was swept over and parted from the side. That male was approximately 180 cm tall, of slim build, Caucasian, with no visible tattoos or scars. Tawse estimated his age at 25 to 30.

[33] Tawse described the other male as approximately 175 cm tall and 25 to 30 years of age. He was wearing dark sunglasses. Tawse could not recall if he was wearing a hat. Tawse could not recall his facial features. That male was slim, fair skinned and Caucasian. He was holding a baton.

[34] Tawse said the male in the orange hi-vis shirt asked if the safe was unlocked. Tawse heard rummaging and cabinets being broken. The next thing Tawse remembered was Kovacs making a movement which attracted the attention of the male wearing the yellow hi-vis shirt. That male and Kovacs began struggling together. They crashed into the rear right-hand corner of the room. A big altercation then erupted between the two males and Kovacs. The male in the yellow hi-vis shirt took numerous heated swings to the rear of Kovacs' head with the tomahawk.

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2 AB 41/14.

3 Kovacs and Furlonger described this shirt as being bright green.

[35] At one point, Tawse recalled being able to see the face of the male in the yellow hi-vis shirt. That male had lost his hat and sunglasses, as well as the bandana he was wearing over his face. Tawse was unable to say where those items went after falling from the male's face. Tawse described the male as being no more than two feet from him. He was looking into Tawse's eyes, whilst hitting Tawse repeatedly on the head.

[36] Tawse told the man to stop hitting him. The male turned his attention back to Kovacs, who was still in the corner of the room. Tawse then ran from the workshop into a neighbouring business. While Tawse was on the telephone in the neighbouring business, he observed the two males walked down the adjacent street.

[37] Tawse later participated in the compilation of a comfit image of the male wearing the yellow hi-vis shirt. Tawse had been able to identify that male because his hat, sunglasses and bandana had been knocked off whilst he was in the store. Matthew Oakman prepared the comfit image in consultation with Tawse on about 26 July 2016. Tawse reviewed that image on 27 July 2016 and made a number of changes to the first draft, including to the size of the head and to the hair.

[38] In cross-examination, Tawse accepted one of the males definitely lost his facial coverings whilst in the store. Tawse did not know whether the other male "had lost them or not".[4] He did not see the other male's face. Tawse did not accept that the reason he could not recall the other person's face was because one of the men's faces stayed covered all the time, saying "I might not have been looking at him".[5] The sunglasses and bandana had been knocked from the face of the male wearing the yellow hi-vis shirt during the fight in the workshop area. The part of the fight Tawse saw happened predominantly in the corner of the workshop opposite to the sink.[6] When Tawse was being hit in the back, he felt that the male in the orange hi-vis shirt was next to the sink.

[39] A forensic examination of the store located a number of cable ties, together with a pair of sunglasses, in the workshop area. The sunglasses were next to a bicarb soda box. Those items and a purple shirt and black vest were analysed for DNA. A swab from Tawse's right forearm was also analysed for DNA. Matthew Hunt, a forensic scientist who undertook the DNA analysis of those items, received reference samples from Kovacs, Furlonger, Tawse, Rickards and Turner. No reference samples were provided from persons named Boyd Herniman or Luke Sullivan. There had been no testing of DNA in relation to those persons.

[40] A DNA analysis of a swab from the metal tie and of the swab of Tawse's right forearm did not reveal any DNA consistent with either Rickards or Turner. DNA consistent with Rickards was located on the bridge of the sunglasses. That DNA could be transferred in a number of possible ways. One possibility is a direct transfer, such as from a person wearing the sunglasses or touching the sunglasses. Another possibility was a secondary transfer. No fingerprints were able to be located on those sunglasses.

[41] There were three contributors to the swab of Tawse's right forearm, Tawse, Kovacs and an unknown contributor. Furlonger, Rickards and Turner were positively excluded as potential contributors. The swab of a cable tie located on the workshop bench had an unknown contributor. Furlonger, Tawse, Rickards and Turner were

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4 AB 50/21.
5 AB 51/45 – AB 52/1.
6 AB 52/20.

positively excluded as potential contributors. Tawse and Kovacs were likely contributors to a swab taken from the front of a purple shirt. It was unlikely Furlonger, Rickards or Turner contributed towards that mixed DNA profile. Kovacs was a likely contributor to a swab taken from the front of a black vest. It was unlikely Tawse, Furlonger, Rickards or Turner contributed to the mixed DNA profile. There was the possibility of an unknown contributor or contributors to each of those swabs.

[42] Evidence was led of text message communications between Rickards and Turner on 15 July 2016, including messages in which there were references to Turner "waiting for Nath", and that Turner was "with Nath".[7]

[43] Vincent O'Rourke (***"O'Rourke"***), the investigating police officer, spoke to Rickards on 4 August 2016. He also spoke to Turner at a later time. O'Rourke described Rickards as being 175 cm tall, with medium build and a pale complexion. He described Turner as being 180 cm tall.

[44] Rickards gave O'Rourke an account of his movements on 15 July 2016. Rickards said he had dropped his daughter off at school before going to Springfield to visit a mate. That mate was not home. Rickards returned back to his house, caught up with his then girlfriend, Stephanie McEwan (***"McEwan"***) and then headed to the north side of Brisbane to catch up with his friend, Rowin Cook. They arrived at Cook's residence at around lunchtime. At one point, he and McEwan had a fight. McEwan left at about 2 pm to pick up her daughter from school. Rickards remained with Cook, consuming alcohol. McEwan returned later, picked up Rickards and they drove back to their residence.

[45] O'Rourke subsequently obtained details of communications between Turner and Jarrod Clayton, recorded by the prisoner communication system known as Arunta. The Arunta telephone calls occurred when Clayton was in prison. Clayton was calling out to Turner. A person cannot call in to a prison.[8]

[46] The first of the calls between Turner and Clayton took place on 16 July 2016. On 15 July 2016 a news report aired on Seven News in relation to the robbery at Albion. In a conversation on the morning of 16 July 2016, Turner told Clayton he had "done something for coin", worth probably "100G";[9] that he "would have seen it"[10] and that it occurred in a northside neighbourhood starting with "A".[11]

[47] There had been subsequent conversations including on 5 August 2016. On that date, Channel 7 news reported Rickards had been charged with the jewellery store robbery and another person was of interest, who was not Turner.[12] In a conversation on 5 August 2016, Turner told Clayton a mate just went down "for a stick up on a jewellery store".[13]

[48] In cross-examination, O'Rourke accepted that Rickards had said, when giving the account of his meeting Cook on 15 July 2016, he would have gone through a toll near Springfield. O'Rourke could not say whether records had been obtained in

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7 AB 122/15.
8 The jury was warned that the Arunta telephone calls were only evidence in the case against Turner.
9 AB 255.
10 AB 255.
11 AB 257.
12 AB 241.
13 AB 261.

respect of the toll. Rickards had also told O'Rourke he went to McDonalds at Springfield and the Kentucky Fried Chicken store at Redbank after he left Cook's residence. No checks were undertaken in relation to CC TV footage. A search of Rickard's residence had not found anything of relevance. No weapons used in the incident or jewellery from the store were found in that residence.[14]

[49] O'Rourke knew people by the name of Luke Sullivan (***"Sullivan"***) and Michael Jones (***"Jones"***). Sullivan could be described as being of slim build, around 175 cm tall, with black hair and brown eyes. He did not accept that Sullivan could be described a Caucasian. O'Rourke would describe him as of European appearance, with a more olive skin. Sullivan was an initial suspect in the robbery. Sullivan was believed to have been involved in a number of robberies said to have involved tomahawks.

[50] O'Rourke accepted that, whilst Rickards was assisting police on 4 August 2016, there was a robbery of a bottle shop in West End. A tomahawk was used during the course of that robbery. Sullivan was said to have been linked to that robbery. There was subsequently an attempted robbery of a newsagency at Ashgrove on 13 August 2016. Sullivan was linked to that robbery. Again, a tomahawk was used during that robbery. There had also been a robbery at a subway store at Albion on 13 August 2016 just a few hundred metres from the jewellery store. Sullivan was alleged to be involved in that robbery. Again, a tomahawk was used during that robbery. Jones had pleaded guilty to involvement in a number of those robberies.

[51] O'Rourke also accepted that, whilst in hospital, Kovacs had given an account to police in which he had estimated the age of the two people who had robbed him as being in their mid to late 30s to early 40s. Tawse, in his statement to police, gave a description of the offenders but did not nominate an eye colour for either offender. Tawse subsequently participated in a photo-board identification, in which he nominated two people. Neither of those persons was Turner or Rickards. Turner's photograph was on that photo-board.

[52] Evidence was led that jewellery taken from the store was located in the residence of Boyd Herniman (***"Herniman"***) on 4 August 2016. Rickards was found inside the garage of Herniman's residence. An initial search of Herniman's house located no jewellery of interest. Police found an empty sunglasses case in a bedroom occupied by two other occupants of the house. It was only after Herniman disclosed to police that there was jewellery from the store in a rubbish bin in the garage in the house that the jewellery was located by the police.

[53] Herniman gave a statement to police on 4 August 2016. At that point he had been arrested and found in possession of drugs, jewellery and cash. He was worried about police searching his house. He accepted he was facing numerous criminal charges. When Herniman was providing his statement to police he had said, in answer to a question of who Rickards was with, he was not sure.[15] His statement to police also included incorrect information in which he tried to blame Rickards for organising a meeting to sell jewellery at a hotel. Herniman accepted he had a "pretty bad" criminal history.[16] It contained multiple convictions, including for offences of violence.

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14 AB 126/39.
15 AB 113/15.
16 AB 85/10.

[54] Herniman, who first met Rickards in about June 2016, described Rickards as being of slim build and roughly 180 cm tall. He told police that Rickards told him that Rickards and a couple of others pretended to be workers wearing hi-vis vests and spraying the ground around a jewellery store in Albion. Rickards said he was with somebody by the name of Toby. As they approached the jewellery store, Rickards put down the spray bottles, pulled out an axe and robbed the jewellery store.

[55] Rickards told Herniman there had been a fight as the victims put up a struggle. Someone managed to get away from the jewellery store and run up the road. Rickards described smashing display cases and grabbing jewellery. Rickards said someone left behind a pair of sunglasses. Rickards had to run back as they were leaving the store.

[56] At about the time of this conversation, Herniman saw some jewellery, with handwritten, white price tags, in Rickards' possession. Rickards asked Herniman if he knew anyone that would buy them. Herniman took six or seven rings from Rickards to try and sell them. He subsequently sold three rings. Other items, subsequently located by police in Herniman's garage, included items provided to Herniman by Rickards.

[57] In cross-examination, Herniman accepted he was approximately 180 cm tall, of Caucasian appearance and had brown hair. He had had a problem with drugs. He was using "meth" daily at about the time of this conversation with Rickards. At about that time, there were a number of other people associated with Herniman's house that would regularly commit criminal offences. Some of them were users of drugs. His house was, at that time, "a drug house".[17] The use of that amount of methylamphetamine had an effect on his memory. He would often go for days without sleeping.

[58] Herniman accepted that, at around the time of this conversation with Rickards, it would not have been unusual for sunglasses to be sitting around in Herniman's house. Rickards had been to that house.

[59] Herniman accepted he subsequently successfully made application for bail in the Supreme Court. The fact he was giving evidence in the proceedings against Rickards may have been put forward to assist his successful bail application.[18] Herniman denied, however, that he was making up the conversations with Rickards. He denied he was involved in the robbery of that jewellery store.

[60] When he gave police the statement, he knew he was in trouble. Police had let him know the jewellery had come from a bad robbery. He was in "in a world of hurt".[19] When he gave the statement to the police, he only knew what he had been told by Rickards.[20] He did not know Turner "from a bar of soap".[21]

[61] Jordan Wilson (***"Wilson"***) had known Turner since Wilson was aged 15 years. In around April 2016, Turner came to stay at Wilson's house. Turner's appearance at that time was of stocky build, about six foot tall with comb-over brown hair. His

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17 AB 80/46.
18 AB 92/25.
19 AB 98/42.
20 The jury was warned the evidence given by Herniman could only be considered by them in the case against Rickards.
21 AB 99/33.

skin colour was white. Wilson saw Turner on occasions in high-vis gear, coloured orange or yellow, like a work uniform. He could not recall if it had short or long sleeves.

[62] At some point Wilson saw jewellery in Turner's possession. Turner told him he had "done" a jewellery shop.[22] Wilson understood Turner to mean he had robbed the jewellery shop. Turner told Wilson they went in with high-vis. They had been out the front, spraying or killing weeds. They waited for the workers to go in before they robbed the jewellery store. By they, Turner had indicated Turner and his mate.

[63] Turner said they tied up the employees and started robbing the place. At one point, the "old man" broke out of the zip ties. They started punching before Turner's mate "whacked him with the back of the axe".[23] Wilson understood that Turner was referring to tying up the workers' hands with zip ties. The old man was a reference to one of the workers.

[64] Wilson described the jewellery as necklaces and gold rings and bracelets. Turner sold the jewellery to a jewellery shop.

[65] In cross-examination, Wilson could not recall when the conversations about the jewellery store had taken place with Turner. He estimated it was in June or July 2016. Wilson accepted that Turner can big note himself. There have been things Turner has told him in the past that did not turn out to be true.

[66] Wilson accepted that in the conversation, Turner said the robbery took place in the morning as the shop was opening and that it was not Turner who had the axe. Turner also said there were three or four people in the shop. Turner said there were two girls; they just froze and did not move. Turner also had told him that one of the victims broke the zip ties and had Turner on the ground, laying into Turner. That is when Turner's mate hit the victim over the head with the back of the axe.[24]

[67] Stephanie McEwan (***"McEwan"***) commenced a relationship with Rickards in April 2016. That relationship ended approximately six months later. At some time around July 2016, Rickards asked her to say she was with him if anybody asked her about his whereabouts. McEwan said, "we were supposed to have driven to Springfield and then – to see our friend, and that friend wasn't home. We then were supposed to have gone over to a friend's house of his on the north side, which we did not."[25] Rickards identified the friend on the north side as Cookie. Rickards also said she was to say they had a fight and she had driven back home, before later returning to pick him up to go back to the friend at Springfield, but the friend was still not home and they returned to their home. During the conversation, Rickards made a telephone call from McEwan's telephone to Cookie, asking him to say they had been together that day.

[68] In cross-examination, McEwan accepted she did not give a formal statement to police until 8 June 2018. She had left out the name Cookie in that statement. McEwan also accepted she was a drug user, who had been convicted of a number of drug offences. She was using methylamphetamine in July 2016 but not daily. She denied still being a drug user. McEwan accepted she had given police a version of

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22 AB 104/39.
23 AB 105/9.
24 The jury was warned that Wilson's evidence could only be considered by them in the case against Turner.
25 AB 174/34.

events on 8 August 2016. She denied that version was truthful.[26] She denied now giving the evidence that Rickards put her up to that version because Rickards had recently formed a new relationship.[27]

[69] Rohan Cook (***"Cook"***), also known as Cookie, gave evidence that he had contact with Rickards in June or July 2016. Rickards called in to Cook's home and remained for a few hours. He left anywhere between 1.30 and three o'clock in the afternoon, although he could have been at Cook's residence up until around 3.30 pm. Cook could not say whether the day was 15 July 2016 but could see no reason why it could not be that date.[28]

[70] At the conclusion of the Crown case, Turner and Rickards both elected to neither give nor call evidence.

Rickards' appeal – CA No 180 of 2018

Rickards' submissions

[71] Rickards submits the trial Judge correctly identified seven categories of evidence relied on by the Crown in support of its prosecution of the appellant, being:

1. The eye witness descriptions;
2. Rickards' confession to Herniman;
3. Herniman's evidence that Rickards was in possession of jewellery from the store;
4. Rickards and Turner were communicating at around the time of the robbery, indicating an association and opportunity to commit the offences;
5. Rickards was present at the time of the search of Herniman's house, near a baton and the jewellery subsequently produced by Herniman following that search;
6. Rickards' DNA was on a pair of sunglasses located in the Albion store; and,
7. Rickards' lie to police that he spent the day with McEwan and Cook.

[72] Whilst the trial Judge correctly directed the jury that it was to decide the case against each appellant solely on the evidence against that person and to give separate consideration to each of their cases, and the trial Judge had given specific directions as to the identification evidence, identifying additional matters regarding specific weaknesses in that identification, Tawse's description of the offender in the yellow shirt and his subsequent comfit identification ought properly to have been regarded as negative identification evidence in favour of Rickard's case.

[73] The trial Judge ought to have directed that the evidence of identification relied upon by the Crown in the case against Turner was available for use by the jury in Rickards' case; that that negative identification evidence raised a doubt that it was Rickard who committed the robbery; that the Crown must eliminate such doubt in order to succeed in establishing, beyond reasonable doubt, that it was Rickards who committed the robbery; and that, if there remained a reasonable possibility that the negative identification evidence is correct, the Crown case against Rickards must fail. Alternatively, the trial Judge ought to have given a specific direction that Rickards did not bear the onus of proof, and it was sufficient if the negative

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26 The jury was warned McEwan's evidence could only be considered by them in the case against Rickards.
27 AB 181/25.
28 The jury was warned that evidence could only be considered in the case against Rickards.

identification evidence left a reasonable possibility consistent with the innocence of Rickards.

[74] Rickards further submits that the trial Judge's summing up in respect of the DNA evidence, although in accordance with the Bench Book, was inadequate. The trial Judge referred to the DNA evidence about the sunglasses; the limitations in relation to the other samples and the lack of comparison of samples with profiles from Herniman and Sullivan, and summarised the arguments of Counsel for Rickards and Turner as to the inadequacies of the DNA evidence. However, the trial Judge failed to adequately set out the categories into which the DNA evidence fell, thereby failing to minimise the risks of a misunderstanding or of misuse of that evidence by the jury.

[75] The trial Judge ought to have separated out the various categories, directing the jury that the Rickard's DNA on the sunglasses could have been explained without Rickards having to be at the store; that the exclusion of Rickards' DNA on the metal tie and Tawse's right forearm was consistent with Rickards not being at the store; that other samples of Rickards' DNA could have been explained by secondary transfer by Turner, who was at the store; and that the existence of DNA from unknown contributors was consistent with a rational hypothesis that Rickards was innocent. Herniman was found in possession of jewellery taken from the store. His DNA was not compared to the unknown contributors. Sullivan and Jones were also implicated in a series of similar robberies. Their DNA was not compared with the unknown contributors.

Crown submissions

[76] The Crown submits that there was no obligation on the trial Judge to give a direction about negative identification evidence. The issue for the jury was whether Rickards was one of the two men who committed the robbery of the store. There was compelling evidence to support a finding beyond reasonable doubt that Rickards was one of those men. That evidence included DNA evidence, a confession, a false alibi and telephone data evidence.

[77] The jury was directed to the discrepancies in the eye witness accounts and correctly directed by the trial Judge that the comfit could not be used in the case against Rickards. That image was never part of the evidence against Rickards. It was potentially inculpatory of Turner. It was not exculpatory of Rickards. The trial Judge directed the jury that none of the evidence identified Rickards or Turner and reminded them of the task of drawing inferences when dealing with descriptions of offenders. No redirection was sought by defence Counsel, consistent with the fact the comfit image was a piece of circumstantial evidence only in the case against Turner.

[78] The Crown further submits that the directions given by the trial Judge in respect of the DNA evidence properly apprised the jury of the issues. In those directions, the trial Judge not only referred to Rickards' DNA evidence on the sunglasses. The trial Judge reminded the jury of the absence of fingerprints and of the need to give such weight to the DNA evidence as they considered appropriate in the circumstances, reminding them it was not absolute proof and its reliability was contingent on the sampling and testing process. The trial Judge specifically drew the jury's attention to the length of time DNA was on a surface; that transfer could

include secondary transfer; and that, in respect of the unknown samples, there was an absence of reference samples of Herniman and Sullivan.

[79] Finally, the trial Judge reminded the jury of the submissions of Rickards' Counsel, including the importance of the sunglasses being a movable item, the scope of transfer, the absence of cell type and the possibility that the DNA came to be on the sunglasses for different reasons. Whilst the cable tie was not specifically mentioned, it was a feature well known to the jury as the only inculpatory result of the DNA evidence was in respect of the sunglasses. There was no need to specifically refer to the exclusion of Rickards in respect of the other items as none of those items were inculpatory. No redirection was sought by defence Counsel.

Negative identification direction

[80] The trial Judge specifically directed the jury as to the special need for caution in assessing the identification evidence. The trial Judge directed:

> "I must therefore warn you of the special need for caution before you use the descriptions of the offenders or the picture as a fact in reasoning towards a finding of guilt. The reason for this is that it is quite possible for an honest witness to make a mistake about a person's physical characteristics or in composing a picture. Notorious miscarriages of justice have sometimes occurred in such situations.
>
> A mistaken witness may nevertheless be convincing. A number of apparently convincing witnesses may all be mistaken.
>
> You must carefully examine the circumstances in which the witness was able to give the description or compose the picture. For example, how long did the witness have the person under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the defendant before? What time elapsed between the original observation and the subsequent description given to the police? Was there any material discrepancy between the descriptions given to the police by the witness?
>
> The evidence of each witness, whilst important in itself, should not be regarded by you in isolation from the other evidence adduced in the trial. It forms part of the whole of the evidence you must consider in each defendant's case. It is not evidence of a positive identification of either defendant and could not, standing alone, support a conviction.
>
> Where evidence is given by a stranger to a defendant, you should treat the evidence of a description, or the creation of an image of the offender, with care. You should be cautious about concluding that the description or picture created is consistent with the defendant and scrupulous to be satisfied, first, that the witness is not only honest but also accurate.
>
> A description of an offender by one witness may support evidence of a description by another witness. But you must bear in mind that

> even a number of honest witnesses may be mistaken about such a matter.
>
> I will now isolate and identify for your benefit the following additional matters of significance which might reasonably, depending of course on your view, be regarded as specific weaknesses or as undermining the reliability of the descriptions given by each witness or the picture created.
>
> Firstly, the alleged offenders were not known to the witnesses. Their bodies were largely covered by items of clothing. The witnesses did not have the offenders under observation for a long period of time. The event was fast moving and very stressful.
>
> In general, the power of observation and of recollection of an observation are fallible and the risk of mistake is especially great with fleeting encounters.
>
> You must consider any inconsistency or discrepancy in the witnesses' description. You will remember that Mr Kovacs told police soon after the incident the offenders were mid to late thirties to early forties. That is different to what he said in evidence in court. Keep in mind that Mr Kovacs said he saw both men at close distance outside the store before the robbery. Mr Furlonger said both men were fairly tanned and their skin aged by the sun and he told police that the man wearing the green hi-vis shirt spoke with an indigenous type of accent. Kovacs had taken a substantial knock to the head and was adversely affected as a consequence.
>
> The picture constructed by Mr Tawse differs from how it would look in nature. It has two dimensions and a static quality and it is in black and white. It is a montage of different facial characteristics which may distort the natural proportions of a human face. And there is nothing distinctive about any particular feature. There is also a difference between the draft and the final picture.
>
> The photo board is not relied on by the Crown in proof of its case of either defendant. You must not use it to reason toward a conclusion of guilt in either case. However, it is for you to consider, first, whether one of the men on the board nominated by Mr Tawse looked like the witness, Mr Herniman, and secondly, that Tawse did not identify Turner, whose picture is on the board."[29]

[81] Those directions were given immediately after directions to the jury that the comfit image was only admissible in the case against Turner and could not be used in considering the case against Rickards; and that the men nominated by Tawse when shown a photo board were not Rickards or Turner. The trial Judge specifically directed the jury that photographs of Rickards and Turner produced by police, as well as the police evidence of their height, build and complexion, was not evidence which could be used to directly identify them as one of the men present. That evidence was led so that the jury could assess whether the descriptions given, or

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29 AB 83/47-85/15.

picture produced by Tawse of the alleged offender are consistent with either of Rickards and Turner.

[82] In the circumstances of this particular case, as presented to the jury, those directions adequately and properly apprised the jury of the issues for consideration in their determination of whether one of the two men in the store was Rickards.

[83] Whilst it may be appropriate, on occasions, to give specific directions as to the use of negative identification evidence,[30] a failure to do so will not constitute an error unless the particular circumstances of the case warranted such a direction. There was no need to give a specific direction as to so-called negative identification evidence in the particular circumstances of this case.

[84] First, there was no negative identification at all. No aspect of the comfit image prepared by Tawse of the offender, said on the Crown case to be Turner, directly or indirectly exculpated Rickards. The comfit image was of no relevance to Rickards' case. The jury was properly directed not to have regard to it at all in determining the case against Rickards.

[85] Second, the jury was specifically directed that the comfit image did not form part of the evidence to be considered by the jury in the case against Rickards. Whilst Tawse's evidence, that it was the male wearing the yellow hi-vis shirt (on the Crown case Turner) who lost the sunglasses in the struggle, may be said to be inconsistent with the finding of only Rickards' DNA on a pair of sunglasses, Tawse, in evidence, specifically would not exclude the possibility that the male wearing the orange hi-vis shirt (on the Crown case Rickards) also lost his sunglasses in the struggle. Significantly, the relevant sunglasses were located in an area consistent with the location of the male in the orange hi-vis shirt at the time of that struggle.

[86] Against that background, to have allowed the jury to use the comfit image as a form of negative identification evidence would have undermined Rickards' case at trial. The directions as given to the jury, in the context of the comfit image not being admissible in Rickards' case, enhanced the prospect that the jury would carefully consider the accuracy of each witness's account in determining whether the Crown had proven beyond reasonable doubt that Rickards was one of the males in the jewellery store that day.

[87] In coming to this conclusion, it is significant that experienced defence counsel did not seek a direction of the nature now contended for at trial. There was good forensic reason for such a decision to be made, having regard to the evidence available for consideration by the jury in Rickards' case.

[88] There was no obligation on the trial Judge, in the particular circumstances, to give a direction in respect of negative identification evidence. There was no miscarriage of justice by reason of the failure to give such a direction. This ground fails.

DNA evidence direction

[89] The trial Judge directed the jury in respect of the DNA evidence, in the context of the sixth piece of evidence relied upon by the Crown in respect of the case against Rickards, being a DNA profile consistent with him found on a pair of sunglasses worn by one of the offenders and found at the scene. The trial Judge instructed the jury:

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30 *Kanaan v The Queen* [2006] NSWCCA 109; *Mule v The Queen* [2002] WASCA 101.

> "You heard evidence from Matthew Hunt that the sample from the nose bridge of the sunglasses found at the scene contained a mixed DNA profile from two contributors. That was compared with DNA samples from Tawse, Furlonger, Kovacs, Turner and Rickards and using a statistical analysis, the result was as follows. Zsolt [Kovacs] is estimated that the mixed DNA profile obtained is greater than 100 billion times more likely to have occurred if he has contributed DNA rather than if he has not. For Nathan Rickards it is estimated that the mixed DNA profile obtained is again greater than 100 billion times more likely to have occurred if he has contributed DNA rather than if he has not. And for George Furlonger, Justin Tawse and Tobias Turner each of those people could be excluded as potential contributors to the mixed DNA profile obtained.
>
> That is evidence only against the defendant Rickards.
>
> In relation to the other samples, they were either too complex or uncertain for analysis or contained mixed profiles consistent with contributors other than either defendant and on occasions included contributions from unknown persons."[31]

[90] After directing the jury that a witness' evidence being referred to as expert does not mean it is to be automatically accepted, and after referring to the usual directions as to the process of identification by DNA and the reliability of this evidence being dependent upon the accuracy and reliability of the profile testings carried out in respect of both samples, the trial Judge instructed the jury:

> "You must also take into account how long DNA can remain on a surface and that it is not possible to say how long DNA has been present in a location, the numerous ways in which DNA material can be transferred and the possibility of secondary transfer. Further, in this case, tests to confirm what part of the body the cells producing the DNA came from were not done and the samples were not compared with the profiles from Boyd Herniman and Luke Sullivan."[32]

[91] The trial Judge, in the course of a summary of the rival contentions advanced in Counsel's address, also expressly reminded the jury of Rickards' Counsel's contention that the DNA of both Sullivan and Jones, who are known to have committed similar types of robberies at the relevant time, was not tested, which would cause serious concern when there were unknown contributors to the samples taken at the scene; that Rickards' DNA being found on the sunglasses was not conclusive, as it was a moveable item and DNA could be transferred in a number of ways including secondary transfer; and there was no way to tell when and for how long the DNA had been in that position and there was no evidence of the cell type, that is where it came from, and it could have come from Rickards trying on those sunglasses.

[92] A consideration of these directions, in the context of the DNA evidence supports a conclusion that, whilst further directions could have been given in respect of each swab the subject of DNA testing, a failure to do so by the trial Judge did not render

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31 AB 90/15.
32 AB 91/31.

the directions inadequate. There is also no basis to conclude that the failure to provide the directions now sought by Rickards has resulted in a miscarriage of justice.

[93] The directions given to the jury, in the context of the issues advanced at trial, properly apprised the jury of the relevant matters to be considered by the jury in assessing the DNA evidence relied upon by the Crown in support of a finding that the Crown had established beyond reasonable doubt that Rickards was one of the offenders in the store. There was no need for the jury to be specifically directed in relation to the various categories of DNA evidence. There was no error by the trial Judge in failing to do so. There was no miscarriage of justice by reason of failure to give such directions.

[94] In coming to that conclusion, it is significant to note that experienced defence Counsel did not seek such a direction. Further, no complaint was made at the conclusion of the summing up as to the sufficiency of the directions given to the jury in respect of this aspect of the case against Rickards. This ground also fails.

Turner's appeal – CA No 185 of 2018

Turner's submissions

[95] Turner submits that the jury's verdicts are unreasonable and cannot be supported having regard to the evidence as a whole. A consideration of the evidence as a whole calls into question the reliability and accuracy of Tawse's testimony and, in particular, the comfit image, such as to give rise to a reasonable doubt as to Turner's guilt of the offences. That doubt was supported by inconsistencies in the descriptions given by Kovacs and Furlonger initially and in evidence at trial. Tawse also had an opportunity to pick Turner from the photo board but chose two completely different people before preparing a significantly different comfit image. No DNA of Turner was detected at the crime scene and there was no other evidence which placed Turner at the scene of the robbery.

[96] Turner further submits that a miscarriage of justice arose as a consequence of a fundamental irregularity in respect of a juror and that juror's discharge before verdict.

Crown submissions

[97] The Crown submits that a consideration of the evidence as a whole supports the conclusion that it was open to a reasonable jury, properly instructed, to be satisfied of Turner's guilt of the offences beyond reasonable doubt. There was, in addition to the general descriptions and the comfit image, the conversations between Turner and Wilson, the contents of the telephone intercepts with the prisoner, Clayton, and the evidence of contact, and the communications between Turner and Rickards on the day of the alleged robbery. The confessional evidence was particularly powerful as it contained details only a person involved in the robbery would know. Any inconsistencies in the identification evidence were matters for the jury. The jury was properly directed as to the absence of identification from the photo board and as to the care to be taken in an assessment of the accuracy of the evidence as to the description of the offenders. The jury was also specifically directed as to the DNA evidence in respect of the exclusion of Turner as a contributor to the samples obtained and as to the absence of other samples being tested against that DNA.

[98] The Crown further submits that there was no miscarriage of justice as a consequence of the behaviour of a juror, who was subsequently discharged from the panel. The discharge of the juror arose as a consequence of the receipt of a note consistent with an apprehension that that juror will not only act on the evidence presented in Court. The trial Judge followed the appropriate course in questioning that juror alone. The trial Judge determined to discharge that juror. There was no irregularity thereafter as the trial was able to properly proceed with only 11 jurors.

Unreasonable verdict

[99] The determination of this ground requires the Court to undertake an independent assessment of the evidence to determine whether it was open to the jury, on the evidence as a whole, to find Turner's guilt of the offences had been established beyond reasonable doubt.[33]

[100] A consideration of the evidence admissible in the case against Turner supports the conclusion that it was open to a jury, on an assessment of the evidence as a whole, to be satisfied of Turner's guilt of each of the offences beyond reasonable doubt.

[101] The descriptions given by the eye witnesses were consistent with Turner's appearance. Tawse had the specific opportunity to carefully observe Turner's facial features in the course of the robbery. He subsequently produced a comfit image consistent with that description and with Turner's general appearance.

[102] The fact that Tawse did not subsequently identify Turner's photograph from a photo board and picked two other photographs from that board were properly matters for the jury to consider in the assessment of his evidence. That assessment also had to occur in the context of evidence consistent with admissions by Turner as to his involvement in the robbery of the store. Those alleged admissions contained information that it was open to the jury to conclude was unlikely to be known by a person other than the offender.

[103] A combination of that evidence, in the context of evidence establishing that there were communications consistent with an association between Turner and Rickards and, in particular, communications on the day of the robbery of the store, consistent with Turner having met Rickards at a time prior to the robbery and being with Rickards at or around the time of the robbery, amply support a conclusion that it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that Turner was one of the males who committed the robbery of the store. This ground fails.

Miscarriage of justice

[104] The discharge of the juror occurred after the trial Judge had received two notes from a member of the jury, indicating that that particular juror was "unable to answer simple questions with coherent answers, has been rambling about items that are irrelevant to their decision … has said he was distracted by spiritual law and … is lecturing the jury about the law and some people are now generally uncomfortable".[34]

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33 *R v Baden-Clay* (2016) 258 CLR 308 at [66]; see also *Lane v The Queen* (2018) 92 ALJR 689; *R v IG* [2019] QCA 208 at [13].

34 AB 128/1-6.

[105] As the trial Judge found, those notes raised concerns about that juror's capacity to act as a juror and whether the juror is impartial or, for any other reason, ought not to be allowed to act as a juror in the trial. That concern enlivened the trial Judge's power, pursuant to s 56 of the *Jury Act* 1995 (Qld), to discharge that juror without discharging the whole jury. In that event, it was open to the trial Judge to direct that the trial continue with the remaining jurors.[35]

[106] The trial Judge exercised those powers after having made relevant enquiry of the particular juror, for the purposes of determining the juror's deliberative capacity and as to whether there was any reason, including a lack of impartiality, that the juror ought not to be allowed to act as a juror in the trial. The trial Judge concluded, on the basis of the juror's answers, that the juror did not lack deliberative capacity but that it appeared that the juror would not act only on the evidence presented in the court room or apply the law as explained by the trial Judge. That conclusion was plainly open on a consideration of the material available to the trial Judge.

[107] Once that conclusion was reached, there was no error in the trial Judge's exercise of the power to discharge that juror without discharging the whole jury, no basis upon which it can be contended that the trial Judge misapplied the discretion available under s 57 of the Act to direct that the trial continue with the remaining jurors.

[108] There was no miscarriage of justice which followed from the trial Judge's proper determination that it was appropriate to discharge the particular juror and order that the trial continue with the remaining jurors. This ground fails.

Sentence

[109] Turner's notice of appeal did not seek leave to appeal sentence. However, aspects of his outline of submissions referred to the sentences imposed as being manifestly excessive.

[110] A consideration of the circumstances of Turner's offending amply supports a conclusion that, to the extent that it is asserted the sentence imposed was manifestly excessive, there is no substance in any such contention.

[111] The offences were serious, involving the theft of almost $300,000 worth of jewellery in a robbery which involved not only the brandishing of weapons but the use of a tomahawk against one of the victims. That victim sustained serious injuries, including a brain injury.

[112] Those circumstances in themselves amply supported an overall effective head sentence of nine years imprisonment, with a declaration that Turner had been convicted of a serious violent offence. An assertion that such a sentence was manifestly excessive is particularly without merit, having regard to the fact that the offences in question were committed by a person with a relevant, lengthy criminal history on parole.

Orders

CA180 of 2018

[113] I would order the appeal against conviction be dismissed.

CA185 of 2018

[114] I would order the appeal against conviction be dismissed.

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35 *Jury Act* 1995 (Qld), s 57.