SUPREME COURT OF QUEENSLAND

CITATION:	*R v Le* [2009] QCA 343
PARTIES:	**R** **v** **LE, Huy Tran** (appellant)
FILE NO/S:	CA No 137 of 2009 DC No 1987 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2009
JUDGES:	Keane, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. Appellant's conviction on count 2 of the indictment be set aside; and** **3. A new trial be ordered in respect of that count.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – POWERS AND DUTIES OF PROSECUTION AS TO CALLING OF WITNESS AND PRESENTING EVIDENCE – UNRELIABLE AND HOSTILE WITNESS – where appellant convicted, after a trial, of one count of unlawfully doing grievous bodily harm (count 1), one count of unlawful wounding (count 2) and one count of robbery with personal violence in company with another person (count 3) – where complainant had identified the appellant as his assailant in a photoboard identification and gave a detailed statement to police – where complainant at trial stated he had not told the truth in his police statement – where primary judge declared complainant a hostile witness – whether primary judge erred in so declaring CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where prosecutor remarked in closing that the complainant's evidence was "somewhat unusual" and instructed the jury not to speculate about why the complainant was no longer prepared to identify his assailant – whether prosecutor impermissibly

encouraged the jury to take into account the bad conduct of the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGES – CONTROL OF PROCEEDINGS – DISCHARGE OF JURY – where a witness, during his evidence-in-chief, revealed he had met the appellant previously in gaol – whether primary judge erred in refusing to accede to the appellant's counsel's application to discharge the jury after the prejudicial evidence was given

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where primary judge, in relation to count 2, directed the jury as to the applicability of s 23 *Criminal Code* 1899 (Qld) – whether primary judge posed an erroneous test for the application of that section

Criminal Code 1899 (Qld), s 23
Evidence Act 1977 (Qld), s 17

McLellan v Bowyer (1961) 106 CLR 95; [1961] HCA 49, cited
R v Hadlow [1992] 2 Qd R 440, considered
R v Hall [1986] 1 Qd R 462, considered
R v Thompson [1964] QWN 25, considered
Timbu Kolian v The Queen (1968) 119 CLR 47; [1968] HCA 66, applied

COUNSEL: S M Ryan for the appellant
M B Lehane for the respondent

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

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by Muir JA in this matter. I agree with his Honour's reasons and with the orders proposed by his Honour.

[2] **MUIR JA: Introduction**
The appellant was convicted after a trial in the District Court of one count of unlawfully doing grievous bodily harm to Kelvin Amaya (count 1), one count of unlawful wounding of Brian Cao (count 2), and one count of robbery with personal violence to Kelvin Amaya while armed with a dangerous weapon in company with another person (count 3).

[3] He appealed against his convictions. Before considering the grounds of appeal, it is useful to summarise the evidence.

The evidence of James Cochrane

[4] The evidence of Mr Cochrane was to the following effect. On 5 July 2007 he worked at Woolworths until 8.30 pm. At about 9.30 pm, when at home, he was phoned by

another Woolworths employee, John La, who asked him for his help in "scor[ing] some heroin". Mr Cochrane rang Kelvin Amaya (the complainant), whom he had known for about a year. The complainant said that he would come to Cochrane's residence at Lynelle Street, Sunnybank Hills. Mr Cochrane then was phoned by Mr La to say that he was at the Caltex service station next to Mr Cochrane's house. He went to the service station, where he found Mr La in a car with two other "gentlemen" who he didn't recognise. He got in the car and was driven back to his house. The car was parked in the street under a street light just past the driveway to the house.

[5] Mr Cochrane was standing near the car, smoking, when he saw the complainant arrive in a "smallish sedan". It parked on the other side of the road. Mr Cochrane and one of his companions, who was an "… Asian gentleman [who had been] introduced to [him] as Ricky" walked across the road to the other vehicle. They got into the car, where "there was a lot of screaming and shouting and basically [Ricky] demanded a wallet and money in a pretty full-on tone from [the complainant] and just started stabbing at him" with what "appeared to be a dark-coloured knife."

[6] There was also a demand for a gold chain. The complainant attempted to "… retrieve his wallet from his pocket and remove his watch." There were two other people in the car with the complainant. Mr Cochrane recognised them as Steffany and Brian, who he had met through the complainant. Mr Cochrane pulled "Ricky" away from the complainant and Mr La told the complainant to go home, while "Ricky" and the other man ran to their car and drove off. Mr Cochrane identified the complainant's assailant, "Ricky", on a police photoboard the following day. He identified Mr La on another photo board. In cross-examination, Mr Cochrane said that when speaking to the complainant on the telephone he didn't mention drugs but asked the complainant "if he wanted to pop over, have a burger, have something to eat …". In cross-examination, Mr Cochrane agreed that he didn't "have a good look at … Ricky" and that he had a doubt as to whether he had correctly identified the complainant's assailant. In re-examination, Mr Cochrane said that he had got out of the car in front of his house, as did "Ricky", and they both smoked a cigarette. When he was smoking, he and "Ricky" "might have been [on] the same side" of the car.

The complainant's evidence

[7] The complainant's evidence was to the following effect. On 5 July 2007 he was in company with friends, Brian Cao, and Steffany Huezo. Miss Huezo and the complainant were preparing to go out and collect methadone from a chemist when Mr Cochrane called. He arranged with Mr Cochrane to call by his house. When the complainant's car stopped outside Mr Cochrane's house, Mr Cochrane and another person approached the car. Mr Cochrane spoke to him and introduced the other person as "Ricky". Mr Cochrane and "Ricky" shook hands. "Ricky" pulled out a knife and stabbed the complainant, who was still sitting in his car with his seatbelt on. "Ricky" demanded his wallet and the complainant was stabbed again. A person other than "Ricky" and Mr Cochrane took the keys out of the ignition and "threw them out". Mr Cao and Ms Huezo were still in the car.

The evidence of Brian Cao

[8] Mr Cao's evidence was to the following effect. The complainant and Ms Huezo had picked up their methadone doses on 5 July 2007 and were planning to go to Calamvale when the complainant received a telephone call from Mr Cochrane. They drove to Mr Cochrane's house and parked. A person of slim build, wearing a dress shirt and dark-coloured trousers, aged about 25 and caucasian-looking, crossed the road and

started stabbing the complainant through the window of the car. The person yelled out, "Give me your fucking jewellery. Give me your fucking wallet." Mr Cao was sitting in the front seat of the car beside the complainant whilst this attack was going on. He tried to push the assailant's arms out of the window and received a cut on the middle finger of his right hand. He thought the cut was made by the knife being wielded by the complainant's attacker. The wound, Mr Cao thought, required about six stitches. As this was happening, the car across the street moved off, performed a U-turn and stopped at right-angles to the kerb in front of the complainant's car. Two people got out of the car, one went behind the person doing the stabbing and then the three of them got into the other car, reversed and drove off.

The evidence of Steffany Huezo

[9] Ms Huezo said that on 5 July 2007 the complainant and Mr Cao picked her up from her house and drove to Mr Cochrane's residence. Mr Cochrane and a male person got out of another car parked across the street and approached the car she was in. The other male "… was Asian … wearing like a long shirt – dressed, like, in, like, dressy pants and a long shirt … [had] clean-cut hair … [which] was fairly short [and] a bit spiky … [and was] … probably just average size." The Asian male was introduced by Mr Cochrane as "Ricky". "Ricky" and the complainant shook hands and said hello. There was a brief conversation. "Ricky" walked back towards the other car, which did a U-turn so that it faced the car she was in. It had its headlights on high beam. It was then "all pretty full on". "Ricky" demanded the complainant's wallet, threatened to stab him and proceeded to do so. The complainant gave "Ricky" his wallet and the other car drove off.

[10] On 7 July 2007, Ms Huezo identified on a photoboard two persons similar in appearance to the person who attacked the complainant. She did not get "much of a good look" at the complainant's attacker.

The evidence of Jaron Schoon

[11] Mr Schoon said in evidence-in-chief that on 5 July 2007 he was at his grandparents' house at Boondall in company with others "abusing drug substances" and that "it was one big blur". A video tape dated 6 July 2007 made by a police officer interviewing Mr Schoon was played. In the video Mr Schoon was shown identifying the appellant as his "mate Chad". He had little recollection of the events of the evening of 5 July but recalled the appellant returning his grandfather's car to Boondall, he thought, on the night of 5 July. He said that when he arrived at his grandparents' house, his clothes were strewn everywhere in his room and his grandfather's Camry was missing. He telephoned the appellant and "a few other friends" asking for the car back. The appellant said that he should have his car back. The car was returned, Mr Schoon thinks, by the appellant. In cross-examination, Mr Schoon admitted that the appellant stayed at his grandparents' house on the evening of 5 July and that it "could have been anyone that was borrowing the car".

The evidence of Jennifer Thomson

[12] Jennifer Thomson was a friend of Mr Schoon's in July 2007. Mr Schoon was sick and Ms Thomson visited a doctor with him. Between 8 and 9 pm they went to Mr Schoon's grandparents' house at Boondall, arriving there at about 10 pm. They noticed items scattered around the back verandah and a car parked out the back. Mr Schoon found a note on the back veranda and started making telephone calls. Later in the evening, Mr Schoon's grandparents' blue Camry was returned to the residence. Its registration number was 848-HKG. That was the registration number of the car identified by Ms Huezo as the one in which the complainant's assailant had departed after the incident.

[13] The person who returned the car was "Chad". She "knew he was Vietnamese" and recalled he had "dark hair [and a] short stocky build". Shortly after Chad arrived, another car driven by "Tim", a Caucasian, drove up. Chad and Tim entered the house and asked Mr Schoon if they could stay. They stayed the night and departed early the next day.

Admissions by the defence

[14] It was admitted by the defence that at 2.25 am on 5 July 2007, the appellant was in the blue sedan, registration number 848-HKG, at Chevron Island on the Gold Coast, and that on 6 July 2007, at 8.05 pm, the sedan was located by police at 103 Zillmere Road, Boondall. It was further admitted that:

(a) A DNA analysis of the car identified the complainant's blood on the outside front passenger's side door handle, the outside rear passenger's side door handle and the outside front passenger's side window; and

(b) A purple lighter located under the front passenger's seat had the appellant's DNA on it.

Grounds 1 and 2 - the primary judge erred in declaring the complainant a hostile witness and allowing cross-examination of him by the crown prosecutor

[15] The second ground is essentially a particular of the first ground. It is that the application that the complainant be declared a hostile witness and the judge's declaration to that effect were made prematurely and without sufficient basis, depriving the appellant of the opportunity of securing an acquittal.

[16] The complainant had identified the appellant, a person of obviously Asian appearance, as his assailant in a photoboard identification on 6 July 2007. The complainant described his assailant in a statement given to a police officer on 12 July 2007:

> "… as being male, mid 20s, tanned complexion, Asian appearance, thin build, 175 centimetres tall, clean-shaven, black hair. At the time this person was wearing black dress pants and a white long-sleeve shirt with pin stripes, I notice that he had his sleeves rolled up at the time and his shirt tucked in."

[17] In his evidence-in-chief, the prosecutor showed the complainant the photoboard on which he had made his identification of the appellant. The appellant's photo was numbered 1. The prosecutor, without objection, said:

> "… you indicated, 'The guy that introduce (sic) himself as Ricky to me on the night of the stabbing, the guy that stabbed me is number 1 on this page here.' Now, if you can look at that photoboard C, can you just tell the jury what is written on the rear of that document?"

The answer was "'Number 1.' My name and – the date."

[18] The prosecutor then asked, "When you were speaking to the police officer that has been recorded on the video, were you speaking the truth or not at that time?" The answer was, "No."

[19] This exchange then occurred:

> "What was untruthful about what you said?-- Well, like I said to you before, it was really dark and I can't see anything without my glasses and there was a lot of blood on my glasses so the reason why I identified the people that I did was because that's who I was told had been - but I never saw.

> In terms of the ethnicity of the stabber, are you able to say, and I'll run through some categories. Are you able to say whether he was----"

[20] Defence counsel then objected. Argument ensued in the absence of the jury and the prosecutor applied to have the complainant declared hostile.

[21] The prosecutor submitted, in effect, that having regard to his identification of an Asian person on a photoboard containing photos of persons of Asian extraction, his "certain identification of the stabber" and his detailed description in his statement to police of the "ethnicity and appearance of the stabber", it should be concluded that the witness had "turned hostile".

[22] After hearing submissions by defence counsel, the primary judge intimated that he proposed to accede to the application. Defence counsel asked if he could consider the transcript overnight and argument continued the following morning in the absence of the jury. In the course of the further argument, the prosecutor referred to the complainant's evidence on a committal hearing in which he had identified his assailant by reference to "dark skin, thin build, Asian looking" and by description of his height and clothing. The prosecutor also referred to another committal proceeding in which he submitted that the complainant had given an even more detailed description of his assailant. That description also included a statement that the assailant was "Asian looking".

[23] In his submissions, defence counsel referred to evidence on a previous trial of the appellant for the subject offences to show that the complainant had resiled from his earlier identification of the appellant. Defence counsel submitted that there was no proper basis for finding that the complainant was not willing to tell the truth. This drew the following response from the primary judge:

> "I mean, my assessment is he's changed his story and he knows he's changed his story. I don't know what his motivation is but it includes, in my opinion, that he's not desirous of telling the truth about what he could say about his assailant this week."

[24] The primary judge then ruled in favour of the prosecutor's application.

[25] The prosecutor then proceeded to question the complainant by reference to his statement to the police and evidence at a committal hearing on 21 April 2008.

[26] Counsel for the appellant submitted that the primary judge's declaration of hostility was fundamentally flawed, as:

(a) The determination of the application to have the witness declared hostile should have been made only after a *voir dire*; and

(b) The primary judge made the declaration without forming the view that the witness was not desirous of telling the truth.

[27] The latter contention is based on the judge's observation that:

> "… I think I should accede to the application. It may resolve the way Mr Cochrane's did that he says he's now uncertain. He might have been mistaken before. I propose to accede to the application."

[28] The judge made the above observations before the matter was adjourned on the afternoon of 27 May and before the further extensive argument on 28 May. On

27 May the primary judge had expressed the view, in effect, that it was unlikely that the witness had become confused about or had forgotten the ethnicity of his assailant. In the course of argument on 28 May, the judge remarked, "Isn't the key thing the 'Asian looking' … Because you don't get stabbed like that every day … You're unlikely to ever forget whether the person who did it to you was Asian looking or not." Defence counsel also submitted to the effect that the primary judge could only declare the witness hostile if he could find that the witness was deliberately withholding material evidence or unwilling to tell the whole truth. The primary judge, in response to that submission, remarked, "And here [the prosecutor's] got both."

[29] Counsel for the appellant referred to an observation of Ryan J in *R v Hadlow*,[1] in which his Honour, after a discussion of authorities on the circumstances in which a witness could be declared hostile, said:[2]

> "It may be that if his Honour had formed the opinion that the witness was hostile simply on the ground that she had made a prior inconsistent statement, without giving her an opportunity to explain the inconsistencies, his determination would have been improperly made. But that was not the position in this case. His Honour stated explicitly that he formed the view that she was not desirous of telling the truth in respect of three matters where her statement was inconsistent with her evidence before the jury by his observation of her, that is, by her demeanour in the witness box. He was, in my opinion, entitled on that ground to make his determination without giving her the opportunity on a voir dire to explain why the inconsistencies existed."

[30] Particular reliance was placed on this passage from the reasons of Cooper J in *Hadlow*:[3]

> "If the Crown seeks to prove the witness hostile in this way [on the basis of a prior inconsistent statement] it will be necessary that the witness be cross-examined on the alleged prior inconsistent statement on a voir dire in the absence of the jury. The purpose of the cross-examination is to establish as an objective question of fact whether the witness is hostile (*McLellan v. Bowyer* at 103). As part of the process to ascertain that fact a trial judge will allow cross-examination by the opposing party in order to establish that the evidence given before the court is truthful and to explain away or repudiate the prior inconsistent statement (*R. v. Hayden and Slattery* [1959] V.R. 102 at 102-103; *Price v. Bevan* at 92, 97). If the witness satisfies the court that he or she is in fact willing to tell the truth for the advancement of justice no declaration as a hostile or adverse witness will be made notwithstanding the prior inconsistent statement."

[31] The above passage from Cooper J's reasons, with which de Jersey J concurred, cannot be taken as a prescription of a mandatory procedure which must be followed invariably before a witness who has made a prior inconsistent statement can be declared hostile. If that proposition needs authority, it can be obtained in part from these observations of Cooper J which appear on the same page of his reasons as the passage just quoted:

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1 [1992] 2 Qd R 440 at 443.
2 [1992] 2 Qd R 440 at 443.
3 [1992] 2 Qd R 440 at 449.

> "A witness may be declared hostile or adverse without reliance being placed on any prior inconsistent statement. Traditionally this was done by reference to the witness' demeanour, conduct in the witness box, the answers given to non-leading questions, choice of language or hostility of mind (*McLellan v. Bowyer* at 103; *Greenough v. Eccles* (1859) 5 C.B.N.S. 786 at 804; 141 E.R. 315 at 322; *Russell v. Dalton* (1883) 4 L.R. (N.S.W.) 261 at 265, 266; *R. v. Hunter* [1956] V.L.R. 31 at 36-37; *R. v. Lawrie* at 514)."

[32] In *McLellan v Bowyer*,[4] Dixon CJ, Kitto and Taylor JJ said at 103:

> "But it has been settled for many years that although hostility, or adverseness, may appear from the demeanour of the witness, this is not the only factor to which a court may have regard. In particular, it may have regard to previous inconsistent statements made to a party (*Dear v. Knight* and *Russell v. Dalton*) or to a party's attorney (*Faulkner v. Brine*) or upon oath in a court of bankruptcy (*Pound v. Wilson*) or to an officer of police (*Reg. v. Hunter*)." (footnotes deleted)

[33] This is not a case in which a witness did no more than contradict evidence previously given by him in a statement. As the foregoing discussion of the evidence shows, the complainant had seen his assailant at very close range and was able to give, contemporaneously, a detailed description of him, which included the fact that he was Asian. The witness identified an Asian person, in fact the appellant, on a photoboard and subsequently confirmed his identification on oath in a detailed way in two committal hearings. He then resiled from his identification on the appellant's first trial. In examination-in-chief in the subject trial, when asked, "What ethnic background did he appear to be?" he said, "I don't recall. He was dark, so" Asked if he was speaking the truth to the police officer who was making the video recording of the complainant's identification of the appellant on the photo board, he said, "No." He went on to say that it was "really dark" and that he couldn't "see anything without [his] glasses and there was a lot of blood on [his] glasses."

[34] Against that background, the primary judge was entitled to conclude that the witness was hostile as "an objective question of fact".[5] The holding of a *voir dire* to establish what was plain on the face of the evidence before the primary judge was quite unnecessary. The witness had made his position clear and the primary judge, who had the opportunity to observe his demeanour when giving evidence-in-chief, with respect, was quite right in concluding that he was in a position to deal with the prosecutor's application without any further delay.

[35] Additionally, to succeed on this argument, the appellant would need to show not merely the application of an erroneous principle by the primary judge, but that "the circumstances were such that the application of the appropriate principles would have led to leave being granted."[6]

[36] It was also argued that the prosecutor should have concluded the examination-in-chief of the witness after he had confirmed his identification of the appellant on the photoboard. Up to that point, it is contended, the witness had given evidence

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4 (1961) 106 CLR 95.

5 *McLellan v Bowyer* (1961) 106 CLR 95 at 103.

6 *McLellan v Bowyer* (1961) 106 CLR 95 at 102.

consistent with the prosecution case and the prosecutor did not need to take the matter further. It is further submitted that the subsequent questioning by the prosecutor was inadmissible and served to "set up" the declaration of hostility which enabled the prosecutor to lead evidence from his own witness of the witness's prior statement. Additionally, it is contended that the prosecutor's behaviour in this regard was improper. The argument is developed by reference to *R v Thompson*,[7] in which Philp J, with whom Hanger and Wanstall JJ agreed, said:

> "The calling of a witness known to be hostile solely with the motive of using him as a conduit pipe as it were to get in inadmissible evidence would be improper and we should interfere if such a thing occurred."

[37] It is acknowledged that this observation predated the enactment of the *Evidence Act* 1977 (Qld) ("the Act"). Section 17 of the Act permits a party "producing a witness", by leave of the Court, to prove that the witness has made a prior inconsistent statement. Section 101 of the Act makes any such statement admitted into evidence "evidence of any fact stated therein".

[38] It is argued, faintly, that the complainant was not required as a witness at all. That was because Cochrane and others could give evidence of the attack upon the complainant, supported by the DNA evidence referred to in admissions. The written submissions in this regard proceeded as follows:

> "His injuries were covered by admission. Cochrane identified the appellant as [the complainant's] attacker and his identification was supported by other evidence. But in the face of the authorities, the appellant cannot submit that it was inappropriate for the prosecutor to call [the complainant] as a witness, even if he expected him to prove adverse. However, the appellant submits however … while it may not have been improper for the prosecutor to have called [the complainant] … it was inappropriate for the prosecutor to have asked him questions designed only to set up a declaration of hostility.
> … the trial judge ought to have taken into account the prosecutor's impropriety in deciding whether or not to grant the application to declare [the complainant] hostile." (footnote deleted)

[39] These submissions lack a factual foundation. It is not the case that until the photoboard identification evidence was given by the complainant, he had given evidence consistent with the prosecution case. The prosecution case was that the appellant, a person of Asian extraction and appearance, had stabbed the complainant. The complainant had said in evidence-in-chief that his assailant "wasn't light-skinned". He had in fact said that "he was dark". He professed a lack of recollection of the "ethnic background" of his assailant's appearance. It was therefore quite appropriate for the prosecutor to seek to put before the jury clear, and much more contemporaneous, evidence of the complainant's recollection.

[40] The complainant, in his evidence, when asked, "But you agree that you didn't have a good look at the person who was this person Ricky?" answered, "I've always agreed that." He conceded that he had a doubt as to whether the person he identified was "Ricky". In the light of these matters and the fact that the complainant was the victim of the grievous bodily harm offence, the submission that it may have been unnecessary to call the complainant as a witness was naïve. It also runs counter to the principle

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[7] [1964] QWN 25.

referred to by McPherson J in *R v Hall*[8] that "…the Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown …".[9]

[41] The following observations of McPherson J and de Jersey J in *R v Hall* also serve to demonstrate why there is no substance in the point under consideration:[10]

> "It can scarcely be doubted that it is improper to adduce evidence with the object of subverting the limited and only purpose for which it is legitimately available. It is another matter entirely to say that counsel armed with a statement of evidence that is admissible acts improperly in calling the witness who made that statement for the reason that there is a possibility or an even probability that the witness may not adhere to that statement. As was said by the High Court in *R. v. Apostilides* (1984) 58 A.L.J.R. 371, 376, the Crown prosecutor alone bears the responsibiliity (sic) of deciding whether a person will be called as a witness for the Crown, and the trial judge is not called upon to adjudicate the sufficiency of the prosecutor's reasons for not doing so. Even less can the trial judge be expected to adjudicate reasons for calling a witness. It is debatable whether the judge can ever effectively do so in cases in which s. 101 may ultimately be invoked. Without the benefit of a conference with the witness in question the trial judge has no means of knowing with any real confidence what the witness is likely to say when he comes to testify: *Greenough v. Eccles* (1859) 5 C.B.N.S. 786, 804; 141 E.R. 315, 322–323. The most that anyone can ever say before the witness is in fact called is that he then has an apparently fixed determination not to repeat the statement he made on the former occasion. Whether he will persist in that attitude on entering the witness box is something that probably even the witness himself cannot be relied on to foretell. To hold that once the Crown prosecutor has been informed, whether by the witness or by his counsel, or by counsel for the accused, that the witness will not, if called by the Crown, adhere to his earlier statement is to transfer responsibility for decisions about the conduct of the Crown case from the Crown prosecutor to the mere *ipse dixit* of the witness or of counsel for the accused. That would be quite inconsistent with the principles laid down in *R. v. Apostilides* (supra).
>
> …
>
> I for my part do not think that there should now be any rule to the effect that where a prosecutor expects a witness to prove adverse, he should not call the witness in the hope that his prior inconsistent statement might become evidence by means of ss. 17 or 18 and 101. I do not exclude the possibility that in particular circumstances it may be inappropriate for him to call the witness where he has a firm view that the witness will prove adverse, and where he would seek to prove, through the witness, only a prior statement admissible because of those sections. But I would not be prepared to fetter a prosecutor's discretion by laying down any immutable rule about this matter. *Prima facie*, a Crown Prosecutor is entitled to adduce

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8 [1986] 1 Qd R 462.

9 See also *R v Andrews* [1987] 1 Qd R 21 at 31.

10 [1986] 1 Qd R 462 at 466 per McPherson J and 473 – 474 per de Jersey J.

> admissible evidence, and ss. 17 and 18 provide means by which evidence may become admissible. Section 101 has the further effect of making such statements admissible as evidence of the facts stated. The legislature has so provided, in respect of criminal as well as civil proceedings. A prosecutor clearly has a discretion not to adduce evidence which he considers to be "unfair" in the sense in which that word is used in s. 130 of the *Evidence Act*. I do not consider that the exercise of that discretion should be subject to a definitive limitation of the nature of that which I have just expressed. How a prosecutor should in a particular case exercise his discretion is primarily a matter for him, subject of course to the trial Judge's overriding discretion earlier mentioned."

[42] As mentioned earlier, there were good reasons for calling the complainant, apart from putting in evidence his prior inconsistent statements. Additionally, I can see nothing faintly reprehensible in the prosecutor seeking to put in evidence a statement made by the complainant that was consistent with his observations when identifying the appellant on a photoboard and with his evidence on oath in the two committal hearings.

Grounds 5 and 6

[43] The attack on the prosecutor's conduct was supplemented by a submission that remarks of the prosecutor had encouraged the jury, impermissibly, to take into account in their deliberations the bad conduct of the appellant. This was said to have arisen from the prosecutor saying to the jury in his address, "Now, [the complainant], his evidence obviously was somewhat unusual". After making the point that the complainant was able to identify one other person present during the incident, the prosecutor said:

> "So, it's in a somewhat strange position and you should not speculate about why he's no longer prepared to identify who stabbed him. What you should concentrate on is whether the evidence shows that that initial photoboard identification was truthful and accurate."

[44] I am unable to draw from these passages the sinister implications detected by counsel for the appellant. If, which I rather doubt, any inference of "bad conduct" on the part of the appellant arose from the prosecutor's statements, I greatly doubt that the jury would have been materially influenced The statements were by way of introduction to a submission to the effect that there were curious aspects of the complainant's identification evidence. The submission was hardly unreasonable in the circumstances. As for the second limb of the submission, it was legitimate, in my view, for the prosecutor to suggest to the jury that the witness, for reasons unknown, had changed his evidence and to warn that it was impermissible to speculate about those reasons.

[45] There was nothing unfair or objectionable in the prosecutor's conduct.

Grounds 3 and 4 – the primary judge erred in refusing an application by the appellant's counsel to discharge the jury after prejudicial evidence was given by the witness, Schoon. The appellant was deprived by this evidence of the opportunity to secure an acquittal and the prejudicial effect of the evidence could not be cured by directions.

[46] At the commencement of the evidence-in-chief of Mr Schoon, the prosecutor asked him if he knew a person by the name Huy Le. He responded, "Yeah, I've met him once." The questioning continued:

> "All right, you've met him once?-- Yeah.
> Right. And where did you – no, sorry. I won't ask that. …"

[47] Later, in the evidence-in-chief, asked about whether he had an occasion to visit his grandparents' house at 107 Zillmere Road, Boondall, in July 2007, he said, "Yeah, once". This exchange then occurred:

> "All right. Who were the friends that went to that house with you?-- There was about a dozen people. I can't really recall because I was - I was abusing drug substances at the time, and it was one big blur, so-----
>
> You've mentioned that you knew - that you had met a person by the name of Huy Le, and you said that you'd met him only once; is that correct?-- Yeah.
>
> And where did you meet him that one time?-- In gaol."

[48] A little later, when questioned about a police identification photo board, the witness said, "I was full of drugs that night when I got arrested and I was awake for like – I was full of methylamphetamine so – like I said, I can't really recall this incident until I was arrested so -----". When the Court resumed at 2.30pm, defence counsel asked for time to obtain instructions from his client. That was done and he then applied, by inference, for the discharge of the jury. The judge adjourned the hearing of that application until 4.30pm when the application was argued at considerable length. The primary judge refused the application, reasoning that:

> "…the clear potential for unfairness in the trial can be overcome by an appropriate direction … on the reasonable assumption that the jury would follow that direction as a matter of logic. Whether or not a person has been in gaol has nothing whatever to do with an issue of identity. The whole issue in this trial is the correctness of identification of the defendant as the person who was at the scene of the offences charged."

[49] Counsel for the appellant submitted that there was a real chance that the jury might have reasoned impermissibly that the appellant must have been "Ricky" because he was a criminal. It is further submitted that even if the primary judge did not err in refusing to discharge the jury, his direction to the jury about this unfairly prejudicial evidence was inadequate and did not guard against the risk that it might be unfairly used against the appellant. The primary judge dealt with the matter this way:

> "You may be wondering whether you know the whole story of the rather inexplicable robbery involving strangers, which has been the focus of this case. You must forget all about topics like that and focus on the case and the evidence before you. You may be wondering about the past of all seven of the people there at Lynelle Street, Sunnybank Hills whose names you heard, that's James Cochrane and three people in each of the two vehicles identified. Of course, it's very much in dispute whether the defendant was in that group of seven at all, and if it wasn't James Cochrane, there may even have been a second Caucasian male about who was seen by police as a person of interest.
>
> The elements and the facts of the charges that you have to consider don't involve the past history of the participants at all. You have counts of grievous bodily harm, wounding and a robbery, in which it seems no more than a wallet was taken, if anything, and jewellery or a watch might have been demanded too.

> …
> As the case has been conducted, on each count you have to decide (a) whether the offence happened as charged, and (b) if so, whether the identification of the defendant, as the person who committed it, is correct."

[50] In my respectful opinion, the primary judge dealt with the matter appropriately and the appellant suffered no prejudice as a result of it being revealed that he had been in prison. Of course, the jury may not have believed Schoon. On his own admission he was a drug taker who had been in prison. The background to the incident also needs to be taken into account. It arose out of a meeting between two groups of people who the jury could safely conclude were involved in the drug scene. A revelation that one or more of the protagonists had been in prison would have been unlikely to have occasioned surprise. Nor would this information have suggested that the appellant, by virtue of his being in jail, if that is what they concluded, would, because of that, have a propensity for violence. The judge explained that identification of the appellant as the assailant was a critical issue.

Ground 7 – the primary judge erred in his directions on accident in respect of count 2 when he explained the defence of accident with reference to the facts "in a famous High Court case" [*Timbu Kolian v The Queen* (1968) 119 CLR 47] and stated that the cases were similar

[51] The appellant's counsel's written outline stated:

> "It is submitted that not only did his Honour err in law in referring to another case and its outcome in his summing-up to the jury but, also, that his Honour wrongly stated the outcome of that case in any event. The High Court quashed Timbu Kolian's conviction for the manslaughter of his child because section 23 of the Criminal Code did apply."

[52] It is not submitted that, apart from the judge's referring to *Timbu Kolian v The Queen* and misstating the outcome of the case that his summing-up was in any way defective.

[53] In oral submissions, counsel for the appellant submitted that the effect of the discussion in relation to *Timbu Kolian v The Queen*, coupled with another part of his Honour's directions on s 23 of the *Criminal Code* 1899 (Qld) ("the Code"), posed an erroneous test for the application of that section.

[54] After giving a conventional direction in relation to the application of s 23, his Honour said:

> "That the assailant only intended to hurt Kelvin Amaya does not, of its own and necessarily, make the event an accident. If the assailant was deliberately stabbing at Amaya in some movement of the knife that had the unintended outcome of the other man being cut, then it's open to you to exclude accident.
>
> A good illustration of this sort of thing is a case in the High Court of Australia, a man intending to strike a woman a blow in the dark connected with a baby she was nursing, unknown to him, and the baby was grievously hurt. No accident was held to be a correct decision, as the defendant had intended to hurt someone."

[55] His Honour then said:

> "It may be that here the assailant was not stabbing or doing anything positively aggressive with the knife in the little part of the incident where Brian Cao got cut. That evidence raises for your consideration the possibility that neither the defendant, nor an ordinary person, could reasonably have foreseen that the event of wounding of the intended victim's passenger would occur, whether he was trying to intervene, as he said he did, or on any other basis.
>
> You'll be looking at the actions at the crucial time of both the assailant and the man who got cut. If the defendant didn't intend or foresee harm to Brian Cao as a possible outcome of his actions in using a knife against Kelvin Amaya, assuming you find that that did happen, and if an ordinary person in the position of the defendant would not have foreseen that as a possible outcome of those actions, then the defendant would be excused by law and you'd have to find him not guilty, subject to your being entitled to find that it was no accident if the person taking action intending to hurt A, hurts B instead."

[56] As counsel for the appellant submitted, it was in fact held in *Timbu Kolian* that the appellant accused was able to rely on s 23 of the Code (which had been adopted in Papua New Guinea) in circumstances in which the appellant, after an argument with his wife, picked up a stick with a view to striking her and struck and killed their baby carried in his wife's arms. The appellant could not see in the darkness and did not know of and had no reason to suspect the child's presence. It was held that the appellant's act of striking the child was within the meaning of s 23 of the Code, both an act which occurred independently of the exercise of the appellant's will and an event which occurred by accident.

[57] The directions did not require the jury to conclude that s 23 was necessarily inapplicable where the accused intends to hurt one person and injures another. However, the effect of the directions quoted above is that the jury was entitled to exclude accident if they found that the appellant, intending to injure the complainant, hurt Cao instead, irrespective of whether an ordinary person in the position of the appellant would not have foreseen the injury to Cao as a possible outcome of his actions. That conclusion is inconsistent with *Timbu Kolian v The Queen*.

[58] There was thus an error of law which deprived the appellant of a chance of an acquittal on count 2.

[59] It was not suggested by counsel for the respondent that this was an appropriate case in which to apply s 668E(1A) of the Code, perhaps because in the scheme of things, count 2 was relatively insignificant.

[60] Accordingly, the conviction on count 2 should be set aside.

Grounds 8 and 9 – the primary judge erred in directing the jury that nothing should be held against the accused by his "failure to give or call evidence"

[61] It is submitted that the appellant was deprived, by the primary judge's reference to his "failure to give and call evidence", of the opportunity to secure an acquittal because of the prejudicial nature of the direction.

[62] It is conceded by the appellant's counsel that the primary judge redirected on the point but it is contended that this was another feature of the trial which, when combined with the other matters relied upon on behalf of the appellant, caused the trial to be unfair.

[63] After the summing-up, in the absence of the jury, defence counsel raised with the primary judge his use of the word "failure". In this regard, his Honour said:

> "The third matter I want to raise concerns something I said to you. I used the phrase "failure to give evidence" in respect of the defendant. Let me assure you that I was simply describing the situation as it is, namely he didn't give or present evidence at the stage in the trial where he could have elected to do that. You heard very early that every defendant has a free choice about what to do in that situation, and no inferences of any kind are to be drawn by the jury from the choice that a defendant makes. If he does choose to give evidence he doesn't become responsible to prove anything. If he doesn't give evidence then the situation is as I told you in the summing-up. It doesn't help the prosecution in the least. So you must not take from my use of the phrase that I mentioned that the defendant was under any kind of obligation to give evidence, because there is no such obligation. You should not take from it that his position is worse or the prosecution's better because he exercised the right that every defendant has not to give evidence. The unfortunate use of that phrase didn't involve any criticism of him or hint to you that he ought to be embarrassed because he didn't give evidence."

[64] No criticism is made of the redirection. If the original direction had the capacity to disadvantage the appellant, which may be doubted, any possibility of prejudice was removed by the careful and comprehensive redirection. This ground is not of the faintest benefit to the appellant, even as a make weight.

Conclusion

[65] For the above reasons, I would order that the appeal be allowed but only to the extent that the appellant's conviction of the offence charged in count 2 of the indictment be set aside. In the circumstances it is appropriate that a new trial be ordered in respect of that count. Whether any good purpose would be served by a new trial, having regard to the sentences imposed for more serious offences, is a matter which the Director of Public Prosecutions will doubtless consider.

[66] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and the orders proposed by his Honour.