

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Green; R v Smith* [2023] QSCPR 12

PARTIES: **THE KING**  
(respondent)  
v  
**DAMON WILLIAM GREEN**  
(defendant/applicant)

**THE KING**  
v  
**JASON ANDREW SMITH**  
(defendant/applicant)

FILE NO/S: SC No 12 of 2023

DIVISION: Trial Division

PROCEEDING: Pre-Trial Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 17 October 2023

DELIVERED AT: Rockhampton

HEARING DATE: 4 October 2023

JUDGE: Crow J

ORDER: **1. The Applications are dismissed.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – WITNESSES – POWERS OF JUDGE – POWER TO CALL WITNESSES – where the Crown did not call a witness to be cross-examined – where the defence argues the witness is a material witness and ought to be called – where the Crown provided reasons that the witness was not reliable, trustworthy or capable of belief – whether the trial judge can invite the prosecutor to reconsider calling the person as a witness – whether the trial judge can make an address to the jury as appropriate on the failure to call the witness – whether the trial judge can call the person as a witness to give evidence.

CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – where the defence made an application to temporarily stay the proceedings until the Crown calls the person as a witness – whether the trial judge has the power to temporarily stay the proceedings because of the Crown’s failure to call the person as a witness to give evidence.

*Nguyen v R* [2020] HCA 23  
*R v Apostilides* (1984) 154 CLR 563  
*R v Manning* [2017] QCA 23  
*R v Ronald Edward Medich (No 38)* [2018] NSWSC 322  
*Richardson & Ors v R* (1974) 131 CLR 116  
*Whitehorn v The Queen* (1983) 152 CLR 657

COUNSEL: A Hoare for the defendant/applicant, Green  
 D R Wilson for the defendant/applicant, Smith  
 J Phillips with T Lawrence for the respondent

SOLICITORS: ATSILS for the defendant/applicant, Green  
 Legal Aid Queensland for the defendant/applicant, Smith  
 Director of Public Prosecutions (Queensland) for the  
 respondent

- [1] The accused, Damon Green, and his brother, Jason Smith, are charged with the attempted murder of their neighbour, Karen O'Donnell, at Capella on 27 May 2021.
- [2] Alternatively, Mr Green and Mr Smith are charged with malicious act with intent. Ms O'Donnell and the members of her family resided at 44 Burn Street, Capella. Mr Green and members of his family resided next door at 46 Burn Street, Capella. For some time there had been hostility between the neighbours.
- [3] The Crown case is that on the afternoon of 27 May 2021, Mr Green and Mr Smith, both armed with knives, came into Ms O'Donnell's house. On entry into the house, Mr Smith was confronted with members of Ms O'Donnell's family and an altercation ensued, during which the members of the O'Donnell family removed a knife from Mr Smith. The Crown case, however, is that Mr Green continued towards Ms O'Donnell with a knife and started to stab her on multiple occasions while telling her that he was going to kill her.
- [4] Mr Green and Mr Smith make an application for a temporary stay of proceedings until the Crown agrees to call Emma Green as a witness in the Crown case. Ms Green is the sister of Mr Green and Mr Smith.

### **Background Facts**

- [5] The complainant, Ms O'Donnell, gave evidence on the first day of the trial on 11 September 2023 that whilst in the front room of her home, Mr Green commenced stabbing her on multiple occasions. Ms O'Donnell described that as Mr Green

stabbed her she would kick him away, however, he would come back and stab her again and further, whilst Mr Green was stabbing Ms O'Donnell over and over "he was telling me that he was only going to get 10 years in jail and I was worth killing for it and he was going to come back and finish it when he was out of jail."<sup>1</sup>

- [6] Ms O'Donnell gave evidence<sup>2</sup> that the knife attack upon her came to an end because Emma Green came through the front door of Ms O'Donnell's house and grabbed Damon and threw him out.<sup>3</sup> Ms O'Donnell gave evidence that it was Emma Green that "literally grabbed Damon Green and threw him out" and "then threw two chairs at him because he kept coming back."<sup>4</sup>
- [7] Ms O'Donnell's evidence was that when Emma Green was throwing Damon Green out of Ms O'Donnell's house, that Emma Green said to Damon Green probably three times as she was trying to get him out the door "What the fuck are you doing here? Get out of the fucking house."<sup>5</sup>
- [8] The statement of Ms Green relating to Ms Green's actions of getting Damon Green out of the house was admitted into evidence over objection on the basis that it was part of the *res gestae*. Ms O'Donnell then gave evidence that after Ms Green had got Damon Green out of the house, and it was Ms Green who came to her aid by grabbing cloths to stop her wounds from bleeding.
- [9] On the first day of trial, Ms O'Donnell was cross-examined and it was put to her, and Ms O'Donnell accepted, that it was Mr Green who caused Ms O'Donnell to suffer injuries by the use of a knife. It was then put to Ms O'Donnell that it was Mr Green who desisted of his own accord, opened the front door, and left the residence.<sup>6</sup> Ms O'Donnell disagreed with this, stating her evidence that it was Ms Green that opened the door, it was Ms Green that grabbed Damon Green "and threw him out of the house."<sup>7</sup>

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<sup>1</sup> T 1-16, lines 30-35.

<sup>2</sup> T 1-18.

<sup>3</sup> T 1-18, line 20.

<sup>4</sup> T 1-18, line 27.

<sup>5</sup> T 1-25.

<sup>6</sup> T 1-50.

<sup>7</sup> T 1-50, line 47.

[10] After her answers in cross-examination, Ms O'Donnell added that she wanted to know why Emma Green was not here at the trial. After Ms O'Donnell's request for Emma Green to attend the trial, defence counsel sought an adjournment for an opportunity to examine Ms Green's evidence. Mr Phillips, Crown prosecutor, then put on the record that Ms Green had declined to provide a statement and therefore would not be called as a witness in the Crown case. It was conceded that Mr Hoare was not expecting Ms Green to be called and so the matter adjourned later in the afternoon on the first day of trial.<sup>8</sup>

[11] On the evening of 11 September 2023, Mr Hoare reviewed the body worn camera footage of police speaking to Ms Green on 29 May 2021. At the commencement of day two of the first trial on 12 September 2023, Mr Hoare accurately summarised that Ms Green's version, was that Ms Green did not enter into Ms O'Donnell's house and remove Damon Green, nor say anything to him to cause him to be removed, but rather she came onto the scene in the aftermath of the attack when Ms O'Donnell was outside of the house and on her front veranda and it was at that point that Ms Green provided first aid to Ms O'Donnell including the entry into Ms O'Donnell's house to obtain materials to staunch the bleeding.

[12] Mr Hoare then submitted "It is clearly significant in a case of attempted murder if there is intervention by a third party."<sup>9</sup> Mr Hoare then put the position on behalf of the defendant Green that:<sup>10</sup>

"Efforts ought to be taken to obtain proof from that witness or alternatively have her subpoenaed to court to have her either adopt the version or give the version as best she recalls by reference to the initial version she gave and that ... the evidence of that witness is critical to affording Mr Green a fulsome defence and narrative which may be acted upon by the jury which is inconsistent with an intention to kill."<sup>11</sup>

[13] Mr Phillips for the prosecution then put on the record the Crown position that there was not any allegation of prosecutorial misconduct in failure to disclose anything and that, there is no suggestion the Crown would be required to call Ms Green on the present information and that the Crown was not asked until approximately "5 minutes

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<sup>8</sup> T 1-53, line 16.

<sup>9</sup> T 2-2, line 46.

<sup>10</sup> T 2-3, lines 43 to 50.

<sup>11</sup> T 2-4, lines 5 to 8.

ago to call Ms Green and it's always been expected on the part our learned friends that she is not going to feature as a witness in the prosecution case.”

[14] Mr Phillips then put on the record that the prosecution would not call Ms Green without a sworn account as to the circumstances. The Crown did not oppose an adjournment in the case to allow the defence more time to obtain information from Ms Green. Mr Phillips then said for the second time that the evidence in the trial, which is available to all parties, was Ms Green had declined to provide a statement.

[15] As to Mr Hoare's submission that “Efforts ought to be taken to either obtain a proof from the witness ...” it is necessary to closely examine the interactions of Ms Green with police officers involved in investigating the case against the accused and also Ms Green's interaction with her brothers.

#### **Ms Green's Interaction with Police and the Accused**

[16] The suggestion by Mr Hoare, that efforts ought to be made to obtain proof of evidence from Ms Green was undoubtedly correct as she was an eyewitness if not to the event, at least to the immediate aftermath of the event.

[17] However, as the below summary shows, considerable efforts were made to obtain a proof of evidence from Ms Green, and as Mr Phillips said, Ms Green refused to provide a statement until 12 September 2023, that is after the trial had commenced.

[18] Ms Green's first interaction with police officers appears to be a lengthy discussion with Senior Constable Price on 29 May 2021. The interaction between Ms Green and SC Price is contained in Exhibit 7, in the visual and sound recording of Ms Green's interaction with SC Price. Part of Exhibit 4 is the transcript of that discussion, which appears to be accurate.

[19] Ms Green's initial version was that she had observed and heard her brother and Ms O'Donnell screaming and fighting and, in the footage at 2 minutes 58 seconds, Ms Green demonstrates with her right arm, the re-enactment of what she observed to be Ms O'Donnell's arm being brought down towards Damon Green. Ms Green then observed the legs of her brothers swing over the fence line, and then she heard further screaming. Ms Green confirmed this version on voir dire and it is a substantial matter as will be explained later.

[20] After this had occurred at the back of Ms Green's residence, she went back into her own house, put her shoes on and then went to the front yard of the O'Donnell house. Ms Green then describes at page five of the transcript, that after she left her own house:

“And I came, I was coming up. And I could see Karen, she was like on the ground out, like out the front here, and she was just screaming. And I just, just, looking at her. And I was just seeing like, there was blood just coming, just coming off her ... and my first instinct, I pushed, I pushed past Damon cause he was out here.” [Ms Green indicated in the front yard of Ms O'Donnell's residence.]

[21] Ms Green went on to say she asked her brother Damon Green what he had done near the car in the front yard of the O'Donnell's residence and it was only then that she came up to the front stairs of the O'Donnell residence and began helping Ms O'Donnell by grabbing whatever she could to staunch the wounds. Ms Green then said that during that process she grabbed a chair and threw it at her brother, Damon Green and struck him.

[22] Importantly, on page eight of the transcript of the interaction, Ms Green said “Didn't know whether they're in the wrong or whether she was in the wrong or whether they're gunna kill someone else or they were gunna come and hurt her, I don't know...”

[23] On the eleventh page of the transcript, SC Price discussed typing up a statement for Ms Green which Ms Green said “Does this mean, like, I'll be like [indistinct]. Will I be signing my brother's life away?” SC Price then explained that sometimes statements from people can help the people who are charged and sometimes they do not, and he had no idea of what Ms Green wished to put in her statement, but his job was to get as many statements from people as he could in order to determine what's occurred. Ms Green also said to SC Price that “I didn't see him do it, honestly.... But I know he did.”

[24] Ms Green and SC Price then had a long discussion about what could be put in the statement which was her direct observations and what she heard, but none of her assumptions. SC Price then contacted a colleague and asked for a laptop to be brought to Ms Green's house as she was more comfortable providing a statement at the house and accordingly there was a break in the discussion.

- [25] Later on the same day, 29 May 2021, there is a further discussion referred to in Exhibit 4 as “Version 2”. It is again a discussion between SC Price and Ms Green. The statement commences with Ms Green stating she did not know what to do, but she knew the right thing to do was to tell the truth. SC Price told Ms Green that it was up to Ms Green whether she provided a statement or not and he could not force her. Ms Green responded that “I need the okay from my brother that I can tell the truth.”
- [26] SC Price said he thought it was fair enough that Ms Green contact her brother. On the third page of the transcript, the following interaction occurred:

GREEN: Was I recorded this whole time?

SCON PRICE: Yes

GREEN: Fuck

SCON PRICE: I record conversation –

GREEN: This is going to go on a file I fucken snitched.

- [27] Ms Green appeared quite upset that she had “snitched”. SC Price then explained to Ms Green that written statements were what was expected a witness would recount in evidence in court. As Ms Green said she didn’t know whether she wanted to provide a statement, SC Price again reminded her that she did not have to, nor did she have to make a decision now and that she could consult her brother or a lawyer. Ms Green said “I am not even allowed to, I’m not even supposed to talk to youse unless [indistinct] here.”<sup>12</sup>

- [28] At page 16 of the transcript, Ms Green and SC Price discussed the need for an understanding of what occurred on that day and the following interaction occurred:

GREEN: We simply want to know why, that’s all.

SCON PRICE: Me too. Did you like, um, over the back fence you said you saw some things, could you hear what they were talking about or indistinct yelling?

GREEN: Um, that she was gunna kill me, and they---

SCON PRICE: She was going to kill you—

GREEN: Yeah, like we’re gunna kill Emma, because they’re always yelling out those threats, her and her sons, and there’s only me at home, it’s really creepy [indistinct].

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<sup>12</sup> T5.

SCON PRICE: So is Karen saying she's going to kill you?

GREEN: Yeah cause she hates me.

[29] At page 18 of the transcript (and at 18 minutes and 50 seconds of the recording), Ms Green said of Damon Green, that after Mr Green had returned from Hervey Bay to Capella, of the hostility between the neighbours, that "It didn't last that long until hatred spread to him and he retaliated." The "hatred" Ms Green spoke of was plainly Ms Green's hatred of Ms O'Donnell.

[30] Ms Green's suggestion that at the commencement of the interaction or argument between her brothers and Ms O'Donnell that Ms O'Donnell was going to kill Ms Green, and was yelling that she was going to kill Ms Green, was not part of Ms Green's version earlier on 29 May 2021, nor was it part of Ms Green's later statement of 12 September 2023, nor was it in any part of Ms Green's evidence on voir dire. It was something Ms Green made up when she was speaking to SC Price.

#### **Arunta Call 1 July 2021**

[31] On 1 July 2021 Ms Green had a discussion with her brother, Mr Jason Smith, whilst Mr Smith was incarcerated at the Capricorn Correctional Centre. As is the usual course, the telephone call was recorded on the Arunta call system and the telephone conversation commenced with the operator warning all parties that the call was being recorded and monitored.

[32] The call is extraordinary as it records Ms Green attempting to orchestrate or influence Mr Smith's defence. It records Ms Green telling her brother, Mr Smith, in emphatic terms to deny everything, "to say nothing, not a god damn thing." Ms Green informs her brother, Mr Smith, that "Damon said to tell you to say nothing cause you've, they've got no evidence." This was repeated on multiple occasions.

[33] Ms Green further said:

"Even if your lawyer tries to say shit, just tell him nothing. Say nothing. Say find evidence. ... Cause there's no evidence tying youse to anything. All youse did was get in the car and crash it... All you need to tell your lawyer was that you got in the car and crashed it, that was it."

[34] After discussing the charges which had been made of attempted murder, Ms Green described her brothers "Youse are naughty, naughty, naughty."



[35] Ms Green later advised :

“Um, have you put in that she’s harassed you for fucking over a year? ... You need to tell your lawyer that at least that she’s done nothing but fucking harass you guys ... right, nothing but harass youse ... and that she stabbed Damon first, remember, don’t forget that... because that’s what I told the police.”

[36] Ms Green did not see Ms O’Donnell stabbing Damon first and Ms Green did not tell that to “the police.”

### **22 July 2021 The Refusal**

[37] The next interaction with police officers and Ms Green occurred on 22 July 2021, is contained in Exhibit 4, and involves Senior Constable Price attending upon Ms Green in what appears to be a most friendly manner. Relevantly, Senior Constable Price is recorded as saying:

“SCON: Yeah, so I’ve just come around, remember last time I came, I spoke to you and you said that you were gonna speak to Damon and decide whether you wanted to make a statement. So I’m just here to follow up, see if you wanted to do that or not?”

GREEN: No, he doesn’t want me to make a statement.”

[38] It is helpful to have reference to one part of the voir dire evidence of Ms Green as it relates to her knowledge of being recorded by SC Price. It is to be recalled in the second conversation on 29 May 2021, Ms Green expressed extreme surprise that she was being recorded in the first conversation. That, on the footage of the interaction between SC Price and Ms Green, appears to be a genuine reaction, yet when cross-examined on voir dire, on 4 October 2023 at T1-27, Ms Green stated that she knew she was being recorded right from the get-go. It is possible, as Mr Hoare submits, to read those two *prima facie* inconsistent statements as being consistent on the basis that it wasn’t clarified with Ms Green whether she was talking about the first or second interview of 29 May 2021 that she knew she was being recorded from the get-go.

[39] As it wasn’t clarified, it seems to me I can, on balance, accept that Ms Green’s evidence ought to be construed as she realised she was being recorded on the second occasion. It seems to me that Ms Green was incorrect in her evidence on voir dire on 4 October 2023 as the footage on the second interaction on 29 May 2021 does appear

to suggest genuine surprise in Ms Green that the first interview had been recorded. In my view, nothing turns upon this matter.

- [40] I conclude that Ms Green had been given every opportunity and a very fair opportunity to provide a statement but made a firm decision on 22 July 2021 not to provide that statement. Accordingly between 22 July 2021 and 11 September 2023, the first day of the trial, there is no suggestion that Ms Green would be called as a witness by the prosecution.

### **Statement of 12 September 2023**

- [41] On the afternoon of 11 September 2023, Mr Hoare telephoned Ms Green and had a conversation with Ms Green whilst on speakerphone in the presence of his solicitor. Mr Hoare sought a subpoena to be issued to compel Ms Green to attend court and that was issued. The subpoena being issued “simply to ensure that she is giving evidence in this case without saying, in which case she gives evidence.”<sup>13</sup> Ms Green was encouraged to provide a statement to police.

- [42] It was in these circumstances on the afternoon of 12 September 2023 that Ms Green provided a sworn statement to police.

- [43] On the resumption of the third day of trial, Mr Phillips sought an adjournment to allow him the opportunity to speak with Ms Green. The trial was adjourned so the prosecution could have the opportunity to speak to Ms Green to form a view as to whether Ms Green ought to be called as a witness in the Crown case. Ms Green attended at Rockhampton on Wednesday 13 September 2023 for a conference with the Crown prosecutors.

### **Crown Prosecutors’ Conference 13 September 2023**

- [44] Exhibit 1 is the file note of Ms Harvey (support officer)’s attendance with two prosecutors, Mr Phillips and Ms Lawrence, at the conference with Ms Green on the afternoon of 13 September 2023. The conference was conducted in a conference room at the Supreme Courthouse. Mr Phillips and Ms Harvey met Ms Green in the waiting area, introduced themselves and asked her if she would speak to them in one of the conference rooms.

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<sup>13</sup> T 2-8.

- [45] The file note records that as Mr Phillips and Ms Harvey walked towards the conference room, Ms Green, a mature female, was “skipping along behind us for most of the way”. The file note records, among other things, that Ms Lawrence advised Ms Green that the prosecution ordinarily would talk to anyone who the prosecutor would call as a witness and “We do this with anyone we call in a case.”
- [46] Ms Green’s response was that she had provided the information before and she just wanted to submit the recording of what she said and go with that. That would include Ms Green’s false allegation that she heard Ms O’Donnell threaten to kill Ms Green. Ms Green then asked whether what she would say that day may be used in the court case. Mr Phillips advised Ms Green it would depend upon what she said and that notes would be taken of the conversation in the meeting and the notes would be shared with the lawyers for Ms Green’s brothers as the prosecutor has an obligation to give them copies of anything concerning the case. Ms Green then stated she would prefer not to be recorded and stated “I was told to stay out of it and now I’m being told to be involved.”
- [47] Ms Lawrence asked Ms Green who asked her to stay out of it, to which Ms Green responded she was told by “concerning people” and then stated “I’m guessing I’m not supposed to say because you’re giving me curious faces.” Ms Lawrence asked Ms Green what she meant by “concerning people” and whether that meant her brothers or the police however Ms Green would not respond. Ms Green repeated that she had been asked to stay out, that the important points were in her statement and that she was troubled that notes were being made of the conversation. Mr Phillips then explained that prosecutors cannot speak to her without a record being made, which Ms Green responded that she did not have to comply with that and Mr Phillips emphasised that notes had to be taken of any conversation the prosecutors had with Ms Green. Ms Green then stated again that she did not want notes being taken and that she and Mr Phillips ought to go for a coffee and speak that way. That offer was not accepted.
- [48] Ms Green then said that she had “Done what’s asked” and that she “Didn’t want anything changed, especially by the prosecutors.” Ms Green then stated “I have had personal experiences where these things have been twisted by prosecutors. I understand the power you have. I am not okay with you changing anything.”

Ms Lawrence advised that the prosecutors would not change anything, but rather were speaking to her out of fairness to her brothers as well, to which Ms Green responded that she thought the whole thing was “unfair”. Mr Phillips then asked again for Ms Green’s consent for the prosecutors to take notes of the conversation. Mr Phillips then asked Ms Green if she would accept that notes had to be taken of the conversation, to which Ms Green responded “I don’t want anything recorded” and then Ms Green left the interview room.

[49] The conference with Ms Green was not successful. Ms Green would not cooperate, exhibited bizarre behaviour such as skipping along behind Mr Phillips and Ms Harvey into an important interview, then suggested that she have coffee with Mr Phillips. Ms Green expressly said that she had personal experience with prosecutors and thought prosecutors would twist things and she did not want anything recorded and that whole thing was unfair.

[50] It then would come as no surprise that following the conference the Crown advised defence counsel that they would not call Ms Green in the Crown case. Defence representatives then made a joint request that the Crown make Ms Green available for cross-examination. On 28 September 2023, the Crown responded that they would not make Ms Green a witness available for cross-examination.

[51] Accordingly on the first day of the second trial, 3 October 2023, a second application was brought for the temporary stay of proceedings until the prosecutors agreed to call Ms Green.

**Issue of Law – Does the Court have Power to Stay a Proceeding until the Crown Calls a Witness?**

[52] In *R v Ronald Edward Medich (No 38)* [2018] NSWSC 322, at para [50], Bellew J expressed the view that there was no doubt that the court had the power to grant a temporary stay of proceedings in a case where the Crown declined to call the witness or make the witness available for cross-examination on the grounds of unreliability.

[53] Bellew J said:

“[50] As far as a temporary stay of proceedings is concerned, there is no doubt that the Court has the power to grant that remedy. The principles governing the exercise of the discretion to do so were summarised by Bathurst CJ (with the concurrence of R H Hulme

J and myself) in *MacDonald v R; Maitland v R* (2016) 93 NSWLR 736; [2016] NSWCCA 306 at [140]:

It is well established that the court has inherent power to direct a temporary stay of proceedings to prevent injustice and that the court has a responsibility to avoid unfairness to an accused by, if necessary, imposing a temporary stay to avoid such unfairness. However ... a stay will only be granted to the extent necessary to relieve against unfair consequences.

[51] In the earlier decision of *R v Seller; R v McCarthy* [2015] 89 NSWLR 155; [2015] NSWCCA 76 Bathurst CJ (with the concurrence of Fullerton J and myself) said (at [128]):

The question of whether a temporary stay should be imposed arises if the court is of the view that it is inappropriate to grant a permanent stay but, notwithstanding, some relief is necessary to ensure a fair trial.”

[54] Counsel for both the prosecution and defence could not refer me to any case in which Justice Bellew’s decision had been followed and my researches have come to the same view. Whilst I agree with Bellew J that in a general sense there is no doubt that a court has power to grant a temporary stay of proceedings, I respectfully differ from Bellew J that the general principle is applicable to a decision by a Crown prosecutor to decline to call a witness or make the witness available on the grounds of unreliability.

[55] In *R v Apostilides* (1984) 154 CLR 563 the unanimous High Court said at p 575:

“We have come to the conclusion that the following general propositions are applicable to the conduct of criminal trials in Australia:—

- (1) The Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.
- (2) The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.
- (3) Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.

- (4) When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.
- (5) Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.
- (6) A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.”

[56] In coming to the view I have formed, I have taken a number of matters into account, which flow from *Apostilides* and its predecessor cases and in particular the reasons of Dawson J in *Whitehorn v The Queen*.<sup>14</sup> In the last sentence of the second point, the High Court has said that a trial judge is not called to adjudicate upon the sufficiency of the reasons of a prosecutor for declining to call a particular person. Perusal of the decision of Bellew J in refusing the stay shows that in order to determine whether a stay ought to be granted or not, it is necessary for the trial judge to adjudicate upon the sufficiency of the reasons for the prosecutor not calling a witness. That is precisely what Bellew J did.

[57] The second point is that where a prosecutor fails to call a witness, which the trial judge considers the prosecutor ought to have called, it is made plain in point three that the trial judge cannot direct a prosecutor to call a witness. There are three remedies that the trial judge has when a prosecutor fails to call a witness that a judge concludes ought to be called. They are as set out in point three, the trial judge may invite the prosecutor to reconsider her decision at the close of the Crown case. The second remedy of the trial judge is contained in point four, that is, in the address the jury, to make such comment as is appropriate on the failure to call the witness. The third remedy, the exceptional circumstance remedy, is the trial judge can call the person to give evidence. The fourth remedy is not a remedy at trial, but a remedy on appeal, and is set out in point six, namely that an appeal court with the benefit of hindsight can review the entire record, consider the conduct of the trial, taken as a

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<sup>14</sup> (1983) 152 CLR 657 at p 682-683.

whole, and then determine whether, in the Court of Appeal's view, the failure to call the witness has given rise to a miscarriage of justice.

[58] I conclude therefore, there are three remedies available to the trial judge, one for Court of Appeal where a view is taken that a Crown prosecutor failed to call a witness that ought to have been called, however, none of them can amount to a direction by a trial judge to a prosecutor to call a particular witness. I consider it unlikely that a unanimous High Court would have overlooked the availability of a stay of proceedings as a remedy, if such remedy existed. In my view, an order by a trial judge granting a temporary stay of proceedings until a prosecutor calls that witness has precisely the same effect as a direction to a prosecutor to call a particular witness.

[59] It seems to me, therefore, I am constrained by authority and principle from accepting the submission that I do have the power to grant a temporary stay of this proceeding until the prosecutor calls Ms Green.

### **Temporary Stay**

[60] Notwithstanding my conclusion of law, and as the matter has been fully argued, it seems to me that it is appropriate that I should act on the assumption that I am wrong in my conclusion that I do not have the power to temporarily stay the proceeding, because of the prosecutor's failure to call Ms Green. In these circumstances, I would respectfully adopt the approach of Bellew J in *Medich* (supra) that requires an adjudication upon the sufficiency of the prosecutor's reasons for failing to call Ms Green.

[61] In this regard, it is important to bear in mind there are different types of cases where this issue has been resolved with alternative conclusions depending upon the facts. In *Apostilides*, the witnesses who were not called by the prosecution were Ms Tibbles, the friend of the complainant and Ms Brodie, a friend of the accused Apostilides. Apostilides had been accused of rape and both Ms Tibbles and Ms Brodie were present in the same apartment at the time the offences were said to have occurred. There was no reason put forward as to the decision of the prosecutor not to call those two witnesses.

[62] *Whitehorn* was again different because the Crown has taken the decision, in a case where a confession to a crime had been made, not to call the complainant.<sup>15</sup> In that case, the circumstances of the confession were disputed and accordingly it is not difficult to understand why it was considered necessary for the complainant to be called or at least an explanation given as to why the complainant was not called.

[63] *Richardson & Ors v R* (1974) 131 CLR 116 was a unanimous decision of the High Court. At page 119, their Honours Barwick CJ, McTiernan and Mason JJ said:

“In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few.”

[64] Their Honours further said at page 121:

“Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has not to call in the Crown case an eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.”

[65] In *Richardson* the witness, Ms Gardiner, was not called by the Crown prosecutor. At page 122 the High Court said:

“Miss Gardiner's evidence before the magistrate seems to have been unsatisfactory and to have justified the conclusion, if justification be needed, that she was not a credible or reliable witness. Moreover, she was an associate of the accused, in particular of Colin Dickinson, and there was evidence from the principal Crown witness that she encouraged the accused in their vicious and unprovoked assault. No dictate of fairness to the accused could properly require that she be called as a Crown witness, free from cross-examination by the Crown. Proper presentation of the Crown case required that she be called, if at all, by the defence. There was, therefore, no basis for any criticism of the Crown prosecutor.”

[66] Although the High Court's reference to the concept of misconduct of the prosecutor does feature in *Richardson's* case, it was eschewed by the High Court that there is any need to demonstrate prosecutorial misconduct in *Apostilides*.

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<sup>15</sup> (1983) 152 CLR 657.



[67] The judgment of Dawson J in *Whitehorn* was extensively relied upon in *Apostilides*. Relevantly at page 674, Dawson J said:

“Nevertheless there is good guidance in the cases for what constitutes a material witness. All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the elements of the crime charged and will include witnesses, notwithstanding that they give accounts inconsistent with the Crown case. However, a prosecutor is not bound to call a witness, even an eye-witness, whose evidence he judges to be unreliable, untrustworthy or otherwise incapable of belief.”

[68] Dawson J’s reasons in *Whitehorn* at page 682 and 683 are expressly referred to by the unanimous High Court in *Apostilides* at page 576 explaining the adversarial system and the judge’s role in the system to hold the balance between the contending parties without himself taking part in the party’s disputations. As Dawson J said with reference to *Richardson*, a trial judge frequently lacks the knowledge and information about the witnesses or their relationship to the parties and the evidence to be presented which is essential to make a decision as to who is to be called.

[69] Dawson J then said:

“If he calls a witness himself he will almost always have to do so in the dark, not knowing with any certainty what the witness is going to say or whether he can be relied upon. If the witness is unreliable (and if neither party has seen fit to call him, that is more likely than not), the fact that he is called by the judge may give his evidence an undesirable aspect of objectivity. There can be no assurance that his credit will be tested by either side but, if it is, the judge has no means whereby he can ensure that any necessary steps to re-establish the witness's credit are taken. Because the judge does not know what a witness called by him may say, he may by calling him necessitate the calling of further evidence so that the trial takes a turn which was not intended and which further involves the judge in a function not appropriately his.”

[70] Importantly, Dawson J highlights the distinction in calling a witness in the dark which relates to two concepts not knowing with any certainty what the witness is going to say and whether that could be relied upon. Reliance must be assessed in terms of whether the witness is trustworthy or capable of belief.

[71] In *Nguyen v R* [2020] HCA 23 at [44] the plurality said:

“It should only be where the reliability or credibility of the evidence is demonstrably lacking that the circumstances may be said to warrant a refusal, on the part of a prosecutor, to call such evidence.”

[72] It seems to me the test is as expressed by the High Court in *Nguyen*, that it is a matter of assessing the reliability and credibility of the witness in terms (as Dawson J put it) of whether the witness is either unreliable, untrustworthy or otherwise incapable of belief, but only if that is properly demonstrated.

[73] As the High Court observed in *Nguyen* at [46], it cannot be accepted that because one witness’s account is different from another witness’s account it can be concluded to be demonstrably false.

[74] In this case, the prosecutor although not required to, has provided his reasons for concluding that Ms Green is not reliable, trustworthy or capable of belief. The Crown does not point to a singular matter but a constellation of numerous features which lead the Crown prosecutor to that decision.

[75] The Crown’s submission that Ms Green is not reliable, trustworthy or capable of belief is based on many matters:

- (a) Ms Green’s preparedness to allege that it was Ms O’Donnell who started the incident or contributed to the incident by Ms O’Donnell making an allegation that Ms O’Donnell was going to kill Ms Green.<sup>16</sup> That allegation is absent in her statement and absent in her oral evidence and was clearly an invention of Ms Green to attempt to assist her brothers.
- (b) Ms Green’s preparedness to advise her brother, Mr Smith, in the Arunta call of 1 July 2021 that it was Ms O’Donnell who instigated the incident by stabbing Damon Green first. That again is absent from Ms Green’s statement and from her sworn evidence and was a lie designed to assist in the defence case. In respect of this identified lie and the previous lie, it is true, as urged by counsel for the defence, that Ms Green was honest enough not to include it in her sworn statement nor in her evidence, however, where a witness commences lying but later then does not lie, it is a matter which, at least, must logically effect the trustworthiness of that witness. However, a more sinister implication may also

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<sup>16</sup> V2 T16.

arise. Although Ms Green has not restated that she saw Ms O'Donnell start the incident by stabbing Mr Green, Ms Green has repeatedly stated that she saw Ms O'Donnell thrust her right arm down at Mr Green. On the camera worn footage at 2minutes 58 seconds the action is performed by Ms Green and it is unmistakably an action which suggests that Ms O'Donnell did use a knife to attack Mr Green. That is Ms Green's evidence is capable of corroborating an allegation (not yet made) that Ms O'Donnell did attack Mr Green with a knife.

- (c) Ms Green has an intense dislike for Ms O'Donnell. The first twenty paragraphs of Ms Green's statement detail numerous instances of events said to have occurred between Ms O'Donnell's household and the Green household involving abuse and violence. Without including the detail of all of Ms Green's statement, Ms Green has alleged in paragraph 8 that Ms O'Donnell had physically attacked her on a number of occasions and that Ms O'Donnell "Was calling us junkies, your brothers are going to jail" well prior to the incident the subject of criminal proceedings. Ms Green's statement suggests there were a few incidents where Ms O'Donnell had attended at "The Coach Inn" and attacked me, including a pushing and shoving incident where police were involved. In a latter incident detailed in paragraph 15 of Ms Green's statement, Ms Green alleges that Ms O'Donnell and another person, Tyler, lifted Ms Green up, threw her onto the road onto her back, after which Ms Green alleges Ms O'Donnell held her arms, ripped her flesh, and continued assaulting Ms Green until Ms O'Donnell's son intervened and threw his own mother, off Ms Green. The incident did not end there. Again, without detailing all of the violence, Ms Green alleges that during the fracas she obtained a glass beer stubby bottle from her brother, Damon Green, attempted to use it as a weapon upon Ms O'Donnell's son, Cody, and that Ms Green "kept headbutting him until Cody started bleeding." Ms Green's statement then continues in paragraph 21 to suggest that after those series of incidents "It became like a war in a sense." That Ms Green has a hatred of Ms O'Donnell is plain but it is also relevant that Ms Green did provide aid to Ms O'Donnell in staunching her wounds. In the interview of Ms Green on 12 September 2023 which preceded the signing of the statement at T52, Senior Constable Worthington asked Ms Green:

“Um now how to you think that Karen came to have these cuts?”

GREEN: Ah, because she’s an aggravating bitch and she’s, fucking, maybe she should start shutting her mouth and start [indistinct] people.”

That alone is an extraordinary response and exemplifies Ms Green’s view that Ms O’Donnell is the author of her own serious injury because in Ms Green’s view, Ms O’Donnell was “an aggravating bitch” that was not “shutting her mouth”.

- (d) Ms Green has repeatedly said that her preparedness to give evidence depends upon the approval of her brother, Damon Green. Ms Green made this plain at the commencement of the second field conversation of 29 May 2021 and repeated it throughout that conversation. Ms Green made it clear that she would not provide a statement unless her brother Damon wanted her to make a statement.
- (e) The contents of the Arunta call clearly show that Ms Green was directing Mr Smith as to how to conduct his defence of the criminal case, Ms Green gave Mr Smith instructions generally to deny everything, to say nothing. Ms Green went so far as to advise Mr Smith not to communicate with his own lawyer, other than informing the lawyer “All youse did was get in the car and crash it.” Ms Green did advise Mr Smith that he should tell his lawyer that Ms O’Donnell had harassed Mr Smith for over a year and, as noted above, advised Mr Smith to tell his lawyer that it was Ms O’Donnell that stabbed Damon Green first. Curiously, Ms Green said that she had told the police that Ms O’Donnell had stabbed Damon Green first, and that was not true. That establishes either Ms Green is prepared to lie to her own brother, or alternatively has a very poor memory. The prosecution further points to the portion of the Arunta call on page 4 of the Arunta record where Ms Green said that Mr Smith may receive 10 years for attempted murder. The Crown submits that the only means for Ms Green to know about the penalty of 10 years is that Ms Green must have heard her brother Damon Green say that he would get 10 years during the attack upon Ms O’Donnell. Whilst that is possibly so, it is also possible that, as Ms Green said in her evidence that she heard that time frame in pub talk in her town. I would not therefore conclude that Ms Green’s reference to 10 years in

the Arunta call could only be sourced to her presence at the time of the attack by Damon Green upon Ms O'Donnell.

- (f) The Crown also points to the inconsistency between Ms Green's version that she was not inside the O'Donnell residence until after the attack and Ms O'Donnell's evidence that Ms Green was inside and stopped the attack by removing Damon Green from inside the house. Ms Green's version is that she did not come into the house during the attack but only after the attack. Ms O'Donnell's version is materially supported by her teenage son Jai O'Donnell and his s 93A statement (page 31). Mr Jai O'Donnell has stated that Ms Green did walk through the front door of the house and got her brothers out of the house. The Crown rightly acknowledges that the inconsistency of itself is insufficient to found an adequate reason not to call Ms Smith but relies upon it as one of the circumstances.
- (g) The prosecutor relies on Ms Green's conduct at the pre-trial conference on the afternoon of 13 September 2023. Ms Green was well aware that her two brothers had been charged with attempted murder, were facing perhaps 10 years incarceration, that she had refused, on her brother's advice, to provide a statement, and only on 12 September 2023 provided a statement after her brother's lawyers has requested her provide a statement. The prosecutor points to Ms Green's conduct in skipping along behind the prosecutor, Mr Phillips, and his legal officer, Ms Harvey, to the interview. That is odd behaviour and not behaviour in keeping with a person who was taking this most serious matter in a serious fashion. It was certainly not behaviour that would have promoted Ms Green as an honest, trustworthy and reliable person. As I have set out above, Ms Green refused to participate in any meaningful conference because she refused to accept that it was necessary for the prosecutor to keep a note of what was occurring during the conference. Ms Green would not answer questions directly. In response to the question whether she had been asked to stay out of it, Ms Green said that she would not participate in a conference because a record was being made. Ms Green expressly said that she thought the whole thing was unfair and that she had personal experience with things that had been twisted by prosecutors.

- (h) The Crown prosecutor relies upon Ms Green's criminal record and submits that as a convicted fraudster, she ought not to be trusted.
- (i) The Crown relied upon Ms Green's evidence and manner of giving evidence on voir dire as being a "performance". I do accept the prosecutor's submission that Ms Green's performance in the witness box was entirely unsatisfactory. There are many matters which lead to this conclusion.

### **Ms Green's Evidence on Voir Dire 4 October 2023**

- [76] Ms Green at T1-15 and T1-27 swore that she was aware that when she was speaking to police officers that they were recording the conversation. More importantly, Ms Green swore at T1-15 that what she told the police officers was true, that necessarily includes Ms Green's evidence in V2 T-16 where she falsely alleged that she had heard Ms O'Donnell alleging that she would kill Ms Green. Ms Green said at T1-16 that she had lost a lot of memory. At T1-17, Ms Green acknowledged that she had refused to give a statement to police initially and explained that it was "A thing in our family. You see, we don't like to snitch... And that is a thing we lived by 100%, unless we're told by one another or told by someone we believe is family that it's okay to speak up, then we will ... it's a general understanding."
- [77] Ms Green then agreed with the proposition that the general understanding was not to cooperate with police and not to snitch on each other. Ms Green was asked a series of questions about the Arunta call. At T1-17, Ms Green claimed that she had not been given a direction by Damon Green, but that her instructions to her brother were "That's our direction, is to make sure we keep it clear, you make sure you only speak to a lawyer, not the police." That evidence, of course, does not accord with the contents of the Arunta call in which Ms Green advised her brother, Mr Smith, not to inform her lawyer of much at all, but only those matters which would assist in the defence case, including the false allegation that it was Ms O'Donnell that attacked Damon Green with a knife first.
- [78] Ms Green said that she did believe Damon Green had been stabbed with a knife and explained her belief was based upon "Because it was what was going around. That's what they were owning accountability to as well. And it made sense in my mind why

she had done it.”<sup>17</sup> Importantly, Ms Green did not claim that she was mistaken on this because she saw Ms O’Donnell thrust her right arm down as she demonstrated to SC Price.

[79] Ms Green gave evidence at T1-18 to T1-19 of the poor relations between her family and the O’Donnell/Langtree family. Ms O’Donnell alleged that the O’Donnell/Langtree family “Were pushing towards all the time, was aggravating my brother so he’d do more than 10 years and I’d be dead in a hole.”

[80] An important part of the Crown case was the evidence of Ms O’Donnell that when she was being stabbed multiple times by Damon Green that Damon Green said to Ms O’Donnell on multiple occasions that he “Was only going to get 10 years for this.” And Ms O’Donnell “was worth killing for it.”

[81] After Ms Green gave evidence of her view that the O’Donnell/Langtree family had been attempting to get Damon Green sentenced to prison for more than 10 years for a long period of time, Mr Hoare specifically asked her whether she heard anything about the phrase 10 years being said on the day of the incident. Ms Green’s answer was “More – more incidents that had happened in our past, that’s what they were pushing towards all the time, was aggravating my brother so he’d do more than 10 years and that I would be dead in a hole.”

[82] As that answer was non-responsive, Mr Hoare asked again:

“So I just want to get some clarity about that. The content of that use of the terms 10 years, and I’ll ask you in a specific way. Did you hear Damon Green say to anyone on the date of the incident ‘I’ll do 10 years for this’?”

Answer: I know my brother and my brother does not talk when acting. ... When he is aggravated he does anything violent he will not speak at all.”

[83] As Ms Green did not answer the simple question on the second occasion, it was asked for a third occasion, to which Ms Green answered in the negative that she did not hear her brother say that.

[84] In terms of her sworn statement, Ms Green said at T1-19 that she did not understand the importance of a sworn statement, but did understand the need to tell the truth in a

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<sup>17</sup> T 1-17, line 47 to 49.

sworn statement. Ms Green explained at T1-20 that she did not think a sworn statement was something she should take seriously and so she did not take the giving of a sworn statement seriously. That appears to be correct. The recording of the interview process between Senior Constable Worthington and Ms Green from T51 to T55 includes at T51 Ms Green's offer to sign the police statement without reading it and SC Worthington's refusal to let that occur. At T1-25, Ms Green repeated she didn't take the giving of a police statement as a serious matter.

- [85] Ms Green was asked about her past criminal history and in particular her convictions for credit card fraud. Ms Green explained she had done a lot of things in the past and that:

“Friends that I used to take the blame for because I believed in loyalty, honour and respect and nothing could waiver that for me, so if I was asked to take the blame for something I had not done, I would. If I was asked to keep names out of the actual situation at the time, I would. And I would step forward and do what I felt was right and at the time, I was misguided by my own self, and I have changed from that.”<sup>18</sup>

- [86] Ms Green was then advised of her right to refuse to answer a question on the basis that it may incriminate her. Ms Green did exercise her right not to answer questions. There are multiple instances in the cross-examination of Ms Green where she was unresponsive, eg. T1-24.

- [87] Ms Green did exhibit a number of unusual actions whilst being cross-examined. Ms Green swore that after saying she did not take police statement seriously, she began smiling and was asked by the prosecutor why she was smiling, to which Ms Green answered “I like your glasses.”<sup>19</sup>

- [88] At T1-28 Ms Green said that she did not trust prosecutors one hundred per cent as “You guys have a large amount of power, okay? So I don't trust you.”

- [89] Ms Green explained that she did not trust prosecutors because “youse don't do the right thing one hundred per cent of the time, and that's a fact.” When asked to explain that comment, Ms Green again exercised her right not to answer questions on the basis of self-incrimination and stated that “I have had enough.”

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<sup>18</sup> T 1-21, line 7 to 12.

<sup>19</sup> T 1-25, line 31.



- [90] The prosecutor pressed for a response and as I again explained to Ms Green privilege against self-incrimination, Ms Green responded to me “I don’t understand why he keeps going on and on about the same thing but not leading back to the actual case itself. This just silly. ... I just don’t want to answer his questions... Can I state ‘None of his business.’”
- [91] Ms Green said at T1-33 that she held a personal opinion that she did not trust prosecutors ever to do the right thing. Ms Green explained that was based on her past personal experience and “There is no one subject I can pinpoint, it’s just my past, so it’s my personal opinion.”
- [92] As to Ms Green’s demeanour at T1-34, Ms Green commenced answering questions under cross examination by the prosecutor by looking away from the prosecutor and explained that she was looking away as “I’m trying not to be distracted by you and trying not to be rude.” When cross-examined about the conference on 13 September 2023, Ms Green at T1-35 agreed that she skipped as she walked into the conference room. Ms Green said in respect of the meeting that she was misled by the prosecution and she believed it was to be a meeting, and “instead it was something to be recorded so you could change my statement.”<sup>20</sup>
- [93] Ms Green then said “I’m not changing my statement for you and you will not be changing my statement. This is pretty much how I went. You were not going to have a bar of it and you sent me on my merry way.” Mr Phillips then sought to obtain an understand as to how Ms Green was misled. Ms Green said she was irritated because it would be a recorded session and she was irritated because she did not trust prosecutors.<sup>21</sup> The prosecutor then sought to obtain an understand of why Ms Green was irritated by a recording being made, to which Ms Green answered non-responsively “I don’t understand where this is going, honestly.”
- [94] Ms Green then alleged that she refused to participate as “I refused the lawyer stating that I would not be re-issuing a statement, a new statement.” Ms Green asserted that she was not told that the record was going to be shared with her brothers’ lawyers.<sup>22</sup> That is plainly incorrect according to the note.

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<sup>20</sup> T 1-35.

<sup>21</sup> T 1-36.

<sup>22</sup> T 1-36, line 23 to 24.

- [95] At T1-40, Ms Green described the prosecutor's conduct as "shocking ... no wonder no one trusts you." Ms Green claimed that she did not recall a lot of what occurred on 13 September 2023<sup>23</sup> adding, on occasion, "Well, whatever you believe I said ... I don't recall. Is that satisfying?"<sup>24</sup>
- [96] Ms Green also confirmed that she did say in respect of the prosecution of her brothers "The whole thing is unfair." Ms Green explained that was her personal opinion:
- "Because people cause shit constantly, ongoing, cry wolf, and then we're the ones who are still in trouble? I believe it's unfair. I believe it's unfair what's happened to my brothers over the course of the fucking time. I believe they've been trayed – portrayed in the wrong way in everyone's fucking eyes as to why it happened and what went down. I believe that's why I believe it's unfair."<sup>25</sup>
- [97] Ms Green then said that she did not believe either of the prosecutors and again said that she considered the prosecution of her brothers to be "One hundred per cent unfair".
- [98] Ms Green was then asked about the Arunta call. Ms Green agreed that she operated on the basis that "snitches get stiches." Ms Green described her conduct in the Arunta call in directing her brother Jason Smith what to say because "I always found Jason a bit weak you know, that's probably why I treated him like that" and that she was attempting to gain "control of – of Jason because I'm a bossy bitch I guess."<sup>26</sup>
- [99] After extensively discussing the Arunta call with Mr Hoare and then the prosecutor Mr Phillips, Ms Green at T1-48 offered "Are you sure you're not talking to – he wasn't talking to my mum? This – this I don't recall. Our voices do sound the same." Ms Green then offered that she did not know if she was involved in the Arunta call and it could have been her mother as their voices sound the same and she did not know. Ms Green then left the court room.
- [100] At the commencement of the Arunta call, Mr Smith, brother of Ms Green, is recorded as saying "Oh, hey, Emma" and the conversation ensues. This is the conversation in which Ms Green had commented to Mr Hoare in explaining her position. As Ms Green had raised the prospect that it was not her at all in the call, even though she

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<sup>23</sup> T 1-40 to T 1-41.

<sup>24</sup> T 1-41, line 10 to 17.

<sup>25</sup> T 1-41 to T 1-42.

<sup>26</sup> T 1-46 and T1-4.

had given evidence upon the contents of the call, the recording was played, and Ms Green agreed that it was her on the Arunta call.

[101] Following the playing of the recording, Ms Green was smiling and was again asked “Why were you smiling when you just gave that response to me?”<sup>27</sup> Ms Green answered “Because I just confirmed that it was not my mum’s voice ... I got that wrong, I was smiling with the fact that I got it wrong and you must be feeling good about that.” Ms Green gave the firm impression of a witness who was playing a game and did not take the swearing of evidence as an important or serious matter.

[102] At T1-57, Ms Green repeated the allegation that Ms O’Donnell had said to her “Finally he’s in jail now, we’ve got him right where we want him, he’ll be spending more than 10 years there, and don’t worry, you’ll be in a hole next.”

[103] At T1-62, Ms Green was cross-examined about her false allegation that she had told police officers that Ms O’Donnell had stabbed Damon Green first, and asked why she had lied to her brother, Mr Smith, about that. Ms Green refused to accept it was a lie, but rather “a misleading of the truth.” Ms Green explained that she misled her brother, Mr Smith, by explaining:

“I don’t recall why at the time, it could be in the heat of the anger over what was going around the town, stipulating they had stabbed him first and we had stabbed – that my brother had stabbed him with samurai swords or stabbed Karen with samurai swords. I remember that at the time I was angry about that story that went around and then the other story about the butterfly knife that she had been stabbed with and I don’t know why I actually stipulated that I told police that she stabbed him first. I don’t know why actually. I don’t know why, yeah. ... Yes I was angry about that, of course I was. They were winning again and they cried wolf and started shit. Of course I was angry.”<sup>28</sup>

[104] At T1-63, Ms Green justified her brothers’ actions, claiming that the attack was not a spur of the moment thing and that “These boys were aggravated. It’s the life that we had to all live, including my family. It wasn’t fuckin’ fun. Right. It wasn’t fun for them. ... It wasn’t something they planned on a little fucking clipboard on the bloody wall.”

[105] At T1-66, Ms Green said of the voir dire that “It’s kind of boring.”

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<sup>27</sup> T 1-54, line 41.

<sup>28</sup> T 1-60 to T 1-61.

- [106] At T1-74, Ms Green did confirm that she signed her police statement without checking it, but then qualified that by saying that she signed the extra page that Senior Constable Worthington had printed out without checking it. Ms Green then explained at T1-76 that she had read a percentage of her sworn statement, but not all of it, as she “Was getting bored by the end...”
- [107] In my view, it is appropriate to conclude that Ms Green’s “performance”, if one can call it that, in the witness box, upon voir dire was entirely unsatisfactory. Ms Green displayed hostility to the prosecutors and exhibited unusual conduct in her smiling at inappropriate times, and describing the circumstances as being boring. Ms Green did provide quite a deal of non-responsive answers.
- [108] Mr Hoare and Mr Wilson for the accused argue that as there is general consistency in Ms Green’s versions provided in May of 2021 and September and October of 2023, and that Ms Green’s version about not entering through the front door during the attack are consistent with Ms O’Donnell’s evidence that the front door was always locked. The defence submission was that Ms Green is telling the truth about her involvement, that is demonstrated by the consistency between her versions over a period of years, and Ms O’Donnell’s evidence about the front door always being locked.
- [109] That may well be true, but as Dawson J said in *Whitehorn* at page 682, a trial does not involve the pursuit of truth by any means. The defence contentions really go to the point of materiality, which is in fact conceded by the Crown.
- [110] In *R v Manning* [2017] QCA 23, the judgment of the court (Morrison and Phillip McMurdo JJ and Boddice J) said at [19]:

“[19] If a witness is able to give credible evidence about matters directly in issue, that alone would ordinarily suggest that the prosecutor should call the witness. A prosecutor should call all material witnesses, being those whose evidence is necessary to “unfold the narrative and give a complete account of the events upon which the prosecution is based.” A material witness should be called although that witness would give an account inconsistent with the Crown case. The word “material” in this context should not be given any narrow meaning and “[a]ll the available admissible evidence which could reasonably influence a jury on the question of the guilt or otherwise of an accused is capable of answering the description ‘material’”. A prosecutor

is not bound to call a witness whose evidence the prosecutor judges to be unreliable, untrustworthy or otherwise incapable of belief. But a suspicion by the prosecutor about the unreliability of evidence is not enough: the prosecutor's opinion as to the unreliability of the evidence will suffice only "where there are identifiable circumstances which clearly establish it".

- [111] That passage is, in my respectful view, a concise summary of the many authorities upon the area and the test remains whether the prosecutor concludes that there are identifiable circumstances to clearly establish that the evidence of a material witness to be unreliable, untrustworthy or otherwise incapable of belief. There is, however, the important direction that it is necessary to have much more than a mere suspicion by the prosecutor about the unreliability of the evidence and the prosecutor's opinion as to unreliability, as their Honours said, "will suffice only where there are identifiable circumstances which clearly establish it."
- [112] That is, in my respectful opinion, very much in accordance with the reasoning of the plurality of the High Court in *Nguyen v R* [2002] HCA 23 at [44] where the plurality said, "It should only be where the reliability or credibility of the evidence is demonstrably lacking that the circumstances may be said to warrant a refusal on the part of the prosecutor to call such evidence."
- [113] Viewed in isolation, many of the above matters would not reach that high level of a demonstrable lack of reliability or credibility or identifiable circumstances which clearly establish it, however, together, in my view, those circumstances do establish that the reliability, credibility or trustworthiness of Ms Green is demonstrably lacking. In my view, the above circumstances show that it would not be in the interests of justice to allow Ms Green to give evidence in the trial without her being subject to cross-examination by the Crown.
- [114] For the above reasons, I dismiss the application brought on behalf of the accused.