SUPREME COURT OF QUEENSLAND

CITATION:	*R v Crossman* [2011] QCA 126
PARTIES:	**R** **v** **CROSSMAN, Justin Lee** (applicant/appellant)
FILE NO/S:	CA No 292 of 2010 DC No 49 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	17 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2011
JUDGES:	Fraser and Chesterman JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed;** **2. Leave to appeal against sentence granted;** **3. Appeal against sentence allowed;** **4. The sentences imposed are varied to the extent of substituting 12 years for 15 years' imprisonment for the offences of intentionally causing grievous bodily harm.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was convicted of two counts of intentionally doing grievous bodily harm – where the appellant argued the trial judge erred by insisting the appellant attend the view – whether the order to attend the view amounted to an error of law – whether the chance of a fair trial was lost by the prejudice the appellant suffered by reason of the jury seeing the appellant confined in the prison van – whether a substantial miscarriage of justice occurred CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR

CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR REDIRECTION – MISDIRECTION – where the appellant was convicted of two counts of intentionally doing grievous bodily harm – where the appellant argued the trial judge misdirected the jury with respect to the definition of "grievous bodily harm" – whether a substantial miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of two counts of intentionally doing grievous bodily harm – where the appellant also pleaded guilty to one count of unlawful wounding and one count of unlawfully doing grievous bodily harm – where the appellant was sentenced to 15 years' imprisonment on each of the counts of unlawfully doing grievous bodily harm with intent with a declaration that the appellant had been convicted of serious violent offences – where the appellant was further sentenced to three years' imprisonment for each of the unlawful wounding and infliction of grievous bodily harm – where all sentences were ordered to be served concurrently – where the appellant argued the trial judge failed to take into account the pleas of guilty for the unlawful wounding and grievous bodily harm counts – where the appellant argued the sentences imposed in total were manifestly excessive – whether the sentences were manifestly excessive

Criminal Code 1899 (Qld), s 1, s 8, s 271, s 302(1)(b), s 617, s 668E(1), s 668E(1A)
Criminal Code Act 1924 (Tas), s 157(1)
Jury Act 1995 (Qld), s 52

Boughey v The Queen (1986) 161 CLR 10; [1986] HCA 29, considered
Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, considered
Goodwin v Phillips (1908) 7 CLR 1; [1908] HCA 55, applied
Karamat v R [1956] AC 256, applied
R v Eade [2005] QCA 148, considered
R v Ely Justices, ex parte Burgess [1992] Crim LR 888, distinguished
R v Hind and Harwood (1995) 80 A Crim R 105; [1995] QCA 202, considered
R v Nielsen [2006] QCA 2, considered
R v Trieu [2008] QCA 28, considered
The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16, applied

COUNSEL: J D Henry SC, with S Growden, for the applicant/appellant
M R Byrne SC for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **CHESTERMAN JA:** On 21 October 2010 the appellant was, after a four day trial in the District Court at Townsville, convicted of intentionally doing grievous bodily harm on or about 31 July 2008 at Townsville to Samuel Budby and to Reece Collins. The next day, 22 October 2010, the appellant pleaded guilty to two offences charged in a separate indictment, unlawfully wounding Henry Ketchup and unlawfully doing grievous bodily harm to Matthew Murphy, both on 17 April 2009 at Townsville. He was then sentenced to 15 years' imprisonment on each of the counts of unlawfully doing grievous bodily harm with intent with a declaration, automatic in the circumstances, that he had been convicted of serious violent offences. He was sentenced to three years' imprisonment for each of the unlawful wounding and infliction of grievous bodily harm. All sentences were to be served concurrently.

[3] The appellant appeals against his convictions by the jury and seeks leave to appeal against all sentences on the ground that in total they are manifestly excessive.

[4] The appellant urged two grounds of appeal. The first is that his presence at a view of the locality of the offences for which he was tried prejudiced his case before the jury and that the trial judge erred by insisting that the appellant attend the view in spite of his express desire not to attend. The second ground is that the trial judge misdirected the jury with respect to the definition of "grievous bodily harm" in the *Criminal Code*.

[5] A rehearsal of the evidence is necessary for an understanding of the argument.

[6] On the evening of 31 July 2008 the appellant and some friends attended a party at a house located at 4 Millet Street, Annandale, Townsville. They left the party and went home. After their departure the two complainants Samuel Budby and Reece Collins, and a third man went to the house at 4 Millet Street where they spoke to some girls sitting in the driveway of a neighbouring house. They complained about the level of noise emanating from the party and hinted that the police might be called if the noise did not abate. There was some evidence that one of the men asked to join the party and complained about noise when his overture was rejected.

[7] One of the appellant's friends, John Donovan, had been at the party and remained there after the appellant left. He observed three men complain about the behaviour of the partygoers "always … drinking and being so loud and that", and that his hostess to whom the complaint was addressed became upset. He thought the men were "getting a bit angry" and were annoying the hostess. He took her into the house where Mr Donovan "grabbed a baseball bat" because he "thought they were going to come in". He then telephoned the appellant and said "I think I might be in a bit of trouble, if I need your help I'll give you a call." The appellant replied "Don't worry about it Johnny we'll get these mother fuckers."

[8] True to his word the appellant and five of his friends drove in the appellant's car to 4 Millet Street. The appellant was the driver. He drove very fast. Two of his passengers were armed, one with a metal baseball bat and one with a metal pole similar to a star picket. According to one of the passengers, Marina Stoodly, one of the occupants said "these niggers are gonna get bashed." The complainants Budby and Collins are Aboriginal.

[9] Sometime shortly before 1.00 am on 1 August 2008 the occupants in the car saw the complainants and their friend walking along Millet Street away from number 4. The accounts of what happened when the appellant's car arrived at Millet Street vary but there was a consistent version which the trial judge accepted when passing sentence.

[10] The trial judge gave this summary of the evidence:

> "… I do not accept that there was any hostility, displayed by any of these three men in any way to the people in the party. There was certainly no attack upon any of the people there. They simply walked up, had a friendly conversation and began to walk away again. In the meantime … some (one) who was attending the party made a telephone call … and passed on a message … (to) the effect … that there were some people at the place where the party was being held … who were attacking the place, and you were also told … that they were Aborigines.
>
> As a result you and your friends piled into a car which you then drove back to the scene. Two of your friends armed themselves with weapons and it was obvious that you were going back with a view to attacking these people. There were comments made in the car … that they were indigenous persons.
>
> When you arrived at the scene they were still on the road but walking … towards the house … away from … the house where the party was. They were certainly not posing any threat to anybody … and that must have been obvious to you.
>
> You had ample opportunity to see them … but the jury must have accepted, and I … accept … that you deliberately lined up one of them and deliberately ran him down. You then went round the corner to a cul-de-sac, dropped off your mates who took off up the road brandishing their weapons, and then you drove back up and drove round the corner and deliberately ran down the other man. … he was … standing over and trying to provide some comfort and assistance to the first person who'd been run over while the third person had run off to call for help, something which neither you nor any of your … friends ever bothered to do."

[11] Reece Collins suffered abrasions to his right thigh, both elbows and left leg. He had a laceration to his left eyebrow and swelling to the back of the head. His right leg was broken below the knee and above the ankle.

[12] According to Dr Sunni who treated Mr Collins on his admission to hospital the likely result of the segmental fractures of the leg were malunion, the bone healing in

an awkward position which would permanently affect leg function and mobility; and increasing pressure in the surrounding muscle which could lead to interrupted blood supply and the atrophy of the muscles which, in turn, would deprive the leg of function and require amputation.

[13] Dr Sunni described the risk of malunion as significant. If it had occurred it would:

> "affect his mobility and … (activity)… . …he won't be able to walk normally … . It may affect … what kind of work … he can perform."

[14] Samuel Budby was more seriously injured. He was taken by ambulance to the Emergency Department of the Townsville Hospital where he was intubated because of an obstructed airway which prevented his breathing spontaneously. The cause was a severe head injury. He had abrasions to his forehead. Blood and cerebral spinal fluid had leaked from his right ear. There was blood in his nostrils and the back of his mouth. There was bruising to his left eye and grazes to his right shoulder, both knees and left ankle. There was a laceration to the left foot, a deformity and swelling to his right elbow and abrasions to the right wrist and left toes.

[15] Radiological examination showed a basal skull fracture at the back of the head and fractures of the bones around the left eye. The skull fractures had resulted in a subdural haematoma. They were the cause of the blood in Mr Budby's ear, nose and mouth. Dr Trout gave evidence that without the intubation Mr Budby "wouldn't have had enough oxygen. That is likely to worsen the outcome of his head injury, so he'd have a more severe disability, or increase the likelihood of death as well." The skull fractures might have healed without medical intervention but with "a risk of … infection … or … meningitis."

[16] A view of Millet Street was arranged for the second morning of the trial. Judge, jury, counsel and the appellant were to attend. After the court adjourned on the first day a Corrective Services Officer told defence counsel that the appellant, who was in custody before and during his trial, would be handcuffed and foot shackled to prevent escape on the view. The appellant having discussed the matter with this counsel decided he would prefer to remain in the precincts of the court and not attend the view. At 8.22 am on 19 October 2010, the day fixed for the view, defence counsel emailed the associate to the trial judge:

> "… (the appellant) wishes to waive his right to attend at the viewing this morning. Prisoner officers advise he would have to be shackled at the viewing.
>
> I shall advise His Honour again when at the view."

The associate replied 20 minutes later:

> "His Honour has informed me that the authorities require (the appellant) to be present at the viewing."

[17] Shortly before adjourning for the day, and in the absence of the jury the trial judge gave an account of the view. Relevantly his Honour said:

> "The one other thing I wanted to record about the … view – I was told before … the view, that (the appellant) was waiving his right to

> be present at the view. The (appellant) is in custody in the trial and … I was concerned that it was … important that (the appellant) be present at the view. I was conscious that there's a note in the Bench book to that effect, so I wasn't happy about the (appellant) not being there.
>
> The (appellant) was there and was in the position to see what was going on, that he was brought out in the prison van. I discussed at the scene with defence counsel what was to be done about the (appellant) because the situation is that because the (appellant) was in custody and because it was out in an area where there were parks and other areas around … where someone could … be able to run away without difficulty, the prison authorities wanted to have the (appellant) handcuffed and legs shackled and defence counsel was unhappy about the jury seeing him in that state. Ultimately, and at the request of defence counsel, I agreed that the (appellant) could remain in the prison van where I was told that he was able to see and hear what was going on … .
>
> It occurs to me on reflection that although nothing was said to the jury specifically about the matter, it was probably just as obvious to the jury … that it was the (appellant) who was in the prison van and that it was a prison van and so it may be that not very much was achieved by concealing the fact the (appellant) had a leg shackle on."

[18] In his report to the Court of Appeal the trial judge added to that account. His Honour wrote:

> "My position was that the view was part of the trial and the (appellant) was required to be present, and that this was not something (he) could waive. Circumstances had not arisen which would permit me to continue the trial in his absence.
>
> My previous experiences of views have always involved a defendant being present, usually subject to escort by corrective services officers or police; obviously the precautions taken depend on whether the defendant is one who is allowed bail during the trial; in this matter there was no application for bail during the trial. That he remained in the prison vehicle, in a position so he could see and hear what was going on during the view, was his choice rather than mine. Perhaps I should add that I would expect that the jury would assume that a person charged with such serious offences would have been in custody pending the trial anyway."

[19] The last matter to mention is that the trial judge discussed with counsel whether the jury should be directed to disregard the fact, which it was presumed they observed, that the appellant had attended the view confined in a prison van. The prosecutor thought that any such direction was "a bit of a double edged sword because … it might draw their attention back" to the occurrence. The trial judge expressed the same opinion and thought it best to say nothing rather than "stir things up at all". Defence counsel when asked endorsed the approach thinking that any such direction was "probably better left unsaid."

[20] The appellant's argument on the first ground had two contentions:

- First, that the appellant was not obliged to attend the view and the trial judge had no power to compel him to attend so that the order that he attend was wrongly made and amounted to an error of law in the conduct of the trial; and
- Second, that the chance of a fair trial was lost by the prejudice the appellant suffered by reason of the jury seeing him confined in the prison van. It was said that there was an "obvious risk … (that) the jury … would assume the appellant was dangerous or a flight risk and thus be more likely to assume his guilt."

[21] The contentions must be examined separately. Was the appellant's attendance at the view necessary? Section 617 of the *Criminal Code* provides:

> "(1) Subject to this section the trial must take place in the presence of the accused person.
>
> (2) If an accused person so conducts himself … as to render the continuance of the proceedings in (his) presence impracticable, the court may order the person to be removed and may direct the trial to proceed in (his) absence."
>
> (3) … ."

Section 52 of the *Jury Act* 1995 is also relevant. It provides:

> "**52 Inspections and views**
>
> (1) If, on a trial, the judge considers it desirable for the jury to have a view of a particular place or object, the judge may give the necessary directions.
>
> (2) The view must be held in the presence of the judge, and the parties and their lawyers or other representatives are entitled to be present.
>
> (3) … ."

[22] The discussion in the Benchbook on "views and demonstrations" does not mention s 617 of the Code but does refer to s 52 of the *Jury Act*. In its commentary it says:

> "While s 52(2) does not compel the presence of the defendant, the defendant's presence is important. The defendant might be able to point out something about which his or her legal advisers are unaware, or note that others are mistaken about something."

The trial judge's recollection of what the Benchbook said was accurate as far as it went but his Honour apparently did not recall the first observation that s 52(2) does not compel the presence of an accused on a view. The trial judge's report suggests, separately, that his Honour had s 617 in mind as the reason why the appellant had to be present. The appellant submitted that the section did not apply because a view is not part of a trial.

[23] Section 617 will not apply unless a view is part of the trial process which "must take place in the presence of the accused". The appellant's submission that it is not part of the trial is contrary to authority. *Karamat v R* [1956] AC 256 was an appeal from a conviction for murder in British Guiana whose *Criminal Law (Procedure) Ordinance* by s 167(2) gave the court power to permit an accused person to be out of court during the trial or any part of it. During the course of the trial there was

a view of the murder scene. The judge and jury were present as were counsel and some witnesses. The accused stated that he did not wish to attend the view and stayed away. He later made his absence a ground of appeal. The decision of the Privy Council was given by Lord Goddard CJ who said (265):

> "… it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. But, in addition to this, their Lordships desire to say that if an accused person declines to attend a view which the court thinks desirable in the interests of justice he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction … ."

[24] The case was followed by a Divisional Court in *R v Ely Justices, ex parte Burgess* [1992] Crim LR 888 (referred to in the Benchbook) in which Popplewell J (with whom McCowan LJ agreed) said:

> "The authorities … make it clear … that the presence of the accused … is a necessary requirement throughout a criminal trial in the absence of exceptional circumstances such as misbehaviour, absconding, illness or a desire not to be present. That applies … in trials before a jury and trials before a magistrate. A view is part of a criminal trial."

[25] The judge then referred to *Karamat* and continued:

> "It is implicit in the speech of Lord Goddard that the absence of the accused, unless there are some special circumstances which I have indicated, is a fatal matter. The reason for it is simple.
>
> The presence of the accused is important because he may be able to point out either to his own legal adviser or to the magistrates, if they will permit, some important matter of which either his legal adviser is ignorant or about which the magistrates are making a mistake."

[26] *Ely Justices* was a case in which the defendant wished to attend the view but was excluded by the Magistrate. His conviction was overturned.

[27] The cases are authority for the proposition which was, I think, obvious in any event, that a view is an incident of the trial and is part of the trial. The cases also establish that if the appellant were not required to be at the view and did not attend by choice his absence would not have made the trial irregular and would not have furnished ground for complaint if he were convicted.

[28] The cases do not address the question which this appeal throws up: was the appellant's presence at the view necessary? Section 617 of the Code compels the presence of the accused at his trial. However s 52(2) of the *Jury Act* provides, differently, that a view on a trial before judge and jury does not mandate the presence of a party, though both judge and jury must be present. Parties "are entitled to be present" but the subsection does not oblige them to attend.

[29] The orthodox approach to construing statutes which conflict in their application to a particular circumstance is to give precedence to a later statute, or to one which

deals with a more specific subject matter. The later, and/or specific act operates as a qualification to the earlier or general one. In *Goodwin v Phillips* (1908) 7 CLR 1 at 7 Griffith CJ said:

> "… where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. … Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

O'Connor J said (14):

> "Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply."

[30] Accordingly, s 52(2) of the *Jury Act* should be read as an exception to the direction in s 617(1) of the Code with the result that if on a trial there is a view the accused is entitled to be present but does not have to be.

[31] There appears to have been no similar provision to s 52(2) in the *Jury Act* of 1929 which was repealed by the 1995 Act. The regulation of views by a jury appears to have first occurred in the 1995 Act. It is a little surprising that the draftsman did not consider the impact of s 52(2) on s 617(1) of the *Criminal Code* but the oversight has no significance. The principles identified by Griffith CJ and O'Connor J indicate how the conflict between the two provisions is to be resolved.

[32] It follows that the trial judge could not compel the appellant to attend the view and the order that he do was made without power so the making of it was an error of law. The appeal must therefore be allowed pursuant to s 668E(1) of the Code unless the proviso found in subsection (1A) applies, that no substantial miscarriage of justice has actually occurred.

[33] The appellant argued that the proviso did not apply because the evidence did not allow the conclusion that there had been no injustice. It was submitted that while there was a powerful prosecution case of dangerous driving causing grievous bodily harm, there was no compelling evidence of an intention to cause that harm, so that the convictions on the more serious charges may have been influenced by prejudice the appellant suffered in the jury's assessment of him by his confinement in the prison van. It was submitted that the observation may have assisted to persuade the jury that the appellant intended to cause grievous bodily harm.

[34] The submission has an assumption which it does not recognise and does not deal with. Implicit in the submission is the contention that the appellant would be prejudiced because the jury would reason from his confinement that he was dangerous, or likely to abscond if given the chance, and from that conclusion would further assume that he was guilty of intentionally causing grievous bodily harm.

[35] The assumptions necessary to found the appellant's submissions are not, to my mind, self evident. They involve the jury subverting the process of reasoning which the trial judge explained carefully to them, and reasoning to guilt not by reference to the evidence and inference from the evidence but by reference to an unexpressed and unexamined opinion of a Corrective Services Officer about the appellant's character.

[36] The possibility of prejudice only arises if the jury engaged in this impermissible manner of approaching their deliberations. There is not the slightest evidence that they were influenced, or might have been, by seeing the appellant in the prison van. If the jury did allow their observation of the appellant to influence their deliberations they would have disregarded the trial judge's comprehensive explanation concerning how they should go about their duties.

[37] The jury was told in conventional but detailed terms that the appellant was presumed to be innocent; and could be convicted only if the jury were persuaded beyond reasonable doubt and by reference only to the evidence that the appellant was guilty, relevantly that he intended to cause grievous bodily harm to the two pedestrians he ran over. The jury was told in detail what constituted the evidence and told they must ignore everything else and that what they saw on the view was not evidence. It is only if the jury ignored these clearly expressed instructions that there was any possibility that the appellant could have been prejudiced by the jury seeing him in the prison van.

[38] The trial judge gave comprehensive directions on these topics. His Honour said:

> "The prosecution has to prove guilt. The (appellant) does not have to prove anything. He is presumed to be innocent, and it is for the prosecution to show and persuade you to the contrary by evidence and argument. The standard of proof … is proof beyond reasonable doubt … (i)f, at the end of your deliberations, you have any reasonable doubt about an element or elements of the charge, you must acquit; that is, find the (appellant) not guilty. … You have to decide the case on the evidence, and only on the evidence."

[39] There followed a detailed dissertation of what was evidence and how the jury should evaluate it, with reference to some particular circumstances in the case which might assist with that process. In the course of that instruction his Honour said:

> "Do not speculate about things which are not the subject of evidence, or about what might have been said by anyone not called as a witness. You try the case on the evidence before you. You are either satisfied of that or you're not."

At the end of the summing up he said:

> "Each of you took an oath at the beginning of the trial, conscientiously to try the charges and to decide them according to the evidence. Your obligation is to deliver an honest verdict and it is for you to determine what is the honest verdict on the evidence in this trial."

[40] Earlier his Honour had given the conventional warning:

> "Another matter which is not evidence is any information you may have received by any means about the circumstances of this matter in

> any other way. You must disregard for example, anything you've read in newspapers which may touch on the subject of this trial, or anything you've seen on television, or any gossip that you may have heard about it. Remember that you have heard the witnesses giving sworn evidence of matters that were within their own personal knowledge, and that evidence, if you accept it, is much more reliable than anything you may read in newspapers or hear in gossip. You should also not have any regards to anything that comes to you outside the courtroom. I'll deal with the view separately in a moment. But you shouldn't engage in and make any private inquiries into the matter. … You're only concerned with the evidence, you act on the evidence which is the evidence you received in the courtroom, and nothing else."

[41] The directions then turned to the use to be made of the view:

> "Now, the view, as I explained after we got back to Court, is not in itself evidence. The function of a view is to assist the jury in understanding the evidence so that, for example, when witnesses described features of the scene it makes it easier for you to follow the evidence and to understand it, appreciate its significance. But the view, and anything you see on the view is not in itself evidence. It can be used to assist you in understanding and applying the evidence you've heard, but it's not evidence in itself."

[42] The jury's observation of the appellant in the prison van does not support the assumptions the appellant builds on it. If one accepts, for the sake of the argument, that the jury saw the appellant confined, what might they have thought? The trial judge believed they would assume that in serious cases all accused persons were detained in custody. Counsel for the appellant submits that the jury should be well aware that in many cases an accused facing serious criminal charges is allowed bail. One contention is as good as another without evidence, but taking the appellant's contention the jury would conclude that the appellant's case was one in which it was thought (by someone) that he should be in custody when away from the security of the court building and in the open spaces of Annandale. There is no suggestion the jury saw evidence of the fact that the appellant was in custody during the trial apart from at the view. If they thought any more about it they might consider, as the appellant submits, that the reason he was confined was that (someone) thought he was dangerous or was likely to abscond. For that to prejudice the accused in the eyes of the jury its members must then have thought that that opinion of the appellant, made by some person unidentified, on grounds not revealed, was right, and because the appellant was dangerous, or might abscond, he must be guilty of the offences charged.

[43] To ascribe this process of reasoning to the jury is to cast doubt upon the integrity and common sense of those who perform that essential function of criminal justice. It presupposes that the jury would prefer an unexpressed and unsubstantiated opinion of the appellant to the knowledge imparted in the summing up that the determination of guilt was for them alone to make on the evidence that they had heard and seen, and on nothing else.

[44] I accept, of course, that the appellant does not have to show that the jury would have reasoned in this manner to establish prejudice. It is enough if there was a real risk

that they so reasoned so as to prejudice the appellant before the jury. I do not accept the existence of such a risk, for the reasons given and the authority next mentioned.

[45] There is authority for the opinion that a court can proceed on the basis that a jury will conscientiously and accurately accept and apply the directions of a trial judge. *The Queen v Glennon* (1992) 173 CLR 592 was a case in which the jury, or some of its members, may have become aware that the accused had prior convictions for the type of offence for which he was on trial. Mason CJ and Toohey J said (603):

> "The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. As Toohey J observed in *Hinch*, in the past too little weight may have been given to the capacity … of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them. In *Murphy v The Queen* we stated:
>
> > "But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in *Reg v Hubbert* …: 'In this era of rapid dissemination of news … it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select twelve jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.'"
>
> To conclude otherwise is to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge." (footnotes omitted)

[46] Without more than appeared in this trial I would not assume that a jury would be influenced in their deliberations by the knowledge that during the course of a criminal trial an accused was held in custody. In my opinion the court should be satisfied that no actual injustice followed on from the erroneous requirement that the appellant attend the view.

[47] The second ground of appeal is that the trial judge erred in directing the jury as to the meaning of "likely" in the definition of grievous bodily harm found in the Code, and that the application of the proper direction to the evidence of the injuries suffered by the complainants would not allow the jury reasonably to have found that either had suffered grievous bodily harm.

[48] Relevantly grievous bodily harm is defined in s 1 of the Code to be:

> "… any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health … ."

[49] When summing up the trial judge recited the definition and enlarged upon some aspects of it and continued:

> "Well, now, "likely" is a word in everyday use. Its meaning depends, to some extent, on context. But, in this context it means that there is a substantial chance, a real chance, rather than a remote chance. So, you're not talking about a mere possibility. You're talking about something which is a real or substantial possibility. But, "likely" does not require that the outcome be more probable than not. It doesn't mean that there's a 51 per cent probability rather than a 49 per cent probability. It's talking about a real or substantial chance. Something which is not a remote chance, more than a mere possibility."

[50] The direction was essentially that contained in the Benchbook, 114.1.

[51] The appellant complains that the direction lowers the standard of proof required to establish grievous bodily harm. He submitted that the exposition given by the trial judge altered the ordinary meaning of "likely", which is synonymous with "probable", so that something is not likely unless it is more probable than not.

[52] The weight of authority supports the meaning given to the word by the trial judge and the Benchbook. In *Boughey v The Queen* (1986) 161 CLR 10 the High Court had to consider s 157(1) of the *Criminal Code* (Tas) which provided that culpable homicide was murder if committed:

> "…
> (c) by means of an unlawful act … which the offender knew … to be likely to cause death in the circumstances … ."

[53] In their joint judgment Mason, Wilson and Deane JJ said (21):

> "…the word "likely" is used … with what we apprehend to be its ordinary meaning, namely, to convey the notion of a substantial – a "real and not remote" – chance regardless of whether it is less or more than 50 per cent: … . … A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement. History would indicate that the codifier will never achieve the clarity and completeness which would obviate any need for subsequent interpretation or commentary: … . The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty. To bury the word "likely" in s 157(1) of the Code beneath the gloss of "more likely than not" and the explanation of "a more than 50 per cent" or an "odds on" chance would be to succumb to that danger. It would also, in our view, be to attribute to the word "likely" a requirement of a specific degree of mathematical probability which the word does not convey either as a matter of ordinary language or in its context in s 157(1) of the Code."

[54] Their Honours went on (22):

> "… whatever may be the difficulties of precise definition the expression "likely to cause death" in s 157(1) is an ordinary expression which is meant to convey the notion of a substantial or real chance as distinct from what is a mere possibility: "a good chance that it will happen"; "something that may well happen"; something that is "likely to happen"."

[55] In *Darkan v The Queen* (2006) 227 CLR 373 the High Court was concerned with the meaning of "probable" where it occurs in s 8 of the *Criminal Code* (Qld). That section provides that when two or more persons form a common intention to prosecute an unlawful purpose together and in prosecuting it an offence is committed of such a nature that its commission was "a probable consequence" of the prosecution of the purpose each of them is deemed to have committed the offence. After a thorough and penetrating examination and analysis of the authorities Gleeson CJ, Gummow, Heydon and Crennan JJ concluded (398):

> "The expression "a probable consequence" means that the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible. It must be probable in the sense that it could well happen." (footnotes omitted)

[56] More relevantly for present purposes their Honours said (390-391):

> "As to the first point, authorities on the construction of the words "likely to cause death" in s 157(1)(c) of the *Criminal Code* (Tas) are not decisive on the meaning of the quite different words "a probable consequence" in s 8 … of the Code. The former words relate to the potential responsibility for murder as a principal offender of someone who has unlawfully killed another in the prosecution of an unlawful purpose. The latter words relate to the potential responsibility otherwise than as a principal offender for conduct which was not within a common purpose or a counselled offence, but which is only a consequence of the common purpose or the counselled offence. These differences in context and language suggest a construction which would make the test created by the former words – "likely to cause death" – easier to satisfy than the test created by the latter words – "a probable consequence"." (footnote omitted)

[57] The consideration which led their Honours to consider that "probable" poses a test harder to satisfy than that expressed in the phrase "likely to cause death" is absent from the definition of grievous bodily harm. The definition is concerned with a factor which, if present, renders an offence more serious and an offender liable to greater punishment for a criminal act. There is no apparent reason why the less demanding test is not appropriate for the imposition of that liability which will follow from the offender's own act.

[58] *R v Hind and Harwood* (1995) 80 A Crim R 105 was a case which required consideration of both s 8 and s 302(1)(b) of the *Criminal Code*. The latter section defines murder as death "caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life." What the court said about s 8 was overruled by *Darken* but the court's discussion of the meaning of "likely" in the context in s 302(1)(b) remains relevant. Fitzgerald P said (113):

> "As *Boughey* demonstrates, there can be considerable difficulty in deciding the test of what is "likely"; the meaning of the word can be influenced by the context, and even its "ordinary" or "natural" meaning is a matter of dispute. Thus, in their joint judgment in *Boughey*, Mason, Wilson and Dawson (sic) JJ said … that the "ordinary meaning [is] to convey the notion of a substantial – a 'real and not remote' – chance regardless of whether it is less or more than 50 per cent …". On the other hand, Gibbs CJ … said that the "natural meaning" of "likely" is "probable" and not "possible", which, without more, does not necessarily fully resolve all difficulties since, according to Mason, Wilson and Deane JJ … the meaning of "probable" is also "liable to vary according to the context …". However, it seems clear enough from the judgment of Gibbs CJ that his Honour considered that "likely" meant more probable than not … . That was also the opinion of Brennan J in *Boughey* … ."

[59] Pincus JA (138) considered that the exposition of "likely" given in *Boughey* by the majority should be applied to the words when used in s 302(1)(b). Death was likely if it was a real, not remote, chance regardless of whether it was less or more than 50 per cent, or was a substantial and real chance as distinct from a mere possibility.

[60] McPherson JA said only that there was:

> "… little if any difference in this context between the use of the word "probable" in s 8 and the word "likely" in s 302(2)."

This, with respect, appears difficult to reconcile with the view expressed by the High Court in *Darken*.

[61] Section 271 of the Code provides a defence against unprovoked assault if the force used in defence is not intended and is not such as is likely to cause death or grievous bodily harm. Speaking of the meaning of "likely" in that section the Chief Justice, in *R v Trieu* [2008] QCA 28 said:

> "[14] It is really not necessary to dwell here on the precise meaning of "likely" in this provision. It is an ordinary English word, and its ordinary meaning is well understood. But then again, so is "probable"; yet it takes a particular meaning from its context in s 8 of the Code, as being something which could well happen (*Darkan v The Queen* (2006) 227 CLR 373, 298-99) – something more than "reasonably possible" (p 393). Further, "likely" in s 302(2) of the Code means there is a substantial chance, one which is "real and not remote" (*Boughey v The Queen* (1986) 161 CLR 10, 21; *R v Hind and Harwood* (1995) 80 A Crim R 105, 141)."

[62] Fryberg J said:

> "[59] The words "possible", "likely" and "probable" are all used in the Code. There are two instances of "possible", 54 instances of "likely" and five of "probable". The two instances of "possible" were added by way of relatively

recent amendment as were three of the five instances of "probable" and a number of those of "likely". It would be unsound to presume that any of the three words necessarily has the same meaning on every occasion it is used, or that the relativity between "likely" and "probable" remains constant. The matter is one dependent upon context.

[60] Section 271 is part of ch 26 of the Code. That chapter deals with matters of justification and excuse in relation to assaults and violence to the person generally. The expression "likely to cause death or grievous bodily harm" occurs in another three places in that chapter: ss 258, 269 and 270. A similar, although not identical, expression occurs in s 302(1)(b) and s 306 (ch 28) where murder and attempted murder are defined: "likely to endanger human life". Similarity of subject matter and proximity of use suggest that in these contexts at least, the meaning of "likely" does not vary.

[61] I have found no case which deals directly with the meaning of "likely" in s 258 or ss 269-271 of the Queensland Code. However in *Boughey v The Queen* the High Court considered the meaning of "likely to cause death" in the Tasmanian Criminal Code. In that context the majority (Mason, Wilson and Deane JJ) wrote:

> "In our view, the word 'likely' is used in both ss 156(2)(a) and 157(1) with what we apprehend to be its ordinary meaning, namely, to convey the notion of a substantial - a 'real and not remote' - chance regardless of whether it is less or more than 50 per cent."

Section 157 dealt with the definition of murder, but in my judgment the passage is apposite in relation to s 271.

…

[65] It cannot be said that the meaning of "likely" in s 271 is free from doubt. However the weight of authority favours giving it the meaning adopted in *Boughey*. It may be that after full argument and due consideration, it will be appropriate to adopt some different meaning. We have had no such argument in this appeal - the appellant was unrepresented. We should not depart from authority by holding that "likely" means "probable" in the *Darkan* sense." (footnote omitted)

[63] This review shows, I think, that the words "likely" and "probable" when used in the *Criminal Code* are not interchangeable, and that "likely" does not mean "probable" in the sense intended for by the appellant. Indeed "probable" when used in s 8 of the Code does not have the meaning contended for by the appellant. No case to which we were referred has held that "likely" (or "probable") means more probable than not so that the chance of the result occurring must be greater than 50 per cent. Although the word "likely" will have a meaning dependant upon its particular context, as the cases say, unless the context indicates to the contrary the word

should be given the same meaning where it appears throughout the Code. For present purposes that has the result that its meaning is that ascribed to it in *Boughey*.

[64] The direction given by the trial judge was correct.

[65] The grounds of appeal have not been made out. The appeal should be dismissed.

[66] The appellant seeks leave to appeal against the sentences. He complains that they are manifestly excessive and do not reflect any amelioration in response to his pleas of guilty on the charges of unlawful wounding and causing grievous bodily harm in April 2009.

[67] The circumstances of the later offences were that while on bail for the charges of intentionally causing grievous bodily harm the appellant was out drinking with friends. During the course of the evening he approached a stage in the Townsville business centre. An Aboriginal man and woman were arguing on the stage. Their conduct annoyed the appellant who abused them, calling them "niggers". The arguing couple were joined by more Aboriginal people. The appellant responded to their presence by shouting "Fuck off, niggers. I'm going to bash you all." A brawl then erupted during which Mr Ketchup was quite severely wounded. He required 175 stiches for a laceration to his back.

[68] Those involved in the brawl moved from the stage. During a lull in the fighting some of the Aboriginal people broke from the crowd and walked away. The appellant and friends pursued them. Mr Murphy went to their assistance but the appellant, who had armed himself with a cricket bat, confronted Mr Murphy and struck him with it on the face, knocking him to the ground. One of the appellant's friends then pinned Mr Murphy to the ground and punched him several times. During that assault the appellant continued to strike Murphy with the bat. He suffered a fractured cheek bone and a four centimetre laceration to his scalp requiring stiches.

[69] The trial judge noted with respect to the earlier offences that when the appellant arrived in Millet Street the three men whom he had been told might be a threat to the occupants of the house were walking away from it and were no threat. Both complainants were deliberately struck. Collins was hit whilst attempting to assist Budby. The applicant showed no concern for them or their injuries. He left the scene. The offences were deliberate. Moreover they were racially motivated, at least in part, which was a serious aggravating factor. Both Collins and Budby suffered substantial permanent injuries.

[70] The trial judge took account of the appellant's pleas of guilty to the subsequent offences but thought his offer to plead guilty, as an alternative to intentionally causing grievous bodily harm, to dangerous operation of a motor vehicle causing grievous bodily harm and leaving the scene of an accident was inconsequential.

[71] The appellant was 17 at the time he committed the offences and 19 when sentenced. His schooling finished part way through year eight but he had worked in the past. He had some family support. His criminal history was irrelevant. 698 days spent in pre-sentence custody was declared as time already served.

[72] The trial judge expressed the view that given the features of the more serious offences which went to trial, and which I have just described, a substantial term of imprisonment was necessary to punish, rehabilitate and deter. In relation to the

latter offences the appellant was sentenced on the basis that he was part of a group who injured Mr Ketchup. He was not the actual assailant. He was of course the assailant with respect to Mr Murphy.

[73] The trial judge observed that the appellant felt some remorse for the victims of the brawl but not for those whom he had run down.

[74] The sentences for wounding and causing grievous bodily harm were made concurrent and not cumulative, though they involved separate offending of a different kind and a later time to the earlier, more serious offences. The reason given for adopting that course was the very lengthy terms of imprisonment imposed for intentionally causing grievous bodily harm. The trial judge thought that "15 years should be enough" for all the offences. The result is that the appellant must serve 12 years, 80 per cent of the 15 years, before becoming eligible for parole.

[75] The appellant relies for his submission that his punishment is too severe on *R v Eade* [2005] QCA 148 and *R v Nielsen* [2006] QCA 2. He has a separate point that by making the sentences for the subsequent offences concurrent with the earlier longer sentences he has received no discount for his pleas of guilty and for the remorse actually shown.

[76] There is substance in both complaints.

[77] Nielsen, who was drunk, got into an argument with a number of people who were leaving a tavern in the early hours of the morning. He went to his car and drove at about 40 kph onto the footpath in front of the tavern into a crowd of people all but one of whom managed to jump clear, the security officer. He had not been involved in the earlier argument. Nielsen drove on and swerved at least three times towards different groups of people walking along the road or on the footpath. He pursued the woman with whom he had argued hitting her on the leg and knocking her onto the roadway. He swerved towards pedestrians a third time at a speed estimated at about 55 kph. Again the crowd scattered but one pedestrian was dealt a glancing blow. None of the persons hit suffered more than minor injuries.

[78] Nielsen pleaded guilty, was 25 at sentence and had no relevant criminal history. The Court of Appeal rejected his contention that his six year sentence was manifestly excessive. It was suggested that after trial the sentences might have been as high as nine years.

[79] In my opinion the sentence of six years was moderate and could well have been higher. Such offences can only be regarded as very serious. A civilised society cannot tolerate its members using motor cars as weapons for revenge or retaliation. Such weapons are apt to cause terrible injuries. Those who commit such offences must be severely punished as a deterrent to others who may be tempted to behave in a similar fashion.

[80] *Nielsen* was a less serious case than the appellant's. His victims were less seriously hurt than Messrs Collins and Budby and Nielsen's intent appears to have been less malicious than the appellant's, in the sense that he struck glancing blows. He was drunk at the time and his conduct was more or less spontaneous. It was not racially motivated and he did not drive some distance to the scene to carry out an intent to inflict grievous bodily harm.

[81] *Eade* was a different case. His victim was attacked by a group of men including Eade who struck the complainant repeatedly with a hockey stick until it broke. Others in the group kicked him and stood on his head. As he lay motionless on the ground Eade drove his car over the body. The complainant suffered such serious permanent injuries that he was unemployable.

[82] The sentence of 10 years' imprisonment was not disturbed on appeal and was said to be at the bottom of the range of between nine and 13 years for such offending.

[83] Despite the appalling nature of the appellant's conduct involving the deliberate use of a motor car as a weapon with its potential for causing ghastly injuries or death the sentences imposed do appear excessive. One must endorse the trial judge's opinion that conduct of the type in question must be severely punished as a deterrent to others and as marking the court's denunciation of racially motivated violence. Notwithstanding these factors a term of 15 years is too long. The appellant was only 17 and had some prospects of rehabilitation. He did not have a substantial criminal history.

[84] There is no criticism of the three years imposed for unlawful wounding and doing grievous bodily harm. The effect of making those sentences concurrent with the others was to require the appellant to serve 80 per cent of the three years, despite the pleas and remorse.

[85] The justice of the case required, I think, a sentence of between 10 and 13 years for the offences of intentionally causing grievous bodily harm. The sentences for the later offences should have been made cumulative. Because of that, in order to give effect to the totality principle, and to prevent the sentences being disproportionate to the overall criminality, a sentence of 10 years should have been imposed for intentionally causing grievous bodily harm to which the sentences for the later offences should have been made cumulative. The appellant would then have been eligible for parole after serving nine and a half years (80 per cent of 10 years plus 50 per cent of three years).

[86] The almost identical result is achieved, in terms of parole eligibility, by imposing a term of 12 years' imprisonment for the offences of intentionally causing grievous bodily harm and in making the other sentences concurrent.

[87] I would therefore grant leave to appeal against sentence, allow the appeal and vary the sentences imposed only to the extent of substituting 12 years for 15 years' imprisonment for the offences of intentionally causing grievous bodily harm.

[88] **CULLINANE J:** I agree with the reasons of Chesterman JA in this matter and the orders he proposes.