SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cornwell* [2009] QCA 294
PARTIES:	**R** **v** **CORNWELL, Jason Darryl** (appellant)
FILE NO/S:	CA No 110 of 2009 DC No 19 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	6 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2009
JUDGES:	Muir and Fraser JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Verdicts of the jury set aside** **3. Retrial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – DISCHARGE OF JURY – where appellant convicted, after trial, of unlawful assault causing bodily harm while in company – where victim impact statement sworn by the complainant was not provided to the appellant until after the jury had begun deliberating – where appellant requested the primary judge discharge the jury as the statement contained prior inconsistent statements upon which the complainant might have been cross-examined – where application was refused – whether opportunity which the appellant was denied "could have made a difference to the verdict" CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – where appellant sentenced to six months imprisonment wholly suspended with an operational period of 18 months – whether sentence manifestly excessive in all the circumstances

Criminal Code 1899 (Qld), s 590AB(1), s 590AB(2), s 590AH(2)(c)(i)(A)

Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, applied
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, applied
R v HAU [2009] QCA 165, applied
R v Rollason and Jenkins; ex parte Attorney-General [2008] 1 Qd R 85; [2007] QCA 65, cited

COUNSEL: F Richards for the appellant
M R Byrne for the respondent

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

[1] **MUIR JA: Introduction**
The appellant and his half-sister, Melissa Cornwell, were convicted on 24 April 2009 after a trial in the District Court of unlawful assault causing bodily harm while in company with each other. The offence of which Miss Cornwell was convicted included the aggravating circumstance of being armed with an offensive weapon. They were each sentenced to six months imprisonment wholly suspended with an operational period of 18 months.

[2] The appellant appeals against conviction and sentence. Before considering the grounds of appeal it is useful to summarise the evidence.

[3] The appellant and the complainant were acquaintances. The complainant's wife, Mrs Morris, from time to time sought refuge with the appellant's mother, Mrs Cornwell. The complainant objected to Mrs Morris residing with Mrs Cornwell. Mrs Morris gave evidence that at times the complainant would come to Mrs Cornwell's residence and scream out abuse. A week before the subject incident, the residence was severely damaged by fire. Mrs Cornwell swore that the complainant telephoned her and said in the course of the ensuing conversation, "Your house is on [fire]. …Your house is burning down" and laughed. Mrs Morris was absent at the time of the fire and on her return moved back in with the complainant.

[4] On 31 January 2007 the appellant, Mrs Cornwell, and Miss Cornwell, travelled from Noosa, where the appellant lived, to Mrs Cornwell's residence. On the return journey they stopped at the Gunalda Hotel where an altercation took place between the complainant, Mrs Cornwell and Miss Cornwell. The complainant then angrily drove off without Mrs Morris but taking his two young sons with him. That was Mrs Cornwell's evidence. The complainant's version of his departure was that he drove off after the appellant and Miss Cornwell approached his car aggressively. The primary judge, in his sentencing remarks, said he was, "quite certain that [the complainant] offered insults to [Mrs Cornwell and her family] at the Gunalda Hotel, which [the appellant] returned."

[5] In response to a telephone conversation between the complainant and the appellant, which the primary judge said he was reasonably confident was initiated by the

complainant, the appellant and Miss Cornwell drove to the complainant's residence late on the afternoon of 31 January.

[6] The complainant went outside the residence to meet the appellant and Miss Cornwell. There is evidence that the appellant and the complainant struck each other at the same time and that the complainant fell to the ground and was disarmed, punched and kicked by the appellant. The primary judge held, implicitly, that Miss Cornwell struck the complainant an indirect blow with a hammer which may have caused either an injury to his elbow or his ear. The complainant suffered relatively minor injuries including: abrasions over his right elbow; a bruised and swollen left ear; a small puncture wound over his left elbow, a small abrasion over his left forearm and a small abrasion over the right eyebrow. No other bruising was noticed by the senior medical officer at the Gympie Hospital who saw the complainant on the evening of the incident. In the medical officer's opinion the complainant would have suffered mild to moderate discomfort as a result of the injuries. She also gave evidence to the effect that the complainant required no sutures and that ambulance records did not suggest the existence of concussion or unconsciousness.

[7] The primary judge concluded that "… the violence and the degree of injury was embellished and exaggerated by [the complainant], for his own reasons." The primary judge also found that the complainant was "ready for violence … ready to fight, and had armed himself with at least the pinch-bar."[1] The primary judge considered it probable that he had another potential weapon as well and noted that the complainant's two children had "described a shifting spanner."

[8] The prosecution led eye witness evidence of the incident from the complainant and other eye witnesses, the complainant's two sons aged nine and eleven respectively, and neighbours, Pamela Lisson, Helen Benstead and Kristine[2] West. The appellant gave evidence. Mrs Morris was the only other witness called in the defendants' case. The primary judge directed the jury in relation to consent, self-defence and aiding in self-defence.

[9] It is now convenient to consider the first ground of appeal.

Ground (a) - the appellant was denied a fair trial because the Director of Public Prosecutions failed to disclose the victim impact statement and covering letter before the complainant's evidence

[10] The victim impact statement was sworn by the complainant on 17 November 2008 and the letter which apparently accompanied it bore a Director of Public Prosecutions date stamp of 13 December 2008. It was not provided to defence lawyers until after the jury had been deliberating for more than half a day. In the statement, the complainant said:

> "…
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> 2. My neighbors helped care for my two children after I was assaulted. I recall being kicked and punched continually by [the appellant] and being hit continually with a claw hammer and rocks by Melissa Cornwell at the same time. I remember putting my arm around my children trying to protect them.

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1 The complainant described it as a "standard jemmy bar".

2 Also spelt "Christine" in the transcript of proceedings.

> 3. I remember vomiting after the attack and being assisted by my neighbors and loosing (sic) consciousness. I recall there was a lot of blood.
>
> 4. I experienced terrible pain in my head, face and body from the assault that took weeks to heal. I still suffer from the trauma of this assault. I have felt a change in my physical health since the assault where I have been given pain relief by my doctor.
>
> …
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> 6. After I was placed in jail my children were taken by their mother to police; to do a police report concerning the 31st January 2007 assault. This new false claim for assault for 16th February 07, was added onto my childrens (sic) statement as part of what happened on the 31st January 2007. This did not make sense to me along with other false information.
>
> 7. My son … aged 9 years told me his mother Natasha told him to lie to the police or they will be put back into foster care. My son told me he was afraid by this threat and did what he was told.
>
> 8. I recall after returning from hospital after the assault on the 31st January 2007, I felt ill and in a lot of pain and remember going straight to bed. I was heavily medicated and was bedridden for approximately two weeks.
>
> …"

[11] The covering letter referred to a raid on the complainant's family home in Mareeba by a government SWAT team of some 13 men who aimed guns at the complainant in front of his two small children. It also alleged that the complainant had been wrongfully imprisoned.

[12] The primary judge described the statement as "… a grossly exaggerated document" and it was not tendered in the sentencing proceedings.

[13] Counsel for the appellant requested that the primary judge discharge the jury on the basis that the statement contained prior inconsistent statements upon which the complainant might have been cross-examined. A like application was made by Miss Cornwell's counsel. The applications were refused.

[14] Counsel for the appellant submitted that the statement contains assertions not previously raised by the complainant or contradicted by other evidence. For example, in the statement the complainant asserted that:

(a) Miss Cornwell also hit him with rocks;
(b) he lost consciousness;
(c) he was in terrible pain after the assault; and
(d) he was heavily medicated and bedridden for two weeks.

[15] It is submitted on behalf of the appellant that the loss of the opportunity to cross-examine the complainant in relation to matters raised in his statement and covering letter "might well have influenced the result of the trial." In written submissions it was argued:

> "Given that the Appellant's trial involved alternative versions of events, and given that these versions in part came from the evidence of the complainant and the Appellant; cross-examining the complainant on his … statement and … letter may well have influenced the result of the trial. Such cross-examination might have been expected to go both to credit, and material matters such as the mechanism and extent of injury.
>
> This is especially so, in light of the … judge's observations, that in evidence '… Mr Morris exaggerated both the degree of violence and the – substance of the injuries. As he does in that victim impact statement.' "

[16] Counsel for the respondent submitted that although issues of credit were important, the matters in the undisclosed material "were not such that there was a real possibility that the appellant suffered a forensic disadvantage of importance … there [was] no significant possibility that a jury acting reasonably would have acquitted the appellant had they been aware of the additional material."

[17] Section 590AB(1) of the *Criminal Code* 1899 (Qld) provides, "This chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth."

[18] Subsection (2) provides, "Without limiting the scope of the obligation, in relation to disclosure in a relevant proceeding, the obligation includes an ongoing obligation for the prosecution to give an accused person full and early disclosure of … all evidence" upon which the prosecution intends to rely and of "all things in the possession of the prosecution … that would tend to help the case for the accused person."

[19] The respondent, properly, accepts that the statement and covering letter should have been disclosed under s 590AH(2)(c)(i)(A) of the *Criminal Code*.[3] The failure was said to have been the result of an oversight and the appellant did not claim to the contrary.

[20] The following discussion of relevant principle appears in the reasons of Keane JA in *R v HAU*:[4]

> "The view has been taken in Queensland that non-compliance by the prosecution with its obligations of disclosure is 'such a serious breach of the presuppositions of the trial as to deny the application of the … proviso', at least where the material not disclosed 'might well have influenced the result of the trial'.
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> In *R v Spizzirri* Pincus JA, with whom de Jersey CJ and White J agreed, said that '[u]se of documents or information contained in them in an attempt to discredit the principal Crown witness is a legitimate forensic purpose'.
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> In this case, as in *R v Spizzirri*, the defence should have been afforded the opportunity to raise with the complainant in cross-

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3 *R v Rollason and Jenkins; ex parte Attorney-General* [2008] 1 Qd R 85 at [21].

4 [2009] QCA 165 at [37] – [40].

> examination the differences in her accounts of events. Whether or not that opportunity should be availed of was, as Pincus JA said in *R v Spizzirri*, a matter for decision by 'counsel for the defence'. Pincus JA went on to say:
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> > 'The real difficulty in acceding to the argument that the verdict should be set aside is that there is absolutely no reason to doubt that the appellant's knife pierced the complainant's abdomen, causing grievous bodily harm, and the appellant's evidence about the way in which this happened is implausible. Nevertheless, it seems to me impossible to conclude that access to and cross-examination on the subpoenaed documents could not have made a difference to the verdict.'
>
> As the decision in *R v Spizzirri* shows, where documents are not disclosed in breach of this obligation, this Court cannot ignore even a relatively slim possibility that the defence has been forensically disadvantaged by the non-disclosure. It is enough that the opportunity which the defence was denied 'could have made a difference to the verdict'." (footnotes deleted)

[21] In order to assess whether defence counsel's opportunity to use the statement and covering letter may have made a difference to the jury's verdict, it is necessary to have regard to the relevant evidence.

[22] The case against the appellant appeared reasonably strong. The complainant, the complainant's two sons, and two residents who witnessed all or part of the incident, gave evidence to the effect that the appellant and Miss Cornwell attacked the complainant and that the appellant punched and kicked the complainant. Another female neighbour swore to having seen the appellant kick the complainant. No eye witness to the incident, other than the appellant, gave evidence for the defence. Nevertheless, as is often the case when witnesses give evidence of what they heard and observed of a fracas, there were significant differences in the various accounts. One common thread, however, which is of benefit to the appellant for present purposes, is the evidence that the complainant had armed himself with a pinch-bar and possibly a shifting spanner prior to going to meet the Cornwells outside his residence.

[23] One of the complainant's sons swore that the complainant and the appellant walked towards each other and that the complainant struck the appellant "around his arm area" with the crowbar at about the same time as the appellant tried to kick the complainant. He also remembered the appellant telling his father to "put the weapons down". He swore that the appellant punched the complainant in the face when he was on the ground but that he did not see the appellant kick the complainant in that position.

[24] The complainant's other son gave this version of events. He recalled his father swearing over the telephone some time before the appellant and Miss Cornwell arrived. His father grabbed the pinch-bar (which he described as a crowbar) and a shifting spanner and walked from his house to the driveway. The appellant ran at his father who went to hit the appellant with one of these items, missed and dropped

it. He said, inconsistently with the evidence of all other eye witnesses, that the appellant was armed with a hammer. He recalled the appellant calling out to his father to "Drop the weapons". When his father dropped to the ground after being struck by the appellant he still had the pinch-bar in his hand. The appellant kept punching the complainant when on the ground.

[25] Ms Lisson, a neighbour of the complainant, saw the appellant and Miss Cornwell's car pull up outside the appellant's residence. After a loud argument with the complainant the appellant got back into the car. The complainant started to walk away, but Miss Cornwell alighted from the car holding an object. Miss Cornwell, accompanied by the appellant, then ran to the complainant and attacked him. Ms Lisson could then see Miss Cornwell striking the complainant with a claw hammer and the appellant kicking him. In cross-examination Ms Lisson accepted that in her statement to police officers she had said nothing of the complainant being punched or kicked by the appellant.

[26] Ms Benstead lived across the road from the complainant. She recalled the appellant's car pulling up, him walking up the road towards the complainant and the two men "yelling and screaming at one another". She noticed that the person accompanying the appellant was carrying a hammer. The appellant went to a gate where he and the complainant argued and then:

> "… the younger guy walked up and went to go past the big guy and he tried to grab her – grab the arm … and tried to stop, but she somehow pulled away from him, and once she got in front of him he walked ahead of her; walked to the end of [the complainant's] gate and – and hit him; knocked him down, and then they both started – one started hitting him with the hammer and the other one started kicking him … while he was on the ground."

[27] She observed that the complainant had objects in his hands, one of which was "maybe a golf stick". Whilst this was taking place she didn't see the complainant's sons. She saw "… the hammer being flogged … into him, and then the big guy laying boots into his – his ribs and his belly." She then heard a next door neighbour calling out and one of the complainant's sons calling out, "Leave my Daddy alone. Leave my Daddy alone." In cross-examination she accepted the description of the kicks as "full-blooded …" with boots.

[28] Mrs Benstead said that after the incident the complainant "was staggering all over the place", bleeding from the "side of his head and his arm" and vomiting.

[29] Mrs West's house adjoined the complainant's. She heard "a lot of yelling" and then the boys screaming out words like, "Don't hurt my daddy, don't kill my daddy." She saw the complainant lying on his back on the ground with his hands held up to shield himself. She observed Miss Cornwell swinging at the complainant with something in her hand and the appellant kicking the prone complainant. She said that the appellant "sunk the boot in a couple of times before he left" saying as he departed, "He [f-ing] deserved that." She said that after the incident the complainant "was really wonky and in shock … and then he started vomiting and carrying on."

[30] The complainant swore that after a loud altercation between himself on the one hand and the appellant and Miss Cornwell on the other, the latter went back to their car

and started to get in. Suddenly, however, they ran at him. He picked up the pinch-bar and hit the appellant with it at about the same time as the appellant struck him, knocking him to the ground. He was getting "kicked and kicked" by the appellant "Everywhere". He was punched mainly in the head but couldn't say how many times he was kicked and punched. He saw Miss Cornwell with the hammer, held up his arms to protect himself and was struck mainly on his arms but also on his "head, some places on [his] head, down near [his] ear and stuff like that." He gave little evidence about the extent of his injuries and their effect on him but recalled "lots of blood every where" and vomiting. In cross-examination, when it was put to him that it was suggested that he was disorientated at the hospital as a result of the alcohol he had consumed earlier that day, he denied this. He did not assert that he had been knocked unconscious but said, "There's periods I can't remember too much of what went on."

[31] Mr Wakelin drove the appellant and Miss Cornwell to the complainant's residence in Miss Cornwell's car. As he drove past the complainant's residence he observed and heard the complainant yelling out with a machete in one hand and another object in the other.

[32] The question for this Court is not, as the respondent's submissions assert, whether the jury may have acted differently had they been aware of the content of the undisclosed material. It is whether the inability of counsel for the appellant to make forensic use of that material "could have made a difference to the verdict".

[33] There is little doubt that the undisclosed material could have been used to challenge the reliability of the complainant's evidence but it is more difficult to see how the use of the material could have materially weakened the prosecution case.

[34] The complainant's evidence on the trial of his injuries and their effects was understated in comparison with his assertions in the statement. It is thus arguably unlikely that the jury would have less confidence in the complainant's evidence on these matters because he chose under oath to be restrained about matters he had, perhaps, tended to exaggerate in the statement.

[35] The evidence of all other eye witnesses, other than the appellant, supported the conclusion that the appellant and Miss Cornwell launched an attack on the complainant. The appellant's own evidence was that he and Miss Cornwell drove to the complainant's residence after being told by the complainant that if the appellant went to his house the complainant would disclose the identity of the person who had burnt down Mrs Cornwell's house. This invitation was said to have been extended in a telephone call by the complainant to the appellant not long after the incident at the hotel and after another telephone conversation in which the complainant had been abusive to the appellant and in which he had called the appellant's mother "a fat pig". This story must have struck the jury as unlikely.

[36] The appellant said that on arriving at the complainant's residence he alighted from the car, walked up the driveway as the complainant was coming down, concealing something behind his back and "looking very suspicious". The appellant raised the offer by the complainant to disclose the identity of the arsonist and said, "… if you want a fight drop your weapons". He turned and started to walk back to the car. Miss Cornwell called out, "He's coming at you". The appellant turned around and saw the complainant with the raised bar, poised to strike.

[37] It may be deduced from the above summary that there was evidence, apart from that of the complainant's, which, if accepted, would have entitled the jury to find as they did. I earlier mentioned one piece of evidence which supported the appellant: the evidence that the complainant had armed himself before the appellant's arrival at his residence. The appellant was unarmed at all times. The medical evidence established that the reports of multiple hammer blows, punching to the hand and body and vigorous kicking with boots were extremely exaggerated or mistaken. There was thus an appreciable degree of uncertainty about the reliability of the evidence of the prosecution witnesses.

[38] It is the province of juries to resolve such uncertainties in criminal cases. Nevertheless, the state of the evidence is relevant because it makes it difficult to conclude that the opportunity to consider, inquire into and cross-examine on the statement and letter could not have made a difference to the verdict.

[39] The principal protagonists in the incident were the complainant and the appellant. Apart from Miss Cornwell, who did not give evidence, they were the persons able to give accurate evidence of what actually happened. It is possible that the cross-examination on the late produced documents may not have assisted the appellant's case or may even have harmed it. But it is also possible that the documents, with or without the aid of matters uncovered by further enquiry, may have caused the jury to take an adverse view of the complainant's character and reliability. The documents would have assisted defence counsel to paint him as a somewhat paranoid individual, prone to exaggeration who lived on society's fringe and subscribed to conspiracy theories. Firm rejection of the complainant's evidence may have promoted a more ready acceptance of the appellant's evidence and, particularly, parts of it which would not have seemed credible unless there was acceptance that the complainant was capable of odd behaviour.

[40] I therefore conclude that the appellant was denied an opportunity to conduct his case in a way which "could have made a difference to the verdict" or which may have created "a significant possibility that the jury, acting reasonably, would have acquitted the appellant", to use the test advanced by counsel for the respondent on the authority of *Gallagher v The Queen*[5] and *Mickelberg v The Queen*.[6] These cases were cited for the reason that they contain discussion of the test to be applied for the reception of fresh evidence on appeal. The principles discussed in the above passage from Keane JA's reasons in *R v HAU* have more relevance to the issue for determination but, whichever test is applied, the result is the same.

[41] The appeal must therefore be allowed.

Ground (b) – The primary judge erred in allowing a s 93A video tape and audio tape to be taken into the jury room, without warning the jury of the danger of over emphasising that evidence, and without reminding the jury of the cross-examination and re-examination of those witnesses

[42] Video and audio recorded interviews with the complainant's sons were admitted into evidence pursuant to s 93A of the *Evidence Act* 1977 (Qld). The children were cross-examined via closed circuit television but the cross-examination and re-examination were recorded digitally in the normal way and transcripts of the evidence were produced. The primary judge permitted the video and audio

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5 (1986) 160 CLR 392, 397, 399, 407.

6 (1989) 167 CLR 259, 273, 292, 301 – 302.

recordings of the children's police interviews to go into the jury room together with an indexed transcript. He directed the jury that the evidence of the children was to be treated in the same way as the evidence of other witnesses and that it did not have any additional or less probative weight as a result of being presented in electronic form.

[43] The appellant complains that he did not, however, warn the jury of the danger of over-emphasising the children's recorded evidence and did not specifically remind the jury of the cross-examination and re-examination of the children. Neither defence counsel took issue with this course at the trial. However, it is submitted there could have been no forensic advantage in not objecting and the failure to object should be regarded as an oversight.

[44] During the sentencing hearing the primary judge said of the complainant's sons:

> "I mean they're both impressive little fellows. I think it's likely the jury concentrated on their evidence, rather than any of the adults. I think that's what I would have done. I mean their evidence was a lot more consistent with the general impression that I had, and of course their memories were much fresher than everyone else's."

[45] It was submitted, on the strength of these observations, that there was a real risk of the jury over-emphasising the children's evidence-in-chief "resulting in imbalance". That imbalance, it is argued, should have been addressed by a warning by the primary judge and by a direction to consider all of the trial evidence and, specifically, the children's cross-examination and re-examination. It is further contended that while the jury may be inclined to play a video or audio tape, it might be far less inclined to read a transcript of cross-examination and re-examination.

[46] In my view, this ground lacks substance. In discussion with counsel in the absence of the jury, the primary judge discussed the materials that should go into the jury room. He described the transcripts of the records of interview as "woefully inaccurate." The prosecutor agreed with this description. Defence counsel did not disagree. In fact, counsel for the appellant on the trial himself suggested that the tape recordings go into the jury room together with "the trial transcript". That was, with respect, a sensible course to follow as counsel for the respondent submitted the tape recordings effectively took the place of the transcripts of their evidence and the trial judge directed that the evidence of the children was to be treated the same as the evidence of other witnesses.

[47] How, in the context of this trial, the fact that some evidence was in the form of video and audio tape resulted in a lack of fairness and balance which prejudiced the accused was not successfully explained. The appellant's suggested method of removing the perceived lack of fairness arising from the provision of the recordings was that the cross-examination of the children be read out. But there are obvious forensic reasons why defence counsel on the trial may have thought this a singularly unprofitable exercise from the defence point of view.

[48] There is no merit in this ground of appeal.

Conclusion

[49] For the reasons given in relation to ground (a) I would allow the appeal, set aside the verdicts of the jury and order a retrial. Whether it would be appropriate or desirable to subject the child witnesses to further court appearances is no doubt a

matter to which consideration will be given, having regard to the nature of the alleged offence and the resulting injuries.

[50] **FRASER JA**: I agree with the reasons of Muir JA and with the orders proposed by his Honour.

[51] **JONES J:** I respectfully agree with the reasons given by Muir JA and with the orders he proposes.