# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Sherrard* [2004] QCA 425 |
| PARTIES: | **R**<br>**v**<br>**SHERRARD, Brian Edward**<br>(appellant) |
| FILE NO/S: | CA No 104 of 2004<br>SC No 106 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 9 November 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 July 2004 |
| JUDGES: | McMurdo P, Jerrard JA and Mackenzie J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Appeal against conviction dismissed**<br>**2. Application for leave to appeal against sentence refused** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of attempted murder – where direct and circumstantial evidence capable of supporting verdict – whether verdict unreasonable<br><br>CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PURPOSE OF SENTENCE –DETERRENCE – where appellant convicted of attempted murder – where offence involved the use of a rifle – where appellant sentenced to 11 years imprisonment – whether sentence manifestly excessive<br><br>*R v Forster* [2002] QCA 495; CA No 10 of 2002, 14 November 2002, cited<br>*R v Reeves* [2001] QCA 91; CA No 276 of 2000, 13 March |

2001, cited

COUNSEL: The appellant appeared on his own behalf
R G Martin for the respondent

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

[1] **McMURDO P:** I agree with Jerrard JA's reasons for concluding that Mr Sherrard's appeal against conviction should be dismissed and his application for leave to appeal against sentence refused.

[2] **JERRARD JA:** On 9 March 2004 Brian Sherrard was convicted by a jury of the offence of attempting to murder Norman Brunt on 10 October 2001 at Ballogie, in the Burnett Valley. On 31 March 2004 Mr Sherrard was sentenced to 11 years imprisonment for that offence, and the learned judge declared that 174 days in custody, between 10 October 2001 and 11 March 2002, and 9 March 2004 and 31 March 2004, was time already served. Mr Sherrard has appealed against his conviction for attempted murder on the ground that the conviction is "unsafe and unsatisfactory and not according to law"[1], and he has applied for leave to appeal against his sentence, arguing that it is manifestly excessive.

**Background matters**

[3] On 10 October 2001 Norman Brunt was living by himself on a 160 acre property at Lot 27 Underwood Road, Ballogie, which he and his then wife Susan had bought in the early 1990's. Mr Brunt had met Brian Sherrard when Mr Brunt moved into the district after buying the property, and difficulties arose in the relationships among all three people. Mr Sherrard told Susan that he felt he was falling in love with her, but she discouraged his advances. Mr Brunt and Susan separated in or about 2000, and on 9 February 2000, on Mr Sherrard's evidence at his trial, two people wearing masks attacked him on a dark night with iron bars when he was out walking for exercise, and attempted to kill him. He was quite seriously injured, and hospitalised. In or about mid 2001 Mr Sherrard, when telephoning the then officer in charge of the Wondai Police Station, had complained about a lack of police investigation of his complaints about that attempted murder, and in that phone call expressed the opinion that his assailants "would be that bloody Brunt", apparently meaning both Mr Brunt and Susan.

[4] The police officer who heard Mr Sherrard's complaint in mid 2001 described having had a lot of dealings with Mr Sherrard about disputes between him and the Brunts, which began after Susan Brunt had complained that Mr Sherrard was continually harassing her. Her complaint led to the police officer speaking with Mr Sherrard, and that officer understood that "it" (the conflict) "had died down, but it would flare periodically", which resulted in "complaints of trespass, gates being opened, notes being written, just incidental sort of stuff. But I never, ever had an

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[1] A ground to be understood as meaning, pursuant to s 668E(1) of the *Criminal Code*, that the verdict is unreasonable or cannot be supported having regard to the evidence (*Gipp v R* (1998) 194 CLR 106; *MFA v R* (2002) 193 ALR 184 at 195)

official type complaint. Nobody wanted to make any[thing] official because they didn't want to have any fallings-out with the" (appellant).[2]

[5] Mr Sherrard's conviction that he had been the subject of a cowardly and homicidal attack by both the Brunts resulted in his forwarding an offer of $10,000.00, for information leading to the successful prosecution of "the two people who tried to murder Brian Sherrard on Feb 9 – 2000", to Susan's workplace, accompanied by a letter requesting her employer to please "circulate or post this reward poster please. One of the attackers is alleged to be one of your staff members." A copy of the poster and a draft of the letter were photographed by investigating police on 11 October 2001 at Mr Sherrard's home.

[6] Mr Sherrard and his wife Yvonne had lived at Lot 40 Lawson Road Ballogie since May 1987, nearby to the Brunt property. The properties are not adjoining, but are relatively close, and aerial photographs showing both properties in the one photograph[3] suggest it would be no more than a few minutes walk through bushland from one residence to the other.

**The attempted murder**

[7] On 10 October 2001 Mr Brunt was engaged in setting up a pump to take water from one house dam into another, when he heard what he described as a "ping, ping, sort of sound", and which he thought was perhaps somebody having target practice with a firearm. He walked around his dam, up onto its wall and to a boundary fence immediately adjacent to that dam wall, and he then saw Mr Sherrard. The latter appeared from behind some wattle that had been "pushed over", and once Mr Sherrard saw Mr Brunt, Mr Sherrard, who was holding a rifle, began moving to Mr Sherrard's right, not taking his eyes off Mr Brunt, and thus moved sideways until he reached a tree.

[8] Mr Brunt was adamant in his evidence that he had recognised Mr Sherrard, whom he knew quite well, and in whose home Mr Brunt had been a guest early in their relationship, when things were better. He estimated the distance between himself and Mr Sherrard when first seen that afternoon as perhaps 20 feet.

[9] Mr Brunt swore that he was puzzled at Mr Sherrard's antics, but that when the latter reached the tree Mr Sherrard drew a bead on Mr Brunt with the rifle, causing Mr Brunt to dive into a wash way or ditch on Mr Brunt's side of the boundary fence separating him from Mr Sherrard. The adjoining property was not owned by Mr Sherrard.

[10] Mr Brunt eventually looked up to see if Mr Sherrard was still there, and was then shot in the head. Realising he had been, and that he was not dead, he got up and ran for his life towards his house. On arrival he rang 000, and on his evidence explained that he had been shot by Brian Sherrard and needed the ambulance and police. He then got into his vehicle and drove to another neighbour's property. At that stage Mr Brunt thought he had only been shot in the head; he was tended by that neighbour, and when the ambulance arrived Mr Brunt discovered to his surprise that he had also been shot in the left shoulder, and that the bullet had passed through

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2 This evidence is at AR 51

3 Exhibits 1 and 79

his shoulder and exited in his back. The bullet that hit his head had entered his left front temple and exited on the left side of his head.

**Mr Sherrard's whereabouts**

[11] Mr Brunt said that he was shot somewhere between 2pm and 3pm that day. The ambulance was dispatched from Murgon at about 2.50pm. Yvonne Sherrard, called by the prosecution, said that she and her husband had had lunch between 12.30pm and 1.00pm that day, he had then gone out for what she assumed to be his normal rest soon after 1pm, and he was next seen by her at approximately 2.30pm. She fixed that time by the amount of work she had done in the intervening period. He remained in the kitchen with her for about 15 minutes, removing some lamp shades, and then went out again. He returned with the mail, which would have been collected from their mail box some 600 metres away, but she was unable to fix or estimate the time of that return. He then went out again, and returned at about 4pm, when they had a cup of tea. She thought it would take about 15 minutes to walk from her home to Mr Brunt's, and much the same estimate was given by a detective Prendergast, although his was that it would take "15 minutes to half an hour". Judging by the photographs, Mrs Sherrard's shorter estimate appears more accurate.

[12] She was put forward as a witness of truth by the prosecution, and her evidence thus described three periods when Mr Sherrard was not in her company that afternoon. One was at the time of his assumed nap, one when he was away and obviously did collect mail which was brought into the house by him, and one was the period that elapsed between delivering the mail and returning around 4pm. The most important of those periods of absence was that between 1pm and the time Mrs Sherrard fixed as being approximately 2.30pm, calculated solely by her recollection of the tasks she did.

[13] She also gave evidence that they did once have both a .22 rifle and a .410 shot gun. She could not recall when she had last seen the .22, or whether Mr Sherrard had got rid of it, as she had previously suggested he do.

**Identification**

[14] Although Mr Brunt's evidence in cross-examination was that he considered Mr Sherrard was "an average size man", whom Mr Brunt said at the time of the trial had "got a lot more weight on him than he had three and a half years ago", Mr Brunt was reluctantly forced to agree in cross-examination that his first statement about the matter supplied to investigating police officers said of Mr Sherrard that he was "in his late 50s, thin-set, five foot seven to eight inches tall". He agreed that perhaps three months had elapsed by 10 October 2001 since he had last seen Mr Sherrard prior to that date, and Mr Brunt agreed that for a portion of those three months he had been in Victoria; and had not been long returned from that State in October 2001. He also agreed that in May 2000 he had been involved in an incident in Nanango with his "ex-wife's boyfriend", and that that boyfriend bore Mr Brunt a grudge. He denied the specifically put suggestion that he had not seen who had shot him on 10 October 2001; he said it was Mr Sherrard.

**The searches**

[15] That identification was the direct evidence against Mr Sherrard. The circumstantial evidence included the result of searches made on 11 October 2001, firstly of Mr

Sherrard's home, and then of the area where Mr Brunt was shot. Mr Sherrard contends that circumstantially incriminating evidence was "planted" by the police during or prior to the second search, using for that purpose material removed from his residence, probably during the first search.

[16] The search of Mr Sherrard's premises resulted in the police locating and photographing two black plastic cartridge holders, each containing 50 discharged .22 calibre cartridge cases. Senior Constable Wilkie, the officer in charge of the Kingaroy crime scene section, denied that any other spent .22 cartridges were located at Mr Sherrard's property, and was confident that only those exactly 100 were found which were photographed and plainly visible, in the two shell casing holders. One plastic holder was found inside a box originally containing Winchester Super Speed .22 LR high velocity bullets, and the other in a box originally holding Winchester .22 long Z bullets. However, the cartridge cases themselves did not originally come from those boxes, since there were 84 Winchester Super-x, 14 Remington, and two Sterling brand cartridge cases. A number of the cartridge cases had been fired more than once; and there were quite a number of empty plastic .22 shell casing holders as well. Mr Sherrard also had a number of editions of the Australian Shooter's Journal.

[17] The prosecution case was that the investigating police located two .22 calibre long, or long rifle, discharged cartridge cases underneath and adjacent to a tree on the property adjoining Mr Brunt's, (referred to as "tree A" in Mr Sherrard's evidence) and at a spot from which the shooter might have fired at Mr Brunt. The latter could not specify at the trial what tree it was from which the shooter had crouched and aimed. Forensic examination of those two cartridge cases established the uncontested proposition that they had both been fired by the same fire-arm which had fired 17 of the 100 discharged cartridge cases found in Mr Sherrard's shed; and would each have carried a 40 grain projectile.

[18] Mr Sherrard's evidence was that he had recovered those shells from the Wooroolin Tip in approximately April or May 2001, when he saw them there in a bag containing the Shooter's Journals, in which journals he was interested. He took the discharged cartridge cases away from the tip with him because he had found from previous experience that those cartridge cases would be useful to him in making objects, particularly those associated with electrical work he performed. He produced at his trial, by way of example, three such objects that he had made whilst on bail. His contention was that the police had taken those two cartridge cases from his property, and as it happened from the collection of cartridge cases he had brought back with him from the Wooroolin Tip (which had been more than just the 100 discharged cartridges in the two boxes), and had simply placed them under tree A.

[19] In Mr Sherrard's opinion, the cartridge cases had been put by the police under the wrong tree, since in his view another tree in the adjoining property (referred to as "tree B" during his evidence) was more likely to have been the one from which the shooter, whoever he or she was, had fired at Mr Brunt. Mr Sherrard calculated tree B as a more likely position because of its closer distance to the place where Mr Sherrard understood Mr Brunt had been when hit by the first bullet, and because of what Mr Sherrard argued was the greater degree of consistency between the location of tree B, a spot where the police found a discharged .22 projectile, and the likely trajectory of a bullet which passed through Mr Brunt and came to rest at that spot

where the police found the projectile. Mr Sherrard suggested the probable trajectory made tree B more likely than tree A, the tree where the police described finding the two spent cartridge cases.

[20] Mr Sherrard's evidence was that he had had other discharged cartridge cases, on 11 October 2001, contained in either a grease tin or a Milo tin, and located in his shed in the cupboard which had also contained the two boxes of spent cases. Those in the tin had come from the Wooroolin Tip as well. At the trial it was put to police officer Wilkie that he had "planted" the two discharged cartridge cases found under the tree, and that if not, he had given them to another police officer for that purpose. The officer who had located the cartridge cases was called, a Detective Sergeant Ferling, and it was put to the latter (and denied by him) that either officer Wilkie, or Sergeant Ferling, or some other officer, had planted the two shells.

[21] It was common ground that a now retired Detective Sergeant Lee Crouch had located a discharged .22 bullet or projectile on the dam wall on Mr Brunt's property, which on examination was found to be blood stained, and the blood carried Mr Brunt's DNA. The projectile was identified as a fired .22 long rifle high velocity one, with gilding, and weighed 38 grains. The jury were certainly entitled to conclude that that projectile had passed through Mr Brunt's body. Sergeant Ferling's evidence was that after he had seen Detective Crouch locate the projectile, he had noticed an ironbark tree, (tree A) walked to it, and had then calculated from his own experience as a shooter where discharged shells might fall had someone fired a rifle from that tree. His search then located one cartridge case, and after further examination, the second one.

[22] Sergeant Ferling's evidence was that "an emu parade" search by SES volunteers had not even started before he had located those shells, and the SES search had only just formed their line when he did that. On the other hand, Sergeant Crouch's recollection was that the SES searchers had already walked past, if not already over, that particular area and had not found those cartridges before Sergeant Ferling did. That inconsistency was relied on at the trial to challenge the reliability of Sergeant Ferling's evidence.

[23] Mr Sherrard's counsel also pointed to the fact that Constable Keith Van Den Boog, who had seen Detective Sergeant Ferling locate the empty .22 cartridge cases under the tree, had described seeing police officer Wilkie photographing what Constable Van Den Boog thought were .22 shells in a Milo container in the front yard of Mr Sherrard's residence, while the police were conducting their search of his premises earlier on 11 October. Senior Constable Wilkie denied ever having seen any Milo or other tin containing cartridge cases, or having photographed them; and all of the negatives he had taken that day were produced and exhibited, including some aerial photographs taken that day and relating to another investigation entirely.

[24] There was no evidence from any other police led in support of the existence of a Milo tin containing discharged cartridge cases in Mr Sherrard's property, or of any discharged cartridge cases other than the exactly 100 in the two boxes. The photographs police officer Wilkie took did include photographs taken at Mr Sherrard's residence, next to a vehicle in the yard and not in the shed, of a dirty plastic container which had in it some undischarged .410 shotgun cartridges, contained in a small belt holder, and in which the brass cartridge caps were visible. Entirely appropriate use was made at the trial of the contradictions in the police

evidence, to challenge its overall veracity and reliability. At the trial police officer Wilkie emphasised in his evidence, and the Crown emphasised in its submission, that the police who searched Mr Sherrard's property in the morning did not have a scanning electron microscope with them, or any other instrument or means, that would have enabled corrupt officers to select at Mr Sherrard's premises two discharged cartridges which had not only each been fired from the same rifle, but which had also been fired from the same rifle as 17 of the other 100 discharged cartridge shells produced by the prosecution as the result of the search. If there had been any conspiracy to fabricate evidence by the police officers accused of it at the trial, the conspirators had extraordinarily good fortune in selecting the two discharged cartridge cases which they did, and were also extraordinarily lucky both that no honest police officers other than Van Dan Boog observed the Milo tin with .22 shells in it, and that no photographs of it were produced by anyone. There was no evidence at the trial that any such tin was recorded as being taken into police possession; Mr Sherrard did not produce it at his trial.

[25] On the hearing of the appeal, Mr Sherrard, who represented himself, really abandoned the argument his counsel made at the trial that there had been a conspiracy between police officers to plant evidence, and contended instead that the dishonesty had involved only a police officer Paul Christensen, who had been the first police officer to locate the two boxes with discharged cartridge cases during the search of Mr Sherrard's shed, and who described himself as being next to Sergeant Ferling, in a line of police officers, when Sergeant Ferling found the two cartridge cases under tree A. Sergeant Christensen had been one of the two police officers who had received Mr Sherrard's first complaints of serious assault, made in February 2000 when Mr Sherrard had been attacked. Mr Sherrard's argument on appeal included criticism of Sergeant Christensen for the latter's recollection at the trial that Mr Sherrard, at the time of his first complaint, had not specifically named Mr Brunt and Mr Brunt's ex-wife as the two suspects, as distinct from saying then words to the effect of "you know who they are, who I have problems with". Mr Sherrard's argument on appeal implied that this answer showed that Sergeant Christensen was unwilling to concede, or attempting to conceal, that Mr Brunt was party to the attack on Mr Sherrard.

[26] Sergeant Christensen had been guarding Mr Sherrard's premises against intruders and protecting the integrity of it as a scene, from about 12.15am on 11 October 2001 until 11.45am later that morning. Mr Sherrard's argument on the appeal also implied that Sergeant Christensen may have used the opportunity, which being on Mr Sherrard's property for that period gave him, to remove two discharged cartridge cases. Sergeant Christensen had undoubtedly gone to take part in the search of Mr Brunt's premises immediately after he left Mr Sherrard's. It was not put to Sergeant Christensen at the trial that he had been responsible for "planting" or fabricating any evidence, and the attack on him on the appeal seemed a new development.

[27] Sergeant Christensen was also the officer who made a second important find on Mr Sherrard's property. This was an oil container filled with sand, located under a bath tub, which had holes in it consistent with it having been used in the past for target practice, by someone firing a .22 weapon. Forensic examination of that container resulted in 60 .22 rifle projectiles being recovered from it, of which 16 were .22 "short or long" projectiles, and 44 were .22 long rifle projectiles. Further forensic examination established that eight of the .22 "short", and five of the .22 long rifle projectiles, had been fired from a rifle with the same firing or rifling characteristics

as the .22 projectile with Mr Brunt's blood on it, found by Sergeant Crouch on Mr Brunt's dam on the afternoon of 11 October 2001. The forensic examination did not establish that all 13 projectiles recovered from the sand had necessarily all been fired by exactly the same weapon, nor that the bloodstained one found on Mr Brunt's property had necessarily been fired by precisely the same weapon as had fired those 13. It established only that the firearm or firearms had the same rifling characteristics, being the same width, groove, and land impressions in the barrel. That would have included Remington rifles, Springfield rifles, and Stephens rifles; so that any one of a very large number of weapons, of a very common design, could actually have fired all the projectiles, or they could have been fired by 14 different weapons.

[28] The appellant contended in his defence and on appeal that the police had probably contaminated the projectile, which he appeared to accept was genuinely found by Sergeant Crouch, with blood from Mr Brunt's residence, shed by him when he returned there bleeding from his bullet wounds. The only apparent motive for all this corrupt conduct was to provide justification for the fact that the investigating police had arrested and charged Mr Sherrard on the night of the 10 October 2001, relying on Mr Brunt's identification, and perhaps to provide an ex post facto justification in not charging Mr Brunt with attempting to kill Mr Sherrard.

[29] Mr Sherrard's explanation at the trial for the fact that projectiles in the sand within the oil tin had been fired from a rifle which may have fired the projectile which was recovered, and which rifle the jury could conclude had fired the two recovered cartridges (from one of which had come the recovered projectile), was that a friend had given it to him a number of years ago. That friend's son had used the oil container for target practice. Mr Sherrard had not.

[30] Mr Sherrard's ground of appeal requires this court to make its own independent assessment of the evidence, and in so doing assess whether or not on the whole of that evidence it was open to the jury to be satisfied beyond reasonable doubt that Mr Sherrard was guilty.[4] The prosecution evidence made a good case against Mr Sherrard, which had both the direct identification evidence given by Mr Brunt of a person whom he had known for a decade and the circumstantial evidence. That included that Mr Sherrard had a continuing belief in a well justified grievance and anger at Mr Brunt and his ex-wife for their attack upon Mr Sherrard, and also had the opportunity to commit the offence provided by both the physical propinquity of the two properties and Mr Sherrard's presence on his own property that afternoon. There was then the undeniable connection – if the jury accepted the police evidence of honest discovery – between the weapon fired at Mr Brunt, and a weapon which had fired cartridges and their projectiles all of which were in Mr Sherrard's possession, and about which weapon the jury could conclude both that it too had been in Mr Sherrard's possession, and that he had gotten rid of it immediately after shooting Mr Brunt. One of the things noticed and photographed in the search of his shed was a length of plastic tubing encased within a carpet, hanging from the roof of the shed, of a diameter and length that would have suited its use for storing a .22 rifle. No .22 rifle was located.

[31] The learned trial judge gave extensive and careful directions to the jury, about which no complaint is made, reminding them of the various inconsistencies and

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4 *M v R* (1994) 181 CLR 487 at 492-493

matters for criticism in the evidence given by the police officers, and which supported the possibility that their evidence was deliberately inaccurate. After lengthy deliberations in which a number of redirections were sought and given, the jury convicted; on the evidence they heard it was reasonably open to them to reject beyond reasonable doubt the suggestions of impropriety by police officers, and to come to the conclusion of guilt.

**Evidence on the appeal**

[32] Mr Sherrard wanted to introduce some new material on the appeal. The first was evidence that in a television interview after Mr Sherrard's conviction, Mr Brunt had complained of having received a letter bomb or letter bombs, apparently sent while Mr Sherrard was still at large. Mr Sherrard submitted that since he had not sent the letter bombs, the fact that someone else had established that at least one person other than himself had considerable animosity towards Mr Brunt, sufficient to lead that person into attempting to injure Mr Brunt. The difficulty with that proposition is that it depends entirely upon accepting Mr Sherrard's unsworn statement that he was not the source of any letter bomb, assuming both that Mr Brunt had said he had received one or more, and that what he said was true. Even if examination of the letter bomb or bombs could establish what Mr Sherrard simply hoped or said the examination would show, namely that Mr Sherrard had not sent them, that fact would only widen the circle of suspects for the letter bombs; Mr Brunt's identification, and the remaining circumstantial evidence other than Mr Sherrard's animosity to Mr Brunt, would still serve to identify Mr Sherrard as the one amongst Mr Brunt's enemies who had acted against him on 10 October 2001. That ground of appeal seeking to lead the generally undescribed contents of that interview should be dismissed.

[33] Mr Sherrard's other significant application was to lead evidence of the examination of three discharged cartridge cases, which he said in his oral submissions he had earlier found under tree A and tree B. Mr Sherrard explained to the court that he found one discharged cartridge case on 25 January 2003, after being released on bail, at tree B; and two further discharged cartridge cases under tree A. He had photographed the three he found in situ on 29 January 2003, given the photographs to his legal representatives on 6 February 2003, and had taken a firearms expert, a Dr Vallati, to the scene in January 2004. The shells were still there. As he understood it they were examined by Dr Vallati, whom Mr Sherrard said was of the opinion that all three had been fired by one and the same rifle, in all likelihood a .22 magnum. That was because all three were .22 magnum cartridges. Mr Sherrard told the court that a .22 magnum rifle fires a projectile of the same size, also gilded, as a .22 long rifle high velocity projectile, identical with the one the police found. Mr Sherrard also said that a .22 magnum cartridge could not be fired from a standard .22 rifle, with which proposition counsel for the Crown agreed on the appeal; both parties agreed that it was possible to fire a .22 long rifle high velocity cartridge from a .22 magnum rifle, although Mr Sherrard stressed that a non-magnum cartridge case – not the projectile, which is the same size – would be a loose fit in a magnum rifle.

[34] The problem facing Mr Sherrard about the evidence of his own discovery in January 2003 was that, as he also described in his oral argument, his legal advisors had been supplied with a report from Dr Vallati, and after a conference with him had elected to not call that witness. Mr Sherrard did not produce any statement by Dr Vallati to

this court, although the appeal record shows that an unidentified expert had, at the defence request, been permitted to hear the evidence of the prosecution's ballistic examiner.

[35] Mr Sherrard himself had said nothing at all in either his evidence in chief, or when being cross-examined, about the asserted discovery of three .22 magnum cartridges, two of them under the very tree at which the police – on his case at the trial and an appeal – had planted two .22 cartridge cases. Mr Sherrard had a number of opportunities in the witness box to raise that matter, as he was cross-examined with great care about a map he had produced which identified both trees, and cross-examined as to why he had particularly identified on his map tree B and its location (under which he found the single magnum cartridge case, on his statement to this court). He was forced in that cross-examination to agree he could not maintain the argument that the location of the recovered projectile, and its probable trajectory, made tree B a more likely spot for the shooter than tree A. He avoided – and it was not easy to do – making any mention in his answers in cross-examination of what he disclosed to this court to be the true reason for his focussing on tree B, namely that he found a spent .22 cartridge there. He also avoided mentioning his finding more spent cartridges under tree A, when cross-examined about why he rejected that tree as a spot for the shooter.

[36] One can readily understand why Mr Sherrard's experienced counsel chose not to lead evidence about the asserted finding of those other cartridge cases, and by implication that the police and SES searches all missed them. There was a significant risk that the jury might come to the conclusion that Mr Sherrard himself had put them there. In a case in which the defence was suggesting that the police had planted evidence, it would be taking a considerable forensic gamble to introduce the possibility that the jury would suspect only that Mr Sherrard had.

[37] Mr Sherrard's written outline of argument did not in fact describe his finding of those shells, and all of this only emerged in response to questions from the court. What is clear is that none of it was in any sense fresh evidence and that a deliberate decision was made not to lead any of it. Mr Sherrard avoided mentioning it at all when cross-examined. He did not cause his legal advisors to supply the three .22 magnum cartridge cases he said he found to the police for forensic examination, to ascertain whether those had been fired from the same or a different rifle from that which had fired the two cartridge cases the police said they found. Putting the matter at its highest for Mr Sherrard, namely treating all this as if this was fresh evidence and sworn to on oath, there is no significant possibility that the jury acting reasonably would have acquitted him had it had before it the totality of the information he put before the court on appeal. That was simply that he had found those .22 magnum cartridge cases, that there had been no forensic comparison of those with any other cartridge cases, that the projectile found could have come from a .22 magnum cartridge, and that all the spent cartridges found could have been fired from the one rifle.

[38] I am satisfied that none of Mr Sherrard's grounds have sufficient merit to demonstrate any miscarriage of justice resulting from his conviction, and his appeal against conviction should be dismissed.

**Sentence application**

[39] The learned sentencing judge accepted that the probable sequence of events leading to the attempted killing of Mr Brunt was that suggested by counsel for the Crown when cross-examining Mr Sherrard, namely that his original purpose had been to alarm Mr Brunt by firing rifle shots at the rear of the latter's property. However, matters had then escalated when Mr Sherrard saw Mr Brunt in the flesh, and then moved to a crouching position adjacent to a tree. The judge accepted that it was at that point only that Mr Sherrard formed the intent to kill Mr Brunt.

[40] As the learned sentencing judge observed, the evidence established that Mr Sherrard was experienced and skilled in the use of rifles. Both shots were deliberate and skilfully executed. It could not surprise had either proved immediately fatal. They did not, and as the judge also observed, Mr Brunt has come out of it surprisingly well. The bullet to the head does not seem to have done any serious or major lasting damage, although the bullet to the shoulder has left him with some continuing disability to the left arm.

[41] Mr Sherrard bore a good character with only one prior conviction for a minor assault prior to 10 October 2001, and his motivation for attempting to kill Mr Brunt was the apparently quite genuine belief that Mr Brunt had been one of two people who had inflicted a cowardly and potentially lethal attack upon Mr Sherrard, causing Mr Sherrard to harbour a growing obsession that Mr Brunt had succeeded in avoiding prosecution.

[42] The sentence of 11 years imprisonment is a heavy one, but of necessity it has a substantial deterrent component. In Mr Sherrard's case there is both the general deterrence to others against attempting to take life, and also deterrence against seeking retribution or punishment outside the appropriate legal processes.

[43] In the circumstances the sentence imposed is not manifestly excessive. By way of comparison, in a matter of *R v Forster* [2002] QCA 495, that applicant was sentenced to 12 years imprisonment for attempting to murder his wife. He entered a shop where she was working, carrying a long cardboard box, directed it at her, and pulled the trigger of a .22 calibre rifle contained within the box. The bullet struck her on the right side of the chest, and he was prevented from firing a second shot only by the intervention of other persons, to one of whom he also caused grievous bodily harm. That applicant had been married for some 27 years to the victim, and had been particularly depressed by their relatively recent separation, and by his loss of employment as a Manager of an industrial plant and inability to find any other employment. He was 62 years old, had a good work record, and had become suicidal and partly alcohol dependent after the marital separation and loss of employment. It appeared from the contents of a note he left in his daughter's car, which he had borrowed and driven to the shop where he attempted to kill his wife, that he contemplated committing suicide after the intended murder, and had even made arrangements for his own funeral. He pleaded guilty at the earliest opportunity.

[44] In dismissing his application for leave to appeal, this court noted that his actions were calculated or pre-mediated. It also noted his pleas of guilty, remorse, mental condition at the time, previous good work record, age, and other matters in mitigation. Nevertheless, this court referred with approval to remarks of Williams

J, as His Honour then was, in *R v Reeves* [2001] QCA 91, where His Honour stated that the range in comparable matters had generally been from 10 to 17 years for such offences. In *R v Forster*, the judgement of McPherson JA, (that of the court), noted that an examination of more recent sentences confirmed the assessment of Williams JA in *R v Reeves*. In *R v Forster* this court held that the sentence of 12 years imposed was well within and somewhat at the lower end of the range, even having regard to the mitigating factors.

[45] In those circumstances Mr Sherrard fails to demonstrate that his 11 year sentence was excessive. I would accordingly dismiss both his appeal against conviction and his application for leave to appeal against sentence.

[46] **MACKENZIE J:** The evidence and issues providing the framework within which the appeal against conviction and application for leave to appeal against sentence must be decided have been comprehensively analysed by Jerrard JA. I generally agree with his reasons and will only emphasise aspects of the matter which lead me to the conclusion that the appeal against the conviction should be dismissed and the application for leave to appeal against sentence refused.

[47] The state of relations between the appellant and the complainant is summarised succinctly in Jerrard JA's reasons. The evidence discloses that the applicant had a firm conviction that the complainant was one of the two people who had, the previous year, attacked him with iron bars and inflicted injuries on him sufficient to require his hospitalisation. His sense of grievance at what he believed to be police inaction over the incident lingered. The cogency of this evidence in light of the allegations about possible involvement of others was a matter for the jury, who were properly directed about it.

[48] On the day of the incident, the complainant identified the appellant, who was well known to him, as the person who fired shots at him from what he identified as a .22 rifle. Features in the evidence of the complainant's description of the appellant which were relied on as material inaccuracies by him were fully and adequately exposed before the jury. The jury, by its verdict, accepted that the applicant was the person who shot the complainant.

[49] There was other evidence relied on by the Crown as linking the appellant to the offence. Cartridge cases of .22 ammunition consistent with a number of similar cases found at the appellant's premises were located in two positions in the area from which, according to the complainant, shots were fired at him. A distorted projectile, not inconsistent with being one from the same kind of ammunition, was found on a dam wall in the general area of the shooting. That projectile had the complainant's DNA on it. It was consistent with a projectile having passed through the complainant's body, which was in fact the case. The appellant's wife gave evidence of periods when the appellant was out of her presence on the day of the shooting. The times of his comings and goings were not precise, being based on estimates. The only firm time is that an ambulance was dispatched at about 2.50pm to treat the complainant. If the jury was satisfied that the times given by the appellant's wife were not precise, as they were entitled to do, her evidence did not exclude opportunity to commit the offence. On the basis of this body of evidence, the prosecution case was quite strong.

[50] The kind of explanation that the appellant developed to neutralise this evidence, which was to the effect that the police had selected cartridge cases from those found at his premises and planted them at the scene. Before us, he theorised that someone had manually deformed the projectile and used DNA of the complainant from another available source to make it appear that the projectile was one that had struck him. This would in all probability not have been appealing to a jury. The other aspect of the appellant's case in this regard is concerned with the failure to raise, as part of his case at trial, his claim to have found other cartridge cases of a different kind at the same locations as the police found those tendered in evidence.

[51] According to his submissions to us, his evidence would have been to the effect that, after being released on bail, he went back to the scene and found the cartridge cases which had apparently been missed by the police and SES personnel who had searched the area. Although there was no evidence of it, it appears from the applicant's submissions that a firearms expert engaged by him attended the scene about a year later and, later still, examined the cases which were .22 magnum cases. The final position seemed to be that ammunition of the kind represented by the cases found by the police might have been fired through a magnum although it was not well adapted to do so.

[52] The appellant, who gave evidence at the trial, did not reveal, during his evidence, his claim to have found the additional cartridge cases despite ample opportunity to do so. It is apparent from his submissions that a deliberate forensic decision had been taken not to call evidence from the expert. Notwithstanding the appellant's assertion to us that he was waiting for his counsel to lead the evidence, he had, according to his oral submissions, signed a document agreeing that the expert should not be called.

[53] In a case where the thrust of the defence relied on at trial was that police officers or a police officer had planted incriminating evidence, there would have been a distinct forensic disadvantage in calling evidence which may suggest to the jury that the appellant himself had serendipitously discovered cartridge cases which no one had found at the time of the original search. A tactical decision not to lead that evidence would not be surprising. In my view there is no reason why the appellant should have leave to call this evidence on appeal. Since the appeal was heard, the appellant has made further written submissions, none of which raise cogent issues in his favour.

[54] With regard to the other matters traversed in detail by Jerrard JA, including the opportunity for the appellant to commit the offence and his application to introduce evidence of a television interview with the complainant after his conviction nothing needs to be added to what Jerrard JA has said. I agree for the reasons given by him that the appeal against conviction must be dismissed and that the application for leave to appeal against sentence should be refused.