SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hicks* [2017] QCA 14
PARTIES:	**R** **v** **HICKS, Gary Roy** (appellant/applicant)
FILE NO/S:	CA No 12 of 2016 CA No 256 of 2016 SC No 228 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 16 December 2015; Date of Sentence: 4 April 2016
DELIVERED ON:	17 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Henry 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 was convicted by a jury of one count of fraud and one count of attempt to murder – where the defence of accident under s 23(1)(b) *Criminal Code* (Qld) was raised on the evidence – where the appellant contends the verdict is unreasonable and cannot be supported by the evidence – whether intention to kill was the only rational inference open to the jury on the whole of the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to 18 months' imprisonment for fraud and 12 years' imprisonment for attempt to murder to be served concurrently – where the applicant had no previous criminal history for violence – where there were no permanent physical injuries to the complainant – where the applicant contends that the sentence

imposed for attempt to murder is unreasonable or plainly unjust – whether the sentence was within the range suggested by sentences for comparable offending – whether the sentence was manifestly excessive

Criminal Code (Qld), s 23, s 306(a), s 408C(1)(b), s 668E(1)

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
MG v R; AE v R [2016] NSWCCA 228, distinguished
Plomp v The Queen (1963) 110 CLR 234; [1963] HCA 44, cited
R v Bird and Schipper (2000) 110 A Crim R 394; [2000] QCA 94, considered
R v Graham [2015] QCA 137, distinguished
R v Kerwin [2005] QCA 259, considered
R v Laus [2005] QCA 33, distinguished
R v Mallie; Ex parte Attorney-General (Qld) [2009] QCA 109, distinguished
R v Perera [1986] 1 Qd R 211, cited
R v Sauvao [2006] QCA 331, distinguished
R v Sherrard [2004] QCA 425, distinguished
R v Willett (2005) 156 A Crim R 214; [2005] QCA 339, distinguished
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: A J Edwards for the appellant/applicant
D C Boyle and J D Finch for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for dismissing this appeal against conviction.

[2] I also agree with his Honour's reasons for refusing the application for leave to appeal against sentence. Twelve years imprisonment is a heavy penalty for a 56 year old with a sound work history, significant health problems and no prior convictions, especially as he will serve 9.6 years before becoming eligible to apply for parole. But he was a mature man who formed a callous plan to kill his older, female neighbour who had shown him nothing but friendship and generosity. His motive was to conceal the $10,200 fraud he had perpetrated on her and which was about to be exposed. He may well have succeeded but for happenstance. He betrayed her goodwill, sociability and trust in a most dreadful way. When caught out, he showed no remorse. Little wonder that the complainant has been severely psychologically traumatised by the offending. She has also suffered significant financial loss beyond the $10,200 of which she was defrauded when she felt compelled to sell her home where the offending occurred at an under value. It is also significant that the 18 month sentence for fraud was to be served concurrently with the 12 year sentence for attempted murder. It follows that the 12 year sentence reflects the overall criminality for both offences. A heavy penalty was required to deter the appellant, and others who might consider such gravely anti-social conduct, and to express the community's denunciation of it.

[3] I agree with the orders proposed by Gotterson JA.

[4] **GOTTERSON JA:** The appellant, Gary Roy Hicks, was charged on indictment on two counts. Count 1 alleged an offence against s 408C(1)(b) of the *Criminal Code* (Qld) in that on divers dates between 21 February and 2 March 2013 at Windaroo, the appellant dishonestly obtained a sum of money from the complainant, Linda Hazel McWatters. Count 2 alleged that on 12 March 2013 at Windaroo, the appellant attempted unlawfully to kill the complainant and thereby offended against s 306(a) of the *Code*.

[5] At a trial over eight days in the Supreme Court at Brisbane, the appellant was found guilty on 16 December 2015 on each count. At a hearing on 4 April 2016, the appellant was sentenced on Count 1 to 18 months' imprisonment and on Count 2 to 12 years' imprisonment, the sentences to be served concurrently. A declaration was made that 110 days of pre-sentence custody be deemed to be time served under the sentences.

[6] On 8 January 2016, the appellant filed a notice of appeal against his convictions on both counts.[1] Two grounds of appeal were stated in it. The first ground, which concerned both convictions, was abandoned.[2] The second ground concerns only the attempted murder conviction.

[7] Later, on 23 September 2016, the appellant filed an application for leave to appeal against his sentence for the Count 2 offending.[3] An order extending time for the filing of this application was made on 13 October 2016.[4]

The circumstances of the appellant's alleged offending

[8] The complainant, aged 62, and the appellant, aged 56, lived diagonally opposite each other in Long Island Drive, Windaroo. She lived alone. He lived with his then partner, Ms Donna Mitchell.

[9] The complainant's evidence was that she met the appellant when he moved into the area in about January 2013. The appellant did some work at her house free of charge. He fixed a gate and scraped some paint off glass on a door.[5] He also fixed the pump for the water tank and pipes at her house at a cost of $1,000.[6]

[10] In February 2013, the complainant told the appellant that she was looking to sell her house and to buy something less expensive.[7] The appellant told the complainant that he owned a funeral parlour business and that "through his acquisitions for the funeral parlours", he had a relationship with a mortgage broker from ING called "Stephen" who would be able to get her a reduced mortgage at 4.45 per cent.[8] He also said that he had a solicitor called "Rick Marshall" who handled all his business matters. He was very good and could assist the complainant with a sale of her house.[9] The appellant also suggested to her that he had "contacts" and that she could save money by not using a real estate agent.[10]

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1 Conviction Appeal Book ("CAB") 834-835.
2 Appellant's Outline of Submissions, paragraph 1. Counsel for the appellant, who was not defence counsel at trial, accepted that the appellant was properly convicted of fraud: Appeal Transcript 1-5 ll10-11.
3 Sentence Appeal Book ("SAB") 141-143.
4 SAB140.
5 CAB32 ll45-47; CAB131 ll11-21.
6 CAB35 ll30-37.
7 CAB34 l4; CAB36 ll21-23.
8 Ibid ll8-21.
9 Ibid ll23-40.

[11] In early March 2013, the appellant mentioned the name of a Melbourne acquaintance of his, "Leon Smart", who would offer her between $550,000 and $600,000 for her house. She expressed interest in that.[11] A few days later, he told her that his acquaintance had actually paid a deposit of $50,000 into Rick Marshall's trust account.[12]

[12] According to the complainant, the appellant told her that there was something wrong with the valleys and guttering in the roofing on her house and that it would not pass a property inspection for a sale. He said that unless it was fixed, his acquaintance would not continue with the purchase.[13] Although the complainant wanted the builder who had built her house to do the roof repairs under warranty, the appellant convinced her that a "mate" of his could do them instead. He suggested a price of between $1,500 and $2,000. She gave the appellant $1,500 as a deposit. He later told her that the work was complete; that the total price was $4,000; and that she owed him the balance.[14]

[13] The complainant worked full-time and was not able to see any work being done.[15] She paid the complainant $2,500. Evidence was given at trial by the builder of the house. His inspection in December 2013 revealed that no work had been done on the roof since the house had been built.[16]

[14] The appellant also told the complainant about a house at 13 Ripple Court, Coomera Waters. He recommended it as suitable for her for "down-sizing" and said that a friend, "Philip Johnson", owned it and needed to sell it quickly.[17]

[15] The appellant told the complainant that she had to pay a fee of $6,200 to ING for a loan to purchase this property. Of that, $5,400 was an "upfront commission", $480 was for a loan application fee and $240 was for an office administration fee. The loan would be for 10 years with an interest rate of 4.45 per cent locked in.[18] These details were written on a piece of paper which the appellant produced as were respective prices for the purchase of the house at Ripple Court ($445,000) and for the sale of her house to Leon Smart ($600,000). The vendor of the Ripple Court house was written as "Phil Collin Johnson". [19] The complainant handed the appellant $6,200.[20]

[16] The complainant was taken by the appellant to look at the house at Ripple Court. He told her that it was rented and that they could not look inside. They inspected it from the outside several times.[21] The appellant gave her a set of keys and said that the tenants would be out within a couple of days. She tried the keys but they did not work. An occupant who was at the house at the time told her that the owner's name was "Turner".[22]

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10 Ibid ll44-45.
11 CAB34 l45 – CAB35 l8.
12 CAB35 ll15-17.
13 CAB36 ll35-44.
14 CAB37 ll4-31.
15 Ibid ll37-40.
16 CAB191 ll15-16.
17 CAB55 l40 – CAB56 l2; CAB59 l24.
18 CAB140 ll30-43.
19 CAB59 ll16-46; Exhibit 5, CAB681-682.
20 CAB66 ll1-2.
21 CAB60 ll21-29.
22 CAB67 ll33-47.

[17] The complainant gave evidence that one evening the appellant told her that he had packed up all her outdoor furniture and had taken it to the house at Ripple Court and had securely locked it in the garage.[23] When she found out that the house was still tenanted, she confronted the appellant. He told her that the tenants would be out by the weekend.[24] She said that she was "quite forceful" and that the appellant was "very defensive and a bit angry".[25]

[18] The owner of the house at Ripple Court, Natalie Turner, testified at trial. She said that it was tenanted in February and March 2013 and was worth between $900,000 and $1.1m. She did not know a Phil Johnson.[26]

[19] A former partner of the appellant, Deborah Foley, gave evidence. She identified one of the keys that he had given to the complainant as belonging to an apartment where she and the appellant had previously resided.[27]

[20] The complainant never had any contact with Smart, Johnson or Marshall.[28] At trial, the appellant formally admitted that police attempts to locate any of them had been unsuccessful.[29]

[21] The appellant, however, gave evidence that Smart visited his house when he was preparing the paper he produced to the complainant.[30] A little later, Johnson and Marshall came to his house and gave him the keys for the Ripple Court house.[31] Notwithstanding, later in the trial and in the course of cross-examination, the appellant said that he had never met Marshall.[32]

[22] It is convenient to note at this point that the prosecution evidence to which I have referred was the core of the Crown case on Count 1. The sum of money dishonestly obtained was $10,200, consisting of the respective amounts of $1,500, $2,500 and $6,200.

[23] **Complainant's evidence – Count 2**: The complainant gave evidence that she was getting anxious because she had not received any paperwork for the transactions. The appellant assured her everything was going to plan.[33] At the time the complainant confronted the appellant about the furniture, the appellant told her that "Rick was coming down on [12 March], and he had all the papers. It would be signed then, and everything would be finalised".[34]

[24] On 12 March 2013 and not long after the complainant had returned home from work, the appellant knocked on her front door. He asked her if she had heard from Marshall. She told him that she had received a text message that stated, "Hi linda papers at your house 730 tonight ok can't make it til then".[35] Evidence established

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23 CAB68 ll32-35.
24 CAB68 ll28-46.
25 CAB69 ll5-6; CAB70 l7.
26 CAB169 l36 – CAB170 l22.
27 CAB172 ll30-35.
28 CAB120 ll9-21.
29 Exhibit 36; AB693.
30 CAB356 l31 – CAB357 l8.
31 CAB398 l3 – CAB399 l45.
32 CAB519 l11.
33 CAB64 l44.
34 CAB71 ll24-29.
35 Exhibit 31; CAB690.

that this text originated from the appellant's mobile phone and had been sent at 2.47 pm that day.[36]

[25] Photographic evidence showed that the rear section of the patio is covered by an open-air timber structure consisting of battens, spaced apart, which run the length of the patio. The battens are below trusses which run at right-angles to the battens. The battens are fastened to the trusses. The witnesses used different terms to refer to the battens. The complainant referred to them as "rafters". The appellant called them "beams". At other times, they were called "slats".

[26] According to the complainant, after the appellant arrived on the evening of 12 March, he began putting up a tarpaulin in the patio area at the rear of the appellant's house. As he was doing that, the appellant told the complainant that he had received a message from Marshall saying that the latter had stopped at Springwood for petrol and would not be long.[37]

[27] The appellant brought the tarpaulin and many pre-cut ropes of various lengths to the complainant's house that evening. On her evidence, he told her that Smart had wanted a spa bath installed on that patio to make the house more attractive for rental. The tarpaulin was to ensure privacy from the street.[38] However, in his evidence-in-chief, the appellant said that the purpose of the tarpaulin was to keep rain off tiles on the patio floor so that they could dry out in preparation for an acid wash to remove "tonnes of rust".[39] The complainant denied that there was significant rust stains on the tiles.[40] She emphatically denied that the appellant had suggested use of an acid wash to remove rust.[41]

[28] The complainant's evidence was that the appellant was using a step ladder to suspend the tarpaulin from the rafters of the patio roof by tying the lengths of rope to them.[42] He asked her to help him to tie up the tarpaulin because he had reached a point where his hands could not fit through the spaces above the rafters. She agreed. Her evidence-in-chief as to what then happened was:

> "… And then he says get up the – the ladder because he pulled over one of my little – one of those little black chairs he had. And I was up the ladder trying to get my hand into – to tie the knot, and he was instructing me put it over, loop it and tie it again, and I had done one or two, and then he was in front of me, and then when I was – had another length – I was tying up one. It was just like – I – I was conscious that he had moved, and I – I sort of – but I was looking up. So I wasn't looking in front of me. I was looking up at the rafters, and I was conscious that he was behind me. I – again, it was just like slow motion. This noose came over – over my head and at the same time, he was trying to pull this – and caught me [indistinct] under my chin and caught me here, and – and I had my hand – this hand just caught the end of it. At the same time, he – he put his arm around

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36 Ibid.
37 CAB72 ll10-13.
38 CAB71 ll38-47. The appellant gave a similar explanation to the complainant's former boyfriend: CAB180 ll19-20.
39 CAB409 l12 – CAB410 l19; CAB455 ll22-25.
40 CAB136 ll43-44.
41 CAB138 ll19-23.
42 CAB71 ll44-46.

> me and was pulling me back so the rope would go under my chin. And [indistinct] took it out. I was just paralysed. I tried – I – I tried to yell out but I couldn't. I couldn't yell out. And I – it just seemed like an eternity, and I could feel my face burning and my body was going into panic mode, and I really don't know how I did it, but it must've been that survival kicked in. I just – I had managed to get my fingers here and I just jumped off that ladder, and the sliding door of the house was opened and I just grabbed my mobile phone I had on the kitchen bench, and I ran out to the street to see if there was anybody there who could see me, because I wasn't going in that house again."[43]

[29] As the complainant gave this evidence, she gestured with her hands. Explaining the gestures, she said:

> "Right. So now - - -?---The rope came down and it was just these couple of fingers underneath.
>
> HIS HONOUR: What you're indicating, Ms McWatters, is roughly a line along your jaw line. Is that - - -?---That's right.
>
> Is that right?---Yeah.
>
> On both sides, you're indicating?---Yeah. It came down and he was pulling me back. So it was – it was here and I got the fingers underneath, but it wasn't underneath. It was - - -
>
> It wasn't - - -?--- - - - right in front.
>
> The rope wasn't below your chin. Is that what you're indicating?---No. He was pulling me back so it would go under my chin.
>
> All right. And the other gesture you made was when you put your right arm and folded it on your abdomen?---Yeah. That's where he was starting to pull me back."[44]

[30] The complainant could not say with much certainty, but she thought that the rope had been around her face for at least five or six seconds.[45] It was being pulled back so it was catching her at the back of the neck about the level of the middle of her ears.[46] The complainant had red marks, particularly on the right-hand side of her face.[47] She identified red marks to both of her cheeks on photographs taken the following day.[48]

[31] The complainant elaborated her evidence-in-chief concerning the arm around her abdomen. She said that the rope was being "pulled tight" and the appellant's arm was trying to pull her back.[49] The rope caught her just about the jawline.[50] She continued:

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43 CAB72 ll15-34.
44 CAB74 ll9-27.
45 CAB113 ll4.
46 CAB154 l45 – CAB155 l1; CAB167 ll5-21.
47 CAB117 ll5-17.
48 CAB118 l13 – CAB119 l42; Exhibit 20.
49 CAB85 ll14-15.
50 CAB85 ll20-22.

> "And, Ms McWatters, so when you – you said that you also felt the arm around your abdomen and you were being pulled backwards?---Yes.
>
> Did you – were you actually pulled off the ladder at all? Did you leave - - -?---I wasn't pulled off the ladder. I could just feel it tightening and being pulled backwards. And I tried to scream and I couldn't.
>
> Yes?---I - - -
>
> Do you recall what you were doing with your right hand?---I was clutching the rope in my right hand.
>
> Yes?---And - - -
>
> So – I'm sorry. So you indicated earlier that you were able to stop this from happening to you. Can you describe how that actually happened?---To be honest, I don't know, because I felt – my brain went – just seemed paralysed and it just seemed like – like everything was in slow motion, and I just felt myself getting pulled – the rope getting tighter and being pulled backwards, and I just – whether it was survival instinct or what happened, but I just leapt off that ladder."[51]

[32] The complainant was asked in-chief whether the pressure on her abdomen changed over time. She answered:

> "… I think from memory it got – it got greater but I – I was more – my mind was sort of frozen and I was conscious that I was being pulled backwards and – but it – it felt as if I was being – the arm was pulling me back as well as the rope".[52]

[33] In cross-examination, the complainant said that she understood that the appellant was standing on a chair behind her for elevation.[53] She could not see the full loop of the rope and accepted that she had assumed that it was a noose. Her explanation for the assumption was that "the circle of rope came down and hit [her] and then [it] was being tightened behind [her] neck and was pulling [her] backwards".[54]

[34] The complainant said in cross-examination that the rope had first caught her at the area under her nose at her upper lip.[55] It did not touch the front of her neck at any stage.[56]

[35] The complainant was challenged on her account of being pulled backwards. It was put to her that for the rope to drop, she would need to have gone forwards, not backwards.[57] It was also put to her that it was an assumption on her part that she was being pulled backwards and that the appellant was trying to get the rope around her neck. Her response was that that was what it felt like at the time.[58]

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51 CAB86 ll1-20.
52 CAB113 ll37-40.
53 CAB153 ll20-21.
54 CAB154 ll15-22.
55 CAB153 l37 – CAB154 l4.
56 CAB155 ll29-30.
57 Ibid ll7-18.
58 Ibid ll43-45.

[36] The complainant rejected a proposition that the appellant had fallen off the chair behind her. She said she would have heard a noise had that occurred.[59]

[37] The complainant was cross-examined about her memory. That evidence took the following course:

> "And, in fact, you don't have a very good recollection of this particular part of the incident, do you?---I have a good recollection because my brain did freeze at the time because I knew it – that my – that I was in danger at that point, and I – I could feel a panic in my face, and I knew that I was being pulled backwards from the ladder both this way and that way and – and the – I felt the rope tightening around my face and being pulled backwards. So it's not as if it was not being pulled. It was being pulled and tightened."[60]

[38] The complainant gave additional evidence of events that followed the incident. When she ran out of the house, the appellant followed her. He had his arms up in an intimidating fashion. They were held up from the sides of his body, almost at shoulder height and not quite straightened. He said to the complainant that, "It was an accident." She rang a male friend, Bunny Matakatea. The appellant went and got his wife, Donna Mitchell.[61]

[39] Ms Mitchell came to the complainant's house and gave her an ice-pack. The appellant came into the house. The complainant realised that she was still clutching a piece of rope. She gestured that the appellant should leave the house. He grabbed the rope from her hand and left.[62]

[40] Mr Matakatea arrived after about five minutes. He and the appellant spoke about something at the door of the house.[63] The appellant told the complainant that he was going to the hospital and asked her if she wanted to come. She said, "No." She left with Mr Matakatea.[64] She went to the police station the following day.

[41] **Mr Matakatea's evidence – Count 2**: Mr Matakatea gave evidence that on 12 March 2013 at around 8.30 pm or 9 pm, he received a phone call from the complainant. He immediately went to her house.[65] He walked straight into the house and met a man in the hallway who said, "I'm Gary. I'm helping Linda sell the house."[66] He saw the complainant in the theatre room. A lady was kneeling in front of her. The complainant looked dazed. She was fiddling with a piece of rope.[67] The rope was about half a metre long, twined, and navy blue and white in colour.[68]

[42] The appellant asked Mr Matakatea to go with him to the patio area so that he could explain what had happened.[69] Mr Matakatea saw a tarpaulin and a ladder. The appellant climbed up the ladder to the second rung and moved his hands up high, slightly above his head to the top of the tarpaulin and demonstrated a tying motion

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59 CAB156 ll32-37.
60 Ibid ll14-20.
61 CAB114 ll6-34.
62 CAB115 ll19-21.
63 CAB116 l17-18.
64 Ibid l38.
65 CAB175 ll26-36.
66 CAB176 ll31-35.
67 CAB177 ll1-11.
68 Ibid ll21-27.
69 CAB178 ll1-2.

with his hands. He said that he had slipped and the rope went around the complainant. He maintained that it was an accident.[70]

[43] Mr Matakatea asked the appellant why the tarpaulin was there. The latter said that the new owners wanted to put a spa pool in the patio area and did not want it to be seen from the street.[71]

[44] He and the appellant went back inside to the theatre room. The appellant went to the complainant. He said, "stop playing with that" to her, then took the short rope from her hand and left the room.[72] A short time later, the complainant requested Mr Matakatea "to get him out". Mr Matakatea asked the appellant to leave the house. The appellant reacted by "showing a lot of concern" for the complainant. He repeatedly said that it was an accident. The appellant and Ms Mitchell then left.[73]

[45] **Ms Mitchell's evidence – Count 2**: Ms Mitchell had passed away by the time of the trial. A recording of her interview with police (Officer Leah Foster) on 21 March 2013 was tendered and played in the prosecution case.[74]

[46] In the interview,[75] Ms Mitchell said that:

(a) the appellant had asked her to come over and help with the tarpaulin. She said that she did not want to because she was still grieving over her mother's recent death;

(b) after the appellant went to hang the tarpaulin, he came running back and said, "Oh, my God, I've nearly hung [Linda]." He was frantic;

(c) the appellant said that he was on a chair and had reached over to tie a knot. The chair slipped and over he went;

(d) he said that the rope went "under here" not around the complainant's neck;[76]

(e) she raced over to the complainant's house; and

(f) the complainant was "shocked". Ms Mitchell asked her if it was an accident and she said, "Yes".

[47] **The appellant's evidence – Count 2**: The appellant took part in a police interview (Detective Sergeant Adam Windeatt) on 21 March 2013. A recording of the interview was tendered and played in the presence of the jury.[77]

[48] The appellant told police that:

(a) he had put the tarpaulin up because it was raining and he was going to scrub the floor with acid and put a spa bath in for the complainant;[78]

(b) he had tried to get up the ladder but could not lift his arm;

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70 CAB179 ll26-47.
71 CAB180 ll19-20.
72 CAB182 ll9-15.
73 Ibid l35 – CAB183 l11.
74 Pursuant to s 93B *Evidence Act* 1977 (Qld).
75 Transcript of Interview, Exhibit MFI7: CAB700-704.
76 Ms Mitchell made a gesture to indicate where the rope went. Officer Foster, who testified at the trial, said she could not remember what the gesture was: CAB215 ll8-10.
77 CAB230 l12; Exhibit 26. Transcripts are Exhibit MFI10, CAB729-760: Exhibit MFI11, CAB761-778; and Exhibit MFI12, CAB779-833.
78 CAB741.

(c) he asked the complainant to help him;[79]

(d) he put the chair behind the complainant and stood on it;[80]

(e) then, in his words,

> "She was up the ladder and I was behind her feeding another bit of rope. As I fed the rope over the beam, she tied them off. I put another rope over the beam. She tied it off. I couldn't get them through the hole! I couldn't get my hand up through the hole. I'm here on my, the chair behind her. I put the rope over and thought, I'll just get that there and I hooked that there, I can hold it. As she gets down I can just pull the rope and the tarp will sit up there and it wrapped right round her neck and caught my arm as well. I'm trying to lift her and get it off her neck";[81]

(f) there were two little burns to his arm;[82]

(g) he apologised and got the complainant a dishcloth and an ice-pack for her face; and

(h) the complainant said, "It was an accident, Gary, I know."[83]

[49] During the interview, the appellant asked for pen and paper to draw a diagram of how the ropes were being tied. The diagram he drew was tendered in Detective Sergeant Windeatt's evidence.[84] In cross-examination, the appellant denied that he had drawn the depiction, which appeared on the exhibit, of a rope hanging vertically with a "teardrop shape loop at the base" of it.[85] The appellant described the rope system he was using as like a pulley system with no pulleys.[86]

[50] The appellant testified at trial. He described the securing of the tarpaulin and the incident in the following terms. The tarpaulin was secured with one rope at the corner from the pillar to the front of the house. He was running a blue and white nylon rope, about four or five metres long, from that corner all the way along the tarpaulin to hold the whole tarpaulin up tight. The loops made with the shorter lengths of rope were temporary. They were to hold the tarpaulin in place while the appellant secured it.[87]

[51] The appellant asked the complainant to assist him because he could not get his hands through the gaps to tie off the temporary loops. She was moving ahead of him tying the temporary fastening loops as he was using the long blue and white nylon rope to wrap around the beams in the roof frame. He would wrap it in a snake-like or corkscrew fashion and then loop it through the next eyelet along the upper edge of the tarpaulin.[88]

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79 CAB742.
80 Ibid.
81 Ibid.
82 In his evidence, the appellant identified the burn marks on a photograph: Exhibit 34.
83 CAB742.
84 Exhibit 27; CAB683.
85 CAB558 ll21-22.
86 CAB744.
87 CAB425 ll29-43.
88 CAB431 l13 – CAB432 l30.

[52] According to the appellant, the complainant was on the ladder no higher than the second rung. He was on a chair behind and to the left of her.[89] He pulled the rope he was using tight "to pull the snake or corkscrew effect" with his left-hand. He had the loose end of the rope in his right-hand with the balance of the rope hanging in a "big loop".[90]

[53] The appellant said that he lent forward to "snake" the rope around the beam towards the next eyelet and asked the complainant to release the next temporary loop so that he could put the long nylon rope through that eyelet. He lent forward, holding that rope in order to put it through the eyelet. He lent too far forward. His chair slipped and he came back and hit the complainant on her face with his full weight.[91]

[54] According to the appellant, his arms were almost at head height. As he slid, the rope came with him and pulled the complainant straight off the ladder. He indicated that the rope caught her on the left side of her face from the upper lip towards her ear.[92]

[55] The appellant denied pulling the complainant off the ladder. He said that it was the long nylon rope that pulled her off it. He gave no evidence about trying to lift the complainant in order to free her from the rope.

The Conviction Appeal

Ground of appeal

[56] The one ground of appeal against the conviction on Count 2 is that it is unreasonable and cannot be supported by the evidence.[93] Counsel for the appellant accepted that the appropriate evidential frame of reference for this ground is the evidence led in the prosecution case. It excluded the appellant's evidence at trial.[94]

[57] No issue is taken with the directions given to the jury by the learned trial judge that the prosecution need prove the following elements beyond reasonable doubt, namely, that the appellant had an intention to kill at the requisite time; that he put the intention into execution by means adopted to its fulfilment; that he manifested the intention to kill by some overt act; and that his act was unlawful.[95] In regard to the fourth element, his Honour told the jury that, in light of the appellant's evidence, they would need to consider whether the prosecution had excluded beyond reasonable doubt the possibility that the rope came in contact with the appellant by accident.[96]

Appellant's submissions

[58] Counsel for the appellant characterised the case against his client as a circumstantial one. The learned trial judge had directed the jury on the footing that it was circumstantial with respect to the element of intention to kill.[97] His Honour explained that unless they were satisfied that the only rational inference from the evidence was that the

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89 CAB432 l41 – CAB433 l44; CAB436 ll32-36.
90 CAB435 l26 – CAB436 l24.
91 CAB436 l35 – CAB437 l10.
92 CAB439 ll3-6.
93 *Criminal Code* (Qld), s 668E(1).
94 Appeal Transcript 1-5 ll1-6. The summary of the appellant's evidence at trial which I have set out has relevance for the jury's rejection of the s 23 defence and for his sentence application.
95 CAB636 ll24-25. Information for Jurors, Exhibit MFI1; CAB697.
96 CAB637 ll29-32.
97 The respondent submitted that his Honour was correct in so doing: Respondent's Outline of Submissions, paragraph 6.11.

appellant intended to kill the complainant, they would find him not guilty of attempted murder.[98] No issue is taken with the content of that direction or with the direction given in relation to the first limb of s 23 of the *Code* (accident).[99]

[59] For the appellant, it was submitted that the evidence was insufficient to establish guilt on his part of attempted murder. It was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty and that, on an examination of the whole of the evidence, this Court would experience a doubt which the jury ought also to have experienced. The doubt is one that arises because the evidence was incapable of displacing a rational hypothesis of innocence.[100]

[60] It was submitted for the appellant that the following matters were "notable":

> "(a) the complainant could not see what the appellant was doing and assumed that he had attempted to put a noose around her neck;
>
> (b) the complainant gave evidence of a panicked and frozen state of mind at the time of the relevant events;
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> (c) the rope incident was over in a matter of seconds;
>
> (d) the rope never went around the complainant's neck, only her face;
>
> (e) no words were spoken to evince any state of mind in the appellant;
>
> (f) the suggested motive lacked force. Whilst there was a background of fraud and a potential that the appellant might be caught out, the hanging of the tarpaulin to install a spa was equally consistent with a continuation of the fraud being perpetrated upon the complainant. The complainant had not indicated an intention to go to the police or complain about the appellant such that there was any need to hang her to hide his fraudulent taking of $10,200;
>
> (g) even on the complainant's version, the appellant had been standing on a chair behind her where she believed he was doing something to put up the tarpaulin at the time of the alleged attempted murder;
>
> (h) the appellant's conduct afterwards was inconsistent with an attempt to kill the complainant, making no attempt to hold on to her when she jumped off the ladder, and showing concern for her afterwards;
>
> (i) the appellant's conduct prior to the alleged attempted murder was inconsistent with an elaborate plan to kill her given that he invited his partner Ms Mitchell over to help. That Ms Mitchell was aware that the appellant was next door assisting the complainant was also inconsistent with a plan to kill her;
>
> (j) the complainant's statements to Ms Mitchell afterwards that it was an accident were inconsistent with the charge of attempted murder."[101]

[61] It was submitted that when all of those matters are taken into account, a rational and undisplaced hypothesis that was open was "a fall from the chair as the appellant described and the rope accidentally going around part of the complainant's face causing her to panic and misapprehend what had occurred."[102] Hence, no properly

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98 CAB615 ll25-29.
99 Appellant's Outline of Submissions, paragraph 54.
100 Appellant's Outline of Submissions, paragraphs 56, 58.
101 Ibid paragraph 57.
102 Ibid paragraph 58.

instructed jury could have concluded that the only rational inference was that the appellant was attempting to kill the complainant.[103]

Respondent's submissions

[62] Counsel for the respondent observed that the s 23 defence had been put to the jury. To consider it, they had to decide whether they accepted the appellant's account of his holding a single strand of rope, his slipping, and the rope connecting with the side of the complainant's face. They evidently rejected that account.[104]

[63] There was a sufficiency in the complainant's evidence, it was submitted, for the jury to be satisfied that it was a looped rope in the appellant's hand or hands that passed over the complainant's head and first caught her upper lip and that the passing of the loop in that manner was by a willed act on the appellant's part. Whether there was the requisite intent at that time to kill the complainant was to be determined from the circumstantial evidence.

[64] Counsel for the respondent submitted that once the jury accepted that the loop was deliberately placed over the complainant's head, an inference of intent to kill was "fairly compelling".[105] The inference was reinforced by the evidence of the complainant's position on the ladder, him behind her, and the rope being pulled backwards and tightened.

[65] The respondent submitted that the evidence of motive was strong. The appellant had, by his multiple lies, locked himself into a position where his fraud was bound to be exposed that night when the fictitious Marshall failed to appear. To have done away with the complainant by an apparent accident would have relieved the appellant of having to repay the $10,200 and of any risk of criminal investigation and prosecution. The appellant's theory that hanging the tarpaulin was equally consistent with a continuation of the fraud was unrealistic. There was no point in doing that in the face of the imminent exposure of it.

[66] In relation to the matters noted by the appellant, counsel for the respondent referred, in oral submissions, to the complainant's evidence that her recollection of the incident was good and that her inference that the rope was looped, which it was submitted was a sound one, arose because she felt the rope at the back of her neck and felt it tighten. It was also submitted, firstly, that the appellant would have known that it was most unlikely that Ms Mitchell would have accompanied him to the complainant's house, given her state of grief that evening and, secondly, that the appellant was forced into an explanation of it all as an accident because the complainant had reached the safety of the street and continuation with his plan had been frustrated.

Analysis

[67] The direction given by the learned trial judge to the effect that the prosecution case on the element of intent to kill was a circumstantial one, was correct. His Honour's explanation to the jury that they must find the appellant not guilty of attempted murder unless they were satisfied that the only inference that could rationally be

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103 Ibid paragraph 59.
104 Appeal Transcript 1-24 ll40-44.
105 Appeal Transcript 1-25 ll1-2.

drawn from the evidence was one of intent to kill, accorded with accepted principle.[106]

[68] Where an appellant relies on the ground that the verdict is unreasonable and cannot be supported by the evidence, the task of the appellate court is settled. In *SKA v The Queen*,[107] the plurality, French CJ, Gummow and Kiefel JJ, described it in these terms:

> "11 It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in *M v The Queen*[108] by Mason CJ, Deane, Dawson and Toohey JJ:
>
> > 'Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'
>
> 12 This test has been restated to reflect the terms of s 6(1) of the *Criminal Appeal Act*. In *MFA v The Queen*[109] McHugh, Gummow and Kirby JJ stated that the reference to 'unsafe or unsatisfactory' in *M* is to be taken as 'equivalent to the statutory formula referring to the impugned verdict as 'unreasonable' or such as 'cannot be supported, having regard to the evidence'.'
>
> 13 The starting point in the application of s 6(1) is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses.[110] However, the joint judgment in *M* went on to say:[111]
>
> > 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.'
>
> Save as to the issue whether the Court of Criminal Appeal erred in not viewing a videotape of the complainant's police interview, to which reference will be made later in these reasons, this qualification is not relevant to the present matter.

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106 *Plomp v the Queen* (1963) 110 CLR 234 at 252 per Menzies J; *R v Perera* [1986] 1 Qd R 211 at 216 per the Court.
107 [2011] HCA 13; (2011) 243 CLR 400.
108 (1994) 181 CLR 487 at 493.
109 (2002) 213 CLR 606 at 623-624 [58].
110 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.
111 Ibid at 494.

> 14 In determining an appeal pursuant to s 6(1) of the *Criminal Appeal Act*, by applying the test set down in *M* and restated in *MFA*, the Court is to make 'an independent assessment of the evidence, both as to its sufficiency and its quality'.[112] In *M*, Mason CJ, Deane, Dawson and Toohey JJ stated:[113]
>
> > "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'."

[69] In written submissions, the appellant sought to rely on the recent decision of the New South Wales Court of Criminal Appeal in *MG v R; AE v R*[114] for the proposition that notwithstanding the benefit the jury has of seeing and hearing the witnesses, a circumstantial case essentially involves what inferences can properly be drawn from the evidence with a marginal role only for evaluation of the truth and reliability of the evidence called. The proposition is one that need not be considered here because, as a perusal of that decision reveals, what was said was directed at a wholly circumstantial case. This case is clearly not that. There was direct evidence as to the other elements of the offence of attempted murder. The jury's consideration of the s 23 defence was informed by that evidence. Furthermore, and inconsistently with the proposition, some of the matters referred to by the appellant as notable ones, go to the reliability of the complainant's evidence.

[70] To my mind, there is a logical difficulty in the rational and undisplaced alternative hypothesis advanced by the appellant to which I have referred. The difficulty arises because this hypothesis is one that accords with the appellant's own account. That account was the basis of the s 23 defence on which the jury were properly directed. No issue is raised in this appeal with respect to their rejection of that defence.

[71] On the footing that despite this difficulty, the alternative hypothesis was one that was available to be considered, in my view, the evidence led in the prosecution case was sufficient for the jury to conclude that it was not reasonably open.[115]

[72] There was a motive. It was one of mounting urgency, and all of the appellant's doing. There was no point in his continuing the fraud. He had set in motion its certain and imminent exposure. There was no purchaser who had asked for the installation of a spa bath. That pretext for the hanging of the tarpaulin was false.

[73] The complainant gave a cogent and consistent account of a rope across her upper lip which was pulled back to her ears. She felt herself being pulled back and the rope being tightened across her jawline and at the back of her neck. The episode lasted

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112 *Morris v The Queen* (1987) 63 CLR 454 at 473 per Deane, Toohey and Gaudron JJ.
113 492-493.
114 [2016] NSWCCA 228 at [252] per Hoeben CJ at CL.
115 *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 at [46] per Gummow, Hayne and Crennan JJ; *R v Baden-Clay* [2016] HCA 35; (2016) 90 ALJR 1013 at [47] per the Court.

for five or six seconds. She said that her recollection of it was good. The red marks to both her cheeks were consistent with the application of force by the rope to them.

[74] There is no evidential basis for the appellant's hypothesis that the complainant panicked and misinterpreted what had occurred. It is, of course, likely that the complainant was shocked by the occurrence once it had occurred, but there is no reason to suppose that her comprehension of the events comprising the occurrence, or her recollection of them, were impaired.

[75] On the basis of the complainant's evidence, key elements of which I have identified, the jury must have been satisfied that the appellant, in a series of willed acts, threw a looped rope over the complainant's head, pulled her backwards and tightened the rope over a period of some five or six seconds.

[76] In this state of circumstantial evidence as to motive and occurrence, it is unsurprising that the jury rejected as not reasonably open, the alternative hypothesis for which the appellant contends. The same might be said of a reformulated alternative hypothesis that the appellant put the rope over the complainant's head and pulled back on it without an intent to kill.

Conclusion

[77] For these reasons, I am unpersuaded that the appellant has established this ground of appeal. The appeal against conviction ought therefore be dismissed.

The Application for Leave to Appeal against Sentence

[78] Following upon the conviction, his Honour ordered that a pre-sentence report be prepared pursuant to s 344 of the *Corrective Services Act* 2006 and that the applicant be examined by a psychiatrist. The report[116] and two reports of the examining psychiatrist, Dr A M Aboud,[117] were taken into account in sentencing the applicant.

[79] In his sentencing remarks, his Honour noted the following circumstances of the Count 2 offending:

(i) the especially vulnerable position of the complainant at the time;[118]

(ii) the applicant's intention to kill the complainant by hanging her;[119]

(iii) after the complainant extricated herself from the noose, she ran out onto the road with the applicant following her;[120]

(iv) the applicant did not suffer from any mental illness;[121] and

(v) the applicant was a skilled liar.[122]

[80] His Honour considered that the following factors aggravated the attempted murder:

(i) the applicant's motivation to kill the complainant to cover up his fraud;[123]

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116 Exhibit 3; Sentence Appeal Book ("SAB") 70-74.
117 Exhibit 4; SAB75-85, Exhibit 5; SAB86-89.
118 SAB47 ll48-49.
119 SAB48 l5.
120 SAB48 ll13-18.
121 SAB51 l28.
122 SAB51 ll40-41.
123 SAB55 l14 – SAB56 l5.

(ii) the offending involved a considerable degree of planning and premeditation undertaken in a "cold and calculated way";[124]

(iii) the absence of remorse on the part of the applicant which was manifested in an absence of concern for the complainant; habitual lying to her, his partner, the police, the jury and the examining psychiatrist;[125] and subjecting the complainant to cross-examination at trial;[126] and

(iv) the lasting psychological effects on the complainant: she suffered financially, selling her house at an undervalued price; she had lost trust in people; and she continued to suffer nightmares and flashbacks;[127]

and that the fraud was aggravated by its elaboration in conception and execution, the vulnerability of the complainant, the persistence in the deception and a failure to repay any of the money obtained by deception.[128]

[81] The following factors were taken into account by his Honour by way of mitigation:

(i) the applicant's ill health with neck and back complaints, but particularly a coronary artery disease that had required surgery and the insertion of stents;[129]

(ii) the absence of any prior convictions against him;[130]

(iii) his good work history;[131]

(iv) his suffering on account of the suicide of his then partner and the death of his parents;[132]

(v) the reliance by his present wife, who suffers from chronic asthma, upon him for financial and carer support;[133] and

(vi) his low risk of future violent offending,[134] which was tempered by a moderate to high risk of fraudulent re-offending.[135]

[82] The applicant does not submit that his Honour misapprehended the circumstances of the offending or erred in having regard to any of the factors to which I have referred. Nor does the applicant identify any factor which, he submitted, was relevant, but was not taken into account.

[83] In the course of his sentencing remarks, his Honour referred[136] to the decision of this Court in *R v Reeves*,[137] in which Williams JA identified cases in which sentences between 10 and 17 years' imprisonment had been imposed for attempted murder, subject to certain exceptions, dependent upon the circumstances of the case.

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124 SAB55 ll26-28.
125 SAB48 l33, SAB49 l48, SAB55 l10 – SAB56 l5.
126 SAB48 ll39-40.
127 Exhibit 8: SAB113; SAB48 l48; SAB49 l9.
128 SAB55 ll6-12.
129 SAB54 ll5-6.
130 SAB54 ll14-15.
131 SAB49 ll11-17; SAB54 l16.
132 SAB49 l35; SAB54 ll17-19.
133 SAB54 ll22-43.
134 SAB51 ll46-47; SAB53 ll37-38.
135 SAB51 l49 – SAB52 l2.
136 SAB52 l34.
137 [2001] QCA 91.

[84] His Honour also recited the following statement of principle expressed in *R v Tevita*:[138]

> "An attempt to kill is, like other forms of attempt, a crime of intention. To that extent all attempts are alike. However, the severity of the sentence imposed necessarily varies with the seriousness of the injuries inflicted on the person targeted; and the extent to which the intention was put into effect by the accused's acts. The contrast is between a single blow, or stroke or shot, and a repetition of the acts intended to cause death. It follows that punishments differ greatly from one case to another."

[85] It is not submitted for the applicant that there was a misapprehension of relevant principle on his Honour's part.

The ground of appeal

[86] The single ground of appeal against the applicant's sentence is that it is manifestly excessive. The applicant submits that the sentence that should have been imposed for Count 2 is nine to 10 years' imprisonment.

[87] In developing this ground of appeal, the applicant submitted that his sentence of 12 years' imprisonment is "unreasonable or plainly unjust" in that it is so out of step with sentences for comparable offending as to ground an inference in that in some way there has been a failure properly to exercise the sentencing discretion. This submission reflects the explanation of manifest excess or manifest inadequacy in a sentence given in *House v The King*.[139]

Applicant's submissions

[88] The applicant noted his Honour's observation[140] that he had been referred to sentencing decisions of this Court in *R v Sauvao*,[141] *R v Laus*,[142] *R v Willett*,[143] *R v Mallie; Ex parte Attorney-General (Qld)*[144] and *R v Graham*.[145] Further, the applicant noted that in each of these decisions except *Graham*, the sentence imposed was nine to 10 years' imprisonment for attempted murder. The applicant submitted that his case was more similar to those four cases than it was to *Graham* where a sentence of 12 years three months was imposed, or to two other cases, *R v Kerwin*[146] and *R v Sherrard*,[147] in each of which the sentence imposed exceeded 10 years.[148]

[89] It was notable, the applicant contended, that "the present case did not involve any injuries to the complainant or the repetition of acts intended to cause death, or a criminal history for violence, at least one of which is usually seen in cases attracting sentences in excess of 10 years".[149]

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138 [2006] QCA 131 per the Court (McPherson JA, Chesterman and Mullins JJ) at [10].
139 (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 505, recently cited in *Barbaro v The Queen* [2014] HCA 2; (2014) 253 CLR 58 per French CJ, Hayne, Kiefel and Bell JJ at [43].
140 SAB52 ll24-31.
141 [2006] QCA 331.
142 [2005] QCA 33.
143 [2005] QCA 339.
144 [2009] QCA 109.
145 [2015] QCA 137.
146 [2005] QCA 259.
147 [2004] QCA 425.
148 Appellant's Outline of Argument paragraphs 9.9, 11.1.
149 Ibid paragraph 11.2.

Respondent's submissions

[90] The respondent submitted that the circumstances of the applicant's case justified the sentence imposed. Although the physical injuries were mild, the attempt at murder had had very serious non-physical consequences for the complainant.[150] The attempt involved a considerable degree of planning and premeditation.[151] Significantly, that went directly to the key element of intention to kill in the offence.[152]

[91] Reliance was also placed on the absence of remorse and the need for the sentence for Count 2 as the head sentence to reflect the criminality of the applicant's offending, including the contrived and persistent fraud.[153]

[92] The respondent made submissions with respect to the sentencing decisions referred to by the applicant. Their tenor is reflected in the following discussion of those decisions.

Discussion

[93] The applicant's argument depends much upon the proposition that the circumstances of his case make it more comparable with the four cases than with the others. The proposition needs to be examined for its validity.

[94] In *Sauvao*, the offender was sentenced to nine years' imprisonment and a serious violent offence declaration was made. On appeal, the period of imprisonment was affirmed but no declaration was made. There, in an altercation with his former de facto partner at a railway station, the offender put her in a headlock. On his own account, he then tried to stab her in the heart with a small kitchen knife. It snapped against her clothing and did not physically harm her. Nevertheless, the offender continued to punch and hit the victim causing her to hit her head against a pole. The offending occurred after the victim had obtained an apprehended violence order against the offender. The offender himself had a minimal criminal history. The factors which significantly differentiate that case from the present are that not only did the offender plead guilty, but also his admission to police formed the basis of the attempted murder charge; the offending was unpremeditated and it did not take the victim by surprise; the offender was profoundly remorseful; and he reported to a police station directly after the offending.

[95] In *Laus*, the offender was convicted at trial of attempted murder for which he was sentenced to 10 years' imprisonment. A concurrent sentence for arson of four years was also imposed. The arson involved throwing a Molotov cocktail into a residence which the offender previously occupied with another man who, the offender thought, had stolen his winning Lotto ticket. The attempt victim saw the offender in the former's front yard in the early hours of the morning. The victim confronted the offender who aimed a rifle at him and attempted to shoot him several times. The weapon failed to fire because the magazine was not properly fitted. The victim had some dated minor criminal convictions and a good work history. His application for leave to appeal against his sentence as manifestly excessive was refused. It had been accepted by the sentencing judge that the intention to fire the weapon was

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150 Respondent's Outline of Argument paragraph 2.4.
151 Ibid paragraph 4.1.
152 Ibid paragraph 4.3.
153 Ibid paragraph 4.16.

"formed suddenly" when the offender was confronted. He was 74 years old when he offended and 75 at sentence.

[96] The offender in *Willett* was 21 years old at sentence. He was convicted at trial. His offending arose out of an involvement in a dispute between the victim, who was the ex-partner of the offender's love interest, and the current flatmate of the love interest. The offender pulled up outside the victim's caravan and shot a pistol at him. The weapon jammed. The offender drove off and successfully fired the weapon several more times but the shots did not hit the victim. The offender's conduct had been provoked by an earlier altercation that evening in which the victim had threatened the offender and smashed his mother's car. The sentencing judge had said that he would have been inclined to impose a sentence of 11 or 12 years' imprisonment, but for the offender's personal characteristics which included relationship dysfunction issues and a history of depression, anxiety and paranoia. His application for leave to appeal against his sentence as manifestly excessive was also refused.

[97] In *Mallie*, the 48 year old offender pleaded guilty to attempted murder. His relationship with the victim had broken down. He jumped on her and stabbed her on the shoulder with a knife, snapping the blade. He punched her in the head about 10 times. She crawled away. He then jumped on her back and sat on her, punching her to the face. He tried to cut her throat. He said that he was going to kill her and then kill himself. She talked him out of it. The attack affected the victim physically and psychologically. On an Attorney's appeal, the offender's sentence of eight years with parole eligibility after two years and six months was set aside. He was resentenced to 10 years' imprisonment. In the view of the appellate court, a sentence of that length "at least" should have been imposed. The Court noted that the offender had entered an early plea; he was genuinely and deeply remorseful; and he had significant health problems that would make custody more onerous for him.

[98] In my view, there is no strong overall similarity between these four cases on the one hand, and the applicant's case on the other, such as would justify a conclusion that the applicant's sentence is inexplicably out of kilter with them. These cases are significantly different as between themselves. The circumstance that none of them has resulted in a sentence of more than 10 years' imprisonment, is attributable to particular features of the offending or of the offender which vary markedly from case to case and do not feature in the applicant's case.

[99] Likewise, the other sentencing decisions mentioned in argument where longer sentences were imposed for attempted murder do not, to my mind, expose the applicant's sentence as one that is manifestly excessive. It need be recalled that the applicant's conduct was a planned strategy to conceal his persistent fraudulent conduct; that it was halted in its execution by the complainant's extrication of herself; that it has had serious health and financial consequences for the complainant; and that the applicant has shown no remorse.

[100] In *Graham*, the charges followed a coincidental meeting between two members of different motorcycle gangs at a shopping centre. Both were armed, the victim with a knife and the offender with a handgun. The offender was convicted at trial of attempted murder and unlawfully wounding with intent to cause grievous bodily harm. The offender shot at his rival victim hitting him in the arm with the first shot and, as he ran away, missing him with the second which caused bullet fragments to lodge in the hip of an innocent bystander. The offender had a criminal history for minor drug offending and was on bail for weapon possession offences at the time. The

sentencing judge adopted a notional head sentence of 14 years' imprisonment which was reduced to 12 years three months to take into account undeclarable time and the severe conditions under which presentence custody had been served. The offender's application for leave to appeal against the sentence as manifestly excessive was refused.

[101] The 46 year old offender in *Kerwin* was convicted at trial of attempted murder. He pleaded guilty to burglary with violence. He had broken into his estranged wife's house at night by smashing a window and, whilst making threats to kill her, repeatedly struck her across the face. He strangled her until she blacked out in front of their eight year old daughter. The police were called by neighbours. They pulled the offender off the victim as he was attempting to strangle her on a couch. The attack was premeditated and was in breach of a domestic violence order and a suspended sentence for assault. Both the victim and the daughter were harmed psychologically by the event. The offender showed no insight or remorse. He was sentenced to 12 years' imprisonment for the attempted murder and to a concurrent six years' imprisonment for the burglary, both cumulative upon an activated 135 day suspended sentence. The offender's application for leave to appeal against the sentence as manifestly excessive was refused. Williams JA expressed the view that the sentence was well within range and could be said to be "towards the lower end of the range for so serious an offence".[154]

[102] In *Sharrard*, the offending arose out of a history of animosity between the offender and the victim. The offender used a rifle to shoot repeatedly at the victim at the latter's property. The victim dived into a ditch. When he looked up to see if the offender was still there, he was shot in the head. One bullet penetrated his temple and exited through the side of his head. Notwithstanding, he was able to run for help and then drive a vehicle. At that point, he noted that a bullet had penetrated his shoulder and exited through his back. The injury to the back left him with some disability. The sentencing judge found that the offender had been firing rifle shots at the rear of the victim's property. Matters escalated when he saw the victim. It was at that point that an intention to kill was formed. It was accepted that the offender had a genuine belief that the victim was previously a party to a "cowardly and potentially lethal attack" on him. The offender harboured a "growing obsession" that the victim had successfully avoided prosecution for it. The offender was sentenced to 11 years' imprisonment. His application to appeal against the sentence as manifestly excessive was refused.

[103] The offenders in *Graham* and *Sharrard* each used a weapon which, when fired, injured the victim. In that respect, the offending was more insidious than that of the applicant here. That was reflected in the adoption of a 14 years' notional head sentence in *Graham*. However, the decision to use the weapon by the offender in *Sharrard* had an element of spontaneity to it arising from the belief that the victim had harmed him physically but got away with it. Absent those factors, a significantly longer sentence might have been expected.

[104] The offending in *Kerwin* was carried out without a weapon. I accept that, in its physical intensity and duration, it was plainly worse than that inflicted on the complainant in the present case. Significantly, on appeal, the sentence of 12 years was regarded by a senior member of the Court as towards the lower end of the range. That view is, to my mind, well justified having regard to the sentences

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154 [2005] QCA 259 at [24].

imposed in *R v Bird and Schipper*[155] and sentencing decisions referred to in it. In that case, two females in their late teens, who shared satanic beliefs, attacked a vulnerable elderly woman on a track in the Noosa National Park. They taunted her, then Bird attacked her with a knife intending to kill her. She slashed the full circumference of the victim's throat and then inflicted other piercing wounds to her face and body. Schipper joined in the attack but did not intend to kill the victim. She hit the victim about 20 times with heavy nunchakus. They stole the victim's bum bag and left her to her fate. Bird pleaded guilty to attempted murder for which was sentenced to 20 years' imprisonment. Schipper pleaded guilty to causing grievous bodily harm with intent and was sentenced to 11 years' imprisonment. On appeal to this Court, those sentences were reduced to 16 years and nine years' imprisonment respectively.

[105] Further, in comparing the circumstances in *Kerwin* to those of the present case, it is relevant that the offending in the former lacked the ulterior and cynical motivation of the elaborately planned attack in the latter.

Conclusion

[106] For these reasons, the applicant has failed to establish that his sentence is manifestly excessive. The application for leave to appeal it must be dismissed.

Orders

[107] I would propose the following orders:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

[108] **HENRY J:** I have read the reasons of Gotterson JA. I agree with those reasons and the order proposed.

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155 [2000] QCA 94.