SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brannigan; R v Green* [2009] QCA 271
PARTIES:	**R** **v** **BRANNIGAN, Joshua James** (appellant/applicant) **R** **v** **GREEN, Shannon David** (appellant/applicant)
FILE NO/S:	CA No 327 of 2008 CA No 338 of 2008 SC No 1149 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2008
JUDGES:	Keane and Muir JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 327 of 2008:** **1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused** **In CA No 338 of 2008:** **1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant Brannigan convicted of causing grievous bodily harm with intent to do grievous bodily harm as aiding appellant Green – where appellant Brannigan argued that jury could not be satisfied that he

knew appellant Green was armed with knife that Green used to stab complainant – whether verdict unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where complainants gave evidence against appellants – where appellant Green challenged reliability of complainants' evidence – whether jury entitled to rely upon complainants' evidence – whether verdict unreasonable

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – ACTS INTENDED TO CAUSE OR CAUSING DANGER TO LIFE OR BODILY HARM OR SERIOUS INJURY – OTHER OFFENCES INVOLVING GRIEVOUS BODILY HARM OR SERIOUS INJURY – GENERALLY – where appellants convicted of unlawfully striking pursuant to s 317(f) of the *Criminal Code* 1899 (Qld) – where striking must be committed with "any kind of projectile or anything else capable of achieving the intention" – where appellant Brannigan struck complainant with a baseball bat – whether striking with baseball bat fell within terms of offence in s 317(f)

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where offence involved appellant stabbing complainant – where appellant Green claimed stabbing not a willed act – where trial judge directed jury with respect to willed acts – whether directions to jury insufficient

CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – SERIOUS OR VIOLENT OFFENDER – where appellants convicted of causing grievous bodily harm with intent to cause grievous bodily harm – where offence declared to be a serious violent offence – where appellant Green argued particular offence was not "beyond the norm" for offence of that kind – whether sentencing judge erred in making declaration

Criminal Code 1899 (Qld), s 1, s 7, s 23, s 317

Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, cited
Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113; [2003] NSWCA 91, cited
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited

Murray v The Queen (2002) 211 CLR 193; [2002] HCA 26, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Mikaele [2008] QCA 261, cited
R v Mowatt [1968] 1 QB 421, cited
R v Nguyen [2006] QCA 542, cited
R v Payne [1970] Qd R 260, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited

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[1] **KEANE JA:** On 14 November 2008 each of the appellants was convicted upon the verdict of a jury of one count of causing grievous bodily harm with intent to do grievous bodily harm to the complainant, John Scott (count 2 on the indictment), and one count of striking the complainant, Gregory Williams with a baseball bat with intent to maim, disfigure or disable him (count 3). Each of the appellants was acquitted of a charge of attempted murder in relation to the complainant Scott (count 1).

[2] On 25 November 2008 each of the appellants was sentenced to eight years and six years imprisonment in respect of the offences in count 2 and count 3 respectively. The sentences were to be served concurrently. The offence in count 2 was declared to be a serious violent offence in relation to each of the appellants.

[3] In relation to Brannigan, a period of 79 days was declared as time served under the sentence. In relation to Green, a period of 36 days was declared as time served.

[4] Each of the appellants seeks to appeal against his convictions and the severity of his sentence. There are differences in the grounds of appeal agitated by the appellants. It is necessary to summarise the Crown case and the evidence adduced at trial before entering upon a discussion of the appellants' various grounds of appeal.

The Crown case at trial

[5] Some time before 1.00 am on the morning of 1 October 2006 the complainants, Scott and Williams, were fishing from a pontoon near the Grand Hotel on Marine

Parade at Labrador on the Gold Coast. The pontoon was situated on the water in front of, but across a road and a park from, a high-rise apartment building. The complainants had been drinking and had smoked cannabis before going fishing.

[6] The appellants were sitting on the verandah of a mid-level ocean-facing unit in the apartment building. They had consumed a large quantity of alcohol and some cocaine during the afternoon and evening.

[7] The two groups began to exchange insults. Williams gave evidence that there was a lot of swearing and abuse for about 20 or 30 minutes. The abuse escalated, and the appellants threatened physical violence to the complainants, suggesting that they (the appellants) would come down to the complainants and "cut [their] throats". Williams said that he "ended up telling them to, 'Bring it on.'" Shortly afterwards, the complainants were attacked near the pontoon.

[8] The appellants armed themselves, Green with a knife and Brannigan with a baseball bat, and went downstairs from their unit, crossed the road and across the park towards the complainants. Brannigan proceeded to assault Scott with the baseball bat rendering his left arm useless. He then assaulted Williams with the baseball bat causing him to suffer a broken arm and to fall off the pontoon into the water.

[9] Scott suffered two stab wounds. While Scott was not able to say how he came to suffer these wounds, it is apparent that they must have been inflicted in a confrontation with Green.

[10] The case for the Crown was that each of the appellants was criminally responsible for the offence committed by the other. The Crown relied upon s 7 of the *Criminal Code* 1899 (Qld) ("the *Criminal Code*") which provides relevantly:

> "(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> …"

The evidence

[11] Mr Comiskey, an independent witness, was in another unit across the road from the pontoon at the time of the fracas. Mr Comiskey gave evidence that he was woken up by loud shouting at about 1.00 am on the morning in question. He went out onto his deck and heard loud shouting coming from the pontoon on the other side of the road. Shortly thereafter, he saw two men walking briskly across the road towards the pontoon. A heavily built man, evidently Brannigan, carrying a baseball bat was in front, and the other man was off to the side and behind him. The two men on the pontoon ran back up the ramp and the two groups met at the sea wall. One of the men who had been fishing went north and the other went south.

[12] Mr Comiskey saw that the fisherman who went north was attacked by the man carrying the baseball bat. Mr Comiskey heard "three or four vicious blows … it was like cracking of bones and the noise that was coming out of him was just fierce". The fisherman then fell off the sea wall into the sea.

[13] Mr Comiskey could not see what precisely happened to the other two men because his view was obscured by trees or shadows. He could, however, see that there was a fight going on. He then saw the two men who had originally come from across the road walk back across the road in the direction of the Grand Hotel. Mr Comiskey then saw one of the fishermen, evidently Scott, emerge from the shadows bleeding badly.

[14] Scott said that when he saw the appellants coming towards him, he walked towards them and said: "We want no trouble. We're just fishing." At this point the fellow with the baseball bat said: "Yeah, you do", and hit him "virtually instantly". Scott gave evidence that this rendered his left arm useless. Scott saw that the other man was carrying a knife, and he obtained a fishing knife from his fishing tackle and approached Green. Scott was unclear about how he came to be stabbed. In his evidence, Scott said:

> "… I've run back down to the jetty to my knife and got my knife and come back up the jetty and the other fellow with the knife also was there waiting for me.
>
> …
>
> Do you know what the fellow with the knife was doing when the man with the baseball bat first struck you?-- Standing behind him, not very far. Like, they both come up together. They were probably two, three foot at the most apart between them.
>
> …
>
> Now, you accept, do you, that one fellow was behind the other?-- Yes.
>
> …
>
> Both the fellows were coming across the road, like, in jogging.
> One was behind the other?-- Yeah, well they weren't running side by side like going [across] the line together.
>
> …
>
> The fellow closest to you was the bigger fellow?-- Yeah, with the baseball bat, the dude with the knife was right behind him.
>
> …
>
> That is why I am suggesting to you that it would have been very difficult for you to have seen a second man, especially if you were on the pontoon?-- No, I say I was closer than that so it was a lot easier to see than that. I visibly – I seen one had a baseball bat and one had

> a knife and they were right - the dude with the knife was right behind the dude with the baseball bat and I am 100 per cent certain of that.
>
> …
>
> … the two men came down from that building and the man with the baseball bat entered the park first?-- He was the one in front of the other one. He was the one leading the run, we'll call it.
>
> I am going to suggest to you that they did not run across the road?-- They might have walked very, very quickly.
>
> That he entered the park and the other man was maybe 5 to 10 metres behind?-- Could someone tell me what 5 to 10 metres is? I've heard it a couple of times.
>
> …
>
> From where you are over to that wall, just to the right of her Honour?-- I disagree. I think it was closer.
>
> All right?-- I don't know how much closer, but I know it was closer.
>
> All right. That-----?-- When they got to me, the dude with the knife was right behind him, but they both stood still virtually at the same time. So that means they arrived together."

[15] Mr Baker, another eye witness in a nearby building, said that he called out that he had called the police. Green and Brannigan then quickly left the scene.

[16] Scott was left bleeding profusely from stab wounds to the chest. But for the arrival of a paramedic, Mr Goldner, Scott would have died. Scott's left arm was broken in three places. Scott's DNA was found in blood on the baseball bat.

[17] Williams' evidence was that he saw the appellants come running out of their building. He saw that one of them had a baseball bat. He said that he did not see a knife and indeed he did not see the second attacker after he was struck with the baseball bat. Williams said that after he was struck with the baseball bat, he fell into the sea. His assailant helped him out of the water. The evidence was not clear as to whether the assault on Williams continued after he got out of the water.

[18] Williams suffered a badly broken left forearm and bruising to his nose and face. It is likely that he would have suffered serious head injuries had he not raised his hands to ward off blows from the baseball bat.

[19] The appellants tried to leave the scene by taxi. They were delayed at the taxi rank by staff from the Grand Hotel. At this point, a knife fell out of Brannigan's trouser leg. Green then picked it up and forced it down a drain. The knife was later retrieved, and was found to have Scott's blood on it.

[20] When the police arrived, the appellants were uncooperative and wanted to leave the scene. An ambulance was arranged to take them to hospital for medical treatment. While the ambulance was taking the appellants to hospital, Brannigan insisted that the ambulance stop and let them out. The ambulance stopped, and the appellants made off. Police later located them at Marine Parade, Southport where they were arrested.

[21] Brannigan did not give evidence at trial but there was evidence that he suffered a 3 cm laceration to the right lower chest wall at the back. This laceration required sutures.

[22] Green's case was that he and Brannigan went down to the park to give Scott and Williams a scare. There was no plan to attack the complainants, and the injuries suffered by them occurred after they had attacked the appellants. The appellants had no intent to kill or maim and were entitled to rely upon self-defence and accident. It was argued that Green only produced a knife in self-defence after Scott had produced his knife. In the ensuing scuffle, Scott slashed Green's face and the wounds suffered by Scott were inflicted in self-defence while both men were scuffling on the ground. Alternatively, the knife held by Green came into contact with Scott only by accident. Green suffered a 3 cm laceration to the left cheek and two lacerations to the back of the left shoulder.

[23] Green gave evidence at trial. The following exchange is relevant:

> "Well, after [you] heard these words of, 'Bring it on.', can you tell me what you did?-- We thought we'd given them a bit of a scare.
>
> Mmm?-- I don't think Josh wearing a top at the time. He said he was going to get some clothes on and grab a bat. When he's done that, I thought I'd get a knife. Got a knife, put it down the side of my shorts and headed down in the lift.
>
> …
>
> … Once you got outside, were you and Mr Brannigan walking together or was one in front of the other, or can you describe it at all?-- Walked through the foyer together. As we've exited the doors, we've walked along the pathway. I was just a few – a few metres behind.
>
> …
>
> All right. So you entered the park?-- Yes.
>
> And followed him down the path?-- Yes.
>
> …
>
> Right, and would you be able to estimate how far in front of him – sorry – of you was he?-- Roughly three to five metres.
>
> …
>
> And you said you stopped. Did – how far away from him did you stop?-- Three to five metres.
>
> Right. So as you were walking through the park … were you three to five metres behind him?-- Yes.
>
> …
>
> So far as the knife was concerned, where did the knife remain when – once you got into the park?-- Still down the side of my shorts.

…

Did you ever have the knife in your hand at that stage?-- No. Not at that stage.

So it was down the side of your pants?-- Yes.

…

Did you at any stage take the knife out of your board shorts?-- Yeah, I did.

When was that?-- When he was running at me.

…

You say that you went across the road with it in your pants?-- When I first arrived at the park.

Yes?-- Yeah.

Could you tell us how you put it in your pants?-- I was wearing boxer shorts underneath my shorts and they are elastic, so tight to the waist, down the side there.

So you had the knife in your boxer shorts walking across?-- Yes."

[24] Green's evidence was that he brandished the knife only after he saw that Scott was armed with a knife. The following exchange is relevant:

"So while he's coming towards you, you've then produced your knife?-- Yes.

…

You're sure you didn't have the knife in your hand in the first place? -- No.

I suggest to you that you did. You can agree with me or disagree with me?-- No. I don't agree.

…

You are not out of control in a rage or anything like that?-- No.

You weren't going to go over there and give them a good touch up as I understand your evidence? I use that term touch up in the colloquial sense, you weren't going to bash them with the baseball bat and knife?-- No.

…

It was really quite a calculating and deliberate series of steps you took over a few minutes to go all the way down in the lift to cross the road?-- Say that again, sorry.

It was really quite a deliberate and calculating measure on your part. You - someone had to put a shirt on, get clothes or something, fetch weapons, put them in your clothes and you had to go down the lift and it took a few minutes?-- Right.

It wasn't a mad frantic rush to get down there?-- I don't know.

Well, can you have a think about it or is this something you can't quite recall?-- I can't remember.

It might have been a mad frantic rush to get down there?-- I can't remember.

…

You're sure you didn't have the knife in your hand in the first place?
-- No.

I suggest to you that you did. You can agree with me or disagree with me?-- No. I don't agree.

Okay, that's all right. What I'm going to suggest to you, Mr Green, is that your plan was to scare nobody, right? Your plan, yours and Mr Brannigan's plan, was to go down there and teach these two men a lesson for swearing at you?-- Definitely not.

…

And the pair of you assaulted Mr Scott together?-- No.

You either assisted Mr Brannigan by standing there with a knife, when no-one seems to know how Mr Scott ended up with these holes in his chest. You seem to think that it was as a result of rolling around on the ground with him; is that right?-- Could have been."

[25] Green was tested in cross-examination with the proposition that he intended to kill or cause grievous bodily harm:

"… Are you able to assist us at all with your memory and its problems that you've indicated about how Mr Scott came to have injuries to his arm?-- No.

Are you able to assist us at all how the baseball bat came to have so much of … Mr Scott's blood all over it?-- No.

Right. What I'm going to suggest to you, Mr Green, is that both you and Mr Brannigan assaulted Mr Scott together?-- No.

That your intention, because of his audacity to produce a knife, escalated from one of intending to do serious bodily harm, more correctly grievous bodily harm, to one of attending (sic) to kill him?-- No, definitely not.

And the pair of you assaulted Mr Scott together?-- No.

You either assisted Mr Brannigan by standing there with a knife, when no-one seems to know how Mr Scott ended up with these holes in his chest. You seem to think that it was as a result of rolling around on the ground with him; is that right?-- Could have been.

All right. You can only proffer that as a possibility?-- I'd say so.

All right. And you say it wasn't your intention to hurt him at all?-- No. Didn't attempt to go down and kill him.

All right. I'm also going to suggest to you, Mr Green, that towards the end of this little fracas, a man by the name of [Baker] yelled out, 'I'm going to call the police.', and from that moment you and Mr Brannigan ran away?-- No.

That didn't happen?-- No.

You walked away?-- That's right.

Why did you walk away?-- Why?

Yes?-- To get help.

For you?-- Yes.

What about this man, Mr Scott - or can't you remember?-- What do you mean what about him?

Well, the evidence is, as I understand it, Mr Green, that Mr Scott was bleeding profusely?-- That's right.

Almost immediately after he was stabbed?-- I don't know. I didn't see it.

You didn't see it?-- I didn't see him bleeding profusely.

You didn't see him bleeding?-- No. I've heard the evidence and I'm not saying that didn't happen.

Right. Did you see him lying on the ground?-- No.

What I'm suggesting to you, Mr Green, is the reason you walked away is you didn't care?-- No.

You wanted him dead?-- Definitely not. No, I didn't.

And you walked away?-- No. I didn't.

And left him there to die?-- A hundred per cent no.

All right. Can you remember what happened to Mr Williams at this time towards the end-----?-- No.

-----just before you walked away?-- No."

[26] Brannigan's case was that he and Green did not attack Scott together, and that he was in no way involved in the stabbing of Scott by Green. The injury to Williams by Brannigan was said to have been inflicted in self-defence.

Brannigan's appeal against conviction

[27] The learned trial judge summarised for the benefit of the jury the elements of the Crown case under s 7(1) of the *Criminal Code*. In the course of that summary, her Honour said:

> "Fourth, that when the perpetrator committed the offence with the knife or the bat, the other defendant had actual knowledge or expectation of the essential facts of that offence. That is all the essential matters which makes the acts done with the knife a crime of attempted murder or grievous bodily harm with intent or - and you must be satisfied that the aider had actual knowledge of the intention on the part of the perpetrator.
>
> One of the relevant matters you would need to be satisfied about is whether Mr Brannigan ever knew Mr Green had a knife …"

[28] On Brannigan's behalf it is argued that the jury could not have been satisfied beyond reasonable doubt on all the evidence that Brannigan knew that Green was armed with, and intended to use, the knife with which Green stabbed Mr Scott.[1]

[29] Mr Farr SC, who appeared with Ms Hillard of Counsel on Brannigan's behalf, focused upon the last sentence in the excerpt from the learned trial judge's directions set out above and submitted that the evidence did not allow the jury to infer beyond reasonable doubt that Brannigan knew that Green had a knife on his person when they left their apartment or, indeed, at any time up to the stabbing of Scott. In the absence of such evidence Brannigan could not, so it is said, have been convicted of aiding Green in the stabbing of Scott.

[30] In my respectful opinion, the part of her Honour's direction on which Mr Farr has focused was unduly favourable to Brannigan in suggesting that it was incumbent on the Crown to prove that Brannigan knew that Green was armed with a knife.

[31] It may be accepted that the evidence did not permit an inference beyond reasonable doubt that Brannigan knew, at some time before Scott was stabbed, that Green was armed with a knife, but the jury were nevertheless entitled to conclude beyond reasonable doubt that Brannigan aided Green in his assault on Scott, first by his own attack on Scott with the baseball bat, and then by his attack on Williams, and that Brannigan did so intending that Scott should suffer grievous bodily harm.

[32] It is readily apparent from Green's evidence that there was some discussion between Green and Brannigan that they should give the complainants "a scare". On Brannigan's behalf it is emphasised that there is no evidence of the precise terms of that discussion. Nor is there evidence that Brannigan was told of, or saw, the knife which Green took with him when they set out to give the complainants "a scare".

[33] While there is a paucity of direct evidence of the oral agreement between Brannigan and Green as to their intentions towards the complainants, there are a number of points which do emerge from the evidence which establish Brannigan's criminal

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1 Cf *M v The Queen* (1994) 181 CLR 487 at 501, 502.

responsibility for the stab wounds suffered by Scott. The first of these points is that the jury were in no way bound to accept that Brannigan's intention was merely to "scare" the complainants.[2] In this respect, the appellants' actions speak louder than mere words. Before the appellants sallied forth from their apartment Brannigan armed himself with a weapon which if actually used against either of the complainants was obviously apt (in the words of the definition of "grievous bodily harm" in s 1 of the *Criminal Code*) to inflict "bodily injury of such a nature that, if left untreated, would … be likely to cause permanent injury to health".

[34] Secondly, as must have been abundantly clear to Brannigan, he and Green were engaged in an attack upon two people: each of the complainants was to be attacked. So far as Brannigan was concerned, his initial attack on Scott aided Green to attack Scott because his blows with the baseball bat diminished the will and ability of Scott to resist the attentions of Green while Brannigan turned his attention to Williams. And Brannigan must have known that Green's confrontation with Scott was necessary to ensure that Brannigan would be free to proceed with his attack on Williams without interference from Scott.

[35] Thirdly, Mr Comiskey's description of the battering inflicted by Brannigan on Williams was an eloquent statement of Brannigan's intention in relation to the level of harm to be inflicted on each of the complainants. There was no evidence which would justify drawing any distinction between Brannigan's intentions towards the complainants in this regard. So far as Brannigan is concerned, the level of violence which he deployed against Williams is good evidence of his intention as to the level of harm to be inflicted on Scott. Brannigan left the further implementation of that intention, so far as Scott was concerned, to Green.

[36] Fourthly, the evidence was that after the assault on Scott, Brannigan had possession of the knife which, it may be inferred, stabbed Scott. How Brannigan came into possession of the knife was unexplained, but the uncontradicted evidence was that he did have the knife. The only possible inference is that he had taken possession of the knife after Scott had been stabbed by Green. There is no suggestion that he expressed any dismay or dissatisfaction that Green had used the knife on Scott.

[37] Fifthly, neither of the appellants showed any inclination to desist from the attack on the complainants. Each of the appellants went about his work with a will. There is no hint in the evidence that either of them expressed any reservation or reluctance as to the level of violence employed in that attack. To adopt the language of Gleeson CJ, Gummow, Heydon and Crennan JJ in *Darkan v The Queen*,[3] the best evidence of what each intended was what actually happened in his unprotesting presence.

[38] For these reasons, I consider that the jury were entitled to conclude beyond reasonable doubt that Brannigan intended that harm consisting of bodily injury likely to cause permanent injury to the health of Scott should be inflicted on Scott in the attack carried out by himself and Green.

[39] That being so, the circumstance that he could not be shown to have known that Green went to the attack armed with a knife is beside the point. I would reject Brannigan's appeal against his conviction.

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2 *Darkan v The Queen* (2006) 227 CLR 373 at 403 – 406 [102] – [105].

3 (2006) 227 CLR 373 at 404 [105].

Green's appeal against conviction

[40] Mr Walker SC, who appeared with Mr Kimmins of Counsel, advanced a number of grounds for challenging Green's conviction. I will deal with them in turn.

Unreasonable verdict

[41] It is argued on behalf of Green that the evidence of the complainants was so unreliable that, in the case of Scott, no weight could be placed on his evidence and, in the case of Williams, no reliance should be placed on his evidence save where it is corroborated by other evidence.

[42] There can be no doubt that there were aspects of the evidence of Scott and Williams which were unsatisfactory. Scott acknowledged a developing forgetfulness, and Williams acknowledged that he had been taking medication for depression. Further, they had been drinking and smoking cannabis. There were aspects of the events where they had no recollection or were vague. Indeed, Scott was unable to explain how he came to be wounded.

[43] On the other hand, it is to the credit of the complainants that they did not seek to fill the obvious gaps in their recollections. Further, their evidence draws general support from the evidence of Mr Comiskey. Most importantly, the nature of the wounds suffered by Scott, the absence of a plausible suggestion as to how the wounds could have been accidentally inflicted, and the fact that it was Green's knife which inflicted those wounds, all afford support for the Crown case against Green.

[44] It is argued on Green's behalf that Green's evidence was uncontradicted, and that the jury could not have been satisfied beyond reasonable doubt that the stabbing of Scott was unintended or accidental. But Green's evidence on these crucial points was, at best, vague, and the nature of Scott's injuries was strongly suggestive of a stabbing, rather than an accidental laceration in the course of a scuffle on the ground. There were two stabbings: one was 10 cm deep. The jury were entitled to regard the proposition that both the stab wounds might have been inflicted by some unwilled act of Green as he and Scott rolled around on the ground as testing their credulity too far.

[45] Even on Green's own evidence there is no reason to doubt that he had ample opportunity to flee from Scott's advance had he not been minded to persist with his attack. In light of the fact that Green brought a knife to the fight, and persisted in pressing home his attack, it was open to the jury to conclude that Green intended the obvious consequences of using the knife. The jury were entitled to reject, as vague and unconvincing, Green's explanation for the stabbings and to conclude that the injuries which were inflicted on Scott were precisely the kind of injury which Green intended to cause when he pressed home his attack with the knife he had brought to the confrontation.

[46] The jury were amply entitled to reject Green's evidence and to conclude beyond reasonable doubt that:

(a) Green was aiding Brannigan in the latter's attack upon Scott with a baseball bat;
(b) after Scott was struck by Brannigan with the baseball bat, Scott suffered wounds in the course of a skirmish with Green;
(c) Green was armed with a knife which he brought to the fight;
(d) Green brought the knife to the fight intending to use it;

(e) the wounds suffered by Scott were inflicted by stabbing: the wounds were not in the nature of lacerations or shallow cuts: there were two wounds, each of which was serious and the more serious was at least 10 cm deep.

[47] In these circumstances, the jury were entitled to conclude that Green stabbed Scott intending to cause him grievous bodily harm.

[48] For the same reasons, the jury were entitled to reject the defences of accident and self-defence.

Green was not a participant in Brannigan's attack on Williams

[49] It is argued that Green was not criminally responsible for Brannigan's attack on Williams pursuant to s 7(1)(b) or (c) of the *Criminal Code*. I would reject this argument.

[50] Green accompanied Brannigan in his attack on the complainants and persisted in the prosecution of that attack even when he saw that Scott had armed himself. There can be no reasonable doubt that Green was aiding Brannigan in his use of the baseball bat on the other complainant. That is because Green's attack on Scott meant that Scott could not attempt to come to Williams' aid against Brannigan.

There was no case to answer in relation to count 3

[51] The next ground of appeal agitated on behalf of Green depends on the interpretation of s 317 of the *Criminal Code*. Section 317(a) and (f) relevantly provides:

> "Any person who, with intent–
>
> (a) to maim, disfigure or disable, any person …
>
> …
>
> (f) unlawfully strikes, or attempts in any way to strike, any person with any kind of projectile or anything else capable of achieving the intention …
>
> …
>
> is guilty of a crime, and is liable to imprisonment for life."

[52] The argument put here on behalf of Green (but not by Brannigan) is that he could not be guilty of the contravention of s 317(a) and (f) with which he was charged because he did not strike Williams with a projectile, his baseball bat not being a projectile.

[53] This argument can succeed only if the reference to "anything else" in s 317(f) is read *eiusdem generis* with "projectile", that is to say, that "anything else" must be taken to refer to some "thing else" in the nature of a projectile.

[54] This is a particularly unattractive argument: the striking proscribed by s 317(a) and (f) is a striking with "any kind of projectile" or "anything else" capable of achieving the intention of doing those things mentioned in paragraphs (a) to (d). The ordinary and natural reading of these words is that a proscribed striking might occur with some kind of projectile or something which is not a kind of projectile: if the "anything else" in s 317(f) is not a projectile it is difficult to see that the words have any operation at all.

[55] Spigelman CJ in *Deputy Commissioner of Taxation v Clark*[4] adverted to the danger of attempting to apply the *eiusdem generis* rule of statutory interpretation where

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[4] (2003) 57 NSWLR 113 at 142 – 144 [125] – [130].

only two "things" are listed in the statute under consideration. In such a case there is little scope for identifying a characteristic shared by the "things" specified which establishes the relevant genus of which the things are said to be members. In this case, of course, the "thing" described by the words "anything else" must logically belong to a different genus of things from projectiles because these words expressly refer to something other than **any kind** of projectile. It is simply nonsense to read s 317(f) as if it spoke of "any kind of projectile or anything else being a kind of projectile …".

The adequacy of directions in relation to "willed acts"

[56] The learned trial judge directed the jury that the defence case for Green was that the stabbing of Scott by Green was not a willed act by Green, but occurred in the course of the struggle as they were "wrestling and rolling around after they faced off with the knives".

[57] Section 23 of the *Criminal Code* provides, so far as presently relevant:

> "(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that occurs by accident."

[58] Mr Walker argues that the learned trial judge's directions were not sufficient to instruct the jury that if the stabbings, as opposed to their serious consequences for Scott, occurred independently of the exercise of Green's will then he was not criminally responsible for the stabbings.

[59] The learned trial judge said:

> "Section 23 provides that subject to the provisions of the Code in relation to negligent acts or omissions a person is not criminally responsible for an act or omission which occurs independently of the exercise of a person's will or an event which occurs by accident. So you can clearly see there are two parts to section 23.
>
> Firstly, an act which occurs independently of the exercise of a person's will and secondly, an event which occurs by accident.
>
> The defence says that the stabbing by Mr Green of Mr Scott was something that was not a willed act by Mr Green but just occurred in the course of the struggle as they were wrestling and rolling around after they faced off with the knives. You have heard the Crown's argument about the injuries that were inflicted and reference was made to the depth of the wound and angle of the injury and the medical evidence and the location of the wounds near vital organs.
>
> The question as to whether it is a willed act is a factual matter for you. The defence submits that the Crown has not negatived that the occurrence of a willed act or event which occurred by accident, namely the serious injuries, beyond reasonable doubt. That is what the defence says. They say the Crown has not negatived the occurrence of an unwilled act or an event which occurred by accident. That is the serious injuries beyond reasonable doubt.

> An event can only be regarded as an accident if the defendant neither intended it to happen nor foresaw that it could happen and if an ordinary person in the defence's position at the time would not reasonably have foreseen that it could happen.
>
> It is settled law that an event occurs by accident within the meaning of that section, if it was a consequence which was not, in fact, intended or foreseen by the defendant and would not reasonably have been foreseen by an ordinary person. The prosecution must prove that the defendant intended the event in question should occur or foresaw it as a possible outcome or that an ordinary person in the position of the defendant would reasonably have foreseen the event as a possible outcome. In considering the possibility of an outcome you should exclude possibilities that are no more than remote and speculative.
>
> The evidence raises for your consideration the possibility that neither the defendant nor an ordinary person could reasonably have foreseen the stabbing would occur when he faced Mr Scott with the knife.
>
> If the defendant did not intend or foresee the stabbing of Mr Scott as a possible outcome of his actions and if an ordinary person in the position of the defendant would not have foreseen that as a possible outcome of those actions the defendant would be excused by law and you would have to find him not guilty. It is not for the defendant to prove anything. Unless the prosecution proves beyond reasonable doubt that an ordinary person in the position of the defendant would have foreseen the serious injury as a possible outcome of his actions or that the defendant intended or foresaw that, you must find him not guilty."

[60] Mr Walker argues that these directions were not apt to alert the jury to the possibility of a verdict of not guilty if the act, namely the stabbing of Mr Scott, rather than the event, namely the serious consequences which he suffered as a result of the stabbing, was not shown beyond reasonable doubt to have been a willed act: the stabbing was the act; the serious injuries suffered by Scott were the event. Mr Walker argues that the directions which were given were apt to conflate unwilled stabbing and accidental wounding of the kind suffered by Mr Scott. Mr Walker argues that her Honour's directions might have led the jury to proceed on the footing that a defence of unwilled acts was not available if serious injury as a result of "rolling around on the ground" was foreseeable. This direction may have been sufficient in relation to the defence of accident, but, so it is said, it was not sufficient to alert the jury to the Crown's burden of negativing the possibility that the stabbing was an unwilled act.

[61] I should say immediately that I do not accept the proposition that her Honour's directions to the jury did not distinguish between an unwilled act, and an accidental event being the serious consequences of that act.

[62] In any event, in this case a failure to draw this distinction was of no moment. In the course of argument in this Court, Mr Walker was invited to give an example of a factual scenario, raised as a possibility on the evidence in this case, in which the

negativing of accident in respect of Mr Scott's stab wounds would not also negative an unwilled act on Green's part in terms of his manipulation of his knife. Mr Walker frankly acknowledged that he could identify no such scenario. Neither can I.

[63] On the evidence in this case, I find it impossible to surmise that something might have occurred between Green and Scott which might have answered the description of an unwilled act, so far as the stabbing of Scott was concerned, which would not also have been an accident so far as concerns the serious injuries suffered by Scott.[5] In any given case, the evidence may give rise to an issue as to accident in terms of the causing of an event which is separate from an issue as to an unwilled act, but that is not always so. Thus in *Murray v The Queen*,[6] Gummow and Hayne JJ regarded the issue as to whether there was an unwilled act, or an event occurring by accident, as one issue for the jury separate from an issue as to the intention with which the appellant acted. It must be emphasised that the learned trial judge's duty was to instruct the jury in the law to be applied to the facts as the jury might find them on the evidence. The trial judge was not giving a lecture in scholastic philosophy: her Honour was addressing the issues which arose on the evidence. Her Honour's direction was sufficient for the purpose for which it was required having regard to the evidence and the **real** issues in this case.[7] No doubt it was for this reason that experienced counsel who appeared for the appellant at trial did not seek a redirection.[8]

[64] In my respectful opinion, the learned trial judge's directions were sufficient to ensure that the jury understood that if they were not satisfied beyond reasonable doubt that the entry of Green's knife into Scott's body did not occur as an unwilled act on Green's part, then they should find him not guilty of the offence charged in count 2 on the indictment.

[65] Accordingly, I would reject this ground of appeal.

Sentence

Brannigan

[66] Brannigan was 33 years old at the time of the offence and 35 years of age at the date of sentence. His only relevant criminal history is that he was fined in 2005 for the possession of a knife.

[67] Mr Farr accepts that if Brannigan's conviction in respect of count 2 stands, his sentence in respect of counts 2 and 3 must also stand. Having regard to the view I have taken in this regard, his application for leave to appeal should be refused.

Green

[68] Green was 30 years old at the time of the offence and 32 years old at the date of sentence. He has a minor history of street offences none of which are of relevance.

[69] So far as sentence is concerned, Green's principal complaint is with the making of the serious violent offence declaration in respect of count 2. It is argued that the offence was not such as could be said to be "beyond the norm" for an offence of this

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5 Cf *Stevens v The Queen* (2005) 227 CLR 319 at 330 – 331 [29] – [30].
6 (2002) 211 CLR 193 at 207 – 208 [41].
7 *Stevens v The Queen* (2005) 227 CLR 319 at 327 [18].
8 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13.

kind.[9] Accordingly, so it is argued, the serious violent offence declaration should not have been made.

[70] There can be little doubt that it is fair to say that the offence charged in count 2 answers the description of a serious violent offence; but it may be accepted that the consequences attracted by a declaration to that effect, in terms of the non-parole period which ensue from that declaration, mean there must be some features of the case which warrant taking that course as a matter of discretion. It may be said, for example, that offences involving the inflicting of grievous bodily harm may occur more or less spontaneously;[10] and where that is the case the proper exercise of the discretion to declare the offence to be a serious violent offence may lead to a refusal to make the declaration. The present was not such a case.

[71] There was an element of premeditation and persistence in Green's attack on Scott. Green made a decision to bring a knife to the fight with the obvious intention of using it. Green's motivation for the attack was frivolous; the attack was distinctly gratuitous. These circumstances mark this offence, as sufficiently beyond the norm to call for special denunciation and personal as well as general deterrence.

[72] It was within the discretion of the learned sentencing judge to decide to declare the offence in count 2 to be a serious violent offence. It is also to be noted that her Honour expressly imposed a sentence at the bottom of the appropriate range because of the making of the declaration.[11]

Conclusion and orders

[73] The grounds of appeal have not been made out.

[74] Each appeal against conviction should be dismissed.

[75] No reason has been shown to warrant the grant of leave to appeal against sentence.

[76] Each application for leave to appeal against sentence should be refused.

[77] **MUIR JA:** I agree with the reasons of Keane JA and the orders he proposes.

[78] **WHITE J:** I agree with the orders proposed by Keane JA for disposing of these appeals against conviction and the applications for leave to appeal against sentence and with his Honour's reasons for doing so.

[79] I particularly agree with his Honour's observations at [63] that, in effect, a trial judge is charged with assisting the jury in their task of applying the relevant law to the facts as they find them to have been by identifying the real issues in the case. It is not helpful to articulate every theoretical possibility which a fanciful view of the evidence might suggest.[12]

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9 Cf *R v McDougall and Collas* [2007] 2 Qd R 87 at [19].

10 Cf *R v Mikaele* [2008] QCA 261 at [32].

11 *R v Nguyen* [2006] QCA 542 at [12] – [16].

12 *R v Payne* [1970] Qd R 260 per Lucas J at 261; *R v Mowatt* [1968] 1 QB 421 per Diplock LJ at 426.