SUPREME COURT OF QUEENSLAND

CITATION:	*R v Butterworth* [2017] QCA 47
PARTIES:	**R** **v** **BUTTERWORTH, David Matthew** (appellant)
FILE NO/S:	CA No 119 of 2016 DC No 78 of 2015 DC No 52 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Hervey Bay – Date of Conviction: 21 April 2016
DELIVERED ON:	23 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2016
JUDGES:	Margaret McMurdo P and Morrison JA and McMeekin J Separate reasons for judgment of each member of the Court, Morrison JA and McMeekin J concurring as to the order made, Margaret McMurdo P dissenting
ORDERS:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – FAILURE TO EXERCISE DISCRETION – where the appellant was convicted by jury of two counts of doing a malicious act with intent under s 317 *Criminal Code* 1899 (Qld) – where the appellant contends that the trial judge erred in refusing him leave to cross-examine the complainant about his criminal history – where the appellant contends that the trial judge failed to exercise the discretions given by s 5(3)(b) *Criminal Law (Rehabilitation of Offenders) Act* and s 15A *Evidence Act* 1977 (Qld) – where the respondent Crown concedes that the trial judge incorrectly construed those provisions but argues that no substantial miscarriage of justice has actually occurred – where identification of the attacker and the complainant's credibility were the central issues at trial – whether the trial judge erred in failing to exercise the discretion – whether the appeal ought to be dismissed regardless CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER

CASES – where the appellant was convicted by jury of two counts of doing a malicious act with intent under s 317 *Criminal Code* 1899 (Qld) – where identification of the attacker was a central issue at trial – where the defence case was that someone other than the appellant attacked the complainant and that the appellant's testimony was false – where the appellant contends that the trial judge erred in refusing to allow him to lead evidence of the violent criminal history of another suspect in the police investigation – whether the trial judge erred in refusing to admit that evidence

Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld), s 5(2), s 5(3)(b)
Evidence Act 1977 (Qld), s 15A, s 16

Hally v Starkey & Anor, Ex parte Hally [1962] Qd R 474, cited
R v Glattback [2007] QCA 204, cited
R v Millar [2000] 1 Qd R 437; [1998] QCA 276, cited
Warry v P B Pty Ltd [1999] QCA 154, distinguished

COUNSEL: J McInnes for the appellant
D Balic for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, David Butterworth, was convicted after a four day trial of unlawfully wounding the complainant with intent to do grievous bodily harm, and also with unlawfully doing him grievous bodily harm. Both offences were charged as occurring on 28 April 2015 at Pialba. He has appealed against his convictions on two grounds. The first is that the court erred in refusing him leave to cross-examine the complainant about his criminal history. The second is that the court erred in refusing to allow him to lead evidence of the violent criminal history of another person put forward by the defence as a possible alternative suspect, when identification was in issue.

Cross-examination of the complainant as to prior convictions

[2] The 19 year old complainant's evidence was central to the prosecution case; the appellant was not implicated by any other evidence. It was not contentious that the complainant was injured and treated at hospital on 28 April 2015 for two relatively minor wounds to his right flank (wounding with intent) and a much more serious injury to his neck (grievous bodily harm).

[3] The complainant gave the following evidence. On 28 April 2015, the appellant, whom he had known since school days, called him a "snitch" and complained he and another friend "were always dogging on [the appellant] back in the day".[1] The appellant stabbed him with a knife to the neck and injured him to the left flank with a pair of stationery scissors.[2] The complainant elaborated, explaining that, when he was 13, the appellant and two of his mates told him to steal a women's handbag.

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1 AB 73.
2 AB 75 – 77.

He did not want to but the others stood over him and he took the bag. Later he spoke to the police, showed them the bag and implicated his co-offenders.[3] The prosecution relied on this as a motive for the appellant to attack the complainant.

[4] The appellant did not give or call evidence but the defence case put in cross-examination was that the appellant did not assault the complainant and was not present at the time when and place where he was injured. The complainant agreed that, shortly before the offences, a person called Troy wanted to fight him. He also agreed that, a few weeks earlier, he had been the target of a home invasion but denied that this was drug related.[4] When asked whether he was a speed or ice user at the time of the offences, he claimed privilege and refused to answer.[5] He agreed he acted aggressively towards nurses whilst in hospital, but only when they accused him of being a junkie.[6] He denied acting aggressively towards his parents at this time.[7] He claimed privilege and refused to answer when asked if he was using cannabis at this time.[8] He agreed he had aggression issues in hospital; he had always had aggression issues.[9] There could have been no doubt that the complainant's credibility and reliability were in issue insofar as he claimed it was the appellant who attacked him.

[5] The appellant's counsel began to cross-examine the complainant about his criminal history which was as follows:

Establishment / Date	Offence	Order / Comment
FINALISED OFFENCES		
HERVEY BAY CHILDRENS COURT 25/09/2009	[CC] 421(1) ENTER PREMISES WITH INTENT TO COMMIT INDICTABLE OFFENCE (ON 23/07/2009) BCS0902726136 QP0900563662 [CC] 421(2)&(3) ENTER PREMISES AND COMMIT INDICTABLE OFFENCE BY BREAK (ON 23/07/2009) BCS0902726152 QP0900626986 [CC] 421(2) ENTER PREMISES AND COMMIT INDICTABLE OFFENCE (ON 23/07/2009) BCS0902726187 QP0900627165 [LIQ] 157(2)(B) MINOR POSSESS LIQUOR (ON 29/08/2009) BCS0902842918 QP0900669630 [redacted]	ON ALL CHARGES: INDEFINITE REFERRAL TO YOUTH JUSTICE CONFERENCE NO CONVICTION RECORDED REPRIMANDED
HERVEY BAY CHILDRENS COURT 30/10/2009	[RO] 5(1)(C) UNAUTHORISED DEALING WITH SHOP GOODS (MAXIMUM $150) (ON 11/09/2009) BCS0903503564 QP0900709306 [redacted]	NO CONVICTION RECORDED REPRIMANDED
HERVEY BAY CHILDRENS COURT 11/06/2010	[CC] 421(2)&(3) ENTER PREMISES AND COMMIT INDICTABLE OFFENCE BY BREAK (ON 03/06/2010) BCS1001770400 QP1000542294 [EGPA06] 334 TRESPASS (ON 03/06/2010) BCS1001770809 QP1000542294 [redacted]	NO CONVICTION RECORDED PROBATION PERIOD: 6MO NO CONVICTION RECORDED REPRIMANDED

3 AB 78.
4 AB 120.
5 AB 121.
6 AB 122.
7 AB 122.
8 AB 123.
9 AB 124.

HERVEY BAY CHILDRENS COURT 04/02/2011	[SOA] 25(A) UNLAWFUL USE OR ENTRY OF VEHICLES (ON OR ABOUT 20/12/2010) BCS1003906431 QP1001133106 [CC] 328A(1) DANGEROUS OPERATION OF A VEHICLE (ON 20/12/2010) BCS1100128108 QP1001133134 [redacted]	ON ALL CHARGES WITH TRAFFIC MATTERS NO CONVICTION RECORDED PROBATION PERIOD: 12MO COMMUNITY SERVICE TIME: 60H TO BE COMPLETED WITHIN: 12MO 1100128108 1003906431 MDL DISQUALIFIED PERIOD: 12MO

Establishment / Date	Offence	Order / Comment
HERVEY BAY CHILDRENS COURT 20/04/2012	[CC] 421(1) ENTER PREMISES WITH INTENT TO COMMIT INDICTABLE OFFENCE (BETWEEN 25/02/2012 AND 28/02/2012) BCS1200675378 QP1200195830 [CC] 421(1) ENTER PREMISES WITH INTENT TO COMMIT INDICTABLE OFFENCE (BETWEEN 25/02/2012 AND 28/02/2012) BCS1200675386 QP1200195830 [CC] 408A(1)(A) UNLAWFUL USE OF MOTOR VEHICLES AIRCRAFT OR VESSELS - USE (BETWEEN 25/02/2012 AND 28/02/2012) BCS1200675394 QP1200195830 [CC] 398 STEALING (BETWEEN 25/02/2012 AND 28/02/2012) BCS1200918131 QP1200195830 [redacted]	ON ALL CHARGES NO CONVICTION RECORDED COMMUNITY SERVICE TIME: 70H TO BE COMPLETED WITHIN: 12MO
HERVEY BAY MAGISTRATES COURT 03/10/2013	[PPRA] 791(2) CONTRAVENE DIRECTION OR REQUIREMENT (ON 13/07/2013) BCS1302310617 QP1300829966 [redacted]	NO CONVICTION RECORDED FINED: $250.00 TIME TO PAY: 28D
HERVEY BAY MAGISTRATES COURT 29/01/2015	[SOA] 11(2) TRESPASS - ENTERING OR REMAINING YARD OR PLACE FOR BUSINESS (ON 12/01/2015) BCS1500210776 QP1500058429 [redacted]	CONVICTION RECORDED FINED: $300.00 TIME TO PAY: 28D
HERVEY BAY MAGISTRATES COURT 16/07/2015	[PPRA] 791(2) CONTRAVENE DIRECTION OR REQUIREMENT (ON 12/05/2015) BCS1502107212 QP1500753440 [redacted]	CONVICTION RECORDED FINED: $400.00 TIME TO PAY: 2MO
HERVEY BAY MAGISTRATES COURT 22/09/2015	[PPRA] 791(2) CONTRAVENE DIRECTION OR REQUIREMENT (ON 18/07/2015) BCS1502804827 QP1500867345 [redacted]	CONVICTION RECORDED FINED: $300.00 TIME TO PAY: 28D

[6] The prosecutor objected, contending that the complainant could not be cross-examined on matters where no conviction had been recorded or where the five year rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) had expired.[10]

[7] Defence counsel submitted that the entry in the Hervey Bay Magistrates Court on 16 July 2015 concerned a conviction for a 12 May 2015 contravention of a direction or requirement that the complainant attend a drug diversion assessment appointment after having been found in possession of a small amount of cannabis on 7 May 2015. He contended that this showed that at about the time of the alleged offences

10 AB 127 – 128.

the complainant was actively using drugs. This, he submitted, was admissible as it was relevant to the complainant's credit and reliability.[11]

[8] The judge, relying on *Warry v P B Pty Ltd*,[12] rejected those contentions and did not allow the appellant to cross examine on any entry other than the trespass conviction in the Hervey Bay Magistrates Court on 29 January 2015. As to the most recent entries, those in the Hervey Bay Magistrates Court on 16 July and 22 September 2015, his Honour noted that they post-dated the alleged offences and were not convictions for drug use, only for contravening a police direction. The judge ruled that counsel could not cross-examine on them. In light of those rulings, the appellant did not cross-examine the complainant about his criminal history at all, no doubt as the trespass conviction on 29 January 2015 on its own would have little impact on the complainant's credibility.

[9] The appellant contends the judge erred in his application of *Warry* and in failing to exercise the discretions given by s 5(3)(b) *Criminal Law (Rehabilitation of Offenders) Act* and s 15A *Evidence Act* 1977 (Qld). As a result, the appellant submits that his trial counsel was wrongly prohibited from cross-examining the complainant as to his credit, the central issue in the case.[13]

[10] The respondent's counsel concedes that the trial judge incorrectly construed s 5(3)(b).[14] She submits, however, that the appeal should be dismissed under s 668E(1A) *Criminal Code* (Qld) because no substantial miscarriage of justice has actually occurred.[15] She emphasises that defence counsel adduced evidence that the complainant was involved with drugs at the time of the offence and was aggressive when in hospital. She contends that cross-examining the complainant about his criminal history could not have affected the jury verdict.[16]

[11] The respondent's concession as to judicial error is rightly made. In *R v Millar*[17] this Court noted that, at common law counsel are entitled in cross-examination to put to a witness that he or she has sustained a conviction or been guilty of some other discreditable past conduct. The Court observed, however, that judges have a discretion to restrict such questioning if it threatens to become oppressive.[18] A court may "refuse to compel such questions to be answered when the truth of the matter suggested would not in the opinion of the court affect the credibility of the witness as to the matter to which he is required to testify."[19] Section 16 *Evidence Act* provides:

> "**16 Witness may be questioned as to previous conviction**
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> Subject to this Act, a witness may be questioned as to whether the witness has been convicted of any indictable or other offence and upon being so questioned, if the witness either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction."

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11 AB 131.
12 [1999] QCA 154.
13 Outline of Submissions on behalf of the Appellant dated 5 October 2016, [17] – [21].
14 Outline of Submissions on behalf of the Respondent dated 20 October 2016, 5.
15 Above, 6.
16 Transcript of Proceedings, 2 November 2016, 23 – 25.
17 [2000] 1 Qd R 437.
18 Above, 440 [12].
19 *Hally v Starkey & Anor, Ex parte Hally* [1962] Qd R 474, 478, Gibbs J.

[12] *Evidence Act* s 15A, however, relevantly provides:

> "**15A Questioning of witness as to certain convictions**
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> A witness in any criminal or civil proceeding shall not be asked and if asked shall not be required to answer any question tending to show that the witness has committed or been convicted of or been charged with any offence if, where the witness has been convicted of the offence—
>
> (a) the conviction is one in relation to which a rehabilitation period is capable of running pursuant to the *Criminal Law (Rehabilitation of Offenders) Act 1986*; and
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> (b) in relation to the conviction the rehabilitation period within the meaning of that Act is not running at the time of the criminal ... proceeding;
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> unless the permission of the court to ask the question has first been obtained, such permission to be applied for in a trial by jury in the absence of the jury."

[13] The ability to cross-examine a witness about their criminal history is further curtailed by s 5 *Criminal Law (Rehabilitation of Offenders) Act* which relevantly provides:

> "**5 Matter excluded from criminal history**
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> (1) It is declared that a conviction that is set aside or quashed and a charge are not part of the criminal history of any person.
>
> (2) A person shall not be required or asked to disclose and, if so required or asked, shall not be obliged to disclose for any purpose a conviction that is not part of the person's criminal history ... or a charge made against the person ...
>
> (3) Subsection (2) does not apply where the requirement or request to disclose a conviction or charge therein referred to is made—
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> ...
>
> (b) in criminal ... proceedings before a court if the fact of the conviction or charge is relevant to an issue in the proceedings or the court has granted permission for the requisition or request to be made."

[14] Section 3(1) of that Act, 'Interpretation', relevantly provides:

> "***charge*** means an allegation formally made in court that a person has committed an offence where—
>
> (a) the allegation is not pursued to a final determination in a court; or

(b) a conviction is not recorded by a court in respect of the allegation; or

(c) a conviction recorded by a court in respect of the allegation is to be deemed, pursuant to law, not to be a conviction.

conviction means a conviction by or before any court for an offence, whether recorded, in Queensland or elsewhere, before or after the date of commencement of this Act."

[15] There was nothing in those provisions or the common law that permitted his Honour to disallow the cross-examination of the complainant about the last two entries in his criminal history where convictions were recorded and the rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act* had not expired.[20] As the complainant's credit was in issue at the date of the trial, it did not matter that these convictions post-dated the alleged offences. There was nothing oppressive about defence counsel's cross-examination. His Honour erred in not allowing cross-examination of the complainant about those two entries in his criminal history.

[16] No convictions were recorded in respect of any of the entries in the complainant's criminal history prior to 29 January 2015. Under s 5, they were charges which were not part of his criminal history. This meant that under s 5(2) the complainant was not ordinarily obliged to disclose them. However, s 5(3)(b) provides for exceptions to s 5(2) where either the fact of the charge is relevant to an issue in the proceeding, or the court has granted permission for the request.

[17] In not allowing defence counsel to cross-examine the complainant on these matters, the primary judge relied on *Warry*.[21] Mr Warry brought an action for damages for personal injuries. In assessing his credibility, the judge took into account that he had been convicted of misappropriation with a circumstance of aggravation and sentenced to 240 hours community service. On appeal, Mr Warry contended that the evidence of his conviction was inadmissible and the judge was wrong to act on it. At that time, a conviction for an offence in respect of which a community service order was made was deemed not to be a conviction.[22] The respondent argued that the conviction was a charge under s 5(3)(b) and that it was relevant to an issue in the proceedings. Although dismissing the appeal on other grounds, the Court held that the fact that Mr Warry had been charged with an offence was not relevant to an issue in the proceedings. The issues were whether the respondent was liable in negligence, and the measure of damages. The Court even doubted whether the charge was relevant to Mr Warry's credit, observing that it was his guilty plea to a charge of dishonesty and subsequent conviction which were relevant to credit. The court determined that the judge wrongly permitted cross-examination about the conviction.[23] I note, however, that the Court did not refer to the extended meaning of "charge" in s 3(1).[24]

[18] The present case is plainly distinguishable from *Warry*. There is no doubt that here the credit of the complainant was at the heart of the sole issue in the case, namely, whether the jury could be satisfied beyond reasonable doubt that the complainant

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20 See s 3(1) (definition of 'rehabilitation period' para (b)(i)).

21 [1999] QCA 154.

22 Above, [8]; s 252 *Corrective Services Act* 1988 (Qld), repealed by s 207 *Penalties and Sentences Act* 1992 (Qld).

23 Above, [12] and [13].

24 See [13] of these Reasons.

had not falsely implicated the appellant as the person who attacked him. The trial judge erred in relying on *Warry* to refuse defence counsel's application to cross-examine the complainant as to those entries on his criminal history where no conviction was recorded. As they were charges under s 5 and they were relevant to an issue in the trial, counsel was entitled to cross-examine the complainant about them under the first limb of s 5(3)(b).

[19] I also note that this Court in *Warry* did not advert to the exercise of the discretion granted in either the second limb of s 5(3)(b) or that in the last paragraph of s 15A *Evidence Act*. If my construction of the first limb of s 5(3)(b) is wrong, I note that, had it been necessary to exercise the discretion in the second limb, there were strong reasons to allow the cross-examination. The complainant alleged that, as a 13 year old, he was cajoled into criminal behaviour by the appellant and his mates and later informed police about their involvement. The prosecutor alleged this was the motive for the appellant's violent attack on him six years later. The complainant's criminal history demonstrates that he was involved in other dishonest offending at that age. This information was capable of throwing doubt on the truthfulness of his evidence that the appellant had cajoled him into committing an offence when he was 13. It also demonstrates that he had committed other offences of dishonesty between 2010 and 2012 and was involved in anti-social behaviour on four occasions between 2013 and 2015. This was all relevant in assessing the truthfulness of his evidence at trial that the person who attacked him was the appellant. Were I required to exercise the discretion, I would allow cross-examination on all entries in the criminal history, including those preceding the conviction of trespass on 29 January 2015.

[20] The respondent submits that no substantial miscarriage of justice has resulted from the judge's error in not allowing this cross-examination. For the following reasons I cannot accept that contention. The complainant's credibility, and in particular whether he was falsely alleging that the appellant was the person who attacked him, was the central issue. The judge's ruling denied defence counsel the opportunity to thoroughly explore this crucial issue and the jury the opportunity to decide the case with all relevant admissible evidence. Whilst there was some evidence the complainant was aggressive in hospital, he did not answer questions about his illicit drug use at that time. Had the jury known the full extent of his criminal history, they may not have been prepared to accept his evidence as truthful beyond reasonable doubt. Even before considering the second ground of appeal, I do not regard this as a suitable case for the application of s 668E(1A) *Criminal Code* which allows this Court to dismiss an appeal, notwithstanding an error of law, where there has been no substantial miscarriage of justice.

Cross-examination about the criminal history of a possible alternative suspect

[21] I turn now to the appellant's second ground of appeal. The investigating police officer stated in cross-examination that CCTV footage depicted a Caucasian male of solid build and short hair running out the gate of the premises where the appellant was attacked, two minutes before the injured complainant and another man who was assisting him went out the same gate. It was common ground that the Indigenous appellant is not Caucasian and that the suspect running out the gate was not the appellant. The complainant was initially reluctant to speak to police or to identify his attacker. He had recently been subject to violence from people other than the appellant. Police obtained names of suspects from the complainant's father, one of

whom was M. The evidence at trial did not reveal whether M's appearance was similar to the person depicted in the CCTV footage, but the prosecution did not exclude that possibility. The trial judge refused to allow defence counsel to cross-examine the police officer about M's criminal history for offences of violence. His Honour determined that, whilst it was relevant whether police made investigations about M's potential involvement in this offence, his criminal history was irrelevant.

[22] I respectfully disagree with that conclusion on the evidence at trial. The defence case was that someone other than the appellant attacked the complainant and that the appellant's testimony was false. There was evidence that someone other than the appellant decamped from the crime scene at about the time of the offences, that M was a suspect, and that the complainant had been subject to recent violence from people other than the appellant. In light of that evidence, defence counsel should have been permitted to question the police officer about M's criminal history, if and insofar as it showed a propensity for violence of the kind done to the complainant. Such questioning was relevant to the central issue in the prosecution case, namely whether the jury could be satisfied beyond reasonable doubt that it was the appellant, rather than another person, who attacked the complainant. Of course, the determination of this issue in any retrial would turn on the evidence in that trial.

[23] The error of law in refusing to allow this cross-examination combined with the error of law identified in ground 1 prevented defence counsel from fully exploring with the complainant the possibility raised on the evidence that M or a person other than the appellant attacked the complainant, and that the complainant had falsely implicated the appellant to avoid implicating the real assailant. I am unpersuaded that, notwithstanding these errors of law, no substantial miscarriage of justice has actually occurred in the conviction of the appellant. I would allow the appeal, set aside the guilty verdict and order a new trial.

[24] **MORRISON JA:** I have had the benefit of reading the President's reasons in draft. Her Honour has set out all that is needed to explain the nature of the offending and the issues that arose in this appeal. They do not need not be repeated and that permits me to express my reasons for coming to a contrary conclusion, in short form.

[25] I agree with the President's reasons for concluding that the learned trial judge erred in not permitting cross-examination on the complainant's criminal history. Where I differ is with respect to the question of whether the consequence involved a miscarriage of justice.

[26] The complainant's criminal record commenced when he was about 13 and a-half. The offences and timing are as follows:

(a) 25 September 2009, aged 13 years and seven months: three counts on one day, (i) enter premises with intent to commit an indictable offence, (ii) enter premises and commit an indictable offence by break, and (iii) enter premises with intent to commit an indictable offence; minor in possession of alcohol;

(b) 30 October 2009; aged 13 years and eight months: unauthorised dealing with shop goods;

(c) 11 June 2010, aged 14 years and four months: two counts on one day, (i) enter premises and commit an indictable offence by break, and (ii) trespass;

(d) 4 February 2011, aged 15 years: two counts on one day, (i) unlawful use or entry of a vehicle, and (ii) dangerous operation of a vehicle;

(e) 20 April 2012, aged 16 years and two months: four counts on one day, (i) enter premises with intent to commit an indictable offence, (ii) enter premises with intent to commit an indictable offence, (iii) unlawful use of a motor vehicle, and (iv) stealing;

(f) 3 October 2013, aged 17 years and seven months: contravene a direction or requirement;

(g) 29 January 2015, aged 20 years: trespass – entering or remaining in a yard or place of business;

(h) 16 July 2015, aged 20 years and four months: contravene a direction or requirement; and

(i) 22 September 2015, aged 20 years and nine months: contravene a direction or requirement.

[27] The complainant identified the appellant as his assailant. The defence was that the appellant was not there, and it must have been someone else. Thus the central issue in the case was the identification of the appellant as the assailant. That required the complainant's evidence as to that fact to be accepted. Therefore his credibility and reliability were in issue.

[28] The complainant said that he had known the appellant since they met at school when they were about 13 years of age.[25] He saw the appellant subsequently, though that stopped when the complainant started working at age 14.[26] The complainant said he saw the appellant at school, parties and around town.[27] There was no challenge to that evidence. Indeed, in cross-examination the complainant agreed to this when it was put to him: that he met the appellant at school in grade eight; he met him "on and off at social events and at the skate park and around town" in his teenage years; they went to school together in grade 11, in the same class; and they regarded themselves as "fine friends".[28]

[29] Thus there was unchallenged evidence that the complainant knew the appellant well, and believed they were friends. The defence case was not that the complainant had mistakenly identified the appellant as the assailant, but that the complainant lied about it as the appellant was simply not present that night.

[30] There were three aspects to the attack on the complainant's evidence to which reference needs be made. First, the identification of the appellant as the assailant. Secondly, the words attributed to the appellant in the lead up to the assault. Thirdly, the description of the nature of the attack and struggle between the complainant and the appellant.

[31] All three depended on the jury's acceptance of the complainant's evidence as credible and reliable. All three featured in the defence address to the jury. The first was obviously critical to the jury deciding that the appellant was guilty. The second concerned a possible explanation as to why the appellant suddenly assaulted the complainant. This was loosely described as a "motive", but the evidence put an

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25 AB 71 lines 21-32.
26 AB 71 lines 34-41.
27 AB 78 line 46 to AB 79 line 1.
28 AB 102 lines 4-20.

extra focus on acceptance of the complainant's evidence. If rejected, it was urged that the jury could not be satisfied that the assault was as described, and therefore that the requisite intention (to do grievous bodily harm) was proved beyond reasonable doubt. The third potentially affected the question of proof of intention. If the complainant's evidence (of how the assault and struggle progressed) was rejected or doubted, it was urged that may have led the jury to have doubts about the requisite intention.

[32] The defence had established a number of matters that it urged as affecting the acceptance of the complainant's evidence. Thus, the jury already had evidence before it that the complainant:

(a) was a drug user, having been seen to use ice or speed once or twice;[29]

(b) associated with drug users;[30]

(c) had quite a few enemies;[31]

(d) had been the subject of a home invasion a few weeks before the incident in question;[32]

(e) was prepared to be involved in violence;[33]

(f) had always had aggression issues;[34]

(g) had acted aggressively towards nurses in the hospital when they accused him of being a junkie;[35]

(h) according to the nursing notes, while in hospital had acted aggressively towards nursing staff and his parents;[36] and

(i) participated in stealing a handbag in 2009 when he was 13, albeit (he said) under duress.[37]

[33] The jury were reminded of that evidence in the summing up.[38] But they did not have the chance to evaluate the cross-examination of the complainant on his criminal history.

[34] Where the miscarriage of justice is said to be that some evidence was not put before a jury, the ultimate question is whether the jury would have been likely to entertain a reasonable doubt about guilt if all of the evidence had been before it.[39]

[35] The proposed cross-examination would have followed the opening question "Do you consider yourself an honest person?"[40] Thus the evident purpose was to establish the commission of the past offences as a way of attacking the credibility and reliability of the complainant. However, most of the offences were committed when the

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29 AB 149 line 15.
30 AB 148 line 40.
31 AB 117 lines 18-19, AB 120 lines 26-28.
32 AB 120 lines 38-42.
33 AB 120 lines 30-36.
34 AB 124 lines 4-7.
35 AB 122 line 24.
36 AB 63 lines 9-11.
37 AB 78 line 24 to AB 79 line 3, AB 80 lines 41-46, AB 102 lines 22-23.
38 AB 171 line 37, AB 172 line 40.
39 *TKWJ v The Queen* (2002) 212 CLR 124, per Hayne J at [104]; *R v Glattback* [2007] QCA 204 per Keane JA at [55].
40 AB 127 line 8.

complainant was young, between 13 and 16,[41] and thus capable of being explained away as not signifying true dishonesty, but merely demonstrating that he was a wayward youth. Any doubts about the complainant's credibility and reliability generated by the knowledge of that history would do little, in my respectful view, to disturb the jury's acceptance of the complainant's identification of the assailant as being someone he knew well, as a long-time acquaintance and one-time friend. What possible reason was there for the complainant to lie about the identity of his assailant? The only suggested animus was from the appellant towards the complainant.

[36] The jury's knowledge of the criminal history would not be likely, in my respectful view, to affect their acceptance or rejection of the second and third aspects of the complainant's account (referred to above in paragraphs [30] and [31]). There could be no credible suggestion that there was no attack on the complainant. The defence did not attempt to suggest that the injuries were sustained other than at the place on the night that the complainant said. The medical evidence, police evidence and evidence of Mr Holmes made all that unassailable. Once that was accepted, and that it was the appellant who did it, the jury would not be likely to reject the complainant's evidence as to the balance of the account, simply by adding the complainant's criminal history into the mix.

[37] I agree with the reasons of McMeekin J on this ground. I am unpersuaded that the test in *TKWJ v The Queen* has been met.[42]

Possible Alternative Suspect

[38] The jury knew that M was a suspect, and that he provided an alibi.[43] The alibi witness had been spoken to, but there was no record of that in the place where it normally should be.[44] There was no evidence to show that M was the Caucasian male of solid build and short hair, seen on CCTV running out of the gate some two minutes before the complainant exited it.[45] The jury also knew that M had been spoken to by police[46] and his alibi witness may have been spoken to by police.[47]

[39] The contention here is that the fact that the defence could not lead evidence that police knew M had a criminal history that bespoke violence, meant that the jury would have been likely to entertain a reasonable doubt about guilt if that extra evidence had been before it as part of the total evidence.[48]

[40] I am unable to reach that conclusion. All that the extra evidence might have added was that M was a person who had a history of violence, and therefore was someone who, if he had been there, could have carried out the assault. But that does not overcome the hurdles that there was no evidence he was there, he gave an alibi, there was no evidence that he matched the description of the person who went out the gate two minutes before, and the complainant's identification of the appellant. Once the jury accepted the complainant's evidence as to identification of his assailant, M ceased to be relevant.

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41 There was a near three year gap between the offences in 2012 and 2015, the only intervening offence being to contravene a direction.

42 *TKWJ v The Queen* (2002) 212 CLR 124, per Hayne J at [104].

43 AB 40 lines 14-18, AB 43 lines 1-11.

44 AB 43 lines 5-44.

45 AB 44 lines 18-26.

46 AB 43 lines 1-3.

47 AB 43 lines 9-10, AB 43 line 43 to AB 44 line 9, AB 44 lines 31-32.

48 *TKWJ*.

[41] I agree with the reasons of McMeekin J on this ground.

Disposition of appeal

[42] For the reasons above I would dismiss the appeal.

[43] **McMEEKIN J:** The President has outlined the facts and relevant issues. It is not necessary that I repeat them.

[44] I agree, for the reasons that the President has given, that counsel for the appellant should have been permitted to cross-examine on the complainant's criminal history. Did that lead to a miscarriage of justice?

[45] The crucial issue concerned the identification of the assailant. As Morrison JA points out there could not have been any doubt that the complainant was attacked at the time and at the place alleged. The complainant made a positive identification of the appellant. They were long-term friends and well known to each other. So the identification was not a mistake – it was either accurate or a deliberate falsehood.

[46] The argument that the appellant advances is that if the jury had seen the complainant cross-examined on his criminal history that would have influenced them on this crucial question.

[47] Morrison JA has listed the less than salutary features of the complainant's past that the jury did know of above at paragraph [32] of his Honour's reasons.

[48] The criminal history showed that when very young (aged 13 and 14), and so five and six years before the attack on the complainant, the complainant entered premises with intent several times and trespassed, obtained liquor and shoplifted. When still 14 but nearly 15 he had graduated to entering and using other people's cars. At age 16 he was again entering with intent, using other people's cars and had added stealing to his repertoire. He committed a trespass just before he turned 19. The appellant's counsel had leave to cross-examine on that offence but did not bother. The history would have been useful to show that the appellant was anti-social in his attitudes - his continued appearances before the courts had not deterred the complainant from his criminal ways. But that he was anti-social was very evident from what the jury did know. The history showed too that he was dishonest when it came to other people's property. But it did not show that he had made false claims before or had been involved adversely with the appellant.

[49] The appellant argues (or could argue) that the criminal history was useful in three ways. First, it demonstrated that the complainant was dishonest and so his evidence on oath should be disbelieved. My response is that it is a very long bow to draw that because a person had committed offences when young, and some when very young, of the type here then he was likely to falsely accuse someone of attacking him and causing very serious injuries, and in doing so shield the true perpetrator. The conclusion simply does not follow from the premise. As well the argument that he might falsely accuse the defendant drew much more force from the fact that there was good reason to think that he had others to fear – a point that the defence could already make from the evidence. Relatively minor acts of dishonesty when young does not meaningfully impact on the issue.

[50] Secondly, it is said, the conviction for contravening a direction or requirement on 12 May 2015 and imposed on 16 July 2015 would have shown the jury that at about

the time of the attack the complainant was taking drugs. The conviction related to a failure to attend a drug diversion assessment. I'm not sure why that is said to be relevant. If drug taking per se is the point then I would answer that there was ample evidence before the jury either directly or inferentially that the complainant was a user of drugs. This added little. If the point is that the complainant was exposed to the unsavoury world of criminals who were likely to attack him then that point was made to the jury well and truly by much more cogent evidence. If the point is that he was befuddled in some way because he took drugs and so made a mistake in his identification, then firstly the evidence certainly does not go to show that he used drugs on the night in question; secondly that point could as well have been made by the evidence already available; and thirdly it was not the defence case that he was somehow befuddled and making an honest mistake. The appellant asserts that the complainant was lying.

[51] The third and most cogent point that could be made is that the several offences when he was aged 13 involving dishonesty might have led the jury to doubt his account that he had been stood over to steal a handbag – he had never been charged with stealing a hand bag and the inference is that he didn't need to be stood over to commit an offence of dishonesty. This is the issue that has caused me most concern. The complainant's assertion that this had occurred was central to his explanation of the possible cause of the attack by the appellant. The appellant's argument is that no such thing had ever occurred. The criminal history is consistent with that argument but does not of course prove it. The appellant effectively argues that the judge's rulings meant that the jury were deprived of admissible evidence going to a central issue that, even though not compelling in itself, could rationally have influenced their minds in a close case.

[52] If I was convinced that the evidence went to a central issue then I would be sympathetic to the complaint. However I am not so convinced. What this aspect of the argument amounts to is an assertion:

(a) that the criminal history shows that he may have lied about the handbag incident, because he wasn't charged with such an offence, therefore the jury would be more easily persuaded that he may be lying in asserting that the appellant was his assailant; and

(b) that the "standing over" was an essential part of the prosecution case, explaining as it did the attack.

[53] While it can be said that catching the complainant out in any lie, the point made in (a), is helpful to the defence this is not much of a point. First, I observe that there was no impediment to the defence putting the foundation for the argument. The defence was not denied the opportunity of putting to the complainant that he had not been charged at any time with an offence of stealing a handbag. Secondly, the defence no doubt faced the prospect that the jury might well think that this proved very little. I think it trite to observe that not every offence results in a complaint and not every complaint is acted on by the police, particularly with children and particularly perhaps where they complain of having been stood over by others. It is relevant to note that the real issue is not whether the complainant stole a handbag but whether he made a complaint to police about the conduct of the appellant. An absence of any charge for the offence is consistent with the complainant justifying his conduct in such a way.

[54] But the significance of the history was weakened considerably because the jury were aware that the "standing over" issue had been left out of the complainant's account in his evidence of the previous day. Far from being fundamental to his recollection of events he had omitted it only the day before. That point was made. It was not made much stronger by the absence of knowledge of the lack of any charge relating to the event. The jury had more cogent reason to doubt the account than the omission from a 13 year old's criminal history.

[55] As to (b) - the defence argument is that absent this account the attack was inexplicable. Absent a motive why would the appellant attack at all? The problem is that on any view there was no rational motive. A "snitch" by a 13 year old hardly provides a motive for a savage attack six years later, particularly given that the two men were in contact throughout those years, were friends over that time (as the appellant's counsel put and the complainant accepted), and with the two emerging from childhood into adulthood. Whether the handbag incident occurred or not, the attack on the complainant was inexplicable. How then does it advance the appellant's case to say that the criminal history does not contain an entry concerning the stealing of a handbag? The jury might well have been sceptical about the whole theory but still entitled to accept the identification. The complainant of course is not to know the motive for the attack necessarily. Whether the six year old grievance was the cause of the attack, or whether there was some other conduct of his that the complainant had forgotten about, or whether the appellant was operating on some false belief about the complainant's conduct, are all possibilities. I assume this was obvious to the jury. It is to me.

[56] The criminal history, at its highest, could only have marginal relevance to the assessment of these issues. The defence attack was to assert that the jury could not rely on the complainant's word as he had given inconsistent versions as recently as the day before, he was considered by others to be aggressive, and that he was the subject of attacks in his home, inferentially drug related. So perhaps many people, and unsavoury people prone to violence, had reason to attack him. The defence could show that there was another person in the area and who fled from the area after the time of the attack. Against this background the impact of the criminal history when he was a child was negligible. It was to throw pop guns in with the cannons.

[57] I make three further observations. First, it needs to be acknowledged that the arguments do not go just one way. The prosecution could point out that the offences committed by the complainant at age 13 were very different in kind to stealing a person's handbag – so he may have needed persuading. At that stage the complainant's criminal activities were directed to entering property, obtaining liquor and shoplifting.

[58] Secondly, I do not mean to accept that this is a close case. The evidence given by the complainant was not contradicted by any other evidence. So far as the transcript can show it, his evidence was given with certainty and confidence.

[59] Thirdly, at best for the appellant the evidence of the criminal history was only tangentially relevant and equivocal on the issue of identification. A reasonable jury should not have permitted any lack of sympathy for the complainant that might have been engendered because of his continued criminal behaviour influence them, nor be prejudiced against him because of that. It is only if the history rationally affects the issue that it can be weighed in the scales.

[60] The test that an appeal court must apply has been put in various ways. Hayne J said in *TKWJ v R* (2002) 212 CLR 124 at 157 [104]: "the ultimate question will be whether the jury would have been likely to entertain a reasonable doubt about guilt if all the evidence had been before it." In *Mickelberg v R* (1989) 167 CLR 259 at 273, 275 and 301, the question put was whether there is a "significant possibility that a reasonable jury" would have acquitted on the basis of this evidence?

[61] However the test be put, I do not think it is met.

[62] To my mind the jury would not have been likely to entertain a reasonable doubt about guilt if all of the evidence including the criminal history had been before it.

Ground 2

[63] The complaint here is that the defence should have been permitted to lead evidence of the criminal history of M. Apparently the history demonstrated a propensity for violence.

[64] I would agree that the evidence was admissible provided it could be shown that M was at the scene or otherwise there was reason to think he was a potential suspect. Neither was shown.

[65] All that connects M to the attack on the complainant is that for reasons unexplained the complainant's father thought that he might be involved. M provided an alibi. Whether the witness who supported that alibi was checked is not certain – the officer asked about it could not say. In the normal course the alibi would have been checked but in the normal course the officer who did the checking (who was not called) should have recorded that fact and did not. So the evidence was equivocal. I observe that the father's opinion of who might have been involved, without more, does not oblige the prosecution to prove at trial that those third parties were not involved nor does his opinion make admissible the criminal histories of those that he named.

[66] The CCTV footage is relevant to show that someone other than the appellant had reason to leave the scene at a run two minutes before the complainant emerged injured. There was no evidence that the person shown was M.

[67] The jury knew of the CCTV footage. They knew that the person shown was not the appellant. The appellant then could argue (and did) that there was another possible suspect. But it is not shown that M's criminal history has anything to do with that suspect. In the absence of that link there is no basis on which to admit the criminal history. It adds nothing to the likelihood that the person running from the scene was the perpetrator. It is simply irrelevant.

[68] Reliance on *R v Cowan; R v Cowan; Ex parte Attorney-General* [2015] QCA 87; (see at [7]) and *R v George* [2013] QCA 267; [2014] 2 Qd R 150 is misconceived. In each case there was evidence to link the third parties whose criminal histories were led as potential suspects to the crime in question and so persons that the prosecution was obliged (or would be well advised) to exclude. There was a rational link between them (and so their histories) and the charge before the jury. There is none here.

[69] I agree with Morrison JA's analysis at [40] above.

Disposition of the appeal

[70] I agree with the Morrison JA that the appeal should be dismissed.