SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kissier* [2011] QCA 223
PARTIES:	**R** **v** **KISSIER, Clinton James** (appellant/applicant)
FILE NO/S:	CA No 231 of 2010 DC No 27 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	6 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2011
JUDGES:	Fraser and White JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to adduce evidence from Veronica Kissier and Sasha Rose McLean refused.** **2. Appeal against conviction dismissed.** **3. Application for leave to appeal against sentence refused.** **4. Order that the appellant serve the balance of the suspended sentence of 12 months imposed at the District Court at Mackay on 16 July 2007, being a period of six months, concurrently with the sentences imposed on the appellant on 9 September 2010.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – PARTICULAR MATTERS – OTHER CASES – where appellant's pre-trial application for a no jury order pursuant to s 615 *Criminal Code* (Qld) was refused – appellant submitted adverse pre-trial publicity may affect jury deliberations – whether primary judge erred in refusing to make a no jury order CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE

– AVAILABILITY AT TRIAL; MATERIALITY AND COGENCY – where appellant sought leave to adduce evidence from the appellant's mother and co-offender's sister that the complaint by the complainant that he was stabbed by the co-offender's sister was made to police after the incident with the appellant – where that fact had been disclosed to the appellant's legal representatives prior to the appellant's trial – where appellant sought leave to adduce evidence from the co-offender's sister about her subsequent acquittal of offence arising from stabbing incident – where prosecution case was that the motivation for the appellant and the co-offender to attack the complainant was their belief that the complainant had complained to police about the earlier incident involving the co-offender's sister – where timing of the complainant's complaint about the earlier stabbing incident and outcome of the trial arising from that incident not material evidence in the trial of the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – OTHER MATTERS – where the complainant had numerous convictions – where the prosecution case depended on the credibility and reliability of the complainant – whether the trial judge's direction on how jury should take account of the complainant's convictions in assessing his evidence was adequate

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where the appellant had a close relationship with co-offender's sister – where the complainant alleged co-offender's sister stabbed him – where prosecution case that appellant and co-offender attacked the complainant to stop him pursuing his complaint against co-offender's sister – where photographs of complainant's injuries supported his account – where there were discrepancies between co-offender's evidence and that of the complainant and the appellant's case put to the complainant in cross-examination – whether the jury's verdict was open having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where the applicant carried out a home invasion in company to intimidate or punish the complainant for pursuing a complaint about a prior stabbing incident involving the co-offender's

sister – where offences committed during the operational period of a suspended term of imprisonment – whether sentence of imprisonment of four years six months for each offence of burglary by breaking with violence while armed in company and assault occasioning bodily harm, while armed in company was manifestly excessive

Criminal Code (Qld), s 615, s 632

Bromley v The Queen (1986) 161 CLR 315; [1986] HCA 49, cited
R v Clough [2009] 1 Qd R 197; [2008] QSC 307, considered
R v Fardon [2010] QCA 317, considered
R v Leu; *R v Togia* (2008) 186 A Crim R 240; [2008] QCA 201, considered
R v Nolan [2009] QCA 129, considered
TVM v Western Australia (2007) 180 A Crim R 183; [2007] WASC 299, considered

COUNSEL: P E Smith, with K Hillard, for the appellant/applicant
M B Lehane for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **WHITE JA**: I have read the reasons of Mullins J and agree with those reasons and the orders proposed by her Honour.

[3] **MULLINS J:** The appellant, Mr McLean and Mr Hodgetts were tried before a District Court judge with a jury on one count of burglary by breaking with violence, while armed, in company and one count of assault occasioning bodily harm while armed, in company. The appellant was found guilty of each count with all circumstances of aggravation. Mr McLean was found guilty of count 1 with all circumstances of aggravation and, in relation to count 2, was found guilty of assault occasioning bodily harm in company. Mr Hodgetts was acquitted.

[4] The appellant appeals against his conviction on the following grounds:

(a) The learned judge who heard the application for a no jury order (and who was not the trial judge) erred in failing to make a no jury order;
(b) There is fresh evidence that could have made a difference to the result of the trial;
(c) The learned trial judge failed to give a *Bromley v The Queen* (1986) 161 CLR 315 direction (*Bromley* direction) concerning the complainant's evidence; and
(d) The verdicts are unsafe and unsatisfactory.

[5] A further ground of appeal that the trial judge failed to warn the jury against propensity reasoning concerning the appellant was abandoned.

Application for no jury order

[6] The incident that resulted in the charges against the appellant and the co-defendants occurred on 22 March 2009. The appellant made an application for a no jury order pursuant to s 615 of the *Criminal Code* (Qld) (*Code*) that was heard on 10 June 2010 on the basis of the nature and extent of articles and materials published in the local newspaper *The Daily Mercury* with respect to the appellant. The respondent opposed the application. The appellant swore an affidavit to which he exhibited a number of published articles and editorial material from the local newspaper in which reference was made to him. The submissions made on his behalf to the pre-trial judge focused on the publicity given to the appellant from mid July 2007 until late 2008.

[7] The appellant was born in May 1986. He was therefore 17 years old when he committed the offences that are the subject of the earliest articles. The first articles dealt with the offences he committed in October 2003 for which he was sentenced in the Mackay District Court in November 2005. The first articles were not relied on for their prejudicial effect, but the offences that were the subject of those articles were recited in the later articles that were canvassed in the course of the application for the no jury order. The appellant was named as one of the defendants who bashed two men with a fence paling with a nail protruding from it after the defendants asked the men for cigarettes. There was then an article in November 2005 that dealt with the appellant's sentence for the offences after he pleaded guilty. He was sentenced to two years' imprisonment suspended after serving 10 months' imprisonment.

[8] After the appellant was released from prison with the balance of that suspended sentence outstanding, he committed the offence of burglary and commit indictable offence on 29 November 2006 for which he was sentenced in the Mackay District Court on 16 July 2007 to a wholly suspended term of imprisonment of 12 months and the operational period of the partially suspended term of imprisonment imposed in November 2005 was extended by one year. The article that reported that sentence included a photograph of the appellant and had the headline of "Man reoffends just 10 days after release." The reporting of this wholly suspended sentence generated a reaction from members of the community who communicated with the local paper by text messages, some of which were published.

[9] The appellant participated in the publicity given to his wholly suspended sentence by making a public plea through the newspaper to be given another chance. On 25 July 2007 there was a short lead in article with a photograph of the appellant and a headline "Should this man be in jail or does he deserve another chance?" to report the appellant's plea for support. In conjunction with another article under the headline "Offender is determined to put past behind him", there was an editorial piece on 25 July 2007 that named the appellant under the headline "Onus on Kissier to prove he deserves a 'fair go'." The article recited that the appellant was "pleading for that opportunity to prove himself after his reprieve from returning to jail sparked a sentencing debate in The Daily Mercury's SMS pages." According to the editorial comment, most of the SMS correspondents said he had blown his chance, but his family asked for him to be given a "fair go."

[10] There was another article in the newspaper on 15 January 2008 including a photograph of the appellant under the headline "He begged for a second chance but

guess what?" The article included a summary of the appellant's offences and sentences since October 2003 and opened with the statement "Clinton Kissier begged the people of Mackay for one final chance last year when there was a public outcry over his suspended sentence for a major break-in." The article recited that he pleaded guilty in the Magistrates Court to stealing a radio from an electrical retailer on 23 August 2007 which was six weeks after he was given the wholly suspended sentence and was supported by an editorial comment under the headline "A second chance was not enough." The breach of the suspended sentence was committed to the District Court.

[11] When the appellant subsequently failed to appear in the District Court when the breach of the suspended sentence was listed for mention, a warrant was issued for his arrest which resulted in another article in the newspaper in 2008 under the headline "Judge issues warrant for Clinton Kissier's arrest." That article recited how the appellant had divided the community when he was asked to be given a second chance for his repeat offending. On 29 October 2008 the newspaper reported that the appellant was locked up in the watch house the previous night after avoiding police for eight months. The headline was "Officers catch Clinton Kissier." In the Mackay District Court on 29 October 2008 the appellant was dealt with for the breach of the suspended sentence imposed on 16 July 2007 and was ordered to serve six months' imprisonment of the suspended sentence. On the same day he was dealt with for a number of offences in the Mackay Magistrates Court for which he was given a further one month's imprisonment cumulative on the sentence imposed in the District Court.

[12] The allegations against the appellant arising out of the incident that occurred on 22 March 2009 were reported in the local newspaper on 24 March 2009 with the headline "Kissier led invasion of home, police say."

[13] The committal hearing for the subject offences was held in August 2009 and was reported in the newspaper with photographs of the appellant and Mr McLean under the headline "Man bashed at home."

[14] The appellant was charged with public nuisance offences arising out of an incident at the Whitsunday Hotel on 23 September 2009. The appellant was sentenced for those offences in the Mackay Magistrates Court on 11 May 2010. When the matter came on for hearing earlier in 2010, there was a newspaper article with a photograph of the appellant under the headline "Police tell court man on ground kicked in head." That recited that CCTV allegedly showed the appellant kicking a man in the head while he was on the floor, the appellant disputed that he kicked anybody, and the case was adjourned to enable the CCTV footage to be obtained. The appellant had pleaded guilty to the public nuisance offences and was sentenced on 11 May 2010 to four months' imprisonment with an immediate parole release date.

[15] The judge who dismissed the application for the no jury order gave written reasons on 15 June 2010: *R v Kissier* [2010] QDC 242. The judge divided the publications into three categories: coverage of the appellant's previous court appearances, convictions and sentences, communications made by readers via SMS published in the newspaper, and editorials containing comment by the newspaper. It was the third category that the judge analysed in detail which primarily concerned the publications that followed the wholly suspended term of imprisonment imposed on

16 July 2007 and the offending dealt with in January 2008 with the consequent breach of the suspended term of imprisonment. The appellant made the submission to the pre-trial judge that the articles and editorial comment moved from factual reporting to victimisation of the appellant and that the use of his name in headlines showed that he had reached notoriety in the local community.

[16] Section 615 of the *Code* provides:

> **"615 Making a no jury order**
>
> (1) The court may make a no jury order if it considers it is in the interests of justice to do so.
>
> (2) However, if the prosecutor applies for the no jury order, the court may only make the no jury order if the accused person consents to it.
>
> (3) If the accused person is not represented by a lawyer, the court must be satisfied that the accused person properly understands the nature of the application.
>
> (4) Without limiting subsection (1), (2) or (3), the court may make a no jury order if it considers that any of the following apply –
>
> (a) the trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury;
>
> (b) there is a real possibility that acts that may constitute an offence under section 119B would be committed in relation to a member of a jury;
>
> (c) there has been significant pre-trial publicity that may affect jury deliberations.
>
> (5) Without limiting subsection (1), the court may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness."

[17] The pre-trial judge considered authorities on the meaning of the interests of justice for the purpose of s 615 of the *Code*, including *R v Clough* [2009] 1 Qd R 197 at [15] (*Clough*) and *TVM v Western Australia* (2007) 180 A Crim R 183 at [28] to [29] (*TVM*). The judge noted that each juror is invited to be excused if the juror were of the view that he or she could not bring an impartial mind to jury deliberations and that juries are warned that any verdict must have its foundation in the evidence alone. The judge concluded:

> "[18] There is no doubt that the publications relied upon by the applicant evidence that he has been in the press on a good number of occasions. Some of the opinions expressed by the editor on the issue of the suspended sentence may, perhaps, be seen by some to be intemperate and over zealous. But in my view, it does not necessarily follow that such editorials or other comments about the applicant would have the effect of causing any potential juror to form an adverse view of the applicant leading to a breach of a juror's oath by allowing irrelevant matters to be a part of his or her deliberations. It may well be that the effect on some people may be to take the opposite view namely that the publicity complained of was unfair to

> the applicant with the result that people of that view would be supportive of him.
>
> [19] Whatever view is taken by people who read such articles, I am not persuaded of the risk that any potential juror would be actuated in his/her verdict deliberations by those articles rather than the evidence at trial and the jurors' oath. If I am wrong, to the extent that any such risk may arise, I am satisfied that appropriate directions from the court at trial would address that risk so as to prevent the applicant being denied a fair trial. By directions I refer also to the opportunity afforded to every juror to be discharged at the outset of a trial if that juror is concerned that he/she can not bring an impartial mind to deliberations. For these reasons, I do not consider it is in the interests of justice that a no jury order be made."

[18] There are three aspects of the pre-trial judge's reasons that are relied on by the appellant to show error. The first is that the pre-trial judge erred in failing to give weight to the waiver by the appellant of his right to a jury trial by making the application under s 615 of the *Code*. The second is that the pre-trial judge erred in considering that the standard to be applied was whether a jury "would" have been influenced, instead of the possibility of the appellant receiving an unfair trial. The third is that the pre-trial judge took into account an irrelevant consideration that some people may have thought that the publicity given to the appellant by the local newspaper was unfair with the result they would be supportive of him.

[19] In relation to the first aspect, the submission was made on behalf of the appellant that where an accused person chooses to waive the fundamental right to a trial by jury, a no jury order should be made where s 615(5) of the *Code* does not apply.

[20] This submission raises the interpretation of s 615 of the *Code* and the approach that should be taken by the court on an application for a no jury order.

[21] Provision for judge alone criminal trials was introduced into the *Code* by the *Criminal Code and Jury and Another Act Amendment Act* 2008. The reason for allowing for a judge alone criminal trial was expressed in the Explanatory Notes at p 2:

> "While a defendant's right to a trial by jury is a key feature of the common law criminal justice system and the jury system is an effective institution for ensuring community participation, judge alone criminal trials may be appropriate in some cases, for example in complex cases and cases involving significant pre-trial publicity."

[22] The Explanatory Notes also summarised at p 3 the effect of the provision for judge alone trials:

> "The Bill amends the *Criminal Code* to insert a new chapter division for judge alone trials for most criminal proceedings in the higher courts. The provisions in this new division are based on legislation in Western Australia. The amendments will allow a prosecutor or accused to apply to the court for an order that the trial of a charge be by judge sitting alone without a jury. The court will have an overriding discretion to make the order if it considers that it is in the interests of justice but only if the accused consents if the prosecution has made the application."

[23] *Clough* was an application for a no jury order where the identity of the trial judge was known. The reason for seeking the no jury order was that the trial essentially concerned mental health issues with an overlay of drug use by the applicant. It was unnecessary for Mackenzie J to express a final conclusion on the interpretation of s 615 of the *Code*, but he noted the difference in views in Western Australian cases about whether the court should treat the provision permitting the making of a no jury order as expressing a neutral position as to the preferred mode of trial. Mackenzie J observed at [14]:

> "The opening words of s 615(4) make it plain that the circumstances in which a no jury order may be made are not limited to those categories of cases. But the starting assumption, once the indictment is presented, is that there will be a trial by jury, absent a no jury order based on a finding that it is in the interests of justice to conduct the trial by Judge alone. If such an order is not made, the trial proceeds as a jury trial. The fact that a trial by jury is, to use a modern analogy, a default position, is not, however, inconsistent with considering an application under s 614 without any preconception or presumption about the appropriate mode of trial in that particular case."

[24] Another issue on which there are differences of view expressed in the Western Australian cases is the weight that should be given to subjective views of the defendant. Mackenzie J in *Clough* at [15] expressed the view that the subjective views of the defendant are one factor to be considered, and are not decisive.

[25] It was unnecessary for the Court of Appeal in *R v Fardon* [2010] QCA 317 (*Fardon*) to consider the ground of appeal based on the failure of the pre-trial judge to make a no jury order, as the appeal against conviction was allowed on another ground. *Fardon* was a case to which s 615(5) applied. Muir JA (with whom McMeekin J agreed) noted at [44]:

> "The overriding consideration in the exercise of a discretion under s 615 is whether it is in the interests of justice to make the order."

[26] Chesterman JA also agreed with Muir JA on the disposition of the appeal in *Fardon*, but made extensive observations on the refusal of the pre-trial judge to make a no jury order:

> "[71] Appeals from no jury orders are likely to be rare because any challenge is against a judicial discretion exercised by reference to undefined and indeterminate parameters. The conventional test found in *House v The King* (1936) 55 CLR 499 at 504-5 is unlikely to reveal appealable error. The width of the discretion conferred by s 615(1) will make challenges to it very difficult. We were not referred to any case in which an attempt has been made. It may therefore be helpful on this occasion to say something of the approach to be taken when an application for a no jury order is made.
>
> [72] The court may make such an order 'if it considers it is in the interests of justice to do so'. The only indication of when it may be in the interests of justice to make a no jury order appears in s 615(4) but the circumstances in which an order may be made are not confined to those examples."

[27] Chesterman JA then relied on the discussion of McKechnie J in *TVM* at [22] to [28], and stated at [74]:

> "I would endorse the remark that the phrase 'the interests of justice' is so general and, indeed, abstract, that it takes on meaning only by a consideration of the particular facts relevant to an application for a no jury order."

[28] Chesterman JA noted at [76] the differences of opinion expressed in the Western Australian cases on whether, on an application for a no jury order, the court should start from the premise that a criminal trial ought to be by judge and jury or whether both modes of trial should be regarded as equally valid. Chesterman JA at [81] preferred the opinion expressed in *TVM* by McKechnie J at [20] that on an application for a no jury order a judge, concluding that it is in the interests of justice for a trial to be held before a judge alone instead of judge and jury, exercises a discretion whether to make the order for trial by judge alone, and does not start from a neutral position as to a preferred mode of trial.

[29] Chesterman JA referred to s 604 of the *Code* which confers the right to trial by jury, subject to chapter division 9A which inserted the provisions into the *Code* for "Trial by judge alone". Chesterman JA then stated at [81]:

> "It follows that trial on indictment before a judge without a jury is exceptional. An applicant for a no jury order must show why the case comes within the exception. An applicant for such an order, prosecutor or accused, must satisfy the court that it is in the interests of justice that that be the mode of trial. If the Code expressed neutrality and no preference for a trial by a jury the order could be had for the asking. As it is the sections make it clear that there must be an application for a trial without a jury and, in accordance with ordinary principles, demonstrate why such an order is in the interests of justice."

[30] In light of the purpose for which provision for a judge alone trial was introduced into the *Code* and that the discretion to make a no jury order may be exercised only if the court considers it is in the interests of justice to do so, I favour the view expressed by Chesterman JA at [81] of *Fardon*. The process for the determination of the application that is reflected in the terms of s 615 does not require expression of a starting point on the application for a no jury order that both methods of trial are equally valid. As it happened, the pre-trial judge followed *Clough* (at [15] of the reasons) and approached the determination of the application "without any preconception or presumption about the appropriate mode of trial in a particular case." It is therefore strictly not necessary to contribute to the debate on whether there is any starting presumption about the appropriate mode of trial when an application for a no jury order is made.

[31] The expressed intention of the Legislature was to make the interests of justice the overriding consideration and that is reflected by the integral role s 615(1) plays in the determination of an application for a no jury order. The appellant's submission that the mere fact that an accused person applies for a no jury trial should be decisive of the application when s 615(5) does not apply does not give effect to s 615(1), the operation of which is expressly not circumscribed where either s 615(4) or s 615(5) applies. The concern of the appellant that prompted the application for a no jury order was the publicity in 2007 and 2008 that gave prominence to his criminal activities. That was the subject matter that was

considered by the pre-trial judge on the application in determining whether the interests of justice required a no jury order to be made. As a matter of statutory interpretation, the appellant's contention that the making of the application for a no jury order determined the outcome of the application in his favour cannot be sustained.

[32] The second aspect of the pre-trial judge's reasons that is the subject of the appellant's complaint focuses on s 615(4)(c). The appellant submitted that the pre-trial judge's use of the word "would" in the third sentence of [18] of the reasons put the bar too high for the appellant on the application.

[33] Even where s 615(4)(c) of the *Code* applies, a no jury order may be made only if the court is satisfied that it is in the interests of justice to do so. The pre-trial judge considered the effect of the pre-trial publicity on the fairness of a jury trial for the appellant in conjunction with the steps within a jury trial to allow those who may have doubts about their impartiality to be discharged at the outset of a trial and the subsequent instructions and directions given to jurors to act on the evidence alone and exclude all other information (including anything they have read about the defendant in the newspaper) from their deliberations. The judge's consideration of the effect of the newspaper publicity about the appellant on a fair trial was part of the process of weighing up all the factors relevant to the question of whether it was in the interests of justice to make a no jury order. The judge was not purporting to apply a test based only on the wording of s 615(4)(c). There was no error made by the judge in using the word "would" in expressing his view of a possible effect of the pre-trial publicity.

[34] In exploring the possible effects of the pre-trial publicity, the pre-trial judge also expressed a view about the possibility that some readers may have sympathised with the appellant as a result which is the third aspect of the reasons relied on to show error. The judge was entitled to express observations about the nature of the pre-trial publicity. It places undue emphasis on the literal wording of s 615(4)(c) to characterise that observation of the judge as an irrelevant consideration. There is no substance in this criticism of the judge's reasons.

[35] The conclusion reached by the pre-trial judge at [19] of the reasons that the threshold issue of whether it was in the interests of justice to make a no jury order was not satisfied was open on the evidence before the pre-trial judge and was not made in error.

Evidence at the trial

[36] The complainant Mr Deaves lived in a shed in Mackay and on the evening of 22 March 2009 Mr Nilsson was staying there with him. At that stage the complainant had known Mr Hodgetts for a few years and he knew Mr McLean from "the drug scene." About two weeks before the incident he had "a bit of a push and a shove" with Mr McLean who was the brother of Ms Sasha McLean (Sasha). About an hour after that Mr McLean, Sasha and Mr Hodgetts came back and Sasha stabbed him in the arm. The appellant was a former partner of Sasha. The complainant first met the appellant when the appellant came around a week or 10 days prior to the incident and said "You won't want to go to fucking coppers," which the complainant described as a threat about going to the police about Sasha stabbing him.

[37] On 22 March 2009 the complainant heard screeching tyres in the driveway. He had just come out of the shower and was wearing boxer shorts. The door broke open and the appellant came in first and was swinging a pick or an axe handle. Mr McLean was directly behind the appellant carrying a handle – if the appellant had the pick handle, Mr McLean had the axe handle, and vice versa. Mr Hodgetts was further back. The appellant yelled something to the effect "You went to the fucking coppers you fucking dog." Mr McLean was screaming the same sort of thing "about going to the coppers." The appellant hit the complainant with the pick handle on the forearm a couple of times and one of the blows struck his elbow and hurt. The complainant dropped his arm and that is when he got hit on the head and he fell onto the bed and got hit a few more times on his back. While the complainant was being struck by the appellant, Mr McLean was right beside the appellant. Mr McLean used his weapon on the complainant when they were at the end of the bed. Mr Hodgetts was seated at the doorway entrance. Mr Nilsson was under the table. The complainant ran out the front door and was chased by the appellant and Mr McLean. He jumped and cut his foot on a piece of metal, but managed to get to a neighbour's place. He required stitches to an injury above his left ear and stitches to the cut underneath his right foot. As a result of being hit with the pick handle on his left elbow, he continues to suffer from fluid build up on his left elbow.

[38] Photographs taken of the complainant the following day were tendered which showed the injury to his head and his swollen left elbow. There were no marks on his back or wounds on his forearm, despite his evidence of being struck in those places with the pick handle. In a photograph of his doona cover that was also tendered, the complainant identified blood stains from the gash in his head.

[39] During cross-examination by counsel for Mr McLean and Mr Hodgetts, the complainant admitted that he was convicted in July 2001 for supplying cannabis sativa, convicted in April 1995, February 2000 and May 1993 for production of dangerous drugs, convicted in September 2002, October and December 2004, and September 2008 for possession of dangerous drugs, and convicted in January 2010 for possessing utensils or pipes that had been used in conjunction with the smoking of a dangerous drug. The complainant admitted to two convictions of assault occasioning bodily harm and another two convictions of the same offence when in company with another person. The complainant also admitted to a conviction in August 2007 of using a carriage service to make a threat or cause serious harm. He had been to prison on three occasions.

[40] Mr Nilsson did not remember very much about the incident. He was smoking marijuana and talking to the complainant at a table in the shed when he heard a car pull up. The complainant opened the door and three men come in the door, one of whom Mr Nilsson recognised as Mr Hodgetts. Mr Nilsson went under the table. He could not see much at all, but he heard yelling. He did not know whether any of the men were carrying a stick. He did not see anyone waving a stick or weapon. He did not see Mr Hodgetts or Mr McLean do anything physically violent.

[41] The appellant, Mr McLean and Mr Hodgetts were located by the police at Mr Hodgetts' residence later the same evening. One of the arresting police officers, Constable Harvey, gave evidence of attending at that residence and noticing that there was a bong on the table around which the three men were seated.

[42] No medical evidence was called by the prosecution.

[43] The appellant did not give or call evidence. The appellant's counsel put the appellant's case to the complainant in cross-examination, but the complainant rejected the suggestions that were put. The case was that the three men went to the shed to purchase marijuana from the complainant and an argument developed between the complainant and Mr McLean over the Sasha incident. As a consequence, the complainant retrieved a stick or of a piece of wood from close to his bed, menaced Mr McLean with it, and then pushed Mr McLean. It was at that point the appellant stepped in between the complainant and Mr McLean and the complainant punched the appellant who fell onto his bed and hit the side of his head on the bed.

[44] Mr McLean gave evidence. He went to the complainant's shed with the appellant and Mr Hodgetts to buy a "50 bag of weed," after telephoning the complainant to make arrangements for the purchase. They walked in, as the door was open. They were talking about the weed and the complainant threw the 50 bag of weed at him and he put it in his pocket and he thought the appellant may have paid for it. The complainant pushed him and shoved him a bit, but Mr McLean did not retaliate and left with the appellant and Mr Hodgetts. The appellant was the last out of the door and got in the way of the complainant to stop him from pushing and shoving Mr McLean. They went to Mr Hodgetts' residence and were smoking the weed when the police came. Neither he nor his friends took any weapons with them to the complainant's shed. He did not see his friends do anything physical towards the complainant. His parents had told him that, in respect of the stabbing incident alleged to involve Sasha, the complainant "went to the coppers or something." Prior to attending at the complainant's shed, Mr McLean, the appellant and Mr Hodgetts had been drinking alcohol and smoking marijuana and were affected by both the alcohol and the marijuana. In March 2009 Mr Hodgetts was Sasha's partner.

[45] Mr Hodgetts did not give or call evidence.

Fresh evidence

[46] The trial concerning Sasha's alleged stabbing of the complainant was heard in February 2011 and she was found not guilty of the offence of unlawful wounding. During that trial Mr Deaves gave evidence that he had not gone to the police concerning the stabbing incident involving Sasha until after 22 March 2009. The appellant seeks leave to adduce evidence from the appellant's mother and Sasha that identified the timing of Mr Deaves' complaint to the police about the incident involving Sasha. The respondent opposed leave being given in relation to this additional evidence on the basis it was not "fresh" or "new" as it was information that had been disclosed to the appellant's legal representatives in connection with his trial. The respondent submitted that, in any case, the prosecution case at trial had not been conducted on the basis that the complainant had reported the stabbing to the police prior to the home invasion, but was conducted on the basis that the appellant may have thought that the complainant had reported the stabbing to the police prior to 22 March 2009. Consistent with that approach at trial, the complainant did not give evidence about whether or not he had made a complaint to the police prior to 22 March 2009 about the alleged stabbing.

[47] Leave to adduce further evidence about the date that Mr Deaves complained to the police about the incident involving Sasha should be refused on the basis that such evidence is neither fresh nor relevant.

[48] The appellant also seeks leave to adduce evidence from Sasha about the acquittal. The respondent opposed that leave on the basis that the issue in the appellant's trial was not whether or not Sasha stabbed the complainant, but that there had been an incident involving Sasha and the complainant at which Mr McLean and Mr Hodgetts were present, as a result of which the complainant alleged that Sasha had stabbed him. The subsequent acquittal of Sasha was not to the point when the issue in the appellant's trial was that he believed that the complainant had reported the stabbing incident to the police. Leave to adduce further evidence about the subsequent acquittal of Sasha of unlawful wounding should be refused.

[49] The respondent did not object to the appellant relying on an affidavit from Ms Hartigan sworn on 14 June 2011 or the affidavit of Mr Fisher sworn on 20 June 2011. Ms Hartigan of counsel appeared for Mr McLean and Mr Hodgetts at the trial. Her affidavit resolved any issue about the consent of Mr McLean and Mr Hodgetts to the making of the no jury order sought by the appellant. Mr Fisher's affidavit exhibited a search that showed the daily circulation of the Daily Mercury newspaper at about 15,000 copies with an estimated readership of 40,000.

***Bromley* direction**

[50] The appellant submits that, where the prosecution case depended on the credibility and reliability of the complainant who had numerous previous convictions, the trial judge should have warned the jury of the danger of relying on the complainant's evidence unless it was confirmed by other evidence. The appellant suggested that a direction based on direction number 42 from the Queensland Supreme and District Courts Benchbook should have been given.

[51] The position in *Bromley* has been affected by s 632 of the *Code.* The trial judge did, in fact, give a direction in the summing up that appears to have been modelled on direction number 42 in the Benchbook:

> "You have heard evidence of Mr Deaves' previous convictions, that he had a conviction for the supply of drugs. That was in 2001, or the last conviction was in 2001. He had convictions for possessing dangerous drugs or cannabis and growing it, and that he had convictions for assault. You take those things into account when assessing his credibility, and the weight that you would give to his evidence.
>
> The fact that someone has previous convictions doesn't mean that his evidence is to be rejected out of hand. It is again a matter for you what weight you give to the fact that Mr Deaves has previously been convicted. In deciding that, you look at the rest of evidence, including any other evidence that supports him, and weigh his evidence and the fact that he has those convictions, in that context.
> If, after you've done that, you're satisfied that he is a truthful and accurate witness, you can act on his evidence, notwithstanding the fact that he does have those previous convictions."

[52] In addition, the trial judge made it clear in other parts of the summing up that the prosecution case was based on Mr Deaves' description of the events and "rests on Mr Deaves' account." The trial judge stated:

> "I've already suggested that in practical terms your starting point before you even go to the elements of the offence- the starting point really needs to be whether Mr Deaves was attacked with some kind of wood or handle. That allegation is at the core of the Crown case, and it's disputed by the defence. If you have a reasonable doubt that he was attacked with some kind of weapon - he thought it was a pick handle or an axe handle or both, if you have a doubt about that then your verdicts will all be not guilty, because none of the offences could be proved against any of the three defendants."

[53] The trial judge made it very clear to the jury that the prosecution case against the appellant depended on the complainant's evidence and instructed the jury to take into account Mr Deaves' previous convictions when assessing his credibility and the weight to be given to his evidence. In the circumstances, the directions given by the trial judge were appropriate for dealing with the complainant's evidence in the case against the appellant. No further direction was required.

Unsafe and unsatisfactory verdicts

[54] The appellant relies on the failure of the prosecution to call medical evidence to support or corroborate the complainant's account and that Mr Nilsson did not seem to support the evidence of the complainant. In addition, the appellant relies on Mr McLean's evidence contradicting the evidence of the complainant.

[55] The photographs of the complainant's injury supported the complainant's account of the appellant's attack. Mr Nilsson did not recall much at all. To the extent that there were discrepancies between Mr Nilsson's evidence and that of the complainant, the jury's preference for the complainant's evidence was therefore not surprising. Although there were some aspects of Mr McLean's evidence that were consistent with the case put by the appellant to the complainant in cross-examination, there were also significant differences between Mr McLean's account and the appellant's case and significant discrepancies between Mr McLean's evidence and that of the complainant. Each of the appellant, Mr McLean and Mr Hodgetts had a close relationship to Sasha who had been involved in an incident with the complainant some two weeks prior to 22 March 2009. The prosecution contention that the three men attended at the complainant's shed on 22 March 2009 to persuade him to keep quiet or not take the stabbing matter any further provided a plausible explanation for the incident on 22 March 2009. The verdicts against the appellant meant that the complainant's evidence was accepted by the jury in preference to that of Mr McLean which was a rational approach to the evidence against the background of the relationships of those involved in the incident.

[56] On an assessment of the whole of the evidence before the jury, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences. The verdicts of guilty against the appellant are not unsafe and unsatisfactory.

Sentence

[57] The appellant applies for leave to appeal against each of the sentences imposed on 9 September 2010 on the basis that the sentence was manifestly excessive. On each count the appellant was sentenced to imprisonment of four years six months with an eligibility date for parole of 8 July 2012. There was a declaration made in respect of

146 days spent in pre-sentence custody between 22 March and 14 August 2009. The eligibility date for parole was calculated as the date at which half the sentence would be served, taking into account the pre-sentence custody.

[58] The appellant committed the subject offences during the operational period of the suspended term of imprisonment of 12 months that was imposed on the appellant in the Mackay District Court on 16 July 2007 for which six months was outstanding. It is common ground that the trial judge should have dealt with the outstanding period of six months of this suspended term of imprisonment.

[59] Being cognisant of that, the appellant's counsel revised the submissions on the sentence application to submit that the sentence that should have been imposed on each count was somewhere between three and four years and submitted that the balance of the suspended term of imprisonment imposed on 16 July 2007 should be activated to run concurrently with the sentences for the subject offences.

[60] At the sentencing, a victim impact statement was tendered from the complainant that was given on 16 November 2009. At that stage the complainant was still suffering from headaches and pain to his lower back, described his elbow as permanently disfigured and causing him severe pain, and was still taking pain relief. The appellant had made inquiries of an addiction treatment service for treatment for opiate addiction and a report dated 26 August 2010 was tendered from psychologist Dr Colquhoun that confirmed the appellant's desire to receive a rapid opiate detoxification and naltrexone implant. In support of the submission that his family was supportive of the appellant, the appellant's mother gave evidence in which she described the family's struggle to find help for the appellant's drug addiction and that in the last 18 months she had seen a positive change in her son. The submission was made on behalf of the appellant that apart from the public nuisance offences committed about one month after his release from prison on 14 August 2009, he had remained out of trouble, pending the trial. He had also been on stringent bail conditions including a night curfew and reporting conditions. At the sentencing the prosecutor submitted for a sentence in the order of four years' imprisonment for the appellant and the appellant's counsel submitted for a sentence of three years to three and one-half years.

[61] In sentencing the appellant, the judge noted that it was a serious aspect to the offences that the appellant wanted to intimidate or punish the complainant for pursuing his complaint about the stabbing. The judge noted that there were three sites of injury on the complainant, namely his arm, elbow and head, and although they were not grievous injuries, they were significant in that they caused him substantial pain and were still affecting him some 18 months after they were inflicted. The judge noted the appellant's age at the time of the offence and that he was drunk and had used cannabis sativa on the day of the offence. Reference was made to the offence being committed whilst he was still on a suspended sentence for burglary for which he had previously been breached. The appellant was treated as the main assailant on the basis that he was one that caused the injuries and led the charge. The judge noted that the appellant had been undeterred by previous periods of imprisonment.

[62] The appellant suggests that the judge sentenced on an incorrect basis when the judge stated that the appellant wanted to intimidate or punish the complainant for pursuing his complaint about the stabbing, when the fact was that the appellant had

a mistaken belief about the complaint having been made. What the judge was referring to was the appellant's motive for his attack. In the light of the complainant's evidence as to what the appellant said to him when he entered the shed, it was a finding open to the judge on sentence that the appellant was motivated to deter the complainant from pursing a complaint about the stabbing incident.

[63] Before the sentencing judge, the prosecutor relied on *R v Leu*; *R v Togia* (2008) 186 A Crim R 240. Leu and Togia pleaded guilty and were each sentenced to five years' imprisonment (with an eligibility for release on parole after serving three years) for each of the offences of burglary by breaking, in the night, with violence, while armed, in company, with property damage and armed robbery in company with personal violence. The complainant was their drug dealer. Leu was armed with a vacuum cleaner pipe and Togia was armed with a wooden stake. Although Leu and Togia were equally responsible for the home invasion and the offences committed during the home invasion, Togia (who was 23 years at the time of the offence) had no relevant criminal history and should have received a more lenient sentence than Leu (who was 20 years at the time of the offence) who had a relevant and quite recent conviction for armed robbery in company with personal violence. The Court of Appeal allowed the appeals and imposed imprisonment of three and a half years on Togia, with a parole eligibility date fixed after serving 12 months, and imposed imprisonment for four and a half years on Leu, with a parole eligibility date fixed after serving 16 months.

[64] The offending in *R v Leu*; *R v Togia* was more serious than the appellant's offending, but the appellant had a worse criminal history than Leu. There was a useful analysis by Fraser JA in *R v Leu*; *R v Togia* of comparable cases, many of which were also cited on this application for leave to appeal against sentence. Consistent with the observations made by Fraser JA at [38] and [43] in relation to comparable cases which each involved a finding of the Court of Appeal that a particular sentence was not manifestly excessive, limited assistance is given by those cases on the limits of the range of sentences for comparable offending. Those comparable cases included some of those relied on by the appellant in this matter: *R v Brelsford* [1995] QCA 594, *R v Jurd* [2007] QCA 228, and *R v Bowe*; *R v Taylor* [2004] QCA 414.

[65] Some assistance is obtained from *R v Nolan* [2009] QCA 129 where a 21 year old offender was convicted after trial for one count of assault occasioning bodily harm in company, burglary and unlawful use of a motor vehicle. He had a concerning criminal history and committed the offence on the day he was released from prison after serving a term of imprisonment for unrelated offending and during the operational period of a wholly suspended term of imprisonment. His sentencing was complicated by the activation of the suspended term of imprisonment of 18 months. He also had six months in pre-sentence custody that was unable to be declared. His sentence appeal was allowed and the effective sentence that was imposed for each of the offences of assault occasioning bodily harm in company, burglary, and unlawful use of a motor vehicle was imprisonment of four years nine months. The complainant owed a debt to Nolan's mother and Nolan and two co-offenders went to the complainant's house and gained entry by smashing open the locked front door. Nolan punched the complainant in the face a number of times, leaving him with bruising and a minimally displaced fracture of the left zygoma. The offenders took the complainant's car and some money as security for repayment of the debt owed to Nolan's mother and all stolen property was

recovered by the police. Nolan was unarmed. His age and antecedents and the seriousness of his offending is comparable to the appellant's circumstances.

[66] These comparable sentences and those analysed in them show that the sentence of four and one-half years imposed for each of the appellant's offences was not outside the range of sentences consistent with a sound exercise of the sentencing discretion. The application for leave to appeal against sentence should be refused.

[67] As the offences arising out of the incident on 22 March 2009 were committed during the operational period of the suspended term of imprisonment that was imposed on the appellant in the Mackay District Court on 16 July 2007, the sentencing judge should have dealt with the activation of the balance of the suspended term of imprisonment. It is convenient that it be done in connection with this appeal, as the appellant's counsel addressed the issue in the course of argument and that will avoid the matter being relisted for that purpose in the District Court. The oversight of the judge in not proceeding to deal with the appellant pursuant to s 146 of the *Penalties and Sentences Act* 1992 for committing the subject offences during the operational period of the suspended imprisonment imposed on 16 July 2007 was not an error on the sentencing of the appellant for the subject offences that requires a fresh exercise of the sentencing discretion in respect of the subject offences. The balance of that suspended term of imprisonment of six months should be activated and ordered to be served concurrently with the sentences imposed on 9 September 2010. It is not unjust to activate the whole of the balance of the suspended term of imprisonment, as it will be served concurrently with the sentences for which the appellant is currently imprisoned.

Orders

[68] The following orders should be made:

1. Leave to adduce evidence from Veronica Kissier and Sasha Rose McLean refused.
2. Appeal against conviction dismissed.
3. Application for leave to appeal against sentence refused.
4. Order that the appellant serve the balance of the suspended sentence of 12 months imposed at the District Court at Mackay on 16 July 2007, being a period of six months, concurrently with the sentences imposed on the appellant on 9 September 2010.