SUPREME COURT OF QUEENSLAND

CITATION:	*R v Woods* [2014] QCA 341
PARTIES:	**R** **v** **WOODS, Aaron Lee** (appellant/applicant)
FILE NO/S:	CA No 4 of 2014 CA No 213 of 2014 DC No 1430 of 2013 DC No 1573 of 2013 DC No 1675 of 2013 DC No 1764 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2014
JUDGES:	Fraser and Morrison JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal against conviction, set aside the convictions and sentences on count 1 (entering a dwelling with intent to commit an indictable offence) and count 2 (unlawfully wounding with intent to disfigure) on indictment number 1764 of 2013 and order a new trial upon those counts.** **2. Set aside the orders that the sentences imposed in respect of the other indictments are to be served concurrently with the sentence of imprisonment on count 1 on indictment number 1764 of 2013 but cumulatively upon the sentence of imprisonment with respect to count 2 of that indictment.** **3. Otherwise confirm the sentences and orders, including the statements and declarations of presentence custody under s 159A of the *Penalties and Sentences Act* 1992 (Qld) in respect of indictments 1430 of 2013, 1573 of 2013 and 1675 of 2013.** **4. Fix a parole release date at 24 November 2015.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was found guilty after trial of entering a dwelling with intent to commit an indictable offence and wounding with intent to disfigure – where the appellant had said to police "You should know me, I'm the granny slasher", and that statement was admitted at trial as an admission – whether that evidence was not capable of amounting to an admission and was therefore inadmissible

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the appellant was sentenced to 14 years imprisonment for wounding with intent to disfigure and to three years imprisonment for 49 other offences, to be served cumulatively – where the primary judge made a serious violent offence declaration, and did not set a parole eligibility date, being informed it would accrue after 80 per cent of the period of 17 years imprisonment had been served – where the Court has vacated the conviction upon which the 14 years period of imprisonment was based, and so it is necessary to grant leave to appeal against sentence – whether the sentence of three years imprisonment with parole release after 50 per cent for the other 49 offences should be disturbed

Corrective Services Act 2006 (Qld), s 185
Criminal Code 1899 (Qld), s 668E(3)
Penalties and Sentences Act 1992 (Qld), s 160B, Sch 1

Lucev v Queensland Police Service [2013] 1 Qd R 518; [2012] QCA 207, cited
Neal v The Queen (1982) 149 CLR 305; [1982] HCA 55, cited
R v Caulfield [2012] QCA 204, considered

COUNSEL: S Bain for the appellant/applicant
M R Byrne QC for the respondent

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

[1] **FRASER JA:** The appellant was found guilty after a four day trial in the District Court of one count of entering a dwelling with intent to commit an indictable offence and one count of wounding with intent to disfigure. He was subsequently sentenced to an effective term of 17 years imprisonment for those offences and numerous other offences to which he pleaded guilty. The appellant has appealed against the convictions at the trial and he has applied for leave to appeal against sentence.

Conviction appeal

[2] The appellant confined his appeal against conviction to a ground of appeal to the effect that evidence adduced in the Crown case that the appellant had said to police words to the effect of "You should know me, I'm the granny slasher" was inadmissible.

[3] The complainant, an elderly lady, gave evidence at the trial that on 27 October 2012 she was at her home with her husband when she disturbed an intruder after 8.00 pm. The intruder emerged from the bathroom into the hallway, shouted at the complainant to get out of the way, and slashed her with a knife across her face. The bathroom was in darkness and there was no light in the hallway. The complainant was left with just a vague impression of the intruder as a tall dark person. She added in cross examination that her impression was that the intruder was young. The complainant's husband dialled triple zero and the police arrived soon afterwards. The complainant was transported to hospital for treatment. She had lacerations on both sides of her face running into her mouth, and a laceration on one side of her tongue. Her wounds were cleaned and sutured.

[4] Police subsequently found a stool outside the house under a window, suggesting that the window was the point of entry. Police also found a knife in a garden bed of a nearby house. No forensic evidence was found to link the offence with the appellant.

[5] In addition to the contentious evidence of the admission, the Crown case that the appellant was the intruder relied upon evidence given by Ms Cook, evidence given by a taxi driver, and records of a telephone call received by the taxi company. Ms Cook gave evidence that she accompanied the appellant to the area where the complainant lived. He left her sitting on a low brick fence next to the driveway of the complainant's house to wait for him. The appellant returned 15 minutes later and told her that they had to leave in a hurry. They walked to a nearby marina and the appellant ordered a taxi in a name which was not his own. After the taxi was directed to stop some streets away from Ms Cook's sister's house, Ms Cook and the appellant ran off without paying. They subsequently met at the sister's house. Ms Cook's credibility was attacked in cross examination by reference to her previous criminal history, a benefit she had obtained by undertaking to give evidence against the appellant, her drug use, and a series of text messages between herself and the appellant which were submitted to suggest that she was upset by the appellant not having reciprocated her sexual interest in him. Ms Cook agreed that she did not see the appellant with a knife or see any blood on his clothing.

[6] The taxi driver gave evidence that he collected a man and a woman from the area which Ms Cook had mentioned in her evidence and drove them to the destination she had mentioned, where they left the taxi without paying. The taxi company records confirmed that the taxi was called in a telephone call received by the company at 8.30 pm and the fare commenced at 8.44 pm. A recording of the telephone call, which was played to the jury, indicated that a male voice booked the taxi in a woman's name. The taxi company records showed that the telephone number which made the call to the taxi company was registered to the appellant and belonged to the mobile phone found in his possession when he was arrested on 6 November 2012. The taxi driver could not identify the male person from a photo board which included a photograph of the appellant. The driver gave evidence that the man had a sack over his head, possibly because of the rain, and sat directly behind him.

The disputed admission

[7] At an interlocutory hearing before the trial the appellant applied for a ruling that evidence that the appellant had said to police words to the effect of "You should know me, I'm the granny slasher" was inadmissible. The appellant and two police officers gave evidence at that hearing. The evidence established that the appellant participated in recorded police interviews in November 2012. One such interview occupied about three hours. The appellant repeatedly denied that he had committed

the offences against the complainant, although he admitted that he had committed many unrelated offences. No transcript of any other recorded interview is in the appeal record book but both parties asked the Court to proceed on the footing that the appellant denied participation in the offence during the total period of about four hours occupied by recorded police interviews.

[8] The appellant was arrested and remanded in custody. Some months later, on about 18 March 2013, the appellant was taken to the watch house at the Wynnum Police Station for the purpose of appearing that day at a mention of the committal proceedings relating to this matter in the Magistrates Court at Wynnum. There was some mix up which resulted in the appellant arriving at the watch house after the committal proceeding had been mentioned and adjourned. When this was explained to the appellant he became upset. The appellant asked to be taken back to jail so that he could avoid spending the night in the watch house and he "give every officer there a spray and I swore at pretty much the lot of them".[1] The appellant gave evidence (and this was common ground in the appeal) that he had earlier been referred to in the media as the "granny slasher". The appellant gave evidence that the lady behind the counter at the watch house referred to him as "the granny slasher", to which he responded in a sarcastic way, "Yeah I'm the granny slasher…". At this time the appellant and other prisoners were in a holding cell waiting to be taken to their intended destinations that day. In cross examination the appellant agreed that the lady who said something about the appellant being a granny slasher said it loudly enough for him to hear it, he being in the cell and the lady being behind the counter. It was said loud enough for others present to hear, including a police prosecutor who was present at the holding cell.

[9] A sergeant of police attached to the Wynnum District Police Prosecution Corps, Ms Tetley, gave evidence that as she was making enquiries in the watch house to identify people in the holding cell who had not yet been processed, she enquired of the watch house keeper (Ms Mullen) who those people were. Ms Tetley may have gestured towards the holding cell as she made the enquiry. She gave evidence that the appellant then said something like, "you should know who I am, I'm the granny slasher." Ms Tetley said that the appellant was the first person to use the phrase "granny slasher" that morning. No police officer used that phrase as an insult or otherwise. Ms Mullen, a senior constable police, gave evidence that the appellant was a bit upset after he had been told he would not be going straight back to his jail that day but would have to be held over for another day. Ms Mullen was processing prisoners at the charge counter when Ms Tetley entered the watch house. Ms Mullen heard Ms Tetley making enquiries about the defendants for court that day and heard the appellant say to Ms Tetley, "You should know me, I'm the granny slasher". She said there was no possibility that Ms Mullen used that phrase before the appellant did. Ms Mullen agreed that she may have heard reference to "the granny slasher" on television.

[10] The police witnesses also gave evidence about the way in which the appellant spoke the relevant words, but the primary judge excluded that evidence. It should be disregarded. A video of the events in the watch house was played at the pre-trial hearing but there was no sound recording.

The primary judge's ruling

[11] The primary judge refused to exclude the evidence of the appellant's statement. The primary judge considered that it was not appropriate to decide what the

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1 Transcript, 4 November 2013, at 1-29.

statement meant on the interlocutory application, although "the circumstances which make it likely that the applicant unresponsively asserted himself to be the granny slasher also tend to support his assertion that the remark was made sarcastically… although the statement might have meant something other than that he was guilty of the serious offence he was charged with, that does not make it inadmissible. It is – although, I think, only just – capable of being regarded as an admission."

[12] The primary judge went on to explain his additional conclusion that there was not sufficient prejudice to the conduct of a fair trial in the appellant having to deal with the material such as to warrant its exclusion in the exercise to exclude substantially prejudicial evidence of a limited probative value. It is not necessary to discuss that aspect of the ruling.

The arguments on appeal

[13] Counsel for the appellant submitted that the context in which the appellant's statement was made demonstrated that it was merely a response to an enquiry by watch house staff seeking to identify prisoners for administrative purposes. In that context the question meant no more than, "what are you charged with?" and the appellant's response conveyed nothing more than an identification of the charge against him. The respondent's senior counsel submitted that the effect of the context in which the appellant's words were said was a matter for the jury to determine, as was the meaning to be attributed to the words used by the appellant. It was submitted that those words were admissible because they were reasonably capable of being construed by the jury as an admission. The respondent emphasised that the words were spoken about four months after the appellant was arrested and at a time when the appellant was upset, so that he may not have been as guarded in his words as he was when he was interviewed in November 2012. In addition, it was submitted to be relevant that the video taken in the watch house showed that the police officers present were in uniform.

Consideration

[14] I construe the primary judge's reference to it being likely that the appellant made the statement "unresponsively" as a rejection of the appellant's evidence that a police officer first used the expression "the granny slasher". Upon the evidence of the police witnesses, which was presumably accepted by the primary judge, the appellant's statement was responsive in the different sense that he made the statement in reply to an enquiry made by one of the police officers.

[15] In *R v Caulfield*,[2] Muir JA, with whose reasons de Jersey CJ and White JA agreed, cited authority[3] for the proposition that it is a function of the jury to decide "whether a statement, whether oral or written, viewed as a whole and in context constitutes an admission". As Muir JA observed, "[i]f words spoken by an accused are reasonably capable of being construed as an admission by the accused, they are admissible". Like the primary judge, I consider that evidence of the statement made by the appellant is close to the borderline between admissible and inadmissible evidence, but for the following reasons I respectfully conclude that it was inadmissible. In the interlocutory application the appellant admitted that he had made the statement.

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2 [2012] QCA 204 at [18].

3 *R v Sharp* (1988) 86 Cr App R 274; *R v Donaldson* (1977) 64 Cr App R 59; *R v Duncan* (1981) 73 Cr App R 359 at 364 – 365; and *R v Khalil* (1987) 44 SASR 23.

The meaning of the appellant's statement cannot be determined without regard to the context in which it was made. The relevant context was that: the appellant had persistently denied involvement in the offences; whilst those denials were made many months before the appellant made the statement, there was nothing to suggest that the appellant intended to withdraw his denials; the appellant was present in the holding cell at the watch house at Wynnum only for the purpose of appearing at the mention of a committal hearing relating to the offences; it was common ground that the appellant had earlier been referred to in the media as "the granny slasher"; and the appellant made the statement immediately after an enquiry by police about the identity of the prisoners in the holding cell.

[16] The prosecution relied upon those circumstances to connect the appellant's statement with the most serious of the offences charged against him, but the same circumstances influenced the meaning of the statement. It is commonplace that the context in which words are uttered requires rejection of a literal construction of the words. In this case, the circumstances revealed by the evidence of the police witnesses demonstrate that the appellant's statement amounted only to a description of the most serious offence with which he had been charged so as to identify him in response to the police inquiry. That the inquiry was not made directly of the appellant and that he identified himself in such a callous way do not detract from that conclusion. Acknowledging that this is an issue about which different views might reasonably be held, I consider that the better view is that the statement is not capable of amounting to an admission. I would hold that the evidence of the appellant's statement was not admissible at the appellant's trial as an admission. It was not admissible on any other basis.

[17] Notwithstanding warnings by the trial judge to the effect that the jury should take care in treating the appellant's statement as an admission, the jury might have attributed significant weight to that statement in finding that the appellant had committed the offences in issue at the trial. There was other evidence in the Crown case which might justify a jury in concluding that the appellant was the intruder, but that is not an inevitable conclusion once the evidence of the alleged admission is excluded. The respondent appropriately conceded as much and disclaimed reliance upon the proviso in s 668E(1)(a) of the *Criminal Code* that no substantial miscarriage of justice had actually occurred. It follows that the verdicts should be set aside and a new trial ordered.

Sentence application

[18] As I would hold that the convictions for entering a dwelling with intent and unlawful wounding with intent to disfigure (on indictment 1764 of 2013) should be set aside, the appellant's application for leave to appeal against sentence relates to the 49 other offences for which he was sentenced on the same day. In fixing upon the sentences for those 49 offences, committed on various dates between about September 2011 and about November 2012 and to which the appellant pleaded guilty (one count of receiving tainted property on indictment 1430 of 2013, two counts of receiving tainted property and one count of possession of a dangerous drug on indictment 1675 of 2013, and 45 counts – mostly burglary, stealing, and similar offences – on indictment 1573 of 2013), the sentencing judge adopted the approach of beginning with the sentence of 14 years imprisonment for the malicious wounding offence, and then adding "something which will reflect the other criminal behaviour, which will be significantly less than it would be were it standing alone…". After observing that, but for the matters set out in a confidential exhibit, he had thought of

imposing a sentence of four years imprisonment, the sentencing judge imposed a sentence of three years imprisonment upon some of the burglary offences and six months imprisonment upon all of the other offences. The sentencing judge ordered that the sentences of three years imprisonment and six months imprisonment were to be served concurrently with each other but cumulatively upon the sentence of fourteen years imprisonment.

[19] The sentencing judge did not fix a parole eligibility date, having been informed by the prosecutor that, having declared the appellant a serious violent offender, the parole eligibility date would accrue after 80 per cent of the aggregate imprisonment of seventeen years. Senior counsel for the respondent pointed out that this was incorrect. The three year term was imposed for offences under s 419(4) of the *Criminal Code*, which could not attract a serious violent offence declaration: *Penalties and Sentences Act* 1992, sch 1. Under the applicable legislation parole eligibility accrued after the expiry of the sum of 80 per cent of the term of 14 years (a sentence which did attract a serious violent offence declaration) and 50 per cent of the additional term of three years: see *Corrective Services Act* 1992, s 185.

[20] It is necessary to grant leave to appeal against the sentence, if only to set aside the orders making the effective sentence of three years imprisonment cumulative upon the sentence of fourteen years imprisonment, and to fix a parole release date. (For the offences committed by the appellant a parole release date, rather than a parole eligibility date, must be imposed if the sentence does not exceed three years imprisonment: *Penalties and Sentences Act* 1992, s 160B.)

[21] The appellant has a very extensive criminal history of similar offences commencing in the Childrens Court in 1996, presumably related to drug use. He has not been deterred or rehabilitated by numerous sentences, including substantial terms of imprisonment and rehabilitative sentences of various kinds. Unfortunately his prospects of rehabilitation even with the benefit of appropriate parole supervision appear to be very slight. In view of the appellant's criminal history there can be little confidence that any sentence will deter the appellant from further offending. General deterrence and the protection of the community must figure in the just sentence. One factor in mitigation is described in a confidential exhibit. Having considered the submissions for the appellant upon this point, I would hold that, for the reasons given by the sentencing judge, the allowance in the head sentence for this factor should not exceed one year. Another mitigating factor is that the appellant could not have been prosecuted for at least 40 of the 49 offences he committed were it not for his confessions of those offences. In the appellant's case this is not persuasive evidence of remorse, but in other respects it requires mitigation in the sentence: see *AB v The Queen* (1999) 198 CLR 111. In the other offences the appellant was caught in possession of tainted property (or in one case a dangerous drug) or he was identified by a member of the public who encountered him during a robbery. Another mitigating circumstance of significance is that the appellant entered pleas of guilty to all these offences. There was no challenge to the sentencing judge's finding that (apart from the early plea of guilty entered to the offence of receiving tainted property in indictment 1430 of 2013) the appellant entered timely but not early pleas of guilty. There were full hand up committals with no cross-examination.

[22] The sentencing judge made it clear that he gave only some weight, rather than significant weight, to the circumstance that the appellant was held in custody for a period which could not be declared as presentence custody. That period of custody resulted from the cancellation of the appellant's parole with respect to previous sentences

of imprisonment. I would endorse the sentencing judge's reasoning that the cancellation of the parole was merely a natural consequence, which the appellant must have anticipated, of his re-offending.

[23] Giving the fullest weight to all of the matters in mitigation upon which the appellant relied and also bearing in mind that the sentencing judge intended to defer parole eligibility until after 80 per cent of the three year term, the appropriate sentence should certainly be no less severe than the effective head sentence imposed by the sentencing judge of three years imprisonment, with parole release after half of that term. A more severe sentence could be imposed; I accept that the sentencing judge significantly moderated what otherwise would have been an appropriate sentence for these offences to take into account that this sentence was imposed cumulatively upon the fourteen year term. The Court is empowered by s 668E(3) of the *Criminal Code* to impose a more severe sentence than was imposed by the sentencing judge, but before exercising that power the Court should first grant leave to appeal and allow the appellant an opportunity to abandon the appeal (*Neal v The Queen* (1982) 149 CLR 305) and the power is not to be exercised lightly (see *Lucev v Queensland Police Service* [2013] 1 Qd R 518 at 521 – 522 [9] – [11]). Also taking into account that if a substantially longer head sentence were imposed it might be appropriate to fix a parole release date after about one-third rather than one-half of the term, on balance I consider that it is not appropriate to increase the severity of the sentence in this case.

[24] Accordingly, emphasising that all of the mitigating factors upon which the appellant relied are fully taken into account in this sentence, the appellant's sentence for these offences should be three years imprisonment with a parole release date fixed after eighteen months. That result may be achieved by varying the orders made in the District Court, so that the sentence continues to take effect from when it was imposed on 31 July 2014. Taking into account the period of 68 days of presentence custody which the sentencing judge declared as time already served under the sentences, the parole release date should be fixed at 24 November 2015.

Proposed orders

[25] I would make the following orders:

1. Allow the appeal against conviction, set aside the convictions and sentences on count 1 (entering a dwelling with intent to commit an indictable offence) and count 2 (unlawfully wounding with intent to disfigure) on indictment number 1764 of 2013 and order a new trial upon those counts.
2. Set aside the orders that the sentences imposed in respect of the other indictments are to be served concurrently with the sentence of imprisonment on count 1 on indictment number 1764 of 2013 but cumulatively upon the sentence of imprisonment with respect to count 2 of that indictment.
3. Otherwise confirm the sentences and orders, including the statements and declarations of presentence custody under s 159A of the *Penalties and Sentences Act* 1992 (Qld) in respect of indictments 1430 of 2013, 1573 of 2013 and 1675 of 2013.
4. Fix a parole release date at 24 November 2015.

[26] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

[27] **HENRY J:** I have read the reasons of Fraser JA. I agree with those reasons and the orders proposed.