SUPREME COURT OF QUEENSLAND

CITATION:	*R v Buckley; R v Ghattas* [2014] QCA 98
PARTIES:	**In Appeal No 8 of 2014:** **R** **v** **BUCKLEY, Karlie Elizabeth** (appellant/applicant) **In Appeal No 33 of 2014:** **R** **v** **GHATTAS, John** (appellant)
FILE NO/S:	CA No 8 of 2014 CA No 33 of 2014 DC No 62 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence Appeal against Conviction
ORIGINATING COURT:	District Court at Bowen
DELIVERED ON:	2 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2014
JUDGES:	Fraser and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 8 of 2014:** **1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted.** **3. Appeal against sentence allowed.** **4. Sentence varied by ordering that the term of two years imprisonment be suspended after serving a period of seven months, and the offender must not commit another offence punishable by imprisonment within a period of two years to avoid being dealt with for the suspended term of imprisonment.**

In Appeal No 33 of 2014:

Appeal against conviction dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant, Buckley, had arranged for three men to accompany her to her ex-partner's house to retrieve her children who were being held beyond the time allowed under a court order – where one of the men in her company forced entry into the house – where Buckley's ex-partner was later assaulted by two of the men after he ran from the house– where Buckley was convicted of burglary by break, in company and assault occasioning bodily harm, in company based upon section 8 of the *Criminal Code* 1899 (Qld) – whether the evidence proved beyond reasonable doubt a common intention to assault the appellant's ex-partner

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant, Ghattas, was charged, as a principal offender, with burglary by break, in company with intent to assault and assault occasioning bodily harm, in company – where there was evidence that Ghattas had actually struck the complainant whilst in company with another person – whether the evidence proved beyond reasonable doubt an intention to assault

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant's, Ghattas', interview with police was admitted – where it was argued that the interview consisted of improper and unfair cross-examination and argument – where the comments implicit in the questions carried the authority of a police officer – where the appellant was not legally represented at trial – whether a miscarriage of justice was occasioned by the admission of the interview

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS OF INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant, Buckley, was convicted of burglary by break, in company and assault occasioning bodily harm, in company – where the appellant was sentenced to concurrent terms of two years imprisonment, suspended after serving 12 months in custody – where the appellant argues insufficient weight was given to her antecedents and to the context in which the offending

occurred - where the appellant argues the sentencing judge formed a more serious view of her conduct than was made out on the evidence – whether the sentence was manifestly excessive

Criminal Code 1899 (Qld), s 7, s 8

Duke v The Queen (1989) 180 CLR 508; [1989] HCA 1, cited
M v The Queen (1984) 181 CLR 487; [1994] HCA 63, cited
McAuliffe v The Queen (1995) 183 CLR 108; [1995] HCA 37, cited
McDermott v The King (1948) 76 CLR 501; [1948] HCA 23, cited
R v Boyd [2009] QCA 8, cited
R v Cockfield [2006] QCA 276, cited
R v Fitzgerald [2004] QCA 241, cited
R v Keenan (2009) 236 CLR 397; [2009] HCA 1, cited
R v Leu; R v Togia (2008) 186 A Crim R 240; [2008] QCA 201, cited
R v Ross [2012] QCA 247, cited
R v Wentt [1995] QCA 613, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Van der Meer v The Queen (1988) 62 ALJR 656; (1988) 82 ALR 10; [1988] HCA 56, cited

COUNSEL: C W Heaton QC for the appellant/applicant, Buckley
S G Bain for the appellant, Ghattas
P J McCarthy for the respondent

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

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

[2] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.

[3] **APPLEGARTH J:** The appellant, Ms Buckley, had two children with the complainant: a daughter aged seven and a son aged four. Her relationship with the complainant broke down in 2010. The children principally resided with their mother. On Tuesday, 17 April 2012 Ms Buckley expected to pick up her children at 7.00 pm in accordance with a court order. However, shortly before that time she received a text message from the complainant informing her that the children would be staying with him that night and that she should call the police with any questions. Ms Buckley tried to call the police, without success. At the time she was with a work colleague and friend, Mr Bryant. He arranged for a mutual friend, Mr Carter, to drive Ms Buckley and him to the complainant's house to collect the children. On the way, Ms Buckley arranged for her friend, Mr Ghattas, to be collected.

[4] As matters transpired, and in the circumstances described below, Mr Ghattas broke into the complainant's house after he heard Ms Buckley's daughter screaming from inside it. The daughter ran to her mother. The complainant ran out the front door of the house, carrying his son. He alleged that he was assaulted after he ran from the house. Mr Ghattas and Mr Carter were charged with assault occasioning bodily harm over this incident. Each denied assaulting the complainant, who was said to have stumbled and fallen to the ground whilst carrying the child.

[5] Mr Ghattas was convicted of wilful damage (count 1), burglary by break, in company (count 2) and of assault occasioning bodily harm in company (count 3). Mr Carter was convicted of assault occasioning bodily harm in company (count 3). Ms Buckley was convicted on count 2 and count 3. The prosecution case against her on both those counts, as it was developed at the trial, was based upon s 8 of the *Criminal Code*. The prosecution was required to prove beyond reasonable doubt that she shared a "common unlawful intention" with Mr Ghattas and/or Mr Carter to assault the complainant.

Ms Buckley's appeal against conviction

[6] Ms Buckley appeals against her conviction on both counts on the grounds that the verdict is unreasonable and cannot be supported having regard to the evidence. The issue in her appeal is whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that she shared a common unlawful intention to assault the complainant. She submits that, rather than supporting that conclusion, the evidence supports the alternative reasonable contention that she intended to recover custody of her children, hoping that the complainant would comply willingly, and that the combined presence of the three men was intended simply to persuade him to allow her to retrieve her children in accordance with the court order.

Mr Ghattas's appeal against conviction

[7] The case against Mr Ghattas on the burglary count was that he entered the house by breaking the glass door, at night, in company, with intent to assault the complainant. The case against him on count 3 was that he was a principal offender in assaulting the complainant. His participation in a common purpose to assault the complainant was relied upon as circumstantial evidence that he did in fact assault him.

[8] On his appeal against conviction, counsel argues that the prosecution relied upon s 8 to extend liability both in respect of the charge of burglary and the charge of assault occasioning bodily harm. The respondent contests this, and correctly submits that the prosecution case did not depend upon s 8, and that it was not the manner in which the jury were directed. The prosecution case on count 2 was that Mr Ghattas was a principal offender. Although the particulars of count 3 alleged that he participated in a joint criminal enterprise, his criminal liability also was under s 7, not s 8, in that he was alleged to have struck the complainant "in the head and/or body/whilst in company with another person".

[9] Mr Ghattas' first ground of appeal against conviction is that the verdicts are unreasonable and cannot be supported having regard to the evidence. He submits that the circumstances do not support that there was a common intention to assault the complainant and that the jury would have a reasonable doubt about this since the evidence was incapable of excluding the reasonable hypothesis that he went to the

home to help Ms Buckley recover her children and with the intention of protecting her from the complainant. He did not enter the house intending to assault the complainant. He forced entry with an instrument that came to hand in the heat of the moment when he heard a child screaming. He followed Ms Buckley into the house, in order to respond to the screams and to retrieve the children, not to assault the complainant.

[10] Mr Ghattas's second ground of appeal is that a miscarriage of justice was occasioned by the admission of inadmissible sections of a police interview. The parts which are alleged to be inadmissible are said to consist of improper and unfair cross-examination and argument. The comments implicit in those questions carried the authority of a police officer, and are said to have undermined his account and devalued it in the mind of the jury. This unfairness was magnified in a situation where Mr Ghattas was not legally represented at his trial.

Separate consideration of each appeal

[11] The prosecution case against Mr Ghattas as presented at his trial had a heavy flavour of a joint unlawful plan to assault the complainant and, as noted, the prosecution case on the count of assault occasioning bodily harm was that Mr Ghattas participated in a joint criminal enterprise. But the respondent is correct in submitting that his criminal liability rested on s 7, not s 8.

[12] The prosecution case against Ms Buckley seemed to rest finally on s 8. However, the particulars of count 2 did not make it clear that liability for entering the house with intent to commit an indictable offence and by means of a break, was based on s 8. Also, part of the trial judge's summing-up suggested that the case against Ms Buckley required the jury to be satisfied that she entered the house intending to assault the complainant. However, the summing-up went on to put the case on that count on the basis of s 8, namely that she shared a common unlawful intention to assault the complainant and that breaking into the premises was a probable consequence of the unlawful plan to assault the complainant.

[13] In summary, a route to criminal liability against Ms Buckley for the burglary as well as the assault upon the complainant, was identified as s 8. But the prosecution case against Mr Ghattas was different and did not rely upon s 8. Instead, his alleged participation in a plan to assault the complainant formed part of a prosecution case that he in fact assaulted the complainant and thereby occasioned him bodily harm, whilst in company. There were different routes to conviction on counts 2 and 3 against Ms Buckley and against Mr Ghattas. The evidence which was admissible against each of them is not identical. It is necessary to separately consider the cases against each of them in determining whether, upon the whole of the evidence which was admissible in each case, it was open for the jury to be satisfied beyond reasonable doubt that the appellant was guilty on counts 2 and 3.

The evidence

[14] Ms Buckley and the complainant were in a relationship between 2004 and 2010. They had two children. The relationship encountered problems and a domestic violence order was made against the complainant in favour of Ms Buckley. The complainant breached that order in 2008. He had a physical altercation with Ms Buckley's father. When the relationship was restored the domestic violence order was replaced by a good behaviour bond. The relationship broke down again.

The Federal Magistrates Court made interim orders for the children to reside with Ms Buckley, and for the complainant to have access to them. He was to have contact with them every second week after school until 7.00 pm on Tuesday and Thursday and on every second weekend.

[15] As noted, shortly before 7.00 pm on Tuesday, 17 April 2012 he sent a text message to Ms Buckley that the children would be staying with him that night and that she should call the police with any questions. The message told her not to come to his house or the police would remove her and that she would hear from his solicitor the following day. Ms Buckley responded with a text message that if the complainant did not return the children that night she would be getting a court order and the complainant would be jeopardising having access to the children. She stated: "I think you need to think about what you think you're doing for the kids!" The complainant replied that he was looking after the welfare of the children, that they were "fine and happy" and that Ms Buckley should talk to the police.

[16] Ms Buckley worked at the same backpackers hotel at Airlie Beach as Mr Bryant, who was 50. She was the Housekeeping Manager. He was the Maintenance Manager. They became friends and Ms Buckley would confide in him about the problems she was having with the complainant. Mr Bryant had seen many abusive and threatening text messages that the complainant had sent to Ms Buckley. These messages did not threaten violence to the children but related to the breakdown of his relationship with the children.

[17] On 17 April 2013 Mr Bryant was having a drink after work with Ms Buckley, and was told about, and probably read, the text message which she received from the complainant. Ms Buckley twice tried to ring the police. But she could not get through to find out why she could not pick up the children. By this time Mr Bryant had had a few mid-strength beers. One of the headlights on Ms Buckley's car was not working, so she suggested that they get a good friend, John Carter, to give them a lift. They planned to go to the complainant's home to pick up the children. Mr Bryant testified that Ms Buckley said the reason for going to the complainant's home was that the children were there and the complainant was not returning the children after the few hours he was meant to have them. On the way, they picked up Mr Ghattas, whom Ms Buckley knew but Mr Bryant and Mr Carter did not. According to Mr Bryant, the only discussion in the car about why they were going to the house at Jubilee Pocket was that Ms Buckley's was "hopefully going to pick up the children". Most of his conversation in the car with Mr Carter was about work.

[18] Mr Ghattas had only met Ms Buckley a few days earlier. Mr Ghattas later told police that at around 7.30 pm he received a call from Ms Buckley who asked him if he could accompany her to go and pick up her children. Mr Ghattas said he was surprised to be asked since he had only known Ms Buckley for a few days. He told the police that he expected that they would get the children, and then go home. He was told by Ms Buckley that the visiting time was over, that the complainant was not answering her phone calls and that she was worried that he might do something to her. He thought that she "just wanted somebody to be there just in case he – something goes wrong". According to Mr Ghattas, he went there simply to make sure that nothing happened to her.

[19] When they arrived at the complainant's home, Ms Buckley and Mr Ghattas left the car. Mr Bryant waited by the side of the car. Mr Carter seemingly also stayed in

the vicinity of the car. Mr Ghattas walked to the front door and knocked on it. Ms Buckley was standing behind him. The complainant described the knock on the front door as a "gentle knock". He did not regard the situation as serious, however, he did not answer the door.

[20] According to Mr Ghattas, the complainant said, "go away, I'm calling the police", whereupon Mr Ghattas turned around and started walking to the front gate. According to Mr Ghattas, Ms Buckley walked past him and started bashing on the door calling, "your time's up" and "why don't you answer the calls". The complainant heard this knocking which he described as becoming faster and louder. Ms Buckley then ran around to the back of the house, and the knocking on the door continued. The complainant could hear only one voice, that of Ms Buckley. First it was at the front of the house, then at the back of the house.

[21] According to Ms Buckley's daughter, who was aged eight when she gave pre-recorded evidence, after her mother came to the house she was yelling out her daughter's name. Her father had put her and her brother in a bedroom, and the daughter left the bedroom and yelled to her mother, "Dad's holding me". The daughter felt sick and she was screaming. Her recollection was that she called out to her mother 10 times.

[22] Ms Buckley was screaming at the same time. Mr Ghattas could hear her screaming and he ran around the back to make sure that nothing "too bad" was going on. He heard the little girl's voice and told police that he thought that it sounded pretty serious. He felt he could not walk away leaving two children screaming inside the house, and so he picked up a gas bottle from near a barbeque and smashed the glass in the back door. Having done so, he told Ms Buckley to "go, get in there", which she did. He ran in after her. The daughter ran to her mother, and the complainant picked up his son and started to run out the front door with the child in his arms. According to Mr Ghattas's record-of-interview, Ms Buckley screamed, "He's got my boy, he's going to do something to him".

[23] The complainant's evidence was that as he ran out the front door he noticed another person to his left with what looked to be a baseball bat. There was no other evidence of a baseball bat or similar weapon. The complainant's evidence was that as he ran across the lawn he received a blow to the back of his head. He did not say what hit him. He said that he lost his balance and fell with his son in his arms, doing the best that he could to protect his son. But the son ended up with a graze on the side of his face when his cheek hit the bitumen. Ms Buckley took the child out of his arms and ran off down the road with him. Then, according to the complainant, the two men started swinging punches at him while he was on the ground. Most of them were around his head but he was raising both his arms to protect his head.

[24] A neighbour, Mr Fenn, came out of his house with his cross pit-bull dog to stop the assault. Mr Fenn, who died before the trial, gave a statement which was admitted into evidence pursuant to s 93B of the *Evidence Act* 1977 (Qld). His evidence was that he saw the complainant being kicked by a man. No other witness gave evidence of a kick and the complainant did not claim to have been kicked. Mr Fenn described one male kicking and possibly wrestling with the complainant while another male watched on from about a metre away.

[25] Mr Fenn's partner, Ms Cooper, also heard the commotion and saw between three and five people running around. She went inside her house to telephone the police.

She did not see any assault upon the complainant. When she went outside she saw Mr Fenn chasing someone down the road.

[26] As Mr Fenn and his dog chased the man who Mr Fenn had seen watching the fight, the man produced nunchakus, and swung them at Mr Fenn and his dog. The man who Mr Fenn knew by the name of Johnny, and who was said by Mr Fenn to be around 30 years of age, jumped in the back of the car. The car took off.

[27] Neither Mr Fenn, Ms Cooper nor anyone else, save for the complainant, described any attempt to run over the complainant as the car drove off. The complainant gave evidence that he heard Ms Buckley say, "run him over". No one else gave evidence of hearing such a thing. The complainant said that he had to jump out of the way to avoid being hit as the car drove off.

[28] Mr Carter and Ms Buckley were charged jointly with dangerous operation of a vehicle arising out of this alleged incident. The jury returned verdicts of not guilty in respect of that count.

[29] Mr Bryant was not charged with any offence. His evidence at the trial was that he was some distance away, and after hearing the window smash went around to see what was going on. He heard screaming and ran back around to the front of the house. He saw the female child who he knew. He tried to comfort her and took her back to the car. Ms Buckley then returned to the car with her son. The car moved off and Mr Ghattas was picked up a few metres later. Mr Carter was driving. Mr Bryant's recollection was that Mr Carter had initially stayed near the car and he did not see him go near the front of the house.

[30] In his record-of-interview with police Mr Ghattas denied having assaulted the complainant in the manner the complainant alleged. His account was of having run out the front door and that the complainant tripped over whilst he was carrying the child. Mr Ghattas said that he told the complainant to stay on the ground and just held his shoulders "so he couldn't really jump up". Mr Ghattas told police that one of the other men in the car took the child and that he started walking back towards the car. Then another person, presumably Mr Fenn, came running after him, and was holding something which looked like a stick and waving it around. Mr Ghattas thought it was a knife so he picked up a stick and waved it around to stop the approaching male from stabbing him. Mr Ghattas denied having any nunchakus.

[31] The defence case in respect of the alleged assault upon the complainant was that as the complainant was being chased with his son in his arms, he lost his footing and stumbled to the ground, injuring himself and the boy. He was not hit on the back of the head and there was no baseball bat or any other form of weapon. The injuries that the complainant suffered were as a result of falling to the ground.

[32] Although a police officer who arrived at the scene observed the complainant holding the back of his head, the doctor who examined the complainant's injuries and who gave evidence did not find any significant injury to the back of the head where the complainant claimed to have been struck. The doctor accepted the proposition put to him by defence counsel that if the complainant had been subjected to the kind of assault which he described, with numerous forceful blows from two men, then he would have expected there to be more injuries. The injuries suffered by the complainant were said by the doctor to be consistent with many types of injuries or accident, including falling heavily onto a bitumen road.

[33] The complainant described his injuries as cuts to his arms and hands, bruising to his face and lumps to his head. He said that the two men had been "unloading for 10 or 15 seconds". He said that he shielded his head from the blows, having tucked his head into his arms. He described the assault as a mixture of "full on blows" and, "glancing blows".

The case against Ms Buckley on counts 2 and 3

[34] The case against Ms Buckley on the burglary count, as particularised, did not rely upon s 8. The particulars erroneously stated in respect of count 2 that she "entered the house by breaking the glass door, at night, in company". This form of words was the same as the particulars in respect of Mr Ghattas' on count 2. The actual charge in the indictment was that each of them entered the house with intent to commit an indictable offence in it and that the entry was by means of a break. It was clear that the prosecution case was not that Ms Buckley had broken the glass door. As the trial judge noted, there was no evidence that she assisted Mr Ghattas to break the glass door. He was charged and convicted of having wilfully and unlawfully damaged the door by smashing it with a gas bottle. This was count 1.

[35] In relation to count 2, the burglary count, the prosecution case, as particularised, required proof beyond reasonable doubt that Ms Buckley and Mr Ghattas each entered the house by means of a break and also, at the time that each of them entered the house he or she had an intent to assault the complainant. The trial judge explained that in considering count 2 for each accused, the jury had to be satisfied that the circumstances left no reasonable possibility that the accused did not intend to assault the complainant or for there to be an assault on the complainant when they went in the house. The jury were told that they had to be satisfied that the accused entered the dwelling "intending to assault him". However, the trial judge went on to direct the jury on count 2 in respect of Ms Buckley in terms of s 8, without objection from Ms Buckley's trial counsel.

[36] As counsel for the respondent on the appeal fairly conceded, this was potentially to Ms Buckley's disadvantage. Had the case against Ms Buckley on count 2 not relied upon s 8 (and the particulars of this count against her did not do so) then it would have been sufficient for Ms Buckley to raise a reasonable doubt about her intention at the time she entered the house. The prosecution was required to prove an intention that the complainant be assaulted at this time, and a competing hypothesis was that she entered the house, having been encouraged by Mr Ghattas to do so, in order to respond to the screams of her daughter and to retrieve her, and that she did not have in mind, at that time, an intention to assault the complainant.

[37] To extend liability pursuant to s 8 against Ms Buckley for both the burglary and the assault committed by others, the prosecution was required to prove beyond reasonable doubt, among other things, the particularised common unlawful intention: to assault the complainant.

Ms Buckley's submissions

[38] Ms Buckley submits that the evidence was capable of supporting other hypotheses consistent with the absence of such a common unlawful intention. The prosecution did not exclude the hypothesis that Ms Buckley went to the complainant's home with her friends intending only to recover the children and that the presence of the three men was intended simply to persuade the complainant to voluntarily hand the

children over. Another reasonable hypothesis which had some support in the police interview with Mr Ghattas was that he accompanied Ms Buckley to ensure that nothing happened to her at the hands of the complainant.

[39] The prosecution case, based on the text messages exchanged that evening, was that Ms Buckley must have known that the complainant was not going to hand over the children voluntarily. In response, Ms Buckley submits that the text messages reveal a reasonable, measured tone, both by the complainant and by her, and that the complainant had been vague about his reason for not complying with the court order. Discussing the problem with him and persuading him to comply with the order was a possible resolution. It was possible that, with the presence of her friends to support her, the complainant would be required to explain why he intended to keep the children and Ms Buckley could reason with him to comply with the court order. The initial, gentle knock on the front door is consistent with a desire to resolve the matter peacefully.

[40] Matters only escalated after there was no response. Ms Buckley began screaming and her daughter was screaming out to her mother. Mr Ghattas took matters into his own hands after hearing the child's screams. He found the gas bottle in order to gain entry. The fact that he did not take an implement to the house to force entry suggests that there was no plan to assault the complainant if, as might have been expected, he did not allow Ms Buckley and Mr Ghattas to enter.

[41] In addition, if Mr Ghattas had intended to assault the complainant as part of a shared plan to do so, it is noteworthy that, having gained access, it was Ms Buckley, not he, who first entered the house. The only direct evidence about Ms Buckley's intention in going to the complainant's house was from Mr Bryant. His evidence was that, after Ms Buckley attempted to contact the police without success, they arranged for Mr Carter to drive them to the complainant's house because she wanted to retrieve the children. The only thing that Ms Buckley said about the reason for going to the complainant's place was that the children were there with him and he was not returning them, as he was required to do.

[42] Ms Buckley submits that the fact that Mr Ghattas and Mr Carter did assault the complainant does not retrospectively evidence that there was an earlier formed common intention that he be assaulted. It was only after the children had been recovered that an assault took place. By then the complainant had behaved in a way which might have provided a basis for Mr Ghattas and Mr Carter to assault him on their own initiative and for their own reasons.

The respondent's submissions

[43] The respondent submits that a plan to retrieve the children from their father is not necessarily exclusive of the particularised common unlawful intention. In fact, the prosecution case was that the reason Ms Buckley and others planned to assault the complainant was to ensure the return of the children.

[44] As noted, the respondent relies upon the fact that the appellant must have known that the children would not be returned voluntarily, and the history of acrimony in the relationship described by Mr Bryant reinforces the proposition that Ms Buckley could not have believed that the complainant would voluntarily return their children to her that evening. Although she may have tried to telephone the police, she did not attend the police station.

[45] The respondent places particular store upon the travel arrangements. According to Mr Ghattas's interview with the police, Mr Carter drove and Mr Bryant was in the front passenger seat. Mr Ghattas did not know them and referred to the "two old fellas in the front". It was the appellant who arranged for Mr Ghattas to be collected. Ms Buckley did not say anything to Mr Bryant about why they were picking up Mr Ghattas. The respondent submits that the arrangement to have three adult males leads to an irresistible inference that she anticipated opposition from the complainant and that the use of force was contemplated by her and the others.

[46] Next, the respondent relies upon the rapid escalation of matters after the complainant did not respond to the knock on the door. Ms Buckley's action are said to contradict the hypothesis that she was there to negotiate the voluntary return of her children. Once access to the home was effected, Ms Buckley sought to locate her children. This is said not to contradict any plan to assault the complainant. As matters transpired, no assault was necessary to obtain the girl, but, on the prosecution case, an assault occurred after the complainant ran with his son. According to the respondent, the jury was entitled to consider the conduct of Ms Buckley in that regard. There was no evidence of a protest by her against the actions of those assaulting the complainant. She did not abandon them, and accordingly the jury might infer that they were not on a frolic of their own. Assaulting the complainant was part of the shared plan.

Was a common unlawful intention to assault the complainant proved beyond reasonable doubt?

[47] The issue for this Court is whether, upon the whole of the evidence that was admissible in the case of Ms Buckley, it was open to the jury to be satisfied beyond reasonable doubt that there was a common unlawful intention to assault the complainant. Could the jury be satisfied beyond reasonable doubt of the alleged common unlawful intention, notwithstanding the sworn evidence of Mr Bryant, the unsworn evidence of Mr Ghattas and whatever reservations it had about the credibility and the reliability of the complainant's evidence which led it to acquit the defendants on count four?

[48] On the hearing of the appeal counsel for the respondent mounted a persuasive argument that the prosecution had excluded an alternative hypothesis that the planned actions of Ms Buckley and others did not contemplate the use or threatened use of violence. It was argued that if violence was contemplated as part of what was to take place then the prosecution case was proven "to the exclusion of a completely innocent plan".

[49] Some care is required in dealing with this submission, lest it be misunderstood as casting an onus upon the defendant to prove a completely innocent plan, rather than require the prosecution to prove the required common unlawful intention.

[50] A plan which does not expressly disavow resort to violence may not necessarily carry with it a common intention to resort to violence. It simply may be a plan in which the parties to it have not contemplated the prospect of violence, even if other persons in that situation would have done so. However, if to achieve an objective it is necessary to resort to violence, it may be possible to infer a common intention to do so.

[51] A more difficult case is one where the shared objective does not necessarily require resort to violence. But if in such a case there is evidence that people reach an agreement that, in a certain event, a person will be assaulted, it may be possible to

identify a common unlawful intention. For example, parties may agree "if X does not hand over the cash, we'll hit him". The intention to assault is not conditional. The intention is present. Instead, the carrying out of the assault is conditional upon X not handing over the cash.

[52] The prosecution case was not that Ms Buckley and the other's shared objective to retrieve her children consisted of a number of plans, with each plan being contingent on the failure of the preceding one: (a) reason; (b) a show of numbers; (c) oral threats; (d) forced entry if necessary to retrieve the children; (e) an assault upon the complainant if that proved necessary. The prosecution case essentially was that the plan was to retrieve the children and, if it was necessary to do so, to assault the complainant. In circumstances in which the complainant was not willing to hand over the children, it was necessary to assault him.

[53] It was not sufficient for the prosecution to show only some ill-defined plan to retrieve the children, which an ordinary person might foresee was likely to degenerate or escalate into a party actually using force. The prosecution had to prove a common unlawful intention to assault the complainant.

[54] Section 8 of the Code refers to when two or more persons "form a common intention to prosecute an unlawful purpose in conjunction with one another". Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and it may be inferred from all the circumstances.[1] It is not to be expected that every plan involving the infliction of physical harm will be detailed and include the means by which it is to be inflicted.[2]

[55] A plan to assault the complainant was not necessarily proved by Ms Buckley's appreciation from the text messages that the complainant was not prepared to return the children voluntarily. Ms Buckley's reply that evening did not disclose a plan to assault. It contained no threat and was moderate in its terms. She may have hoped to reason with him in person and rely upon the presence of her friends as a sign that she had support and that the complainant should comply with her demands and the court order.

[56] There was nothing necessarily sinister about the arrangement to have Mr Carter drive Ms Buckley. Mr Bryant had had a few drinks and it was responsible of him to not drive. Ms Buckley's car had a broken headlight and that may explain why she was not willing to drive it. That said, her preparedness to retrieve her children without providing appropriate seating for them in a car in which there were four adults is noteworthy. There was no suggestion at the trial that Mr Bryant planned to assault the complainant, and his conduct in staying near the car when they arrived at the house suggests he was not intending to assault the complainant.

[57] I accept Ms Buckley's submission that excessive reliance should not be placed upon the fact that, as matters transpired and escalated, Mr Ghattas and Mr Carter assaulted the complainant. One should not necessarily infer that this was their shared intention as they travelled to the house or even shortly after they arrived. It was consistent with each reacting to the complainant's conduct, the daughter's screams and the injury sustained by the young boy.

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1 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; [1995] HCA 37.

2 *R v Keenan* (2009) 236 CLR 397 at 432 [119]; [2009] HCA 1.

[58] Ms Buckley's arrangement to collect Mr Ghattas is a significant piece of circumstantial evidence. Her purpose in having Mr Carter pick him up was not satisfactorily explained in the evidence. Mr Ghattas's record-of-interview explained his intention. As he said, "All I wanted to do was make sure that he wasn't gunna hurt her". But the jury was not required to accept this unsworn evidence in the case against Ms Buckley. There was no other evidence that she requested Mr Ghattas to join her that evening because she was concerned about being assaulted. Mr Bryant gave no evidence of a discussion along these lines in the car or beforehand.

[59] It is possible to infer that the collection of Mr Ghattas was simply to add numbers and to have a younger man than Mr Bryant or Mr Carter present. The combined presence of three men was more likely to persuade the complainant to voluntarily hand over the children than if Ms Buckley was there on her own or only with one man. The weight of numbers may have prevented matters degenerating into a physical confrontation.

[60] I do not accept that it was an "irresistible inference" that the addition of Mr Ghattas showed that Ms Buckley anticipated that the use of force was necessary. However, Mr Ghattas's unexplained presence supported the inference of a plan between Ms Buckley and Mr Ghattas to assault the complainant if this proved necessary in order to retrieve the children. It was not as if Mr Ghattas was already a passenger in the car, and went along for the ride. Ms Buckley had to arrange for him to be collected. The jury was not required to accept exculpatory statements made by Mr Ghattas in his record-of-interview.

[61] The prosecution case did not depend upon any plan between Ms Buckley and Mr Ghattas to assault the complainant if this was required in order to retrieve the children to have been reached when they were in the car together, or to have been discussed with Mr Carter and Mr Bryant. The jury may have accepted Mr Bryant's evidence that the only discussion he heard in the car was that they were going to pick up the children and after that was mentioned his conversation with Mr Carter was about work. The extension of s 8 liability to Ms Buckley was possible on the basis that she shared a common unlawful intention with Mr Ghattas to assault the complainant and that this understanding or arrangement was reached between them in private conversations, possibly after they left the car and walked to the front door.

[62] The fact that Ms Buckley did not attempt to negotiate with the complainant for an extended period and did not yell out to him that she was accompanied by three adult males undermines the hypothesis that their presence was simply intended to persuade the complainant to voluntarily hand the children over.

[63] The rapid escalation of matters may not have been planned. No house-breaking implements were brought and Mr Ghattas's decision to break the back door may have been prompted by the girl's screams for help, and not part of a plan. However, the course of events shows that Ms Buckley was determined to retrieve her children and Mr Ghattas was prepared to accompany her in order to gain access to the house in order to achieve this purpose. Mr Ghattas was found by the jury to have assaulted the complainant after he ran out the front door of the house carrying his son. The fact that he did so does not necessarily prove that this was always his intention. But it is a piece of circumstantial evidence which, together with the other evidence, permitted the jury to infer the particularised common unlawful intention.

[64] In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing

and hearing the events is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.[3] The jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has the benefit of having seen and heard the witnesses.[4] The task of this Court is to make an independent assessment of the whole of the evidence to determine whether the verdict could be supported.[5] It is required to determine whether the evidence was such that it was open to the jury to conclude beyond reasonable doubt that Ms Buckley was guilty of the offences with which she was charged.[6]

[65] I conclude that it was. The evidence was capable of excluding the hypothesis that Ms Buckley went to the complainant's home with three adult males intending simply to persuade the complainant to voluntarily hand the children over. The presence of the three males was not explained on the basis that they were there to protect Ms Buckley from an assault at the hands of the complainant. The direct evidence of Mr Bryant served to confirm that their purpose was to retrieve the children in circumstances in which the complainant had made clear that he did not intend to return them voluntarily, that Ms Buckley should contact the police and that, if she came to the house, he would call the police. His refusal to answer the door must have been expected by Ms Buckley.

[66] Anticipating such a problem, she arranged for Mr Ghattas to accompany her and two other males. Even if Ms Buckley entertained the possibility that the complainant would relent and hand over their children, her objective was to retrieve them, and to use force if this proved necessary. She may not have contemplated precisely how matters would develop. If the complainant opened the door then there may have been a tug-of-war over a child. Mr Ghattas was there to help if, as must have been expected, a confrontation developed. It was open to the jury to be satisfied beyond reasonable doubt that part of Ms Buckley's plan was to assault the complainant if this proved necessary in order to retrieve the children. It was open to the jury to be satisfied beyond reasonable doubt that Mr Ghattas joined in this plan, notwithstanding the exculpatory statements made in his record-of-interview.

[67] Insofar as each verdict was based upon s 8, I am not satisfied that the verdict was unreasonable and could not be supported having regard to the evidence.

[68] To the extent that the burglary count was originally prosecuted as a s 7 case, it was necessary for the prosecution to prove that Ms Buckley had an intention to assault the complainant at the time she and Mr Ghattas entered the house. As noted, the jury were directed that they had to be satisfied that there was no reasonable possibility that she did not intend to assault the complainant. The evidence clearly indicated that, upon entering the house, Ms Buckley's first impulse was to retrieve her children. Does this mean, in the light of all of the other evidence, that this was all that she meant to do when she entered the house?

[69] Even if it could be said that on the way to the house there was no plan to assault the complainant, by the time Ms Buckley went through the broken door matters had changed considerably. There had been an ugly confrontation. Some of the evidence suggested that the daughter was in a state of acute distress, having been held down

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3 *M v The Queen* (1984) 181 CLR 487 at 494; [1994] HCA 63.
4 *SKA v The Queen* (2011) 243 CLR 400 at 405 [13]; [2011] HCA 13.
5 Ibid at 409 [22].
6 Ibid at 408 [21].

by her father. It was open to the jury to conclude that a distressed mother in Ms Buckley's condition was intent on rescuing her child from the father who was detaining her, was prepared to assault the father in order to do so and in fact intended to do so at the time she entered the house. To the extent that she enlisted the support of Mr Ghattas to rescue the child, it is significant that, once the back door was broken, she did not tell him to stay outside while she went in and negotiated with the complainant. Nothing in the circumstances suggested that the complainant at that point was prepared to hand over both children without a fight. Ms Buckley must have known this when she entered his home. In the circumstances, it was open to the jury to be satisfied beyond reasonable doubt that when she entered the house Ms Buckley intended that the complainant be assaulted.

Appeal against conviction – Mr Ghattas

[70] As previously discussed, and contrary to Mr Ghattas's submissions on appeal, the prosecution did not rely upon s 8 of the Code to extend liability against Mr Ghattas for the burglary and the assault upon the complainant. Instead, the prosecution relied upon the evidence of a common intention to assault the complainant to support its case against Mr Ghattas:

(a) on count 2 that he intended to assault the complainant at the time he entered the house, having broken the back door;

(b) on count 3 that he in fact assaulted the complainant and occasioned him bodily harm whilst in company with another person.

Mr Ghattas's first ground of appeal: the verdicts were unreasonable

[71] In support of his contention that the verdicts were unreasonable and not supported by the evidence, Mr Ghattas contests that there was a common plan to assault, and points to other reasonable inferences consistent with the absence of such a plan. He submits that a reasonable hypothesis consistent with innocence is that he went to the home with Ms Buckley intending only to offer some support by way of affording her some protection or possibly to intimidate the complainant by his presence. This hypothesis draws some support from his statements in his interview with the police, if the jury was prepared to accept them as reliable.

[72] As in Ms Buckley's appeal, the submission is made by Mr Ghattas that the fact that the incident ultimately evolved into an assault, assuming the reliability of the evidence of the complainant and his neighbour, Mr Fenn, does not mean that Mr Ghattas and Ms Buckley had a common intention to enter the home and assault the complainant. The absence of a common intention to assault the complainant is said to be evidenced by a number of matters. These matters are also relied upon to reject liability under s 7, on the grounds that the evidence left open a reasonable inference that he did not have the intent required to make him a principal offender in respect of the burglary. He submits that his intention was simply to assist Ms Buckley to recover her children.

[73] His statement to the police that he had no intention for anybody to get hurt and was simply there to ensure that the complainant did not get hurt is evidenced by his conduct upon arrival, when he gently knocked on the front door. He told the police that, after that, he was intending to leave, but was prompted to stay after Ms Buckley ran around the back of the house and began screaming. The absence of a common plan to use force is shown by the fact that the other two men remained near the car or in the front yard. There was no combined force of three men and

their conduct is inconsistent with their arriving with the intent to break into the house and assault the complainant. Mr Ghattas only ran around the back of the house to investigate the screaming, not to gain entrance. There was no conversation with Ms Buckley at that stage about gaining entry. The act of the throwing the gas bottle was an impulsive act by Mr Ghattas, which he explained was prompted by his grave concern having heard the child inside screaming. The fact that he allowed Ms Buckley to enter the house first suggests that the purpose of breaking in was to allow her to retrieve her children, not to assault the complainant.

[74] Mr Ghattas told the police that inside the house Ms Buckley screamed to him:

> "He's got my boy. He's going to do something to him. He's going to do something to him."

which prompted Mr Ghattas to run out the front door after the complainant. The incident that occurred out on the road, when the complainant fell over, injuring himself and the child, could be regarded as a separate incident and not part of the entry into the house and the intent which accompanied it. It was only after the complainant ran out of the house that Mr Ghattas pursued him, and he only did so at the request of the mother.

[75] Counsel for Mr Ghattas accepted that her arguments about the absence of an intention to assault had less force with respect to count 3, there being direct evidence from the complainant and his neighbour about an assault. However, the way in which the prosecution case was conducted in relation to count 2 was said to set the scene and to have coloured the way in which the jury would consider the evidence of the assault on the complainant in count 3.

The respondent's submissions

[76] The respondent relied upon many of the submissions advanced in respect of Ms Buckley's appeal about the common unlawful intention to assault the complainant. The evidence of an intent to assault the complainant did not taint the jury's consideration of count 3. It was circumstantial evidence which, in combination with direct evidence, enabled the jury to be satisfied that Mr Ghattas in fact assaulted the complainant after the complainant ran from the house with the boy. The jury were entitled to conclude that Mr Ghattas intended to retrieve the children and to assault the complainant if it proved necessary to do so.

[77] The same circumstantial evidence which was relevant to the s 8 case against Ms Buckley was relevant to inferring Mr Ghattas's intention at the time he entered the house. In addition, the inference that Mr Ghattas intended to assault the complainant was supported by his conduct in smashing the glass door and pursuing the complainant. After the complainant fell to the ground, he was assaulted by Mr Ghattas. The obvious inference is that at the time he broke into the home, he intended to assault the complainant.

[78] The respondent submits that the evidence strongly supported a conclusion that Mr Ghattas had been engaged by Ms Buckley and that they were prepared to use violence to retrieve the children from their father's custody. The inferred contemplation of violence in the case against Mr Ghattas was fortified by evidence of his possession of a weapon. Although he denied having nunchakus and using them, Ms Cooper saw the man who was being chased down the road pull nunchakus from his backpack. She was only a few metres away from the man who did so, who

was being confronted by her partner and his dog. She was sure that they were nunchakus. They were being used by the man who was the last person to get in the car. If, contrary to Mr Ghattas's denial in his interview with police, he was in possession of nunchakus, then it was possible that he brought them with him for purely defensive purposes, in order to defend himself or the complainant if the need arose. However, the contemplation of violence was fortified by evidence of Mr Ghattas's possession of a weapon.

Were counts 2 and 3 proven beyond reasonable doubt against Mr Ghattas?

[79] The respondent's submissions are persuasive. Mr Ghattas was in company with Ms Buckley. At the time they entered the house each intended to retrieve the children. There was compelling evidence that at the time he entered the house Mr Ghattas intended to assault the complainant. He intended to do so in order to retrieve the children in what he perceived to be an emergency. It was this emergency situation which, on his version of events, prompted him to break into the house. It was open to the jury to infer that entry into the home with an intention of assaulting the complainant was part of the execution of a plan between Ms Buckley and Mr Ghattas, if not others. Alternatively, it was open to the jury to infer that Mr Ghattas intended to assault the complainant in order to retrieve one or both of the children from what he perceived to be an emergency, even if the plan to assault the complainant had not been hatched between Ms Buckley and Mr Ghattas on their way to the house or when they first went to the front door.

[80] In the circumstances that presented themselves to Mr Ghattas at the time he entered the house, there was no apparent scope for negotiating. He had to do something to retrieve the children and this explains why he broke and entered the house. The evidence compelled a conclusion that he was prepared to retrieve the children by assaulting the complainant if this proved necessary, and nothing which happened just before he entered the house suggested that this would not prove necessary.

[81] His actions after entering the house, even if prompted by Ms Buckley's scream which caused him to run after the complainant and the boy, are consistent with an intention to assault the complainant in order to retrieve a child. The compelling inference is that he was prepared to assault the complainant, not necessarily with great violence, in order to retrieve the child. Even if the complainant tripped and fell and was not pushed, Mr Ghattas's conduct after gaining entry to the house is consistent with an intention to assault him in order to retrieve the child.

[82] As to count 3, even if the complainant was not struck on the head as he ran from the house, it was open to the jury to conclude on the basis of the complainant's evidence and the evidence of his neighbour, that the complainant was assaulted as he lay on the ground. The complainant thought that this part of the incident went for 10 or 15 seconds. He may have over-estimated the length of time. He described the assault as a mixture of full-on blows and glancing blows. The injuries which he received were consistent with such an assault. It was open to the jury to accept the complainant's evidence about being assaulted when he was on the ground and to conclude that Mr Ghattas was one of the assailants.

[83] The jury were directed about what needed to be proven in the case against Mr Ghattas on each count. I conclude that it was open to the jury on the evidence that was admissible in the case of Mr Ghattas to conclude beyond reasonable doubt that he was guilty of the offences with which he was charged.

Mr Ghattas' second ground of appeal: the interview with police

[84] Mr Ghattas submits that at a certain point in his interview with police in the early hours of 18 April 2012, the line of questioning became improper. No complaint is made in relation to the first part of the interview, which is recorded up to page 7 of the transcript. It is said that from page 8 of the interview the questioning became improper and unfair. It included questions about:

- why Mr Ghattas did what he did having known Ms Buckley for only a short time;
- his absence of knowledge about the contents of court orders and who had access rights;
- the fact that he could not see anyone hurting the child;
- the assertion that "in all reality you shouldn't have even be there";
- that he did not evaluate the situation;
- that throwing a gas bottle itself was a "really dangerous" thing to do if there had been a fault with the gas bottle.

The final series of questions is alleged to have descended into cross-examination and argument. Counsel for Mr Ghattas acknowledges that he appeared to withstand the questioning and was not bullied into shifting his position. Still, it is submitted that the line of questioning was apt to leave a prejudicial effect with the jury, and give the impression that the personal views of the police officer reflected the correct or lawful approach which Mr Ghattas should have taken. These comments carried the weight of authority of a police officer, and some of them are said to have been emotive and inflammatory. Mr Ghattas submits that this part of the interview was improperly and unfairly admitted against him, that a miscarriage of justice was occasioned and that a new trial should be ordered.

[85] The respondent contested there was any miscarriage of justice occasioned by the admission of the interview. There is no suggestion that the statements made were not voluntary. The admission of the statement afforded Mr Ghattas an opportunity to have a largely self-serving version of the events before the jury and, having chosen not to give evidence, Mr Ghattas was able to address after the prosecution. The impugned questions are said to have amounted to attempts to clarify Mr Ghattas's state of mind or knowledge and not to have created any risk of producing unreliable answers. There was no unfairness such that the judge ought to have excluded parts of the interview in the exercise of a discretion.

Was a miscarriage of justice occasioned by the admission of the interview?

[86] The parts of the interview objected to included unnecessary and unfortunate comments by the police officer. Improper questioning may lead to the discretionary exclusion of a police interview on an unfairness ground.[7] One such ground is cross-examination going beyond the clarification of information voluntarily given.[8] One reason that such cross-examination is improper is that it may amount to an attempt to break down a prior voluntary account.[9]

[87] In this case, Mr Ghattas was not bullied. He responded to the implicit criticisms conveyed by the impugned questions. The jury may have been influenced by the police officer's view that Mr Ghattas failed to evaluate the situation prior to going to the house, and in throwing a gas bottle through the glass door after he heard

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7 *Duke v The Queen* (1989) 180 CLR 508 at 513.

8 *Ibid.*

9 *Van der Meer v The Queen* (1988) 82 ALR 10 at 19 citing *McDermott v The King* (1948) 76 CLR 501 at 517.

screams. However, Mr Ghattas responded to these criticisms and the prosecution case was not about a careless failure to evaluate the situation. The prosecution case related to his intent, his actions and the absence of the defence of extraordinary emergency which Mr Ghattas raised in relation to the charge of wilful damage. To the extent that the questioning went beyond clarification of information voluntarily given, it was not of a character which justified its exclusion on the unfairness ground.

[88] I take into account that Mr Ghattas was self-represented at the trial. However, even if he had been represented, I am not satisfied that counsel would have had a sound basis to seek the exclusion of that part of the interview recorded after page 8 of the transcript. Any implicit criticism made by the police officer to the effect that Mr Ghattas should not have gone to the premises in the circumstances was subsumed by the prosecution case that he went to the house with a shared unlawful intent at the instance of Ms Buckley. The police officer's implicit view that he should not have been there and not gone into the house coincided with the prosecution case. I am not persuaded that it infected the jury's deliberations.

[89] Any unfairness to Mr Ghattas in having certain questions admitted into evidence needs to be balanced against the forensic advantage which he had from having his answers to those questions admitted into evidence. He continued to explain his position. His answers did not inculpate him. Along with his earlier answers, they provided a foundation in the evidence upon which he could rely in addresses to contest the prosecution case.

[90] An initial step in deciding whether the reception of the questions gave rise to a miscarriage of justice is to ask what the prosecution achieved by introducing the questions into evidence.[10] In my view, the prosecution achieved very little. There was not a proper basis for the discretionary exclusion of those questions and their reception into evidence did not occasion a miscarriage of justice. Mr Ghattas fails in his second ground of appeal.

Ms Buckley's application for leave to appeal against sentence

[91] Ms Buckley was sentenced to concurrent terms of imprisonment of two years, to be suspended after she had served a period of 12 months in custody. She applies for leave to appeal against that sentence on the grounds that a requirement for her to serve 12 months actual custody of her two year sentence is manifestly excessive and the result of the learned sentencing judge:

(a) giving insufficient weight to her antecedents;
(b) giving insufficient weight to the context in which the offending occurred;
(c) forming a more serious view of her conduct than was made out on the evidence.

Ms Buckley correctly concedes that offences involving breaking into homes and threatening the safety of persons in them are serious, and generally warrant custodial sentences.[11] She submits that principles of deterrence and denunciation can be achieved by the imposition of a sentence of imprisonment of two years, whilst the circumstances of the offending in her case, which involved heightened emotions in relation to children exacerbated by the complainant's contravention of a court order, place this in a category of case where additional leniency ought to be

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10 *Van der Meer v The Queen* (1988) 82 ALR 10 at 21.
11 *R v Wentt* [1995] QCA 613.

extended to her. Given her previous good character and antecedents, she submits that she should not be required to remain in custody beyond the period of approximately five months that she has served, and that the period of imprisonment ought to be suspended forthwith.

[92] The respondent submits that the sentence imposed was not in error when measured against the "yardsticks" of other sentences in more or less comparable cases.[12] It submits that the circumstances are unexceptional, and the fact that Ms Buckley committed the offence against the background of a heightened emotional response in respect of her children does not alter the need for a sentence in which general deterrence is a significant factor. Despite Ms Buckley's heightened emotion and lack of criminal history, the respondent submits that the sentence was not manifestly excessive.

Ms Buckley's antecedents

[93] Ms Buckley was born in early 1985, making her 27 at the time of the offences and now aged 29. She completed year 12 at high school, a Certificate III in Nursing and a Certificate III in Business Administration. She began part time work as a 12 year old and has worked all of her life. Her work ethic and personal responsibility were reflected in the fact that she purchased her first property when she was 18 years old. She has always supported herself and never claimed unemployment benefits. At the time of the offences, she was working as a House Cleaning Manager. She had been engaged in a custody battle over her children, and there were some issues about the child support debt owed by the complainant. She cared for her children, supporting them emotionally and financially. At the time she came to be sentenced, Ms Buckley was working three days a week, with the youngest child in day care on each of those three days and the older child attending a private school. In addition to being a good parent, Ms Buckley worked as a volunteer for the RSPCA.

[94] This episode was the first occasion that she had been in trouble with the authorities. She had no criminal history and no traffic history. That fact contrasts her situation with many "home invasion" cases in which the offenders have a criminal history and the home invasion is related to criminal behaviour such as drug dealing.

[95] The learned sentencing judge mentioned in her sentencing remarks the absence of a criminal history and stated that the head sentence would be moderated to recognise this and "the heightened emotion at this particular period". But the extent to which it was moderated for these two facts is unclear. Apart from reference to the absence of criminal conviction, there was no reference to Ms Buckley's antecedents and previous good character.

The circumstances of the offending

[96] The learned sentencing judge took an understandably serious view of the conduct of Ms Buckley. Her Honour stated that Ms Buckley "rushed over for a violent confrontation", that Mr Ghattas's violent incursion into the house using the gas bottle was "the natural development of the unlawful plan", that Ms Buckley "set the violence in motion" and that she "orchestrated a dangerous situation".

[97] The circumstances of the offending have been extensively canvassed in the appeals against conviction. Ms Buckley's conviction on each count did not depend on proof that she planned a violent confrontation with the three men who accompanied her. Mr Bryant was not part of any plan to assault, and the learned sentencing judge

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12 *R v Fitzgerald* [2004] QCA 241; *R v Boyd* [2009] QCA 8.

mis-described events as a "pack attack" upon the complainant's house. It was Ms Buckley and Mr Ghattas who approached the home. Mr Bryant stayed at the car and Mr Carter also stayed in that vicinity, later coming into the front yard it seems at about the time the complainant ran out of the front door and assaulting the complainant after that time. The initial approach to the house by Ms Buckley and Mr Ghattas was not violent. There was a gentle knock at the door. Matters then escalated.

[98] The verdicts against Ms Buckley indicated that the jury accepted that she and at least Mr Ghattas attended the home with the intention of assaulting the complainant if this proved necessary. The evidence did not indicate that there was any plan for Mr Ghattas to smash in the door using a gas bottle or any other implement. The evidence tended to suggest that Mr Ghattas, in the heat of the moment and having heard a child's screams, took up the gas bottle and broke the door without any encouragement from Ms Buckley.

[99] In sentencing Mr Ghattas, the trial judge referred to him as "the principal offender in all three offences". He was sentenced to concurrent terms of imprisonment of two and a half years on counts 2 and 3 and a separate concurrent sentence of six months for the wilful damage count. His sentences of two and a half years were suspended after 13 months in custody. This was only one month more actual custody than imposed upon Ms Buckley. Yet, as the learned sentencing judge remarked, Mr Ghattas was "in the worst position because of your role as principal offender and [your] criminal record". Mr Ghattas was aged 40 at the time of the offences, had a four page criminal history including drug offences and an assault in 2001. He had not been convicted of any offences since 2005.

Extenuating circumstances

[100] Part of Ms Buckley's submission that the learned sentencing judge formed a more serious view of her conduct than was justified on the evidence is the contention that insufficient weight was given to the context in which the offending occurred. The complainant, in breach of court orders relating to the children, unilaterally decided to retain custody of them. That said, he encouraged Ms Buckley to contact the police. She tried to call them, without success. She should have gone to the police station. Instead, she took a different course by which she hoped to retrieve her children. It was not surprising that the complainant chose not to answer the gentle knock on the door. But it also was not surprising that an upset mother would seek the complainant to comply with a court order and seek support in doing so after she was unable to telephone the police. A clearer mind would have anticipated the risk of matters escalating in the way which they did, when the complainant chose not to engage in discussion through the closed door.

[101] The learned sentencing judge referred to the heightened emotion involved in the episode, which arose against the background of an acrimonious relationship and tension about the children. However it is not apparent that the extenuating circumstances attracted much leniency, with a period of actual custody being only one month less than that imposed upon Mr Ghattas. Moreover, the learned sentencing judge somewhat overstated the respects in which Ms Buckley "orchestrated" matters and "set the violence in motion". It was not part of the prosecution case that the common unlawful intention included breaking into the house. The evidence at the trial tended to suggest that Mr Ghattas did so without reference to Ms Buckley, and that, the door having been broken, he encouraged Ms Buckley to go into the house in order to retrieve her children.

Was the sentence manifestly excessive?

[102] The rapid escalation of matters was not unpredictable, and this is why a sentence which denounced Ms Buckley's conduct and deterred others from engaging in similar conduct was called for. Individuals in Ms Buckley's position, who have the benefit of court orders, should be encouraged to seek the assistance of police and the courts, and deterred from taking the enforcement of court orders into their own hands. As matters transpired, the complainant suffered minor physical injuries. The evidence did not prove, and the sentencing judge did not find, that a weapon was used to assault him. However, implementation of a plan to assault the complainant, if necessary, could have resulted in more serious physical consequences for the complainant and for others. The sentence of two years' imprisonment was not excessive when regard is had to the principles of deterrence and denunciation.

[103] The issue is whether requiring the applicant to serve 12 months was manifestly excessive and the result of one or more of the errors contended for by Ms Buckley's counsel.

[104] I consider that it was. A requirement to serve 12 months of actual custody gave too little weight to Ms Buckley's previous good character and antecedents and too little weight to the extenuating circumstances which induced her to enlist at least Mr Ghattas to retrieve her children, and to assault the complainant if this proved necessary.

[105] A period of actual custody of 12 months for Ms Buckley is hard to reconcile with a period of actual custody of 13 months in the case of Mr Ghattas, who was sentenced as a principal offender, and was in the worst position of the three offenders, in part because of his criminal record. The learned sentencing judge found that the complainant was knocked from behind and fell to the ground but did not specify whether this was a knock from Mr Ghattas or Mr Carter. She remarked that it was Mr Carter who the complainant passed as he was hit. These remarks suggest that the hit came from Mr Carter. Mr Carter was sentenced to imprisonment for 18 months to be suspended after having served a period of eight months for the assault which he committed, which the learned sentencing judge found included a joint attack with Mr Ghattas when the complainant was on the ground.

[106] That Ms Buckley was held liable for the offences of burglary and assault committed by others by virtue of s 8 placed her circumstance in a different category to Mr Ghattas who was convicted of each offence as a principal offender. The evidence did not disclose a common plan to break into the home. The common intention to assault the complainant did not necessarily involve inflicting serious violence upon him. An assault may have been planned, but the evidence did not support the conclusion that the plan necessarily entailed serious violence or that Ms Buckley did not intend to first negotiate a resolution if possible.

[107] Nevertheless, Ms Buckley warranted substantial punishment in circumstances in which there was a risk that such an ill-defined plan might escalate and result in serious violence being inflicted and the house being broken into in order to retrieve the children. These matters and the need for general deterrence did not make a sentence of two years in the case of Ms Buckley manifestly excessive. However, insufficient weight was placed on the particular circumstances of her offending and her good character. The subjective circumstances of Ms Buckley's offending did not justify her being required to serve 12 months actual custody. Such a requirement was manifestly excessive in the circumstances.

[108] Reference to broadly comparable cases also suggests that a requirement for her to serve twelve months of actual custody was excessive and did not give sufficient weight to her antecedents, the extenuating circumstances and the nature of her offending.

[109] In *R v Fitzgerald*[13] the offender deliberately went to the complainant's house to assault him, forcibly entered the house, attacked him for some time and resumed the attack even after the police had arrived. His actions were prompted by the complainant's part in the breakdown of the offender's marriage. The offender's wife was present with the complainant at the time. The offender was aged 39, had no prior convictions and had committed the offences when in a rage. He pleaded guilty to offences of entering a dwelling with intent to assault, the entry being by means of a break, and one count of unlawful assault occasioning bodily harm. The assault included head butting the complainant, then placing him in a headlock (which was only released when the complainant grabbed the offender by the testicles), threats to disfigure the complainant, grabbing the complainant's throat which rendered him unconscious briefly and punches to the complainant's face. The offender was sentenced to imprisonment for 21 months, to be suspended after six months. This Court, by majority, was not persuaded that the sentence was beyond the proper exercise of the sentencing discretion. The Chief Justice described the offender's conduct as exhibiting "considerable deliberation and brutality". Mackenzie J noted that the period of actual imprisonment reflected a larger discount for factors in the offender's favour than would ordinarily be given. Jerrard JA, in dissent, would have varied the sentence by ordering that it be suspended immediately (the offender having served around six weeks at the time the application was heard and determined).

[110] That case, like this one, involved a person of previous good character. The attack was more sustained than that inflicted upon the complainant in this case, and occurred after what is referred to as a "home invasion". The offender in that case acted alone, but as Mackenzie J observed "the conduct involved a deliberate decision to go to the complainant's home to assault him, and the assault was premeditated and not transitory".[14]

[111] In *R v Cockfield*[15] the 22 year old applicant had a criminal record, including serious assault. He and a companion went to the complainant's house asking for drugs. They forced entry, and the applicant demanded money, saying he had a gun in his pocket and would shoot the complainant. Violence was used in robbing the complainant. The applicant in that case pleaded guilty. This Court reviewed a number of cases of "home invasion" before granting leave to appeal against sentence. But for the applicant's undertaking under s 13A of the *Penalties and Sentences Act* 1992 a sentence of two and a half years imprisonment suspended after nine months would have been imposed. Instead, the applicant was sentenced to two years imprisonment to be suspended after three months.

[112] The applicant in *R v Ross*[16] was sentenced to 18 months imprisonment for burglary by breaking, 15 months for assault occasioning bodily harm and three months for stealing, with a parole release date fixed after six months. The applicant and another man were intoxicated and after abusing the occupants of a home forced entry into it, and began to assault the complainant with a plastic oar. He later

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13 [2004] QCA 241.
14 At [37].
15 [2006] QCA 276.
16 [2012] QCA 247.

lunged toward the complainant with a spear gun, causing superficial injuries. The applicant was 26 years of age, had no criminal history and a good work history. There was a late plea of guilty. There was no dispute that the head sentence of 18 months was appropriate. The applicant's lack of a criminal history and the fact that he was not initially armed were submitted to warrant a non-custodial sentence. This submission was rejected. The Court noted that the applicant has used a dangerous weapon, and that a parole release date fixed after six months was not excessive in the circumstances.

[113] Examples of more serious cases of "home invasion" include *R v Boyd*[17] and *R v Leu; R v Togia*[18].

[114] The more comparable cases to which I have referred indicate that, if appropriate account had been taken of Ms Buckley's good character and the extenuating circumstances of her offending, a head sentence of less than two years might have been imposed. If, however, a head sentence of two years was to be imposed (being a head sentence higher than those imposed in *R v Fitzgerald* or *R v Ross*) then the applicant's antecedents, and the circumstances under which she came to be held liable for the offences committed by Mr Ghattas should have been reflected in a period of actual custody substantially less than the 12 months period imposed, and substantially less than the period of actual custody which the principal offender, Mr Ghattas was required to serve.

[115] Ms Buckley's conduct in enlisting the help of Mr Ghattas to assault the complainant, if this proved necessary in order to retrieve the children, was undoubtedly serious and justified the head sentence of two years imprisonment. However, inadequate weight was given to her antecedents and to the circumstances in which, after two failed attempts to telephone police, she was prompted to go the house with others to retrieve her children, who should have been returned to her in accordance with a court order. This resulted in a period of actual custody that was manifestly excessive.

[116] I would vary the sentence by reducing the period of actual custody to seven months.

Orders

[117] In Ms Buckley's Appeal No 8 of 2014 I propose the following orders:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence granted.
3. Appeal against sentence allowed.
4. Sentence varied by ordering that the term of two years imprisonment be suspended after serving a period of seven months, and the offender must not commit another offence punishable by imprisonment within a period of two years to avoid being dealt with for the suspended term of imprisonment.

[118] In Mr Ghattas' appeal CA No 33 of 2014:
Appeal against conviction dismissed.

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17 [2009] QCA 8.

18 (2008) 186 A Crim R 240; [2008] QCA 201.