SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tahiata* [2024] QCA 59
PARTIES:	**R** **v** **TAHIATA, Tuhirangi-Thomas** (appellant)
FILE NO/S:	CA No 59 of 2020 SC No 1712 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 21 February 2020 (Davis J)
DELIVERED ON:	19 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2023; 25 October 2023
JUDGES:	Bowskill CJ and Flanagan JA and Buss AJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – APPLICATION OF PROVISO TO PARTICULAR CASES – where the appellant was convicted of two counts of murder – where a pre-trial s 590AA ruling was made that the Crown was allowed to lead evidence of an off-camera confession by the appellant, which amounted to wrong decision of any question of law – where there was a substantial body of other confessional and corroborative evidence which went to proving the appellant's guilt – where the appellant was interviewed by police four times and provided a different version of events in each interview – where the third and fourth interviews were consistent with the appellant's guilt – where there was a significant amount of other documentary and oral evidence which corroborated the versions consistent with the appellant's guilt – whether, notwithstanding the error of law, no substantial miscarriage of justice actually occurred *Criminal Code* (Qld), s 668E(1), s 669E(1A) *Police Powers and Responsibilities Act 2000* (Qld) s 436, s 437, s 439 *Baini v The Queen* (2012) 246 CLR 469; [2012] HCA 59, applied *Kalbasi v Western Australia* (2018) 264 CLR 62; [2018]

HCA 7, applied
Mraz v The Queen (1955) 93 CLR 493; [1955] HCA 59, cited
Hofer v The Queen (2021) 274 CLR 351; [2021] HCA 36, considered
Huxley v The Queen (2023) 98 ALJR 62; [2023] HCA 40, applied
Orreal v The Queen (2021) 274 CLR 630; [2021] HCA 44, distinguished
R v Faumuina [2004] QSC 264, cited
Filippou v The Queen (2015) 256 CLR 47; [2015] HCA 29, considered
R v Smith (2003) 138 A Crim R 172; [2003] QCA 76, cited
R v Tahiata (No 2) [2020] QSCPR 9, considered
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, applied
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, applied

COUNSEL: A C Freeman and E J Cooper for the appellant
N W Crane for the respondent

SOLICITORS: Wallace O'Hagan Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **BOWSKILL CJ:** On the basis of my own consideration of the evidence properly received at the trial, I agree with Flanagan JA.

[2] **FLANAGAN JA:** On 21 February 2020, after a 14-day trial in the Supreme Court of Queensland at Brisbane before Davis J, a jury found the appellant guilty of two counts of murder. He was sentenced to life imprisonment with parole eligibility after 30 years.

[3] The first count alleged that the appellant murdered Corey Robert Spier Breton ("Breton"). The second count alleged that the appellant murdered Iuliana Tabita Triscaru ("Triscaru"). Both murders were alleged to have been committed on 24 January 2016 at Kingston.

[4] On 11 February 2016, in circumstances more fully detailed below, the appellant, in the course of a recorded walk-through, showed police the location of a sunken toolbox at Scrubby Creek, Kingston, containing the bodies of Breton and Triscaru.

[5] The appellant appeals against his convictions. He raises two grounds of appeal:

"1. there was a wrong decision of a question of law by the trial judge in that his Honour misconstrued the phrases 'a record of questioning' and 'a record of a confession or admission' in s 439(1) of the *Police Powers and Responsibilities Act 2000* (Qld) ("PPRA"), and consequently wrongly ruled that the oral evidence of Officer Tunks as to the off-camera confession was admissible in the trial; alternatively, a miscarriage of justice in relation to the admission of that evidence has occurred in circumstances where the evidence was inadmissible;

2. the verdicts were unreasonable or cannot be supported by the evidence in circumstances where the four accounts provided by the appellant to the police differed in such material ways that the jury could not have been satisfied beyond reasonable doubt as to the truth of any account provided by the appellant."

[6] The respondent concedes that the learned trial judge committed the error of law identified in Ground 1.[1] For reasons outlined below, this concession is correctly made. It follows that for the purposes of s 668E(1) of the *Criminal Code*, the appeal proceeds on the basis "that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law". In those circumstances, both the appellant and the respondent accept that the alternative in ground 1, namely that there was a miscarriage of justice because of the wrongful admission of evidence, has no work to do.[2] The appellant does not press this alternative ground of appeal.

[7] As there was a wrong decision of a question of law for the purposes of s 668E(1), the appeal should be allowed unless this Court considers, pursuant to s 668E(1A), that no substantial miscarriage of justice has actually occurred notwithstanding this error. The appellant accepts that if the respondent is able to satisfy the Court that no substantial miscarriage of justice has actually occurred, the second ground of appeal which seeks to challenge the verdicts on the basis that they are unreasonable or cannot be supported by the evidence, also has no work to do.

[8] It follows that the primary issue in this appeal is whether, by reference to the principles discussed below, this Court considers that notwithstanding the error of law, no substantial miscarriage of justice has actually occurred.

Relevant background

[9] Prior to the commencement of the trial on 4 February 2020, the appellant applied for a pre-trial ruling pursuant to s 590AA of the *Criminal Code*. The appellant sought the exclusion of evidence of confessions made by him to police including the off-camera confession referred to in ground 1. The exclusion of the confessional evidence was sought on two main bases. First, the appellant submitted that his confessions were not voluntary in that they were induced by a promise offered by police. Secondly, the appellant submitted that the evidence should be excluded on discretionary bases, primarily upon the unfairness ground. Relevantly for the purpose of this appeal, one of the matters relied on by the appellant in relation to the unfairness ground was that there had been a breach of s 436 and s 437 of the PPRA. Section 436 deals with the recording of questioning and mandates that questioning must, if practical, be electronically recorded. Section 437 deals with the requirements for a written record of a confession or admission.

[10] The pre-trial hearing was heard over the course of four days. On 24 January 2020, the appellant's application was dismissed by his Honour and all the confessional evidence, including the off-camera confession, was led at trial. Prior to making this ruling, both counsel had informed Davis J that the reasons for the ruling were not required prior to the commencement of the trial. The trial commenced on 4 February 2020. As already observed, the appellant was found guilty of two counts

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1 Respondent's Supplementary Outline of Submissions, paras 14–17.

2 Transcript (25 October 2023) 1-3 ll 10–14; Respondent's Supplementary Outline of Submissions, para 14. See also *Dhanhoa v The Queen* (2003) 2017 CLR 1, [49] per McHugh and Gummow JJ.

of murder on 21 February 2020. The appellant filed a notice of appeal on 16 March 2020. The original ground of appeal was that the trial judge erred in failing to exclude interviews and statements (led by the Crown as confessions or admissions) as evidence in the trial. On 3 June 2020, Davis J delivered written reasons for the ruling made on 24 January 2020[3]. In those reasons, his Honour accepted that he erred in permitting oral evidence from a police officer, Detective Sergeant Tunks, as to the off-camera confession. His Honour considered that the oral evidence of the off-camera confession did not constitute a record of the confession for the purposes of s 437 of the PPRA.

[11] It is necessary to consider the evidence of the off-camera confession in the context of the Crown case and in the sequence of the appellant's four interviews with police. The Crown alleged that the appellant acted in concert with other persons who were also charged with the two murders but were tried separately. The Crown's case was that Breton and Triscaru were lured to a unit at Juers Street, Kingston. A number of persons whom the appellant had known since school resided at this unit, including Trent Thrupp and Lelan Harrington. The unit was often used as a meeting place and was referred to as "the Tav".

[12] After Breton and Triscaru were lured to the unit they were tortured and subsequently placed in a large toolbox. There was no evidence that the appellant was involved in these acts.

[13] The appellant attended the unit after receiving a text message from an unknown number that his vehicle, a green Toyota Hilux, was required. After visiting the Tav earlier in the day, the appellant drove his Hilux to the Tav at approximately 18:30 on 24 January 2020. He removed two smaller toolboxes from the tray of his Hilux and assisted in loading the toolbox containing Breton and Triscaru onto the tray. He then drove his vehicle in company with Thrupp to Scrubby Creek. Thrupp then caused the toolbox to be submerged in Scrubby Creek, causing Breton and Triscaru to die of either asphyxia or drowning. The Crown alleged that both Breton and Triscaru were still alive and conscious at the time the toolbox was submerged in the water. The appellant was alleged to have aided Thrupp by removing the toolbox from the Hilux, throwing him a claw hammer to punch holes in the toolbox to assist it to sink, and by letting off a round from a home made gun to silence Breton and Triscaru.

[14] The families of Breton and Triscaru subsequently reported them as missing to police. As part of the police investigation, the appellant became a person of interest. At about 18:25 on 10 February 2016, the appellant was intercepted in his Hilux by police. There is an audio recording of this interaction.[4] The appellant was informed that he was being arrested in relation to both murders and that he was being detained. He was cautioned and taken to the Logan Central Police Station. While being cautioned, he informed police that he had recently consumed cannabis but stated he was aware of what was occurring. Having listened to this audio recording, the appellant's tone may be described as polite.

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3 *R v Tahiata (No 2)* [2020] QSCPR 9.

4 Exhibit 45; the transcript of the recording is MFI-G, RB vol 5, pages 1795 – 1813.

[15] A preliminary interview was conducted with the appellant by Detective Sergeant Tunks and Detective Senior Constable Kidd.[5] In this preliminary interview, the appellant was informed that police wished to speak to him about two missing persons, Breton and Triscaru. The appellant informed police that he knew Triscaru, having met her twice. Police informed the appellant that apart from himself there were another six persons in custody. The appellant denied knowing the location of the missing persons.

[16] He agreed to participate in a formal interview, stating that he had "no need to lie".[6]

[17] The first interview between Tunks, Kidd and the appellant, which was electronically recorded, commenced at 19:28 and, after being paused briefly at 19:33, was resumed at 19:42 and suspended at 20:59 ("the first interview").[7] The appellant then had a short sleep between 20:59 and 21:41. The second interview commenced at 21:41 and terminated at 22:22.[8] In the course of the first interview, the appellant denied any involvement in the offences. He accepted that he knew Lelan Harrington and Triscaru. He did not know Breton. He accepted that his car was a green Hilux and he would let "the boys borrow it".[9] During the second interview, the appellant sought to establish an alibi that he was four-wheel driving with his cousin and some friends on the day of the offences. This was what he had told his partner in a text message sent at 22:17 that night.[10] He told police that he had lent his utility out but initially refused to tell police to whom. On numerous occasions he expressed a strong desire not to implicate his friends or associates. Ultimately he stated that he lent his utility to Thrupp.[11] Each interview, as well as the applicant's signed statements, are considered in detail below.

[18] As already observed, the second interview was terminated at 22:22. It was at this stage that the off-camera confession was made. The evidence given by Tunks at trial was as follows:

> "Yes? --- The interview had finished so we had terminated and Tahiata put his hands to his face and he's …
>
> All right. Before you go to that, what happens to the tapes or the disks that were ---? --- They were burning, so ---
>
> What does burning mean? … Recording. So once you press finalise, there's a button for finalise, it goes into, like, the burning process which is recording it to the actual DVD.
>
> Yes. All right. And then you were telling us what he did, that is the accused did? --- So during the burning process of those disks, he's – Tahiata's put his hands to his eyes and said 'I did it. I killed 'em, I murdered both of them'".[12]

[19] Tunks gave additional evidence in relation to the off-camera confession as follows:

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5 Exhibit 47; the transcript is MFI-I, RB vol 4, pages 1443 – 1522. All 14 transcripts of interviews and interactions of the appellant with police were tendered as Exhibit 3.
6 MFI-H, RB vol 4, pages 1436 to 1441, l 40.
7 Exhibit 47, MFI-I, RB vol 4, pages 1443 – 1498.
8 Exhibit 51, MFI-I, RB vol 4, pages 1498 – 1522.
9 RB vol 4, page 1462, ll 19 – 36.
10 Exhibit 5, RB vol 4, page 1503.
11 RB vol 4, page 1509, ll 40 – 60.
12 RB vol 4, page 1084, ll 1 – 13.

"MR MEREDITH: Now, you told us earlier that at the end of the second interview the accused did something, what was that?---Yes, so the interview terminated and Tahiata put his hands to his eyes, looked upset and said, 'I did it. I killed them. I murdered both of them.'

And then what did you do?---I was watching him. I looked at the DVDs that were burning and also Chris and I've left - - -

When you say Chris, you mean Chris Kidd?---Yes – sorry – Chris Kidd. And then I've left the room to get some more DVDs.

All right. Did he say anything more before you left?---No.

Right. And had anyone said anything to him that got him to make – make those comments?---No.

Right. And at the end of that last interview there's an answer, it's on page 80 of the transcript, line 41, you are – where you've asked him:

Is there anything you want to say?

He says:

No, ma'am. There's nothing else. I've already snitched my mate, so fucking mel – so fucking may as well kill me now.

Did you notice anything about his demeanour at that stage that we might not have picked up on the interview – on the recording?---Not – not that I recall. I - - -

You know he was – he appeared upset shortly afterwards. Was he showing any signs of it at that stage?---No."[13]

[20] By his 590AA application, the appellant sought to exclude not only the off-camera confession but also the evidence of the subsequent third and fourth interviews, the walk-through, and his three signed statements. For the purposes of the present appeal however, the appellant only challenges the trial judge's ruling in relation to the admissibility of Tunks' oral evidence concerning the off-camera confession.

[21] The third interview commenced at 22:55 and terminated at 23:40.[14] The appellant was again cautioned. At the commencement of the third interview, Tunks sought to confirm what had happened upon the termination of the second interview:

"SGT TUNKS: And then once we finished that interview, ah you broke down and ah you said a few things –

TAHIATA: Confessed basically.

SGT TUNKS: Instead of ask trying to ask you –

TAHIATA: Yep.

SGT TUNKS: And to, to thing-o, are you able to just tell us –

TAHIATA: Yep I can tell you everything.

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13 RB vol 3, pages 1109, l 45 – 1110, l 29.

14 Exhibit 54, MFI-I, RB vol 4, pages 1523 – 1561.

SGT TUNKS: What you said when we turned those tapes off?

TAHIATA: Yep.

SGT TUNKS: Yes.

SCON KIDD: Oh sorry.

SGT TUNKS: Yeah.

TAHIATA: I said, on the date, I said that I did it. I murdered them. I had them in my car. I, Trent was with me, but then I dropped him off because he didn't wanna go through with it, so I just dropped him off on the road. I done it myself, near Kingston Park Raceway. I saw them out, and I stood on top of them. I heard them scream, everything."[15]

[22] Subsequent to the third interview in which the appellant took sole responsibility for the murders, he participated in a walk-through with police. The walk-through commenced at 00:53 on 11 February 2016 and was recorded.[16] In the course of this walk-through, the appellant showed police where the toolbox was submerged in Scrubby Creek and even offered to retrieve it.[17]

[23] Approximately 24 hours after the walk-through, the appellant, who was still detained, asked to speak to police. This resulted in a fourth interview conducted on 12 February 2016 between 00:56 and 03:42 by Senior Constable Phillips and Senior Constable Ovreseth.[18] The fourth interview commenced with the appellant again being cautioned. He referred to the fact that he was sitting in the cells wondering why he was going to take the rap.[19] The appellant proceeded to give a detailed version of what occurred which included the loading of the toolbox containing Breton and Triscaru onto his Hilux at the unit and accompanying Thrupp to Scrubby Creek where the toolbox was unloaded into the water. This version included details involving the appellant providing a claw hammer to Thrupp and the appellant letting off a round from a home made gun.

[24] Subsequently, the appellant provided a 79-paragraph statement dated 12 February 2016 ("the primary statement"), as well as two addendum statements.[20] The primary statement contained a version consistent with what he had told police in the course of the fourth interview.

A wrong decision of a question of law

[25] While the respondent concedes that the trial judge erred in law in ruling that the off-camera confession was admissible, ss 668E(1) and (1A) require this Court to form its own opinion as to whether there was a wrong decision of any question of law.

[26] Sections 436 and 437 of the PPRA provide as follows:

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15 RB vol 4, page 1525, ll 18 – 56.
16 Exhibits 56 and 57; Exhibit 3, RB vol 4, page 1344.
17 RB vol 4, page 1351, ll 58 – 59.
18 Exhibit 65; Exhibit 3; RB vol 5, pages 1957 – 2050.
19 RB vol 5, page 1964, ll 15-21.
20 Exhibits 58, 59 and 60.

"**436 Recording of questioning etc.**

(1) This section applies to the questioning of a relevant person.

(2) The questioning must, if practicable, be electronically recorded.

Examples for subsection (2)—

1 It may be impracticable to electronically record a confession or admission of a murderer who telephones police about the murder and immediately confesses to it when a police officer arrives at the scene of the murder.

2 It may be impracticable to electronically record a confession or admission of someone who has committed an armed hold-up, is apprehended after pursuit, and makes a confession or admission immediately after being apprehended.

3 Electronically recording a confession or admission may be impracticable because the confession or admission is made to a police officer when it is not reasonably practicable to use recording facilities.

(3) If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 437.

(4) If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person.

437 Requirements for written record of confession or admission

(1) This section applies if a record of a confession or admission is written.

(2) The way the written record of the confession or admission is made must comply with subsections (3) to (7).

(3) While questioning the relevant person, or as soon as reasonably practicable afterwards, a police officer must make a written record in English of the things said by or to the person during questioning, whether or not through an interpreter.

(4) As soon as practicable after making the record—

(a) it must be read to the person in English and, if the person used another language during questioning, the language the person used; and

(b) the person must be given a copy of the record.

(5) Before reading the record to the person, an explanation, complying with the responsibilities code, must be given to the person of the procedure to be followed to comply with this section.

(6) The person must be given the opportunity, during and after the reading, to draw attention to any error in or omission from the record he or she claims were made in the written record.

(7) An electronic recording must be made of the reading mentioned in subsection (4) and everything said by or to the person during the reading, and anything else done to comply with this section."

[27] Section 439 is also relevant:

"**439 Admissibility of records of questioning etc.**

(1) Despite sections 436 and 437, the court may admit a record of questioning or a record of a confession or admission (the *record*) in evidence even though the court considers this division has not been complied with or there is not enough evidence of compliance.

(2) However, the court may admit the record only if, having regard to the nature of and the reasons for the noncompliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice."

[28] The appellant submits that the oral evidence of the off-camera confession given by Tunks was "not a record" for the purposes of s 439 because it was neither an electronic nor written record of what was said. It was therefore not admissible pursuant to s 439 in circumstances where the PPRA provides only for a discretion to admit "a record of questioning" or "a record of a confession or admission".[21]

[29] The appellant accepts that s 436 contemplates circumstances where a confession cannot be electronically recorded if it is impracticable.[22] The trial judge considered that there was no breach of s 436(2) because by the time the off-camera confession was made, the recording of the interview had been terminated and the confession was not in response to any question by police:

> "There was simply no occasion to catch the confession electronically. Therefore it was not 'practicable' to record the confession."[23]

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21 Revised Outline of Submissions on behalf of the appellant, para 33.

22 Revised Outline of Submissions on behalf of the appellant, para 31.

23 *R v Tahiata (No 2)* [2020] QSCPR 9, [127].

[30] The appellant accepts that in such a situation contemplated by s 436(2), the confession may be admissible under s 437, but only if it constitutes "a record of a confession or admission" which is written.[24]

[31] As correctly submitted by the appellant and as found by the trial judge, s 437 did not apply as there was no written record of the off-camera confession and the procedure in ss 437(4) to (7) was not followed.[25] That procedure required the relevant police officer to make a written record of the off-camera confession, read it to the appellant, and give the appellant an opportunity to correct any error or omission in the record. This process was itself required to be electronically recorded. In such circumstances, the oral evidence of Tunks could not constitute a "record of a confession". Nor was the required procedure followed by Tunks at the commencement of the third interview in which the appellant confirmed the off-camera confession.

[32] Further, Tunks' oral evidence of the off-camera confession does not constitute "a record of a confession or admission" for the purposes of an exercise of discretion pursuant to s 439. As correctly identified by the trial judge, this construction of s 439 is consistent with the decision of this Court in *R v Smith*[26] and the decision of Fryberg J in *R v Faumuina*:[27]

> "[137] In *R v Smith*, a police officer gave evidence at trial of an oral confession that had been made to him. The confession was not recorded. McPherson JA ruled that the oral evidence of the police officer was not evidence which could be admitted in exercise of discretion under s 266 of the PPRA, which is now numbered as s 349. That was because the oral evidence of the police officer that the confession was made was not a "record".
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> [138] Some time after the confession was made by Mr Smith, the police officer made a written statement in which he said that the oral confession was made. McPherson JA thought that the statement was a "record" for the purpose of s 264. This observation was obiter as the Crown did not seek to tender the statement. His Honour said:
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> > "[27] Under s 266(1) it was nevertheless open to the court to exercise a discretion to admit in evidence 'a record of questioning' or 'a record of a confession or admission' even though it considered that Division 5 had not been complied with or there was not enough evidence of compliance. The word "record" in this context is not defined, but it is not easy to equate it with Kitching's unrecorded recollection of the conversation at any time before to 16 May 2002, when he first wrote it down in his witness statement. After that date, there was a 'record' in the form of the witness statement which he prepared for the proceedings against the appellant. However, it was not that "record" or written statement

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24 Section 437(1) PPRA.
25 Revised Outline of Submissions on behalf of the appellant, para 31; *R v Tahiata (No 2)*, [128].
26 [2003] 138 A Crim R 172.
27 [2004] QSC 264.

that the trial judge was asked to admit in evidence at the trial. Instead, it was Kitching's oral evidence based on his recollection of the conversation that was tendered and admitted. He may in fact have refreshed his memory by reading his statement again before giving evidence at the trial on 7 August 2002. He did not, however, ask for leave to do so at the trial, but gave his evidence of the conversation as something he was able to do of his own unaided and independent recollection. It was something he was not questioned about. According to the decision in *King v Bryant (No 2)* [1956] St R Qd 570 , he was not obliged to seek leave to refresh his memory in that way. Doing so would not in any event have made his statement or 'record' of the conversation admissible unless defence counsel had chosen to make it so by cross-examining him and then tendering it, which it was hardly likely he would have wished to do."

[139] His Honour went on to say:

"[28] The result is that his Honour had no power or discretion under s 266 to admit, or for that matter to reject, the evidence of Det Sgt Kitching. It was not 'a record of questioning' or 'a record of confession or admission' that was tendered at the trial, but Kitching's independent recollection of what had been said to him in the course of the conversation on 21 October 2001. In consequence, s 266 did not apply so as to authorise the court to admit the evidence if it was not otherwise admissible under the Division. Even though it was not a 'record' of the questioning or the confession or admission, was it otherwise not admissible? That inquiry must in my opinion be answered in the affirmative. Section 263(3) renders a confession or admission admissible in evidence in a proceeding against the person making it only if it is recorded as required by s 263(4) (electronically) or s 264 (in writing). The confession or admission here was, for the reasons I have given, not recorded as required by s 264(4) and by force of s 263(3), was not admissible in evidence at the appellant's trial. Under s 266(1), the judge had no power or discretion to admit."

[140] In the same case, McMurdo P observed:

"[11] Section 266 of the Act allows a record of questioning to be admitted despite non-compliance with the Act where the court is satisfied 'in the special circumstances of the case, admission of the evidence would be in the interests of justice'. Here, however, it was not sought to tender any written record but rather Kitching was permitted to give oral evidence of the conversation. The discretion

> conferred by s 266 was therefore of no assistance to the respondent but in any case there were no circumstances, special or otherwise, which suggested the admission of a written record of Kitching's evidence would be in the interests of justice. To allow in such evidence here would be to ignore the safeguards for those the subject of police investigation and questioning provided by Ch 7 of the Act and to risk a return to an earlier less accountable period when police evidence of verbal admissions was regularly challenged in the courts as fabricated, often with justification. Kitching's evidence was wrongly admitted."

[141] As already mentioned, in *Smith* there was no attempt by the Crown to tender a "record" of the confession beyond the oral evidence of the police officer. In *R v Faumuina*, Fryberg J was faced with the attempted tender of a note made by a police officer of a conversation which was not recorded. The procedure prescribed in the then equivalent to s 437 had not been followed.

[142] His Honour held, consistently with *Smith*, that the PPRA does not permit the admission of oral evidence of the confession, but permits the admission of a "record" of the confession. His Honour then held that the provisions did not make admissible evidence which would otherwise be inadmissible, so a "record" of a confession could only be admitted if, according to the rules of evidence, it (the "record") was admissible. In the absence of some statutory provision, or perhaps an allegation of recent fabrication, the policeman's note of the confession was not admissible. His Honour so found, and rejected the tender.

[143] In my respectful view, *Faumuina* should be followed. The clear intention of the provisions is to exclude evidence of confessions to police unless the prescribed safeguards are observed or, it is in the interests of justice to admit the evidence of the confession. It would be an extraordinary result, and in my view contrary to the objects and intention of the provisions, if otherwise inadmissible material such as a police officer's written note of a confession was made admissible."

[33] Accordingly, the admission of Tunks' oral evidence as to the off-camera confession constitutes a wrong decision of any question of law for the purposes of s 668E(1) of the *Criminal Code*.

The operation of s 668E(1) and (1A) of the *Criminal Code*

[34] Section 668E(1) and (1A) provide:

> "**668E Determination of appeal in ordinary cases**

> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[35] Section 668E(1) identifies three criteria. As to the second criterion, that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, Gageler J (as the Chief Justice then was) observed in *Baini v The Queen*[28] by reference to *Mraz v The Queen*[29] that this criterion "has always been understood to have the effect that 'if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso'". His Honour further observed that:

> "… it has always been understood that it is for the respondent and not the appellant to establish to the satisfaction of the court of criminal appeal that the case is within the proviso – that 'no substantial miscarriage of justice has actually occurred'."

[36] In *Filippou v The Queen*,[30] French CJ, Bell, Keane and Nettle JJ said that "[a] 'wrong decision of any question of law' includes misdirections on matters of substantive law as well as misdirections on matters of adjectival law" and that the question under the second criterion in the New South Wales equivalent of s 668E(l) is "whether the error constitutes a miscarriage of justice in the sense of a departure from trial according to law".[31] Their Honours also said that, where the second criterion applies, "the circumstances in some cases may be such that, despite the judge making 'the wrong decision of [a] question of law', the Court of Criminal Appeal is persuaded that the error could not have deprived the appellant of a chance of acquittal that was fairly open to him or her" and in that case the proviso will operate.[32]

[37] In *Simic v The Queen*,[33] Gibbs, Stephen, Mason, Murphy and Wilson JJ, by reference to *Mraz*, observed:

> "The test thus stated is less favourable to an appellant than that which is applied in cases where there has been a wrong decision of a question of law – cases that would include those in which there has been a misdirection as to the law or in which evidence has been

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28 (2012) 246 CLR 469, [49].
29 (1955) 93 CLR 493, 514.
30 *Filippou v The Queen* (2015) 256 CLR 47.
31 *Filippou v The Queen* (2015) 256 CLR 47, [13].
32 *Filippou v The Queen* (2015) 256 CLR 47, [15]; see also [48].
33 (1980) 144 CLR 319, 327.

> improperly admitted or rejected. Some of the statements of the principle to be applied in cases of that kind are collected in *Mraz v The Queen*. In such a case, the Crown must establish that if there had been no error the jury would (or must) have come to the same conclusion. According to the test approved in *R v Leggatt*, the appellant has the burden of showing that the misstatement probably affected the verdict, whereas in the case of an error of law the appeal will be allowed unless the Crown shows that the error did not affect the verdict."

[38] It followed therefore that where there had been an error of law, the question of miscarriage of justice arose only under the proviso.[34]

[39] In *Simic*, the High Court considered whether there had been a miscarriage of justice arising from a misstatement by the trial judge of a matter of fact. The case did not concern a wrong decision of any question of law. The relevant test stated in *Simic* for a miscarriage of justice arising from a misstatement of fact was that such a misstatement "will not invalidate a conviction unless the Court is satisfied that it is probable that but for the misstatement the jury would not have returned the verdict it did".[35]

[40] Their Honours suggested two reasons for applying a stricter test in the case of a misstatement of fact than in the case of a misdirection as to the law. The first reason, already identified above, is that any question of miscarriage of justice in relation to an error of law arises only under the proviso. The second suggested reason however, introduced a concept of materiality in relation to an error of law:[36]

> "Secondly, where the judge has made a misstatement of fact, the jury, who have had the same opportunity as the judge to hear the evidence, will not necessarily be misled. Where there is a misdirection or other error of law, the jury, which must take its instruction on matters of law from the judge, must necessarily be misled to some extent unless the error is corrected – that is, of course, if the error is a material one".

[41] This concept of materiality in *Simic* is discussed further below. It is sufficient to observe at this stage that the reference to an error of law being "a material one" should not be understood as introducing an additional requirement which an appellant must establish under the second criterion in s 668E(1) of the *Criminal Code*. The materiality of an error of law is a matter to be assessed by a court of criminal appeal in considering whether the proviso may be applied and, if so, whether no substantial miscarriage of justice has actually occurred.

[42] In *Weiss v The Queen*,[37] Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ considered the operation of the proviso and its application in criminal appeals. Similar to the present case, *Weiss* concerned an error of law which resulted in the wrongful admission of evidence. In describing the task of a court of criminal

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34 *Simic v The Queen* (1980) 144 CLR 319, 328.
35 *Simic v The Queen* (1980) 144 CLR 319, 327.
36 *Simic v The Queen* (1980) 144 CLR 319, 328.
37 (2005) 224 CLR 300.

appeal in applying the proviso, their Honours first identified "[t]hree fundamental propositions":[38]

> "First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt."

[43] Their Honours then referred to the various tests that had been proposed as to the application of the proviso:[39]

> "Reference to inevitability of result (or the converse references to "fair" or "real chance of acquittal") are useful as emphasising the high standard of proof of criminal guilt. They are also useful if they are taken as pointing to "the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record". But reference to a jury (whether the trial jury or a hypothetical reasonable jury) is liable to distract attention from the statutory task as expressed by criminal appeal statutes, in this case, s 568(1) of the *Crimes Act*. It suggests that the appeal court is to do other than decide for itself whether a substantial miscarriage of justice has actually occurred."

[44] In accordance with *Weiss*, the appellate court must make its own independent assessment of the evidence and determine whether the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. In doing so, the appellate court must make due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record. The appellate court must itself decide whether no substantial miscarriage of justice has actually occurred. This task must be undertaken on the whole of the record of the trial, including the fact that the jury returned a guilty verdict. Their Honours continued: [40]

> "The court is not "to speculate upon probable reconviction and decide according to how the speculation comes out". But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt."

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38 *Weiss v The Queen* (2005) 224 CLR 300, [39].
39 *Weiss v The Queen* (2005) 224 CLR 300, [40].
40 *Weiss v The Queen* (2005) 224 CLR 300, [43].

[45] Their Honours recognised that some errors occurring in the course of a criminal trial may amount to such a serious breach of "the pre-suppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso".[41]

[46] *Baini v The Queen* also concerned the wrongful admission of evidence arising from a wrong decision of law by the trial judge not to sever a count on the indictment concerning the blackmail of a different person. French CJ, Hayne, Crennan, Kiefel and Bell JJ recognised that in some cases the nature of the error or irregularity will prevent the appellate court carrying out the task required under the proviso.

[47] The plurality also emphasised that the relevant appellate task is to determine whether no substantial miscarriage of justice has actually occurred. In light of the primary task of an appellate court, their Honours made two observations in relation to applying a test that "a guilty verdict was inevitable". First, it was observed that a court's satisfaction that a guilty verdict was inevitable "will not in every case conclude the issue about whether there has been a substantial miscarriage of justice but it is a matter to be taken into account in answering the question posed…".[42]

[48] The second observation was as a follows:[43]

> "Thirdly, the inquiry to be made is whether a guilty verdict was *inevitable*, not whether a guilty verdict was *open*. … If it is said that a guilty verdict was inevitable (which is to say a verdict of acquittal was not open), the Court of Appeal must decide that question on the written record of the trial with 'the natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record'. That the jury returned a guilty verdict may, in appropriate cases, bear upon the question. But, at least in cases like the present where evidence has wrongly been admitted at trial and cases where evidence has wrongly been excluded, the Court of Appeal could not fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that it was not *open* to the jury to entertain a doubt as to guilt. Otherwise, there has been a substantial miscarriage of justice because the result of the trial *may* have been different (because the state of the evidence before the jury would have been different) had the error not been made."

[49] In *Kalbasi v Western Australia*,[44] Kiefel CJ, Bell, Keane and Gordon JJ, by reference to *Weiss*, identified the task of a court of criminal appeal in the application of the proviso as follows:

> "The determination of whether, notwithstanding the error, there has been no substantial miscarriage of justice is committed to the appellate court. The appellate court's assessment does not turn on its estimate of the verdict that a hypothetical jury, whether 'this jury' or a 'reasonable jury', might have returned had the error not occurred. The concepts of a 'lost chance of acquittal' and its converse the 'inevitability of conviction' do not serve as tests because the

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41 *Weiss v The Queen* (2005) 224 CLR 300, [46].
42 *Baini v The Queen* (2012) 246 CLR 469, [30].
43 *Baini v The Queen* (2012) 246 CLR 469, [32].
44 (2018) 264 CLR 62, [12].

> appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had."

[50] In *Kalbasi*, the plurality also identified the types of errors which would prevent the appellate court from being able to assess whether guilt was proved to the criminal standard:[45]

> "Contrary to the appellant's submission, *Weiss* requires the appellate court to consider the nature and effect of the error in every case. This is because some errors will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard. These may include, but are not limited to, cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence. In such cases *Weiss* does not disavow the utility of the concept of the lost chance of acquittal or inevitability of conviction: regardless of the apparent strength of the prosecution case, the appellate court cannot be satisfied that guilt has been proved. Assessing the application of the proviso by reference to considerations of 'process' and 'outcome' may or may not be helpful provided always that the former takes into account the capacity of the error to deprive the appellate court of the ability to justly assess the latter."

[51] A recent example where the High Court considered that the proviso could not be applied in circumstances where inadmissible evidence was admitted by consent is *Orreal v The Queen*.[46] *Orreal* was not a case which concerned a wrong decision of any question of law. Kiefel CJ and Keane J noted the following in relation to the proviso and its application:[47]

> "An appellate court must be persuaded that evidence properly admitted at trial establishes guilt to the requisite standard before it can conclude that no substantial miscarriage of justice has actually occurred. It must consider the whole of the record of the trial and the nature and effect of the error which gives rise to the miscarriage of justice in the particular case. As explained in *Kalbasi v Western Australia*, this is because some errors will prevent the appellate court from being able to assess whether guilt was proved beyond reasonable doubt. The examples there given include cases which turn on issues of contested credibility or cases where there has been a wrong direction on an element of liability in issue. What they have in common is that the appellate court cannot be satisfied that guilt has been proved."

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45 *Kalbasi v Western Australia* (2018) 264 CLR 62, [15].
46 (2021) 274 CLR 630.
47 *Orreal v The Queen* (2021) 274 CLR 630, [20].

[52] *Orreal* was a case that turned upon the jury's acceptance of the evidence of the complainant. Kiefel CJ and Keane J explained why in such circumstances the proviso could not apply:[48]

> "In such a case the appellate court should not seek to duplicate the function of the jury, because it does not perform the same function in the same way nor have the same advantages."

[53] In the present case, the appellant concedes that the error of law identified in the first ground of appeal is not an error contemplated by the plurality in *Kalbasi* so as to prevent this Court from being able to assess, notwithstanding the error, whether guilt was proved to the criminal standard.[49]

[54] *Hofer v The Queen*[50] did not concern a wrong decision of any question of law. The High Court had to consider the application of the proviso where there was a miscarriage of justice. The relevance of *Hofer* to the present case is the High Court's uniform endorsement of the correctness of the approach in applying the proviso stated in *Weiss*.

[55] In *Hofer*, Kiefel CJ, Keane and Gleeson JJ referred to *Weiss* in the following terms:[51]

> "In *Weiss* this Court resolved the apparent tension in the former Victorian equivalent of s 6(1) of the *Criminal Appeal Act* between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, and the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, on the basis that the appellate court's assessment of the appellant's guilt "is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do", but on the basis that the appellate court is itself satisfied of the appellant's guilt beyond reasonable doubt. As was explained by the plurality in *Kalbasi v Western Australia*, in such a case 'the appellate court is not predicting the outcome of the hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had."

[56] Justice Gageler in *Hofer* observed that *Weiss* had not sought to be re-opened in any case since it was decided. His Honour considered that absent an application to re-open *Weiss* it was his duty to follow it.[52]

[57] As to the application of the proviso, Gageler J observed:[53]

> "The demand of *Weiss* is for an appellate court to survey the whole of the appellate record:

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48 *Orreal v The Queen* (2021) 274 CLR 630, [22].
49 Transcript (25 October 2023) 1-16 l 45 – 1-17 l 39.
50 (2021) 274 CLR 351.
51 *Hofer v The Queen* (2021) 274 CLR 351, [59].
52 *Hofer v The Queen* (2021) 274 CLR 351, [95].
53 *Hofer v The Queen* (2021) 274 CLR 351, [90].

> "The task is to be carried out by each member of the appellate court personally. The relevant question to be asked is not whether the jury which returned the guilty verdict would have done so if there had been no error. Nor is it whether a reasonable jury would convict. Instead, the question for each member of the appellate court personally is whether that member thinks that the evidence properly received established the accused's guilt beyond reasonable doubt.""

His Honour continued:[54]

> "*Weiss* further demands that each member of an appellate court approach that question conscious of the inherent limitations of fact-finding on the basis only of an appellate record."

[58] Justice Gordon in *Hofer*, while disagreeing that no substantial miscarriage of justice had actually occurred, referred to the principles in *Weiss* as follows:[55]

> "The principles governing the application of the proviso are set out in *Weiss v The Queen*. *Weiss* was decided 16 years ago and has since been applied by this Court and intermediate appellate courts in the determination of many hundreds of criminal appeals."

Her Honour considered that the proviso cannot be applied unless the appellate court is positively persuaded by the Crown that the admissible evidence at trial proved the accused's guilt beyond reasonable doubt.

There is no onus on the appellant to establish that the wrong decision of law was material

[59] The appellant, by reference to *Simic*, submitted that:[56]

> "… where there has been a wrong decision of a question of law, including cases where there has been evidence which has been improperly admitted at trial, upon the appellant demonstrating that there has been a material error of law, the appeal ought to be allowed unless the Crown can show that error did not affect the verdict." (emphasis added).

[60] If this submission was correct, it would impose on an appellant a requirement not only to establish that there has been a wrong decision of any question of law, but also that such an error was material. The respondent, however, accepts that if the appellant demonstrates a wrong decision of any question of law, the onus is on the respondent to demonstrate that no substantial miscarriage of justice has actually occurred.[57]

[61] The respondent's submission should be accepted. For the following reasons the materiality of the relevant error of law is to be considered by the appellate court in the application of the proviso.

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54 *Hofer v The Queen* (2021) 274 CLR 351, [91].
55 *Hofer v The Queen* (2021) 274 CLR 351, [128].
56 Appellant's Supplementary Outline of Submissions, para 24.
57 Respondent's Supplementary Outline of Submissions, para 6.

[62] First, s 668E(1) does not expressly qualify, by use of the word "material" or otherwise, a wrong decision of any question of law.

[63] Secondly, where an error of law has been established by the appellant, on the authority of *Weiss*, it is for the Crown to satisfy the Court that no substantial miscarriage of justice has actually occurred notwithstanding the error.

[64] Thirdly, Gageler J in *Baini* observed that the second limb "has always been understood to have the effect that 'if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso'".[58]

[65] Fourthly, the respondent's submission "accords with the long tradition of criminal law that a person is entitled to a trial where rules of procedure and evidence are strictly followed".[59]

[66] Fifthly, the appellate court in applying the proviso is required to consider the materiality of the relevant error of law. This was stated by the plurality in *Kalbasi*, noting that "*Weiss* requires the appellate court to consider the nature and effect of the error in every case".[60]

[67] Sixthly, as observed in *Weiss*, there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury.

[68] In *Kalbasi* the plurality gave such an example by reference to an observation of Gleeson CJ in the course of argument in *Weiss*:[61]

> "In the course of argument in *Weiss*, Gleeson CJ put the case in which inadmissible evidence is wrongly admitted to prove a fact against an accused who later gives evidence admitting the fact. His Honour identified that case as one where the proviso would be rightly applied even though it could not be said that a conviction was inevitable. Gleeson CJ's example is of a case in which the appellate court may readily conclude for itself from the record – including the admission and the jury's verdict of guilty – that guilt was proved beyond reasonable doubt. As Gleeson CJ said, in concluding his intervention in argument in *Weiss*: 'I suggest that the appropriate test is the statutory test'."

[69] More recently, in *Huxley v The Queen*[62] Gordon, Steward and Gleeson JJ stated that:

> "Not every error of law, however trivial, will give rise to a substantial miscarriage of justice. If there has been a misdirection or other error of law the question is always whether there has been a substantial miscarriage of justice."

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58 *Baini v The Queen* (2012) 246 CLR 469, [49].
59 *Kalbasi v Western Australia* (2018) 264 CLR 62, [12]; *Hofer v The Queen* (2021) 274 CLR 351, [41].
60 *Kalbasi v Western Australia* (2018) 264 CLR 62, [15].
61 *Kalbasi v Western Australia* (2018) 264 CLR 62, [14].
62 [2023] HCA 40, [44].

The Crown's case and the evidence

[70] The Crown opened the case on the basis that although the appellant took sole responsibility for the murders in the third interview, the true version was that told by the appellant in his fourth interview and his primary statement.[63] The Crown's particulars identified the relevant acts committed by the appellant as follows:

1. Putting the toolbox in Scrubby Creek;
2. Placing the toolbox on the Green Hilux;
3. Driving the vehicle to Scrubby Creek;
4. Removing the toolbox from the vehicle at Scrubby Creek;
5. Providing Trent Thrupp with a claw hammer;
6. Firing a shot in order to silence Triscaru and Breton when the toolbox was placed in the water.[64]

[71] The Crown submitted to the jury in its closing address that, irrespective of whether they accepted the appellant's version in the third interview or the fourth interview, in both versions he was "confessing to involvement in their murders".[65]

[72] The trial judge summed up to the jury in relation to the party provisions of the *Criminal Code* in relation to both versions. If the jury accepted the version in the third interview as true, they could be satisfied that it was the appellant who did the act (Particular 1) which caused the death of the deceased: s 7(1)(a) of the *Criminal Code*. Alternatively, if the jury accepted the version in the fourth interview (and the primary statement) as true, the appellant's criminal liability fell to be considered under s 7(1)(c) of the *Criminal Code* as aiding Thrupp (Particulars 2 – 6) to commit the offences.[66]

[73] The Crown called 32 witnesses. The appellant did not give or call any evidence. Approximately seven hours of police interviews with the appellant were played to the jury. It is convenient to commence a consideration of the evidence with the four interviews, as well as the walk-through and the appellant's signed statements.

[74] The original evidence of what the appellant told police in the course of each interview are the relevant recordings. The Court has viewed each of these recordings. Counsel for the appellant accepted that in applying the proviso, the Court should view the recordings for the purposes of assessing the appellant's demeanour and determining the plausibility of his various versions.[67]

(a) The first interview

[75] As already observed, in the course of the first interview the appellant denied any involvement in the offences. Early in the first interview, he informs police that he

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63 RB vol 1, page 25, ll 27 – 34.

64 The Crown's particulars in this form were provided to the jury by the trial judge in the course of the summing up. RB vol 5, page 2317. The relevant acts were slightly re-ordered from the Crown's particulars as provided at the start of the trial: RB vol 5, page 2228.

65 RB vol 1, page 41, ll 5 – 14.

66 RB vol 1, pages 78, l 5 – 79, l 26.

67 Transcript (25 October 2023) 1 – 14, ll 17 – 47; cf *Pell v the Queen* (2020) 268 CLR 123 at 144 – 145, [36] – [39].

would not be giving names: "… 'cause they're my boys from school, not telling names, I'm not snitching."[68] He states that Lelan Harrington is "my boy", that he knows him from school, and that he "gets fried a lot". The appellant informs police that his mates "smoke crack" but he does not.[69]

[76] The appellant denies knowing anything about the disappearance of Breton and Triscaru. He states that he did not even know they were missing. He understood that Lelan Harrington had gone to Mackay.

[77] He accepts that as at 24 January, he was driving a green Toyota Hilux and that he would let his "boys" use his vehicle.[70]

[78] He states that his two toolboxes were ordinarily carried on the tray of his Hilux. He draws the position of these toolboxes on the tray for police.[71] This drawing, as well as a photograph of the actual vehicle with his two toolboxes,[72] show that the toolboxes fit on the tray of the Hilux without straps so as to permit the back of the tray to be closed.

[79] In the course of the first interview, the appellant continues to reiterate that he will not be naming names "cause I'm not snitching on anyone"[73] When asked by police whether he knows who resides at the unit at Kingston, he refuses to give any names.[74] It is at this point that police inform the appellant that they have a statement from Lelan Harrington. Police then proceed to read parts of Harrington's statement to the appellant. This includes the events of 24 January at the unit. According to Harrington's statement, Breton and Triscaru were present at the unit as well as Stou Daniels and Thrupp. The appellant denies knowing Daniels and Thrupp. Harrington's statement refers to the appellant arriving at the unit in a green Toyota Hilux. The appellant denies this and suggests that Harrington was "cray-cray, fried."[75] The appellant, however, accepts that he has known Harrington since primary school.

[80] The appellant describes as "a lie" the suggestion that he backed his Hilux into the carpark and was playing loud music. The appellant further denies that he assisted carrying the toolbox out the front door and placing it on the Hilux. Police further suggest to the appellant from Harrington's statement that Brenton and Triscaru could be heard screaming and kicking from inside the toolbox and that the appellant requested Harrington to assist him to lift the toolbox onto the Hilux. Thereafter, the appellant and Thrupp entered the Hilux and drove away. The appellant's reaction to these suggestions is as follows:

> "Like serious guys, really. What the fuck."[76]
>
> "I don't know what the fuck he's on about. Check my toolboxes."[77]

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68 RB vol 4, page 1457, ll 14 – 16.
69 RB vol 4, page 1457, ll 35 – 36; RB vol 4, page 1458, ll 53 – 54.
70 RB vol 4, page 1462, ll 10 – 22; RB vol 4, page 1463, ll 10 – 15.
71 Exhibit 50.
72 Exhibit 48.
73 RB vol 4, page 1472, ll 53 – 54.
74 RB vol 4, page 1472, ll 56 – 59.
75 RB vol 4, page 1477, ll 50 – 51.
76 RB vol 4, page 1480, ll 1 – 2.
77 RB vol 4, page 1480, ll 31 – 33.

[81] Police proceed to read from Harrington's statement where he referred to the appellant being covered in mud and telling Harrington and another person "it's done".[78] The appellant's response to this suggestion is as follows:

> "What the fuck. I dunno what the fuck he's talkin-about. Dunno what the fuck he's on about."[79]

[82] Police then show a photograph[80] to the appellant which depicts the Hilux with the back of the tray down with a long toolbox extending over the tray and strapped to the tray. When shown this photograph, while the appellant accepts that it is his vehicle shown in the photograph, he states "[i]t's not my fuckin' toolbox though"[81] and that "they better not be fuckin' setting me up".[82]

[83] Apart from expressing concern that he may be being set up, the appellant tells police that he knows "fuck all"[83] and that he does not know why Harrington would throw him under the bus.[84] He is unable to explain why the toolbox is on the Hilux, but suggests to police that it was probably a night "one of the boys borrowed the truck".[85] When police ask who borrowed the truck, the appellant refuses to give any names but reiterates that he was not involved in any murder and he did not know the location of the missing persons.

[84] The demeanour of the appellant in the course of the first interview is generally calm and polite. He does however become slightly animated when stating that he will not provide any names.

(b) The second interview

[85] The second interview commences with police again showing a photograph of a tray back Hilux with a toolbox on the back.[86] The appellant accepts that the photograph appears to have been taken at "one of the boys' houses."[87] The appellant refuses to sign the photograph, fearing that he may be set up.

[86] Police then show the appellant a text message[88] sent on 24 January, which states "just doing some cool ass forbying babe. Hectic tracks. Nearly got bogged." The appellant accepts that this text constituted part of an exchange he had with his partner on the night of 24 January. The appellant tells police that he was four-wheel driving with his cousin on the day of the murders. After further questioning, the appellant informs police that he did lend his Hilux on 24 January. The appellant expresses concern at being labelled a snitch, and is concerned that he not be identified if he was to name names. The following exchange occurs which results in the appellant naming Thrupp as the person who borrowed his Hilux:

> "… I know who I gave the car to. I know who I gave my car to, okay. I'm a, I'm gonna say his name, but just please, please do

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78 RB vol 4, page 1483, ll 40 – 43.
79 RB vol 4, page 1483, ll 45 – 46.
80 Exhibit 49; RB vol 4, pages 1484, l 38.
81 RB vol 4, page 1485, l 35.
82 RB vol 4, page 1485, l 42.
83 RB vol 4, page 1486, l 3.
84 RB vol 4, page 1489, ll 12 – 14.
85 RB vol 4, page 1491, ll 52 – 54.
86 Exhibit 52.
87 RB vol 4, page 1500, l 59.
88 Exhibit 53.

> anything you can to try and, 'cause I don't want anything to my family. That's it. … I know these guys, I've known them since school. I know what they're capable of. That's all. I don't want anything happening to my family. It was, I lent it to my mate, Punchy. There. I said it."[89]

The reference to "Punchy" is a reference to Thrupp. Having named Thrupp, the appellant places his head in his hands and is visibly upset at having named Thrupp as the person who borrowed his Hilux.

[87] The appellant tells police that Thrupp came around to where he was residing and borrowed the Hilux. The appellant again becomes upset, refers to himself as "a fuckin' snitch", and tells police "I'm dead".[90]

[88] The appellant then supplies to police the name of his cousin with whom he says he was four-wheel driving. He states that when he returned home on the night of 24 January, his Hilux was not there and he assumed that it must have been returned later that night.

[89] Near the end of the second interview, the appellant is asked if there is anything further he wishes to say, to which he replies:

> "No ma'am. There's nothing else, I've already snitched my mate, so fuckin' may as well just kill me now."[91]

(c) The third interview

[90] As outlined at [21] above, the third interview commences with the appellant accepting the effect of the off-camera confession in which he had "confessed basically".[92] His demeanour is calm and polite. He admits to murdering the missing persons and having them in his Hilux. He dropped Thrupp off prior to committing the offences because Thrupp did not wish to go through with the murders. He states that he committed the offences near the Kingston Park Raceway where he swam out, stood on top of the toolbox and heard screams.[93]

[91] The appellant continues:

> "I spent, think I spent the day with my family. Boys said they need me. Fuck I went over, and then there's only like two or three people there. Um and then, I just loaded them up by myself. Loaded them up. Lelan gave me hand lifting, but he couldn't lift, so I just lifted them both, both onto my truck. Um I strapped in down, me and Trent drove off. I asked Trent, oh gee, have you ever killed anyone before, and he's like, no. And I was like, oh well, get out 'cause you're not gonna go through with it. So he got out, um I drove to Scrubby Creek and then done the job. Done it all on my own."[94]

[92] The appellant admits going to the "Tav" and being "really stoned". He accepts that he reversed the Hilux into the carport, loaded the toolbox onto the tray and strapped it on. He turned up the music in his vehicle. He expresses a willingness to sign the

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89 RB vol 4, page 1509, ll 35 – 45.
90 RB vol 4, page 1511, ll 36 – 45.
91 RB vol 4, page 1522, ll 41 – 42.
92 RB vol 4, page 1525, l 31.
93 RB vol 4, page 1525, ll 50 – 59.
94 RB vol 4, page 1527, ll 29 – 39.

photographs that police had previously shown him depicting the toolbox on the Hilux. He emphasises that Thrupp was not involved.[95]

[93] He informs police that while he did not know who was in the toolbox he could hear screaming coming from the toolbox. He describes himself as "doing a job to protect the boys".[96] He knew that there were two persons in the toolbox and could hear them kicking. He states that he drove to Scrubby Creek.[97] He told Thrupp, prior to dropping him off that "I'm just gonna dump the box".[98]

[94] The appellant offered an explanation as to why he was confessing:

> "I just know that I, I've done it, and you know I'm confessing everything, you know. I'm really sorry to all the family that I've hurt, you know, I know I've done wrong, but you know. I just gotta man up."[99]

[95] The appellant tells police that if they went to the location they would smell the decomposing bodies because he had returned to the location. The previous week he had observed the toolbox floating in Scrubby Creek, so he went down to put some rocks on it.[100] He picked up some rocks (including a 50-kilogram rock from another location) and placed the rocks on top of the toolbox, causing it to sink.

[96] When asked whether there was a firearm involved, the appellant states that, while he did not shoot Breton and Triscaru, he did shoot his gun off in the air. He describes this as standing next to his vehicle when he "just put off a round".[101] He refers to this gun as something which he made himself from a few pipes. He recalls discharging the gun twice. In the course of the third interview, the appellant does not offer any reason as to why he discharged his gun. This is to be contrasted with his explanation in the fourth interview, in which he states that he discharged his gun at the request of Thrupp in order to silence Breton and Triscaru.

[97] The appellant informs police that he is the only one who knows the location of the missing persons and that he was the only one who did "the job".[102] He informs police that he is prepared to take them to the location of the toolbox.[103]

[98] As to Lelan Harrington, the appellant states that he is aware that Harrington had fled to Mackay because he was involved in getting rid of evidence by burning a car.[104]

[99] The appellant informs police that he knew he was going to kill Breton and Triscaru once the toolbox had been loaded onto his Hilux.[105] He accepts that he played his music at full volume while at the unit because "they could hear the kicking".

[100] When asked by police what the incident was all about he replies "[i]t was just over drug money".[106]

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95 RB vol 4, page 1532, ll 44 – 45.
96 RB vol 4, page 1533, l 9.
97 RB vol 4, page 1534, l 57.
98 RB vol 4, page 1535, ll 39 – 40.
99 RB vol 4, page 1537, ll 41 – 44.
100 RB vol 4, page 1540, ll 25 – 50.
101 RB vol 4, page 1543, ll 39 – 48.
102 RB vol 4, page 1549, ll 51 – 55.
103 RB vol 4, page 1553, ll 6 – 7.
104 RB vol 4, page 1553, ll 15 – 31.
105 RB vol 4, page 1556, ll 36 – 39.
106 RB vol 4, page 1558, l 50.

[101] The third interview concludes with the appellant expressing his desire to apologise to the family face-to-face and stating that he was "happy" to take police to the location of the toolbox.[107]

(d) The walk-through

[102] The walk-through commenced at 00:53 on 11 February 2016 at Mudgee Street, Kingston. It was recorded by a police bodycam.[108] In the recording, the appellant accepts that the purpose of the walk-through is to show police the location of the missing persons. He informs police that he had driven his Hilux to the end of Mudgee Street and then turned left.

[103] The appellant tells police that they would "smell it" when they arrived.[109] He shows police where he had previously collected a pile of rocks after discovering that the toolbox was still floating in Scrubby Creek. When at Scrubby Creek the appellant instructs police to shine their lights on the creek where they would see a brown patch within the green colour.[110] He explains that the brown patch was "all the decomposition".[111] He then offers to go into the creek to retrieve the toolbox. This offer was refused by the police.

[104] He shows police where his Hilux became bogged which resulted in him becoming covered in mud.

(e) The fourth interview

[105] The circumstances in which the appellant came to participate in the fourth interview are outlined at [23] above. During the fourth interview the appellant's demeanour is calm and polite. The impression from viewing the video of the fourth interview is that the appellant is recounting, in an apparently genuine manner, the version of events that actually occurred. Near the end of the interview, he raises both his arms and exclaims "that's the truth".[112] There is a look of genuine relief on the appellant's face when he speaks those words. The appellant appears to be engaged in the process and his narrative does not appear to be contrived or an invention.

[106] The narrative commences with a text which the appellant says he received at 09:00 on 24 January. The text requested that he attend the Tav as soon as possible. When he arrived, he observed a number of persons, including Breton and Triscaru. They were sitting on a sofa and according to the appellant "the boys were just talking to them".[113] The appellant was informed that use of his Hilux was required and he was requested to come back at 19:00. He was instructed to unload all his tools. He returned at 19:00 and proceeded to unload his tools. Also present was Stou Daniels, Thrupp and a female known to him as "Chanel". A Civic motor vehicle was moved from the driveway to enable the appellant to back his Hilux into the driveway.[114] The appellant was told that there were two persons in the toolbox

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107 RB vol 4, page 1560 – 1561.
108 Exhibits 56 and 57.
109 RB vol 4, page 1347, l 18.
110 RB vol 4, page 1351, ll 28 – 30.
111 RB vol 4, page 1351, l 58.
112 RB vol 5, page 2046, l 58.
113 RB vol 5, page 1965, l 36.
114 RB vol 5, page 1966, ll 3 – 4.

and they needed him "to drop them off".[115] He backed the Hilux into the carpark and started to play his music very loudly. He could hear kicks and screams from the toolbox. With the assistance of Thrupp and others, the appellant loaded the toolbox onto his Hilux. The toolbox was then strapped onto the tray.

[107] The appellant, with Thrupp, drove along the Logan Motorway in the Hilux, initially towards the north coast, but then executed a u-turn back to the Pacific Highway. There was meant to be an entourage following the Hilux, but ultimately no one ended up following the appellant and Thrupp. An attempt was made to dump the toolbox at a quarry, but none of the gates were open. Thereafter, they proceeded towards Kingston Park, to the same place that the appellant showed police in the walk-through. The appellant drove down a track and backed up the Hilux while listening to music. Thrupp alighted from the Hilux and called on the appellant to assist him in removing the toolbox from the vehicle, which he did. Thrupp then proceeded to pull the toolbox into Scrubby Creek. The appellant could still hear the screams and kicking of Breton and Triscaru.

[108] Thrupp jumped into the water and pushed the toolbox along and stood on it. The appellant observed that the toolbox was floating. Thrupp asked the appellant for a claw hammer so that he could create some holes in the toolbox as it was not sinking fast enough. The appellant threw his claw hammer to Thrupp, who then created some holes.[116]

[109] At one stage, Thrupp told the appellant to make some noise to scare Breton and Triscaru. The appellant obtained his gun and shot it off in the air.[117] The appellant explained that he shot off the rounds "to sort of see if they'd quiet it down".[118] Thrupp then proceeded to submerge the toolbox in the creek.

[110] After becoming bogged while leaving Scrubby Creek, the appellant drove to Sunshine Auto Carwash where he guerneyed the Hilux, himself and Thrupp.[119]

[111] Prior to returning to the Tav, the appellant and Thrupp encountered Lelan Harrington, who was driving a white Toyota Hilux. There was a passenger with Harrington. The appellant told them "it's done".[120] They then went to the house of Stou Daniels' partner. Upon returning to the Tav, the appellant loaded his two toolboxes onto the Hilux and went home.

[112] Approximately one week later, when it was noticed that the toolbox was floating in Scrubby Creek, the appellant with Thrupp and another person returned to the site where they found the toolbox floating. They laid rocks on top of the toolbox in order to sink it.[121]

[113] Near the conclusion of the fourth interview, the appellant states:

> "I hope I've helped you guys in the mystery…".[122]

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115 RB vol 5, page 1965, ll 56 – 59.
116 RB vol 5, page 2001, ll 25 – 40.
117 RB vol 5, page 2007, ll 27 – 29.
118 RB vol 5, page 2009, ll 53 – 54.
119 RB vol 5, page 1989, ll 10 – 21.
120 RB vol 5, page 1989, l 10.
121 RB vol 5, page 2041, ll 33 – 60.
122 RB vol 5, page 2048, l 22.

[114] The interview concludes with the following exchange:

> "TAHIATA: Nah, that I'm really sorry for what I've done and I fucked up. I'm really sorry to the families and you know if there's anything I can do, I, I'll do it. If there's anything I can do for them to forgive me, I'll do it. I'd do anything. … [j]ust glad I told the truth and got it off my chest."[123]

(f) The appellant's statements (Exhibits 58, 59 and 60)

[115] In the primary statement, the appellant commences by outlining his knowledge of a number of persons including Breton, Triscaru, Harrington, Thrupp, Daniels and Tepuna Mariri (also known as "Puna").

[116] The statement generally recounts a version of events consistent with the appellant's fourth interview, with some additional details. He states that he arrived at the Tav at around 18:15 on 24 January. He parked in the visitors carpark and was informed by Thrupp that there were two persons in a toolbox. He was instructed by Thrupp to unload his two toolboxes and assisted others in loading the toolbox containing the two persons onto the tray of the Hilux. He was instructed to play loud music but could still hear loud kicks and screams coming from the toolbox. He observed Thrupp strapping the toolbox down with two yellow ratchet straps. When they arrived at Scrubby Creek he observed Thrupp cut the yellow straps with a knife. He was instructed by Thrupp to help him pull the toolbox off the tray. He recalls that Thrupp dragged the toolbox into the water. He was yelling "time to die". The appellant states that after he let off a round from his gun, the screams from the toolbox grew louder.

[117] In his second statement, the appellant recalls a conversation with Thrupp on 24 January, where Thrupp suggested that they should deal with Harrington. Also that Stou Daniels was concerned about Harrington. Thrupp's suggestion was that Harrington should also be placed in the toolbox. This was because Harrington had "nearly let one of them go".

[118] In his third statement, the appellant refers to Mariri inviting him to check out an apartment at Evolution Apartments, Tank Street, Brisbane City. At this apartment he observed that Stou Daniels was present as well as Thrupp and Mariri. Daniels informed the group that they were all going to go to New Zealand. Daniels also expressed concern about Harrington, as things were "really starting to get hot".[124]

Other evidence

(a) Phat Tan Khuu

[119] Khuu was the owner of a convenience store in Marsden. In the course of his evidence, upon being shown a photograph of Breton,[125] Khuu testified that he had known Breton only by the alias of "Woody", and that he was his drug dealer. In exchange for dealing drugs to him, Khuu sold Breton (and other drug dealers) cheap mobile phones to conduct his drug dealing.

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123 RB vol 5, pages 2048, l 49 – 2049, l 5.
124 Exhibit 59, para 22.
125 Exhibit 28.

[120] Breton had previously told Khuu that he sourced his drugs "…from Islanders". Daniels also frequented Khuu's store to buy mobile phones. Khuu suspected that Daniels was a drug dealer. On 22 January 2016, Khuu texted Breton a photograph of Daniels that he had screenshotted from his store's CCTV footage. Khuu asked Breton via text message "Do you know him?". A few minutes later, Breton replied "Yeah that's him". The Crown alleged that this interaction set off the entire chain of events which followed.

[121] On 24 January, Khuu received several text messages which appeared to come from one of Breton's mobile phones. Around 14:00, Breton texted Khuu to ask if he was at work, to which Khuu replied that he was not. Around 18:00, the following messages were exchanged with respect to the photograph of Daniels:

> Breton's mobile: "Do you know that guy?"
> Khuu's mobile: "Only seen him come to shop to get phones and cigs"
> Breton's mobile: "Yeah he's a big timer not a person to fuck with lol".[126]

The Crown alleged that these messages were not coming from Breton, but that Daniels and others at the Tav had taken control of Breton's phone.

[122] Khuu did not message Breton again until two days later to request that he come to the shop. He received no response to this message and never heard from Breton again.

(b) Lelan Harrington

[123] Harrington was a close friend of the appellant; they had attended primary and high school together along with Mariri. Thrupp had also attended the same high school.

[124] In January 2016, Harrington was living at the Tav. He shared the unit with Thrupp and Mariri, but only Harrington and Mariri were parties to the lease.

[125] Harrington had been family friends with Breton and had known him for several years.[127] Harrington and Triscaru also knew each other through their families.

[126] On the evening of 22 January 2016, Harrington, Breton, Triscaru, and two others were socialising at Breton's house. After going out to a local hotel, they returned to Breton's home, where Breton showed everyone the photograph of Daniels which Khuu had sent to him earlier that day.

[127] The next day, Harrington and Breton drove two of Breton's vehicles including a Courier to have the wheels changed on one of them. Breton informed Harrington that he had a $50,000.00 bounty on him. Upon returning to the Tav that evening, Harrington was met by Mariri, Thrupp and Taiao. The three of them questioned Harrington extensively about his whereabouts that day, which led Harrington to suspect that they were aware Breton had a photo of Daniels on his phone. Harrington slept at the Tav that night.[128]

[128] On the morning of 24 January, Harrington awoke to find Daniels sitting on his sofa in the living room. Daniels asked Harrington, "Did he (Breton) have a picture of

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126 Exhibit 6.
127 RB vol 2, page 780, l 13.
128 RB vol 2, page 789, ll 35 – 45.

me?". Harrington told Daniels that he did. Daniels then instructed him to call Breton and ask him to pick up his Courier from the Tav, which had been left nearby the previous night by Harrington. On Daniels' instructions, Thrupp went to retrieve the Courier from Hibiscus Street and brought it within the security gates of the Juers Street unit complex.[129]

[129] Breton arrived at the Tav in his Pajero. Harrington was sitting upstairs at the time, and he heard Breton ring the bell from the front gate of the unit and then knock on the door. From the lounge room, Daniels, Thrupp and Mariri told Breton to come inside. Taiao was hiding at the top of stairs with a rifle and, once Breton walked inside, he followed him downstairs and pointed the gun at him. There was a scuffle. Daniels then questioned Breton about who his drug dealing customers were and how long they had known about him. They then turned the music up and assaulted Breton. From upstairs, Harrington heard loud thuds and Breton screaming while his mouth was covered. They continued to interrogate and assault Breton for some time.[130]

[130] Once they had finished beating Breton, Daniels ordered that either Thrupp or Mariri call Triscaru and have her come to the unit. They told her they had ice for her to sell. Around midday, Triscaru arrived at the outside area of the unit complex and was met by Mariri, who led her into the unit. Once inside, Harrington heard her scream as she was assaulted by Daniels, Thrupp and Mariri. As with Breton, the trio assaulted and interrogated Triscaru for some time, including bashing her with a pole, using loud music to suppress the noise.

[131] Afterwards, Mariri retrieved Harrington from upstairs and informed him that Breton and Triscaru had been bound and had duct tape placed over their mouths. Harrington walked downstairs and saw Breton and Triscaru sitting on the sofa, restrained with zip ties and duct tape.

[132] Harrington later saw Marieti and her boyfriend, Webbstar Latu, arrive. On Daniels' instructions, Marieti searched Triscaru and her bag. She found ice and a stash of phones in her bag. Everyone present, besides Breton and Triscaru, smoked the ice.

[133] Harrington saw the appellant arrive at the Tav through the back blinds of the unit. The appellant did not enter the unit, but Harrington observed him talking with Daniels and Thrupp in the back courtyard.[131] When shown the CCTV footage of the Juers Street unit complex entry,[132] Harrington recognised the appellant's green Hilux with the appellant's two toolboxes in the back and the teddy bear on the front, which was recorded as arriving at 13:52 on 24 January.

[134] He testified that Marieti was asked to get drinks and buy cleaning products.[133]

[135] The toolbox was brought up to the living room, where Breton and Triscaru were told to lay in it.[134] Triscaru attempted to resist when they went to close the toolbox lid, so Daniels slashed at her forearms with a knife. Once they were inside,

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129 RB vol 2, page 796, l 20.
130 RB vol 2, page 797, ll 20 – 40.
131 RB vol 2, page 802, ll 40 – 45.
132 Exhibit 10; RB vol 2, page 802, ll 25 – 40.
133 RB vol 3, page 820, ll 12 – 45.
134 RB vol 3, page 822, ll 46 – 47.

Harrington went to the garage with Thrupp and everyone else went upstairs. As Harrington returned to the room, he saw Triscaru out of the box, pleading with him to be quiet. Harrington ran upstairs and informed the others that she was getting away. They ran downstairs and beat her. New zip ties were placed around her hands and feet. They then forced her back in the box.

[136] Around 18:16, the appellant drove into the Juers Street unit complex in his Hilux and parked in the visitors carport outside the Tav. Thrupp, Webbstar Latu, the appellant and Taiao carried the toolbox containing Breton and Triscaru from the living room to the Hilux. The persons who actually put the toolbox onto the Hilux were Thrupp, Webbstar Latu, the appellant and Taiao.[135] Despite the loud music playing, Breton and Triscaru could be heard kicking and screaming from inside the toolbox. Thrupp and Webbstar Latu strapped down the toolbox to the Hilux using rachet straps.[136] The appellant and Thrupp then entered the Hilux and drove off. Mariri returned to the unit, panicking that they had aroused the suspicions of the Juers Street complex building manager. Daniels and Waylon Walker drove off in Breton's Pajero around 20:33. Harrington, Mariri and Taiao then drove off in Breton's Ford Courier around 20:41.

[137] According to Harrington, he went with Mariri and Taiao to a shisha bar and did not see the appellant until later. After approximately 20 minutes, Taiao instructed Harrington to drive him to a nearby paddock. Shortly after they arrived, the appellant drove out of the paddock in the Hilux and parked opposite to them. The appellant jumped out of the Hilux. He was shirtless and had mud splattered across his chest. He walked over to Harrington and said, "[i]t's done".

[138] Afterwards, the appellant and Thrupp drove off in the Hilux to pick Mariri up from the shisha bar. Harrington and Taiao followed behind in Breton's Ford Courier, and then went to burn the vehicle. They were intercepted by police on the way. The police confiscated a meth pipe and extendable baton from Taiao. They took them both to the station because Harrington did not have a driver licence. Once released, Harrington arranged for a family friend to drive them back to the Tav.

[139] In cross-examination, Harrington accepted that he had been a user of methamphetamine. He had smoked the drug in the days leading up to, and including, 24 January. In January 2016 he was also using cannabis. On 24 January he was "high on ice"[137] and had consumed alcohol.[138] He accepted that his thinking on the day had been "scattered".[139] He accepted that he was confused about both the timing of events and what events occurred. He rejected the suggestion that mental health issues affected his memory of events.[140]

[140] Harrington accepted that when police first located him on 9 February 2016, he initially lied in order to minimise his own involvement in the offences, despite the fact that this resulted in other people getting in trouble.[141] While he was uncertain as to who assisted the appellant load the toolbox onto the tray of the Hilux, his

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135 RB vol 3, page 826, ll 4 – 5.
136 RB vol 3, page 828, ll 11 – 16.
137 RB vol 3, page 852, l 23.
138 RB vol 3, page 853, ll 21 – 30.
139 RB vol 3, page 852, ll 34 – 35.
140 RB vol 3, page 855, ll 8 – 9.
141 RB vol 3, pages 863, l 35 – 864, l 3.

evidence was consistent that the appellant had been one of those involved in this act. He testified that he saw the appellant, Thrupp and Webbstar Latu load the toolbox; however, he was unsure if the fourth person who assisted was either Waylon Walker or Taiao.[142]

[141] Harrington accepted that, as a result of his interactions with police and his willingness to give evidence against the appellant, he had not been sentenced to any actual jail time for his role in the events of 24 January.[143]

(c) Ngatokoona Marieti ("Chanel")

[142] Ngatokoona Marieti was the partner of Webbstar Latu. She went by the nickname "Chanel". As at 24 January, Marieti was a daily user of methamphetamine and cannabis, which she purchased from Daniels. She frequented the Tav three to four times per week.

[143] At the time of her giving evidence at trial, she was serving a nine-year prison sentence, having pleaded guilty to two counts of manslaughter in relation to the matter. At her sentencing, she gave an undertaking that she would give evidence against the appellant and others in relation to the matter, which resulted in a reduction of her sentence. She was interviewed by police in February 2016, during which she made admissions as to her involvement. She subsequently provided statements to police.

[144] On 24 January, Marieti drove to the Tav with Webbstar Latu and some of his friends. She had never met the appellant before that day and in the course of her evidence referred to him as "the truck driver". She observed the appellant driving a green Toyota Hilux. She saw this vehicle at the Tav on the evening of 24 January. When she first entered the Tav around 16:14, Breton and Triscaru had been bound and were sitting on the living room couch. Marieti searched Triscaru's bra and found a point of ice, which she gave to Daniels.[144] She was then instructed to go and buy alcohol and cleaning products from a nearby convenience store.

[145] Upon her return some time around 17:44,[145] she found Breton and Triscaru inside the toolbox in the living room, with Harrington standing and/or sitting on the lid. She stated that Thrupp and the others had also put garbage bags into the toolbox with Breton and Triscaru.[146] She was called over to the back porch where Daniels, the appellant, and Thrupp were having a conversation. They were discussing what they planned to do with Breton and Triscaru. Marieti gave evidence that she overheard the appellant saying "I'll do it".[147]

[146] As the toolbox was being moved from the living room to the appellant's Hilux, Marieti was sitting in a Mitsubishi Pajero which was parked in the middle of a nearby driveway.[148] From this position, she could observe the two doors and just "a little bit of the back" of the Hilux,[149] but she could not see the rear of the Hilux. She observed the appellant "come around the front [of the Hilux] and put something

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142 RB vol 3, page 878, ll 22 – 40.
143 RB vol 3, page 884, ll 21 – 40.
144 RB vol 3, page 964, ll 35 – 45.
145 RB vol 3, page 965, ll 7 – 15.
146 RB vol 3, page 967, ll 28 – 38.
147 RB vol 3, page 966, l 10.
148 RB vol 3, page 969, ll 11 – 15.
149 RB vol 3, page 972, l 35.

in the front of the truck… then he got into the truck".[150] She could see Thrupp and Webbstar Latu carrying the toolbox but could not see who was holding the back end of the toolbox.[151] It was after she observed this that she saw the appellant "come around to get into the vehicle".[152]

[147] In cross-examination, she rejected the suggestion that all she could see from her position in the Mitsubishi Pajero was the appellant going to the front of the Hilux and getting in. Her evidence was that the appellant was helping carrying the toolbox.[153] She did, however, accept that she had previously given evidence that she did not see the appellant put the toolbox on the back of the Hilux.[154] While she accepted that she was not in a position to observe the appellant assist in placing the toolbox onto the tray of the Hilux, she stated:

> "I did see him. When the boys was carrying the toolbox onto the truck he was on the other side. I assume he would be carrying the box onto the truck, because they all carried the box".[155]

She saw Daniels and Waylon Walker[156] drive the Peugeot out of the garage. The appellant and Thrupp then followed behind them in the Hilux.

[148] Marieti also accepted during cross-examination that she had been abusing methamphetamine, alcohol and cannabis in January 2016.[157] She agreed that her ice consumption (of approximately 1.75 grams per day) at the time was "an enormous amount".[158] She accepted that she had been diagnosed with "mixed personality disorder, with dependent and borderline traits",[159] and that her mental health condition was "probably" made worse by her taking drugs.[160]

[149] In the months leading up to 24 January, Marieti had frequented the Tav about two to three times per week in order to buy ice from Daniels.[161] She accepted that she had never seen the appellant at the Tav during that time, and that the first time she saw him was on 24 January.[162]

[150] Marieti stated that on the morning of 24 January, she had drunk four pre-mixed cans of alcohol and consumed about two "cones" of cannabis.[163] When she arrived at the Tav, she also consumed around 2 points or a puff of ice.[164] She continued to drink alcohol at the Tav and smoked more cannabis.[165]

[151] Marieti was cross-examined in relation to her evidence that she had heard the appellant say "I'll do it" during a conversation with Daniels and someone else

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150 RB vol 3, page 972, ll 40 – 43.
151 RB vol 3, page 973, ll 16 – 17.
152 RB vol 3, page 973, l 19.
153 RB vol 3, page 1027, ll 145 – 49.
154 RB vol 3, page 1029, ll 24 – 35.
155 RB vol 3, page 1029, ll 40 – 44.
156 Although Marieti only knew him by the name "Peugeot driver".
157 RB vol 3, page 1018, ll 25 – 40.
158 RB vol 3, page 1018, l 31.
159 RB vol 3, page 1018, ll 12 – 14.
160 RB vol 3, page 1021, ll 14 – 15.
161 RB vol 3, page 1019, ll 24 – 43.
162 RB vol 3, pages 1019 – 1020.
163 RB vol 3, page 1018, l 37-45.
164 RB vol 3, pages 1019, l 1-7, 1020, l 37-40.
165 RB vol 3, pages 1020, l 44, 1027, l 8.

outside the Tav. She accepted that while police were preparing her witness statements over several days in early February 2016, she had never mentioned this fact.[166] In 2019, another witness statement was prepared in relation to Marieti's own sentencing proceedings. This statement included reference to the conversation.[167]

[152] Marieti explained that she had included this conversation later because, when preparing her 2019 statement, police had asked her exactly what had been said in the conversation.[168] In re-examination, Marieti agreed that the police had shown her additional images and asked specific questions about the conversation during the preparation of her 2019 witness statement.

(d) Jahquita Halbert

[153] In January 2016, Jahquita Halbert was living at a unit in the Juers Street unit complex. On 24 January, she was returning home from her shift at the Sunnybank Private Hospital when she noticed someone parked in her carpark. Halbert confronted the person who had parked in her carpark and observed that they were of Māori or Islander descent. She observed another woman and man who both appeared to be of Māori or Islander descent as well. Eventually, the man who was occupying her carpark moved the car.

[154] Once Halbert had parked her car, she noticed a green ute with a teddy bear on the front parked in the carport of unit 17 (i.e. the Tav). Loud music was coming from the ute and there were three men standing around it who were singing very loudly. As the ute began to drive away, Halbert could hear banging coming from the toolbox on the back of it getting louder and louder.[169] This banging continued until the ute was out of earshot. Halbert was not cross-examined.

(e) Katrina Watson

[155] Katrina Watson also lived at the Juers Street unit complex. On 24 January, her children drew her attention to various people of Islander extraction who were milling about unit 17 (i.e. the Tav). They were playing loud music. She noticed there were several cars, including a ute. She testified that several men then came through the gate next to the carport and got in the cars. As the ute drove off, Watson could hear banging "coming from the back [of it]… [like] someone was in there".[170] Watson's cross-examination was limited to whether she observed two or three people enter the Hilux before it drove off.

(f) Xilin Yang

[156] At the time, Xilin Yang was employed as the property manager of the Juers Street unit complex. On 24 January, he was cleaning the swimming pool around 20:00. He heard very loud music coming from a green ute in front of unit 17 (i.e. the Tav). As he began to walk towards the unit, the ute drove away. He could hear kicking coming from the back of the vehicle until it drove out of earshot. Afterward, he went and spoke briefly to someone who he later identified to police as Tepuna Mariri. Yang's cross-examination was limited to whether the green "vehicle" he

166 RB vol 3, page 1024, ll 20 – 35.
167 RB vol 3, page 1048 ll 12 – 23.
168 RB vol 3, page 1048, l 40-44.
169 RB vol 3, page 1014, ll 25 – 33.
170 RB vol 3, pages 925, l 43 – 926, l 3.

observed was a sedan, wagon or utility.

(g) The Cellebrite phone records

[157] The Crown tendered the mobile phone records of the appellant as evidence.[171] The appellant's records corroborated the following facts: the appellant was requested to come to the Tav around 13:32; the appellant provided a false alibi to his partner about "doing some cool ass fourbying" (i.e. four-wheel driving); and the appellant received a text asking him to come and check up on the toolbox on 28 January 2016, to which he replied that he would come in a few hours' time.[172]

(h) The Juers Street unit complex footage

[158] On 24 January, CCTV footage at the Juers Street unit complex captured the appellant's Hilux at various times. First, consistently with Harrington's evidence, the Hilux can be seen entering the complex at 13:52 and then leaving the complex shortly after at 14:02. At 18:20, the Hilux is seen returning to the unit complex. The CCTV later captured the appellant's Hilux driving out of the complex at 20:31 with the toolbox strapped onto the back.[173] Finally, at around 23:27, the Hilux was captured driving back into the Juers Street unit complex without the toolbox, where the appellant loaded his own toolboxes and left.[174]

(i) The Logan Motorway Toll footage[175]

[159] On the evening of 24 January, CCTV footage from the Logan motorway twice captured the appellant's Hilux with a large toolbox strapped to the tray. It first captured the Hilux travelling eastbound at 20:32, and then later it captured the Hilux travelling westbound at 20:49.[176] This is consistent with the account given in the appellant's fourth interview and primary statement to the effect that he initially drove towards the Gold Coast, but then changed direction once he realised that no one in the convoy was following him.

(j) The Hume's Doors & Timber footage

[160] At 21:44 on 24 January, CCTV footage from Hume's Doors & Timber captured the appellant's Hilux travelling down Mudgee Street with the toolbox.[177] Later, around 22:45, the appellant's Hilux could be seen leaving Mudgee Street without the toolbox.

(k) Photographs of the toolbox

[161] Exhibits 98 to 100 were photographs of the toolbox, which were taken approximately one month before the trial.[178] The Crown led this as evidence to corroborate the fact that Thrupp had attempted to make holes with a claw hammer provided by the appellant, so that the toolbox would sink faster. However, while there were dents, scratches, and holes apparent on the toolbox, it was not clear

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171 Exhibits 5 and 6.
172 Exhibit 5; RB vol 5, page 2139.
173 Exhibit 10.
174 RB vol 5, page 2205.
175 Exhibit 25.
176 RB vol 2, page 752, ll 1-5.
177 Exhibit 20; RB vol 2, page 746, ll 9 – 18.
178 RB vol 3, page 1242, ll 17 – 19.

whether these had been caused in this manner or if that was simply how the box had been manufactured.

(l) Alastair Fenton, Queensland Police Diving Unit

[162] Senior Constable Alastair Fenton, a member of the Queensland Police Diving Unit, gave evidence that he was directed by detectives to a particular part of Scrubby Creek on 11 February 2016. He found a "metal object" (i.e. the toolbox) approximately four metres from the bank with concrete rubble placed on top of it. Due to the decomposition of Breton and Triscaru's bodies, a thick sludge emanated from the box, and it had a strong odour. As Fenton and his colleague removed the rubble from the box, it floated to the surface of the creek. This aligned with the appellant's account in his fourth interview and subsequent statements to the effect that he had later returned to Scrubby Creek with Thrupp and Mariri to submerge the toolbox with rocks.[179]

(m) Dr Nadine Forde, forensic pathologist

[163] Doctor Nadine Forde was the forensic pathologist who examined the bodies of Breton and Triscaru. At trial, she gave evidence that the bodies had been severely decomposed by the time she saw them, which meant that it was difficult to ascertain their exact cause of death. Breton had sustained a defensive injury to his left ulna bone, which had been fractured into several pieces, and a possible wound to his right thigh region. Triscaru's body had several areas of discoloration which were potentially indicative of bruising. Given the bodies were found in a toolbox submerged underwater, Dr Forde concluded that the only potential causes of death were either drowning or asphyxiation.

Notwithstanding there was a wrong decision of a question of law, no substantial miscarriage of justice has actually occurred

[164] Notwithstanding the wrongful admission of the off-camera confession, upon an application of the principles identified at [42] to [58] above, I consider that no substantial miscarriage of justice has actually occurred. Upon a consideration of the whole of the record, the guilt of the appellant is established beyond reasonable doubt. The jury's verdicts of guilty in relation to both counts of murder were inevitable.

[165] The essence of the appellant's off-camera confession was that it was he who murdered Breton and Triscaru. If the off-camera confession had been the only evidence of the appellant admitting his culpability, it would be very difficult to consider that no substantial miscarriage of justice had actually occurred. In the present case however, this inadmissible confession was comprehensively subsumed by subsequent admissible confessional statements made by the appellant, which were both extensive and detailed. This included the appellant's admissions in the third interview, the walk-through, the fourth interview and his subsequent signed statements. There is no challenge on appeal to the admissibility of this body of evidence, which includes the appellant confirming the effect of his off-camera confession at the commencement of the third interview. Further, as discussed below, significant aspects of the appellant's version of events in the fourth interview were materially corroborated by other evidence. In light of this other evidence, and

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179 RB vol 5, pages 2205, 2033.

notwithstanding the wrongful admission of the off-camera confession, it was not open to the jury to entertain a doubt as to guilt.

[166] It is convenient to first deal with the appellant's primary submission as to the application of the proviso. The appellant submits that upon a consideration of the whole of the record, this Court would not be satisfied of the appellant's guilt beyond reasonable doubt because of the inconsistencies in his four interviews.[180] These inconsistencies, according to the appellant, should give rise to a reasonable doubt. The appellant submits:

> "Ordinarily, confessional statements would be compelling evidence of guilt. In this case however, the confessional evidence in the fourth interview needed to be assessed considering the other versions given by the appellant to police within a two-day period. It is submitted that these other versions were entirely inconsistent with the one held by the Crown as being true and correct and included significantly, a false confession. This ought to have left the jury with a reasonable doubt about the reliability of the confessional statements made by the appellant in the fourth interview."[181]

[167] The appellant refers to the off-camera confession as a "pivotal moment",[182] and emphasises the use of the inadmissible evidence in both the Crown's opening and closing addresses. This evidence was also referred to by the trial judge in the summing up. The appellant submits:[183]

> "The net effect of all of this is that the evidence of the inadmissible off-record confession played a crucial role in connecting the four different versions of events given by the appellant as to his involvement in the offences."

[168] The appellant's submissions should not be accepted. The inconsistencies between the four versions provided by the appellant to police may be logically reconciled and do not give rise to any reasonable doubt as to the appellant's guilt.

[169] Prior to the first interview, the appellant had been intercepted by police and informed that he was under arrest for both murders. In the preliminary interview prior to the first interview, the appellant was informed by police that they wished to speak to him about two missing persons, Breton and Triscaru. He was also informed that a further six persons were in custody. The appellant denied knowing the location of the missing persons. It may therefore be accepted that, prior to the commencement of the first interview, the appellant must have appreciated that he had been arrested on very serious charges and that police were seeking to locate Breton and Triscaru.

[170] At the commencement of the first interview, the appellant was unaware that police had obtained a statement from Harrington and were in possession of photographs of the appellant's Hilux depicting the toolbox strapped to the tray. While the appellant gave the appearance of being generally cooperative, he denied knowing anything about the disappearance of Breton and Triscaru and further stated that he did not

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180 Revised Outline of Submissions on behalf of the appellant, para 55.
181 Revised Outline of Submissions on behalf of the appellant, para 50.
182 Outline of Submissions on behalf of the appellant, para 29.
183 Outline of Submissions on behalf of the appellant, para 34.

even know they were missing. A recurring theme was his refusal to name names. In the course of the first and second interviews, police read parts of Harrington's statement to the appellant and showed him a photograph of his Hilux with the toolbox. The appellant, near the end of the first interview, expressed concern that he was being set up.

[171] At the commencement of the second interview, a photograph was shown to the appellant, which appeared to have been taken at the Juers Street unit complex. It is in the course of the second interview that the appellant changed his story and states that Thrupp borrowed his Hilux. This change in the appellant's version may be readily understood by reference to the fact that from the police reading to him portions of Harrington's statement and showing him the relevant photographs, the appellant must have appreciated that police knew his vehicle was involved in the disappearance of Breton and Triscaru. Prior to naming Thrupp, the appellant expressed concerns about his family's safety and stated that he knew what Thrupp and the others were capable of. Having named Thrupp, the appellant became upset, referring to himself as a "snitch". He told police, "I'm dead" and "just kill me now".

[172] The appellant's concern at being labelled a snitch and endangering his own and his family's safety readily explains why, in the third interview, he seeks to take full responsibility for the offences. He also knew prior to the third interview that Harrington had provided a statement to police implicating him in the offences.

[173] Importantly, the appellant provided details in the third interview which are not inconsistent with some of the details provided in the fourth interview and his subsequent signed statements. For example, in both interviews he refers to letting off a round from his gun. As already observed, there is no explanation in his third interview as to why he did this, whereas in his fourth interview, it was done at the request of Thrupp to silence Breton and Triscaru. In the third interview, he also confirmed the fact that his Hilux was used to load and transport the toolbox to Scrubby Creek. He also stated that he was willing to show police the location of the missing persons, and then participated in the walk-through in which he showed police the precise location of the submerged toolbox.

[174] As to the fourth interview, it is significant that this interview was requested by the appellant after he had had 24 hours in a cell to consider his position. There is no suggestion in relation to the fourth interview that the appellant was possibly tired or affected by cannabis. The change in the appellant's version (as reflected in the fourth interview and his primary statement) is again readily explained by the fact that he had had time to think and was refusing to take sole responsibility for the two murders. Further, the fact that the appellant's version in the fourth interview was subsequently confirmed in his primary statement lends weight to this version being the true version. As already observed at [105] above, the impression from viewing the video of the fourth interview is that the appellant is recounting, in an apparently genuine manner, the version of events that actually happened.

[175] As referred to at [44] above by reference to *Weiss*, the fact of the jury's guilty verdicts cannot be discarded from this Court's assessment of the whole record of trial. In this respect, the jury's verdicts of guilty were arrived at in circumstances where the primary submission made by defence counsel in his closing address was

that the jury should entertain a reasonable doubt because of the inconsistencies in the appellant's four versions.

[176] As there are rational and logical explanations for the inconsistencies in the appellant's versions, the mere fact of these inconsistencies does not prevent this Court from being satisfied that guilt has been proved to the criminal standard on the admissible evidence at trial, notwithstanding the wrongful admission of the off-camera confession. This conclusion is supported both by the admissible confessional statements made by the appellant as well as other supporting evidence.

[177] The appellant in his third interview, the walk-through, the fourth interview and his signed statements made extensive and detailed confessional statements. As outlined at [21] above, the third interview commenced with the appellant confirming what he had said in the admissible off-camera confession. The third interview then continued for approximately a further 40 minutes, constituting 45 pages of transcription. In the course of the third interview, the appellant confirms that he went to the Tav and that the toolbox was loaded onto the tray of his Hilux, which he subsequently drove to Scrubby Creek. In both the third and fourth interviews, the appellant seeks to explain why he is confessing, stating that he knows he has done wrong and feels very sorry for the families of Breton and Triscaru. At the end of the fourth interview, he expresses remorse for what he has done.

[178] The trial judge directed the jury as to the alternative paths to the appellant's culpability by reference to s 7(1)(a) and s 7(1)(c) of the *Criminal Code*. Irrespective of whether the version in the third interview or the fourth interview is accepted, in both versions the appellant confesses to intentionally killing Breton and Triscaru. In the third interview, he informs police that he knew he was going to kill Breton and Triscaru once the toolbox had been loaded onto his Hilux. On this version, he knew that both were still alive when the toolbox was loaded onto the Hilux. As to his presence at Scrubby Creek, it is significant that at the conclusion of the third interview he states his preparedness to take the police to the location of the toolbox. In the course of the walk-through, the appellant is able to instruct police where to shine their lights on the creek to the location where the toolbox is subsequently located.

[179] The appellant's liability as an aider (pursuant to s 7(1)(c)) is also established by his admissible confessional statements. The appellant knew that Breton and Triscaru were alive when the toolbox was loaded onto the tray of his Hilux and that they were still alive when he assisted Thrupp in removing the toolbox from the tray and when Thrupp pushed the toolbox into Scrubby Creek. The appellant's knowledge that Thrupp had the intention of killing Breton and Triscaru when he pushed the toolbox into Scrubby Creek is established by his statement that Thrupp was yelling "time to die". As to the appellant aiding Thrupp, in his fourth interview, the appellant refers to letting off a round from his gun at Thrupp's request to silence Breton and Triscaru. In the same interview, he also admits to providing Thrupp with a claw hammer. In both the third and fourth interviews, he admits to placing the toolbox onto the Hilux (unassisted in the third interview and assisted by others in the fourth interview), driving to Scrubby Creek, and removing the toolbox from the Hilux at Scrubby Creek.

[180] Importantly, the confessional statements made by the appellant in the fourth interview and his primary statement are materially corroborated by other evidence.

[181] Firstly, in both his fourth interview and his primary statement, the appellant refers to receiving a text on 24 January requesting him to attend the Tav. Exhibit 5, which is the Cellebrite phone records of the appellant's mobile phone, shows that on 24 January at 13:32, the appellant received a text which said "I need to speak to u right know. ASAP. Tav". The appellant responded to this text at 13:33 by texting, "Yo be there in 10".[184] While the appellant, both in his fourth interview and primary statement, refers to receiving a text message at 9:00 rather than a 13:32, it remains the fact that the appellant did receive a text which requested him to attend at the Tav, to which he agreed.

[182] Secondly, the appellant's attendance at the Tav in response to this text is corroborated by the Juers Street unit complex footage referred to at [158] above, which shows the appellant's Hilux entering the complex at 13:52 and leaving at 14:02. The presence of the appellant at the Tav is further supported by Harrington's evidence referred to at [133] above. Both the CCTV footage, as well as Harrington's evidence, support the fact that when the appellant attended the Tav earlier in the day on 24 January, there were two toolboxes of his own which fitted within the tray of the Hilux.

[183] Thirdly, the appellant's return to the Juers Street unit complex, and his actions of playing loud music from the Hilux and assisting in loading the toolbox onto the Hilux tray, is corroborated by a body of evidence. The CCTV footage shows the appellant's Hilux returning to the Juers Street unit complex at 18:20. As outlined at [158] above, the CCTV later captures the Hilux driving out of the complex at 20:31 with the toolbox strapped onto the tray. Harrington stated in his evidence that the appellant assisted others (including Thrupp) to place the toolbox onto the tray. While Marieti could not see the back of the Hilux, from her evidence outlined at [146] above that she observed the appellant assisting in carrying the toolbox, it may be inferred from her subsequent observations of the appellant that he assisted in placing the toolbox onto the Hilux.

[184] Fourthly, the fact that the appellant could hear loud kicks and screams coming from the toolbox (even over the top of the loud music playing from his Hilux) is supported, not only by Harrington's evidence,[185] but also by the unchallenged evidence of residents from the unit complex, namely Halbert,[186] Watson[187] and Yang.[188]

[185] Fifthly, there is CCTV evidence that, upon leaving the Juers Street unit complex, the appellant's Hilux ultimately travelled down Mudgee Street in the direction of Scrubby Creek.[189]

[186] Sixthly, while no other person witnessed the actions of the appellant and Thrupp at Scrubby Creek, there is evidence which generally supports the appellant's version in the fourth interview. This evidence includes the fact that police divers located the toolbox with the bodies of Breton and Triscaru submerged in Scrubby Creek. This supports the inference, quite apart from the appellant's admissions, that the toolbox

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184 Exhibit 5, items 92 and 94.
185 See [134] above.
186 See [152] above.
187 See [153] above.
188 See [154] above.
189 See [156] – [158] above.

had been removed from the tray of the Hilux and pushed into Scrubby Creek. Further, given there was evidence of more than one person assisting in the placing of the toolbox on the tray at the Juers Street unit complex, it may be inferred that one person would have probably required assistance in removing the toolbox from the Hilux tray at Scrubby Creek. There was evidence that the Hilux, together with other vehicles, left the unit complex at 20:31. Harrington's evidence was that the appellant and Thrupp drove off in the Hilux.[190] This would support, in terms of Particular 4, that it was Thrupp and the appellant who removed the toolbox from the Hilux at Scrubby Creek. Both the Logan Motorway Toll footage and the Hume's Door & Timber footage capture the appellant's Hilux travelling along either the Logan Motorway or Mudgee Street with a large toolbox strapped to the tray. The Hume's Door & Timber footage subsequently shows the Hilux leaving Mudgee Street without the toolbox.

[187] Seventhly, while there is no direct evidence of the appellant providing Thrupp with a claw hammer, as outlined at [161] above, there were photographs taken of the toolbox which showed dents, scratches and holes on it (although it is not clear that these had been caused by use of a claw hammer).

[188] Eighthly, the appellant's version and his involvement in the offences is further corroborated by Harrington's evidence set out at [137] above. He observed that when the appellant alighted from the Hilux later in the evening of 24 January, he was shirtless and had mud splattered across his chest. Harrington's evidence was that the appellant said to him "[i]t's done".

[189] Ninthly, the appellant's version that he returned to the location of the toolbox days after the initial submersion and placed rocks on top of the toolbox is supported by the Cellebrite phone evidence set out at [157] above. Further, police divers located concrete rubble lining the top of the toolbox which upon removal permitted the toolbox to rise in the water.[191]

Disposition

[190] The appeal should be dismissed.

[191] **BUSS AJA:** I agree with Flanagan JA.

[192] I have considered the nature and effect of the trial judge's error of law in the context of the whole of the trial record. The trial judge's error does not prevent this court from being able to assess whether guilt was proved to the criminal standard. His Honour's error did not involve a fundamental defect which leaves no room for the application of the proviso. I am satisfied that the evidence that was properly admissible at the trial established beyond reasonable doubt that the appellant was guilty of the two counts of murder. No substantial miscarriage of justice has actually occurred.

[193] The appeal must be dismissed for the reasons given by Flanagan JA.

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190 RB vol 3, page 826, l 4.
191 RB vol 3, page 1191, ll 10 – 25.