SUPREME COURT OF QUEENSLAND

CITATION:	*R v Graham* [2016] QCA 73
PARTIES:	**R** **v** **GRAHAM, Bradley Edward** (appellant)
FILE NO/S:	CA No 72 of 2015 DC No 151 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 26 March 2015
DELIVERED ON:	1 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2015
JUDGES:	Gotterson and Philip McMurdo JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The jury's finding of a circumstance of aggravation of the appellant's offence of burglary, being that he used actual violence, be set aside.** **2. The appeal against convictions be otherwise dismissed.** **3. Set aside the sentence imposed for the offence of burglary.** **4. Remit the matter to the District Court of Queensland for the appellant to be resentenced upon the conviction of burglary.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where, after a trial by jury, the appellant was convicted of one count of burglary with the aggravating circumstances of being in company and using actual violence and one count of extortion and acquitted on one count of assault occasioning bodily harm and one count of common assault – where the appellant contends there is an irreconcilable inconsistency between his convictions for burglary using actual violence and extortion where he was acquitted on the assault charges – where at trial, the prosecution particularised its case, and the trial judge so directed, that the aggravating circumstance of actual violence could be proved either by proof of the appellant's violence or proof of violence by the appellant's co-offender which the appellant assisted or aided by virtue of s 7(1)(c) *Criminal Code* – where the trial judge

further directed that, upon proof of the appellant's offence of robbery under s 419(1) *Criminal Code*, the jury could be satisfied of the appellant's use of actual violence by the operation of either s 7(1)(a) or s 7(1)(c) *Criminal Code* – where the jury apparently reasoned according to s 7(1)(c) and concluded that the appellant used actual violence because he aided his co-offender to use actual violence in the commission of an offence of burglary – where the appellant contends that s 7(1)(c) could not be used in such a way – whether the verdicts were inconsistent and irreconcilable

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of one count of burglary with the aggravating circumstances of being in company and using actual violence and one count of extortion – where the appellant contends that it was not open on the evidence for the jury to conclude that he went to the complainant's house intending to do or threaten violence – where it was clear from the evidence that the appellant went to the complainant's premises to reclaim property and take the complainant's car – where the evidence further established that the appellant had entered the complainant's house in a group without invitation, made demands upon the complainant and that one member of the appellant's group assaulted the complainant – whether the jury's finding that the appellant intended to do or threaten violence was unreasonable or insupportable on the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of one count of burglary with the aggravating circumstances of being in company and using actual violence and one count of extortion – where a record of the appellant's police interview was adduced as an exhibit at trial – where the appellant contends that three passages were inadmissible because they contained irrelevant and prejudicial statements that may have infected the jury's reasoning – whether there was a miscarriage of justice from the improper admission of the evidence

Criminal Code (Qld), s 2, s 7, s 7(1)(a), s 7(1)(c), s 8, s 419, s 564, s 575

Mackenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v Barlow (1997) 188 CLR 1; [1997] HCA 19, considered
R v De Simoni (1981) 147 CLR 383; [1981] HCA 31, cited
R v Phillips and Lawrence [1967] Qd R 237, considered
R v Wyles, ex parte Attorney-General [1977] Qd R 169, distinguished

COUNSEL:	M C Chowdhury for the appellant D C Boyle for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philip McMurdo JA and with the reasons given by his Honour.

[2] **PHILIP McMURDO JA:** After a nine day trial the appellant was convicted of burglary, with the aggravating circumstances of being in company and using actual violence, and extortion. He was sentenced to concurrent terms of two years for the burglary offence and 18 months for the extortion offence and it was ordered that he be released on parole on 20 November 2015, thereby requiring him to serve six months before release.

[3] He appeals against those convictions. His initial ground or grounds of appeal were that the verdicts were unreasonable or could not be supported by the evidence. However the appellant was granted leave to add further grounds, one being that the verdicts are illogical and unreasonable in their inconsistency with other verdicts of the jury and then after that inadmissible and prejudicial parts of his interview by police were not excluded from the evidence.

[4] The appellant was tried with two other defendants, named Williams and Brooker. The events in question were said to have occurred when they and the appellant went to the complainant's house one afternoon in January 2014. They were there because the appellant believed, as was the fact, that the complainant and a friend of his, another young man called Baumgart, had stolen several items of valuable property from the appellant's business premises. Baumgart had been an employee of the appellant who believed that he had not been properly paid. Baumgart and the complainant had decided to seek redress by stealing these items. The appellant quickly learned of the complainant's involvement and this prompted the visit of the appellant's group (which included a woman who was not a defendant at this trial) to the complainant's house.

[5] The relevant events, according to the complainant's evidence, were as follows. The complainant was watching television when he heard the sound of a reversing truck. He looked outside to see that it was a tow truck which had arrived at his house and that the appellant's group was walking towards his back stairs. The man he identified as the appellant, he claimed, was carrying a small axe and the man he identified as Williams had "a sort of crowbar in his hand". The appellant spoke to him aggressively as the appellant and Williams confronted the complainant in his kitchen. The appellant asked where his stolen property was. The complainant claimed that he did not know, which the appellant then said was a lie.

[6] According to the complainant, the appellant then punched him in the side of his face. It was this incident which was the subject of count 3 on the indictment, in which each of the defendants was charged with an assault occasioning bodily harm whilst armed with an offensive weapon.

[7] By this stage Brooker and the woman had also entered the house and moved to another part of it. The appellant again demanded that the complainant tell him where

his property was and this time the response was that it was downstairs. The appellant, Williams and the complainant went downstairs where they found some of the appellant's stolen property. According to the complainant, the appellant was "quite angry, because he didn't see the rest of his stuff that we had taken" and the appellant then punched him again in the face. After that punch the complainant felt that he was bleeding and noticed that his cheek had been split open. That punch was the subject of count 6 upon the indictment, in which it was alleged that each of the defendants had assaulted the complainant, doing him bodily harm and whilst armed with an offensive weapon.

[8] The complainant said that Williams then punched him in the jaw, an assault that became the subject of count 4 by which each of the defendants was charged with unlawful assault.

[9] The party then went upstairs where the complainant said that he telephoned Baumgart, at the appellant's request, during which time Williams, Brooker and the woman were in the house looking for property and taking various things to their car.

[10] There followed a conversation in which the appellant asked the complainant to write a document about the appellant's proposal to take the complainant's car. The complainant agreed because he was "scared" of the appellant and the other defendants who were "threatening" him. He wrote the document requested which was in these terms:

> "I Matt Tapsall allow my vehicle … to be taken and held until further meeting with brad from bcw Cars [the appellant] in lue [sic] of payment caused by myself Matt Tapsall and Kyle Baumgart stole workshop equipment and entered the premises unlawfully and without permission
>
> I willfully [sic] hand over some household goods as interest caused by myself and Kyle Baumgart"

The complainant then signed and dated the document and it appears that the appellant co-signed it.

[11] The document facilitated the removal of the car used by the complainant and which was at his house because the document was able to be shown to the tow truck driver, whose presence the appellant had arranged, as evidence of the complainant's consent to its removal. The car was not in truth owned by the complainant but by his mother.

[12] This document was the subject of count 2 which charged the appellant with extortion, in that without reasonable excuse, the appellant made a demand (to write the note) with intent to gain a benefit (possession of the car), threatening a detriment (violence to the complainant).

[13] The complainant said that whilst he was writing this note a woman in the party kicked him in the back of his leg. That became the subject of count 7 on the indictment, which was another charge against all three defendants of an unlawful assault.

[14] At this point the complainant's partner arrived home just as the appellant's group was about to leave and the tow truck, loaded with the complainant's car, was departing. She saw that the complainant had blood on his face and noticed that property was missing from the house. She then went to her mother's house where she received a telephone call from a person, who identified himself as "Brad", who said that "he did it to teach him a lesson for taking their stuff, and just kept going on to say that, you know, if - if we returned his stuff that he'd give it back and we could all go around

there and have a chat, and he didn't want to harm us, and things like that." When cross examined, she said that she did not see anyone at the house with an axe or a crowbar and that in her telephone conversation with "Brad", he was adamant that items had been taken from the house as "just collateral" and that he had not realised that some of her property had been taken. She also agreed that there had been no threats or violence to her.

[15] Soon afterwards the incident was reported to police. That evening a police officer found the complainant's car parked at the rear of the appellant's business premises. A search of those premises identified other items which had been taken from the complainant's house. A few hours later the appellant was interviewed by police and a recording of that interview was tendered at the trial.

The verdicts

[16] The first count on the indictment charged each defendant with entering the complainant's dwelling with intent to commit an indictable offence and with three circumstances of aggravation: the first being that each used actual violence, the second that each was armed with an offensive weapon and the third that each was in company of the others.

[17] At the commencement of the trial, Williams and Brooker each pleaded guilty to that count with the exception of the circumstance that he was armed with an offensive weapon. It was not the prosecution case that Brooker was himself armed but rather that he was criminally responsible for aiding the appellant and Williams, each of whom was allegedly armed.

[18] The appellant pleaded not guilty to this and each other count. On this charge he was convicted of the offence and with the aggravating circumstances as alleged, save that he was found not to have been armed. Similarly the jury found that this circumstance was not proved against Williams or Brooker. But importantly for the appellant's present argument, the aggravating circumstance of the use of actual violence was found to be proved against him.

[19] On count 2, the charge of extortion, he was convicted.

[20] On count 3, which was based upon an alleged punch by the appellant, each of the defendants was acquitted.

[21] On count 4, Williams had pleaded guilty at the commencement of the trial. Brooker was acquitted of this count but the jury was unable to agree about this count in the appellant's case.

[22] The prosecution had not proceeded with what had been the fifth count on the indictment.

[23] On count 6, the subject of which was another alleged punch by the appellant, the jury was unable to agree on a verdict in the case of any of the defendants.

[24] On count 7, which was based upon the alleged kick by the woman in the party, each of the defendants was acquitted.

The appellant's case at the trial

[25] The appellant did not give or call evidence at the trial. Unsurprisingly, the credibility of the complainant was strongly challenged. Consistently with what the appellant had said to police in the interview, which was recorded and played to the jury, the

appellant's case denied any intended threatened or actual violence on his part or for which he should be responsible.

[26] It was common ground that the appellant, Williams, Brooker and the woman had gone to the complainant's house and had left with property, some of which belonged to the appellant. It was also accepted that the appellant had asked the complainant to write the note and that it had been beneficial in the appellant's securing possession of the car. As the appellant argued that he had not entered the complainant's house with an intention to commit any offence, he was innocent on the charge of burglary and as the appellant had not himself used actual violence or aided another to do so, the aggravating circumstance of the use of actual violence, it was argued, was not established.

[27] As to the extortion charge, it was argued for the appellant (as it was in this court) that the prosecution had not proved that the appellant had threatened to cause a detriment to the complainant. On the prosecution case, there was no express threat and the prosecution had not proved a threat which was implied from the behaviour of the appellant's group.

Inconsistent verdicts

[28] The basis for the intervention of an appellate court, where there are inconsistent verdicts by a jury in a criminal trial, is that the outcome is suggestive of some error. An inconsistency of verdicts can suggest a compromise of the performance of the jury's duty, a confusion in the minds of the jury or a misunderstanding of their function, an uncertainty about the legal differentiation between the offences or a lack of clarity in the judicial instruction on the applicable law.[1] The obligation is upon the appellant to establish inconsistency of verdicts.[2] Where an inconsistency of verdicts is established, it is only the verdict of guilty which can be disturbed.

[29] In this context there is an important distinction between a verdict of an acquittal and a disagreement within the jury. A disagreement on one count is not necessarily inconsistent with a conviction on another, as an acquittal might have been.[3] For this reason the appellant's argument must be confined to the suggested inconsistency between the verdict of acquittal on count 3 and his convictions on counts 1 and 2.

[30] In some cases, an apparent inconsistency in verdicts has not resulted in the setting aside of a conviction because the jury's acquittal on other counts has been explained as the jury being "merciful" in wishing to avoid a defendant being convicted upon a large number of counts for fear that that would be oppressive.[4] No such explanation was suggested by the respondent in this case.

[31] Count 3 was particularised by the prosecution as a punch by the appellant to the complainant's face. It was alleged that Williams and Brooker were also responsible for that offence by assisting or aiding the appellant to do so.

[32] For count 1, the jury had to be satisfied that when the appellant entered the complainant's house, he intended at least to threaten violence. The prosecution case was particularised as follows: "Each [was] in the dwelling with an intention to threaten

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1 *Mackenzie v The Queen* (1996) 190 CLR 348, 368 per Gaudron, Gummow and Kirby JJ.

2 Ibid.

3 *Osland v The Queen* (1998) 197 CLR 316, 406; *R v DAL* [2005] QCA 281, [8] per McPherson JA, [23] per Keane JA.

4 See e.g. the discussion by Keane JA in *R v DAL* [2005] QCA 281, [28] to [31].

violence to and/or assault Tapsall (s 7(1)(a) CC); Brooker assisted or aided Graham and/or Williams in being in the dwelling with an intention to threaten violence to and/or assault Tapsall by his intentional presence and/or actions designed to encourage Graham and/or Williams (s 7(1)(b) and/or (c) CC)".

[33] Consistently with those particulars, the prosecutor's argument was that the appellant had entered the house intending to threaten violence and/or to assault the complainant. There was no inconsistency between the fact of that intention and there being no assault by the appellant. The jury could have reasoned, for example, that the appellant entered intending to threaten violence but did not in fact assault the complainant.

[34] If the offence of burglary was proved, one circumstance of aggravation was proved in that clearly the defendants entered the house in the company of each other. The jury was not satisfied as to the aggravating circumstance that the appellant was armed with an offensive weapon. That conclusion was not inconsistent with the appellant having an intention to threaten violence.

[35] However there is an apparent tension between the acquittal on count 3 and the finding, in the appellant's case, of the use of actual violence as an aggravating circumstance of the burglary offence. How could the jury have been left in no doubt as to the use of actual violence by the appellant whilst acquitting him of assaulting the complainant? In the respondent's argument, the explanation is that the jury could have concluded that although the appellant had not used actual violence, he had assisted or aided Williams to do so. The prosecution particularised its case at the trial in this respect as follows:

> "Each of Graham and Williams used actual violence (s 7(1)(a) CC); Graham, Williams and Brooker assisted or aided the person using actual violence by their intentional presence and/or actions designed to encourage that person (s 7(1)(b) and/or (c) CC)".

[36] Williams pleaded guilty to count 4. The appellant was charged with that offence on the basis that he assisted or aided Williams by his "intentional presence and/or actions designed to encourage that person", for which the particulars of the prosecution case referred to s 7(1)(b) and (c) of the *Criminal Code*. The jury could not agree on count 4 in respect of the appellant.

[37] It was argued for the appellant that the jury could not have found the aggravating circumstance of actual violence because, it was said, on the complainant's testimony only the appellant could have been the assailant. That submission cannot be accepted. If, as a matter of law, the violence of Williams could be treated as the "actual violence" of the appellant on count 1, then the complainant's evidence of the assault by Williams could have been considered by the jury, as the prosecutor asked them to do, on this count.

[38] At the trial there was no objection to the way in which the prosecution particularised and sought to prove this part of its case. And the learned trial judge directed the jury that the aggravating circumstance of actual violence by the appellant could be proved either by the proof of the appellant's violence or proof of violence by Williams assisted or aided by the appellant.

[39] As the appeal was argued, there was no challenge to the legal validity of that reasoning. But at the request of the court, the parties provided further submissions on two questions as to this aggravating circumstance. The first is whether a circumstance of

aggravation within s 419(3) of the *Criminal Code* is able to be established against a defendant by the application of s 7(1)(c) of the Code. The second is whether s 7(1)(c) was able to be used in the proof of this aggravating circumstance against the appellant, when the elements of the offence under s 419(1) were sought to be proved against him only by the operation of s 7(1)(a) of the Code.

[40] Section 2 of the *Criminal Code* defines "an offence":

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an ***offence***."

[41] In s 1 of the Code the term "circumstance of aggravation" is defined to mean:

> "[A]ny circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance."

[42] Section 419(1) of the Code defines the offence of burglary. Circumstances of aggravation for that offence are prescribed by s 419(2) and s 419(3). Section 419 provides:

> "**419 Burglary**
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> (1) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits a crime.
>
> Maximum penalty—14 years imprisonment.
>
> (2) If the offender enters the dwelling by means of any break, he or she is liable to imprisonment for life.
>
> (3) If—
>
> (a) the offence is committed in the night; or
>
> (b) the offender—
>
> (i) uses or threatens to use actual violence; or
>
> (ii) is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance; or
>
> (iii) is in company with 1 or more persons; or
>
> (iv) damages, or threatens or attempts to damage, any property;
>
> the offender is liable to imprisonment for life.
>
> (4) Any person who enters or is in the dwelling of another and commits an indictable offence in the dwelling commits a crime.
>
> Maximum penalty—imprisonment for life.

[43] The act which renders a person doing the act liable to punishment is the entry or presence of a person in the dwelling of another. That act must be done with an intent to commit an indictable offence in the dwelling. If the commission of that offence is

attended by any of the circumstances set out in s 419(2) or (3), the offender is liable to a greater punishment. This is not because a different offence is created by s 419(2) or (3). The Code does not create a distinct offence of "aggravated burglary".

[44] In *R v De Simoni*,[5] the question for the High Court was as to the effect which a sentencing judge could give to a circumstance of aggravation, in that case of an offence of robbery under s 391 of the *Criminal Code* (WA), where that circumstance had not been referred to in the indictment. That question does not arise in the present appeal. Although Wilson J dissented on that question, the following passage from his judgment can be applied to s 419 in the present case:[6]

> "The basic proposition on which that conclusion rests is that the Code creates only one offence of robbery, namely, the offence constituted by s. 391. The presence of a "circumstance of aggravation", being a circumstance which if charged in the indictment and proved exposes the offender to liability to a greater maximum period of imprisonment, does not make the offence a different offence; it remains the crime of robbery, that is to say, conduct contrary to s. 391, notwithstanding the somewhat strange wording of that section. Section 393 is concerned only with punishment; it does not create a more serious offence of "aggravated robbery".

[45] Where a circumstance of aggravation is intended to be relied upon by the prosecution, s 564(2) of the Code requires that circumstance to be charged in the indictment. But again the circumstance of aggravation is distinguished from the offence itself, which is required by s 564(1) to be "set forth [by the indictment] … in such a manner, and with such particulars as to the alleged time and place of committing the offence, and as to the person (if any) alleged to be aggrieved, and as to the property (if any) in question, as may be necessary to inform the accused person of the nature of the charge." Thus although a circumstance of aggravation appears as an allegation in an indictment, the circumstance is distinct from the offence with which the accused person is charged.

[46] The same distinction appears from s 575 of the Code which provides as follows:

> "Except as hereinafter stated, upon an indictment charging a person with an offence committed with circumstances of aggravation, the person may be convicted of any offence which is established by the evidence, and which is constituted by any act or omission which is an element of the offence charged, with or without any of the circumstances of aggravation charged in the indictment."

[47] Section 7 of the Code provides as follows:

> "**7 Principal offenders**
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;

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5 (1981) 147 CLR 383.

6 (1981) 147 CLR 383, 396.

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

(2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.

(3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission."

[48] The meaning of the term "offence" in s 7 and s 8 of the Code was explained by Brennan CJ, Dawson and Toohey JJ in *R v Barlow*[7] as having the meaning as defined by s 2 of the Code. Their Honours said:[8]

> "Section 2 of the Code makes it clear that "offence" is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment. Section 7(a) confirms that "offence" is used to denote the element of conduct in that sense. By the ordinary rules of interpretation, the term must bear the same meaning in pars (b), (c) and (d) of s 7 as it bears in par (a). Section 8, which complements s 7 and extends the net of criminal liability for an offence to the parties who have formed a common intention of the kind therein mentioned, reveals no ground for attributing a different meaning to "offence" in s 8."

[49] The question in that case was whether s 8 of the Code permitted a jury to return a verdict of manslaughter where the principal offender (the party by whose act the victim was killed) had been convicted of murder. The majority answered that question in the affirmative upon the basis of that meaning of the word "offence" in s 8 of the Code which provides as follows:

> "When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution

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7 (1997) 188 CLR 1.

8 (1997) 188 CLR 1, 9.

> of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

It was held that the "offence" in that case was not the offence of murder for which the principal offender had been convicted, but was a reference to, in the terms of s 2, an act done which rendered the principal offender liable to punishment. Brennan CJ, Dawson and Toohey JJ said:[9]

> "In the light of these provisions, "offence" in s 8 must be understood to refer to an act done or omission made. So interpreting the section, it deems a person falling within its terms to have done the act or to have made the omission which the principal offender has done or made. It fastens on the conduct of the principal offender, but it does not deem the secondary party to be liable to the same extent as the principal offender. It sheets home to the secondary offender such conduct (act or omission) of the principal offender as (1) renders the principal offender liable to punishment but (2) only to the extent that that conduct (the doing of the act or the making of the omission) was a probable consequence of prosecuting a common unlawful purpose.
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> …
>
> Interpreting s 8 in this way, how does it apply to the facts of the present case? It was not only the striking of Vosmaer but also the result of Vosmaer's death, the absence of any justification or excuse for the striking of the blow and the intention to cause death or grievous bodily harm that made the striker of the blow guilty of the offence of murder. But not all of those facts were needed to give to the striking of a blow the character of an act rendering the principal offender liable to punishment. Absent the intention to cause death or grievous bodily harm, the striking of the blow without justification or excuse and the resultant death rendered the striker liable to punishment for manslaughter. As the striking of that blow was an act that rendered the principal offender liable to punishment, Barlow is deemed to have done that act if the requirements of s 8 are satisfied."

[50] *Barlow* was not concerned with the present question, which is whether s 7 can be employed in the proof of an aggravating circumstance. Nevertheless the reasoning in *Barlow* founded as it is on the proposition that the word "offence" in both s 7 and s 8 takes its meaning from the definition in s 2, is authoritative. As their Honours noted[10] that is confirmed by the language of s 7(1)(a)[11] which corresponds with the definition in s 2.

[51] By s 7(1)(c) a person who aids another person in committing the offence is deemed to have taken part in committing the offence. Where an offence is constituted by an act, s 7(1)(c) deems the aider to have done the act and to be thereby guilty of the offence. Where an act constitutes an offence only if done with a certain intention, such as an offence of murder as defined in s 302(1)(a) of the Code, s 7(1)(c) deems the aider to have done the act with the intention of the perpetrator. The operation of s 7(1)(c) requires the proof of the offence by the perpetrator (including the proof of

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9 (1997) 188 CLR 1, 10.
10 (1997) 188 CLR 1, 9.
11 Then numbered s 7(a).

any requisite state of mind of that person). It also requires the proof of a certain state of mind on the part of the person to be made liable under s 7(1)(c). Importantly, the effect of s 7(1)(b), (c) or (d) (according to the reasoning in *Barlow*), is to impose a criminal responsibility by deeming a person to have done the act (or made the omission) by which the perpetrator committed the offence and not to "deem the secondary party to be liable to the same extent as the principal offender".[12]

[52] Section 7 makes no express reference to a circumstance of aggravation. It does not provide, for example, that where an offence is committed with a circumstance of aggravation on the part of the person who does the act which constitutes the offence, that every person who aids in the commission of the offence is deemed to have committed that offence and be liable for the same punishment as the perpetrator.

[53] How could s 7 be interpreted so as to make a s 7(1)(c) offender liable to a punishment as if he or she had done an act which for that offence is a circumstance of aggravation? The only possibility would appear to be an interpretation of "the offence" as being constituted by the perpetrator's act or omission attended by the circumstance of aggravation. There would appear to be substantial difficulties in such an interpretation. One would be that contrary to *Barlow*, "the offence" in s 7 would then have a different meaning from its defined meaning in s 2 and the definition of circumstance of aggravation in s 1. From those definitions, it is apparently clear that a circumstance of aggravation is not a constituent part of the offence itself. Another difficulty would come from the words of s 7 itself, because in s 7(1)(a), "the offence" is confined to its constituent parts.

[54] However there is authority to support that interpretation. In *R v Phillips and Lawrence*,[13] a number of defendants were charged with offences which included robbery with the circumstances of aggravation that each was in company with the others and that each used personal violence. The prosecution relied upon both s 7 and s 8. Mack CJ described the questions for determination under s 7 as being:

> "[F]irst, was there a common intention by the five accused to rob using personal violence; and, second, was robbery with personal violence committed by one or more of those forming the common intention, the others aiding."[14]

The Chief Justice did not discuss the present question but instead assumed that s 7 could be employed to expose an aider to punishment according to the circumstances of aggravation.

[55] In separate judgments, Hanger J (as he then was) and Hart J considered an argument by the appellants that a circumstance of aggravation could not be visited upon an offender by the operation of s 8. Hanger J rejected that argument as follows:[15]

> "The basis of the argument was that the offence is robbery simpliciter; that the element of personal violence merely renders the culprit liable to a greater punishment; and that s. 8 merely enables a conviction to be for robbery simpliciter; that s. 8 postulates the commission of an offence as the result of a common purpose, and that the section in saying "each of them is deemed to have committed the offence" limits the liability to "the offence" which is robbery.

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12 (1997) 188 CLR 1, 10.
13 [1967] Qd R 237.
14 [1967] Qd R 237, 247.
15 [1967] Qd R 237, 260-261.

> Section 409 of the Code defines robbery; s. 411 provides for a maximum sentence of fourteen years' imprisonment with hard labour. Section 411 then provides that, if personal violence is used, the liability is to imprisonment with hard labour for life. By s. 1 "circumstance of aggravation" means and includes any circumstance by reason whereof an offender is liable to a greater punishment than that to which he would be liable if the offence were committed without the existence of that circumstance. As by s. 411 the offender becomes liable to an increased punishment if the robbery is accompanied by the circumstance of aggravation, it appears to me that the circumstance of aggravation is an element of the offence. In these circumstances, the offence in s. 8 includes the offence of robbery with any circumstance of aggravation."
>
> (Emphasis added.)

[56] The reasoning of Hart J was similar:[16]

> "Mr. Nolan's point here was that the word "offence" each time it occurs in s. 8, when it is applied to the robbery charges in this case, means the offence of robbery *simpliciter* without the circumstances of aggravation, in company with personal violence. The offence of robbery is defined in s. 409 as stealing with violence. Section 411 fixes the penalty for robbery as imprisonment with hard labour for fourteen years, then adds further penalties for certain circumstances of aggravation one of which is being in company and another of which is using personal violence. If the offender is found guilty of either of these circumstances of aggravation he is liable to imprisonment with hard labour for life. He says therefore the offence referred to in s. 8 is robbery and this does not include the circumstance of aggravation. I do not agree with this argument. Section 2 is as follows - "An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence." Robbery in company makes a person liable to punishment, robbery in company with personal violence makes him liable to another punishment. I think therefore that each of these is an offence."

[57] Although Hanger J and Hart J were addressing s 8, their reasoning would be relevant to the present question under s 7. By this reasoning, in this case the circumstance of actual violence would be an element of the offence of burglary.

[58] That reasoning is not easily reconciled with that in *Barlow*. However this court was not asked to disagree with the judgments in *Phillips and Lawrence* and indeed, counsel for the appellant conceded that, in general, an aggravating circumstance of burglary could be proved by the operation of s 7(1)(c). It is preferable for this question to be determined in a case where it is fully contested. And because the employment of s 7 in this case was irregular for another reason, I will not express a concluded view as to whether s 7(1)(c) could ever be used to prove an aggravating circumstance of burglary.

[59] I come then to the second of the questions upon which the court received further submissions, namely whether s 7(1)(c) was able to be used in the proof of the aggravating circumstance, when the elements of the offence under s 419(1) were to be proved against him by the operation of s 7(1)(a).

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16 [1967] Qd R 237, 284-285.

[60] The prosecution case was that the appellant committed an offence under s 419(1) by his own act in entering the dwelling, intending to commit an indictable offence there. Upon the proof of his offence under s 419(1), the appellant became "the offender" for the jury's consideration of the operation of s 419(3). They had to consider whether the appellant, as the offender, had used actual violence. The jury were directed that they might be satisfied of that fact by the operation of s 7(1)(a) or s 7(1)(c). It appears that they reasoned according to s 7(1)(c). They concluded that the appellant was to be treated as having used actual violence because he had aided Williams to use actual violence in the commission by Williams of an offence of burglary.

[61] But the offence of burglary committed by Williams was a different offence from that committed by the appellant. That was because the acts which constituted those offences were several acts. This was not a case of two defendants charged with committing the one offence, where it could be found that the act constituting the offence must have been done by one of them and whichever was the other must have aided him or her to do so.[17] Nor was it a case such as *R v Wyles, ex parte Attorney-General*,[18] where there was a single offence although constituted by more than one act. In the present case there were several acts of entry, one by the appellant and one by Williams, but each constituting an offence.

[62] The appellant was not charged with committing the offence of burglary which was committed by Williams. Had that been the prosecution case, it would have required proof, *as against the appellant*, that Williams committed his offence. The jury was not asked to consider the guilt of Williams under s 419(1), even as against Williams, because Williams had pleaded guilty to that offence at the commencement of the trial.

[63] There was an error then in the way in which this part of the case was put to the jury, in that it failed to distinguish between the distinct offences of burglary which were alleged against the appellant and Williams. Absent any violence on the part of the appellant, any assistance which the appellant had provided to Williams in the commission by Williams of his offence was irrelevant to the proof of violence as a circumstance of aggravation of the appellant's offence. It follows that the jury's finding of this aggravating circumstance against the appellant cannot stand. As the respondent here argued, the explanation for that finding was that the jury reasoned by reference to s 7(1)(c).

[64] Apart from that finding, there is no inconsistency between the verdicts. The use of actual violence was not an element of the offence under s 419(1) and there is no inconsistency between a finding that the appellant entered the house intending to threaten violence and a finding that there was no act of violence by him.

[65] Similarly the use of actual violence was not an element of the offence of extortion. Section 415 of the Code relevantly provides as follows:

> "**415 Extortion**
>
> (1) A person (the ***demander***) who, without reasonable cause, makes a demand—
>
> (a) with intent to—
>
> (i) gain a benefit for any person (whether or not the demander); or

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17 See eg *R v Jeffrey* [2003] 2 Qd R 306, 310 and *R v Lowrie and Ross* [2000] 2 Qd R 529, 535.

18 [1977] Qd R 169.

(ii) cause a detriment to any person other than the demander; and

(b) with a threat to cause a detriment to any person other than the demander;

commits a crime."

It was the threat of physical harm to the complainant which was the relevant element of the offence. Again the jury could have reasoned that there was threatened but not actual violence by the appellant. Therefore, there is no inconsistency.

Unreasonable verdicts

[66] Much of the submissions for the appellant relied upon the argument that the verdicts were inconsistent. But it remains necessary to discuss whether it was open to the jury to convict the appellant of burglary under s 419(1) and extortion.

[67] The issue under s 419(1) was whether when the appellant entered the house he intended to do or threaten violence. For present purposes it is sufficient to discuss an intention to threaten violence.

[68] Whatever reasons there were for doubting the complainant's credibility or the reliability, there were some facts which were clear. The first was that the appellant had gone to the complainant's house, in the company of three others to make demands upon a person who had stolen from the appellant. They walked into the house without invitation and the photographs of the house after their visit show that their manner was anything but cordial.

[69] Secondly, earlier in the day the appellant had sent a text message to a friend as follows:

> "I am going to get my tools soon so if I don't answer, I am probably bashing my first disrespectful cockhead of the day".

When asked about that text when interviewed by the police, the appellant said that he was hoping that Baumgart would be at the complainant's house. The jury was not bound to accept that explanation. But in any case the text message is a further indication of the appellant's anger and a preparedness to make others think that he would be violent.

[70] Thirdly, the complainant was in fact seriously assaulted by one of the appellant's group. When examined by a doctor later in the day, the complainant had a laceration under his eye and bruising surrounding the eye, which were injuries consistent with a blunt force trauma such as a punch from a fist. The doctor was unable to say whether the injuries were caused by more than one blow but clearly the complainant was assaulted. Of course whether the appellant intended to and did threaten violence are the present questions. But the fact that a member of his group was violent is relevant to them. There was nothing in the evidence which suggested that the assault was the result of something which had arisen only at the house, such as some provocation by the complainant which changed the mood of the meeting from civility to violence.

[71] The appellant and his group were there in an exercise of self help, with a tow truck and an angry resolve to obtain what the appellant thought should be in his hands. In these circumstances it was open to the jury to find that he went there intending to threaten violence and did so. What remains of the argument that the verdicts were unreasonable must be rejected.

The police interview

[72] The first passage of which the appellant complains is this exchange between him and a police officer:

> "SCON COLLINS: Why do you think he's, he's written that letter?
>
> GRAHAM: Because I caught him and he knows that he was caught stealing my equipment. And rather than have a confrontation with a big guy like me he's gone, yep no problem I'll do this.
>
> SCON COLLINS: I put it to you that m-, perhaps after he was assaulted you're at the address where there are a number of other people and armed with a, an axe and he felt threatened and he felt like he--
>
> GRAHAM: I didn't have an axe, nobody assaulted him while I was there.
>
> SCON COLLINS: Mhm, well that's why I believe that's why he's written that note.
>
> GRAHAM: Well you're definitely wrong, one hundred percent wrong. I promise you he admitted to doing it, he obviously felt intimidated by me initially 'cause I did come in aggressive as I've explained and he was quite open and helpful.
>
> SCON COLLINS: Can you explain then why when we're entered the address um, it looked like the place had been ransacked? There was lots of drawers open, cupboards to, you know--"

[73] There were statements by the appellant in that passage which were relevant to the question of whether there had been a threat to the complainant. But the problem was that the passage also contained statements by the police officer of his own view of what probably occurred.

[74] This was raised by defence counsel at the conclusion of the evidence. The particular objection was about the police officer's statement "Well, that's why I believe that's why he's written that note", but the same objection could have been made to other statements by the police officer within this passage. The trial judge agreed that the officer's opinions were irrelevant and objectionable. The appellant's counsel then suggested that the trial judge give a direction to that effect. His Honour did so, indeed twice, in the summing up. There is no criticism of those directions. In my view the risk that the jury would improperly use the police officer's comments was avoided by the directions which were given.

[75] The second passage in question is as follows:

> "SGT MASH: Did you have any conversation about um, a firearm whilst you were there at the house?
>
> GRAHAM: No.

SGT MASH: Matt has told us that at one point um, during this incident that you have said to one o' the other males present um, [INDISTINCT]--

GRAHAM: That's why you were askin' me about the firearms down at the shed--

SGT MASH: [INDISTINCT]--

GRAHAM: [INDISTINCT].

SGT MASH: He's he's said that you asked about um, or actually told someone to go and get the shotgun.

GRAHAM: No I didn't, no way. I don't own a shotgun, nobody, nobody I know owns a shotgun.

SGT MASH: Apparent--, he said that you said, get the shotgun out of the car.

GRAHAM: No, I did not."

The suggestion as to what the appellant had said about a shotgun had obviously come from the complainant. But there was no evidence given by the complainant to that effect. Nor was there any other evidence of a firearm being used by the appellant.

[76] This passage was not the subject of any objection at the trial and nor was anything said about it in the summing up. The appellant's argument is that although no reference was made to the passage, it may have infected the reasoning of the jury. In my view this was not a real possibility. By the various verdicts, the jury has demonstrated a care and circumspection about the complainant's evidence. For example, they did not accept his evidence that the appellant was carrying an axe or his evidence that the appellant assaulted him. Those questions were the subject of argument by counsel and directions by the trial judge. But this passage received no attention at any stage in the trial. There is no real possibility that the jury reasoned from a premise that the appellant had said something about getting a shotgun, when that was simply something attributed to the complainant whose testimony was rejected in many important respects.

[77] The third passage in the interview was as follows:

"GRAHAM: Yeah, yeah okay fair enough, yeah I'd love to punch Kyle up, I'd re-, oh in fact I'd love youse to let me in a room with him with no weapons just blokes dukin' it out. If he wants to threaten me over the phone I would love to punch his face in yes, I admit that, I'm sorry but he's a thief and he stole and it affected my family and there was no need for him to do it, and he should be in trouble for it, he should be the one in these here, he should be the one paying that back for the car, he should be the one replacing the tools, he was the one who got Matt into the trouble in the first place. Ah, and this guy who bought the tools who he told

wasn't stolen, you know he's the one that's done it and he is a prick and I don't like him at all and I don't give a shit if I never see him again in my life.

SCON COLLINS: Mhm.

GRAHAM: If I do I will probably punch him because I don't like him, he hurt my family and he stole from me when I gave him an opportunity and that's not fair."

Again this passage was not the subject of any objection. But it is now said it should have been excluded because it was irrelevant. It is argued that the passage was relevant only to the appellant's attitude towards Baumgart and not to the complainant.

[78] In my view the passage was relevant at least in providing a further indication of the appellant's anger about the theft of his equipment and it would be unrealistic to suppose that he had been angry with one of the men who had stolen it but not the other. Further, the passage is unlikely to have had any prejudicial impact. There was other evidence of the appellant's aggressive disposition, such as the text message to which I have earlier referred.

[79] In my conclusion there was no miscarriage of justice from the admission of any or all of these passages from the police interview.

Conclusions and orders

[80] I have rejected the appellant's arguments except that there is an inconsistency between the acquittal on count 3 and the jury's finding of the circumstance of aggravation of actual violence for count 1. That inconsistency is explained by an error in the framing of the prosecution case and the directions to the jury as to how that finding could be made. The jury's verdict in that respect cannot stand. Once that is set aside there is no inconsistency of verdicts. The appellant should be resentenced for the offence of burglary.

I would order as follows:

(1) The jury's finding of a circumstance of aggravation of the appellant's offence of burglary, being that he used actual violence, be set aside.

(2) The appeal against convictions be otherwise dismissed.

(3) Set aside the sentence imposed for the offence of burglary.

(4) Remit the matter to the District Court of Queensland for the appellant to be resentenced upon the conviction of burglary.

[81] **JACKSON J:** I agree with Philip McMurdo JA in general, including that the question as to the operation of s 7(1)(c) of the Code upon a circumstance of aggravation should be left open. I would add that I agree with his Honour's analysis of that question.