SUPREME COURT OF QUEENSLAND

CITATION:	*R v Warwick* [2014] QCA 101
PARTIES:	**R** **v** **WARWICK, Anthony Scott Roy** (appellant/applicant)
FILE NO/S:	CA No 117 of 2013 SC No 554 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2014
JUDGES:	Margaret McMurdo P, Fraser JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant found guilty of malicious act with intent – where the appellant argued the jury should have rejected the complainant's evidence because of implausibilities and inconsistencies – where complainant gave evidence that he was stabbed by the appellant – where the complainant's evidence contradicted the appellant's evidence – where the evidence of other witnesses was consistent in some respects with the complainant's evidence – where scientific evidence was consistent with the complainant's evidence – whether the conviction was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – PROCEDURE – JURIES – DISCHARGING AND EXCUSING FROM ATTENDENCE – GENERAL PRINCIPLES – where the jury retired to consider their verdict – where one juror sought to be excused due to an unbreakable personal commitment – where the juror was discharged and the remaining 11 jurors continued deliberations – where the jury reached a guilty verdict –

whether there was a miscarriage of justice as a result of not discharging the entire jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was 35 years old – where the applicant had a significant prior criminal history – where the applicant stabbed the complainant with a knife and attempted to stab him again – where the complainant suffered a life threatening injury – where the seriousness of the injury and circumstances of the attack were treated as aggravating factors – where the sentence was reduced by 12 months for time already spent in custody on another sentence and four months for the manner in which the applicants instructions facilitated the trial – where the applicant sentenced to eight years and eight months imprisonment and a serious violent offence declaration made – whether sentence was manifestly excessive

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, considered
R v Thompson [1983] 1 Qd R 224, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, considered

COUNSEL: The appellant/applicant appeared on his own behalf
P J McCarthy for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Mullins J's reasons for dismissing this appeal against the appellant's conviction for grievous bodily harm with intent.

[2] I also agree with her Honour's reasons for refusing the application for leave to appeal against sentence. I add only that counsel for the respondent in his submissions as to the sentence application referred this Court to *R v Nguyen*[1] and *R v Whittaker*,[2] contending that they were comparable cases supporting the effective eight years and eight months sentence imposed here. Although those cases are not closely factually comparable, they demonstrate that the applicant's sentence is broadly consistent with the sentences imposed there when the various competing mitigating and aggravating features in each case are considered. Both Nguyen and Whittaker unsuccessfully sought to challenge as manifestly excessive sentences of eight years imprisonment with declarations that the offences (grievous bodily harm with intent) were serious violent offences. At 23 and 21 respectively, both were considerably younger than the present applicant and unlike him, both had entered timely guilty pleas. The present applicant also had a more concerning, relevant

1 [2006] QCA 542.
2 [2011] QCA 237.

criminal history than either Nguyen or Whittaker. The sentence imposed on the applicant, including the declaration that the offence was a serious violent offence, was entirely appropriate.

[3] I agree with the orders proposed by Mullins J.

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

[5] **MULLINS J:** After trial before a jury, Mr Warwick was acquitted of attempted murder, but found guilty of the alternative count of malicious act with intent. He was sentenced to imprisonment for a period of seven years eight months and it was declared that he was convicted of a serious violent offence.

[6] Mr Warwick appeals against the conviction on the ground that the verdict was unsafe and unsatisfactory in that the verdict was not reasonably open on the evidence. He also applies for leave to appeal against the sentence on the basis that it was manifestly excessive, as a result of the serious violent offence declaration.

[7] When the appeal first came on for hearing on 25 September 2013, Mr Warwick appeared for himself, as his application for legal aid had been refused. He was granted an adjournment in order to seek legal representation. He was unsuccessful again in obtaining legal aid. When the appeal came on for hearing on 4 February 2014, he was still unrepresented, and had foreshadowed seeking a further adjournment. He decided, however, to proceed with the appeal and present the arguments himself.

[8] Mr Warwick's primary contention is that the jury should have rejected the complainant's evidence because of implausibilities and inconsistencies within the complainant's evidence and when compared with other evidence.

[9] It is therefore necessary to traverse the evidence that was before the jury to assess independently whether it was open for the jury to be satisfied beyond reasonable doubt that Mr Warwick was guilty: *M v The Queen* (1994) 181 CLR 487, 492-495; and *SKA v The Queen* (2011) 243 CLR 400 at [21]-[22].

[10] Mr Warwick had been charged jointly with his partner. The jury was unable to agree on verdicts in respect of the charges against Mr Warwick's partner and the jury was discharged from bringing in verdicts against the partner.

Summary of the evidence adduced at the trial

[11] The subject incident occurred around 8.30 pm on 6 November 2011 at Mr Warwick's home, when the complainant came to see him, driven there by Mr Mitchell. Photographs of the scene taken after the incident were before the jury.

[12] The complainant's evidence-in-chief was as follows. He had known Mr Warwick for 20 years. He had been fishing at the Gold Coast. He had telephoned Mr Warwick prior to his arrival. The complainant was wearing boardshorts and no shirt or shoes. He saw Mr Warwick walking through the front gate, wearing boxer shorts and a shirt. Mr Warwick asked him to come back up into the house. The complainant followed him up onto the verandah, while Mr Mitchell remained in his car. When he reached the verandah, he could see the partner with a baseball bat standing to his right and Mr Warwick went inside and then came back out. The

partner was about two to three metres away and did not say anything to him. When he was walking up the stairs Mr Warwick had said to him "Say something to him, talk to him, quieten him down" or something along those lines, explaining that he and his partner were arguing.

[13] When Mr Warwick came out of the house, he was "just ranting" and stood to the complainant's left saying "What have you been saying about my boyfriend?". The complainant proceeded to say to Mr Warwick "That's bullshit. I don't know what you're talking about." and went to leave by walking through the lattice gate. He grabbed hold of the lattice gate to open it and got stabbed underneath the right arm. Immediately before being stabbed, Mr Warwick said something like "What have you been saying about my boyfriend?" or "You're going to get this." The partner was still standing to the complainant's right. After he was stabbed, he ended up on the other side of Mr Warwick and he noticed both Mr Warwick and the partner coming towards him. The complainant proceeded to jump across the railing and Mr Warwick was saying "Hit him with the bat." The complainant tried to get to the gate to get away and both Mr Warwick and his partner were at the bottom of the stairs coming towards him again. He got hold of the metal gate and was trying to get out when he was struck three or four times around the shoulder and around the back of the head from the bat and at the same time Mr Warwick was attempting to further stab him with the knife, as the complainant tried to fend him off by putting up his arms with both hands up in the air with his palms out. The complainant got stabbed on the hand at the gate. He managed to get through the gate and ran to Mr Mitchell's car. Mr Mitchell drove him to the hospital. The complainant is 198 cms tall and at the time of the incident weighed 80 kgs. Mr Warwick is shorter than the complainant, coming up to his shoulder height.

[14] During cross-examination by Mr Warwick's counsel, the complainant said as follows. He had not had an argument with either Mr Warwick or his partner before he went up onto the verandah. He knew Mr Warwick since high school and had been a regular weekly visitor to his home in the six months before the incident. He had performed some work on a Toyota Celica motor vehicle that belonged to Mr Warwick for which he was not paid. Mr Warwick did tattoo work on the complainant for which he paid Mr Warwick. He was admitted to hospital for an overdose from prohibited drugs after the time of the incident. The complainant had a vague memory of speaking to detectives on 9 November 2011, but did not recall a great deal about the time in hospital. The complainant recalled giving a statement after he was released from hospital to Detective Ahrens and accepted the statement was dated 2 December 2011. The complainant accepted that he recorded in his statement that he did not have to run far, because Mr Mitchell was just out the front, but explained that he remembered "when I came out the gate the car was moving down the street". The complainant denied being armed with a knife when he went to Mr Warwick's home. The complainant accepted that it was a shock for him to see the partner standing on the verandah with a baseball bat, but he said nothing to the partner who said nothing to him.

[15] When cross-examined on the paragraph in his statement to the effect that the complainant did not see what he was stabbed with, the complainant's explanation for his evidence at the trial that he saw Mr Warwick with a knife on the verandah was "These things come back to you." When cross-examined on the fact that his statement did not mention that the lattice door (on the verandah) was closed, the complainant said "I actually recall trying to leave and I put up my right arm to open

up the lattice gate and that's what (*sic*) I got stabbed underneath the arm." He accepted that before he was stabbed Mr Warwick said something along the lines of "You're deadset going to get this," and that was not recorded in his statement. He said "Well, things come back to you after a while." He accepted that his statement did not record that his hand was injured from the knife during the confrontation in the front yard at the gate. He denied that nothing occurred in the front yard involving him, Mr Warwick and the partner. He denied that, when they were on the verandah, Mr Warwick threw a wallet at him and grabbed the knife from him. He also denied that he then lunged towards Mr Warwick who was forced onto a couch on the verandah and pushed the complainant away from him.

[16] The complainant disagreed with the suggestion put to him by the partner's counsel in cross-examination that there was no altercation whatsoever involving the partner with him. He also disagreed that the partner did not have a bat or other implement.

[17] At the time of the incident Mr Mitchell had known the complainant for about three years, but had known Mr Warwick for two or three months. Mr Mitchell assumed that he was driving the complainant to Mr Warwick's home to pick drugs up or to give him drugs. He pulled his car up at the front, level with the wheelie bin, and Mr Warwick moved towards the car. He was wearing red boxer shorts and a short sleeve red shirt and asked the complainant to come up to the house. The complainant was wearing red boardshorts and had no shoes on and no shirt. He had nothing on him that Mr Mitchell could see. On arrival both the complainant and Mr Warwick were calm. They walked up the stairs to the verandah, he could no longer see them, but he could hear that they started swearing and yelling at each other. Mr Mitchell proceeded to drive off slowly. He heard the complainant yell out and saw him running down the footpath. He stopped the car, opened the door and the complainant got in and had blood coming out of him. Mr Mitchell took off his singlet, put it on him, and drove to the hospital.

[18] During cross-examination by Mr Warwick's counsel, Mr Mitchell said as follows. It was possible the complainant had a knife on him and he did not see it. The first raised voice he heard was the complainant's voice. The only two voices he heard coming from the verandah were Mr Warwick's and the complainant's. He did not see or hear any struggle or commotion at the gate.

[19] Mr Luxton lived diagonally across from Mr Warwick's house. He heard a commotion about 8.30 pm, went to the window and identified the commotion as coming from Mr Warwick's residence. He was looking down at 45 degrees to Mr Warwick's house. He could see the end of the verandah, the bottom of the stairs, the path to the gate area, and the gate area. He could see silhouettes from the light on the verandah and heard someone yell out "You fucking dog." He could hear sounds of a struggle with people slamming into each other and noise on the verandah "like stuff getting knocked around." He saw the car out the front start rolling away down the road and the man come running out the gate, yelling out to his mate to hold off. The man jumped in the car and they took off. Mr Luxton did not see the two men who lived in the house at the time he saw the visitor opening the gate and running down the footpath. He heard Mr Warwick yelling out abuse at the car and the visitor. Mr Luxton saw Mr Warwick at the gate and his partner walked down to the gate after the yelling of the abuse. At no time did Mr Luxton see the visitor assaulted in the area of the front gate.

[20] Mrs Luxton looked out the window with her husband, when they first heard the commotion. The verandah light was on at Mr Warwick's house and Mrs Luxton could see two outlines moving around the verandah and could hear Mr Warwick's partner screaming. After 15 or 20 seconds Mrs Luxton went to another room to ring 000. When Mrs Luxton returned after four or five minutes, she could hear someone on the verandah using a scrubbing brush and a hose and someone walking around the garden with a torch. About five minutes later the police drove past and both Mr Warwick and his partner were on the verandah.

[21] Mr Bracker lived in a double storey house next to Mr Warwick's house. He was downstairs in his house when he heard a loud commotion from Mr Warwick's house including some crashing and swearing. He heard Mr Warwick's voice. He went upstairs to shut the windows. He heard the partner saying "There's blood everywhere. He's bled everywhere." He went downstairs to ask his wife to ring the police and then returned upstairs. He heard Mr Warwick saying "We've got to find the knife. We have to get the knife." He observed a torch light on the verandah moving about in front of the lattice door shining on the floor and then in the yard. Mr Bracker then heard Mr Warwick say "I've got it" or something to that effect and saw him go upstairs. He then saw both Mr Warwick and his partner come out and hose off the verandah and the path and heard a broom used that made a scrubbing noise. They went back inside and then three or four minutes later the police arrived.

[22] Mrs Bracker also lived in the property next door to Mr Warwick's house. Mrs Bracker heard a big loud noise and swearing. Her husband went upstairs and, when he came downstairs, Mrs Bracker went upstairs with him, looked through the window, and could see a torch light moving around. Mrs Bracker went downstairs and rang the police.

[23] Mr Warwick's cousin, Mr David Warwick, was asleep on the evening of 6 November 2011. His partner, Ms Hall, alerted him to the arrival of Mr Warwick. Mr Warwick asked him for a lift to a mate's place over in North Ipswich. As he dropped him off, Mr Warwick said to Mr David Warwick that he had stabbed someone. Ms Hall gave evidence of opening the door to Mr Warwick and that he smelled like bleach.

[24] Detective Morgan attended at the Ipswich General Hospital at 3.36 pm on 9 November 2011 and recorded an interview with the complainant. The complainant was receiving morphine for pain relief, but Detective Morgan formed the view that he was capable of giving a version of events. No scrubbing brush or yard broom was located during the course of the search of Mr Warwick's property.

[25] Detective Ahrens prepared the complainant's written statement from the digital recording made by Detective Morgan of his interview with the complainant in hospital. Detective Ahrens showed the statement to the complainant who asked him to exclude the material about drugs. In that statement, the complainant said he was stabbed by Mr Warwick, but did not mention seeing the knife. Detective Ahrens provided information about the 000 calls. Mrs Luxton made her call at 8.41 pm. Mrs Bracker's call was made at 8.50 pm.

[26] It was admitted by the parties that Mr Warwick telephoned the landline at the complainant's parents' home at 6.40 pm on 6 November 2011 and spoke to the complainant's mother, although he wanted to speak to the complainant who was not

present. Mr Warwick told the complainant's mother that "it was Tony" and he wanted the complainant to call him. A table summarising telephone evidence was admitted by the parties. That showed that Mr Mitchell's mobile telephone was used to contact Mr Warwick's mobile telephone at 7.19 pm and 8.13 pm and that Mr Warwick's telephone was used to contact Mr Mitchell's telephone at 7.23 pm and 8.23 pm on 6 November 2011. The measurements of the verandah and front stairs and the vicinity were also admitted by the parties.

[27] Dr Ivernee treated the complainant when he arrived at the Ipswich Hospital. He had lost a quantity of blood. He had a laceration under the sixth rib on the right hand side of the chest that was a very serious injury. If he had arrived at hospital 10 minutes later, he would have died. The sharp object or blade that caused the wound would have been no wider than 2 cms and a blade of 10 cms in length may have been sufficient. Not a lot of force was required to put a sharp object through the path in the chest that the stab wound followed. The blade penetrated the right atrium of the heart. There was also a laceration to the complainant's left hand for which no specific treatment was given. The complainant was examined the next day when in the intensive care unit and no injuries other than the lacerations to the chest and the left hand were noted. The complainant was hospitalised for 14 days.

[28] Scenes of crime officers examined the verandah, the front entrance, front stairs, front pathway and some of the rooms of Mr Warwick's house after the incident. At the outset photographs were taken of the areas of interest. The officers then did presumptive testing for blood and took swabs and other samples. One of the officers accepted that no photograph was taken of the inside left side of the lattice door and explained that would have been because there was nothing that was of interest to the scenes of crime officers. The scenes of crime officers and the scientists gave evidence by reference to a table that was admitted by the parties and identified each item, its location, whether it was tested presumptively for blood and the result of such test and any DNA result. The DNA result for the blood swab taken from the hitting end of a baseball bat found on the bed in the front bedroom was consistent with the complainant's DNA (1 in 44 billion probability of another person's DNA). The DNA results for a blood swab from the floor behind the lattice door and a blood swab from the post and plant to the left of the lattice door were also consistent with the complainant's DNA. No knife that was located at the house was identified as the relevant knife.

[29] Mr Warwick's evidence-in-chief was as follows. He had purchased a Toyota Celica car that needed a new clutch and a few minor repairs. He asked the complainant to give him a hand fixing the car for which Mr Warwick would make some payments but also give him tattoos. He got three tattoos and about $500 to $600 in cash. At the time of the incident Mr Warwick had a problem with drugs, using morphine, cannabis and amphetamines. The complainant saw Mr Warwick as someone who could get cannabis for him and the complainant could get methylamphetamine for Mr Warwick. Mr Warwick had taken morphine around lunchtime on the day of the incident which had the effect of relaxing him.

[30] Mr Warwick was on the verandah when the car driven by Mr Mitchell arrived. He proceeded down the stairs and out the front gate to meet the complainant. The complainant proceeded to walk up the stairs and Mr Warwick followed him onto the verandah. Mr Warwick gave the complainant $100 for the work on his car and told him that was the last money he was going to give him. The complainant became

aggressive, swore at him, and produced a knife. Mr Warwick threw his wallet at the complainant and snatched the knife out of the complainant's hand with his left hand, the complainant came forward at him and they toppled onto the couch on the verandah with the complainant on top of Mr Warwick. Mr Warwick tried to push the complainant off and lost track of the actual knife. Mr Warwick realised that he was lying on the baseball bat, picked it up and, as the complainant was going over the railing, started swinging at him in a panic. Mr Warwick's partner was not on the verandah when the complainant arrived or during the altercation between Mr Warwick on the verandah. As the complainant ran out the front gate, Mr Warwick followed, swearing at him, as he thought the complainant had his wallet. Mr Warwick did not attack the complainant in the front yard or in the area of the front gate.

[31] Mr Warwick went into his house and into the bathroom and noticed blood all over him, as he had cut himself on the hand when he snatched the knife from the complainant. Mr Warwick took his clothes off and threw them into the washing machine which was already going. He had a shower and then went to the front to look for his wallet and the knife. He found his wallet. He heard sirens and left the premises by jumping the back fence, because he was aware there was an outstanding arrest warrant for him due to his breaching a drug court order that required him to stay at a rehabilitation centre.

[32] During cross-examination by the prosecutor, Mr Warwick said as follows. Mr Warwick did not remember stabbing the complainant. Mr Warwick denied the suggestion that he wanted to sort out with the complainant that the complainant had been spreading rumours in relation to Mr Warwick and his partner. Mr Warwick denied that the complainant had followed him up onto the verandah, and that it was Mr Warwick who wanted to talk to him. It was usual for the complainant to come to Mr Warwick's house for drugs. Mr Warwick would normally give the complainant some money first and the complainant would leave and get the drugs. Mr Warwick denied that he had wanted to get the complainant onto the verandah to get him away from Mr Mitchell. Mr Warwick was much smaller than the complainant and he estimated his height at 169 cms. He accepted that he would be at a disadvantage in a physical struggle with the complainant. Mr Warwick denied he had armed himself with a knife and confronted the complainant about the rumours. The complainant pulled the knife from his waist on his right hand side. The blade would have been about 10 to 12 cms. When Mr Warwick grabbed the knife off the complainant, the complainant lunged at Mr Warwick and his body went forward onto Mr Warwick, they ended up on the couch, and that was when Mr Warwick pushed him off. Mr Warwick followed the complainant into the yard, because he thought he had his wallet. In response to the prosecutor's question as to why he did not look for the wallet first on the verandah, Mr Warwick responded that he was in a panic and "was freaked out." Mr Warwick realised he had injuries to his hands only when he was in the bathroom after the incident. He denied using a hose or any brooms after the incident. Mr Warwick denied telling his cousin after the incident that he had driven to his place because he had stabbed someone. He denied looking for the knife after the incident.

Prosecution submissions at the trial

[33] The scientific evidence was consistent with the complainant's evidence, but not Mr Warwick's evidence. There was no evidence of blood found on the couch or on

the stairs. Mr Mitchell saw nothing on the complainant. Mr Warwick's evidence that he was able to distract the complainant and grab the knife made no sense. The complainant's evidence as to the baseball bat made sense, whereas Mr Warwick's evidence did not. The fact that Mr Warwick was heard yelling abuse at the front gate was inconsistent with the complainant being the aggressor. The fact that Mr Luxton did not see the assault at the front gate did not mean it did not happen. It is clear that Mr Luxton did not see all that happened during the incident. He did not see the complainant jump off the verandah.

Submissions on behalf of Mr Warwick at the trial

[34] The submissions on behalf of Mr Warwick focused on discrepancies between the complainant's various accounts and also with the evidence of other witnesses and attacking the credit of the complainant. It was significant that the complainant in his statement to the police said he never saw the knife either on the verandah or down in the front yard, but gave evidence in the trial that he saw the knife on the verandah in Mr Warwick's hand and when the altercation continued in the front yard. The complainant gave evidence that the lattice door at the top of the stairs was shut when he tried to leave the verandah, but that was not in his police statement. There was no photograph of blood on the lattice door on the inside of the left hand side of the door, which would have been expected, if the door had been shut and the complainant had attempted to open it, when he was bleeding. There was no medical evidence of any bruising consistent with the complainant's account that he was struck with the baseball bat near the front gate. The complainant's account was inconsistent with the evidence of Mr Luxton who did not see any assault on the complainant at the gate. There was one stab wound to the chest only which did not require a great deal of force and that was particularly relevant on the issue of intention.

Was it open for the jury to be satisfied of Mr Warwick's guilt beyond reasonable doubt?

[35] There was no challenge to the directions given by the learned trial judge to the jury on the issues of law and the summing-up otherwise summarised comprehensively and fairly the evidence and the submissions of counsel. The jury were directed that they could not bring in a guilty verdict against Mr Warwick unless they were satisfied beyond reasonable doubt that the prosecution had excluded the defences of self defence against an unprovoked assault (under s 271(2) of the *Criminal Code* 1899 (Qld)), defence of dwelling, accident and unwilled act.

[36] The critical issue for the jury was who introduced the knife into the incident. The complainant's evidence that he did not have the knife was supported by Mr Mitchell's evidence that he did not see him carrying anything and the complainant was wearing only boardshorts. Even though Mr Mitchell conceded that it was possible the complainant had a knife on him and he did not see it, it was otherwise clear from the evidence of Mr Mitchell that he was not expecting the confrontation that took place between Mr Warwick and the complainant. The fact that neither Mr Mitchell nor Mr Luxton saw the assault that the complainant claimed continued at the front gate may mean that the complainant's recollection on that aspect was unreliable. It should not result necessarily in the rejection of the evidence of the complainant on the major aspect of the incident involving his being stabbed by Mr Warwick on the verandah.

[37] Apart from the support for the complainant's evidence found in Mr Mitchell's evidence including that it was Mr Warwick who suggested to the complainant that he come up onto the verandah, the scientific evidence supported the complainant's evidence on where the stabbing occurred. Even though there was no blood found on the inside left side of the lattice door, two swabs of blood taken from the vicinity of the lattice door were consistent with the complainant's DNA. One of the inconsistencies between the complainant's statement and his evidence about whether he saw the knife at the time that he was stabbed was not that significant when there was no issue that the complainant's injury was caused by a blade or sharp implement.

[38] In the circumstances, it was not unreasonable for the complainant's account of the manner in which the stabbing occurred to be accepted, despite the discrepancies in his accounts that were highlighted during the trial by cross-examination and the address of Mr Warwick's counsel. In view of the fact that there was only one stab wound, and the incident itself was over very quickly, it is not surprising that the jury were not satisfied that the prosecution had proved beyond reasonable doubt that Mr Warwick's intent was solely the intent to kill at the time the stabbing occurred. After reviewing the whole of the evidence, it was open on the evidence for the jury to be satisfied beyond reasonable doubt that Mr Warwick was guilty of malicious act with intent.

The discharge of a juror before verdict

[39] The judges before whom the appeal was first listed raised with Mr Warwick and the respondent whether the unusual events resulting in the discharge of a juror after the jury retired, but before verdict, should be considered for the purpose of the appeal. Mr Warwick did not seek to pursue that as an issue. The respondent provided further written submissions to the effect that there was no miscarriage of justice occasioned to the appellant by the discharge of the juror.

[40] The jury retired at 11.04 am on 16 April 2013.

[41] A note was received from the jury at 2.35 pm on 16 April 2013 about the reading of all the evidence of Mr Mitchell and Mr Bracker and certain passages of evidence of the complainant and Mr Warwick. The relevant evidence was read to the jury for an hour from 3 pm. The jury separated at 5 pm on 16 April 2013 to resume at 9.30 am the next day.

[42] At 10.28 am on 17 April 2013, one juror provided a sealed note to the bailiff that was given to the judge. The judge marked the jury note for identification and read out the relevant parts to counsel. The gist of the note was that the juror had commitments that precluded the juror's participation in the trial beyond lunch the following day. With the consent of counsel, a message was sent to the juror through the bailiff that the judge had received the note and that the juror's concerns would be taken into account.

[43] A note was received from the jury at 4.13 pm on 17 April 2013 requesting assistance from the trial judge on "(1) how we deal with competing evidence? (2) the actual definition/burden of proof (we are concerned that some members of the panel have a higher impossible standard of proof). (3) how do we get a resolution if one person has an opposing view to the rest of us? (4) We are concerned that some may be motivated by time restrictions."

[44] The trial judge gave re-directions with the concurrence of counsel in these terms:

> "So, the first question was: How do we deal with competing evidence?
>
> Well, do you remember I said to you at the - during the summing-up, you can accept all of what a witness says or some of it or none of it. And that's what you've really got to do; weigh it up, you can accept all of it, some of it or none of it.
>
> You'll have different views, you're 12 people, about it when you're assessing people. All I'd ask you to do is listen respectfully to other people's views as they express them, take them into account. In the end you have to form your own view. That's really the answer to your question.
>
> The second question is the actual definition and burden of proof. 'We're concerned some members of the panel have a higher impossible standard of proof.' Well, the burden of proof lies on the prosecution. The standard of proof is beyond reasonable doubt. They are ordinary English words, they just mean that, beyond reasonable doubt.
>
> If I could use another phrase that would be the standard of proof. The standard of proof is that used in those ordinary English terms, ordinary English words, beyond reasonable doubt. So that's what it means is just its ordinary meaning, nothing more, nothing less.
>
> The last question, which sounds a little more as if you – it reflects your fatigue, is 'How do we get a resolution if one person has an opposing view to the rest of us?' It is possible in this case for me to take a majority verdict, that is, the verdict of 11 of you. I won't do that this afternoon because I'd still like you to think about it having listened to my question, even if it were possible to take the majority verdict. What I'd like you to do is think about what I've said, sleep on it, talk to each other tomorrow morning and if, after some deliberation tomorrow morning, you can't come to a unanimous view, unanimous verdicts, but you can come to a verdict of 11 of you, then let me know that and I'll take a majority verdict.
>
> And you mentioned that some may be motivated by time restrictions but I think that really goes into the other question, so I understand that."

[45] After those re-directions the jury retired at 4.37 pm and separated.

[46] At 12 noon on 18 April 2013 the court convened in the absence of the jury in order to work out what to do about the juror who sought to be excused by lunchtime on that day.

[47] Mr Warwick's counsel submitted that if one juror was to be discharged, then the entire jury should be discharged. Counsel was concerned the length of time the jury was deliberating showed that the jury was having difficulties reaching a verdict and that, if the jury were reduced to 11 jurors and a *Black* direction given, the dynamics of the jury deliberations were changing. The partner's counsel also supported that

position. The trial judge ruled that upon the discharge of the one juror, the trial would then proceed with 11 jurors, and was not satisfied that the jury was unable to reach a verdict.

[48] The jury returned at 12.48 pm and the jury were informed of the communication from one of the jurors about "an unbreakable personal commitment" from lunchtime on that day, that the trial judge had decided to discharge that juror, and the trial would continue with the remaining 11 jurors. That juror was discharged and the jury comprising 11 jurors resumed deliberations.

[49] At 4 pm on 18 April 2013, a note was received from the jury that they had reached their verdict in regard to the charges against Mr Warwick and that they were not unanimous in their verdict on the charges against the partner. They returned their unanimous verdicts against Mr Warwick at 4.03 pm. They were discharged from bringing in a verdict against the partner.

[50] It was a matter for the exercise of the trial judge's discretion whether or not to discharge the entire jury, rather than the one juror who had good reason for no longer being available to complete jury service. If there had been a ground of appeal based on this refusal to discharge the entire jury, it could succeed only if it were shown that there had been a miscarriage of justice resulting from the failure to discharge the jury: *R v Thompson* [1983] 1 Qd R 224, 227.

[51] The re-directions given by the trial judge in response to the critical note from the jury reminded the jurors of their obligation to form their own views on the evidence and there is no reason to suspect that the jury did not follow that direction. In fact, the inability of the remaining 11 jurors to reach a verdict in respect of the partner suggests that the jurors remained true to their individual views of the evidence.

[52] Any appeal based on the exercise by the trial judge of the discretion not to discharge the entire jury, when one juror was discharged late during the deliberations, would not have succeeded, as Mr Warwick would not have been able to show that a miscarriage of justice resulted from the failure to discharge the jury.

Was the sentence manifestly excessive?

[53] Mr Warwick was 35 years old when he committed the offence. He had a significant prior criminal history including drug related, property and dishonesty offences. He was convicted of causing grievous bodily harm on 12 June 1998 in relation to stabbing an associate during an altercation. He was dealt with for breaches of a domestic violence order in September 2001 and January 2002 and for an offence of possessing a knife in a public place in November 2008.

[54] There is no challenge to the findings of fact that the judge made for the purpose of the sentencing. These included that the complainant was a much larger man than Mr Warwick, something that the complainant had done or said had "greatly displeased" Mr Warwick, they argued about it, and Mr Warwick armed himself with "a very sharp knife". Mr Warwick stabbed the complainant as he was attempting to leave the verandah and, after he jumped off the verandah, Mr Warwick attempted to stab him again. The incident was described as "a very savage attack." It was noted that Mr Warwick was so angry, that he continued to yell "vile abuse" at the complainant after he escaped. The complainant suffered a very serious injury that was life threatening. After the incident Mr Warwick set about looking for the knife

which he found and disposed of, cleaning up the crime scene and then decamping in an attempt to avoid detection. The complainant had been "gravely traumatised from the attack emotionally, psychologically and physically." The aggravating factors were listed as "the seriousness of the injury, the type of weapon used, the enclosed environment which precluded easy escape by the victim, the fact that there were two of you present and the planning involved in getting [the complainant] into the situation where he was unprotected and exposed so that you could attack him."

[55] The judge considered that the appropriate sentence was nine years' imprisonment, but reduced that by 12 months for time that he had spent in custody in completing a sentence for other offences (which he would not have spent in custody had it not been for committing the subject offence) and a further four months for the manner in which his instructions facilitated the conduct of the trial. The judge exercised the discretion to declare that Mr Warwick had been convicted of a serious violent offence, because of the way in which he planned and carried out the offence.

[56] On the basis of the findings made by the judge for the purpose of sentencing, there were features about the commission of the offence that supported the making of the declaration that Mr Warwick was convicted of a serious violent offence. Although Mr Warwick's complaint about the sentence is the making of the serious violent offence declaration, the issue on the application for leave to appeal is whether the overall sentence is manifestly excessive: *R v McDougall and Collas* [2007] 2 Qd R 87 at [17] and [19]. In light of the findings made by the trial judge and Mr Warwick's age and relevant prior criminal history and that Mr Warwick was being sentenced after a trial, the sentence as imposed, including the serious violent offence declaration, reflected a sound exercise of the sentencing discretion in all the circumstances. The application for leave to appeal against sentence cannot succeed.

Orders

[57] It follows that the orders which should be made are:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence refused.