SUPREME COURT OF QUEENSLAND

CITATION:	*R v John* [2014] QCA 86
PARTIES:	**R** **v** **JOHN, Jason Christopher** (appellant/applicant)
FILE NO/S:	CA No 127 of 2013 CA No 207 of 2013 SC No 20 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Bundaberg
DELIVERED ON:	24 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2014
JUDGES:	Margaret McMurdo P and Morrison JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted after a trial of the attempted murder of his wife – where the appellant resided with the complainant in a house which was largely destroyed by a vapour explosion and fire – where the complainant suffered dreadful injuries – where the gas cylinder that supplied the house was removed from its usual location and its exploded remains were found at the foot of the bed – where the fire was caused by the ignition of either the contents of the gas cylinder, or petrol, or a combination of gas and petrol – where forensic evidence established that the fire was not caused by an electrical or gas fault – where there were two emergency calls between the complainant, the appellant and the operator – where the calls record the events leading up to the ignition of the fire, including statements consistent with the appellant intending to kill the complainant – where the appellant consistently stated that the vapour explosion and fire started when the complainant lit a cigarette – where the complainant

had no memory of the incident, but had twice adopted as her version the appellant's version as to how the fire started – whether the conviction was unreasonable or insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the trial judge found the appellant poured petrol on the complainant before striking the lighter – where there was evidence that at some point before the second phone call the appellant poured petrol on the complainant – where the expert evidence was to the effect that the damage to the house could have occurred by igniting either petrol or gas, or a mix of both – whether the trial judge erred in finding under s 132C of the *Evidence Act* 1977 (Qld) the appellant poured petrol on the complainant

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was sentenced to 16 years imprisonment – where the applicant probably intended to kill himself and only formed an intent to kill the complainant impulsively – where the applicant had a shocking criminal history for previous acts of violence against his partners and those close to them – where the applicant had documented, long-term mental health issues – where the applicant repeatedly failed to address those problems and continued to turn to substance abuse rather than long term professional help – whether the sentence was manifestly excessive

Evidence Act 1977 (Qld), s 132C

Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Bird and Schipper (2000) 110 A Crim R 394; [2000] QCA 94, cited
R v Day, unreported, CCA No 364 of 1990, 26 March 1991, cited
R v Hardie [1999] QCA 352, cited
R v Lepp [1998] QCA 411, cited
R v Rochester; ex parte Attorney-General (Qld) [2003] QCA 326, considered
R v Schaefer [2001] QCA 327, cited
R v Streeton [1997] QCA 178, cited
R v Tevita [2006] QCA 131, considered
R v Witchard; ex parte Attorney-General (Qld) [2005] 1 Qd R 428; [2004] QCA 429, cited
R v Woodman [2009] QCA 197, considered

COUNSEL: C W Heaton QC for the appellant/applicant
G Cummings for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, Jason Christopher John, was convicted on 10 May 2013 after a five day trial of the attempted murder of his wife, Robyn Joy John, on 11 June 2011. He was sentenced to 16 years imprisonment. He has appealed against his conviction contending that the jury verdict was unreasonable and cannot be supported having regard to the evidence. He also has applied for leave to appeal against the sentence contending that it was manifestly excessive.

The appeal against conviction

[2] Consideration of the appellant's ground of appeal requires the Court to independently assess the whole of the evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *MFA v The Queen*.[1]

The evidence and course of the trial

[3] The appellant and the complainant resided in a rural area at Pine Creek outside Bundaberg. There was no street lighting, near neighbours nor mains electricity. The small concrete block house had one bedroom and a combined lounge/living area.[2] The stove, hot water system and refrigerator were supplied by a 45 kg gas cylinder installed against an exterior wall. They could only afford to buy one gas cylinder at a time. A full cylinder was correctly installed on 1 June 2011 and was expected to provide them with gas for about three months. They also had a petrol-driven generator and a solar electricity system. They used a mobile phone in speaker mode fixed to a sliding door in the lounge/kitchen area to obtain phone reception. They were home alone on 11 June 2011 at about 7.00 pm when the house was largely destroyed by fire. It was a cold, wet evening. The solar electricity system and the generator may not have been working. They had both been drinking alcohol for some hours.

[4] Forensic evidence established that the fire was not caused by an electrical or gas fault. The gas cylinder had been removed from its usual location against the exterior wall of the house and the screw-in fitting connecting it to the gas pipes had been broken. It could not be connected to any fitting without being repaired. The exploded remains of the cylinder, with the valve in the off position, were found at the foot of the bed. The cylinder was not faulty but had exploded after being heated by fire for some time. There had been an initial vapour explosion in the house, that is, a rapid consumption of an air/fuel mixture, resulting in a rolling ball of flame. This had been caused by the ignition of either the contents of the gas cylinder emanating into the atmosphere inside the house, or petrol, or a combination of gas and petrol. LP gas is heavier than air and tends to settle lower in the atmosphere over time.[3] The initial vapour explosion was not likely to have caused a loud noise. It blew out some glass windows and curtains which were not burned in the resulting fire. All combustible items within the house were consumed in the fire which ultimately caused the gas cylinder to explode. This second explosion would have caused a loud noise.

[5] At about 6.30 pm the complainant made a call to 000. The following conversation was recorded between the complainant and Senior Constable Heidi Kearns:[4]

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1 (2002) 213 CLR 606.
2 See ex 13, house plan, AB 206.
3 AB 74-75, 84.
4 Ex 1.

"Complainant: Hello.
Operator: Caller, police emergency, what is your location?
Complainant: My husband's trying to kill himself.
Operator: Caller, it's a very bad line, I can barely hear you. Where are you? What's your address?
Complainant: I'm at 114 Matts Road, Pine Creek.
…
Complainant: I need help, quick.
Operator: Yeah, I'm not understanding you. The call's breaking up. Can you hear me? … what is your name?
Complainant: Indistinct I just need someone out here soon, very soon.
Operator: OK, no, I'm not getting anything I'm afraid. Look, what I'll do is, I'll call the Bundaberg Police and I'll get someone out to you straight away because I can't hear you, OK?
Complainant: OK.
Operator: So I'm going to have to hang up so that I can call them.
Complainant: Indistinct need an ambulance as well indistinct.
Operator: You need an ambulance as well? Who is injured?
Complainant: OK.
Operator: Look, I'll get someone to give you a call back that's closer, OK?
Complainant: OK.
…"

[6] I have listened to the recording and noted that the complainant sounded tearful throughout.

[7] At 6.41 pm Senior Constable Donna Sperling telephoned the complainant and the call was recorded.[5] I have listened to it and it included the following exchange to which I have added my assessment of the tone of voice of each interlocutor:

"Operator: Hello, did you need police assistance?
Appellant: No.
Complainant: No. My husband says no, he's turned the gas bottle on. …
Operator: Are you injured?
Complainant: No, I'm OK. (hesitantly)
Operator: OK. We'll get police there as soon as we can.
Appellant: You're fucking dead you fucking cunt.
Complainant: Uhh.
Appellant: You know how fucked you are.
Operator: Just hold on the line for me. What's going on there, matey?
Appellant: I don't need any assistance, I'm just going to kill myself. Why do I need police assistance to do that? Fuck?
Complainant: UI.
Appellant: UI. (angrily)
Operator: You there?
Complainant: UI. Yeah, I am now. Did you hear all that?
Operator: Yeah, I heard that, matey. I'll just put you on hold, just stay with me.

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5 Ex 2.

Appellant: UI you fucking shithouse people UI.
Operator: Mate, I'm still here with you. Are there any injuries there at the moment?
Appellant: UI fucking UI.
Complainant: Hello there.
Appellant: UI hang up.
Complainant: UI I'm going to die if I UI.
Appellant: UI there's nothing wrong UI I can't fucking let you do that.
Complainant: UI.
Operator: Are you there?
Appellant" UI why can't hurt myself? I'm not hurtin' my darlin'.
Operator: That's OK. Is there any injuries there, sir?
Appellant: I'm just about to have a heart attack, alright, I can't breathe, can't do anything.
Operator: OK, sir. Do you need an ambulance?
Appellant: Leave my wife alone.
Operator: I'm not, OK. Do you need an ambulance?
Complainant: UI … bottle … he's put it in the room.
Appellant: UI I'm gonna blow the whole place up.
Complainant: … he's trying to kill us but
Operator: OK then. Are you on speaker phone, ma'am.
Appellant: UI.
Complainant: Yes.
Operator: Take yourself off speaker phone and just talk to me.
Appellant: Oh, yeah, because then you UI on their way, right?
Operator: I can't hear you.
Appellant: They're on their way at the moment, ready to pick me up, thank you very much. My wife, I love you so much, (ironically and bitterly) I'm out of here.
Complainant: It's alright, he's getting in my car and he's goin'.
Operator: Mate, can you take take that speaker phone off so I can hear you better. …
Complainant: OK, you're off speaker phone now.
Appellant: UI [in background]
Operator: OK, what address are you? 114? Or 14?
Appellant: Fuck!!!
Complainant: Yes.
Operator: Matts Road?
Appellant: UI.
Complainant: Yeah.
Operator: OK, what's going on there?
Appellant: Nothing.
Operator: It's not off speaker.
Complainant: UI … , tryin' to kill himself.
Operator: He can still hear me?
Appellant: Yeah, fuckin' oath I can. UI.
Operator: So I'm not off speaker phone, ma'am? I'm still getting feedback.
Appellant: Yes, UI I'll see you later.
Complainant: It's off now.
Operator: So what's going on there?

Appellant: Leave me alone.
Complainant: Um, he's tryin' to kill himself.
Operator: How's he trying to do that?
Complainant: He bought the gas bottle in, and he's opened it up and put it in our bedroom, he doused[6] me in petrol …….
Appellant: Oh, you're a cunt.
Complainant: … before.
Appellant: You are a cunt.
Operator: Is the gas still on in the house?
Complainant: No, he's turned the gas off, oh no. (fearfully)
Operator: Mate, stay with me if you can, is he assaulting you right now?
Complainant: He wanted to hit me then, but he didn't, he stopped. (tearfully)
Operator: So he hasn't hit you, is anyone injured in the house?
Complainant: No.
Operator: No?
Appellant: You're dead! (coldly)
Complainant: No, but I'm dead, he just told me I'm dead.
Operator: Yeah, I just heard that. UI
Complainant: Uhh.
Operator: What's your name, matey?
Complainant: Robyn.
Operator: Robyn?
Complainant: Robyn Joy John.
Appellant: Ohh, you can get the fuck out of my life UI
Operator: And what's his name?
Complainant: Jason Christopher John.
Appellant: Fuck off.
Operator: Jason Christopher John. Is there any way that you can
Appellant: UI. You're fuckin' gone, you are history, you are fucking history, you put me back in jail again, you are fucking history. (coldly and angrily)
Complainant: Hmm.
Appellant: You put me back in jail, you are fucking history.
Complainant: I never want to be hurt. He hurt me before.
Appellant: she won't get hurt if she leaves me alone.
Operator: We, we getting
Appellant: Just leave me alone."

[8] There was then a clicking sound followed by loud, distressing screams. It was common ground at trial and in this appeal that the clicking sound was the striking of a lighter. This ignited either the gas inside the house, or perhaps petrol which the appellant had poured onto the complainant earlier, or a combination of petrol and gas, causing a vapour explosion and then a fire which in turn led to the explosion of the gas cylinder in the bedroom.

[9] Defence counsel at trial admitted under s 644 *Criminal Code* 1899 (Qld) that the complainant's injuries amounted to grievous bodily harm and that on 24 February 2009 the appellant had pleaded guilty to three charges of assault occasioning bodily

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[6] The transcript used at trial records "gassed" but I heard "doused".

harm committed against the complainant on 25 October, 15 November and 29 November 2008 and was sentenced to 12 months imprisonment.

[10] The complainant, who was a smoker, gave evidence. The last thing she remembered on 11 June 2011 was the appellant bringing the gas cylinder to a step outside the back door. Her next recollections were her neighbour, Iris Newitt, taking off the complainant's rings and her waking up in the Royal Brisbane Hospital. At some point, she was unsure whether it was that night, the appellant had siphoned petrol out of a jacked-up, damaged car in the carport. She agreed she sometimes collected petrol for the generator and re-fuelled it. She could not remember when she last did this but it was when the appellant was in jail about two years before the fire.[7] The appellant had threatened to kill himself many times before. He would just "snap"; "go from one sort of person to a totally different person".[8]

[11] Whilst she was being treated in hospital she told the appellant that she did not know what happened that evening. He told her that she had lit a cigarette and suggested she put this on her Facebook page to keep the police off his back. The appellant gave her money to use a hospital computer so that she could access her Facebook page where she posted "silly me, I lit a cigarette".[9]

[12] The complainant suffered burns to her face and the back of her hands. The appellant suffered burns to his full right leg, the bottom half of his left leg and his left hand.

[13] They left the house before the gas bottle exploded and went to Ms Newitt's house. There was no evidence as to how long it took to walk this distance. Ms Newitt was in bed watching TV at about 6.40 pm when she heard a loud explosion. About 20 minutes later, she opened the window to tell her barking dog to be quiet. She heard a voice which she did not recognise yelling "Help me, Iris, please help me." When the security lights came on, she opened the door and saw the complainant who said her hands were burning. She did not want to come inside as she had fallen over in the mud. Ms Newitt asked her where the appellant was. He yelled, "I'm here, Iris." Ms Newitt rang 000 and took the complainant and then the appellant into the kitchen and sat them at the table. The complainant's hands, face and hair were burned. Skin was peeling off the appellant's face, legs and arms and his hair was burned. The complainant was crying and they both said their hands were hurting. She took them to the sink and ran cold water on their injuries before wrapping them in cold, wet towels. The appellant asked for and was given a glass of water. The complainant asked for and was given a cup of tea, but Ms Newitt had to hold it for her.

[14] Ms Newitt asked the appellant what happened. He hung his head and said, "I went outside and got the big gas cylinder, took it in the bedroom and [the complainant] lit the cigarette and it went bang." The complainant did not say anything. Ms Newitt rang a neighbour, Laurie Ross, for help. Soon after he arrived, emergency vehicles drove by. Mr Ross left and returned with the police and ambulance. The ambulance officers assisted the complainant and the appellant and took them to hospital. They had left the complainant's track suit pants on the floor. Ms Newitt put them in a plastic bag and gave them to police.

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7 AB 55.
8 AB 51-52.
9 AB 49.

[15] In cross-examination, she agreed that the appellant told her that the complainant lit a cigarette after which everything "went up". The complainant made no response.

[16] Mr Ross lived about 500 metres from the complainant and appellant and their properties were separated by a timber forest. After Ms Newitt phoned him, he drove to her house and saw that the appellant's home was on fire. He asked the appellant and complainant what happened. The complainant said that the appellant was trying to hook up a gas bottle which the appellant clarified as being the house bottle from outside. Mr Ross replied, "My goodness, no wonder the place has gone up in flames." This conversation was brief but he had no trouble understanding the appellant and he described the complainant as reasonably coherent. In cross-examination, he agreed that she had said that the appellant was trying to hook up a light to the gas bottle and she went to the back door, lit a cigarette, and the whole place went up in flames.[10]

[17] Whilst the complainant and appellant were receiving first aid at Ms Newitt's home, the following conversation with a paramedic was recorded:[11]

> "Paramedic [to appellant]: And she was gonna light the heater?
> Appellant: No, no, I put it in the bedroom …
> Complainant: No, I lit a cigarette.
> Paramedic [to complainant]: And boom?
> Complainant: Yeah."

[18] Senior Constable Susan Morey arrived at the Newitt home shortly after 7.15 pm. She saw the obviously injured complainant and appellant. She contemporaneously recorded her conversation with the appellant in her notebook. She asked him what happened and he said he was using gas to light the stove in the kitchen and wanted to light a gas light in the bedroom. The complainant walked in, lit up a cigarette and it exploded. The ambulance officers cut off the clothes of the complainant and appellant to tend their injuries. Senior Constable Morey placed the clothing in plastic bags supplied by Ms Newitt.

[19] Forensic scientist Nikki Vernados gave evidence as to tests performed on the clothing. The complainant's clothing was undamaged by fire. Petrol residues were found only on the complainant's Ugg boots, dirty socks and blue jumper. Police found a jacked-up car in the appellant's carport with the fuel flap open.[12] There was a petrol container with the cap off in the carport. A fuel cap was found on the ground.[13]

[20] The appellant was interviewed by police in hospital at 12.40 pm on 12 June 2011. He had taken morphine and valium for his pain. Police asked him to say in his own words what happened:

> "[APPELLANT]: I tried to set up a light with a, a heater.
> …
> so I brought the gas bottle inside cause like we run on solar power--
> …
> And that's just dropped dead on us.
> …
> And so like we had no power or anything.

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10 AB 35-36.
11 Ex 22.
12 Ex 4, photograph 1.
13 Ex 4, photographs 2 and 3.

> …
> So I tried to get a light going and a bit o' heat.
> [POLICE]: So there's no power at all?
> [APPELLANT]: No.
> [POLICE]: Okay, you don't have any m-, mains out there?
> [APPELLANT]: Nope.
> …
> Um, yeah and like I said I brought the gas bottle in and um, then I had to go down into the shed to find the, me little heater thing. I was probably gone for about half an hour and um, still never found it. And so like [INDISTINCT] oh shit.
> [POLICE]: Are you right?
> [APPELLANT]: Yeah--
> [POLICE]: Are you just tryin' to sit up?
> [APPELLANT]: [INDISTINCT] me ribs.
> [POLICE]: Do you want that bed up again?
> [APPELLANT]: No it'll be right I'll just--
> [POLICE]: You're right?
> …
> [APPELLANT]: Yeah that's much--
> …
> Better. Yeah and um, unbeknownst to me I mustn't have shut it off properly, the gas bottle. Next thing you know the wife comes in and lights a cigarette, that's all I remember."

[21] He told police his relationship with the complainant, to whom he had been married for four years, was good. They had been having a few drinks that night and played games on the computer until the power ran out. He tried to hook up a light to the gas bottle inside. Everything was fine between him and the complainant. Once he brought the gas bottle into the bedroom he turned it on to check that gas was coming out and then turned it off again. He was simply trying to hook up a light. He did not know of anyone in the house making phone calls that afternoon or evening. He started drinking wine at about 11.00 am or 12 midday. He had not had that many wines and was not intoxicated but he could not have lawfully driven a car. He was certain that no-one in the house was angry that evening. He had no recollection of any 000 calls. He denied pouring petrol over the complainant, observing that if he had "she would have been blown sky high". The police asked if he had threatened to kill himself. He responded, "Oh, occasionally I get a bit depressed, that's why … I'm on anti-depressants." The police asked if he threatened to kill himself the previous evening and he responded, "Probably." The police asked if he was trying to harm the complainant the previous evening. He responded, "Definitely not." The police asked if he loved his wife and he responded, "I love her big time." Police asked if he sometimes got angry and he agreed.

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

[23] The prosecution contended that the appellant, not the complainant, flicked on the lighter and caused either the gas inside the house, or the petrol which the appellant had poured on her, to ignite and that when he did so he intended to kill her. This was consistent with his threats recorded in the second phone call and with the complainant's remark that he had "doused me in petrol … before".[14]

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[14] See [6] of these reasons.

[24] The defence case was that the jury could not be satisfied beyond reasonable doubt that the appellant rather than the complainant flicked on the cigarette lighter causing the fire and the burns to the complainant and himself. The jury could not be sure he intended to kill her rather than himself.

[25] The jury retired to consider their verdict at 4.10 pm on the third day of the trial. At 10.00 am on the fifth day of the trial they asked for a redirection on "the definition in layman's terms of beyond reasonable doubt". They were given the apposite directions and retired again to consider their verdict. The court resumed as some jury members reported having trouble reaching a verdict. At 10.25 am the judge gave them a direction consistent with *Black v The Queen*.[15] The jury returned with their verdict convicting the appellant of attempted murder at 3.54 pm.

The appellant's contentions

[26] The principal questions in the trial were whether the jury could be satisfied beyond reasonable doubt that it was the appellant rather than the complainant who flicked on the cigarette lighter, igniting either the petrol or gas and, if so, whether he did so intending to kill her.

[27] The appellant emphasised that at no time in either recorded phone call did the appellant try to prevent the complainant from speaking to police or from leaving the house. He turned off the gas well before the cigarette lighter was ignited. Although at one point he may have motioned towards her as if to assault her, he did not physically assault her. Her clothing was undamaged in the fire and her injuries were confined to her face and the back of her hands, the areas of her body not covered by clothing. She was a smoker. The clicking sound seems to come from close to the telephone which by then she was holding close to her mouth. This is consistent with her lighting a cigarette, igniting the flammable gas within the house and burning her face and hands. By contrast, the appellant's injuries were to the lower part of his body, suggesting that he was in a different part of the house where the gas had settled lower in the atmosphere burning his lower torso. All reports of the evening's events were that the complainant lit a cigarette, igniting the gas in the house. There was no evidence to support the prosecution theory that the appellant importuned her to accept responsibility by falsely stating that she flicked on the lighter. The evidence showed the appellant was capable of aggressive outbursts and dangerously foolish behaviour and had a previous history of assaults on the complainant for which he had been imprisoned. But it did not demonstrate beyond reasonable doubt that he flicked on the lighter and ignited the gas or petrol with an intent to kill her.

Conclusion on the appeal against conviction

[28] The complainant's evidence was that she has no memory of the incident. The evidence does not establish any medical reason for her memory loss but nor is there any evidence that this is feigned. In view of her dreadful injuries and extended hospitalisation and treatment following a vapour explosion and fire, some memory loss seems entirely plausible.

[29] The appellant has consistently stated that the vapour explosion and fire started when the complainant lit a cigarette. On occasions the complainant, accepting that account, has

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15 [1993] HCA 71; (1993) 179 CLR 44.

repeated it as her own. No weight can be given to her statements to this effect on the evening of the fire and later on Facebook. She has no memory of what happened and may well have merely repeated what the appellant told her. The appellant lied about significant matters in his record of interview with police. Whilst there are explanations for these lies other than that he is guilty of the attempted murder of his wife, the lies do show he has no credibility. I place no weight on his account that the complainant lit a cigarette and ignited the gas or petrol.

[30] Neither the positioning of the burns suffered by the complainant and the appellant nor the absence of damage to the complainant's clothing, assists one way or the other in determining what happened that evening. Remarkably, the Court has a contemporaneous, chilling record in the second recorded phone call of events leading up to the ignition of the gas or petrol by the striking of the lighter.

[31] The appellant's statements and behaviour throughout the two phone calls[16] suggest that he originally intended to kill himself or, at least, to give that impression. Contrary to the appellant's contentions, I apprehend he was trying to persuade the complainant to end the second phone call with police. Nor was I confident that she was free to leave the house during the second phone call. He became increasingly angry during that call. She was seeking police help and he feared he would be returned to prison in light of his prior history. His statements to her immediately leading up to the striking of the lighter included "you're fucking dead you fucking cunt"; "you're dead"; "you're fuckin' gone, you are history, you are fucking history, you put me back in jail again, you are fucking history, you put me back in jail, you are fucking history". These statements are all consistent with the appellant intending to kill the complainant, and probably also himself, immediately before he flicked on the lighter.

[32] The appellant had removed the large gas cylinder from outside, breaking its fitting and dragging it into the bedroom where he turned on the gas for a time. He also doused the complainant in petrol at some point before the second phone call. This was consistent with the petrol found on some of her clothing.

[33] The evidence is unclear as to whether the lighter ignited gas or petrol but certainly one or a combination of these was ignited causing the vapour explosion and fire. The complainant's last statement preceding the striking of the lighter was "I never want to be hurt, he hurt me before". It seems implausible, even in her intoxicated and distressed state, that in the highly dramatic atmosphere, with gas throughout the house and probably having been earlier doused in petrol, that she would have lit a cigarette. By contrast, the appellant was prone to "snap" and "go from one sort of person to another". His mounting anger and his menacing, abusive and vitriolic statements to the complainant during the second phone call are well capable of demonstrating an intention to kill her. Earlier in the phone call, he stated that he was going to "blow the whole place up". It does not assist the appellant that he may also have wished to kill himself. By contrast, her attempts to obtain police assistance to stop him from harming them both are inconsistent with her striking the lighter.

[34] After reviewing the whole of the evidence, I am satisfied the jury were entitled to conclude beyond reasonable doubt that the appellant flicked on the lighter intending to kill the complainant and perhaps himself. The guilty verdict was not

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16 Ex 1 and ex 2 set out in [4] and [6] of these reasons.

unreasonable and was supported by the evidence. This sole ground of appeal is not made out.

[35] It follows that the appeal against conviction must be dismissed.

The application for leave to appeal against sentence

The appellant's antecedents

[36] The appellant's sentence was adjourned until 19 August 2013 to enable his lawyers to obtain a mental health report. The appellant was 42 at the time of the offence and 44 at sentence. He had been in presentence custody for 725 days.

[37] He had a disturbing criminal history commencing in the early 1990s with relatively minor street, drug and bail offences. Of more concern, in May 1993 he was convicted and fined for resisting police, wilful damage to property and the assault occasioning bodily harm of his then partner.

[38] In 1995 he was sentenced to an effective term of three years imprisonment for arson, attempted arson and unlawful wounding with a recommendation that he receive psychiatric treatment and counselling for his drug and alcohol problem whilst in custody. The unlawful wounding complainant was the father of his then partner. The appellant attempted and ultimately succeeded in burning down the unit he shared with his partner. He immediately admitted his wrongdoing and pleaded guilty. The judge warned him that he must deal with his substance abuse problems if he was to stay out of prison. The next day he was also sentenced for minor property and drug offences to three months cumulative imprisonment with a recommendation for parole after six months.

[39] There was then a break in his violent behaviour as he abstained for a time from alcohol abuse. He married another woman in the late 1990s and they had two children. Tragically, their baby son died in a car accident, his marriage broke down and he relapsed. In 2003 he was convicted of a minor drug offence. In 2008 he was convicted of making a menacing phone call to the Child Support Agency in which he threatened to shoot his former wife.

[40] Consistent with his admissions at trial, on 24 February 2009 he was convicted of three charges of assaulting the present complainant and occasioning her bodily harm, together with some minor drug offences and a breach of a domestic violence order. These offences occurred at their Pine Creek home. He had been drinking, became aggressive and pushed her face into a bedside table, causing bruising to her eye. A few weeks later he had been drinking again and was doing burnouts in the car until it became bogged. When the complainant was critical of his driving, he punched her several times to the face and head, bruising her lips and eyes. A few weeks later on his birthday he was at home drinking again. When the complainant finished a phone call to her mother, he verbally abused her before ramming her head into a metal door frame, cutting her nose and blackening her eye. He denied all offending to police. The complainant handed up a letter at sentence stating that they had a happy and stable marriage but that he had problems with his ex-wife, financial pressures and alcohol. In sentencing the appellant to an effective term of 12 months imprisonment to be served by an intensive correction order, the judge made plain that his conduct was most serious and that he would not be given any further

leniency. Once more there was a special condition that he undergo medical, psychiatric and psychological treatment. On 1 December 2010 he was convicted of but not punished for breaching his intensive correction order by drink driving with a blood alcohol reading of .305.

The submissions of counsel at sentence

[41] The prosecutor contended that the appellant should be sentenced on the following basis. He brought the gas cylinder into the bedroom and turned it on. He later turned it off. His initial intention may have been to harm himself or at least feign that intention. Once he realised his wife was on the phone to police and that she had identified him, he also intended to kill her. He doused her with petrol and then set her on fire by striking the lighter. The appellant's criminal history and the circumstances of the present offending demonstrated that he was a risk not only to himself and his partners, but also to others as fires can spread and innocent people can be injured by an exploding gas cylinder. He had not taken advantage of past assistance aimed at rehabilitation. He showed no remorse.

[42] The prosecutor emphasised the complainant's serious injuries and that she was in an induced coma for at least 10 days. He tendered her victim impact statement[17] which described the painful skin grafts she underwent while her face was rebuilt. Her airways have been damaged and she now requires strong seretide puffers to assist her breathing. She has lost confidence in people and finds it hard to leave home. She has been diagnosed with post-traumatic stress disorder and is seeing a psychologist and a psychiatrist. She now realised how badly the appellant had treated her. She found giving evidence against the man she used to love the most emotionally difficult thing she had done but was determined to remain positive and get on with her life.

[43] The prosecutor submitted that a sentence of 18 to 20 years was appropriate. Sentences for attempted murder varied between 10 and 17 years depending on the relevant facts: *R v Rochester; ex parte Attorney-General*.[18] The cases of *R v Woodman*[19] and *R v Tevita*[20] supported a sentence in this case of between 18 and 20 years.

[44] Defence counsel tendered a report from psychologist Mr Luke Hatzipetrou.[21] He interviewed the appellant for two hours and forty minutes on 1 August 2013. The appellant grew up in a household where his father perpetrated domestic violence on his mother until they separated during his early childhood. His mother, whom he admired and to whom he was close, raised him and became a teacher. In early high school he joined delinquent peer groups and truanted. His employment opportunities had been limited by his substance abuse, itinerant behaviour and limited training. His first son died at three months of age when his wife rolled the car. The baby was not restrained and was crushed. He was in custody at the time, was escorted to his son's cremation by police officers and was not permitted to have contact with his family. He had a complex grief reaction which has worsened his substance dependency disorder. He had a history of depressive disorder and chronic adjustment disorder. His mental health problems were perpetuated by his avoidant coping style, low self-esteem

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17 Ex 27.
18 [2003] QCA 326.
19 [2009] QCA 197.
20 [2006] QCA 131.
21 Ex 28.

and impulsivity. He had attempted suicide on numerous occasions and was being treated with anti-depressants at the time of the present offence. The effectiveness of this medication was probably compromised by his substance abuse and ineffective coping mechanisms.

[45] Defence counsel urged the judge not to find that the appellant had doused the complainant in petrol on the evening of the offence. Her use of the word "before" threw into doubt whether any dousing in petrol occurred that evening or at some much earlier time. The fact that her clothing was not damaged is not supportive of her being doused in petrol that evening; clothing doused in petrol would have burned. The only parts of her body that were burned were those not covered by clothing. This was more consistent with a gas explosion.

[46] The appellant's mind was distorted by his mental health difficulties which were compounded by alcohol consumption so that his judgment was clearly impaired. This lessened his moral culpability and put this offence in a different category to cases like *Woodman* and *Tevita*. His life completely unravelled when his baby son was killed, leading to the breakdown of his relationship with his former wife and their surviving young child. He had attempted suicide many times before. He did not attempt to prevent the complainant from leaving the house and was initially focussing on killing himself, not her. At no time did he attempt to prevent her from continuing the phone call to police. Immediately after the explosion, he went with her to obtain assistance and alert the authorities. A sentence in the range of 12 to 14 years imprisonment was appropriate.

[47] The prosecutor responded that the notion of reduced moral culpability through mental disease or illness was not applicable to someone who had notice almost 20 years ago that when he drinks he behaves violently. The appellant knew that his self-induced intoxication could result in him behaving in a serious violent manner towards others and yet he again drank to excess on this occasion.

[48] Defence counsel countered that the appellant suffered from depression which affected his capacity for rational thought and sound judgment. He had a long history of self-medicating by drinking to excess as he did on the evening of this offence. His mental health problems affected his capacity to rationally think through the consequences of his behaviour.

The judge's sentencing remarks

[49] In sentencing, the judge found, on the balance of probabilities, that the appellant put petrol on the complainant that evening and that he flicked on the lighter intending to kill the complainant.

[50] The judge noted the psychologist's report which set out the appellant's difficult background, including the death of his son and his history of substance abuse. The appellant's criminal history was concerning. His offending was against a background of excessive consumption of alcohol. He had a long and significant history of violence towards partners following his abuse of alcohol. The mental state of a person can operate as a mitigating factor, diminishing the consequences of general and personal deterrence. But whilst it might reduce moral culpability, it may also raise concerns that the criminal conduct could be repeated, justifying a longer sentence in order to protect the community. The psychologist's report was

of limited assistance. Judges had been aware for about 20 years that the appellant had mental health issues. Any reduction in the appellant's moral culpability must be modest as he knew that when he abused alcohol he could become violent, particularly towards his partner. The fact that the complainant also drank alcohol with him did little to reduce his culpability. The appellant was a danger to those with whom he had formed intimate relationships and was a potential danger to those who might be in the vicinity when his irrational conduct erupted. The appellant's mental health issues did not detract from the need for general and personal deterrence.

[51] The offence was a serious example of attempted murder. It was exacerbated by his prior history of like offending. He demonstrated no remorse and there were no promising signs of rehabilitation. The complainant suffered burns to at least 10 per cent of her body, causing extreme pain and requiring skin grafts and long periods of hospitalisation. She has scarring and alteration to her face, scarring to her arms, and continuing psychiatric problems.

[52] The judge noted that the appellant may have formed the intent to kill the complainant only shortly before he flicked on the lighter. After the explosion he rendered some assistance by taking her to a neighbour's home. No doubt his judgment was impaired by his consumption of alcohol. He, too, suffered serious burns. Drunken male partners who violently attack their vulnerable female partners are deserving of condemnation. After referring to *Tevita*, *Rochester* and *Woodman* the judge determined that a sentence of 16 years imprisonment should be imposed and declared the conviction to be a conviction of a serious violent offence.

The appellant's submissions

[53] Counsel for the appellant contends that the judge erred in finding that the appellant put petrol on his wife and ignited it with an intention to kill her. It was on that basis that the judge placed this offence as a serious example of attempted murder.

[54] Attempted murder is an offence where penalties vary depending on individual circumstances. This offence occurred in a context of the appellant's intoxication, heightened emotions and fragile mental health. He had expressed a desire to end his own life. The offending was not premeditated in that he brought the gas cylinder inside the house to kill himself, not his wife. He has had a difficult early life and a troublesome adult life, dominated by the death of his baby son after which his life continued to unravel. His personality made it difficult for him to deal with stressors. He was suffering from depression and lacked insight into his dangerous self-medication with alcohol and cannabis abuse. Although he had opportunities in the past for counselling and mental health treatment, at the time of the offence he remained untreated. His action in striking the lighter put his own life at risk and he suffered significant injuries. His moral culpability was reduced by his impaired judgment following from his mental illness. Immediately after the offence he did not persist in his attempt to kill her and assisted her. The 16 year sentence was manifestly excessive. The appropriate sentence was between 12 and 14 years imprisonment.

Conclusion

[55] The appellant's first contention is that the judge erred in finding the appellant poured petrol on the complainant before striking the lighter. There was evidence that at some point before the second phone call the appellant poured petrol on the

complainant. The complainant said as much in the second phone call. Her use of the word "before" raised some doubt as to when this happened. She gave evidence that the appellant had transferred petrol from the fuel tank of the jacked-up vehicle in the carport into a fuel can to use in the generator. She was unsure when he did this. Police found the fuel can with the lid off. Petrol was found on the complainant's jumper, boots and socks which she was wearing at the time of the fire. She had not transferred petrol to the generator for about two years. The expert evidence was to the effect that the damage to the house could have occurred by igniting either petrol or gas, or a mix of both. This evidence in combination was sufficient to allow the judge to conclude to the degree of satisfaction required under s 132C *Evidence Act* 1977 (Qld) that the appellant poured petrol on the complainant earlier in the evening of the offence and that, at the conclusion of the second phone call he flicked on the lighter igniting the petrol intending to kill the complainant.

[56] I turn now to consider whether the lengthy 16 year sentence imposed was manifestly excessive. Attempted murder is one of the most serious criminal offences as it involves an actual intent to kill. The fact that the appellant probably also intended to kill himself and impulsively formed this intention does not take away from the fact that he formed and acted on a murderous intent to kill his wife.

[57] None of the cases to which counsel has referred this Court is closely comparable to the unique circumstances of this offence. In *Rochester* the appellant was convicted of attempted murder after a trial and sentenced to 10 years imprisonment. Before the trial he pleaded guilty to unlawful stalking and doing grievous bodily harm with intent but the prosecution did not accept those pleas. The Attorney-General appealed claiming the sentence was manifestly inadequate, and Rochester applied for leave to appeal contending it was manifestly excessive. Rochester stabbed his separated wife at her place of employment. She suffered a four centimetre stab wound to the upper left abdomen and other less serious lacerations. Had the abdominal wound not been treated, it was highly likely she would have died from infection. He had an extensive criminal history commencing at age 18 which included 12 previous convictions for assault or related offences, some of which attracted custodial terms. This Court determined that his criminal history and the circumstances of the offence meant that a sentence of less than 10 years would have been manifestly inadequate, but the sentence imposed was not so low as to warrant this Court's interference on an Attorney's appeal.

[58] In *Tevita* the appellant pleaded guilty to attempting to kill a defenceless, wheelchair-bound complainant who suffered from cerebral palsy and to stealing his video camera. He was sentenced to 18 years imprisonment. The appellant came from behind, cut his throat, inflicting a 15 cm wound severing the jugular vein and left him to die. The complainant managed to get outside in his wheelchair where neighbours assisted and called the ambulance. He was hospitalised for a week including time in intensive care. He had previously lived an independent life working as a disc jockey at a hospital and was learning to fly an aeroplane. The injuries to his larynx meant he was unable to speak above a whisper, at constant risk of choking and vulnerable to upper respiratory tract infections. He suffered continuous back pain and required a full-time carer. He suffered significant psychological consequences. His quality of life was greatly diminished. Tevita was a 17 year old man of Samoan and Maori heritage with a low average range of intellectual functioning, particularly in literacy. He had a dysfunctional and violent upbringing and abused drugs and alcohol since early adolescence. Unless that was

addressed, he was at risk of committing further violent offences. A co-offender arranged for him to kill the complainant in return for $500,000. Tevita pleaded guilty at the earliest opportunity. The court reviewed other cases where sentences in the range of 14 to 16 years were imposed for attempted murder including *R v Hardie*,[22] *R v Lepp*,[23] *R v Schaefer*,[24] *R v Bird and Schipper*[25] and *R v Witchard*.[26] The Court also reviewed *R v Streeton*[27] and *R v Day*[28] where life sentences were imposed for attempted murder. The Court concluded that, despite Tevita's youth and plea of guilty, the 18 year sentence was not excessive.

[59] In *Woodman* the appellant, a traditional Aboriginal man, pleaded guilty to doing grievous bodily harm with intent and was sentenced to 11 years imprisonment. The offence was committed during the operational period of a partially suspended sentence. He was 27 with an extensive criminal history including offences of violence: assault occasioning bodily harm and grievous bodily harm for which he was sentenced to 12 months imprisonment suspended after four months for two years. The sentencing judge advised him to stop drinking and fighting, but he did not heed that advice and breached a domestic violence order for which he was sentenced to three months imprisonment. He continued to commit breaches of domestic violence orders, assaults and property offences. In October 2006 he was sentenced to two and a half years imprisonment suspended after 14 months with a three year operational period for the assault occasioning bodily harm of his pregnant partner.

The offence of grievous bodily harm with intent occurred when he argued with his partner and she tried to walk away. They had both been drinking from a plastic bottle containing methylated spirits. He threw the liquid onto her face and arms and set her on fire. Others rolled her in a quilt on the ground, extinguishing the flames. She was treated at hospital for severe burns to her face and arms and was later flown from Mt Isa to the Royal Brisbane Hospital burns unit where she was an in-patient for two weeks and was fed by a naso-gastric tube. She suffered permanent scarring at skin graft sites and changes in skin pigmentation. Whilst her face did not appear to be seriously disfigured, she had unsightly scarring to her hands and arms. She suffered very great pain and emotional trauma. The appellant left for the Northern Territory but was arrested and charged about three months later. The sentence was made concurrent with the remaining 16 months of his formerly suspended sentence. This Court noted that, after a trial, a sentence of 12 to 16 years could have been imposed so that Woodman's 11 year sentence was not manifestly excessive.

[60] In *Rochester*, the appellant showed some remorse and cooperation with the authorities through pleading guilty to a serious intentional offence, although that plea was not accepted in discharge of the indictment. The complainant's injuries were not as extensive as in the present case and although he had a bad criminal history including offences of violence. Rochester's offending was not nearly as grave as that of the present appellant. This Court made clear that Rochester's 10 year sentence was the minimum that could have been imposed. *Rochester* suggests that a lesser sentence

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22 [1999] QCA 352.
23 [1998] QCA 411.
24 [2001] QCA 327.
25 (2000) 110 A Crim R 394.
26 [2005] 1 Qd R 428.
27 [1997] QCA 178.
28 Unreported, CA No 364 of 1990, 26 March 1991.

than 16 years would have been open in this case, but it does not demonstrate that the 16 year sentence was manifestly excessive.

[61] This offence is not as morally reprehensible as that in *Tevita* although Tevita pleaded guilty, was but 17 years old at the time of his offending and had nothing like the dreadful prior history of the present appellant. *Tevita* does not demonstrate that the 16 year sentence here is manifestly excessive.

[62] In *Woodman* the appellant was sentenced for doing grievous bodily harm with intent, not attempted murder. He pleaded guilty at an early time. The injuries suffered by the complainant in *Woodman* and in this case were similar but the present appellant intended not just to seriously harm his partner but to kill her. Woodman was a traditional Aboriginal man who suffered disadvantage through his dysfunctional upbringing and lifestyle. The Court noted that after a trial a sentence of between 12 to 16 years could have been imposed. *Woodman* does not suggest that the present sentence, where there was neither a timely plea, cooperation with the authorities nor remorse, is manifestly excessive.

[63] The appellant's shocking criminal history for previous acts of violence against his partners and those close to them warranted a heavy sentence to finally bring home that he must get ongoing assistance to overcome his mental health issues and his alcohol and drug abuse. He must realise that impulsive, drunken violent conduct towards others will not be tolerated. A heavy penalty was also necessary to deter others who might otherwise consider that serious acts of domestic violence are not deserving of the sternest of punishment. A heavy sentence was also necessary to denounce conduct like this and to express the community's disapprobation of it.

[64] The appellant had documented, long-term mental health issues. He was a mature man who, despite the efforts made by the courts and community correctional authorities to assist him with his many problems, repeatedly failed to address those problems and continued to turn to substance abuse rather than long term professional help. Until he abstains from alcohol and drugs, those with whom he forms close personal relationships, and members of the general public who may be in the vicinity when he erupts and reoffends, are at risk. The judge correctly balanced the appellant's lesser moral culpability following from his mental health issues and substance abuse, with the need to protect the community. A lengthy sentence to denounce his reprehensible conduct and to ensure community protection was, as the learned sentencing judge recognised, entirely apposite.

[65] For these reasons I am unpersuaded that the 16 year sentence, though heavy, was manifestly excessive. I would refuse the application for leave to appeal against sentence.

ORDERS:

1. The appeal against conviction is dismissed.

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

[66] **MORRISON JA:** I agree with the reasons of the President, and the orders proposed.

[67] **MULLINS J:** I agree with the President.