McKay v Bryant and Rhodes v Bryant [2017] NTSC 88

PARTIES:	MCKAY, Tyler v BRYANT, Anne Margaret AND RHODES, Jayke v BRYANT, Anne Margaret
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 11 of 2017 (21626399); LCA 12 of 2017 (21626410)
DELIVERED:	8 December 2017
HEARING DATES:	25 October 2017
JUDGMENT OF:	HILEY J
APPEAL FROM:	JUDGE SMITH

CATCHWORDS:

CRIMINAL LAW - APPEAL AGAINST CONVICTION - Notices of appeal – appeals against convictions on charges where one is laid by complaint and another on information – validity of single notice of appeal concerning both convictions

CRIMINAL LAW – APPEAL AGAINST CONVICTION - Trespass – no direct evidence of trespass – no stealing from within the motor vehicles upon which an inference of trespass can be based – reasonable hypotheses consistent with innocence – convictions quashed

INTERPRETATION - *Criminal Code* (NT) Part IIAA– no joint criminal enterprise provision other than s 43BG – no provision such as s 8 *Criminal Code* (NT) or s 11.2A *Criminal Code* (Cth)

INTERPRETATION - *Criminal Code* (NT) s 43BG– meanings of "aide" and "abet" – whether the appellants' conduct "in fact aided, abetted, counselled or procured the commission of the offence by the other person" - s 43BG(2)(a)) – whether the appellants had the intention required by s 43BG(3)

CRIMINAL LAW – APPEAL AGAINST CONVICTION - convictions unreasonable and not supported by the evidence - unsafe and unsatisfactory - evidence of accomplice - warnings concerning reliability of accomplice's evidence - warnings concerning inconsistencies and lies in relation to accomplice's evidence - warnings concerning corroboration - use of evidence only admissible against one co-accused

EVIDENCE - s 164 and 165 *Evidence (National Uniform Legislation) Act 2011* (NT) - corroboration no longer required – s 165 only applies to jury trials - use of evidence only admissible against one co-accused

Criminal Code (NT) s 8, s 12, s 43BG, s 43AA,
Criminal Code 1995 (Cth) s 11.2A
Evidence (National Uniform Legislation) Act 2011 (NT) s 191, 165
Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Act Bill 2010 (Cth)
Local Court (Criminal Procedure) Act (NT) s 163

AK v Western Australia [2008] HCA 8; 232 CLR 438, *Clayton v The Queen* [2006] HCA 58; 231 ALR 500, *Douglass v The Queen* [2012] HCA 34 *Fleming v The Queen* [1998] HCA 68; 197 CLR 250, *Jones v The Queen* (1997) 191 CLR 439, *M v The Queen* [1994] HCA 63; 181 CLR 487, *McAuliffe v The Queen* (1995) 183 CLR 108, MFA v R (2002) 213 CLR 606,

Miller v The Queen [2016] HCA 30; 90 ALJR 918, *Parker v The Queen* [2007] NTCCA 11, *W v R* [2014] NSWCCA 110, *Warford v Firth* [2017] NTSC 75, applied

Campbell v The Queen (2008) 73 NSWLR 272, *Conway v The Queen* [2002] HCA 2, 209 CLR 203, *Giorgiami v The Queen* (1985) 156 CLR 473, *Handlen v The Queen* [2011] HCA 51; 245 CLR 282, *Karui v Malogorski* [2011] NTSC 17, *R v Beck* [1990] 1 Qd R 30, *R v Johnson; Ex parte Attorney-General (Qld)* [2007] QCA 76, *R v Jones* (2006) 161 A Crim R 511, *R v Lam* [2008] VSCA 109; 185 A Crim R 453, *R v Russell* [1933] VLR 59, *R v Vinh Ngoc Phan* [2001] NSWCCA 29; 123 A Crim R 30, *R v Winner* (1995) 79 A Crim R 528, *The Queen v Dookheea* [2017] HCA 36, referred to

Chidiac v The Queen (1990) 171 CLR 432, *Hart v The Queen* [2000] WASCA 103, *R v Gibb and McKenzie* [1983] 2 VR 155; 7 A Crim R 385, distinguished

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REPRESENTATION:

Counsel:

Appellants:	A Abayasekara
Respondent:	L Hopkinson

Solicitors:

Appellants:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McKay v Bryant and Rhodes v Bryant [2017] NTSC 88
No. LCA11 of 2017 (21626399); LCA12 of 2017 (21626410)

BETWEEN:

TYLER MCKAY
Appellant

AND:

ANNE MARGARET BRYANT
Respondent

AND BETWEEN:

JAYKE RHODES
Appellant

AND:

ANNE MARGARET BRYANT
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 8 December 2017)

Introduction

[1] Tyler McKay (the **first appellant**) and Jayke Rhodes (the **second appellant**) were jointly charged in the Local Court with 113 charges relating to the damaging of, trespassing on and stealing from a number of cars which were parked in an underground carpark at 30 Parap Road,

Parap (**the carpark**) between 30 and 31 May 2016. The charges consisted of:

(a) 48 charges of criminal damage relating to 51 cars that were damaged;[1]

(b) 52 charges of trespass relating to 52 cars that were trespassed upon;

(c) 13 charges of stealing from 13 of those cars.

[2] An associated defendant, Phillip Jones-Garling, had also been jointly charged. He pleaded guilty to the offending on an earlier occasion and his matter was dealt with separately.

[3] On 21 February 2017, the appellants pleaded not guilty to all charges. The matter proceeded as a joint hearing on 21 February 2017, 1 March 2017 and 14 March 2017.

[4] On 14 March 2017 the Local Court found both appellants guilty of all charges. The first appellant appeals against all of those findings of guilty. The second appellant appeals against the findings of guilty on the criminal damage charges and 39 of the trespass charges.

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[1] The discrepancy between the number of charges and the number of cars damaged arises from the fact that three of the victims owned two cars each that were damaged and both cars were included in the one charge (counts 83, 88 and 128).

Notices of appeal

[5] On 7 April 2017 each appellant filed a notice of appeal. Each notice identified a single ground of appeal, namely that the finding of guilt was unsafe and unsatisfactory. On 22 September 2017 each appellant filed an amended notice of appeal.

[6] The amended notice of appeal filed by the second appellant (in LCA 12 of 2017) contained two grounds, namely that:

> 1. The findings of guilt in relation to 39 of the counts of trespass (as set out in the attached schedule)[2] were not supported by the evidence.
>
> 2. The findings of guilt in relation to all 48 counts of criminal damage (as set out in the attached schedule)[3] were not supported by the evidence having regard to the proper application of s 43BG of the *Criminal Code* (NT).

[7] The amended notice of appeal filed by the first appellant (in LCA 11 of 2017) contained the same two grounds, and included a third ground that the findings of guilt against the first appellant were unreasonable or cannot be supported having regard to a number of circumstances.

[8] In its Outline of Submissions the respondent objected to the validity of each notice of appeal on the basis that s 163 of the *Local Court*

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[2] These were counts 6, 33, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 81, 84, 86, 89, 91, 94, 97, 100, 103, 106, 109, 112, 115, 118, 120, 123, 126, 129, 131, 134, 137, 140, 143 and 146.

[3] These were counts 2, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, 65, 68, 71, 74, 77, 80, 83, 88, 93, 96, 99, 102, 105, 108, 111, 114,117, 122, 125, 128, 133, 136, 139, 142, 145, 148 and 151.

(Criminal Procedure) Act (NT) (***Local Court Act***) requires separate notices of appeal to be filed for every sentence or order appealed against.[4] The respondent contended that in this matter, it is preferable, and the *Local Court Act* requires, there must be separate notices in respect of the convictions for the charges on information and the convictions for the charges on complaint. The respondent cited the recent decision of Southwood J in *Warford v Firth*[5] where appeals from convictions for two aggravated assaults and appeals from convictions for breaches of a domestic violence order were joined in the same notice of appeal. A similar question is likely to be determined in another appeal presently before this Court.

[9] At the commencement of the appeals counsel for the appellants sought and was granted leave to file fresh notices of appeal, thus rendering it unnecessary for this question to be determined in these appeals.

[10] After the hearing of the appeal, counsel for the appellants sought and was granted leave to further amend the notice of appeal in LCA 11 of 2017 by adding an additional ground as follows:

> 4. The learned judge erred by failing to consider separately the guilt of the appellant on the basis only of evidence admissible against the appellant.

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4 Citing *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 47 NTR 8 and *Lawrie v Stokes* (1951) NTJ 66.

5 [2017] NTSC 75.

[11] Although the filing of the fresh notices of appeal, now four instead of two, has resulted in a renumbering of the grounds it is convenient to refer to and deal with the grounds using the original numbering. Accordingly I shall use the reference "Ground 1" to refer to the first of the two grounds set out in [6] above (the **trespass ground**) and "Ground 2" to refer to the second of the two grounds set out in [6] above (the **criminal damage ground**). I shall use the references "Ground 3" and "Ground 4" to refer respectively to the third ground described in [7] above and the additional ground in [10] above.

[12] Grounds 1 and 2 assume that the first appellant was present at the time of the offending.

[13] Grounds 3 and 4 are only raised in LCA 11 of 2017, namely the appeal brought by the first appellant. They concern the issue as to whether the Local Court could have been satisfied beyond reasonable doubt that the first appellant was present at the time of the offending by Jones-Garling and the second appellant.

Relevant background

Evidence at trial before the Local Court

[14] Agreed facts were tendered pursuant to s 191 of the *Evidence (National Uniform Legislation) Act 2011* (NT) (**UEA**). It was an agreed fact that in the early hours of the morning of 30 May 2016 a number of vehicles

in the carpark were damaged and that items were stolen from some of those vehicles. A table in the agreed facts (**the Table**) identified particular vehicles and their owners, the damage caused, the items stolen from particular vehicles and the corresponding charges. The Table shows that, in total, there were 51 cars that were damaged belonging to 48 separate owners and 13 of those owners had various items of property stolen from within their cars. In each case the damage comprised a smashed window, usually the driver's side window.

[15] Phillip Jones-Garling, an accomplice, was the primary source of evidence against the appellants. He had previously pleaded guilty. He gave evidence that it was the appellants who were with him and participated in the offending. During his evidence photographs were tendered that showed three people in the carpark at the time of the offending. He identified himself and the two appellants as the people depicted in the photographs.[6]

[16] Tendency evidence was admitted without objection in respect of the second appellant. That was evidence of prior occasions on which the second appellant damaged and stole from vehicles in carparks in Darwin. The tendency sought to be proved by that evidence was the tendency of the second appellant to act in a particular way, namely, to

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6 Transcript at 17.

"search and/or break the windows of vehicles in order to steal items within."

[17] The second appellant gave evidence in his own case denying his involvement in the offending. The first appellant did not call any evidence.

[18] The agreed facts also establish that:

(a) On 3 June 2016 police located the appellants along with the first appellant's girlfriend, Stephanie Pascoe, in a room at Capricornia Motel, Fannie Bay.

(b) Police located in a white Toyota sedan (NT CC-18-JU) a blue iPod nano which had been stolen from one of the vehicles at 30 Parap Road, Parap.

(c) Police searched the motel room and the residence of the first appellant and his girlfriend and no stolen items were located.

Submissions before Local Court

[19] The prosecutor and counsel for each appellant made comprehensive submissions about the reliability of the evidence of Jones-Garling, and in particular whether the Court could be satisfied beyond reasonable doubt that the appellants were the two people shown on the photographs and present in the carpark at the time of the offending.

This issue was the main, if not the only, focus of dispute (the **key issue**). Both defence counsel drew attention to various inconsistencies and alleged lies in Jones-Garling's evidence.

[20] Counsel for the second appellant relied heavily upon the second appellant's evidence which directly conflicted with Jones-Garling's evidence on the key issue. Counsel for the first appellant also reminded his Honour of the need for caution because of the potential unreliability of Jones-Garling's testimony and of the kind of warning suggested by s 165(1)(d) of the UEA.

[21] His Honour engaged in robust discussion with counsel about the inconsistencies and reliability of Jones-Garling's evidence. His Honour said that he would adjourn the matter before delivering his decision, noting that there were some evidentiary matters that required careful consideration, including the fact that the case was a circumstantial case which relies heavily on the evidence of a co-offender.

[22] He said, before adjourning to consider his decision:

> I obviously have to give myself warnings about that and carefully examine the evidence, particularly in circumstances where there are obvious demonstrated inconsistencies in that co-offender's evidence, but ultimately, I have to carefully determine whether those inconsistencies are of a kind that cause me such trouble that I wouldn't accept his evidence to the degree necessary to find the defendants guilty.

> Obviously if I've had no trouble with his evidence, then they are in deep trouble, but there is a significant body of material, given that he has given a record of interview, two separate statements, and evidence in chief and then been cross-examined. So arguably, there's five different sets of material to consider and compare as to whether the proposition put, effectively … that … he's a liar and we know he was there, but it seems that … before the Crown can get up, I've got to be satisfied that I can accept his evidence that the two people he was with was these two.
>
> I have already outlined some of the circumstantial matters that would cause one to, on the face of it, think [it] pretty likely that they were. But this is not a balance of probabilities question. This is a beyond reasonable doubt question and I go through that material carefully and give an appropriately reasonable decision.[7]

[23] Unfortunately none of the three counsel at trial made any distinction in their closing addresses between the different kinds of offending the subject of the charges, namely the stealing, trespass and criminal damage charges. The only issue was whether or not the two appellants were present at all. It seems to have been assumed that if they were present then they were guilty of all of the 113 charges. Unsurprisingly the primary focus of his Honour's consideration was that key issue.

[24] Needless to say His Honour was not called upon to, and did not, consider the evidence concerning the particular involvement of each accused in the offending now raised for the first time in grounds 1 and 2. Nor was it ever suggested that the evidence of an accomplice needs

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[7] Transcript at 115.

to be corroborated or that he should give himself an additional warning about the significance of Jones-Garling's inconsistencies and lies.

[25] After he had given his reasons and said that he was "satisfied beyond reasonable doubt of the guilt of each of the defendants in relation to all the matters" his Honour sought confirmation from counsel as to which particular charges his rulings applied to, in light of the fact that a number of the original 133 charges had previously been withdrawn. Counsel were given the opportunity to confirm that the charge numbers identified by the prosecutor matched up with the agreed facts. The matters were adjourned for a full plea hearing at some later date.

Ground 1 – 39 counts of trespass not supported by the evidence

[26] During the hearing of the appeal, counsel for the respondent conceded this ground. Counsel had previously conceded this ground in relation to count 120 because the Table that formed part of the agreed facts did not include any reference to that motor vehicle. Consequently there was no evidence before the Court in relation to that vehicle.

[27] The 39 counts that are the subject of this ground are counts 6, 33, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 81, 84, 86, 89, 91, 94, 97, 100, 103, 106, 109, 112, 115, 118, 120, 123, 126, 129, 131, 134, 137, 140, 143 and 146. Each of these counts relates to an individual car parked in the carpark within which the appellants were charged with

trespassing. The complaint on this ground is that the evidence, even if it is accepted, does not establish that the appellants trespassed on any of these 39 cars.

[28] It is common ground that the trespass that is the subject of each trespass count involved some physical entry into the motor vehicle, relevantly after one of its windows had been smashed, for the purposes of stealing something inside the vehicle.

[29] The distinction between these 39 counts and the remaining 13 counts of trespass,[8] which are not challenged in this ground, is that there was no associated evidence of stealing items from any of the cars that these 39 counts relate to. This is illustrated in the Table that formed part of the agreed facts.

[30] There is no complaint under this ground of appeal against the findings of guilt of those 13 trespass charges. That is so despite the absence of evidence as to which of the alleged co-offenders actually trespassed within which vehicle and stole from it. Each of them would be criminally liable for trespass and stealing under s 8 of the *Criminal Code* (NT) as part of the joint criminal enterprise found by the Court.

[31] Whilst an inference could readily be drawn beyond reasonable doubt that one or other of the co-offenders put some part of his body inside

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[8] Counts 3, 9, 12, 15, 18, 21, 24, 27, 30, 36, 78,149 and 152.

each of the 13 vehicles in order to steal from them and thereby committed trespass by doing so, such an inference cannot be drawn where nothing was stolen and there was no other evidence upon which to base such an inference. Explanations consistent with no trespass having occurred after a particular car window was broken include the possibility that the prospective thief could see through the broken window that there was nothing worth stealing and or simply decided not to trespass within that vehicle.

Ground 2 – 48 counts of criminal damage having regard to proper application of s 43BG of the Criminal Code

[32] This ground turns on the absence from Part IIAA of the *Criminal Code Act 1983* (NT) (***Criminal Code***) of joint criminal enterprise provisions such as those in s 8 of the *Criminal Code* and s 11.2A of the *Criminal Code 1995* (Cth). Unlike the trespass and stealing charges, the criminal damage charges are offences within the operation of Part IIAA of the *Criminal Code*. Accordingly the convictions of the appellants for these offences necessarily rely on the applicability or otherwise of s 43BG of the *Criminal Code*.

[33] The relevant parts of s 43BG provide as follows:

43BG Complicity and common purpose

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) the person's conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) the person's conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

Appellants' contentions

[34] The appellants contend that the evidence does not establish that they are criminally responsible for any of the 48 counts of criminal damage.

Those counts relate to 51 individual cars that were damaged in the car park as set out in the Agreed Facts.[9]

[35] Counsel for the appellants particularised the ground as follows:

(a) the evidence at trial was that Phillip Jones-Garling damaged all but one of the cars and there was no evidence identifying which of the two appellants damaged the remaining car;

(b) s 43BG of the *Criminal Code* is the only applicable provision that can extend criminal responsibility for damaging the cars to the appellants;

(c) there was no adequate evidentiary foundation to extend criminal responsibility for that offending to the appellants.

[36] The focus at the trial, by all parties, was whether the evidence of Jones-Garling ought to be accepted. The assumption, it seems, was that if that evidence was accepted, findings of guilt for both appellants inevitably followed. There were no submissions nor any explicit consideration by the learned judge as to whether, after accepting the evidence of Jones-Garling, the appellants were criminally responsible for each offence.

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[9] The discrepancy between the number of charges and the number of cars damaged arises from the fact that three of the victims owned two cars both of which were damaged. In each such case both cars were included in the one charge (counts 83, 88 and 128).

[37] This is of particular significance as each particular criminal act was charged individually[10] and the evidence of Jones-Garling did not, at any point, establish which of the two appellants did any specific act. Accordingly, the appellants could only be found guilty of any offence if the law extended criminal responsibility to them for each act.

[38] The evidence from Jones-Garling at trial was that there was an agreement that they would "do a job", namely stealing. But there was no evidence about them deciding to damage property, for example by smashing the windows of motor vehicles. It would have been possible to steal from cars without damaging them, for example if the car was unlocked or if it could otherwise be entered without causing damage.

[39] The assumption at trial, it seems, was that all three were jointly criminally responsible for the actions of the others. On analysis, whilst this assumption holds true in relation to the charges of trespass and stealing, it does not for the charges of criminal damage.

The relevant law

[40] The *Criminal Code* provides two regimes governing criminal responsibility. Part II of the *Criminal Code* contains the relevant provisions that once applied to all offences but now only apply to those

[10] There was a separate count for each act of criminal damage, trespass and stealing relating to each car, with the exception of the three criminal damage charges.

offences not governed by Part IIAA of the *Criminal Code*.[11] Part IIAA substantially enacted the criminal responsibility provisions of the Model Criminal Code. It applies to declared offences and those contained in Schedule l.[12] The offence of criminal damage is a Schedule 1 offence[13] and, accordingly, Part IIAA applies. Trespass and stealing are not Schedule 1 offences and Part II of the *Criminal Code* therefore applies to those offences.

[41] The extension of criminal responsibility to those who have not personally engaged in conduct constituting the offending is similarly governed by different provisions. In particular, and for present purposes, sections 8 (common purpose) and 12 (abettors and accessories) of the *Criminal Code* do not apply to Schedule 1 offences[14] which are instead governed by the provisions of Part IIA Division 4. The difference is significant, particularly in relation to the inapplicability of s 8.

[42] Section 8 of the *Criminal Code* is a particular formulation of the common law doctrine of "acting in concert" or "joint criminal

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11 *Criminal Code* s 43AA(3)(a).
12 *Criminal Code* s 43AA(1).
13 Criminal damage (s 241) is an offence contained with Part VII, Division 6 of the *Criminal Code* (NT), all of which are Schedule 1 provisions.
14 *Criminal Code* (NT) section 43AA(2).

enterprise" as expressed in *McAuliffe v The Queen*[15] and recently reaffirmed by the High Court in *Miller* v *The Queen*:[16]

> The law, as stated in *McAuliffe*, is that a joint criminal enterprise comes into being when two or more persons agree to commit a crime. The existence of the agreement need not be express and may be an inference from the parties' conduct. If the crime that is the object of the enterprise is committed while the agreement remains of foot, all the parties to the agreement are equally guilty, regardless of the part that each has played in the conduct that constitutes the actus reus. Each party is also guilty of any other crime ("the incidental crime") committed by a co-venturer that is within the scope of the agreement ("joint criminal enterprise" liability).

That doctrine has no counterpart in the Model Criminal Code provisions that are enacted in Part IIAA of the *Criminal Code*.[17]

[43] This is further evidenced by the insertion of s 11.2A, a "Joint Commission" provision, in 2010, into the then almost identical Commonwealth legislation. The Explanatory Memorandum to the amending Bill provided:

> The new joint commission provision addresses a gap in Part 2.4 of the Criminal Code by introducing into the Code the common law principle of "joint criminal enterprise" (sometimes referred to as offenders "acting in concert" in the commission of an offence).

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15 (1995) 183 CLR 108.

16 [2016] HCA 30; 90 ALJR 918 at 921.

17 See *R v Handlen* (2010) 247 FLR 261 at [52] - [54] which was referencing the then identical provisions of the *Criminal Code* (Cth) (a conclusion that was not argued against on appeal in *Handlen* v *The Queen* (2011) 245 CLR 282 at 296); and Ian Leader-Elliott, Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code— A Guide for Practitioners* (Australian Institute of Judicial Administration Incorporated, 2002) at pp 261-263 for the reasoning of why this is so.

> None of the existing grounds for extending criminal responsibility in Part 2.4 capture circumstances where there is an agreement to commit an offence, and the offence is committed under that agreement.
>
> Prior to the enactment of the Criminal Code, the prosecution would have relied upon the common law principle of joint criminal enterprise to capture offenders who acted together in the commission of an offence.[18]

[44] As Odgers observes,[19] s 11.2A "significantly extends ancillary liability beyond the existing s 11.2. There has been no similar amendment to the *Criminal Code*.

[45] For Schedule 1 offences, the relevant provision that applies is s 43BG (Complicity and common purpose) which gives accessorial liability to a person who aids, abets, counsels or procures the commission of an offence by another. This provision is akin to s 12 of the *Criminal Code*.

[46] The difference in criminal liability from that in cases of joint criminal enterprise was explained in *Clayton* v *The Queen*:[20]

> ... liability as an aider and abettor is grounded in the secondary party's contribution to another's crime. By contrast, in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture.
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> (emphasis added by me)

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18 *Explanatory Memorandum*, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010 *(Cth)*.

19 Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 3rd ed, 2015) at 190 [11.2A.100].

20 [2006] HCA 58; 231 ALR 500 at 505 [20], approved in *Miller v The Queen* [2016] HCA 30; 90 ALJR at 11 [34].

[47] The application of s 43BG therefore requires a different analysis. It requires the identification of a crime committed by a principal and a consideration of the contribution that the secondary party has made to the commission of that crime.

[48] The *Criminal Code* does not define the meaning of "aids, abets, counsels or procures the commission of an offence." It is accepted that the words are plainly intended to bear the same meaning as they do at common law.[21] It has been said that the phrase is descriptive of a single concept[22] in describing an accomplice who "was by his or her words or conduct doing something to bring about, or rendering more likely, through encouragement or assistance, its commission."[23]

[49] In *Principles of Federal Criminal Law,* Odgers summarises the traditional common law approach which is paraphrased below:[24]

(a) "aids": means to assist the principal to commit the offence. The assistance may only be very minor and it is not necessary that there be a causal link between the conduct constituting the aiding and the commission of the offence;

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21 *Campbell v The Queen* (2008) 73 NSWLR 272 at 298 [155]. See too *Handlen v The Queen* [2011] HCA 51; 245 CLR 282 at 288.

22 *R v Russell* [1933] VLR 59 at 67; *Giorgianni v The Queen* (1985) 156 CLR 473.

23 *R v Vinh Ngoc Phan* [2001] NSWCCA 29; 123 A Crim R 30 at 45 [69].

24 Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 3rd ed, 2015) at 172.

(b) "abets": is traditionally linked with "aids" and is understood to refer to encouragement of the principal at the time the offence is committed. The encouragement may be minor - in some circumstances, simply standing by may be regarded as encouragement.

(c) "counsels": various synonyms have been used by the courts, for example "urged", "advised", "solicited" to explain the concept but the prevailing view is that it is an ordinary English term which has its usual meaning. Traditionally the person who "counsels" is not present at the time the offence was committed.

(d) "procures": is traditionally linked with "counsels". The person who "procures" an offence is usually not present at the time it is committed. The prevailing view is that it is an ordinary English term which has its usual meaning.

[50] For the present case, s 43BG also provides two other requirements that must be established for a person to be guilty of the principal offence. First, the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence.[25] Second, the person must

[25] *Criminal Code* (NT) s 43BG(2)(a).

have intended that his or her conduct would aid, abet, counsel or procure the commission of the offence.[26]

The evidence of Phillip Jones-Garling

[51] The evidence of Jones-Garling in relation to the offences that were committed was given in his evidence-in-chief. He said that "all of us, me, Jayke and Tyler" decided to do a job. That job was stealing. They "went across the road to scope the place out" and one of them "jumped the fence". He wasn't sure who jumped the fence. He thinks he then opened the door that led to the underground carpark.

[52] Once in the carpark he smashed the windows of the cars with a bat that had a spark-plug attached to the end. He said the bat came from "Tyler's place". When asked whether there was any discussion between them as to who would do what he said that: "I would break the windows and the boys get everything else." He said "I smash, they grab." He said he saw them grab a few things from the cars and "they chucked them in" a bag that he had. Charger cords and phones were taken from the cars. He did not smash a particular Subaru as it was his cousin's. He told them not to smash it. One of them smashed it but he didn't see who.

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[26] *Criminal Code* (NT) s 43BG(3)(a).

[53] He said that when they finished they went back to Tyler's apartment and sat on the couch. They counted up the coins which added up to "108 bucks". Tyler went up to his bedroom, Jayke sat on a chair/couch and he went to sleep.

[54] In relation to the charges of criminal damage, the evidence of Jones-Garling was that he alone was personally responsible for damaging 48 of the 49 cars and was therefore the principal. In relation to the 49th car, he could not identify which of the two appellants caused the damage and therefore could not identify the principal. Accordingly, in relation to all 49 charges, the appellants could only be found guilty if they were captured by section 43BG.

Application of section 43BG to the present case.

[55] In the instant case there is no dispute that the principal offence of damaging the cars was committed. The question is whether the appellants aided, abetted, counselled or procured that offending.

[56] The evidence of Jones-Garling establishes that there was a plan between him and the two appellants which involved Jones-Garling damaging cars and the two appellants stealing items. Both appellants were present at the time that Jones-Garling damaged the cars and had full knowledge that that was what he was going to do. The purpose of damaging the cars was so that they could steal items from the cars.

[57] It is important to note that, unlike in the case of joint criminal enterprise, an agreement and commonality of purpose are not elements of the analysis under section 43BG.[27] The analysis rather involves consideration of the evidence, as to whether it sufficiently establishes that the appellants, by their words or conduct did in fact aid, abet, counsel or procure the damaging of the cars by Jones-Garling.

[58] In *R v Lam* the Supreme Court of Victoria (Court of Appeal) said, at [92]:[28]

> The culpability which attracts the operation of the criminal law to an individual designated as an aider and abettor under those principles arises from the fact of his or her presence at the time that the crime is committed and behaviour whilst there and not by reason of any earlier agreement or arrangement with the perpetrator with respect to it. That situation is separately addressed. Whatever uncertainty may exist with respect to the limits of accessorial liability, it is crystal clear that simply being present at the scene of a crime being committed by another is insufficient to render an individual also guilty. Further, it is not enough that the person alleged to be aiding and abetting is present by reason of curiosity, a high level of interest or even of a strong approval of the principal's conduct. The justification for rendering the individual liable arises from the contribution that he or she intentionally makes to the commission of the crime. This, of course, can take different forms and these are encompassed by the broad descriptive notions of counselling, procuring, assisting or encouraging the principal offender. It is apparent that quite different questions will be thrown up according to the type of contribution alleged and the circumstances surrounding the particular offence. But whatever the form of contribution, in order to become a party to or participant in the commission of a crime by another, an aider and abettor must do something of a kind that can be reasonably

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[27] See, for example, *Giorgiami v The Queen* (1985) 156 CLR 473 at 493 per Mason J.
[28] [2008] VSCA 109; 185 A Crim R 453.

> seen as intentionally adopting and contributing to what is taking place in his presence. In this sense, the aider and abettor becomes linked in purpose with the principal actor.

[59] Whilst mere presence at the scene will not ordinarily result in criminal liability, in some circumstances, presence at the scene can in fact aid or abet the commission of an offence. In *R v Beck*[29] Macrossan CJ said, at 37:

> Proof of guilt of the crime of aiding will not ordinarily be established by mere presence if no tell-tale acts are performed by the alleged aider but the intention behind and the effect of the presence of the additional person at the scene may be established by other evidence from which it is possible to say that a case of intentional encouragement or support of the principal offender is made out.

[60] In *R* v *Johnson; Ex parte Attorney-General (Qld)* (***R v Johnston***)[30] the above passage in *R v Beck* was quoted and explained by Holmes AJ, at [48]:

> That passage emphasises three things: (1) that proof of mere presence at the scene of the offence will not suffice; (2) that the prosecution must establish that the intention behind the presence is to encourage; and (3) that the prosecution must establish that the effect of the presence is to encourage.

[61] Critically, for present purposes, the prosecution must establish on the evidence that the appellants did in fact aid and abet Jones-Garling and that they intended to do so.

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29 [1990] 1 Qd R 30.
30 [2007] QCA 76.

[62] In the present case, the evidence does not establish this. There is an absence of evidence:

(a) of whose idea it was that Jones-Garling damage the windows;

(b) of any words that were said by any person at any time before, during or after the offending;

(c) that either appellant said any words of encouragement to Jones-Garling to damage the windows;

(d) that by their words or conduct, the appellants intended to encourage Jones-Garling to break the windows; and

(e) that by their words or conduct, the appellants did in fact encourage Jones-Garling to break the windows.

[63] Although one could speculate, for example, that Jones-Garling was emboldened by the presence of the appellants or in some other way they aided or abetted the commission of the offences, that is mere conjecture and does not have any evidentiary basis. Accordingly, criminal liability for damaging the car windows cannot be extended to the appellants.

[64] During oral submissions counsel pointed out that by smashing car windows Jones-Garling was clearly aiding and abetting the appellants in their criminal activities of trespassing and stealing. However that

does not imply that they were aiding and abetting him in relation to his criminal conduct of smashing the windows. Counsel also pointed out that although Jones-Garling gave evidence he did not suggest that either of the appellants did anything to assist or encourage him in any way when he was smashing the windows.

Respondent's contentions

[65] Counsel for the respondent did not challenge or add to the first appellant's counsel's submissions concerning the relevant legal principles. Rather, counsel pointed out that s 43BG extends criminal liability to a person who aids, abets, counsels or procures the commission of an offence by another person.

[66] Counsel contended that each of the appellants contributed to the commission of the criminal damage offences by:

(a) being involved in the decision to go across the road to steal;

(b) accompanying Jones-Garling across the road;

(c) being involved in scoping the place out;

(d) being present on the understanding Jones-Garling would break the windows and the appellants would grab things from the cars and put them in bags;

(e) actually taking items from inside the cars that had been damaged thus encouraging Jones-Garling to continue damaging cars; and

(f) wearing clothing designed to conceal his identity thus encouraging Jones-Garling to execute the plan.

[67] Counsel contended that the first appellant also contributed to the commission of the criminal damage by permitting Jones-Garling to take from his apartment the bat which Jones-Garling used to smash the windows.

Consideration

[68] For the most part I agree with the outline of the relevant legal principles provided by counsel for the first appellant set out in [40] - [50] above.

[69] However the fault requirements in s 43BG(3) also contemplate the principal offender committing an offence other than the particular offence which the accused intended.[31] It would be sufficient that the accused intended that his conduct would aid, abet, counsel or procure the commission of "any offence … of the type" the other person

[31] C.f. [50] above.

committed,[32] or some other offence if he was reckless about the principal offender committing such other offence.[33]

[70] It is also important to note that many of the authorities referred to, such as *R v Lam*, *R v Beck* and *R v Johnson* concern aid and abet provisions more analogous to s 12 of the *Criminal Code*, rather than to s 43BG (and s 11.2 of the *Criminal Cod*e (Cth)). Although the primary focus of such cases concerns the intent of the accused (cf s 43BG(3)) the third element identified by Holmes JA in *R v Johnson* was the need for the prosecution to show that the effect of the accused's presence was to encourage.

[71] Also relevant are the following observations by the High Court in *Handlen v The Queen* at [6]:[34]

> The words "aids", "abets", "counsels" and "procures" are not defined in the Code. They have a long history in the law of complicity and are to be understood as having their established legal meaning. Each is used to convey the concept of <u>conduct that brings about or makes more likely the commission of an offence</u> [footnotes omitted].
>
> (emphasis added by me)

[72] I do consider that there was evidence sufficient for the Local Court to be satisfied beyond reasonable doubt that the appellants intended that their conduct would aid, abet and or procure the criminal damage

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32 S 43BG(3)(a).
33 S 43BG(3)(b).
34 [2011] HCA 51; 245 CLR 282 at 288 [6].

caused by Jones-Garling. That they had such an intention flows from a number of the surrounding circumstances. These include their joint decision to "do a job", namely to steal from motor vehicles in the car park, disguising themselves, crossing the road, "scoping the place out", entering the car park at a time early in the morning when no one else would be likely to be nearby and stealing things from vehicles after Jones-Garling had broken the windows. I consider that s 43BG(3) was satisfied.

[73] The real question however is whether s 43BG(2) was satisfied beyond reasonable doubt.

[74] Most of the facts relied upon by the respondent, and listed in [66] above, only go to support the inference concerning the appellants' intent, for the purposes of s 43BG(3). There was no evidence that Jones-Garling was encouraged to continue damaging cars after or by the appellants taking items from inside cars that had been damaged (cf [66](e) above) or that the first appellant permitted the bat with a spark plug on the end to be taken from his apartment or even knew about the bat (cf [67]).

[75] There was no evidence that directly implicated a particular appellant in any particular offending. Whilst it is likely that both of the appellants were involved in the trespassing and stealing, and one of them was

responsible for damaging the Subaru that belonged to Jones-Garling's cousin, the only evidence of either of them having anything to do with the criminal damage was the mere fact that they were there at the time.

[76] In some cases the mere presence of an accused when a co-accused is committing an offence may be sufficient encouragement and assisting for that offence to be committed and thus fall within the scope of aiding or abetting. Obvious and common examples would be; where a single victim is being assaulted by the primary offender, or where the sole function of the accused is to provide warning to others in his gang who are committing a crime such as a robbery.

[77] The situation is not so clear in a case such as the present, where the crime of criminal damage could have been performed without any assistance or encouragement from anyone else.

[78] With the exception of the Subaru, all of the criminal damage was done by Jones-Garling without any assistance from anyone else. I consider that there is a real doubt as to whether any of the conduct of either of the appellants "in fact aided, abetted, counselled or procured" the damaging of the cars by Jones-Garling. I do not consider that the Local Court could have been satisfied beyond reasonable doubt that the requirement in s 43BG(2)(a) was met.

[79] I uphold this ground of appeal.

Grounds 3 & 4 - findings of guilt unreasonable and not supported by the evidence (Ground 3) and failure to consider separately the guilt of the first appellant on the basis of evidence admissible only against him (Ground 4) - LCA 11 of 2017 only

[80] By Ground 3 the first appellant contends that the findings of his guilt were unreasonable or cannot be supported having regard to the evidence in that:

3.1 The learned judge, acting reasonably, should have entertained a reasonable doubt as to the guilt of the appellant because:

3.1.1 The case against the appellant relied principally on the evidence of an accomplice, Phillip Jones-Garling, which was substantially uncorroborated;

3.1.2 Phillip Jones-Garling admitted under oath to lying to police in his:

a. electronic record of interview conducted on 31 May 2016; and

b. first statutory declaration dated 31 May 2016.

and admitted to doing so in circumstances where he knew that it was an offence to do so.

3.1.3 The evidence of Phillip Jones-Garling was inconsistent in a number of respects and, in some cases, was plainly untrue;

3.2 The learned judge made an error of law by failing to give himself a warning in addition to the accomplice warning

that, apart from being dangerous to convict the appellant by relying on the uncorroborated evidence of Phillip Jones-Garling because he was an accomplice, it was additionally dangerous to convict the appellant by relying on the evidence of Phillip Jones-Garling because he was a self-confessed liar;

3.3 The learned judge made an error of law by impermissibly using evidence that was admissible against the second appellant only or, in the alternative, by failing to give himself an appropriate warning in relation to the use that he could make of that evidence as against the first appellant.

[81] Counsel for the first appellant contended that the findings of guilt made in relation to the first appellant were unreasonable and not supported having regard to the evidence due to a number of factors particularly relating to the evidence of the accomplice, Phillip Jones-Garling. As already noted, the fundamental issue involved in Grounds 3 and 4 was the Local Court's finding that the first appellant was present in the car park at the time of the offending.

[82] It was not in dispute on the first appellant's case that he and the second appellant were with Jones-Garling on the night prior to the offences being committed and that they were also with him on the morning after. The issue at trial was whether the first appellant was one of the persons in the carpark who committed the offences. Jones-Garling gave evidence at trial and provided the only direct evidence of that fact.

Relevant principles

[83] The principles concerning challenges to a guilty verdict on the basis that a decision was unreasonable and could not be supported by the evidence are well established. The question a court of appeal must ask itself is whether, notwithstanding that there is evidence to sustain a verdict, it "thinks that upon the whole of the evidence it was open to the [trier of fact] to be satisfied beyond reasonable doubt that the accused was guilty."[35]

[84] In *M v The Queen*[36] the plurality of the High Court said, at 494-5:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

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35 *M v The Queen* [1994] HCA 63; 181 CLR 487.
36 [1994] HCA 63; 181 CLR 487.

[85] As Southwood J recently pointed out in *Warford v Firth*[37] those principles have been applied by appellate courts on appeal from courts of summary jurisdiction[38] and to cases of trial by judge alone, even if the appeal provisions under the relevant statute did not specifically provide, as a ground, that the decision was unreasonable and could not be supported by the evidence.[39] They have been subsequently affirmed and applied by the High Court in *Jones v The Queen*[40] and *MFA v R*[41] and by the Court of Criminal Appeal of the Northern Territory in *Parker v The Queen*.[42]

[86] As Southwood J said[43] the question which must be determined is one of fact, to be resolved by the appellate court making its own independent assessment of the evidence.[44] Notwithstanding that there is evidence upon which a trial judge might have convicted the appellant, the appellate court must nevertheless determine whether it would be dangerous in all the circumstances to allow the verdict to stand.

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37 [2017] NTSC 75 at [9].
38 *Karui v Malogorski* [2011] NTSC 17. See too *Wurramarba v Langdon* [2017] NTSC 5 at [43] - [44] per Barr J; *Ashley* v *Nalder* [2007] NTSC 23 at [3] per Martin (BR) CJ; and *Campbell* v *Gokel* [2003] NTSC 81 at [44] per Thomas J.
39 *Douglass v The Queen* [2012] HCA 34; 86 ALJR 1086.
40 (1997) 191 CLR 439.
41 (2002) 213 CLR 606.
42 [2007] NTCCA 11.
43 *Warford v Firth* [2017] NTSC 75 at [10].
44 *M v The Queen* [1994] HCA 63; 181 CLR 487.

[87] In *Libke v The Queen*,[45] Hayne J expressed the question as follows, at [113]:

> [T]he question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt.[46] It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.
>
> (emphasis in original)

[88] More recently, in *The Queen v Dookheea*,[47] the High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ) stated, at [39]:

> ...a reasonable doubt is not just any doubt that the members of a jury as a reasonable jury might entertain, but is rather what a reasonable jury considers to be reasonable doubt.

[89] It is relevant to add that a judge trying a matter alone is not required to record every consideration which has been taken into account in reaching a determination of guilt, nor is the judge required to expressly refer to all the matters that would need to be stated to a jury.[48] However he or she must include a statement of the principles of law

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45 [2007] HCA 30, 230 CLR 559.
46 *M v The Queen* (1994) 181 CLR 487 at 492-493.
47 [2017] HCA 36.
48 See for example *R v Winner* (1995) 79 A Crim R 528 at 531 (Kirby ACJ).

and expose a reasoning process that shows, at least by implication, how those principles were applied.[49]

The evidence

The evidence of Phillip Jones-Garling

[90] Phillip Jones-Garling was arrested on 31 May 2016, the day after the offending. On 31 May 2016 he participated in an electronic record of interview with police (**EROI**)[50] in which he made some admissions to the offending and named both appellants as being involved in the offending. Later that day he signed and swore a written statement to police (the **first statement**) also implicating the appellants. On 7 December 2016 he gave a second written statement to police (the **second statement**) which also implicated the appellants.

[91] At the trial of the two appellants, on 21 February 2017, Jones-Garling's evidence in chief was relatively brief and not particularly detailed. He maintained that it was the two appellants who committed the crimes with him.

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49 *Fleming v The Queen* [1998] HCA 68; 197 CLR 250 at 263 [30]; *AK v Western Australia* [2008] HCA 8; 232 CLR 438 at 445-446 [16], 453 [44], 454 [48], 467-468 [85], 480-481 [107], *Douglass v The Queen* [2012] HCA 34; 86 ALJR 1086 at 1088-1089 [8]; *W v R* [2014] NSWCCA 110 at [110].

50 Exhibit D1 tendered at T 57.

[92] He said that on 29 May 2016 he, Jayke (Rhodes) and Stephanie Pascoe, had moved some boxes to "Tyler's mum's house" in Parap.[51] After sunset:

> We were chilling at Tyler's and Steph's place and then Tyler scored some greens of this woman. And, they had an argument about it, because he originally couldn't pay for it and at the end we all had a smoke and then later on … between midnight and 4 o'clock we decided we went across the road to do a job.
>
> Now, you said, "we decided". Do you remember whose idea that was? --- Not too sure whose idea it was.
>
> Okay. But when you say "we decided to do a job" who is it you're talking about? --- All of us, me, Jayke and Tyler.
>
> Okay. And you say you've decided to go across the road for a job. Was there anything else said about what that job might be? --- (inaudible) stealing
>
> Okay. And so after you've had that conversation, what have you done next? --- Well we've gone across the road to scope the place out and jumped the fence and then one of us would have jumped the fence and then opened the door. It wasn't alarmed, so we just walked in, looked around a bit, walked in, and then down to the fire escape and opened the door there and went down there into the underground car park.

[93] He was then asked about what happened in the car park:

> So you are downstairs in the car park and what have you done after that? --- Started breaking in, smashing windows.
>
> How did you do that? --- He got a bat and spark plug on the end.

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[51] Transcript at 12 – 14.

> A little bat with a spark plug on the end? Who had that? --- Me.
>
> And where did it come from? --- Tyler's place.

[94] He was then asked what each of them were wearing. He said he was wearing a singlet and a pair of shorts, and he had socks on his hands and a T-shirt over his face. Tyler was wearing a T-shirt, jeans, balaclava and a pair of gloves on his hands. Jayke was wearing a green mask and boots.

[95] He was then asked more about what they did:

> So while you were down there, you said that you were breaking into cars. Can you just be a bit more specific about how that went down? Was there any discussion between you as to who could do what? --- (Inaudible) I'd break the windows and the boys get everything else.
>
> And you said before you were carrying the bat, is that right? --- Yeah.
>
> So I take it you used that to …? --- I used it to smash the windows.
>
> And was all this happening together or separate. I mean was it a case that you smashed and they jump straight in, how does it happen? --- I smash, they grab.
>
> And after, you say "they grab", did you see them get anything from the cars? --- Yeah, a few things, but they just chuck them in the bags and then I had a few bags I needed to carry as well.

> Okay. You spoke about they chucked it in the bags, do you remember who had a bag? --- I had a bag and I think I was the only one that had a bag.
>
> … you say "they chucked things in the bag" did you know at that point what had been taken from the cars? --- (Inaudible) charger cord and (inaudible) phones.

[96] He said that he recognised one of the cars in the carpark. It was a Subaru that belonged to his cousin. He yelled out and told the other two men not to smash that car because it was his cousin's car. However the window did get smashed but he did not see who did it.

[97] After they had finished they left the car park through another fire escape door, went "in the bushes for a bit and then behind the units and straight into Tyler's place." They sat on a couch and counted up the coins. He said he remembers Tyler going up to his bedroom and Jayke sitting down on the couch. He fell asleep on the couch about 20 minutes after they got back.

[98] He woke up at about 9 o'clock in the morning and asked Tyler if they could go and get some cigarettes. Tyler gave him some "synthetic", which was a drug called Kronic. He had some of that and then had a seizure. An ambulance attended and took him to hospital.

[99] The prosecutor showed him a number of photographs taken in the car park and he identified himself and the two appellants. The three of

them were wearing clothing and other items of the kind that he had previously described in his evidence.

[100] He was cross-examined at some length, particularly in relation to inconsistencies between what he had said to the police on 31 May in the EROI and the first statement, and what he said some time later, in his second statement on 7 December 2016 and in his evidence on 21 February 2017.

Inconsistences and lies

[101] Counsel for the first appellant referred to a number of Jones-Garling's answers which, counsel contends, were inconsistent with other parts of his evidence and in some instances lies.

[102] Counsel asserted the following inconsistencies:

(a) In his evidence Jones-Garling said that he stayed overnight at the hospital but in his second statement he said he was discharged on the same day as his admission.[52]

(b) The written statements contained different accounts of the events leading up to the offending. In his first statement he gave an account of catching a bus to Parap at 10 o'clock, going to a park to meet a girl who never showed up, drinking rum in the park, the appellants arriving at the park, going for a walk with the

[52] Transcript at 20 – 25.

appellants and then waking up in the carpark. In the second statement he gave an account of attending the first appellant's house and spending time there before going to the carpark to commit the offences.[53]

(c) In his evidence he said that he gave his first statement before his interview with police[54] which was inconsistent with an agreed fact at trial.

(d) In his evidence he said that when police came to arrest him on 31 May 2016 they told him that they knew that the first and second appellant were involved in the offending,[55] which was inconsistent with an agreed fact at trial.

(e) In his evidence he said that when he was in hospital (prior to his arrest and interview) he saw the appellants and himself on the news,[56] which was inconsistent with an agreed fact at trial.[57]

(f) In examination-in-chief, he said that when he returned from committing the offences he did not see Stephanie Pascoe, the first appellant's girlfriend.[58] This was inconsistent with his second

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53 Transcript at 33-37.
54 Transcript at 28-30.
55 Transcript at 28-30.
56 Transcript at 36.
57 Transcript at 56.7.
58 Transcript at 15.17-16.1.

statement.[59] When he was cross-examined about this his evidence became uncertain and contradictory.[60]

(g) In his interview on 31 May 2016, a day after the offending, he thought that Jayke was wearing the balaclava and Tyler the mask. In his second statement it was the other way around.[61]

[103] I pause here to note that:

(a) The evidence referred to in paragraphs (a), (c), (d) and (e) of [102] above was adduced during cross-examination.

(b) In relation to paragraph (f) he initially said he was "not too sure" whether he saw Stephanie when they got back. However he did say "no" in response to the next question: "But you didn't see her?"

(c) He said that when he made the first statement he was trying to protect the second appellant. Presumably this was also the case when he participated in the EROI the same day.

(d) He made the second statement after he had pleaded guilty and been sentenced in relation to his part in the offending.

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23 Transcript at 36.
60 Transcript at 36.
61 Transcript at 45.

[104] Counsel also submitted that when Jones-Garling was giving evidence he admitted that some of the inconsistencies in his account were as a result of deliberate lies. During cross-examination he admitted that he lied in his first statement because he was trying to help the second appellant.[62] He was later questioned about some specific parts of his first statement relating to the things that happened prior to the offending. He agreed that these were lies.[63] He also agreed that similar things he said in his interview with police were lies.[64] Furthermore, he admitted that when he signed his statements he knew that it was an offence to lie and that he could get in trouble if he did.[65]

The evidence of the second appellant

[105] The second appellant gave evidence in his own case. He denied any involvement in the offending. He said that on the day of the offending he drove with Jones-Garling to Bunnings and then to the old house before taking some things to the new house. He said that he smoked cannabis a lot and did so on that night. He said that Jones-Garling asked if a person named Nathaniel Genge could come over and, when this was refused, Jones-Garling said he would meet up with him later. He said that Jones-Garling left not long after that and came back to the house the next morning as the sun was rising. He said that Jones-

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62 Transcript at 24.2, 25, 33.6.
63 Transcript at 34-35.
64 Transcript at 46.2-5.
65 Transcript at 24.3, 26.1.

Garling then smoked some synthetic cannabis and he had a seizure and an ambulance was called.

[106] In cross-examination he said that he had been smoking cannabis daily for three weeks and that he spent his Centrelink money on it. He said that he met Jones-Garling because he wanted to do a "deal" which seemed to involve drugs. He said that he had last seen Nathaniel Genge in Queensland in 2013. He said that he went to the Capricornia Motel on either the night before or the morning of his arrest. He went there with Tyler and Steph and one of them paid for the room. He went there because "everything erupted on the media" and to avoid being arrested by police. He was asked about his previous offences that were admitted for a tendency purpose and said that on other occasions he had committed similar offences for money, food and necessities.

The judge's conclusions

[107] The judge considered the evidence of Jones-Garling in some detail. He considered that some of the inconsistencies in the evidence were of little consequence. He referred to some cross examination "about what appears to be a really reasonably significant difference between the story that he gave in the record of interview and the written statement that he made on 31 May last year and the subsequent statement he made on 7 December last year."

[108] In relation to Jones-Garling's explanation that he was initially trying to help the second appellant, the judge said:[66]

> He says that he was, at the time, trying to help Jayke. He doesn't seem to suggest he was doing anything to try to help Tyler McKay. It's difficult to see exactly how they could be helped, but … It may have been that given the story he was telling, he was trying to leave enough vagueness there for there to be an escape hatch. He did appear to tell some story about not being aware of what was going on, and coming to in the underground car park.
>
> So it's pretty clear that he was at least minimising his involvement and perhaps the involvement of his friends on 31 May, but given that it is clear that the police had material that put him squarely in it, I would have thought at least in his own mind, given his particular stature, he stood out somewhat in the …stills of the footage that apparently were made available to him. So it seems to me he was a person in some difficulty at that time and struggling to work out how to deal with the matters he was confronted with.

[109] The judge found Jones-Garling's claim that police had introduced the names of the appellants to him and that he had seen the appellants on TV at the hospital as "particularly odd." In relation to these two points the judge said:

> Standing by themselves they cause me considerable time to pause to wonder about the reliability of Mr Jones-Garling evidence. I will come back to those matters when I deal with the totality of the material before me.[67]

[110] The judge noted that Jones-Garling's unreliable descriptions of the appellant's outfits could be a matter that could be taken into account as

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66 Transcript at 121.
67 Transcript at 122.2.

to whether he was lying about the appellants, but concluded that it was "a bit of a stretch."[68] The judge noted that the interview and statement on 31 May occurred soon after Jones-Garling had been released from hospital following some sort of seizure that resulted from his use of Kronic. This may be another explanation for some of his apparent contradictions.

[111] His Honour said:[69]

> The upshot of his evidence is that - what is mostly consistent is that he was with the two defendants, that they committed the offences together, and they went back to the premises, and they did so in a fashion designed to get money from the particular cars. The Crown in this case doesn't have any DNA and doesn't have any fingerprints. I am unable to make use of the photographs in any meaningful way to identify the two defendants before me.
>
> What the Crown does have is a significant circumstantial issue as a starting point that there seems to be no doubt that Tyler McKay and Jayke Rhodes were at a premises across the road from the place where the break-ins occurred. Smash and grab is perhaps the better way to put it. That they were in the company of Jones-Garling in the hours prior to the offences at the very least and they were again in his company in the aftermath.

[112] His Honour then spent a lot of time considering the evidence of and concerning the second appellant.

[113] The judge considered the tendency evidence relating to the second appellant. After noting as relevant the fact that the second appellant

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68 Transcript at 122.6, 123.4.
69 Transcript at 123.2.

has been known to engage in this kind of offending previously he said:[70]

> It would also be fair, however, to say one needs to be a little careful about how far I take that tendency evidence because the smashing of cars and windows etc and the taking of items from within cars would have to be one of the most common crimes committed by youthful offenders.

[114] His Honour then spent some time considering the other evidence of the second appellant. This included his assertions that he no longer needed to commit these kinds of offences because "he had another source of income he didn't want to tell me about because telling me about its existence might incriminate him."

[115] He said:[71]

> Being asked to accept that, it seems to me, that Mr Rhodes has moved on from getting his money from smashing cars and stealing the money out of them and found some other form of criminality … that was providing him with the income he needed while he was absent on parole. I found his evidence to be frankly completely unbelievable. If I had any doubt about the essential reliability of Jones-Garling's evidence, the evidence of Rhodes put that to bed.
>
> As I said in going through the evidence of Jones-Garling, there are some inconsistencies standing by themselves. They might have caused me some concern, but in terms of the total scenario I am dealing with, the evidence is clear. Rhodes and McKay were in the close vicinity of this premises, Rhodes has a history of committing offences like this and provided an explanation of his conduct and his monetary situation at the time which I find

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70 Transcript at 123.
71 Transcript at 125.9.

only adds to my concerns about the likelihood that he committed these offences.

The suggestion that Jones-Garling, having been in the company of these two men, left the premises and found two other men and then went and committed the offence with them, they disappearing and Jones-Garling returning to the premises later on where he shared, at the very least - or had some Kronic provided to him, it appears by McKay, paints a scenario which, in my view, is overwhelmingly consistent with the commission of the offence by these two men.

I should note that McKay gave no evidence at all. He doesn't have to, but the circumstantial scenario that he is there with the other two is such that in the totality of the evidence before me he ends up, in my view, in the same position as his co-offender and despite the various irregularities that appear in the evidence of Jones-Garling, I am completely satisfied that the truth of the matter is that he committed this offence in the company of the two men that he said he committed the offence in the company of.

(underlining added by me)

[116] His Honour returned to consider the inconsistencies between what Jones-Garling had initially told the police and what he subsequently said after he had pleaded guilty and been sentenced.

He essentially said that he determined that he would - after being harassed, he said, to change his story - that he had had enough of it and he decided to come completely clean and tell the full truth, not the partial truth as he had apparently told before. So his explanation that he told lies earlier is consistent with that and the inconsistencies that exist between those things he said on 31 May and those things that he said on 7 December, which to my mind are almost wholly consistent with what he said in his evidence in chief, are of less concern.

> I accept that it's somewhat bizarre, the things he said about what he reckons he saw on the television at the hospital. It is difficult to know what to make of that, but given the state of his mind when he was in the hospital and the immediate aftermath, who knows what he thought about that. I have thought about that carefully and about whether it affects the reliability of his evidence. In my view it does not in the sense that, as I say, the essential truth of the matter is clear. He was in the company of these two men, they went to the premises, they were after money, they smashed up the vehicles and they took the money they could get from the cars.

[117] He then said:

> I am satisfied beyond a reasonable doubt of the guilt of each of the defendants in relation to all of the matters and if I need to say it if it's not obvious, I have given myself the warning, have considered the fact that Jones-Garling is a co-offender and have acknowledged that there are elements of his evidence which are inconsistent in themselves, weighed them all up, and come to the view that those inconsistencies don't cause me to doubt the central truth of the matters that he gave in evidence.

The appeal

Submissions on behalf of the first appellant

<u>The quality of the evidence of Phillip Jones-Garling</u>

[118] Counsel for the first appellant made the following submissions in his written outline of submissions.

> 27. Phillip Jones-Garling was an accomplice and was therefore in a category of witnesses that ordinarily require a warning that it is dangerous to convict without corroboration.[72] Additionally, he admitted to deliberately lying in statutory declaration and in his interview with police in circumstances where he knew it was an offence to do so. The lies have

[72] *Peacock v The King* [1911] HCA 66; 13 CLR 619.

greater significance in this analysis because they directly relate to the actual offending. Jones-Garling was someone who was prepared to lie about the circumstances of the offending itself.

28. Furthermore, the explanation for his admitted lies do not have a rational foundation. His claim that he lied to assist the second appellant in some way does not stand up to scrutiny. His claim in the interview and first statement was that he was approached by the appellants and then woke up in the carpark with them in the midst of the offending. This cannot be explained as "trying to leave enough vagueness there for there to be an escape hatch [for the appellants]" but appears instead calculated to have the opposite effect of shifting responsibility for the offending from himself to the appellants.

29. At trial, counsel for both appellants placed great emphasis on the lies of Jones- Garling. It was also contended that some of the evidence he gave on oath could not be explained as anything other than lies. Two particular items in this category were his evidence that he had seen the two appellants on the news whilst he was at the hospital and that police had identified the two appellants as his accomplices when they first arrested him. This evidence was untrue, the agreed facts indicating that it was in fact Jones-Garling who first identified the appellants. This is of significance. It is not something that one would not expect someone to forget or get wrong. This is particularly so if he was someone who was trying to help the appellants as he claimed. These untruths bear greater significance given that they concern the central fact in issue: the identity of the offenders.

30. The poor quality of the evidence of Jones-Garling is not confined to the various inconsistent accounts that he gave. At one stage he proposed that he had memory problems from smoking a lot of marijuana and being hit on the head by a lot of people. He said that he couldn't remember what happened last year or on his 18th birthday. He later claimed to have had flashbacks and seemed to indicate that he was able to remember things after thinking about them over lunch. Counsel for the second appellant described the manner in which he gave evidence as "giving evidence on

the run, that is, that he was making up things as he went along." The way that the whole of his evidence reads suggests that there is some force in this submission.

31. In giving evidence, Jones-Garling also did not provide much in the way of detail. He could not remember what time he arrived in Parap nor the address of the first appellant notwithstanding that he had given detailed contradictory accounts in earlier statements. When talking about the actual offending he said that he could not remember whose idea it was, who jumped the fence or anything that anyone said other than that there was a plan to commit the crimes.

32. It is contended that the learned judge, in considering the credibility and reliability of the evidence of Jones-Garling, did not properly consider the significance of the lies that the witness had told and the circumstances in which he had made them. It would have been appropriate for the judge to give himself a warning, in addition to the accomplice warning, of the danger of acting upon Jones-Garling's evidence having regard to the lies he had told including in statutory declarations about this very offending when he knew that to do so would be an offence. Such directions are warranted when the case requires it.[73]

33. In *Chidiac v The Queen*, the Court explained that occasions do arise when the Crown case rests upon oral testimony which is so unreliable or wanting in credibility that no jury, acting reasonably could be satisfied of the accused's guilt to the required degree. The Court went on to say, at 444:

> When that happens the court is not substituting its view of credibility for that of the jury; the court is giving effect to its conclusion that, notwithstanding the jury's apparent willingness to accept the particular witness or witnesses as credible, the evidence was, having regard to its nature and quality, insufficient to satisfy a reasonable jury of the accused's guilt according to the criminal standard of proof.

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[73] See for example, *Chidiac v The Queen* (1990) 171 CLR 432 (***Chidiac***) and *Hart v The Queen* [2000] WASCA 103 (***Hart***).

It is contended that this was such an occasion.

Corroboration

[119] Counsel contended that the evidence of Jones-Garling required corroboration. The submissions proceeded to refer to well-established principles concerning corroboration such as those discussed in *Doney* v *The Queen*[74] and contended that those principles were not satisfied in relation to the corroboration of Jones-Garling's evidence.

Improper use of evidence of second appellant

[120] Counsel contended that the judge did not take adequate care in limiting the use that was made of evidence that could only be corroborative of the second appellant's involvement in the offending. The complaint is that in determining the guilt of the first appellant the judge impermissibly used the evidence of the second appellant to corroborate the evidence of the accomplice. At the very least, the judge did not explain the use he was making of the evidence admissible against the second appellant, nor give himself a careful warning about the use that he could make of it in relation to the first appellant.

[121] In his reasons, the judge considered all of the evidence and properly focussed on the evidence of Jones-Garling. He then proceeded to give careful consideration to the evidence of the second appellant including

[74] (1990) 171 CLR 207 at 211.

the tendency evidence. After reviewing all of the evidence of the second appellant, the judge said the things quoted in [115] above.

[122] Counsel contended that in determining the guilt of, at least, the second appellant, the judge was of the view that the "total scenario" which encompassed that the second appellant's close proximity to the premises, the second appellant's history of committing like offences, and the second appellant's explanation of his conduct and monetary situation, was sufficient to outweigh the concerns that he had about the evidence of Jones-Garling. To put it another way, those factors were sufficient corroboration of the evidence of Jones- Garling.

[123] In order to constitute corroboration the evidence must be admissible against the relevant accused. The rule as to admissibility does not cease to apply merely because there is more than one defendant in a case.[75] In *R v Smith*,[76] Taylor J said, at 542:

> It is clear that where the testimony of a witness is to be corroborated or confirmed, the corroboration of such testimony, by evidence admissible only against one accused, is no corroboration of such testimony against another accused.

[124] Counsel referred to *Conway v The Queen*[77] where it was said that "the relevant inquiry must be whether the evidence in question tends to

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75 *R v Jones* (2006) 161 A Crim R 511.
76 [1964] NSWR 537.
77 [2002] HCA 2, 209 CLR 203 at 226.

confirm or support the evidence which implicates the accused, not just whether the evidence is relevant to issues at trial."

[125] Counsel conceded that there may be some circumstances where evidence can be used that is not admissible against one accused at trial, not as corroboration, but to show that a witness is speaking the truth. This was so in *R v Jones* where certain evidence was admitted against all accused to establish the credit of a witness in certain disputed areas where the witness had been challenged. Counsel contended that this situation does not arise in this case.

[126] Further, counsel contended that the tendency evidence relating to the second appellant was not admissible against the first appellant and could not be corroborative of Jones-Garling's testimony when assessing the guilt of the first appellant. The evidence of the conduct and monetary situation of the second appellant was relevant to the determination of whether the second appellant was guilty of the crimes but, in assessing the guilt of the first appellant, it could not corroborate the testimony of Jones-Garling, bearing in mind that corroborative evidence is that which strengthens evidence by confirming the accused's involvement in the events as related by the accomplice.

[127] In the judge's reasons, no distinction was drawn between what use was to be made of the above evidence for the purposes of corroborating the

testimony of Jones-Garling in relation to each appellant. There is a real concern that the learned judge used the "frankly unbelievable" evidence of the second appellant in a general way to bolster the reliability of the evidence of Jones-Garling in respect of both appellants. This is demonstrated by the remark: "If I had any doubt about the essential reliability of Jones Garling's evidence, the evidence of Rhodes put that to bed." It is also of note that in specifically finding the first appellant guilty, the learned judge referred to the "totality of the evidence." At the very least, in not exposing the use that was made of that evidence, there is a real risk of a miscarriage of justice.

Consideration

Corroboration

[128] The submissions on behalf of the first appellant rely heavily upon the assumption that the evidence of an accomplice requires corroboration and that it is dangerous to convict on the evidence of an accomplice in the absence of corroboration.[78] This assumption is no longer correct.

[129] Previous requirements under common law for certain kinds and categories of evidence to be corroborated and for warnings to be given

[78] See Ground 3.1.1 and [119], [120], [122], [123], [126]and [127] above.

to the jury about such evidence have been expressly abolished by s 164 of the *UEA* and replaced by s 165.[79]

[130] In *Conway v The Queen* the trial judge had warned the jury that it would be dangerous to convict the accused upon the evidence of two other men who were involved in the offending unless their evidence was corroborated. On appeal the accused complained that the warning was inadequate. Per Gaudron ACJ, McHugh, Hayne and Callinan JJ at [53]:

> While such a warning would have been appropriate had the general law applied, it is a warning that was framed without regard to the applicable provisions of the *Evidence Act* 1995 (Cth), particularly ss 164 and 165. Section 164 provides, so far as is now relevant:
>
> (1) It is not necessary that evidence on which a party relies be corroborated.
>
> …
>
> (3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:
>
> (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
>
> (b) give a direction relating to the absence of corroboration.

[79] See for example *Conway v The Queen* [2002] HCA 2, 209 CLR 203; *Kanaan v R* [2006] NSWCCA 109 at [214] – [217] and *MJ v R* [2012] NSWCCA 146 at [49].

> Two aspects of [s 164] should be noted. First, it abolishes the *necessity* for corroboration and the *necessity* for a warning about acting on uncorroborated evidence; it does not *prohibit* warning the jury that it would be dangerous to convict on uncorroborated evidence. Secondly, s 164(3) is expressly said to be subject to other provisions of the Act and, therefore, account must be taken of those other provisions, including s 165 and its provisions about unreliable evidence.
>
> (emphasis in original)

[131] Section 165 requires a judge to warn a jury about the potential unreliability of certain kinds of evidence if a party so requests, unless the judge considers that there are good reasons for not giving such a warning. One kind of evidence that might be unreliable is evidence given by a witness who may be an accomplice.[80] Per Williams , Anderson, Marychurch and Roy in *Uniform Evidence in Australia*,[81] at [164-1]:

> Section 165 provides a 'guided discretionary approach'[82] to these kinds of warnings and creates greater flexibility[83] in relation to judicial directions to the jury than exists under the traditional law of corroboration.

[132] It is also important to note that s 165 only applies in cases where there is a jury.[84] There will normally be far less a need for warnings of the kind contemplated by s 165 where the fact finder is an experienced

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80 S 165(1)(d). See for example *Kanaan v R* [2006] NSWCCA 109 at [214] – [217].
81 Neil Williams, John Anderson, Judith Marychurch and Julia Roy, *Uniform Evidence in Australia* (Lexis Nexis, 2015).
82 Australian Law Reform Commission, *ALRC Interim Report, Evidence,* Report No 26 (1985) vol 1 at [1020].
83 *Jenkins v R* [2004] HCA 57; 79 ALJR 252 at [26].
84 See *Evidence (National Uniform Law) Act 2011* (NT) s 165(2).

judge who, unlike a jury, will have had the opportunity to engage in full discussion with counsel about particular issues of importance during the trial and during submissions.

Inconsistencies and lies

[133] The judge was well aware of the inconsistencies and lies on the part of Jones-Garling. These were the subject of extensive cross examination by counsel for the first appellant during the hearing on 21 February, and the subject of detailed oral submissions on 1 March 2017. His Honour adjourned the matter to 14 March when he provided detailed reasons, in the course of which he canvassed the various matters put and clearly articulated his reasons for accepting Jones-Garling's evidence that both of the appellants were present in the carpark at the time of the offending.

[134] He was also well aware of the need for caution when accepting and applying the evidence of co-offenders, including where their evidence was shown to have been unreliable in some respects.

[135] I do not agree that "the lies have greater significance because they directly relate to the actual offending."[85] At all times Jones-Garling implicated himself and the two appellants in the offending in saying

[85] Paragraph [27] of counsel's submissions quoted in [118] above.

that all three were present together in the car park at the relevant time. As I have said this is and always has been the key issue.

[136] The fact that he initially attempted to minimise the involvement of himself and the second appellant was of lesser significance in the scheme of things. The fact that he said things to the police on 31 May 2016 that were misleading or plain wrong is also of less significance. Whilst it was clearly wrong for him to tell lies, particularly on oath, it is not surprising that a person in his situation at the time did so. The judge gave careful consideration to these matters including in the passages referred to and quoted in [107] - [110] and [115] - [117] above.

[137] Many of the inconsistencies and odd responses referred to by counsel for the first appellant emerged from the cross-examination of Jones-Garling at the hearing. Most, if not all, of those related to minor things of the kind which most people would not be expected to remember, particularly more than eight months after the relevant events. In addition, as his Honour noted, Jones-Garling acknowledged that his memory was not very good, perhaps because of his problems with drugs.

[138] The two authorities cited by counsel for the first appellant concerning the directions that his Honour should have given to himself, are readily distinguishable.

[139] In *Chidiac* the Crown case relied upon the oral evidence of two accomplices. The trial judge referred to them in the following directions to the jury:

> You as judges of fact have got to decide whether these two self-confessed liars have told the truth or not. What I am bound to tell you is that being accomplices as they are that it is dangerous to convict on that evidence unless it is corroborated. Not only that are they accomplices, not only are they down and out villains, not only are they drug smugglers themselves but they are self-confessed perjurers and liars.
>
> I have been sitting on these courts for something like eight years and I have never heard two witnesses so readily admit that they have lied on oath. Now, that does not mean to say that they may not be telling the truth, but what I am saying to you is you will look very carefully at what they said before you would hang a dog on their evidence. Really, it is really appalling and you heard it all as much as I did.

[140] Notwithstanding that direction the jury convicted the appellant. He appealed to the New South Wales Court of Criminal Appeal and then to the High Court of Australia on grounds which included that the verdict should be set aside as unsafe or unsatisfactory, and that the trial judge's direction did not properly explain the importance and meaning of corroboration. The High Court dismissed his appeal

notwithstanding views such as those set out in [33] of the first appellant's written submissions quoted in [118] above.

[141] In the other case, *Hart*, the Western Australia Court of Criminal Appeal quashed the conviction of the appellant because the trial judge did not specifically warn the jury of the need to question closely the reliability of the key Crown witness, who was an accomplice. The Crown case relied solely upon his evidence which was "undoubtedly uncorroborated."[86] During cross-examination he admitted that he had lied to police and on oath at the preliminary hearing in relation to three very important issues:

(a) to falsely implicate a particular person because the two of them had had an argument earlier that night and he was angry about that;

(b) to exculpate another person as a result of which that person was discharged after the primary hearing; and

(c) that the appellant was standing with him when the victim was assaulted.

[142] Per the Full Court, at [19]:

> The direction given adequately put to the jury the danger of acting upon the evidence of Parfitt having regard to the fact that

86 *Hart v The Queen* [2000] WASCA 103 at [11].

> he was an accomplice and so may have had a purpose of his own to serve. But it did not specifically warn the jury of the need to question closely Parfitt's reliability as a witness and his truthfulness having regard to the fact that he was a confessed perjurer and a confessed liar out of court to the police, lies motivated frankly by a desire to implicate those who may not have been involved and exculpate others who might have been offenders. In the circumstances of this case where Parfitt was a confessed accomplice who was apparently not hiding the fact that he was implicated, although he had not been charged, the question of Parfitt's reliability as a witness because he was a liar was the larger consideration affecting his credibility and the capacity to prove the appellant's guilt beyond reasonable doubt.

[143] Their Honours stressed the importance of giving adequate directions to a jury to aid them in their evaluation of the evidence and in the fact-finding process upon which they are embarked. They are the sole judges of questions of fact, not the judge.[87]

[144] Their Honours referred to a number of other authorities which relate to the common law requirement for certain kinds of evidence to be corroborated, one of which was *Chidiac*. They said, at [28]:

> The same approach was taken in *Chidiac v The Queen* where, as in this case, the High Court was concerned with the adequacy of directions given by the trial judge in respect of the evaluation of the evidence of accomplices who were also self-confessed perjurers.

[145] Their Honours said that there should have been "a further direction specifically focusing upon the lies told by [the particular witness] out of court and his perjury at the preliminary hearing." Otherwise "the

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87 Ibid at [20] – [22].

jury may have relied upon the essential evidence of this witness without a proper appreciation of the need to carefully consider the impact upon his credibility of his previous lives."[88]

[146] As I said, there are some significant distinctions between those authorities and the present matter. The main one is that they concerned direction to a jury, not a self-direction to an experienced magistrate or judge. Secondly, his Honour did have the benefit of a robust discussion with counsel about the evidence and the findings that he should make, an opportunity which members of a jury do not have. Thirdly, the relevant witnesses were self-confessed perjurers who had lied in court, as distinct from a person who told lies during his initial interviews with the police. Fourthly, the lies in *Hart* were of major significance going to the very issue as to exactly who was present and committed the crime. Finally and importantly, since the application in the Northern Territory of s 164 of the UEA there is no longer any requirement for the evidence of an accomplice to be corroborated.

[147] As I have said, his Honour analysed all of Jones-Garling's evidence very carefully, fully aware of the lies and inconsistencies and fully aware of the potential unreliability of his evidence because he was a co-offender. This is the kind of exercise which a judge of his Honour's experience undertakes very regularly. There was no need for him to

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88 Ibid at [29].

expressly direct himself as to the need to take special care when assessing and applying such evidence.

Evidence of and admissible against the second appellant

[148] The contentions referred to particularly in [120], [122], [126] and [127] above assume that the judge did impermissibly take into account the tendency evidence relating to the second appellant and the second appellant's evidence about his own financial circumstances in finding that the first appellant was also involved in the offending.

[149] I do not consider that this can be assumed. Indeed his Honour could well have found that both of the appellants were present and involved in the offending without that evidence relating to the second appellant. See for example, the reasons quoted in [111] above, which His Honour expressed before considering the evidence concerning the tendency and financial circumstances of the second appellant.

[150] When he did consider the evidence concerning the tendency and financial circumstances of the second appellant he expressed reservations about relying too heavily upon it, (even) as against the second appellant.[89] In addition to that circumstantial evidence which tended to implicate the second appellant, the judge had the direct

[89] See [113], [114] and the first two paragraphs in [115].

evidence of Jones-Garling, which he accepted on the key issue of who was present in the carpark with Jones-Garling.

[151] Had the second appellant not given evidence, and even without the tendency evidence, the Court had the direct evidence of Jones-Garling which his Honour would still have had to carefully weigh up in light of the inconsistencies in Jones-Garling's evidence and the fact that he was a co-offender. The fact that the second appellant did give evidence and directly challenged Jones-Garling's evidence on the key issue of who was present in the car park with Jones-Garling provided the judge with a greater opportunity to assess the reliability of Jones-Garling's evidence, not only in relation to the involvement of the second appellant but also as to the overall offending itself including the involvement of the first appellant.

[152] It was in this context that his Honour made the remark that: "If I had any doubt about the essential reliability of Jones-Garling's evidence, the evidence of Rhodes put that to bed." By "essential reliability" I take his Honour to be referring to his reliability on the essential issue, namely whether Jones-Garling's two accomplices were the two appellants. This is consistent with his Honour's subsequent references to the "essential truth of the matter [being] clear" and about "the central truth of the matters that he gave in evidence."

[153] In *R v Jones*, Bleby J with whom Anderson J agreed observed:

> [336] ... it is necessary to recognise that there is a distinction between evidence which is capable of amounting to corroboration and evidence which is not necessarily relevant to the case against an accused but which may tend to affect the jury's assessment of the reliability of a witness whose evidence is in dispute.
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> …
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> [345] There are many situations which can be called to mind where evidence which is not relevant to an accused's guilt may be admitted or used for the purpose of assessing the reliability of a witness, and where evidence, irrelevant and inadmissible against an accused, may become admissible for a collateral purpose. …
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> …
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> [347] It follows that, in a trial of multiple defendants, evidence which is admissible only against one accused or, strictly speaking, evidence which is not admissible or even relevant to the case against another accused may assume additional relevance to the jury in determining whether the disputed evidence of a particular witness admissible against any accused should be accepted. The question is not whether that evidence may be said to corroborate the evidence of the witness in the case against any accused. That requires different criteria."

[154] Bleby J ultimately held at [362] that it would be "quite illogical and absurd" if a jury found "a witness's evidence could be relied on in the case against one accused but that the same witness giving the same evidence cannot be relied on in the case against another accused because it does not have the same degree of support."

[155] Counsel for the first appellant referred to a decision of the Full Court of the Supreme Court of Victoria in *R v Gibb and McKenzie*,[90] a matter involving the joint trial of co-accused, where important evidence was given by an accomplice. In those days, such evidence required corroboration. The Court recognised that for evidence to be capable of corroboration against a particular accused it had to be admissible against him. As I have said, there is no longer any requirement in the Northern Territory for corroboration of such evidence. Accordingly those sorts of questions no longer arise. However their Honours did make observations consistent with those made in *Jones* to the effect that where the accomplice's evidence against one offender is more strongly corroborated than the evidence against another offender:

> it is an inevitable feature of a joint trial that some deductions or impressions of the jury in one case must affect their consideration of the other. It is a consequence that must be accepted for the reasons which lead to the ordering of a joint trial. Were this not so, a jury might, theoretically, do the very thing sought to be avoided, that is, return inconsistent verdicts.[91]

[156] I agree with the submission made by counsel for the respondent that it was permissible for the trial judge to consider the truthfulness of Jones-Garling's evidence in light of the evidence given by Rhodes. When Jones-Garling is considered a witness of truth on the issue of whether McKay was involved in the offending, coupled with the

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90 [1983] 2 VR 155; 7 A Crim R 385.
91 Ibid at 396.

uncontroversial circumstances that McKay was with Jones-Garling before and after the offending and in the vicinity of the crime scene on the night of the offending, it was open for the trial judge to find McKay guilty beyond reasonable doubt.

[157] I reject the contentions referred to in [122] - [127] above to the effect that the judge's references to "the total scenario I am dealing with" and to "the totality of the evidence before me", in the second and fourth paragraphs respectively of the reasons quoted in [115] above, imply that he was impermissibly using evidence against the first appellant evidence that was only admissible against the second appellant and was failing to properly deal with the case against each appellant separately.

[158] As I have said, his Honour could well have found that both of the appellants were present and involved in the offending without the evidence concerning the second appellant's tendencies and financial circumstances.

[159] Further, in my opinion his Honour was carefully dealing with each appellant separately and sequentially.

[160] In the first of the paragraphs quoted in [115] above, His Honour was clearly only referring to the second appellant, Rhodes. He clearly rejected Rhodes' denials and thus accepted "the essential reliability of

Jones-Garling's evidence" (at least as between Jones-Garling and Rhodes).

[161] In the second paragraph his Honour used Jones-Garling's evidence together with the fact that Rhodes and McKay were in close vicinity of the premises, and Rhodes' history of committing similar offences and his financial situation, to conclude that "he", that is Rhodes, was one of Jones-Garling's co-offenders and thus "committed these offences". Although he had referred to McKay in the second paragraph, that was only to support his conclusion that Rhodes had committed the offences.

[162] It was only in the third paragraph that the judge refers to the likely involvement of both Rhodes and McKay in the commission of the offences. His Honour was having regard not only to the evidence of Jones-Garling and Rhodes but also to compelling and unchallenged circumstantial evidence including that about the activities of the three of them both before and after the offending. The context of that paragraph is his Honour's rejection of the absurd scenario that would have existed if Rhodes' evidence was accepted and Jones-Garling's evidence on the main issue was not. There is no suggestion in that paragraph, or anywhere else, that his Honour was having any regard to the tendency evidence concerning Rhodes or the evidence about Rhodes' financial situation, in the process of rejecting such an absurd

scenario and concluding that the other two co-offenders were indeed the two appellants.

[163] In the fourth paragraph his Honour specifically turned his attention to the first appellant. In addition to the circumstantial evidence including that about the activities of the three of them both before and after the offending he was entitled to give full weight to Jones-Garling's evidence on the critical issue, namely that he was with the other two offenders when the offences were committed. I consider that his Honour's reference to "the totality of the evidence before me" was a typical sweeping statement intended to convey that he had taken into account all of the evidence relevant to and admissible against the first appellant. That his Honour did not simply lump together all the evidence including that which was solely related to the second appellant, but considered the evidence against each offender separately, is also apparent from his Honour's specific references to "he", namely McKay, in that paragraph and his statement that "he ends up … in the same position as his co-offender …". If His Honour was using all the evidence in relation to both offenders he would have instead said something like: "On the basis of all the evidence I find both defendants guilty."

[164] I do not consider that his Honour used the evidence of the second appellant's tendencies or financial circumstances as a basis for concluding that the first appellant committed the offences.

[165] Nor do I consider it was necessary for his Honour to expressly identify particular evidence or categories of evidence that he did not have regard to, in the course of providing his *ex tempore* reasons, albeit after an adjournment. It is well accepted *ex tempore* reasons may not contain the same structure and detail expected of reserved written decisions,[92] and an appellate court is entitled to assume the judge considered all matters necessarily implicit in the conclusions reached.[93]

[166] The situation might be different where one of the parties raises a particular point, or seeks a particular ruling or direction, in the course of final submissions. In the present matter, apart from counsel's suggestion that the judge should give himself an unreliability warning of the kind contemplated by s 165(1)(d) of the UEA there was no suggestion that he should give himself any other warning or identify which particular evidence and inferences he was relying upon as against each of the co-accused.

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92 See *Maloney v Heath* [2016] NTSC 62, [41] citing *Bird v Peach* [2006] NTCA 7; 17 NTLR 230 at 232 per Martin (BR) CJ, (Angel and Thomas JJ agreeing); and *Semple v Williams* (1990) 156 LSJS 40 per Olsson J at 40.

93 *Dickson v Houseman & Dickson v Harland* [2016] NTSC 28 at [26] per Kelly J; *Peters v Perkins* [2015] NTSC 77 at [11] per Riley CJ.

[167] I also consider that his Honour had a considerable advantage over this Court when observing the demeanour and assessing the credibility of the important evidence of Jones-Garling. This was particularly so in light of the extensive cross examination concerning the various inconsistencies in his versions of the evidence and in light of the fact that there was another witness, namely the second appellant, who was directly contradicting the critical evidence of Jones-Garling.

[168] In any event, I have reviewed the evidence, particularly that of Jones-Garling. I do not have a reasonable doubt that the first appellant was present in the carpark at the time of the offending. Consequently I do not have a reasonable doubt that he was guilty of all of the offences for which the Local Court convicted him, apart from the offences the subject of Grounds 1 and 2. It was open to the Local Court to be satisfied beyond reasonable doubt that the first appellant was guilty of those offences.

Conclusions and orders

[169] Each appeal is allowed in part.

[170] In respect of appeal LCA 11 of 2017 (21626399):

(a) The 39 convictions for trespass are quashed;

(b) The 48 convictions for criminal damage are quashed;

(c) The appeal against the 13 convictions for stealing is dismissed.

[171] In respect of appeal LCA 12 of 2017 (21626410):

(a) The 39 convictions for trespass are quashed;

(b) The 48 convictions for criminal damage are quashed.

[172] Both matters are remitted to the Local Court for resentencing in relation to the 13 convictions for stealing and the 13 remaining convictions for trespass.
