SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gibb* [2018] QCA 120
PARTIES:	**R** **v** **GIBB, Margo Jane** **(appellant/applicant)**
FILE NO/S:	CA No 276 of 2016 DC No 513 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport – Date of Conviction & Sentence: 8 September 2016 (Kent QC DCJ)
DELIVERED ON:	12 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	23 February 2018
JUDGES:	Holmes CJ and Gotterson and McMurdo JJA
ORDERS:	**1. The appeal against conviction on count 1 is allowed.** **2. The verdict on count 1 is set aside and a verdict of guilty of burglary while armed and in company is substituted.** **3. The appellant is sentenced to four years imprisonment on count 1. It is declared that she has already served 829 days of that sentence in pre-sentence custody and the parole eligibility date is fixed at 7 March 2018.** **4. The appeal against conviction on count 2 is dismissed.** **5. Leave to appeal against the sentence imposed on count 2 is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant appeals against her conviction on the ground that the verdict is unreasonable – where the appellant contends that the complainant's evidence should not have been accepted and that there were conflicts in and between the evidence of other witnesses – where the appellant has not pointed to anything which would make the complainant's evidence impossible of belief – where there were rational explanations for conflicts

in the evidence and they did not concern critical aspects of the Crown case – whether the jury was entitled to be satisfied beyond reasonable doubt of the appellant's guilt – whether the verdict was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that there had been a miscarriage of justice because she was unrepresented at trial – where the trial judge had given leave to the appellant's representatives to withdraw due to a breakdown in their relationship with their client – where the trial judge refused an application for an adjournment – whether that refusal resulted in an unfair trial – whether there was a miscarriage of justice requiring quashing of the conviction

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that there had been a miscarriage of justice because the trial judge did not rule that she was unfit for trial – where the appellant's medical practitioners expressed a view that the trial's postponement would be in her interests, but gave no opinion that she was unfit for trial – where the appellant's claims about her medical conditions were largely unsupported by any expert evidence – whether the trial judge erred in concluding that the appellant was fit to stand trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CONDUCT OF TRIAL JUDGE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that there had been a miscarriage of justice because the trial judge intervened inappropriately in the trial – where the appellant contended that the trial judge's interventions were intimidating to her – where the trial judge's interventions contained elements of cross-examination – whether the interventions resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that the revocation of her bail was unfair and prejudiced her capacity to defend herself – whether the revocation of the appellant's bail was justified – whether the revocation of the

appellant's bail produced an unfair trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that certain pieces of evidence should not have been admitted – whether the trial judge erred in the admission of evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that the trial judge had erred in failing to give directions and had misdirected the jury – where the appellant contended that the trial judge misdirected the jury by instructing them that the lifting of an already open garage door could constitute a breaking of the dwelling – whether the trial judge erred in the directions he gave

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that the sentence imposed was manifestly excessive – where the appellant contended that the trial judge erred in sentencing by failing to take into account her medical condition and the possibility of her being deported – where the appellant contended that the principle of parity had not been taken into account – whether the trial judge erred in his sentencing of the appellant

Criminal Code (Qld), s 22(2), s 418(1), s 668F(2)
Evidence Act 1977 (Qld), s 8(1), s 21M, s 21O

Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57, cited
Galea v Galea (1990) 19 NSWLR 263, cited
Galea v The Queen [1989] 1 WAR 450; [1989] WASC 512, cited
Halley v The Crown (1938) 40 WALR 105; [1938] WALawRp 17, cited
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
Michel v The Queen [2010] 1 WLR 879; [2009] UKPC 41, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Blenkinsop; *R v Blenkinsop* [2007] QCA 181, cited
R v Boal [1965] 1 QB 402, cited
R v Cockfield [2006] QCA 276, cited
R v Esposito (1998) 45 NSWLR 442, cited
R v Leu; *R v Togia* (2008) 186 A Crim R 240; [2008] QCA 201, cited
R v Mawson [1967] VR 205; [1967] VicRp 23, cited

R v Miller [2015] QCA 94, cited
R v Rigney [1996] 1 Qd R 551; [1995] QCA 571, cited
R v Senior [2001] QCA 346, cited
R v Smith (1827) 1 Mood CC 178; [1827] EngR 146, cited
R v Sonter [2008] QCA 292, cited
Royal Guardian Mortgage Management Pty Ltd v Nguyen (2016) 332 ALR 128; [2016] NSWCA 88, cited
Zaburoni v The Queen (2016) 256 CLR 482; [2016] HCA 12, followed

COUNSEL: The appellant/applicant appeared on her own behalf
D C Boyle for the respondent

SOLICITORS: The appellant/applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The appellant was convicted of one count of burglary by breaking while armed and in company (count 1 on the indictment) and one count of armed robbery in company with personal violence (count 2). She was sentenced to 4.5 years imprisonment on each count, with a declaration that she had already served 187 days in pre-sentence custody and a parole eligibility date fixed at 7 March 2018, 18 months after the sentence date. A co-accused, Jay Birch, pleaded guilty to the burglary count, but not the armed robbery; instead he pleaded to an alternative count, assault occasioning bodily harm while armed and in company. Mr Birch was sentenced to four years imprisonment on each of those counts, suspended after 180 days (which he had served in pre-sentence custody), with an operational period of five years.

[2] The appellant appealed against the jury verdicts on the ground that they were unreasonable; but her submissions entailed a litany of complaints concerning the trial judge's conduct of the trial and his summing up, as well as the admission of certain items of evidence. She was given leave to amend the grounds of appeal against conviction to reflect those complaints. She also sought leave to appeal against her sentence on the ground that it was manifestly excessive.

The Crown case

[3] Robert Cummins, the complainant whose dwelling was, on the Crown case, broken into and who was the subject of the armed robbery with personal violence, gave evidence to the following effect. He met the appellant in 2000. He had been in a brief sexual relationship with her in 2007, but after that was no more than a friend, although he was involved with her for some financial purposes. They had bought a Gold Coast unit together and then refinanced it, at which point title was transferred into Mr Cummins' name alone. They had used part of the loan proceeds to jointly buy a Harley-Davidson motorcycle, which was registered in the name of a company, GRU Property Investments. The appellant had been responsible for the setting up of the company, and had promised Mr Cummins that he would be a director.

[4] The appellant did not have a licence, so it was always Mr Cummins who drove the motorcycle, with her as a pillion passenger. In 2009, Mr Cummins moved to Gladstone for work, retaining the motorcycle over that period. Subsequently, the appellant

transferred $10,000 from the GRU bank account, to which both were signatories and the funds in which were Mr Cummins' wages, to her own account. A bank statement for the "GRU Family Trust" account was tendered. It showed a transfer of $10,000 on 30 August 2010 with the notation, "part harley payout". As a result of that transaction, Mr Cummins said, he took steps to prevent the appellant from having access to the account. Also in 2010, the appellant, who remained on the Gold Coast, travelled to Gladstone and took possession of the bike for three months. Mr Cummins negotiated its return by signing a statutory declaration indicating that he was assigning 70 per cent of his interest in the unit to the appellant. She acknowledged that the motorcycle was now his; he collected it and returned to Gladstone with it. He transferred its registration from the company to his own name and thereafter paid all the maintenance expenses in respect of it.

[5] In 2011, Mr Cummins visited the appellant at the Gold Coast unit and told her that he needed her to contribute to the mortgage payments, since she had been living in it rent-free. In 2014, he returned to the Gold Coast area and rented the downstairs section of a house at Nerang from a friend, Ms Otto, who lived upstairs with her adolescent son, Logan. On Australia Day 2014, five males, two of whom Mr Cummins recognised as the appellant's sons, came to the premises and demanded the return of the motorcycle. He told them to get off the property.

[6] On 7 March 2014, Mr Cummins was in the downstairs area of the Nerang house watching television, while Logan Otto was upstairs. Access to the downstairs area was through the garage at the front of the house, inside which there was a door giving entry to the house. Ms Otto had a CCTV surveillance system on the premises. Mr Cummins looked up at the CCTV screen and saw a car in the driveway. He had left the garage door half open and the inner door open as well, to allow a breeze. He heard the garage door being opened and then was confronted by the appellant, who walked into his lounge room. She demanded the keys to the motorcycle. He told her to leave the property.

[7] The appellant returned to the garage, then turned, smiled at Mr Cummins, and said "Look who's here, Rob". At that point a male appeared and struck Mr Cummins on the head with an object. He tried to shut the door between the garage and the house to keep them out, but the appellant stuck her leg in the doorway to prevent him. Mr Cummins heard her say that her leg was in the door; a second or two afterwards the door was burst off its hinges, knocking him backwards. The male, who had a tyre iron in his hand, came at him and proceeded to assault him with it, striking him four times on the top of his head, and punched him four to five times in the face. He could not see for blood. He retreated to the other end of the room, but the male came at him with the tyre iron again. Mr Cummins tried to grab it, unsuccessfully, before being hit once more. He tried to dissuade his assailant, saying that if he kept hitting him in the head, he would kill him, Cummins. The appellant screamed, "Kill the cunt".

[8] At that point, Mr Cummins said he would give the pair the keys; he then saw the appellant nodding at the male assailant. The keys were actually in the pocket of a motorcycle vest, which the male took. The appellant told him that if he called the police he was "fucking dead". The two then left the property.

[9] Mr Cummins identified a number of photographs, of the premises, showing the door off its hinges on the floor and large amounts of blood, and of the injuries to his face and head together with cuts to his ankle, elbow and hands, as well as footage downloaded from the digital video recorder (DVR) of the CCTV system showing

the appellant and her companion leaving through the garage. As she left, he said, the appellant was screaming that next time they would kill him. Mr Cummins said a neighbour came to his assistance. At this point, he first saw Ms Otto's son emerge from where he had been in the upstairs part of the house.

[10] The appellant being unrepresented at trial, an order was made pursuant to s 21O of the *Evidence Act* 1977 for cross-examination of Mr Cummins, as an alleged victim of the offence, and Logan Otto, as a witness under 16 years,[1] to be conducted by a lawyer engaged by Legal Aid Queensland. Under cross-examination by the barrister retained in accordance with that order, Mr Cummins agreed that in 2013, police officers spoke to him about a complaint which the appellant had made, that he had stolen the motorcycle from her. He denied a scenario put to him to the effect that: on two occasions, on 24 October 2013 and on 13 March 2014, he had offered the appellant $20,000 in exchange for her "dropping the charges" and for the motorcycle; in the conversation on 3 March 2014, he had agreed with her that she would come to the Nerang premises on 7 March to give him the set of keys she had in her possession; and when she arrived he had assaulted her with a tyre iron, hitting her in the side of the head and the right knee, and had kicked her. It was also put to him that as the appellant endeavoured to leave he had jammed the door over her ankles; he agreed that in the incident on that day, one of her legs was jammed in the door and he was trying to push it shut. He also agreed that the appellant's "friend and carer", Jay, came to her assistance and got the door off her legs. He rejected the suggestion that as Jay went to help the appellant from the ground, Mr Cummins attacked him with an iron bar and in the ensuing struggle both fell to the ground, where they wrestled.

[11] On being shown a document, Mr Cummins accepted the possibility that the motorbike was purchased in the appellant's name but rejected the proposition that it was bought because the appellant was intending to employ him in a motorbike touring company and that the motorcycle was leased to GRU Property Investments for that purpose. He confirmed that he had signed a document authorising the transfer of ownership of the motorcycle from GRU Property Investments to himself. He denied that the tyre lever was his or was on the premises prior to the events of 7 March 2014.

[12] Logan Otto, who was 13 years old, was interviewed by police on 7 March 2014. A heavily edited version of the interview was put into evidence. In it, he said that the events had occurred at about 3.50 pm. He was watching a movie upstairs when he heard a big bang, a lot of swearing, a female voice saying "I will fucking kill you cunt" and a man saying "No, shut-up you fucking (inaudible)". He heard Mr Cummins saying that they were trespassing and were to get out, followed by sounds of hitting and Mr Cummins grunting as if hurt. Later in the interview, he said that he thought both people made threats to kill Mr Cummins. He telephoned his mother, then the police and an ambulance. When he went downstairs he saw blood everywhere and things smashed. Mr Cummins was outside talking to their neighbour; he had serious injuries.

[13] Cross-examined by the lawyer retained for the purpose, Mr Otto agreed with the suggestion that he was playing his Xbox upstairs with his headphones on and said he took his headset off when he heard a bang. He maintained that he did not hear a male voice threaten to kill Mr Cummins; it was the appellant he heard say it. He agreed that his mother had told him what the incident was about.

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1 Each was a "protected witness" pursuant to s 21M of the *Evidence Act*.

[14] Ms Otto gave evidence that on Australia Day 2014, she heard some males at her premises arguing with Mr Cummins. They were asking where the bike was. Looking out from her window, she saw the appellant behind a fence. On 7 March 2014, after receiving a telephone call from her son, she went home to see Mr Cummins covered with blood, on a stretcher. She took pictures of him and of the state of her home on her cell phone. The photographs depicted the door between the garage and the house lying on the floor and areas of blood around the house, including on the ceiling.

[15] Ms Otto said that one of the cameras in her CCTV system pointed down the driveway, while another was at the front door to the upstairs area, which was accessible by stairs. The footage from the CCTV cameras was recorded onto the hard drive of her DVR. There were screens upstairs and downstairs and also at her workplace, on which live feed could be seen. Whether footage was recorded was determined by the operation of the system's motion sensors.

[16] Under cross-examination, Ms Otto confirmed that in her police statement she said that when her son rang her on 7 March, she looked at her workplace screen and saw the appellant and a male with a shaved head, who was carrying a tyre iron, run from the front gate. She had not seen the appellant arrive. Ms Otto agreed that her friends sometimes entered the property by lifting the garage door. Ordinarily, there would be footage of anyone entering the property. However, she had looked at the CCTV footage for 7 March and it did not show the appellant arriving at the property, although she was able to see her running out of it.

[17] Ms Otto had provided the DVR for her CCTV system and two discs containing footage from it to the police. She said that she retrieved the security system hard drive from the police in 2014 once they had finished their examination of it; she wanted it for her home security. Cross-examined about what she could hear on her mobile phone when her son telephoned her, Ms Otto said that she could hear screaming and someone who sounded like the appellant saying "get him, get him". She was asked whether she had coerced her son into giving evidence that the appellant and a male had attacked Mr Cummins; she denied having done so.

[18] A forensic video analyst, Ms Scibilia, confirmed that she had examined the DVR for the CCTV system and had found footage of two people leaving the Nerang premises time stamped at 3.36 pm on 7 March; however the device operated about 10 minutes behind Australian Eastern Standard time, so the footage of the people leaving probably represented an event which occurred at about 3.46 pm. Having examined the previous three hours of footage, she could not find the point at which they had arrived.

[19] The neighbour who had come to Mr Cummins' assistance, Mr Bell, lived in the adjoining property. He gave evidence of hearing banging, shouting and screaming from next door on the afternoon of 7 March 2014. He saw Ms Otto's son, who asked him to call the police; he did so. While on the phone, he moved around to the front of his property and saw two figures running from the front of the garage at the adjoining property, towards a car. He heard a male voice saying, "Next time we'll kill you", followed by a female voice saying something similar. The two people got into a light blue car and drove away at speed. He went into the house and saw Mr Cummins (whom he knew only as Rob) in the garage, with gashes in his head and blood everywhere. He looked through the door into the house and saw blood

stains and items strewn about. Mr Bell stayed with Mr Cummins until the ambulance arrived.

[20] Two Queensland Ambulance Service Officers, Mr Turner and Mr Hammond, were the first members of emergency services to attend at the Nerang premises. Mr Hammond said he attended to Mr Cummins, who had a good deal of blood on him, with one wound still bleeding. Most of his injuries were on his face or head. Under cross-examination, Mr Hammond said that the injuries were not life-threatening, but they were substantial. He saw six lacerations to the head and face that had caused substantial bleeding.

[21] The second ambulance officer, Mr Turner, said that Mr Cummins was covered in blood over his face, chest and arms and there were injuries apparent around the left side of his face. He looked around the premises while his partner treated Mr Cummins. He saw blood in a number of areas of the house and some broken spectacles. He took a number of photographs on his mobile phone to assist with gauging how much blood loss there had been; they were admitted into evidence. It was apparent, Mr Turner said, that items in the property had been moved around forcefully. The door was lying on the ground as though it had been kicked in. The appellant asked Mr Turner in cross-examination whether it was possible that water had been mixed in with blood and smeared about. He disagreed, although he accepted that in one particular area where there was a shoe with surrounding blood, it was possible that there had been some water dropped.

[22] Mr Cummins was taken to a hospital at the Gold Coast where he was found to have six head and face wounds, most of which were closed by stitching or stapling. His discharge summary gave his diagnosis as "minor head injury". A doctor who gave evidence explained that the adjective "minor" suggested that there was no bleeding within the skull; had there been, the word "severe" would have been used.

[23] Mr Michael Radic, a friend of Mr Cummins, lived on acreage at Guanaba. Mr Radic said that on 7 March 2014, he received a telephone call from Mr Cummins. Records showed that there had in fact been a call by Mr Cummins to Mr Radic's phone at 4.08 pm, which lasted 40 seconds and then two return calls by Mr Radic: at 4.13, for 13 seconds and at 4.14 for three minutes and 10 seconds. As a result of what Mr Cummins said, Mr Radic formed the intention to go to see him at his house in Nerang. Before he could do so, however, a light blue Commodore vehicle driven by Mr Birch, with the appellant as passenger, came at speed down his driveway. He did not know Mr Birch personally, but had seen him on CCTV footage previously; he had known the appellant for many years.

[24] Mr Radic said that the appellant was screaming obscenities at him. He threw a brick at the vehicle, which hit the back tyre. The car stopped and Birch got out with a steel bar and threatened to smash his head in, "like that other cunt". The appellant meanwhile, was encouraging Birch, saying that "Jay" would smash Mr Radic. He told them he had nothing to do with the motorcycle and they were to get off his property. Eventually, they both got back into the vehicle and they left. He then travelled to the Nerang premises, where he saw that the door was knocked off the hinges and there was blood and glass lying about.

[25] A former police officer named Rodgers said that on 7 March 2014, he was driving on the Pacific Motorway just south of Nerang at 4.15 pm, when he saw a pale blue

Commodore being driven erratically. The male driver seemed agitated, and his arms were covered in what looked to be blood. He had a female passenger who seemed slumped in the seat. Rodgers accepted that it would have been impossible for a vehicle to travel in the space of two minutes from the area where Mr Radic lived to the location at which he saw the Commodore on the highway.

[26] The following day, 8 March 2014, the appellant and Birch were apprehended in a light blue Commodore by two uniformed officers. They were arrested and taken to a police station, later being transported to the Southport watchhouse. A search of the appellant's handbag at the watchhouse located a set of Harley-Davidson motorcycle keys. At the watchhouse, a police officer photographed the appellant and recorded a cut to her scalp. The appellant complained of a brain aneurysm and head pain and was taken to a Gold Coast hospital. She was found to have a small laceration to the back of her head, which did not require treatment, and had some bruising on her feet, with a couple of small bruises on her forearm. A CT scan demonstrated a normal brain with no intracranial pathology. The treating doctor accepted, from the appellant's account of her symptoms, that she had a concussion, and she was given Panadol.

[27] Meanwhile, the Commodore was searched and a tyre lever, with what appeared to be blood on it, was found in it, as well as a black leather motorcycle vest. There was also a folder in the vehicle, which contained documents including a receipt from a motorcycle retailer for a Harley-Davidson motorcycle in the appellant's name and an ASIC search showing that GRU Property Investments Pty Ltd had been deregistered in 2010.

The defence case

[28] The appellant gave the following account in evidence. She said that about a week before the events of 7 March, 2014, she had met Mr Cummins by chance in Nerang at a time when Jay Birch was also present. They had discussed the motorcycle, and her need for money for brain surgery. Mr Cummins asked her to bring the motorcycle keys (of which she had the only set) and paperwork to his premises and to "drop the charges", in return for which he would give her $20,000. Accordingly, she went to his house on 7 March.

[29] The appellant lifted the garage door, which was ajar, called to Mr Cummins, and was invited in. As she entered the lounge area, he said "Give me the keys". She asked about the money, but he continued to demand the keys and asked what she had told the police about him and about Radic. She said she had not told the police anything. At that point he called her names, grabbed her around the head and punched her. He had a bar in his hand at the time. She yelled that he was not to hit her head because she had an aneurysm and it would kill her. He continued to push her. She got away from him but fell on a step. He kicked her as she tried to get up and get out the door. She fell over the step leading to the garage, at which point he pinned the door over her legs.

[30] Birch came running in and pushed the door off her. The force on either side of the door made the door come off its hinges. Birch attacked Mr Cummins with the brace, but missed. Cummins grabbed him and the two fell to the ground. In the process, Mr Cummins split his head, hitting it on the kitchen bench top. He was holding Birch in a headlock, but the latter spun around and punched him in the face

to get away. Eventually, after Birch had punched him a few times, Mr Cummins released him and then moved to take up the bar. As he went to swing it, Birch caught his arm and disarmed him. The two then left. They had not gone to Mr Radic's property that afternoon.

[31] Under cross-examination, the appellant said that when she and Mr Birch had been apprehended on the afternoon of the following day, they were on their way to a police station to report Mr Cummins' assault on her. They had not done so immediately after the attack because she was concussed and suffered from post-traumatic stress disorder. She had stayed the night with a friend at Tugun, and had not gone to hospital because she had a fear of doctors. However, when she was taken to the watchhouse, she realised that she did need medical attention and agreed to go to a hospital then.

[32] The reference to "part Harley payout" on the bank statement referred to a lease payment on the motorcycle made from the GRU account, which she regarded as her personal business account, to her private bank account. Her company had leased the motorcycle from her. Mr Cummins was able to ride the bike as part of her Harley tour business. It was his responsibility to keep the registration current; he paid the fee from her account. He had transferred the motorcycle into his name without permission. There was only a single set of keys to the motorcycle, of which she had possession. The second set had been lost. She had told the barrister who cross-examined Mr Cummins that he should put to the latter that he had hit his head on the kitchen bench, but he had failed to do so. The incident involving her leg being in the door had caused a permanent indent to her leg. She had fallen because Mr Cummins had hit her in the leg with a tyre brace. Cummins, she said, was in a drug-induced rage. In the garage, Mr Birch had picked up the motorcycle vest, which she had actually bought to fit Mr Cummins, in order to wipe his face. She knew that the bike was held at Mr Radic's property, but she had not gone there.

[33] The appellant called Mr Birch to give evidence in her case. He said he was not present for any conversation between her and Mr Cummins in the week prior to 7 March in which she was invited to the property. He had gone to Mr Cummins' premises on the understanding from the appellant that she was going to discuss with Mr Cummins a motorcycle which she owned. He remained in the car while she entered the premises. He heard screaming and went inside, where he saw the appellant being attacked by Robert Cummins. He saw Mr Cummins strike her in the back of her head. The appellant landed heavily in between the interior of the property and the garage door, upon which Mr Cummins proceeded to shut the door on her legs. The door came off the hinges because Mr Cummins was pressing on it. When he, Birch, went into the premises, he was unarmed. He picked up the tyre lever in the garage and left with it. He had taken the motorcycle vest from Mr Cummins. They had not gone to Mr Radic's house that afternoon. He was not sure where he and the appellant were going the following day when they were intercepted by police. He was aware that the appellant owned a set of original keys to the motorbike.

[34] Under cross-examination, Birch agreed that he had taken the motorcycle vest from Mr Cummins because he was angry. He was covered in Mr Cummins' blood; the latter was bleeding from the head. It was possible that Mr Cummins had said that the keys were in the vest. He then agreed that he had asked where the keys were. He recalled that Mr Cummins had gone somewhere to retrieve the vest; it might

have been in the bedroom. He agreed that he had attacked Mr Cummins and hit him with a tyre iron and with his fists, and that Mr Cummins's injuries were the result of his attack. Birch denied that he had gone into the property armed, although he had pleaded guilty to an offence involving that circumstance. He was aware that there was a lot of blood on the ground, because it was slippery.

[35] Mr Birch admitted to having previously been convicted of a number of offences of dishonesty, which he said were committed to fuel his addiction to ice (crystal methamphetamine). He also admitted that in his own sentence hearing he had pleaded guilty to a factual circumstance which included his following Mr Cummins into the bedroom with the tyre lever and holding it above his head. He had not disputed that he had arrived with the tyre iron or that he and the appellant had made threats to Mr Cummins. He agreed too, that he had accepted, for the purpose of sentence, that both of them had yelled out words to the effect of "Call the cops and you're dead".

Unreasonable verdict

[36] The appellant maintained that the verdict was unreasonable, making the following arguments. Rodgers' evidence of seeing the Commodore on the highway at 4.15 showed that Radic's evidence of her having been at his property at 4.13 could not have been true, and this in turn indicated that he must have colluded with Mr Cummins to lie about what had occurred. As reasons why the jury should have disbelieved Mr Cummins, the appellant submitted that his evidence was "hearsay" (when it was in fact direct evidence of what he had seen or done) and that it was "unsubstantiated" (which, of course, was no bar to the jury relying on it). She also made a number of allegations that Mr Cummins had perjured himself, purely on the basis that his evidence conflicted with hers.

[37] More specifically the appellant pointed, as evidence of perjury by Mr Cummins, to the fact that although the tax invoice for the motorbike's purchase showed that it had cost $27,309, he said in evidence that it had cost $25,000 and when he registered the transfer of the motorbike into his own name he had put its value at $20,000. She asserted that Mr Cummins had admitted to fraud when he said that he had prevented her from having access to the GRU bank account and that he had transferred the motorcycle registration into his own name. In addition, Mr Cummins had agreed, when the question was put to him by counsel cross-examining on the appellant's behalf, that he and she were not in a boyfriend/girlfriend type relationship (although he did say that they were involved in a sexual relationship for a couple of weeks). Ms Otto and Mr Radic, when asked the question, agreed that the two had been boyfriend and girlfriend. The appellant identified this as a critical conflict in the evidence. Finally, the appellant pointed to an inconsistency in the evidence of Logan Otto, who, when speaking to the police, said that he had been watching a movie on television when he heard noises downstairs, but under cross-examination, said that he had been playing on his Xbox.

[38] None of these matters was of any real significance or should have caused the jury a reasonable doubt. They were entitled on the evidence to reach the verdicts of guilt. There was no dispute that the appellant and Mr Birch had gone into the dwelling and it was there that Mr Cummins had sustained head injuries. The appellant maintained that he had done so in a fall, hitting his head, after attacking both her and Birch with a bar, but Birch said that it was he who took up the tyre iron and hit

Mr Cummins with it, causing his injuries. It would be difficult to say, then, that the jury could not have been satisfied that the appellant and Birch were in company, that Birch was armed or that there was personal violence inflicted on Cummins. The real issues were whether the appellant was on the premises at Mr Cummins' invitation, and whether she had a right to take the motorcycle keys and vest.[2]

[39] These involved determinations of credibility between the appellant and Mr Cummins. It was her word against his as to the claimed encounter a week prior at which he was said to have asked her to come to his premises; notably, Mr Birch, contrary to the appellant's account, said that he was not a witness to it. Birch said that he had taken the motorcycle vest and that he had asked Mr Cummins where the motorcycle keys were; which was inconsistent with the appellant's claim that the keys were always in her possession, the purpose of her presence on the property being to exchange them for the $20,000 payment. The evidence of Logan Otto and Mr Bell as to hearing threats to kill Mr Cummins may also have gone some way in convincing the jury to reject the appellant's claim to having gone there for a simple exchange of money and keys.

[40] Despite the appellant's assertion to that effect, Mr Cummins at no stage admitted fraud in his actions in relation to the bank account or the motorcycle. On his evidence he had an entitlement in respect of both, and believed himself to be a director of the company when he signed the transfer papers for the motorcycle. It is self-evident that there was nothing indicative of perjury in the fact that his recall of the motorcycle's purchase price was not precise, or that he estimated its value at a lower figure after it had been in his possession for some years.

[41] As to other matters raised, the jury could well have taken the view that there were explanations other than untruthfulness for the apparent conflict in timing as between Rodgers and Radic: that the vehicle seen by Rodgers was not in fact the one in which the appellant and Birch were travelling, or that he was mistaken as to the time at which he saw it, or that Mr Radic was wrong in his timing of when he had seen the appellant and Birch. But even if they disbelieved Mr Radic as to the substance of his evidence, that would not preclude a conclusion that the appellant and Birch had assaulted Mr Cummins in the circumstances he described. The variation in Mr Otto's evidence as to whether he was playing on the Xbox or watching a video was an inessential detail and in no way suggested that he was inaccurate, let alone dishonest, in his recall of the more dramatic events of the day.

[42] The appellant has pointed to nothing which would make Mr Cummins' evidence impossible of belief, and it was supported by Logan Otto and Mr Bell, and, in some respects, by Birch. The jury was entitled to accept Mr Cummins' evidence as to his ownership of the motorcycle and the circumstances in which he was assaulted. The verdicts were not unreasonable.

Failure to grant an adjournment

[43] The appellant contended that there had been a miscarriage of justice because she was unrepresented at the trial, her solicitors and counsel having been given leave to withdraw owing to what the trial judge described as a breakdown in their

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2 For reasons explained later in this judgment, the evidence did not support a bona fide claim of right to the keys or vest.

relationship with their client. The affidavits put before his Honour were not before this court, but what emerges from some statements by the appellant later in the trial (in the jury's absence) is that she had accused her barrister of stealing documents from her which were relevant to her defence, by abstracting them from the appellant's folder and concealing them in her own. (In the course of her arguments here, the appellant complained that she had not been given the opportunity to object to her legal representatives' withdrawal; but nothing she might have said could have justified the trial judge in requiring her lawyers to continue in those circumstances.)

[44] The lawyers' withdrawal was against a background in which there had been several changes of representation for the appellant over the previous year. In July 2015, a listed trial had not proceeded because the appellant and Birch had dispensed with the services of their solicitors, and replaced them with a different firm and, in the appellant's case, a barrister, Ms Hawkins. At the next mention, in August, Ms Hawkins appeared to represent the appellant again but with different solicitors. In October 2015, those solicitors were given leave to withdraw. A new firm of solicitors then instructed Ms Hawkins but in early May 2016 were given leave to withdraw. At that stage the trial was listed for 13 June 2016; the appellant repeatedly asked for it to be delisted because of her difficulties in finding "appropriate" representation. At the end of May, the appellant was granted legal aid, and the 13 June trial was delisted and subsequently re-listed for 12 August 2016, the date on which it in fact commenced. Legal aid funding was later withdrawn and Legal Aid Queensland given leave to withdraw on 11 July 2016. The basis is not clear, but it follows an appearance at the end of June in which the Legal Aid solicitor advised that the appellant had failed to attend an appointment and could not be contacted by phone and the appellant informed the court that the Legal Aid solicitor was not following her instructions.

[45] The appellant then informed a judge on review that she had instructed a private solicitor and was retaining a silk, both of whom she identified; however, an email from the solicitor produced on the next review a few days later advised that the appellant had failed to attend an appointment, had given no instructions and had provided no funds. The appellant subsequently claimed to have different representation: Ms Hawkins once again. The Director of Public Prosecutions' office contacted Ms Hawkins; she advised that she held no instructions, would not take a direct brief and was not aware of any instructing solicitor. Legal aid was reinstated and a solicitor and counsel and barrister retained; they were the legal representatives who withdrew at the start of the trial.

[46] In light of that background, the trial judge expressed a reluctance to delay the trial. The history, his Honour said, suggested that the appellant might have deliberately engineered the situation or, alternatively, that it was an incident of the way she conducted herself in relation to her legal representatives. The appellant said that she had been contacted that morning by a solicitor and her erstwhile barrister, Ms Hawkins, who said they would like to take the matter on and were available that week. The trial judge observed that it appeared the appellant would have time to contact Ms Hawkins and the solicitors, but he proposed to have a Legal Aid representative appointed for the purpose of cross-examining the complainant.

[47] The appellant handed up two letters from medical practitioners. The first, from a general practitioner, described her as having a history of "anxiety, depression and PTSD" and observed that she was "emotionally labile and not in an optimal state to

conduct her own case". It went on to express the view that the postponement of the hearing would be in her best interests. The second letter, from a psychiatrist, said that the appellant had been his patient for the conditions identified by the general practitioner and had a "relapse due to current stressors". He also suggested that it would be in the appellant's best interests to have hearing postponed. No view was expressed in either letter as to how long such a postponement might be; nor, critically, did either letter say that she was incapable of representing herself. The trial judge said that he did not consider the material raised a proper basis for an adjournment, to which the appellant responded that she "would like to get it over with too".

[48] The trial judge gave the appellant some information about jury empanelment, and after a brief adjournment the court resumed for that purpose. At that point the appellant announced that she had engaged a "lawyer and barrister" who could be there within a day or two, although she would like a break to seek advice on whether she should or should not plead. She and Mr Birch were, however, arraigned in front of the jury panel, Birch entering his pleas of guilty and the allocutus being administered. The jury was duly empanelled but permitted to leave. There was then some discussion about arrangements for Legal Aid to retain counsel to cross-examine the complainant.

[49] In the course of that process, the Legal Aid Grants Manager appeared by telephone and referred to the history of his office's endeavours to provide representation for the appellant. He said that in arranging the most recent representation, Legal Aid had required the appellant to accept certain conditions. Having regard to what had subsequently occurred, Legal Aid would not engage a practitioner to appear for her in relation to the trial as a whole, but he would endeavour to arrange for someone to cross-examine Mr Cummins and Logan Otto. The trial was adjourned, the trial judge noting that the appellant would now have time to contact the lawyers who were to represent her. However, nothing more was heard of them.

[50] On the third day of the trial, in the course of cross-examining the third of the police officers who had attended Mr Cummins' premises, the appellant said that she did not want to represent herself. The trial judge referred to the discussion with the Legal Aid Grants Manager and said there was nothing more to be done. The trial would proceed, with the appellant to be represented for cross-examination of Mr Cummins and Logan Otto.

[51] *Dietrich v The Queen*[3] establishes that where a trial judge

> "is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation...in the absence of exceptional circumstances, the trial…should be adjourned, postponed or stayed until legal representation is available".[4]

If in such circumstances an application to delay the trial is refused and, through the accused's lack of representation, the resulting trial is not a fair one, there will have been a miscarriage of justice requiring quashing of the conviction.

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3 (1992) 177 CLR 292.

4 At 315.

[52] But this is not such a case. The first premise, of the accused's inability, without fault, to obtain representation, was not met, and in any case, the circumstances were exceptional, given the history of the proceedings. The appellant had had opportunities for representation, the most recent of which she had ended by an absurd allegation against her barrister. There was reason to suspect, as the trial judge did, that the appellant had deliberately engineered the situation. There was no prospect of the appellant's receiving further Legal Aid funding. Certainly the trial judge could not reasonably have adjourned the trial on the strength of her claims to have engaged a solicitor and barrister, given her previous claims of the kind; and, as it proved, they were similarly without basis on this occasion.

[53] Nor was there any likelihood of any barrister and solicitor being able to conduct a trial for the appellant without her creating insuperable difficulties. At various points during the trial, and also during the appeal, the appellant complained that her legal representatives had refused to follow her instructions: to have the hard drive of Ms Otto's CCTV system examined, despite the absence of any evidence that the device had been tampered with (and Ms Scibilia's evidence to the contrary); to investigate whether the photographs Mr Turner took were doctored in some way to show blood about the crime scene which had not really been there; to advance an alternative theory that the crime scene itself had been tampered with; to conduct a s 590AA hearing at which, she imagined, witnesses like Cummins, Radic and Logan Otto would be cross-examined, with the result that the case would be thrown out. No counsel and solicitor could, with propriety, have prepared for and conducted the trial in accordance with the appellant's wishes; and her history was one of parting company with her lawyers in such circumstances.

[54] This trial was as fair as was practicable, given the conduct of the appellant. The cross-examinations of Mr Cummins and Logan Otto were professionally conducted. There was no prospect of representation being obtained for the appellant, and if there had been, little chance of its continuing unterminated by the appellant when her demands were resisted. No miscarriage of justice resulted from the failure to adjourn the trial.

The appellant's fitness to stand trial

[55] The appellant complained that the trial judge had forced her to defend herself, although she was medically unfit. His Honour knew, she said, that she suffered from post-traumatic stress disorder and "had a known untreated brain aneurysm requiring brain surgery". The judge and the prosecutor had refused to call a government medical officer to examine her, and she had been forced to continue, despite doctors at the Gold Coast University Hospital informing the court that she had many letters stating that she was not fit for trial, and was having a severe reaction to stress.

[56] As already mentioned, the appellant tendered letters from a psychiatrist and a general practitioner which indicated that a postponement of the trial for an unspecified period was in her best interests. She had not at that stage sought an adjournment; but, in any event, the trial judge was, given the history of the matter, entitled, in the absence of any definitive medical view that she was unfit for trial, to conclude that there should be no further adjournment. Later in the trial, however, the issue of the appellant's health re-emerged. On the sixth day of the trial, the appellant was late for court. She claimed that she had a brain aneurysm which

caused her to suffer migraines in the morning, so that it was necessary for her to wait for that effect to subside before she could come to court. At the end of the day she informed the judge that she had a specialist appointment at 8.30 am the following morning and was not sure if she would be able to be at court at 9.30 am (the scheduled time) although the practice was less than 10 minutes away.

[57] The following morning, the appellant arrived 45 minutes late at the court, just as his Honour was about to issue a warrant for her arrest. She said that she had not in fact gone to see the doctor, because of the pain allegedly caused by her brain aneurysm. She also asserted that she needed her lungs evaluated because she had an "asbestosis nodule", which caused her to cough blood for an hour in the morning. The trial judge asked the prosecutor to arrange for a government medical officer to attend and examine the appellant before it was necessary for her to cross-examine the witness currently giving evidence. Before the luncheon adjournment, the appellant informed the judge that she still suffered the effects of an anaphylactic reaction some years earlier. She went on to say that she required CT scans of her brain and lungs because of symptoms; she claimed to be presently coughing up blood as a result of the stress of the case. She asked that the court adjourn early so that she could visit her doctor for medication and a check-up.

[58] At this stage, the prosecutor advised the court that there were no longer forensic medical officers based on the Gold Coast (where the trial was taking place) and that the only option was to revoke the appellant's bail and take her to the Gold Coast University Hospital for examination. The trial judge instead decided to make the appellant's bail subject to a condition that she attend the hospital that afternoon for examination, including any necessary scans. The appellant, rather inconsistently with what she had said before, objected: she could not attend that hospital because they did CT Scans there; she could not have CT scans because she had previously experienced too much radiation; what she needed was an MRI. The trial judge observed that this would be up to the medical experts.

[59] A decision was then made as to what documents should be provided to the hospital. They included the psychiatrist's and general practitioner's reports tendered at the start of the trial as to the appellant's post-traumatic stress disorder, anxiety and depression, as well as some more reports now tendered by the appellant: a radiologist's report dated 2 February 2015 as to the findings on an MRI, which among other normal findings, noted

> "a small focal prominence of the anterior communicating artery…reaching approximately 2.5 millimetres, suspicious for a tiny aneurysm";

a letter from her general practitioner, which said that she was "currently under management of a cerebral aneurysm"; and another letter from the Gold Coast University Hospital which indicated that she had been removed from the appointment list of the neurosurgery clinic because she had not responded to requests for information. At 2 pm the trial judge adjourned the court until 10 am the following morning, granting the appellant bail on the condition that she attend the hospital that afternoon for medical examination.

[60] The next day, at 10.30 am, the appellant emailed the judge's associate to say that she would arrive by 11.30 am. The trial judge advised the prosecutor that this had occurred and said that he would adjourn until 11.35 am. When at that time the

appellant had still not appeared, the prosecutor applied once more for the revocation of her bail. His Honour observed that the appellant's conduct seemed consistent with an attempt to delay the trial and noted that he had seen nothing about her health which indicated that she was not physically capable of continuing with it. However, at 11.37 am, the appellant telephoned the court to advise that she would be there in 20 minutes, actually arriving at 12.30 pm.

[61] In the period before the appellant's arrival, the prosecutor submitted that a warrant should be issued. He provided the court with material subpoenaed from the Gold Coast University Hospital. The appellant had attended the emergency department of the hospital shortly after midnight. The intern on duty provided her with a letter advising that she and the registrar also on duty were unable in the circumstances to deem "the patient unfit for trial" and observing that any letter about fitness for trial should be provided by the appellant's general practitioner. The patient history taken from the appellant recorded that she was complaining of a "general decline in physical health in reaction to stress" and that she asserted that she had "multiple physician letters to court stating that she is unfit for court attendance".

[62] The appellant, on her arrival at court, explained that she had not gone directly to the hospital from court the previous day because she had to take her paperwork home and someone at the courthouse had told her there was no particular time she needed to go the hospital, and also because her house had been burgled and all of her clothing and other possessions stolen by a connection of a witness at the trial. She had arrived late at the court because the key to her son's car was lost and then it would not start, and she had to borrow money to get a taxi.

[63] The trial judge revoked the appellant's bail. His Honour observed that the intern's letter provided no further evidence about her condition and there was no basis for interfering with the continuation of the trial. This was a reasonable conclusion. The hospital note of the appellant's reaction to stress and supposed possession of letters confirming her unfitness represented no more than the history taken from her; it reflected neither a matter of fact nor of medical opinion. There was no medical evidence that the appellant was in any imminent risk of rupture of the aneurysm, assuming it to exist, that it was symptomatic, or that it required surgery. Nor was there any medical evidence about the supposed lung condition.

[64] Given all that happened during the trial and before it, the trial judge was entitled to regard the appellant's own claims about her health with extreme suspicion, when they were not independently supported. His Honour's own observation was that she was physically able to continue. In fact, the appellant proceeded to the end of trial showing no evidence of a reduction in her physical capacities so far as her cross-examination and tendency to interrupt the judge and argue with him were concerned. Nothing before the judge required him to conclude that she was unfit for trial, and he did not err in this regard.

The trial judge's interventions

[65] The appellant made a number of complaints that the trial judge had intervened inappropriately in the trial. One of the most remarkable allegations was in relation to his Honour's discussion with the Legal Aid Grants Manager about arrangements for legal representation pursuant to s 21O of the *Evidence Act*. His Honour observed that

> "whoever it is would have to have some mastery of the overall issues".

[66] This seems an anodyne and obvious comment, but the appellant maintained that it was evidence of collusion with the prosecutor, because the trial judge was actually signalling that a Freemason should be appointed to represent her. That submission, patently absurd as it is, might lead to some concern about the appellant's mental state, but other submissions she made were relatively rational, albeit not necessarily well-founded. At any rate, there was no inappropriate intervention by the trial judge in this regard; it was necessary that representation be arranged for the appellant and his Honour took appropriate steps to ensure that occurred.

[67] A number of the judge's statements the subject of this ground of appeal were actually made in the absence of the jury, and thus had no capacity to affect their considerations. The appellant's contention, however, was that they were intimidating to her and thus affected her ability to represent herself. She identified one such example, occurring on the fifth day of the trial. The prosecutor applied for the revocation of the appellant's bail, on the ground that she had followed one of his colleagues (whom he identified only by his surname) just outside the court house and made a threatening gesture to him. He filed an affidavit by that person, but expressed some concern about its being provided to the appellant, because it would identify the person complaining. The trial judge told the appellant that she was not in danger of having her bail revoked, and if he were to use evidence against her for that purpose, it would be given to her. But, his Honour said, he would not give the affidavit to her at that time because he did not trust her and was concerned that she was "a potential danger". That was the statement of which the appellant complained. But there was, contrary to the appellant's complaint, nothing threatening in it; it was the giving of reasons, albeit in blunt terms, for his Honour's proposed course of action.

[68] A second instance of what the appellant identified as an intimidating comment, again made in the absence of the jury, occurred on the tenth day of the trial. The appellant's bail by then having been revoked, she complained that she did not have access to her asthma preventative medication. The trial judge asked whether she had contacted any of her family members to obtain the medication; for example, her son, since she had said some days previously that he was to be her carer. The appellant responded that one of her sons lived in Canberra and another in Melbourne. The trial judge asked whether they were getting further away; whether she had any in Antarctica or Siberia. This was a piece of sarcasm which, although no doubt borne of understandable frustration, would have been better avoided. However, it had no effect at all on the course of the trial. Nor did it or any other comment by the trial judge have any discernible impact in daunting the appellant; certainly she continued in her propensity to flout the judge's instructions and rulings.

[69] The appellant contended that the trial judge had interrupted her cross-examination of Ms Otto just at a point at which she was about to make admissions. However, the pages identified concerned an episode while Ms Otto was in the witness box, but the jury had been sent out. The appellant was claiming that she had a USB of CCTV footage showing her arrival with Mr Birch at the premises. (That footage never came to light, either at the trial or on the appeal.) In the course of that discussion, the trial judge asked the prosecutor whether the investigators had looked at all the footage on the DVR's hard drive. Ms Otto, still sitting in the witness box,

volunteered the information that on 7 March, at her premises, a number of police officers had looked at the hard drive. The trial judge asked her some questions about how many police officers had been present and when the exercise had occurred, but was interrupted by the appellant demanding that the questioning take place in front of the jury. She continued to interrupt the trial judge as he questioned Ms Otto about whether she had seen any vision of the appellant arriving on the recorder. This was not, it need hardly be said, interruption by the judge of the appellant's cross-examination, rather the reverse, and nothing emerged which suggested Ms Otto was about to admit anything.

[70] Other complaints concerned the appellant's witness, Birch: the fact that he was sentenced before he gave evidence, and the trial judge's participation in questioning of him. As to the first, both the trial judge and Birch's counsel took the view that it was necessary that Birch be sentenced in order to make him a compellable witness; and he had given instructions that he did not wish to give evidence. The view as to his compellability was presumably based on s 8(1) of the *Evidence Act*, which provides:

> "In a criminal proceeding, each person charged is competent to give evidence on behalf of the defence (whether that person is charged solely or jointly with any other person) but is not compellable to do so."

It is at least arguable that Birch, having pleaded guilty and having been administered the allocutus, was no longer a "person charged" within the meaning of the provision.[5] However, it is unnecessary to reach any firm conclusion on that point. It was in the appellant's interests that Birch be able to give his evidence without fear or hope that anything he might say could affect the prosecution's approach to him on sentence, or the sentence imposed on him.

[71] As to the second matter, when Birch was called, the trial judge began the questioning of him by asking him to identify himself and then asking whether he had pleaded guilty to burglary by breaking while armed in company and assault occasioning bodily harm while armed and in company, and whether he had been dealt with for those matters, to all of which he agreed. It is not entirely clear why his Honour did so; this was not the equivalent of the situation in which, as a matter of fairness, the prosecution should clarify the position of a co-offender in giving evidence. However, had his Honour not done so, the prosecutor certainly would; and there was the advantage of making it clear from the outset that Birch had been dealt with, and had no reason to anticipate either advantage or disadvantage in giving his evidence.

[72] Other interventions are more concerning. Under cross-examination, Birch described seeing the appellant attacked by Mr Cummins and the door slammed on her legs. His Honour then asked these questions:

> "And you say you saw him attack her. What did you see?---I saw him shove her and, like, throw, sort of, like, a punch and, like, really attack her and shove her out.
>
> Consistent with a household that didn't want someone in their house?---That is consistent with that, yes, your Honour. Yeah."

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5 See *R v Boal* [1965] 1 QB 402, in which it was held that a co-accused who had pleaded guilty was not "charged with an offence actually within the consideration of the jury at the time" and thus was not a "person charged" within the meaning of a similar provision.

Later, after Birch said that he was glad he entered the property because he did not know what might have happened, his Honour intervened again:

> "What are you trying to infer there?---Well – okay, I---
>
> That Ms Gibb might have been successfully ejected from Mr Cummins' house?---Sure, you're right, your Honour, I'll take that – that statement back, yeah, because I'm definitely not glad that I was there that day, so, yeah. Absolutely."

[73] It would have better had the trial judge left it to the prosecutor to make the suggestions as to the nature of what was happening. The prosecutor subsequently took up the line of questioning, asking whether what Birch observed was consistent with Cummins trying to get the appellant out of the house. He agreed that it was consistent; Cummins was shoving the appellant "in the direction of out of the house". Asked whether he might have misread a situation in which Cummins was trying to get the appellant out of the house, Birch answered:

> "Well, I've not denied ever that I'd assaulted him and there was no good reason, really, to do that. Even with Margo at my feet and the door coming off the hinges, there was no need for me to do what I did. That's true. So I take responsibility for that."

In response to further questioning by the prosecutor, he confirmed that most of the appellant's body was in the garage, consistent again, he agreed, with Cummins trying to exclude her from the property.

[74] The subject was not, unfortunately, left there. In re-examination the appellant asked Birch why he entered the house, and he said he had gone in because he had heard what he thought to be a female yelling and screaming. He saw, on his entry, the appellant being pushed to the ground and the door being shut on her leg. The trial judge then said that he was having difficulty in understanding the course of events which had, no doubt, happened quickly. His Honour asked some questions about the appellant's position in the doorway, and then went on to ask this series of questions:

> "Right. And, from what you could see, Mr Cummins was trying to close the door; right?---He did close the door on her legs, yeah, and he was trying to shut the door. Yeah.
>
> Yes?---Yep.
>
> And so he was, from you [sic] what you could see, trying to exclude the two of you from his dwelling?---Absolutely. That's right, your Honour.
>
> Yes?---Yeah.
>
> So when you went in – well – sorry. Do you think that any of the things that you were doing to Mr Cummins were in defence of Ms Birch – Ms Gibb, rather, sorry?---Look, initially – initially when I heard Margot grimacing from that I was sparked a little bit. There was a little bit of anger in me, and I do know her medical history. When the – when the door came in, I really – I had a choice in that moment there where I was standing face to face with Rob, who was obviously angry, and I just acted on instinct.

> Right?---And I just attacked him. I – I ---
>
> And you – and, again, I understand you're saying that you acted on the instant, as it were. It wasn't sort of a thought-out, considered decision; right?---Yeah. I can't ---
>
> But is it also true that you could have picked up Ms Gibb and left?---That is true, your Honour. Yeah.
>
> And nothing about Mr Cummins at that point, at least, had indicated that he was likely to pursue you if you did that, because he was trying to close the door?---He was trying to close the door, and I'd seen him push Margot to the ground, and, to be honest, when the door came open and I was standing face to face with him, I do feel that I probably could have just left the premises, which is why I pled guilty to what I've done, to assaulting him.
>
> Yes?---So he was angry, though, and he did fight back and, you know ---
>
> Well, that's not really surprising, is it?---Yeah. No. I don't – I don't – you know, obviously---
>
> Yes. I'm just wondering whether your actions, then, in continuing to assault him, as you agree that you did ---?---Yep.
>
> --- were really in defence of Ms Gibb or is it just something that happened, you know?---Maybe initially in the first frame of it. After that no. But, yeah, maybe initially the strike.
>
> All right?---But after that, not really, no. It was just ---

[75] It is permissible for a trial judge to ask questions

> "designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself".[6]

And a judge may ask questions of a witness

> "not only to clarify his or her evidence, but also to test that evidence where the judge perceives that it may be untruthful or even inconsistent with other evidence".[7]

Miscarriages of justice may arise when questioning appears to be directed towards advancing the case for the prosecution or it is such as to give the jury the impression that the judge is aligned with the prosecution or is convinced of the accused's guilt.[8]

[76] The judge's questioning here contained elements of cross-examination and would have been better not undertaken. Birch had already agreed under cross-examination that what Cummins was doing was consistent with his trying to force the appellant out of the property and had conceded that his own assault on Cummins was unnecessary. These questions took matters no further; but they ran the risk of creating an impression that the trial judge was reinforcing the prosecution case. However, the questioning was not aggressive and did not in fact advance the Crown

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6 *R v Esposito* (1998) 45 NSWLR 442 at 472.
7 *R v Senior* [2001] QCA 346 at [36].
8 *R v Mawson* [1967] VR 205 at 207.

case. Nor was it suggestive of disbelief of Birch's evidence, as opposed to an attempt to tease it out.

[77] Another exchange of some concern occurred during cross-examination of Birch as to how the door came to be forced off its hinges. It did suggest disbelief, and came in response to Birch saying that Mr Cummins had been pushing hard on the door:

> "HIS HONOUR: So, let me get this straight: a man who you've conceded is a fair bit bigger than you, and we've heard estimates. We've seen him in this court. Heard estimates of being over 100 kilos. Is pushing on a door from the inside of the residence, in an apparent attempt to close that door, and the end result of that is the door ends up torn from its hinges and some feet inside the residence, in the opposite direction to which Mr Cummins was pushing?---Yes, your Honour.
>
> That's what's happened there?---Yes, your Honour. Her legs---
>
> Is this a rubber door that bounces back somehow, is it? Is that what's going on here, Mr Birch?---It definitely wasn't a – it definitely wasn't a Jarrah door. It was a lightweight door. Yet her leg did act as leverage as it came in. As the door came in, that's when I attacked him, which could have been the catalyst for the door to end – end up so far in the – in the house.
>
> It wouldn't be that you pushed it inside, would it?---That's not true. I can comfortably say that the door was – came off its hinges because Margo's leg acted as leverage, and she was on the ground. I can clearly say that. That's what happened."

[78] In *Michel v The Queen*,[9] Lord Brown set out the parameters of the trial judge's proper role at trial:

> "Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced."[10]

[79] In the passage set out above, the trial judge's questioning was sarcastic, ridiculing what Birch had to say about the dynamics of the door incident. Birch held his own, but the jury would have discerned a certain incredulity in his Honour's tone. However, while that tone was unfortunate, it did not concern any vital issue. The door was unquestionably broken, at a time when the appellant's leg was caught in it and Mr Cummins was trying to shut it. The question of who applied the greater

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9 [2010] 1 WLR 879.

10 At 889. This passage was cited with approval by the New South Wales Court of Appeal in *Royal Guardian Mortgage Management Pty Ltd v Nguyen* (2016) 332 ALR 128.

force (on the Crown case, Mr Cummins, to keep the intruders out; on the defence case, Birch, to get the door off the appellant's leg) was not really critical to either the Crown or the defence case.

[80] The overall question in relation to interventions is whether the trial has in consequence been rendered so unfair as to produce a miscarriage of justice. That is a question to be decided

> "…in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions".[11]

In the present case, the passages involving questions of Birch during cross-examination and re-examination are, as I have said, of concern, particularly that which involved ridiculing him. They were, in my view, unnecessary and undesirable, but they were not, in the context of the trial as a whole, of such proportions as to create a miscarriage of justice.

The revocation of the appellant's bail

[81] As already mentioned, the trial judge revoked the appellant's bail after her failure to go as directed in the afternoon to the Gold Coast University Hospital for examination and her failure to appear in court on time the following day. The appellant contended that this was unfair; it prejudiced her capacity to defend herself, impeding her in subpoenaing evidence, calling witnesses and tendering evidence. However, given the appellant's repeated late attendances and her disregard of the specific bail condition the judge had imposed, it was an appropriate exercise of the judge's power, in the interests of ensuring that the trial continued in a relatively orderly way. The revocation occurred on the seventh day of the trial. By that stage, the appellant had had ample time to organise what she needed for the trial, and it appears one of her sons was in court had she needed anything else brought in. (That is evident from the fact that immediately before addresses commenced he was excluded from the public gallery when there was a jury complaint that he was staring at individual members of the jury and taking notes.) No witness whom the appellant might have wished to subpoena and whose evidence was admissible was identified. The trial judge in fact ensured that Birch was available to give evidence for the defence by sentencing him on the day the appellant wished to call him. The revocation of the appellant's bail did not produce an unfair trial.

Admission of evidence

[82] The appellant raised a number of contentions, none of which had substance, about the admission of various items of evidence. The first was the CCTV footage, which she said was suspect; her thesis was that it had been edited to exclude footage of her and Birch arriving unarmed at the premises. This appears to have been largely founded on some evidence of a police officer, Senior Constable Bates, who initially agreed with a question put by the appellant on a voir dire, as to whether having watched the footage, he had seen her enter the property by lifting the garage door. He then corrected himself and said that he had got mixed up; what he had seen was Birch and the appellant leaving. The appellant relied on this as evidence that the footage had been tampered with, and asserted that it should not have been admitted. She also maintained that the DVR hard drive had not been appropriately preserved and unfairness was created by the fact that she had not been able to have it

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11 *Galea v Galea* (1990) 19 NSWLR 263 at 281.

independently examined. Her theory was that Ms Otto had somehow interfered with file creation dates for the footage. She also had a theory that Ms Otto's signature on a field property receipt provided on the handing over of the CCTV recording device was a forgery.

[83] The trial judge took evidence on the voir dire in relation to the hard drive, in relation to both its content and its continuity. In the course of it, the prosecutor put the Crown's position, that the item had been available for analysis to any expert the appellant nominated for the purpose. That had not taken place. The appellant's explanation was that her lawyers had failed to comply with her request to arrange the examination. In the course of the voir dire, Ms Otto identified the CCTV recording device and denied altering any file dates (and, later, in evidence identified the signature on the field property receipt as hers). A police officer confirmed that she had received the DVR and two discs containing footage from Ms Otto and lodged it with the property office at Coomera Police Station. Constable Bates gave evidence of transporting the DVR and discs to the electronic recording section for analysis by Ms Scibilia, the forensic video analyst. Ms Scibilia said that she had examined the DVR and downloaded the content of 7 March 2014 onto discs. When it became apparent that there was no footage of the arrival of the appellant and Mr Birch, she removed the hard drive and retrieved the data from it. She could not locate any such footage. It was likely that the motion sensor for the system had not been triggered; there were a number of things which might have interfered with it.

[84] The trial judge ruled that there was nothing in the evidence which created any doubt as to the integrity of the evidence on the CCTV, and he did not propose to delay the trial in order to allow the appellant any more opportunities to have the hard drive examined.

[85] The trial judge's ruling was correct. Nothing emerged in the evidence, either on the voir dire or before the jury, which cast any doubt on the genuineness or completeness of the footage downloaded by Ms Scibilia or suggested that the hard drive of the DVR had been interfered with in any way. The evidence was properly admitted.

[86] The appellant also contended that the evidence of Logan Otto, Mr Cummins and Mr Radic should not have been admitted because in her view it was inconsistent and unreliable, and in the case of Logan Otto, because some of what he had said in his original police interview was hearsay (notwithstanding that it was edited out for the trial). None of those arguments, plainly, provided any basis for concluding that there was any error in the admission of that evidence. The appellant argued, in addition, that Logan Otto's evidence was "coerced". Nothing in the evidence supported that argument. The appellant also advanced a surmise that the photographs taken by Mr Turner, the ambulance officer, were not authentic because some appeared to her to show the sunlight at the wrong angle had they been taken at the time of day claimed. There is nothing in this contention.

[87] Finally, the appellant submitted that the trial judge had made a wrong ruling on a voir dire as to the admissibility of the GRU bank account statement showing the transfer to her account of the $10,000 and bearing her handwritten notation. In fact, there was no such voir dire. The document was tendered through Mr Cummins, who was a signatory to the account and had given evidence about the funds transfer. No objection to its tender was taken by the barrister who was representing the

appellant at that stage of the trial. It seems likely that was because the prosecutor had indicated an intention to otherwise prove it through a police officer later in the trial; one infers that it had been found among the appellant's documents in the Commodore. At any rate, the trial judge made no ruling and made no error in admitting the statement.

The trial judge's directions

[88] The appellant contended that the trial judge had erred in failing to give directions in relation to two matters and had misdirected the jury in two respects. The first submission was that his Honour should have directed the jury that Mr Cummins had admitted to having committed a fraud in transferring the registration of the motorcycle. There was, however, no basis in the evidence on which he could, or should, have given such a direction; Mr Cummins had made no such admission.

[89] The next contention was that the trial judge erred in not directing the jury that the appellant had an honest claim of right to the keys and the motorcycle vest. Section 22(2) of the *Criminal Code* provides for excuse from criminal responsibility in certain circumstances:

> "But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

[90] But in my view the evidence was not such as to require a direction on a bona fide claim of right. The appellant was adamant that no keys were ever taken by her, so there was no occasion for the jury to consider the possibility of an honest, although mistaken, claim to them. The evidence as to the motorcycle vest was that the appellant had bought it to fit Mr Cummins, which fell somewhat short of a claim to ownership. More importantly, her explanation as to why it was taken was not that she believed it to be hers, but that Birch had picked it up to wipe his face; the implication being that its removal from the premises was inadvertent. There was no suggestion that it was taken away "in the exercise of an honest claim of right".

[91] The appellant asserted that the trial judge had misdirected the jury by referring to Mr Cummins' head wounds as "major", when the medical evidence was that they were minor head wounds. In fact, his Honour did not use that expression in summing up, although he did use it later in sentencing. In any case, the description given by the doctor who gave evidence was that this was a minor head injury, because it did not involve bleeding in the skull, not that the wounds themselves were to be regarded as minor.

[92] Finally, the appellant submitted that the trial judge erred by directing the jury that further opening the already partly opened garage door could constitute "breaking". In addition, she contended that it could not be a breaking because Ms Otto's evidence was that this was how people regularly entered the property. As to the second point, it was unnecessary for the Crown to prove the absence of consent by Ms Otto and Mr Cummins to the appellant's entry,[12] but in fact, it had done so. The first point has more substance.

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12 *R v Rigney* [1996] 1 Qd R 551.

[93] Section 419(1) of the *Criminal Code*, set out below, creates the offence of burglary. Also set out are those subsections containing aggravating circumstances with which the appellant was charged: gaining entry by a break, being armed with an offensive weapon and being in company.

> "**Burglary**
>
> (1) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits a crime.
>
> Maximum penalty—14 years imprisonment.
>
> (2) If the offender enters the dwelling by means of any break, he or she is liable to imprisonment for life.
>
> (3) If—
>
> …
>
> (b) the offender—
>
> …
>
> (ii) is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance; or
>
> (iii) is in company with 1 or more persons;
>
> …
>
> the offender is liable to imprisonment for life."

[94] Section 418(1) defines "break". A person who

> "…opens, by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window…or other thing, intended to close or cover an opening in a dwelling…is said to break the dwelling…"

Although that definition might appear wide enough to encompass the appellant's actions in lifting the already ajar garage door, a different conclusion has been reached in respect of an identical definition in s 400 of the *Criminal Code* (WA). In *Halley v The Crown*,[13] the Full Court of Western Australia noted the common law approach: in *R v Smith*[14] it had been held that a defendant who had opened wider a partly opened window could not be said to "break" a building. A similar approach, it was held, should be taken to the *Code* definition. The logic is not explicit, but it seems to be that one cannot open something which is already in an open state. *Halley* was followed by the Court of Criminal Appeal of Western Australia in *Galea v The Queen*;[15] there it was held that a man who further opened a door which he found ajar had not committed a breaking.

[95] The point does not appear to have been considered in any Queensland case, but there is no reason to conclude that the interpretation given to the same words in the

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13 (1938) 40 WALR 105.
14 (1827) 1 Mood CC 178.
15 [1989] 1 WAR 450.

appellate decisions from Western Australia is "plainly wrong".[16] The words used in s 418(1) should, accordingly, be given the same meaning: a person who pushes or lifts an already opened door or window does not "break" the relevant dwelling or premises. Consequently, the trial judge ought to have directed the jury that the aggravating circumstance of entry by means of a break was not made out.

[96] Nonetheless, the jury must have been satisfied that the appellant was guilty of entering with the aggravating circumstances that she was in company with another and armed, an offence of which she could have been found guilty on the indictment. Section 668F(2) of the *Code* gives the court the power to substitute a different verdict in a case such as this:

> "**Powers of Court in special cases**
>
> …
>
> (2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

The appropriate course here is to exercise that power and to substitute a verdict of guilty of burglary while armed and in company, without the aggravating circumstance of breaking.

The sentencing of the appellant

[97] The appellant was 47 years old when she committed the offences, and 50 years of age when she came to sentence. Her criminal history consisted of offences mostly dealt with summarily by way of fine or community service order. The exception was a series of charges of assault, wilful damage and dangerous operation of a vehicle, dealt within the District Court in 2000; but it too resulted in a non-custodial sentence. The summary offences consisted of two separate offences of obstructing a police officer in 2000 and 2001; two failures to appear in accordance with a bail undertaking in 2012 and 2013 respectively; a shoplifting offence in 2013; and a series of unlawful use, stealing and shoplifting charges, dealt with in 2015.

[98] The medical reports which the appellant had previously tendered were received on the sentence, as well as a referral to a neurologist recording that she was to be seen in the context of "a small three millimetre aneurism (asymptomatic)", and a radiologist's report with a finding that she had a meniscal tear in her right knee. The appellant also tendered two references by persons who had known her in her previous work as a real estate agent (she informed the judge that her licence had been suspended as a result of her being charged) and some documents in connection with her claim to have previously given assistance to police. They were placed in a sealed envelope, but it is relevant to note that they contained the appellant's handwritten

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16 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 152.

account of assistance she said she had given, unconfirmed by anyone in authority, as well as a report from her psychiatrist suggesting that this experience had contributed to her post-traumatic stress disorder. The latter seems, however, to have accepted the appellant's account at face value.

[99] The trial judge sentenced the appellant on the basis that she had entered Mr Cummins' premises and engaged in the argument about the motorcycle with him, drawing him out into the garage where Birch, who was waiting, immediately hit him in the head with the tyre iron. Cummins had tried to keep the two of them out by closing the door, which had been broken down with great force and the attack on him continued. He had suffered major wounds and the assault was accompanied by threats to kill. When he succumbed and said he would give them the keys, the appellant gave her approval for Birch to end the attack. The offences were extremely serious, representing a home invasion. The appellant was responsible for Birch's attack and was largely in control of it; she should receive a higher head sentence than Birch.

[100] His Honour took into account the medical reports tendered and accepted that the appellant suffered from what was described as a "suspected tiny aneurysm" which warranted specialist examination; that she had an injury to the cartilage in her knee; that she suffered from asthma; and that she had some symptoms of post-traumatic stress disorder of an unclear origin. Those features led to a conclusion that her time in custody would be more difficult than for an ordinary person, a circumstance which warranted an earlier eligibility for parole than otherwise would be the case. His Honour said that he accepted that the appellant had some work history, particularly in the real estate industry, and had undertaken a course with a view to becoming a life coach. He accepted, too, that there had been some co-operation with the authorities. On the other hand, unlike Birch, the appellant had not demonstrated any remorse. The appropriate sentence on each count was one of four and half years imprisonment with eligibility for parole after two years; but allowing for the 187 days the appellant had already served, the eligibility date was set at 18 months after the date of sentence.

Application for leave to appeal against sentence

[101] Substitution of a verdict which does not contain the aggravating circumstance of breaking necessitates resentencing on the burglary charge, a matter to which I shall return, but the sentence on the robbery count is unaffected by that result. In support of her argument that the sentence was manifestly excessive, the appellant relied on a number of sentencing decisions of the District Court. Five out of the six dated from around 18 to 20 years ago and involved charges of robbery or armed robbery with actual violence, resulting in sentences ranging from probation to three years and six months imprisonment partially suspended. None of them involved the element of being in company, a home invasion, or injury of any significance to the victim. They were neither factually comparable nor authoritative. A sixth case, *R v Sonter*,[17] was a decision of the Court of Appeal and involved two offences of burglary with actual violence, in one instance while armed and in company, as well other offences of burglary simpliciter, fraud and stealing. One of the victims sustained bruising and lacerations, but not, it seems, injuries as serious as Mr Cummins'. That appellant, who had pleaded guilty was sentenced to cumulative

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17 [2008] QCA 292.

periods of imprisonment of three years and two years and six months, with parole eligibility half-way; substantially longer than the appellant's sentence.

[102] The Crown relied on four decisions of the Court of Appeal, all involving offenders who had pleaded guilty: *R v Cockfield*;[18] *R v Blenkinsop*; *R v Blenkinsop*;[19] and *R v Leu; R v Togia*.[20] In *Cockfield*, the 22 year old applicant with two other young men barged into a house occupied by a group of young people and demanded drugs and money. The applicant took one of the occupants by the throat and, pretending to have a gun, threatened to shoot him if he did not hand over money. In the end, he and his companions stole two mobile phones before being physically pushed out the door. The applicant entered an early plea of guilty and gave statements to the police implicating his co-offenders. He had a relatively minor criminal history involving a number of summary charges, including some of assault, for which he was fined. He had good references, was hard working, was supporting a partner and a baby daughter and appeared to have rehabilitated himself. This court set aside a sentence of three and half years imprisonment suspended after six months on each count and substituted a sentence of two years imprisonment, suspended after three months with an operational period of two years on each count. But for his s 13A undertaking, the sentence would have been one of two and half years imprisonment suspended after nine months, with an operational period of two and half years. Significantly for comparative purposes, no-one was injured in that offending, and plainly enough, the appellant does not have that applicant's mitigating features of youth, rehabilitation, remorse and an early guilty plea.

[103] *Blenkinsop* concerned two brothers who were part of a home invasion. They were part of a group of four men who went at night to premises which, on their account, they believed to be occupied by a paedophile, with the intent of wreaking some vigilante justice, but also robbing their victim. They had the wrong premises, but nonetheless tied up the two male occupants, ransacked their unit and threatened them at various times with a baseball bat and a knife. The victims were terrorised but not physically injured. The older brother, Aaron Blenkinsop, was the ringleader and carried a sword. He threatened to return and harm the two men if they told anyone what happened, and when police arrived on the scene and apprehended the group, and one of the men identified him as the ringleader, once again threatened him. He was 23 years old, and had a criminal history with entries of dishonesty and, in particular, one of robbery with actual violence while armed and in company, which also involved a home invasion. His sentence, which was effectively one of six years and four months with a recommendation for release on parole after two years and 10 months, was not interfered with. The younger brother, Tony Blenkinsop, was 18. He played a minor role, moving one of the men from one room to another and at one stage removing the tape from his hands when he complained that they were numb. He had no criminal history, was working and had a wife and young family. His original sentence of four years imprisonment suspended after 12 months was set aside and a sentence of three years imprisonment, with a parole release date fixed after he had served nine months, was substituted. The appellant's conduct in the present case is closer in culpability to that of Aaron Blenkinsop.

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18 [2006] QCA 276.
19 [2007] QCA 181.
20 [2008] QCA 201.

[104] The third case, *Leu and Togia*, bears more resemblance in terms of level of seriousness to the present one. The two applicants in that case were brothers who had been exchanging threats with their drug dealer over whether one of them had stolen money or drugs from him. They went to his house, burst through the door and chased him into a bedroom. Leu was holding a vacuum cleaner pipe, Togia a wooden stake. They shouted at him demanding money and punched and kicked him. Togia hit him with the stake. He sustained contusions to his scalp and shoulder and an abrasion to his face with some scaring that would fade. In the course of the offence they smashed a fish tank on the premises and they stole some money and marijuana. Leu was 20 years old and had a previous conviction for armed robbery accompanied with personal violence; he had played a minor role in a street robbery and escaped with a sentence of probation and community service. Togia was 23 years old; his criminal history consisted of a fine for stealing. Both were sentenced to five years imprisonment, with an eligibility date for parole release set after three years. No explanation was given for deferring the eligibility date or for imposing the same sentence, notwithstanding that one brother had a relevant and recent conviction for a similar offence. The court set aside the sentence imposed and substituted a sentence of four and a half years imprisonment, with eligibility for parole after serving 16 months, in the case of Leu, the brother with the recent conviction, and a sentence of three and a half years imprisonment, with eligibility for release on parole after 12 months, in the case of Togia.

[105] A fourth case, *R v Miller*[21] involved again a home invasion, the relevant offences being burglary, deprivation of liberty and robbery in company with personal violence. The applicant punched a middle-aged man in the face as he opened his front door, continued to punch him and tied him up before stealing a number of items from his premises. The applicant was said to have a significant past criminal history. He was sentenced to five years and six months imprisonment on the burglary, robbery and deprivation of liberty offences and a further six months imprisonment cumulative for breach of bail. The court concluded that the sentences imposed other than for the deprivation of liberty were not manifestly excessive; but the maximum penalty for the deprivation of liberty charge was three years imprisonment, so the sentence on that offence was necessarily set aside and a lower sentence substituted.

[106] None of the Court of Appeal cases referred to, either by the appellant or the Crown, suggests that a head sentence of four and a half years was excessive for this offending which involved, as the trial judge observed, a home invasion and significant injury to its victim. Having gone to trial, the appellant could reasonably have expected no recommendation for parole at all, having to serve two years and three month before eligibility at the statutory halfway point. Instead, the trial judge fixed a parole eligibility date three months earlier than that, having regard principally to her health condition. The sentence was unquestionably within a proper exercise of discretion.

[107] In addition to the proposed appeal ground, that the sentence was manifestly excessive, the appellant suggested error on the trial judge's part in sentencing and also advanced a parity argument. She suggested that his Honour had not taken into account her medical condition, particularly her untreated brain aneurysm, or, although he knew she was born in Scotland, the risk of her being deported. And she

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21 [2015] QCA 94.

contended that the sentence was disproportionately severe relative to Mr Birch's sentence of four years imprisonment, suspended after 180 days already served.

[108] As to the first point, the trial judge clearly did take into account what was known of the appellant's medical condition. As to the second, the mere fact that the appellant was born in Scotland was irrelevant in the absence of any evidence as to her citizenship, and she did not suggest any prospect of deportation or resulting hardship. His Honour was not obliged to embark on an enquiry as to whether there might be some such prospect.

[109] As to the parity argument, the trial judge sentenced Birch, who was 34 years old at the time of the offences, on the basis that he had assisted the appellant in what amounted to a home invasion; that his intention on entering the dwelling was to assault Mr Cummins, to obtain the motorcycle. He had first assaulted Mr Cummins with the tyre brace in the garage and then pushed the door down with force when the latter resisted. He had assaulted Mr Cummins on numerous occasions, including hitting him multiple times in the head with a tyre brace, and pushing him as well. When Mr Cummins had pleaded with him to stop assaulting him, he had held a tyre lever over his head following him into his bedroom, grabbed the motorcycle vest and left with it. The appropriate range of sentence for that conduct was between three and five years.

[110] The trial judge accepted that Birch did not, in fact, know who owned the bike; hence the Crown's not persisting with the robbery charge against him. Birch had been under the influence of the appellant at the time of the offending. His plea of guilty was timely. He had a criminal history which was "moderately extensive", but consisted of "fairly low level property and drug offences" and, significantly, there were no entries for violence. His Honour accepted also that Mr Birch had demonstrated extensive and genuine remorse. After spending six months in custody, he had realised the evil of the drug ice, was no longer a user, and had, since his release, taken a very active part in an organisation which campaigned against the use of the drug. The judge accepted that Birch was gainfully employed and was trying to re-establish his relationship with a daughter. His Honour took into account the exceptional circumstances in the form of Birch's conduct since he had been released on bail two years previously, and the fact that he had also completed a period of six months pre-sentence imprisonment. These factors convinced his Honour to take what he described as the "exceptional course" of not requiring Birch to serve any further term of imprisonment.

[111] Birch's Queensland criminal history was not dissimilar to the appellant's. It consisted of some possession of utensils charges, a number of shoplifting and stealing offences, and some failures to appear and breaches of bail. It was more concentrated into a period of six years between 2010 and 2016 than the appellant's history, which featured a significant gap between 2001 and 2012. On the other hand, unlike the appellant, Birch had not been dealt with on indictment in Queensland for an offence of violence. However, counsel for the Crown brought to this Court's attention that although the trial judge had sentenced Birch on the basis that he did not have a previous history for offences of violence, it had subsequently been discovered that he had a history from Western Australia which included a 2004 offence of unlawful wounding, for which he was fined. (There was also a burglary offence in 2012, in respect of which he was placed on a community based order.)

[112] The parity principle requires a judge in sentencing to administer equal justice; that is to say, to sentence in such a way as to ensure that there is not a marked disparity between the sentences of co-offenders, such as to give rise to a "justifiable sense of grievance".[22] A judge, plainly enough, can only sentence on what is before him or her. So, for example, the fact that an accused might, after being sentenced, be able to point to some factual error which had rendered unduly favourable the basis on which a co-offender was sentenced would do nothing to show that there had been any error in sentencing. It is debatable whether the information that Birch in fact had a prior conviction for a violent offence some 12 years previously would have made any difference to the judge's sentence, because it is clear that his Honour was primarily giving weight to Birch's rehabilitation in deciding to give him immediate release. But the fact that there was something unknown to his Honour which might have influenced his sentence is, in any event, irrelevant to any argument on behalf of the appellant here.

[113] There was not, in fact, much difference between the head sentences imposed on the appellant and Birch; a matter of six months. That margin did not, in my view, really reflect the difference in culpability between the two, given that Birch was not convicted of robbery and the appellant was clearly the moving force behind what occurred. But the significant difference in sentence was in the time required to be served in actual custody; the appellant had 18 months longer to serve. That difference was entirely warranted, given that Birch had demonstrated, in his Honour's view, both remorse and very significant rehabilitation, while the appellant had manifested nothing of the sort.

Re-sentencing on the burglary charge

[114] It is necessary, however, to resentence the appellant on the burglary charge with the aggravating circumstances of being armed and in company. That offence carries life imprisonment, the same maximum penalty as entry with intent involving a breaking. It is implicit in the trial judge's finding that the appellant lured Mr Cummings to the garage where he was immediately assaulted by Birch that his Honour found that the entry was made with the intention of committing such an assault. The seriousness of that offence is very little diminished by the fact there was no breaking involved. I would impose a sentence of four years imprisonment on this count. There is, however, no reason to alter the parole eligibility date, which remains appropriate having regard to the four and half year sentence imposed in respect of the robbery count.

Orders

[115] Section 668F(2) says the court may substitute a different verdict "instead of allowing or dismissing the appeal". However, the High Court in *Zaburoni v The Queen*,[23] concluding that this Court should have acted under s 668F(2) to substitute a verdict, observed

> "The correct order for the Court of Appeal was to allow the appeal and substitute a verdict of guilty of the alternative offence and impose sentence for it".[24]

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22 *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1996) 189 CLR 295.
23 (2016) 256 CLR 482.
24 At 500.

The High Court then proceeded to make the orders it said should have been made, allowing the appeal and substituting a verdict of guilty of a lesser offence. With the benefit of that guidance, then, it would seem that, notwithstanding the phrase "instead of" used in s 668F(2), the appeal on count 1 should be allowed.

[116] I would:

1. allow the appeal against conviction on count 1, setting aside the verdict and substituting a verdict of guilty of burglary while armed and in company;

2. sentence the appellant to four years imprisonment on count 1, with a declaration that she has already served 829 days of that sentence in pre-sentence custody and fixing the parole eligibility date at 7 March 2018;

3. dismiss the appeal against conviction on count 2;

4. refuse leave to appeal against the sentence imposed on count 2.

[117] **GOTTERSON JA:** I agree with the orders proposed by Holmes CJ and with the reasons given by her Honour.

[118] **McMURDO JA:** I agree with Holmes CJ.