SUPREME COURT OF QUEENSLAND

CITATION:	*R v Melling & Baldwin* [2010] QCA 307
PARTIES:	**R** **v** **MELLING, Henry Joseph** (appellant) **R** **v** **BALDWIN, Allen Bruce** (appellant)
FILE NO/S:	CA No 28 of 2010 CA No 47 of 2010 DC No 409 of 2009 DC No 408 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	5 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2010
JUDGES:	McMurdo P, Holmes JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The verdicts against each appellant of guilty of grievous bodily harm with intent are set aside;** **2. A new trial is ordered on that count;** **3. The sentence of eight years imprisonment imposed on each appellant in respect of the count of torture is set aside and a sentence of six years imprisonment is substituted;** **4. The sentence of three years imprisonment imposed on each appellant in respect of the count of burglary is confirmed;** **5. The sentence of three years imprisonment imposed on the appellant, Baldwin, in respect of three counts of arson, three counts of entry of premises with intent and one count of unlawful use of a motor vehicle is set aside;** **6. Sentences of three years imprisonment are imposed on each of the counts of arson, and entry of premises with intent;**

7. A sentence of six months imprisonment is imposed on the count of unlawful use of a motor vehicle;
8. The period of 750 days is declared as time already served under all sentences.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where appellants pleaded guilty to one count of torture and one count of burglary – where appellants pleaded not guilty to one count of doing grievous bodily harm with intent – where appellant sought instead to enter a plea of guilty to one count of grievous bodily harm simpliciter – where the Crown declined this plea in discharge of the indictment – where appellants tried and convicted of one count of doing grievous bodily harm with intent – where each of the three counts on the indictment referred, by way of margin note, to ss 7 and 8 of the *Criminal Code* 1899 (Qld) – where the Crown did not otherwise put the case on the basis of accessorial liability – where no direction as to accessorial liability was given by the learned trial judge – where counsel for the appellants argued that as the case was left to the jury, neither appellant could be convicted unless the jury were convinced of their guilt as a principal offender – where counsel for the appellants argued that, since there was no direct evidence as to when or by which of the appellants the grievous bodily harm was inflicted, it was impossible for the jury to convict either appellant beyond a reasonable doubt, because it was equally open that the other was responsible – where the Court held that it was not open for the appellants to be convicted as principal offenders – where the Crown had a strong case for conviction based on accessorial liability – where the basis on which the jury convicted the appellants was unclear – whether a substantial miscarriage of justice occurred – whether a new trial should be ordered

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE HAVING REGARD TO THE EVIDENCE – OTHER MATTERS – where counsel for the appellants argued that the conviction on the count of grievous bodily harm with intent was unreasonable or insupportable having regard to evidence – where it was suggested by the Crown that the Court could substitute verdicts of guilty for the lesser offence of grievous bodily harm pursuant to s 668F(2) of the *Criminal Code* 1899 (Qld) – whether verdict unreasonable – whether a verdict of guilty for the simpliciter offence should be substituted

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL PERSONS – where a telephone conversation implicating the appellant, Melling, was overheard by a witness – where a remark was made by the appellant,

Melling, implicated him in the commission of the offence – whether a direction should have been given that the telephone conversation and remark were not admissible against the appellant, Baldwin – whether a substantial miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellants sentenced to 12 years imprisonment for grievous bodily harm with intent, eight years for torture and three years for burglary – where the appellant, Baldwin, sentenced on a second indictment to three years for three counts of arson, three counts of entry of premises with intent and one count of unlawful use of a motor vehicle – where the conviction for the grievous bodily harm with intent set aside – whether the sentence of eight years for torture manifestly excessive – whether the appellant, Baldwin, properly sentenced on the second indictment

Criminal Code 1899 (Qld), s 1, s 7, s 8, s 668E(1), s 668F(2)

R v B; ex parte A-G [2000] QCA 110, considered
R v Baynes [1989] 2 Qd R 431, cited
R v Cowie [2005] 2 Qd R 533; [2005] QCA 223, considered
R v Mah [2004] QCA 198, considered
R v Serratore (1999) 48 NSWLR 101; [1999] NSWCCA 377, applied,
R v Sherrington & Kuchler [2001] QCA 105, cited
The Queen v Storey (1978) 140 CLR 364; [1978] HCA 39, cited
R v Taufahema (2007) 228 CLR 232; [2007] HCA 11, applied
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, applied

COUNSEL: P Callaghan SC for the appellant, Melling
P E Smith for the appellant, Baldwin
M J Copley SC for the respondent

SOLICITORS: Robertson O'Gorman for the appellant, Melling
A W Bale & Son for the appellant, Baldwin
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The evidence at trial was capable of supporting the verdicts returned against each appellant of guilty of grievous bodily harm with intent under s 317 *Criminal Code* 1899 (Qld) on the basis of s 7(1)(c) *Criminal Code*. But the absence of appropriate and clear particulars of the prosecution case; the prosecution's reliance on s 7(1)(a) and not s 7(1)(c) *Criminal Code*; and the absence of any appropriate judicial directions to the jury as to s 7(1)(c) mean that the jury verdicts of guilty of grievous bodily harm with intent amount to a miscarriage of

justice. It follows that the appeals against those convictions in each case must be allowed and the guilty verdicts set aside.

[2] The appellants each pleaded guilty in the presence of the jury to doing grievous bodily harm simpliciter under s 320 *Criminal Code*. The suggestion that this Court could substitute in each case verdicts of guilty of doing grievous bodily harm (s 320) by way of s 668F(2) *Criminal Code* therefore held some initial attraction. That section provides:

> "(2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[3] The difficulty in adopting that course is that, despite the appellants' guilty pleas to doing grievous bodily harm (s 320), there was no commonality between the defence and the prosecution as to the factual basis of those pleas. In those circumstances, this Court should not act under s 668F(2). Instead retrials should be ordered.

[4] I agree with Holmes JA's reasons and proposed orders.

[5] **HOLMES JA:** The appellants, Henry Melling and Allen Baldwin, were arraigned before a jury on an indictment which charged them jointly with one count of torturing Terence Murray; one count of entering Murray's dwelling house with intent to commit an indictable offence, with various circumstances of aggravation; and one count of doing grievous bodily harm to Murray with intent to do grievous bodily harm. Each of the three counts on the indictment referred, by way of margin note, to ss 7 and 8 of the *Criminal Code* 1899 (Qld). The appellants pleaded guilty to the counts of torture and burglary. They pleaded not guilty to the count of grievous bodily harm with intent, but each sought instead to enter a plea of guilty to the charge of grievous bodily harm simpliciter. The Crown declined to accept those pleas in discharge of the indictment, and the appellants were tried on that count.

[6] Both men were convicted by the jury of grievous bodily harm with intent. They were sentenced to 12 years imprisonment for that offence, eight years in respect of the torture and three years in respect of the burglary. Baldwin was sentenced to three years imprisonment, to be served concurrently, on seven counts contained in a separate indictment: three counts of entering premises with intent, three counts of arson and one count of unlawful use of a motor vehicle.

[7] Melling appeals his conviction of grievous bodily harm with intent on the ground that the verdict was unreasonable, while Baldwin appeals his on the grounds that the verdict was unsafe and that the trial judge erred in failing to direct as to ss 7 and 8 of the *Criminal Code*, and erred further in failing to direct the jury that remarks attributed to Melling were not admissible against Baldwin. Both appellants seek leave to appeal against the sentences imposed on them on the ground that the sentences were manifestly excessive, with, in Melling's case, the additional grounds that the trial judge erred in failing to make a necessary finding as to the nature of the

complainant's injuries and in failing to take into account Melling's co-operation in the administration of justice. Baldwin points out in respect of the additional offences on which he was sentenced that the learned judge erred by imposing a single sentence in respect of those counts.

The Crown case

[8] The complainant, Mr Murray, had been in a relationship with Melling's niece. That relationship had broken down over Mr Murray's insistence, despite her denials, that he was the father of her child and entitled to a parental role. That dispute, in turn, led to animosity between Mr Murray and Melling. Mr Murray lived with two boarders, Robert Dart and Gael McAvan, at Hatton Vale. Mr Dart gave evidence of having heard a telephone conversation between Mr Murray and a caller using the name "Henry" (Mr Murray had put his phone on loud speaker) in which the two were arguing about Mr Murray's access to the child; the conversation ended with Henry saying, "I should kill you", followed by an expletive.

[9] Baldwin and Melling were friends. On the evening of 15 October 2008, they arrived at Melling's home in an intoxicated state. They informed Melling's wife and teenaged daughter that they intended to go to Mr Murray's house to frighten him and give him a "slap around" because he had been harassing Melling's niece. Despite the women's attempts to stop them, they drove off in Melling's utility. At Mr Murray's house, Mr Dart and Ms McAvan had retired for the night when they heard noises from elsewhere in the house, and went to the lounge room. They saw two men they did not know and Mr Murray, who was lying on his stomach on the floor. According to Mr Dart, one of the men was kneeling over Mr Murray punching him to the side of the face. The other, a balding man, was using tape to bind Mr Murray's hands together behind his back. Ms McAvan described both men delivering "very fierce" punches into Mr Murray's head; she heard one of them say, "this will teach you for threatening my sister".

[10] The two men told Mr Dart and Ms McAvan not to get involved. They retreated to their room and rang the police. They could still hear thumping noises and, later, the sound of gun shots. Mr Dart looked out of the bedroom window and saw a utility at the front of the house. The man who had been restraining Mr Murray ran from the vehicle to the front door. After that, Mr Dart heard the gun shots followed by some more banging sounds, and then the sound of the utility driving away. Mr Dart went out, first into the lounge room where he saw a pool of blood, and then into the back yard, where he saw a shell and a hole in some pavers, as well as another pool of blood on the grass and a broken chair and lantern.

[11] Police later recovered two cartridge cases from the pavers and the grass and found a series of bullet holes which seemed to indicate that a bullet had passed through the outer wall of the house, through a bedroom wall and through another interior wall. It was possible that it had been fired from the passenger seat of a car approaching the house. Melling's counsel admitted that the shot had been fired by his client's rifle. The security grill and the flyscreen from the front door to the house had, respectively, been removed and ripped out.

[12] Meanwhile, Melling's wife and daughter had decided that they would drive towards Mr Murray's house to make sure that nothing untoward had happened. They had gone a couple of hundred metres from their house when they saw Melling's utility

approaching. It did a U-turn and travelled away from them. They pursued it a short distance until it stopped immediately after taking a bend. The two women pulled up about five metres behind, and saw that Mr Murray was lying on the road at the rear right-hand side of the utility. He was wearing jeans, but no shirt or shoes. They did not see any binding on him. Melling reassured his daughter that he intended to take Mr Murray to hospital. She returned to her mother's car.

[13] After a half-hour detour for other reasons, the two women returned to their home, where they saw Melling and Baldwin at the utility. Melling's daughter asked Baldwin if Mr Murray was all right, and where he was. Baldwin responded, "You can hear him". Ms Melling realised that she could hear moaning coming from her father's boat. The men said that they were intending to take him for a ride before delivering him to the hospital. The women drove to a nearby store and telephoned police and ambulance. When the police arrived, they saw Melling's utility approaching, now towing the boat, which had not previously been attached to the utility. Police officers stopped the utility and found Mr Murray wrapped in a blanket under a tarpaulin in the boat. He had tape around his face, across his mouth, and around his hands, knees and ankles. His hands were bound so tightly that they were blue. His big toe on the left foot was injured and had lost its nail. There was either no sock or only a remnant of a sock on that foot, although he still wore a sock on his right foot.

[14] Mr Murray was taken to hospital. He had a left parietal depressed compound skull fracture with some bleeding into the brain, and extensive facial injuries including fractured nasal bones and a fracture of the maxilla. He had lost some teeth. His left big toe had sustained a compound fracture with traumatic removal of the nail. There were numerous areas of abrasion and bruising over his head, torso and limbs. He required ventilation, but the severity of his facial injuries meant that a conventional intubation could not be performed, and instead, a breathing tube had to be inserted by a different process involving a cut in his windpipe. He was ultimately admitted to a brain injury rehabilitation unit.

[15] The rehabilitation unit's director, Dr Hazelton, commented on the injuries. It was unlikely that the skull fracture had been sustained by the mechanism of Mr Murray's head's coming into contact with the road: there was no tearing to the scalp and no sign of bitumen in his wound. It was likely to have been produced by a very hard object of small diameter (a couple of centimetres) applied with considerable force. Mr Murray's brain had been left permanently scarred. His short term memory was impaired and he was at risk of epilepsy. He had suffered from post traumatic amnesia for a week after the sustaining of his head injury. The various facial injuries were unlikely to have been caused by a single fall from the utility. They appeared to be the result of separate trauma. The force required to cause them would have been considerable, more than would have been occasioned in a punch on the nose, because not only the nasal bones, but the small bones on either side and the maxillary sinus had been fractured. The wound to the big toe was consistent with a dragging injury.

[16] Mr Murray was called as a witness but the Crown did not examine him, taking the position that the brain injury had rendered him unreliable. Instead, he was made available for cross-examination. He said that he could recall being in the back of Melling's utility on the night he was injured. As the vehicle went at speed around a corner, he had rolled out over the side board onto the side of the road. Melling

had backed the utility onto his foot. Before he was returned to the utility, he said, Baldwin had shot him in the foot (although the evidence did not support the wound as being the result of a gun shot), and had hit him in the face with the butt of the gun. Mr Murray agreed that he had previously claimed to have been shot in the leg, but said that he now accepted that he was not, although he maintained (despite contrary medical evidence), that there was shrapnel in his leg.

[17] The appellants did not give evidence.

[18] The Crown prosecutor, in addressing the jury, did not differentiate between the two appellants or make any reference to accessorial liability. He suggested that one of the two had fired a bullet into the house as they drove up to it; that the two had gone in and beaten Mr Murray; and that he had been struck, with great force, with a blunt object, which might have been the rifle butt or some other item. His face had been smashed and his toenail removed out of cruelty. Despite Mr Murray's own account, the evidence did not support his having fallen out of the utility, though it was not possible to say how he had got onto the road when he was seen by Melling's wife and daughter. The inescapable inference was that the appellants had intended to do him grievous bodily harm and had carried out that intention.

The summing-up

[19] In her summing-up, the learned trial judge identified Mr Murray's head and facial injuries as the grievous bodily harm alleged by the Crown. Her Honour read this part of the *Criminal Code* definition of grievous bodily harm to the jury:

> "any bodily injury of such a nature that, if left untreated, could endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health".[1]

She reminded them of the appellants' admission (through their pleas of guilty) of causing grievous bodily harm to Mr Murray, and concentrated her directions on the question of intent. In that connection it was, she said, necessary to consider when the grievous bodily harm was caused and whether it might have been, as defence counsel suggested, the result of falling out of the utility. Her Honour directed also in respect of the possible excuse of intoxication. Neither the Crown nor the defence sought any direction in relation to derivative liability under either s 7 or s 8 of the *Criminal Code*, and none was given.

The contentions on the appeals against conviction

[20] Mr Callaghan SC and Mr Smith for the appellants argued that as the case was left to the jury, neither one of them could be convicted unless the jury was satisfied beyond reasonable doubt that he had caused the grievous bodily harm with the intention to cause grievous bodily harm at that time. Since there was no direct evidence as to when or by which of them the grievous bodily harm was inflicted, it was impossible for the jury to convict either beyond a reasonable doubt, because it was equally open that the other was responsible. The Crown had not sought to rely on ss 7 or 8 of the *Criminal Code* and there had been no direction in relation to those provisions; so there was no basis on which the jury could find one responsible for the actions of the other.

---

1 s 1 *Criminal Code.*

[21] The consequence was that the verdicts were unreasonable; they should be set aside and verdicts of acquittal entered. Another possibility suggested was that the Court could substitute verdicts of guilty for the lesser offence of grievous bodily harm pursuant to s 668F(2) of the *Criminal Code*, on the basis that it could be satisfied that the jury must have found the facts necessary to support convictions on that offence proved beyond reasonable doubt.

[22] For Baldwin, the further submission was made that the trial judge, although not asked to do so, erred in failing to direct the jury on the elements of ss 7 and 8. In addition, counsel for Baldwin contended that the trial judge had erred in failing to instruct the jury that the evidence as to the telephone call overheard by Mr Dart was not admissible in the case against Baldwin and similarly, that a remark by Melling that they would take Mr Murray for a joyride and leave him on the side of the road should also have been the subject of such an instruction.

[23] Mr Copley SC, for the respondent, accepted that the Crown had left its case to the jury solely on the basis of s 7(1)(a) of the *Criminal Code*; that is to say, on the basis that both offenders were liable as principals, both having done grievous bodily harm and both having the intention at the relevant time to do grievous bodily harm. It was open to the jury, he argued, to accept the Crown case as put on that basis. It could conclude from the evidence of Ms McAvan, of seeing both appellants punching Mr Murray in the head, together with the further observation of a pool of blood in the lounge room, that both appellants had then caused him the facial injuries which were an aspect of the grievous bodily harm with intent. The facial injuries should be regarded as grievous bodily harm because they were life threatening: they had prevented Mr Murray's being ventilated in the ordinary way through his nose or mouth. The trial judge had directed the jury that the prosecution was required to prove beyond reasonable doubt that each of the appellants had the necessary intent to cause grievous bodily harm.

[24] Mr Copley raised in his written submissions, albeit faintly, the possible application of the proviso on the basis that the jury could have convicted both as principal and aider. If the jury was satisfied of a common intention to do grievous bodily harm, it followed that they would have been satisfied that each of the appellants, if aiding the other, knew of the other's intent. He made the additional point that Baldwin could only succeed on his appeal ground in relation to the failure to give a direction as to s 7 or s 8 if it were shown that there was some miscarriage of justice because the direction had not been asked for.

Could both appellants have been convicted as principals under s 7(1)(a)?

[25] In order for the Crown to succeed in establishing criminal responsibility on the part of both appellants under s 7(1)(a), it was necessary that against each there be proved an act causing injuries amounting to grievous bodily harm, as well as the necessary intent. The only direct evidence of what either man did came from Mr Dart and Ms McAvan; and only Ms McAvan ascribed the punching of Mr Murray to both appellants. Given the evidence of Dr Hazelton that the skull fracture was likely to have been caused by a very hard object of small diameter, it does not seem probable that it was caused by the punching those witnesses described. There was, therefore, no evidence as to when that injury was inflicted and no basis on which a jury could be satisfied as to which of the two men had inflicted it.

[26] Apparently through oversight, no evidence was adduced from Dr Hazelton as to whether the facial injuries met the definition of "grievous bodily harm". I do not

think that Mr Copley's argument that they were life-threatening because they prevented ventilation through the nose or mouth is tenable, although it is certainly ingenious. The evidence did not suggest that those injuries, of themselves, had produced a need for ventilation; nor was there any evidence as to the medical significance of the treating doctor's having to resort to cutting the windpipe in order to insert the breathing tube, or of the consequences had ventilation failed.

[27] In any event, although Ms McAvan's evidence was that the punches to the head were "very fierce" it did not follow that they were the cause of the severe facial injuries which, according to Dr Hazelton, were beyond what might be sustained through a punch in the nose. Nor does it follow from the fact that the injuries Mr Murray suffered in the lounge room produced a pool of blood of unspecified dimensions that they were such as to be likely to endanger life or cause permanent injury to health; a bleeding nose or split lip could have had that effect. Convictions of the appellants of the count of grievous bodily harm with intent based solely on Ms McAvan's evidence and the existence of blood would not, in my view, have been open.

[28] But, of course, the evidence was clear that Mr Murray had suffered the skull fracture, which unquestionably did amount to grievous bodily harm, at a time when he was in the company of both men; and a jury could infer, from the evidence of their conduct towards him, that whoever inflicted the injury did so with the necessary intent, while the other aided (by assistance in restraining or detaining Mr Murray, or at the very least, encouragement) with the knowledge of that intent. It was not essential that the Crown establish which of the two was the principal actor and which the aider.[2] In other words, both could properly have been convicted on the same evidence on a Crown case advanced pursuant to a combination of s 7(1)(a) and s 7(1)(c). But although both s 7 and s 8 were referred to in the indictment, that was not the basis on which the prosecutor sought the conviction, nor was it the subject of direction. The evidence was not such as to permit guilty verdicts on a case that each man was criminally responsible as having committed the act constituting the offence.

[29] The jury may well, in fact, have reasoned to a finding of guilt on a view of criminal responsibility along the lines of s 7(1)(c), but it is impossible to say that they did, as opposed to reasoning, in the absence of appropriate direction, to a flawed conclusion that both appellants were guilty as primary offenders. I do not think it is to the point that directions were not sought by the defence; it was not incumbent on the defence to ensure the Crown case was put on a proper basis. As to the possible application of the proviso, although one's first inclination is to say that the case against the two was simply overwhelming, on reflection I do not think that one can say that the appellants have not lost "a real chance of acquittal"[3] so as to conclude that no substantial miscarriage of justice has occurred.

[30] One might readily conclude that one of the two appellants inflicted the injury amounting to grievous bodily harm with the intent to cause that harm. But in the absence of evidence as to how and when that injury was caused, I do not think the inference that the other must have aided with the necessary knowledge of that intent (as opposed, for example, to some lesser intent to assault) is inevitable, although it is open. Absent that inference, neither could be convicted of the charge of causing

---

2 *R v Baynes* [1989] 2 Qd R 431 at 434; *R v Sherrington & Kuchler* [2001] QCA 105.

3 *The Queen v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

grievous bodily harm with intent. Consequently, this is not a case for the application of the proviso, notwithstanding the strength of the case against the appellants. The appeals must be allowed and the guilty verdicts set aside. But the next question is whether there should be acquittals or an order for a new trial; so the basis for allowing the appeals (in terms of s 668E(1)) must be explored further.

What orders should follow?

[31] It is as well to dismiss immediately the suggestion that this court could enter guilty verdicts in respect of the counts of grievous bodily harm simpliciter. It cannot be accepted because the conditions of s 668F(2) are not met. It is impossible to say that "the jury must have been satisfied of facts which proved the appellant[s] guilty of" the offence of grievous bodily harm, because the same uncertainty which infects the verdicts actually given applies: one does not know how the jury, as instructed, could properly have come to such a conclusion.

[32] It may be accepted that where an appeal succeeds on the ground that the evidence at the trial was not sufficient to justify a conviction, no new trial should be ordered. But this is not a case, in my view, in which the court would reach the conclusion that,

> "…the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence… ."[4]

On the evidence put before the jury here, verdicts of guilty could properly have been entered on the count of grievous bodily harm with intent, on the basis that one appellant committed the offence, aided by the other. The difficulty lay, rather, in the absence of submission or direction to the jury as to the path by which that result might be arrived at.

[33] Mr Copley helpfully drew our attention to the decision of the New South Wales Court of Criminal Appeal in *R v Serratore*.[5] In that case, the trial judge had misdirected the jury by instructing it that it could not convict the appellant of murder (the case being put on the alternative bases that he had either killed the deceased himself or had procured someone else to do so) unless it was satisfied beyond reasonable doubt of four specified matters, described as "essential circumstances". The majority in that case concluded that it was not open, on the evidence, for the jury to be satisfied beyond a reasonable doubt of all of the four matters, or that the appellant had himself killed the deceased. Accordingly they must have misunderstood or failed to follow the judge's directions. However, they could, correctly instructed, have been satisfied that the appellant was guilty of murder on the alternative basis relied on by the Crown, that he had procured the killing.

[34] As the jury could not, acting reasonably, have followed the directions it was given and found the essential circumstances proved beyond a reasonable doubt, such an irregularity had occurred as to constitute a miscarriage of justice; but because there was evidence on which a jury could, acting reasonably and on proper directions, convict, the appropriate course was to order a new trial. That case turns largely on

---

4 Section 668E(1) *Criminal Code*.

5 (1999) 48 NSWLR 101.

its own facts, and it had the distinguishing feature that the Crown, at all times, relied on appropriate alternative bases of criminal responsibility, but it provides at least some comfort that my analysis of what occurred here is correct.

[35] The conclusion that there has been a miscarriage of justice does not, of course, resolve the question of whether a new trial should be ordered, allowing the Crown to put forward its case under s 7(1)(c). In *R v Taufahema*,[6] the Crown case of murder of a police officer had been left to the jury on the basis that the respondent was party to a joint criminal enterprise to evade arrest, in which the shooting of a police officer was a foreseen possibility. His appeal to the New South Wales Court of Criminal Appeal succeeded on the ground that there was no evidentiary basis for a conclusion that he was party to an agreement of the kind. Nor did an alternative case, that the respondent was party to a supposed offence of hindering, have any foundation in fact or law. No new trial was ordered. On appeal to the High Court, the Crown proposed, if it were granted an order for a new trial, to contend that the joint criminal enterprise was, in fact, one of armed robbery.

[36] The High Court majority reviewed a number of authorities, concluding from them that there must be a substantial difference between the case relied on at a first trial and the proposed case at a re-trial before there could be any bar to an order for a re-trial. In that case, the prosecution did not propose to advance any different factual allegation; it intended, rather, to rely on inferences which could have been drawn on the evidence at the original trial. Although the foreshadowed case was "based on a radically different particularisation of the joint criminal enterprise", the Crown's appeal was allowed, the verdict of acquittal set aside and a new trial was ordered.

[37] Mr Copley, outlining the case to be run at a re-trial, eschews reliance on s 8 and says that the Crown would, instead, rely on a combination of s 7(1)(a) and s 7(1)(c). It is important that there no suggestion that in a new trial any markedly different evidence would be presented. Instead, the Crown will, presumably, embark on some particularisation in its opening and address as to the appellants' liability as principal and aider, without its being necessary to identify who performed which role. The new case will be one not so much inconsistent with what was advanced on the previous trial, as one in which the jury will receive some proper guidance as to the only rational basis on which both men could be held criminally responsible. That does not seem to me a substantially different case. Accordingly, the proper remedy for the miscarriage of justice in this case is the ordering of a new trial.

[38] Given my view that a new trial should take place, I should mention that Mr Smith's submission that evidence of statements by Melling was not admissible against Baldwin is correct in relation to the telephone conversation between Mr Murray and Melling (assuming, as seems to have been accepted, that it was indeed Melling). It may also be correct in relation to the "joyride" remark, but it is not clear whether that remark was made in Baldwin's presence. To the extent that the evidence was not admissible against Baldwin, that would have been a proper subject of direction. I would not, however, have allowed the appeal on the basis of that complaint, since the absence of direction did not cause any substantial miscarriage of justice.

The applications for leave to appeal against sentence

[39] Each of the appellants also applied for leave to appeal against the sentences imposed in respect of the three counts. The application is, of course, obviated so far as the

---

6 (2007) 228 CLR 232.

sentence for grievous bodily harm with intent is concerned by the setting aside of that conviction, but it remains necessary to consider the sentences imposed in respect of the torture and aggravated burglary offences. In respect of Baldwin, the question of whether the sentence in respect of the offences on the second indictment against him were properly imposed, also requires consideration.

[40] It should be noted that the trial judge in this case made a valiant attempt, against the apparent indifference of both Crown and defence counsel, to obtain particulars of the charges of grievous bodily harm with intent and torture. Eventually, the Crown identified the torture as the psychological, emotional and physical pain which had been inflicted on Mr Murray over the course of events of the night in question. The learned judge, in sentencing, found insufficient evidence for a conclusion that there was any deliberate removal of Mr Murray's toenail. On the other hand, it had been severely injured by some reckless or deliberate action on the part of the appellants. She noted, too, that during the period of in excess of an hour in which Mr Murray was in the company of the appellants after his fall from the truck, they had made no attempt to assist him, although he was obviously injured.

[41] The torture then, can properly be regarded as the restraining and assault by punching of Mr Murray at some time after 8.00 pm; the firing of shots near him; his being placed and transported in the back of Melling's truck, including his fall onto the road; the occasioning of the toenail injury, though not with any specific intent to remove it; his placing and movement in an injured state, tightly bound and with his mouth taped, in Melling's boat. He was eventually rescued by police at about 11.45 pm. One can infer that, for most, if not all, of that three and a half hour period of time, he feared for his life, but what cannot be taken into account, as Mr Callaghan SC correctly points out, are the injuries constituting the separate offence of grievous bodily harm, that is to say, the skull fracture and resulting brain injury and the facial injuries.

[42] The offence of entering premises with intent was not the subject of discussion or particularisation but it is reasonable to suppose that it was constituted by the entry of Mr Murray's premises with the intention to assault him.

[43] At the time he was sentenced, Baldwin was 26 years old. He had two children from different relationships whom he had supported until he was taken into custody. He had a good work history and, at the time of his arrest, had been working as a fork-lift driver. A psychologist who reported in respect of him observed that he was of low IQ and that his desire for acceptance made him easily led. His father, his former employer and a chaplain at the prison where he was incarcerated, all provided favourable references. He had completed some courses while in prison. He had a criminal history which was lengthy, but not of great proportions, consisting, in the main, of public-order type offences and breaches of community based orders.

[44] Baldwin was subject to a community service order at the time he committed the arson, entering and unlawful use offences in February 2008. He was a part of a group of eight or nine people who, in a night of drinking, drove to three different unoccupied houses in a rural area, broke in and set fire to them. They also took an old vehicle they found at one of the properties, but do not seem to have done more than push it some distance. On his behalf, it was submitted that insufficient weight had been given to his pleas of guilty to the torture and burglary counts, and the

respective sentences were manifestly excessive. The error in relation to the sentencing on the entering and arson counts meant that it was necessary to re-sentence on those counts.

[45] Melling was aged 44 when the offences occurred. He had a very minor criminal history, 20 years earlier, for drug and traffic offences. At the time of the offences he was running his own business, with some casual employees, laying down bitumen driveways. Prior to that he had worked as a truck driver. He had a number of favourable references from family members and members of his local community, which described the offences as entirely out of character. He had undertaken courses while in gaol and had a favourable reference from a Correctional Services officer who had supervised his work while he was on remand.

[46] For Melling, it was submitted that the learned sentencing judge had overlooked his plea of guilty and the fact that he had told the police where his firearm could be found in a place near a road, where it might otherwise have been taken by a passer-by. The learned judge's failure to recognise his co-operation in those respects meant that there was an error in the exercise of sentencing discretion which warranted the sentences being set aside and this court's re-exercising the discretion. In that event, the applicant sought to put fresh material before the court as to Mr Murray's present state of health, as disclosed by an affidavit the latter had sworn in relation to his attempts to obtain access to the child he believed to be his. In any case, it was argued, Melling's sentence of eight years imprisonment for the torture offence was manifestly excessive, having regard to the sentences imposed in cases such as *R v Mah*[7] and *R v B; ex parte Attorney-General*.[8]

[47] For the respondent, it was submitted that the pleas to the torture and aggravated burglary counts were late. They resulted in only minimal savings of time and resources. The term of eight years was not manifestly excessive for the torture. *R v Cowie*[9] supported that submission.

[48] It is, I consider, necessary to reconsider the sentences imposed in respect of the torture and burglary charges. Unfortunately, because of the focus on the most serious conviction, relatively little attention was paid to the facts constituting those offences and any possible allowance for co-operation seems to have been overlooked. The affidavit concerning Mr Murray's health may be received, but I do not think the evidence is of any cogency so far as the torture and burglary charges are concerned. He really indicates no more than that he is now capable of managing his daily needs, notwithstanding his brain injury.

[49] The offences of the applicants in *R v B* and *R v Mah*, cited by the appellants, attracted sentences of imprisonment of seven years and six years respectively, in each case with a declaration that the applicant was convicted of a serious violent offence. There are some distinctions to be drawn between the facts of those cases and those of the present case. The acts constituting torture here were committed over a period of hours, rather than over weeks and on separate occasions. That is significant because, as the court observed in *R v B*,

> "…a person who is convicted of the crime of torture particularly where it involves the intentional infliction of pain or suffering on

---

7 [2004] QCA 198.
8 [2000] QCA 110.
9 [2005] 2 Qd R 533.

> more than one occasion, [is likely to] be declared a serious violent offender."[10]

The appellants' victim was not, as in *Mah*, disabled and vulnerable; nor was he in any special relationship with them as was the victim in *B*: she was the daughter of the offender and under his control. The desire to harm Mr Murray was at least motivated by some perceived wrongdoing on his part towards Melling's niece, in contrast with the sheer love of cruelty for cruelty's sake exhibited in *B* and *Mah.*

[50] This case is distinguishable, too, from *Cowie*, relied upon by the Crown (in which the applicant was sentenced to 12 years imprisonment for torture) in respective of motive, level of cruelty, and criminal antecedents of the offenders. In *Cowie*, the complainant was held by five men over several hours and assaulted in a number of ways, including burning with a cigarette lighter, in order to obtain his property, particularly the PIN for his Bankcard. The applicant there had a lengthy criminal history which revealed, according to the court, a "proclivity to offences involving personal violence".

[51] In the circumstances of this case, having regard to the limited period of time over which the appellants' abuse of Mr Murray occurred, the fact that their actions were, although appallingly cruel, not motivated by an abstract pleasure in cruelty, and their lack of any previous convictions for violence and their co-operation, I would set aside the sentence of eight years imprisonment on the torture count and, in each case, substitute a sentence of six years imprisonment without any recommendation for eligibility for parole. In imposing that sentence, I would not distinguish between the appellants: any credit which might be given to Melling for his additional co-operation in identifying the location of his firearm is off-set by his greater age and the probability that Baldwin was led into the offending by him. No particular submissions were made as to a proper range for sentencing for the burglary. In the circumstances, I would not interfere with the sentence of three years imposed in each case.

[52] The sentences imposed on Baldwin in respect of the three counts of arson, the three counts of entry of premises with intent and the one count of unlawful use of a motor vehicle, should be set aside and in respect of each count of arson and entry of premises with intent, a sentence of three years imprisonment should be imposed. It was not suggested that those sentences should be varied in any other way. The unlawful use of a motor vehicle, however, seems to have been quite minor. I would substitute a sentence of six months imprisonment in respect of it.

Orders

1. The verdicts against each appellant of guilty of grievous bodily harm with intent are set aside;
2. A new trial is ordered on that count;
3. The sentence of eight years imprisonment imposed on each appellant in respect of the count of torture is set aside and a sentence of six years imprisonment is substituted;
4. The sentence of three years imprisonment imposed on each appellant in respect of the count of burglary is confirmed;

---

[10] At [32].

5. The sentence of three years imprisonment imposed on the appellant, Baldwin, in respect of three counts of arson, three counts of entry of premises with intent and one count of unlawful use of a motor vehicle is set aside;

6. Sentences of three years imprisonment are imposed on each of the counts of arson, and entry of premises with intent;

7. A sentence of six months imprisonment is imposed on the count of unlawful use of a motor vehicle;

8. The period of 750 days is declared as time already served under all sentences.

[53] **APPLEGARTH J:** I agree with the reasons of Holmes JA and with the orders proposed by her Honour.