SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lacey & Lacey* [2011] QCA 386
PARTIES:	**R** **v** **LACEY, Dionne Matthew** (appellant/applicant) **R** **v** **LACEY, Jade Michael** (appellant/applicant)
FILE NO/S:	CA No 91 of 2010 CA No 218 of 2010 CA No 92 of 2010 CA No 219 of 2010 DC No 2783 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2011
JUDGES:	Chief Justice, Fraser JA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 91 of 2010:** **1. Appeal dismissed.** **In CA No 92 of 2010:** **1. Appeal dismissed.** **In CA No 218 of 2010:** **1. Application for leave to appeal against sentence refused.** **In CA No 219 of 2010:** **1. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – OF COUNTS – BY STATUTE – SAME FACTS OR SERIES OF OFFENCES OF SAME OR SIMILAR CHARACTER – where the appellants were found guilty of assault occasioning bodily harm whilst armed and in company, extortion,

threatening violence at night, torture, unlawful wounding with intent and deprivation of liberty – where all of the offences were committed against the same complainant, Matthews, with the exception of the charge of threatening violence, which was committed against the complainant, Gale – where the appellants argued that the charge of threatening violence was improperly joined – where Matthews' account of the events constituting count 3 was an integral part of his narrative of the remaining counts – where neither defence counsel sought a separate trial – where the appellants argued there was a risk that the jury impermissibly used Gale's evidence to bolster Matthews' credibility – where both defence counsel used Gale's evidence to attack Matthews' credibility – whether there was an improper joinder of the count of threatening violence on the indictment

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL COUNTS – where, in the alternative to an improper joinder, the appellants argued that the trial judge failed to warn the jury against impermissible propensity reasoning arising from the joinder of the charge of threatening violence – whether a warning in relation to propensity reasoning was required

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellants argued that a *Markuleski* direction was required – where the trial judge raised the issue of a *Markuleski* direction but no party sought such a direction to be made – whether a *Markuleski* direction ought to have been given

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellants argued that the prosecutor's address to the jury went further than his foreshadowed intention to rely on lies told by the appellant, Dionne Lacey, in the witness box as going only to credit – where the appellants argued that, as a result, an *Edwards* direction ought to have been given – where the prosecutor's address, taken in context, conveyed an impression that the jury was merely invited to disbelieve Dionne Lacey's evidence – whether the jury would have understood the prosecutor to be relying upon the lies as being probative of guilt – whether an *Edwards* direction was required

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellants argued that the trial judge failed to direct the jury

as to impermissible propensity reasoning arising out of uncharged acts of which evidence was given – where the trial judge specifically identified the limited purpose for which the jury could use that conduct – where the structure of the trial judge's summing up focussed the jury's attention upon the evidence relevant to each count and related the evidence to the elements of each charge – whether a direction as to impermissible propensity reasoning was required

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the trial judge gave a direction to the jury to scrutinise the evidence of one witness, Bowley, with great care as a result of a discount he received in sentencing for cooperation with law enforcement authorities – where counsel for the appellant, Dionne Lacey, sought a redirection in relation to the reliability of Bowley's evidence, and a redirection was given in the terms sought – where no further redirection was sought – where the appellants contended that the accomplice direction was insufficient because it did not include the precise words used in the Benchbook, specifically, that Bowley might have given false evidence because of his involvement in one of the charges – whether any further accomplice direction was required

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the complainant, Matthews, was taken by the appellants to a sand island and made to dig a large hole approximately the size of a grave – where, shortly after Matthews had started digging, one of the appellants said that the hole was "too close to the other one" – where the appellants argued that evidence was inadmissible because it was ambiguous and its prejudicial effect outweighed its probative value – where the respondent argued the evidence was admissible in support of the charge of torture as the words conveyed a threat of impending harm – whether the evidence was inadmissible and therefore caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL PERSONS – where the directions given by the trial judge referred to "the defendants" having done certain acts – where the trial judge also clearly directed the jury to consider the cases against each defendant and on each charge separately – where jury notes were given to the jury containing the elements of each offence and the basis of liability alleged by the Crown – where the appellants argued that the trial judge's directions were inadequate to enable the

jury to properly consider their verdicts in respect of each appellant – whether there was any deficiency in the directions

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the Crown relied upon an assault occasioned by both appellants upon the complainant shortly before the demand for money as the relevant "threat to cause future detriment" – where the appellants argued that past conduct alone could not be used to imply such a threat – where the appellants also argued that a number of inconsistencies in the accounts given by Matthews to various people, and inconsistencies between his evidence and other evidence, made the verdict unreasonable – whether past conduct can constitute a "threat to cause future detriment" within the meaning of s 415(1)(b) of the *Criminal Code* – whether the inconsistencies raised required the jury to harbour a reasonable doubt about the appellants' guilt

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where both appellants received a head sentence of six years imprisonment on the charge of torture with a declaration of a serious violence offence – where the sentences were ordered to be served cumulatively upon lengthy terms of imprisonment that both appellants were already serving – where the trial judge started with a range of 10 to 12 years, but referred to the totality principle and reduced the term to six years – where the appellants argued that the totality of the sentences imposed were crushing and that the sentences would detrimentally affect rehabilitation – whether the sentences imposed were manifestly excessive in all the circumstances

Criminal Code 1899 (Qld), s 7, s 8, s 415(1)(b), s 415(3), s 567(2), s 597A, s 668E(1)

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, considered
Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
KRM v The Queen (2001) 206 CLR 221; [2001] HCA 11, considered
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, considered

Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, considered
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, considered
R v Bates [2010] QCA 139, cited
R v B; ex parte A-G (Qld) (2000) 110 A Crim R 499; [2000] QCA 110, distinguished
R v Cannon [2004] QCA 440, distinguished
R v Cowie [2005] 2 Qd R 533; [2005] QCA 223, considered
R v El-Masri [2003] QCA 52, distinguished
R v HAB [2006] QCA 80, distinguished
R v Jessen [1997] 2 Qd R 213; [1996] QCA 449, cited
R v Kennedy and Watkins; ex parte A-G of Queensland [2002] QCA 26, distinguished
R v Lacey [2009] QCA 275, cited
R v Mah [2004] QCA 198, distinguished
R v MAK (2006) 167 A Crim R 159; [2006] NSWCCA 381, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, considered
R v Navarolli [2010] 1 Qd R 27; [2009] QCA 49, cited
R v Nuttall; ex parte A-G (Qld) [2011] QCA 120, cited
R v PAH [2008] QCA 265, considered
R v Sheppard [2010] QCA 342, distinguished
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, cited
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, applied

COUNSEL: A Boe, with P Morreau, for the appellants/applicants
M R Byrne SC for the respondent

SOLICITORS: Nyst Lawyers for the appellants/applicants
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of my colleagues. I agree that the appeals against conviction should be dismissed for the reasons expressed by each of them. I agree that the applications for leave to appeal against sentence should be refused for the reasons expressed by P D McMurdo J.

[2] **FRASER JA:** After a trial which occupied 18 days, both appellants were found guilty by a jury of six offences: assault occasioning bodily harm whilst armed and in company (count 1), extortion (count 2), threatening violence at night (count 3), torture (count 4), unlawful wounding with intent (count 5) and deprivation of liberty (count 6). The appellants were sentenced to six years imprisonment on count 4 and lesser concurrent terms on counts 1, 2, 3, and 6. No further punishment was imposed on count 5, since that offence formed part of the particulars of count 4. Those sentences

were ordered to be served cumulatively upon sentences of imprisonment previously imposed upon the appellants for other offences.

[3] The appellants have appealed against their convictions and they have applied for leave to appeal against sentence.

Conviction appeals

[4] In all counts except count 3 the complainant was Owen Matthews. He was 19 years old at the time of the alleged offences in April 2007. He regularly used drugs and he occasionally sold drugs or assisted others to sell drugs. In April 2007 Matthews lived with Rosemary Gould and her partner Bradley Johnson on their rural property at Kenilworth. One of Matthews' associates in the drug scene was Andrew McLeod. Another was Alicia Swan, who lived with Ashley Bowley at Kidd Street, Robertson.

[5] Matthews gave evidence that at McLeod's request, Matthews arranged to supply Swan with some marijuana in return for some ecstasy pills. Bowley gave evidence that Dionne Lacey (who Bowley called "D") had supplied those ecstasy pills to him on credit. Matthews gave evidence that on Saturday 21 April 2007 he, McLeod, and Mark Cone met Swan near the Kidd Street house. Instead of swapping the drugs as agreed, Cone and McLeod stole the tablets from Swan and left. When Matthews remonstrated with Cone and McLeod, Cone punched him in the face, giving him a black eye. By arrangement with Swan, Matthews returned to Bowley's house on the following day, 22 April 2007. He was shown into the downstairs rumpus room. There were guns on display. Matthews felt threatened by Bowley and especially by another man (who other evidence suggested was Kevin Marshall). They did not believe Matthews' protestations that he was not involved in the drug "rip-off". The other man said that they were going to make Matthews watch while they shot whoever did it.

[6] I will outline the evidence given by Matthews in relation to each count on the indictment and other evidence in relation to count 3.

Count 1: Assault occasioning bodily harm whilst armed and in company

[7] Matthews gave evidence that the appellants subsequently arrived at the house and came into the rumpus room. Jade Lacey was holding an aluminium baseball bat and Dionne Lacey was holding a wooden baseball bat. When Bowley pointed out Matthews to the appellants, each of the appellants repeatedly hit him with their baseball bats between his head and shoulders, causing a broken tooth, bleeding in his mouth, and a cut forehead. Bowley joined in the assault, punching Matthews. The men moved away from Matthews and Jade Lacey fired a pistol towards Matthews' legs.

Count 2: Extortion

[8] The appellants then led Matthews out to their car. On the way to the car, one of the appellants demanded that he pay them back $13,000. Matthews could not remember which appellant said that or whether the other one said anything in response. After they got into the car, Jade Lacey asked Matthews how he was going to get the money. Matthews said that he had money in Kenilworth and gave the appellants directions to Johnson and Gould's property. When they arrived at the property, Matthews walked with the appellants up the driveway to the house. Matthews believed that Jade Lacey

was holding his gun in a pocket. Matthews told Johnson that McLeod had ripped Swan off, Matthews had been blamed for it, and he had been shot at and needed money or he was going to get shot again. Jade Lacey said that it was not them that shot at Matthews, it was someone else, and that they had saved Matthews. Matthews said something along the lines of "you'd believe that". Johnson told them to leave, saying that he had no money. The appellants then drove Matthews back to Brisbane, making threats to kill him along the way.

Count 3: Threatening violence

[9] Matthews gave evidence that the car stopped outside Cone's house at Kingston. Jade Lacey fired his gun out of the car window in the direction of a woman with blonde hair past shoulder length on the veranda.

[10] Cone's girlfriend, Michelle Gale, was the complainant in count 3. Cone gave evidence that she had blonde hair past shoulder length. Gale gave evidence of an occasion in April 2007 when she heard a car motor and opened the door onto the veranda to look out. She saw sparks inside the car and heard gunshots. Gale recalled that this happened at around 7 or 8 pm. The prosecution relied upon telephone records as evidence that this in fact occurred between 9.41 pm and 10.34 pm on 22 April, when the appellants diverted to Cone's house from their southward journey to the Gold Coast. The telephone records contained details of the use of telephones by Matthews, the appellants, and other witnesses during the period of the alleged offences. In relation to mobile phones, the records identified the location of the towers which relayed the calls.

Counts 4 and 5: Torture and wounding with intent

[11] Matthews gave evidence that he was then driven to Ephraim Island on the Gold Coast where the appellants lived in a unit. The appellants took him by boat to a nearby sand island (Brown Island). As they walked onto the island through a gap in the mangroves, Matthews dropped a piece of the Medicare card he had in his pocket, thinking that it might be found one day if he did not make it off the island. Dionne Lacey threw a shovel to Matthews and ordered him to dig. After Matthews had dug out three or four shovels of sand one of the appellants said that "it was too close to the other one". Matthews was then ordered to walk a couple of metres away. Matthews said that if he was going to die he would rather not dig. Dionne Lacey hit him in the face. Matthews then dug the required hole, with Dionne Lacey also doing some digging. The completed hole was about five or six feet long, two or three feet wide, and four feet deep. When the hole was completed, Jade Lacey told Matthews to kneel in the hole with his hands on top of his head. He heard a gunshot and felt pain in the left side of his head. Jade Lacey then stood next to the hole, aimed the gun towards Matthews' head, and pulled the trigger two or three times. The gun clicked but did not fire. Matthews was told to get out of the hole and he was asked how he could get the money. Matthews said that he could try his mother, who had just sold a house. Jade Lacey told Matthews to put his hand out. He shot through Matthews' left hand "to prove they weren't joking". (That was the wounding alleged in count 5). Matthews took off his shirt and wrapped it around his hand.

[12] Matthews gave evidence that the appellants put some black plastic on top of the hole, after which they took him back to Ephraim Island. Matthews felt sick, light headed, and scared, but he was slightly relieved because he was still alive. As they walked towards the unit block where the appellants lived, they encountered a security guard.

Count 6: Deprivation of liberty

[13] Matthews gave evidence that the appellants took him to a unit, where he was led into a laundry and the door was closed. He was told that if he tried to escape he would be beaten up. He had bruises, he had already been shot, and he was scared that he would get shot again if he tried anything. He was too frightened to try to escape.

[14] On the following morning, Dionne Lacey told him that they were going to ring Matthews' mother. The appellants took Matthews to their car, they left Ephraim Island, and Dionne Lacey drove them to Yatala. Matthews was required to ring his mother and ask her to transfer $50,000 into his bank account. He told his mother that he had to pay that amount as a result of a rip-off in a drug deal and he had already been shot. His mobile phone, which the appellants had taken from him, was returned to him while he made this call (and subsequent calls) at the appellants' direction. When they returned to the appellants' unit, Matthews was again put in the laundry. Dionne Lacey put a handcuff on one of Matthews' wrists and attached the other end to a broom cupboard door handle. He unsuccessfully attempted to pick the lock with the remaining pieces of his Medicare card. When Matthews later asked for the handcuffs to be loosened, Dionne Lacey (who said that he had lost the key to the handcuffs) brought an electric grinder into the laundry and started to grind through the handcuff on Matthews' hand. After Matthews said that it was burning, he was allowed to use the grinder to cut through the handcuff. At one point, Dionne Lacey took an earring out of Matthews' ear, saying something along the lines of "this would be a start".

[15] The appellants subsequently drove Matthews to various places in and around the Gold Coast where they made him ring his mother to ask for money again. He was driven to an ATM and checked his bank account balance, receiving an "insufficient funds" message.

[16] After returning to the unit once more, Matthews was again put in the laundry, where he spent the night. On the following day, 24 April 2007, Dionne Lacey drove Matthews to a service station where he was left with Bowley. A woman drove them for two or three hours. Whilst in the car, Matthews telephoned his mother to tell her that he was alright. Eventually Matthews was left near a railway station in Brisbane. He went to the police and also obtained medical treatment.

Forensic and police evidence

[17] There was expert evidence that damage to a bar at the Kidd Street house, which Matthews' identified as the spot where the shot was fired in his direction, was consistent with it having been caused by a single projectile fired from a gun, amongst other possible causes. Police found an aluminium baseball bat in the appellants' unit at Ephraim Island. They found two disturbed areas of sand at the location on Brown Island described by Matthews. The size and shape of the large hole were generally consistent with Matthews' description. There were two Corflute (rigid plastic) sheets about two to three feet wide and six feet long in the hole. On the edge of the hole, police found a spent .25 calibre cartridge. A projectile which had been fired from a .25 calibre firearm was found in the hole. A police diver found two pieces of one half of a set of handcuffs in the Broadwater not far from the appellants' unit. Police found black particles on the top of the skirting board adjacent to the cupboard in the laundry of the appellants' unit. There was expert evidence that the particles and the pieces of handcuff were very probably composed of the same material. A police

officer found two pieces of plastic card on the floor of the laundry in the appellants' unit. A forensic document examiner expressed the opinion that those pieces had originated from a Medicare card or cards.

Mrs Matthews' evidence

[18] Matthews' mother gave evidence that she received the following phone calls and text message from Matthews in the period relevant to count 6:

(a) At about 11.00 am on 23 April 2007 Matthews called her from his phone. He said that he needed $50,000 and that she would be able to get the money from the sale of her house, which she was in the process of selling at the time. Matthews said he needed the money because he had "15 pounds" which had been stolen. Mrs Matthews heard a male voice in the background telling Matthews to tell her what the money was for.

(b) After Matthews hung up, she tried ringing him back twice. He answered the second call. He asked her to put the money in his bank account.

(c) About half an hour later Mrs Matthews received a text message along the lines of "They're taking me back to the hole", "They've already shot me once", and she had an hour to put the money into his bank account and not to call the cops.

(d) At about 12.30 pm Matthews called Mrs Matthews again, (by this time she was at a police station). He asked her if she had put the money into the bank yet. She said that she had not and needed more time to get that sort of money. Matthews was crying. He said he was in pain and "I love you Mum" before he hung up.

(e) Mrs Matthews tried to ring Matthews every five or 10 minutes between about 12.30 and 4.30 pm but was unable to get through. At about 4.30 pm she received a call from Matthews' mobile. He said that if she put $30,000 in the bank they would let him go. Mrs Matthews said that she needed more time to get that sort of money and she asked to talk to whoever it was that had him. The phone was hung up.

(f) Mrs Matthews attempted to ring Matthews back every five or 10 minutes until she received a call from Matthews at about 9.30 pm. He told her that if she put $20,000 into his bank account they would let him go. She replied that she did not have $20,000 and needed more time. She asked to speak to whoever had him again and the phone went dead.

(g) On the following day (Monday 24 April 2007) Matthews rang her and told her that they had let him go. He said that he was alright and that everything was sorted out.

[19] The last telephone call was made just after 4.30 pm, when Matthews was no longer in the company of the appellants. Mrs Matthews gave evidence that in each of the previous telephone conversations Matthews sounded scared, but in the last telephone conversation he did not sound scared and he did not ask for money.

[20] Matthews was cross-examined about the changing amounts that he tried to borrow. He agreed that he had tried to borrow $13,000 from Johnson. He said that he tried to borrow $50,000 from his mother because, after he was shot in the hand, he was told that he now owed $50,000. He said that he only ever asked for what he was told he had to pay.

Bowley's evidence

[21] Bowley gave evidence of an occasion in April 2007 when Matthews came to his house and Kevin Marshall, "V", Swan, and "Steve" were in the house. Bowley's memory was not really good because he was under the influence of LSD at the time. Bowley recalled getting a phone call from "D". Bowley told D that he had a bit of a problem. D and another man subsequently arrived at the house. Bowley told D about the taking of the pills. There was an argument between D and Matthews. D and the other man hit Matthews, one of them using a baseball bat, and there was a gunshot. D and the other man left the house at about the same time. They did not leave the baseball bat or the gun behind them. A couple of days later, D rang and asked him how many pills. Bowley said there were 500. Another day or two later, Bowley received a text message from D enquiring about his shirt or whether he wanted D to hang it on his door. D did not have a shirt of his and Bowley did not know what the text message meant. D later called and arranged to meet Bowley at a service station at Beenleigh. Tracie Donaldson drove him to the service station. D told Bowley that he owed him $14,000. There was a brief conversation about how Matthews was going to try and get the money together. Bowley told D that he would get the money and fix up D later. Matthews then came away with Bowley.

[22] Bowley denied that he had assaulted Matthews or that Marshall had threatened Matthews. He borrowed money from D before, but he did not owe D $7,000 for money lent, rather, he owed D $13,000 for drugs on credit. He agreed that he did not find any shell cartridge or bullet in the rumpus room and that police found shotgun pellets. There had been an earlier occasion when a gun had discharged in the rumpus room. Bowley agreed that he had received a discount in a sentence for drug trafficking for agreeing to give evidence in accordance with statements which he had provided to police. He had told the police that he agreed with the story they were telling after they told him that nothing would happen to him if he assisted them. He was in a "haze of intoxication" at the time of the events. Bowley agreed that when he subsequently met D with Matthews, D said something to the effect of "I couldn't get the money. I'll leave him with you" and "Don't hurt him". Bowley did not notice anything about Matthews' state of dress or if he was suffering any injuries, but he later noticed that Matthews had a bandaid or something on one of his hands. They stopped at Donaldson's house because Matthews wanted to get changed. Later that night Bowley dropped Matthews with Kevin Marshall in Auchenflower. He could not recall whether Matthews said or did anything to indicate that he did not want to go with Marshall. Bowley denied that when Marshall approached the car Matthews became frantic and cried out that he did not want to go with Marshall, and that he locked himself in Donaldson's car.

Donaldson and Fawcett's evidence

[23] Donaldson gave evidence that at Bowley's request she drove him to a place at Oxenford near a unit block. Bowley went over to speak to two men and two women, and he returned with Matthews. Matthews was very nervous and jittery and seemed reluctant to go anywhere with Bowley and Donaldson. Matthews had mud all over him and stunk, he had a head injury on his temple, blood covering his hand and a weeping wound on his hand. He had some tape on that injury. (In re-examination Donaldson agreed that when she first saw Matthews he also had blood around the neck of his shirt.) Donaldson drove them to her place where Matthews had a shower, got changed, and Donaldson helped Matthews to apply Dettol and bandage his hand.

Donaldson said that the injury to Matthews' hand went through his palm to the other side. The injury to his head was weeping fluid other than blood.

[24] Bowley later drove her and Matthews over to the western side of Brisbane, where they met Marshall. Matthews, who had calmed down whilst he was in the car, became scared and said that they (apparently Marshall and Bowley) were going to kill him. He cried and begged Donaldson not to let them take him away. In cross-examination she agreed that Matthews jumped inside the car and locked all the doors from the inside. She used her key to open the doors and Bowley and Marshall dragged Matthews out of the car, taking him in the direction of the railway station and Marshall's house. Bowley returned about half an hour later without Matthews or Marshall.

[25] Vanetta Fawcett gave evidence that in April 2007, at Marshall's request, she took Bowley's son and Swan away from the Kidd Street house and returned when Marshall rang her to say it was alright to come back. About a week later, she saw Matthews sitting on a couch in Marshall's house. Bowley was also in the house. Matthews had a bandage on his hand or his foot. He may have had a graze to his head. Matthews spoke about going to his mother's place.

Other evidence in the Crown case

[26] Swan gave evidence that when Matthews arrived at the Kidd Street house on 22 April 2007 he had a black eye and a swollen right cheek. She intervened in an altercation between Bowley and Matthews and Bowley threw her out of the house. In the altercation, Bowley hit Matthews while Matthews was sitting on a couch. Bowley was enraged and acting quite violently. After she was thrown out, she and Bowley's young son were collected by "V". They stayed away from the house for an hour or an hour and a half.

[27] A statement of Kevin Marshall's evidence was admitted in the Crown case. He could not recall why he went to Bowley's house on 22 April 2007. Bowley, Bowley's young son, Swan, Matthews, and another woman and child were present. Marshall was at the house when the appellants arrived. He did not see any baseball bats or guns. He did not see the appellants assault Matthews and he did not hear a gun discharge when the appellants were at the house.

[28] Cone refused to answer any questions in evidence in chief or when the prosecutor was permitted to cross-examine him as a hostile witness. He was later recalled and gave evidence that on 21 April 2007 he met McLeod and another man, whose description fitted that of Matthews, at the Kingston railway station. The three of them went to a house in Kingston. Cone claimed privilege against self-incrimination in relation to questions about what else they did.

[29] McLeod gave evidence that he was using a lot of drugs at the time and that affected his memory. There was a good chance he spoke to Matthews by telephone in April 2007. He met Matthews at a railway station in the northern suburbs of Brisbane, he travelled with Matthews by train, and he could not recall meeting Cone. He went with Matthews to a house somewhere. He claimed privilege against self-incrimination when asked whether he saw Swan at the Kidd Street house. In cross-examination McLeod denied that he had introduced Matthews to Cone, he said that he was not involved in any rip-off, but in most respects he claimed to have no memory of matters that were put to him.

[30] Gould gave evidence that Swan rang her on Saturday (21 April) and said that Matthews had ripped her off. Gould heard a man in the background yelling and ranting. Gould sent a text message to Matthews saying that Swan had rung, she was "ballistic", and not to come back until he had sorted out whatever he had done. Matthews later replied with a text message that he had been bashed but had sorted it out. Gould said that on Sunday, she thought it would have been about 5 pm, Matthews rang and said that he wanted to come up and talk to her and Johnson. (The telephone schedule records a first phone call by Matthews to Gould on 22 April 2007 at 4.52 pm.) She sent him a text to make sure that he came alone. Later, when she was away from the property, Matthews rang her asking her where the key to the gate was. She heard another voice. (The telephone schedule indicates that Matthews' second call was made to Gould at 6.57 pm.) In cross-examination, Gould agreed that Matthews sounded perfectly relaxed and normal.

[31] Johnson gave evidence that on the Sunday night Matthews arrived at the property with two men, walking up together to the house. Matthews said something about some pills getting stolen and that he had been blamed for it, and he asked Johnson for $13,000. The taller of the men with him said, "Go on, tell your mate. Tell him what you've done. Tell him what you're here for", or something to that effect. Johnson told them that there was no money and nothing to give. The shorter of the two men said something to the effect "You brought us all the way fucking up here for nothing." In cross-examination, Johnson said that Matthews did not look worried to him and seemed comfortable in the company of the other two men. Johnson said that Matthews had his hands in his pockets during the conversation. Johnson did not see any injuries on him. Johnson could not remember anything being said about anyone getting shot.

[32] Beardsley, a security guard employed at Ephraim Island, gave evidence of encountering three men in the early hours of Monday 23 April 2007. He said that one man, who was not a resident at the complex, seemed giddy, was laughing a lot, and was carrying his shirt which he waved around, and the other two men were behaving normally. The security guard saw nothing to concern him.

Dionne Lacey's evidence

[33] Dionne Lacey gave the following evidence in his defence.

[34] He and his brother went to Bowley's house on 22 April 2007 to recover a debt of $7,500 arising out of an earlier loan of $7,000 to Bowley. Neither of the appellants carried a baseball bat or a firearm. The baseball bat which police found at their unit belonged to the appellants. When the appellants arrived at Bowley's house, Dionne Lacey saw a big buy (presumably Marshall) holding a shotgun and there was a shotgun or a rifle in a guitar case on the pool table. Bowley told Dionne Lacey that Matthews "has ripped us off" and was the reason why Bowley could not pay. No shot was fired whilst the appellants were there, but either the big guy or Bowley said that they had fired a shot earlier. Bowley "snapped" and punched Matthews. At some point Bowley said that Matthews had stolen some pills, others were involved in the rip-off, Matthews had lied about the names of those others, and Bowley had finally got their names out of him.

[35] Dionne Lacey asked Matthews whether he could get the money and Matthews said that he could. Bowley said that Matthews owed $13,000. Dionne Lacey asked Bowley whether, if he took Matthews to get the money, he could take $7,500 out of the

$13,000 owed to Bowley. Bowley agreed. Matthews then went with the appellants. On the trip from Brisbane to Kenilworth, Matthews assured the appellants that there was "a heap of gear" on the property and that the guy on the property had "pounds of bush marijuana". Matthews told the appellants that he had been shot and he showed them a mark on the palm of his hand. In response, Jade Lacey told Matthews that he was "full of shit". Matthews also said that he had been handcuffed. He did have a handcuff bracelet on one wrist. Dionne Lacey could not remember Matthews saying who had put the handcuff on him.

[36] After Matthews made some phone calls in an unsuccessful attempt to get the key to the gate to the Kenilworth property, the three of them walked up the driveway to a house. They were met by an old guy who said to Matthews "What did I tell you about bringing people up?" Matthews said that he was in trouble, and that he was part of a rip-off or that it was not his fault. Jade Lacey said that Matthews owed some people money for a rip-off and Matthews asked the old guy for $13,000. The old guy said that he was poor and could barely afford to eat. Matthews said "Oh, I've already been shot", and if he did not get the $13,000 he was going to get in trouble or going to get shot again. Jade Lacey then said that the appellants had not shot Matthews but they had saved him and helped him. Dionne Lacey got frustrated at Matthews and said that he had made them drive all the way up for nothing. He remembered the old guy telling them to "Piss off or else I'm going to let the dogs off you."

[37] On the return journey, he told Matthews that he was not interested in ideas Matthews had mentioned about getting the money by manufacturing drugs. He just wanted his money. Jade Lacey said that they should just drop Matthews back at Bowley's house, but Dionne Lacey "knew that if Matthews had gone, that I knew I wouldn't – hard to track him down to find him to get my money." Dionne Lacey told Matthews to think of a plan about how he was going to get the money. The appellants agreed that Matthews could stay with them and Dionne Lacey would sort it out the next day. When they stopped at a service station just past the Gateway Bridge to refuel the car and eat something, Matthews spoke about getting the money from his mother, telling her that he had been kidnapped. Matthews said that his mother had a lot of money from selling a house and he would be able to get a lot of money from her. He would tell his mother that he had been ripped off and he would probably get $50,000 from her.

[38] They drove back to the appellants' unit at Ephraim Island. They did not go to Cone's house. On the way to Ephraim Island, Matthews asked about getting some drugs. Dionne Lacey asked Matthews whether he wanted to go fishing and Matthews said that was alright. Upon arrival at the unit, Dionne Lacey picked up some bait, a torch, and cigarette papers. They then took Dionne Lacey's boat and fishing rods and went across to Brown Island. Dionne Lacey gave evidence that he and Jade Lacey had buried a gun with some ammunition and about a pound of marijuana on the island. He had found some pieces of plastic and he had taken two shovels across to the island. A week and a half or two weeks before Saturday, 21 April, the appellants had dug a hole which was big enough for the pieces of plastic to fit in the hole, with two pieces on either side and a third piece fitting between them and resting on the items in the hole. The items were wrapped with garbage bags. They had refilled the hole and put a piece of wood on top as a marker.

[39] When they arrived at the island, Dionne Lacey retrieved the hidden shovels, the three men went to the site of the hole, and the appellants dug it out and retrieved the

marijuana and the gun. Matthews checked the boat a couple of times during this period to make sure it did not float away. Dionne Lacey dried the gun off, aimed it towards the ground, and clicked the trigger about three times before it fired. He fired only one shot towards the ground, at a time when Matthews was behind him. Matthews was never in the hole. Dionne Lacey started digging another hole to store the marijuana and the gun in a drier spot, but he abandoned that hole when the water started coming into it. They fished for some time and smoked marijuana in the boat pretty much all night. No harm of any kind was done to Matthews. On the way back they bumped into a security guard and spoke to him.

[40] Matthews slept on the couch in the appellants' unit. Matthews had earlier complained about the handcuff bracelet on his wrist; he was "pretty much complaining the whole time until I got it off him." Matthews was trying to remove the handcuff, so Dionne Lacey offered to grind it off with an angle grinder he had in the unit. He took the grinder and a lamp into the laundry so that they would not make a mess on the carpet. Dionne Lacey gave evidence that the power cord for the grinder was about a metre long. (That was shorter than the distance between the powerpoint and the cupboard door to which Matthews said he was handcuffed). Dionne Lacey attempted to grind the handcuff off Matthews' wrist. Matthews complained that it was burning him, so Dionne Lacey stopped. Matthews operated the grinder himself and freed the handcuff. Dionne Lacey gave evidence that the last time he remembered seeing the handcuff was when he was attempting to grind it off.

[41] Dionne Lacey's evidence of the movements of the appellants and Matthews on the following two days was generally consistent with Matthews' account. He said that it was Matthews' idea to ask his mother to put money in his bank account. Jade Lacey told Matthews that his mother was not going to give him the money and that she would call the police, but Matthews said that she would not call the police. It was Jade Lacey who said that they should not call from the unit. During the telephone call at Yatala, Dionne Lacey heard Matthews ask his mother for $50,000 and tell her not to call the police and that he had been kidnapped. When it was suggested in cross-examination that Matthews sounded scared and was crying when he spoke to his mother, Dionne Lacey said that he remembered telling Matthews to make it sound like it was real.

[42] On their return to the unit he and Matthews smoked marijuana together and each of them slept at various times. The appellants and Matthews subsequently drove around the Gold Coast area. Matthews told the appellants about how he could break into chemists, computer shops and a jewellery shop. In the course of that trip they stopped at a petrol station where Matthews went into the shop and bought cigarettes and Dionne Lacey paid for the fuel. That night Matthews again slept on the couch in the unit.

[43] On the following morning (24 April 2007) Dionne Lacey arranged with Bowley that he would drop Matthews off at a service station in or near the Coomera area. Bowley was standing at the agreed meeting place when Dionne Lacey arrived with Matthews. Dionne Lacey remembered saying to Bowley, "It is your responsibility, so it is up to you, you know what I mean, to get the money back" and "Don't hurt Owen". Bowley agreed and Matthews went with him.

[44] Jade Lacey did not give or call evidence.

Ground 1: The joinder on the indictment of count 3, together with counts 1, 2, 4, 5 and 6 resulted in a miscarriage of justice

[45] The appellants argued that count 3 was improperly joined with the other counts on the indictment because count 3 involved a different complainant, it was alleged to have been committed at a different location, it was founded on facts which were different from the factual bases of the other offences, and the purpose of "payback" alleged by the Crown in respect of it differed from the purpose of unlawfully obtaining money from Matthews by physical acts and threats directed towards him.

[46] Section 567(2) of the *Criminal Code* 1899 (Qld) authorises the joinder of multiple charges on an indictment against one accused if "those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose."

[47] I accept the respondent's submission that s 567(2) authorised the joinder of count 3 as a part of a series of offences of a similar character and having a close factual connection with each other count. Matthews' account of the appellants diverting to Cone's house on the trip from Kenilworth to Ephraim Island was admissible in evidence on the other counts as an integral part of his narrative. Without that evidence the jury would have been left with an unexplained gap in the records of telephone calls upon which the Crown relied to corroborate Matthews' accounts of the times and places of other offences. Furthermore, in relation to each count the Crown alleged that the appellants acted in response to the drug rip-off and, in doing so, the appellants, in the company of each other, used or threatened violence with a weapon.

[48] The appellants referred to a passage in *Phillips v The Queen*,[1] but in that passage the High Court merely noted that it was not controversial in that case that, if the evidence of one complainant were admissible on the charges relating to other complainants there would be a "nexus or connection" between the charges sufficient to make them a "series" within the meaning of s 567, and that, if the evidence were not admissible, there would not be a "series".

[49] Neither appellant applied to the trial judge for separate trials and neither complained about the joinder of count 3 until after the convictions. There was no occasion for any ruling about the appropriateness of the joinder. Thus, even if count 3 was not properly joined, the appellants could not succeed on ground 1 unless they established that the joinder caused a miscarriage of justice. The appellants contended that there was a miscarriage of justice arising from a risk that the jury impermissibly used the evidence of Gale to bolster the credibility of Matthews in respect of his evidence about the other counts. They submitted that there was no forensic advantage in not applying to the trial judge under s 597A of the *Criminal Code* to order a separate trial in the circumstances.

[50] That submission is falsified by the cases presented for each appellant at the trial. In addressing the jury, both defence counsel referred to evidence that Bowley was a drug dealer who dealt for an outlaw motorcycle gang and that Marshall had guns and provided "muscle" for Bowley. An aspect of defence counsels' addresses concerned the possible involvement of Bowley and Marshall in causing Matthews' injuries which the Crown attributed to the appellants. Defence counsel argued that Bowley and Marshall might have driven to 3 View Street, Kingston and been responsible for

[1] (2006) 225 CLR 303 at 307 [7].

discharging the firearm. There was no evidence that either had done so, but both counsel referred to Matthews' evidence that Bowley and Marshall forced Matthews to give them Cone's address and that Marshall threatened that he would shoot whoever was involved in the rip-off, and to evidence that Bowley and Marshall were not at the Kidd Street house when the firearm was discharged at the Kingston house. Defence counsel contrasted Gale's evidence (between about 7 and 8 pm, she opened the door to the outside, she did not step onto the veranda, and she saw two men in the car from which shots were apparently fired) with Matthews' evidence (shots were fired towards a person with long hair on the veranda, after 9.40 pm by reference to the telephone schedule) and referred to evidence that no projectile was found in the house. In that way the appellants relied upon the evidence relating directly to count 3 in an attempt to discredit Matthews' evidence in relation to the serious offences charged in the other counts.

[51] If, contrary to my opinion, count 3 was not properly joined in the indictment, that did not occasion any miscarriage of justice.

Ground 2: Alternatively, the trial judge erred in failing to adequately warn the jury against impermissible propensity reasoning arising from the joinder of count 3 together with counts 1, 2, 4, 5 and 6

[52] The trial judge gave a conventional direction in the following terms:

> "Although the defendants are being tried together, you must give the cases against and for each of them separate consideration. In respect of each charge, each defendant is entitled to have the case decided on the evidence and on the law that applies to him and as it relates to each particular charge, and so you must return separate verdicts in respect of each defendant and separate verdicts on each charge."

[53] The appellants submitted that, if the evidence on count 3 was inadmissible in respect of the other counts, it was necessary for the trial judge to give a direction prohibiting the use of that evidence in considering the other counts and a warning against impermissible propensity reasoning, and if the evidence was admissible, the propensity warning was still required. They submitted that the evidence of Gale, a person independent of Matthews and not involved in the drug dealings, might otherwise be used to bolster Matthews' credit in relation to the other counts, so that the absence of appropriate directions resulted in a miscarriage of justice.

[54] In *KRM v The Queen*,[2] McHugh J said:

> "37. Thus, although the evidence on one count may show a propensity to commit crime — even crime of the kind the subject of the other charges — the experience of the judiciary is that ordinarily juries do not use propensity reasoning to convict on other counts unless instructed that they can do so. To give the warning when it is not needed may divert the jury from its proper task. The more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings. Further, to require that a propensity warning always be

[2] (2001) 206 CLR 221 at 234 [37] - 235 [38].

> given may sometimes be prejudicial to an accused person because it might distract a jury from doing what the trial judge told them to do here, to focus upon the evidence relevant to each charge. It may even suggest the very train of reasoning that a propensity warning is designed to overcome and make it difficult for the jurors, try as they might, to remain uninfluenced by the forbidden chain of reasoning.
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> 38. In some cases of multiple counts, however, some feature of the evidence may create a risk that the jury will use that particular evidence or a conviction in respect of a count to reason that the accused is the kind of person who would commit the crime charged in another count or counts in the presentment. If that risk exists, the judge is bound to direct the jury that they cannot use that evidence or conviction to convict the accused on the other count or counts unless, of course, the evidence is admissible in respect of that count or counts. An example of such a risk is the accused being charged on the one presentment with offences against different victims and the evidence in respect of one or more counts being inadmissible in respect of the other counts. Ordinarily, however, the court should order separate trials where there are different victims, where the evidence in respect of one victim is not relevant to the charge in respect of the other victims and where the joinder of charges creates a risk of prejudice. But in some cases, an application for the trial of separate counts may be refused on the ground that the convenience of trying the charges together far outweighs any risk of prejudice or, more usually, because a separate trial is not sought. If that occurs, a propensity warning will almost certainly be required." (citations omitted)

[55] The appellants particularly relied upon paragraph 38, but the question in these appeals is whether the omission of a propensity warning resulted in a miscarriage of justice in the circumstances of this case. In my opinion it did not. As the respondent submitted, Matthews was the only witness who gave evidence that either appellant possessed or used a firearm at any time. Gale did not give any such evidence. The trial judge made it very clear to the jury that the prosecution case on each count depended upon the jury accepting Matthews' evidence as being true and accurate beyond reasonable doubt, despite the sworn evidence by Dionne Lacey. His Honour also clearly set out the elements of each count and, separately in relation to each count, summarised the evidence upon which the prosecutor and defence counsel relied and their competing arguments about the credibility and reliability of the witnesses, including Matthews.

[56] In that context, the jury would not have used Gale's evidence in relation to count 3 to support Matthews' account that the appellants committed the other offences. That the experienced defence counsel who appeared for the appellants did not seek the direction which is now said to have been required tends to confirm my conclusion that the summing up was not inadequate in this respect.[3]

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[3] See *R v Lacey* [2009] QCA 275 at [8], per de Jersey CJ, Keane, Muir and Chesterman JJA, referring with approval to *R v Aziz* [1982] 2 NSWLR 322 at 330 - 331.

Ground 3: The trial judge erred in failing to give a "*Markuleski* direction"

[57] The appellants submitted that this was a "word against word" case in which a *Markuleski* direction was required. In *R v Markuleski*,[4] Spigelman CJ and Wood CJ at CL identified the concern about the prospect of inconsistent verdicts as requiring consideration of a direction to the jury that a reasonable doubt about one aspect of a complainant's evidence should or might properly be taken into account in assessing that witness's evidence on other matters. That concern does not arise in this case, where there was no difference in the verdicts.

[58] The appellants argued that such a direction was nevertheless important and necessary and that there was no tactical benefit to be gained from not seeking it. However, the trial judge expressly raised the question with counsel, remarking that no-one had suggested that there should be a *Markuleski* direction, but his Honour mentioned it in case anyone thought that one ought to be given. The prosecutor submitted that it was not necessary and both defence counsel indicated that they did not seek to make a submission about it. No such direction was necessary in this case.

Ground 4: The trial judge erred in admitting into evidence at the trial, evidence of words said to be uttered by the appellant Jade Lacey whilst at Brown Island, that the complainant, Owen Matthews, was digging "too close to the other one"

[59] The appellants argued that the trial miscarried as a result of the evidence by Matthews that, after Dionne Lacey had told him to start digging a hole on Brown Island, one of the appellants said that "it was too close to the other one". The appellants did not contend that any miscarriage of justice was caused by the omission of the trial judge to give any particular direction in relation to this evidence. Their argument was that the evidence was inadmissible.

[60] The prosecutor argued that the evidence was admissible in support of the charge of torture in count 4, the words clearly conveying a threat of impending harm to Matthews. Defence counsel's argument was that the statement was ambiguous and insufficient to justify an inference that Jade Lacey subjectively intended to cause Matthews emotional stress. The trial judge overruled the objection, finding that the statement was not ambiguous and evidence of it was directly relevant to count 4. His Honour could see no basis for exercising the discretion to exclude that evidence.

[61] On appeal, the appellants repeated the argument rejected by the trial judge. They submitted that the statement might have been intended to refer, for example, to another nearby hole which was not a grave site. They submitted that the prejudicial effect of an interpretation that the appellants had killed and buried someone there in the past outweighed the probative value of the evidence of the statement as proof that the appellants intended to cause emotional stress to Matthews.

[62] There was no real ambiguity in the statement. On Matthews' evidence, the appellants held him responsible for Bowley's failure to pay a drug debt, they had assaulted him with baseball bats, one of the appellants had fired a gun in his direction at the Kidd Street house, the appellants had taken him to Kenilworth in an unsuccessful extortion, they had subsequently threatened his life, one of the appellants had fired a shot at Cone's house, the appellants had taken Matthews to an island in the middle of the night, and one of the appellants had told him to start digging a hole. In that context,

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[4] (2001) 52 NSWLR 82 at 121 [185] per Spigelman CJ and at 135 [258] per Wood CJ at CL.

the statement that Matthews was digging "too close to the other one" unambiguously evidenced both appellants' intention to cause Matthews to fear for his life. The appellants' argument that the statement might have been referrable to an innocuous hole should not be accepted. That was not what the alleged statement conveyed and no other hole was mentioned in the evidence, even though the police had conducted an extensive search in the vicinity. The prosecutor did not submit to the jury that there was, in fact, another hole. The Crown case was that the words were designed to frighten Matthews.

[63] The appellants also submitted that the availability of a rational view of this evidence consistent with innocence rendered the evidence inadmissible "if the evidence reveals propensity". For that proposition the appellants cited *Pfennig v The Queen.*[5] In the cited passage, Mason CJ, Deane and Dawson JJ made it clear that the propensity evidence in that case was inadmissible if, in the context of the prosecution case, there was a reasonable view of the evidence that was consistent with the innocence of the accused. For the reasons already given, I would hold that in the context of the prosecution case there was no reasonable view of the evidence which was consistent with the innocence of either appellant. However, it was not necessary to satisfy the test in *Pfennig*. That decision concerned the admissibility of propensity evidence tendered as circumstantial evidence in proof of an element of an alleged offence.[6] The evidence in this case was not tendered for that purpose. It was admitted and it was admissible as evidence that the words were said with the intention of causing emotional stress to Matthews.

Ground 5: The trial judge erred in declining to give a sufficient accomplice direction in respect of the witness Ashley Bowley

[64] In relation to the evidence of Bowley the trial judge reminded the jury that Bowley had received a discounted sentence for drug trafficking for agreeing to give evidence in accordance with his statement. His Honour then directed the jury in the following terms:

> "Members of the jury, I must explain this to you in relation to the discounted sentence that Bowley received as a result of his agreement to cooperate with the authorities: under Queensland sentencing law, sentences may be reduced by the Court where the offender undertakes to cooperate with law enforcement authorities by giving evidence against someone else. If an offender receives a reduced sentence because of that sort of cooperation and then does not cooperate in accordance with the undertaking, the sentencing proceedings may be reopened and a different sentence imposed. You can see therefore that there may be a strong incentive for a person in that position to implicate the defendants when giving evidence. You should therefore scrutinise Ashley Bowley's evidence with great care. You should only act on it after considering it and all the other evidence in the case you are convinced of its truth and accuracy. Also, his participation in drug dealing and the allegation that he assaulted Mr Matthews means that he may have reasons of self-interest for implicating others."

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5 (1995) 182 CLR 461 at 483.

6 See *Roach v The Queen* (2011) 242 CLR 610 at 623 - 624 [41].

[65] Counsel for Dionne Lacey subsequently submitted that the trial judge should have directed the jury that Bowley "acknowledged having had snippets of memory through a haze of intoxication", and that Bowley's evidence may be unreliable because of the sentencing discount he received, "his involvement in unlawful conduct such as the jury finds that involvement to be", and because of his drug-taking. After hearing from the prosecutor and counsel for Jade Lacey, the trial judge said that he would give a redirection reminding the jury to scrutinise Bowley's evidence because it was potentially unreliable in the light of the factors identified by defence counsel. The trial judge subsequently gave the following redirection to the jury:

> "Yesterday, I referred to Ashley Bowley's evidence. You should carefully scrutinise his evidence bearing in mind a number of factors: first, he acknowledged having snippets of memory through a haze of intoxication; second, he received a discount on sentence in recognition of his cooperation. He does face the possibility of his sentence being reopened if he does not give evidence in accordance with his police statement; thirdly, his involvement in unlawful conduct is a factor that you would bear in mind; and fourthly, you would bear in mind his drug-taking generally and on this particular occasion. If, having, scrutinised his evidence, together with the other evidence, you are convinced that it is truthful, accurate and reliable, then you may act on it."

[66] The appellants acknowledged that the extent of any warning required as to the use of the evidence of accomplices depended upon the dictates of justice in each individual case.[7] The appellants submitted, however, that a defect in the trial judge's directions was that they did not alert the jury to the possibility that Bowley might have given *false* evidence by virtue of his involvement in count 1. The appellants pointed out that the direction given by the trial judge did not include the precise words used in the model directions contained in the Benchbook. It refers to an accomplice having reasons to "lie or to falsely implicate" others, to seek to justify the accomplice's own conduct or minimise the accomplice's involvement by shifting blame, and an inherent danger that evidence by an accomplice may have a seeming plausibility about it because of the accomplice's familiarity with some of the details of the crime.

[67] The absence of those particular directions did not work any miscarriage of justice in this case. The redirection given by the trial judge was in accordance with the redirection sought by Dionne Lacey's counsel and no further direction was sought. The trial judge's directions appropriately emphasised the point concerning the discounted sentence given to Bowley in a different matter which had been emphasised in the addresses made on behalf of the appellants.

[68] The jury did not need any further directions to understand the point that Bowley might have had an interest in giving false evidence. In the context in which the first quoted direction was given, the jury would have understood the direction that Bowley "may have reasons of self-interest for implicating others" as meaning that he may have reasons for falsely implicating others. As the respondent submitted, it had been put to Bowley in cross-examination on many occasions that his evidence which implicated the appellants was incorrect, and that evidence conflicted with the evidence given by

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[7] *Robinson v The Queen* (1999) 197 CLR 162 at 168 [20], *R v Tichowitsch* [2007] 2 Qd R 462, and *R v Bates* [2010] QCA 139.

Dionne Lacey. Counsel for Dionne Lacey submitted to the jury that a "key question" was whether they accepted at least generally Matthews' evidence and, "linked with that", whether they accepted Bowley's evidence. Counsel submitted that if that evidence was not accepted then an acquittal was the right outcome. Counsel submitted that questions of credibility and reliability arose, and that the jury should bear in mind that Bowley gave evidence "having obtained a benefit in sentencing on the basis that he promised to give evidence in accordance with the statement that he had made". Counsel submitted that Bowley did not present as a credible witness. He analysed the evidence of Bowley about count 1 in detail and repeated more than once that Bowley had received a benefit in sentencing for agreeing to testify in accordance with his statement and that he had no more than "snippets of memory in a haze of intoxication".

[69] Counsel for Jade Lacey asked the jury to speculate whether Marshall and Bowley had stood over Matthews and told him that if he wanted them to leave him alone he should never dob them in. Counsel asked the jury whether it could be that it was Marshall or Bowley, rather than the appellants, who caused the injuries to Matthews. He also asked the jury to consider whether it was Marshall and Bowley who had gone to Cone's house and discharged the firearm, rather than one of the appellants as Matthews had testified. That was a significant theme in his address, which concluded on 22 March 2010 at about 12.30 pm. The first quoted direction by the trial judge was given shortly afterwards, at about 2.45 pm.

[70] The jury can not have been under any doubt that the truthfulness of Bowley's evidence implicating the appellants was in issue, and that his participation in drug dealing and the allegation that he assaulted Matthews meant that he might have had self-interested reasons for falsely implicating the appellants.

Ground 6: The trial judge erred in failing to adequately warn the jury against using alleged lies by the appellant Dionne Lacey as evidence of consciousness of guilt

[71] In the course of submissions about the directions which should be made by the trial judge, the prosecutor foreshadowed his intention to submit to the jury that Dionne Lacey lied in the witness box but added that he did not intend to rely on any lie as probative of guilt. He submitted that, for that reason, it would not be necessary for the trial judge to give an *Edwards*[8] direction, but that it would be necessary to give a *Zoneff*[9] direction. So much was accepted by both defence counsel. The trial judge indicated that his Honour would follow that course, but added that "we can revisit that."

[72] The appellants submitted that the prosecutor's address went much further and did rely upon alleged lies by Dionne Lacey as being probative of his guilt. The appellants quoted the following passages from the prosecutor's address:[10]

> "*Now, we say to you, undeniably and quite clearly, that the evidence given by Dionne Lacey is a story*, and it is an untrue story. It is evidence which I will submit to you ultimately was fabricated. It was evidence which, in essential areas, does not make sense and *smacks of being made up to cover some highly incriminating pieces of evidence and areas of evidence*.

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8 *Edwards v The Queen* (1993) 178 CLR 193.

9 *Zoneff v The Queen* (2000) 200 CLR 234.

10 Emphasis added as in the appellants' submissions.

> …
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> *We suggest that Dionne Lacey lied to you. Any of you who have or have had children might be familiar with a line of reasoning that generally there are two ways to tell a lie*. The first is a complete fabrication, which children usually abandon in their early childhood because they get so easily caught out all the time. *The second is to build a story on a foundation of truth, and that is what we submit Dionne Lacey has done here*.
>
> *You know, ladies and gentlemen, that he had the opportunity to know what the intended evidence of all of the witnesses was to be because he had seen the brief of evidence after the committal hearing at which a large number of witnesses were called*."

[73] The appellants submitted that, contrary to the prosecutor's earlier indication, the emphasised passages clearly suggested that Dionne Lacey lied out of a consciousness of guilt in order to explain away the Crown case. The appellants submitted that this was false reasoning because the relevant passages of Dionne Lacey's evidence were merely inconsistent with Matthews' evidence about how the offences occurred and were not proven to be untrue by any objective evidence. The appellants also submitted that the prosecutor's arguments required the trial judge to give a direction in accordance with *Edwards* rather than the direction which the trial judge gave in accordance with *Zoneff*.

[74] The trial judge gave the following directions:[11]

> "Members of the jury, in his final address to you Mr Byrne, for the Crown, made submissions that Dionne Lacey had lied in his evidence, particularly with respect to his reason for digging the large hole on Brown Island, his account of the trip from the service station near the Gateway Bridge back to Ephraim Island *in an endeavour to distance himself from the View Street incident*, and in relation to the grinding of the handcuffs in the laundry at Ephraim Island.
>
> *It is for you to decide what significance those suggested lies have in relation to the issues in the case*. You will make up your own minds about whether Dionne was telling lies, and if so whether he was doing that deliberately. *You may decide that if you find that Dionne did lie that only affects his credibility*.
>
> However, you should bear in mind this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt. The mere fact that a defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons. For example, to bolster a true defence, to protect someone else, to conceal disgraceful conduct of his, short of the commission of the offence, or out of panic or confusion. If you think that there is, or may be, some innocent explanation for his lies, if you find that they were lies, then you should take no notice of them."

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[11] Emphasis added as in the appellants' submissions.

[75] The appellants submitted that these directions may have encouraged the impermissible use of the evidence which the prosecutor had advocated in his submissions. The appellants relied upon *R v Sheppard*,[12] in which similar directions were found to be insufficient.

[76] In *Edwards*,[13] Deane, Dawson and Gaudron JJ said:

> "A lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence (i.e. it relates to a material issue) and if it was told by the accused in circumstances in which the explanation for the lie is that he knew that the truth would implicate him in the offence. Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg. v. Lucas (Ruth)*, because of 'a realization of guilt and a fear of the truth'.
>
> …
>
> If the telling of a lie by an accused is relied upon, not merely to strengthen the prosecution case, but as corroboration of some other evidence, the untruthfulness of the relevant statement must be established otherwise than through the evidence of the witness whose evidence is to be corroborated." (citations omitted)

[77] In this case, the prosecutor did not argue that the alleged lies constituted admissions or that they amounted to corroboration of Matthews' evidence. The whole thrust of the prosecutor's submission in this respect was that Dionne Lacey's evidence was unreliable and would not cause the jury any reasonable doubt in relation to the appellants' guilt. The first passage quoted from the prosecutor's address was taken from the transcript of day 14 of the trial. Immediately before that passage, the prosecutor had reminded the jury that they had the benefit of a sworn account from Dionne Lacey, and that defence counsel for Jade Lacey had put his instructions in the course of cross-examining Matthews. After that passage, the prosecutor submitted that Dionne Lacey's evidence would have the jury accept that "over and above being unbelievably good Samaritans that Dionne and Jade Lacey took this stranger under their wings, a man they did not know, that they went fishing, that they showed him where they … hid their drugs, where they had hidden a gun and ammunition and that they, in effect, had a fairly relaxing time for a couple of days." There followed a detailed analysis of evidence given by Matthews.

[78] On the following day, the prosecutor resumed that analysis before returning to the topic of Dionne Lacey's evidence at 11.46 am. Before the second passage quoted in the appellants' submission, the prosecutor introduced the topic by observing that the

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12 [2010] QCA 342, particularly at [20] - [21].

13 (1993) 178 CLR 193 at 210 - 211.

Crown said that the jury should not accept Dionne Lacey's evidence because it suffered from inherent defects of incredibility, believability and defects of reliability. The prosecutor accurately foreshadowed that the trial judge would direct the jury to the effect that even if they were to reject the evidence of Dionne Lacey in its entirety, that did not automatically mean that the jury would convict either or both of the appellants; that the jury must act on the evidence that they accepted as honest and reasonable to determine whether the guilt of each respective accused was proven beyond reasonable doubt. The prosecutor then observed that it remained open to him to address the jury "in an attempt to convince you that the evidence of Dionne Lacey will not raise any reasonable doubt about the guilt of either of the accused men". The prosecutor referred to what were submitted to be insurmountable difficulties in accepting some of the essential aspects of Dionne Lacey's evidence when it was compared with objective reliable evidence. He submitted that "his evidence lacks a hallmark of reliability and common sense that you would look for."

[79] The second passage quoted in the appellants' argument followed those submissions. Immediately following that quoted passage, the prosecutor went on to submit:

> "So in your process of deciding what is going to be the honest and reliable evidence you accept, you of course will still look to see whether there is any independent evidence, evidence independent of him to support his account. But even if you find that, the weight of it is going to be greatly diminished, we submit. So that you might want to consider if what he says simply makes sense or not."

[80] The strong impression that the jury was merely invited to disbelieve Dionne Lacey's evidence and then to consider whether other evidence justified a finding of guilt beyond reasonable doubt is strengthened by the following three pages of transcript recording the prosecutor's submissions. The prosecutor embarked upon a detailed analysis of the evidence of Dionne Lacey with a view to demonstrating that it was unreliable, internally inconsistent, inconsistent with other evidence, and that for those reasons it would not cause the jury to harbour any reasonable doubt about the appellants' guilt. The prosecutor concluded that topic by submitting that the evidence of Dionne Lacey "will not cause you any reasonable doubt in relation to the guilt of the accused men."

[81] In this context, the trial judge's direction to the jury to "not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt" was appropriate and sufficient. The jury would not have understood the trial judge's earlier direction that it was "for you to decide what significance those suggested lies have in relation to the issues in the case" to convey that the jury might use a finding that Dionne Lacey lied to prove that either appellant was guilty. That conclusion is reinforced when regard is had to the trial judge's emphatic directions that the prosecution case depended upon acceptance of the prosecution's witnesses, that the jury did not have to believe that Dionne Lacey was telling the truth in order to acquit the appellants, and that if the jury did not accept the defence evidence they should not jump to an automatic conclusion of guilt but set the defence evidence to one side and go back to the prosecution case.

[82] In this case, the prosecutor's address included one statement that was similar to the submission made by the prosecutor in *Sheppard* that the accused man's account to police was "just simply an effort to distance himself from this allegation that he did

commit the offence as [the complainant] has outlined", but the context was very different. The prosecutor in *Sheppard* made that submission after emphasising marked inconsistencies between the accused man's prior accounts and his case at trial. The accused man had initially told police that he had only stayed at the house for a couple of drinks before leaving, and that he could not remember meeting or speaking to the complainant. He subsequently told police that he had had consensual sex with the house-owner, but he denied entering the complainant's bedroom or touching the complainant. The effect of the accused man's case at trial was that he was in the complainant's bedroom but did not improperly touch the complainant. In that context and in what was described as a "finely balanced" case, it was held that there was a real possibility that the jury might have treated the accused man's lie to police as evidence of his consciousness of guilt.[14]

[83] For the reasons I have given, there was no similar risk in this case. There is no reason in this case for departing from the general rule expressed in *Zoneff*[15] that an *Edwards* direction should only be given if the prosecution contends that a lie is evidence of guilt in the sense that the accused lied because the truth would implicate the accused in the commission of the offence and the lie is in fact capable of bearing that character.

Ground 7: The trial judge erred in failing to provide adequate directions to enable the jury to properly consider their verdicts in respect of each appellant on counts 1, 2, 4 and 6

[84] Counsel for the appellants identified the error alleged in ground 7 as being a failure to instruct the jury as to the separate routes to liability in relation to each appellant. The appellants argued that the shortcoming in the directions was that they did not sufficiently distinguish the different cases against each appellant with reference to the elements of the offences; for that reason, the directions did not meet the requirement that the jury be instructed about so much of the law as they needed to know in order to dispose of the issues in the case, including instructions about the elements of the offence, the burden and standard of proof, the respective functions of judge and jury, and instructions identifying the issues in the case and relating the law to those issues.[16]

[85] There is no substance in this ground The trial judge clearly directed the jury that separate consideration must be given to the cases against each appellant:

> "Although the defendants are being tried together, you must give the cases against and for each of them separate consideration. In respect of each charge, each defendant is entitled to have the case decided on the evidence and on the law that applies to him and as it relates to each particular charge, and so you must return separate verdicts in respect of each defendant and separate verdicts on each charge."

[86] The trial judge also clearly explained the circumstances in which evidence of acts done or things said by one appellant out of the presence and hearing of the other appellant would be admissible against the other appellant. After giving those directions, the trial judge turned to the basis upon which the Crown alleged that "each of the defendants" was guilty of the particular charges and the elements of each offence the Crown must

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14 [2010] QCA 342, particularly at [20] - [21].

15 (2000) 200 CLR 234 at 244 [16].

16 *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; *Fingleton v The Queen* (2005) 227 CLR 166 at 197 [78] - 198 [80].

prove beyond reasonable doubt. The trial judge then directed the attention of the jury to "jury notes" which had been distributed to each juror and which were taken to the jury room. The document set out the provisions of the *Criminal Code* concerning parties to offences in s 7 and s 8. In relation to each count, the document set out each of the elements which must be proved by the prosecution beyond reasonable doubt, as well as the basis of liability alleged by the Crown, separately identified for each appellant. After explaining that the document was not a substitute for the summing up but was designed as a summary for the assistance of the jury, the trial judge went on to give directions about the Code's provisions concerning parties upon which the Crown relied.

[87] In those directions the trial judge distinguished the prosecution case against Dionne Lacey from the prosecution case against Jade Lacey. His Honour told the jury that the prosecution case against Dionne Lacey was that he was liable under s 7(1)(a) of the *Criminal Code* ("every person who actually does the act or makes the omission which constitutes the offence") in respect of counts 1, 4 and 6 and he was liable as an "aider" in respect of counts 2, 3 and 5, whereas the case against Jade Lacey was that he was liable in respect of all counts under s 7(1)(a) as the person who actually did the relevant act or acts. The trial judge also told the jury that in relation in count 5 the Crown also relied upon s 8. In subsequent directions the trial judge explained the operation of the parties provisions upon which the Crown relied and dealt separately with each count, described the elements the Crown must prove beyond reasonable doubt and summarised the evidence upon which the Crown relied, Dionne Lacey's evidence, and other matters concerning the reliability of important evidence.

[88] The trial judge's directions plainly did require the jury to give separate consideration to the liability of each appellant, the evidence against each appellant, and the basis upon which the Crown alleged that each appellant was liable.

[89] In relation to count 1 (assault occasioning bodily harm whilst armed and in company) the Crown case was that on 22 April 2007 at Bowley's house at Kidd Street, Robertson, each appellant was armed with a baseball bat, each appellant hit Matthews with a baseball bat, and the combined assaults, or one of them, by the baseball bats caused bodily harm to Matthews. The trial judge clearly explained that case to the jury and outlined the evidence upon which the Crown relied. The appellants made no complaint about that aspect of the summing up. Rather, their submission was that the requirement that the Crown prove an actual assault by each appellant was confused by the trial judge's references to "the defendants" having assaulted Matthews and by the directions as to the "in company" element. This argument also lacks substance. The jury notes provided:

> "**COUNT 1 - ASSAULT OCCASIONING BODILY HARM WHILST ARMED & IN COMPANY**
>
> The prosecution must prove that:
>
> 1. The defendants assaulted Owen Matthews;
>
> - Any person who strikes, touches or moves or otherwise applies force of any kind to the person of another, either directly or indirectly, without that person's consent is said to assault that other person;
>
> 2. The assault was unlawful, that is not authorised, justified or excused by law;

3. The defendants thereby did Owen Matthews bodily harm; that is, any bodily injury which interferes with health or comfort.

4. The defendants did so while armed with an offensive instrument.
   - An offensive instrument includes anything capable of being used and intended by the defendant to be used for offensive purposes even though it is also capable of being used for innocent purposes.

5. The defendants did so whilst in company with each other.
   - Being 'in company' requires proof that the complainant was confronted by the combined force or strength of two or more persons including the defendant or the force of two or more persons including the defendant must be deployed against the complainant.

   It is not necessary that more than one participant actually strike the victim. It is sufficient that the defendant and one or more other person or persons be physically present for the common purpose of assaulting the complainant and of physically participating as required.

All five elements must be proved by the prosecution, and must be proved beyond reasonable doubt.

BASIS OF LIABILITY ALLEGED BY THE CROWN:

Dionne Mathew Lacey- s.7(1)(a)
Jade Michael Lacey- s.7(1)(a)

VERDICTS – COUNT 1:

Dionne Mathew Lacey -
Jade Michael Lacey - ".

[90] The trial judge's direction that the case against each appellant must be separately considered was reinforced by the separate identification in the jury notes of the basis of liability alleged by the Crown for each appellant. But if the notes under the first heading of the jury note were read in isolation from the summing up, the prosecution case against each defendant failed unless the prosecution proved beyond reasonable doubt that both defendants assaulted Matthews, both did him bodily harm, both did so while armed with an offensive instrument, and both did so whilst in company with each other. Thus the use of the plural could not have worked to the disadvantage of either appellant. Nor is there any basis for the argument that the reference to "in company" in the fifth element of the offence was confusing.

[91] The appellants argued that a question asked by the jury in the course of their deliberations suggested confusion. The jury question was:

> "We are all agreed on 4 out of 5 elements in count 1 with the exception of element number 3. Can you please advise?"

That question related only to the "bodily harm" element of count 1. It did not evidence any confusion about the requirement to consider the case against each appellant separately.

[92] Counsel for Dionne Lacey initially asked the trial judge to instruct the jury that the prosecutor must prove beyond reasonable doubt that "any assault you find to have been perpetrated by the accused, whose case you are considering, did cause bodily harm to Owen [Matthews], that is to say that the assault caused [Matthews] to suffer a bodily injury which interfered with his health or comfort." There followed a debate whether a direction along those lines might mislead the jury to think that they had to be satisfied that a particular blow by each particular accused caused bodily harm. The trial judge suggested a direction along the lines that "in the case of each defendant you must be satisfied … that the blow or blows" caused bodily harm. Counsel for Dionne Lacey and counsel for Jade Lacey indicated that such a direction was satisfactory. The trial judge formulated the direction in fuller terms and neither counsel demurred. The trial judge redirected the jury accordingly, in the following terms:

> "In the case of each defendant in respect of count 1 in order to convict you must be satisfied beyond reasonable doubt that the blow or blows with baseball bats caused the state of injury described as 'bodily harm', the definition of which is set out on the written document that you have, of which I will now remind you, that is, bodily harm is any bodily injury which interferes with health or comfort."

[93] The introductory words of the redirection reinforced the requirement for proof of the element separately in relation to each appellant.

[94] In relation to count 2 (extortion), the offence was charged as having occurred on 22 April 2007 at Robertson. In opening and closing addresses, the Crown particularised the offence as having occurred at or near the Kidd Street house, the demand for money having been made by one of the appellants as Matthews was being taken out to the car. The Crown case that whoever made the demand was a principal offender under s 7(1)(a) and the other appellant was an aider or enabler under s 7(1)(b) or s 7(1)(c) of the *Criminal Code* was reflected in the trial judge's directions to the jury.

[95] The Crown case was that the element of the offence created by s 415(1)(b) of "a threat to cause a detriment" was to be inferred from each appellant's violence to Matthews in the context of an allegation that he had stolen the drugs, and the fact that the appellants then took Matthews alone in their car. The prosecutor relied upon the continuing conduct over the next few days as demonstrating that the demand for the payment of money was deliberate and serious, and that there was a continuing attempt to obtain the money that was initially demanded when the appellants walked with Matthews from the house at Robertson to the car.

[96] The appellants argued that the trial judge's directions concerning the different paths to liability for each appellant were deficient, having regard in particular to the circumstances that one appellant was said to have made the demand, but the accompanying threat was to be inferred from earlier conduct of both appellants, and that it was necessary to find a "threat to cause a detriment" was intended by each appellant.

[97] The jury notes provided:

> "**COUNT 2 - EXTORTION**
>
> The prosecution must prove that:

> 1. The defendant intended to extort a sum of money from Owen Matthews.
>
> 2. The defendant orally demanded the sum of money.
>
> 3. The demand threatened injury to be caused to Owen Matthews by the defendants if the demand is not complied with.
>
> 4. The demand was without reasonable or probable cause.
>
> - It is not for the defendant to prove that he acted with reasonable and probable cause, it is for the prosecution to prove he did not.
> - There cannot be a reasonable and probable cause to make a demand containing threats of injury or detriment which would involve the commission of a criminal offence.
>
> All four elements must be proved by the prosecution, and must be proved beyond reasonable doubt."

[98] Those notes conveyed the requirements that each defendant intended to extort a sum of money and orally demanded the sum of money in a way which threatened injury to Matthews by both defendants if the demand was not fulfilled. In summing up, the trial judge made it plain to the jury that it was for the Crown to prove beyond reasonable doubt that the appellants were guilty and in order to prove guilt beyond reasonable doubt the Crown must prove each of the four elements outlined in the jury notes. The trial judge directed the jury that:

> "In order to convict the defendants in respect of count 2, you need not be satisfied as to who made the actual threat, as long as you are satisfied that a threat was made and that the other defendant knowingly aided in respect of that threat.
>
> …
>
> As I have mentioned, the Crown case is that whoever made the demand would be liable under section 7(1)(a) and the other person, if they knowingly aided in the making of the demand and the threats of injury, would be liable under section 7(1)(b) or (c)."

[99] In the context of the jury notes, which clearly identified each element of the alleged offence and set out the text of s 7(1) of the *Criminal Code*, and the trial judge's clear explanations elsewhere in the summing up of the effect of those provisions, those directions clearly identified the requisite intention by each appellant.

[100] In relation to count 4 (torture), the Crown case was that each appellant was a principal offender under s 7(1)(a) of the *Criminal Code*. The appellants' argument in relation to this count was similar to their argument concerning count 1. The jury notes were to the effect that the prosecution was obliged to prove beyond reasonable doubt that the "defendants" inflicted severe pain or suffering on Matthews, that the "defendants" did so intentionally, and that the "defendants" did so by an act or a series of acts done on one or more than one occasion. Those notes were mirrored in the trial judge's fuller directions. The trial judge directed the jury, for example, that the Crown had to prove that "the defendants consciously decided to subject the complainant to the alleged acts

in order to cause him severe pain or suffering", and that the "defendants did so by an act or series of acts done on one or more than one occasion." As was the case in relation to count 1, on a literal interpretation of the jury notes taken out of their context, the jury could not convict either defendant unless the prosecution proved beyond reasonable doubt that both defendants did the relevant acts and had the relevant intention. That could not have prejudiced either appellant. But for the reasons given in relation to count 1, the jury would have understood that they were required to consider the elements separately in relation to each appellant.

[101] The appellants argued that additional directions were required because the prosecutor relied upon Matthews' evidence that Jade Lacey shot him through the hand as one aspect of count 4 as well as constituting the offence of a malicious act with intent charged in count 5. The appellants pointed out that the Crown case on count 4 was that each of the appellants was liable as a principal offender under s 7(1)(a) of the *Criminal Code*, but the Crown case against Dionne Lacey in count 5 was that he was liable as an aider or enabler under s 7(1)(b) or s 7(1)(c), or as a party to an offence committed in the prosecution of a common unlawful purpose under s 8. The appellants did not precisely identify what direction they contended should have been given, but they noted that no direction was given "in light of the possibility that an 'act' or part of the 'series of acts'" for count 4 "could involve the commission of count 5 in order to assist the jury to determine liability for the appellant Dionne Lacey…".

[102] No such direction was required. The directions given by the trial judge in relation to count 4 accurately described the elements of the offence of torture which the Crown was obliged to prove beyond reasonable doubt and the appellants did not argue that there was any deficiency in those directions. The appellants also did not argue that there was any deficiency in the directions given in relation to count 5. Nor was it in issue that the acts relied upon by the Crown to prove the liability of Dionne Lacey in respect of count 5 could properly be taken into account by the jury in respect of count 4 if the jury were satisfied, in accordance with the trial judge's directions, that those acts were done with the intention of inflicting severe pain or suffering on Matthews. Notwithstanding the different bases upon which Dionne Lacey was said to be liable under the different counts, the jury could comply with the trial judge's directions to give the cases against and for each defendant separate consideration and that each defendant was entitled to have the case decided on the evidence and on the law that applied to him as it related to each particular charge. There was no indication that the jury in fact encountered any difficulty in complying with those directions.

[103] In relation to count 6 (deprivation of liberty), the appellants again argued that the directions were deficient because they referred to the obligation of the prosecution to prove beyond reasonable doubt that the "defendants" deprived Matthews of his personal liberty and that the "defendants" did so unlawfully. For the reasons given in relation to the other counts, this did not disadvantage the appellants, and the jury would have understood their obligation to consider the separate cases in relation to each appellant.

Ground 8: The verdicts on count 2 are against the evidence and the weight of the evidence

[104] Counsel for the appellants explained that the appellants' contention under ground 8 was that there was no evidence upon which the appellants could be convicted on count 2. The appellants advanced two arguments in support of this contention.

[105] First, the appellants argued that the evidence was insufficient to establish that both appellants were present and in the hearing of each other at the time of the demand of which Matthews gave evidence. However an inference to that effect was clearly available on the evidence of Matthews. On his evidence, he was led to the car by both appellants and told by one of them that he had to repay "them". That occurred shortly after both appellants had set upon him with baseball bats immediately upon Bowley identifying Matthews as "him" (an implicit reference to a person involved in the drug rip-off). On Matthews' evidence, once all three men were in the car, one of the appellants asked him how he was going to get "the money". There was no suggestion that the other appellant questioned the meaning of that statement. Matthews' evidence of subsequent events suggested that each appellant appreciated that Matthews was attempting to comply with the initial demand. It was reasonably open to the jury to conclude both that one appellant made the demand in the presence and hearing of the other appellant and that both appellants intended to threaten injury to Matthews if he did not comply with the demand.

[106] Secondly, the appellants argued that an implied threat arising from the conduct alleged against the appellants before the demand was made did not constitute a demand "with" a threat to cause a detriment within the meaning of s 415(1)(b) of the *Criminal Code*. The appellants acknowledged that the question whether particular conduct and statements amount to a threat is a question of fact, that words which imply a threat are covered by the offence,[17] that any words stated by an accused must be taken in context, and that a threat may be implied by conduct in the absence of a direct threat. The appellants submitted, however, that past conduct alone could not be used to imply a threat to cause future detriment.

[107] In the form the section was in before it was amended on 1 December 2008,[18] s 415(1) provided:

> "Any person who with intent to extort … any property … from any person—
>
> …
>
> (b) orally demands without reasonable or probable cause—
> (i) any property … from any person …
>
> with threats of injury … to be caused to that person … by the offender or any other person, if the demand is not complied with;
>
> is guilty of a crime and is liable to imprisonment for 14 years."[19]

[108] Section 415(3) provided that it was immaterial that the threat did not specify the injury that was to be caused.

[109] On Matthews' evidence, an implied threat arose from the making of the demand in the context of the immediately preceding assault and from both appellants leading him to the car whilst they retained possession of the baseball bats used to assault him and one of them retained possession of the firearm he had earlier discharged in Matthews' direction. Section 415 plainly applies in such a case.

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17 *R v Jessen* [1997] 2 Qd R 213 at 219.

18 Reprint No 6J. The provision was amended by Act No 55 of 2008, s 73.

19 Section 415(4) imposed a maximum penalty of imprisonment for life if the carrying out of the threat would be likely to cause, amongst other things, loss of life or serious personal injury to any person.

Ground 9: **The trial judge erred in failing to adequately warn the jury against impermissible propensity reasoning arising from evidence admitted in the trial which disclosed uncharged acts**

[110] The appellants submitted that Matthews' evidence revealed uncharged criminal conduct by the appellants as to the discharge of a firearm at Kidd Street by Jade Lacey, demands and threats made by the appellants whilst in the car travelling between Kidd Street, Kenilworth, and Ephraim Island, and in various places around the Gold Coast area over the following two days. They argued that, as a result, it was necessary for the trial judge to direct the jury as to the limits of the use that could be made of that evidence and to warn against propensity reasoning. The appellants submitted, in relation to count 2, that the following redirection did not warn of the dangers of propensity reasoning:

> "In relation to count 2, the charge is based upon the oral demand for money made at Kidd Street on the 22nd of April 2007. I summarised the evidence of subsequent conduct because the Crown relies on that conduct as demonstrating that the demand was deliberate and to show that there was a continuing attempt to obtain the money. However, you must bear in mind that it is the oral demand made on the 22nd of April 2007 that is the foundation of the charge. The subsequent conduct was outlined to you for the limited purpose that I have just mentioned."

[111] That redirection was sought by Dionne Lacey's counsel to make it clear that the jury understood that, despite reliance upon the subsequent conduct for the purposes identified in the redirection, the charge related to conduct on 22 April 2007 only. Experienced defence counsel did not perceive that there was a risk of propensity reasoning which required specific directions. There being no request for a direction about propensity and no ruling upon any question of law in that respect, the question is whether the absence of any propensity directions gave rise to a miscarriage of justice. Clear directions about propensity should be given in cases in which the evidence may show propensity,[20] but the absence of any more specific directions on that topic did not give rise to a miscarriage of justice in the particular circumstances of this case.

[112] In that respect it is significant that the summing up emphasised that the jury had to be satisfied beyond reasonable doubt that Matthews' evidence in respect of each count was credible and reliable.[21] Furthermore, the trial judge specifically identified the limited purpose for which the jury could use the subsequent conduct mentioned in the redirection. There is no reason to think that the jury would have used that evidence of subsequent conduct for any other purpose. The "evidence of subsequent conduct" which the trial judge summarised in relation to count 2 included much of the evidence of uncharged acts to which the appellants referred. The trial judge also referred to: Matthews' evidence about Jade Lacey giving the impression at Kenilworth that he had a gun in his pocket; Matthews' statement at Kenilworth that he had been shot at and needed money and he was going to get shot again; Jade Lacey's statement to Dionne Lacey that they could "pop" Matthews and throw him over the edge of the range; one of the appellant's questions to Matthews as he got out of the hole at Brown Island about how he could get the money; Matthews staying in the laundry at the Ephraim

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20 *Roach v The Queen* (2011) 242 CLR 610 at 625 [47].

21 cf *Gipp v The Queen* (1998) 194 CLR 106 at 133 [78].

Island unit and being handcuffed; the driving around various places on the Gold Coast; Jade Lacey's statement that he wanted his money and did not care how long he had to have Matthews as long as he got his money; and Mrs Matthews' evidence about Matthews sounding scared on the telephone and making various requests for money so that the appellants would let him go.

[113] The structure of the trial judge's summing up focussed the jury's attention upon the evidence which was relevant to each count and appropriately related the evidence to the elements of each offence charged against the appellants. The offences charged against the appellants were very serious ones. In the context of those clear directions the jury would not have reasoned towards guilt by reference to incidental aspects of Matthews' narrative which revealed other forms of criminal conduct.

Ground 10: The verdicts are unsafe and unsatisfactory

[114] The contention in ground 10 that the verdicts are "unsafe and unsatisfactory" invokes the ground of appeal that the verdicts are unreasonable or cannot be supported having regard to the evidence: *Criminal Code*, s 668E(1). That requires the Court to conduct an independent review of the evidence in order to determine whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that each appellant was guilty.[22] In making that determination, the Court must bear in mind that the jury had the benefit of seeing and hearing the witnesses give their evidence and it must accord respect to the jury's resolution of the contested factual questions reflected in the guilty verdict.[23]

[115] In *R v PAH*,[24] Mackenzie AJA summarised the Court's task:

> "The question which the court must ask itself is whether it thinks that upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In most cases, a doubt experienced by an appellate court will be a doubt the jury ought also to have experienced. Where a jury's advantage in seeing and hearing the evidence is capable of resolving the doubt experienced by the appellate court, the court may conclude that no miscarriage of justice occurred. Where the evidence lacks credibility for reasons which are not explicable by the manner in which the evidence was given, the reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.
>
> If the evidence, on the record itself, contains discrepancies, inadequacies, is tainted, or otherwise lacks probative force in such a way to lead the court to conclude that, even allowing for the advantage enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, the court is bound to act and set aside a verdict based on that evidence. In doing so, the court is not substituting trial by the Court of Appeal for trial by jury, for the ultimate question must always be whether the court thinks that, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

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22 *M v The Queen* (1994) 181 CLR 487 at 493 - 495.

23 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 624 [59].

24 [2008] QCA 265 at [29] - [30].

[116] The essence of the appellants' argument under the final ground of appeal was that various inconsistencies in versions given by Matthews in evidence, and between his evidence and other evidence, required the conclusion that there was a reasonable doubt about each appellant's guilt on all counts. Reference was made in the appellants' written outline of submissions to numerous matters which were submitted to throw into doubt the reliability and credibility of the account given by Matthews at the trial. I have considered each of those matters, but it is appropriate to focus upon the five arguments which were submitted to encapsulate the essential aspects of the unsatisfactory nature of Matthews' evidence.

[117] The first argument was that Matthews' account that he dug the hole on Brown Island in the middle of the night whilst threatened with a gun was inconsistent with the evidence, including police photographs, that the hole was neatly excavated with straight lines and with pieces of Corflute which fitted neatly inside the hole. The photographs do suggest that the hole was dug with quite straight planes, but somebody dug the hole in that shape. There does not seem to be any particular reason for thinking that Matthews could not have done so. Presumably he was not in a particular hurry to finish the work. It seems much more significant that Matthews' account of starting to dig one hole and then being required to dig what appeared to be his own grave was supported by the discovery of two such holes in the place he had indicated to police on Brown Island. The size and shape of the large hole were quite unnecessary for the purpose, to which Dionne Lacey testified, of concealing plastic bags containing a handgun, some ammunition, and some cannabis. As the respondent submitted, it was an awfully large hole for such a small amount of property.

[118] As to the Corflute found in the hole by police on 11 May 2007, Matthews gave evidence that a "black-plasticky looking thing was put over where the hole had been dug". He did not see the plastic before he started to dig. A police officer, Arnold, described the Corflute as being some six feet long and two or three feet wide. In the photographs, it appears to be a blue-grey colour and to fit within the hole. That is how it was described in the evidence. When Matthews was shown the police photographs, he identified the hole with the plastic in it. He gave evidence that he did not know where the plastic came from. There was no evidence that Matthews handled the Corflute. Bearing in mind also that Matthews' account concerned events occurring at night and when he was traumatised, it does not seem very significant that he said that the plastic was black. At the trial, defence counsel emphasised that Matthews could not explain how the black plastic came to be on the island, but that was quite unremarkable.

[119] The appellants' second argument concerned Matthews' account of being shot in the hand whilst he was on the island. A police officer, Maclean, gave evidence that he spoke with Matthews on 25 April 2007 at the Nambour Police Station and took photographs of him. The appellants submitted that Matthews did not complain to Maclean that he had been shot on Brown Island. In fact, Maclean gave evidence in cross-examination that his notes of statements Matthews made to him on 25 April 2007 included "something about a shot being fired through the palm of his hand".

[120] There were other inconsistencies between Matthews' evidence and statements he had made to Maclean, including:

(a) As to the rip-off, Matthews told Maclean that he stood on the footpath with Swan when an unknown male person grabbed the package of 500 ecstasy

tablets out of Swan's hand and ran off, Matthews then left Swan, he walked around the corner, and he bumped into McLeod. That conflicted with Matthews' evidence that he travelled to the Kidd Street house with McLeod and Cone and they took the tablets from Swan.

(b) As to the assault with baseball bats, Matthews said that when he walked into the Kidd Street house he was assaulted by two male persons with baseball bats and one of the males produced a small pistol and shot towards his legs. The inconsistency concerned Maclean's evidence at the committal hearing on 11 February 2008 that Matthews told him that he was assaulted by the two males with baseball bats "as soon as he arrived".

(c) Matthews told Maclean that the shorter of the two men who kidnapped him spoke with a Croatian accent but did not mention this in his evidence.

(d) Matthews said that when he arrived at the Gold Coast a towel was placed over his head to blindfold him, he was still blindfolded when he was put into the small rubber dinghy, the blindfold was removed when they reached the mangrove island, and he was blindfolded when he subsequently left the unit on 23 April. In his evidence he spoke of his head being concealed when he first went to the unit, but he did not suggest that he had been blindfolded on other occasions.

(e) Matthews said that when he was on the island he heard two shots fired and felt a pain to the left hand side of his head and a shot was fired through the palm of his hand. The inconsistency was the reference to three rather than two shots on Brown Island.

(f) Matthews said that he was put in a laundry cupboard, rather than in the laundry, in the unit on Ephraim Island.

(g) Matthews told Maclean that when he was taken from the unit on the last occasion he was driven to the motorway and dropped off close to the Beenleigh turnoff and he then telephoned Bowley, who collected him, whereas in evidence he said he was dropped at a service station.

(h) Matthews did not mention to Maclean that the appellants drove him to Cone's house and one of them fired a shot in the direction of the house.

[121] In considering the significance of those inconsistencies, the jury could have regard to evidence of the circumstances of this police interview. Maclean gave evidence that Matthews was reluctant to give information that would identify the perpetrators, he was in a distressed state, and his main aim in coming to the police was to call off the police hunt, who were looking everywhere for him. Maclean told Matthews that it was a serious matter and whether he made a complaint or not it would be investigated. Matthews was distressed during the whole interview, which occupied three or four hours. Consistently with that evidence, Matthews gave evidence that when he spoke to Maclean he did so at the urging of his mother, he was not keen to talk to Maclean at all, and he "was just trying to get out of there". In response to the suggestion in cross-examination that he had no reason to lie to Maclean, Matthews said that he did not want Mclean to do anything about it because he had been told that if he went to the police he would be killed.

[122] Much the same considerations are relevant in relation to the assessment of some inconsistencies between Matthews' evidence and his account to an ambulance officer,

Small, some 11 hours earlier on 25 April 2007. Small, saw Matthews at the Eagle Junction train station shortly before 3.00 am on 25 April 2007. With reference to a printed form which included information generated by Small, he gave evidence that Matthews said that he had been involved in a fight with numerous punches to his head and nil loss of consciousness four days earlier. Matthews told Small that two days earlier at about 2.30 am he was shot with a .22 air rifle through his left palm and he was shot at close range to the left occipital region. The form includes question marks after references to shooting in the left palm and shooting to the left occipital region. In cross-examination, Small denied that Matthews said he was unsure about those matters. He said that he wrote the question mark because Matthews did not give specific or exact details. He agreed that the question marks reflected his assessment of possible unreliability in Matthews' history. When asked if he observed any injury to the left occipital region Small answered, "Per my notes, I've got nothing on the left occipital." He agreed that if Matthews had told him that he had been attacked with blunt weapons he would have noted that on the form. He had also noted on the form that Matthews was adamant that no drugs or alcohol were involved.

[123] The inconsistencies between Matthews' evidence and this account included: the omission of any reference to the use of baseball bats, instead referring to "numerous punches" to his head; the reference to a ".22 air rifle" rather than a pistol; and the timing of the injuries. On the other hand, it seems much more significant that Matthews' account of having been shot was consistent with the police evidence that a spent cartridge and projectile which had been discharged from a firearm were found on the edges of the hole and in the hole respectively. The appellants made the point that Matthews gave evidence of two shots, one grazing his forehead and one piercing his hand, but only one projectile and cartridge case were found on the island despite an apparently detailed and extensive search. However, the difficulties of finding such items at this location were apparent from the evidence. A police officer, Brock, examined two holes in the sand at the island with another officer, Hansen. The metal detector did not give any indication of any metal object in the large hole. It is apparent that the metal detector was not a reliable means of discovering the cartridge and projectile. Using a shovel and a sieve they found a spent cartridge in the soil around the edges of the hole. Brock found the projectile in the hole only by systematically working through layers of sand and tilling it through his fingers and sieving it whilst he was on his hands and knees.

[124] The appellants' third argument concerned Matthews' account that he was handcuffed to a door in the laundry and used the grinder to cut himself free. The appellants contended that Matthews' account must have been wrong because the length of the power cord on the grinder was too short to enable it to be connected to the electricity outlet in the laundry in a way which permitted him to operate the grinder at the place in the laundry he identified. However, the argument depended upon acceptance of Dionne Lacey's evidence that the length of the power cord on the grinder was only about one metre and that there was no extension cord connected to it. There was no other evidence which corroborated that account. Furthermore, the black particles (which probably came from the grinding of the handcuff pieces found by police in the Broadwater) were collected from the top of the skirting board adjacent to the cupboard where they might be expected to have been found on Matthews' account. That evidence contradicted Dionne Lacey's account.

[125] The appellants' fourth argument was that Matthews' evidence of the assault with the baseball bats at Bowley's house was inconsistent with the medical evidence which

suggested that there were no significant injuries to his head, neck and ear areas. The appellants referred to Matthews' evidence that he was hit many times on the head with the aluminium bat, causing him intense pain and dizziness. Matthews said that he was struck on his jaw with the wooden bat in a way which broke a tooth at the back of his mouth in half and he tasted blood. He said he was hit two or three times over the top of his right eye, which made him feel as though his eye socket was being crushed and which caused swelling and blood to drip from his forehead. It should be noted, however, that in the same passage of cross-examination by counsel for Dionne Lacey, when Matthews was asked whether he said that he was struck by the metal bat and the wooden bat with great force, he said that he was not.

[126] The medical evidence which was submitted to be inconsistent with Matthews' account was given by Dr Swain, but I will also summarise other relevant medical evidence.

[127] Small took Matthews to hospital at 3.20 am. Matthews was initially assessed by a nurse, Moar. This involved an interview and a brief physical assessment. Matthews told Moar that he had been shot in his left hand, punched in the right eye, and that he was feeling dazed and nauseated. She noted an injury to his left hand with some black spotting, a graze to the left hand side of his head, in the temple region above the ear, and bruising around his right eye. In cross-examination Moar said that Matthews told her that he had been shot at two days ago. She agreed that Matthews had told her that he had a graze on his temple and she observed that graze when she examined him. Matthews did not tell her that he had been hit with a baseball bat. Matthews was not then bleeding from his head or from his hand.

[128] After Matthews had been in the Emergency Department on 25 April for about four to five hours he was seen by Dr Loke. She observed that Matthews had a bruise to the side of his head and some grazing and abrasion of the forehead. She did not note any injury to his hand. In cross-examination Dr Loke agreed that Matthews said that he had been hit on the head with a .22 calibre pistol and that had caused the abrasion or graze. She could not remember whether he had a black eye but she did not think that he did. She agreed that the graze was on the top part of his forehead about where the hairline is on the right side. In re-examination Dr Loke was shown a photograph of Matthews which showed the cut and abrasion to the right side of the head and she agreed that Matthews also seemed to have bruising to the right eye, but she did not remember it. She did not have a recollection of whether she examined through the hair on the left hand side of his head, although she usually would have done so.

[129] Dr Swain, a government medical officer, examined photographs of Matthews' injuries which were taken on 25 April 2007 and 15 May 2007, and she had reference to the notes of a different government medical officer who had examined Matthews, and Matthews' statements. I will summarise the opinions she expressed. In relation to the head injuries (count 1):

(a) The visible brown discolouration around the right eye appeared to be a bruise. It was likely to have been caused by blunt force, and it was consistent with the blunt force having been applied about four days earlier. There was also subconjunctival haemorrhage in the superficial layers of the right eye which could have been caused by the same application of blunt force which caused the bruise or by a different application of blunt force.

(b) There was a roughly oval-shaped scab just below the hairline, with a small area of surrounding redness, and two parallel red marks (a "tram track

injury") angling down towards the right ear, with what appeared to be healing abrasions or lacerations at the upper end. It was not possible to date any of those injuries. A tram track injury is caused by a cylindrical object striking the skin. It was consistent with having been caused by the aluminium baseball bat but it could have been caused by any cylindrical object.

(c) There was a linear red mark on the neck which was caused by trauma by any object of narrow width but she could not date when it occurred.

[130] In relation to the injuries to the right hand (count 5):

(a) There were a roughly circular red scar or scab just above the right wrist, a mark on the prominent knuckle of the third finger, and a small scab on the first joint of the first index finger which were all consistent with some non-specific form of blunt trauma including the possibility of Matthews hitting someone in a fight. She could not date these injuries.

(b) There were two roughly parallel red marks on the inner aspect of the right wrist (the thumb side), with the upper mark slightly thicker than the lower one, which were caused by contact with something. A handcuff to the right wrist was a reasonable explanation for the injuries but there would be numerous other explanations.

[131] In relation to the injuries to the left hand (counts 5 and 6):

(a) There was a roughly circular scab approximately three millimetres in diameter between the palmar creases and in line with the webbing between the ring and little fingers, surrounded by a circular area of redness approximately seven millimetres in diameter, and some small reddish brown marks on the palm and the little finger. On the outer aspect of the hand there was a red, roughly oval scab approximately five millimetres by two millimetres which, by virtue of its position, could be associated with the wound on the palmar side. These injuries were consistent with having been caused by a firearm projectile. If that was the case, the circular red mark around the palmar injury might be the muzzle imprint, indicating an entry wound. If the circular red mark were not a muzzle imprint, the small reddish brown marks on the palmar side would indicate the burning particles coming out of the end of the weapon, also pointing to an entry wound. (However there were also red or reddish brown marks on the outer aspect of the hand on the index finger and on the thumb side of the ring finger, which were similar to those on the palmar side. Being on opposite sides of the hands, those marks could not all be caused by propellant from the same gunshot. They could, however, be caused by slight flecks of molten or hot metal coming off an angle grinder.)

(b) If a shot was fired through the palm of the hand, it would be fortuitous if there were no damage to any of the bones of the hand, but that was possible. If a shot did hit the bone it would be expected that there would be intense pain for at least hours afterwards, with the pain getting better after days if there were no movement in the hand. If a shot was fired through the palm of the hand, there would be a reasonable amount of bleeding; it would be surprising if there was very little bleeding, but that was not quite impossible.

(c) The wound could have occurred in the early hours of 23 April 2007 but it was not possible to say when it occurred in relation to the photographs of it which were taken on 25 April 2007.

(d) She could not determine from the photograph alone whether or not there was in fact a through and through bullet wound to the hand. It was possible that there were two, unconnected abrasions on each side of the hand. She would have been in a better position to express an opinion had she herself examined Matthews.

[132] The head injuries described by Dr Swain do not appear to be particularly serious or as serious as Matthews suggested in his evidence at the committal, which was put to him in cross-examination, but Dr Swain had the opportunity only to examine photographs of the injuries taken some time after Matthews said that they were inflicted. It seems much more significant that: Dr Swain described injuries which were consistent with having been caused by the application of blunt force to Matthews' head about four days before the photograph dated 25 April 2007 was taken; she described a "tram track injury" which was consistent with having been caused by a cylindrical object; and her evidence of the hand injury was consistent with Matthews' account of having been shot through the hand. Similarly, nurse Moar's evidence of the graze to the left side of Matthews' head was consistent with his account of having sustained pain in that region immediately after a pistol aimed at his head was discharged. Whilst this evidence was only to the effect that Matthews' injuries were consistent with the assaults he attributed to the appellants, it provided some support for his account.

[133] The appellants' fifth argument was that Matthews' account was contradicted in significant areas as to the sequence of events at Kidd Street and in relation to when he parted company with the appellants. In relation to the first aspect of the argument, the appellants argued that Swan's evidence was that she saw Matthews being severely assaulted by Bowley and Marshall, before the appellants arrived at Kidd Street. In fact, she did not give evidence that Marshall assaulted Matthews. She did give evidence that Bowley assaulted Matthews before the appellants arrived. That was inconsistent with Matthews' evidence, but there were grounds upon which her evidence on this topic might have been found to be unreliable. She said that Matthews and Bowley had an "altercation". When she was first asked what she meant by that she said, "I believe" that Bowley hit him "probably" in the head. She changed that evidence in response to the next question, when she said, "Okay. I seen [Bowley] hit [Matthews]." She subsequently agreed that she saw more than one blow struck by Bowley to Matthews' head. She also gave evidence that she could not remember anybody else being in the rumpus room with Matthews and Bowley.

[134] The appellants referred to evidence which suggested that Marshall was a "muscle man" involved with a "bikie club" who had access to guns. This was an aspect of the theme in defence counsels' submissions at trial that it might have been Bowley and Marshall, particularly Marshall, rather than the appellants, who were responsible for the assault upon Matthews (count 1) and the shooting at Cone's house (count 3). As I have mentioned, there was no evidence that either of them did discharge a firearm at Cone's house. Whether or not either or both of them assaulted Matthews at the Kidd Street house, it was reasonably open to find beyond reasonable doubt that the appellants assaulted Matthews, having regard to his evidence, and also to the support his evidence derived from Bowley's evidence, Dr Swain's evidence, and the evidence that a baseball bat was found at the appellants' residence.

[135] The second aspect of the appellants' fifth argument concerned the discrepancy between Matthews' account of what happened after the appellants parted company with him and the accounts given by others. Matthews' evidence was to the effect that: the appellants left him with Bowley; the woman with Bowley (Donaldson) drove him to various places before stopping; Bowley walked away from the car; and Matthews then left. Donaldson's evidence was to the effect that, after the car trip, Matthews was taken by Bowley and Marshall to a unit, very much against Matthews wishes. On her evidence Matthews was frightened that Bowley and Marshall would kill him. There were grounds upon which the jury might doubt that Donaldson's evidence on this topic was reliable. It was inconsistent with Bowley's evidence. Bowley's evidence might itself have been unreliable, but it does not follow that Donaldson's evidence must have been preferred to that of Matthews. On the other hand, Marshall's girlfriend, Fawcett, gave evidence that some five to seven days after the events at Kidd Street, she encountered Matthews at Marshall's house, with a bandaged hand or foot. On her evidence, however, Matthews was not apparently fearful or concerned about being there. She gave evidence that Matthews was talking about going to his mother's place and he subsequently did so.

[136] Whichever version of these events was accepted by the jury, and the jury might have constructed a version supported by aspects of the evidence of different witnesses, the jury was not obliged to regard any particular inconsistency between Matthews' evidence and the account preferred by the jury on this topic as requiring doubt about Matthews' evidence of the essential events underlying the charges against the appellants.

[137] The appellants also referred to what was submitted to be the evidence that every time Matthews was seen to be in the company of the appellants there was no suggestion that he was scared of them. The appellants referred to the evidence of Johnson that Matthews did not look worried to him and he did not see any problem, and to the evidence of the security guard at Ephraim Island, Beardsley, who did not see anything which concerned him. In both cases, however, Matthews was in the company of both appellants, and his evidence was that he had very good reason to be frightened of them. If so, it is not surprising that he did not draw attention to his predicament.

[138] The appellants also referred to Matthews' evidence in cross-examination about an occasion when he was in the appellants' car when it stopped at a service station to refuel. Matthews gave evidence that: Jade Lacey told him that he could shout out to Dionne Lacey to ask him to get cigarettes; Matthews got out of the car; Jade Lacey did not try to stop him getting out of the car; Matthews walked over to the place for paying the attendant for petrol, cigarettes and other goods; Matthews bought cigarettes from the attendant; and Matthews did not ask the attendant for help or complain of being held by the appellants. However, Matthews also gave evidence that at this time Dionne Lacey was just outside the door of the service station and Matthews at that time was too scared to attempt to run away. He said, "I thought if I done what they said that I would survive."

[139] In addition to the forensic and police evidence summarised in [17] of these reasons, it was reasonably open to the jury to find support for Matthews' account of the extortion charged in count 2 in his uncontroversial evidence that he travelled with two men, unknown to him until that day, to Kenilworth to ask for money from Johnson. That count, and the deprivation of liberty charge in count 6, also derived support from Mrs Matthews' evidence that her son sounded scared in each of the telephone calls

made from the Gold Coast, whereas in the telephone call made after Matthews was no longer in the company of the appellants he did not sound scared and, unlike in each other call, he did not ask his mother for any money. Matthews' account in respect of count 3 was consistent with the evidence of Gale that shots were fired from a car which was parked outside Cone's house. Defence counsel emphasised that her evidence was that she did not go out onto the veranda, whereas Matthews' evidence was that the shots were fired towards a woman who was on the veranda. That does not seem to be a very significant inconsistency in light of Gale's evidence that she opened the door to the veranda and looked out.

[140] It is necessary also to take Dionne Lacey's evidence into account. The prosecutor referred the jury to particular passages in that evidence and submitted that they were incredible, but it is not necessary to discuss those points. Dionne Lacey's evidence was very improbable on its face. On his evidence: the appellants travelled for hours in their car with a complete stranger who claimed to have been shot and who was wearing a single handcuff; Matthews willingly travelled with two complete strangers to the Kenilworth property where he lived to ask for a large sum of money; the appellants dug a hole in the shape of a grave and which was far larger than necessary to store a few bags containing marijuana, a gun, and some boxes of ammunition; the appellants showed a complete stranger where they hid their drugs, firearm and ammunition; they went fishing with him in the middle of the night; they let him sleep on the couch in their unit for a couple of days; and, in order to assist Bowley to repay money he owed to the appellants, Matthews, in the presence of both appellants, deceived his mother into thinking that he had been kidnapped and that his life was in danger. It is hardly surprising that the jury rejected that account.

[141] The jury's advantage of having seen and heard the witnesses give evidence was of real importance in this case. Bearing that in mind, and notwithstanding the many inconsistencies and discrepancies in the evidence to which the appellants referred in their outline of submissions and in oral argument, it was open to the jury to find that there was no reasonable doubt that both appellants were guilty of each count.

Proposed orders

[142] I would dismiss each appellant's appeal against conviction.

Sentence applications

[143] I have had the advantage of reading the reasons of McMurdo J concerning the sentence applications. For those reasons, the sentence applications should be refused in each case.

[144] **McMURDO J: Appeals against conviction**

[145] I agree that the appeals against conviction should be dismissed. I agree with the reasons given by Fraser JA, except in some few respects as will appear below. I also wish to add some comments of my own upon some of the arguments.

Ground two

[146] I agree with Fraser JA that the evidence of count 3 was admissible upon the other counts. If so, the appellants argued, a warning against propensity reasoning was still required, for which they cited *R v HAB*[25] and *R v Navarolli*.[26] But neither case

[25] [2006] QCA 80 at [14].

[26] [2010] 1 Qd R 27 at 56-7 [144]-[145]; [2009] QCA 49.

supports the submission. In the passage relied upon in *HAB*, I said that the jury in the circumstances of that case should have been warned about probability reasoning. I added that with that warning it may have been unnecessary to give a distinct instruction against propensity reasoning. That was upon the premise that the relevant evidence there was admissible as similar fact evidence. As Fraser JA has explained, the evidence as to count 3 was admissible on the other counts as an integral part of the complainant's narrative.[27]

Ground five: Edwards direction

[147] In *Edwards v The Queen*, Deane, Dawson and Gaudron JJ described the instructions which should be given to a jury where the prosecution argues that the accused had lied and that the fact of those lies was itself evidence of guilt.[28] The appellants say that this was such a case. In particular, they argue that a statement by the prosecutor in his address that Dionne Lacey's evidence "…smacks of being made up to cover some highly incriminating pieces of evidence and areas of evidence"[29] was a suggestion that he had lied out of "a consciousness of guilt", as that term has been used in this context.[30] In the absence of the jury, the prosecutor had disavowed such an argument and counsel for the defendants agreed that a direction according to *Zoneff v The Queen*[31] would be sufficient. Although neither defence counsel made the complaint at the trial, it is now said that the prosecutor advanced the argument which he had disavowed, for which the so-called *Edwards* direction was necessary.

[148] This characterisation of the prosecutor's argument is inspired by the judgment of this Court in *R v Sheppard*.[32] In that case, the Court found that the prosecutor had suggested to the jury that the appellant had lied to police out of a consciousness of guilt, largely because the prosecutor had said to the jury that "[the appellant's] account to police is just simply an effort to distance himself from this allegation that he did commit the offence as [the complainant] has outlined".[33] In this appeal, the appellants seize upon the trial judge's summary of the prosecutor's address where, at one point, his Honour said that the prosecutor had submitted that Dionne Lacey had lied "in an endeavour to distance himself from the View Street incident".[34]

[149] The appellants' argument overlooks what else was said by the prosecutor on this issue. As Fraser JA has explained, the prosecutor submitted to the jury that they should disbelieve Dionne Lacey, finding him to be a liar, and that having done so they should assess the prosecution evidence to determine whether it had proved each of the charges. The prosecutor maintained the position which he had foreshadowed when, in the jury's absence, it was common ground that a *Zoneff* direction would be sufficient. It is hardly surprising that neither of the experienced counsel for the defence failed to object to the prosecutor's address or to seek an *Edwards* direction.

[150] Further, the trial judge's description of the prosecutor's argument, in terms of Dionne Lacey endeavouring to distance himself from certain events, did not create a risk that the jury would reason impermissibly (i.e. that lies by that defendant were themselves probative evidence of his guilt).

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27 At [47] of his judgment.
28 (1993) 178 CLR 193 at 210-211.
29 T 14-48.
30 See in particular *Zoneff v The Queen* (2000) 200 CLR 234 at 244 [15] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.
31 (2000) 200 CLR 234 at 245 [23].
32 [2010] QCA 342.
33 Ibid at [20].
34 T 16-18.

[151] The appellants were further critical of the directions, emphasising this passage:

> "It is for you to decide what significance those suggested lies have in relation to the issues in the case. You will make up your own minds about whether Dionne was telling lies, and if so whether he was doing that deliberately. You may decide that if you find that Dionne did lie that only affects his credibility."[35]

To that could be added his Honour's comment that:

> "If you think that there is, or may be, some innocent explanation for his lies, if you find that they were lies, then you should take no notice of them."[36]

[152] The entire passage in which these statements appeared is set out by Fraser JA at [74]. It is said that this suggested to the jury that there was a use which could be made of these lies other than their impact upon the appellant's credibility. These directions were in terms of the then Benchbook. Following *R v Sheppard*, the Benchbook has been amended to delete the words "it is for you to decide what significance those suggested lies have in relation to the issues in the case …". And the suggested direction is now relevantly in these terms:

> "If you conclude that the defendant deliberately told lies, that is relevant only to his credibility. It is for you to decide whether those suggested lies affect his credibility."

[153] But the present question is not a drafting one, involving a fine comparison of the respective versions of the recommended direction. Instead, it is whether the directions which were given gave rise to a real risk that the jury impermissibly reasoned that the fact that Dionne Lacey lied in the witness box was proof of his guilt and perhaps that of his brother. In my view there was no such risk, again because of the way in which the prosecutor argued the case (taking his argument as a whole) and also because of the clear instruction by the trial judge that they were not to treat any lies by Dionne Lacey as evidence of guilt.

Ground seven: directions upon counts one, two, four and six

[154] The essential complaint of the appellants is that the trial judge failed to properly direct the jury as to the basis or bases of criminal responsibility upon these counts and, where necessary, distinguish the case against one defendant from the other.

[155] The prosecutor told the jury that his case was that Dionne Lacey was liable under s 7(1)(a) of the *Criminal Code* in respect of counts one, four and six and as an aider in respect of counts two, three and five.[37] He said that Jade Lacey was liable in respect of all counts under s 7(1)(a). That was repeated by the trial judge in his summing up. But in my respectful opinion, this identification of the bases for criminal responsibility was in some respects incorrect.

[156] On count 1, the prosecution case was that each of the appellants did an act or acts involving the assault of the complainant by, in particular, striking him with a baseball bat. There was evidence from which the jury could be satisfied that bodily harm had been inflicted by one or more of those blows. But the prosecution case did not seek to

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35 Ibid.

36 Ibid.

37 T 16-25.

identify which blow or blows, and inflicted by which appellant, caused bodily harm. It did not have to do so because if the jury was satisfied that each appellant struck the complainant, in the circumstances of this case it followed that each appellant had either inflicted the blow or blows which caused bodily harm or aided the other to do so. Therefore the prosecution case was one which relied upon s 7(1)(a) and (c) against each appellant.

[157] In the notes he provided to the jury, the trial judge included this statement:

> "It is not necessary that more than one participant actually strike the victim. It is sufficient that the defendant and one or more other person or persons be physically present for the common purpose of assaulting the complainant and of physically participating as required."

That passage was not directly relevant to this case, because it was alleged that each of the appellants struck the complainant.

[158] This imprecision in the identification of the relevant parts of s 7 did not affect the fairness of the trial upon these counts. In respect of count 1, the jury were told that they had to be satisfied that each of the appellants struck a blow or blows and that bodily harm was caused by one or more of them, although it was not necessary for them to decide which blow or blows did so.[38] That accorded with the prosecution case. The jury was also given general directions about the different bases of responsibility under s 7. Once the jury concluded that both appellants struck the complainant, necessarily in the presence of each other and in the one incident, the jury could not have doubted that one assailant was also aiding the other. The jury was not diverted from the correct path of reasoning by any imprecision in the identification of only s 7(1)(a) as the only basis of criminal responsibility.

[159] In respect of count 2, the relevant threat, upon the prosecution case, was implied from the violence which had been inflicted upon the complainant and which was the subject of count 1. The prosecution case was that one of the appellants had made the demand in the presence of the other and with that implied threat by each of them. The trial judge correctly instructed that whoever made the demand would be liable under s 7(1)(a) and the other, if he knowingly aided in the making of the demand and the threats of injury, would be liable under s 7(1)(b) or (c).[39] Strictly speaking, upon the prosecution case each of the appellants threatened injury, as well as assisting the other to do so. But again the jury could not have been diverted from a correct path of reasoning.

[160] In respect of count 4 (torture), the prosecutor had said that each appellant was liable under s 7(1)(a), although he had said that Dionne Lacey was an aider in respect of count 5 (the shooting of the complainant at Brown Island) which was one of the acts relied upon for count 4. Again, it can be seen that this was imprecise. However, again, there was no risk that the jury would have misunderstood the facts which were alleged and had to be proved in order to convict, in turn, each appellant upon this count.

[161] In respect of count 6, again the appellants complain that the directions failed to distinguish between the acts alleged against each appellant. But for this count, it is

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38 Summing up T 16-30.

39 Summing up T 16-41.

said that it was particularly important to do so because Jade Lacey was not present for a number of the events relayed by the complainant. The alleged offence involved the deprivation of the complainant's liberty. It did not require the prosecution to prove a particular act by either of the appellants. It was plain, according to the evidence of the complainant, that the appellants were acting together to deprive him of his liberty. Again therefore, the prosecution case was one which was actually founded on both s 7(1)(a) and (c) for each appellant. But yet again, in the circumstances of this case the jury was properly instructed as to the facts which had to be proved.

Ground nine: propensity reasoning from uncharged acts

[162] To the reasons of Fraser JA, I would add only that the directions which the appellants now say should have been given were not only unnecessary, but also would have had the risk of diverting the jury from its task, as the trial judge had instructed them, to focus upon the evidence relevant to each charge. In *KRM*,[40] McHugh J said that an unnecessary propensity warning "…may even suggest the very train of reasoning that a propensity warning is designed to overcome and make it difficult for the jurors, try as they might, to remain uninfluenced by the forbidden chain of reasoning".

Applications for leave to appeal against sentence

[163] There is an application by each of the appellants for leave to appeal against the sentences imposed for these offences. Each was sentenced to the following terms of imprisonment:

> Count 1 (assault occasioning bodily harm whilst armed and in company) – four years
> Count 2 (extortion) – four years
> Count 3 (threatening violence at night) – three years
> Count 4 (torture) – six years
> Count 5 (wounding with intent) – no further punishment beyond that for Count 4
> Count 6 (deprivation of liberty) – two years.

In Dionne Lacey's case, Counts 1, 3 and 4 were declared to be serious violent offences and in Jade Lacey's case, Count 4 was so declared.

[164] These sentences were to be served concurrently, but cumulative upon sentences which were then being served by each applicant for offences committed by them in May 2007, about two weeks after they committed the subject offences. The May offences consisted of manslaughter committed by Dionne Lacey, for which he was then serving a term of 11 years, and wounding with intent committed by Jade Lacey, for which he was then serving a term of five years. At the time that the subject sentences were imposed, there was an outstanding appeal by Dionne Lacey against that term of 11 years. Subsequently, the High Court allowed that appeal with the consequence that his sentence for manslaughter was reduced to 10 years.[41]

[165] At the time of this application therefore, the overall sentences being served by the applicants, for both the subject offences and those committed in May 2007, were as follows. Dionne Lacey is serving a period of 16 years imprisonment, with an eligibility for parole after 80 per cent or 12.8 years. Jade Lacey is serving a period of 11 years, with parole eligibility at 7.3 years.[42]

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40 (2001) 206 CLR 221 at 234 [37].

41 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573.

42 The total of one half of his five year sentence and 80 per cent of the sentence for torture in this case.

[166] Those periods of imprisonment commenced in May 2009. At that point, the applicants had already served two years on remand but which could not be declared as pre-sentence custody when they were sentenced for the May 2007 offences. However, that two years was effectively allowed in the quantification of those sentences. The result of the present orders is that Dionne Lacey will serve 14.8 years before being eligible for parole and Jade Lacey will serve 9.3 years.

[167] The learned trial judge was referred to several cases which were said to be comparable. He said that the most helpful of them was *R v Cowie*,[43] which he said supported the prosecutor's submission that the appropriate range for these offences of torture was a head sentence of 10 to 12 years imprisonment. He took that as the starting point but imposed six years having regard to the totality principle.

[168] The applicants argue that the appropriate range was much less than 10 to 12 years. They further argue that the outcome does not accord with the totality principle. For Dionne Lacey, it is submitted that an appropriate sentence would be a cumulative term of 18 months to two years imprisonment, resulting in an effective overall sentence of 13.5 to 14 years with a release after 11.2 to 11.6 years. For Jade Lacey, it is submitted that a cumulative sentence of three years would be appropriate with the declaration of a serious violent offence. This would result in an effective overall sentence of 10 years with an eligibility for release after 6.9 years.

[169] In *R v Cowie*, after a trial the applicant was convicted of torture, supplying a dangerous drug, kidnapping and receiving. He met the complainant, an 18 year old backpacker, when selling him drugs. The following evening the applicant, in company with four other men, met him again and took him to an abandoned building where the applicant and some of his co-offenders were squatting. Over the course of several hours, the complainant was assaulted by several men, including the applicant, who were trying to obtain property from him. He was punched, kicked, burnt with a cigarette lighter and a piece of paper, choked with a chain and assaulted with a wooden bat. He was left with psychological disturbance as well as injuries to an eye and a finger. The complainant had some intellectual impairment of which the applicant was not aware. The applicant was 26 at the time of the offences and 28 when sentenced. He had a lengthy criminal history for offences of violence and had been in prison for up to two years. The sentencing judge said that he had shown no remorse. He was sentenced to 12 years imprisonment for the offence of torture.

[170] The Court in *Cowie* referred to three decisions of the Court of Appeal, which had resulted in terms ranging from four to 11 years imprisonment for torture, which were *R v Roelandts*,[44] *R v Rankmore, ex parte A-G (Qld)*[45] and *R v R and S, ex parte A-G (Qld)*.[46] The Court (McPherson and Keane JJA and McMurdo J) explained that the case before it was more serious as follows:

> "[24] While the acts of violence perpetrated upon the complainant in the present case may be said to be less serious than those the subject of the offences in the cases to which the applicant's counsel has referred, those cases were all cases where the offender or offenders were related to, or in a relationship with, the complainant.

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43 [2005] 2 Qd R 533.

44 (2002) 131 A Crim R 603; [2002] QCA 254.

45 [2002] QCA 492.

46 [2000] 2 Qd R 413; [1999] QCA 181.

> [25] That the injuries actually inflicted in the present case may be less serious than those inflicted in the cases to which the applicant's counsel has referred does not mean that the overall criminality of the applicant is significantly less than that of the offenders in those cases. That is because, as the learned sentencing judge noted, the offence of torture in this case was the result of the cold-blooded detention and torture for money by several men of a vulnerable man who did not know them and who was alone in a foreign country. These circumstances reveal a distinctly different form of criminality but one which is at least as serious as that involved in the decisions to which the applicant's counsel referred. Indeed the view was open to her Honour that the demands of deterrence are considerably stronger in this case than in the cases to which the applicant's counsel has referred because of the callous, impersonal, organised and financially motivated brutality visited upon the complainant by the applicant and his co-offenders."[47]

[171] That reasoning is clearly applicable to the present cases. Of course there are some differences between them and *Cowie*. Neither of these applicants had a criminal history as serious as that applicant. Dionne Lacey was only 20 years of age at the time of the subject offences and was 23 when sentenced. In 2005, he was convicted of dangerous conduct with a weapon and possessing dangerous drugs, for which he was given non-custodial sentences. The weapon was an unloaded handgun which he revealed to a man with whom he had a disagreement at a casino. Jade Lacey was 24 years of age at the time of these offences and was 27 when sentenced. Prior to the subject offences, he had received non-custodial sentences for the unlawful possession of a weapon, possession of dangerous drugs, obstructing police and breaching a bail condition. The weapon was a silencer for a handgun. However, there were features of the present cases which made them relatively more serious than *Cowie*. The conduct occurred over a more extensive period and it involved the shooting of the complainant.

[172] The applicants submit that the appropriate range was also according to *R v El-Masri*,[48] *R v Cannon*,[49] *R v B; ex parte A-G (Qld)*,[50] *R v Kennedy and Watkins; ex parte A-G of Queensland*[51] and *R v Mah*.[52]

[173] *El-Masri*[53] was not a sentence for the offence of torture. He pleaded guilty to offences of deprivation of liberty and assault occasioning bodily harm in company committed in late 1999 and further offences of deprivation of liberty, kidnapping for ransom and assault occasioning bodily in company committed in February 2000. The same complainant was involved in each of the offences. It was alleged that he owed $20,000 to the applicant from some drug dealings. He was tied up, hit with an iron bar and a baseball bat, blindfolded, struck around the head and put into the boot of a car. He suffered fractures to the cheeks and was left with some scarring. He was 22 years old

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47 [2005] 2 Qd R 533 at 539.
48 [2003] QCA 52.
49 [2004] QCA 440.
50 (2000) 110 A Crim R 499.
51 [2002] QCA 26.
52 [2004] QCA 198.
53 [2003] QCA 52.

at the time of these offences. He was sentenced to concurrent terms of five years for the kidnapping offence and three years for the other offences. The application for leave to appeal was dismissed.

[174] In *R v Cannon*,[54] the appellant and others forcibly invaded a house occupied by a couple and their young children. After a trial, the appellant was found guilty of offences of burglary, assault occasioning bodily harm, torture, deprivation of liberty and stealing. The assault and the torture were committed upon the male occupant of the house who appears to have been connected with his assailants by drug dealings. The complainant was repeatedly kicked and punched, and a gun was put in his mouth. He was hit with a shovel, tape was put over his eyes and a rag over his mouth and nose. The applicant received a range of sentences, the highest being six years for the offences of burglary and torture and there was a declaration in each case of a serious violent offence. By a majority, the Court of Appeal allowed his appeal against all convictions and ordered a new trial. Only the dissenting judge (Jerrard JA) commented upon the sentences, saying that he would allow them to stand.

[175] In *R v B; ex parte A-G (Qld)*,[55] the respondent pleaded guilty to offences including the torture of his 17 year old daughter in three incidents over approximately six weeks. The incidents involved punching, hitting her with a shovel, attempted strangulation and threats to kill including threatening her with an axe, putting a knife to her throat and having taken her to a remote location, stabbing her. He was sentenced to seven years imprisonment for the offence of torture with a declaration of a serious violent offence. Moynihan SJA and Atkinson J said:

> "[30] The appropriate sentencing range in the circumstances of this case appears to us to be imprisonment of 7 to 10 years with a declaration that the respondent is a serious violent offender.
>
> [31] The circumstances warranting that range include on the one hand the repeated and escalating violence used, the serious injuries the complainant suffered, the breach of trust of the father-daughter relationship, the desire of the respondent to impose his will through terror and violence both to control his daughter's behaviour and more significantly to cause her to drop the charges laid against him, and on the other hand, his early plea of guilty, previous good relationship with his daughter and his age and good employment history."[56]

[176] In *R v Kennedy and Watkins; ex parte A-G of Queensland*,[57] each applicant was sentenced to three years imprisonment for torture in attempting to obtain payment of a drug debt owed by the complainant. They also received sentences for drug offences, Watkins being sentenced to a concurrent term of four years for trafficking. They were each in their 40s, with Kennedy having a significant criminal history. Each pleaded guilty. The applicants had tied up the complainant and placed him in a locked room. Over the ensuing hours, they took turns at assaulting him by punching, kicking and whipping him with an electrical cord. They made attempts to use an electric taser or "stun gun". They threatened to kill him before releasing him. His physical injuries

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54 [2004] QCA 440.
55 (2000) 110 A Crim R 499.
56 Ibid at 505.
57 [2002] QCA 26.

were described as being not of a high order and leaving no residual disability. The appeals by the Attorney-General were dismissed, as were the applications for leave to appeal against sentence. The Court (de Jersey CJ, McPherson and Williams JJA) said:

> "[16] Neither the three years for the torture, nor the four years for the trafficking, to which there were pleas of guilty, should however be regarded as sitting comfortably within the requisite range: they should be regarded as low order penalties which survive appeal only because the Court must focus on the aggregate terms, in the context of the constraints by which the Court is traditionally, and appropriately, limited in determining appeals by the Attorney-General."[58]

[177] In *R v Mah*,[59] a sentence of six years imprisonment, with a declaration of a serious violent offence, imposed upon a plea of guilty to torture, doing grievous bodily harm and deprivation of liberty, was not disturbed on appeal. The applicant was then aged 25 when he moved into the house of the complainant, a young autistic man. Over a period of a fortnight to a month, the applicant hit the complainant with a steel pipe, daily at first but within increasing frequency. The complainant required significant medical treatment and was left with permanent scarring and a loss of some muscle tissue function and range of movement in his shoulders. The Chief Justice, who gave the principal judgment, said that the applicant's motivation in committing these offences was not clearly disclosed but that inferentially it was sadism.

[178] Each of these cases is of some relevance, but none is as close to the present case as *Cowie*. In *El-Masri*, there was no conviction for the offence of torture and in that case and the others relied upon by the applicants here, save for *Cannon*, there was a plea of guilty. In *Cannon*, there was no consideration by the majority of the sentence and no discussion of comparable sentences. *R v B; ex parte A-G (Qld)* provides no substantial support for the applicants' argument, given the point of distinction referred to in *Cowie* in the passage set out above and considering also that it involved an early guilty plea. In my conclusion, the learned sentencing judge here was correct in holding that *Cowie* provided the most assistance and indicated a starting point of a range of 10 to 12 years.

[179] The question then is whether these sentences offend the totality principle. The submissions for the applicants concede that some cumulative terms had to be imposed, particularly in respect of Dionne Lacey where a concurrent term would not involve any further punishment. But it is submitted that the total of the sentences imposed in each case for the subject offences and the May 2007 offences was more than one which was just and appropriate: *Mill v The Queen*.[60]

[180] The May 2007 offences were committed when the applicants went to an apartment, apparently to negotiate the purchase of some drugs. They were each armed with loaded firearms. Dionne Lacey began to argue with the occupants, one of whom became the victim. Jade Lacey entered the argument and as he was approached by that man, he shot him in the legs. The man was unarmed. In what the sentencing judge (Martin J) described as a chaotic situation after this first shot was fired, Dionne Lacey intentionally fired his gun but, according to the verdicts, without an intent to kill or cause grievous bodily harm. The victim was killed by that shot. As in the present

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58 Ibid.

59 [2004] QCA 198.

60 (1988) 166 CLR 59 at 62-63.

cases, the applicants had made admissions which assisted in the conduct of the trial. But allowing for those admissions, Martin J said that they still demonstrated little in the way of remorse.

[181] The learned sentencing judge here referred to *Mill v The Queen*.[61] Plainly, he had regard to the totality principle by substantially reducing what would otherwise have been a head sentence of between 10 and 12 years. But it is said that there were two matters, in particular, which were overlooked. One was the proposition that an extremely long total sentence may be "crushing" in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release.[62] There was material before the sentencing judge by way of character references and evidence of their good conduct in prison, from which it was submitted that they have strong prospects of rehabilitation. Although the sentencing judge did not refer in terms to the risk of a "crushing" sentence, he clearly adverted to the potential for a longer sentence to detrimentally affect rehabilitation. He weighed that matter against other relevant considerations and, in particular, those of punishment and deterrence.

[182] It was submitted that the sentencing judge did not consider the particular impact of this cumulative sentence in the case of Dionne Lacey, who was serving double the head term being served by his brother and four times the period in custody before eligibility for parole, for the May 2007 offences. But his Honour did specifically refer to that, saying that "…the totality principle has more significance in Dionne's case because you are serving an 11 year sentence compared to Jade's 5 year sentence".[63]

[183] No error in the judge's reasoning has been established. Ultimately, the argument is that the proper application of the totality principle had to result in something less than the six years which was imposed. I am not persuaded to accept that argument. Particularly in the case of Dionne Lacey, the sentences, in aggregate, will require these young men, each with no history of imprisonment prior to these matters, to spend long periods in jail. There is a risk that the length of these terms, especially in Dionne Lacey's case, could impede rehabilitation. But there is also here a particular consideration of deterrence, where all of this offending was characterised by a propensity to use firearms against unarmed victims. In my conclusion, the applications for leave to appeal against sentence should each be refused.

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61 (1988) 166 CLR 59.

62 *R v MAK* (2006) 167 A Crim R 159 at 164 [17], recently cited in *R v Nuttall, ex parte A-G (Qld)* [2011] QCA 120 at [37].

63 Sentencing remarks, T 1-23.