SUPREME COURT OF QUEENSLAND

CITATION:	*R v Witchard & Ors; ex parte A-G (Qld)* [2004] QCA 429
PARTIES:	**R** **v** **WITCHARD, Jennifer Faye** (appellant/applicant) **R** **v** **WITCHARD, Jennifer Faye** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant) **R** **v** **OAKES, John Noel** (appellant) **R** **v** **OAKES, John Noel** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant) **R** **v** **BARNETT, Wayne Lindsay** (applicant) **R** **v** **BARNETT, Wayne Lindsay** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 105 of 2004 CA No 128 of 2004 CA No 152 of 2004 CA No 129 of 2004 CA No 120 of 2004 CA No 130 of 2004 SC No 3 of 2004

SC No 4 of 2004

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction and Sentence
Appeal against Conviction
Sentence Application
Sentence Appeals by A-G (Qld)

ORIGINATING COURT: Supreme Court at Bundaberg

DELIVERED ON: 12 November 2004

DELIVERED AT: Brisbane

HEARING DATE: 30 July 2004

JUDGES: de Jersey CJ, Mackenzie and Mullins JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER:

1. **In CA No 105 of 2004:**
   - **(a) appeal against conviction dismissed**
   - **(b) leave to appeal against sentence refused**
2. **In CA No 128 of 2004:**
   - **(a) appeal against sentence allowed**
   - **(b) the sentence of 12 years' imprisonment imposed in the Supreme Court at Bundaberg on 2 April 2004 for the offence of attempted murder be set aside and, in lieu, the sentence of 15 years' imprisonment be substituted**
   - **(c) declare the conviction for attempted murder to be a conviction of a serious violent offence**
   - **(d) affirm the other orders made in the Supreme Court at Bundaberg on 2 April 2004**
3. **In CA No 152 of 2004:**
   - **(a) appeal against conviction dismissed**
4. **In CA No 129 of 2004:**
   - **(a) appeal against sentence allowed**
   - **(b) the sentence of six years' imprisonment imposed in the Supreme Court at Bundaberg on 2 April 2004 for the offence of attempted murder be set aside and, in lieu, the sentence of nine years' imprisonment be substituted**
   - **(c) affirm the other orders made in the Supreme Court at Bundaberg on 2 April 2004**
5. **In CA No 120 of 2004:**
   - **(a) leave to appeal against sentence refused**
6. **In CA No 130 of 2004:**
   - **(a) appeal against sentence dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – whether

defendant suffered substantial miscarriage of justice as a result of not being tried separately from co-defendants – whether risk of prejudicial and improper use in case against defendant of one co-defendant's statement given to the police which was admissible in the case against that co-defendant only – whether risk of prejudicial or improper use of statement was avoided by directions given to jury – whether any prejudice was compounded by aspects of conduct of trial including statements by prosecutor in address – no substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – whether verdict of guilty of attempted murder against defendant could be supported on basis that he was either a principal offender or aided a co-defendant – whether co-defendant's attempt to kill the complainant ceased upon inflicting the initial stab wound or continued to be manifested in her exhortations to defendant and other co-defendant to kill – whether defendant encouraged or aided his co-defendant in executing her intention to kill – verdict supportable on either basis

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – whether defendants were entitled to the benefit of s 538 *Criminal Code* (Qld) on sentence – whether each defendant made a deliberate decision to desist from further conduct prosecuting the intention to kill the complainant – whether series of events were a continuing manifestation of the intention to kill

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – appeal by Attorney-General against sentences for attempted murder - whether sentences were manifestly inadequate – sentences increased

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE

SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – application for leave to appeal on the basis that the sentence is manifestly excessive – application refused

Criminal Code (Qld), s 7(1), s 538
Criminal Code (Northern Territory), s 279
Evidence Act 1977 (Qld), s 132C
Penalties and Sentences Act 1992 (Qld), s 161

R v Bird and Schipper [2000] QCA 94; (2000) 110 A Crim R 394, followed
R v Booth [1999] QCA 100; [2001] 1 Qd R 393, followed
R v Byers; *ex parte A-G (Qld)* [1995] QCA 44; CA No 430 of 1994 and CA No 436 of 1994, 28 February 1995, considered
R v Crawford [1989] 2 Qd R 443, distinguished
R v Gill; ex parte A-G (Qld) [2004] QCA 139; CA No 414 of 2003, 30 April 2004, cited
R v Hess [2003] QCA 553; CA No 122 of 2003, 12 December 2003, distinguished
R v Ishibashi [1998] QCA 342; CA No 88 of 1998, 29 May 1998, considered
R v Longshaw (1993) 114 FLR 423, considered
R v Marks; *ex parte A-G (Qld)* [2002] QCA 34; CA No 268 of 2001, 18 February 2002, considered
R v Rochester; *ex parte A-G (Qld)* [2003] QCA 326; CA No 362 of 2002 and CA No 399 of 2002, 1 August 2003, considered
R v Rogers (1996) 90 A Crim R 405, considered
R v Schaefer [2001] QCA 327; CA No 89 of 2001, 10 August 2001, cited
R v Thompson; ex parte A-G (Qld) [1989] CCA 110; CA No 86 of 1989, 30 May 1989, cited
Webb v The Queen (1994) 181 CLR 41, followed

COUNSEL: G P Long for the appellant/respondent, Witchard
J R Hunter for the appellant/respondent, Oakes
T A Ryan for the applicant/respondent, Barnett
R G Martin for the respondent/appellant

SOLICITORS: Legal Aid Queensland for appellant/respondent, Witchard
Legal Aid Queensland for appellant/respondent, Oakes
Legal Aid Queensland for applicant/respondent, Barnett
Director of Public Prosecutions (Queensland) for the respondent/appellant

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Mackenzie J and Mullins J, with which I agree. I too would make the orders proposed by Mullins J.

[2] As to sentence, the bizarre curiosity of the case cannot be allowed to obscure the gravity of the offending, a gravity which was in my respectful view insufficiently reflected by the sentences imposed on Witchard and Oakes by the learned Judge.

[3] The revised sentence of 15 years imprisonment, with a declaration, for Witchard, nine years with a declaration for Oakes, with the five year sentence imposed on Barnett remaining, involve appropriate parity.

[4] I would regard the 15 years to be imposed on Witchard as at the bottom of the range in her case, especially having regard to *R v Bird and Schipper* (2000) 110 A Crim R 394. Witchard's crime reveals her as a manipulative, evil person.

[5] Oakes may have been Witchard's pawn, but he exhibited independently an intent to kill Wallace, and rendered the potentially life threatening injury via the stab to the centre of the chest. I would likewise regard the nine years to be imposed on Oakes as falling at the bottom of the relevant range.

[6] The case raises an important question as to the construction of s 538 of the *Criminal Code*. That section provides:

> "**Reduction of punishment**
>
> **538** (1) When a person is convicted of attempting to commit an offence, if it is proved that the person desisted of the person's own motion from the further prosecution of the person's intention, without its fulfilment being prevented by circumstances independent of the person's will, the person is liable to one-half only of the punishment to which the person would otherwise be liable.
>
> (2) If that punishment is imprisonment for life, the greatest punishment to which the person is liable is imprisonment for 7 years."

[7] Counsel's research has not uncovered any particularly helpful analysis of the provision, which has appeared in the Code from its outset. That is probably consistent with its having the limited application I will shortly describe. Within Australia, the provision is unique to the State of Queensland. With the migration of the Griffith Code, the provision has appeared elsewhere, for example in the Northern Territory (cf. *R v Longshaw* (1993) 114 FLR 423) and Malta. The Queensland provision was mentioned, but not considered, in *R v Gill, ex parte Attorney-General* [2004] QCA 139. *R v Thompson, ex parte Attorney-General* CA No 86 of 1989 provides an example of its application, where an accused attempting to penetrate a complainant child desisted when she said it was hurting her. I am indebted to Mackenzie J for the reference to another Northern Territory case, *R v Rogers* (1996) 90 A Crim R 405, where an intended bank robbery was aborted because of the actions of the teller: a subsequent change in heart on the part of the offender occurred too late to render the provision applicable. As it was put by the court (p 411):

> "… in order for the respondent to be entitled to the benefit of this section the respondent must have desisted of his own motion from the further prosecution of his intention before the fulfilment of his intention is prevented by circumstances independent of his will and not afterwards."

[8] The *Criminal Code* sets life imprisonment as the maximum penalty for the crime of attempted murder (s 306). An attempted murder is complete when the requirements of s 4 are met: the existence of the intent to kill, beginning to put that intention into execution, manifesting the intention by an overt act, and not fulfilling the intention. In this case, Witchard had completed her offence of attempted murder by the time of her stabbing, or depending on how one interprets the jury's acquittal of Barnett on the count of attempted murder, by the time of the last stabbing by Oakes. Oakes had completed the offence by the time he inflicted his last stabbing upon the victim Wallace.

[9] Yet in reliance on s 538, it is said, for both Witchard and Oakes, that they respectively thereafter "desisted [of his or her] own motion from the further prosecution [of his or her] intention", without the intervention of "circumstances independent [of his or her] will". It fell to those accused persons to establish that. In finding that Oakes had, the learned Judge took into account Oakes's conduct over the hours which followed that last stabbing, focusing on his not availing himself of further opportunities to kill Wallace. Before us, the contention for Witchard was as follows:

> "He [Wallace] was completely at her mercy after the initial attack and in these circumstances a lack of resolve to carry through an earlier formed intention to kill is enough to satisfy the requirement of desisting of one's own motion from the further prosecution of that intention."

[10] In my respectful view, His Honour's determination in relation to Oakes involved a misapplication of s 538, a provision which contemplates temporal proximity between the conduct which constitutes the attempt, and the desisting, with the desisting at the end of a continuum constituted by the conduct. What happened here, in the case of each of these accused, was a completed attempted murder, and then, assuming a persisting intent to have Wallace dead, a failure to implement that intent, with the result that a further discrete instance of attempted murder did not occur.

[11] I interpolate to say that the concept of desisting of one's own motion means, simply, voluntarily desisting because of one's own determination to do so, unaffected by the intervention of any other circumstance which would prevent the fulfilment of the intention. The Macquarie Dictionary defines "of one's own motion" by reference to "an inward prompting or impulse; inclination". For s 538 to apply, that prompting, impulse or inclination must not be a response to the existence of some other external circumstance seen as likely to frustrate the implementation of the intention.

[12] Mr Hunter, who appeared for Oakes, emphasized that the provision speaks of the offender's desisting of his own motion from the further prosecution of, not the offence, but his intention, so that, he submitted, it is not to the point that an offence had already been completed, even if completed an appreciable time before Oakes's withdrawal or retreat. But in my view it is the intention prevailing during the commission of the offence to which the provision relates, not an intention which may continue thereafter. That is, I believe, the natural reading of the provision.

[13] The reason why the provision begins with a reference to conviction is because it is concerned with punishment. That explains why the words "convicted of" appear in

sub-section one. But they need not be there, and the true construction of the provision becomes clear if read as if those words were not there:

> "When a person is … attempting to commit an offence … [and] the person desist[s] of the person's own motion from the further prosecution of the person's intention, without its fulfilment being prevented by circumstances independent of the person's will …"

[14] In other words, for s 538(1) to apply, one must be able to identify the desisting as the culmination, or end point, of the conduct which constitutes the attempt, and that was plainly not the case here, in respect of either Oakes or Witchard. In this case, any retreat was not from the commission of the charged offence, but from committing another or others.

[15] The intended limited application of the provision may be illustrated by these examples.

(a) Intending to kill, an offender loads a rifle, cocks it and fires at his victim. The weapon misfires. The offender then repents of his intention and does not reload, but desists from any further attempt. Section 538 does not apply.

It would have applied if, after loading and cocking and raising the weapon, he then repented and lowered the weapon before pulling the trigger.

(b) Intending to kill a pedestrian, a motorist swerves in his direction, but does not make contact. He repents, continues on, and does not return to make another attempt. Section 538 does not apply.

It would have applied if, after beginning to swerve towards the pedestrian, the motorist regained his senses and moved away.

[16] In the Northern Territory case of *Longshaw*, the offender struck his victim with a wheel brace, intending to kill him. The accused believed he had killed him. Then a friend took the wheel brace from the accused. The accused came to realise that his victim was not dead, and felt relieved. Kearney J said (p 424):

> "The fact that when he realised that his victim was not dead he did not then form a fresh intention to kill him, and make a fresh attempt to do so, does not attract the provisions of s 279 [the Northern Territory equivalent of s 538] to his already completed attempt."

I agree. But then His Honour continued:

> "Had he not believed he had killed his victim, and had he voluntarily desisted from striking him again before he was disarmed by Jack, I consider – contrary to the Crown's submission – that s 279 could have been relied on."

Consistently with the analysis set out above, I would respectfully disagree with that dictum.

[17] Section 538 is intended to encourage persons, while attempting to commit an offence, to desist voluntarily, and does so by reducing the applicable maximum penalty when that occurs; but the benefit is not available where, having made one attempt, the offender repents of his wrong doing and desists from making a further attempt.

[18] It would be surprising were the benefit of the provision, which concerns punishment for an attempt to commit an offence, to relate, not to the manner of commission of that attempted offence, but to retreat from the commission of another offence.

[19] The construction I have described accords both with the natural scope of the provision, and with its sensible application. On that construction, the relief which it provides was not available to either Witchard or Oakes: each fell to be sentenced for attempted murder in the context of a maximum penalty of life imprisonment (s 306).

[20] **MACKENZIE J:** The statement of fact in Mullins J's reasons for judgment comprehensively provides the framework within which the respective appeals are to be considered. It is convenient to adopt the subsequent headings used by Her Honour for the purpose of expressing my conclusions.

Witchard's appeal against conviction

[21] The sole ground of appeal against conviction pursued was that the learned trial judge erred in refusing her application that her trial be heard separately from her alleged co-offenders. During the course of the trial there were four applications on her behalf for a separate trial, on days 1, 7, 8 and 12. The question before an appellate court when such a ground of appeal is under consideration is whether, by reason of the joint trial, there has been a substantial miscarriage of justice, or to put it another way, whether improper prejudice has been created against an accused (*Webb v The Queen* (1994) 181 CLR 41, 89).

[22] In developing the argument in support of the ground of appeal, many of the issues touched upon in those applications, summarised by Mullins J, were relied on. It was conceded by counsel that in many cases, the risk of a jury making improper use in a joint trial of a statement by one accused which was inadmissible against another accused may be avoided by appropriate directions by the trial judge. However, there were cases where the risk could not be avoided and improper prejudice was created against an accused. In such a case a substantial miscarriage of justice occurred.

[23] It was conceded that the learned trial judge gave appropriate directions to the jury that it must use evidence that was admissible against the particular accused only against that accused. However, it was submitted that, because of the centrality of the issue of intent and the impact of assertions made by the appellant Oakes as to the appellant Witchard's state of mind, it was impossible to expect that the risk of impermissible use of the material could be avoided by any directions to the jury.

[24] It was also submitted that the problem was compounded by a number of other factors, including statements by the Crown Prosecutor, and allegedly repeated by the learned trial judge, which may have suggested to the jury that they could use aspects of Oakes' statement against Witchard. The case was likened to *R v Crawford* [1989] 2 Qd R 443, where there were a very significant disparity between the quality of evidence admissible against the respective accused persons and passages in the summing-up which directed attention to evidence only admissible against Crawford in a way that suggested that the evidence could be used as part of the process of determining the other accused's guilt. The problem was exacerbated because there was an absence of evidence against the latter about matters, referred

to in Crawford's record of interview, which were highly important as part of the proof of the case against the co-accused.

[25] A fundamental difference between the present case and *Crawford* is that, in the present case, the victim survived and was able to give an account of events from which a jury may well have independently inferred that Witchard had an intent to kill the victim, irrespective of any opinion held by Oakes about her intention. Further, for the reasons developed by Mullins J, with which I agree, it is not made out that there was an invitation to use Oakes' evidence or an implication that what Oakes had said might be used to determine Witchard's guilt. The two vices identified in *Crawford*, which were conjoined in that case, do not affect this matter. In my view, the ground of appeal that a miscarriage of justice has occurred because Witchard was tried jointly with the other two accused must fail, for the reasons developed by Mullins J.

Oakes' appeal against conviction

[26] The sole ground argued was that the learned trial judge erred in directing the jury that Oakes' conduct was capable in law of amounting to aiding Witchard in an attempt to kill. I agree with Mullins J's reasons for judgment in relation to this ground. I only wish to add that the evidence is that, immediately after Witchard had stabbed the victim, she called out, according to the victim, "Come on, get him", and according to Oakes, "Finish him off". This exhortation to Oakes and Barnett might reasonably be taken to manifest a continuing intention on her part that those to whom it was addressed do further acts to assist in fulfilling her intention that the victim die. On the facts it is untenable to characterise Witchard's attempt to kill the victim as having ceased upon her inflicting her stab wound on him, leaving the immediate response by Oakes to her exhortation to "get him" or, as Oakes recalled it, to "finish him off" to be considered as something other than conduct falling within s 7.

[27] Whether the stab wound Oakes inflicted at that time, which the medical evidence suggests was the deepest, was a genuine attempt to inflict a fatal wound on the victim or a pretence by a man under Witchard's influence designed to give the false appearance that he was complying with her call for assistance was a distinct issue for the jury to consider within this framework. It is apparent from the verdict, which was open to them having regard to the nature of the wound, that they considered that what Oakes did was not a pretence. It was also open, on the evidence, that there was sufficient continuity in the subsequent events to allow the subsequent wounds to be considered as aiding. This ground of appeal is not made out.

Application of s 538

[28] After Sir Samuel Griffith compiled his Digest of the Statutory Criminal Law in Force in Queensland on the First Day of January, 1896, (which did not contain any analogue of s 538), and presented it to the Attorney-General on 1 June 1896, a draft Criminal Code was prepared by him and submitted under cover of a letter of 29 October 1897. There were numerous marginal notes identifying the sources of draft sections. In a footnote to draft s 4 which, apart from recent amendments designed to achieve gender neutrality and numbering of paragraphs, is identical to the present s 4, he said:

> "(1) The Italian Code distinguishes between the first and second of these three cases, the first being called "crimine mancato," a missed crime, and visited with double the punishment with which the second case, an interrupted attempt, is visited. The third case is not treated as a substantive offence unless it falls within the last paragraph of this section. The English law calls all these cases "attempts," and I have been unable to find any suitable word by which to distinguish the third case, which seems to involve a less degree of guilt. It is proposed, however, that the punishment should be less in the third case. (*See* s 561.)"

[29] Draft s 561 which is, apart from gender neutral amendments, identical to the present s 538, is not identified in the margin as having any pre-existing source but has a cross-reference to s 4. What Sir Samuel Griffith said in the footnote quoted above, is in my view, accurately reflected in the words used in the Code. Lesser punishment applies in a case where a person fulfils the requirements of s 538 but not in a case of a completed or an interrupted attempt. In the case of attempted murder, the maximum sentence where the requirements of s 538 are complied with, is seven years imprisonment.

[30] The scope of s 538 is therefore dictated by those general principles. Section 538 comprises several components. Firstly, a person must have been convicted of an attempt to convict an offence. Then it must be proved that the person desisted from further prosecution of their intention. The next is that they did so of their own motion. Finally, there must have been a desisting without fulfilment of that intention being prevented by circumstances independent of the person's will. There is thus an onus of proof on the offender to establish, on the balance of probabilities, that the qualifying requirements have been established.

[31] It is necessary to focus on the facts of the incident to resolve the questions posed by s 538. The notion of desisting from further prosecution of the intention which existed at the time when an overt act which manifested the intention was done implies that at some time after that overt act was done, the person who wishes to claim the benefit of s 538 must be able to point to circumstances in the evidence from which it can be inferred that he or she ceased, of his or her own motion, from further prosecution of the intention, or, to put it simply, deliberately discontinued carrying out the intention without the intervention of circumstances independent of the offender's will.

[32] It cannot be sufficient, for the purpose of that test, that a person who had simply terminated the series of events he or she intended to perform in prosecution of the intention because of the belief or expectation that the intent had been fulfilled, could take advantage of s 538. Once an attempt identifiable by a discrete continuum of conduct has ceased in such circumstances, it is of no relevance, for the purpose of deciding whether s 538 operates, that the offender did not resume conduct that may have fulfilled the original intention. It is in no way decisive that, once the initial incident has ended, the person may still have available something adapted to the fulfilment of the original intention but does not renew the attack.

[33] Once there is a clearly identifiable cessation of the original series of actions, the attempt is complete for the purpose of analysing the circumstances in which the offender desisted. Where the series of acts has ended simply because the attacker

has done all he or she intended to do in prosecution of the intention, the offender has not desisted of his or her own motion in the relevant sense. An identifiable cessation followed by a fresh attack because the attacker had realised that the initial attempt had been unsuccessful involves the formation of the same intent for a second time.

[34] Standing alone, cessation of the initial continuum of conduct may mean no more than that the attempt had run its course. Something which indicates that the attempt was desisted from of the attacker's own motion is necessary. To treat cessation alone as relevant would accord little meaning to the words "of their own motion" which imply that a deliberate decision was taken by the person to desist from further prosecution of the intention while that intention still existed. In the case of attempted murder, there must be a deliberate cessation of things done with the intention of causing the death of the intended victim, in circumstances where it can be inferred that the continuum of conduct ceased only because of the deliberate voluntary abandonment of the intent to kill without the intervention of circumstances independent of the exercise of the offender's will.

[35] The purpose of the section is to reward those who, having put into effect a course of conduct with intention to bring about a particular result, voluntarily bring the incident to an end as a result of the conscious decision to terminate it before what they intended to achieve happens. A case where the evidence suggests that the incident ended only because the attacker believed or expected at that point that the intention had been fulfilled would, in my view, be insufficient to enliven the section. In other words, if the incident has simply run its course without any apparent manifestation of a decision to terminate the attempt prematurely, it is insufficient to entitle an offender to the benefit of s 538.

[36] To illustrate the concept involved, cases where a person shoots at someone with intent to kill and after a shot or shots have been fired does not do so again may present some factual complexities. The same applies to a case where a driver tries to run over someone with intent to kill but having failed drives away. Often the intended victim may have removed himself or herself from a vulnerable position before the conduct can be continued. In that case, circumstances independent of the offender's will have intervened.

[37] Cases where an initial attempt has been made but there is evidence that raises the issue of whether the person has desisted of his own motion are more difficult. For example, in the case of the shooter, if, after firing the first shot and missing, he immediately presents in the firing position again and aims at the intended victim but deliberately averts the firearm before firing another shot, even though the intended victim is still vulnerable, or empties the magazine into the air or the ground, the case may be one where he would have the benefits of the section.

[38] The outcome may be similar in the case of a driver, if, after an initial unsuccessful attempt to run the intended victim over, he immediately drives again towards the intended but uninjured and vulnerable victim but brings the vehicle to a halt at a point in his approach so it may be inferred that he deliberately desisted from the attempt to kill. Other scenarios, such as the case where the victim has been shot by the first shot or collided with on the first occasion the car was driven at him, may weaken the case for an application of s 538, since subsequent averting of firearm or

stopping the car may merely be attributable to a belief or expectation that the initial shooting or collision had already fulfilled the intention.

[39] If the evidence established no more than that the shooter merely left the scene or that the driver merely drove away after the initial failed attempt, it would, in practical terms, be insufficient to discharge the onus of proof lying on the offender. A belated claim, in an equivocal case, that the offender had desisted of his or her own motion where no such claim had been made in a timely way would, as a matter of prudence be subject to close scrutiny by the court before being accorded any weight. Whether the onus is discharged in a particular case will depend on whether there is anything in the facts as a whole sufficient to do so.

[40] Giving these examples is, in the end, no more than making a point that each case will depend on its own circumstances. The critical issue is whether, on the facts, there is evidence sufficient to enable the person relying on s 538 to discharge the onus of proving that it is more probable than not that he or she desisted of his or her own motion from further prosecution of the relevant intention without fulfilment of that intention being prevented by circumstances independent of the exercise of the person's will.

[41] There is surprisingly little authority on sections similar to s 538. *R v Thompson, ex parte Attorney-General* (CA No. 86 of 1989, unreported, 30 May 1989) is an example of its application. The Court of Criminal Appeal acted, in a case of attempted rape, on a view of the evidence that the appellant had voluntarily desisted from an attempt to penetrate a child because she said it was hurting her.

[42] In *R v Gill, ex parte Attorney-General* [2004] QCA 139, another case of attempted rape, the need for the offender to identify positively the reason why he or she desisted from the offence, as part of the process of discharging the onus by reference to the evidence, is stressed by the Chief Justice at paragraph [4] and Holmes J, with whom Davies JA agreed, at paragraph [14].

[43] There are two Northern Territory cases, *R v Longshaw* (1993) 114 FLR 423 and *R v Rogers* (1996) 90 A Crim R 405. In *Longshaw* the offender struck the victim with a wheel brace intending to kill him. He said that when the victim fell to the ground, he "thought he was dead then and there". Later in his interview he said that he thought he was dead because "he was out for a couple of minutes". There was also evidence that an associate had taken the wheel brace from the offender almost immediately after the initial blow was struck. The Court of Criminal Appeal of the Northern Territory unanimously held that the offender was not entitled to the benefit of the equivalent provision in the *Criminal Code* (NT), s 279.

[44] Kearney J said (at p 424) that the section required a subsisting intention from which the offender may desist. To hold the belief that the victim was dead was inconsistent with a continuing intention to kill. The fact, that when the offender realised that the victim was not dead, he did not form a fresh intention to kill him and make a fresh attempt to do so did not attract the benefit of the section to his already completed attempt. That approach is consistent with my analysis above. However he continued (at pp 424 and 425):

> "Had he not believed he had killed his victim, and had he voluntarily desisted from striking him again before he was disarmed … I consider … that s 279 could have been relied on."

[45] If that is to be understood as saying no more than that, if there was evidence supporting the inference that he had voluntarily desisted during the period when he continued to put his intention to kill into effect, the provision would apply, it is consistent with my view of the proper scope of the provision. However if it is extrapolated to a case where the evidence establishes no more than that the person discontinued the attempt, either believing or knowing that he had not killed the intended victim or not knowing whether he had done so or not, it is not consistent.

[46] Priestley J with whom Thomas J agreed, said (at p 436) that in a case where the evidence suggested that the offender had intended to kill the victim with the one blow struck, that immediately after he struck it he believed the victim was dead, and that before he formed any intent to hit him again he had been disarmed, it would not have been reasonably open to find that the offender had "desisted" in the way described in the section. He continued :

> "For a person to desist of his own motion from further prosecution of an intention to kill it must at least appear that the person knew at the time of desisting that the attempt already made had not succeeded."

[47] In *Rogers*, an attempted armed robbery case, the factual basis upon which the offender was sentenced was that he had carefully planned and prepared for the robbery of a bank, including ascertaining that money was counted in a room with a one way glass window facing the car park. On the day, he parked on the footpath outside the bank, smashed a hole in the window, held a bag through it, pointed a firearm at the teller and demanded the money. Instead of complying, the teller picked up the money and fled from the room, tripping and falling over in her haste. Another teller who saw what was happening shut the connecting door. The offender got in his vehicle and left.

[48] The sentencing judge accepted that one reason why the offender desisted was the futility of continuing, since the teller had evacuated the area. However, he also accepted that the offender was shocked by the teller's panic and realised that what he was doing was morally wrong and that he ought not continue. On appeal, it was also submitted that because the offender had not smashed a larger hole in the window to enable him to enter the bank and further prosecute his attempt to obtain the money, there was evidence that his departure from the scene was due to a change of heart on his part.

[49] The Court of Criminal Appeal held that it was not open to conclude that one of the reasons for cessation of the attempt was desistence of his own motion. On the facts, it was clearly the action of the tellers which aborted the plan. That occurred independently of the offender's will and before any change of heart took place.

[50] That conclusion is consistent with my analysis of relevant principles in paragraphs [28] to [40]. One other matter arising from *Longshaw* and *Rogers* is where the onus of proof lies. In *Longshaw* (at p 436) Priestley J said that the words of s 279(1) to his mind required that the court be affirmatively satisfied of the required facts. In *Rogers* (at p 408) it is apparent that the sentencing judge had cast the onus of proof beyond reasonable doubt on the prosecution to establish that the offender had not desisted of his own motion and that, on appeal, the prosecution did not seek to argue that it was wrong to do so. In the joint judgment of the Court of Criminal Appeal it was observed that the correctness of that concession may be doubted having regard to the opinion of Priestley J in *Longshaw*. However, final resolution of the issue

was left for future determination because of the concession maintained. In my view, the doubt expressed about the correctness of the concession is well founded. The proper construction of s 538 is that there is a persuasive onus on the person seeking to rely on it.

[51] Applying these principles to the present case, neither Witchard nor Oakes was entitled to the benefit of s 538. It follows that the learned trial judge was correct in declining to apply the section to Witchard but erred in allowing its benefit to Oakes.

Applications for leave to appeal against sentence

[52] I have had the opportunity to read in draft form the reasons of the Chief Justice and Mullins J. The factual basis for sentencing Witchard is set out in Mullins J's reasons. While implementation of what Witchard intended proved to be inept, it was nevertheless a strategy involving protracted cruelty in the form of infliction of serious injuries and mental torment on the victim, as well as making false accusations of rape against him. I agree that the seriousness of her offence was not appropriately reflected in the sentence imposed. With regard to the other aspects of the respective applications for leave to appeal against sentence, I can add nothing further to what the Chief Justice and Mullins J have said. I agree that the orders proposed are appropriate.

Orders

[53] I agree with the orders proposed by Mullins J.

[54] **MULLINS J:** Jennifer Faye Witchard ("Witchard"), John Noel Oakes ("Oakes") and Wayne Lindsay Barnett ("Barnett") were tried together before a jury in the Supreme Court at Bundaberg. Witchard was convicted by the verdict of the jury of the offence of attempted murder of Matt Wallace ("Wallace") and she was sentenced to imprisonment of 12 years. Witchard was charged on a separate indictment with attempting to pervert the course of justice to which she pleaded guilty and was sentenced to a concurrent term of imprisonment of 12 months. Oakes was also found guilty of attempted murder of Wallace and was sentenced to six years' imprisonment and a declaration was made that he was convicted of a serious violent offence. Barnett was found guilty of wounding Wallace with intent to do grievous bodily harm. He was sentenced to five years' imprisonment.

[55] Witchard appealed against her conviction and applied for leave to appeal against sentence. Oakes appealed against his conviction. Barnett applied for leave to appeal against sentence. The Attorney-General ("the Attorney") appealed against the respective sentences imposed on Witchard and Oakes for attempted murder and against making the sentence imposed on Witchard for attempting to pervert the course of justice concurrent with the sentence for attempted murder. The Attorney also appealed against the sentence imposed on Barnett, for the purpose of ensuring that no parity issue could arise that might impede consideration of the sentences involving Witchard and Oakes.

Facts

[56] Witchard, Wallace, Paul Wright ("Wright") and Reginald McCalman ("McCalman") were the directors and shareholders of a company that conducted a nightclub business under the name of "Fuddruckers" in Bundaberg from March 2001. Witchard and Wallace had been in a sexual relationship for some period prior to the commencement of this business.

[57] Barnett worked as the disc jockey at the nightclub from the time it opened. Barnett and Witchard began a sexual relationship. From July 2001 Oakes was employed at the nightclub on a casual basis to collect glasses. He was not in a sexual relationship with Witchard.

[58] The relationship between Witchard and Wallace deteriorated so that by late July 2001 Wallace had moved out of Witchard's house. At the same time Witchard asked Wallace to leave the nightclub and he handed his key to the appellant saying "I should kill you. You're just destroying my life at the moment". Wallace went to live at McCalman's farm.

[59] An acrimonious dispute involving Witchard and Wright against Wallace and McCalman followed over the management of the nightclub. On or about 21 September 2001 Witchard and Wallace were arguing and Wallace said "This is just getting out of hand. I should – I should kill you".

[60] The prosecution case against Witchard was that she formulated a plan to induce Wallace to have sexual intercourse with her, so as to form the basis of a false allegation of rape; that Wallace would be killed and his body disposed of; and Wallace's absence would be attributed to his fleeing the consequences of the rape.

[61] On 24 September 2001 Wallace attended at the nightclub premises from about 8 am with McCalman. He had been told by Witchard that a meeting had been organised with Wright and another man. After Witchard arrived, McCalman left around 10 am. McCalman returned at about 11.30 am for about 15 minutes before leaving again. Witchard kept saying the others would be coming for the meeting. Wallace and Witchard filled in their time around the nightclub, whilst waiting. Wallace observed Witchard appear to make a number of telephone calls and use her telephone for text messages.

[62] McCalman was driving along the driveway of his property in order to return to Bundaberg at about 4 pm, when he got a telephone call from Witchard who told him to wait at his property as Wright would be meeting him there. Witchard knew at the time of this call that Wright had left Bundaberg on 22 September 2001 for his home interstate and was not going to be meeting McCalman.

[63] At about 4 pm Witchard and Wallace had a couple of alcoholic drinks, while they were waiting. Wallace recalled having six drinks over the course of the next one and a half to two hours and observed Witchard to have the same amount. Wallace described how Witchard then seduced him into sexual intercourse which occurred in one of the booths at the nightclub.

[64] After the intercourse was finished, Wallace observed that Oakes had arrived at the nightclub.

[65] Oakes sat down with Wallace and Witchard and they discussed the running of the nightclub. At some point during the conversation Wallace observed a knife on the floor near Oakes and that Oakes put his foot on the knife. Wallace said to him "It's all right, mate, I've seen the knife. You can pick it up". Wallace said that Oakes picked the knife up, although he conceded in cross-examination that it may have been Witchard who picked it up. During the conversation, Wallace had sat down in the booth and described how Witchard climbed up on the top of the booth and put her legs around his shoulders, asked him how his back was and suggested that he lie on the floor, so she could walk on his back to try and "click it back in".

[66] Wallace, Witchard and Oakes had been talking for about half an hour when Barnett arrived at about 7.10 pm. Barnett abused Wallace about the running of the nightclub. After five or 10 minutes Wallace went to leave and Witchard followed him. As he was turning on the dance floor, Wallace felt a sharp pain in his back and his legs gave way. He fell into a corner on the dance floor, near the office door with his legs outstretched in front of him. He had been stabbed by Witchard. As Wallace fell, he heard Witchard yell out "Come on, get him". In his statement, Oakes stated (at R1316) that when he ran up to where Wallace was on the ground, Witchard said "Finish him off". Wallace described that both Oakes and Barnett came running over, that Oakes stabbed him once in the shoulder area near the left arm pit with a large hunting – style knife (which was different from the knife that he had earlier seen on the floor) and that Barnett kicked him in the head no more than five times. Wallace conceded in cross-examination that Oakes seemed hesitant, when he stabbed him and agreed that Oakes poked him twice with the knife, but only one blow pierced the skin on this occasion. Wallace also conceded in cross-examination that it was possible that the kicking by Barnett did not occur at that stage.

[67] Wallace then gave evidence of the conversation that then took place. He said that Witchard said "Come on. Tell them what you did to me." and that he responded that he had raped her. Wallace said that Witchard said again "Did you hear what he said? Repeat that so that everyone hears it properly." and that he said again that he had raped her. Wallace recalled that Barnett then said "What did you say?" and that he said it again that he had raped Witchard. In his statement, Oakes stated (at R1316) that Witchard said "He raped me." and that she said to Wallace "You tell them the truth that you raped me." and that Wallace replied "Yes" and that when Oakes asked "What?" Wallace replied "I raped her" and then repeated the statement again when Barnett asked "What did you just say?". Oakes stated that Witchard again said "Finish him off" and that he said "Call the police", but that Witchard said "No, finish him off".

[68] Immediately after this conversation in which Wallace stated a number of times that he raped Witchard (which Wallace said he admitted doing as he believed he was being set up and that was the only way he could think of to save his life), Wallace was attacked again. Oakes stabbed Wallace twice more using the hunting knife (one of which wounds was near the centre of the chest) and Barnett kicked Wallace in the head. Oakes stated that he looked at what he had done and dropped the knife and turned to Witchard and said "Ring the cops" and that she said "No there is someone coming to pick him up and he has to die" (at R1318). Wallace somehow got the hunting knife. Wallace described how bar stools were thrown at him. Wallace was holding the hunting knife and was also holding onto one of the bar stools that had been thrown at him. Wallace felt another knife on the floor at the

back of him which was the knife he had seen earlier on the floor. Wallace had no movement in his left leg and only a little bit of movement in his right leg. Wallace estimated that the period of the attack from the first stab until the last stab or kick was five minutes or a little longer.

[69] At about 8 pm Wright was telephoned by Witchard. He stated that she screamed into the telephone and said that Wallace had raped and beaten her.

[70] Barnett left to go to work at a community radio station about 9 pm. After Barnett left, Oakes described in his statement (at R1319) that Witchard was speaking on her mobile telephone and dealt with what then occurred:

> "I don't know who she was talking to but while she was gone I went up to Matty and asked him, 'Why did you rape her?'
>
> Matty said, 'I didn't, She wanted to sleep with me one last time because she is dying.'
>
> I replied, 'I am sorry for what has happened, I have a daughter and never done anything like this before.'
>
> I then said, 'You have my word I'm not going to kill you.' I (*sic*) was clear to me that Jen wanted him dead. I thought that was the case when she was yelling at me to finish him off but was sure this is what she wanted after she said someone was coming to pick him up."

In cross-examination Wallace conceded that it was possible that Oakes said to him "You have my word, I'm not going to kill you."

[71] One of the telephone calls that Witchard made between 9 pm and 10 pm was to Michael Carpenter ("Carpenter"). He gave evidence that Witchard told him that she had stabbed Wallace and asked him whether he could come down to the nightclub, because she wanted help in getting rid of the body. Carpenter declined to assist.

[72] A further conversation took place between Wallace and Oakes in which Oakes offered to swap a utility knife for the hunting knife. Wallace gave the hunting knife to Oakes, but Witchard stopped Wallace from getting the utility knife. The following is set out in Oakes' statement (at R1320):

> "Not long after taking the knife from him Jen said, 'We have to kill him, Reg said kill him.'
>
> I turned around at that stage fearing she might stab me and said, 'No.'
>
> Jen said, 'Why?'
>
> I replied, 'I gave Matty my word I'm not going to kill him.'
>
> Jen said to me, 'I'll give you five grand if you kill him.'
>
> I still said, 'No.'"

Wallace conceded in cross-examination that when he complained of being thirsty, Oakes got him a bottle of water.

[73] Wallace stated that Witchard told him repeatedly after the attacks "Sean's coming to get you. Sean wants you dead when he gets here because he's going to mince you up". Wallace also described hearing Witchard's telephone, because of the receipt of text messages or incoming telephone calls.

[74] According to Oakes' statement (at R1320), Barnett returned to the nightclub at about 11 pm. Oakes stated (at R1320) that when Barnett returned, Witchard told him "Go and kill him" and that when Barnett said he could not do it, Witchard turned to Oakes again and said "I'll give you five thousand to finish him off." and that Oakes refused. Oakes stated that Witchard walked up to Wallace saying "You're going to die, someone is coming to pick you up and put you in a mincer." Oakes then helped Witchard move Wallace by each grabbing one leg and dragging him away from the door of the office into the middle of the dance floor. Wallace stated that he started pleading "Please don't kill me." and that Witchard told him that she did not want to, but had to and made the reference again to Sean wanting him dead.

[75] At one stage Wallace decided "to play like I was dying" and soon after Witchard remarked "he's dying".

[76] About 10 minutes after Barnett had returned, Witchard, Barnett and Oakes left for a period of time. When they came back Wallace said that Witchard said to him "It's okay, Matty, you're – you're going to live, we're going to go to the police and tell them about the rape and – and send and (*sic*) ambulance". At about 11.40 pm Sergeant Bubb at the Bundaberg Police Station received a telephone call from a female caller who asked how to report a rape. The caller said her name was "Jennifer". Witchard, Barnett and Oakes left the nightclub, turning the power off as the emergency lighting came on. Sergeant Bubb was able to say that around midnight Witchard attended at the Bundaberg Police Station in company with Barnett.

[77] Witchard was interviewed by Constable Moore. She described to Constable Moore how the rape was committed against her by Wallace, that he admitted committing the rape in front of two people when they turned up at the nightclub and that he then bolted. Witchard did not complain to Constable Moore about being beaten by Wallace. Constable Moore also interviewed Barnett. He told her that he was doing a radio show, when Witchard rang him and told him that she needed him to come to the nightclub to take her to the police station. Barnett said that Witchard had told him that Wallace had attacked her and she wanted to make a complaint. Barnett said that he noted that the time was 10.53 pm. Witchard was examined by the Government Medical Officer, Dr Graham, at about 4 am on 25 September 2001.

[78] Wallace attempted to make a telephone call after Witchard and the others had left, but the line was dead. He managed to get himself two bottles of water which he drank. He was about to set off for the front door, when Oakes and Barnett came back into the club. He said that they looked surprised to see him. They went straight back out. About five minutes later McCalman arrived with two police officers.

[79] Wallace was taken from the nightclub to the Bundaberg Hospital. Dr Nydham, the assistant director of medical services at that hospital, gave evidence of the injuries that were recorded in the hospital's notes, even though Dr Nydham was not the

treating doctor. The first injury was recorded as multiple cuts over the head and the upper body, including a cut of 4 cms over the forehead and three cuts each of 4 cms over the posterior part of the head. There was noted to be three cuts to the left side of the chest. One was 4 cms long, one was 3 cms and the other was 2.5 cms. The third injury was a haemopneumothorax which was associated with a contusion of the right lung. The last injury was loss of power of Wallace's left lower leg in combination with pain in the right lower leg which was the result of an injury to the spinal cord.

[80] Using a scale of mild, moderate and severe, Dr Nydham expressed the opinion that the injuries to the head were caused by force in the moderate to severe range. Dr Nydham considered that the injury to the chest that was furthest left (in the area of the left armpit) was the deepest cut, because to make contact with the lung, it had to penetrate the muscle in that particular area. Dr Nydham estimated that if the wound had been perpendicular to the skin (and the knife had not gone in at an angle), it was 3 cms from the surface of the skin to reach the chest cavity. Dr Nydham estimated that it would have required penetration of 2.5 cms for the other two wounds to reach the chest cavity. There was noted to be air bubbles through all the three wounds to the chest. Dr Nydham concluded that at least one of the wounds penetrated the chest cavity for the haemopneumothorax to have occurred and for air bubbling to have occurred in all three wounds.

[81] Wallace was taken to Princess Alexandra Hospital where he was treated between 25 September and 29 October 2001. On admission he was diagnosed with incomplete or a partial paraplegia due to damage to the spinal cord from a stab wound. Wallace was stabilised in the intensive care unit, because of the haemopneumothorax, before being treated in the spinal injuries unit. A neurological examination showed that he was weakened in both legs, but worse in the left leg, and there was loss of feeling in his body below the area where the spinal cord had been damaged involving both the left and right sides. His condition improved with a combination of natural recovery and rehabilitation.

[82] A large number of SMS or text messages sent to and from Witchard's mobile telephone, to and from Barnett's mobile telephone and to Oakes' mobile telephone were admitted into evidence. There was a schedule of some 2,523 messages covering the period from 15 August 2001 to 25 September 2001. The evidence was used to demonstrate the nature of the relationship between each of the defendants and provided evidence of motive, particularly against Barnett; established the manipulative character of the relationship between Witchard and others, particularly Barnett and Wright; provided some indications of planning (although this was a contentious issue at trial); provided time references as to when some events occurred; and showed a relationship between Witchard and Oakes.

[83] The above summary of the facts is not a complete summary of all the relevant evidence at the trial which was extensive, but gives sufficient detail to enable the arguments advanced on the appeal to be considered in some degree of context.

Witchard's appeal against conviction

[84] The only ground of appeal that was pursued on the hearing of the appeal by Witchard was that a substantial miscarriage of justice had occurred, as a result of Witchard not being tried separately from Oakes and Barnett.

[85] At the trial, none of the defendants gave evidence, but the written statement made by Oakes to the police dated 12 December 2001 (Exhibit 16) was admitted in the case against him.

[86] The nub of Witchard's ground of appeal is that admissions made to the police by Oakes that were in evidence in the trial against Oakes and were inadmissible against Witchard gave rise to the risk of prejudicial and improper use of that material against her which could not be removed by appropriate directions to the jury as to separating the evidence that was admissible against each accused. It was conceded on the appeal by Mr Long of Counsel on behalf of Witchard that there was nothing inappropriate about the directions that were given by the learned trial judge on deciding the guilt of each defendant only by reference to the evidence admissible against that defendant.

[87] At the outset of the trial, Witchard had pleaded guilty to unlawful wounding and thereby admitted that she had stabbed Wallace. The issue to be decided by the jury was whether the prosecution had proved beyond reasonable doubt an intent to kill on Witchard's part. It was appropriately left to the jury that it was Witchard's intention at the time of stabbing Wallace that was relevant.

[88] The matters on which the prosecution relied to enable the inference to be drawn that Witchard attempted to unlawfully kill Wallace were that she had possession of a knife or knives in the nightclub on 24 September 2001 in circumstances where she had exhibited no fear of Wallace (despite some of the earlier threats made to her by Wallace); she stabbed Wallace in the back with a knife with sufficient force to partially sever his spinal cord; when Wallace collapsed onto the floor of the nightclub, she called out to Oakes and Barnett to get him; in the following hours she told Wallace in a number of different ways that she would kill him; and she ultimately left Wallace wounded in the nightclub without assistance and without alerting anyone to his presence there or to his condition. It was left to the jury that if they were not satisfied on those facts that Witchard was guilty of attempted murder, they would need to look at the broader picture and the prosecution case against Witchard based on her plan (whether the plan was with or without either or both of Oakes and Barnett) to kill Wallace which the prosecution alleged was decided upon before Witchard went to the nightclub on 24 September 2001. In the case that depended on the broader picture, the prosecution relied on the false complaint of rape, the presence of the knives at the nightclub, the SMS messages, and that Witchard kept McCalman away from the nightclub on 24 September 2001.

[89] According to Oakes' statement, there was no pre-planning to kill Wallace involving him, but he made a number of statements that suggested that Witchard did have an intent to kill Wallace.

[90] The assertions made by Oakes in his statement as to Witchard's intent that are relied upon as raising prejudice against Witchard to such a degree that it was not able to be overcome by judicial direction are:

(a) the reference to a conversation that took place about one week prior to 24 September 2001 when Oakes stated that Witchard said to him "Matty is going to kill me unless I kill him first" (at R1311);

(b) Oakes' recording that Witchard's instruction to him after stabbing Wallace was "Finish him off" (at R1316), rather than the words that Wallace said Witchard used at that time of "Come on, get him";

(c) the comment made by Oakes in his statement (at R1319) after setting out the conversation which Oakes said he had with Wallace after Barnett left for work at the radio station:

> "I (*sic*) was clear to me that Jen wanted him dead. I thought that was the case when she was yelling at me to finish him off but was sure this is what she wanted after she said someone was coming to pick him up."

(d) the reference by Oakes after he described how he had stabbed Wallace and dropped the knife to the statement made to him by Witchard "No there is someone coming to pick him up and he has to die" (at R1318);

(e) the recording by Oakes of the statements which he said Witchard made to him after she had taken the knife off Wallace "We have to kill him, Reg said kill him" and "I'll give you five grand if you kill him" (at R1320);

(f) the assertion that when Barnett returned at about 11 pm Witchard told Barnett "Go and kill him" (at R1320);

(g) the assertion that after Witchard had gone to the police to complain of rape, she came to the car where Oakes and Barnett were waiting and knocked on the window and said "Go back to the club and put Matty in the cold room" (at R1324).

[91] It was submitted that the impermissible use of these assertions made in Oakes' statement by the jury when considering Witchard's intent in the case against her was impossible to avoid by the directions given to the jury. It was also submitted that the prejudice was further compounded by a number of aspects of the conduct of the trial.

[92] The first aspect relating to the conduct of the trial which was claimed to be prejudicial was that counsel for Oakes during the trial adduced evidence in cross-examination of Wallace from which the jury could conclude that Witchard had previously made a false complaint about rape by another man, where the issue of the falsity of Witchard's complaint of rape by Wallace was an important issue in the prosecution's case against her. The learned trial judge had refused to allow the prosecution to lead the evidence from Wallace, that was then adduced from him in cross-examination. There was overwhelming evidence against Witchard, however, on the falsity of her complaint of rape against Wallace. Ultimately the evidence about her making a false rape complaint against another man was of no consequence. No reference was made to it in the learned trial judge's summing-up.

[93] Another matter was that counsel for Oakes and Barnett conducted their cases in a way that enabled the jury to infer that Witchard had a criminal conviction or criminal convictions (from the fact that there was evidence adduced that neither Oakes nor Barnett had criminal convictions) and that Witchard had forged a letter on hospital letterhead that suggested that she was suffering from a terminal illness and some "police" document about Barnett being investigated for drug offences that she showed to Barnett. Most of the evidence relating to the forged documents was admissible in the case against Witchard to explain Witchard's capacity to manipulate Oakes and Barnett. To the extent that the manner in which the respective cases on behalf of Oakes and Barnett may have suggested some dishonesty on the part of Witchard, that had no significance in the light of the evidence about the actual events which formed the basis of the charge against

Witchard. Although theoretically it is possible to point to some residual prejudice against Witchard, realistically in the circumstances that prejudice was irrelevant.

[94] In this context of prejudice arising from how the trial was conducted, reliance was also placed on something that the prosecutor said at the outset in his address that was later described as a dramatic flourish and an overstatement by the learned trial judge when summing up to the jury. In referring to Witchard, the prosecutor said (at R816, lines 43 to 44) words to the effect that if Witchard was not guilty of attempted murder, then nobody was ever guilty of anything. It is apparent that was merely the prosecutor's way of endeavouring to convey his view to the jury on the strength of the case against Witchard.

[95] Reliance was also placed on further statements in the prosecutor's address that were said to have the effect of inviting the jury to use inadmissible evidence against Witchard. The first of these statements is found at R823, lines 30-50. The prosecutor made it clear, however, that he was addressing the question of Wallace's credibility and stated "I'm not suggesting for a moment that the three accounts that they've given are mutually cross-admissible or anything of that sort". The submission was made that this part of the address was repeated by the learned trial judge in summing-up. The reference in the summing-up is to the learned trial judge's summary of the prosecutor's submission on how Witchard's lies to the police and to McCalman about where Wallace was could be used by the jury as part of the process of rejecting the truth of the allegation of rape made by Witchard against Wallace. When the learned trial judge stated (at R1020) "In essence he invites you to use them to damage the credibility of Ms Witchard, on whose statement that allegation depends" the learned trial judge was referring to the lies that the prosecutor submitted were lies of Witchard, about which there can be no complaint.

[96] The evidence of Wallace that he heard Witchard yell out "Come on get him." after he had been stabbed was admissible in the case against Witchard. The prosecutor referred to that in his address (at R818, lines 44 to 46) and asked the jury "What can that mean?". He then went on to say (at R818, lines 48 to 51) words to the effect that it could not mean anything other than "get him to finish him off, kill him" and followed that by saying "And then they did get him. The other two men join in and inflict horrible additional injuries to him". In addressing on the effect of intoxication on whether Witchard intended to do what she did, the prosecutor stated at R869, lines 45 to 50:

> "So, that conclusion becomes even stronger because the same time as that's happening, you can articulate why you're doing it. She stabs him and then says to the others, on one version, 'Kill him', on another version, 'Get him'. There's no practical difference between the two in the context of the present case. And thereafter, she spends the night saying, 'You're going to die'. She's articulated what's going through her head."

In addressing the jury on the case against Barnett, the prosecutor observed at R878, lines 41 to 44:

> "I pass to the evidence from Wallace was that there was the stab by Witchard, then the expression, 'Get him', which as I said before doesn't really mean much difference than 'kill him', but that's what he said, 'get him'."

In addressing the jury on the case against Oakes, the prosecutor at R898, lines 37 to 38 referred to the words used by Witchard as "get him, kill him, finish him off".

[97] The prejudice which it is submitted that Witchard has suffered, as a result of these statements made by the prosecutor in his address, is that the prosecutor has used the material in Oakes' statement to give colour to the words that Wallace could recall Witchard using of "Come on, get him". Although the prosecutor did resort to the language used by Oakes when addressing the jury on the case against Witchard, all that he did was endeavour to give meaning to the actual words recalled by Wallace in the context in which they were used. The prosecutor made it clear in his address why he was submitting that there was no effective difference between the different expressions. He also made it clear that the words that were used in the evidence that was admissible against Witchard were "Come on, get him". The learned trial judge in summing-up the case against Witchard referred to Witchard calling out to Oakes and Barnett to "get him".

[98] The last aspect of the prosecutor's address on which the submission is based that the prosecutor may have confused the jury about the use they could make of Oakes' statement in the case against Witchard is the passage at R885, lines 10 to 20:

> "The Crown has run this trial in such a fashion that Oakes' account, even though on its face it's damning of Witchard, and please let's compartmentalise this, when I say these things, don't hold it against Witchard, the part of the case against Oakes.
>
> The trial's been run in such a fashion that even though Oakes' account is damning of Witchard it's not admissible against her. If the Crown accepted a plea from Oakes and called him to give evidence, then his account would have become admissible against her and advanced the Crown case accordingly."

All that passage did was explain to the jury that Oakes' statement was part of the case against Oakes and was not admissible against Witchard. The observation that was made about what the position would have been, if the prosecution had accepted a plea from Oakes, served to emphasise why Oakes' statement was not admissible against Witchard.

[99] When Oakes' statement was read to the jury, the learned trial judge stated (at R290, lines 10 to 17):

> "Once again this is a statement by Oakes only, so it's only admissible against him. When the summing up time comes I'll identify for you what evidence is, as a body, admissible against each of the separate defendants, so it might sound a bit complicated at the moment, but when it's broken down that way at the end you'll find it's relatively simple to identify what is the evidence against each one."

[100] When summing-up, the learned trial judge stated (at R1016, lines 23 to 45):

> "Although the defendants are being tried together, you must give the cases against and for each of them separate consideration. Separately consider the evidence admitted in relation to each defendant. With respect to each charge, the defendant is entitled to have the case

> decided – to have the case decided on the evidence and on the law that applies to him or her and as it relates to the particular charge. And so you must return separate verdicts in relation to each defendant. Of course, as the evidence is not the same necessarily in each case, your verdicts need not necessarily be the same in relation to the different defendants."

The learned trial judge explained at R1037 that there were, in effect, three separate cases being conducted, one against each defendant.

[101] The learned trial judge then dealt, in general terms, with the evidence of various classes of witnesses and different types of evidence, explaining to the jury which type of evidence was admissible against which defendant.

[102] When summing-up the case against Witchard, the learned trial judge told the jury that there was no evidence admissible in the case against Witchard which could identify the knives used either by Oakes or her (R1042). This emphasised the need to separate the evidence against each of the defendants, as Oakes' statement made it clear that the knives were his and had been brought to the nightclub by Witchard. The point was made expressly by the learned trial judge in summing-up the case against Oakes that the evidence from Oakes' statements could be used only against him (at R1055).

[103] As the defendants were charged as co-offenders and it was part of the prosecution case against each of them that there was a plan to kill Wallace that had been decided upon, before Witchard went to the nightclub on 24 September 2001, *prima facie* there should have been a joint trial: *Webb v The Queen* (1994) 181 CLR 41, 89 per Toohey J:

> "I respectfully agree with that discussion which emphasizes that when accused are charged with committing a crime jointly, prima facie there should be a joint trial. There are administrative factors pointing in that direction but, more importantly, consideration by the same jury at the same trial is likely to avoid inconsistent verdicts, particularly when each accused tries to cast the blame on the other or others. There are of course dangers for an accused in a joint trial by reason of the admission of evidence which would not be admitted at the trial of one accused. That risk must be obviated by express and careful directions to the jury as to the use they may make of the evidence so far as it concerns each accused." (*without footnotes*)

[104] There was sought to be drawn an analogy between the position of Witchard and that of the defendant Taunoa in *R v Crawford* [1989] 2 Qd R 443. That analogy is not appropriate. The position of the defendant Taunoa was that the prosecution case against him was weak and the evidence that was inadmissible against him, but admissible against Crawford, may have obscured that fact. Taunoa's appeal was successful and a separate trial ordered. In contrast in this matter, Witchard was the prime participant in the subject events and the evidence against her was overwhelming.

[105] There is a doubt that the aspects of Oakes' statement that were relied on for this argument were prejudicial against Witchard. The other matters relied upon by Witchard on the appeal, as compounding that prejudice, have not been made out.

Any prejudice that flowed from the manner in which Oakes and Barnett conducted their cases was of no significance. The complaints made on this appeal about the prosecutor's address do not have the significance which was sought to be attached to them. The learned trial judge gave careful and precise directions that the jury could use against Witchard only the evidence that was admissible against her and throughout the course of the trial and the summing-up made it clear that Oakes' statement was not part of the case against Witchard. The joint trial did not create improper prejudice against Witchard that was not able to be dealt with (and was dealt with) by appropriate directions in the summing-up. There was no substantial miscarriage of justice caused to Witchard.

[106] Witchard has failed to make out her ground of appeal and her appeal against conviction must be dismissed.

Oakes' appeal against conviction

[107] The prosecution put the case against Oakes on three alternative bases:

(a) that he was party to a plan with Witchard and/or Barnett to kill Wallace before he arrived at the nightclub and guilty of attempted murder, as soon as Witchard inflicted the initial stab wound;

(b) that he was a principal offender in that he intended to kill at the time he inflicted the three stab wounds; or

(c) that he, knowing of Witchard's intention to kill, deliberately aided her or did an act for the purpose of aiding her in attempting to put that intention into execution.

[108] In view of the fact that the jury acquitted Barnett of attempted murder, and there was less evidence of a pre-existing plan to kill Wallace involving Oakes than there was involving Barnett, it was submitted by Mr Hunter of counsel on behalf of Oakes that it was reasonable to proceed on the basis that the jury rejected that Oakes was party to a pre-existing plan to kill Wallace. It was therefore submitted that the jury could have found Oakes guilty of attempted murder either on the basis that he was a principal offender and intended to kill at the time he inflicted the three stab wounds or that he aided Witchard. It was conceded on behalf of Oakes that it was open for the jury to be satisfied that in stabbing Wallace in the chest three times, that Oakes himself had an intention to kill when he stabbed Wallace. The submission was made, however, that there was no evidence to support the conviction on the basis of aiding, and that the alternative basis of aiding should not have been left to the jury.

[109] The reason that it was submitted that there was no evidence to support the conviction on the basis of aiding was that it was submitted there was no evidence of Witchard doing anything to put her intention to kill Wallace into execution, after stabbing him in the back. It was therefore submitted that, even if Oakes knew of Witchard's desire for Wallace's death, his stabbing Wallace did not encourage or aid any offence by Witchard. It was argued that Witchard's conduct in exhorting Oakes to "Finish him off" did not amount to an attempt to kill Wallace pursuant to s 7(1)(a) of the *Criminal Code* ("the *Code*"), but an attempt to procure murder.

[110] The stabbing by Witchard, her first exhortation of Oakes and Barnett, the first stabbing by Oakes, the conversation in which Witchard got Wallace to admit that he had raped her which was then followed by the further stabbing committed by Oakes

and the kicking by Barnett lasted a relatively short period of about five minutes. It is artificial to dissect the series of events and treat Witchard's conduct that amounted to the offence of attempted murder as ceasing with her one act of stabbing, particularly when proximate to that act she was exhorting Oakes to kill Wallace. The fact that the exhortations to kill, by themselves, may have amounted to an attempt to procure murder does not preclude the exhortations, in the circumstances of this offence, from amounting to part of the attempt by Witchard to kill Wallace. There was therefore evidence to support the conviction on the basis of aiding. There was no difficulty in the jury returning their verdict against Oakes on the basis either that he was a principal offender or that he aided Witchard in attempting to put her intention to kill (of which Oakes knew) into execution.

[111] Oakes' appeal against the conviction must be dismissed.

Section 538 of the *Code*

[112] Submissions were made on behalf of Witchard and Oakes at the sentencing that s 538 of the *Code* applied to each of them. Section 538 provides:

> "(1) When a person is convicted of attempting to commit an offence, if it is proved that the person desisted of the person's own motion from the further prosecution of the person's intention, without its fulfilment being prevented by circumstances independent of the person's will, the person is liable to one-half only of the punishment to which the person would otherwise be liable.
> (2) If that punishment is imprisonment for life, the greatest punishment to which the person is liable is imprisonment for 7 years."

The learned trial judge was not satisfied that Witchard's desisting from the attempt to kill was voluntary in that Witchard seemed to be anxious that Wallace not be found as late as her SMS messages to Oakes and Barnett at 5:15 am on 25 September 2001. With respect to Oakes, the learned trial judge found that Oakes was entitled to the benefit of s 538 on the basis that, after a period following the attack, Wallace seemed not to have regarded Oakes as any further threat, because Wallace voluntarily surrendered the hunting knife with which Oakes had stabbed him to Oakes and Wallace conceded that Oakes might have told him at that time that he would not kill him.

[113] Witchard on her application for leave to appeal against sentence seeks to establish that the learned trial judge erred in finding that she had not proved that she had desisted of her own motion from further prosecution of her intention to kill. The Attorney, on the appeal against sentence against Witchard, seeks to preserve the finding of the learned trial judge that s 538 of the *Code* had no application to Witchard. The Attorney on the appeal against Oakes sentence seeks to have the finding of the learned trial judge in favour of Oakes on the application of s 538 of the *Code* set aside.

[114] I have had the advantage of reading the respective reasons of each of the Chief Justice and Mackenzie J on the construction of s 538 of the *Code*. I agree that there is no room for the operation of that provision in respect of the offence of attempted murder, where the offence has been committed by putting into effect the intention to kill by stabbing the victim and the issue of desistance arises in the sense of the

defendant not taking advantage of a later opportunity to kill the victim, rather than the defendant desisting in the course of the act or acts implementing the intention to kill that comprises the offence of which the defendant was convicted. It follows that the learned trial judge's interpretation of s 538 of the *Code* was in error. I therefore agree with the Chief Justice and Mackenzie J that neither Witchard nor Oakes was able to discharge the onus of showing that s 538 of the *Code* applied to the circumstances of the offence committed by each of them.

Witchard's sentence

[115] Even on the basis that s 538 of the *Code* had no application to Witchard, Witchard applies for leave to appeal against the sentence on the basis that it is manifestly excessive. The Attorney's appeal against sentence is on the ground that it is manifestly inadequate. One limb to the Attorney's argument is that the findings of fact made by the learned trial judge for the purpose of the sentence were wrong. The second limb is that, even accepting those findings of fact, the sentence was too low.

[116] The learned trial judge referred to the obvious motive for Witchard's attack on Wallace being to advantage herself in relation to the nightclub and that her involvement in the offence was aggravated by the fact that she inveigled Oakes and Barnett to assist her. The learned trial judge acknowledged that ultimately Witchard did not carry through her intention to kill Wallace, despite having the opportunity, but that may have followed from the fact that she did not have "the stomach for the job" and her hold over Oakes and Barnett was insufficient to compel them to do it. The learned trial judge referred to the fact that after the attacks on Wallace, Witchard was in the position of being unable to extricate herself from the mess. The learned trial judge remarked (at R1160):

> "Nonetheless, you amused yourself over a period of hours by torturing Mr Wallace with threats of having him put in an industrial mincer and finally abandoned him to his fate, perhaps hoping that nature would do what you had failed to do and that he would bleed to death."

[117] The learned trial judge expressed the view that he did not think that Witchard was "a particularly dangerous criminal" and that it was likely that the jury had determined the matter on the basis of her individual intent, having regard to the nature of the attack that Witchard made by stabbing Wallace in the back. The learned trial judge was prepared to accept that the attack did not involve pre-planning on Witchard's part, prior to 24 September 2001, for the reasons which Witchard's counsel had put to the jury. These included that Witchard had secured effective control of the nightclub by acquiring Wright's share; if there were a plan to kill Wallace, there was plenty of opportunity for that to happen after Wallace was disabled by the first stab; there was no plan to dispose of Wallace's body; the killing took place in the nightclub with blood and mess everywhere; Wallace's car was outside the nightclub until after Witchard had gone to the police; and Witchard complained to the police of a rape at the nightclub, when Wallace was still there. The learned trial judge was satisfied that Witchard had some plan on 24 September 2001 to separate Wallace from his interests in the nightclub and that involved the false accusation of rape and organising for Oakes to come at a time sufficiently proximate to the sexual intercourse to use Oakes to add force to Witchard's threat of an accusation of rape. The learned trial judge rejected the prosecutor's submission

that Witchard's offence was one of the most serious examples of attempted murder, but accepted that it was necessary for the sentence to reflect the community's abhorrence of Witchard's conduct and to provide for significant deterrence.

[118] Mr Martin of counsel on behalf of the Attorney described the learned trial judge's findings of fact for the purpose of sentencing Witchard as "unsustainably generous to her". The learned trial judge was quite specific in his finding of fact as to planning that there was no plan to kill Wallace prior to 24 September 2001. It was not a finding that Witchard had no plan involving Wallace prior to 24 September 2001. It is apparent as events unfolded at the nightclub on 24 September 2001 that by some stage during 24 September 2001 Witchard evolved a plan not only to seduce Wallace and accuse him of rape, but to kill him. The learned trial judge had the advantage of observing and listening to the witnesses. His findings of fact for the purpose of sentencing Witchard are consistent with the jury's verdicts. Having regard to the requirements of s 132C of the *Evidence Act* 1977, the Attorney's challenge to the learned trial judge's findings of fact on Witchard's sentence must be unsuccessful.

[119] Witchard was born on 4 April 1967. Witchard had a problem with alcohol. She pleaded guilty to four counts of fraud in the Bundaberg District Court on 15 May 2000 which were committed in November 1998. No conviction was recorded and she entered into a recognisance in the sum of $500 to be of good behaviour for 12 months. The frauds arose from making payments by cheques that were dishonoured. At the sentence in the District Court Witchard had relied on a letter that she had forged which purported to be from the Maryborough Hospital that stated that she was diagnosed in September 1998 with myeloid leukaemia. It was the forgery of that letter that was the subject of the charge of attempting to pervert the course of justice that was dealt with at the same time as the sentence for attempted murder. Because of the length of the sentence imposed by the learned trial judge for the attempted murder, the learned trial judge made the sentence of 12 months' imprisonment for the offence of attempting to pervert the course of justice concurrent with the sentence for attempted murder.

[120] It was submitted on behalf of the Attorney that the range for sentences for attempted murder is between 10 to 17 years in the ordinary case and that, even accepting the learned trial judge's findings of fact on the sentence, and allowing for moderation appropriate on an Attorney's appeal, the appropriate range for Witchard commenced at 15 years.

[121] It was submitted on behalf of Witchard that the sentence of 12 years' imprisonment that was imposed on an offender who was aged 34 years at the time of the offence with only a minor criminal history was manifestly excessive, having regard to the refusal of the Court of Appeal to increase the sentence of 10 years' imprisonment on appeal by the Attorney in *R v Rochester, ex parte Attorney-General* [2003] QCA 326; CA No 362 of 2002 and CA No 399 of 2002, 1 August 2003, and the need to take into account the impact of the sentence, having regard to the provisions of part 9A of the *Penalties and Sentences Act* 1992.

[122] The submission was made on behalf of the Attorney that the observations in *R v Byers, ex parte Attorney-General* [1995] QCA 44, CA No 430 of 1994 and CA No 436 of 1994, 28 February 1995, were a useful starting point in considering the appropriate sentence for Witchard. Byers was convicted of attempted murder of her

de facto husband whom she had shot in the head while he was sleeping. In the months preceding the shooting, Byers had taken out four insurance policies on her victim's life. She was found guilty at trial and sentenced to 12 years' imprisonment with a recommendation for parole eligibility after three years. The offence was described as cold blooded, committed for personal gain and planned over several months. No remorse was demonstrated. The Attorney appealed against sentence to seek the removal of the parole recommendation only. That was done. Fitzgerald P observed that the head sentence was lenient. Reference was made in the joint judgment of Pincus JA and Thomas J to the range being between 12 to 18 years' imprisonment for an offence of that type and seriousness. They noted that a sentence considerably higher than 12 years could have been imposed and expressly stated that the sentence in that case should not be seen as a benchmark for serious cases of attempted murder.

[123] The point is made on behalf of Witchard that Byers was sentenced before the commencement of part 9A of the *Penalties and Sentences Act* 1992 and that consideration should be taken into account in favour of Witchard that any sentence of imprisonment imposed on her of 10 years or more will have a greater impact on her, because she will not be eligible for parole until having served at least 80 per cent of the sentence. The fact that the serious violent offence declaration is mandatory for a sentence for the offence of attempted murder that is for 10 or more years' imprisonment may be a relevant factor for the sentencing judge to take into account in fixing a sentence within the appropriate range for the offence, but it is not an appropriate course to fix the sentence to avoid or reduce the effect of s 161B of the *Penalties and Sentences Act* 1992 which represented a change in the law: *R v Booth* [2001] 1 Qd R 393, 401 and *R v Bird and Schipper* (2000) 110 A Crim R 394, 398.

[124] The Attorney relies on the sentences imposed in *Bird and Schipper*. Bird pleaded guilty to attempted murder and Schipper pleaded guilty to grievous bodily harm with intent. At the time of the offences, Bird was 17 years nine months old and Schipper was 18 years one month old and both had been dabbling in satanic beliefs. They travelled from Melbourne to Noosa and decided to rob someone in Noosa National Park. They chose a vulnerable elderly woman who was walking by herself. They taunted her, before Bird attacked her with a knife, intending to kill her. Bird slashed the full circumference of the victim's throat and inflicted additional knife wounds to the cheek, right shoulder and two deep penetrating wounds to the back, one of which penetrated the right lung. Schipper joined in the attack, not intending to kill the victim, but to rob her and cause her grievous bodily harm. Schipper tried to knock the victim out by hitting her with considerable force about 20 times with heavy nunchakus. They stole a bag containing $1 and a few items of no particular value. They left the victim, not caring whether she was alive or dead. On appeal, the sentence imposed on Bird was 16 years' imprisonment and the sentence imposed on Schipper was nine years' imprisonment and a declaration that the conviction was of a serious violent offence.

[125] The Attorney also relied on the sentence in *R v Schaefer* [2001] QCA 327; CA No 89 of 2001, 10 August 2001. Schaefer was 22 years old at the time he committed the offence of attempted murder. He had a bitter relationship with his mother and held deep resentment against her. On the day of the offence he spent the day with his mother. They were in her vehicle. He directed his mother to a bush road on the pretext of showing her a swimming pool. When they were out of the car and

walking along, he stabbed her with a knife which he had brought with him. She sustained seven or eight stab wounds to the abdomen, back and arm and a compound fracture to the nose. Schaefer left her, believing her to be dead. He pleaded guilty and was sentenced on the basis that he had committed a ferocious and premeditated attack. A sentence of 15 years' imprisonment was not varied on appeal.

[126] In *Rochester*, the offender was found guilty after trial of attempted murder of his wife. At the time of the offence, the parties were living apart. Rochester went to the tavern where his wife was working. He took a knife with him which was one he used when fishing and was in the boot of the car. He found his wife and they had a short conversation, before he pulled the knife out and stabbed her once in the abdomen. The Court was not persuaded that a sentence of 10 years' imprisonment was so low as to warrant interference by the Court on an Attorney's appeal.

[127] The aggravating features of Witchard's conduct were identified by the learned trial judge as involving Oakes and Barnett to assist her and, after the attack on Wallace, cruelly torturing him over a few hours with threats of how he was going to die. In addition, there was a complete lack of remorse on the part of Witchard. Although Witchard's offence was not the worst example of attempted murder, it was a serious and not an "ordinary" case of attempted murder. The aggravating features of the offence identified by the learned trial judge were not present in *Byers*. Even though there was much greater prior planning of the offence in *Byers*, the sentence of 12 years' imprisonment in *Byers* was observed by the Court of Appeal to be low. The offence in *Rochester* was a much less serious example of the offence than that committed by Witchard. The authorities relied on by the Attorney show that the sentence imposed by the learned trial judge was manifestly inadequate and bear out the submission that the appropriate range for Witchard, taking into account all the relevant considerations, commenced at 15 years' imprisonment.

[128] The sentence of 12 years' imprisonment imposed on Witchard for the offence of the attempted murder must be set aside and, in lieu, the sentence of 15 years' imprisonment be substituted. It follows that Witchard has been convicted of a serious violent offence, pursuant to s 161A(a) of the *Penalties and Sentences Act* 1992. The learned trial judge did not formally declare Witchard's conviction for attempted murder to be a conviction of a serious violent offence. The failure to do so did not affect the fact that Witchard had been convicted of a serious violent offence: s 161B(2) of the *Penalties and Sentences Act* 1992. As orders are being made on this appeal which affect the sentence of Witchard, it is appropriate to make that declaration.

[129] The basis on which the learned trial judge decided not to impose a cumulative sentence for the offence of attempting to pervert the course of justice remains valid with the increase in the sentence for attempted murder.

Oakes' sentence

[130] As the learned trial judge found that Oakes should be sentenced on the basis that s 538 of the *Code* applied, the learned trial judge's sentence of Oakes was constrained by a maximum sentence of seven years' imprisonment. Without the benefit of s 538 of the *Code*, the maximum sentence for the offence of attempted murder is life imprisonment.

[131] Oakes was born in June 1981. He was therefore 20 years old at the date of the offence. He had no prior criminal history.

[132] The learned trial judge sentenced Oakes on the basis that it was his "slavish devotion" to Witchard that resulted in his being convicted of attempted murder. The learned trial judge considered that the jury's verdict was best interpreted by concluding that Oakes had attacked a defenceless man with a knife, intending to kill him, but Oakes was not part of a pre-arranged plan to kill him. The learned trial judge referred to the fact that the position of the wound in the centre of Wallace's chest was likely to have been an important factor in the conclusion of the jury that Oakes intended to kill Wallace. Although the learned trial judge noted that Oakes refused to complete the task of killing Wallace, despite the urging of Witchard, Oakes ultimately did nothing to assist Wallace and Oakes' actions after the attack were to a large extent motivated by Oakes' concern for his own position, rather than any genuine remorse.

[133] It was submitted on behalf of the Attorney, that without the benefit of s 538 of the *Code*, the appropriate sentence for Oakes falls within the range of 10 to 15 years' imprisonment, with a recognition of the need to maintain the sentence for Oakes below that of Witchard.

[134] It was submitted on behalf of Oakes that it was proper that the sentences imposed upon him and Witchard respectively should reflect the disparity between their antecedents and culpability for the offence.

[135] On this re-sentence, taking into account the increase in the sentence imposed on Witchard, the appropriate sentence for Oakes is nine years' imprisonment with a declaration that he has been convicted of a serious violent offence. This gives due weight to both the factors which are personal to Oakes and the circumstances of the offence.

Barnett's sentence

[136] Barnett was born in October 1973 and was therefore 27 years old at the date of the offence. Barnett had no prior criminal history.

[137] In imposing sentence, the learned trial judge took into account that Wallace was prepared to concede that Barnett may not have attacked him until after Wallace had volunteered that he raped Witchard. The learned trial judge noted that although Barnett's attack did not result in any serious injury to Wallace, it had the potential to do so. As the attack by Barnett was made when Wallace was helpless and unable to defend himself, the learned trial judge described Barnett's attack as "not only dangerous but cowardly".

[138] Although Barnett was convicted on the basis of the acts committed by him, his attack was committed in conjunction with the acts undertaken by Witchard and Oakes.

[139] It was submitted by Mr Ryan of counsel on behalf of Barnett that the sentence imposed on him of five years' imprisonment was manifestly excessive, based on the sentences in *R v Ishibashi* [1998] QCA 342; CA No 88 of 1998, 29 May 1998, *R v Marks, ex parte Attorney-General* [2002] QCA 34; CA No 268 of 2001, 18 February 2002, and *R v Hess* [2003] QCA 553; CA No 122 of 2003, 12 December

2003, and having regard to the sentence imposed on Oakes. The latter submission is no longer relevant in light of the increase in the sentence imposed on Oakes.

[140] Although the injuries caused to the victim in *Ishibashi* were more significant than those suffered by Wallace, Ishibashi's sentence of four years' imprisonment took into account his guilty plea and that no other person was involved in the attack. *Marks* involved a worse example of the offence than that committed by Barnett, but the sentence imposed in *Marks* on appeal was seven years' imprisonment with no declaration under part 9A of the *Penalties and Sentences Act* 1992. That sentence supports the one that was imposed on Barnett.

[141] There are also features that distinguish the sentence imposed in *Hess*. Hess pleaded guilty on the first day of his trial to committing the offence of burglary with one Power, when Power was armed with a dangerous instrument and used actual violence, the offence of unlawful wounding and the offence of unlawful assault doing bodily harm, whilst in the company of Power. Hess accompanied Power when he broke into the home of his former partner. Power had a large butcher's knife and seized his former partner's new partner around the throat, threatening to kill him and commenced sawing his throat with the butcher's knife. Hess then head butted the victim. Hess and Power then left. Hess therefore did not commit the act that resulted in the offence of unlawful wounding, but was convicted as a party to the offence. He was not charged with the more serious offence of unlawful wounding with intent to do grievous bodily harm of which Barnett was convicted. Hess was sentenced to four years' imprisonment to be suspended after 18 months for an operational period of five years for the burglary and two concurrent terms of three years' imprisonment for the other charges.

[142] It has therefore not been shown that the sentence imposed on Barnett was manifestly excessive, in all the circumstances. As was appropriate in the circumstances, the Attorney did not seek to have Barnett's sentence increased.

Orders

[143] It follows that the orders which should be made are:

1. In CA No 105 of 2004:
   (a) appeal against conviction dismissed
   (b) leave to appeal against sentence refused

2. In CA No 128 of 2004:
   (a) appeal against sentence allowed
   (b) the sentence of 12 years' imprisonment imposed in the Supreme Court at Bundaberg on 2 April 2004 for the offence of attempted murder be set aside and, in lieu, the sentence of 15 years' imprisonment be substituted
   (c) declare the conviction for attempted murder to be a conviction of a serious violent offence
   (d) affirm the other orders made in the Supreme Court at Bundaberg on 2 April 2004

3. In CA No 152 of 2004:
   (a) appeal against conviction dismissed

4. In CA No 129 of 2004:
   (a) appeal against sentence allowed
   (b) the sentence of six years' imprisonment imposed in the Supreme Court at Bundaberg on 2 April 2004 for the offence of attempted murder be set aside and, in lieu, the sentence of nine years' imprisonment be substituted
   (c) affirm the other orders made in the Supreme Court at Bundaberg on 2 April 2004

5. In CA No 120 of 2004:
   (a) leave to appeal against sentence refused

6. In CA No 130 of 2004:
   (a) appeal against sentence dismissed.