SUPREME COURT OF QUEENSLAND

CITATION:	*R v Baker* [2014] QCA 5
PARTIES:	**R** **v** **BAKER, David Alan** **aka BALDWIN** (appellant/applicant)
FILE NO/S:	CA No 174 of 2012 SC No 199 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2013
JUDGES:	Gotterson and Morrison JJA and North J Separate reasons for judgment of each member of the Court, Gotterson JA and North J concurring as to the orders made, Morrison J dissenting
ORDERS:	**1. The appeal is allowed.** **2. The appellant's conviction is set aside and a re-trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION AND NON-DIRECTION – where the appellant was convicted after trial of attempted murder – where the appellant and the complainant had been in a relationship – where at the time of the offence they had become estranged – where the appellant stabbed the complainant a number of times below the abdomen – where the injuries to the complainant's heart were life threatening – where the appellant was charged with attempted murder or alternatively a malicious act with intent – where it was not in issue that the appellant stabbed the complainant causing her grievous bodily harm – where it was submitted that the learned trial judge had not complied with the obligation upon a trial judge imposed by s 620 of the *Criminal Code* – whether the failure to independently identify the evidence that might be relevant to consideration of the intent to kill as opposed to the intent to cause grievous bodily harm deprived the jury of judicial guidance on important matters – whether there has been a miscarriage of justice

*Criminal Code*1899 (Qld), s 620
Evidence Act 1977 (Qld), s 18, s 101, s 102

Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, cited
Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
R v Fox (No 2) [2000] 1 Qd R 640; [1999] QCA 140, cited
R v Mogg (2000) 12 A Crim R 417; [2000] QCA 244, cited

COUNSEL: A Boe, with A I O'Brien, for the appellant/applicant
D Kinsella for the respondent

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

[1] **GOTTERSON JA:** I agree with the orders proposed by North J and his Honour's reasons which I have had the benefit of reading.

[2] I wish to express my concurrence with his Honour's observations on the summing up in paragraphs [89] to [91] inclusive of the reasons and his conclusions that a substantial miscarriage of justice was occasioned.

[3] The features of the evidence identified by his Honour for specific reference in the directions to the jury had a distinct prominence in this case. By virtue of that, the jury was required to make findings with respect to the sequence in which the conversation between the complainant and the appellant, on the one hand, and the stabbings, on the other, occurred.

[4] The sequence that they were to find had occurred would be a highly significant factual circumstance within the framework of found facts to which the members of the jury were to refer in order to decide whether the appellant acted with an intent requisite for Count 1 or an intent that would justify a guilty verdict of grievous bodily harm only. In my view, those were matters on which the jury should have been directed during the course of the summing up.

[5] I agree also with his Honour that the alternative ground of appeal of an unsafe and unsatisfactory verdict would have no prospects of success. I would add that the answer to the question whether there was sufficient evidence on which a jury properly instructed could have convicted is no answer to the appellant's justifiable complaint of deficiency in the jury directions occasioning a substantial miscarriage of justice. Particularly is this so here where the process of answering that question would involve recognition that the jury had heard the complainant's version of the sequence of those events and acknowledgement that it was open to the jury to accept that version and then to draw an inference as to intent by reference to it. However, putting that evidence to one side, I am unable to conclude that on the basis of other evidence, a jury would necessarily have convicted the appellant of attempted murder.

[6] **MORRISON JA:** I have had the considerable advantage of reading the reasons prepared by North J. His Honour has comprehensively summarised the trial and the

evidence of the trial.[1] I am content to adopt that analysis, which permits me to state my reasons in shorter compass than might otherwise have been the case.

[7] I differ from the conclusion reached by his Honour: in relation to the adequacy of the directions; and in respect of the central contention of the appellant, which was that the learned trial judge failed to relate the issues in the case to the evidence given at the trial, thus not complying with the obligation under s 620 of the *Criminal Code*, to properly instruct the jury. Central to that submission was the exchange between the complainant and the appellant during his attack upon her. That is, the verbal exchange where she asked, "Are you going to kill me?", and his reply, "Yes".[2]

[8] Justice North has conveniently summarised the rival contentions in paragraphs [84] and [85] of his reasons.

[9] Section 620 of the *Criminal Code* specifies that "it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make". As McHugh J said in *Fingleton v The Queen*[3] the court does not discharge that duty by merely referring the jury to the law that governs the case, and leaving it to them to apply it to the facts. The term "instruct" requires the court to identify the real issues of the case, the facts that are relevant to those issues, and an explanation as to how the law applies to those facts. However, the function of a summing up is not to give the jury a general dissertation, but to tell the jury what the *issues of facts* are, so that the jury can make up their minds on determining guilt.[4]

[10] The rule is not such that failure to observe it necessarily results in a miscarriage of justice. Thus, McMurdo P said in *R v Mogg*[5] that the duty will *ordinarily* include relating issues to the relevant law and the facts of the case. The caveat adopted in *Mogg* was derived from the High Court decision in *Domican v The Queen*[6] where it was said that:

> "Whether the trial judge is bound to refer to an evidentiary matter or argument ultimately depends upon whether a reference to that matter or argument is **necessary** to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence."

[11] The extent of the obligation on a trial judge to identify and summarise the evidence applicable in the case will vary depending upon the length of the case, and the complexity of the trial. So much was recognised in *Domican v The Queen*:[7]

> "In a criminal trial, the distinction between directions on matters of law and directions on matter of fact or argument is fundamental. A trial judge is bound to direct the jury as to any principle of law or rule of practice applicable to the case, and a misdirection or non-direction on such a matter would usually mean that the trial has miscarried. But matters of fact and the arguments in relation to them

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1 See paragraphs [49] to [79] of North J's reasons.
2 Canvassed in the passage about evidence at paragraph [53] of North J's reasons.
3 *Fingleton v The Queen* (2005) 227 CLR 166, at 196-198 [77]-[80].
4 *Fingleton* at 197 [79].
5 *R v Mogg* (2000) 12 A Crim R 417, at 427 [54].
6 *Domican v The Queen* (1992) 173 CLR 555, at 561 (emphasis added) (internal reference omitted).
7 *Domican*, at 560-561.

> are in a different category. A trial judge is not bound to discuss all the evidence or to analyze all the conflicts in the evidence, and, by itself, the failure of a trial judge to do so does not mean that there has been any miscarriage of justice. … Whether the trial judge is bound to refer to an evidentiary matter or argument ultimately depends upon whether a reference to that matter or argument is necessary to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence."[8]

[12] As North J has identified in paragraphs [80] to [83] of his reasons, the learned trial judge's directions followed the format of those suggested by the benchbook. When it came to the question of intention the primary judge's directions followed this sequence:

(a) as to the count of attempted murder, there had to be "an intent to kill Ms Revesz at the time of or during the relevant act or acts inflicted on her";[9]

(b) it was specifically said that "[a]nything less, anything less than intent to cause death, is insufficient";[10]

(c) an example was then given of what would be insufficient, specifically referring to an intention to do grievous bodily harm;

(d) the learned primary judge then told the jury "I think it's fair to say that it's the intention to kill that is the central element to which you need to direct your attention for present purposes";[11] and

(e) turning to the count of a malicious act carried out with intent, the primary judge reminded the jury that there had been an admission of unlawfully doing grievous bodily harm, then telling the jury that if they were at the stage of considering the alternative count on the indictment, "the question for you is the further question which is whether he intended to cause her grievous bodily harm".[12]

[13] In the appellant's first set of submissions[13] the ground raised was that the summing up in relation to the issue of intention was inadequate and not in compliance with the obligation under s 620 of the *Criminal Code*. The attack was a global one, on the basis that all the primary judge had done was record the facts by reference to the arguments that had been made by opposing counsel in the closing addresses. Only one matter was raised specifically, as an "illustration" of the alleged vice, that being concerned with the verbal exchange "Are you going to kill me?", and the reply "Yes".[14] Included in that illustration were submissions about the impact of ss 18 and 102 of the *Evidence Act* 1977 (Qld) and the lack of directions in respect of those sections and their impact upon the verbal exchange.[15]

[14] That was the ground addressed more specifically in the appellant's written reply. It was also the only ground addressed in oral argument. In the original outline two other aspects of the evidence were mentioned, but without any elaboration.

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8 *Domican*, at 560-561 (internal footnotes omitted).
9 AB 274.
10 AB 274.
11 AB 276.
12 AB 279.
13 Done on an *amicus curiae* basis and filed 5 July 2013 ("**the original outline**").
14 Original outline, paras 27-34.
15 Original outline, paras 27-34.

The first was the evidence of witnesses who saw the appellant on the morning of the offence. The contention was that their evidence needed to be explained and related to the principal issue in the trial, namely intention.[16] The second was the forensic and medical experts' evidence, which, it was said, ought adequately to have been explained and contextualised.[17] Beyond those bald references no attempt was made to explain how a failure to explain either category of evidence, in terms of its impact on intention, would have had some material effect on the trial.

[15] In oral argument on the appeal the appellant sought to establish that in the cross-examination of the complainant as to her previous statements, and specifically that where she had given a different version as to whether there had been a stab after the verbal exchange,[18] s 18 of the *Evidence Act* had been engaged. That provision applies where a witness, upon cross-examination as to a former statement made by them and inconsistent with their present testimony, "does not distinctly admit that the witness has made such statement".[19] In that event "proof may be given that the witness did in fact make it".[20] The contention was that if a statement was proved under s 18, then s 102 would apply, requiring that in estimating the weight of the previous statement "regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise" of it.[21]

[16] It may well be doubted that counsel for the appellant at the trial[22] was attempting, by his cross-examination on the complainant's prior statements, to actually prove these under s 18. That is for two reasons. First, it was not a case where the complainant did "not distinctly admit" that she had made those statements. She did admit that they were made.[23] Indeed, she conceded in one respect that it was possible that what was in her statement was correct.[24] Secondly, where such a statement was proved, s 101(1) of the *Evidence Act* would have the effect that the statement "shall be admissible as evidence of any facts stated therein". Whilst it might be true that the complainant had already given oral evidence to the same effect, why would counsel for the appellant desire to enforce that evidence by adducing another statement admissible as evidence of the same fact? I think it is more likely that what counsel was attempting to do was simply to discredit the complainant so that the jury would have doubt about which version was correct.

[17] However that may be, I am prepared to assume for the purposes of the appeal, that ss 18 and 102 of the *Evidence Act* were engaged. All that would mean was that the jury would have regard to whether they believed the complainant, and believed one version as against another. There cannot be any question that they would have engaged in that task in any event, given that they were confronted with two versions as a result of the cross-examination. In the address to the jury by counsel for the appellant, it may be accepted that he attacked the credibility of the complainant based upon the competing versions of the sequence of events surrounding the verbal exchange. Other discrepancies were also highlighted, as is evident from summing up by the primary judge.[25]

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16 Original outline, paras 27-34.
17 Original outline, paras 27-34.
18 AB 146-148.
19 *Evidence Act*, s 18(1).
20 *Evidence Act*, s 18(1).
21 *Evidence Act*, s 102.
22 Different counsel appeared on the appeal.
23 AB 146-148.
24 AB 146; T-60, ll 50-51.
25 AB 291-292.

[18] In the course of his summing up the primary judge said a number of things relevant to the jury's task of weighing the evidence. Having said at the outset that the jury were to decide what evidence they accepted,[26] and given the standard direction as to what constitutes evidence and what does not,[27] the following appears:

(a) "Now, matters which will concern you are the credibility of the witnesses and the reliability of their evidence and counsel for the prosecution and counsel for the defence both addressed you on elements of that. It is for you to decide whether you accept the whole of what a witness says or only part of it or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified."[28]

(b) As a factor to be considered in deciding what evidence should be accepted, "Another point may be has the witness said something different at an earlier time?";[29]

(c) "It is … up to you to assess the evidence and what weight, if any, you give to a witnesses' testimony or to an exhibit";[30]

(d) "I want to say something to you about intention because, as you will have gathered, intention is central to the two charges that you need to consider for the purposes of this case … Intention may be inferred or deduced from the circumstances in which the injury was caused to the complainant and from the conduct of the defendant before, at the time of or after he did the specific act – in this case the stabbing – which caused the injury and, of course, whatever a person has said about his intention may be looked at for the purpose of deciding what the intention was at the relevant time";[31] and

(e) "I think it's fair to say that it's the intention to kill that is the central element to which you need to direct your attention for present purposes".[32]

[19] The major criticism of the primary judge was that he dealt with the evidence by way of reviewing the submissions of both counsel. That is true, but in the course of that the primary judge highlighted various matters which are relevant to the current appeal.

[20] Thus, in terms of matters that touched on the inconsistencies in the complainant's evidence, and in particular that which concerned the verbal exchange at the heart of the appellant's case, the following appears:

(a) referring to the prosecutor: "He pointed to the arguments that he expected would be made about inconsistencies in [the complainant's] evidence and these are points, of course, that Mr Fraser made in the course of his submissions, that in urging you to be very cautious and critical when examining the evidence of [the complainant] – and it will require you, ladies and gentlemen, to consider all of the evidence";[33]

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26 AB 265.
27 AB 267.
28 AB 269-270.
29 AB 270.
30 AB 270.
31 AB 271-272.
32 AB 276.
33 AB 284-285.

(b) referring to the prosecutor: "In relation to differences in the sequence of events he asked ["]does it really matter["]? Either way, he had already stabbed her in the heart";[34]

(c) "… I keep on saying, ladies and gentlemen, all of these are matters for you ...";[35]

(d) as to being hit with a piece of wood: "… and I keep on saying, ladies and gentlemen, all of these are matters for you – the extent to which you consider the log is relevant in your considerations is completely a matter for you. To the extent that it was argued on behalf of the defendant it was to highlight what might be called inconsistencies in the complainant's evidence before you in the various versions of events that she's given, but it's – at the end of the day it's a matter for you, ladies and gentlemen, remembering that it's an undisputed fact that this woman was stabbed in the chest";[36] and

(e) referring to the prosecutor: "He asked you to consider … things that were said at the time, and in that regard you'll need to consider the cogency of the evidence from [the complainant] where she said to the effect that she asked the defendant whether he was going to kill her and he said yes".[37]

[21] The primary judge then turned his attention to highlighting matters that arose in the course of address by counsel for the appellant. In the course of that the following appears:

(a) "… Mr Fraser reminded you that … [referring to the complainant] … you needed to approach her evidence with some care given the shift in her evidence concerning the nature – the on and off nature of the relationship between … her and the accused";[38]

(b) many topics were dealt with on the basis that they were not necessarily submissions by counsel for the appellant, as opposed to matters raised by him, using the phrase "he reminded you" or "Mr Fraser reminded you" in many instances;[39]

(c) "He then reminded you of specific passages in the transcript. I won't go over those with you. He referred you to the witnesses Bonny, Salmon, Leighton, Norris, McKenzie, Dr Mahoney, Dr Olsson and then he spent some time critically reviewing the evidence of the complainant … again, highlighting in the course of that the differing versions of some matters that had been given …";[40] and

(d) "He concluded by submitting that you should be very careful, ladies and gentlemen, about the complainant's evidence at very least because of two flaws, he submitted. That is the evidence concerning the striking on the head with the log and the evidence concerning the choking to the point of collapse …".[41]

[22] That summing up, following so closely on the heels of the address by counsel, highlighted that the jury had to decide what evidence they relied upon, and for that

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34 AB 285.
35 AB 285.
36 AB 285-286.
37 AB 287.
38 AB 288-289.
39 AB 289-290.
40 AB 291.
41 AB 291-292.

purpose they had to assess the credibility of witnesses and the reliability of their evidence. Specifically the jury could not have been in any doubt that it was up to them as to whether they accepted the whole of what the complainant said, or only part of it, or even indeed none of it. One factor in that analysis was whether the complainant had said something different at an earlier point in time and whether the inconsistencies in the complainant's evidence were such that, quite apart from being very cautious and critical when examining her evidence, the jury might reject it. In addition, the jury could have been in no doubt that one of the things they had to weigh was the sequence of events at the time when the appellant stabbed the complainant in the heart. Specifically, albeit that it was by reference to what the prosecutor had said, the jury were directed expressly to things that were said at the time of the stabbing and in that regard the "need to consider the cogency of the evidence from [the complainant] where she said to the effect that she asked the defendant whether he was going to kill her and he said yes".[42]

[23] At the end of the primary judge's summing up counsel for each side were asked whether they had anything to submit, and each said no.[43] Indeed, counsel for the appellant agreed with the primary judge that there was no need for him to say more, submitting:

> "It was a case, in my view, your Honour, they've heard the addresses and they were probably appropriate in length in an hour each and … I think your Honour's right. They – unless they're morons – and we assume they're not … they'd remember what we were saying".[44]

[24] The directions given by the primary judge in relation to whether a witness had made a prior inconsistent statement or given inconsistent evidence in the past, closely mirrored that which was the subject of consideration by this Court in *R v Fox (No 2)*.[45] In that case there was a prior inconsistent statement and the contention was that the jury would have been entitled to treat the prior inconsistent statement as evidence of the truth. The court held that the defence case was not conducted on that basis, nor was any such direction requested by defence counsel. As a consequence the inconsistent statement was very much an issue as to the reliability of the identification, and canvassed in defence counsel's address to the jury. The absence, therefore, of a specific direction under s 101 of the *Evidence Act*, was inconsequential.[46]

[25] The first category of evidence which was nominated in the original outline, though not argued, was that of witnesses who saw the appellant on the morning of the offence. The first was Ms Bonny, who had been in a relationship with the appellant that had ended some 10 years before. As at the day of the offence the appellant was residing with her maybe three nights a week.[47] Her evidence principally concerned the conversation and episode where the appellant was exploring how to find one's heart, on which side of the body, and how far up. In addition, the appellant had experimented on Ms Bonny about how to find the heart, using his fingers and palms in the middle of her chest. Finally, he said that he was going to library to look it up in some books. Just how the absence of a specific direction about this evidence

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42 AB 287.
43 AB 294.
44 AB 294.
45 *R v Fox (No 2)* [2000] 1 Qd R 640.
46 *R v Fox (No 2)* [2000] 1 Qd R 640, at [33]-[34] and [87]-[88].
47 AB 155.

could have affected the jury's deliberations on the question of intent is hard to see. It could hardly be said that if a direction had been given in relation to it, the direction would have suggested it was not evidence of intent, nor evidence of intent to kill.

[26] The balance of Ms Bonny's evidence, at least insofar as it concerned events on the morning of the offence, were relatively inconsequential. They included that the appellant took a lunch box with him when he left Ms Bonny, and that there was a large knife in the lunch box. But it also included that the knife had been in his possession for a number of weeks, and that the appellant was taking it to work to sharpen it for her.[48] Just what the direction would have been in relation to this evidence, that would have assisted the appellant's case, is difficult to see.

[27] The other witness who saw the appellant on the morning of the offence was Ms Bonny's daughter, Hayley Salmon. Her evidence went to the demeanour of the appellant on the morning. She said that his demeanour was fine, though he had become a little bit agitated and appeared to be in a hurry after he had collected her from the pool. However, he was soon back to his normal self. Her evidence was inconsequential.

[28] In terms of the forensic and medical evidence to which reference is made in the appellant's original outline,[49] I do not see how the absence of a specific direction in respect of it would have affected the jury's deliberations on the question of intent. Dr Mahoney treated the complainant on her arrival at the Royal Brisbane & Women's Hospital. All of his evidence was to the effect that she had sustained three stab wounds to the heart which were severe and life threatening, and, without treatment, death was imminent.[50]

[29] It is true that his evidence was also that no injuries to the neck or throat were documented and further, had someone been hit on the head with a log, he would be likely to see bruising or a lump, or superficial injury to the skin. He agreed that he did not see anything in the notes or chart that was consistent with the complainant having sustained injuries of that kind.[51] However the difference between the complainant's account that she had been hit with a log and choked, and the medical evidence, had been thoroughly explored by the appellant's counsel and the primary judge had highlighted it: see paragraph [21] above.

[30] In terms of the complaint by the appellant, namely that there was an absence of direction in relation to this evidence and its impact on the question of intent, it is difficult to see how any direction would have affected the deliberations on that issue. The simple fact is that the complainant had sustained three wounds to the heart itself, as well as other injuries to the hands and forearms. The wounds to the heart were "desperate" injuries, very severe and life threatening.[52] I fail to see how any direction could have diminished the force of that evidence, when seen with the evidence summarised below at [33].

[31] Another forensic witness was Ms Medic. Her evidence really went to the blood stains on the appellant's clothing and how it might have occurred. I fail to see how any direction would have assisted.

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48 AB 158.
49 At para 37.
50 AB 207.
51 AB 220.
52 As described by Dr Mahoney: AB 207.

[32] That, then, focuses attention on the absence of directions in relation to the only point addressed in oral submissions, namely that concerning the verbal exchange "Are you going to kill me?" and the answer, "Yes". It is to that issue which I now turn.

[33] The trial was of short duration and the jury had before them evidence of a number of facts that went to the question of intention. Putting them in chronological form they were:

(a) on the morning of the attack the appellant questioned his then partner, Ms Bonny, about where the heart was situated, on which side of the body and how far up; the appellant then tried to find where Ms Bonny's heart was, and for that purpose he prodded at her chest with his fingers; the appellant told her that he was going to go to the library and look it up in some books;

(b) when the appellant left the house some time after that episode, he took a blue lunch box with him; there was a knife in the lunch box;[53] that knife was used in the attack on the complainant;

(c) Ms Bonny said that the appellant's car had three or four cans of unopened alcohol in it, but at the time she could not smell any alcohol on him; nor could anyone else;

(d) the appellant met the complainant at her house and spent some time talking to her whilst having a couple of cups of tea or coffee, and a cigarette; the ostensible reason for the meeting, and the topic of conversation, was in relation to some goods of the complainant which had been stolen, and the appellant saying he could reveal where they were;

(e) the appellant put his arm around the complainant as they were preparing to depart, and put his thumb up against her chest bone, measuring underneath the rib cage; at that time he held a knife in his hand;

(f) he used his thumb to measure at a point near where the two rib cages meet, and he was pushing up with it underneath her rib cage;

(g) the appellant said to her, "You won't be telling anybody where the stuff is, where your stuff is";

(h) he then turned the knife around and pushed against her, stabbing her in the same place where he had held his thumb;

(i) he then took the knife out and stabbed her again;

(j) at that point the complainant realised she was in danger and said, "What are you doing? What are you doing?", and "Are you going to kill me?"; the appellant answered, "Yes";

(k) on one version by the complainant the appellant then stabbed her again, at which point she started to retaliate, screaming, screaming for help and struggling;

(l) another version by the complainant did not include the third episode of stabbing, after the question, "Are you going to kill me?";

(m) the complainant pulled away from the appellant, at which point he "came at me with a knife more or less front on, and I defended myself"; she did that by putting her arm in the air "while he was bringing the knife down"; and

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[53] Although the knife had been in his possession for some weeks.

(n) the appellant then put the knife against the complainant's throat and was about to cut her throat when she stopped the knife by grabbing hold of it.

[34] Of all the matters in that sequence of events, the focus of the appellant's complaint was the failure of the judge to deal in the directions with the two versions concerning the question, "Are you going to kill me?" and the answer, "Yes". On one version there was another stab after that was said. On the other version, there was no evidence of the stab after that was said.

[35] In my respectful opinion the failure to deal specifically with that aspect in directions cannot be demonstrated to lead to a miscarriage of justice. The jury had very compelling evidence pointing to an intention to kill, quite apart from the verbal exchange. Whilst it might be said that merely to take a knife in order to attack someone is not necessarily indicative of an intention to kill, as opposed to cause grievous bodily harm, I do not think the same can be said of the evidence concerning the appellant's efforts to measure where the heart was, then doing that on the complainant, stabbing twice in that very spot, and prefacing that with the statement: "You won't be telling anybody where your stuff is". I mention that comment and the two occasions of stabbing, simply to deal with those events that were unequivocally prior to the critical verbal exchange.

[36] In my view, even if the verbal exchange about whether the appellant was going to kill the complainant was not followed then by another stabbing, there was nonetheless very powerful evidence that a jury could easily understand, and weigh on the question of intent to kill. To use the words of the High Court in *Domican*, I do not consider that the failure of the trial judge to deal specifically with the verbal exchange was necessary to ensure that the jurors had sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence. In my view the primary judge correctly identified[54] that "the intention to kill … is the central element to which you need to direct your attention for present purposes".

[37] To my mind the matter can be tested this way. Assume that the evidence of the verbal exchange was not followed by a further incident of stabbing. The jury were then faced with the evidence to which I have referred, including the deliberate attempts by the appellant to investigate how one would identify where the heart was on the diaphragm with a thumb, telling the complainant that she "won't be telling anybody where your stuff is", then stabbing her at the very point he had determined with his thumb, and stabbing again. The medical evidence established that these were deep wounds of potentially fatal character. Given this evidence alone is sufficient, how can it then be said that the trial miscarried because the jury were not given a specific direction about the complainant's evidence of the verbal exchange and its timing with the third stab?

[38] In my view the appellant's contentions in this regard have a certain air of unreality about them. The contention is that whether the question and answer ("Are you going to kill me?", "Yes") was followed by a third stab or not, would or could create doubt on the question of intent. This was, on either case, a question and answer in the course of the appellant stabbing deeply at the location he had measured as reflecting where the heart was, and after he had told the complainant

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54 AB 276.

that she was not going to tell anyone where her stuff was. I do not accept that it was reasonably possible that the jury's deliberative process miscarried for that reason.

[39] In my opinion the timing of the "Are you going to kill me?" question and answer does not critically impact on the question of intention as the appellant contends. The question and answer were in the midst of the stabbing either way. Even if it followed the third stab I consider that they were so closely timed to the act itself that they were indicative of intent to kill. It would be different if there was an appreciable time lag between the act of stabbing and the verbal exchange, but there was no such thing.

Conclusion

[40] I would dismiss the appeal.

[41] As to the ground that the verdict was unsafe and satisfactory, I agree with what North J has said in paragraph [90] of his reasons.

[42] **NORTH J:** On 14 June 2012 the appellant was convicted by a jury of the attempted murder of Margaret Frances Revesz. The following day, 15 June, he was sentenced to 15 years' imprisonment. In his amended Notice of Appeal he appeals against his conviction contending that the verdict of the jury was unsafe and unsatisfactory[55] and that there was a miscarriage of justice contending that the learned trial judge "failed in his summing up to relate the relevant issues to the fact (sic) of the case".[56] The appellant also seeks leave to appeal against his sentence.

[43] Before addressing the detail of the evidence and the grounds of appeal it is convenient to mention the issues at the trial and say something of its length and relative complexity. The appellant and the complainant had been in a relationship but by 2 November 2009, the day of the offence, they had been estranged for some time with occasional contact between them. On the occasion of the offence, the appellant was visiting the complainant at her residence. The prosecution case was that the appellant stabbed the complainant a number of times in the upper abdomen, just below the ribs with a knife causing injuries to her heart that were life threatening. Count 1 charged on the indictment was attempted murder,[57] alternatively count 2 charged malicious act with intent.[58] As a matter of law a further alternative verdict of unlawfully doing grievous bodily harm[59] could have been taken from the jury were it to have found the appellant not guilty of count 2.[60] As it transpired because the jury convicted the appellant of attempted murder no verdict was taken from the jury on count 2 nor the alternative to that of grievous bodily harm.

[44] At the trial it was not in issue that the appellant stabbed the complainant causing her grievous bodily harm. This was made clear to the jury on two occasions before any evidence was adduced. After the arraignment when the appellant entered pleas of not guilty to counts 1 and 2 his counsel announced to the court, in the presence of the jury panel, but before the jury was empanelled:[61]

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55 Ground 1.
56 Ground 1A.
57 Section 306(2) *Criminal Code.*
58 Section 317 *Criminal Code*. In this instance, with intent to do grievous bodily harm doing grievous bodily harm to the complainant.
59 Section 320 *Criminal Code*.
60 Section 579 *Criminal Code*.
61 AR 98 l 32 – 42.

> "Could I indicate your Honour in respect of the plea in relation to count 2, there is an alternative count in fact to that – it's not necessarily pleaded and doesn't need to be – and that is a charge of unlawfully doing grievous bodily harm. My client admits to that charge, your Honour, so that the aspect of the grievous bodily harm is not in issue, your Honour".

The learned trial judge then said "It's only the intent element that's in issue?" to which counsel responded, "That is exactly right, your Honour".

[45] This matter was again ventilated before the jury by defence counsel when he took the opportunity to make an opening statement following the prosecutor's opening to the jury. Defence counsel said:[62]

> "MR FRASER: … Ladies and gentlemen you have just heard me say that I propose to make a short opening statement, and that's what it will be. You have just heard the Crown Prosecutor open the Crown case. He's given you a brief outline of the evidence he anticipates you will hear over the course of the next couple of days. Some of this evidence and indeed in respect of some of the witnesses there is no dispute as to what they say, but some of this evidence is not in dispute, and I will give you two examples just to follow on from what the Crown Prosecutor has said.
>
> Mr Baker did stab Ms Revesz. Ms Revesz suffered injuries amounting to grievous bodily harm. Those two issues are not in dispute. This isn't a who done it case. The central issue of this case is intention, is intention. Count 1 is the intention to murder. Count 2 is the intention to cause or inflict grievous bodily harm to Ms Revesz. So it's those aspects of those charges that is in dispute.
>
> Importantly, as his Honour has said to you, you should not and you must not prejudge the issues in this case. Keep an open mind throughout the trial, bearing in mind, members of the jury, that my client is presumed to be innocent and it is for the Crown to prove its case, and in this case the aspects of intention, beyond a reasonable doubt.
>
> Our case, that is the defence case, is simply this, that the Crown cannot prove beyond a reasonable doubt this element, this aspect of intention in respect of either count 1 or count 2.
>
> You will hear evidence in this case, members of the jury, amongst other things, that my client stopped stabbing Ms Revesz in circumstances where he could have easily overpowered her. He rendered assistance. You have already heard that he performed CPR, and that, I suspect, will not be in dispute. You will hear evidence that he called the triple 0, and you will hear evidence that he waited for the ambulance and for the police to arrive. The defence says that these are some of the important matters for your consideration in determining whether the Crown has proven its case beyond a reasonable doubt. Thank you, your Honour."

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62 Supplementary AR 9-10.

[46] This issue was revisited in an exchange between his Honour and counsel when matters to be the subject of directions to the jury were considered. It was agreed that his Honour would remind the jury of the admission made by defence counsel.[63]

[47] The foregoing was acknowledged by counsel who appeared for the appellant at the appeal[64] but this beguiling simplicity might mask, so the appellant submitted, the circumstance that some matters of fact were in issue. This was foreshadowed in the appellant's written outline in which counsel submitted:

> "At trial there was no real dispute about the functional actions alleged against the appellant. The appellant's intention at the time of his unlawful acts was the primary issue at the trial. What was in dispute included the sequence of events surrounding these acts, including when the appellant said certain things relevant to intention and motive".[65]

[48] Ignoring pre-trial hearings and adjournments before the jury was empanelled and the sentence hearing on 15 June, the trial took three days[66] but this should be put in its context. The trial was short. It moved very swiftly and was efficiently conducted. On the morning of day 1 the appellant was arraigned and the jury empanelled. Following the routine formalities and his Honour's introductory remarks to the jury both the prosecutor and defence counsel made opening statements to the jury. Then at approximately 12 noon the prosecution called the complainant as the first witness. In all five witnesses were called on day 1. The trial moved quickly on day 2. Between 10.00 am and 1.00 pm the prosecution called six witnesses. By 1.00 pm the prosecution was almost in a position to close its case save for the question of some admissions that had to be formalised. At the luncheon adjournment the jury was sent away till the next day. The afternoon of the second day was devoted to the consideration of the issues in the trial, the directions on matters of law and also to discussions between counsel concerning the admissions. On the morning of day 3 certain admissions were made by the accused relating to DNA and other forensic examinations.[67] The prosecution then closed its case and counsel for the accused announced that the accused would neither give evidence nor call any evidence. The prosecutor and the defence counsel addressed the jury between 10.30 am and 12.40 pm. His Honour summed up to the jury between 2.30 pm and 3.35 pm. The jury then retired to consider its verdict and at 5.45 pm on day 3 it returned its verdict.

Evidence at the trial[68]

[49] The appellant and Ms Revesz first met in January 2007, and thereafter a relationship developed and lasted for approximately 18 months[69]. Approximately two weeks

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63 AR 253 l 27 - 255 l 35.

64 It should be noted that counsel appeared pro bono and provided considerable assistance to the court in both their written outlines and at the hearing.

65 Amicus Curiae submissions filed 5 July 2013, para 2. This issue will be elaborated upon when the grounds for appeal are considered.

66 12, 13 and 14 June 2012.

67 See exhibit 19.

68 The following draws upon a comprehensive summary of facts prepared by counsel who appeared for the appellant at the appeal that was provided for the assistance of the court. While I have drawn heavily upon counsel's summary what follows is not an exact repetition. It is my summary following a review of the transcript of the evidence.

69 AR108 l 47.

after the relationship started, the appellant moved in with the complainant. She gave evidence that initially she was not keen on having the appellant live with her, and that when she discussed it with the appellant he told her that he had nowhere else to go. As the relationship continued, the appellant's explanation for why he did not wish to leave the complainant's residence developed into statements allegedly said by him including, "I can't live without you. I can't live without you. If I can't have you, no-one will have you. I can't leave you. I've got nowhere to go"[70]. After the relationship ended, the complainant described an occasion when the appellant said to her that his father had offered him money in his Will on the condition that the appellant was married, and that he had selected the complainant to be his wife. The complainant declined that proposal.[71] The complainant gave evidence that the appellant would often ring her, and talk about reconciling with her stating that he could not live without her. She said that the conversations started to become more serious when he said things like, "Nobody else will have me" and "If he's going down, I'm coming down with him, no-one else will have me."[72] The complainant said that the appellant would on occasion attend her house and mow her lawn.[73]

[50] The complainant gave evidence of an occasion in late September 2009 when throughout the evening, she received numerous phone calls from the appellant which she ignored. Later in the evening, she received a text message from him that he had found a rape victim in a park and that he required the complainant's assistance to which the complainant replied that she was not going to assist him.[74] The next morning, the complainant felt "a little bad" for the rape victim and telephoned the appellant to find out what had transpired. The appellant told the complainant that everything was "all good", and that he had taken the rape victim to the place of a person called Maree where the alleged victim had had a shower and the appellant had looked after her for the night.[75] That day, the complainant was at Somerset Dam attending her daughter's soccer break-up function. On arriving home, the complainant discovered that her house had been broken into and that her television, laptop and some other property of hers had been taken from the house.[76] The complainant telephoned the appellant to enquire whether or not he had seen anything and the appellant responded and said that he hadn't but that there had been quite a few people at the neighbour's house[77]. After that, the appellant continued to contact her "probably once every two weeks". In these discussions, the complainant said that the appellant told her that he was attempting to get her stolen possessions back and on another occasion he told her that someone had chased him with a machete and that that was related to the theft of the complainant's belongings.[78]

[51] Turning to the events on 2 November 2009, the day before, the appellant contacted her and sought to arrange a time to meet with her because he knew "where her belongings were" and that he was going to be able to tell the complainant where they were.[79] She said that the appellant had asked her to contact him at about 10.30 am in the morning but when she did the appellant said that he could not speak

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70 AR109 l 50-60.
71 AR110 l 15.
72 AR110 l 45.
73 AR111 l 2.
74 AR 111 l 25-30.
75 AR111 l 45.
76 AR112 l 5-23.
77 AR112 l 30.
78 AR112 l 45.
79 AR113 l 15-20.

to her because he was at a funeral for a baby and asked that she call him back later. She called the appellant again at 12.30 pm and the appellant said that he wanted to meet the complainant at her house at about 1 pm during her lunch hour. She said it was the appellant who suggested the time and place to meet.[80]

[52] The complainant arranged to leave work and said that on the drive home, she saw the appellant's car parked in one of the side streets.[81] That side street was Highview Street and was not too far from the complainant's home. The complainant gave evidence that she continued on her way home and pulled into her driveway and saw the appellant pull out of a side street and proceeded to park out the front of the complainant's house.[82] The complainant said that she alighted from her car and unlocked the house. She saw the appellant "rummaging" around in either the front seat or the back seat of his car, she said that she left him be and went upstairs.[83] The complainant stated that she unlocked the glass sliding doors upstairs in the living room and put on the kettle, and she waited for the appellant to come up which he did quite soon after.[84] She said that the appellant was carrying a Refidex.[85] They then both went out onto the front verandah to have a cigarette with their "cuppa" where small chit chat ensued before the complainant said she more or less got straight to the point regarding her stolen belongings. She said the appellant told her he knew where her stolen belongings were, and he emphasised that he needed to make sure he had left town before the complainant contacted police, but that he was willing to tell the complainant the address of where her belongings were held. He then told her that it was either a residence in Gatton or Grafton - but the complainant could not recall which.[86] The complainant then suggested to the appellant that she would "Google Earth" the address of where her belongings were. In all, this process of accessing Google Maps took approximately 15 minutes, after which the complainant shutdown her computer and returned upstairs with the appellant where they had "another cuppa or a cigarette" on the front verandah.[87]

[53] The complainant then said that she told the appellant that she had to go back to work[88]. She said that the appellant then said to her, "If you tell anybody about this, these people won't be after you, they will be after your children." She responded to the appellant saying, "I don't want to go ahead with locating my stuff if my children are going to get hurt." She then said it was time for "us to go" as the complainant had to go back to work. She said she went back inside and the appellant followed her and that she then locked the glass sliding door.[89] She was then asked:[90]

> "And what happened then?-- I stepped away and David put his arms out. I thought he was going to give me like a hug goodbye, because I was like wishing him all the best in Gladstone and it was – we were saying goodbye, and he put his arm out and he held me very close to his side. It wasn't a front-on hug. It was like held towards his side,

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80 AR113 l 32-45.
81 AR114 l 11.
82 AR114-AR115.
83 AR115-AR116.
84 AR116 l 30-56.
85 AR117 l 20.
86 AR117 l 48.
87 AR118 l 57.
88 AR118 l 60.
89 AR119 l 3-11.
90 AR119 l 32 – 120 l 50.

and I didn't think much of it, and then next minute he had his thumb up against my chest bone.

And what was he doing with his thumb?-- He was measuring underneath my ribcage, and in his hand he held – had a knife.

You say he was measuring. Can you describe in fact what he was doing, and how he was doing it?-- He had this thumb, measured here where – I don't know what you really – where your diaphragm is, I suppose, and he was like pushing up with it underneath my ribcage.

All right. So where you're placing your thumb right now, is that where he placed his thumb?-- Yes.

So you're indicating there's a position just below your breast or between your breast there?-- Yep.

All right?-- It's where your two rib cages meet. There's a space there.

Okay. So you see him do that?-- Mmm.

What happens then?-- Well, I've noticed he's got a knife in his hand, and he said to me, 'You won't be telling anybody where the stuff is, where your stuff is.', and then next minute he turns the knife around and he pushes it up against me and he stabs me with it.

And you say he pushes it up against you. Where do you feel this knife? Whereabouts?-- I feel it pushed into the same place as where he had his thumb.

And what happens then?-- He pulls it out, and then he puts it back in again, and then I'm starting to like – it was all surreal. I didn't think this was happening and then all of a sudden I thought I'm in danger, and I said, 'What are you doing? What are you doing?', and I said, 'Are you going to kill me?' And he said, 'Yes.' He then takes it out and he puts it back into me again, and that's when I started to retaliate, screaming, and I started screaming for help.

All right. You say you started to retaliate, you started screaming for help. Can you tell me how you retaliated, what you did, or what happened?-- By then David had the knife out of me. I started to struggle and I was starting to scream. I pushed him away from me and that's when he actually came at me with the knife more or less front-on, and I defended myself.

And what did you do? You say you defended yourself. What did you do?-- I put my arm up in the air while he was bringing the knife down.

What happened then?-- Somehow we got in the position where David was behind me and he had one of his arms around me, holding me. I had one arm free and he was – he brought the knife up against my throat and he was about to cut my throat and I once again stopped the knife.

> Now, you say you stopped the knife. How did you stop the knife?— I grabbed hold of the blade.
>
> Right. And when – when you grabbed hold of the blade, did you feel anything?-- No.
>
> Now, what happened then?-- I was still fighting. We were still fighting. He then put his hands around my throat and started to choke me.
>
> Yes?-- I then collapsed. I'm on the floor, and the last thing I remember for that time is a hunk of wood coming down on my forehead.

[54] She was then asked questions concerning her observations or description of his manner:[91]

> "First things first. You spoke about David coming up to your side. Can you tell the Court, what was his demeanour like at that stage? How was he acting?-- Incredibly calm, just very calm. There was no aggression. He just seemed calm.
>
> Now, you also talked about him saying something to you after you asked a question of him. How did he sound when he answered your question?-- Calm.
>
> Now, how close were you when David was holding you? How far apart were you, would you say?-- We couldn't get any further apart. He had me held incredibly close to him. Like, I was – there was no – no gap between us.
>
> Were you able to – while he was that close, able to smell alcohol or anything like that?-- Nothing.
>
> Have you seen David intoxicated before?-- Certainly.
>
> How many times do you think you might have seen him intoxicated?-- 30 times, 50 times.
>
> All right. Now, was his behaviour anything like what you had seen at those times he was intoxicated?-- Absolutely not".

[55] The complainant described the knife with a long blade, said that she had not seen that knife before, and to her knowledge the knife was not in her residence the morning before she left for work.[92] The appellant then said "Oh Margie, what have I done? I love you. I will be going away for a long time for this. I love you. Do you love me? Will you wait for me?" to which she responded, "Yes, I'll wait for you. Yes, I love you". She said that the appellant then started to perform CPR and that she told him to call 000. The complainant then gave evidence that she blacked out again, until she could hear some voices and she recalls hearing the appellant's voice saying, "She won't be in. She won't be coming back in. She's not feeling very well." She then went on to give evidence that she faded back out and then

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91 AR120 l 55 – 121 l 21.

92 AR125 l 5-19.

back into consciousness when she then heard the appellant say, "Yes, I've stabbed her. Yes, I've stabbed her."[93] She recalled the paramedics attending and receiving some treatment and that she recalled waking up in hospital a couple of days later.[94]

[56] In cross-examination, the complainant conceded that she had not included in her original police statement, her evidence about the appellant speaking to her about the appellant's father's Will.[95] It was suggested to her that the appellant had never said those things. The complainant rejected the proposition. It was also put to her that the appellant was estranged from his father, to which the complainant disagreed and said that she had visited the appellant's father with the appellant twice. She accepted however that the appellant did have genuine problems with his father.[96] It was also suggested that the appellant had contacted her before he mowed the complainant's lawn. The complainant disagreed. It was said to the complainant that her son was not much help around the house and he did not volunteer to mow the lawn. The complainant agreed with these propositions.[97]

[57] The complainant was cross-examined[98] upon the contents of her police statement about when she first saw the appellant's vehicle on the way home to meet the appellant, and what she had in fact said at trial. It was also suggested to the complainant that the reason the appellant had brought the Refidex with him was that he was returning it to the complainant. The complainant's response to that suggestion was, "maybe."[99] When asked whether she knew how she sustained the injuries to her arms and her hand, she responded that she did.[100] It was put to the complainant that on 20 November 2009, she participated with police in a "walk-through" and that on that occasion she was asked about how she sustained the wound on her arm and that she had then stated during the walk-through that she did not know and did not recall.[101] The complainant gave evidence that when she was struck with the log by the appellant, it had been a "full force blow".[102] She was then cross-examined about evidence that she gave at committal, and then qualified her evidence by saying that whilst she did not actually remember the force of it hitting her head, she did remember looking at it coming down onto her head.[103]

[58] The complainant was then cross-examined about the differences between her evidence at the trial and earlier statement concerning the stabbings and the timing of the verbal exchange.[104] The complainant agreed that in her statement to police, she did not refer to any stabbing after that verbal exchange had occurred.[105] When counsel returned to this issue the complainant reiterated her evidence that after she had asked the appellant whether he was going to kill her and his affirmative response, that he did stab her once again. Although the complainant accepted that it was possible her statement was correct[106] she maintained that she remembered asking the

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93 AR125 l 34-60.
94 AR126 l 10.
95 AR134 l 50.
96 AR135 l 5-15.
97 AR135.
98 AR136.
99 AR138 l 35.
100 AR138 l 55.
101 AR139 l 1-35.
102 AR140 l 30.
103 AR141 l 45.
104 Commencing at AR142.
105 AR143 l 27.
106 AF146 l 50.

question and then being stabbed again.[107] The complainant was then reminded about her evidence at committal where she said that she had been stabbed two times[108] and that she had not been stabbed after the alleged verbal exchange. Ultimately the complainant accepted that that is what she had said at committal.[109]

[59] The complainant also agreed in cross-examination that the appellant was a strong man.[110] She accepted that she had said to police that the appellant could have used so much more force than he did.[111] It was then suggested to her that the appellant had told the complainant that he used to take ecstasy. She rejected that proposition, but then went on to say that the appellant had told her that after their relationship had finished that he had overdosed and taken five ecstasy tablets, but she said that when she was living with the complainant, she never knew him to take ecstasy and the only drug which she knew he consumed was cannabis, which she said he did not do particularly often.[112] She accepted however that the appellant had left a cannabis grinder at her residence, and that he would, while living with the complainant, go outside to smoke cannabis. Further in cross-examination, it was suggested to the complainant that the appellant had helped her repay the loan on her car. She accepted this proposition.[113] She rejected that she owed the appellant money, and said that he owed her money from time to time. She was asked whether any of her stolen property was recovered and the complainant said that it had not been.[114]

[60] The second witness was Marie Bonny who said that she had known the appellant for between 15 and 16 years, and that he was the father of her son. She said that although her relationship with the appellant had ended some 10 years before he still resided with her "on and off" and that as at 2 November 2009, the appellant was residing with her maybe three nights a week.[115] On the morning of 2 November 2009, Ms Bonny said that the appellant came home early in the morning and took their son to school. He then returned to the residence and sometime later, they both went to collect their son from swimming and then went together down to the Strathpine Shopping Centre.[116]

[61] Ms Bonny stated that she recalled a conversation with the appellant earlier that morning. She then said that this conversation occurred before they went to collect their son from the pool.[117] She said that the appellant wanted to know where the heart was situated, on which side of the body and how far up. She said that the appellant had been looking for books in the house and then started to try to find where her heart was, and that he prodded at her chest with his fingers. She said that the appellant stated he had a bet with one of his workmates about where exactly the heart was. She then said that the appellant told her that he was going to go to the library and look it up in some books. Ms Bonny said that after they had collected their son from swimming, they stayed at the Westfield Shopping Centre for probably and hour to two hours. She said that on the way back to her house from

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107 AR147 l 1.
108 AR147 l 17.
109 AR147 l 25 – 148 l 38.
110 AR143 l 55 ff.
111 AR144 l 7-10.
112 AR145 l 30-50.
113 AR149 l 20-35.
114 AR150 l 28.
115 AR155.
116 AR155.
117 AR156 l 56.

the Westfield Shopping Centre, the appellant appeared erratic and was tapping his fingers on the dashboard and became impatient. The appellant then said to Ms Bonney that he was meeting someone and when they arrived home, she ironed some black jeans and found some clothes for him to wear while he was having a shower. She said that she was not able to smell any alcohol on the appellant, but recalled three or four cans of unopened alcohol in the car. When they were at home the appellant received a telephone call and she could hear a female voice at the other end but did not know who it was. She recalls the appellant saying, "I'm late, I'm late, I'll be there soon" and that he then got dressed and went out.[118]

[62] She said that when he left, he took a blue lunchbox with him. She said that at the time he left, she knew there was a knife in the lunchbox. She knew that because it was her knife, and that the appellant was taking it to work to sharpen it for Ms Bonny.[119] She identified the knife that had been tendered as the knife that she spoke of.[120] Later that day, she received a telephone call from the appellant in which he hysterically yelled, "I killed her. I killed Margie. I stabbed her. I stabbed her." Ms Bonny said that she could hear moaning in the background. Ms Bonny said that she told the appellant, "Ring the police and the cops and get her help."[121]

[63] In cross-examination, Ms Bonny accepted that the appellant had had the knife in his possession for a number of weeks, that the cans of alcohol in the car were 'Tooheys New' beer and that the appellant had told her that a person by the name of Roxie had made him buy a carton, and that he said that they had drunk half a slab already.[122] Ms Bonny was then asked about the conversation she had with the appellant after the complainant had sustained her injuries. She accepted that in her statement she said that the appellant had said to her, "I've killed Margie. We've had a big fight". Ms Bonny also agreed that the appellant had said to her, "Look, I'm going to nick myself" and that he was very upset and distraught.[123] Ms Bonny said that she knew the appellant often consumed cannabis. She also agreed that the appellant had told her that he had consumed ecstasy.[124] She also accepted that the appellant had told her that he had been drinking on that day and had, with Roxie, drunk half a slab.[125]

[64] In re-examination, Ms Bonny agreed that she had seen the appellant intoxicated in the past, but that on this occasion he did not appear to be affected by alcohol or cannabis[126].

[65] The third witness was Ms Bonny's daughter, Hayley Salmon. She recalled that on 2 November 2009, she went to swimming with her little brother to assist him, and that she was then picked up by the appellant and her mother. She said that they went shopping for a few hours before the appellant drove them back to her mother's house. She said that when the appellant collected her from the pool, she described his demeanour as being "fine". However she said that on the way home from the Shopping Centre, he had become very agitated like he had to be somewhere, but she

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118 AR157 l 58.
119 AR158 l 19.
120 AR159 l 20, Exhibit 7.
121 AR159 l 44-53.
122 AR160 l 46.
123 AR161 l 20-39.
124 AR161 l 55.
125 AR162 l 5-12.
126 AR163.

said he "wasn't drunken."[127] She said that she then waited there until she got ready to go to work. She said that she had asked the appellant to take her, but he said he was unable to as he had other plans.[128] In cross-examination, Ms Salmon agreed that the appellant had seemed a little bit agitated, and that he appeared to be in a hurry. However she accepted that he was not in an awful mood or anything like that. She said that he was his normal self, joking with her.[129]. She accepted that later in the day when he was saying goodbye to Ms Salmon that he was back in the same happy mood.[130]

[66] Sharon Mighall gave evidence that she knew the complainant through their work together at Brendale Windows where her duties included receptionist. She knew the complainant as a work colleague and also through the social club, through which they would socialise three or four times a year.[131] Ms Mighall said that she knew the appellant had been in a relationship of sorts with the complainant. Her involvement with the appellant was limited to being through the social club and when he would pop in and see the complainant at work. She said that he would stop in on almost a daily basis to see the complainant at work.[132]

[67] On 2 November 2009 she took a call from the complainant, after the complainant had gone out for lunch. The complainant asked to speak to "Kenisha". Ms Mighall said that she put the complainant's phone call through to "Kenisha"[133]. About 25 minutes later she received a telephone call from the appellant who asked to speak to "Jo Jo", a reference to Joanne Campbell who was a good friend of the complainant. Ms Mighall responded to the appellant and said that "Joanne" was sick that day and asked if there was anything she could assist with. The appellant then said that he needed to speak with "Kenisha", however "Kenisha" was on another call such that Ms Mighall was unable to put the call through. She said that the appellant then said, "Stop fuckin' about Shaz. This is David. I need to speak to Kenisha" to which Ms Mighall responded, "I'm not fuckin' about. Kenisha is on a call. I can't put you through". She then said that the appellant said it was an emergency and that he needed to speak with "Kenisha". Ms Mighall then said, "Well if it's an emergency maybe I can help you"[134]. She said that the appellant then said, "Oh, don't worry about it. I'll fuckin' call back later" and hung up. She said that the appellant while not shouting, was agitated.[135]

[68] In cross-examination, Ms Mighall agreed that the appellant was very agitated and she said that he sounded desperate.[136]

[69] The Crown then called Kenisha Busby. She recalled that on 2 November 2009 she worked with the complainant. She said that on that day she became aware that the complainant had left the office sometime after lunch, approximately around 1 pm. She said that at around that time, she took a call from the complainant which lasted about 5-10 minutes at the most. She said that thereafter she received some

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127 AR165 l 7-25.
128 AR164 l 54.
129 AR165.
130 AR166.
131 AR167 l 5-27.
132 AR167 l 25-44.
133 AR168 l 1-10.
134 AR168 l 54.
135 AR169 l 1-12.
136 AR169 l 40-55.

information, and went to the complainant's house.[137] She let herself inside and walked up the stairs. She said that at the top of the stairs in the dining room, she saw the complainant was on the ground curled on her side. Two paramedics were attending to her. Ms Busby says that she could see blood coming from the complainant's chest, and that there were bloody tea towels on the floor beside her.[138] When asked why she went to the house she said that she had received a message that the appellant needed to speak to her urgently. Ms Busby said that she then tried to contact the complainant on her mobile and then her home phone but was not able to do so. She then said she was able to contact the appellant on his mobile and she had a discussion with him. She said that she asked the appellant what was going on and that he responded that the complainant was sick and wasn't coming back to work that afternoon. Then after some further exchange the appellant said, "I stabbed her". She then said in response, "Are you fucking kidding?" and he then responded, "No, I'm not fucking kidding. I stabbed her". Ms Busby said that he then said, "I've called an ambulance" to which she responded, "I don't believe you. I'm calling an ambulance". She said that in that telephone call, she could hear the complainant moaning.[139] Ms Busby then gave evidence that she then went around to the complainant's house.

[70] The last evidence the jury heard on day one was the recording of the triple-0 call made by the appellant.

[71] The first witness on day two was Tobie Leighton, a paramedic who attended the scene.[140] On arrival upstairs she saw a female person lying on her back; there was a man crouched over her smoking a cigarette and two police officers in the room as well.[141] The woman looked very pale and sweaty, which indicated that her circulation was not as good as it should have been. She said that the woman was complaining of tightness in her chest and difficult breathing. She was blue around the lips.[142] When she removed the woman's upper clothing she saw "three or four" large wounds. Fatty tissue was visible indicating deep wounds. The wounds were located in the mid sternum – below the bottom of the breasts – and were approximately two centimetres long each.[143] She also observed cuts on her hands and forearms.[144] Ms Leighton recalls brief statements by the woman including "he hit me" and "he did it."[145] Ms Leighton said that she asked the man who was smoking a cigarette about what was used to cause the injuries he picked up the knife and showed it to her.[146] Ms Leighton gave evidence that Dr Rashford, the medical director of the Queensland Ambulance, attended the scene. He came with a portable ultrasound machine which was used to examine the woman and revealed that the pericardium had been pierced and blood was filling around the outside sac of the patient's heart. Dr Rashford ordered that the patient be transferred urgently to the Royal Brisbane hospital for surgery.[147] In cross-examination Ms Leighton confirmed that a tea towel had been placed on the patient's chest to stop bleeding.

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137 AR171l 1-45.
138 AR171 l 47-58.
139 AR172 l 1-35.
140 AR179.
141 AR180 l 24.
142 AR181 l 30-42.
143 AR182 l 10-30.
144 AR182 l35.
145 AR182-AR183.
146 AR183 l 41.
147 AR184 l 40.

She agreed that the male person present was not aggressive and that he had been cooperative.[148] It was suggested to her there were only two chest wounds but her recollection was there were three or more. However she conceded that she could not "put that in stone".

[72] The Crown then called a police officer, Paul Norris[149] who said that on arriving at the scene he saw a male standing on the deck on the second level[150] and that when he entered and went upstairs, he noticed a female lying on the floor.[151] He identified the man he saw on the deck as the appellant.[152] Mr Norris said that a QAS officer asked the appellant what had been used to cause the injuries when the appellant then pointed and picked up a knife, which was to the right-hand side of the basin in the kitchen.[153] He said that he observed the appellant who appeared quite calm and did not appear intoxicated.[154] In cross-examination Mr Norris agreed that he did not have the appellant under observation for a long period of time and nor did he have any lengthy conversations with him. He also could not discount the fact that the appellant was in shock.[155] Mr Norris also confirmed that the appellant was rendering assistance to the complainant when they arrived and was cooperative.[156]

[73] The next witness was Craig McKenzie, another police officer who attended the scene.[157] He said that on arriving he saw a man on the front patio who he later identified as the appellant.[158] He entered and proceeded upstairs where he saw the appellant kneeling over a female, who was lying on the ground. The appellant was holding a tea towel on her chest. He heard the appellant say "It's all right, Margie. Help's here."[159] Mr McKenzie gave evidence consistent with other witnesses that the appellant showed the knife that was used to inflict the injuries on the complainant.[160] Mr McKenzie then warned the appellant and the appellant declined to speak to him.[161] Mr McKenzie said that he had virtually no communication with him after that, but was with him at the scene and was in his company for approximately 30 minutes.[162] The appellant did not appear intoxicated to him.[163] In cross-examination Mr McKenzie agreed that he only had a short conversation with the appellant, but he did add that he walked the appellant down the stairs.[164]

[74] Dr Ian Mahoney, a forensic medical officer[165] who had been retained to review the treatment records of the complainant was called. His evidence was that the complainant arrived at the Royal Brisbane & Women's Hospital at approximately 3.18 pm in the afternoon, and was taken immediately into the operating theatre.

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148 AR186 l 45.
149 AR190.
150 AR190 l 40.
151 AR191 l 38-45.
152 AR192 l 1-10.
153 AR192 l 34.
154 AR193 l 45.
155 AR194 l 1-9.
156 AR194.
157 AR196.
158 AR197 l 15.
159 AR197 l 10-40.
160 AR198-199.
161 AR199 l 20.
162 AR199 l 30-45.
163 AR200 l 10.
164 AR220 l43.
165 AR202.

The operation notes record that there were multiple stab wounds to the precordium which is a reference to the area in front of the heart, which is the front of the chest.[166] He went on to say that the records documented three stab wounds to the heart. He also observed that they documented an injury to the right index finger and an injury to the middle of the right forearm.[167] Dr Mahoney said that the records indicated that the most significant wound was to the left side of the complainant's sternum, and that the bulk of the references to the wounds refer to there being three chest wounds, but he added that one of the ambulance officer's notes refer to four chest wounds.[168] Dr Mahoney then explained that internally there were three wounds to the heart itself. One was in the right atrium and two were in the right ventricle. He said that these were "desperate" injuries and that they were very severe and life threatening.[169] He said that without treatment death would be imminent.[170] He went on to explain that the wounds to the atrium and ventricle also penetrated the muscle of the heart.[171] He said that the injuries to the heart were consistent with being inflicted by a knife and that a knife was the commonest cause of wounds of that type to the heart.[172] Dr Mahoney said that while there were three wounds in the chest, and three wounds in the heart, he was not able to say whether each wound in the chest related to a wound in the heart. He said that while the three wounds to the chest were consistent with the three wounds to the heart, the records did not specify which was related to which.[173]

[75] Dr Mahoney also gave evidence about the further injuries that were recorded in the notes which included a laceration to the forehead, one to the left forearm, one to the right forearm and one to the right hand.[174] Dr Mahoney said that the injury to the right forearm could be consistent with a defensive wound.[175]

[76] In cross-examination Dr Mahoney agreed that the bruising to the right arm, which was described as substantial, could be explained from blood tracking down from the right forearm wound.[176] No injuries to the neck or throat area were documented. He agreed that if someone had been choked to the extent that they collapsed, one would expect to see injuries to that area and that there was no evidence of those kinds of injuries described in the notes.[177] He also agreed that if someone was struck with a full force blow with a log to a head, that you would be likely to see injuries including bruising, a lump or an egg on the head, or a superficial injury to the skin caused by the pressure and movement. He agreed that he did not see anything in the notes or chart that was consistent with the complainant having sustained any injuries of those kind.[178] He agreed in cross-examination that there is a phenomenon called the drum effect, that where a sharp object penetrates the skin and gives way, the sharp object can go straight through[179] and that it was possible, it

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166 AR204 l 10-25.
167 AR204 l 20-32.
168 AR206 l 20-40.
169 AR207 l 45-55.
170 AR208 l 5.
171 AR210 l 20-23.
172 AR211 l 7.
173 AR211 l 50 to AR212 l 11.
174 AR213 l 15-27.
175 AR217 l 10.
176 AR218 l 40-50.
177 AR219 l 10-40.
178 AR220 l 20-55.
179 AR221 l 20-40.

could not be ruled out, that one stab wound could have caused the three wounds to the heart.[180]

[77] Ms Amanda Medic, a forensic scientist employed by the Queensland Police, was called. She examined the appellant's clothes and identified that there was blood on the shirt and the jeans that the appellant was wearing.[181] She identified that there was a projected blood stain on the left sleeve of the shirt that the appellant was wearing, and that the presence of that projected blood stain was consistent with the wearer standing next to someone who had been stabbed.[182] In cross-examination, she accepted that that projected blood stain could have been caused by someone who was flicking blood off their hand.[183]

[78] The final witness was the arresting officer, Clinton Olsson. He arrived at the scene after officers Norris and McKenzie, and then took over the investigation. He said that on 2 November 2009, he spent approximately 2-3 hours in the company of the appellant at various locations. He said that throughout that period of time, he did not observe any indicia of intoxication.[184] He was taken through the photographs of the scene and confirmed that various items were in fact there, including the log that the complainant said the appellant struck her with.[185]

[79] In cross-examination, he accepted that there was no toxicology report obtained from the appellant.[186] He was also cross-examined about a conversation, recorded by a person Hoffmann, wherein the appellant stated that he had consumed "grog, pot and a bit of ecstasy" and also had consumed about 10 Tooheys New.[187] He also accepted that Hoffmann asked the appellant what his intoxication was on a scale of 1 to 10, and that the appellant responded 6, 7 and that the appellant stated that he had taken half a tablet of ecstasy the day before.[188] Mr Olsson also agreed that the appellant said to Hoffman that he was still feeling the effects from the tablet, and further that he had had five or six cones of cannabis at about 12.30 pm, one o'clock.[189] Mr Olsson also accepted that people who are under the influence of drugs can mask the extent of that intoxication to some extent.[190]

The Summing Up – Its Structure and Content

[80] His Honour followed the format of the general directions suggested by the Benchbook[191] in his instructions to the jury concerning the consideration of the evidence, proof of matters, inferences, admissions and the assessment of the credit and reliability of witnesses, noting that intention was central to the two charges the jury had to consider.[192] He reminded the jury that counts 1 and 2 were alternative charges, that it was a matter entirely for the jury in what order they considered the charges but he suggested that they might start with count 1 as it was the most serious charge.[193]

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180 AR224 l 10-20.
181 AR228-AR230.
182 AR230 l 10-25.
183 AR231 l 20-26.
184 AR233 l 1-30.
185 AR235-AR236.
186 AR240 l 10-40.
187 AR241 l 10-30.
188 AR241 l 30-40.
189 AR243 l 29-45.
190 AR244 l 1.
191 Queensland Supreme and District Court Criminal Benchbook.
192 AR271-272.
193 AR272-273.

His Honour then, consistently with the Benchbook, gave appropriate directions upon count 1, attempted murder.[194] In the course of those directions his Honour made his first allusion to the evidence:[195]

> "Where a person is physically attacked, the phrase 'by means adapted to its fulfilment' basically requires you to ask whether the means were such as to be capable of killing someone and, ladies and gentlemen, you may not perhaps need to dwell very long on the proposition that stabbing a person in the chest with a knife may be a means adapted to the fulfilment of an intention to kill.
>
> The third element is that there must be a manifestation of the intention to kill by some overt act. That simply means that there was some act that, if an observer had been standing by, the observer could have seen. Once again, stabbing someone in the chest is an overt act that you might think is something that an observer would have seen as a manifestation of the intention to kill."

[81] Concerning the element of intention involved in the first count his Honour made two important references to it:[196]

> "Now, let's talk about each of those elements. The first is that the defendant had an intention to kill at the requisite time. As I've said, it is an essential element of the offence that the defendant had an intent to kill Ms Revesz at the time of or during the relevant act or acts inflicted on her. Anything less, anything less than intent to cause death, is insufficient. **It is not sufficient, for example, that the defendant was recklessly indifferent as to whether Ms Revesz lived or not, nor is it sufficient on a charge of attempted murder that the defendant intended to do grievous bodily harm. The prosecution must prove beyond reasonable doubt that the defendant had an intention to kill.**"
>
> (Emphasis added.)

And then, shortly after[197]

> "In relation to the second two elements, ladies and gentlemen, there really has been no issue on the case before you. I think it's fair to say that it's the intention to kill that is the central element to which you need to direct your attention for present purposes. The concept of attempted murder is really in a nutshell that someone unlawfully attacks or does something else to another person intending to kill them and using means capable of doing so but fails."

[82] When his Honour turned to count 2 he correctly reminded the jury that the appellant had, through his counsel, admitted unlawfully doing grievous bodily harm.[198] Then he instructed the jury of the intent specific to that count. He began:[199]

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194 AR273-278 including as part of these directions the use that might be made of inferences and general instructions upon intoxication in the context of intention.

195 AR275 l 40 – 276 l 10.

196 AR274 l12-35.

197 AR276 l 17-30.

198 AR279 l 10.

199 AR279 l 19-35.

> "There is a specific criminal offence in the Criminal Code and this is the offence that's on the indictment and that's the offence of causing grievous bodily harm with intent to do grievous bodily harm. So for the purposes of this trial you can take it as accepted that the defendant caused grievous bodily harm. The question for you, if you are at the stage of considering count 2 on the indictment, the question for you is the further question which is whether he intended to cause her grievous bodily harm."

And then, after instructing the jury of the definition of grievous bodily harm, he continued:[200]

> "But the question for you for the purposes of considering count 2 is not did he cause her grievous bodily harm – that's not an issue, it's accepted that he did cause her grievous bodily harm – it's "Did he intend to cause her grievous bodily harm?" Once again, the burden is on the Crown to prove that. The burden is on the Crown to prove that beyond reasonable doubt. Everything that I said to you before about intention in relation to the count of attempted murder applies equally to intention to cause grievous bodily harm for the purposes of count 2.
>
> Similarly, for the purposes of this particular section, intent to cause grievous bodily harm is a specific intent and so the considerations that I explained to you before about intoxication are equally appropriate. If you, having considered the evidence, if you accept that there was some degree of intoxication, the extent and the nature of that intoxication, ladies and gentlemen, is a matter for you to determine. If there was any intoxication, that's a matter for you, but whether and to what extent that intoxication impacted on his capacity to have the necessary intention is a matter that's relevant to consider."

[83] His Honour then turned to the addresses by counsel and the evidence lead before the jury. He began[201]:

> "Now, [counsel] both addressed you this morning and I know that their addresses are ringing fresh in your ears and are fresh in your mind, so I'm not going to delay you by giving an extensive summary of what they said. Sometimes in trials that go for a long time it's necessary and where counsel's addresses go for a long time it's necessary to give the jury a more extensive summary. I don't need to do that because I know that you've been paying close attention to the evidence over the last couple of days and you've paid close attention to what both counsel said this morning.
>
> Let me just touch on what you might think are some of the highlights of the submissions that were made to you this morning."

What followed was a summary of the closing addresses by the prosecutor and counsel for the appellant in which his Honour referred in passing, but not in detail, to the evidence of some of the witnesses in so far as it bore upon the issues identified by both counsel. There was no separate direction by his Honour which

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200 AR279 l 55-280 l 40.

201 AR281 l 49 – 282 l 15.

would have reminded the jury of the evidence and how, depending upon what evidence the jury accepted they might use the evidence in considering their verdict.[202] Neither counsel made an application for redirection.[203]

The Rival Contentions – Summing Up

[84] On behalf of the appellant it was submitted that the learned trial judge had failed to relate the issues in the case to the evidence given at the trial and thus had not complied with the obligation upon a trial judge imposed by s 620 of the *Criminal Code* to properly instruct the jury. Focussing on the different intents inherent in the alternative counts it was submitted that the jury should have been reminded of the evidence that bore upon the issue of intention. Specifically it was contended that the jury should have been told they had to consider if they were satisfied whether or not the verbal exchange in which the complainant alleged she asked, "Are you going to kill me?" and his alleged reply, "Yes"[204] occurred.[205] If the jury was satisfied the words were said the timing of the exchange was important because upon that the complainant had given conflicting versions.[206] More particularly, it was submitted, if the exchange occurred after the last of the stabbings it raised the possibility of a doubt concerning the intent necessary for attempted murder. Counsel further submitted that, in the circumstance where it had been demonstrated that the complainant had given conflicting versions, directions concerning the weight to be given to the complainant's evidence[207] be given and it was important that the jury's attention be drawn to that. Counsel submitted that the way in which his Honour adverted to this issue in his summary of the way in which the Crown prosecutor had addressed this issue in his closing address served to obscure the importance of this issue.[208]

[85] For the respondent it was submitted than an examination of the evidence given by the complainant at trial, including the cross-examination, demonstrated that very few aspects of her evidence were disputed and that few factual matters were in dispute. That in the way in which the trial was conducted and the questions raised by the parties an inference could be drawn concerning the appellant's state of mind from largely uncontested evidence. Accordingly it was unnecessary to recite factual matters separately and it was suitable for the trial judge to highlight the factual issues in combination with his summary of the rival contentions. Thus, it was submitted, his Honour's approach equipped the jury with sufficient knowledge and understanding of the evidence to enable the jury to discharge its duty.

Discussion

[86] The obligations of a trial judge in summing up to the jury which are recognised in s 620 of the *Criminal Code* were referred to by McHugh J in *Fingleton v The Queen*[209] where his Honour said:[210]

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202 In the conventional way his Honour told the jury that if they required assistance he would give them further directions on the law or remind them of any evidence. There was no request from the jury to be reminded of any evidence.

203 In fact defence counsel expressed satisfaction with the summing up in emphatic terms, AR294 l 27-49.

204 See para [15].

205 Bearing in mind the complainant was challenged upon this. See AR149 l 45-55.

206 See para [20] above.

207 Whether directions were required by reason of s 18 and s 102 of the *Evidence Act* 1977 or by reason that the complainant's admission that she had said otherwise on earlier occasions affected the reliability of her evidence.

208 AR285 l 42.

209 (2005) 227 CLR 166.

210 (2005) 227 CLR 166 at [77]-[80].

"77 Section 620 of the *Criminal Code* declares that, after the evidence has concluded and counsel have addressed the jury, 'it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.' The court does not discharge that duty by merely referring the jury to the law that governs the case and leaving it to them to apply it to the facts of the case. The key term is 'instruct'. That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts. As McMurdo P said in *Mogg*, ordinarily the duty imposed on a trial judge in respect of a summing-up requires the judge to identify the relevant issues and relate those issues to the relevant law and facts of the case. In the same case, after referring to s 620 Thomas JA said:

> "The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken."

(Footnote omitted.)

78 The statements of the learned President and Thomas JA show that the law concerning a summing-up in trials under the *Criminal Code* is no different from the law in trials at common law. Their Honours' statements are consistent with the statements of Gaudron A-CJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen* concerning the duty of a trial judge in jurisdictions that have no counterpart to s 620:

> "The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes."

(Footnotes omitted.)

79 As Diplock LJ pointed out in *R v Mowatt*, the 'function of a summing-up is not to give the jury a general dissertation upon some aspect of the criminal law, but to tell them what are the *issues of fact* on which they must make up their minds in order to determine whether the accused is guilty of a particular offence'. (Emphasis added.)

> 80 A summing-up is radically defective unless it adequately explains 'to the jury the nature and essentials of' the offence with which a person is charged. Where the offence involves statutory terms, it is usually 'imperative that the jury be specifically directed as to the criteria to be applied and the distinctions to be observed in determining' whether particular conduct is within the terms of the section."
>
> (Footnotes omitted)

[87] As his Honour noted the authorities in this State made it clear that the obligations under s 620 of the *Criminal Code* are co-extensive with the case law. In *R v Mogg*[211] McMurdo P emphasised that in this context the duty of a trial judge "will ordinarily include identifying the issues, relating the issues to relevant law and the facts of the case and outlining the main arguments of counsel".[212] In *Mogg* Thomas JA said:[213]

> "72 The statement just quoted is the first part in *Alford v Magee* referred to as 'Sir Leo Cussen's great guiding rule' (at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ). The High Court in that case held that the law should be given to the jury with an explanation of how it applied to the facts of the particular case (at 466). Of course 'whether the trial judge is bound to refer to an evidentiary matter or argument ultimately depends upon whether a reference to that matter or argument is necessary to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence': *Domican* at 561; 172 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
>
> 73 The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken: *Alford v Magee* at 466; *Jellard* at 902; *Nembhard* (1982) 74 Cr App R 144 at 148; *Holland* at 200-201. I do not understand the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS* at 449 [41]-[43], which encourage reticence in making comments on the facts, to be contrary to that view."

[88] However the extent of the obligation on a trial judge to identify and summarise the evidence applicable in the case will vary depending upon the length and complexity of the trial. This was recognised in *Domican v The Queen*[214] where, in the joint judgment, their Honours said:[215]

> "In a criminal trial, the distinction between directions on matters of law and directions on matters of fact or argument is fundamental.

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211 (2000) 112 A Crim R 417.
212 (2000) 112 A Crim R 417 at [54].
213 (2000) 112 A Crim R 417 at [72]-[73].
214 (1992) 173 CLR 555.
215 (1992) 173 CLR 555 at 560-561.

> A trial judge is bound to direct the jury as to any principle of law or rule of practice applicable to the case, and a misdirection or non-direction on such a matter will usually mean that the trial has miscarried. But matters of fact and the arguments in relation to them are in a different category. **A trial judge is not bound to discuss all the evidence or to analyze all the conflicts in the evidence, and, by itself, the failure of a trial judge to do so does not mean that there has been any miscarriage of justice.** … Whether the trial judge is bound to refer to an evidentiary matter or argument ultimately depends upon whether a reference to that matter or argument is necessary to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence."
>
> (Footnotes omitted and emphasis added.)

[89] His Honour's instructions upon the law and his summary of the rival contentions were appropriate. The evidence was in short compass and it was a relatively short trial,[216] consequently it was not necessarily the obligation of the trial judge to recite or summarise all the evidence.[217] Some of the evidence bearing upon intent, for example concerning intoxication, might adequately have been the subject of only passing reference. But an identification of the evidence upon what was said between the two, when it was said, whether before or after the last stabbing, that might bear upon intent and how, depending upon what evidence the jury accepted, that evidence might be used in consideration of the proof of the intent required by count 1 contrasted with the intent involved in count 2 was necessary. Further, because a consideration of these matters required the jury to assess the reliability of the complainant's evidence given at trial compared with her statements on earlier occasions, the identification of these matters otherwise than in the context of a summary of the rival contentions was required.[218] Notwithstanding that the trial was relatively straight forward; that at the outset of the trial intent had been identified as the issue and that the defence admitted from the beginning a stabbing and the infliction of grievous bodily harm, more than the instruction upon the law relating to intent in attempted murder and malicious act with intent was required. Otherwise the jury might, without specific instruction, not appreciate that proof to the requisite standard required them to deliberate and with care upon the evidence. To the extent his Honour touched upon these matters he did so in the context of his summary of the rival contentions, thus the failure to independently identify the evidence that might be relevant to consideration of the intent to kill as opposed to the intent to cause grievous bodily harm deprived the jury of judicial guidance upon important matters. This was an oversight that occasioned a miscarriage of justice,[219] one of the obligations required of a summing-up was not performed, this is not an appropriate occasion to apply the "proviso."[220]

Conclusion

[90] In the circumstances the appeal should be allowed. The conviction should be quashed and a new trial should be ordered. In the circumstances it is not necessary

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216 See para [7] above.
217 See *R v FAC* [2012] QCA 213 at [29] per Muir JA.
218 See for example para [17] above.
219 Section 668E(1) *Criminal Code.*
220 Section 668E(1A) *Criminal Code*.

to separately consider at length the alternative ground of appeal that the verdict was unsafe and unsatisfactory. This ground had been included before counsel, who appeared pro bono, were briefed. In argument counsel frankly conceded that he was unable to identify any basis for this ground but in view of the circumstance that he was unable to obtain instructions he was not in a position to abandon it. A consideration of the evidence at the trial, summarised above, demonstrates that if the evidence were to remain the same such a ground of appeal would be hopeless.