SUPREME COURT OF QUEENSLAND

CITATION:	*R v Van Ling* [2003] QCA 382
PARTIES:	**R** **v** **VAN LING, Johannes William** (appellant)
FILE NO/S:	CA No 109 of 2003 DC No 2601 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2003
JUDGES:	McMurdo P, Jerrard JA and Muir J Separate reasons for judgment of each member of the Court, Jerrard JA and Muir J concurring as to the orders made, McMurdo P dissenting
ORDERS:	**1. Allow the appeal** **2. Quash the conviction for grievous bodily harm and substitute instead a conviction for assault occasioning bodily harm while in company** **3. Set aside the sentence of four years imprisonment originally imposed and substitute a sentence of 18 months imprisonment**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL ALLOWED – where appellant convicted of unlawfully doing grievous bodily harm – where appellant complains that verdict is unsafe and unsatisfactory – where appellant not proven to have used a weapon – where appellant, if successful on conviction appeal, may still be liable for a conviction of assault occasioning bodily harm – whether this court should substitute a verdict of guilty for this alternative offence CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – COMPLICITY – COMMON PURPOSE – GENERALLY – where appellant co-accused with two others – where learned trial judge gave careful directions as to

complicity – whether appellant was a party to the plan to attack the complainant – whether appellant should be held criminally responsible for the complainant's injuries

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where appellant sentenced to four years imprisonment for doing grievous bodily harm – where group of people, including the appellant, invaded complainant's home – where appellant affected by alcohol – where appellant has no prior convictions – where appellant not proven to have used a weapon in the attack – whether sentence excessive in the circumstances

Criminal Code (Qld), s 7, s 8, s 668(2)

M v R (1994) 181 CLR 487, followed
R v Barlow (1996-1997) 188 CLR 1, applied
R v Nagy [2003] QCA 175; CA No 24 of 2003, 2 May 2003, referred to
R v Parkes [1993] QCA 34; CA No 344 of 1992, 2 February 1993, discussed

COUNSEL: The appellant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I have read the helpful reasons for judgment of Jerrard JA in which the facts and issues are set out. I will repeat only those necessary to explain my reasons for reaching a different conclusion.

[2] The appellant, who represented himself on this appeal, raised two grounds of appeal against conviction in his notice of appeal, but has only addressed one ground, effectively that the jury verdict is unsafe, amounting to a miscarriage of justice.

[3] The unargued ground relates to a redirection given by the learned primary judge at the request of both the appellant's counsel and his co-offender's counsel to the effect that, before considering the prosecution case, the jury could consider whether the appellant and his co-offender, Greg Rose, were or might be truthful in their evidence; if so, they would be not guilty. This direction in no way detracted from his Honour's earlier directions as to the onus on the prosecution to establish its case on the accepted evidence beyond reasonable doubt. The direction was not an error of law. This ground of appeal is without merit.

[4] The second ground of appeal requires a consideration of the evidence, which is fully set out in Jerrard JA's reasons.

[5] The evidence established that on 5 May 2000 the appellant and the complainant, who worked together, had an altercation after drinking alcohol at the Sundowner Hotel, Beenleigh in which the appellant saw himself as the wronged party. Later

that afternoon, they had a further altercation in which the appellant again saw himself as the wronged party. There was then a third altercation, this time between the appellant's co-offender, Gregory Rose, and the complainant. The complainant went home and, some time later in the evening, the appellant's vehicle arrived at the complainant's home with four others: Gregory Rose, his friend Annette, his brother, Jason Rose and Chris. The events described in Jerrard JA's reasons then ensued.

[6] There was conflicting evidence as to the role played by the appellant in the attack on the complainant; whether the appellant was armed with a pole and whether the appellant or his cohorts only armed themselves after the complainant confronted them with a machete. It is obvious that, even if the jury accepted the arming occurred only after the production of the machete, the appellant could have left the scene rather than join in the fracas.

[7] The prosecution evidence included that of Mr Mahony, who had worked for the appellant as a labourer. He said he was at the complainant's house when the appellant's van arrived; three men and an Aboriginal girl, all armed with poles, approached the complainant and him; he conceded he called the woman a "black slut"; the three men brandished the poles as they approached the complainant and attacked him.

[8] The complainant gave evidence that the appellant was one of the men involved, although ineffectually, in the attack upon him.

[9] The complainant's daughter, Ms Hayley Prophet, also gave evidence that the appellant was armed with a pole and although she did not see him strike her father she saw him swing the pole in the air above her father who was lying on the ground.

[10] The assessment of evidence of an event like this, which happened quickly and at night-time with some key witnesses affected by alcohol, is always difficult; it is especially a matter for the collective experience of the jury who see and hear the various accounts of witnesses. The evidence of the complainant, his daughter and Mr Mahony was not so inherently flawed or unreliable that it had to be rejected by the jury and nor were they obliged to accept the appellant's version of events. The evidence was capable of establishing that the appellant went to the complainant's house, encouraged by alcohol and the safety of numbers, to avenge, with violence if necessary, the complainant's treatment of him and others in his vehicle. It was open to the jury to conclude that, in these circumstances, a reasonably foreseeable consequence of an assault by three men and a woman, whether armed with the appellant's aluminium extension painting poles or not, upon one man could result in the victim suffering grievous bodily harm which, here, involved no more than a broken rib and resulting pneumothorax and pulmonary contusion. The evidence was also capable of establishing that the appellant, armed with a pole, joined in the attack upon the complainant which resulted in grievous bodily harm. After reviewing the whole of the evidence I am confident it was sufficient to enable the jury to be satisfied beyond reasonable doubt that the appellant caused grievous bodily harm to the complainant, either on the basis of prosecuting a common unlawful purpose (s 8, *Criminal Code*) or as a principal offender under either s 7(1)(b), (c) or (d) *Criminal Code*.[1]

[11] I would dismiss the appeal against conviction.

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1 *M v The Queen* (1994) 181 CLR 487, 493-494.

The appeal against sentence

[12] The appellant contends the sentence of four years imprisonment was manifestly excessive and the learned primary judge gave no or insufficient weight to the question of delay in the commencement and progress of the prosecution and other mitigating factors.

[13] The learned primary judge found that the appellant visited the complainant for the purpose of assaulting him because of incidents earlier in the evening and that he was aware there were aluminium poles in the rear of his vehicle; the complainant armed himself with a machete to frighten away the appellant and his cohorts; it was irrelevant whether the attackers were armed with poles before the machete was produced because they could have easily left the scene after being confronted with the machete with no resulting violence; the appellant and his co-offenders used the poles to flog the complainant who suffered resulting extensive bruising and lacerations to the body, head and face and a fractured rib causing a pneumothorax and pulmonary contusion; he was hospitalised for a fortnight but fortunately has not been left with any significant residual disability. His Honour also found that the offenders at some stage during the fracas each had possession of a pole and used it to assault the complainant and they all played their part in a joint enterprise. All these findings were open to his Honour.

[14] The appellant was 40 years old at the time of the offence and 43 at sentence. His Honour stated that he took into account the delay in bringing the matter to trial, which was against the appellant's wishes and through no fault of his own, and that this delay personally adversely affected the appellant.

[15] The appellant had a criminal history commencing as a juvenile in New South Wales. In 1988 he was convicted of being armed with intent to commit a felony and sentenced to 12 months imprisonment with an additional term of two years non-parole period expiring on 30 October 1990 and has no convictions since. His counsel at sentence submitted that the appellant as a youth had a drug problem which was the cause of his earlier offending. He has not returned to the use of drugs since his release from prison. He came from New South Wales to south-east Queensland in 1995 to save his marriage. He has four children aged from 9 to 17 years. He has used his past experiences to benefit others by working with Drug Arm and other community groups to help troubled young people and commendable references in his support were tendered. He has had a solid work history. More recently his health has failed and he has been on a permanent and total disability pension. His imprisonment will result in the forced sale of the mortgaged home he owns jointly with his wife who has recently separated from him.

[16] Although the offence occurred on 5 May 2000, the appellant was not committed for trial until 15 October 2002 and despite his efforts to speedily finalise the matter, because of issues concerning his co-offenders and a number of unfruitful listings the matter was not heard until March 2003. This delay has caused him considerable anguish and is unfortunate, but, it seems, probably unavoidable. It appears to have resulted from the fact that he offended with others; it was desirable that all the co-offenders were dealt with together; there is no suggestion that the delay has been deliberate or even caused by the negligence or inadvertence of the prosecution. Whilst it is a background factor to consider, as his Honour did, the delay here is not a significant mitigating factor.

[17] The appellant emphasises the matter of *R v Parkes*.[2] Parkes and others pleaded guilty to grievous bodily harm. The offence involved a group attack on a person over an unpaid drug debt. Parkes was not the ringleader but both the ringleader and another co-offender, Harris, were sentenced to four years imprisonment with varying recommendations for parole. Parkes' application for leave to appeal was based on the discrepancy between his and Harris's sentence. Parkes was 21 and had only a relatively minor criminal history. Harris was of a similar age but had pleaded guilty to more offences, had a worse criminal history and was on probation at the time. This court determined that Harris's considerably worse criminal history, his greater involvement in acts of actual violence and his liability for additional house-breaking offences justified a heavier sentence than Parkes. Parkes' sentence of four years imprisonment for grievous bodily harm was reduced to three years with a recommendation for parole after nine months rather than 12 months. The case of *Parkes* is of no particular assistance as, first, the detailed facts of the offence do not emerge from the judgment, second, Parkes, unlike this appellant, was a young man and, third, it turns on principles of parity which have no application here.

[18] The complainant fortunately appears to have recovered fully from his physical injuries and because of his medical treatment the consequences of the assault on him are much less serious than in many examples of the offence of grievous bodily harm. Whilst this may be more good luck that good management, it does mitigate the sentence imposed. In such circumstances sentences ranging from 18 months to three years imprisonment, often with periods of suspension or parole recommendations, are imposed. They suggest the sentence of four years imprisonment was high.[3]

[19] Nevertheless, the appellant, a mature man who should have known better, fuelled by alcohol, went to the complainant's home to seek violent revenge in the company of three others. The attack on the complainant was in company whilst armed with the aluminium painter's poles and at night in the complainant's own yard. The appellant does not have the benefit of any remorse or the mitigating factor of a plea of guilty. A salutary deterrent penalty was warranted.

[20] The appellant had rehabilitated himself before this serious lapse and has made genuine efforts to help others with his community work. The comparable sentences provided by the respondent of *R v Anderson*,[4] *R v Pearce, Cone, Clark, Atkinson*[5] and *R v Bryan; ex parte Attorney General*[6] were all more serious examples of this offence involving burglary and actual home invasion in the first two cases and in the last a gratuitous, almost fatal attack, with a knife in the centre of Brisbane on New Year's Eve. They also suggest the sentence here was high.

[21] In the end, after weighing the competing factors, I am persuaded the sentence of four years imprisonment imposed here was manifestly excessive. I would substitute a sentence of two and a half years imprisonment.

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2 [1993] QCA 34; CA No 344 of 1992, 2 February 1993.

3 *R v Craske* [2002] QCA 49; CA No 11 of 2002, 1 March 2002; *R v Harvey* [2003] QCA 286; CA No 112 of 2003, 10 July 2003; *R v Rangeley* [2003] QCA 116; CA No 22 of 2003, 18 March 2003; *R v O'Rourke* [2003] QCA 220; CA No 38 of 2003, 26 May 2003.

4 [1996] QCA 143; CA No 434 of 1995, 1 February 1996.

5 CA Nos 206, 215, 216 and 222 of 1998, 22 September 1998.

6 [2003] QCA 18; CA No 410 of 2002, 5 February 2003.

Orders:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence granted. Appeal allowed. Substitute a sentence of two and a half years for the sentence imposed at first instance.

[22] **JERRARD JA:** On 12 March 2003 Johannes Van Ling was convicted by a jury of unlawfully doing grievous bodily harm to Garry Prophet. Mr Van Ling was sentenced to four years imprisonment. Two men co-accused with him, Gregory Rose and Jason Rose, were also convicted of doing grievous bodily harm to Mr Prophet and likewise sentenced to four years imprisonment. In the case of Jason Rose, who had pleaded guilty to the charge, that sentence was ordered to be suspended after Jason Rose had served 18 months imprisonment. Gregory Rose was also convicted of a separate offence of having unlawfully assaulted Mr Prophet and sentenced to one month imprisonment for that offence, to be served concurrently. Mr Van Ling has appealed against both his conviction and the sentence imposed.

[23] Garry Prophet was assaulted at some time after about at 9.30 p.m. outside his home by a number of men who used aluminium poles as weapons. The Crown case, as put in its outline of submissions on this appeal, was that while Mr Van Ling may not have been one of those who actually hit Mr Prophet with those weapons, he was criminally responsible for the grievous bodily harm caused by that attack by reason of either s 7(1)(c) or (d), or s 8, of the *Criminal Code*.

[24] The events occurring at Mr Prophet's home which resulted in Mr Van Ling's conviction arose out of earlier events that same day, 5 May 2000, in and about the Sundowner Hotel in Beenleigh. Mr Prophet, Mr Van Ling and Mr Joseph Mahony (referred to by the other men as "deaf Joe") and a man referred to only as "Chris", had been working on a building site at Mt Gravatt. They stopped work that day around 1.30 p.m. and went to the Sundowner hotel. Mr Van Ling is a painter, and Mr Mahony was working for him as a labourer, as was Chris. Mr Prophet worked with him as a painter.

[25] The four men drank alcohol at that hotel for a number of hours, and at some stage an altercation occurred between Mr Van Ling and Mr Prophet. Both were asked to leave the hotel. That incident was the subject of the first count in the indictment, in which Mr Van Ling was accused of unlawfully assaulting Mr Prophet, and on which charge Mr Van Ling was acquitted by the jury. Mr Van Ling called as witnesses at his trial both the duty manager of the hotel (a Mr Evans) and a Mr Grantham, and their accounts supported Mr Van Ling's description of himself as the wronged party on that occasion.

[26] A second incident took place later in the car park of that hotel, in which force was used between Mr Van Ling and Mr Prophet. That incident was the subject of count 2 on the indictment, in which Mr Van Ling was accused of unlawful assault of Mr Prophet; and the jury acquitted Mr Van Ling of that charge too. The evidence of Mr Evans and Mr Grantham would have assisted Mr Van Ling on that count as well.

[27] A third incident occurred at the hotel, the subject of count three on the indictment, on which Gregory Rose was convicted by the jury of unlawfully assaulting Mr

Prophet. That occurred after Mr Prophet had returned to the hotel to retrieve his lunch box and mobile phone from Mr Van Ling's utility. During that return visit, Mr Gregory Rose assaulted Mr Prophet.

[28] Mr Prophet went to his home. Mr Mahony was there. Some time later, and after 9.30 p.m., the appellant's Toyota utility pulled up outside Mr Prophet's home, and in it were the appellant, the two Rose brothers, the man Chris, and a young woman ("Annette"), who was a friend of Greg Rose. The evidence of Mr Grantham, called by Mr Van Ling, suggests that she was present with Mr Greg Rose when he assaulted Mr Van Ling earlier in the car park of the hotel, in the incident resulting in Mr Greg Rose's conviction for assault.

The complainant's version

[29] Mr Prophet's account of what occurred when he saw the utility pull up and when he and Mr Mahony were at his home, as was Mr Prophet's daughter Hayley, is best quoted in its entirety:

> "I knew they weren't here to talk so I jumped back inside. I grabbed the machete. When deaf Joe seen me grab that – he's making sign languages – he jumps out the door and all I could hear him going (makes noise). Next minute this black streak comes through, kicks Joe, knocks him and she's right into him. I don't know if she done any martial arts, but she done a good job of driving him into the dirt. I just was walking towards the boys – and Greg Rose was the one I wanted to smash with the machete, because I knew that he was the one that drove me eye in up at the pub, and Johnny more or less folded his arms thinking, Uh oh he's got a knife, and I'd hit – I went to hit Greg with the sharp part of the blade – if you see it I've sharpened it up, because I use it from cutting bushes away from around houses when going I'm going to paint and that. Why it was in my house that night really I had no reason. I was cleaning around the house, but I don't know why it was there, anyway, I seen it, I grabbed it. I was going to hit Greg straight across the head, I was nearly going to take his head clean off, but halfway I turned the head side ways and smacked him and he went down. I went back to Johnny, I said, 'I'm going it to you with these[7]'. Johnny went down on the ground like a little ball and I all I heard was Jason Rose saying, 'Now, you're going to get it you cunt.' And I did get it. I coped a flogging. I knew what it was like to be an old bit of carpet getting whipped".

[30] "Johnny" is Mr Van Ling. Mr Prophet's account was therefore that Mr Van Ling at no stage had any visible weapon, and Mr Prophet had first assaulted Mr Rose with the machete and then threatened to assault Mr Van Ling before others attacked Mr Prophet, at a time when Mr Van Ling was "down on the ground like a little ball". Mr Prophet's further evidence in chief even described how "Johnny got hit a couple of times himself"[8], so "that's how good his boys were". Mr Prophet then described how the attackers ran from him and while Mr Prophet was still "blurry", Mr Prophet

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7 The witness apparently indicated the intended use of his fists

8 The evidence in chief of Mr Prophet quoted herein as at AR 174

made for the utility and put a slash in the passenger side door with the machete. Then "they took off and I went back inside".

[31] It was common ground at the trial that the aluminium pipes with which Mr Prophet was hit came from Mr Van Ling's utility, and that it was painters' equipment, being the aluminium handles to which, for example, rollers are attached. They would be relatively light. The grievous bodily harm suffered was a fractured rib and a considerable contusion of the lung. Mr Van Ling's evidence was that:

> "You only have to look inside and you could easily see" (those poles or pipes).[9]

He was referring to his utility; what he said is supported by photos of it tendered at the trial.

Other witnesses

[32] No other version of events was as helpful to Mr Van Ling, including his own. Mr Mahony's evidence described seeing four people arm themselves with those "poles", who included Mr Van Ling[10], and Mr Mahony described himself being pushed over by Annette, whom he admitted having called a "black slut". Mr Mahony said she had a "pole". He swore that Mr Van Ling, Greg Rose and another person unknown to Mr Mahony had approached Mr Prophet while Mr Mahony was being assaulted by the woman, and that he had seen Mr Prophet hit repeatedly with "poles". He agreed in cross-examination that he could not say he had seen the appellant actually strike Mr Prophet with a pipe. His recollection of events (at AR 42) which contradicted that of Mr Prophet in this as in other respects, was that Mr Prophet armed himself with the machete only after he had been assaulted with the pipe. On that point Mr Mahony's evidence contradicted not only the complainant, but also that of Hayley Prophet, the complainant's daughter.

[33] She recalled the woman (Annette) complaining to Mr Mahony that he had called her by the term already described, and Ms Prophet told the people who had arrived to go away. She recalled her father screaming[11] and his having "his knife beside him"[12], and that "they've gone back and grabbed the aluminium paint pole" and assaulted her father[13]. She recalled that two men had possession of those pipes or poles, and thought that it was one of the Rose brothers who did not have one (AR 266). On more than one occasion in evidence she said Mr Van Ling had one. She did agree she had not seen Mr Van Ling actually strike her father (AR 271), but swore she did see him holding "a rod above his head ready to strike" (AR 272). She recalled seeing her father having "slap" one of them with "the knife" (AR 269), which on her description was some time after the assault with the poles commenced.

[34] A number of neighbours gave evidence with varying degrees of recall. A Mr Joshua Russell recalled a male and a female visitor arriving, and either two or three males having "poles" in their hands.[14] A Ms Trisha Chircop recalled the utility arriving, seeing five people alight from it and "they were holding something or

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9 AR 445
10 At AR 26
11 This evidence is at AR 265
12 At AR 266
13 At AR 266
14 AR 313

other in their hands" that "looked like a pole, kind of looking thing" (at AR 329). She heard the sound of something being hit with those poles.

[35] More was observed by the witness Belinda Hoar, who recalled a vehicle arriving, hearing screaming, hearing a female yell "he called me a black slut", hearing Mr Prophet call "get off my fucking property", and other noises. She recalled seeing the occupants of the vehicle "all run over to Garry's place" (AR 350), and that "the people obviously from the ute had come running back to the ute and had grabbed the PVC piping things, they looked like to me, out of the back of the car"; and she thought three or four people had those objects (AR 351). She heard "thudding sounds and stuff" (AR 352).

[36] A Mr Troy Sweedman saw the appellant's vehicle arrive, five people get out of it, and then three of them went to the back and "grabbed poles out" (AR 381), and the fourth came over to where Mr Sweedman was. He heard a woman complain of being called a "black slut", and then heard "these poles hitting somebody, presuming it was Garry" (AR 385). He saw the visiting party return to their vehicle, the complainant approach it, and three of the men got out of the vehicle and assaulted Mr Prophet all over again with those poles (at AR 386).

[37] In summary that was the evidence independent of Mr Prophet, his daughter, Mr Mahony, and those who were accused. None of those other witnesses saw that Mr Prophet had a machete in his hand or saw him use it. Despite this, it appeared common ground between all parties at the trial that the appellant's vehicle was hit by Mr Prophet's machete; and that Greg Rose had been struck (whether lawfully or not) with that machete by Mr Prophet. Other than the complainant and those accused, only Hayley Prophet described seeing the latter incident. Chris was not called as a witness by any party; the evidence did not disclose if he is or was, or is to be, charged with any offence.

The appellant's evidence

[38] Mr Van Ling's evidence was that he had gone at that time (quite late at night) to Mr Prophet's house because he realised that they both needed to work at their common place of employment as painters, and he wanted "to organise work and sort this mess out" (AR 415), as they were both supposed to be working the next day. Mr Van Ling had been originally driven away from the Sunnybank Hotel in Mr Van Ling's utility by the man Chris after the first altercation at that hotel with Mr Prophet. They had been asked for a lift by Annette (apparently a stranger) and it transpired that she was friendly with and staying at the home of Mr Greg Rose, whom Mr Van Ling then met for the first time at the residence of Mr Rose. Likewise he met Jason Rose for the first time. That newly formed group of persons decided they would purchase more beer from the Sundowner Hotel and returned to it; and it was at that stage that the altercation occurred between Mr Van Ling and Mr Prophet, who had also been driven away from the hotel (by Mr Van Ling's witness, Mr Grantham) and who had also returned to the hotel. This was the occasion as well of the assault by Mr Greg Rose upon Mr Prophet, at which time Mr Prophet was understood by Annette to have insulted her.

[39] This all resulted in a decision to buy another carton of beer and visit Mr Prophet's house. Mr Van Ling agreed that he knew that the young woman was resentful that Mr Prophet had called her (at the hotel apparently) "you black slut", and that

Annette was being urged to "forget it" by Mr Greg Rose. The cross-examination by the Crown Prosecutor at the trial did not establish that Mr Van Ling actually knew, when he went to Mr Prophet's home with those other people, that Mr Rose had already assaulted Mr Prophet at the hotel. Mr Van Ling's evidence was that he directed Chris to Mr Prophet's residence, and that when Mr Van Ling got out of the car he saw Mr Prophet at the front of the vehicle, with the machete. He saw him hit Greg Rose with it and saw Greg Rose fall down, and then Mr Prophet chased Mr Van Ling with the machete. It was dark, and when the pursuing Mr Prophet got close enough "I leapt out and grabbed him around his arms"[15]. Mr Prophet and Mr Van Ling then wrestled, with Mr Van Ling keeping "my eye on the machete" (AR 420), and he heard advice being yelled out "get in the fucking car, lets get the fuck out of here, fucking get here". He saw Greg Rose in the passenger seat holding his head, and Mr Prophet got up and jumped in the vehicle. He could recall that he and Mr Van Ling were "getting hit" while they were wrestling, and he received some injuries to the knuckle of his left hand. The Crown did not challenge in cross-examination his claim that his hand received some injury from a hit with a pipe; it was suggested in argument on the appeal that could have happened while Mr Van Ling was wielding one.

[40] He swore his car had only two aluminium poles in it that night, which was also not challenged in cross-examination; and that Mr Prophet struck the passenger side windowsill with the machete as they were leaving, just missing the elbow of Greg Rose. Mr Rose had pulled his elbow away (AR 422). He denied the suggestion put in cross-examination by the Crown that either he or anyone else called out "he's got a knife, get the poles"; but agreed that there were those weapons used, which came from his utility.[16] Mr Prophet had said when cross-examined that he heard someone call out those words last quoted.

Unsafe and unsatisfactory?

[41] The appellant's grounds of appeal relevantly complain (in ground 2(c)) that the verdict of the jury is unsafe and unsatisfactory. The learned trial judge went to considerable lengths to give the jury careful directions on Mr Van Ling's possible criminal complicity in an assault with those aluminium pipes if Mr Van Ling did not himself wield one, such complicity being on the basis of either s 7 or s 8 of the *Criminal Code*. There is no complaint about those directions. Rather the appellant's real complaint is that when this court undertakes the task imposed on it by ground of appeal 2(c) (which should be understood as a complaint that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence or that there was a miscarriage of justice)[17], the court must ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that Mr Van Ling was guilty as charged[18]; and that the answer should be "No".

[42] The Crown case against Mr Van Ling was summarised, very fairly, in the Crown's outline of argument in these terms:

> "The evidence established that despite two earlier violent encounters that evening, the appellant travelled to the home of the man he

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15 This evidence of Mr Van Ling's as at AR 418-419

16 This evidence as at AR 459

17 s 668E(1) of the Code

18 *M v R* (1994) 181 CLR 487 at 493

> claimed had assaulted him. He went there with a woman he first met that evening who felt aggrieved by the actions of the complainant. She had her boyfriend with him. He knew the woman had complained to the boyfriend about the complainant's actions. He also went with the boyfriend's brother. He did not know either man prior to this night. When they arrived they all alighted from the vehicle which happened to contain instruments capable of being used as weapons. A jury acting rationally could not have concluded other than the appellant went to the house with the safety of numbers, intending to seek revenge for the humiliating behaviour the appellant claimed he had been subjected to. The fact the complainant armed himself with a machete had no bearing on what could be inferred the appellant's party's plan was."

[43] Taken as a whole the evidence is not capable of establishing that those pipes were obtained from the appellant's vehicle before the complainant produced a machete and hit Mr Rose with it. Accordingly it is not safe to infer beyond reasonable doubt from the fact of arrival in that vehicle with those others as described that the appellant was party to a plan to assault Mr Prophet with weapons and formed before Mr Prophet produced the machete. I understand the Crown did not challenge that on the appeal.

[44] This makes it significant that the appellant and complainant agree that the appellant did not threaten him or have a weapon, and that the appellant was on the ground with the complainant when the latter was hit with sufficient force by those aluminium pipes to break the complainant's rib and cause him grievous bodily harm. This agreement in evidence between Mr Prophet and Mr Van Ling is important because of the injury to Mr Van Ling's hand. It is possible Mr Prophet was attempting to help Mr Van Ling by the evidence Mr Prophet gave; but that evidence is consistent with the damage to Mr Rose and the force used to Mr Van Ling's car door.

[45] The evidence is likewise not strong enough to support a finding beyond reasonable doubt that Mr Van Ling armed himself with a pole (and thereby encouraged others), or actually used one. He may have done so; but proof of that conclusion would depend on the evidence of Mr Mahony and of Hayley Prophet; and those witnesses described a sequence of events which had critical omissions about the use of the machete to damage Mr Van Ling's utility and Mr Rose. The Crown does not attempt to uphold the conviction on that basis.

[46] I am not comfortable with the conclusion that in this case a plan to assault which did not include use of weapons would have as a probable consequence that grievous bodily harm would be caused, as opposed to bodily harm. Further, I consider the evidence a little too unclear to justify a conclusion that Mr Van Ling, unarmed, encouraged or procured the others to do grievous bodily harm. The Crown's outline describes evidence providing sufficient grounds for the jury inferring a common plan to assault, but not for inferring that on arrival there was a plan the intended or probable consequence of which was that Mr Prophet would suffer grievous bodily harm. Indeed, the outline does not even actually argue that; or that Mr Van Ling was shown to have used a weapon, or uttered words or done acts of encouragement to the doing of grievous bodily harm after arrival. Instead, the submission rests on

the circumstances of the arrival without actually specifying what inferences those support.

[47] In *M v R* (at CLR 494) the High Court reminded that:

> "It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by Court of Criminal Appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If…there is a significant possibly that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence".

I think there is a significant possibility that Mr Van Ling was not a party to a plan which would make him criminally responsible for the grievous bodily harm suffered by Mr Prophet and would order that that conviction be set aside.

[48] This is not the end of the matter. The decision in *R v Barlow* (1996-1997) 188 CLR 1 (at CLR 10 and 11) renders Mr Van Ling liable to conviction for the offence of unlawful assault occasioning bodily harm. Acts were committed by those who struck Mr Prophet rendering them liable to punishment for that offence, the commission of which was very much a probable consequence of the common plan described by the Crown and established by the evidence.

[49] Section 668(2) of the *Criminal Code* permits this court to substitute, for a jury's verdict, a verdict of guilty of another count on which the jury could have found an appellant guilty on the indictment presented, and on which it appears to this court the jury must have been satisfied of the facts which proved the appellant guilty of that count. Mr Van Ling was charged, in the alternative to the count of doing grievous bodily harm, with a count of unlawful assault occasioning bodily harm while armed, and while in company. The jury was not required to return a verdict on that count, but on the evidence led was entitled to be, and must have been, satisfied of facts proving him guilty of unlawful assault occasioning bodily harm to Mr Prophet while in company. I would substitute a conviction for that offence in place of the conviction for doing grievous bodily harm.

[50] With respect to the appropriate sentence the matters discussed by Williams JA in *R v Nagy* [2003] QCA 175 at [4] – [10], and [41] – [42], make a sentence of 18 months imprisonment appropriate in this matter. It has the aggravating feature of what was for all intents and purposes an invasion of Mr Prophet's home by a group. Matters mitigating Mr Van Ling's criminality include the apparently considerable amount of alcohol he had consumed, the ongoing acrimony and use of force between himself and Mr Prophet earlier that day and for which Mr Van Ling was not shown to be criminally responsible, his absence of prior convictions, and that he was not proven to have used a weapon.

[51] I would order that the conviction for doing grievous bodily harm be quashed and there be substituted instead a conviction for assault occasioning bodily harm while in company, and that the sentence of four years imprisonment originally imposed be set aside and be replaced by a sentence of 18 months imprisonment.

[52] **MUIR J:** I agree with the reasons for judgment of Jerrard JA and with the orders he proposes.