SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kay* [2012] QCA 327
PARTIES:	**R** **v** **KAY, Anthony Lee** (appellant/applicant)
FILE NO/S:	CA No 124 of 2012 CA No 293 of 2011 SC No 364 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2012
JUDGES:	Chief Justice and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where appellant convicted after trial of unlawfully attempting to kill complainant – where appellant and complainant were acquaintances – where appellant visited complainant's property whilst intoxicated – where appellant and complainant had altercation and discussion about drugs before appellant "king-hit" complainant – where this took complainant off guard, causing him to soil himself – where complainant told appellant to leave property and went for shower – where complainant returned to kitchen after shower and was stabbed three times to the back of his head by appellant – where complainant then stabbed in the stomach and chest by appellant – where complainant managed to seize knife – where earlier that day appellant was attacked and, as a result, was interviewed at his home by police – where during recorded interview appellant made various statements that he, in effect, took care of his own business without the assistance of police – where interview also included threats to

stab the complainant – where appellant's wife made various statements during interview – where appellant submitted that the primary judge erred in failing to give a propensity or bad character warning in relation to the recorded interview – whether primary judge should have given jury a propensity or bad character direction – whether verdict unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant submitted conviction unreasonable and cannot be supported by the evidence – where appellant submitted that evidence did not support intention to kill, but to only stab or shive – where appellant contended his telephone call to police and request for medical assistance suggested no intention to kill – where appellant submitted conviction unreasonable and cannot be supported by the evidence – whether verdict unreasonable

CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant convicted after trial of unlawfully attempting to kill complainant – where appellant sentenced to 14 years imprisonment – where appellant submitted sentence manifestly excessive – where appellant submitted primary judge erred in formulating a sentence to deal with the problem posed by appellant's behaviour rather than a sentence that punished the actual offence committed – whether sentence manifestly excessive – whether judge erred in sentencing discretion

Acts Interpretation Act 1954 (Qld), s 14, s 35C
Criminal Code 1899 (Qld), s 590AA
Penalties and Sentences Act 1992 (Qld), s 9(4)

B v The Queen (1992) 175 CLR 599; [1992] HCA 68, considered
BRS v The Queen (1997) 191 CLR 275; [1997] HCA 47, considered
Crampton v The Queen (2000) 206 CLR 161; [2000] HCA 60, cited
Dinsdale v The Queen (2000) 202 CLR 321; [2000] HCA 54, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, considered
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v David [2006] QCA 206, considered
R v Jurcik [2001] QCA 390, considered
R v Kovacs [2009] 2 Qd R 51; [2008] QCA 417, considered
R v Mallie; ex parte A-G (Qld) [2009] QCA 109, considered
R v Reeves [2001] QCA 91, considered
R v Rochester; ex parte A-G (Qld) [2003] QCA 326, considered

R v Sherrard [2004] QCA 425, considered
R v Tevita [2006] QCA 131, distinguished
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12 , considered
Smith v The Queen (2001) 206 CLR 650; [2001] HCA 50, considered
Suresh v The Queen (1998) 72 ALJR 769; [1998] HCA 23; cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: E P Mac Giolla Ri with J Crawford for the appellant/applicant (pro bono)
V A Loury for the respondent

SOLICITORS: No appearance for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with the orders proposed by his Honour, and with his reasons.

[2] **MUIR JA**: **Introduction** The appellant was convicted on 4 October 2011 after a trial in the Supreme Court of attempting unlawfully to kill Matthew Dauncey on 23 July 2009. He was sentenced on 27 April 2012 to 14 years imprisonment. The appellant appeals against conviction and applies for leave to appeal against sentence.

The evidence

[3] Before considering the grounds of appeal, it will be useful to say something of the evidence before the jury. The following facts have been extracted mainly from the appellant's outline of submissions and the trial judge's summing up. Counsel for the respondent made no criticism of the former and neither counsel criticised the factual content of the latter.

[4] The complainant and the appellant were acquaintances. At about 3.30 pm on 23 July 2009, the complainant, who was taking a Mr Lotz to a laundromat, drove past the appellant and his wife. The appellant made a vulgar gesture towards the complainant. Mr Lotz said that he saw the appellant raise his fist and shake it violently in their direction while yelling something out. The complainant stopped his car across the road from the appellant and asked what the problem was. The appellant ripped his shirt off and charged at the complainant's car. Mr Lotz and the complainant alighted. The appellant was heard by the complainant to say that he was going to "shive" him.[1] "He said he was gonna get some mates to come around and do that." Asked if the appellant was affected by alcohol, he responded, "Well, he wasn't staggering or losing balance, or anything, so I just noticed he was aggressive". Mr Lotz said that the appellant stated that he would be back around that night to get the complainant. He also heard the appellant threaten to "shive" the complainant. Mr Lotz said that the appellant seemed to be fairly coordinated without any slurred speech.

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1 Meaning to stab him.

[5] Early in the evening of 23 July, Mr and Mrs Ros Olen saw two men kicking another man in the gutter. One of the standing men was seen to be holding a metal pole above his head. Mr Ros Olen agreed that the assault was vicious. The Ros Olen's reported the incident to police and police officers, apparently believing the appellant to be the victim, attended at the appellant's house between 6.15 and 6.20 pm. One of the officers, Constable Griffiths, said that the appellant had a very aggressive demeanour when he tried to interview him, that he was clearly intoxicated and that his speech was affected. Another officer, Constable Parker, recorded an interview during which the appellant made statements including:

> "… I'll get the cunts myself."
>
> "… this fuck head up the road mate I'm telling you I'll get him myself… And I will stab him. I will stab him… if you get called back tonight 'cause I've gone back for revenge alright? Okay?"
>
> "…I will be getting him tonight."
>
> "I'm after revenge I will get the fucker. If youse don't get him I will."
>
> "… if I sort them out mate you're gonna have fucking problems on your hands. If I do something to them I'm not going, I'm not going easy."

[6] Counsel for the appellant admitted that, as is apparent from the above, during the conversation the appellant spoke openly about his hostility to the complainant and of his intention to use violence in retaliating against him.

[7] Constable Parker said that he believed the appellant would have been above 0.15, as an alcohol measure that he was then drinking a beer, walking and talking, had red eyes and smelt quite strongly of liquor.

[8] At around 4.30–5.30 pm, Mr and Mrs Brookhouse heard an argument in the street. Mrs Brookhouse heard the complainant say, "You don't owe me any money" and words to the effect, "Come back tomorrow when you are sober". Mr Brookhouse heard the complainant say that: there was no money owing to the appellant; "Go home. We'll talk about it tomorrow, or later when you are sober" or words to that effect; and "Let it go today. Come back and see me when you are sober. Come back and I'll talk to both of you tomorrow".

[9] The complainant said that just before 8.00 pm he was approached in the yard of his house by the appellant who was behaving aggressively and asking if the complainant wanted to fight him. The appellant had a can of beer in one hand, but was not staggering or having problems speaking. The appellant shoved the complainant who said that he did not want to fight. The appellant asked him for drugs and was told, "No, not today". He then departed, but returned half an hour later; again asking for drugs. The complainant said that he would try again later for him. The appellant then left, but returned again around 9.00 pm.

[10] The complainant let the appellant into his yard and then his kitchen where the two men sat at a table. The complainant gave the appellant a beer. There was a discussion about drugs and "all of a sudden" the complainant was "king-hit". He

fell off his chair and the shock of the incident caused him to soil his pants. He got up and was hit in the head a few times by the appellant who, when asked why he hit the complainant, said "I gotta go. Where's my money?". Prior to this the appellant had placed two $50 notes on the kitchen table and the complainant had put them beside the microwave where the appellant could see them. There was a struggle. The complainant charged at the appellant and pushed him down in between the stove and the wall. The complainant "probably hit [the appellant] in the head and the body a couple of times".

[11] The complainant demanded that the appellant leave the house and left the kitchen in order to shower and change his clothes. Having done so, he returned to the kitchen. He felt thuds in the back of his head, reached around and felt blood. He then turned around and saw that the appellant was holding a knife. He asked "Why did you stab me?" and was stabbed in the stomach and chest.

[12] After the stabbing, the appellant was "kind of lunging" at the complainant with the bread knife he had used in his attack. The complainant managed to wrestle the knife away from the appellant by grasping the handle and pulling the knife out of the appellant's hands. He went to a door and threw the knife into a neighbour's yard.

[13] A neighbour of the complainant heard men arguing about money and swearing. Someone, she thought it was the complainant, said "You owe me $50". Later in the evening, she looked out her bathroom window into the complainant's kitchen and saw the complainant arguing with somebody. He appeared also to be struggling with someone. She again heard mention of money and reference to $100. One person said "You owe me a hundred dollars". The other said, "Calm down, calm down, here it is". She heard someone then say "Let me up". After that she heard someone screaming "I've been stabbed" and saw the appellant near a phone box. She described the appellant's voice as sounding slurred as if he was intoxicated.

[14] After the appellant left the complainant's house he went to a nearby telephone box and telephoned the police. He complained that he had been stabbed and was bleeding. He said that another man had been stabbed, but he did not know who had done that.

[15] The complainant was taken to hospital and treated for his wounds. He sustained a stab wound to his abdomen which penetrated the abdominal wall and the peritoneal cavity. The wound track was approximately six to seven centimetres long and the wound resulted from the application of significant force. There was a stab wound to the chest which was approximately one centimetre deep and did not penetrate the chest cavity. Moderate force was required to inflict that injury. There were three stab wounds to the complainant's scalp on the back of his head. These wounds penetrated the layers of the scalp, but did not penetrate the scalp, which was very thick in the area in question. They were cleaned and stapled. The wound to the abdomen was likely to be life threatening.

The grounds of appeal

[16] There are two grounds of appeal:

Ground 1 – the failure to give a propensity or bad character warning in relation to the contents of the tape recording made on 23 July 2009 was an error of law and/or resulted in a miscarriage of justice; and

Ground 2 – The conviction was unreasonable and cannot be supported having regard to the evidence.

The appellant's argument in respect of ground 1

[17] The trial which led to the appellant's conviction was a re-trial. On the earlier trial, defence counsel had sought to have the recording of the police interview ruled inadmissible. He was unsuccessful but, in an *ex tempore* ruling, the judge observed in respect of the recording:

> "It is also clear that, on the basis of the decision of *The Queen v Roach*, there is no doubt that the jury should be given a very clear direction in relation to what use they can make of those statements. And it's clear that there should be a very clear direction in relation to propensity; they should not argue on that basis and that there will need to be a clear direction."

[18] The *ex tempore* ruling was entered in the order sheet as: "Incident 3 – admissible but clear direction in relation to propensity to be given". In her address to the jury on the re-trial, the prosecutor said:

> "Certain people act in different ways, some become withdrawn, some become bubbly and loud, and others become aggressive. Alcohol supports, in my submission, [the appellant's] intent to kill because it loosens the brakes. It makes him aggressive, wants to stab [the complainant] and, in fact, stabs him five times."

[19] The appellant complains that although there is evidence that the appellant was both drunk and aggressive on 23 July 2009, there is no evidence that the appellant had a tendency to become aggressive when drunk. Nevertheless, the prosecutor implied that such evidence existed. The argument was developed by submitting that, although the tape was merely one part of a body of evidence which established that the appellant was drunk and aggressive on 23 July, there was a danger that the jury would have reasoned that the tape was evidence from which they could reason that the appellant had a propensity for being aggressive while drunk.

[20] In the course of the trial, the primary judge discussed with counsel the issues for the jury. Defence counsel said, in effect, that the defence would be relying on self-defence and the absence of intent to kill or cause grievous bodily harm having regard to the appellant's intoxication. Defence counsel observed:

> "Now, the other issue will be the use to be made of the threats earlier in the day…
>
> Now, they're not being led as propensity evidence, of course, they're being led as background evidence…
>
> And the content of them I believe the Crown, and it's a proper basis, is saying that it goes to demonstrate intent."

[21] The ruling on the previous trial concerning propensity reasoning was not mentioned to the trial judge. Later in the trial, defence counsel accepted that what was said in the police interview was relevant to prove motive. Defence counsel and the

prosecutor accepted that it was appropriate for the trial judge to refer to the recording when dealing with motive in the summing up. There was no objection to the primary judge's summing up in relation to motive, except as is about to be mentioned.

[22] Counsel for the appellant argued that the trial judge's failure to give a propensity direction resulted in a miscarriage of justice as:

1. It was not open to the trial judge to admit the recording into evidence without giving the direction ordered by the judge on the first trial. Accordingly, the appellant was convicted on evidence which included inadmissible evidence. Alternatively, the failure to give such a direction amounted to a wrong decision on a question of law. The appellant is not required to show that the direction should have been given or that it was reasonably possible that the failure to give it may have affected the verdict.

2. Such a fundamental departure from due process constituted a significant denial of procedural fairness.

3. Even without the subject order or direction, a propensity or similar direction was clearly necessary because of the danger that the jury might reason that the bad character demonstrated by the accused in the recording made it more likely that he was the type of person who would intend to kill or seriously injure the complainant and be less likely to be the sort of person who acted only in self defence.

[23] It was submitted that the warning that should have been given was a combination of the bad character and propensity directions in the benchbook.

Consideration

[24] The evidence, being relevant, was therefore admissible, absent some specific exclusionary rule of evidence.[2] Gleeson CJ stated the relevant principles as follows in *HML v The Queen*:[3]

> "The basic principle of admissibility of evidence is that, unless there is some good reason for not receiving it, evidence that is relevant is admissible. Evidence that is not relevant is inadmissible; there is then no occasion to consider any more particular rule of exclusion. Reasons for not receiving relevant evidence may relate to its content, or to the form or circumstances in which it is tendered. Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings." (citations omitted)

[25] Gleeson CJ expanded on these general statements by reference to the role of motive in criminal proceedings:

> "The prosecution may set out to establish that an accused had a motive to commit an offence charged. Motive may rationally affect the assessment of the probability of the existence of one or more of

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2 *Smith v The Queen* (2001) 206 CLR 650 at 653–654 [6].

3 (2008) 235 CLR 334 at 351.

> the elements of an offence. Evidence that tends to establish motive, therefore, may rationally affect such assessment. If so, it is relevant. When the prosecution sets out to establish motive, that is often a step in the prosecution case that is not indispensable. If it is established, motive may support (sometimes powerfully) the prosecution case, but juries are often told that failure to establish motive does not mean the case must fail. The legal necessity is to establish beyond reasonable doubt the elements of the offence. What that entails as a matter of fact may depend upon the circumstances of the particular case."

[26] Another relevant principle is that if evidence admitted for one purpose is not admissible for another, it cannot be used for that other purpose.[4] Also, as Gaudron J said in *BRS v The Queen*:[5]

> "It is well settled that where evidence is admissible for one purpose but is inadmissible for another, the trial judge 'should direct the jury that they must not use the evidence for the purpose for which it is inadmissible ... [if] the use of the evidence for that purpose would be adverse to the accused.' Certainly, a direction of that kind must be given whenever necessary to avoid a perceptible risk of injustice."

[27] In the course of oral submissions, it became apparent that the statements with which the appellant was most concerned were not those quoted in paragraph [4] above, but the following:

> "I take care of my own shit Tammy."[6]
>
> "I don't ring coppers mate. I don't ring coppers for no one okay she wants to fucking, my wife wants to ring coppers well she's a fucking dog okay?"
>
> "I take care of own shit mate okay?"
>
> "I don't fucking dob on people"
>
> "I can handle myself mate."
>
> "Why fucking not. Why not they fucking do it to me."

[28] The following comments of the appellant's wife recorded on the tape were also the subject of complaint:

> "I know he said he (sic) stubborn, tell him he's stubborn."
>
> "I think he's fuming too is because he's been hit in the head and he's got slight brain damage from when he was little and dr-, I know drinking--"

[29] The statements quoted in paragraph [4] of these reasons were directly relevant to the question of whether the appellant had an intention to kill. The recording included threats to do what the appellant in fact did about three hours later: stab the

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4 *B v The Queen* (1992) 175 CLR 599 at 607–608.

5 (1997) 191 CLR 275 at 301.

6 The appellant's wife.

complainant. The appellant's recorded statements reveal an animosity towards the complainant which was apparent in the incident earlier in the day and an intention to "get" the complainant for reasons including revenge. The tirade of abuse directed against the complainant provided not only evidence of motive (a desire for revenge) but an intention to exact such revenge by means of a knife attack. Having regard to the incident earlier in the day and the short period of time between the interview and the actual attack, the statements in the recording of the appellant's contention at that time were plainly relevant to the jury's determination of his intention during the attack and his motive in launching it.

[30] I do not accept that the statements quoted in paragraph [4] show that the appellant had, whether drunk or sober, a propensity to kill let alone inflict serious injury. They do not include admissions of any unlawful killing, or even assaults, in the past. The relevant parts of the recorded statements are made up of declarations of the appellant's intention to exact retribution; assertions as to the way in which retribution was to be exacted; and express or implied explanations for the existence of that intention. The appellant's aggressive threatening behaviour during the incident was consistent with his conduct earlier in the day. Whether the appellant's statements showed some underlying disposition or propensity for violence when under the influence of alcohol was a matter about which speculation was unnecessary.

[31] The statements quoted in paragraph [27] above were also directly relevant to motive and intention. The appellant was stating, in effect, that he was ready and able to take revenge on the deceased who had wronged him without the assistance of the police or anyone else. The statements were not such as to lead the jury to reason that the appellant was the sort of person who might attack another with an intention to kill. There was no issue about the fact that the appellant had attacked the deceased with a knife. Even if I am wrong in concluding that no propensity or bad character direction was called for, the direction which the appellant should have been given would not have given the appellant a real chance of acquittal that he did not have because the judge said nothing about the propensity evidence.[7]

[32] The comments by the appellant's wife were not admissible but, particularly in comparison with the appellant's statements under consideration, were inconsequential. Neither of the comments suggested the existence of a criminal or reprehensible propensity, let alone a disposition, to mount a violent attack or kill.

[33] Defence counsel did not request a redirection by the trial judge in respect of the evidence now under consideration. That was understandable. If there had been a redirection, it was likely to have focussed more attention on the statements in paragraph [27]. It would also have given some prominence to the otherwise fairly inconsequential statements in paragraph [28]. Objectively viewed, the failure to object is readily explicable as the product of a rational forensic decision. Consequently, even if a propensity direction should have been given, the failure to object and the failure to seek a redirection did not result in a miscarriage of justice in the circumstances just discussed.[8]

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7 *BRS v The Queen* (1997) 191 CLR 275 at 308.

8 *Crampton v The Queen* (2000) 206 CLR 161 at 173; *Suresh v The Queen* (1998) 72 ALJR 769 at 775; *R v Kovacs* [2008] QCA 417; and *TKWJ v The Queen* (2002) 212 CLR 124 at 128–130; but c.f. *BRS v The Queen* (1997) 191 CLR 275 at 294–295, 302, 310.

[34] In referring to *Roach v The Queen*,[9] the judge on the appellant's first trial appeared to have been swayed by the following observations of French CJ, Hayne, Crennan and Kiefel JJ:

> "The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true."

[35] Their Honours held the direction given by the trial judge to be sufficient. They said:

> "At the conclusion of the evidence the trial judge directed the jury of the need to exercise care and that it would be dangerous to convict on the complainant's evidence alone unless they were convinced of its accuracy. His Honour told the jury that the history of the relationship between the complainant and the appellant had been led 'for a very specific purpose' and that they must be 'very, very careful in relation to the limited use that [they] may make of such evidence'. He explained how evidence could be used as evidence of propensity and directed them that they were not to use the evidence in that way. His Honour informed the jury that the evidence was led so that the incident charged was not considered in isolation or in a vacuum but 'to give [them] a true and proper context to properly understand what the complainant said happened on the 13th of April 2006'. More specifically, his Honour said that otherwise they would consider the relationship of 'boyfriend/girlfriend' had been on and off for about two and a half years, and then 'on the Sunday evening out of the blue he suddenly attacked her with quite a degree of violence'. He said that their reaction to that might be to say '[w]ell, that's highly unlikely. That just doesn't make sense'."

[36] It may be seen from the above discussion in *Roach* that it was very different factually from this case. The charge was assault occasioning bodily harm. The complainant gave evidence of a history of domestic violence preceding the subject assault, including evidence of frequent violent assaults which occurred after the appellant had been drinking. The appellant was intoxicated at the time of the subject assault. In *Roach*, unlike this case, the evidence of earlier assaults did not go directly and cogently to proof of an element of the subject offence. There was an obvious possibility that without a propensity direction, the jury might engage in impermissible reasoning.

[37] Part of the appellant's argument is based on a false premise: that the judge on the first trial made a ruling under s 590AA of the *Criminal Code*. The ruling was made during the course of the first trial. Section 590AA is not concerned with rulings

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[9] (2011) 242 CLR 610 at 625.

made by a judge in the course of a trial. That may be seen from the language of the provision even without reference to the section and division headings.[10] The purpose of the provision is to facilitate the efficient and unimpeded conduct of trials by affording parties the facility of obtaining directions or rulings in advance of a trial. Insofar as the judge gave a direction, it was that the recorded statements were admissible.

[38] The primary judge's later observations about a propensity direction, in my view, should be regarded merely as an intimation of intention in relation to her summing up. The contrary conclusion, namely that the judge was purporting to give a direction about the content of the summing up to herself in advance of the hearing of the prosecution and defence cases, is one which, to my mind, would be remarkable.

[39] It is not clear that the criticism was maintained of the submission claimed to have been, implicitly made by the prosecutor, that there was evidence that the appellant had a propensity to become aggressive when drunk. No such submission was made. Defence counsel did not advert to any such submission. The prosecutor was merely making some commonplace observations about the effects of alcohol on human behaviour. The jury would not have taken the submission as referring to conduct prior to 23 July 2009, as the evidence before them was of the appellant's aggressive behaviour and intoxication on that day.

[40] This ground of appeal was not made out.

The second ground of appeal

[41] I now turn to the ground that the conviction was unreasonable and cannot be supported having regard to the evidence. The argument advanced in this regard by counsel for the appellant was brief. It commenced with a concession that the injuries inflicted on the complainant were capable of supporting an inference that the appellant intended to kill. It was also conceded that the finding of an intention to kill was supported by the fact that the attack only came to an end when the complainant charged the appellant and grabbed the knife.

[42] It is argued, however, that the appellant never articulated an intention to kill. His stated intention was not to kill, but simply to stab or shive. Given his state of intoxication and his unrestrained candour in his interview with police it should be accepted that he was not being deceitful when making statements about stabbing or shiving. The prosecution wrongly conflated an intention to stab with an intention to kill. The telephone call and accompanying requests for medical assistance suggested that immediately after the stabbing the appellant did not have an intention that the complainant die.

Consideration

[43] These submissions are not compelling. The appellant's stated intention to "get" the complainant, in the context of a desire for revenge and a declared intention to stab or shive him, necessarily gave rise to an inference that there is an intention to cause, at least, serious physical injury. There was nothing about the evidence to suggest

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[10] Regard may be had to the section and division headings in construing a section. *Acts Interpretation Act* 1954, s 14 and s 35C.

that the assault contemplated by the appellant with the use of a knife was to be restrained or directed so as to render it unlikely that any major organ would be damaged or that the victim's life not be endangered. The only positive aspect of the threats, from the appellant's perspective, is that they do not contain an explicit threat to kill.

[44] However, the nature of the attack and the location and severity of the wounds inflicted provided further evidence from which the jury could infer an intention to kill. The stabbing was initially from behind and to the back of the head. Significant force was used in that stabbing and in the stabbing of the abdomen. The appellant did not desist in his attack until the complainant succeeded in seizing the knife. At the time of the stabbing the appellant was capable of walking and talking coherently. Immediately afterwards he left the complainant's house, went to a telephone booth, inserted money and was able to make a coherent telephone call. It was open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt that the accused was guilty.[11]

[45] This ground of appeal was not made out either and I would order that the appeal against conviction be dismissed.

Consideration of the application for leave to appeal against sentence

[46] The appellant applies for leave to appeal against sentence on grounds that the sentence is manifestly excessive and that the trial judge erred in "formulating a sentence to deal with the problem posed by the appellant's behaviour rather than a sentence to punish the actual offence committed by the appellant". It is convenient to deal with the second ground first.

[47] Counsel for the appellant relied on these observations in the sentencing remarks:

> "The appropriate sentence, in my mind, to deal with the problem posed by your behaviour is 14 years' imprisonment, and what I propose to do therefore is to sentence you to 14 years' imprisonment."

[48] It was submitted that the trial judge did not formulate a sentence proportionate to the crime and that this may be seen from the explanation that the term imposed was "to deal with the problem posed" by the appellant's behaviour. It was pointed out that in the preceding paragraph, the trial judge used the word "behaviour" in the context of the danger the appellant posed to the public. That paragraph is:

> "It seems to me, however, that having regard to your record and the danger you pose to the public by your behaviour, which, as Ms Aylward submitted for the Crown, appears to have been escalating to some extent over time, that a sentence higher than that range is called for."

[49] The range referred to was between 10 and 11 years which defence counsel contended was the appropriate range. The appellant's submissions ignore the structure of the sentencing remarks. The trial judge dealt earlier in the sentencing remarks with the appellant's criminal history. He said that it was "very significant"

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11 *MFA v The Queen* (2002) 213 CLR 606.

and affected his "task significantly". Prior to that he had, inferentially, dealt with the prospects of rehabilitation. His Honour referred to the seriousness of the injuries caused to the complainant, to the attack being, at least to some extent, premeditated and the appellant's lack of remorse on the evening of the attack. His Honour then referred to the appellant's "intellectual disability and other psychiatric disabilities" as reducing the appellant's moral culpability.

[50] Defence counsel's submissions were then addressed. When the sentencing remarks are read as a whole, as they must be, it is not reasonable to conclude that in arriving at a sentence of 14 years imprisonment the trial judge disregarded or failed to take into account appropriately the matters he had canvassed or mentioned.

[51] This ground of appeal was not made.

The manifestly excessive ground

[52] The appellant was 40 years of age when sentenced. He had a relevant criminal history commencing with convictions for arson and attempted arson in July 1987. He was convicted in 1989 of assault with attempt to steal with a threat of actual violence whilst armed with a dangerous weapon. His first conviction which resulted in a term of actual imprisonment was in February 1990. He was then convicted of an assault with intent to steal using actual violence when armed with a dangerous weapon and attempted arson. There were further convictions for assaults occasioning bodily harm in May 1990. In January 1995 he was convicted of stealing with actual violence whilst armed with an offensive weapon and imprisoned for seven years. In committing that offence, the appellant knifed a taxi driver and threatened to blow his head off with a gun. In 1996 the appellant was convicted of threatening to injure and cause grievous bodily harm to a corrective services officer. Between October 1996 and September 2006 the appellant committed a number of minor offences. In September 2006 he was sentenced to two years imprisonment for assaults occasioning bodily harm whilst armed.

[53] In March 2009, he was convicted in the Magistrates Court of a series of offences which involved punching a woman in the face, threatening her neighbours with firearms, damaging property and assaulting and threatening security officers when intoxicated. He was sentenced to four months imprisonment. Twenty-two days after his release on 1 July 2009 he committed the subject offence.

[54] In a report prepared for the appellant's solicitors, a forensic psychologist expressed opinions that the appellant had a "life long history of intellectual impairment, adaptive skill deficits and impoverished social skills". It was reported that the appellant's employment history was restricted to sheltered workshops, and that he was unable to gain further work due to intellectual disability, substance abuse and previous incarcerations. Other opinions in the report were that: the appellant's intellectual disability was a life long condition which was unlikely to improve; his full scale IQ fell within the extremely low range of intelligence; he "demonstrated significant deficits in his general cognitive abilities"; and he had significant impairment in impulse control. Assessments made by the psychologist suggested that the appellant demonstrated marked impairments in memory, planning and ability to regulate his own emotional and behavioural responses. It was reported that:

> "His cognitive impairments appeared to be permanent and contributed to his limited insight and impaired capacity for reasoning and social judgement… [His] proclivity for alcohol and illicit drugs had significantly impacted on his capacity for emotional and behavioural regulations."

[55] Counsel for the appellant submitted that although the offence was serious, meriting punishment by a substantial term of imprisonment, the appellant:

- Had not planned the offence;
- Received no personal gain from the offence;
- Was not armed when he arrived at the complainant's house;
- Impulsively used a weapon which was opportunistically to hand;
- Had been the victim of a violent assault earlier in the evening;
- Had expressed remorse; and
- Had not caused continuing physical disabilities.

[56] Although the offence may not have been planned for any lengthy period, there was clear evidence that a knife attack on the complainant had been in the appellant's mind earlier in the day. Also, the fact that the appellant loitered in the kitchen and launched a surprise attack indicated an element of premeditation. The fact that the appellant may have thought that the complainant had been involved or implicated in the assault on him earlier in the evening may assist in explaining the appellant's conduct, but does not excuse it in any way.

[57] Counsel for the appellant relied on four decisions to support the contention that the sentence was manifestly excessive: *R v Mallie; ex parte A-G (Qld)*;[12] *R v Rochester; ex parte A-G (Qld)*;[13] *R v Sherrard*;[14] and *R v Jurcik*.[15]

[58] In *Mallie*, the 48 year old offender attempted to cut the complainant's throat with a knife in the course of a vicious attack during which the complainant was stabbed in the middle of her upper back and left shoulder. She suffered lacerations, scratches, a stab wound in the back, a three centimetre wound to her finger and blunt trauma to the head. She was able to leave hospital the day after the attack and the continuing effects of the attack were mainly psychological (she suffered from post traumatic stress disorder). The appellant's sentence of eight years imprisonment (imposed after a plea of guilty) was increased to 10 years on appeal.

[59] When regard is had to the guilty plea, this sentence does not appear to assist the appellant, particularly as the physical injuries were far less severe than those inflicted by the appellant.

[60] *Sherrard* was sentenced to 11 years imprisonment after a trial. His only prior conviction was for a minor assault. He believed that the complainant had been one

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12 [2009] QCA 109.
13 [2003] QCA 326.
14 [2004] QCA 425.
15 [2001] QCA 390.

of two people who had inflicted a cowardly and potentially lethal attack on him and developed a "growing obsession" that the complainant had succeeded in avoiding prosecution. Sherrard had originally intended to frighten the complainant, his neighbour on a rural property, by firing a rifle at the rear of the complainant's property. However, he formed an intention to kill the complainant when he saw him move to a crouching position adjacent to a tree. The complainant, although shot in the head and arm, did not sustain any serious lasting injury beyond a continuing disability to his left arm. The sentence of 11 years, which was upheld, was described as "a heavy one".

[61] This sentence offers some support to the appellant. However, Sherrard's offending was spontaneous, the injuries inflicted appear to be less severe than those in this case and Sherrard had no prior convictions of significance.

[62] *Jurcik* was sentenced after a trial to nine years imprisonment for attempting to murder a prostitute whom he stabbed eight times in the body and twice in the left hand before his knife broke. Jurcik was 43 years of age and had no relevant prior convictions. The complainant had made a good physical recovery and there was no evidence as to her psychological state. Jurcik was refused leave to appeal. The decision established that the sentence was not manifestly excessive, not that a higher sentence would not have been warranted.

[63] An Attorney-General's appeal against a sentence of 10 years imprisonment imposed on *Rochester* after a trial for attempting to kill his wife by stabbing was dismissed. The appellant had an extensive criminal record which included 12 convictions for assault or related offences. The subject offence was committed in a public place where a number of persons were present and involved breach of a Domestic Violence Order. Williams JA, with whose reasons the other members of the Court agreed, repeated the observation made by him in *R v Reeves*[16] that the "appropriate range for the offence of attempted murder is generally from 10 to 17 years."

[64] The usefulness of this sentence for the appellant's purposes is diminished by the fact that the Court's conclusion, reached after implicitly acknowledging the "attitude of restraint"[17] adopted by appellate courts on Crown appeals, was that the sentence was not manifestly inadequate.

[65] The respondent relied on *R v Tevita*[18] and *R v David*.[19]

[66] In *Tevita*, the applicant was sentenced to 18 years imprisonment after a plea of guilty for attempting to murder a young male who suffered from cerebral palsy and had been confined to a wheelchair with only a limited ability to move even his arms and hands. The applicant cut his throat with a knife severing the jugular vein. He returned after a while, stabbed the complainant three times in the back, stole some of his property and left him to die.

[67] The complainant had surmounted his profound disabilities to the extent of living an independent life, becoming a disc jockey and was learning to fly an aeroplane. Because of his injuries, he was unable to continue these pursuits. He was unable to speak above a whisper, was at constant risk of choking, required his food to be cut

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16 [2001] QCA 91.
17 *Dinsdale v The Queen* (2000) 202 CLR 321 at 341.
18 [2006] QCA 131.
19 [2006] QCA 206.

up, became vulnerable to colds, flu and throat infections, suffered continuous back pain and required a full-time carer. The Court described the crime as terrible.

[68] As is apparent from the above discussion of its facts, *Tevita* has little, if any, relevance for present purposes.

[69] *David* was sentenced after a trial to 15 years imprisonment for attempted murder. He was 26 years of age at the time of the offence with a criminal history involving drug offences and offences involving personal violence. David, who was under the influence of alcohol, after being refused a cigarette by the complainant, a stranger, stabbed him in the abdomen with a bowie knife. The knife penetrated the complainant's colon and dissected a kidney. He was saved by emergency treatment and underwent six operations losing a kidney and part of his colon in the process. He spent over three months in hospital and may be in need of further treatment.

[70] In the course of his reasons Keane JA referred, with implicit approval, to Williams JA's observations in *Rochester* to the effect that the appropriate range for attempts to kill was between 10 years to 17 years imprisonment. His Honour also repeated the observations of the Court in *R v Tevita*:[20]

> "…the severity of the sentence imposed necessarily varies with the seriousness of the injuries inflicted on the person targeted; and the extent to which the intention was put into effect by the accused's acts. The contrast is between a single blow, or stroke or shot, and a repetition of the acts intended to cause death."

[71] That, of course, does not purport to be an exhaustive statement of relevant considerations. Of particular relevance here are: the appellant's criminal history; the fact that the offending was not spontaneous, and the likelihood of re-offending. Section 9(4) of the *Penalties and Sentences Act* 1992 requires the Court, in sentencing an offender for an offence that involved the use of violence, to have regard primarily to matters including, *inter alia,* the offender's past record, his antecedents, age and character and the need to protect members of the community from the risk of physical harm.

[72] The appellant's intellectual disability and, in particular, his "limited insight and impaired capacity for reasoning and social judgment" and to "understand the consequences of his actions" lessens the appellant's culpability and must be taken into account in mitigation.

[73] That mitigating factor, however, as the trial judge recognised, must be considered along with other relevant considerations including the requirements imposed by s 9(4) of the *Penalties and Sentences Act*. The appellant's criminal history, his history of substance abuse coupled with the impulsive behaviour and reduced capacity for "behavioural regulations" described in the psychologist's report suggest that it was appropriate for the primary judge to give emphasis to the risk of serious harm to members of the community when determining the sentence.

[74] The sentences discussed above indicate that the sentence of 14 years imprisonment was quite high, but when regard is had to the relevant, and sometimes conflicting or competing considerations, I am unable to conclude that it was manifestly excessive. I would refuse leave to appeal.

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[20] *R v Tevita* [2006] QCA 131 at [10].

[75] **FRASER JA**: I have had the advantage of reading in draft the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour. In relation to the application for leave to appeal against sentence I would add only that, whilst for the reasons given by Muir JA the sentence is not manifestly excessive, it seems to me to be at or near the upper limit of the range of sentences falling within the sentencing judge's discretion.