SUPREME COURT OF QUEENSLAND

CITATION:	*R v Blair* [2015] QCA 281
PARTIES:	**R** **v** **BLAIR, Simeon Frederick George** (appellant)
FILE NO/S:	CA No 147 of 2014 SC No 19 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Maryborough – Unreported, 27 May 2014
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2015
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of murder and sentenced to life imprisonment – where the deceased was injured in a fight with the appellant and sustained skull fractures which led to brain haemorrhages which caused the deceased's death – where the appellant and the deceased barely knew each other and the appellant contends he had no motive to kill or seriously injure the deceased – where the appellant used a piece of wood to hit the deceased and the forensic evidence showed that the deceased received multiple blows, at least once whilst he was on the ground – where the appellant contends that the verdict of guilty of murder was unsafe and unsatisfactory in that there was insufficient evidence of an intention to kill or do grievous bodily harm – whether the jury verdict was unsafe and unsatisfactory CRIMINAL LAW – PROCEDURE – JURIES – DISCHARGE – where during the course of the appellant giving evidence the appellant swore at the prosecutor – where the trial judge intervened and gave the appellant a dressing down – where defence counsel applied for the jury to be discharged on the basis that what had occurred was so seriously prejudicial to her client that it could not be overcome by any judicial directions – where the prosecutor

opposed the application to discharge the jury – where the trial judge refused the application and gave a lengthy direction to the jury – where the appellant contends that the trial judge erred in not discharging the jury at the request of defence counsel and this has led to a miscarriage of justice – whether there has been a miscarriage of justice

Criminal Code (Qld), s 668E(1), s 671A
Jury Act 1995 (Qld), s 60

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL:	S M Ryan, with D V Nguyen, for the appellant (pro bono) G P Cash for the respondent
SOLICITORS:	No appearance for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** This is yet another tragic case where one drunken young man has killed another drunken young man in an episode of alcohol infused violence. Cleveland Clay is dead. The appellant, Simeon Blair, is serving a life sentence for his murder. The families of both young men are devastated. And the community has been diminished by this needless violence and its consequences. The appellant was convicted on 27 May 2014 after an 11 day trial of murdering the deceased at Maryborough on 1 May 2012. He appeals against his conviction on two grounds. The first is that the verdict of guilty of murder was unsafe and unsatisfactory in that there was insufficient evidence of an intention to kill or do grievous bodily harm. The second is that the trial judge erred in not discharging the jury at the request of defence counsel. His application to lead fresh evidence from the appellant's trial solicitor as to the volume and tone of the trial judge's voice during the exchange with the appellant which preceded the application to discharge the jury was granted at the appeal hearing.

[2] If the appellant is successful on the first ground, he contends that the appeal should be allowed, the conviction for murder quashed and a verdict of guilty of manslaughter substituted. If he is successful on the second ground, he contends the conviction should be quashed and a re-trial ordered.

Was the verdict unsafe and unsatisfactory?

[3] In contending that the verdict of guilty of murder was unsafe and unsatisfactory the appellant is submitting under s 668E(1) *Criminal Code* (Qld) that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. That contention requires this Court to review the whole of the evidence and to determine whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *M v The Queen*[1] and *SKA v The Queen*.[2]

The evidence at trial

[4] The deceased was injured in a fight with the appellant late on 27 or in the very early hours of 28 April 2012. The deceased died on 1 May 2012. He paid for accommodation at the Carlton Hotel, Maryborough, on the afternoon of Friday, 27 April 2012 and

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1 (1994) 181 CLR 487, 493 – 495.
2 (2011) 243 CLR 400; [2011] HCA 13, [12].

intended to spend the night there. He met Jared Bush and Kiah Webster at the Carlton where the three young men played pool and drank alcohol until the bar closed at about 4.30 or 5.00 pm. They all moved onto the Central Hotel and then to other venues before returning to the Carlton where they were joined by Blade Paku. All four young men then went to other venues in search of alcohol. During the course of the night they met up with others including Jaleel Evans, Dally Law and the appellant. Late in the night, all these young men, who without exception were intoxicated, went to Rick's Pies.

[5] Blade Paku gave evidence that on the short walk from the pie shop back to the Carlton the deceased said, "You got my back" and that he was "going to fight" the appellant that night. When Paku said, "like stuff that" the deceased called Paku words to the effect of "a pussy". As they approached the Carlton, the deceased punched the appellant. The appellant retaliated, hitting him once. The deceased fell over but then walked with the group, yelling, swearing and calling out to the appellant to fight. On the balcony of the Carlton, Bush was nudging the deceased who said, "keep pushing me and I'm going to throw you off the balcony". Bush stopped but then again nudged the deceased who grabbed Bush, "like bear-hugged him sort of" and tried to throw him off the side of the balcony. The appellant tried to help Bush. The deceased fell over on the landing at the top of the stairs and "booted" the appellant. Paku caught the appellant and pushed him back up. Bush and the appellant were hitting into the deceased who climbed between the rails to the outside of the landing. The appellant hit him and the deceased let go of the railing and fell down. Paku was smoking "dope" that night.

[6] In cross-examination, Paku agreed that he had previously said that the deceased told him he was going to "smash" the appellant. He agreed that when he looked over the railing the mattress was on top of the deceased, who was on the ground below. He earlier heard a cracking or crunching sound. It was very dark. The deceased got up from underneath the mattress. At some stage he saw blood on the deceased who was yelling out and swearing. The appellant threw a keg which hit the deceased in the back.

[7] Jaleel Evans also gave evidence that the deceased yelled at the appellant and wanted to fight him but at that time the appellant was still at the pie shop "getting a feed".

[8] Dally Law gave evidence that as the deceased walked up the stairs of the Carlton, the deceased and the appellant were both yelling at each other. The appellant followed the deceased upstairs. A young man with red curly hair was present. These three people had a little scuffle near the top of the stairs. He did not know what happened but he saw the deceased fall down onto the ground. It was "all pitch dark." The appellant went downstairs to where the deceased fell. The appellant lifted up a keg and put it on the deceased. Law told the deceased that he was going. He saw the appellant pick up the keg and throw it "but it was all still dark." Law grabbed the appellant and told him that he was leaving. The deceased got up and went into the dark. Law headed across the road.

[9] Jared Bush gave evidence that he saw the appellant and the deceased wrestling on top of the stairs of the Carlton. He was not sure what happened next. He saw the appellant from the back. It looked as though he was probably kicking the deceased or something. Paku, who was on the landing, lifted the deceased's hands when the deceased was on the outside of the railing and the deceased fell down. There were some mattresses on the ground. The deceased got up off a mattress, and yelled out to the appellant, "Simeon come here you black cunt, I'm going to kill you". He kept asking the appellant to come downstairs. The appellant walked downstairs and hit the deceased with his fist to the top half of the body, knocking him to the ground. Someone picked

up an empty keg and threw it at the deceased. He did not see the keg hit the deceased. Someone (he did not see who) was hitting the deceased and the cement with a piece of wood, while the deceased was lying on the ground, still. The person who was swinging the wood at the deceased's body was aiming for the top half and kept hitting until the wood broke. There may have been five blows. He heard a "crack sort of sound" which "made a pretty big echo." This person then threw the piece of the wood in the air and walked away. He went downstairs to check on the deceased. When he got no response he rang an ambulance.

[10] Kiah Webster was woken up about midnight in his room at the Carlton by loud noise and arguments. He saw people walking up towards the back of the pub and heard yelling. He recognised Bush and saw the deceased and Paku at the top of the stairs. The deceased was trying to kick whoever was coming up the stairs. The appellant, whom he did not know, pretty much overpowered the deceased and slid him under the landing. A few seconds later Webster saw the deceased under a mattress directly below the landing. The appellant was downstairs by the time Webster reached the landing. The appellant picked up two kegs and threw them onto the deceased while he was under the mattress. The deceased lifted up the mattress and stood up. He said something like, "You broke my neck" and tried to run behind the hotel. Webster could not see anything because it was pitch black and raining. The appellant chased the deceased. Bush, Paku and Evans were present but only the appellant chased the deceased. Webster heard the sound of wood hitting concrete. He saw the appellant walk away. Webster walked down to check on the deceased. He was not too good and Bush rang the ambulance.

[11] Robyn Pont was working in the Customs House Lounge on Friday, 27 April 2012. When she closed the bar at about 12.45 am, she saw the appellant, whom she knew, walking down the street. She said: "He was pretty well drunk, but he was fine. He was happy. He was all about life. He had a – a new job that he'd just started the week before…there was nothing wrong with him." He was too drunk to allow into a bar but she gave him a drink of water and said she was very proud of him. He told her he was drunk. He was slurring his words a little but she could still understand him.

[12] There was no evidence the appellant had anything more to drink before the police arrived and saw the gravely injured deceased at about 1.45 am.

[13] A police forensic officer gave evidence that she examined the area where the deceased was found. She saw a large pool of blood diluted by the rain on the concrete outside the garage. Blood stains on the wall were projected blood stains, that is, they were formed with a force additional to gravity with a 90 degree directionality to the point of impact (the wall) and were low to the ground. This indicated that the source of blood was from low down, perpendicular to where the blood stains made impact with the wall. If the projected blood drops came from a person, that person would have been low to the ground when the drops were projected.

[14] A forensic scientist gave evidence that she examined samples of blood taken from low down on the wall and compared them to the DNA profile sample from the deceased. The probability of the swabs from the wall coming from someone other than the deceased was approximately 1 in 1900 billion. She considered the DNA profile obtained from the swab taken from the wall matched the deceased's DNA profile.

[15] An investigating police officer found a number of pieces of timber at the scene. One, exhibit 44, was 750 x 43 x 43 mm and had visible blood stains. When tested, the stains gave a positive finding for blood which matched the deceased's DNA profile.

[16] The appellant gave evidence that he did not know the deceased until the night of 27 April. He had been drinking home brew bourbon, beer and wine with friends and relatives when he arrived at Rick's Pies. He was pretty drunk and his memory of that night was not good. When Paku was buying the appellant a pie, he heard the deceased say something like, "Don't shout Simeon a pie." The appellant told the deceased to shut his mouth and walked away towards the Carlton. Paku told the appellant that the deceased was going to fight him, smash him, stab him. The appellant walked over to the deceased who started throwing punches at the appellant's head, dazing him. The appellant threw back punches but was unsure if they connected. He threw two punches at the deceased which missed. The appellant and the deceased were swearing at each other until they reached the Carlton. The deceased ran upstairs. When the appellant got to the top of the stairs, the deceased kicked him and the appellant fell down about four to six steps. He grabbed the side of the rail and pulled himself back up but the deceased continued to kick at him. He caught the deceased's leg and pushed him back. The deceased slipped and fell over the landing, head first onto the ground; a mattress fell on top of him.

[17] The appellant went downstairs, picked up a keg and threw it at the deceased who yelled and swore at the appellant and threatened to kill him. He "sort of did and sort of didn't" take the deceased seriously. He did not leave because he was looking for a drink. The deceased told the appellant to come out the back and the appellant followed. The deceased had a stick and said, "Come on, I'm going to kill ya" and took a swing at the appellant. The appellant blocked the blow with his hand and grabbed the stick from the deceased. He swung it as hard as he could and hit the deceased three times. He was not aiming anywhere in particular. He was not thinking about what he was doing. He then threw the stick on the ground. The deceased limped into a shed and the appellant followed saying, "Where the fuck are ya?" The deceased did not answer. The appellant left the deceased standing in the shed, walked home and went to sleep.

[18] In cross-examination, the appellant admitted he wanted to fight the deceased and that he chased him up the stairs to fight him, "cos he hit me." He disagreed with the suggestion that he lost his temper with the deceased. He said he did not want to hurt him, only to fight him.

[19] The deceased's aunt gave evidence that she had met the appellant on one occasion. She telephoned him on 28 April to tell him that the deceased had been hurt. The appellant said, "Yes, I had a fight with him last night". She became upset and yelled at the appellant but he did not respond. She said, "you did this to [the deceased], didn't you?" The appellant did not respond. She later had another phone conversation with him which was recorded. After first denying that he had a fight with the deceased, the appellant said, "I just had a fight. That was it…That's all. And plus, he, he, he wouldn't even um, he wouldn't even tell me his name. If I knew he was a Clay I would've brang him back home drink with me…he kept picking me on that and I kept telling him, no, go on, bro, I don't wanna fight you. I just wanna get drunk…And fuckin', yeah, it was just fuckin', kept picking me all night and oh well he just…".

[20] When police apprehended the appellant on 28 April, he told them that he had been in a fight the night before with a lad who threw the first punch. He had to defend himself, threw a couple of punches and that was it.

[21] After his arrest, he was in the watch house where, on 29 April, a police officer heard him whisper to his parents in a telephone call, "he's going to die" and "it wasn't meant to be like that. It was just supposed to be a fight." The appellant had tears in his eyes and wiped them with his t-shirt.

[22] Forensic pathologist, Dr Rohan Samarasinghe, conducted the post-mortem on the deceased. He noted 49 injuries, most of which were not significant. The injuries to the head area were marked on a diagram, exhibit 35. Injuries 10, 11, 12 and 16 marked on exhibit 35 could have been caused by exhibit 44 and were the result of the application of blunt force. Injury number 10 was a bruise on the lateral aspect of the right temporal area, with an underlying depressed fracture and a linear fracture. Injury number 11 was a transfer abrasion with bruising and a light scab to the lateral aspect of the right temporal area above the right ear. Injury number 12 was to the back of the head behind the right ear and was an oblique pattern bruise. Injury number 16 was to the left side of the head towards the front; it was a complex injury, an abrasion and pattern bruise, with a skull fracture immediately underneath the injury. The deceased had a "hinge fracture" at the base of his skull caused by the application of severe force to the side of the skull, which transferred force to cause the fracture at the base. He could not say which impact or impacts had caused the hinge fracture. Such fractures were commonly caused in assaults or motor vehicle accidents but rarely in falls from a height. The cause was likely to be a severe force applied to the side of the skull which transferred force to the base of the skull rather than a direct application of force to the base of the skull. Copies of the CT scans[3] showed the gross fracturing to the deceased's skull. There were also subarachnoid and subdural haemorrhages to the brain which caused the deceased's death. The brain injuries resulted from the skull fractures.

[23] In cross-examination, Dr Samarasinghe agreed that he could not isolate any single particular injury as being the cause of death which was the several head injuries in combination. He could not be precise about the order in which the injuries occurred or the timeframe over which they were inflicted.

[24] The defence called forensic pathologist, Dr Johan Duflou, who reviewed Dr Samarasinghe's post-mortem examination. Dr Duflou agreed that the deceased died from blunt head injuries to the skull and brain. The hinge fracture to the skull was the result of one or more impacts to the head. It could arise from impacts to both sides of the head but it could also arise from an impact to just one side of the head. It could have been caused by a single impact to the deceased's skull after falling from a height and hitting the ground. A skull fracture on one side of the head with associated hinge fractures could have been caused by a fall from a height resulting in an impact to that side of the skull. That, however, would not explain the fractures on both sides of the skull. He could not isolate one particular injury or group of injuries as the likely cause of death; it was the constellation of injuries and fractures plus the subsequent secondary brain damage. A blow to the side of the head following a fall, with the head impacting on the ground causing a consequential skull fracture, may have proved lethal on its own. In those circumstances a person could initially appear normal and then deteriorate, either rapidly or gradually. In cross-examination, he agreed that the deceased's head injuries could be sufficiently explained by a fall in which he suffered no serious injury but after which he was hit to the head more than once with a piece of wood.

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[3] Exhibits 36 and 37.

The appellant's contentions

[25] The appellant does not contend that the issue of causation makes the verdict unreasonable. He contends, however, that it was unreasonable for the jury to have concluded beyond a reasonable doubt that the appellant struck the deceased intending to kill him or do him grievous bodily harm. The deceased and the appellant barely knew each other so that the appellant had no motive to kill or seriously injure him. The appellant was intoxicated and had been refused service at a hotel. He had been drinking home brew bourbon and coke as well as beer and wine. His intoxication made it less likely he formed an intention at all. The appellant gave evidence that he was not aiming anywhere in particular when he struck at the deceased. This suggested he was engaged in an intoxicated fight with no purpose other than to win. His conversation with his parents at the watch house was also inconsistent with any intention to kill or do grievous bodily harm. The jury should have had a reasonable doubt as to whether the appellant intended anything other than to win the fight and have another drink.

Conclusion on this ground of appeal

[26] It is true that the appellant and the deceased did not know each other prior to 27 April and that there was no reason for the appellant to kill the deceased. His conversation with his parents after his arrest was inconsistent with an intention to kill the deceased. But the jury were entitled to conclude from the evidence at trial that the appellant, although intoxicated, was angry with the deceased who had been aggressive towards him for an extended period during the course of the night. Following a scuffle on the landing of the Carlton with the appellant and others, the deceased fell onto the ground below. The appellant threw an empty beer keg at him whilst he was lying on the ground under a mattress which had fallen on top of him. The large piece of wood, exhibit 44, on which a quantity of the deceased's blood was found, must have been the weapon which caused the very extensive lethal injuries to the deceased's head. There was no evidence that anyone other than the appellant hit the deceased with a piece of wood or assaulted him in any other significant way. Bush's evidence was that the deceased received multiple blows to the top half of his body which were inflicted with very considerable force. He heard a cracking echo sound. On the appellant's own account he wanted to fight the deceased and hit him as hard as he could three times with the piece of wood. The forensic evidence of the blood splashes allowed the jury to conclude that the appellant forcefully assaulted the deceased at least once whilst the deceased was on the ground. The degree of force necessary to cause the deceased's skull fractures depicted in the copies of the CT scan was severe. There was no doubt that the skull fractures and resulting brain haemorrhages were the cause of death. The only rational inference was that the fatal injuries were caused by the appellant's brutal attack with a large piece of wood in a gross over-reaction to the deceased's aggressive behaviour.

[27] The prosecution case did not establish beyond reasonable doubt that the appellant intended to kill the deceased. But to establish the offence of murder it is necessary only to establish that the appellant intended to cause grievous bodily harm at the time of inflicting the lethal injuries. The evidence as to the appellant's intoxication made clear that, while he was too drunk to be lawfully served alcohol, he was functioning. Ms Pont could understand and communicate with him. The judge gave uncontentious directions to the jury as to the relevance of intoxication to the question of intent. The jury were entitled to conclude that the appellant was not so intoxicated that he did not intend to cause the deceased a life-endangering injury when he repeatedly struck him very forcefully and in anger with a large piece of wood. Once the jury were satisfied

that the appellant killed the deceased by forcefully and repeatedly hitting him with exhibit 44, with at least one blow being struck when the deceased was on the ground, splattering the wall with blood, the only rational inference was that the appellant then intended to cause the deceased life-endangering injuries to win the fight. The jury's verdict of guilty of murder was both reasonable and supported by the evidence. The first ground of appeal is not made out.

The failure to discharge the jury

The events surrounding the application to discharge the jury

[28] As the appellant gave evidence of the altercation with the deceased, he peppered his testimony with what is referred to in polite circles as "the f word". Intentionally, neither his counsel, nor the presiding judge, asked him to desist from using such inappropriate language in the courtroom. His swearing continued in cross-examination, culminating in the following exchange:

> "PROSECUTOR: You're following him up the back because you don't want to leave…?---Na, I never said because of that. Fuck you cunt.
>
> HIS HONOUR: Hey, listen, I've tolerated your swearing - - -?---Well - - - so far - - - because I didn't want to interrupt what you were saying?---Yeah. Well - - -
>
> HIS HONOUR: You listen to me. You'll get through this a lot better if you don't swear generally?---Yeah, well - - -
>
> And I won't have you swear at [the prosecutor]---But he must ask questions properly.
>
> You be quiet?---Tell him to ask the question properly then.
>
> If he's not asking the questions properly - - - ?---Yeah.
>
> - - - your barrister will object?---Yeah. Well - - -
>
> She's looking after you. She's doing a very good job?---Yeah.
>
> You're not doing yourself any favours by swearing at [the prosecutor]. I know you're under a lot of pressure?---Yeah, well- - -
>
> So just calm down. You've been swearing a lot?---Yeah. Well, who cares? I swear all my life if I wanna.
>
> Well, that – that's why I've let you swear?--- You're not telling me.
>
> There's lots of people here and I don't appreciate you swearing and saying the things you've said?---Yeah. Well- - -
>
> And saying the f word so often in front of all the crowd here. We've got students. But I have let you do that because - - -?---Well, I'm the one telling my evidence, am I?
>
> Just listen to me for a second[- - -]Yeah, well, fuck.
>
> I've – I've let you swear as you have been because I understand that's the way you normally speak?---Yeah.

> And I want you to be able to speak in the way that you - - -?---I only speak to youse like that. I don't speak to any of my parents like that.
>
> What I'm not going to let you do is swear at the barrister?---No. Yeah, all right.
>
> I'd like you to swear as little as you can?---Yeah.
>
> Try not to say the f word and the other words because even though that might be the way you normally speak- - -?---I just told ya- - -
>
> Just – just try and do your best?---I only speak to youse like this. I don't speak to none of my fuckin' parents like that.
>
> Listen?---I speak with them with respect.
>
> You're just not doing yourself any favours?---Yeah. Well - - -
>
> - - -at the moment. I think – I think what - - -?---- - - - hurry up and get the fuckin' thing done.
>
> - - -I think what I'll – I think what I'll let you do is we'll have a short adjournment?---Yeah.
>
> And you can talk to – [the prosecutor], I wouldn't object if [defence counsel] spoke - - -
>
> PROSECUTOR: I have no problem, your Honour.
>
> HIS HONOUR: - - -spoke – spoke to Mr – we all understand, Mr Blair, that you're under a lot of pressure?---Yeah.
>
> Anyone who goes into the witness box in any circumstance is. We all understand that?---Yeah.
>
> We understand that you're upset- - -?--- Understand the- - -
>
> - - -but just talk to [defence counsel], calm down, and it will be a lot better for everyone, including you. Okay?---Yeah.
>
> So, [defence counsel], we might just have a – have a break for- - -
>
> DEFENCE COUNSEL: Thank you, your Honour.
>
> HIS HONOUR: - - - What, like five or ten minutes?
>
> DEFENCE COUNSEL: Thank you, your Honour.
>
> HIS HONOUR: Yes.
>
> BAILIFF: All rise.
>
> APPELLANT: Not fuckin' rise for you, you cock sucker. [Indistinguishable]. [It's] that man in a wig, ya cunt."

The court then adjourned.

[29] After the adjournment, now in the absence of the jury, the appellant's counsel applied for the jury to be discharged on the basis that what had occurred was so seriously prejudicial to her client that it could not be overcome by any judicial directions to the jury; the only course was to discharge the jury under s 60 *Jury Act* 1995 (Qld).

[30] The judge stated that he did not send the jury out because he thought the matter could be quickly dealt with. He was keen to stop the abuse directed at the prosecutor and wished to maintain decorum in the courtroom. The prosecutor opposed the application for the jury's discharge. His Honour accepted the prosecution contentions that any perceived potential prejudice to the appellant could be addressed by the judge impressing upon the jury not to take an adverse view of the appellant's conduct which was perhaps understandable from someone unfamiliar with the courtroom from a disadvantaged background and under pressure. The judge indicated his intention to direct the jury in those terms and refused the application to discharge the jury as those directions would adequately address any perceived prejudice.

[31] When the jury returned to the courtroom the judge gave them a lengthy direction which included that the appellant was under huge pressure being asked questions in unfamiliar circumstances by people wearing wigs. There was a lot riding on his evidence. Even those in high positions such as ministers of the Crown can become rude when cross-examined, as happened the previous day in a Sydney ICAC hearing. The pressure on somebody like the appellant with a limited education and in the circumstances he found himself in was huge. His Honour directed the jury not to think any less of the appellant because he frequently used swear words when giving his evidence.

[32] At this point the appellant interrupted with "fucking oath." His Honour then explained that he did not interrupt the appellant when he was swearing because he wanted him to give his evidence in his own words and to use words with which he was familiar. The judge told the jury not to think ill of the appellant because of his language. Many people, even Queen's Counsel, his Honour explained, sometimes used bad language when under pressure. When he interrupted the appellant for speaking harshly to the prosecutor, his Honour stated, he should perhaps have sent the jury outside but he merely intended to "state the ground rules" for the appellant. The judge directed the jury not to perceive that by dressing down the appellant and telling him not to speak to the prosecutor in that way that the judge thought less of the appellant. Many people in an unfamiliar situation could react in the same way. The prosecutor had "pocketed the insult and [was] ready to move on." The appellant had had a chance to calm down. It would be quite wrong of the jury to think ill of the appellant because of the judge's dressing down or to think that the judge thought ill of him; he did not. The jury's interest was in the evidence. These extraneous matters must be put to one side. The jury must forgive witnesses who swear or misbehave. They must disregard the episode and not think any less of the appellant because of the unfortunate exchange; they should just ignore it.

[33] The judge also directed the jury not to think that because the appellant lost his temper when the prosecutor was cross-examining him that he has generally a bad temper under pressure. Everyone loses their temper on occasions. It would be quite wrong to reason that because he lost his temper in the quite extenuating circumstances of being cross-examined in his trial that he has a bad temper. Like all witnesses the jury must listen to the appellant's evidence and assess its quality but not on the basis that the appellant reacted badly in unfamiliar circumstances. His Honour directed the jury to "put that episode away. It's just unimportant. I don't think any less of the [appellant] because of it. You shouldn't. You shouldn't improperly use anything that you saw or observed or heard. It's behind us."

The trial judge's report

[34] The judge helpfully prepared a report for the Court of Appeal under s 671A *Criminal Code*. His Honour pointed out some transcript errors which my associate has corrected in

my copy of the Appeal Book. His Honour noted that the Maryborough courtroom was old and the acoustics not very good. The witness box was to the left of the judge's bench and well away from the jury box. The jury retired through a door to the right of the bench and the judge retired to the judge's chambers through a door to the left of the bench. When the jury retired through its door and the judge retired through his door, his Honour did not hear the appellant say the final words recorded in paragraph [28] of these reasons. Defence counsel later noted in court that she did not hear them. The judge considered that, as the jury was further away from the witness in the witness box when he uttered the words than defence counsel, the jury probably did not hear the words. His Honour considered it likely that the jury, like his Honour, had left the courtroom before the appellant's final outburst.

[35] His Honour added that before his final directions to the jury, he raised with counsel, in the absence of the jury, whether he should give further directions to the jury about this issue. Neither counsel requested such a direction and the judge gave none.

The further evidence

[36] The appellant adduced evidence from his trial solicitor to the following effect. The Maryborough courthouse has a large bar table in the middle of the courtroom. Directly to the right and approximately equidistant between the judge's bench and the bar table is the witness box. The solicitor was facing the appellant whilst he was giving evidence. Directly behind the solicitor was the jury box so that the jurors were also facing the appellant. A group of school children were present in the public gallery. When the judge intervened after the appellant swore at the prosecutor, the judge raised his voice significantly and spoke extremely loudly. He seemed extremely angry. This was demonstrated by his facial expressions, his demeanour and his voice which gave the impression of a dressing-down of the appellant. The jury were present.

The appellant's contentions

[37] The appellant contends that the trial judge's intervention was warranted and appropriate but it should not have occurred in the presence of the jury. The exchange between his Honour and the appellant carried too great a risk of unfairly prejudicing the jury against the appellant. The judge ought to have discharged the jury. The jury is likely to have allowed the appellant's words and conduct during that exchange to overshadow his testimony and dominate their deliberations, thus rendering the trial unfair. The appellant stated that, whilst he treated his parents with respect, he used offensive language in court, which showed disrespect for the judge, counsel and the jury. The appellant was an unsophisticated man whose words in court made clear that he felt he was being manipulated by the prosecutor. Despite the judge's directions to the jury, the exchange created the irremediable risk that the jury may have been unfairly influenced by the appellant's offensive and disrespectful conduct which, when fairly viewed, was a consequence of his struggling to follow the court process and also his general disadvantages in life.

[38] The judge's directions, rather than assisting the appellant, may have highlighted for the jury a reasoning process which would not otherwise have occurred to them. The appellant contended that the jury may have followed that reasoning process despite the judge's contrary directions. There was a risk that the jury was so taken aback by the volume and tone of his Honour's dressing down of the appellant that the trial was rendered unfair by it.

Conclusion on this ground of appeal

[39] The judge's admonishment of the appellant for his disrespectful and insulting behaviour towards the prosecutor was appropriate in the circumstances. As his Honour appreciated, it was regrettable that he did not first send the jury from the courtroom. But his Honour was not to know the appellant would so overreact to the judge's entirely reasonable directions to stop his aggressive behaviour towards the prosecutor. The appellant's subsequent statements and behaviour certainly did nothing to help his case and would not have impressed the jury. The judge, however, gave careful and lengthy directions to the jury to dilute any resulting prejudice. There is no evidence before this Court to suggest that the jury did not conscientiously follow those directions not to take an adverse view of the appellant because of his bad language and discourteous courtroom behaviour and not to use those matters to reason toward guilt. The appellant's contention that the jury may have acted in flagrant disregard of those directions cannot be accepted.

[40] I have listened to the Auscript recording of the exchange at the heart of this ground of appeal. The judge's tone of voice was firm but appropriate to the bad language and disrespectful behaviour he was seeking to stop. It is not surprising that defence counsel at trial did not submit that any angry demeanour or loud tone of voice on the part of the judge were factors relevant to the application for the discharge of the jury.

[41] With hindsight it is now apparent that the judge should have sent the jury out of the courtroom before he admonished the appellant. But it was the appellant and not the judge who behaved unacceptably. It is not clear that the jury heard the full extent of the appellant's aggressive abuse towards the prosecutor. But even so, the judge's lengthy and generous directions to the jury, which there is no reason to consider the jury did not follow, must be taken to have neutralised any harm the appellant caused to himself through his offensive outburst in front of the jury. Were it otherwise, an appellant could have a jury discharged simply by behaving badly in front of the jury, irrespective of the resulting judicial directions to the jury. The appellant has not demonstrated that the judge's failure to discharge the jury in the circumstances here has resulted in a miscarriage of justice.

Order

[42] The appellant has not made out either of his grounds of appeal. It follows that the appeal against conviction must be dismissed.

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

[44] **MORRISON JA:** I have read the reasons of McMurdo P and agree with those reasons and the order her Honour proposes.