SUPREME COURT OF QUEENSLAND

CITATION:	*R v McMartin* [2013] QCA 339
PARTIES:	**R** **v** **McMARTIN, Trent Alan-John** (appellant/applicant)
FILE NO/S:	CA No 294 of 2012 SC No 43 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	12 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2013
JUDGES:	Margaret McMurdo P and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is allowed.** **2. The guilty verdicts are set aside.** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL ALLOWED – where the appellant was convicted of doing grievous bodily harm with intent and attempted murder – where the appellant owed the two complainants a sum of money – where the appellant and complainants had previously had a number of confrontations concerning the repayment of the money – where the two complainants attended the appellant's residence to recover the money – where the appellant struck the male complainant with a machete once through the hand as the complainant put his hands up to protect his face – where the appellant struck the female complainant with the machete twice through the top and front of her head and once through her hand – where the appellant poured petrol over the female complainant while she was on the ground and reached for a lighter – where the appellant contends that the trial judge erred when directing the jury as to how the prosecution might exclude the operation of defence of a dwelling under s 267 *Criminal Code* 1899 (Qld) – where the trial judge erred in directing the

jury that if the prosecution has proved beyond reasonable doubt that the complainants were unlawfully on the premises or that the appellant had an intent to kill or do grievous bodily harm, then defence of a dwelling was not open – whether the errors amount to a substantial miscarriage of justice in terms of s 668E(1A) *Criminal Code*

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF DEFENCE CASE – where, at trial, the appellant's counsel asked the trial judge to leave only self-defence against unprovoked assault to the jury – where, at the conclusion of summing up, the appellant's counsel unequivocally conceded that there was insufficient evidence to raise the question of provocation for the purpose of self-defence against provoked assault in terms of s 272 *Criminal Code* – where, on appeal, the appellant contended that the evidence of the female complainant, two neighbours and the appellant's girlfriend raised self-defence against provoked assault – where the appellant contends that the trial judge erred in failing to direct the jury to consider self-defence against provoked assault – whether trial judge erred in not directing the jury to consider self-defence against provoked assault

Criminal Code 1899 (Qld), s 267, s 271, s 272, s 688E(1), s 668E(1A)

R v Craig [1998] QCA 277, cited
R v Messent [2011] QCA 125, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: D R Lynch for the appellant (pro bono)
B J Merrin for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant pleaded not guilty to doing grievous bodily harm with intent to Paul Valenti at Townsville on 31 December 2008 (count 1), attempting unlawfully to kill Sarah Leishman on 31 December 2008 at Townsville (count 2), and, alternatively to count 2, doing grievous bodily harm with intent to Ms Leishman on 31 December 2008 at Townsville (count 3). After a three day jury trial, he was convicted of both counts 1 and 2. He was sentenced to six years imprisonment on count 1 and 15 years imprisonment on count 2. He has appealed against his convictions on two grounds. The first is that the trial judge erred in failing to direct the jury to consider self-defence against provoked assault under s 272 *Criminal Code* 1899 (Qld). The second is that the trial judge erred when directing the jury as to how the prosecution might exclude the operation of defence of dwelling under s 267 *Criminal Code*. He has also applied for leave to appeal against his sentence contending that it was manifestly excessive.

[2] Counsel for the respondent contends the grounds of appeal against conviction are not made out. Alternatively, he contends that, if made out, the evidence at trial was so overwhelmingly strong that no substantial miscarriage of justice has actually occurred so that the appeal against conviction should be dismissed under s 668E(1A) *Criminal Code*. The respondent also contends that the sentence was within the appropriate range and the application for leave to appeal should be refused.

The pertinent evidence at trial

[3] Defence counsel made the following admissions on behalf of the appellant at the commencement of the trial. On the evening of 31 December 2008, Ms Leishman and Mr Valenti suffered injuries during an incident that occurred at Unit 2/67 Punari Street, Currajong. Ms Leishman suffered two 10 cm lacerations to the left scalp extending to the lateral aspect of the face, an open skull fracture and a laceration to the right hand. The scalp laceration, skull fracture and hand laceration each amounted to grievous bodily harm. Mr Valenti suffered lacerations to both the middle and index fingers of his left hand and a bone fracture in the index finger of his left hand. The lacerations and fracture amounted to grievous bodily harm. At about 8.40 pm on 31 December 2008, police located a machete with blood and hair on the blade on the floor at Unit 2/67 Punari Street. DNA from both Ms Leishman and Mr Valenti was identified in samples taken from the blade. Police also located a five litre can which contained or had contained motorbike fuel in the driveway of Unit 2/67 Punari Street. The defence did not dispute the continuity of the path of the various police exhibits.

[4] The evidence uncontroversially established at the time of the alleged offence that Ms Leishman and her then partner, Mr Valenti, lived at Unit 1/73 Punari Street. The appellant, who lived at Unit 2/67 Punari Street, was their neighbour.

[5] Ms Leishman's evidence was as follows. When she came home on 20 December 2008, she saw the appellant leaving her unit. Her front door had been forced and $2,000 cash, a bonus payment for the children from Centrelink, was missing. She and Mr Valenti confronted the appellant who admitted taking the money. He asked them not to tell police because he was on parole. Over the following weeks, she and Mr Valenti spoke to him many times about returning the money. He became abusive and threatening. On one occasion, he threw beer bottles at them and spat at her. On another occasion, he threatened Mr Valenti with a knife and punched him in the throat. On yet another occasion, when the appellant argued with her and produced a knife, she walked towards the appellant with her hands behind her back pretending that she had a gun and could shoot him. The appellant walked away and calmed down. They had no further contact until the evening of the alleged offences. Her relationship with Mr Valenti at this time was troubled and he was abusive towards her.

[6] On New Year's Eve 2008 at about 7.00 pm, she was waiting for a taxi outside her home. She was leaving Mr Valenti and was intending to travel with her children to the airport. Mr Valenti did not want her to leave. The appellant rode a motorbike up to the front of the neighbouring premises and Mr Valenti spoke to him. Mr Valenti told her that the appellant would repay the money he had taken. She sent the children off to watch a video and followed Mr Valenti to the appellant's home, carrying her phone and a stubbie. The appellant asked them to come inside but they declined. The appellant wanted Mr Valenti to service the motorbike as the

appellant planned to sell it to repay her. The appellant was inside his unit and Mr Valenti was in the doorway. She was about a metre and a half behind Mr Valenti. The appellant swung a knife with a blade about 18 inches long at Mr Valenti. The knife missed him but struck the door frame, causing sparks to fly. Mr Valenti stepped back and the appellant swung again. Mr Valenti put his hands up to protect his face and the knife cut his hand. She tried to get between Mr Valenti and the appellant. She threw the stubbie at the appellant, trying to hit him with it to "stall him."[1] The stubbie bounced off him and went inside. She pushed Mr Valenti out of the way.

[7] As she looked back to see where the appellant was, he struck her with the knife through the top of her head. The appellant tried to pull the machete out of her head and she could feel it was jammed. After a second or two, he freed the knife and struck her again, this time through the left eye and cheek. He struck straight down with both hands on the knife. She turned to run, trying to hold her head together. The appellant hit her with the knife across the back, from the right shoulder blade down to her ribs on the left side. She was winded and dropped to the ground. She was bleeding heavily and saw pieces of bone and blood on her hand. Her phone fell from her hand. Her son, who was then not quite six, was standing about two metres away. She told him to run but he would not. The appellant swung the machete towards her son who was screaming at the appellant to stop and to leave her alone. As she lay on the ground and reached for her phone, the appellant brought the knife down very fast on top of her hand, cutting it from top to bottom. She again tried to reach her phone and he struck her again on the top of her hand. She looked up to see the appellant pouring petrol over her from a jerry can. The petrol stung her head and hands. He reached towards an orange lighter about one or two metres away.

[8] She got up, grabbed her son and ran as fast as she could down the road. She put her son down and told him to keep running but he refused, grabbed her arm and dragged her to her house. She got as far as her front driveway before collapsing. Her son fetched a tea towel and put it on her head to try to stop the bleeding. The ambulance and police arrived and she was taken to hospital where she remained for over a week. When she was released she quietly packed her belongings and she and the children left Mr Valenti.

[9] In cross-examination, she stated that Mr Valenti was not using drugs at the time of the attack and denied that the appellant owed a drug debt to Mr Valenti. She denied that Mr Valenti threatened to take the appellant's motorbike as collateral for the appellant's debt. She denied that she and Mr Valenti rushed the appellant at the door to his unit, saying words to the effect of, "Let's fuck him. Fuck him, we'll get him."[2] She denied that either she or Mr Valenti telephoned Odin's motorcycle club or that she yelled out during the phone call, "Tell them to bring the big fellow."[3] She denied that she and Mr Valenti tried to push their way into the appellant's unit whilst saying that he "was going to get a visit".[4] She denied that the appellant picked up the knife only to fend off Mr Valenti's attack on him. She denied that the appellant threw a tin of fuel at her as she and Mr Valenti fled down the driveway.

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1 T2-13.15.
2 T2-36.10.
3 T2-36.25-26.
4 T2-36.51.

[10] The prosecution called Mr Valenti to give evidence but he declined to answer questions. After two *voir dire* examinations and an opportunity to obtain legal advice, the trial judge declared him hostile. His statement to police which was read to the jury largely constituted his evidence in chief.[5] This account was broadly similar to Ms Leishman's. Immediately before the attack, the appellant was riding a quad bike which he said he had serviced and re-tyred. He claimed he would be able to repay Mr Valenti and Ms Leishman when he was paid for that work. Mr Valenti told him that his work was worth only $300 whilst he owed them $2,000. The appellant became agitated and asked if they wanted a "bong".[6] They declined but he kept asking them to come inside his unit. Ms Leishman insisted they stay outside. Before Mr Valenti knew what was happening, the appellant swung something at him which he at first thought was a police extendable baton. Mr Valenti told Ms Leishman to run and tried to defend himself with a broom handle. The next thing he recalled was seeing Ms Leishman run along the street with their son. Blood was everywhere. Her face was peeled back, her hand was hanging off her and she collapsed. When he reached her, he could not feel a pulse and she was not breathing. He told their son to run to a neighbour to call an ambulance. He performed CPR until he could feel a pulse. He heard a motorbike start up and go down the street. He could not understand why the appellant acted as he did. He and Ms Leishman gave him every opportunity to repay the money and then he attacked them for no apparent reason.

[11] In cross-examination, he refused to answer questions about the $2,000 which he claimed the appellant had stolen. He claimed not to recall the incident on 31 December 2008 or an earlier incident involving a tomahawk. He even claimed not to recall whether he knew the appellant. He could not recall whether he sold methylamphetamine. He denied any association with the Odin's motorcycle club. He could not recall a dispute with the appellant over an $1,800 drug debt. He could not recall whether he said his associates would come after the appellant if he did not pay this debt. He could not recall whether there was an open fuel tin near the motorbike. He could not recall whether he and Ms Leishman threatened the appellant as he was working on his motorbike. Mr Valenti did not recall whether he and Ms Leishman tried to force their way into the appellant's unit threatening to "fuck him … get him."[7] He could not recall whether he had convictions for dishonesty and violence or whether he had been sent to jail. He agreed he had a charge of trafficking in methylamphetamine and cannabis outstanding.

[12] Jaylynne Kupper gave evidence that she was the appellant's girlfriend in December 2008. He came to her home on the night of 31 December 2008. He had blood on his legs, appeared distraught, had trouble speaking, and was angry and confused. He said he might have done something silly and wanted help. He said something like, "I just hit a bikie slut in the head with a machete."[8] A man and woman broke into his house and came at him and he pulled out a machete. In cross-examination, she agreed that the appellant was emotionally distraught about their failed relationship and was using both alcohol and drugs on a regular basis. He was physically half the size he was at trial. She described his appearance that night as "quite extreme".[9] She had not "seen him that worked up, that – that out there"[10]

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5 Ex B for identification (AB 337–344).
6 Ex B for identification (AB 342, [44]).
7 T1-72.2-3.
8 T2-68.58 – T2-69.1.
9 T2-70.48.
10 T2-70.48-49.

before. He was sweating, shaking, freaking out, crying and had difficulty stringing words together. He said he struck the female in the context of two people breaking into his house and that the female had a gun, which was why he pulled out the machete.

[13] Michael Higgins gave evidence that the appellant was living with him in December 2008. Mr Higgins was away from the unit from 30 December until early January 2009. When he returned, the driveway area was a mess with an empty petrol can and blood everywhere. The appellant owned a machete with a blade over 12 inches long which Mr Higgins had seen in the garage. In cross-examination, he stated that the appellant was detrimentally affected by a relationship breakdown and that was why he moved in with Mr Higgins. The appellant used drugs and alcohol and was also on medication for bipolar disorder. In 2008, he was lean but not skinny; much lighter than he was at the trial, but still fit. When the appellant was under the influence of drugs or alcohol he seemed "maybe a bit jumpy, maybe a bit, you know, uneasy."[11] On occasions, he was nervous and stressed out. Mr Higgins tried to stay out of the appellant's personal life.

[14] Gary Gangell lived with Karen Mitchell at Unit 2/73 Punari Street, next door to Mr Valenti and Ms Leishman. On the evening of 31 December 2008, Mr Gangell heard a motorbike and later heard Mr Valenti calling for help. He assisted Mr Valenti and Ms Leishman after the attack but did not witness what had occurred.

[15] Karen Mitchell gave evidence about two episodes. The first was in early December when she witnessed an incident involving Mr Valenti, Ms Leishman and two or three men next door who were arguing, yelling, swearing and throwing bottles. The men next door were on their balcony goading Mr Valenti and Ms Leishman to fight and threatening to kill them. Mr Valenti and Ms Leishman on the one hand, and the men on the other, swore and goaded each other. Mr Valenti had "a tomahawk or something"[12] and one of the men had a knife with a 20 inch blade with which he was hitting the fence. She was concerned for the safety of her car but both sides assured her that it would not be damaged. The second episode was on 31 December 2008 when she was disturbed by the noise of a loud motorcycle. She heard two male voices. One said, "Where did you get it from. How much did you pay for it"[13] and then the motorbike took off. The next thing she remembered was hearing Mr Valenti knock on her door pleading for help. Mr Gangell phoned "Triple 0."[14] She took Ms Leishman's children inside her unit and assisted Ms Leishman who was unconscious.

[16] In cross-examination, she said that at one stage during the incident in early December, Mr Valenti told Ms Leishman, "Go and get the gun."[15] Ms Leishman appeared to respond to the command by moving towards her unit but she did not go in. She described the interactions between the two sides as aggressive and belligerent, each giving as good as it got. The men were throwing bottles. By contrast, the exchange on 31 December 2008 between the two men was cool-headed and did not involve aggravation or aggression.

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11 T1-64.49-50.
12 T2-52.4.
13 T2-53.7-8.
14 T2-54.18.
15 T2-56.42.

[17] Patricia McGregor lived at Unit 2/65 Punari Street, next door to the appellant's unit. On the night of 31 December 2008, she was outside smoking a cigarette with her daughter when she heard a motorbike "rev"[16] up the driveway at an excessive speed. It was "very, very loud".[17] She heard a male voice screaming out, "'You … f'ing c' and that was used excessively and then there – he also said that, 'And you can f-off to you c – you s'".[18] She heard another male voice say, "Where is he I'm going to f'ing well kill him".[19] She then heard a lady screaming out to her little boy in a distressed voice, "Run baby, run"[20] and the little boy said, "No mummy … You're hurt."[21] Ms McGregor heard a commotion inside the appellant's unit like furniture being moved around and then heard the motorbike leave. In cross-examination, she said the whole incident lasted 13 or 14 minutes. The noise from inside the unit sounded like furniture being thrown around.

[18] Allison Exton gave evidence that she knew the appellant for a short period of time in late 2008 and 2009 and regarded him as a mate. In early January 2009, she met up with him shortly before she began a road trip from Townsville to south-east Queensland. He suggested he "grab a lift"[22] and she agreed. He came only with the clothes he was wearing and without luggage. She "kicked him out"[23] somewhere between Bundaberg and the Sunshine Coast after they argued about him not having any money to contribute for fuel.

[19] Dr Nabeel Sunni was working at Townsville Hospital on New Year's Eve 2008 and treated Mr Valenti's and Ms Leishman's hand injuries. Mr Valenti's injuries were consistent with being caused by a single blow. Without surgery he would have lost full function of his fingers and would have probably lost both fingers altogether. Ms Leishman required surgery to her hand to repair tendons, nerves and blood vessels. Her hand injuries were consistent with being caused by a single blow with a very sharp object and without treatment would have resulted in a loss of function of the index and middle fingers with a probable total loss of the index finger. Ms Leishman's laceration went through the joint itself, penetrating only soft structures. Mr Valenti's laceration went through to the bone which was fractured.

[20] Dr Lakshmi Ramalingham, a maxillofacial surgeon, gave evidence in respect of Ms Leishman's head injuries. She underwent surgery during which the fractures to her skull were reduced and fixed with plates. Without treatment, the frontal bone fracture left her susceptible to a brain abscess, encephalitis or osteomyelitis of the bone, which would have been life threatening. In cross-examination, he agreed that Ms Leishman had suffered three individual wounds: two to the head and one to the hand. In re-examination, he stated that he was unable to comment on how many blows were struck to the hand.

[21] The appellant did not give or call evidence.

The directions concerning defence of a dwelling

[22] I will deal first with the appellant's contention that the judge misdirected the jury as to defence of dwelling under s 267 *Criminal Code* which provides:

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16 T2-43.31.
17 T2-43.32.
18 T2-43.32-35.
19 T2-43.38-39.
20 T2-43.40-41.
21 T2-43.41-42.
22 T2-79.9.
23 T2-80.6.

"**267 Defence of dwelling**

It is lawful for a person who is in peaceable possession of a dwelling, and any person lawfully assisting him or her or acting by his or her authority, to use force to prevent or repel another person from unlawfully entering or remaining in the dwelling, if the person using the force believes on reasonable grounds—

(a) the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling; and

(b) it is necessary to use that force."

[23] His Honour's directions to the jury on s 267 were as follows:

"Before I turn to a brief overview of the evidence, this defence of self defence has in common some of the same evidence, or largely the same evidence, as another defence that arises, that of defence of a dwelling house, and that is because of the circumstances that applied that evening. With respect to that defence, defence of a dwelling house, the law provides certain protection for a householder when there is an intrusion into his premises by someone who he believes is intending to commit a crime.

A person in peaceable possession of a dwelling may use force to prevent or repel another person from unlawfully entering or remaining in the dwelling if the person using the force believes, on reasonable grounds, firstly, that the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in it; and secondly, that it is necessary to use the force. Now, I will refer to this as a defence, but it is important that you understand that it is not something that the [appellant] must prove, but something that the prosecution must rule out beyond reasonable doubt.

The first question that arises is whether the [appellant] was in peaceful possession of the dwelling. A dwelling is a building or part of it kept by the owner or occupier for his residence and that of his family or servants. On the evidence, the [appellant] was living in the premises where the events occurred, and there is no dispute about his entitlement to be there. Was the force used for the purpose of repelling the intruders, as he would have it, Valenti and Leishman, from unlawfully entering? *If the prosecution has satisfied you beyond reasonable doubt that Valenti and Leishman were unlawfully on the premises or that force was used not to repel them but as a form of vengeance or with the intent alleged, as charged in the indictment, then this particular defence is not open*.

The next way the prosecution seeks to exclude the defence is this; it contends that the [appellant] could not have believed, on reasonable grounds, that Valenti and Leishman were attempting to enter or remain [in] the dwelling within intent to commit an indictable

> offence in it. In other words, the question here is whether the [appellant] genuinely believed they had the intention of committing an indictable offence. That is to say, one of sufficient seriousness to require it to be dealt with by a higher Court. In this case it has been suggested that he believed they meant to harm him or to cause him injury.
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> If you are satisfied beyond reasonable doubt that the [appellant] did not have that belief or did not hold it on reasonable grounds, the prosecution has properly excluded the defence and you need not consider it further. Otherwise you go on to consider this further point.
>
> The prosecution contends that the [appellant] did not believe, on reasonable grounds, that the force he used was necessary to prevent Valenti and Leishman from entering or remaining. You should remember that a person defending himself or his home cannot always weigh precisely the exact action which he should take in order to avoid the threat which he reasonably believes that he faces at the time. You should approach your considerations in a practical way, to take account of the situation [in] which the [appellant] found himself, bear in mind that unlike those of us in this courtroom he may have had little, if any, opportunity for calm deliberation or detached reflection. It is relevant, of course, to look at the degree of force he actually used in considering whether he could have believed, on reasonable grounds, it was necessary. But it's only part of the whole picture. You must consider the whole of the circumstances.
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> If you conclude in the end that he did not believe that the force he used was necessary or that he did not have that belief or if he did have that belief that it was not held on reasonable grounds, that is the end of the particular question and this particular defence could not apply.
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> If the prosecution cannot to your satisfaction beyond reasonable doubt exclude the possibility that the injuries suffered by Valenti and Leishman occurred in the use of force which the [appellant] believed, on reasonable grounds, was necessary to prevent unlawful entry or remaining in the dwelling, as I've outlined to you, that is the end of the case; the [appellant] would not be regarded as criminally responsible for the result, and you should find him not guilty."[24] *(my emphasis)*

[24] A judge's associate has listened to the recording of the judge's directions and confirmed that the italicised passage in the preceding paragraph was correctly transcribed.

[25] The respondent rightly concedes that the judge erred in using the phrase "were unlawfully on the premises" in the italicised passage. That is because s 267 expressly permits the use of force to prevent or repel a person from "unlawfully entering or remaining in the dwelling". The judge should have said "were not

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[24] T3-34.29 – T3-37.29.

unlawfully on the premises" or "were lawfully on the premises". This error was not corrected. It follows that if the jury acted in accordance with that direction, the appellant may have been wrongly convicted.

[26] The judge also erred in adding the words "with the intent alleged, as charged in the indictment". These words do not reflect the terms of s 267. The jury would have understood this direction to mean that, if the prosecution proved beyond reasonable doubt that the appellant had an intent to kill or to do grievous bodily harm, s 267 did not assist the appellant. This was inconsistent with the clear terms of s 267 which require only that the appellant believe on reasonable grounds that Ms Leishman and Mr Valenti were unlawfully entering or remaining in his unit with an intent to seriously assault him and that it was necessary for him to use the force he did to prevent or repel them. If these matters are raised on the evidence, it is immaterial that, in using that force, he intended to kill or do grievous bodily harm. This error was not later corrected.

[27] These two errors of law require that the appeal must be allowed unless, under s 668E(1A) *Criminal Code*, this Court is of the opinion that the appeal should be dismissed as there has been no substantial miscarriage of justice.

Section 668E(1A) *Criminal Code*

[28] The respondent contends that there has been no substantial miscarriage of justice in light of the strength of the prosecution case and the high degree of violence used by the appellant.

[29] The application of s 668E(1A) does not involve a consideration of how the jury's reasoned verdict demonstrates that they would inevitably have rejected the defence under s 267. Rather, it requires this Court to review the whole of the evidence and determine whether it is satisfied beyond reasonable doubt of the guilt of the appellant: see *Weiss v The Queen*.[25]

[30] As the trial judge rightly identified, there was evidence raising the issue of defence of dwelling under s 267. Indeed, in a strong prosecution case, it was the appellant's most promising defence. The following matters were relevant.

[31] The jury may well have considered it possible that the appellant was in peaceable possession of his unit.

[32] They may have been sceptical about Ms Leishman's claim that the appellant stole $2,000 from her and thought it more plausible that he was in debt to Mr Valenti and Ms Leishman for that amount because of drug purchases. One of the few things Mr Valenti did admit was that he had been charged with trafficking in methylamphetamine and cannabis. The appellant was emotionally unstable at the time of the alleged offences and was abusing alcohol and drugs.

[33] Ms McGregor gave evidence of two aggressive male voices at the time of the alleged offences and one male threatening to kill. She also heard a commotion inside the appellant's unit which sounded like furniture being moved around. The jury may have thought it possible that Mr Valenti and Ms Leishman forcibly entered or tried to enter the appellant's unit to assault or intimidate him into repaying his debts.

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25 (2005) 224 CLR 300.

[34] Ms Mitchell gave evidence about an incident earlier in December when Mr Valenti was armed with "a tomahawk or something". She heard him tell Ms Leishman, "Go and get the gun" and she appeared to respond by moving towards but not entering the unit. Ms Leishman gave evidence of an incident involving the appellant where she pretended to be armed with a gun. The jury may have thought that the appellant reasonably believed Mr Valenti and/or Ms Leishman were armed with a lethal weapon or weapons when they tried to enter his unit in an attempt to kill or maim him. This possible version of events received some support not only from the evidence of Ms McGregor and Ms Mitchell, but also the appellant's account to Ms Kupper shortly after the alleged offences, apparently led as a mixed admission against interest.

[35] Despite the shocking violence the appellant used on Ms Leishman, the jury may have thought he used that force believing on reasonable grounds that it was necessary to do so to prevent or repel them from unlawfully entering or remaining in his unit.

[36] After carefully reviewing the evidence, I am persuaded that these issues were quintessentially for a properly instructed jury to determine after assessing the critical witnesses' evidence at trial. I do not consider this is an appropriate case in which to exercise the power given by s 668E(1A).

[37] The appeal against conviction must be allowed, the verdicts of guilty set aside and a re-trial ordered. It is not necessary to deal with the application for leave to appeal against sentence or even with the remaining ground of appeal against conviction. But as there is to be a retrial, I will make some brief observations about the remaining ground of appeal against conviction.

The self defence directions

[38] The appellant makes no complaint as to the judge's directions on s 271 *Criminal Code* (self-defence against unprovoked assault) but contends that the judge should have directed also in terms of s 272 *Criminal Code* (self-defence against provoked assault).

[39] Defence counsel at trial asked the judge to leave only self-defence against unprovoked assault to the jury. He conducted the trial on that basis and the judge acceded to that request.[26] At the conclusion of the summing-up, when counsel discussed with the judge the possibility of redirections, defence counsel unequivocally conceded that there was insufficient evidence to raise the question of provocation.[27]

[40] It is true that all defences fairly raised on the evidence should be left for the jury's determination, even absent a request by trial counsel. In this case, however, the evidence raising defence against provoked assault under s 272 was, at best, tenuous. Defence counsel seems to have made a forensic decision that a direction on s 272 would undermine the defence case and specifically elected not to conduct the trial on that basis. It was incumbent upon the judge to assist the jury by explaining the real factual and legal issues requiring resolution. A direction on s 272 would have distracted them from those issues. In these circumstances, his Honour's

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26 T2-94 (AB 179).

27 T3-48 (AB 241).

directions limiting self-defence to s 271 and not directing on s 272 were appropriate: see *R v Craig*[28] and *R v Messent*.[29]

[41] The judicial directions as to self-defence required at the retrial will turn on the evidence given and the way the defence is conducted.

ORDERS:

1. The appeal against conviction is allowed.

2. The guilty verdicts are set aside.

3. A retrial is ordered.

[42] **MUIR JA:** I agree with the reasons of McMurdo P and with the orders proposed by her.

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

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28 [1998] QCA 277, [19] (Thomas JA).

29 [2011] QCA 125, [29], [30].