SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bishop* [2010] QCA 375
PARTIES:	**R** **v** **BISHOP, Jacqueline Kay** (appellant)
FILE NO/S:	CA No 61 of 2010 CA No 101 of 2010 DC No 2926 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2010
JUDGES:	Margaret McMurdo P, Chesterman JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – appellant jointly charged with co-offenders Cox, McDonnell and Weldon of burglary with several circumstances of aggravation (count 1), common assault (count 2) and doing grievous bodily harm (count 3) – appellant pleaded not guilty to all counts – appellant found not guilty of circumstances of aggravation that burglary was by means of break and in company, not guilty of count 2, guilty count of 3 – whether jury entitled to reject exculpatory evidence of appellant and accept contrary evidence beyond reasonable doubt – whether it was open to the jury to be satisfied beyond reasonable doubt that appellant was guilty of burglary with circumstances of aggravation – whether verdicts were unreasonable or insupportable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER

ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – appellant gave interview to police in which she gave a false alibi – appellant gave evidence at trial that she was induced to take part in interview by promises that charges against her were dropped – police officer conducting interview denied making promises – appellant stated in interview that took she part voluntarily – whether judge correctly applied s 10 *Criminal Law Amendment Act* 1894 (Qld) – whether record of interview was admissible

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – whether not guilty on count 2 and some circumstances of aggravation on count 1 are inconsistent with guilty verdicts – whether the diverse verdicts can stand together logically

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – trial judge failed to direct jury that appellant not criminally responsible of property offence if acts were exercise of honest claim of right under s 22 *Criminal Code* 1899 (Qld) – whether s 22 applies to burglary – whether evidence raised honest claim of right with respect to property – whether trial judge should have directed the jury on s 22 defence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – whether trial judge should have directed the jury that appellant is not criminally responsible for offences done in sudden or extraordinary emergency under s 25 *Criminal Code* 1899 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL - CONDUCT OF TRIAL JUDGE – judge asked defence witness questions following improper question from prosecutor – counsel had opportunity to question witness – whether trial judge's questions prejudiced the appellant or caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – whether defence counsel's decisions and conduct at trial explicable on basis of proper forensic decision-making – whether miscarriage of justice has occurred as a result of defence counsel's conduct

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – appellant sentenced to a total of four years imprisonment with parole eligibility after 18 months – Cox sentenced to four years to be suspended after serving 12 months with an operational period of five years – McDonnell co-offender sentenced to four and a half years imprisonment with parole eligibility after 15 months – Weldon sentenced to two years imprisonment with parole fixed on day of sentence – co- offenders pleaded guilty and cooperated with authorities – whether sentences of co-offenders give rise to a justifiable sense of grievance – whether appellant's sentence manifestly excessive compared to co-offenders

Criminal Code 1899 (Qld), s 8, s 22, s 24, s 590AA
Criminal Law Amendment Act 1894 (Qld), s 10

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v Leu; R v Togia (2008) 186 A Crim R 240; [2008] QCA 201, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: J Cremin for the appellant
M J Copley SC for the respondent

SOLICITORS: Davellin Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P**: The appellant, Jacqueline Kay Bishop, was charged jointly with Jeffrey Neil Cox, Kragg Adam McDonnell and Natasha Lee Weldon with burglary by breaking, at night, with actual violence, whilst armed with an offensive weapon, and whilst in company with other persons (count 1); common assault (count 2); and doing grievous bodily harm (count 3). The appellant pleaded not guilty to all counts on 1 March 2010. Cox and McDonnell pleaded guilty to counts 1 and 3 and the prosecution did not proceed further against them in respect of count 2. Weldon pleaded guilty to counts 1 and 2 and the prosecution did not proceed against her on count 3. The sentences of Cox, McDonnell and Weldon were adjourned to the conclusion of the appellant's trial. On 5 March 2010, the appellant was found not guilty on count 1 as charged, but guilty of burglary, at night, with actual violence, whilst armed (that is, not guilty of the circumstances of aggravation that the entry was by means of a break and that she was in company with other persons). She was found not guilty on count 2 and guilty on count 3.

[2] Her sentence was adjourned until 8 April 2010. She was then sentenced to three years imprisonment on count 1 and four years imprisonment on count 3 with parole eligibility fixed on 8 September 2011. A period of 37 days spent in pre-sentence custody was declared to be imprisonment already served under the sentence.

[3] Her co-offenders were also sentenced that day. Cox was sentenced to four years imprisonment on each of counts 1 and 3, to be suspended after serving 12 months imprisonment with an operational period of five years. Forty-one days of pre-

sentence custody was declared to be time served under the sentence. McDonnell was sentenced to four and a half years imprisonment on each of counts 1 and 3, with parole eligibility on 1 July 2011. Pre-sentence custody of 41 days was declared to be imprisonment already served under the sentence. Weldon was sentenced to two years imprisonment on count 1 and six months imprisonment on count 2, with parole fixed on the day of sentence, that is, 8 April 2010. Pre-sentence custody of three days was declared to be imprisonment already served under the sentence.

[4] The appellant appeals against her conviction and applies for leave to appeal against sentence.

The grounds of appeal against conviction

[5] The appellant amended the grounds of appeal against her conviction at the hearing. They are:

- that the verdicts of guilty were against the weight of the evidence, that is, they were unreasonable and not supported having regard to the evidence under s 668E(1) *Criminal Code*;
- that the verdicts of guilty were inconsistent with the jury's verdict that two charged circumstances of aggravation on count 1 were not proved;
- that the judge erred in admitting the record of interview because of s 10 *Criminal Law Amendment Act* 1894 (Qld);
- "the judge erred in law in entering into the arena in questioning the medical evidence of the Doctor in circumstances where the prejudicial effect of his questioning as to the effects of drugs and alcohol, without a proper basis in medical or scientific premises, denied the [appellant] the charge of an acquittal, in that her credibility could have been effected and prejudiced in circumstances where there was no opportunity to rebut the answers to the questioning";
- that the judge erred in not directing the jury as to s 22 *Criminal Code* 1899 (Qld);
- that the judge erred in not directing the jury as to s 25 *Criminal Code*;
- that the judge failed to adequately instruct the jury on "the necessary timing of the intent, and excluding the after-entry intent, in relation to the offence of grievous bodily harm, and the offence of entering with intent";
- that the judge erred in not addressing and giving due weight to the appellant's medical condition;
- that trial counsel was incompetent in that he:
    - failed to seek a direction as to s 22 and s 25 *Criminal Code*;
    - failed to seek a direction on the admissibility of the record of interview after the judge ruled it admissible requesting the judge to exclude it in the exercise of his discretion because of its prejudicial nature;
    - failed to "seek a ruling from the learned trial judge as to the [appellant's] right to claim privilege from answering questions on matters of the allegations of false alibi, not charged before the court";

- questioned the appellant as to the allegations of the alleged false alibi and potentially depriving the appellant of the right to claim privilege when answering questions related to it;

- called the appellant to give evidence after other defence witnesses had given evidence "requiring the learned trial judge to comment to the jury about the timing of the giving of evidence which could be seen as adverse to [the appellant's] credibility"; and

- failed to ensure the judge directed the jury on the prosecution's failure to call material witnesses present at the premises when the offences were committed and who could have supported the appellant's case.

[6] The appellant's counsel, who appeared pro bono in the appeal, made oral submissions only in respect of ground 2. This was plainly his primary contention. He stated, however, that he was also relying on his written outline of submissions. Those submissions did not seem to me to always correlate to the amended grounds of appeal, but I will do my best to address the arguments he has raised as to the amended grounds of appeal insofar as I am able to comprehend them.

Did the judge err in admitting the record of interview?

[7] It is chronologically sensible to deal with the appellant's third ground of appeal first, namely, that the judge erred in admitting into evidence the appellant's record of interview with police.

The evidence in the s 590AA application

[8] Before the jury was empanelled, the appellant's counsel at trial brought an application under s 590AA *Criminal Code* to have the judge exclude the appellant's record of interview with police on the basis of involuntariness under s 10 *Criminal Law Amendment Act*.

[9] The offences charged in the indictment were all alleged to have occurred on or about 9 February 2008. The appellant was arrested that day and charged after declining to be interviewed by police. The committal hearing took place on 11 August and 10 October 2008. The indictment was presented in the District Court on 20 October 2008. On 20 February 2009, the appellant's then barrister sent the Office of the Queensland Director of Public Prosecutions (ODPP) copies of statements from Katerina Anderson and Jason Babarovich dated 16 February 2009 which tended to provide evidence of an alibi for the appellant. The investigating officer, Detective Senior Constable Cope, was directed to investigate the alibi statements. The appellant's trial was originally listed for the first week of March 2009, but the listing was vacated. Cope obtained a statement from Anderson on 27 May 2009 and spoke by telephone with Babarovich.

[10] Cope gave the following evidence in the s 590AA application. He needed to make contact with the appellant to obtain contact details for Babarovich and for two other people named in the barrister's letter accompanying the alibi statements. The appellant contacted Cope and told him she wished to be interviewed about these offences. He suggested she seek legal advice and, depending on that advice, she could contact him again. She telephoned him some days later and he arranged to see her. She came to the front counter of the Ferny Grove police station on 15 July

2009. The appellant asked him what was going to happen to Anderson. He told her that he could not say and that further discussion should be held over until the arranged interview.

[11] The appellant participated in a video recorded interview with police officers Cope and Morrow at the Ferny Grove police station on 15 July 2009 between 10.20 am and 11.28 am. In the interview, she was asked whether she attended the police station voluntarily. She replied, "Yes, I harassed you to get the interview." She agreed that she contacted Cope on his mobile phone; stated that she wished to participate in the interview; that they had texted each other a couple of times; that she had spoken to her legal representatives about the interview; and she had agreed to participate in it.

[12] She provided the following information to police in the interview. On 8 February 2008, friends telephoned her and told her that Andre Martin, the complainant in counts 1 and 3, wanted the return of his tools which she had in her possession. He offered to pay back some money she had previously lent him when she borrowed his tools. Rather confusingly, she then added that he also wanted to borrow $100 from her.

[13] She went to the Ferny Grove Tavern where she saw many acquaintances, including Weldon, McDonnell and Cox. During the evening, her son, James, and his friend, Ben Carter, arrived. At closing time at about 2.00 am, another friend, Daniel (she did not know his family name), told her that James had driven Weldon's car from the hotel and that McDonnell was going to "sort out" Martin. The appellant asked another acquaintance, "Biscuit" (Marika Verenitani), to drive her to Martin's home. Biscuit parked around the corner from Martin's home. She got out of Biscuit's car and told James and Ben Carter to get into Biscuit's car. This was because she was concerned that James was breaching the terms of his limited work licence by driving after 11.00 pm.

[14] When she was outside Martin's home, she saw that some front windows had been smashed and the door was open. She entered the house and heard screaming. She opened the back door and turned on the back light. She called out for Ben Parkes who lived at the house, but he did not come. She went into the first bedroom (Martin's room) where she saw a group, including a small 15 year old boy who lived nearby, Weldon, Martin, Cox, McDonnell and Daniel. Weldon was punching Louise Candy (the complainant in count 2). The appellant told Weldon to stop. Martin was on the floor. McDonnell and Daniel were kicking him. The appellant announced she would call the police. She told the group they "were the sort of people who needed a bullet in their heads and they were disgusting". McDonnell knocked the telephone out of her hand. It fell to the floor and broke; she was unable to telephone police. She left the house and returned to Biscuit's car where she waited until the ambulance arrived. She was not armed with any implement during this incident. She did not discuss with others any intended visit to Martin's house.

[15] As to Anderson's statement, the appellant described it as "totally my fault". Anderson had stated in it that on 8 February 2008 the appellant left the tavern and went home. The appellant said she asked Anderson to make the statement to police after she realised Martin had wrongly implicated her in the offences, Anderson's statement was untrue. The appellant admitted that she encouraged Barbarovich to provide her with an alibi which was not true.

[16] At the conclusion of the interview, the following exchange occurred:

> "SCON COPE: Alright um we'll just go conclude the interview now, okay. Is ah, is what you've told me here today the truth?
> [APPELLANT]: On the bible, oh god it is the full --
> SCON COPE: Okay.
> [APPELLANT]: Everything about it is the full truth.
> SCON COPE: No worries. And ah once again, I know I asked you at the start of the interview but has there been any threat, promise or inducement that either myself or --
> [APPELLANT]: Not from you guys.
> SCON COPE: Or the Senior has asked you, nah, to take part in this interview? Or any, any police officer.
> [APPELLANT]: No, no.
> SCON COPE: Okay.
> [APPELLANT]: The only threats I've had is from the other parties."

[17] Cope and police officer Farley each gave evidence denying that they told the appellant that if she agreed to be interviewed about these matters, the charges would be dropped, and that Farley had suggested to Cope that the appellant could then become a Crown witness.

[18] Cope denied telling the appellant as she walked through the police station to be interviewed, that, if she gave a truthful interview, the charges would be dropped and those who had provided false alibi statements would not be charged. Cope also denied that he had told her these things during a telephone call.

[19] Farley gave evidence that the first contact he had with the appellant was on 23 July 2008 when he executed a search warrant at her home. This was unconnected with the present charges. He next saw her on 1 August 2008. He again attended at her home with police officer Christina Davage on 28 January 2009. They were enquiring whether the appellant would provide a statement for police in relation to another matter not associated with the present charges. There was no discussion of these charges at all. She phoned him a few days later, but not about the present charges. The next contact he had with her was on 16 July 2009 at the Ferny Grove police station. Any conversations he had with the appellant about the present charges were initiated by her. He made clear that he was not involved in the investigation of the present charges, knew nothing about them, and could not assist her in respect of them.

[20] Davage gave evidence that she first met the appellant in company with Farley in relation to another police investigation. Together with Farley, she subsequently saw the appellant in the latter half of 2008 concerning information the appellant had about matters unrelated to the present charges. Sometimes they met at the appellant's home and other times they met for coffee at various places, once at Harry's Diner. She denied ever having or overhearing any conversation with the appellant about the present charges.

[21] The appellant gave the following evidence on the s 590AA application. A week or two before 15 July 2009, she met Farley with an attractive young woman (Davage) at a coffee shop. She complained to him that Cope would not act on her information. Farley told her he would discuss with Cope the prospect of her becoming a witness for the prosecution in the present charges. Farley told her she

should not have been charged and that her fingerprints had not been found at the scene. Farley rang her later and told her she should seriously consider giving the police a statement because her safety was not assured; Cope told him that the police would definitely drop the present charges if she became a prosecution witness. On the basis of that conversation, the appellant telephoned and left a message for Cope who returned her call to her mobile telephone late one Friday afternoon. Cope told her the charges would be dropped if she became a prosecution witness. As he had not progressed the matter with the ODPP, he said there would be no problems about Anderson being charged. That was why, the appellant explained, she went to the police station to be interviewed on 15 July 2009. Cope told her outside the police station that if she said she got the alibi witnesses to provide their statements, there would be no charges and he would not have to put the paperwork into the ODPP.

[22] Joel Anthony Kindred also gave evidence for the defence in the s 590AA application. In early June 2009, the appellant asked him to be present when she made a telephone call to a man who said he was Cope. He heard Cope say that, if the appellant gave testimony for the prosecution, she would not be charged; Anderson's statement would go no further; and Anderson would not be charged. During cross-examination, Kindred added that Cope had said the charges against the appellant would be dropped.

The judge's ruling

[23] The judge determined that the appellant's record of interview with police was, subject to the question of voluntariness, admissible in the case against her. It was evidence that she admitted she was present at the place where, and the time when, the three alleged offences occurred. It was also evidence that she gave a false alibi in respect of the alleged offences. This tended to show that she was guilty of the offences charged.

[24] The judge noted that the prosecution must show, under s 10 *Criminal Law Amendment Act*, on the balance of probabilities, that the appellant's answers were not induced by any promise by a person in authority. The appellant's case that was she was induced to take part in the interview by a promise that, if she did, the present charges would be dropped; and if she accepted responsibility for the false alibi statements, those who gave the false statements would not be charged.

[25] The judge reviewed the evidence given in the application. His Honour noted that the police officer who primarily conducted the interview, Cope, denied he offered any such inducement. During the course of the interview, the appellant stated that she was taking part in it voluntarily and that no inducement had been offered to her. She even added that she had harassed Cope in order to be interviewed.

[26] His Honour did not accept the evidence of the appellant and Kindred as their account was inherently implausible. The appellant's evidence was full of inconsistencies. Kindred may have been honest but he was not reliable. It was surprising that he could recall accurately, so long after the event, the telephone conversation he claimed to have heard. He had discussed the matter with the appellant and he may well have been giving evidence about something he had been told by her, rather than evidence of what he actually heard the police officer say. The appellant may have mistakenly believed that she could have these charges dropped by arranging the interview with Cope, and she may have impressed that mistaken idea on Kindred.

[27] The judge concluded that he was satisfied that the police offered no relevant inducement to the appellant.

Conclusion on this ground of appeal

[28] The judge was entitled to find unreliable the evidence of the appellant and Kindred and to accept the evidence of the police officers that they did not provide any inducement to the appellant to take part in the record of interview. That conclusion is supported by the appellant's video recorded answers. The appellant's evidence contained inconsistencies. One significant inconsistency was that she claimed that Cope held out inducements in a telephone call when Cope telephoned the appellant, whilst Kindred claimed he heard the inducements made in a telephone call when the appellant telephoned Cope. The judge correctly applied s 10. The appellant has demonstrated no error in the approach taken by his Honour. This ground of appeal is without merit.

The trial

[29] Before returning to the remaining grounds of appeal, particularly the first and the second upon which the appellant primarily relies, it is necessary to review the prosecution case as opened, the evidence at trial, and the relevant directions given by the primary judge.

The prosecution opening

[30] The prosecution case against the appellant on all three counts relied on both s 7(1) and s 8 *Criminal Code* 1899 (Qld). The prosecutor, in her opening address, particularised the count against the appellant in count 1 as being that the appellant intended at the time of entry to commit "some sort of offence of assault". The offence of burglary (count 1) involved aggravating features, one of which was that actual violence was used in that:

> "once these people had entered into the house, that one or other of the persons was armed. You are going to hear evidence that the [appellant] was herself armed, she was armed with some sort of long, thin instrument and that she, in fact, used that instrument and one of the other circumstances of aggravation is that she was in company and you will hear evidence that there were four people that entered into the house and entered into the bedroom of Andre Martin and Louise Candy.
>
> Now, ladies and gentlemen, our law provides that criminal responsibility extends to people other than those that commit the actual act. So, that may be something that you need to consider during the course of the trial. It is not necessary for the Crown to prove that [the appellant] was the one that damaged the window or damaged the flyscreen when they entered in. If you are satisfied that one of the people that she was with did that and then she went in there knowing that had been done, then that also makes her criminally responsible.
>
> Similarly with respect to the evidence you will hear about the common assault and the grievous bodily harm, it's not necessary that it was only [the appellant] that did all of the acts or delivered all of

the blows that amount - that have resulted in those particular two offences. By her presence, she can aid or encourage, that is being aware of what was going on. By participating in some of the acts, she is also criminally responsible.

So, some of the evidence you will hear is that [the appellant] actually participated in the assault on Ms Candy and delivered some blows to Mr Martin but not that she was responsible for all of the assault on Ms Candy, nor all of the injuries that was suffered by Andre Martin, but the Crown says to you that her criminal responsibility for those particular offences will be - is established in the evidence and his Honour will give you directions about that at the end of the trial, but they're acts by her which make her what we call a party, which make her criminally responsible for everything that went on in that house.

The other charge, the second charge, that you will have to consider is one of common assault and that is simply that there has been some unlawful assault. Now, 'unlawful' means not authorised, justified or excused at law. Here the *allegation of the common assault is that [the appellant] went up to Ms Candy with this instrument that she was holding and told her not to go anywhere, so she threatened her, and that she was then present when one of the other person in the house, Natasha Weldon, came up and punched Ms Candy twice to the face, and that [the appellant] remained there, remained threatening Ms Candy with this particular instrument*. So, if you accept that at the end of the trial, there seems little issue that you will find that that was not authorised, justified or excused by law.

The third charge that you will have to consider is one of grievous bodily harm and in order to prove that the Crown must present evidence to you that proves that the [appellant] did grievous bodily harm to Andre Martin and that that was unlawful.

Now, you're going to hear that Andre Martin was punched in the head, that blows were delivered to him by two men, and *that while those two men were delivering those blows that [the appellant] prevented Louise Candy from going to Mr Martin's assistance*, and that after Mr Martin had already been injured, that as she left the bedroom that [the appellant] hit Mr Martin as he lay on the ground, hit him a number – a couple of times in the torso with this instrument that she had. So, *her involvement in involvement in that offence of grievous bodily harm is in preventing someone to come to his assistance while he is being beaten by two men*, and then also as she leaves actually participating in some violence on him." *(my emphasis)* (errors as in the original)

The prosecution evidence

[31] The complainant in counts 1 and 3, Andre Martin, gave the following evidence. He lived in a house at Keperra with Candy. Martin had been friendly with the appellant for some years. He was also friendly with Weldon. McDonnell was Weldon's boyfriend. He did not know Cox. On 8 February 2008, Martin went to bed at about 10 pm. Candy had gone to bed earlier. At about 2.35 am on

9 February 2008 they were awakened by a loud banging noise from the front verandah. Their bedroom door flew open and McDonnell and Cox entered. They were followed by two women, one of whom was the appellant. Cox grabbed Martin by the shirt or neck and McDonnell punched Martin with a fist. The appellant, McDonnell and Cox were each holding an object. The last thing he could remember was lying on the bed and Cox and McDonnell hitting him.

[32] In cross-examination, Martin agreed that he had known the appellant well enough for her to simply come into his house, though he would have expected she would knock before entering. He agreed she was a helpful person by nature. He did not see her say or do anything on the night he was attacked. He conceded that Candy and the appellant were not the best of friends but he "wouldn't say they were enemies". Candy was a little jealous of the appellant. He agreed that sometimes Ben Parkes and Ashleigh Patterson stayed over at his house, but not often; they were not there on this occasion. He worked as a self-employed carpenter. He agreed he had left tools at the appellant's house for storage and to assist her son who wanted to be a carpenter. He intended to allow her to purchase the tools to help him pay back the outstanding loan on his house. He denied that the appellant had previously warned him about a plan to lure him to McDonnell's house to assault him there. He agreed that, at trial, he was in custody on remand for drug-related charges. He denied that the appellant entered his bedroom at a different time to the two men who assaulted him. Once the attack started, his focus was on those attacking him. In re-examination, he stated that the appellant was standing behind the two men when they opened his bedroom door.

[33] Candy gave the following evidence. After hearing a noise, she got out of bed and opened the bedroom door to find McDonnell and Weldon. She did not notice anyone else. McDonnell put his face very close to hers and asked where Martin was. She said he was asleep. McDonnell pushed past her and leapt onto the bed where he repeatedly punched Martin in the face. Candy ran to Martin's assistance. Cox was by then in the bedroom. McDonnell told Cox to get Candy away and Cox pulled her from the bed where she was trying to help Martin. Candy saw the appellant come "flying" into the bedroom armed with a metre long black wooden pole about two inches in diameter. The appellant held it towards Candy and said, "You stay right where you are, don't move or I'll make a mess of your face." McDonnell and Cox dragged Martin off the bed. Weldon entered the room, repeatedly called Candy a slut, and punched her twice to the face. The appellant stood nearby with the pole. McDonnell and Cox repeatedly kicked Martin in the face. Candy asked them to stop. The appellant told her to shut up. McDonnell punched Martin in the face and Cox stomped on his head. The appellant held the stick so as to make Candy stay where she was. Weldon pulled McDonnell off Martin, saying that it was enough. Weldon pushed McDonnell out of the bedroom. In doing so, she knocked some bottles off a shelf and they fell on top of Martin. Candy saw the appellant hit Martin three times to the torso or arm with the pole before she left. Ben and Ashleigh came out of a bedroom. Candy used their phone to call an ambulance.

[34] During Candy's examination in chief, the judge had the jury leave the court room so that the prosecution case could be clarified. The prosecutor stated that count 2 depended on the evidence of the blows delivered by Weldon to Candy after the appellant had threatened Candy and told her to remain there and her

keeping Candy there during Weldon's attack on Candy. Defence counsel indicated that he understood the prosecution's particulars and had no submissions in respect of them.[1]

[35] Candy continued her evidence in cross-examination. She denied that she was jealous of the appellant and that she had fallen out with Weldon over drugs. Candy admitted that she had numerous drug related convictions. She denied that the appellant's role was benign: the appellant did not merely try to stop the assault; she was armed and threatened Candy. Candy denied that the appellant screamed at Weldon to stop hitting Candy. The appellant instigated the whole thing and was in charge of the situation. The appellant did not tell the assailants to stop or she would call the police. The appellant pointed the stick or baton at her and then hit Martin with it. The appellant did not try to call the police using her mobile phone. Candy was certain of the appellant's actions that night.

[36] In re-examination, she said that the appellant came into the bedroom about 30 seconds after McDonnell and Cox began hitting Martin. The appellant immediately pointed the black pole at Candy and said, "Don't move … Stay where you are, or I'll make a mess of your face" or "I'll make a mess of you" or something. The appellant was standing at the end of the bed. Martin was then getting kicked and punched by Cox and McDonnell.

[37] Police arrived at the scene and found Martin on the bedroom floor. They noticed a damaged verandah window. Martin was taken to hospital by ambulance. He had fractures to the nasal bone, left facial bone, a knuckle and two ribs; collapsed lungs; and facial cuts which required stitches. The collapsed lungs were potentially life threatening as they could have stopped oxygen reaching the heart. The prosecution relied on the collapsed lung or lungs as constituting the grievous bodily harm relevant to count 3. Significant and multiple applications of force were required to cause the broken ribs which resulted in the lungs collapsing.

[38] As noted earlier, the appellant was arrested and charged on 9 February 2008 after declining to be interviewed by police. Police conducted a tape recorded interview with her about 18 months later. She admitted that she went to and entered Martin's house and was present at the time these alleged offences occurred. She also admitted that she procured Anderson and Babarovich to provide her with a false alibi.[2]

The defence evidence

[39] At the close of the prosecution case, the judge addressed the appellant in these terms:

> "… the prosecution having closed its case against you, I must ask you do you intend to adduce evidence in your defence. This means you may give evidence yourself, call witnesses, or produce evidence. You may do all or any of those things or none of them. You are represented by council [sic] who may, if you wish, answer for you."

[40] Defence counsel indicated that the appellant would be calling evidence and opened her case before calling the following witnesses on her behalf.

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1 Appeal book, 194.

2 See [12]-[16] of these reasons.

[41] Kindred, who gave evidence in the s 590AA application in the absence of the jury, gave the following evidence at the trial before the jury. One Sunday morning in early June 2009 he was at the appellant's house when McDonnell and Weldon arrived. McDonnell yelled at her and pushed her.

[42] Marika Verenitani gave evidence which was consistent with him being the person whom the appellant called "Biscuit" in her interview with police. On 8 February 2008, he was leaving the Ferny Grove Tavern when the appellant asked him to drive her to a Grovely address to collect her son and his friend. He did so. The appellant's son and another man got into his car soon after the appellant got out. The appellant returned about a minute and half later.

[43] Dr Steven James Cook, a general practitioner of 26 years experience, gave evidence that he had been the appellant's doctor since mid-2004. She had some serious medical conditions. She suffered orthopaedic and neurosurgical pain-related conditions, namely, chronic low back pain and left sided sciatica. She had a related structural condition of the lower spine called spondylolisthesis. She also suffered from migraines and had a depressive disorder. She was prescribed 20 mg of OxyContin, a narcotic, morphine-type pain killing medication. She also received injections to her lower spine from time to time comprising a mix of local anaesthetic and a steroid. Because of her limitations through pain and her reduced range of movement, it was unlikely she could swing a metre long pole and strike somebody who was prone on the ground three or four times.

[44] During the prosecutor's cross-examination, the following exchange occurred which directly relates to one ground of appeal:

> "If - can I put a scenario to you, too? If [the appellant] had been playing pool, that is picking up a pool cue, late one evening and then in the morning of the following evening cleaning up her house and sweeping, is it possible that in that intervening period that she could have picked up an instrument, as described to you, and carried out the movements that were described to you?-- Well, it - yes. Playing pool typically involves some forward flexion, a bending forward over the table.
>
> Yes, and holding a long-----?-- Yes.
>
> -----a long instrument?-- Yes.
>
> Yes.
>
> HIS HONOUR: Well, perhaps we'll break it up then.
>
> [PROSECUTOR]: Thank you, your Honour.
>
> HIS HONOUR: Doctor, would you - would the condition that you've described, your understanding of the mechanism, if her back were painful and interfering with her range of movement, would you expect her to be playing pool?-- I would be surprised - I am surprised that she was playing pool.
> Would that suggest that she at that particular time was not suffering particular difficulties with the movement in her lower back?-- Yes, I - yes, that seems a reasonable assumption, your Honour.
>
> Yes. Yes. You see, you do it one step at a time, [prosecutor]. Thank you.

PROSECUTOR: Thank you, your Honour. I appreciate your assistance. Then similarly, doctor, if some time a number of hours after - after she may have delivered these blows, it was that [the appellant] was sweeping her house, would that then also indicate that she had some range of movement and wasn't suffering the pain that would impede her from having done that earlier act?-- Yes, I would agree with that, although I – if I could just say that it's the act of sweeping or, in fact, may be playing pool would seem a more gentle movement than a violent act of striking somebody. It's a - yeah, that would be my only other comment, I suppose.

So in reaching that conclusion you've assumed that it was a violent striking?-- Oh, yes, sorry. Yes.

All right. So you've assumed a particular - a severe level of force?-- Yes, I suppose I have assumed that. I have no knowledge of the degree of force involved, so.

All right. But if it was just that there was a raising of it and hitting on to someone, what might be described as a whack rather than a violent hitting, would your opinion be any different?-- Well, the - the - the more violence involved I would say the less likely that she was able to perform that act. So to reverse that, I suppose the - the - the less violent - yes, the less violence involved the more likely she's be able to perform that I would say.

Thank you. And the highest that you can put it is that it would be unlikely that she would be able to use severe force to hit someone with an implement of that kind?-- Yes, I – I still believe that that act as described is unlikely considering her - her-----

The limitations that you've spoken about?-- Yes.

Pain and movement, yes?-- Yes.

And just to confirm, you've got no record of any testing or conditions of movement and pain or the results of treatment at the Royal Brisbane Hospital from around February of 2008?-- No, not - not in that immediate period.

Right. Thank you?-- I've actually got my records in front of me if I could quickly refer to them if-----

HIS HONOUR: Yes, certainly.

[PROSECUTOR]: Yes. February 2008?-- I saw her on the 15th of January, 12th of February and the 12th of March. Those three consultations are fairly routine. From my notes it's simply just review and - and prescribing some medication, but no – no examination referred to.

Thank you, doctor. Nothing further, thank you, your Honour.

HIS HONOUR: Just a couple of other matters. Doctor, I wonder if you could comment on the effect of someone who was taking OxyContin of the dose that you prescribed on having alcohol as well.

> Would that react in any particular way?-- Yes. Narcotic medication has a potentiating effect with alcohol and vice versa that is likely to cause some drowsiness or sedation. It's - although it's very complicated, and I don't pretend to be an expert in this.
>
> All right?-- But someone who's been taking even higher doses of narcotic for relief of pain, the effect is almost that the pain and the narcotic cancel each other out, and it is almost as if they take the narcotic to be normal, to be - to have normal function. But certainly alcohol and OxyContin together would have an additive effect on each other.
>
> All right. So that if she had - in simple terms then, if she had been drinking, the pain relief from the medication you've prescribed would have been more effective than usual; is that right?-- Yes, that's true.
>
> All right. Which might impact on the opinion that you expressed earlier, might it?-- Sorry, your Honour.
>
> About the likelihood of her being able to engage in the conduct described by [defence counsel]?-- Yes, that is likely to impact, yes.
>
> Yes. [Prosecutor], anything arise out of that?
>
> [PROSECUTOR]: Thank you, your Honour. Doctor, you've said it is likely to impact. How? Does it make it more likely that she was able to perform the act of holding that instrument and delivering three blows?-- Look, I - it's difficult to comment because the - although, you know, in theory the alcohol and the OxyContin together are likely to potentiate or increase the effect of the OxyContin, increase the pain relief. On another way it can be looked at that it may also reduce her ability to perform any act. It depends on the level of sedation. Her coordination may be affected. It's very difficult to say, I'm sorry.
>
> If it was having that impact, that more adverse impact where her ability to do any act may be impaired, would you expect her to be able to walk at least 200 metres?-- No, not - no, that's - no, I wouldn't.
>
> Thank you. Nothing further.
>
> HIS HONOUR: [Defence counsel]?
>
> [DEFENCE COUNSEL]: No re-examination, thank you, your Honour."

[45] At the conclusion of Dr Cook's evidence, defence counsel closed his case. The judge told the jury that they had heard all the evidence they would hear in the trial. As it was then 1.00 pm, the court took the luncheon adjournment. When the court resumed at 2.44 pm in the absence of the jury, counsel discussed with the judge the appropriate jury directions. Defence counsel then apologised, stating that he had "just received some instructions to ask for [the judge's] leave to call [the appellant] to give evidence in the trial". The judge allowed the appellant to re-open her case.

[46] She gave the following evidence. She had known Martin very well for a long time. She had attended school with his brother. Martin had been a great support to her.

She had seen less of him in the months preceding this incident because he became "quite heavily involved in drugs". She had met Candy on four or five occasions but did not know her well. Candy introduced Weldon to her. The appellant thought that Martin's relationship with Candy had ended and did not expect to see her at the house on 9 February 2008.

[47] The previous evening, the appellant went to the Ferny Grove Tavern to deliver a birthday present to a friend. She left the tavern with Katerina Anderson. At the tavern she played pool with a large group of people. She was wearing a back brace because of her back pain. She had not taken any medication for a month beforehand as she was concerned not to become addicted to the morphine-based pain killers. She was planning to have some friends back to her house after the tavern closed. She learned that her son, James, had driven Weldon and others to Martin's house. She was very angry with James. He had an apprenticeship and had lost his full licence. He had only a work licence which did not allow him to drive after 11.00 pm.

[48] She asked Verenitani to drop her around to Martin's house to pick up her son. He agreed. Verenitani parked his car and she got out to find her son and his friend. She found them in Weldon's car and they went to Verenitani's car. Before she could return to Verenitani's car, she heard a female screaming inside Martin's home. She noticed the gate and door were open and a broken window. She "made a very silly decision and decided to go and find out what was going on and if everyone was alright". She had been to the house many times and was familiar with it. She turned on the lights as she walked in. Ben Parkes and Ashleigh had been living in the garage. She called out to Ben Parkes but he did not come.

[49] She walked into Martin's bedroom. It was quite dark. She saw Weldon and Candy fighting. Weldon was punching Candy. The appellant told Weldon to "knock it off … stop it straight away". She saw that somebody was on the floor. There were four other people in the room. One was a "young boy" who was punching into the person on the floor. The appellant told him to stop. Cox elbowed her and winded her. McDonnell, Cox and Daniel appeared "sort of out of control" and were kicking someone on the floor. She yelled at them and told them she was calling the police, adding "You're the sort of people who end up getting bullets put in their head. You're disgusting." She could not see who was on the ground. She went to use her mobile phone to call police. McDonnell threw her phone on the floor. The assailants then took off. She picked her phone up but it was not working. She was shocked by the whole thing. She ran out to Verinitani's car. She yelled out to Ashleigh to call the police as she knew she would be in the house somewhere.

[50] She instructed Verinitani to drive down a side street towards the shops and to wait until they heard a siren because she wanted to be sure an ambulance had been called. When she arrived home, Weldon's car was in her driveway and Daniel's car was on the road. McDonnell, Weldon and Cox threatened her from the bottom of the driveway. On subsequent occasions they came to her house and threatened her.

[51] She agreed that she asked Anderson and Babarovich to provide statements about what happened that night, but she denied that she asked them to provide false statements. She knew nothing about any plan to go to Martin's house and assault him or Candy. She did not know Candy was then living there with Martin because there was a domestic violence order in place. She did not assault anybody and did not assist anyone in assaulting anybody at Martin's house.

Relevant aspects of the judge's summing-up

[52] Whilst dealing with preliminary matters at the commencement of the jury directions, the judge explained that the jury must consider each count separately in deciding each count on the evidence applying to that particular count. In setting out the elements of count 1 (burglary with circumstances of aggravation) the judge explained that the prosecution case on count 1 was that the appellant entered Martin's dwelling at night time with an intent to commit an assault on him, either a personal intent to assault him or a common intention with the other three offenders to assault him. If the prosecution established those matters, it established the basis of count 1, the burglary. The jury would then need to look at the charged circumstances of aggravation.

[53] The first aggravating circumstance in count 1 was that the entry was effected by means of a break. There was evidence that the house had been broken into. If the jury were satisfied that the appellant was part of a common purpose to break into Martin's house and assault him, it was not necessary to show that she actually effected entry by the break. The next aggravating circumstance in count 1 was that the offence occurred at night, that is, between 9.00 pm and 6.00 am. The next aggravating circumstance in count 1 was that the appellant was armed with a pole. The final aggravating circumstance in count 1 was that the appellant was in company with other persons. This means that she and one or more other person or persons were physically present for the common purpose of entering the dwelling or premises. The question for the jury for these circumstances of aggravation was whether they were all there together to get into the premises. The fact that they were all in the room together after the entry would not be enough to satisfy the circumstance of aggravation that they were in company. They must have entered the dwelling in company. That issue was certainly in dispute. The appellant denied she was part of the group who initially broke into Martin's premises.

[54] Only if the jury were satisfied of all five circumstances of aggravation would they convict her of the offence charged. The judge pointed out that, on Candy's and Verinitani's evidence, the jury could well have a doubt as to whether the appellant was there with the others at the time they broke and entered the dwelling. If the appellant did not enter with the others, the prosecution case of a collective intent would fail. There remained the question of the appellant's personal intent. If, because of the evidence of Martin and Candy, the jury had some doubt as to whether the appellant entered with the others, but they were satisfied that she entered with intent to assault Martin and used actual violence on Martin whilst armed with the pole, they could return an alternative verdict of guilty of the offence of burglary at night with violence whilst armed. (The jury verdict of guilty on count 1 was on this alternative basis.)

[55] The defence case on count 1 was that the appellant went into the house but not with the others and not with any intention to either assault Martin as part of a group or to assault him personally, and she was not armed at the time.

[56] As to count 2, the assault on Candy, the judge explained that the prosecution relied on Weldon's punching of Candy. The prosecution contended that the appellant intentionally aided Weldon in the commission of this offence by using the stick to prevent Candy from moving whilst Weldon punched Candy in the face. If the jury were satisfied of those matters beyond reasonable doubt, they should convict the appellant of count 2.

[57] The judge reminded the jury that the appellant denied she did this. If the jury had any reasonable doubt, they should give the appellant the benefit of that doubt. His Honour added that there was not a lot of evidence about count 2 but it was up to the jury to decide whether Candy's evidence left them satisfied beyond reasonable doubt that the appellant was criminally responsible.

[58] The judge then turned to count 3, explaining the elements of unlawfully doing grievous bodily harm. The doing of the grievous bodily harm was caused by the attack on Martin by the men who punched or kicked him.

[59] The prosecution case against the appellant on count 3 was put on two alternative bases. The first was that the appellant knowingly aided the commission of the offence of grievous bodily harm. This was dependent upon Candy's evidence. Candy tried to protect Martin from his attackers but was pulled off. The appellant then threatened Candy with a stick and stopped her from attempting to protect Martin. The appellant aided the attackers in this way and hence aided the doing of grievous bodily harm to him. To convict the appellant on this basis, the jury would need to reject her account and accept Candy's account. Alternatively, the judge explained, the law provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with another, and in its prosecution an offence is committed of such a nature that its commission was a probable consequence of the prosecution of the purpose, each person is deemed to have committed the offence. The prosecution contended that there was a common intention on the part of the appellant, Cox, McDonnell and Weldon to break into Martin's house and beat him up. That could be inferred from Candy's and Martin's evidence. The prosecution contended that the grievous bodily harm to Martin was a probable consequence of the prosecution of that common purpose. Although the injuries suffered by Martin may not have been specifically intended, the prosecution contended that they were precisely the sort of injuries that might be expected to have occurred in light of the severity and the persistence of the attack on him.

[60] The defence case was that the appellant was not part of any common purpose to go to Martin's house and beat him up. The appellant did not in fact assist the other co-offenders inside the house.

[61] The judge explained that, to a large extent, the prosecution case on all three counts depended on Candy's evidence. In some respects, Candy's evidence was supported by Martin's, but his memory of events faded soon after the attack. The medical evidence suggested his memory may have faded because of the attack. The judge emphasised that, as Candy's evidence was of such significance, the jury should scrutinise it carefully before being satisfied of the appellant's guilt beyond reasonable doubt. Candy's evidence was relevant to all counts. The jury must consider her evidence in respect of each count separately. If the jury were not satisfied beyond reasonable doubt about her evidence on one count, it did not mean they could not convict on another count if they were satisfied of Candy's evidence beyond reasonable doubt on that count. But, if they had a doubt about Candy's evidence on one count, they would also have to have a doubt about the same part of her evidence insofar as it was relevant to another count.

[62] The judge gave careful directions to the jury as to how to use the evidence which the prosecution submitted amounted to an attempt to produce false alibi statements, adapted in terms broadly consistent with the approach taken to the use of lies as

consciousness of guilt in *Edwards v The Queen*.[3] In particular, the judge warned the jury that people might try to secure false alibis for reasons other than because they were guilty of the offence. For example, they might do so out of panic, to escape an unjust allegation, to protect another person or to avoid a consequence unrelated to the offence.

[63] His Honour gave a like warning in respect of how the jury should use the evidence of the appellant's flight upon which the prosecution also relied as showing a consciousness of guilt.

[64] The judge further warned the jury against reasoning that, simply because they did not accept the appellant's evidence, or even if they considered that she was lying, they must not reason that she was therefore guilty. They must then consider the prosecution evidence they accepted beyond reasonable doubt and determine whether or not she was guilty.

[65] The judge summarised the competing prosecution and defence cases in this way. The entering occurred at night. The prosecution case was that the jury would accept the prosecution witnesses and reject the appellant's evidence as unreliable. She arranged a false alibi. The evidence demonstrated her presence at the house at the time of the offences. Her conduct whilst at the house showed she was a party to breaking into Martin's dwelling; she helped assault Martin by stopping Candy from interrupting the assault on him; she was armed with a stick; and there was a plan for the four offenders to go to the house together and collectively beat up Martin. He suffered grievous bodily harm, something which was always a probable consequence of what was intended by the common plan.

[66] The defence case was that the jury would accept the appellant's evidence that she was not involved in any of these offences; she was not part of any plan to assault Martin and was not there in company with the others. She arrived separately, being taken there by Verinatani. She did not have a stick; she did not threaten Candy with it; she did not hit Martin with it. She tried to protect Candy from Weldon and to protect Martin by trying to call the police. The jury would at least have a reasonable doubt about the basis of the prosecution case. The evidence of Dr Cook made it inherently unlikely that the appellant would have behaved in the way described by Candy.

[67] The judge explained to the jury the procedure when giving their verdicts:

> "My associate will call over your numbers again and ask, 'Are you agreed upon your verdict?' If you say, 'Yes, she will then say, 'In respect of count 1, do you find the [appellant] guilty or not guilty of burglary by breaking at night-time with violence whilst armed and in company?'
>
> Now, you will recall I told you before lunch that there may be an alternative verdict, depending on the view that you take, open in relation to count 1. If you are satisfied beyond reasonable doubt that the [appellant] entered with intent to commit an indictable offence, by means of a break at night with actual violence whilst armed and in company with other persons, if you are satisfied beyond reasonable doubt of all of those things, the foreman will say, 'Guilty.' If you're

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[3] (1993) 178 CLR 193.

> not satisfied beyond reasonable doubt of all of those things the foreman will say, 'Not guilty.'
>
> If the foreman says, 'Not guilty', my associate will then say, 'Do you find the [appellant] guilty or not guilty of burglary in the night with violence whilst armed?' Now, if you're satisfied that she entered the dwelling with intent to commit an indictable offence in the dwelling at night whilst armed with the pole and used actual violence whilst she was in there, if you're satisfied beyond reasonable doubt of all of those things you find her guilty of that offence. If you're not satisfied of that beyond reasonable doubt you find her not guilty, and that's the end of it.
>
> In theory, with all those circumstances of aggravation there might be a large number of alternative verdicts. I have determined, as part of my function, that on the evidence you've heard the only verdicts that you could reasonably return in relation to count 1 are guilty of burglary with all the circumstances of aggravation charged, or guilty of burglary in night with violence whilst armed, or not guilty. So it's only one of those three. If you've got any reasonable doubt about breaking and in company, it's the second one, and if you've got any reasonable doubt about either element of the burglary or any of the other three circumstances of aggravation, it's just not guilty. Okay?
>
> Now, she will then say, 'Are you agreed - is that the verdict of you all', and you should all indicate your assent to the verdict your foreman has delivered, and she will then say, 'Do you find the [appellant] guilty or not guilty of count 2', that's the common assault, and that's either guilty or not guilty, and the foreman will say 'guilty' or 'not guilty', she will ask you to all indicate your assent to the verdict, and she will then say, 'Do you find the [appellant] guilty or not guilty of count 3', that's the grievous bodily harm, and again it's guilty or not guilty. No alternative verdicts there. Again she will ask you to all indicate your assent to the verdict the foreman has delivered." (errors as in the original)

[68] The jury retired at 3.39 pm. There were no requests for redirections, neither by counsel nor by the jury during their deliberations. The jury returned with their verdicts at 5.04 pm.

Are the guilty verdicts unsafe because of the not guilty verdicts?

[69] The oral submissions of the appellant's counsel at the hearing focussed on the alleged inconsistency in the jury verdicts. The jury found the appellant not guilty on count 2 (the assault on Candy) and on some circumstances of aggravation in count 1 (that the entry was means of a break and that at the time of entry the appellant was in company with others). These not guilty verdicts were inconsistent with the verdict of guilty of burglary with actual violence whilst armed with an offensive weapon and of doing grievous bodily harm.

[70] In determining this ground of appeal, the question for the Court is whether the diverse verdicts cannot stand together logically, so that the guilty verdicts are unsafe and unsatisfactory: *MacKenzie v The Queen*.[4]

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4 (1996) 190 CLR 348, Gaudron, Gummow, Kirby JJ, 365.

[71] I have carefully considered the enthusiastic, if unfocused and unhelpful, submissions made by the appellant's counsel in support of this ground of appeal, but I have concluded that the verdicts can be logically rationalised and are not inconsistent.

[72] The jury knew from the judge's instructions that they must decide each count separately on the evidence relevant to that count. As the judge explained, the evidence of both Candy and Verinitani supported the conclusion that the appellant did not arrive at the house with her three co-offenders, Cox, McDonnell and Weldon. It is unsurprising, then, that the jury were not satisfied beyond reasonable doubt that the appellant was in company with the others at the very time of the entering, or that she was involved with them in breaking into the house. Those were the two aggravating circumstances to count 1 in respect of which that the jury found the appellant not guilty. The jury were entitled to accept Candy's and Martin's evidence and to reject the appellant's evidence. They could then readily conclude from the appellant's conduct at Martin's house that she had either formed a common intention with her co-offenders to enter Martin's house and beat him up, or she individually had that intention when she entered the house, and that whilst in the house she was armed with a stick or pole which she used to assault Martin.

[73] The jury acquitted the appellant on count 2. Even accepting Candy's evidence, the jury were entitled to have a doubt as to whether the appellant was threatening Candy with a stick so as to allow Weldon to punch her. After all, the common purpose alleged by the prosecution was to come to Martin's house to beat him, not Candy. As the appellant said in evidence more than once, she did not expect Candy to be present. The judge explained that, before convicting the appellant on count 2, the jury would have to be satisfied that she did something to knowingly aid or encourage Weldon in her assault of Candy. The most plausible view of the evidence was that the appellant was "bailing up" Candy with the stick to aid in the assault by Cox and McDonnell on Martin, not Weldon's assault on Candy. The jury verdict acquitting the appellant on count 2 as particularised by the prosecution was in no way inconsistent with the guilty verdict on count 1 (burglary in the night with violence whilst armed).

[74] And nor is the not guilty verdict on count 2 inconsistent with the guilty verdict on count 3 (doing grievous bodily harm to Martin). Even if the appellant was not part of the break of Martin's house, did not enter the house at the same time as her co-offenders, and did not knowingly aid or encourage Weldon's assault on Candy, the jury were entitled to accept the prosecution evidence as to count 3 on one of two possible bases. They could have been satisfied beyond reasonable doubt that the appellant was part of plan to enter Martin's house and beat him up and that the grievous bodily harm was a probable consequence of that plan (s 8). Alternatively, the jury equally could have been satisfied beyond reasonable doubt that she used the stick or pole to restrain Candy from assisting Martin whilst Cox and McDonnell assaulted him and inflicted grievous bodily harm on him (s 7(1)(b) or (c)). Indeed, the latter scenario was the factual basis on which the judge sentenced the appellant on count 3.

[75] For those reasons, it follows that the verdicts can logically stand together and this ground of appeal is also unsuccessful.

Was the jury verdict unreasonable or not supported having regard to the evidence: s 668E(1) *Criminal Code*?

[76] The appellant contends the guilty verdicts were unreasonable and not supported by the evidence.

[77] As I have explained in dealing with the preceding ground of appeal, the jury were entitled to reject the exculpatory evidence of the appellant and to instead accept Candy's evidence and to reach the following conclusions beyond reasonable doubt. The appellant went to Martin's house in the early hours uninvited, arriving very shortly after her co-offenders, having formed a common intention with at least one of them to enter Martin's house and beat him up. Alternatively, the appellant independently formed a personal intention to enter Martin's house and beat him up. Once in the house, she used actual violence on Martin, hitting him with the stick or pole with which she was armed. The guilty verdict on count 1 (burglary with the circumstances of aggravation that it was at night, with actual violence, and whilst armed with an offensive weapon) is supported by these findings which the jury were entitled to reach beyond reasonable doubt on the evidence.

[78] There were also alternative bases for supporting the jury's guilty verdict on count 3 on the evidence. The jury may have found the appellant aided McDonnell and Cox in their doing of grievous bodily harm to Martin by "bailing up" Candy with the stick or pole so that Candy could not assist Martin (s 7(1)(a) or (b)). In the alternative, the jury may have found that the doing of grievous bodily harm to Martin was a probable consequence of the common plan with one or more of her co-offenders to enter his house in the early hours and beat him up. The jury were entitled to reach those conclusions on the evidence beyond reasonable doubt.

[79] After reviewing the whole of the evidence, I am confident that it was well open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of burglary with the circumstances of aggravation that the offence was committed at night, with actual violence, whilst armed with an offensive weapon; and of doing grievous bodily harm to Martin. See *M v The Queen*;[5] and *MFA v The Queen*.[6] This ground of appeal is not made out.

Failure to direct on s 22 *Criminal Code*

[80] The appellant contends in his written submissions that the judge erred in not directing the jury as to s 22 *Criminal Code*. That section relevantly provides:

> "**22** …
> (2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

[81] It is immediately apparent that s 22 can have no application to count 3 (doing grievous bodily harm) which is not an offence relating to property. As the particularised intention to commit an indictable offence in count 1, burglary, was entering with an intention to unlawfully assault Martin, it is doubtful whether s 22 could have any application to count 1. Conversely, the jury verdict of guilty on

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5 (1994) 181 CLR 487, 493-495.

6 (2002) 213 CLR 606 [25], [59].

count 1 (burglary) means that they were satisfied beyond reasonable doubt that at the time the appellant entered Martin's house, she intended to unlawfully assault him. Her actions therefore do not seem to be "with respect to any property in the exercise of her honest claim of right".

[82] But even more fundamentally, the appellant did not give any evidence to raise an honest claim of right with respect to property. Although she was welcome at Martin's house when visiting as a friend, she was not authorised to enter his house in the small hours whilst he slept for the purpose of beating him up.

[83] This ground of appeal is also without substance.

Failure to direct the jury on s 25 *Criminal Code*

[84] Section 25 *Criminal Code* relevantly provides:

> "**25 Extraordinary emergencies**
> Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise."

[85] The appellant's evidence, that she heard a scream and that there were signs of forced entry of Martin's house, was not sufficient to invoke the exculpatory provision of s 25. This ground of appeal is entirely unmeritorious.

The judge's questioning of Dr Cook

[86] The appellant's counsel contends the trial judge erred:

> "in entering into the arena in questioning the medical evidence of the doctor in circumstances where the prejudicial effect of his questioning as to the effects of drugs and alcohol, without a proper basis in medical or scientific premises, denied the [appellant] the chance of an acquittal, in that her credibility could have been affected and prejudiced in circumstances where there is no opportunity to rebut the answers to the questioning."

[87] The judge's impugned questioning of Dr Cook, a defence witness, is set out in these reasons at [44]-[45]. The judge's questioning followed from the prosecutor improperly asking the doctor several questions in one. The judge's intervention was entirely warranted and unremarkable. Both counsel had the opportunity to question the doctor about matters arising from the judge's queries. His Honour's questioning of the doctor did not improperly prejudice the appellant or cause a miscarriage of justice. This ground of appeal is also entirely unmeritorious.

Incompetence of defence counsel

[88] The appellant's counsel contends that her counsel at trial was incompetent for a host of reasons. The first is that he failed to seek a direction as to s 22 and s 25. As I have explained, those exculpatory provisions were not raised on the evidence.

[89] The next contention is that trial counsel should have asked the judge to exclude the record of interview in the exercise of the judge's discretion on the basis that it was prejudicial. Defence counsel cannot be fairly criticised for not doing this, having

been unsuccessful in the s 590AA application in which he sought to have it excluded. The record of interview was relevant and admissible, and such an application was likely to waste time and risk the wrath of the judge.

[90] The appellant's counsel submits that trial counsel was incompetent for not ensuring that the judge warned the appellant of her right to claim privilege from answering questions on matters of the allegations of false alibi. It is entirely understandable why counsel did not ask for such a warning. The jury would likely be unimpressed with a claim of privilege: it would have undermined the appellant's credibility. And, in any case, the appellant claimed in her evidence before the jury that she did not orchestrate the alibi statements so that she did not need to claim privilege. This contention is baseless.

[91] The appellant's counsel next criticised trial counsel for calling the appellant to give evidence after other defence witnesses had given evidence. The transcript makes it plain that the appellant was well aware of her right to give evidence: the judge informed her of it.[7] She was not reticent in instructing her counsel later that she did wish to give evidence. It is plain that this was no failure on the part of defence counsel, but a late change of mind on the part of the appellant.

[92] Finally, the appellant's counsel contends that defence counsel was incompetent in that:

> "he failed to seek a direction from the learned trial judge to address the jury on the failure of the Crown to call material witnesses that were present at the premises when the offences were committed and who could have corroborated the defences of the [appellant]."

[93] I apprehend that this contention refers to the fact that the prosecution called neither the small 15 year old boy referred to in the appellant's evidence, nor Ashleigh Patterson nor Ben Parkes. Cope explained in his evidence at trial before the jury that he had made efforts to contact Parkes and Patterson but both refused to provide any information to police. As to the boy who was thought to be a neighbour of Martin, door knocking in the neighbourhood failed to provide any information as to his identity or whereabouts. In those circumstances, it would have been fruitless and improper for defence counsel to seek a direction from the trial judge.

[94] The appellant's contentions as to this ground of appeal, individually and collectively, are also completely unmeritorious. They do not demonstrate that a miscarriage of justice has occurred as a result of counsel's conduct. The conduct of trial counsel relating to these matters were all entirely explicable on the basis of proper forensic decision-making at trial: see *TKWJ v The Queen*.[8]

The remaining grounds of appeal against conviction

[95] The appellant contends that the judge failed to adequately instruct the jury on "the necessary timing of the intent, and excluding the after-entry intent, in relation to the offence of grievous bodily harm, and the offence of entering with intent".

[96] I have difficulty in understanding this ground of appeal. The judge's directions made clear to the jury that the appellant must have intended to assault Martin at the time she entered his house before they could convict her of burglary: see [52] of

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7 See [39] of these reasons.

8 (2002) 212 CLR 124, 130-131 [16]-[17]; 135 [33]; 150-151 [81]-[82]; 157 [101]; 158 [108]; 159-160 [112].

these reasons. The offence of grievous bodily harm does not include an element of intent. This ground of appeal is without substance.

[97] That leaves the appellant's contention that the judge erred in not addressing and giving due weight to the appellant's medical condition. The judge referred to the evidence of Dr Cook in his summation for the jury of the defence case. He stated that the defence contention was that Dr Cook's evidence made it inherently unlikely that the appellant would have behaved in the way described by Candy: see [66] of these reasons. The judge's reference to Dr Cook's evidence was unexceptional and fair. This contention is also without substance.

Conclusion on appeal against conviction

[98] It follows that, as none of the grounds of appeal relied on by the appellant have been made out, the appeal against conviction must be dismissed.

The application for leave to appeal against sentence

[99] The appellant's primary contention in respect of the application for leave to appeal against sentence is that it was manifestly excessive when compared to the sentence imposed on the co-offender Weldon. The sentences imposed on the appellant and her co-offenders are set out at [2] and [3] of these reasons.

[100] The maximum penalty for count 1 (aggravated burglary) was life imprisonment; for count 2 (assault on Candy) three years imprisonment; and for count 3 (grievous bodily harm), 14 years imprisonment. Weldon pleaded guilty to counts 1 and 2. The appellant was convicted on count 1 (without some of the circumstances of aggravation of which Weldon, Cox and McDonnell were convicted, but the maximum penalty was still life imprisonment) and count 3. Unlike the appellant, Weldon, Cox and McDonnell pleaded guilty, although not at an early stage. The appellant's co-offenders were each entitled to some mitigating benefit for their pleas of guilty and cooperation with the authorities. The appellant was not.

[101] The appellant's offending, a home invasion resulting in grievous bodily harm, is considered most seriously by the courts. It involved the entering of Martin's home in the early hours of the morning, whilst he was sleeping and defenceless, for the purpose of a group assault on him. The appellant armed herself with a stick or pole and aided McDonnell and Cox in their attack. Martin suffered injuries from which he could have died if left untreated. Fortunately, he made a reasonably good recovery over time. She struck Martin a couple of blows with the long pole or broken billiard cue with which she was armed.

[102] The judge accepted that McDonnell instigated the offending. His counsel stated that McDonnell had been angered by Martin's text messages to Weldon, who was then McDonnell's de facto partner. All four offenders were mature, had solid employment histories and mitigating personal circumstances. All had provided references suggesting that their behaviour this night was out of character. This was supported by their criminal histories. The appellant had no criminal history. The appellant had medical difficulties so that, to some extent, prison would be a more serious punishment for her than for a healthy person. That was why the judge, unusually after a trial, fixed a parole eligibility date somewhat earlier than half way through the term of imprisonment.

[103] Courts impose significant deterrent penalties on those convicted of home invasions causing significant personal injury. In *R v Leu; R v Togia*,[9] Fraser JA (Keane JA and A Lyons J agreeing) noted that premeditated home invasions at night, involving the use of weapons and an assault which caused relatively minor bodily harm, invoked sentences of between three and five and a half years imprisonment. The injuries suffered by Martin in this case were much more than "relatively minor bodily harm". The sentence imposed on the appellant is not manifestly excessive.

[104] It requires her to spend seven months longer in custody than Cox before her parole eligibility, and two months longer in custody before her parole eligibility than McDonnell. There can be no justifiable sense of grievance when her sentence is compared to theirs in light of their guilty pleas and greater cooperation with the authorities. Weldon also pleaded guilty and cooperated with the authorities. She was not convicted of grievous bodily harm. No fair comparison can be made between her sentence and the appellant's sentence. Weldon's sentence could not give the appellant a justifiable sense of grievance.

[105] The appellant has not shown the judge erred in any way in sentencing her. Her sentence is not manifestly excessive. It is appropriate when compared to the sentences imposed on her co-offenders, including Weldon.

[106] It follows that the application for leave to appeal against sentence must be refused.

ORDERS:

1. The appeal against conviction is dismissed.

2. The application for leave to appeal against sentence is refused.

[107] **CHESTERMAN JA:** I agree with the President.

[108] **CULLINANE J:** I have had the advantage of reading the draft reasons of the President in this matter. I agree with those reasons and the orders proposed.

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[9] (2008) 186 A Crim R 240; [2008] QCA 201.