SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ngwira* [2017] QCA 294
PARTIES:	**R** **v** **NGWIRA, Musa Brandon** (appellant)
FILE NO/S:	CA No 257 of 2016 SC No 92 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 7 September 2016 (Henry J)
DELIVERED ON:	1 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2017
JUDGES:	Sofronoff P and Philippides JA and Flanagan J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was found guilty by a jury of one count of rape and one count of murder – where the trial judge directed the jury in relation to accident, and in particular s 23(1A) of the *Criminal Code* – where accident was raised and the death did not result because of defect, weakness or abnormality – where counsel for the defendant at trial did not seek redirections at trial – whether the direction on accident given by the learned trial judge in the summing up was an error CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the prosecution case in respect of the rape charge was circumstantial – where forensic and other circumstantial evidence was presented – where the appellant contended that the circumstantial case of rape was answered by direct evidence of the appellant – whether it was reasonably open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that the appellant had raped the deceased – whether it was reasonably open to the jury to be satisfied that penetration for the rape charge had occurred prior to the deceased's death – whether time of death could be resolved

on the evidence – whether the evidence could sufficiently establish that penetration occurred and that it occurred while the deceased was still alive

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where the learned trial judge did not direct the jury that they must consider each count separately and consider only the evidence on each count in relation to that count – where the appellant contends that the learned trial judge erred in failing to give a separate consideration warning – where counsel for the appellant did not seek redirections at trial – where the elements of the offences are different – whether there was a substantial miscarriage of justice – whether there was a risk that the jury would use a conviction on one count to impermissibly reason guilt on the other – whether the direction was given in essence by the trial judge – whether the judge established that the verdicts of the jury did not need to be the same

Criminal Code (Qld), s 23(1A), s 668E(1)

GAX v The Queen (2017) 91 ALJR 698; [2017] HCA 25, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Charles (2001) 123 A Crim R 253; [2001] QCA 320, distinguished
R v Clapham [2017] QCA 99, cited
R v Conn; R v Conn; Ex parte Attorney-General (Qld) [2017] QCA 220, considered
R v Doolan [2014] QCA 246, considered
R v Schafer [2017] QCA 208, cited

COUNSEL: B J Power with W R Ness for the appellant (pro bono)
M Cowen QC for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Flanagan J and with the order his Honour proposes.

[2] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Flanagan J.

[3] **FLANAGAN J:** The appellant appeals against his convictions for rape and murder recorded in the Supreme Court at Cairns on 7 September 2016 after an eight day trial. The victim was Joanne La Spina ('the deceased'), who was known to the appellant.

[4] The three counts on the indictment related to events occurring at Bingil Bay on 19 April 2014. Count 1 alleged that the appellant raped the deceased. Count 2 alleged that, in the alternative to count 1, the appellant indecently interfered with a dead human body. Count 3 alleged that the appellant murdered the deceased. The appellant pleaded not guilty to all charges. The jury having found the appellant guilty of rape did not return a verdict on the alternative charge of indecently interfering with a dead human body.

[5] There are three grounds of appeal. First, that the learned trial judge erred in directing the jury as to section 23(1A) of the *Criminal Code* where accident was raised and the death did not result because of defect, weakness or abnormality (ground 1). Secondly, that the verdict of the jury on count 1 was unreasonable (ground 2). Thirdly, that the learned trial judge erred in failing to give the jury the separate consideration of charges warning (ground 3).[1]

Background

[6] The appellant was born on 15 December 1982. He was born and raised in South Africa. At the time of the offences he was 32 years old.[2] In March 2014, the appellant moved from Sydney to Mission Beach in Queensland to work as an Operations Manager for Echo Creek Adventure Centre.[3] He lived in the downstairs area of a house at 26 Jackey Jackey Street in South Mission Beach. Michelle Lloyd, the Manager of Echo Creek Adventure Centre, also resided at this address.

[7] The deceased was 26 years old. She was a photographer for a white water rafting company 'Raging Thunder'.

[8] The appellant and the deceased had met before 19 April 2014. The appellant had previously visited Mission Beach for six weeks in 2013. During this time, he met people associated with the white water rafting community, including the deceased.[4]

Factual Overview and the Conduct of the Trial

[9] On 18 April 2014 the deceased was part of a 'Raging Thunder' rafting trip on the Tully River. The appellant was kayaking on the Tully River and had remained near those on the 'Raging Thunder' trip to minimise the risks of kayaking alone. After rafting, the deceased and others from the trip went to the Feluga Hotel to look at photos and enjoy refreshments. The appellant had not gone to the hotel and returned to his house. The deceased left Feluga Hotel at or about 4.30 pm with Warrick Daniel, Mark McKay and Paul Porteous. After dropping the deceased home, the others continued to Bingil Bay Café for drinks. The deceased went to her house to change her clothes. She then drove to Warrick Daniel's residence at unit 1, 30 Bingil Bay Road, Bingil Bay. She intended to sleep there that night. She parked her car in front of Mr Daniel's unit and walked to Bingil Bay Café, arriving at approximately 5.00 pm. She met up with the group, including Mr Daniel, Bradley Patterson and Stephen Bertucci. The group left for Jackaroo's Hostel at or about 8.00 pm.[5]

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1 Amended Notice of Appeal.
2 AB 633.
3 AB 44.
4 Outline of Submissions Filed by the Appellant, Annexure A, 1-2.
5 AB 223.

[10] The appellant had returned home at or about 4.30 pm. He had gone to dinner with Michelle Lloyd and Kenneth Fox who was a director of Echo Creek Adventure Centre.[6] Mr Fox's wife also went to dinner.

[11] After arriving at Jackaroo's, Mr Daniel texted the appellant inviting him to join. The appellant received that message when he returned home from dinner. He subsequently drove to Jackaroo's and arrived between 9.30 pm and 10.00 pm. Alcohol was being served and there was free wine for an event called 'Free Wine Friday'.[7] The area at Jackaroo's was small, and consisted of a dance floor, bar and tables. It was described by numerous witnesses as a happy evening with a friendly atmosphere.[8]

[12] At about 9.30 pm, the deceased called her friend, Jami Godfrey. During that conversation, the deceased told Ms Godfrey that she had taken a drug.[9] Ms Godfrey, at about 10.50 pm, joined the group at Jackaroo's. Ms Godfrey was not drinking that evening.

[13] Mr Patterson and Ms Godfrey gave evidence that they saw the appellant slow dancing with the deceased and there was no evidence that she was reluctant or resisting him.[10]

[14] At approximately 2.00 am, a group, including the appellant, the deceased and Mr Daniel went back to Mr Daniel's unit. The appellant drove separately from Jackaroo's to Mr Daniel's unit and parked behind the deceased's car.[11] The group briefly went inside to get drinks before going down to the beach and "sat around the fire".[12] The appellant went back to the unit before the others and lay down on the downstairs couch, where Mr Daniel had told him he could sleep that night.[13]

[15] After spending approximately 30 minutes on the beach, Mr Daniel and the deceased walked back to his unit together. During their walk, the deceased stated to Mr Daniel that the appellant had "tried to pick her up" and that "she wasn't keen". The deceased had told Mr Daniel that "she found [the appellant] a bit creepy".[14] When they returned to the unit, Mr Daniel told the deceased she could sleep in Matt Smith's bed for the night. Matt Smith and Jack O'Malley lived with Mr Daniel but were away camping for the weekend. The deceased went upstairs to Mr Smith's room. Mr Daniel noticed the appellant on the couch.[15]

[16] At or about 5.00 am on 19 April 2014, the appellant was woken by a man, later identified as Brian Norman, who lived at unit 2, 30 Bingil Bay Road, Bingil Bay with Kal Kal Delaporte. Mr Norman was outside Mr Daniel's unit knocking on the front door. He told the appellant that there was a car partially blocking his driveway. That was the appellant's car. The appellant moved his car and then returned to sleep on the couch.

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6 Outline of Submissions Filed by the Appellant, Annexure A, 2.
7 AB 207.
8 Outline of Submissions Filed by the Appellant, Annexure A, 2.
9 AB 122.
10 AB 123.43 and AB 56.12; Outline of Submissions Filed by the Appellant, Annexure A, 4.
11 AB 229.35.
12 AB 229-230.
13 AB 230.1, 230.25 and 231.13.
14 AB 230.34.
15 AB 231.11.

[17] Mr Daniel woke up at 7.00 am to go rafting.[16] He said that he dressed quickly and collected his bag from the kitchen. He asked the appellant, who was on the couch, whether he was coming out on the river that day. Both Mr Daniel and the appellant recalled that he said he was.[17] Mr Daniel told the appellant that he would meet him at the top of the river at 9.00 am and the appellant set an alarm.[18] Mr Daniel did not shower that morning. He did not hear the shower running when he left.[19]

[18] At about 7.20 am, Mr Norman heard "a loud, short scream" from a female that he thought came from unit 1.[20] His partner, Ms Delaporte, gave evidence of hearing a woman scream on two occasions and the sound of some thuds.[21]

[19] The deceased's body was found by Mr Daniel at about 5.00 pm on 19 April 2014 in the upstairs shower. Mr Daniel said he came home and "slipped on the tiles on the front door".[22] He noticed water "coming through the light fixture in the roof".[23] He went upstairs to check the bathroom because he thought someone had left the tap on. He said he then saw the deceased in the shower and "ran down to see her".[24] She was seated in the shower with the water running with her head facing towards the taps. She was not clothed and had a bit of flip tie loosely tied around her chin. A flip tie is a nylon rope used to flip rafts which have capsized. Mr Daniel checked for a pulse and noticed that she was cold. Mr Daniel called 000. The operator asked him to check the deceased's pulse again, which he did, and told him to get her out of the shower and put her on her back.[25] Mr Daniel placed a towel over the deceased, turned the shower off and waited outside for the ambulance. There were no prosecution witnesses who were able to give direct evidence as to the events that occurred at the time of the offences.

[20] Forensic officers attended the scene and found a pile of clothes, the deceased's mobile phone, keys and a purse.

[21] The unit was tested for fingerprints. The appellant's fingerprints were not identified at any locations in the house.[26] The alternative charges of rape (count 1) and interference with a corpse (count 2) were based on the appellant's DNA (including a spermatozoa fraction) being found on a swab taken from within the deceased's rectum. The appellant's DNA (including a spermatozoa fraction) were also found on the rear of the deceased's underpants and other items of her clothing.

[22] With regard to the cause of the deceased's death, a forensic pathologist, Dr Paul Botterill, gave evidence for the prosecution that in his opinion, the cause of the deceased's death was due to "neck compression, most probably from manual strangulation".[27]

[23] The appellant participated in a police record of interview and gave evidence at trial. This evidence is considered in detail below. His evidence at trial was starkly

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16 AB 234.
17 AB 232.46.
18 AB 429.23.
19 AB 233.25.
20 AB 145.1.
21 AB 170-192.
22 AB 235.35.
23 AB 236.46.
24 AB 237.17.
25 AB 239.
26 AB 237.1.
27 AB 105.37.

different to what he told police. In his record of interview the appellant denied any involvement with the death of the deceased. He asserted that he never went upstairs or saw the deceased at all on 19 April 2014. He stated that he left the unit shortly after Mr Daniel had departed.

[24] At trial however, the appellant did not dispute that his actions caused the death of the deceased. The appellant's evidence was that after consensual sexual foreplay between himself and the deceased, he made a comment about her body and she had become angry and attacked him. His evidence was that in response to her attack he restrained her using a chokehold around her neck. The appellant said that because of his restraint around her neck, the deceased went limp and stopped breathing. The appellant's evidence was that, realising he caused her death, he panicked. He staged the scene to make it appear that the deceased had committed suicide and he lied to police telling them that he had no involvement in her death.

[25] The appellant's evidence was that he did not have penetrative sex with the deceased at any time. His version was that during some consensual sexual interaction with the deceased, which had included close body contact, he had ejaculated while they were both still wearing underwear.[28] The defence contention as to any allegation of penetration was that the presence of the appellant's DNA being found on a swab taken from within the deceased's rectum was due to the transference of the DNA before or after death or due to a sampling error at the time the sample was taken from the deceased's rectum.

[26] The appellant formally admitted that on the afternoon of 19 April 2014 he conducted Google searches for "what is the penalty for madder" (sic), "what is the penalty for killing a person in Australia" and "what is the punishment for murder in Australia QLD".[29] Further that on 22 April 2014 between 10.25 am and 10.27 am he conducted a Google search for "how long does it take to get forensic DNA results in Australia". The appellant also admitted to deleting the cache of internet searches.[30]

Ground 1 – that the trial Judge erred in giving the s 23(1A) jury direction

[27] Ground 1 concerns the direction given by the learned trial judge in relation to accident and in particular s 23(1A) of the *Criminal Code.* His Honour provided to the jury the text of s 23 which relevantly provides:

> "**Intention—motive**
>
> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that—
>
> (i) the person does not intend or foresee as a possible consequence; and

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28 AB 456.41.
29 AB 30.46.
30 AB 380.29.

(ii) an ordinary person would not reasonably foresee as a possible consequence.

Note—

Parliament, in amending subsection (1)(b) by the *Criminal Code and Other Legislation Amendment Act 2011*, did not intend to change the circumstances in which a person is criminally responsible.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality."

[28] Before setting out the direction it is necessary to detail the circumstances that caused his Honour to direct in terms of s 23(1A). The appellant's evidence was that he used his right arm to place the deceased in a chokehold. He used his left arm to lock his right arm around the neck of the deceased. When he did this she screamed. The deceased was struggling and the appellant continued to apply pressure. The appellant felt the deceased "getting weaker and weaker" until she went limp. He accepted in cross-examination that he held the deceased's neck until she stopped breathing. After she went limp the appellant checked for a pulse and found none. He also noticed that there was no rise or fall in her chest.[31] The appellant asserted that he did not intend to kill the deceased, nor to cause her any life-threatening injuries.

[29] Dr Botterill, in the course of his examination of the deceased, noted approximately 52 injuries. At least 50 of these injuries were, in his opinion, consistent with a struggle.[32] He found underneath the skin surface of the neck multiple areas of bruising both of the muscle and other soft tissues. This bruising occurred in at least four areas on the right side of the neck and at least one area on the left side of the neck. In Dr Botterill's opinion the cause of death was neck compression most probably from manual strangulation. According to Dr Botterill pressure on certain structures in the neck discharge an electrical impulse to the heart and tell the heart to slow down and stop.

[30] The toxicology carried out on the deceased found alcohol and blood at a level of 30 milligrams per 100 millilitres (0.03) and methylamphetamine at 0.02 milligrams per kilogram. Dr Botterill stated that this was a relatively low level of methylamphetamine which would not be expected to cause death. He stated that the drug does have the propensity to make the heart beat faster than it ordinarily would beat and in some susceptible individuals it may lead to the heart being irregular and sometimes stopping. It is not possible until such an occurrence actually happens to determine whether a person is or is not susceptible. He opined that while the methylamphetamine was at a toxic level, it was not at such a level as to constitute a contributing cause of death.

[31] In cross-examination Dr Botterill stated that the vagus nerve runs from the brain to the heart, and to other elements of the chest and abdomen. In susceptible individuals, that nerve can cause the heart to speed up and slow down, and in some cases, to stop. This process is referred to as vagal inhibition. Vagal inhibition does

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31 AB 432-436.

32 AB 100.5-15.

not always result in death, but depends on the functioning of a person's heart. Dr Botterill also opined that methylamphetamine can sometimes increase a person's susceptibility to cardiac arrest if they had this heart predisposition. There was however, no evidence that the deceased had any greater susceptibility to death from vagal inhibition, caused by pressure to the neck, compared to any other person.

[32] Experienced defence counsel at trial raised the issue of vagal inhibition with the trial judge prior to the summing-up. The following exchange occurred:

> "MR FEENEY: Or there's the vagal inhibition part.
>
> HIS HONOUR: Well, I think with accident I've got the business about susceptibility and so on has got to be – unusual susceptibility but---
>
> MR FEENEY: Yes.
>
> HIS HONOUR: ---it's not an axial skull case---
>
> MR FEENEY: No.
>
> HIS HONOUR: ---but it's that theme, isn't it, that I've got to raise with them.
>
> MR FEENEY: Well, the doctor seems to be saying, 'Well, the vagal inhibition is something which would occur in susceptible people.' But it complicates matters further by the methylamphetamine at a low level – there being no safe level and, perhaps, it having an effect which means the heart might be more susceptible."[33]

[33] It is also evident from his Honour's summary of the rival contentions in the summing-up that defence counsel addressed the jury in respect of vagal inhibition:

> "He reminded you of the evidence of Dr Botterill and the mechanism of the electrical signal that stops the heart, and it was stressed that this is quite different from what the lay expectation of how the act of throttling might cause someone's death, by blocking the airway. He submitted the accused was assaulted, and that that, which was not begun by him, culminated in his hold around the neck of the deceased and gave rise to the prospect of vagal inhibition from that restraint. He reminded you that there's said to be no safe level for methylamphetamine and that all of this supports the prospect the death occurred unforeseeably and unexpectedly."[34]

[34] It was in this context that his Honour gave the following direction in respect of accident:

> "Section 23 relevantly provides:
>
> *A person is not criminally responsible for an event –*
>
> in this case, the death of Ms La Spina –
>
> *that the person does not intend or foresee as a possible consequence and an ordinary person would not reasonably foresee as a possible consequence.*

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33 AB 462.31.
34 AB 584.1-9.

You'll see subsection (1A) provides:

> *However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.*

I need to say a little about that. Really, it flows as potentially relevant from the evidence of Dr Botterill where he spoke about if the mechanism of death here was the vagal inhibition that triggered the electric episode with the heart of the kind he discussed with Mr Feeney in cross-examination, and it's impossible to tell whether it's that or the blockage of air as the case may be or some mixture of circumstances, but that there's the prospect of methylamphetamine heightening the risk of heart failure from that particular mechanism. Now, he said it's not possible to tell if a person has that susceptibility, so it's difficult to know in this case whether or not Ms La Spina had such susceptibility. But if she did, section 23(1A) would be relevant in that:

> *...the person would not be excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.*

So in the context of those words, it might be thought that a heightened sensitivity that someone had might come within the description of an abnormality or a weakness, but, of course, the fact that it might in turn be heightened by methylamphetamine would complicate that further. Exactly what you make of whether or not death may have been caused by the particular mechanism Mr Feeney was exploring and whether that was because she had a particular susceptibility or not is a matter for you. But you might think on the evidence it's impossible to sensibly determine such a question and that you would approach this by broader considerations in considering what happened.

However, depending on what view you form, it is the case that if the death resulted because she had a particular susceptibility, a weakness or abnormality to a particular mechanism of death that some people have, but not, it seems, the majority of people, well, that would not be an excuse in dealing with this section. As I say, you may think it's impossible to know and that it's fairer to the accused to consider this defence simply on the basis that she was a person with generally normal physical properties and reactions. Enough on that. Let's return to the core of this which is contained in 23(1)(b).

Its effect is that the prosecution must prove that the defendant intended that the death should occur. Well, if that was so, members of the jury, you might think that element number 4 in terms of intention to kill would be proved, so that's one way of the prosecution excluding this defence plainly enough, but I continue. The prosecution must prove the defendant intended that the death should occur or – there's another way of looking at it – that the

> defendant foresaw it as a possible consequence or – and this is the third way of looking at it – that an ordinary person in his position would reasonably have foreseen the event as a possible consequence.
>
> You may find it easiest to think about it by reversing that and asking, firstly, well, would an ordinary person in his position reasonably foresee death as a possible consequence of applying force to a person's throat until they stopped breathing? If you're persuaded beyond reasonable doubt that an ordinary person in such a position would foresee death as a possible consequence of the application of force to the throat until the point where the person was no longer breathing, then the defence would be excluded."

[35] Counsel for the appellant made no oral submissions in respect of this ground of appeal, relying on his written submissions. The appellant concedes that the jury's guilty verdict for murder means that the jury found that the appellant at least intended to cause grievous bodily harm to the deceased at the time he caused her death.[35] This concession is appropriate given the appellant's evidence that he held the deceased's neck until she stopped breathing. The appellant nevertheless submits that because of the trial judge's direction, the appellant was in effect, deprived of a narrow but possible operation for the defence of accident.

[36] A susceptibility to vagal inhibition may constitute a "defect, weakness or abnormality" for the purposes of s 23(1A). It may be accepted, as submitted by the appellant, that an increased susceptibility either to vagal inhibition or cardiac arrest due to voluntary consumption of methylamphetamine would not however fall within the proviso which s 23(1A) establishes with regard to s 23(1)(b).[36]

[37] There was evidence that methylamphetamine increased the risk of death from vagal inhibition.[37] The appellant therefore submits that in those circumstances, the direction given constituted an error of law. Rather than being directed as they were the jury should either:

(a) not have been directed as to s 23(1A), as its application or lack of application could not be resolved on the evidence, or

(b) have been directed that unless they were satisfied beyond reasonable doubt that the prosecution had established that methylamphetamine had played no role in the death, then the jury should not apply s 23(1A).[38]

[38] The appellant referred to the decision of this Court in *R v Charles*[39] where the Court considered a direction given in respect of s 23(1A). In *Charles* the appellant was convicted of one offence of doing grievous bodily harm. The relevant harm was a disc herniation. On the prosecution case this was caused by the appellant pushing the complainant on several occasions into a wall. The medical evidence from an orthopaedic surgeon was that the degree of force required to disrupt the disc depended on its strength and whether it was degenerative. While there was evidence of some degeneration it was not clear as to the degree. The orthopaedic surgeon concluded that in order to cause the herniation a moderate degree of force

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35 Appellant's Outline, [15].
36 Appellant's Outline, [23] citing *R v Steindl* [2002] 2 Qd R 542; [2001] QCA 434.
37 AB 107.44 and AB 113.33.
38 Appellant's Outline, [25].
39 [2001] QCA 320.

was required. The Court observed that given the evidence there were reasons for concluding that it was not necessary for there to be any direction based on s 23 of the Code:

> "If the jury concluded that the appellant forcibly pushed the complainant on several occasions into a wall so that her upper back, neck and head came into contact with the wall, the only question would have been whether or not the conduct caused the grievous bodily harm. It could hardly be contended that a reasonable person in the position of the accused would not reasonably have foreseen an injury to the upper spine as a possible outcome of such conduct."[40]

[39] *Charles* is readily distinguishable from the present case. The trial judge in *Charles* referred in her summing-up only to s 23(1A). The jury were not directed to consider the defence of accident in terms of s 23(1)(b) at all, nor were they directed that accident was open. As subsection (1A) is essentially a proviso to s 23(1)(b) and is only intelligible when read in conjunction with the relevant law on s 23(1)(b), the Court accepted the appellant's contention that by only referring to s 23(1A) the trial judge introduced an extraneous consideration which would have been confusing to the jury.[41]

[40] In the present case the learned trial judge did not make a similar error and instructed the jury in terms of both s 23(1)(b) and s 23(1A).

[41] The other error in *Charles* was that the jury were not clearly directed on the issue of causation which "may well have been compounded by the inappropriate reference to s 23(1A)".[42] No such error arises here. The learned trial judge in instructing the jury on the second element of murder, namely that the appellant killed the deceased, correctly directed the jury that the appellant's acts had to be a substantial or significant cause of death or have contributed substantially to the death:

> "You will recall, to use an example, what Dr Botterill had to say about the possible effects of alcohol or methylamphetamine – and I will come to his evidence shortly, but the general effect – was it might lead to an increased susceptibility. But, you might think it rather obvious this, on no interpretation of his evidence could it be suggested that either alcohol or methylamphetamine could have been the sole cause of death or even, you might think, the most substantial of the causes. The most substantial, you might think, on Dr Botterill's evidence, if not the only, at the very least the most substantial, plainly enough, would have been the application of force to the neck which, as Dr Botterill explained, was what killed her.
>
> In any event, though, the defendant's acts must be a substantial or significant cause of death, or have contributed substantially to the death and, if so, that would be enough to prove that he caused the death, even if there were some lesser contributing causal features.
>
> It is a matter for you, but you might think it clear that Mr Ngwira caused Ms La Spina's death by applying force to her neck. Again,

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40 [2001] QCA 320, [10].
41 [2001] QCA 320, [11].
42 [2001] QCA 320, [14].

> it's a matter for you. That's a comment on the facts, but let's not waste time on something that doesn't seem to be particularly in issue. It appears to be an inference open to you, on the prosecution case, and indeed even on Mr Ngwira's account, it implicitly is acknowledged."

[42] In the circumstances of the present case the learned trial judge's direction on accident does not reveal any error. The issue of vagal inhibition and any effect of methylamphetamine on such a susceptibility was raised in evidence by defence counsel. He also raised the issue of vagal inhibition in the context of s 23 with the learned trial judge prior to the summing-up. Defence counsel did not seek any redirection. Dr Botterill's evidence as to a person's susceptibility to vagal inhibition and the effects of methylamphetamine on vagal inhibition and cardiac arrest were theoretical. There was simply no evidence that the deceased had any actual susceptibility to vagal inhibition or that the low level of methylamphetamine found in her system constituted a contributing cause of death.

[43] The issue of vagal inhibition having been raised in cross-examination, his Honour did not err in giving the direction. His Honour was also correct in identifying to the jury the paucity of evidence relating to the issue. As stated by his Honour:

> "But you might think on the evidence it's impossible to sensibly determine such a question and that you would approach this by broader considerations in considering what happened."

As is evident from his Honour's summing-up both in respect of causation and accident there was an obvious means by which death was caused, namely the application of a chokehold with increasing pressure to the deceased's neck until she stopped breathing. Manual strangulation was, in Dr Botterill's opinion, the most probable cause of death. In all of the circumstances outlined above the direction did not result in any unfairness to the appellant. I accept the respondent's submission that the direction correctly informed the jury "on the very weak possibility of a defect, with an acknowledgment it would be fairer to the accused to treat the deceased as not having such a defect".[43]

[44] No error is established.

Ground 2 – that the verdict of the jury in relation to the rape charge was unreasonable

[45] The appellant submits that the verdict of the jury on count 1 (rape) was unreasonable. The amended notice of appeal identifies two bases for ground 2 particularised as follows:

(a) The count of rape was in the alternative to a count of indecent interference with a dead human body. The issue of time of death could not be resolved on the evidence;

(b) Alternatively, the results of the swab were not, in the circumstances, capable of establishing penetration.

Applicable principles

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43 Respondent's Submissions, [9].

[46] In considering this ground, the Court must review the whole of the evidence to determine whether it was open to the jury to determine that the appellant raped the deceased, and that his guilt was proved beyond reasonable doubt.[44]

[47] The relevant principles were recently stated by Fraser JA (with whom Gotterson and McMurdo JJA agreed) in *R v Clapham*:[45]

> "The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand". The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the "starting point … is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses", but:
>
> > *"In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."*
>
> In *R v Baden-Clay* the High Court emphasised that the jury is "the constitutional tribunal for deciding issues of fact" and observed that, "the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial", "a court of criminal appeal is not to substitute trial by an appeal court for trial by jury", and "the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'."[46] (Footnotes omitted)

[48] The issue is whether the Court is of the opinion that the guilty verdict of the jury should be set aside on the basis that it is unreasonable, or cannot be supported having regard to the evidence pursuant to s 668E(1) of the *Criminal Code*.[47]

[49] In *R v Conn; R v Conn; Ex parte Attorney-General (Qld)*[48] Sofronoff P highlighted the following principle from *M v The Queen*:[49]

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44 *GAX v The Queen* [2017] HCA 25 at [20].
45 [2017] QCA 99 at [4]-[5].
46 See also *R v Schafer* [2017] QCA 208 at [120].
47 *R v Doolan* [2014] QCA 246.
48 [2017] QCA 220, [24].

> "[24] In *M v The Queen* the plurality emphasised the kind of case in which an appellate court might conclude that a reasonable jury ought to have entertained a doubt. Their Honours said:
>
> *'If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."*"

[50] One of the '*advantages enjoyed by the jury*' is the fact that the jury has the benefit of seeing and hearing the witnesses.[50]

[51] The prosecution's case in respect of the rape charge was circumstantial. It relied on both forensic evidence and other circumstantial evidence. This included the interaction between the appellant and the deceased the previous night, her statements to Mr Daniel and Mr Bertucci concerning the appellant and the evidence of Mr Norman and Ms Delaporte of hearing a woman scream. The jury also had the evidence of the appellant's police interview and the advantage of observing the appellant giving evidence, which occupied approximately two hours including 40 minutes of cross-examination. It is necessary to consider this evidence in detail to determine whether it was open to the jury to determine that the appellant raped the deceased and that his guilt was proved beyond reasonable doubt. The evidence is analysed below particularly with a view to determining first, whether there was sufficient evidence to conclude that there had been penetration and secondly, whether there was sufficient evidence to determine if penetration happened before or after death.

(a) Evidence from Jackaroo's Hostel

[52] Bradley Patterson and Stephen Bertucci were part of the group who were at Jackaroo's with the deceased on the night of 18 April 2014. Mr Patterson gave evidence that the deceased had asked him to dance. When he went to dance with her, the appellant began "sort of leading [the deceased] away".[51]

[53] Mr Bertucci also danced with the deceased during the evening. He said the deceased was "like one of [his] own daughters".[52] He gave evidence that the appellant approached him and the deceased while they were dancing and grabbed the deceased's arm. The appellant said words to the effect of "that's not how women act or how women are supposed to be like".[53] Mr Betrucci and the deceased continued dancing until the music finished, at which point Mr Bertucci returned to the bar and the deceased went to talk with a group of friends. Later in the evening, Mr Bertucci was again dancing with the deceased when the appellant grabbed her.[54] Mr Bertucci confronted the appellant and told him to "fuck off".[55] The events

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49 (1994) 181 CLR 487 at 494.
50 *M v The Queen* (1994) 181 CLR 487 at 494.
51 AB 55.29.
52 AB 128.
53 AB 132.1.
54 AB 134.2.
55 AB 134.2.

described by Mr Bertucci were not seen by any other witness. Other witnesses described the evening as being pleasant and without any aggression.[56]

[54] Mr Bertucci also gave evidence that the deceased told him that the appellant was "creeping her out".[57] He recalled a conversation he had during this time with the deceased:

> "She said to me – she said, hey, Steve. This fellow's really creeping me out, or he creeps me out, something like that."[58]

[55] The comment made by the deceased as recalled by Mr Bertucci is similar to the comment that Mr Daniel recalled being made by the deceased as described in [15] above.

[56] The appellant denied any confrontation at Jackaroo's with Mr Bertucci in the following exchange with Counsel:

> "I'm going to suggest that he [Mr Bertucci] was dancing with Joanne, and you pulled her forearm?--- That's incorrect.
>
> You also said, "That's not how women act or how women are supposed to be like," didn't you?--- That's incorrect.
>
> So is he lying is he?--- Yes. He is.
>
> …
>
> I'm also going to suggest there was another incident where Steve Bertucci was dancing with Joanne, again [indistinct] a slow dance, and you have again grabbed Joanne by the forearm?--- That's incorrect.
>
> You grabbed her quite forcefully by the forearm?--- No.
>
> And the baldheaded man, Mr Bertucci, told you to, "Fuck off idiot"?--- No.
>
> Mr Patterson, the army boxer guy, you saw he was interested in Jo that evening, didn't you?--- I wasn't paying attention to what anyone else was doing.
>
> You were paying attention to Joanne that evening, though, weren't you?--- Because I was talking to her. She was part of the group.
>
> Yeah. And when you weren't with her, you were staring at her?--- [indistinct] incorrect, eh?
>
> You were watching her? --- [indistinct] incorrect.
>
> Because you were attracted to Joanne, weren't you?--- Did say I was attracted to her."[59]

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56 AB 59.23.
57 AB 134.26.
58 AB 134.25.
59 AB 444.21.

[57] The appellant recalled that at Jackaroo's Hostel, he had slow danced with the deceased. He said that he and the deceased had talked at Jackaroo's and later at the beach. He denied trying to pick her up. The appellant admitted that he "may have been attracted to her".[60]

(b) Scream evidence

[58] Brian Norman lives at unit 2 in the same complex as Mr Daniel. This is the unit located next door to Mr Daniel's unit. Mr Norman recalled that on 19 April 2014, he woke up between 5.00 am and 5.30 am. He noticed a car blocking his driveway. He went around to unit 1 to record the numberplates on the two cars. He said that a "tall, dark – darkish person" appeared behind him, in front of Mr Daniel's unit. Mr Norman said "He just, sort of, jumped in the car, moved it away, out of my driveway".[61] The appellant confirmed that he was the person who had moved the car.[62]

[59] Mr Norman said when he encountered the appellant they were standing "pretty close" and that the appellant smelled of "stale booze".[63] After he asked the appellant to move his car, he and his partner, Ms Delaporte, went for a walk for about half an hour.

[60] After returning home from their walk, at about 7.20 am he heard "a loud, short scream" from a female that he thought came from unit 1.[64] In cross-examination, Mr Norman conceded that the scream could have come from upstairs, and that sound echoes in the units, but "it seemed like it was downstairs".[65] Mr Norman went to investigate where the sound came from. He walked outside and towards Mr Daniel's unit. He said he stood at the back of Mr Daniel's unit to see if he could find out what was going on. He said he "didn't see anything" but heard "muffled sounds".[66] Mr Norman walked to the front door and knocked on the window and asked "is everything all right in there?" He said a male voice responded "it was all right, bro" and a female voice responded in a loud "no".[67] It sounded like the voices came from downstairs. Mr Norman returned to his unit.

[61] The appellant was asked at trial if the deceased had answered "no" to Mr Norman's inquiry. The appellant did not "recall [the deceased] saying anything of that sort".[68]

[62] Ms Delaporte's evidence was that after she and Mr Norman had returned home from their walk, she went to the kitchen and turned on the radio. She then heard a woman scream. She then heard a second scream and turned the radio off. Ms Delaporte told the police that the scream "sounded like someone was petrified of something".[69] Ms Delaporte said:

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60 AB 446.13.
61 AB 143.
62 AB 428.36.
63 AB 143.16.
64 AB 145.1.
65 AB 145.28 and 161.40.
66 AB 150.44 and 151.9.
67 AB 152.33 and 153.14.
68 AB 455.23.
69 AB 184.22.

> "This scream sounded like the person was frightened of something. This scream sounded like it came from a female. The screams sounded like they were coming from the back bedroom of unit 1."[70]

[63] Ms Delaporte gave conflicting evidence about the interval between the screams.[71] She ultimately agreed that the two screams were two to five seconds apart. A "couple of seconds" after she heard the second scream, Ms Delaporte heard three thudding noises, "like someone running down the steps" coming from "the back bedroom of unit number 1".[72]

[64] The appellant conceded that the deceased screamed at least once that morning.

(c) The appellant's evidence

[65] The appellant in his record of interview with police denied seeing the deceased at any point on 19 April 2014. He stated he had never been upstairs at Mr Daniel's unit. He denied having any knowledge of what had happened to the deceased. His evidence at trial was substantially different.

[66] The appellant recalled that he woke up on 19 April 2014 to move his car after being woken by someone at the door. He recalled that he woke up again when Mr Daniel left. He said he woke up about an hour after Mr Daniel had left and went outside for a cigarette. While outside, he heard a voice from upstairs ask "do you have another"? He recognised that voice as the deceased's. He offered to 'throw' her up a cigarette but she said she would come downstairs. The deceased joined the appellant outside for a cigarette. They talked about the previous night. The deceased said she was sore from rafting and the appellant offered to give her a massage. She accepted and they went inside. The appellant began to massage the deceased. After some time, the two went upstairs and 'fondled'.

[67] The appellant said he ejaculated while they were fondling. Both were wearing underwear when the appellant ejaculated.[73] He said he was going to perform oral sex on the deceased, but he smelled an odour and said "maybe not". He said that this angered her, as she thought he was making fun of her. The appellant said that the deceased then told him to "get up" and as he opened the bedroom door, he felt a "big shove from the back". He recalls the deceased being on top of him so he put her in a "chokehold" to defend himself. He said that the deceased was a "big girl" and that they "wrestled". The appellant says it was during this exchange that the deceased screamed. The appellant could not remember if it was Mr Norman who was at the door, but he did recall that he "heard a voice" while he and the deceased were engaged in their struggle. The following exchange occurred between Defence counsel and the appellant:

> "Do you know what was said?--- Yes, I do. I – it was something along the lines is everything okay?
>
> Did Ms La Spina answer?--- I don't remember. I don't know.
>
> Did you answer?--- Yes, I did.

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70 AB 185.9.
71 AB 173 and 182.19.
72 AB 188.1.
73 AB 448.25-35.

> Do you remember what you said?--- I must have said yes, it's all good, bro.
>
> HIS HONOUR: So you said you must have said that. Do you recall saying that?--- I – I said that. I said that."[74]

[68] The appellant said that the struggle continued for "maybe a minute – two minutes" but could not recall exactly how long it took.[75] After some time in the chokehold, the deceased "just went limp". The appellant checked to see if she was alive by checking the pulse on her neck, but could not feel a pulse. The appellant's mobile phone was downstairs at Mr Daniel's unit. The appellant was aware that Mr Norman was home next door. He said the reason he did not seek help was because he was scared. Being a "black man and – and having vivid memories of growing up in South Africa" he was scared that no one would believe him.[76] The appellant is trained in first aid.[77]

[69] Counsel for the prosecution asked the appellant what he did "instead of helping her". The appellant said:

> "I tried to create a scene – fake scene. I – I moved [the deceased's] body from the hallway to the shower."[78]

[70] The appellant set up the deceased's body in the shower to look like a fake suicide scene. He placed her body on the floor of the shower in the upstairs bathroom and tied a piece of cord around her neck. He said he did not intend to kill or harm the deceased or cause any permanent injury.[79] The appellant subsequently left Mr Daniel's unit and drove to his own house.

[71] As discussed below, the appellant's DNA (including a spermatozoa fraction) was found on a swab taken from within the deceased's rectum. The appellant said a reason spermatozoa could have been found in the deceased's rectum was that it transferred from him to her during foreplay.[80] He denied penetrating any part of her body or forcing himself on to her.[81] He said he "did not penetrate into [the deceased] at all".[82] When asked if he had done anything to the deceased that could leave spermatozoa in her rectum, the appellant responded:

> "No. As I said, we were rubbing against each other and she was wearing her underwear. I never whatsoever I did not force myself on Ms La Spina, I did not rape Ms La Spina. I did not penetrate into Ms La Spina at all."[83]

[72] The appellant is six foot four inches tall (approximately 1.93m) and "physically fit".[84]

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74 AB 434.32.
75 AB 435.26.
76 AB 437.12.
77 AB 436.42.
78 AB 437.
79 AB 436.32.
80 AB 437.46.
81 AB 437.36.
82 AB 438.2.
83 AB 437.46.
84 AB 446.47.

[73] The appellant also denied performing any indecent act after the deceased was dead.[85]

(d) The forensic evidence

[74] Dr Botterill conducted a post-mortem examination of the deceased's body. He gave evidence at trial. He determined that the deceased was 1.71 metres tall and weighed 76 kilograms. He observed that the deceased's anus was dilated. Dr Botterill stated that in most cases the anus is contracted after death, but in 'a number of cases' it can be dilated. A dilated anus is an 'abnormality' but not one worthy of any weight or inference. He opined the dilation may have been the result of rigor mortis, the natural process of muscles stiffening after death.[86]

[75] Dr Botterill observed no injury or tearing around the deceased's anus or over the area extending towards the vagina, nor was there any bruising, tearing or abrasion of the anus.[87]

[76] Dr Botterill took a rectal swab from the deceased. He stated that spermatozoa was found inside the deceased's rectum. In order to take the sample Dr Botterill used a cue-tip, which is a wooden stick with cotton wool wrapped around one end. The cue-tip is 10-20 centimetres in length.[88] According to Dr Botterill his standard approach was to insert the cue-tip approximately five or six centimetres. He stated:

> "… we don't try to sample around the anus. We actually bypass the anus and sample the inside of the rectum."[89]

[77] Dr Botterill opined as to the possible explanations for the appellant's spermatozoa being found in the rectum of the deceased:

> "Now, in this case, the accused's sperm is found inside the rectum. In your opinion, is that consistent with the accused ejaculating inside of [the deceased's] rectum?--- Yes. It's not the only possible explanation, but is certainly consistent with that."

[78] Dr Botterill gave evidence that another explanation for its presence could be if spermatozoa was present on a finger, or another instrument, that was placed in the rectum, which could cause a transfer. He said that was "theoretically possible".[90] He said that the rear of the deceased's underpants was "covered" in the appellant's semen.[91] Dr Botterill said that it was possible that the semen on her underpants could have transferred onto her body then onto her dilated rectum.[92] He said that spermatozoa could transfer through mediums such as water, but that "large volumes of water" such as a shower, "generally dilute rather than concentrate things".[93]

[79] In re-examination the following exchange occurred:

> "Doctor, the scenario in the shower with the water overflowing, the water would have to be above the anus. Is that correct?--- Well, it

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85 AB 438.17-22.
86 AB 84.11.
87 AB 110.9.
88 AB 103.13-22.
89 AB 104.18-19.
90 AB 104.32.
91 AB 104.37.
92 AB 104.40.
93 AB 112.6.

> could be at the level of the anus, but yes, if it's above, then there's theoretically the possibility that anything in that water might, just simply by the presence of the water leaning against that surface, allow communication between whatever is in the water and – and the surfaces of the rectum. So yes.
>
> And you'd expect to find it in the vagina?--- In that instance, yes."[94]

[80] Emma Caunt, a forensic scientist with Queensland Health, conducted a DNA examination on a number of items including the deceased's hair, fingernails and swabs of fluids taken post-mortem. The "high vaginal, low vaginal and oral swabs", the swab taken from the deceased's back and the swabs taken from the outside of the deceased's underpants returned negative results when tested for spermatozoa fraction of the appellant.[95]

[81] The rectal swab and swabs from the inside of the deceased's underpants returned positive results for spermatozoa fraction, as well as the possible presence of seminal fluid and blood.[96] Ms Caunt explained the rectal swab as the following:

> "So the rectal swab, as I said, was separated into two parts. So the epithelial fraction: this is the cellular part. The profile obtained from that matches the profile of Joanne La Spina, and that wasn't unexpected, given that the swab was taken from her. The profile also indicated that there was possible additional DNA from somebody else, but was below our thresholds for reporting and couldn't be interpreted further. The spermatozoa fraction or part of the – of the rectal swab gave a mixed DNA profile, indicating two people. One of those could have been Joanne La Spina – and, therefore, I assumed the presence of her DNA… Based on statistical analysis, it's estimated that the mixed profile is greater than 100 billion times more likely if there has been a contribution of DNA from Musa Ngwira, rather than if there has not. The reference samples from Warrick Daniel, Paul Porteous, Jack O'Malley and Matt Smith can be excluded as potential contributors."

[82] Swabs taken from the deceased's dress and her bra also returned positive results for the appellant's DNA. Ms Caunt was not able to identify how the DNA was deposited or transferred from the appellant to the deceased.

(e) The summing-up

[83] The learned trial judge directed the jury as to the relevant elements of rape, including the requirement for penetration without consent. His Honour identified that the prosecution invited the jury to conclude that there was such penetration of the deceased's anus by reason of the presence of the appellant's DNA, including a spermatozoa fraction being found in the rectal swab. His Honour continued:

> "The probability of, if there right about that, such spermatozoa getting there by reason of penetration by the accused would have been that it would have been by his penis, or alternatively, by some other thing, not his penis, which has been put in her anus and

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94 AB 114.20-27.
95 AB 343.21.
96 AB 343.6.

> deposited the spermatozoa, and you recall there was some examination, particularly of Dr Botterill, about something else being forced in the vicinity of the anus. So, whether there was penetration of the anus with a thing or a part of the body of the accused that was not his penis, or whether it was carnal knowledge in a more conventional sense, that is say sodomy, penetration of her anus with his penis, either way the prosecution says you would infer one of those happened, and you would infer it was done without her consent."[97]

[84] His Honour referred to other background evidence, including the appellant's sexual interest in the deceased and the scream evidence which the jury may have thought inconsistent with consensual sexual relations.

[85] As to the rape occurring while the deceased was still alive his Honour stated:

> "Importantly, the crime of rape can only be committed against a person, that is to say someone who is alive. So the prosecution also asks you to draw the inference that this occurred before she died. This inference, as I understand the prosecution case, is invited from what is likely to be the most obvious sequence of things, that it was his sexual violence against her that essentially, because of her resistance of his sexual approach – these are all matters of inference, there's no direct evidence of this on the Crown case – were really part of an accelerating and building up process where the violence increased so he could achieve his ends. Whether or not that's, in fact, so, or whether it's merely speculation and not adequately supported by the evidence is a matter for you to consider. Bear in mind what I said about circumstantial evidence and the need to exclude competing hypothesis consistent with innocence beyond reasonable doubt."[98]

[86] His Honour instructed the jury that if they were uncertain as to whether the deceased was alive or dead when penetrated, they should acquit in respect of both the charge of rape and that of indecent interfering with a dead human body.[99]

[87] The learned trial judge summarised the defence contentions as follows:

> "Even before you get to Mr Ngwira's account of events, on the prosecution's own case you should have some doubts about whether or not the rectal swab was actually detecting a DNA inside the rectum, or just DNA innocuously outside. You should have regard, also, to the limitations of the evidence in being able to establish beyond reasonable doubt whether she was alive or dead at the time the event happened, if it did happen, and over and above all that, the defence say, in any event you would either accept what Mr Ngwira says happened, which plainly was not rape or indecent interference with a corpse, or at least would be left in a state of reasonable doubt either way on the topic."[100]

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97 AB580.5-14.
98 AB 580.28-39.
99 AB 582.1-9.
100 AB 582.17-25.

Consideration of ground 2

[88] The appellant submits that the only evidence in relation to the rape was the presence of his DNA (with spermatozoa fraction) in the rectum of the deceased. The appellant submits that such circumstantial evidence is not sufficient to prove beyond reasonable doubt that the appellant penetrated the deceased's anus with his penis or another object at any time.[101]

[89] The appellant acknowledges that "there was a powerful circumstantial Crown case for murder" but "the circumstantial case (for) rape was much less strong and was 'answered by direct evidence from the appellant'".[102]

[90] The appellant submits that the DNA fraction found in the deceased could have occurred by transfer when he "manhandled" the deceased into the shower to stage her suicide.[103] In the appellant's submission, that possible transfer "wasn't a circumstance that could be rejected on the state of the evidence".[104] These submissions should not be accepted. They are difficult to reconcile with the appellant's own evidence at trial that there was nothing which he did to the deceased that could have resulted in the transfer of his spermatozoa to her rectum.[105] Further the appellant's spermatozoa was found in the deceased's rectum but not in her vagina. As a result it was open to the jury to reject the suggestion that the appellant's spermatozoa came to be in the rectum of the deceased as a result of transfer by operation of water from the shower. The prosecution's version of events was the more likely given that on the appellant's version he ejaculated into his underpants and never took them off. Further at the time of ejaculation, on the appellant's version, the deceased was also still wearing her underwear.

[91] As outlined in [26] above, the appellant conducted a Google search on 22 April 2014 for "how long does it take to get forensic DNA results in Australia". The inference capable of being drawn from this Google search is that the appellant knew he had transferred some of his DNA to the deceased sufficient for it to be found. I accept the submission of the respondent that the jury were entitled, in considering the circumstantial case, to reasonably infer that the appellant's semen was in the rectum of the deceased due to penetration and not by innocent transfer. Even on the appellant's own version there had been sexual activity between him and the deceased, who did not scream until after that sexual activity occurred.[106] It was open to the jury not to accept the appellant's evidence of consensual sexual activity. Such activity was inconsistent with the statements of the deceased to both Mr Daniel and Mr Bertucci to the effect that she found the appellant "creepy". The fact that the deceased screamed is also inconsistent with consensual sexual activity.

[92] The jury also had the evidence of Dr Botterill outlined in [76] to [78] above. The spermatozoa sample of the appellant was obtained by use of a cue-tip of 10 to 20 centimetres in length, which was inserted five or six centimetres into the rectum of the deceased in order to sample the inside of the rectum. This evidence is generally consistent with the deceased's rectum having been penetrated by the appellant. The fact that the anus was dilated and showed no sign of tearing,

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101 Appellant's Outline, [32].
102 T1-2, lines 19-32.
103 T1-6, line 32.
104 T1-6, lines 37-38.
105 AB 437.46.
106 Respondent's Outline, [13(b)].

bruising or abrasion were, on the evidence, neutral considerations as to whether the deceased's anus had been penetrated.

[93] The appellant's secondary submission is that the evidence does not establish when penetration took place and it is therefore not possible to distinguish between counts 1 and 2. If this were the case, as the trial judge directed the jury, the proper verdict should have been not guilty on both counts.[107] It was open to the jury in finding the appellant guilty of rape to accept that penetration occurred while the deceased was still alive. From the evidence of the witnesses from the Jackaroo's Hostel and the evidence of the appellant himself the jury could conclude that the appellant was sexually interested in the deceased. The evidence of the deceased being heard to scream supports a finding that the deceased was still alive while physically struggling with the appellant. Even on the appellant's own version, all sexual activity occurred prior to any struggle and therefore prior to the deceased screaming and certainly before death. The appellant also specifically denied indecently interfering with the deceased after she was dead.

[94] While the appellant denied raping the deceased, it remained open to the jury to reject his denial of rape but accept his denial of indecently interfering with a corpse. Further, on the Crown case part of the appellant's motivation for murdering the deceased was the fact that he had raped her. Such motivation, which may have been accepted by the jury, sequentially required the rape to occur before the murder.

[95] I consider that upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of rape. Whilst other possibilities for the transfer of spermatozoa were "theoretically possible" there was a proper basis for the jury to accept the forensic evidence that it was likely that penetration had occurred. It was also open to the jury to conclude from the whole of the evidence that penetration had occurred while the deceased was still alive.

[96] Ground 2 fails.

Ground 3 – Separate consideration of charges warning

[97] The appellant's third ground is that the learned trial judge erred in failing to give the jury a separate consideration of charges warning. Direction 34.1 in the Supreme and District Courts Criminal Directions Benchbook provides:

> "Separate charges are preferred. You must consider each charge separately, evaluating the evidence relating to that particular charge to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved its essential elements. You will return separate verdicts for each charge.
>
> The evidence in relation to the separate offences is different, and so your verdicts need not be the same."

[98] In circumstances such as the present case where the elements of the offences are different, the Benchbook suggests that the following sentence should be added or substituted for the last sentence of the direction quoted above:

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107 AB 582.3.

> "The elements of the offences are different, and so your verdicts need not be the same."

[99] The separate consideration of charges direction is necessary where there is a risk a jury may undertake impermissible reasoning in considering the case globally; in not considering each charge separately, and using a conviction on one count impermissibly to lead to guilt in relation to other counts.[108]

[100] The appellant submits that counts 1 and 2 being alternatives, had to be considered together. Count 3 however, had to be considered separately from counts 1 and 2, although the evidence was cross-admissible. According to the appellant the jury were not given a direction that they must consider counts 1 and 2 separately from count 3 and that it was open for them to deliver different verdicts for the two sets of offences. The appellant asserts that none of the directions given by the learned trial judge directed the jury that they must consider each charge separately, evaluating the evidence relating to that offence, and that as the elements of, and the available evidence in relation to each of the offences was different, the jury's verdicts need not be the same for each count. The jury were also not told that if they convicted on one count, they should not take the fact of that conviction into account in considering the other count.[109]

[101] The appellant further submits that the failure to give the separate consideration of charges direction constitutes an error primarily because the learned trial judge, having not given a separate consideration direction, should have at least given a propensity evidence warning. Such a warning was, according to the appellant, necessary because "a jury could well view a person who committed rape as being a person more likely to intend to kill or to cause grievous bodily harm".[110] The appellant submits that the learned trial judge, having not given a propensity evidence direction, should have given a separate consideration of charges direction.

[102] In support of this submission the appellant relies on the following statement of McMurdo P (with whom Gotterson JA and Atkinson J agreed) in *R v Doolan*[111] where the President stated:

> "Almost invariably whenever charges are joined, it is incumbent on the trial judge to direct the jury to consider each charge separately and evaluate the evidence on that charge to decide whether each juror is satisfied beyond reasonable doubt that the prosecution has proved the elements of that charge. The jury should also be directed that the evidence in relation to each charge is different so the verdict need not be the same. … The trial judge did not direct the jury in those terms and his failure to do so was an error of law."

[103] It may be accepted that the giving of the separate consideration of charges direction is standard practice. The appellant's submission should be rejected however because in the circumstances of the present case the learned trial judge adequately directed the jury as to the relevant aspects of the separate consideration direction. In the present case the jury had to consider rape (and the alternative) and murder. Not only were the elements of the offences different, the issues were also different.

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108 Respondent's Outline, [14].
109 Appellant's Outline, [38].
110 T1-3, lines 32-34.
111 [2014] QCA 246 at [39].

The defences of accident and self-defence, for example, were only relevant to the murder count. The danger of the jury engaging in impermissible reasoning does not arise in the present case. Here, the evidence was admissible on all counts. The offences arose out of one continuous course of conduct. In such circumstances there was no real possibility for the jury to engage in impermissible reasoning. This is made evident when the learned trial judge's direction on motive is considered:

> "On one view of the evidence, the accused had a sexual interest in Ms La Spina which was not reciprocated. Given that, along with the finding of what was likely his spermatozoa in her rectum and the state of the injuries to her body, there exists the prospect, depending on your view of the evidence, that the killing was motivated by a desire for forceful sexual conquest, or a desire to cover up the fact there had been forceful sexual conquest."[112]

As the evidence was admissible on all counts the jury were entitled to take into account the evidence of the rape in considering the issue of motive for the murder count. The appellant does not suggest that a propensity direction was required. I accept the respondent's submission that in these circumstances "it's almost impossible to see that there was any danger of propensity reasoning."[113]

[104] Any danger of the jury impermissibly reasoning that a person who committed rape was more likely to commit murder was sufficiently addressed by the directions given by the learned trial judge. When the structure and content of the summing-up is properly analysed it is apparent, in my view, that his Honour communicated the essence of the separate consideration direction. This is evident from the following directions given by his Honour:

- "In respect of each charge, you must reach a unanimous verdict, that is, a verdict on which you all agree, whether guilty or not guilty."[114]
- "So, in order to convict, you must be satisfied beyond a reasonable doubt of every element that goes up to make the relevant offence charged. I will explain these elements later, but when I speak of elements, I am speaking of the constituent ingredients, the essential ingredients that give rise to the offence being proved. It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences."
- "In this case, members of the jury, the prosecution has chosen not only to charge murder, which is count 3. It has also charged rape or, alternatively, indecently interfering with a dead body, which are counts 1 and 2. I propose shortly to focus exclusively upon the charge of murder, count 3, including its inherent lesser alternative of manslaughter. In doing so, I will be alluding to the evidence suggesting the possibility of sexual activity by the accused towards Ms La Spina, because it forms part of the circumstances from which you are asked to infer that the accused murdered or unlawfully killed Ms La Spina. You should appreciate the mere fact such is relevant to counts 1 and 2 does not make it irrelevant to count 3, or vice versa, that is, the fact that evidence is relevant to count 3 does not make it irrelevant to counts 1 or

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112 AB 511.31-37.
113 T1-28.4-5.
114 AB 497.26.

2. To a greater or lesser degree, all of the evidence has relevance to all of the charges.

That said, it seems simplest to me to consider the evidence as it relates to count 3, murder, and its inherent alternative of manslaughter, and do the full job on that, rather than complicating things by discussing the issues involving counts 1 and 2 at the same time. So, members of the jury, for the moment I want you to ignore counts 1 and 2. Just pretend they're not there so we're not cluttering your head with what the elements of that charge is. I simply want to focus upon murder and manslaughter.

We will return to counts 1 and 2 after I've dealt with everything relating to count 3."[115]

- The jury were directed that there would be separate verdicts for each charge when being directed on how the verdicts would be taken and were given a document "Questions on return of verdicts".[116]
- "All right. Now, I want to turn, finally, to the other two offences. Remember I completely pigeon holed them. And everything I've been talking about when I talk about the offence charged and so on, it's the context of murder/manslaughter. You'll appreciate that count 1 charge is rape, and count 2 charge is indecent interference with a dead body."[117]
- "Finally, in leaving rape, bear in mind that if you're of the view that, look, I'm satisfied that he penetrated her, either with his penis or something else, and that's the rational explanation for the deposit of his DNA inside her rectum, and that he did so when she was alive or dead, but I'm not sure which, then there'd be a problem. The charge that you're asked to consider first is rape. If you were persuaded beyond reasonable doubt that the other elements of rape other than that she was living were established beyond reasonable doubt, but you weren't persuaded beyond reasonable doubt that she was alive, that you're in doubt about that one way or the other, then rape couldn't be made out because you can't rape a dead body. It has to be a living person.

  That's the nature of the offence, so if you're in any doubt about that, even if you are persuaded beyond reasonable doubt that he penetrated with his penis or with some other object into the anus and that it would otherwise constitute rape, but if you're alive to the element that she must have been living at the time, and you're not persuaded beyond reasonable doubt one way or the other as to whether she was alive or dead, well, he'd had have to be acquitted of rape because that offence could not be proved beyond reasonable doubt because it's not been proved beyond reasonable doubt that she was alive.

  Through whatever combination of reasoning, if you are to return a verdict, as I've already explained, of guilty of rape, we won't go on to ask you the second question about whether or not he's guilty of indecent interference with a dead body, but if you said not guilty of rape, then we would have to go on to ask you about indecent interference with a dead body."[118]

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115 AB 504.20-41.
116 AB 507, line 32 to AB 508, line 12 and AB 589 and AR 615, exhibit 53.
117 AR 576.25-30.
118 AB 580.40 to AB 581.18.

- "The prosecution case is that the accused either ejaculated into the deceased's anus, in effect, penetrating with the penis, or alternatively, penetrating with some other part of his body or an object. You might think it obvious that if he did do such a thing to the deceased's body, it was indecent and was not justified or excused by law. The real two issues are: whether that happened, and I won't trawl over the same discussion we've had about that, and the other issue is whether it was a dead body when it happened, if you're persuaded beyond reasonable doubt that it did happen. Because if you're not persuaded beyond reasonable doubt the body was dead, then you would have to acquit of that charge.

  So, as a matter of logic, whilst people may think it defies belief that if you're persuaded beyond reasonable doubt that this happened but you're not sure whether she was alive or dead, you'd end up acquitting of both. Now, this debate may be a little academic to you in terms of your interest in it because you may be more concerned with the obviously much more serious charge, but the charge has been brought, so we have to treat it seriously and not academically, and so I've explained these things to you.

  As to how the prosecution seeks to prove either of these offences, it is in exactly the same way as I've already explained how it seeks to prove that he murdered her. So it's the same general areas of circumstantial evidence that I've discussed and the way in which they work. The prosecution relies on them in the same way to build its circumstantial case that he either raped or indecently interfered with her corpse."[119]

[105] From the above passages it is apparent that the learned sentencing judge left the jury in no doubt that each charge had to be considered separately and that they had to return separate verdicts for each charge. The directions also made it clear that their verdicts need not be the same. The summing-up was structured in such a way that there was no danger of the jury using a conviction on one count to impermissibly reason guilt on the other. I accept the respondent's submission that it would have been obvious to the jury that their verdict on the rape/interference charge need not have been the same as the murder/manslaughter charge.[120]

[106] Defence counsel did not seek a separate consideration direction. As submitted by the respondent, this was most probably because in the atmosphere of the trial it was obvious that there was no risk, in combination with the directions which were given.[121]

[107] The structure of the summing-up and the directions given by the learned trial judge properly reflected the different nature of the offences, including the different elements. The directions given and the structure of the summing-up itself sufficiently conveyed to the jury the essential requirements of the separate consideration direction.

[108] Ground three fails.

Disposition

[109] The appeal should be dismissed.

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119 AB 581.38 to AB 582.13.
120 Respondent's Outline, [25].
121 Respondent's Outline, [23].