SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bricola* [2017] QCA 51
PARTIES:	**R** **v** **BRICOLA, Carl Shane** (appellant)
FILE NO/S:	CA No 131 of 2016 SC No 4 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 12 May 2016
DELIVERED ON:	31 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2017
JUDGES:	Gotterson and Morrison JJA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted by a jury of murder – where the appellant contends a number of events during the trial had a cumulative prejudicial effect on the defence – where the Crown's opening address erroneously implied the appellant had stabbed another person – where the implication was not corrected or explained immediately – where the trial judge admitted evidence, over objection, of the appellant referring to himself as a "gangster" – where the trial judge directed the jury to overcome the prejudice – where the appellant contends a recording of a police interview admitted at trial insinuated the appellant was known to police – where defence counsel at trial chose not to seek a direction – where, in his evidence-in-chief, the appellant referred to a correctional centre as the place where he met a witness – where defence counsel at trial chose neither to apply to discharge the jury nor to seek a direction – whether the aforementioned events had an unfair prejudicial effect on the defence either individually or cumulatively– whether the appellant was deprived of a fair trial – whether there was a miscarriage of justice

APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant's case at trial relied on self-defence – where the defence was critically dependent upon the location of two knives within the passenger side door of the vehicle – where the main Crown witness provided statements to police that the appellant had a tendency of keeping his knife pouch in the passenger side door and that he was unaware of the location of the knife leading up to the offence – where defence counsel did not cross-examine the Crown witness in relation to these statements – where the Crown witness' evidence at trial was inconclusive on the point – whether there was a reasonable explanation for the failure of defence counsel to cross-examine the Crown witness – whether the failure deprived the appellant of a significant possibility of acquittal

Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22, cited
R v Fraser [2001] QCA 187, considered
R v Genrich [2001] QCA 466, cited
R v Glennon (1992) 173 CLR 592; [1992] HCA 16, cited
R v Hally [1962] Qd R 214, distinguished
R v Knape [1965] VR 469; [1965] VicRp 63, considered
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: R A East for the appellant
D R Kinsella for the respondent

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

[1] **GOTTERSON JA:** At a trial over four days in the Supreme Court at Cairns, the appellant, Carl Shane Bricola, was, on 12 May 2016, found guilty of murder. The count on which he had been charged alleged that on 3 November 2014 at Coen he had murdered Robert Jamie Baartz.

[2] The appellant was convicted and sentenced to life imprisonment. A period of 555 days of pre-sentence custody was declared time served under the sentence.

[3] On 16 May 2016, the appellant filed a notice of appeal against his conviction.

The circumstances of the alleged offending

[4] The appellant and a friend of his, Brian Yoelu, set off from Bamaga near the top of Cape York in the late afternoon of Monday, 3 November 2014. They were accompanied by the deceased, Robert Jamie Baartz, a friend of Mr Yoelu and, more recently, of the appellant.[1] The three were travelling in a Nissan Patrol single cabin utility

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[1] Mr Yoelu had done carpentry work for the deceased for about 10 years. The appellant began working for the deceased about six months before the alleged offending.

owned by the deceased. They intended to travel to Cairns via Mareeba using the Peninsula Development Road.

[5] The group acquired two 30 can cartons of Tooheys New lager at Bamaga. They took the 5 pm ferry across the Jardine River and began a nine hour drive to Mareeba. Mr Yoelu drove for most of the journey. The deceased sat next to him and the appellant on the other side. Mr Yoelu drank about 12 cans of lager. The appellant and the deceased drank much more than that. There were frequent stops so they could have a drink and smoke cannabis outside the cabin. Both of them became heavily intoxicated by the alcohol and cannabis.

[6] The appellant had with him a black plastic knife pouch. It contained a white-handled knife, a black-handled hunting knife, and a fillet knife with a handle, the tip at least of which, was blue. It is convenient to refer to it as the blue-handled knife. The appellant gave evidence at his trial. In evidence-in-chief, he said that the knife pouch was stored in what he called his "knapsack" on the tray of the utility.[2]

[7] At a point about 20 to 25 kilometres north of the Wenlock River bridge near Bramwell Station, Mr Yoelu saw a pig with two little suckers crossing the road in front of them. He stopped the utility. The deceased's dog jumped off and chased and caught the pig. The appellant took the knives out of the pouch. The deceased dragged the pig on to the roadway and the appellant then used the white-handled knife to kill it.

[8] The pig was thrown up on to the tray of the utility. According to Mr Yoelu, the same knife and the other two knives were then used to gut the pig.[3] After that, all the knives were put in the tray.[4]

[9] The group journeyed onto the Wenlock River where the pig was washed in the running water. Blood was also washed off the knives.[5] The appellant's evidence was that he washed the black-handled knife and the blue-handled knife and put them in a pocket in the passenger side door of the cabin. The white-handled knife was left in the tray.[6]

[10] They then drove further south and passed through Coen township. The appellant and the deceased began to argue over sharing the small amount of cannabis the appellant had left. They tried to wrestle with each other inside the cabin.[7]

[11] They stopped briefly at the Port Stewart turnoff at about midnight. Between the turnoff and Yarraden Station, the appellant and the deceased resumed wrestling with each other. Mr Yoelu stopped the utility at the deceased's request and told the appellant to get out. He did and then climbed onto the tray of the utility. After about five

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2 AB160 Tr3-7 ll33-34.

3 AB34 Tr1-26 ll44-45. The appellant said that he did not remember if any other knives were used in "the pig processing": AB160 Tr3-7 ll44-45.

4 AB46 Tr1-38 ll22-25; AB56 Tr1-48 ll36-37. At one point in cross-examination, Mr Yoelu said that he last saw the blue-handled knife was when they were packing the utility in Bamaga: AB55 Tr1-47 ll41-42. He amended that to say, consistently with his evidence-in-chief, that both the black-handled knife and the blue-handled knife were used to gut the pig: AB56 Tr1-48 ll3-14.

5 AB167 Tr 3-14 ll36-38.

6 AB161 Tr3-8 ll1-10. The appellant and Mr Yoelu were agreed that the white-handled knife was in the tray at all material times. It did not feature in either side's case as being the knife with which the deceased was stabbed.

7 AB37 Tr1-29 ll9-39.

kilometres travel, Mr Yoelu stopped again so that the appellant could re-enter the cabin.[8]

[12] Less than five minutes later, the appellant and the deceased started arguing again. At a point about 100 kilometres south of Coen just past Yarraden Station, the two again resumed wrestling. Mr Yoelu stopped the utility and told them to finish the fight before they went any further.[9]

[13] Mr Yoelu saw them jump out from the passenger side and start wrestling outside the utility. They rolled down where the roadside sloped away. He did not see either of them armed with a knife. Mr Yoelu went to relieve himself. When he returned to the utility, he thought things had settled down because he saw the appellant walking northwards. He called out to the appellant to come back to the utility. As he did so, he saw the deceased enter from the passenger side.[10]

[14] The deceased said to Mr Yoelu, "… he got me". Mr Yoelu noticed blood stains on the deceased's shoulder. He said that when the deceased was crawling back into the cabin, he saw a black-handled knife sticking into the lower right side of the deceased's back. The handle rubbed against the seat. The deceased then pulled the knife out and placed it next to Mr Yoelu. The wound started to bleed.[11]

[15] Mr Yoelu straightened the deceased out on the passenger seat, started the utility and turned it around to the north. He drove a few metres to where the appellant was walking. He confronted the appellant saying:[12]

> "Hey – you stabbed him you bastard."

The appellant responded:

> "Well I told him not to fuck with a gangster."

The appellant testified that he was in shock and did not remember the conversation.[13]

[16] Mr Yoelu drove off, leaving the appellant on the roadway. He went first to Yarraden Station for assistance for the deceased. None was available there so he drove back to Coen and reported to the police station where he was directed to the Coen Primary Health Care Clinic.[14] It was immediately obvious to a member of the professional staff there that the deceased was lifeless.[15]

[17] The deceased's body was transported to the Cairns Mortuary where an autopsy was carried out on 4 November 2014. Four stab wounds were observed to his left shoulder region. One was towards the side of his neck and another was in front of the left armpit and extended into the lung cavity. The other two were on the back. The fifth stab wound was to the right front of the chest. As well, there were two

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8 AB39 Tr1-31 ll1-28.
9 Ibid ll30-37.
10 AB39 Tr1-31 l4 - AB40 Tr1-32 1-11.
11 AB40 Tr1-32 ll13-26.
12 AB40 Tr1-32 l3 - AB41 Tr1-33 l2, maintained in cross-examination: AB76 Tr2-11 l40 – AB77 Tr2-12 l34.
13 AB164 Tr3-11 ll18-26.
14 AB41 Tr1-33 ll6-33.
15 AB82 Tr2-17 ll11-12.

incised wounds to the right hand.[16] At trial, the appellant admitted that he had caused the death of the deceased by stabbing him, but not that the killing was unlawful.[17]

[18] The appellant was examined by a government medical officer on 6 November 2014. His left eye was black and swollen. There were some scratches on his left hand and forearm which were two to three days old. He had pain in his right shoulder. There were no other injuries which appeared to have dated from his physical contact with the deceased.[18]

The respective cases

[19] **Crown's case**: The prosecution argued that the inference to be drawn from Mr Yoelu's evidence was that after the appellant and the deceased had exited the cabin to continue their physical altercation, the appellant must have gone to the tray of the utility, picked up the black-handled knife and stabbed the unarmed deceased with it. The stabbing was done with the intention of doing grievous bodily harm to, if not of killing, the deceased.

[20] **Defence case**: The appellant testified that after they wrestled on the ground, he noticed that the deceased had armed himself with a knife. It must have been one of the two knives he put in the passenger's side door. He grabbed the other knife to defend himself once the deceased had, by his words and his actions, indicated that he intended to kill the appellant. He stabbed the deceased with the other knife in self-defence.[19] I pause here to note that this account is at variance with the account the appellant gave to police. He did not tell them that the deceased had pulled a knife on him.[20] Moreover, he spoke of both Mr Yoelu and the deceased having bashed him a little earlier.[21]

[21] After Mr Yoelu had driven off with the deceased, the appellant went into the bush "to sleep it off". When he awoke in the morning, he noticed blood in the area "and then the blue-handled knife was sitting there".[22] He picked up the knife and walked towards the Yarraden Station turn off. There, he sat in the shade and waited to catch a lift. After an hour or so, he noticed police in the vicinity. He panicked and threw the knife into the bush.[23] On the evidence, the blue-handled knife was unaccounted for when police searched the utility.

[22] The defence case proposed that, although other possibilities were open, the evidence that the deceased returned to the utility with the black-handled knife provided some support for the appellant's account that the former had armed himself with a knife. Further, when the deceased had said to Mr Yoelu that the appellant had stabbed him, he did not also say that he had wrested the knife that he then had with him, from the appellant. That the blue-handled knife was missing lent some support to the appellant's account as did evidence that the deceased was intoxicated and angry with the appellant.

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16 AB130 Tr2-65 l36 – AB132 Tr2-67 l35.
17 AB27 Tr1-19 ll32-34.
18 AB125 Tr2-60 l26 – AB126 Tr2-61 l35.
19 AB162 Tr3-9 l16 – AB163 Tr3-10 l47.
20 AB180 Tr3-27 ll33-36.
21 Ibid ll6-10.
22 AB164 Tr3-11 ll30-46.
23 AB165 Tr3-12 ll1-28.

Grounds of appeal

[23] At the hearing of the appeal, the appellant was given leave to amend his grounds of appeal to the following:[24]

> "1. The fair trial of the appellant was prejudiced by inadmissible evidence thereby giving rise to a miscarriage of justice.
>
> 2. Failure by Defence Counsel to fully put the appellant's version of events and the failure to elicit evidence favourable to the appellant's case was incompetent and deprived the appellant of a significant possibility of acquittal.
>
> 3. The jury were misdirected as to self-defence thereby occasioning a miscarriage of justice."

[24] I note that at the same time, the appellant abandoned the single ground of appeal stated in the filed notice of appeal, namely, that the jury verdict was unreasonable. The appellant thereby abandoned any challenge to the sufficiency of the Crown case for exclusion of self-defence.

[25] It is convenient to consider each of the grounds of appeal individually.

Ground 1

[26] In opening his submissions, counsel for the appellant, who was not defence counsel at trial, explained that his client had elected to testify at trial in circumstances where his case relied on self-defence and the only other witness at the scene, Mr Yoelu, did not see or hear anything relevant immediately before, or at the time when, the deceased was stabbed. He submitted that a number of events had occurred during the trial which put the defendant's case in "a very bad prejudicial light". It was in that unfavourable light that the appellant began and gave his evidence. Accordingly, this ground was based upon an accumulation of those events, rather than any one of them on its own.[25] It is, nevertheless, appropriate for this Court to assess the prejudicial effect, if any, of each of the events in order then to assess what cumulative prejudicial effect they may have had.

[27] **Crown opening**: During his opening, the prosecutor told the jury:[26]

> "The other factors that you might want to consider is that about this night, the accused used a knife to kill a pig, that is, he's consciously using a knife to **kill another animal**, and then – and knows that he has killed it, because he guts it and puts it in the back of the truck. Some time later, he also uses a knife and stabs **another person** at least five times. Those are relevant factors. (emphasis supplied)

[28] For the appellant, it was submitted that the passage overall was apt to inflame because of its content and because what it was meant to convey, namely, that, despite his intoxication, the appellant was able to form an intention to kill a pig and had sufficient motor skills to carry that intention into effect, was not explained to

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24 Amended Notice of Appeal filed on 3 February 2017.
25 Appeal Transcript ("AT") 1-4 l41 – AT 1-5 l3.
26 AB25 Tr1-17 ll33-37.

the jury until the prosecutor's closing address.[27] However, the greater concern, it was submitted, was that the words "another person" implied that the appellant had already stabbed someone else. That implication was not corrected then and there.

[29] The respondent submitted that the jury would have understood those words to have been a slip of the tongue and that they were clearly referable to the killing of the pig given that they were spoken immediately after the reference to that event. The words "sometime later" obviously referred to a point in time after the pig, and not another person, had been killed.

[30] I accept that the two words in question were capable of conveying the implication suggested by the appellant. However, the factors to which the respondent refers make it highly likely that the jury did not take the prosecutor to mean that the appellant had earlier killed someone other than the deceased. That likelihood is supported by the narrative given by the prosecutor in the opening of three men travelling together, the consumption of alcohol and cannabis, the killing of the pig and, particularly, the absence of any interaction with other individuals prior to the stabbing of the deceased.

[31] As to the reference to a conscious killing and gutting of the pig, a sufficient explanation of its import was given in the prosecutor's address.

[32] Having regard to these considerations, the appellant was not, in my view, measurably prejudiced by what the prosecutor said in the opening.

[33] **Admitted evidence**: At the commencement of the trial, the learned trial judge ruled against an application that had been earlier made by defence counsel.[28] The application was for the exclusion from Mr Yoelu's evidence of the conversation between him and the appellant in which the latter replied: "Well I told him not to fuck with a gangster."[29]

[34] A number of grounds for exclusion were advanced before the learned trial judge. However, on appeal, the focus was on the word "gangster". Defence counsel had submitted that the use of that word might cause the jury to speculate impermissibly about whether his client had a criminal history or other reputation for violence.[30]

[35] His Honour was of the view that the risk of prejudice from the use of word "gangster" was "very low". He noted that, in contemporary usage, the word had a connotation of toughness but did not carry "the opprobrium of actually being a gangland criminal". He considered that any prejudice could be adequately catered for by an appropriate direction to the jury.[31] His Honour gave the intimated direction to the jury during his summing up.[32]

[36] Counsel for the appellant stressed that this ground of appeal did not involve a "back door" challenge to the ruling. He accepted that, in the circumstances, there was no

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27 Addresses Transcript, p 19 ll8-10.

28 The application was made in March 2016. Written submissions had been filed and exchanged prior to trial: AB289-294; AB295-298.

29 The application was made in circumstances where, in Mr Yoelu's statement made to police on 4 November 2014 at the Weipa CIB, he had described the appellant's reply as: "Well don't fuck with a gangster". However, the deposition for his trial evidence indicated that he would testify that the reply was in the terms of the reply to which objection was taken.

30 Defendant's Outline of Submissions, para 29: AB294.

31 AB65 ll30-39.

32 AB231 l43 – AB232 l15.

other ruling his Honour could have made.[33] He explained that his purpose in referring to this evidence was to illustrate that when the appellant began his evidence, the jury would have had an unfavourable picture of him as a "self-indulged gangster" who regularly carried three knives.[34]

[37] I would accept that the word "gangster", without any qualification, could have contributed to an unfavourable picture of the appellant. However, it was a contribution arising from evidence of a contemporaneous conversation with the appellant that was relevant. The appellant did not deny the conversation. The possibility of prejudice was acknowledged by the learned trial judge. It was addressed in explicit terms in the direction given to the jury.

[38] **The roadside recording**: The last police witness called in the prosecution case was Detective Senior Constable, J M Goodwin, who was stationed at Weipa. She was the investigating officer for the matter. In the early morning of 4 November 2014, she drove from Weipa to Coen. She and other officers, including Senior Constable G Doyle, then travelled to the Yarraden Station turn off. She approached the appellant with a digital recorder activated.

[39] In the conversation that ensued, the appellant was told that he was under arrest and told of his rights. He was also told that he would be placed in a "suit". This was a blue evidence-protection suit, called a "zoot suit", the purpose of which was to protect any biological samples that might have been required from the appellant later.[35] The suit consisted of a set of hooded overalls with a face mask, gloves for the hands and slippers for the feet.[36]

[40] The conversation between the police and the appellant was recorded. It began at 9.33 am, continued during a road trip back to Coen and ended at 10.40 am. The recording was edited to remove prejudicial and irrelevant matters. It was tendered[37] during officer Goodwin's evidence and played to the jury. A transcript[38] was made available to members of the jury. Counsel for the appellant referred the Court to a passage in the transcript where the following sequence of events occurred: the appellant had put the suit on, cuffs had been applied to his feet and he had been lifted into the police vehicle. The following interchanges then occurred:[39]

> "SCON DOYLE: We're gonna release these cuff, one of your cuffs.
>
> BRICOLA: You're alright, mate. I'm not gonna do anything.
>
> SCON GOODWIN: Alright, no, no, we know mate.
>
> SCON DOYLE: Okay, mate. So the minute you do something.
>
> BRICOLA: Won't even know we're here mate. I'm gonna –
>
> SCON GOODWIN: Go, gonna be goin' back down, so. That's it. Alright.
>
> SCON DOYLE: Just hold that for me.

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33 AT 1-6 ll18-20.
34 AT 1-6 l34 – AT 1-7 l2.
35 AB148 Tr2-83 ll32-41.
36 Exhibit 6.1.
37 Exhibit 16.
38 MFI"E": AB365-388.
39 AB373 ll10-52.

SCON GOODWIN: Yep.

SCON DOYLE: Stay there, mate.

BRICOLA: Mate I won't, I'm, you don't have to –

SCON DOYLE: No you're right.

SCON GOODWIN: I know.

BRICOLA: [INDISTINCT] silly.

SCON GOODWIN: **You know us and our procedures, Carl**.

BRICOLA: **Yes**.

SCON GOODWIN: It's all procedures buddy. Nearly mate, nearly. Ah all our paper work's blown away. We might um cuff you to the front.

BRICOLA: Yeah –

SCON GOODWIN: Yep.

BRICOLA: Yeah, yeah, [INDISTINCT].

SCON GOODWIN: Make it a bit more comfortable for the road trip back hey." (emphasis added)

[41] The Court's attention was drawn to the statement by officer Goodwin and the reply by the appellant which appear in emphasis. Counsel for the appellant submitted that this exchange was highly prejudicial to the appellant's fair trial for two reasons.

[42] First, it plainly suggested that the appellant knew the three police involved in his arrest and therefore they knew him. In the absence of any innocent explanation as to how they knew each other, the only reasonable inference to be drawn was an entirely prejudicial one of previous involvement with police.[40]

[43] Secondly, the reference to "our procedures" could have been understood by jury members to imply that the appellant had had previous zoot suit experience. It was put that a juror would be unlikely to assume that a zoot suit was a matter of course in every police investigation, but might take the view that one would be required where the offence involved some degree of violent conduct, such as a stabbing. The juror might have questioned to himself or herself whether the appellant knew about these procedures because he had been through a similar exercise before in relation to another stabbing.[41]

[44] The respondent referred to aspects of the transcript of the recording which, it was submitted, indicated that officer Goodwin did not know the appellant and that her reference to police procedures was a general reference to the procedures that a police service has, and not to any specific procedure. So understood, the particular exchange highlighted by the appellant was not prejudicial to a fair trial.

[45] I turn to the first aspect of prejudice identified by the appellant. Here, it is said to arise from an implication of personal acquaintance between the appellant and officer Goodwin and the other officers with her. To my mind, no such implication readily

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40 Appellant's Outline of Submissions, para 9.4.1.

41 Ibid para 9.4.2.

arises from the words "You know us". The word "us" was plainly not meant to mean only those police officers present. Had that been so, then, consistently with that meaning, the words "our procedures" would have meant procedures personally devised and adopted by each one of the officers present, a quite unrealistic meaning. Apart from that, at the beginning of the recording, officer Goodwin said, "What's his name again, Carl, isn't it?"[42] That strongly suggests that she did not know the appellant personally.

[46] As to the second aspect of alleged prejudice, the meaning that the jury would have understood the words "our procedures" to have is illustrated by the use of the word "procedure" in the prevailing context. At the point when the appellant was being cuffed, officer Goodwin said to him, "… this is a bit ridiculous, but we're remote mate, so we gotta get you back like this … it's all a procedure."[43] Then, as can be seen from the interchanges quoted above, immediately after the appellant's reply she said to him, "It's all procedures, buddy." In context, the words "our procedures" were evidently meant by officer Goodwin to mean, and would have been understood by the jury to mean, procedures generally adopted by the police service, and not the use of a zoot suit specifically.

[47] In summary, I consider that it would have been reasonably clear to the jury that the statement made by officer Goodwin to which the appellant has drawn attention, meant that the appellant knew that as an operational organisation, the police service had procedures which its members were required to follow. It is, of course, a matter of common knowledge that that is so. I think it unlikely that members of the jury would have taken the statement to mean that the appellant was familiar with specific police procedures because he had been subjected to them in the past.

[48] Overall, I do not consider that the exchange in question gave rise to a risk of significant prejudice to the appellant. It is not irrelevant that both the learned trial judge and defence counsel had a similar view. At the conclusion of the re-examination of the appellant, and in the absence of the jury, defence counsel said to his Honour that the exchange in question had been "missed" in the editing of the recording. He said that he "just wanted to ignore and not draw attention to that". His Honour said that he was happy to give a warning about it, but that he thought that it was better left alone. It was a matter for counsel if they wanted to seek a direction. Defence counsel indicated that his intention was to leave the matter alone.[44]

[49] **The appellant's reference to "Lotus Glen"**: Before the prosecutor opened the Crown case, he raised with the learned trial judge in absence of the jury that, in his police statement, Mr Yoelu said that he first met the appellant in prison in Lotus Glen earlier in 2004. The reference to Lotus Glen was a reference to the Lotus Glen Correctional Centre on the Atherton Tableland near Cairns. The prosecutor said that he would be careful to avoid reference to where they met in Mr Yoelu's evidence-in-chief.[45]

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42 AB365 l14.

43 AB372 ll34-40.

44 AB189 Tr3-36 ll18-27. Defence counsel mentioned the matter in a discussion between bench and bar initiated by the prosecutor with respect to a reference by the appellant to "Lotus Glen".

45 AB17 Tr1-9 ll16-18.

[50] Early in his evidence-in-chief, Mr Yoelu explained the circumstances in which both he and the appellant had worked together for the deceased. The prosecutor asked him, "… And you knew – without going into it, you knew him before that?" Mr Yoelu answered, "Yeah."[46] The subject of where they first met was not otherwise touched upon the Crown case.

[51] However, early in the appellant's evidence-in-chief, he said that he had been living in a house with Brian Yoelu and the deceased for six months before they set off on the trip. When asked how long he had known the deceased, he replied:[47]

> "Six months also. I knew Brian from earlier from up at Lotus Glen, but to live and work with Brian would have been the same period as with [the deceased], six months."

[52] At the conclusion of the appellant's evidence and in the absence of the jury, the prosecutor raised the appellant's reference to Lotus Glen. He queried whether defence counsel wished to do anything about that or ignore it. His Honour remarked that his own inclination was to ignore it. Defence counsel said that that was his inclination, too.[48] Lotus Glen was not further mentioned in the trial.

[53] Counsel for the appellant submitted that the fact that it was mentioned by the prosecutor before he opened his case bespoke a concern that any reference to Lotus Glen could be greatly prejudicial to a fair trial.[49] Further, there was no warrant for inferring a benign interpretation on the part of the jury as to what Lotus Glen was. It was entirely reasonable to assume that some of the jurors would have understood the reference to have been to the correctional centre.

[54] Relying on the observations of Gibbs J in *R v Hally*,[50] the appellant maintained that had defence counsel applied for a discharge of the jury, then it ought to have been granted.[51] Failure to apply for a discharge was not necessarily fatal on appeal where a serious irregularity has taken place.[52] It was submitted that it was immaterial that the prejudicial disclosure occurred in the defence case. The critical factor was that the disclosure was in evidence.

[55] Counsel observed that notwithstanding the prejudice, there was no application to discharge the jury. The jury were not warned to ignore the evidence or instructed as to how to deal with it. That might be contrasted with the explicit direction given with respect to the word "gangster".[53] Drawing upon the four aspects of prejudice advanced under this ground of appeal, counsel contended that they produced a "deeply prejudicial background" against which the defence of self-defence was to be assessed by the jury. No direction could have dealt with it adequately to ensure a fair trial. A discharge of the jury with a retrial was the only available route to that.[54]

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46 AB29 Tr1-21 l3.
47 AB156 Tr3-3 ll14-16.
48 AB188 Tr3-35 l36 – AB189 Tr3-36 l27.
49 Appellant's Outline of Submissions, para 10.3.
50 [1962] Qd R 214 at 211, Mansfield CJ agreeing.
51 Appellant's Outline of Submissions, para 10.7. It was also submitted, citing *R v Smith* [1967] Qd R 406 at 408-9, that had the appellant been unrepresented, the trial judge would ordinarily have been obliged to inform him that he might apply for a discharge of the jury: para 10.6.
52 Ibid para 10.8, citing *R v M* [1991] 2 Qd R 68 per Cooper J at 83.
53 Ibid paras 10.9, 10.10.
54 Ibid para 10.10.

[56] The respondent submitted that the reference to Lotus Glen occurred only once, and briefly. It was unspecific as to why the appellant and Mr Yoelu were at Lotus Glen. In context, it might have been thought that they met working there together.[55] In any event, what was said did not imply that the appellant had any prior conviction for similar offending.[56] That a discharge of the jury was not canvassed, let alone applied for, nor a specific direction sought, illustrated the degree and nature of the potential prejudice apparent to those engaged in the trial.[57] The appellant was not deprived of the fair chance of an acquittal by the reference to Lotus Glen.

[57] I acknowledge that the observation made by Gibbs J (as his Honour then was) in *Hally* were addressed to circumstances where an inadvertent statement is made in evidence "with regard to a person's previous record or of that kind". Thus, in *R v Genrich*,[58] a conviction was set aside where evidence led in the prosecution case disclosed to the jury that there were many other charges of very serious criminal offending pending against the accused. By way of contrast, there is high authority to the effect that conjecture or speculation that at least one juror might have acquired knowledge before the trial of an accused's prior conviction for comparable offending, was not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice.[59]

[58] These decisions illustrate the need in this context to identify precisely what the disclosure made was and what information it conveyed expressly or impliedly. Here, there was no express disclosure of a criminal record on the part of the appellant. The express disclosure was of a location where the appellant and Mr Yoelu had first known each other. It is reasonable to suppose that some, at least, of the jurors knew that that location is a place where there is a prison. However, the disclosure did not specify why either of them was at the location.

[59] There is some force in the respondent's contention that, in context, it was open to jurors who knew of the prison, to infer that the appellant and Mr Yoelu were there to carry out work for the deceased. On the other hand, it might have been inferred that they were there to serve periods of imprisonment, or at least that was why the appellant was there. What conclusion a juror reached as to why the appellant was at Lotus Glen would be based upon a speculative choice made between open inferences. Any impression formed as to the nature of any prior offending by the appellant would have been entirely a product of speculation.

[60] It is, I think, fair to conclude that the reference to Lotus Glen raised no more than a possibility of an inference being drawn by some members of the jury that the appellant had been previously convicted. My reading of the exchanges between the learned trial judge and counsel on the topic is that that is how those present at the trial assessed the situation. Clearly, both his Honour and defence counsel were conscious that a direction about the reference would have risked highlighting it and generating speculation based upon it.

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55 Respondent's Outline of Submissions, para 18.
56 Ibid para 27.
57 Ibid para 21.
58 [2001] QCA 466.
59 *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J.

[61] His Honour's assessment was that the evidence in question was probably better left alone. Defence counsel was of a similar view. It will be recalled that in *Crofts v The Queen*,[60] the plurality (Toohey, Gaudron, Gummow and Kirby JJ) reminded that much leeway must be allowed to the trial judge to evaluate considerations relevant to the fairness of the trial.

[62] A not dissimilar situation arose in *R v Fraser*[61] in relation to inadmissible evidence giving rise to a possibility of an inference that an accused had a prior conviction. That evidence was similarly treated at trial. No mention was made of it in the addresses or in the summing-up. On appeal from the refusal of an application for a mistrial, this Court was far from persuaded that the guilty verdict was intrinsically flawed by a failure to give the accused a fair trial.[62]

[63] In *Fraser*, White J (as her Honour then was) discussed the decision of the Supreme Court of Victoria in *R v Knape*,[63] to which counsel for the appellant referred the Court. Her Honour said:

> "[40] In *R v Knape*, a decision impliedly approved by the High Court in *Webb and Hay*,[64] the accused had conducted his own defence being careful to ensure that his prior convictions would not come out. In the course of the evidence-in-chief of a witness called by the accused in answer to the question how long had he known the accused, the witness said at p 470 'About 1960. I met him at Bendigo Training Prison'. The Full Court concluded that by that unresponsive answer "the linchpin of his whole defence was knocked away", p 471. There was no suggestion that the accused had deliberately arranged for the damaging evidence to be given to engineer a mistrial. The trial judge declined to discharge the jury. On appeal the respondent submitted that no substantial miscarriage of justice had occurred since the prosecution case was very strong and conviction was inevitable, irrespective of evidence of the accused's bad character.
>
> [41] In the course of his reasons Winneke CJ, who delivered the judgment of the Court, observed at p 472
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> > 'The law has long recognised the prejudicial effect of evidence of prior conviction and bad character, and that such evidence is calculated to render a fair trial improbable. Thus as a matter of high policy evidence of such matters, apart from the well-known exceptions, is rigidly excluded. ... The introduction of this evidence, therefore, cannot be regarded as some minor irregularity. The question is whether in the circumstances of this case we are satisfied that no substantial miscarriage has actually occurred.'

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60 [1996] HCA 22; (1996) 186 CLR 427 at 440-441.
61 [2001] QCA 187.
62 Ibid per McMurdo P at [11] and White J at [45], both citing *Wilde v The Queen* [1988] HCA 6; (1988) 164 CLR 365.
63 [1965] VR 469.
64 *Webb and Hay v The Queen* [1994] HCA 30; (1994) 181 CLR 41.

His Honour concluded at p 473 that

> 'An examination of the authorities leads us to the view that unless it can be said, upon the evidence, that the irregular disclosure could not in any way affect the judgment of the jury in coming to their decision of guilty or not guilty, the trial judge should exercise his discretion in favour of the accused.'
>
> Having regard to the prejudicial nature of the objectionable disclosure and to the fact that it destroyed the underlying basis of the defence, the court concluded that it was impossible to say that the jury would inevitably, or without doubt, have convicted if the inadmissible evidence had not been given."

[64] The circumstances in *Knape* may be distinguished from those in the applicant's case in two relevant respects. First, the description in that case of where the witness and the accused met, appears to have allowed for but one inference, that is, that they met there as prisoners. Secondly, and more importantly, that evidence seriously undermined the accused's line of defence which was critically dependent upon the exclusion of evidence of prior convictions on his part. The evidence in question here did not raise doubt as to the appellant's subsequent account of self-defence.

[65] For these reasons, I am of the view that neither the appellant's reference in his evidence-in-chief to having known Mr Yoelu at Lotus Glen, nor the absence of any direction with respect to it, deprived the appellant of a fair trial. They were not productive of a miscarriage of justice.

[66] **Summary**: In view of the assessments I have made of the possibility of prejudice to the appellant's trial arising from the first three of the events on which this ground of appeal is based, I do not consider that, by virtue of them taken singly or together, the appellant began his evidence-in-chief in a setting where he or his case had been cast in an unfairly prejudicial light. Nor did unfair prejudice arise, of itself or cumulatively with the other events, from the fourth event which occurred very early in the appellant's evidence-in-chief. I am unpersuaded that this ground of appeal has been made out.

Ground 2

[67] In speaking to this ground of appeal, counsel for the appellant emphasised that the self-defence case was critically dependent upon the black-handled knife and the blue-handled knife having been in the pocket in the passenger side door when the appellant and the deceased exited the cabin of the utility for the last time. He observed that defence counsel at trial understood that to be so because, in opening his case, defence counsel explained to the jury that the appellant would testify that after the pig was stabbed and gutted, he put those two knives into the passenger side door.[65] In the altercation outside the cabin, the deceased came at the appellant with the black-handled knife "like a madman", and threatened him. The appellant grabbed the blue-handled knife from the passenger side door as he was cornered by

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65 Opening Transcript, p 3 ll15-19.

the deceased against the utility. He defended himself, stabbing the deceased several times.[66]

[68] The appellant did give evidence that after washing the two knives, he put them in the passenger side door.[67] In cross-examination, he was asked why he had done that. His answer was that if they saw another pig, he would know where the knives were. He commented that he would normally carry his knives in the door of a car.[68]

[69] The basis for this ground of appeal is to be found in two paragraphs of the signed statement that Mr Yoelu gave to police on 4 November 2014.[69] The first is paragraph 20 which states:

> "Carl has a black plastic knife pouch that he normally has three knives in. He has a black-handled knife with a blue floating device on the top that is meant to be stored in the pouch. He also keeps two other knives in there, one has a white-handle and the other has a black-handle. Carl normally keeps his knife pouch in the passenger side door compartment ready if we get a pig."

The second is paragraph 42 as follows:

> "Rob then rolled in the car and I saw he had a small black-handled knife in his right hand. He had his left hand holding his right side of his ribcage. This was the first time I saw a knife since Carl used one to kill the pig."

[70] The criticism made of the conduct of the defence is that, in cross-examination of Mr Yoelu, counsel did not elicit from him that he had made these statements. Evidence that he had, it was submitted, would have raised a real doubt as to Mr Yoelu's testimony that the knives had ended up in the tray of the utility. Further, it would have confirmed that the appellant did have a habit of keeping his knife pouch in the passenger door compartment of a vehicle ready to get a pig, and thereby provide some support for the appellant's version of events.[70]

[71] It was submitted that there was no forensic disadvantage in putting Mr Yoelu's earlier statement to him. Had he refuted their contents, the reliability of his evidence would have been further impaired. Indeed, his earlier statements might have been regarded by the jury as more likely to be accurate.[71]

[72] Counsel for the appellant contended that the failure to raise the statements with Mr Yoelu, whether inadvertently or because of incompetence, had the consequence that critical evidence was not induced. As a result, the appellant may have lost a real chance of acquittal.[72]

[73] The respondent submitted that an examination of the state of the evidence led in the Crown case concerning the location of the two knives at the time when the appellant

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66 Opening Transcript, p 2 ll11-45.
67 AB161 Tr3-8 ll6-10.
68 AB168 Tr3-15 ll13-22.
69 Affidavit K Walker sworn 6 February 2017, Exhibit "KJW1".
70 Appellant's Outline of Submissions, para 13.4. I would reject a submission made in that paragraph that the prosecutor, in his closing address, ridiculed the appellant's claim to a habit of keeping his knife pouch in the passenger side door. That did not occur in the address.
71 Ibid para 13.5.
72 Ibid para 13.6.

and the deceased exited the cabin, reveals that the version that the appellant had given to his legal advisers, and which was subsequently opened, was not in conflict with that evidence. Mr Yoelu's evidence was inconclusive on the point. Whether to put to Mr Yoelu what was in paragraphs 20 and 24 involved a judgment call. Relevant to that were the considerations that, for this trip, the appellant had not put the knife pouch in the passenger side door. It was in the knapsack in the tray. Secondly, for those knives to have been in the door, would have been at variance with the practice suggested in paragraph 20 that the knives were kept in the pouch, rather than loosely in a pocket in the door. The judgment call made was therefore rationally explicable.

[74] As to the approach to be taken to this ground of appeal, useful guidance is given in the judgment of Hayne J in *TKWJ v The Queen*.[73] His Honour observed that where, on appeal, a complaint is made of a failure to call certain evidence, if there could be a reasonable explanation for not calling it, it follows that counsel could have chosen to act in that way without criticism. Similar considerations apply where the complaint is of failure on the part of defence counsel to put something to a Crown witness in cross-examination.

[75] What then was the evidence Mr Yoelu gave on the point? Did he say that the two knives were in the tray, and not in the passenger side door, when the deceased and the appellant exited the cabin?

[76] Mr Yoelu said in evidence-in-chief that the white-handled knife and "a couple of other knives" were used to gut the pig. The other knives were the black-handled knife and the blue-handled knife.[74] After the pig was gutted, the knives were put back in the tray of the utility.[75] Mr Yoelu told of the journey of 20 to 25 kilometres from the point where the pig was killed and gutted to the Wenlock River bridge.[76] It was there that the pig was washed and the appellant washed the knives.[77] Mr Yoelu gave no evidence as to what was done with the knives once they were washed. Specifically, he did not say, or imply, that either the black-handled knife or the blue-handled knife was placed back in the tray.

[77] Faced with that state of evidence, defence counsel ventured the proposition that Mr Yoelu did not have any memory of what happened to the knives after the pig was killed. Mr Yoelu agreed with the proposition, adding, "They were just left in the side of the tray in the back".[78] Obviously, this was a reference to where the knives were placed just after the pig was gutted and before they set off for the Wenlock River.

[78] In light of all of this evidence, I accept the respondent's submission that Mr Yoelu's evidence was, at its highest, inconclusive as to the location of the two knives at the time when the appellant and the deceased exited the cabin.

[79] For defence counsel to have put that the two knives were placed in the passenger side door after they were washed would have invited a speculative response from

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73 [2002] HCA 46; (2002) 212 CLR 124 at [2] (Gummow J agreeing).
74 AB34 Tr1-26 l44 – AB35 Tr1-27 l3.
75 AB46 Tr1-38 ll22-25.
76 AB34 Tr1-26 ll32-35.
77 Ibid ll36-42.
78 AB56 Tr1-48 ll36-37.

Mr Yoelu. It would have risked a rejection by Mr Yoelu of the proposition and a positive assertion by him, even if speculatively based, that the knives were then placed back in the tray.

[80] I accept also that putting paragraphs 20 and 24 to Mr Yoelu would have been an awkward line to pursue for support for the appellant's version. It was uncontroversial that the knife pouch had not been placed in the passenger side door when they set out on the journey. On the appellant's version, the two knives, once washed, were not placed back in the pouch where Mr Yoelu said they were kept. As well, one pig had already been killed and gutted. These are discrepancies that Mr Yoelu himself might have pointed out in his responses to what was put.

[81] In his closing address, defence counsel drew to the jury's attention the inconclusiveness in Mr Yoelu's evidence as to the location of the knives.[79] Some of the evidence to which I have referred was read to the jury by him to reinforce the point.[80] The emphasis given by defence counsel to this rather strongly suggests that he wished to keep available a submission that there was no evidence in the Crown case that contradicted his client's account of where the knives were placed after they were washed. A desire to preserve that opportunity provides, in my view, a reasonable and rational explanation for not putting the two paragraphs to Mr Yoelu.

[82] For these reasons, I have concluded that this ground of appeal ought not succeed.

Ground 3

[83] It is sufficient to record that this ground of appeal was based upon a hypothesis that, in the course of summing up to the jury, the learned trial judge had, on one occasion, told the jurors that self-defence must be **proved** beyond reasonable doubt. At the hearing of the appeal, counsel for the appellant was informed that each of the members of the Court had listened to the recording of the summing up and were satisfied that the word his Honour used was **excluded**, and not proved. Counsel accepted that if that was the word used, then there was no substance to the ground and he would not advance it any further.[81]

Disposition

[84] None of the grounds of appeal have succeeded. It follows that this appeal must be dismissed.

Order

[85] I would propose the following order:

1. Appeal dismissed.

[86] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.

[87] **BOND J:** I agree with the reasons for judgment of Gotterson JA and with the order he proposes.

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79 Addresses Transcript p 5 ll13-15.
80 Ibid p 7 l39 – p 8 l27.
81 AT 1-29 l38 – 1-31 l3.