

SUPREME COURT OF QUEENSLAND

CITATION: *R v Le; Ho & Le* [2005] QCA 144

PARTIES: **R**
v
LE, Ghi Van
(appellant)

R
v
HO, Toan Thai
(appellant/applicant)

R
v
LE, Linh Van
(appellant)

FILE NO/S: CA No 164 of 2004
CA No 189 of 2004
CA No 191 of 2004
SC No 406 of 2003

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 May 2005

DELIVERED AT: Brisbane

HEARING DATE: 7 March 2005

JUDGES: Williams and Jerrard JJA and White J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Each appeal against conviction is dismissed**
2. In CA No 189 of 2004 the application for leave to appeal against sentence is dismissed

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – appellants convicted of attempted murder, doing grievous bodily harm and unlawful wounding – limited evidence of prior relationships between appellants and complainants – one complainant and one appellant argued at a soccer match – appellants subsequently visited the house at which all complainants were present –

gun battle ensued during which all complainants were shot – conflicting evidence regarding the number of shooters and the direction from which the bullet entered one of the complainants – independent witness evidence given – Crown case based on a common intention formed by the appellants to kill the complainants – whether the jury were entitled to find on the evidence that a common intention to kill at least some of the complainants had been proven beyond a reasonable doubt

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – two appellants relied on self-defence at trial – judge directed the jury as to self-defence under s 271(2) and s 272 of the *Criminal Code* according to two possible versions of events – appellants submitted on appeal that a third possible version of events existed which would have required a specific and further direction under s 271(1) – whether the trial judge erred in not giving the suggested direction

Criminal Code (Qld), s 7, s 8, s 271, s 272

R v Andreassen [2005] QCA 107; CA No 334 of 2004, 15 April 2005, distinguished

R v Corry [2005] QCA 87; CA No 306 of 2004, 1 April 2005, distinguished

COUNSEL: A J Glynn SC for the appellant, G Le
C Chowdury for the appellant, Ho
G P Long for the appellant, L Le
M J Copley for the respondent

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

- [1] **WILLIAMS JA:** I have had the advantage of reading the comprehensive reasons of Jerrard JA in this matter. Therein he has fully summarised all relevant evidence and dealt with the arguments raised by counsel for each appellant on the hearing of the appeals. I cannot usefully add anything to what Jerrard JA has said in support of my conclusion that there was no miscarriage of justice in the jury returning the verdicts which they did.
- [2] The summing up made it clear to the jury that they had to be satisfied beyond reasonable doubt of an intent to kill before verdicts of attempted murder could be returned. In my view a reasonable jury was entitled to draw that inference beyond reasonable doubt with respect to each appellant given the circumstances established by the evidence.

- [3] For the reasons given by Jerrard JA there was no deficiency in the directions given by the learned trial judge to the jury on the possible defence of self defence with respect to the appellant Linh Le.
- [4] I agree with the reasoning of and the orders proposed by Jerrard JA.
- [5] **JERRARD JA:** On 27 May 2004 Ghi Van Le, Linh Van Le, and Toan Thai Ho were each convicted of the attempted murder of Thiet Duy Duong (“Hoang”) on 2 December 2001, and also of doing grievous bodily harm to Than Van Nguyen (“Lieu”) and of unlawfully wounding Yung Hung Tran (“Hung”) that same day. Each has appealed all three convictions on the common ground that the verdicts of the jury were unreasonable or could not be supported having regard to the evidence. Counsel for Linh Le, Mr Long, argued a further ground of appeal asserting a deficiency in the directions by the learned trial judge to the jury on a possible defence of self-defence, which ground if successful would also apply to Toan Ho. Each appellant had filed an application for leave to appeal against the sentences respectively imposed upon them, but those applications were abandoned by Ghi Le and Linh Le, and struck out during argument in their respective appeals; Toan Ho’s counsel made no submissions in support of his application for leave to appeal his sentence. Accordingly, that latter application will be dismissed.
- [6] The victim of the attempted murder, Hoang, was often to be found with his wife Mai Thai Huynh (“Mai”) and their children at 15 Hook Street Inala, although it was not his permanent residence. On 2 December 2001 there were three visitors staying there, Xuan Van Nguyen (“Xuan”), Hung, and Lieu. Lieu had arrived there two days earlier. Hoang knew all three appellants, and also a fourth appellant An Van Le (a brother of the appellants Ghi Le and Linh Le), whose appeal against his convictions was withdrawn. Hoang also knew two other persons jointly tried with the appellants, Quan Hai Ho and Dien Thi Nguyen. Quan Ho received a directed acquittal and Dien Nguyen a nolle prosequi respectively, at the end of the Crown case. Dien Nguyen is the wife of the appellant Ghi Le.

Limited evidence of prior relationships

- [7] The evidence did not reveal the detail of the relationships between, on the one hand, those who stood trial, and on the other, those who were complainants or Crown witnesses. The latter group include Hoang, Xuan, Hung, and Lieu. Nor did it frankly reveal the relationships among those four people. Xuan’s evidence was that he had come from Sydney to Brisbane by plane with Hung at the latter’s request, about two weeks before 2 December 2001, and he and Hung had just “come up for fun”. Xuan already knew Hoang and the latter’s wife Mai, having known them for some years. They met through Ghi Le. Xuan knew An Le, Linh Le, and Ghi Le, having gone to school with An Le and Linh Le in Melbourne. He had only known Lieu for two weeks; he met him through Hung, in Sydney.
- [8] Hoang was less forthcoming about relationships. His evidence was that Xuan had rung him from the Brisbane Airport two days before 2 December 2001, and he understood that Hung had arrived in Brisbane two days before that. Prior to Hung’s arrival in Brisbane, Hoang had had no contact with Hung for three to four years; he did not know what either Hung, Xuan, or Lieu did to support themselves. Lieu, on Hoang’s account, had arrived at Hoang’s home with Hung. Hoang’s evidence did

not describe how he knew the Le brothers or Toan Ho or the other accused, although he clearly did.

- [9] Lieu's evidence was that he had come to Brisbane from Adelaide via Sydney to check out the market gardening up here; that differed from his explanation to the police that he had come here for a holiday. He previously knew Hung, and was introduced to Xuan by Hung in Sydney, apparently whilst on route from Adelaide to Brisbane. Lieu journeyed from Sydney to Brisbane by car with two other people, and had arrived at Hoang's residence on or about 30 November 2001. Hoang and Mai were strangers to him until introduced to them by Hung at the residence of Hoang and Mai. Lieu had travelled from Adelaide to Sydney with Hung, although Lieu's evidence was that he did not know why Hung was going to Sydney. Lieu had gone to 15 Hook Street on 30 November 2001 because Hung had invited him there to socialise. He did not know why Hung was going to Brisbane.
- [10] Hoang's evidence, and Ghi Le's interview with the police, each described Hoang and Ghi Le having known each other for a number of years and having once been friends who drank together. Hoang also described the appellant who withdrew his appeal, An Le, as having been a friend of Xuan. Ghi Le's interview with the police described Toan Ho as a friend of the Le brothers, and did not reveal in that interview prior knowledge of any of Xuan, Hung, or Lieu.
- [11] Linh Le admitted in an interview with police to knowledge of Hoang, but not of any of Hoang's three visitors. He described Hoang as a person he had known once, and whom he saw "around".

An earlier visit to Number 15

- [12] None of the appellants gave evidence, and Toan Ho did not have an interview with the police. The jurors accordingly got what seems to have been a somewhat circumspect account from all those involved about their prior knowledge of, and dealings with, each other. What was otherwise established was that on an occasion Hoang described as "a few weeks" before 2 December 2001, Linh Le and two other men visited 15 Hook Street and spoke to Hoang. On Hoang's account, Linh Le wanted to know if Hoang had been criticising his brother Ghi Le. Hoang denied it, and Linh Le suggested that Hoang attend a soccer field on Sunday to learn more about the matter, and Hoang was not to say bad things about Ghi Le. Mai gave much the same evidence; and a neighbour Mr Price recalled a visit to his home by two Vietnamese men on an occasion Mr Price thought was about nine days before 2 December 2001. The two men spoke aggressively in Vietnamese to him, and he suggested they had the wrong address. A little later he saw those men arguing with people who lived at number 15.
- [13] Linh Le admitted to the police having been to number 15 on one occasion before 2 December 2001, and knowing Hoang lived there; but he was not asked by police about the visit Hoang and Mai described, and which Mr Price may have witnessed. The jurors were entitled to notice the general coincidence between the approximate date of that visit by Linh Le to Hoang's home (and his speaking of a later meeting at a soccer field) and the date of the journey by Hung and Lieu from Adelaide to Sydney where they met Xuan, before those three then travelled to Brisbane and to Hoang's residence.

A meeting at a soccer game

- [14] The suggestion Linh Le made that Hoang go to a soccer match was relevant because Hoang and his guests did meet two of the appellants (An Le was also there) at a soccer match at Inala some time between 1.00 pm and 2.00 pm on 2 December 2001. Hoang's evidence was that he had gone there with Xuan and Lieu, and met Linh Le and Toan Ho. An argument occurred between himself and Toan Ho about the claim which Linh Le had made to Hoang at his home, namely that he had been criticising Ghi Le. Xuan gave evidence of attending that match with Hoang, and seeing the latter argue with Toan Ho. He heard Hoang say to Toan Ho words to the effect "I gave you something. Then why didn't you pay me the money?" He also heard words said about Hoang "bad mouthing" Ghi Le. Hoang and Toan Ho pushed each other, and during that Hung arrived at the grounds in a car. Hung attempted to produce a gun, but Xuan prevented his doing so by pushing him back into the car. Linh Le helped break up the argument between Hoang and Toan Ho.
- [15] Lieu gave evidence of having met Xuan and Hoang on 2 December 2001 at a hotel at Inala, and having driven them to the soccer field where he left them, returning to 15 Hook Street. He then drove Hung to the soccer field, where Lieu saw Hoang arguing with "some other people", whom he said he did not know. It was common ground in the evidence of Hoang, Lieu, and Xuan, that those three and Hung returned together from the soccer field to 15 Hook Street. Somewhere around 3.30 pm that afternoon the appellants and their co-accused arrived at 15 Hook Street and a gun battle almost immediately erupted thereafter in which Hoang, Lieu, and Hung were each shot. Lieu was shot through the back and is now a paraplegic, Hung was shot through the hand, and Hoang was shot in the upper chest region. The prosecution case at the trial was that the bullet entered and passed through Hoang's body from behind; the case for all defendants was that Hoang was shot through the front of his chest.

The shoot out at Number 15

- [16] It was common ground at the trial and on the appeal that the defendants had arrived at much the same time outside 15 Hook Street in more than one car. In addition to the bullet which hit Lieu in the back, there were at least nine other shots fired into or at the front door area of number 15, and at least one shot was fired from within it. Number 15 is a low set brick house with a small front yard, enclosed by a waist high wire netting fence. On the front and on at least one side that netting was topped at the time by three strands of barbed wire, about nine inches apart. The result was that access to the front yard could be gained only through the front driveway, and perhaps also from the house yard immediately adjacent to that driveway. Number 15 had a small concrete patio running right across the front, and at the end of the patio adjacent to the front driveway it widened into a square concrete landing, giving access to the front door. Steps led from the yard to that landing, and those steps (there were five) faced a sliding glass window. The front door, protected by a security mesh, was recessed at a ninety degree angle to that sliding window.
- [17] The door, mesh, sliding window, adjacent brickwork, and parts of the house interior were all bullet damaged after the incident. The upward trajectory revealed by that damage showed that at least two of those bullets had been fired from the yard or the lower front steps. The nine bullets fired into or at the house were fired by a minimum of two weapons, judging by the rifling marks on the nine projectiles the

police located. Those could have been fired from a .357 calibre, a .38 calibre, or a 9 mm calibre weapon. Because the rifling characteristics which identified the existence of at least two separate weapons fired at the house are common to a number of firearms, more than two firearms may have been used in firing at the house.

- [18] Someone firing from within the house had a Tokarev pistol, upon which Hung's blood was located. He had been shot in the hand. That pistol was found hidden in a box under a cloth at the rear of number 15, and had been put there by Mai after the shooting ended. None of the defendants were in any way injured, and they all left the yard at Number 15 at or about the same time, although it did appear common ground that Ghi Le was the first to drive away, doing so before the other appellants had left the premises, and perhaps before all the defendants who did so had entered the yard at Number 15. None of the defendants contacted the police with any complaints about being shot at. Only one discharged cartridge case was found at the scene, on the front landing, and it had been fired by the Tokarev pistol. Apart from that, only discharged projectiles were located.
- [19] There was a considerable body of evidence, including from neighbours, that more than one man who arrived at or outside number 15 had been seen to carry and fire a gun. None of the appellant defendants gave any explanation to the police or the jury about why those who carried or fired guns at number 15 or the people in it had done so, or why guns were brought there at all, or by more than one person. Neither Hoang nor Lieu claimed to know the identity of the person who had shot either of them, or Hung. Neither Hoang nor Mai gave evidence of having seen anyone that afternoon brandishing or firing a weapon from either outside or inside the house. Ghi Le and Linh Le each denied having had a weapon at the house in their respective interviews with police, while the summing up revealed that An Le had told the police that he had taken two guns there, both of which he had fired. The Crown case was that in saying that, he was attempting to take the blame for at least one other person.

Hoang's gun-shot wound

- [20] The prosecution called evidence from the orthopaedic surgeon who operated on Hoang, whose firm opinion evidence was that Hoang had an entry wound to the front part of his left shoulder (just below the "collar bone"), and an exit wound on the posterior aspect of his upper torso, or out the back of the shoulder. The wound at the back was roughly circular, though better described as star-like or ragged, consistent with it being an exit wound. The wound the surgeon considered the entry wound, on the front of the body, was a small, round one, about half a centimetre in diameter. The wound the surgeon regarded as the exit wound was larger. The surgeon said he was confident in his description of exit and entry wounds, describing how he had treated between 10 and 20 such wounds over the preceding five to six years.
- [21] The prosecution preferred at the trial not to rely on that expert opinion evidence, and to rely instead on the opinion of an ambulance officer Mr Limpus, who lived in number 7 Hook Street, and who heard the shots and went to the scene. His opinion was that the gun shot wound Hoang suffered from had entered his body from the back, and exited just above the left trivicle. He recalled the injury to the front of the chest as slightly jagged and slightly larger in diameter than that to the back. Mr

Limpus had served in the Army and was experienced in the use of firearms. He did not describe any experience with gun-shot wounds.

- [22] He was not cross-examined at all on his opinion, although it was contradicted by the surgeon. The difference was important to the case for the appellants, who maintained that the Crown could not exclude the possibility Hoang had been shot by one of those inside number 15 firing out from it, rather than by any of the accused. That possibility depended both on the opinion of the ambulance officer, and on the evidence of Xuan and Hoang.

Hoang's evidence

- [23] He had sworn that his permanent address was at a residence in Hemmant, but said he was a frequent visitor to the residence of his wife and children at 15 Hook Street. On Sunday 2 December 2001 he went to the soccer field, as earlier suggested to him by Linh Le (there was a game there every Sunday and his visit was "a few weeks after" his conversation with Linh Le), and argued there with Toan Ho. Ghi Le was not present. After Hung's arrival, Hung "left with us", and they returned to 15 Hook Street. There Hoang prepared a meal and some drinks, and then he saw Ghi Le arrive in a car, driven by Ghi's wife. Another car arrived, perhaps as Ghi Le was walking toward number 15. Ghi Le walked to the top of a small patio or landing outside a front door. Hung was in the bathroom, Lieu was sitting at the dining table, and Xuan and Mai were somewhere else. Hoang and Ghi Le met on the landing outside the front door, and they argued, according to Hoang, about things Hoang was alleged to have said about Ghi Le. Hoang's evidence continued:¹

"And he said if he heard or knew that, I said any bad things about him, he said he would get me, and he said 'what would he do to me?' and he swung his arm and hit me and I ran into the house and I heard gunshot and I realised I got injured."

He said he was running or walking towards the door and facing it when he was shot, that he could not see Ghi Le when he was shot, and when he turned to leave Ghi on the landing, there was no one else in the yard. He then tried to run into his kitchen and heard a lot of gun shots. He "didn't pay much attention" to where Hung and Lieu were, and after everything quietened down he came out of his kitchen and saw Lieu lying on the floor shot.² On his evidence he did not see a single person with a gun; and on his evidence, as a matter of logic, if the bullet which struck him entered his body from the front, then it must have been fired from inside the house.

What was the dispute about?

- [24] Although Hoang's evidence did not directly incriminate anyone, he was cross-examined with a view to demonstrating a general lack of credibility in any sworn evidence from him. Cross-examination established that although he had been a social security recipient, and although he had at first denied on oath at the committal hearing that anyone had bought him cash in the hospital, in fact his niece brought \$1,100 to him there, causing some concern to the nursing staff about the security of that money. He described it as a gift collected by relatives. Mai had \$8,000 in cash concealed in her pants after the shooting, and \$1,300 in cash in her handbag. She

¹ At AR 429

² This is all at AR 432

was cross-examined about that, and the implication from the cross-examination was that it was money from unlawful conduct. The same was implied about the cash given to Hoang in the hospital.

- [25] The learned judge's summing up records that counsel for Toan Ho submitted to the jury that the dispute at 15 Hook Street was about drugs, specifically heroin. That submission referred to the evidence by Xuan of statements by Hoang to Toan Ho that the latter owed him money; Toan Ho's counsel had put to Hoang in cross-examination that Toan Ho owed Hoang \$200 for a drug debt and that Hoang had asked Toan Ho to sell heroin for him. Hoang had denied those suggestions, and also the suggestion that he told Toan Ho that if the debt was not paid "I'll phone someone in Sydney or Melbourne", and that Toan Ho would then see what happened.³ The proposition was specifically put by Toan Ho's counsel in cross-examination, that the argument at the soccer field on 2 December 2001 had been about the demand that Toan Ho repay a debt by selling heroin, and that Xuan had hit Toan on the head. Those suggestions were denied, as was the further suggestion that the argument with Toan at the soccer fields was not about "bad things" Hoang had said about Ghi Le.
- [26] There appears to have been little direct evidence that the conflict was over drug related debts as opposed to defamation of Ghi Le, but the suggestions forcefully put to Hoang by Toan Ho's counsel accord with the unavoidable impression otherwise presented that the complainants and those of the accused who spoke to the police were all withholding a good deal of information about what was really going on. That impression required that the jurors approach the evidence of the (Crown) witnesses with great care, to ensure that a false account was not being positively put forward by those unwilling to give the true one. There was certainly independent and objective evidence that at least two cars had arrived at almost the same time outside number 15, that a number of Asian males carrying weapons had emerged from those and entered the yard, and a number of shots had been fired into, and at least one from, that house, with three persons in the house being injured, two of them severely. When considering the evidence other than that independent evidence of largely unexplained shootings, it was necessary for the jurors to look with care for evidence of common ground between the accused and the Crown witnesses, particularly Xuan and Lieu, where that common ground was consistent with the independent evidence.

Xuan's Evidence

- [27] Xuan swore that when the group arrived back from the soccer field Hung had placed the gun he had produced there on the table at number 15, and had said words to the effect "Why didn't you let me shoot these guys?" No reply was described, and Hoang and Xuan drank some beer. Xuan then noticed Ghi Le arrive, and the latter walked up the landing steps onto it, and argued there with Hoang. Xuan recalled Ghi saying "You are grown up, why did you ask these guys to do stupid things?", and Hoang replying with words to the effect that it was not Ghi Le's business, and asking why Ghi Le had to interfere. Xuan then described Ghi Le pushing Hoang, Hoang pushing back, Xuan attempting to break them up, and "then Ghi left."⁴ As Ghi Le walked out of the gate two other cars arrived and, according to Xuan, Toan

³ This cross-examination is at AR 454-456

⁴ At AR 671. That short sentence accorded with Ghi Le's interview with the police, and was his defence

Le and An Le then ran into the yard brandishing guns. Hoang said “Shoot the mother out of them” and shooting started, with the first shot being fired from inside the house.⁵

- [28] Xuan did not describe seeing anyone actually get shot. He swore that when the shooting started he attempted to jump off the landing upon which he had necessarily placed himself when attempting to break up the argument between Ghi Le and Hoang, and by means not clear from his evidence he extricated himself from the patio and arrived at a position outside the front fence.⁶ Although he heard gun shots fired from inside the house and saw both An Le and Toan Ho fire guns, he described seeing little else of relevance. When the shooting stopped he ran back into the house and saw Hung standing with a bleeding hand and holding a gun, Hoang putting his hands to his shoulder, and Lieu lying injured. Mai took Hung’s gun, cleaned it, put it in the box and disposed of it.
- [29] Ghi Le’s interview with police agreed with Hoang’s evidence and Xuan’s evidence that Ghi Le had argued with Hoang on the front landing at number 15. Linh Le’s interview with the police also described Hoang and Ghi Le arguing at the front of the house. Neither Hoang’s evidence nor Ghi Le’s interview (nor Linh Le’s interview) described Xuan being present on that landing and attempting to intervene. On the latter’s evidence, he was certainly out of the house. He was uninjured, and none of the charges laid alleged any intent to injure him. His evidence supported Ghi Le’s claim to the police, and Hoang’s evidence, that Ghi Le had simply argued with Hoang and then left before any shooting at all. That account is also supported by the simple fact that Ghi Le also remained uninjured, although he had been on the landing in front of a door and sliding window out of which a bullet or bullets were fired, apart from those fired at and into those.

Lieu’s Evidence

- [30] The evidence specifically incriminating Ghi Le came from Lieu. He swore that after the group had arrived back at Hook Street from the soccer field, he had been watching television when he noticed a vehicle arrive. A man he had not seen before came onto the landing and argued there with Hoang. Lieu did not see Xuan, who had remained outside the house after the group had returned from the soccer field. The man with whom Hoang was arguing hit Hoang “And then I heard a gun shot. When they were arguing I got up and went to the security door to see what was going on. And then I heard a gun shot.”⁷ Hoang moved back inside, and Lieu saw that Hoang’s chest was bleeding. Lieu said that the same man who had been arguing with Hoang was “holding a gun in his right hand. And there was smoke coming out of it.”⁸ Lieu himself then turned around and retreated further into the house, but was shot in the back.
- [31] That was his evidence-in-chief. In cross-examination he described how Hoang “when he got hit he sort of backing and then now I think he just he moved into towards the house”, and explained that Hoang was walking backwards into the house.⁹ Lieu did not actually see Hoang get shot, but repeated that he had heard an

⁵ AR 671; 683; 686; 699; and 739

⁶ AR 686

⁷ At AR 774

⁸ At AR 775

⁹ At AR 792

argument, gone to the door to see what was going on, and “I heard a gun shot and I see the man hitting Hoang and then I heard a gun shot and then Hoang backing into the house”. It was put to him that the man had hit Hoang and walked off, but Lieu denied that, saying “he was still there”. He repeated in further cross-examination that having looked outside to see what was going on, he had seen the man, “saw that man hit Hoang once. Hoang ducked a jerk and I heard a gun shot, something like that, and after I heard the gun shot he was backing or walking backwards into the house.” He added that “I think when he turned around I’d opened the door. That’s when I saw he was bleeding.”¹⁰ He emphasised that he did not know whether the first shot came from inside the house or outside.

The case against Ghi Le

- [32] The other evidence clearly identified Ghi Le as that man who was standing there arguing with Hoang. Lieu’s evidence was challenged in cross-examination, to the extent that it was put that the man who hit Hoang left the landing after hitting him; but there was no specific challenge made to Lieu’s evidence that he had seen that man holding a gun when on the landing and, by necessary inference from his evidence that it had smoke coming out of it, that this was immediately after hearing the gun shot which preceded Lieu seeing Hoang walking backwards into the house, bleeding from the chest. Nor was there any cross-examination of the relevant expert witnesses from the police about the proposition that the apparently discharged gun had smoke coming out of it.
- [33] The jury could properly regard that evidence as identifying Ghi Le both as a person who fired a gun that afternoon and the person who shot Hoang. It was supported by the evidence of a witness Lynette Jones, who had described seeing one man standing at a balcony and two others standing on the top step leading to it,¹¹ and all three were shooting into the house. It was suggested to her that one man had two guns and one of the other men did not have one, but she was of the view that she had seen all three, each with one and firing.¹² The jurors could accept that Ghi Le left the scene earlier than the other defendants, but still accept Lieu’s evidence that he did so after shooting Hoang. When evaluating Lieu’s evidence incriminating Ghi Le, the jurors were entitled to have regard to the absence of any challenge in cross-examination to the description that the man arguing with Hoang was seen to hold a smoking gun. The only challenge the jurors heard was the suggestion put to Lieu that the man who hit Hoang left after hitting him, which suggestion Lieu denied, repeating that when Hoang moved (presumably into the house) “I saw that the man was still there”. He agreed with the suggestion that he could be mistaken about that, but that was as far as the challenge went.

The larger picture

- [34] Evidence was called from a number of neighbours, who described hearing gun shots variously estimated to be between approximately six and approximately 12. The general effect of that evidence was that at least two cars had been seen at number 15 and leaving hastily from it. The witnesses varied in their recollections as to the number of Asian men seen getting out of those cars and carrying guns, or seen carrying a gun in the yard of number 15, or seen re-entering the cars. The highest

¹⁰ At AR 793

¹¹ At AR 161

¹² At AR 170 and 171

estimate was either four or five men in the front yard of number 15, all apparently armed;¹³ other witnesses recalled seeing anywhere between one person definitely holding a gun and three doing so. Three witnesses described actually seeing men firing shots at the house.

- [35] The picture presented by that evidence was that at least two cars arrived at or near number 15, a number of Asian men got out, more than one of those being armed; firing into the house began very soon after those men arrived. The police evidence established at least 10 shots were fired into the premises. The jurors could find that Ghi Le and Hoang quarrelled at the front door, Hoang was then shot from in front, and that that occurred at the start of an incident which was all over quite quickly; that An Le and Toan Ho each carried and fired weapons, and that Ghi Le was leaving as they started shooting; and could find that Ghi Le had shot Hoang and fled immediately from the landing, with the firing then starting from the others and allowing his escape.

Particulars and directions

- [36] The Crown particularised its case on attempted murder(s) as being that the defendants were engaged in a common enterprise to kill Hoang and his associates, or alternatively had a common intent to kill him and any one else whom it was necessary to kill to succeed in killing Hoang. The defendants were indicted on charges of having attempted to murder Hoang, Lieu, and Hung; but the jury acquitted the appellants of the latter two counts and convicted them on alternative charges of doing grievous bodily harm to Lieu and unlawfully wounding Hung. They specifically acquitted the appellants of the aggravating circumstance of any intent to do grievous bodily harm to Hung or Lieu when wounding and doing them grievous bodily harm respectively. The defendant An Le had been convicted of that aggravating circumstance in relation to Hung and Lieu, and this Court was informed on the appeals that those convictions were apparently based on statements he had made to the police, admissible in the case against him but not against the appellants.
- [37] There was no complaint at either the trial or on the appeal about the directions the learned trial judge gave to the jury on s 7 of the *Criminal Code* and the law as to the criminal responsibility of a principal offender or a party to an offence. The learned judge directed the jurors about s 7 without repeating its terminology, but in accordance with its effect.¹⁴ After discussion with all counsel, and with their agreement, the learned judge did not direct the jurors in terms of s 8 of the Code,¹⁵ although the final directions the learned judge gave to the jurors in re-directions the jury sought do appear to reflect the concept expressed in that section. Those directions were given after discussion with counsel, and without objection,¹⁶ and are not complained about on the appeal. The directions the learned judge gave *in toto* explained the jurors' task clearly to them, and resulted in the jury being able to distinguish among the different defendants as to the acts for which each defendant was criminally responsible, and as to the intent of each defendant.

¹³ Evidence of David Nguyen at AR 396-407

¹⁴ Those directions appear at AR 1261-1271

¹⁵ The agreement with counsel that directions in accordance with s 8 would achieve nothing except a complication appears at AR 1121

¹⁶ The directions appear at AR 1352

[38] There was no complaint that the learned judge had failed to put properly and accurately the defence of any defendant. Instead the argument advanced by all appellants was simply that the prosecution was unable to establish its case of an intent common to all appellants to kill Hoang. On the directions given, existence of that intent explained the convictions for doing grievous bodily harm and unlawful wounding *simpliciter* as well as the conviction for attempted murder – whether that intent was formed before the appellants went to 15 Hook Street, (the prosecution’s primary case) or, as the Crown put its case in the alternative, formed after they had arrived there.

[39] The principal argument advanced was that the jurors could not properly have excluded beyond reasonable doubt the hypotheses argued to have been open on the evidence, other than arrival with an intent to kill Hoang or formation of that intent after arrival, namely:

- an intention in common only to confront Hoang (and possibly others), with the guns being taken there as insurance or back up;
- an intention in common only to threaten or intimidate Hoang and others, perhaps even by firing guns, but without any intention to kill or injure any person;
- a combination of those two propositions.

The submissions referred particularly to *Knight v R* (1992) 175 CLR 495 at 503-504.

Inferences

[40] It was open to the jury to find that Hoang was shot through the chest from in front and when standing on the porch, and that shot was fired with an intent to kill. If anything, the possibility advanced by the appellants at the trial, namely that a shot or shots had already been fired from inside the house – and which the jury could find did not hit Hoang – before any defendant fired a shot, simply adds to the reasons for finding an intent to kill Hoang. The jury could conclude that shot which hit him was fired early in the fracas, and by Ghi Le. If not fired by him, the jury could conclude it was fired by another of the defendants. It was open to the jury to be satisfied beyond reasonable doubt that the defendants Ghi Le, An Le, and Toan Ho went there with the intent the Crown primarily advanced, namely to kill Hoang, and that Linh Le knew that. The evidence shows that Hoang had played a significant role in the bad relationship between the two groups of Vietnamese Australians, and Xuan’s evidence in cross-examination had included that he believed Hoang to be a violent, dangerous man, and Xuan was also frightened of Mai. Xuan said that earlier that day Hoang told him that Toan Ho owed him money, and that the argument between Hoang and Toan Ho was over that, with Hoang telling Toan Ho to “sell something” for him, and that it was Toan’s refusal to do that which made Hoang angry. Xuan agreed with the suggestion in cross-examination that Hoang had told Toan Ho to “go fuck his mother”, and it was at that point that Hung attempted to get out a gun to shoot Toan Ho. That evidence, adduced by counsel for Toan Ho, was consistent with the suggestions made to Hoang in cross-examination. It also explained to the jury why the appellants might have considered it necessary to kill Hoang.

- [41] Even if none of Hoang, Mai, Lieu, or Xuan had given evidence, and none of the defendants spoke with the police, the jurors would have been entitled, simply from the evidence of the neighbours and the police to conclude that the people who arrived at number 15 carrying guns and who then fired them had gone there with the intention to kill at least some of the people in number 15. They very nearly killed two of them. Accordingly I would dismiss the argument by each appellant that the jury's verdict was unreasonable and cannot be supported by the evidence.

The case against Linh Le

- [42] The conclusions last described fall hardest on Linh Le, who was not identified individually as either definitely or probably carrying or firing a weapon. However, he arrived there with others who clearly were armed, and the jurors were instructed as to what could constitute aiding, and were told that simply being present was not sufficient. The judge directed that "The defendant must in some way have assisted, helped, or encouraged the person shooting to attempt to unlawfully kill (that complainant)." On Linh Le's account to the police, he had attempted when outside number 15 to persuade An Le not to fire his guns; but that conduct was not described by either Xuan or Lieu, and it was not suggested to them that they had seen Linh Le do that. The jurors were entitled to take into consideration that Linh Le had made the earlier visit to Hoang's residence which led to the meeting at the soccer ground, and the generally evasive contents of Linh Le's interview with the police. He denied seeing any argument at the soccer field, and said he had driven a car to the house simply because An Le had asked him to take An Le there, for a talk (with Hoang). It was open to the jurors to find that Linh Le knew An Le, Ghi Le, and Toan Ho were going there with the intent to fire guns at Hoang to kill him. The small size of the front yard would have made it quite crowded when the appellants and An Le were in it, and impossible not to see that the others in it had guns. The jurors could disbelieve Linh Le's statement to the police that he thought An Le and Ghi Le were just going there to talk to Hoang. The jury could accept that Linh Le did not want Hoang shot, but nevertheless find that he intentionally assisted his brothers in their plan to kill Hoang by driving the car to number 15 and away from it,¹⁷ with An Le in it.

Self-Defence

- [43] The appellants other than Ghi Le¹⁸ specifically relied at the trial on self-defence, upon which the learned judge gave the jurors directions in terms of both s 271 and s 272 of the *Code*¹⁹. The judge read s 271(2), 272(1) and (2), and 273 to the jury, directing them on the terms of those sections and on aiding in self-defence. No complaints were made at the trial about the directions, although Linh Le's counsel now submits that they were deficient. This case is quite different from *R v Corry*²⁰, and *R v Andreassen*,²¹ in that the learned trial judge here did direct the jury on both s 271 and s 272.

¹⁷ "It is possible, after all, to aid someone in the commission of an offence while harbouring feelings of disapproval of the offence and of the conduct involved in it." (*R v Beck* [1990] 1 Qd R 30 at 38 per Macrossan CJ, with whom McPherson J (as His Honour then was) agreed)

¹⁸ His defence was that "Ghi left"

¹⁹ These appear at AR 1272-1280

²⁰ [2005] QCA 87

²¹ [2005] QCA 107

- [44] The judge explained the difference between those sections with a direction that the law distinguishes between two types of case for the purposes of self-defence. The judge described one case being where the original assault comes from the defendant, or the defendant provokes an assault by the defendant's ultimate victim. The other case is where it is the victim who makes the original assault, or where the victim's assault is not provoked and is itself an unlawful one. The judge directed the jurors they should assume the case to be of the second kind unless satisfied beyond reasonable doubt that it was of the first kind, that is, one where the original assault came from the defendant.
- [45] As to the latter (or "first") situation – s 272 or self-defence against a provoked assault – the judge suggested the jury might consider in the case of each defendant whether it was that defendant who assaulted someone first, either by shooting or by threatening with a gun in the hand to shoot at somebody at number 15 Hook Street, before there was any assault by the firing of any shot from number 15. If so satisfied, then it was necessary for the jury to consider whether at the time of that first assault by that defendant, he then intended to kill or do grievous bodily harm to any person. The learned judge then referred the jurors to the relevant evidence on that point, and gave further directions on that variety of self-defence. There is no complaint about those.
- [46] The learned judge then moved to directions in terms of s 271(2) – self-defence against an unprovoked assault. The direction was to the effect that if not satisfied that any shot fired from the house was fired only after an assault by the defendant or defendants, the jurors would proceed on the basis that a shot or shots from within the house was an unlawful assault and a defendant may have believed on reasonable grounds that it was an assault upon him. The judge then directed the jury's attention to the question of whether they could be satisfied that a relevant defendant had not formed the belief that that defendant had to fire the shot which hit a relevant victim in order to defend that defendant or some other person. The judge gave the jurors accompanying directions, about which there is no complaint.
- [47] The complaint that is made now is that a possible version of events which could not be excluded was that one or more of the defendants entered the yard with drawn guns but without any intention to kill or do grievous bodily harm to any person, a shot was fired by an occupant of the house, and guns were fired by the defendants at the house in response to that. Mr Long submitted that in those circumstances a specific and further direction in terms of s 272(1) would have been appropriate, and that direction had not been given. He argued that there were really three alternatives, whereas the trial judge put only two to the jury, the third alternative being that there had been an unlawful assault committed by one or more defendants who did not then have any intent to kill or do grievous bodily harm, to which the residents of the house had replied by gun fire, thereby assaulting those defendants, and providing a basis for them to plead s 272(1), and where its provisions could not be excluded by the operation of s272(2). That is, the defendants had not intended to kill or do grievous bodily harm when brandishing their guns and provoking a potentially lethal response from within number 15.
- [48] Mr Long agreed that the appellants had not suffered, on the assumption that a shot or shots fired from the house had been an assault upon the defendants, from the fact that the directions about self-defence in that situation had been given in terms of s 271(2) rather than s 272(1). He acknowledged that the provisions in each tended to

mirror one another, as they do. Both require that the assault constituted by firing from the house was such as to cause a defendant reasonable apprehension of death or grievous bodily harm, and that the defendant firing in response believed on reasonable grounds either:

- that the defendant could not otherwise preserve the person defended from death or grievous bodily harm [271(2)];

or

- that it was necessary for the defendant's preservation from death or grievous bodily harm to use force in self-defence [272(1)];

and in those circumstances either:

- it was lawful for a defendant to use any such force (to the people in number 15) as was necessary for defence, even though such force might cause death or grievous bodily harm [271(2)];

or

- a defendant was not criminally responsible for using any such force as was reasonably necessary for such preservation, although such force might cause death or grievous bodily harm [272(1)].

[49] Application of either section s 271(2) or s 272(1) requires that the jury consider a defendant's subjective state of belief, when deciding if the defence given by the section has been excluded. The only relevant difference in their terms is the distinction between the use of force which is necessary for defence, and force which is reasonably necessary. In the present case that distinction is irrelevant, and the argument now made seeks a direction that could have made no difference, and would not have benefited the appellants pleading self-defence. Had the further directions now suggested been given, it would have been necessary to add a further direction in terms of s 272(2), to include the requirement that the jurors consider whether a defendant could simply have declined further conflict and left earlier than he did. The learned judge did not err in law in not giving the suggested direction, and no miscarriage of justice has resulted from it not being given. I would dismiss all appeals.

[50] Accordingly, the order I would make is that each appeal is dismissed, and so also is the application by Toan Ho for leave to appeal against sentence.

[51] **WHITE J:** I have read the reasons for judgment of Jerrard JA and agree with his Honour, for the reasons that he gives, that the appeals should be dismissed and the application by Toan Ho for leave to appeal against sentence should be refused.