SUPREME COURT OF QUEENSLAND

CITATION:	*R v GAM* [2011] QCA 288
PARTIES:	**R** **v** **GAM** (appellant)
FILE NO/S:	CA No 31 of 2011 DC No 54 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	Orders delivered ex tempore 12 July 2011 Reasons delivered 18 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2011
JUDGES:	Margaret McMurdo P, Fraser JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 12 July 2011:** **1. The appeal is allowed.** **2. The convictions of guilty are set aside.** **3. A new trial is ordered.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – FURTHER EVIDENCE – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL OF NEW TRIAL – where the appellant was convicted after a trial of offences including burglary by breaking in the night with violence, while armed and in company, stealing, assault occasioning bodily harm while armed and doing grievous bodily harm – where the only evidence against the appellant was his admissions to the police – where the appellant and respondent adduced further evidence on appeal – whether that evidence, if received, when combined with the evidence at trial requires the convictions to be set aside and a new trial ordered *Acts Interpretation Act* 1954 (Qld), s 36 *Police Powers and Responsibilities Act* 2000 (Qld), s 421 *Youth Justice Act* 1992 (Qld), sch 4

Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
Lawless v The Queen (1979) 142 CLR 659; [1979] HCA 49, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, cited
R v Condren; ex parte Attorney-General [1991] 1 Qd R 574, cited
R v Daley; ex parte A-G (Qld) [2005] QCA 162, cited
R v Freer & Weekes [2004] QCA 97, cited
R v Katsidis; ex parte A-G (Qld) [2005] QCA 229, cited
R v Main; ex parte A-G (Qld) (1999) 105 A Crim R 412; [1999] QCA 148, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Young (No 2) [1969] Qd R 566, cited
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, cited

COUNSEL: M J Byrne QC for the appellant
M B Lehane for the respondent

SOLICITORS: MacDonald Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** On 12 July 2011, this Court made the following orders:

1. The appeal is allowed.

2. The convictions of guilty are set aside.

3. A new trial is ordered.

4. The Court will reserve its reasons for these orders.

What follows are my reasons for joining in those orders.

[2] The appellant was convicted in the Toowoomba District Court on 28 February 2011 after a six day trial of burglary by breaking in the night with violence, while armed and in company (count 2); stealing (count 3); assault occasioning bodily harm while armed (count 4) and doing grievous bodily harm (count 5). The judge directed a not guilty verdict on the fifth day of the trial on burglary and stealing (count 1). The appellant was sentenced to four years imprisonment. BL, a friend of the appellant, pleaded guilty on 21 February 2011 to counts 1 to 4 and assault occasioning bodily harm (count 6, an alternative to count 5).

[3] The appellant appealed against his conviction only, on the ground that fresh evidence establishes a significant possibility that the jury, acting reasonably, would have acquitted him had the evidence been before the jury at trial.

The evidence at trial

[4] Before dealing with the further evidence and the ground of appeal, it is necessary to understand the evidence given at trial. The prosecution evidence was as follows.

[5] The complainants were an elderly couple living in Cooper Avenue, Oakey. The male complainant's habit was to check that all doors and windows were locked before going to bed. There were security screens on the house windows and the sliding back door, but not on the garage window. The gate to their property was usually closed, with a padlock underneath the latch.

[6] The female complainant woke up at about 1.20 am on 23 May 2010 when she was struck a heavy blow to the side of her head. She saw a figure leaning over her who said, "I'll kill you, you old cunt". She hid under the blankets and screamed. She was struck further blows. She thought a light had been turned on in the kitchen/dining area. She could see her assailant was a man and that he had struck her with a sword. She heard her husband's voice. Her assailant turned quickly and walked down the hallway.

[7] The male complainant was sleeping in another bedroom. He saw reflections on the wall through his door. He heard the kitchen back door slide open. Seconds later he heard his wife screaming. He headed towards the lights in the kitchen and came upon a man in the hallway. He chased the man who fled through the kitchen and out the back door. The male complainant was then struck from behind on a number of occasions by the offender with the sword. The male complainant used a broom to fend off his assailant who also fled through the back door. The male complainant sustained serious injuries amounting to grievous bodily harm.

[8] The weapon with which he was attacked was a Samurai sword which had been stolen from the complainants' next door neighbour shortly before the burglary of the elderly complainants' home. Entry to the neighbour's house was gained by throwing a brick through the back door window (count 1 on which the judge directed a verdict of not guilty).

[9] Police found a padlock near the elderly complainants' garage window. (The padlock was normally attached to the front gate.) The front gate was open. There was no clear evidence of the point of entry into the complainants' house. Entry did not seem to have been made through any windows as they all had intact security screens, but for a garage window which was undamaged and closed. There was no evidence as to whether there was ready access from the garage into the house or as to the colour of the back door.

[10] The only evidence linking the appellant with the offences was his admissions to police in an interview between 2.15 pm and 2.35 pm on 26 May 2010, three days after the offences were committed. Police located him at a hotel in Oakey where he worked as an apprentice chef. They arrested him and took him to the Toowoomba watch house. He was crying and very upset and asked police why he was there. Police told him they were investigating a break and enter in Cooper Avenue, Oakey and the assault of an elderly couple in the early hours of Sunday, 23 May 2010. They said they had already spoken to his friends, LB, BL and AS who had placed him at the elderly couple's house. They told him they reasonably believed he was involved in the offence and asked him to take part in an interview.

[11] The resulting interview contained the following. Police asked him what he was doing at that time. He said he was drinking with friends at a party until 12 o'clock. His friends went to another party but he was not allowed in because he was too drunk. He went back to the first house at about 1.00 am and then left. He continued:

> "[W]e went to that house in, in the street and we went to the window and I jumped through the window and then he followed me and I unlocked the black back door. And then they all came, all the, rest of the boys come in. And then when I was in there for about two, three minutes ah, I heard rest of the boys come in. And then when I was in there for about two, three minutes ah, I heard a bang and then I ran out the back door. And then about a minute later four [INDISTINCT] come out there and we left." (errors as in original)

[12] He told police he consumed a 700 ml bottle of Jim Beam and a half carton of "four X Summers". He was a little bit "drunk" but he could still walk straight; he was not too bad. Later he described himself as "pretty drunk". The others involved with him were BL, LB and "Foreskin". (It is common ground that "Foreskin" is AS.) He did not know why he went to the house. He was just walking and ended up there. He just wanted to get money or something. He thought the window was open just a bit down the bottom and that he "popped it". He was pretty sure that the window was at the side of the house. He went inside and helped Foreskin get in. They walked out to the back door and opened it. LB then came inside. They were all inside for two or three minutes. He then heard a big bang. He walked into the back room with Foreskin. LB walked in and someone followed him. It was dark so he could not really see. He used the light from his phone to look around for money or something. The back door opened into the kitchen. He heard a big bang like a thud and ran outside. He did not take anything from the house. They then walked around the town for a while.

[13] The next day his grandfather told him that "two old people got bashed in the house". He did not realise that this had happened in the house in which he had been that evening. He was not holding anything when he entered the house. He did not recall seeing anyone else carrying a metal bar or something similar. He only met BL that night. He had not seen LB for "ages" before that evening as he left Oakey when he was in grade eight and went to Brisbane. He did not know when he met Foreskin. He last saw Foreskin the previous evening and LB and BL about two weeks ago.

[14] He did not know who owned or lived in the house he entered. He did not see anybody there and did not assault anybody there. He did not see anyone else assault anybody in the house. He said, "I only heard about it like yesterday or the day before and, ah like my grandad told me about it. And I didn't even think it was that house."

[15] The police told him that the house next door to the elderly couple's house was broken into and property taken, some of which was located in the back yard of the elderly couple's home. This property included a sword and other items. They asked him if he had anything to do with breaking into the neighbouring house (count 1). He said he knew nothing about it. He said he had no complaints with the way police had treated him and no threat, promise or inducement was held out to take part in the interview.

[16] When cross-examined, the police officers involved in detaining and interviewing the appellant denied any impropriety. No one at the police station matched the description of the police officer whom the appellant's counsel suggested gave inducements and provided information to him before the interview. Police did not interview AY or EB in the course of their investigations.

The defence evidence at trial

[17] The appellant gave the following evidence. He had been drinking at parties on the evening of 22 May 2010. He was not involved in the burglary of the elderly couple's house. On the day of the police interview he initially denied involvement in the offence but the police badgered him. They provided him with all the information surrounding the offence. They told him that he would only be fined and not convicted and would get bail. He falsely told police he was involved in the offence so that he could leave. In cross-examination he agreed that in September 2009 he was convicted and fined $600 for stealing a bicycle and wilfully damaging it and he was interviewed by police on that occasion.

[18] AY, a 16 year old family friend of the appellant, gave evidence that he was with the appellant at all times on the evening of 22 May 2010 and the appellant did not break into any houses. CL was also with them. AY did not go to the police when he heard that the appellant had been charged.

[19] The appellant's counsel closed his case on the fourth day of trial. During legal argument in the absence of the jury, the prosecutor informed the court that the appellant's grandmother had just given the investigating police officer some statements which she believed were exculpatory, but the defence barrister would not call the witnesses. The statements were unsigned but purported to be from JC and SB. Defence counsel stated that he had copies of the statements but had considered them hearsay and inadmissible. The court adjourned to allow defence counsel to investigate the matter. Later that day the matter was further mentioned, somewhat presciently, the judge inquired whether anybody had spoken to NA or EB. Defence counsel stated that his solicitors had been unable to locate them. The next day, defence counsel successfully applied to re-open his case and to call further evidence from SB, JC and AS.

[20] SB gave evidence that McK told her that on the morning of 23 May 2010 that he had done a break in at "an old folks' home". His conversation included "the boys like, hit them and stuff" and "[t]hey brang swords onto them or something".

[21] JC gave evidence that the appellant was a good mate whom he had known since grade one. He had a conversation on Facebook with NA about a week after the offences. NA told him that he was outside the house when it happened and kept hearing the old lady screaming. NA did not say the appellant was involved.

[22] AS gave evidence that he had pleaded guilty to entering the two houses in Cooper Avenue (counts 1 and 2) and assault. He and others broke into the first house and took "the samurai sword, some DVD's and stuff and piled outside and that, but we didn't end up getting anything". They then left and went next door (to the elderly complainants' house). The back door was unlocked and they slid it open. He was in the kitchen with three other boys. They turned on some lights. The other boys went their own way. He heard a noise and ran off. He was 100 per cent sure the appellant was not there at all that night. He had seen him earlier in the night at

a friend's house. He did not wish to name the others involved in the offences. In cross-examination he reluctantly said that EB, McK and NA were with him. He did not know the extent of their involvement or who had the sword and did not want to give evidence against them. He did not tell the police in his interview that the appellant was innocent even though he knew he was a suspect. He was in the dock in court when BL pleaded guilty to offences concerning the elderly couple and did not try to stop him.

Further evidence

[23] The further evidence on which the appellant relied in this appeal is as follows.

[24] The principal of the high school which was attended by the appellant's brother, JG, and NA gave the following affidavit evidence. On Monday, 21 March 2011 as NA, the deputy principal and the principal walked towards the administration block, NA was attacked by the appellant's brother, JG. The principal physically intervened and tried to separate the boys but JG continued to strike NA and to struggle with the principal. NA did not fight back, despite being struck several times. When he finally separated them, he took NA back to his office for medical attention for a split lip. NA was clearly fearful. He said "the attack was as a result of him not telling police that he was present when a number of young people entered an Oakey Home resulting in an elderly couple being assaulted". NA told him that on that night he had met some young people at the BP service station and they discussed the presence of a flat screen TV in the area. He went with a number of people of whom he only knew one. He waited outside the front of the house and ran off when he heard a female scream from inside. He said that the appellant "was not even there". As a result of the attack, JG was suspended from school for 20 days and his mother informed. NA was sent home with his parents with a recommendation that he report what he knew about the offences concerning the elderly couple to the local police.

[25] TD gave affidavit evidence to the following effect. He had a party at his home on 22 May 2010.[1] EB, McK, AY, NA, BL, the appellant, and his brothers, JG and TG, also attended. Everyone left at about 11 pm. The appellant came back a little after midnight with AY. They had a couple more drinks and then left, saying he was going home. TD went to bed and was woken up by a telephone call from EB and McK sometime between 3.00 am and 4.00 am. He told them he was in bed. They hung up and he went back to sleep. McK came over between 8.00 am and 10.00 am. He was going out with TD's partner's sister who was living with TD at the time. McK seemed a bit upset or in shock. He said that in the early hours of that morning he and EB had broken into a house in Cooper Avenue. The old lady woke up. One of them grabbed her on the mouth and threatened that if she made a sound they would bash her. The old man woke up and approached them. One of them came from behind and struck him. They immediately fled. They had no further discussion about the matter as McK did not want to talk about it. TD spoke to his stepfather and had him phone Sergeant Cook, a family friend, to report this. Sergeant Cook came around within the next few days and spoke to TD in the presence of his parents. TD told Sergeant Cook what McK had told him. He also gave Sergeant Cook a necklace which McK had given him. Sergeant Cook made some notes. TD heard nothing further from Sergeant Cook or any other police officer.

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1 His affidavit gives the date as 21 May 2010 but he corrected this in his evidence.

[26] TD also gave oral evidence. He confirmed that the contents of his affidavit were true but noted that paragraph 10 was missing. This paragraph concerned the fact that McK gave TD's brother a necklace. TD knew the necklace was stolen and that is why he gave it to Sergeant Cook.

[27] In cross-examination TD agreed he was good friends with the appellant and with other members of his family. LB was also present at his party for a time. There were also others there but he could not really remember because it was so long ago. He thought AS was present. TD had a lot to drink and by the end of that night was drunk. He could not remember when the various people left his party as it was not important to him. He could be mistaken as to when the appellant left his party.

[28] In re-examination he explained that Sergeant Cook came to his house twice. The first time was early on 23 May, before McK arrived. Sergeant Cook asked TD who attended the party and what he could remember about it. Sergeant Cook spoke to him a second time some days later. It can be inferred that this second occasion was that requested by TD's stepfather and took place in the presence of TD's mother and stepfather.

[29] A record of interview between McK and police was conducted in the presence of an Aboriginal Legal Service field officer at the Toowoomba police station on 12 April 2011 from 9.09 am to 9.57 am, almost two months after the appellant's trial. It contained the following information. He finished school in year 9 and could read. He was not on medication. He had some "yarndi" the previous evening but he was no longer under its influence although he was tired. He was voluntarily participating in the interview. He agreed that the previous day police spoke to him about two break and enters of neighbouring houses committed last year, during which an elderly couple was assaulted.

[30] He gave the following information about those offences. He went to a party where people were going to sleep and it was "getting slack". He and three mates left, strolled around the streets and decided "to do a couple of sneaks" in Cooper Avenue. They got into the first house by smashing a window and got a Samurai sword. McK took a small knife but left it at the front of the second house. They then went into the second house. They were not intending to assault anyone and did not know anybody was home. The back door was unlocked. His mate went in first and McK followed. McK grabbed the phone off the table. His mate went into the hallway and then into a room. He turned the light on and a woman started screaming. No-one knew what to do. The "old fella" ran out of the room towards McK so McK "just cut out of there" and "legged it".

[31] He and his three mates ran across the paddock towards the main street into Oakey. They saw the police pull up the appellant. They dropped to the ground and watched. He and his mates went back to another mate's place and laid low there for the night. He did not want to mention his mates' names as he did not want to "dob" them in. One was a mate but the other two were not. He then disclosed that AS and NA were involved. He knew AS because they smoked yarndi together. He had only met NA that night. McK left the party at about midnight with AS, NA and his other mate who was probably his closest friend. AS also went into the house but he thought NA stayed outside waiting for them. McK ran off with the mobile phone. He did not assault the old man or the old woman and they did not touch him. He did not see anybody else touch the old couple. His close mate was in a position where he could have assaulted them but AS and NA were not. His unnamed friend

was the only one who could have assaulted these people. His friend did not tell him that he had assaulted them.

[32] McK's mate had the Samurai sword; McK did not touch it. It was in the newspaper that the old man had his arm broken but he did not see the old man get hurt. As soon as McK saw the complainants were awake, he was out of the house. He did not want to provide a description of his close mate.

[33] He came to the police to tell his story because many people threatened to "dob" him in. LB and BL and the appellant were not with him that night. The appellant was "not a, like a criminal. He doesn't do, no he doesn't even steal". AS was with McK the whole night. NA wanted to come along with them even after McK told them what they were going to do. The appellant was mates with McK's sister's boyfriend. McK had not spoken to the appellant about the matter. They were not friends, although they knew each other and had nothing against each other. About a week after the offences, he heard that people who were not involved were being arrested for it. He did not know what to do. He was scared but he had a good a think about it and decided to come forward to tell the police what he knew. When he and his sister argued, she told him she wanted to dob him in. He told three people he was involved: his girlfriend, his girlfriend's brother-in-law and his girlfriend's sister. On the night of the offences, he was sober and had not consumed alcohol or "yarndi". He told police he would not dob in his friends because they were "true mates" but the other two, AS and NA, were "two faced cunts".

[34] McK gave the following oral evidence in the appeal. He was 15 years old. His mother was present in court. He knew the appellant but he was not a particular friend. The Court warned McK that he did not have to answer questions which might incriminate him and invited him to speak to his mother before answering further questions. He explained that he had already done so. He stated that Legal Aid Queensland was acting for him on these matters. The Court then adjourned to enable him to get legal advice.

[35] McK's examination in chief resumed with his lawyer in court. McK confirmed that what he told the police in his record of interview was true and correct to the best of his recollection. He was present with others during the break-ins of two houses. At the first one a Samurai sword was taken, and at the second one an elderly couple was present. The appellant was not present for either offence.

[36] In cross-examination his answers included the following. At the time of his police interview he was living with his sister and mother. His sister's boyfriend was a friend of the appellant. He presently lived with his mother but not his sister. He had a criminal history for burglary on 25 January 2010 and unlawful use of a motor bike and a trespass offence when he rode the bike on school grounds on 24 April 2010. On 14 June 2010, he committed a further offence of burglary and he stole a TV and attempted to break into a Toowoomba shop. He did not like the police and was charged with a public nuisance offence in October 2010 when he called them "dogs". He was asked whether June 2010 was the last time he had broken into premises. The Court adjourned to allow him to obtain legal advice and he ultimately claimed privilege and declined to answer that question.

[37] He decided to tell police about his involvement in the offences to get everything off his chest. He thought he was better off in custody than staying out in the community and getting into trouble by committing offences. The term "yarndi"

means marijuana. He claimed privilege and declined to answer questions about his consumption of marijuana on the day before the interview. His memory was alright but not the best. He took a knife from the first house they broke into because it looked like it was worth something. He agreed with the suggestion that he took the knife into the elderly couple's house. He told the police that he did not take the knife from the first house into the second house. He was not sure who took the Samurai sword into the house but he knew it was not him. When he was told this was different from what he told police, he said it was his mate whom he did not wish to name who took the Samurai sword into the second house. He agreed his answer to the police was the truth; he was not lying; he just forgot.

[38] He had not been drinking much on the night of the offences but he drank enough to get drunk. He "wasn't like drunk, off my head or nothing but I was feeling it a bit". He was asked whether he remembered telling the police that he was completely sober. He responded that he was sober when he did the crime but was drunk earlier that night. He explained that he opened the unlocked back door and went inside. He was quite sure that only he and his three co-offenders (his good mate, AS and NA) entered the elderly couple's house. He knew nobody else entered the house because when he ran outside there were only the four of them. He did not like NA and AS as they were "dogs" and two-faced. He had known the appellant since the previous year but did not really mix with him. The appellant was not two-faced.

[39] About a week after these break-ins, he learned that the appellant, BL and LB had been arrested for the offences. BL and LB were his mates and he would hang around with them when he was in Oakey which was every now and then. He had not seen BL since the offences. He had seen LB since and had spoken to him about the break-in at the elderly couple's house. BL said he had been charged and they locked him up when he did not even do it. BL did not ask McK to give evidence or do anything. He did not see LB until after McK had given his interview to police in April 2011. He agreed he had been threatened by people about this matter but said "[T]hat's nothing. I wouldn't even worry about it. That's not the reason why I handed myself in." His sister had threatened him a number of times in arguments. He was aware that the appellant was convicted in February this year of the offences involving the elderly couple. Nobody had come to him since and told him that he should confess. He had spoken with AS since and AS told him "he was getting done for it" but he did not ask McK to give evidence. He did not know that JG had bashed NA for not confessing to his involvement in the offences. He did not even know JG. McK gave his statement to police because he wanted to give it. He was not influenced by his sister or anyone else. He thought the person he saw talking to the police after the offences were committed was the appellant. It looked like him but he was not sure. The boys he was with told him it was the appellant.

[40] In response to the further evidence led by the appellant, the respondent produced the following evidence.

[41] Oakey police did not speak to the appellant in the early hours of 23 May 2010 but they did speak to him in the early hours of the previous morning, 22 May 2010, about 25 hours prior to the commission of these offences.

[42] Sergeant Cook gave a statement in which he said that on Friday, 28 May 2011 he went to TD's home at the request of the stepfather. He spoke to TD in the presence of his parents. TD gave Sergeant Cook a silver necklace which did not appear to be valuable. TD had a birthday party at his place on 22 May 2010, the night before the Cooper Avenue burglaries. TD was concerned the necklace may have been stolen.

Sergeant Cook knew that the necklace was not involved in the Cooper Avenue burglaries and did not consider it relevant. He did not recall TD mentioning EB or McK as possibly involved. Had he done so, he would have provided this information to the Toowoomba Criminal Investigations Branch so that it could be further investigated.

Conclusion

[43] The test for determining whether a court should receive evidence on appeal which was not given at trial differs depending on whether the evidence is fresh evidence or new evidence. Fresh evidence is evidence which either did not exist at the time of trial or which could not then with reasonable diligence have been discovered.[2] New or further evidence is evidence on which a party seeks to rely in an appeal which was available at the trial or which could, with reasonable diligence, then have been discovered.

[44] At least some of the evidence upon which the appellant relies in this appeal did exist at the time of trial and, at least arguably, could with reasonable diligence have been discovered. TD's evidence is in that category. On the other hand, the school principal's evidence of NA's third party admission is plainly fresh evidence as it post-dates the appellant's trial.[3] It is less clear whether McK's evidence is fresh evidence or new evidence. His oral evidence was available at trial but his police interview post-dates the trial. I doubt that his evidence could have been obtained with reasonable diligence by the appellant's lawyers as it seems McK was not prepared to come forward until April this year, some months after the appellant's trial. The point is a moot one, but I would treat it as fresh evidence.

[45] The distinction between fresh evidence and new or further evidence is often significant, although ultimately it is not in this case. Where an appellant in a criminal appeal relies on fresh evidence to overturn a conviction, the test is whether the appellant has established that there is a significant possibility (or that it is likely) that, in the light of all the admissible evidence, including the evidence at trial, a jury acting reasonably would have acquitted the appellant: *Gallagher v The Queen*;[4] *Mickelberg v The Queen*;[5] *R v Main; ex parte A-G (Qld)*.[6] But there remains a residual discretion in exceptional cases to receive on an appeal against conviction new or further evidence which is not fresh evidence if to refuse to do so would lead to a miscarriage of justice: *R v Condren; ex parte Attorney-General*;[7] *R v Young (No 2)*;[8] *R v Daley; ex parte A-G (Qld)*;[9] *R v Main; ex parte A-G (Qld)*[10] and *R v Katsidis; ex parte A-G (Qld)*.[11] As to fresh evidence in sentence appeals, see *R v Maniadis*.[12] In determining an appeal against conviction which turns on

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2 *Ratten v The Queen* (1974) 131 CLR 510, 516-517; [1974] HCA 35; *Lawless v The Queen* (1979) 142 CLR 659, 674-676; [1979] HCA 49.

3 *R v Freer & Weekes* [2004] QCA 97, [75]-[91] allows for such evidence to be admitted in Queensland criminal trials. In other jurisdictions, such evidence is generally not admitted. The respondent, however, does not submit that *Freer & Weekes* should not be followed in this case.

4 (1986) 160 CLR 392, 397, 407; [1986] HCA 26.

5 (1989) 167 CLR 259, 273, 292, 301-302; [1989] HCA 35.

6 (1999) 105 A Crim R 412; [1999] QCA 148.

7 [1991] 1 Qd R 574, 579.

8 [1969] Qd R 566.

9 [2005] QCA 162.

10 (1999) 105 A Crim R 412, Margaret McMurdo P at 416-417, [16]-[17]; Pincus JA at 417-418, [22]-[24]; [1999] QCA 148.

11 [2005] QCA 229, Margaret McMurdo P [2]-[4]; Jerrard JA [11]-[19] and White J [36].

12 [1997] 1 Qd R 593; [1996] QCA 242.

fresh, new or further evidence, the first question is whether the court should receive the evidence. The second is whether that evidence, if received, when combined with evidence at trial requires that the conviction be set aside to avoid a miscarriage of justice. Frequently the two questions merge[13] as they do in this case.

[46] At the hearing, this Court proceeded without objection on the basis that it should receive the further evidence so as to determine whether the appeal should succeed. When that evidence is combined with the evidence called at trial, the following facts emerge.

[47] The only evidence against the appellant was his admissions to police. On the night of the offences he had been drinking heavily. He was a 17 year old youth taken by police from his place of employment as an apprentice chef in Oakey to the Toowoomba watch house where he was charged. On the prosecution case, he was distressed and crying. Police told him he had been implicated in these offences by his friends, LB, BL and AS. He made admissions to the police implicating himself in the offences but at trial he gave evidence that these admissions were falsely made in an effort to end his interrogation and obtain bail. His admissions were very general and did not reveal any details that unequivocally linked him with the offences. He told police that entry was effected to the elderly couple's house through a window. The mode of entry by sliding open the unlocked back door as described by AS and McK in their evidence seems to fit more comfortably with the prosecution evidence. And AS and McK gave unequivocal evidence that they committed the offences and the appellant was not with them. History has shown that overwrought and suggestible young men on rare occasions may make false confessions about matters which have occurred when their memory has been affected by drunkenness.

[48] As the respondent emphasises, there were inconsistencies and weaknesses in the evidence of the appellant and AS at trial and of McK in this appeal. But AS and McK both gave unequivocal evidence that they committed these offences with NA and another person (according to AS, EB). They gave broadly consistent accounts of their offending and were adamant that the appellant was neither present nor involved. It is true, as Fraser JA points out, a jury may completely reject the evidence of McK and AS. But in light of the unconvincing prosecution case against the appellant which turned solely on his admissions of dubious reliability, their evidence raised a real doubt in my mind as to the appellant's guilt of these offences. That doubt is supported by the fresh evidence that NA told his school principal that he was outside the elderly couple's house when the offences were committed and that the appellant was not involved.

[49] After reviewing both the evidence at trial and the evidence in this appeal, I consider there is a real possibility that the 17 year old appellant made a false confession at a time when he was frightened, overwrought and suggestible about events which occurred when he was heavily intoxicated. His admissions suggest he was involved with friends in some break and enter at around this time, but I do not consider it possible to conclude beyond reasonable doubt on the evidence before this Court that he committed the offences involving the elderly couple. For these reasons, it was necessary to set aside the guilty verdicts to avoid a miscarriage of justice. That is why I joined in this Court's orders on 12 July 2011 allowing the appeal, setting aside

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[13] See the observations of Pincus JA in *R v Main; ex parte A-G (Qld)* (1999) 105 A Crim R 412, 417-418, [22]-[23]; [1999] QCA 148; *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229, [4].

the guilty verdicts and ordering a new trial. Having now fully and carefully reviewed the evidence both at trial and the evidence called in this appeal, I have grave doubts whether a reasonable jury could be satisfied on that evidence beyond reasonable doubt of the appellant's guilt of any of these offences. But a retrial could involve different evidence. It is ultimately for the prosecuting authorities to determine whether there should be a retrial in this case.

[50] This case highlights the difficulties faced by Queensland police in dealing with 17 year olds. According to the United Nations Convention on the Rights of the Child (the Convention), a 17 year old is a child.[14] Australia signed the Convention on 22 August 1990 and ratified it on 17 December 1990. But in Queensland, for the purposes of the criminal justice system, a child is defined as "a person who has not turned 17 years".[15] This definition of "child" contrasts with that under most other Queensland legislation where a child is "an individual who is under 18".[16] Queensland is now the only Australian jurisdiction where 17 year old offenders are dealt with, contrary to the Convention, in the adult criminal justice system. In all other Australian States and Territories, offenders under the age of 18 are dealt with under the youth justice system.[17] The Committee on the Rights of the Child (the Committee) has also expressed concerns about this anomaly in the criminal justice system.[18] It has recommended that 17 year olds should be removed from the adult criminal justice system and that Queensland should bring its system of juvenile criminal justice into line with the Convention and other related United Nations standards.[19] The Committee has provided further guidance on children and the juvenile justice system in its General Comments. These include a reminder to State parties that every person under 18 should be dealt with in the juvenile criminal justice system and a recommendation that States should change laws to ensure the application of the rules of juvenile criminal justice to individuals under the age of 18.[20]

[51] Had the appellant been treated as a child consistent with the Convention, as he would have been in every other Australian jurisdiction, he would not have been questioned by police before they had allowed him to speak to a support person who would have been present whilst he was questioned: see s 421 *Police Powers and Responsibilities Act* 2000 (Qld). If the appellant had spoken to his parents before

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14 [1991] ATS 4, art 1.

15 *Youth Justice Act* 1992 (Qld), sch 4, definition "child" (a).

16 See *Acts Interpretation Act* 1954 (Qld), s 36, definition of "child".

17 *Children (Criminal Proceedings) Act* 1987 (NSW), s 3, "child"; *Children, Youth and Families Act* 2005 (Vic), s 3, "child" (a); *Young Offenders Act* 1993 (SA), s 4, "youth"; *Young Offenders Act* 1994 (WA), s 3, "young person"; *Children and Young People Act* 2008 (ACT), pt 1.3, s 11, s 12 and *Legislation Act* 2001 (ACT), dictionary, pt 1, "adult"; *Youth Justice Act* 2005 (NT), s 6; *Youth Justice Act* 1997 (Tas), s 3, "youth".

18 Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention – Concluding Observations: Australia*, 20 October 2005, 40th Session (UN Doc CRC/C/15/Add.268).

19 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, UN GAOR, A/RES/40/33, 96th plen mtg, 29 November 1985 ("the Beijing Rules"), the *United Nations Guidelines for the Prevention of Juvenile Delinquency*, UN GAOR, A/RES/45/112, 68th plen mtg, 14 December 1990 ("the Riyadh Guidelines"), the *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN GAOR, A/RES/45/113, 68th plen mtg, 14 December 1990 and the *Vienna Guidelines for Action on Children in the Criminal Justice System*, recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

20 General Comment Number 10: *Children's rights in juvenile justice*, 25 April 2007, 44th sess (CRC/C/GC/10), paras 37 and 38.

the police interview, he may not have made these unreliable admissions and the resulting unfortunate consequences, including a costly trial and appeal, may have been avoided.

[52] **FRASER JA:** Subject to the following matters, I would respectfully adopt [1] – [48] of the reasons of the President as my reasons for joining in the orders made on 12 July 2011.

[53] The jury must have regarded the appellant's admissions to police as reliable and rejected his evidence that his admissions were false. That was reasonably open to the jury on the evidence adduced at the trial. The appellant's description of the kitchen being near the back door (which he opened to let in the other offenders) seems consistent with the complainants' description of the layout of their house. The male complainant's evidence that the offenders fled through the back door was consistent with the appellant's statement that he and "Foreskin" left through that door. It is not particularly surprising that the appellant's account did not contain more detail, since he described an occasion when, under cover of darkness and under the influence of alcohol, he entered an occupied house and remained only for a very brief period. That might explain why the appellant's account omitted other details, or the jury might instead have attributed that to a natural reluctance by the appellant to incriminate himself in more serious offences. The facts that the appellant was a 17 year old youth who was distressed and crying when taken from his place of employment to be interviewed by police are certainly relevant, but that does not mean that his admissions were necessarily unreliable.

[54] Nor was the appellant's statement to police that he entered the house through a window inconsistent with the prosecution case. I could not find any indication that the prosecutor tied the Crown case to an initial entry through the back door. The complainants must have been mistaken in their belief, to which they testified, that they had secured all the doors and windows of their residence before they retired on the night of the burglary. That is so regardless of whether the appellant entered through the garage window and then opened a door for others (as he told police) or whether he was not present and others entered through an unlocked door (as was the appellant's contention on appeal). On the prosecution case there were no security screens on the garage window and a padlock which was normally attached to the front gate to the complainant's property was found near that window. The garage window was not damaged and it was found in a closed position after the burglary, but there was no evidence which suggested that the appellant could not have entered through that window in the way he described to police. His admissions were consistent with him having entered through the window without damaging it.

[55] The male complainant gave evidence which suggested that there was access from the garage into the house. After referring to a photograph which showed the padlock found near the garage window, he agreed that the window led into the garage. He then agreed with the suggestion that "the entrance and exits for that" (meaning the garage) "is the window – then there's the garage door and then there's the back door". Whilst that evidence was ambiguous, in its context it described a route from the garage window to the back door. That was consistent with the appellant's admissions that he gained access to the house through a window.

[56] Accordingly, on the evidence adduced at trial there was nothing unreasonable about the jury's acceptance of the truth of the appellant's confession to police and

rejection of the appellant's evidence that his confession was false. Of course the evidence at trial must now be understood also in the context of the fresh evidence adduced in the appeal. However, in assessing the fresh evidence, it is important to bear in mind the significance of the jury's verdicts.

[57] The evidence of TD could readily have been adduced on behalf of the appellant at trial, if it were thought to be significant. It would be unsurprising if the appellant had thought that it was not significant. That evidence is not "fresh evidence" (evidence which was not known to and could not with reasonable diligence have been discovered and adduced by the appellant at trial) and it has no material weight for present purposes.

[58] For the reasons given by the President I regard McK's evidence as being "fresh evidence". That evidence coincided in essential respects with AS's evidence at trial that they, NA, and another person who was not the appellant, committed the offences by gaining entry to the complainants' premises through the unlocked back door. That was also consistent with the fresh evidence of the school principal that NA admitted involvement in the offences and claimed that the appellant was not involved. Although the principal's evidence is admissible,[21] a third hand account of that kind is not very persuasive. The strength of the appeal rested upon the fresh evidence of McK and its coincidence in essential respects with the evidence given at trial by AS.

[59] McK's fresh evidence is sufficiently cogent to be capable of being believed by the jury. If that evidence had been before the jury, they might have believed both it and AS's evidence. On that hypothesis the jury very likely would have acquitted the appellant. However, whilst it seems likely, it has not been demonstrated that the jury, acting reasonably, must have believed McK's and AS's evidence or that McK's evidence necessarily introduced a reasonable doubt. This Court did not have the jury's advantage of seeing and hearing the other evidence adduced at trial. That is particularly significant because the jury must have rejected AS's evidence. That was not unreasonable. AS initially declined to name his co-offenders and he did not tell the police in the course of his police interview that the appellant was not involved, yet he claimed that he had mentioned that to the police before the interview. It is readily apparent that the reliability of McK's very belated evidence exculpating the appellant is susceptible to challenge on similar grounds.

[60] In *Ratten v The Queen*,[22] Barwick CJ summarised the duty of a court of criminal appeal in such a situation:

> "To sum up, if the new material, whether or not it is fresh evidence, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will be found if that new material is not fresh evidence. But if there is fresh evidence which in the court's view is properly capable of acceptance and likely to be accepted by a jury, and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered as

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21 *R v Freer & Weekes* [2004] QCA 97.

22 (1974) 131 CLR 510 at 520. See also *R v Maniadis* [1997] 1 Qd R 593 at 596.

> a remedy for the miscarriage which has occurred because of the absence at the trial of the fresh evidence."

[61] My opinion was that the present case fell squarely within the last sentence.

[62] In view of the loss of strength in the prosecution case as a result of the fresh evidence, the lapse of time, and the ordeal already endured by the appellant, there is much to be said for the view that there should not now be a new trial, but those are matters for the prosecuting authorities to consider.

[63] **DALTON J:** I adopt the reasons of the President as my reasons for joining in the orders made on 12 July 2011.