SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mead* [2017] QCA 310
PARTIES:	**R** **v** **MEAD, Raymond John** (appellant/applicant)
FILE NO/S:	CA No 211 of 2016 CA No 308 of 2016 SC No 169 of 2016 SC No 846 of 2016 SC No 1326 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence Miscellaneous Application – Criminal
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 2 August 2016; Date of Sentence: 2 November 2016 (A Lyons J)
DELIVERED ON:	19 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2017
JUDGE:	Gotterson and Philippides JJA and Boddice J
ORDERS:	**1. Appeal against conviction dismissed.** **2. Leave to amend the application for leave to appeal against sentence in accordance with paragraph 1 of the appellant's Outline of Submissions on Sentence filed 16 May 2017 granted.** **3. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of murder and pleaded guilty to assault occasioning bodily harm – where the circumstances of the alleged offending were that the appellant stabbed the deceased and then assaulted the deceased's mother – where the appellant claims to have been pushed by the deceased's mother and inadvertently stabbed and killed the deceased as a result of the fall – where the appellant asserted that the testimony of the deceased's mother, as the principal witness, was either contradicted by other evidence or was otherwise so improbable as to be impossible to accept – where there was a relatively minor inconsistency in the

witness' memory of time – where the forensic evidence left open the possibility the appellant wielded the knife in his right hand, instead of left as the witness said – whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the deceased's mother provided evidence of an incident two years prior to the alleged offending whereby the appellant threatened to kill her while holding a knife to her throat – where defence counsel did not object to the admission of the evidence at trial – where the learned trial judge characterised the evidence as relationship evidence – where evidence was led that quarrels between the appellant and the deceased's mother often involved the deceased both directly and indirectly – where the appellant argues the evidence was plainly irrelevant to the relationship between the appellant and the deceased, who was not present for that altercation – where the respondent contends the evidence was admissible as relationship evidence – where the respondent contends in the alternative that there was no miscarriage of justice because defence counsel had a rational basis to have not objected – where the respondent contends in the further alternative that the proviso in s 668E(1A) of the *Criminal Code* (Qld) should apply – whether the evidence was admissible – whether the wrongful admission of the evidence occasioned a miscarriage of justice – whether the proviso should be applied

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the forensic pathologist who conducted an autopsy on the deceased expressed the opinion that it would be unlikely for the injury to have been inflicted unintentionally as the result of a fall – where the appellant argues the opinion should not have been admitted in the absence of a re-enactment or further testing – whether the learned trial judge erred by admitting the forensic pathologist's opinion evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant's blood alcohol concentration at the time of the alleged offending was within the range of .16 and .19 per cent – where the learned trial judge misdirected the jury on two occasions by suggesting the issue was whether the appellant was capable of forming the requisite intent given his level of intoxication – where the learned trial judge correctly

identified the true issue, namely whether the requisite intent was actually held notwithstanding his intoxication, on six other occasions – where the issue was clarified by a redirection following a request from the prosecutor – whether a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant claims his legal representation at trial was incompetent because counsel had only five weeks to prepare; no evidence raised by the appellant in his appeal was adduced; and witnesses were not properly cross-examined – whether the appellant was denied the right to a fair trial – whether the conduct of defence counsel produced a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant was sentenced to life imprisonment for murder and two years' imprisonment for assault occasioning bodily harm – where, at the sentencing hearing, the applicant pleaded guilty to a further charge of retaliating against a witness and was sentenced to one year's imprisonment – where the applicant also pleaded guilty to three summary charges of contravening domestic violence orders and was convicted and not further punished – where the sentences were ordered to be served concurrently – where the learned sentencing judge extended the applicant's parole eligibility date by six months as a consequence of the aggravating features of the offending – where the learned sentencing judge remarked that the applicant's guilty pleas were not "timely" – where the applicant contends this conclusion was incorrect and allowance should have been made for his cooperation – where the respondent argues that the observation was accurate given the lengthy period between the verdict on the murder charge and sentencing and the delayed listing of the sentencing hearing at the request of the applicant – whether the plea should be considered timely – whether the learned sentencing judge erred in exercising the sentencing discretion

Criminal Code (Qld), s 668E

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v SCV [2017] QCA 218, cited
R v Simpson [2008] QCA 413, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Suresh v The Queen (1998) 72 ALJR 769; (1998) 153 ALR 145; [1998] HCA 23, followed
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, followed

Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, applied
Wilson v The Queen (1970) 123 CLR 334; [1970] HCA 17, applied

COUNSEL: The appellant/applicant appeared on his own behalf
M R Byrne QC for the respondent

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

[1] **GOTTERSON JA**: The appellant, Raymond John Mead, was charged on indictment on two counts. Count 1 alleged an offence against s 302(1) of the *Criminal Code* (Qld) in that on 16 February 2014 at Boronia Heights, the appellant murdered his step-daughter, Sherelle Anne Amelia Locke ("the deceased"). Count 2 alleged an offence against s 339(1) and (3) of the Code in that, on the same date, the appellant unlawfully assaulted his then wife, Marlene Sherelle Mead (now Marlene Locke) and did her bodily harm while armed with an offensive instrument. Both offences were charged as domestic violence offences under s 564(3A) of the Code.

[2] On 25 July 2016, at the beginning of the appellant's trial, he pleaded guilty to manslaughter but the plea was not accepted by the prosecution. He also pleaded guilty to Count 2. At the conclusion of a six day trial, the appellant was found guilty of murder. At a hearing on 2 November 2016, the appellant was sentenced to life imprisonment on the murder count and to a concurrent term of two years' imprisonment on the unlawful assault count. For reasons detailed below, his parole eligibility date was postponed by six months beyond the expiration of the minimum term of 20 years which he must serve on the murder conviction. A period of 989 days of pre-sentence custody was declared to be time served under the sentence. Both offences were declared domestic violence offences.

[3] On 4 August 2016, the appellant's then solicitors, Lawler Magill, filed a notice of appeal against the conviction for murder on the basis that the verdict was unsafe and unsatisfactory. Later, on 15 November 2016, an application for leave to appeal against sentence was filed by the appellant himself on the basis that it was manifestly excessive.

Ancillary applications

[4] In September 2017, the appellant applied to the Court of Appeal Registry for subpoenas to be issued to the following persons requiring them to attend and give evidence at the hearing of his appeal:

- Ms Locke;
- Dr Alex Olumbe, Forensic Pathologist, who conducted an autopsy on the deceased and testified at the appellant's trial; and
- Three of his children: Raechel Mead, Kayla Mead and Krystal Mead.

[5] Later, on 25 September 2017, Mr Mead filed applications in the Registry for orders pursuant to r 108 of the *Criminal Practice Rules* 1999 (Qld) granting him leave to

adduce evidence from each of those persons in his appeal. These applications were heard by me on 6 October 2017 and refused.[1]

[6] On 19 October 2017, the same day the appeal and application were heard by this Court, the appellant brought applications to vacate his guilty pleas to both counts[2] and an application for appeal bail.[3] All of these applications were also refused and reasons were given *ex tempore* by the Court.

The circumstances of the alleged offending

[7] The appellant commenced a relationship with the deceased's mother, Ms Locke, in 2007 when the deceased was aged 16. The couple were married on 19 April 2008 and have since had two children together, a girl born in February 2009 ("Z") and a boy born in August 2011 ("O"). The deceased moved away from their house in June 2008.

[8] The marriage was interrupted by a number of separations. In 2012, an incident occurred in which, according to Ms Locke, the appellant sat on top of her armed with a steak knife saying, "if you don't stop this shit I'm going to kill you" as he pushed the knife into her throat ("the 2012 incident").[4] The couple separated for six months.

[9] In April 2013,[5] another incident occurred whereby the appellant and the deceased engaged in a heated argument where Ms Locke was present. The appellant called the deceased and Ms Locke "fucking sluts" and "dirty little bitches".[6] Police were called to placate the situation.

[10] Following this incident, Ms Locke moved in with the deceased. They lived together until September 2013 at which point she resumed cohabiting with the appellant despite objections from the deceased.[7] Soon after, the appellant began drinking again and resumed behaviour which Ms Locke described as verbally, physically and sexually abusive.[8] On one occasion during which the appellant accused Ms Locke of sleeping with other men, the appellant called her a slut and that she was "just like [her] fucking daughter". Referring to the deceased, the appellant said, "she should have been hit on the head when she was born".[9] At a similar time to this incident, Ms Locke began sleeping in a separate bedroom.

[11] Sometime in December 2013 or January 2014, the deceased and the appellant encountered each other at the appellant's house. The deceased told Ms Locke that the appellant had said if she were to "fuck up one more time and upset [Ms Locke] … he's going to make sure that [the deceased] never sees [Ms Locke] or [Z] or [O] again".[10]

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1 *R v Mead* [2017] QCA 229.
2 Although no formal applications were brought, the appellant sought leave to read and file two affidavits both sworn on 12 October 2017 to that effect.
3 "Application for bail in the Supreme Court" filed 5 October 2017.
4 Appeal Record Book ("AB") 36 Tr1-24 ll11-13.
5 Ms Locke's testimony initially placed this in June or July 2013 (AB37 Tr1-25 ll46-47) but she then corrected herself noting the specific date of 8 April 2013 (AB42 Tr1-30 ll1-12).
6 AB36 Tr1-24 l36 – AB37 Tr1-25 l33.
7 AB42 Tr1-30 ll31-33.
8 AB44 Tr1-32 ll36-46.
9 AB45 Tr1-33 ll5-18.
10 AB44 Tr1-32 ll4-7.

[12] Evidence was adduced from other sources about the appellant and the deceased's relationship.[11] The appellant had spoken to Ms Robyn Cosgrove, a next door neighbour, about Sherelle in 2013 and described her as a "troublemaker", having "three different fathers" and needing "knocking on the head".[12] Ms Cosgrove's son, Jay Cosgrove, said that while he was doing work on the appellant's property, he often heard yelling and screaming from inside the house. The arguments increased in regularity leading up to 16 February 2014 and the appellant began opening up about his issues with the deceased. He told Mr Cosgrove that the deceased was "the big contributor to all their fights" and that "he hated her". On one occasion, the appellant stated that the deceased needed "a hammer to the head" and that "if [he] could stab her and get away with it, [he'd] do it". Mr Cosgrove recalled the latter comment was made not long before the alleged offending.[13]

[13] On 16 February 2014, the deceased sent a text message to Ms Locke requesting to stay the night. Ms Locke sent a message to the appellant who responded "[w]hy the fucking hell do we have to have her here again… she was only here the other night, and now she fucking wants to stay again".[14]

[14] At about 11 am, the deceased arrived at the house with her daughter, H. The appellant returned home from Bunnings shortly after and ignored the deceased. Ms Locke recalled the appellant was drinking alcohol throughout the day.[15] During the afternoon and evening, Ms Locke and the appellant, who was in the shed, exchanged text messages in which the appellant complained about the deceased. After putting Z and H to sleep, Ms Locke and the deceased sat together on the couch to watch television and look through magazines. O fell asleep on another seat in the living room. At about 8.30 pm, the appellant came into the house and asked what they were doing. Ms Locke told him it was not his business and that he stank of alcohol. The appellant responded by saying Ms Locke was "fucking mental" and a "stupid bitch" and returned to the shed.[16]

[15] Sometime between 11.15 pm and 11.30 pm, the appellant returned to the house. Ms Locke heard the appellant enter the kitchen, take a glass from the cupboard, open and close the fridge and take his nightly tablets. She heard nothing further until he appeared around the corner of the living room. He suddenly put his right leg on the deceased, pinning her down, then grabbed her throat with his right hand or arm and pushed her back into the couch.[17] He repeatedly exclaimed, "do you think this is fucking funny?" and "do you think this is funny?"[18]

[16] The appellant then pulled his left hand out from behind his back and made a quick action around his body. Next, Ms Locke saw the appellant pull a knife out of the deceased and realised that the deceased had been stabbed.[19] At this point, Ms Locke tried to help the deceased but O began screaming so she picked him up. As she turned, the appellant grabbed her by the throat and pushed her against the wall while still holding the knife. He told her to put the baby down and that she was "fucking

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11 See, for example, Beau Delmo AB110 Tr2-48 ll16 – AB111 Tr2-49 l10; Robyn Cosgrove AB152 Tr3-18 l35 – AB153 Tr3-19 l33; Jay Cosgrove AB161 Tr3-27 l19 – AB163 Tr3-29 l18; Suzanne Skyring AB129 Tr2-68 ll24-27.

12 AB152 Tr3-18 l38 – AB152 Tr3-19 l9.

13 AB161 Tr3-27 l19 – AB163 Tr3-29 l18.

14 AB46 Tr1-34 ll43-45.

15 AB47 Tr1-35 ll7-31; AB49 Tr1-37 ll36-39; AB52 Tr1-40 l1-5.

16 AB71 Tr2-10 ll2-8.

17 AB72 Tr2-11 ll6-9.

18 Ibid ll9-11.

19 Ibid ll11-17.

next". She protested repeatedly as she watched the deceased struggle but the appellant held onto her for between five and ten minutes[20] and said "I don't fucking care" and "she deserved it".[21] When the appellant eventually released her, Ms Locke assessed that the deceased had stopped breathing and her body was starting to go cold. She tried to call emergency from her mobile but a lack of reception interfered with the call. She then ran to the kitchen to call emergency from the house phone.[22] Both calls were made at 11.33 pm.[23]

[17] Ms Locke next ran into the front yard with O, screaming for help. She ran to the Ms Cosgrove's house next door and observed the appellant briefly come out of their own house still armed with the knife. Once the police had arrived, Ms Locke returned and heard the appellant yelling repeatedly, "you killed your own fucking daughter".[24] Police officers at the scene also heard this.[25]

[18] A breath alcohol test was conducted on the appellant at around 12.45 am and the following morning at around 9.30 am.[26] The evidence of Dr Catherine Lincoln, a forensic medical officer, was that the appellant's blood alcohol concentration at the time of the offending was within the range of .16 per cent and .19 per cent.[27]

[19] This version of events is disputed by the appellant. When the police arrived at the scene, and later in his police interview on 17 February 2014, the appellant adhered to the same account. He stated that Ms Locke and the deceased had been involved in a heated argument concerning text messages the appellant sent the deceased while he was still in the shed. The text messages insinuated that Ms Locke hated the deceased and wished she was not her daughter. When the appellant entered the house to investigate yelling, he found Ms Locke leaning over the deceased who had a knife protruding from her body. Ms Locke then accused him of killing the deceased.[28] The appellant believed he had been set up by Ms Locke so she could benefit from an equine hydrotherapy machine he had invented.[29]

[20] However, in a letter written while the appellant was on remand on 21 January 2016, his version of events changed.[30] The letter was sent to his friend, Gordon Weightman, to be passed on to a family member.[31] The appellant recounted entering the kitchen to take his tablets and finding a knife under a tea towel. He was convinced that the deceased was intent on killing him with the knife because she was jealous of his relationship with Ms Locke and their children.[32]

[21] He took the knife and entered the living room with it in his right hand. He approached the deceased and said, "do you think this is funny?"[33] Ms Locke was

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20 AB76 Tr2-15 ll28-29.
21 AB72 Tr2-11 ll17-28.
22 AB76 Tr2-15 ll28-43.
23 AB235 Tr4-37 ll33-35.
24 AB77 Tr2-16 l28 – AB78 Tr2-17 l14. Neighbours Suzanne Skyring and Ms Cosgrove also heard words to a similar effect: AB133 Tr2-72 ll11-12; AB156 Tr3-22 ll22-23.
25 AB170 Tr3-36 ll2-7.
26 AB223 Tr4-25 ll26-28, ll39-41.
27 Exhibit 21: AB388; AB226 Tr4-28 ll15-33.
28 AB402 Tr6 ll28-35; AB405 Tr9 ll45-49; AB438 Tr14 l36 – AB439 Tr15 l28.
29 AB498 Tr2 l52 – AB499 Tr3 l50.
30 Exhibit 19: AB372-386.
31 Exhibit 20: AB387.
32 AB373.
33 AB382.

standing to the left of the appellant and said, "no babe, don't stab her".[34] As the appellant turned to address Ms Locke, he lowered the knife in his right hand. At this moment, Ms Locke pushed the appellant away from the deceased but he lost his balance and fell backwards onto her, inadvertently stabbing her in the chest.[35] It was this account that the appellant maintained was correct in his written[36] and oral submissions on appeal.[37]

Grounds of appeal

[22] The appeal and application were listed to be heard by this Court on 6 June 2017, however the hearing was adjourned to 19 October 2017 at the appellant's request. At the hearing on 6 June 2017, the appellant's then counsel, Mr M J Copley QC, sought and was granted leave to withdraw. The appellant appeared for himself at the applications on 6 October 2017 and the hearing on 19 October 2017.

[23] Although the appellant is acting for himself, the written submissions filed by Mr Copley QC on 16 May 2017 were relied upon by the appellant in his oral submissions and addressed by the respondent.[38] These submissions foreshadowed an amendment to the notice of appeal by replacing the existing pleaded ground (effectively that the verdict is unreasonable) with the following:[39]

> "A miscarriage of justice occurred because inadmissible evidence was adduced in the prosecution case."

[24] It was clear from the appellant's oral submissions, however, that he did not intend to abandon the unreasonable verdict ground.[40] The appellant also advanced arguments on several additional issues that were identified and addressed in the respondent's written submissions. Given the appellant is self-represented, it is appropriate to treat each of these matters as pleaded "grounds", notwithstanding the absence of a formal application to amend the notice of appeal. They are as follows:

(i) That the verdict was unsafe and unsatisfactory;

(ii) That the witness, Ms Locke, "perjured" herself on 25 occasions;

(iii) That on 18 instances, inadmissible evidence was admitted into the trial;

(iv) That the appellant's blood alcohol concentration was such that he was incapable of forming the requisite intent; and

(v) That negligence and incompetence on the part of the appellant's legal representatives at trial resulted in a miscarriage of justice.

[25] Mr Copley QC also proposed a different ground of appeal against sentence be substituted for the ground stated in the application.

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34 Ibid.

35 Ibid.

36 Appellant's Outline of Submissions, p 4.

37 Appeal Transcript ("AT") 1-27 l30 – AT1-30 l18.

38 The appellant specifically relied upon Mr Copley's submissions for his sentence application: AT1-57 ll23-39. Although not referred to in terms by the appellant in his oral submissions, Mr Copley's submissions in relation to the conviction appeal (and foreshadowed amendments to the grounds of appeal) were dealt with by the respondent both in written and oral submissions: Respondent's Supplementary Outline of Submissions filed 29 May 2017; AT1-49 l27 – AT1-51 l27. It is appropriate to address these submissions alongside those advanced by the appellant himself.

39 Appellant's Outline of Submissions filed 16 May 2017 ("Counsel's Submissions"), para 2.

40 AT1-36 ll24-26.

Appeal against conviction

[26] It is convenient to deal with the first two grounds collectively and the other grounds separately.

Grounds 1 & 2: Unreasonable verdict and the complaints of perjury

[27] In his written submissions, the appellant asserted that Ms Locke "perjured" herself on 25 occasions in her testimony at trial. Much of her evidence, the appellant contended, was either contradicted by other evidence or was otherwise so improbable as to be impossible to accept. In written submissions, the respondent accurately characterised the appellant's allegations of perjury as tantamount to an assertion that the verdict of the jury was unreasonable.[41] The claims of perjury must therefore be considered in an overall determination of whether it was open to the jury to have convicted on the whole of the evidence.

[28] The following instances are referred to by the appellant.[42]

[29] **Wound:** The appellant challenges the evidence of Ms Locke in relation to the circumstances of the stabbing. He argues that her account of the appellant pulling the knife from behind his back in his left hand and stabbing the deceased in a quick, single action contradicts the evidence of Dr Alex Olumbe.[43] Dr Olumbe, the forensic pathologist who conducted an autopsy on the deceased, considered the wound to have been inflicted by a single blade implement penetrating the skin surface from the left to the right at an angle of 45 degrees.[44] The appellant contends that according to Dr Olumbe's evidence, holding the knife in his left hand was "an impossibility, because the direction of the knife goes in the complete opposite direction".[45] Instead, the upwards direction of the wound indicated the appellant had fallen back upon the deceased's body, and had not been facing her.

[30] The respondent disputed that it was impossible for the stabbing to have occurred with the knife in the appellant's left hand. The respondent further suggested that even if the jury accepted the stabbing took place with the knife wielded in the appellant's right hand, the verdict was not unreasonable. Given the appellant had pleaded guilty to manslaughter, the fact that he had caused the deceased's death was not in dispute. Consequently, it was not essential for the prosecution's case that the jury accept the accuracy of that particular detail of Ms Locke's evidence.[46]

[31] In my view, it was not necessary for the jury to reach a firm conclusion as to the hand in which the appellant was holding the knife when the deceased was injured. However, the issue of whether the appellant intended to cause death or grievous bodily harm was necessarily interlinked with the circumstances of the stabbing. Should the forensic evidence regarding the nature of the wound have undermined Ms Locke's account and corroborated the appellant's version detailed in the letter dated 21 January 2016, then the finding as to intent that the jury evidently made could be brought into question.

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41 Respondent's Supplementary Outline of Submissions, para 3.2.

42 Although the appellant refers to Ms Locke committing perjury on "at least 25 occasions", not all were articulated in the appellant's submissions: Appellant's Outline of Submissions, p 10.

43 Appellant's Outline of Submissions, p 1.

44 AB141 Tr3-7 ll31-36.

45 AT1-33 ll19-20.

46 Respondent's Supplementary Outline of Submissions, para 3.6.

[32] Despite the appellant's contentions, I am unpersuaded that Ms Locke's account was undermined in that way. That the wound could not have been inflicted with an implement held in the right hand was not demonstrated by any evidence at trial, nor did Dr Olumbe make such a finding. Further to this, Dr Olumbe gave the following evidence-in-chief which put in doubt the appellant's version:[47]

> "[I]t would be [an] unlikely event that somebody would fall and cause such a well measured and exacting kind of wound track and injury… [T]here was no representation that there was a second wound track of where the implement would have moved. In the aspect of where – and I've seen that in cases of even suicidal stab wounds, there's always a wound track or hesitation mark. In the event of one accidental, I would expect, again, to have those kind of representations where the wound track is not very clean. And then this particular wound track, I would favour that the implement entered the body up to the hilt because of 22 centimetres length of the blade and 27 centimetres of the wound track, one would expect the entire blade to have entered into the body cavity. So that's why I would favour – that is a clean as opposed to a hesitant kind of injury that [indistinct] accidental aspect."

[33] Having regard to the forensic evidence adduced at trial and in the absence of any evidence to the contrary, one could not reason that it was impossible for the stabbing to have occurred as Ms Locke described.

[34] **Throat injuries:** The appellant claims that Ms Locke's description of the appellant pinning the deceased down by his knees and forcing her throat into the back of the chair was inconsistent with the medical evidence.[48] There was no indication of any injury to the deceased's neck, undermining Ms Locke's testimony. Additionally, Ms Locke's statement that the appellant "grabbed [her] by the throat [and] threw [her] up against the wall"[49] was contradicted by the doctor's report,[50] as there was also no evidence of bruising to her neck.[51]

[35] The appellant is correct in his assertion that there was no evidence indicating that the deceased had suffered an injury to her neck. However the respondent correctly points out that there was equally no evidence as to the period of time that the appellant was said to have held the deceased by the throat.[52] Even if evidence was adduced to the effect that the throat was not bruised, this would not necessarily be inconsistent with the testimony given by Ms Locke. It was open to the jury to conclude that the appellant held the deceased by the throat for only a short period of time with sufficient grip to hinder her movements.

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47 AB147 Tr3-13 ll5-20.

48 The appellant referred to "Doctor Alex Olumbe's Report", saying with reference to it, "[t]here are no external injuries to the neck. Meticulous discretion of the neck – of the muscles of the neck does – in layers, does not show any injury or haemorrhaging": Appellant's Outline of Submissions, p 1; AT1-35 ll13-15. Such a report was neither exhibited at trial nor provided at the hearing of the appeal.

49 AB72 Tr2-11 l20.

50 Appellant's Outline of Submissions, p 2.

51 AT1-38 l28.

52 Respondent's Supplementary Outline of Submissions, para 3.7. The appellant incorrectly recounts Ms Locke's testimony as describing the deceased to have been "held by the throat for five to 10 minutes": AT1-31 ll3-4. It is clear in Ms Locke's evidence that the period "five to 10 minutes" referred to the appellant's attack on her, rather than the deceased.

[36] Turning to the attack on Ms Locke, I note that, contrary to the appellant's submission, evidence was adduced of several injuries to her. Dr Lincoln, who examined Ms Locke on 17 February 2014,[53] observed tenderness in the jaw and the neck, although without any physical markings. She also observed a tender red mark on the right side of Ms Locke's chest and a bruise on her right upper thigh. After referral for imaging, Dr Lincoln determined Ms Locke had possible minimally displaced fractures of the right fifth and sixth ribs (around the shoulder blade area).[54] These injuries are consistent with Ms Locke's account that she was forced back into a wall and held by the throat for "a period of time, maybe five, 10 minutes'.[55]

[37] **Furniture evidence:** According to the appellant, had Ms Locke's account of being thrown up into the wall been true, then "several photos and [a] small chair" would been knocked over.[56] A photo taken of the scene, however, did not show any furniture as having been displaced. Furthermore, there was no sign of a struggle, "[n]o damage to the walls, no damage to any photos being knocked over – anything".[57]

[38] Exhibit 4 shows a child's plastic chair close to the wall and a large multi-photo frame leant up against the wall. It is clear from the photograph that a scuffle against the wall would not necessarily disturb the frame or the chair given their respective heights. Also, it cannot be inferred from viewing the photograph alone that these items were not moved from their original position during the scuffle merely because they had not been tipped over. It was reasonable for the jury to have concluded as much and accepted Ms Locke's version of events.

[39] **State of the kitchen:** Ms Locke recounted that before the deceased was stabbed, the appellant entered the kitchen and took his medication. This provided the appellant with an opportunity to access a knife. The appellant draws attention to the fact that the photographic evidence[58] does not show any glass or medication in the kitchen.[59]

[40] This complaint is inconsequential in my view. On his own version of events, the appellant entered the kitchen and took the knife.[60] Whether he took a glass from the cupboard and consumed his evening medication or not was not essential to the integrity of Ms Locke's testimony about the stabbing.

[41] **Timing:** According to the appellant, the last text message he sent to the deceased was at 11.25 pm when he was in the shed, 30 metres away from the living room. The appellant recounts sending the message and walking seven or eight metres down the backyard to relieve himself. He then walked to the undercover area next to the house and finished his drink.[61] Before entering the house, he waited for the double roller door on the garage to seal and then entered through the internal door.[62]

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53 AB227 Tr4-29 ll31-39.
54 AB277 Tr4-29 l37 – AB278 Tr4-30 l5.
55 AB76 Tr2-15 ll28-29.
56 Appellant's Outline of Submissions, p 3.
57 AT1-35 ll8-9.
58 Exhibits 1.15 and 1.16.
59 Appellant's Outline of Submissions, p 3.
60 AT1-25 ll9-11.
61 The appellant pointed out that the photos in Exhibits 1.4, 1.6 and 1.7 show a champagne flute and empty champagne bottle in this area, corroborating his story: AT1-21 ll35-39.
62 AT1-21 l20 – AT1-22 l12.

The appellant estimates the first emergency call was made at 11.31 pm, whereas Ms Locke's version of events occurred over a period of 15-20 minutes. So long a period of time, the appellant submitted, was inconsistent with the evidence.[63]

[42] The appellant's hypothesis is contradicted by evidence adduced at trial. The text message sent at 11.25 pm was in fact sent by the deceased's fiancé, Beau Delmo, to the deceased.[64] The final text sent from the appellant's phone was to Mr Delmo at 11.16 pm.[65] Ms Locke's evidence was that she heard the garage door and understood the appellant to enter the house at about 11.15 pm or 11.30 pm. The first emergency call in fact occurred at 11.33 pm.[66]

[43] As the respondent correctly submits, even if the narrative hypothesised by the appellant (which included events not in evidence) were to be accepted, it cannot be said that the testimony of Ms Locke was inconsistent with this timeframe.[67] The evidence before the jury was that at some stage between 11.15 pm and 11.33 pm, the appellant had entered the living room and stabbed the deceased. Contrary to the appellant's contention, Ms Locke's evidence did not require a period of 15-20 minutes. As already noted, there was no specific evidence of how long the appellant held the deceased before stabbing her. I also accept the respondent's submission that the estimation of Ms Locke being held against the wall for "maybe five, 10 minutes" was vague and subject to the fallibility of recollection of time common to dynamic situations.[68] It was open to the jury to accept Ms Locke's version of events notwithstanding this inexactitude.

[44] **Secondary wound:** The appellant submits that Ms Locke's testimony is weakened by her failure to account for a second stab mark on the opposite side of the deceased's body.[69] The wound was described by Dr Olumbe as being a "superficial incision"[70] that was angled in an upwards direction along the right bicep.[71]

[45] The fact that Ms Locke did not see the infliction of the second stab wound was not necessarily detrimental to her testimony. As the respondent put it in written submissions, there may be many reasons why Ms Locke failed to witness the laceration despite her close position.[72] It was compatible with Ms Locke's evidence that such an injury occurred as a result of the deceased attempting to remove herself from the appellant's grasp.

[46] **Assistance to the deceased:** The evidence given by Ms Locke was that after the appellant released her, she rendered assistance to the deceased by checking her pulse and trying wake her.[73] The appellant claims that Ms Locke made a statement to police that she "placed her hand over the wound". The appellant points out that forensic photos show that there was no blood on Ms Locke, the phone, or the front door.[74]

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63 Ibid pp 3-5, 11.
64 AB367.
65 AB362.
66 AB390.
67 Respondent's Supplementary Outline of Submissions, para 3.11.
68 AT1-46 ll1-17.
69 Appellant's Outline of Submissions, pp 5-6.
70 AB147 Tr3-13 l24.
71 Appellant's Outline of Submissions, pp 5-6.
72 Respondent's Supplementary Outline of Submissions, para 3.13.
73 AB76 Tr2-15 ll37-38.
74 Appellant's Outline of Submissions, p 11.

[47] This complaint is also inconsequential. The police report to which the appellant refers is not in evidence. Nothing that was in evidence at trial suggested Ms Locke would be unable to assist her daughter by way of checking her pulse and trying to wake her without coming into contact with her blood.

Discussion

[48] The relevant principles concerning an appeal on the ground that the conviction is unreasonable or cannot be supported having regard to the evidence were recently set out by this Court in *R v SCV*.[75] Morrison JA (with whom Sofronoff P and I agreed) observed:[76]

> "*SKA v The Queen*[77] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact."

[49] It need be borne in mind that the appellant chose not to give evidence at trial. Many of the arguments outlined above rely on factual assertions made by the appellant to this Court through his submissions, of which there was simply no evidence before the jury.

[50] I have reviewed all the evidence that was before the jury at trial. The appellant's guilty plea to manslaughter left two critical factual issues for the jury's determination; first, whether the infliction of the fatal stab wound was a willed act on the appellant's part; and, second, if it was, whether he stabbed the deceased intending either to kill her or do her grievous bodily harm. The inconsistent versions given by the appellant justified a cautious approach by the jury to his second version, marked by a reluctance to accept it unless otherwise supported by the evidence.

[51] In my view, it is highly significant that the appellant and the deceased had a persistently hostile relationship. Evidence from Ms Locke, Ms Cosgrove, Mr Cosgrove and Suzanne Skyring (a neighbour), in addition to text messages exchanged between the appellant and the deceased, demonstrated its longstanding and serious nature. The witnesses variously testified that the appellant had said the deceased "should have been hit on the head when she was born",[78] needed "knocking on the head"[79] and "a hammer to the head" and that "if [he] could stab her and get away with it, [he'd] do it".[80] The events that led up to the day of the offending confirmed that such animosity was present on the night of the offence. The appellant's first interview with police and subsequent letter to Mr Weightman reiterated these sentiments. The appellant's hostility towards the deceased and his belief that she was the source of his marital problems could well have been seen by the jury as providing a motive for removing her from the scene.

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75 [2017] QCA 218.
76 Ibid at [93].
77 [2011] HCA 13; (2011) 243 CLR 400 at [20]-[22].
78 AB45 Tr1-33 ll5-18.
79 AB152 Tr3-18 l38 – AB152 Tr3-19 l9.
80 AB161 Tr3-27 l19 – AB163 Tr3-29 l18.

[52] Clearly, it was open to the jury to accept Ms Locke's version of events. At the highest, there was a relatively minor inconsistency in Ms Locke's accounts of the time when the appellant entered the house and the period for which the appellant held her. Also, there was a possibility that the appellant wielded the knife in his right hand, instead of left as she said. Even if each of these aspects of Ms Locke's testimony were to be regarded as imprecise or unreliable, they were insufficient to undermine her credibility as a witness to a significant degree. It is within common experience and common sense to expect some level of fallibility in recollecting what would have been an extremely traumatic experience.

[53] The evidence of Dr Olumbe did not exclude Ms Locke's account of the stabbing. Indeed, the improbability of a fall causing the knife to enter the body up to the hilt and create a single wound track without movement was consistent with Ms Locke's testimony. The characteristics of the wound identified by Dr Olumbe were crucial to determining whether the conduct of the accused was a willed act.

[54] The volatile relationships between the appellant, Ms Locke and the deceased, his hostility directed at the deceased, the location of the wound so close to the heart and the appellant's subsequent actions, including his assault on Ms Locke which prevented her from rendering assistance to her daughter, were all significant factors in determining whether the appellant had a murderous intent.

[55] The High Court recently emphasised in *R v Baden-Clay* that setting aside a jury's verdict on the ground it is unreasonable is a serious step and a court of criminal appeal must not substitute trial by an appeal court for trial by jury.[81] Ultimately, for the reasons identified above, the issues raised by the appellant are insufficient to generate any genuine concern about the reasonableness of the jury's verdict. When account is taken of the evidence as a whole, the inevitable conclusion is that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. It follows that this ground must fail.

Ground 3: Inadmissible evidence

[56] In his written submissions, the appellant refers to "18 counts of inadmissible evidence".[82] These complaints can be reduced to two categories of evidence admitted at trial, the first of which was covered by Mr Copley QC's written submissions:

(a) testimony by Ms Locke relating to the 2012 incident; and

(b) evidence given by Dr Olumbe (as set out above) in which he expressed the opinion that it would be unlikely for the injury to have been inflicted unintentionally as the result of a fall.

[57] **2012 incident:** As outlined in the summary of facts above, Ms Locke testified that during an argument in 2012, the appellant threatened to kill her while holding a steak knife to her throat. The learned primary judge characterised this component of Ms Locke's testimony as relationship evidence and directed the jury as follows:[83]

> "The evidence has been led only for the limited purpose of showing the history and the nature of the relationship between Marlene Lock and [the appellant], and [the deceased] and [the appellant]. Remember that that evidence of those incidents not the subject of the

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81 [2016] HCA 35; (2016) 258 CLR 308 at [65]-[66].

82 Appellant's Outline of Submissions, p 1.

83 Summing Up, Tr7 ll18-37.

> charges – that is, the prior evidence of the domestic violence – comes before you only for the limited purpose mentioned."

[58] Despite its relevance to the relationship between the appellant and Ms Locke, it was submitted by Mr Copley QC for the appellant that this evidence was plainly irrelevant to the relationship between the appellant and the deceased. There was no suggestion that the deceased was involved in any way in the altercation which incited the incident. Ms Locke testified that nobody else was at home at the time.[84] In counsel's submission, the relevance of the marital relationship to Count 1 was limited strictly to the extent of which it was affected by the appellant's attitude towards the deceased. The 2012 incident did not bear upon that aspect and was therefore inadmissible.[85]

[59] Such evidence, it was submitted, was extremely prejudicial as it showed that the appellant had previously assaulted another with a knife, thereby implying that he was prone to outbursts of grossly excessive violence towards women. The appellant reiterated this submission at the hearing.[86]

[60] Four arguments were advanced by the respondent to counter these submissions. They were:

(i) the evidence was admissible as relationship evidence as it bore upon the likelihood of Ms Locke's account being possible;[87]

(ii) the evidence was also admissible under s 132B of the *Evidence Act* 1977 (Qld) ("*Evidence Act*");[88]

(iii) alternatively, no miscarriage of justice was occasioned by the wrongful admission of the evidence;[89]

(iv) in the further alternative, if there was a miscarriage of justice, it was an appropriate case for the application of the proviso in s 668E(1A) of the Code on the basis that no substantial miscarriage of justice had actually occurred.[90]

[61] **Relationship evidence argument:** In developing the first argument, the respondent submitted that, as relationship evidence, the 2012 incident was relevant to issues of intent, motive and accident, in that it tended to enhance the likelihood of the Ms Locke's account being accepted.[91] The history of the appellant and Ms Locke's tumultuous and, at times, violent relationship often involved the deceased both directly and indirectly. Ms Locke gave evidence that the appellant blamed the deceased for all their arguments and consequent marital problems and that "[if] anything ever happened between us… he'd always blame [the deceased] for it".[92] In his evidence, Mr Cosgrove also noted that the deceased "was the big contributor in all [the appellant's and Ms Locke's] fights" and that "all their issues with each other was (sic) because of Sherelle".[93] The letter sent by the appellant to Mr Weightman supports such a notion.[94]

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84 AB36 Tr1-24 l17.
85 Counsel's Submissions, para 23.
86 AT1-41 ll44-46.
87 AT1-50 ll1-6.
88 Ibid ll8-12.
89 AT1-50 l20 – AT1-51 l16.
90 AT1-51 ll8-27.
91 Respondent's Outline of Submissions, para 3.5; AT1-50 ll2-6.
92 AB69 Tr2-8 ll7-20.
93 AB162 Tr3-28 ll24-46.

[62] The respondent noted that much of the evidence concerning the marital relationship was inextricably linked with the relationship between the appellant and the deceased. For example, evidence was led of the April 2013 incident when the appellant referred to both her and Ms Locke as "sluts and… dirty little bitches" and that they "[took] after each other". Similarly, in an incident sometime after Ms Locke resumed living with the appellant in September 2013, the appellant called Ms Locke a slut and said she was "just like [her] fucking daughter". Although the deceased was not present for this argument, it is clear that this evidence can be considered relevant to the relationship between her and the appellant.

[63] The respondent further submitted that the 2012 incident was related in a similar way to the relationship between the appellant and the deceased, notwithstanding her absence from the scene. Although there was no evidence as to the cause of the argument, the respondent contends that, in the context of all the evidence, the demand made by the appellant that Ms Locke "stop this shit"[95] could be understood as referring only to conduct which in some way involved the deceased.

[64] I would reject this contention. Although evidence existed that the relationship between Ms Locke and the appellant was often impacted by the appellant's animosity towards the deceased, there was also evidence demonstrating hostility and violence between the couple for entirely different reasons. For instance, Exhibit 7[96] discloses a series of text messages exchanged between the couple. At various times, the appellant would accuse Ms Locke of being unfaithful, argue over his drinking and gambling habits and demand Ms Locke go on medication. Ms Locke accused the appellant's daughter of physically abusing and stealing from her some years previously.

[65] In order to be admissible, the foremost requirement is that evidence be relevant. The question is therefore whether this evidence, if it were accepted, could rationally affect the assessment by the jury of the probability of the existence of a fact in issue.[97] The use of relationship evidence to the extent that it may bear upon the likelihood of a motive was explored by the High Court in *Wilson v The Queen*.[98] In that case, evidence of prior mutual enmity between the accused and his wife was used to undermine the accused's story of an accidental shooting. The Court made clear, however, that relevance underpinned the admissibility of such evidence.[99] Barwick CJ observed:[100]

> "If the evidence does tend to explain the occurrence, or, as in this case, to assist the choice between the two explanations of the occurrence, then in my opinion on general principles, because it is relevant, it is admissible. Of course if it does not have that relevance it is inadmissible... It is not that all evidence of the relationship of the parties is admissible, but only that from which a relevant inference may logically and reasonably be drawn."

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94 AB372-386.
95 AB36 Tr1-24 l12.
96 AB344-367.
97 *Smith v The Queen* [2001] HCA 50; (2001) 206 CLR 650 at [7].
98 [1970] HCA 17; (1970) 123 CLR 334.
99 Ibid 339.
100 Ibid.

[66] That the appellant and the deceased's mother violently quarrelled two years prior to the deceased's death in the context of a volatile marriage cannot, in my view, be said rationally to bear upon the likelihood that the appellant deliberately killed the deceased. Following the guidance given by *Wilson*, I therefore conclude that the evidence was not admissible as relationship evidence.

[67] **S 132B argument:** For the same reason of lack of relevance, the second basis upon which the respondent relies must also be rejected. Section 132B of the *Evidence Act* facilitates the admission of relevant evidence of the history of the "domestic relationship" between the defendant and the victim. As this evidence lacks relevance, it was not evidence to which the section could apply. It is therefore unnecessary to consider whether an interaction between the appellant and Ms Locke is capable of being characterised as an incident of the appellant and the deceased's "domestic relationship".[101]

[68] **No miscarriage of justice argument:** There having been no objection at trial to the evidence on which the learned trial judge was required to rule, it cannot be said that the admission of the evidence, though inadmissible, resulted from an error of law.[102] In the context of s 668E(1) of the Code, the question that next arises is whether "on any ground whatsoever there was a miscarriage of justice" thereby occasioned.

[69] As noted, the respondent's first alternative argument is that there was no miscarriage of justice. No objection was raised at trial and, in the respondent's submission, there was a rational basis for defence counsel to have not objected.[103] Defence counsel's address sought to "build up some degree of animosity between [the appellant and Ms Locke] to cast some doubt on the reliability of Marlene Locke's account".[104] In the eyes of the jury, such evidence could support the notion Ms Locke "inflated the egregiousness of the appellant's conduct".[105]

[70] The approach taken by defence counsel was influenced by the need to avoid any perception of an "attack" on Ms Locke. According to the respondent, to have done so would have risked not only eliciting from Ms Locke further evidence of the appellant's bad character, but also engendering sympathy for a woman whose daughter had died violently on any version of the events.[106] Thus defence counsel painted the possibility that Ms Locke was confounded by the dynamics of the events on the night and her hostile relationship with the appellant. The respondent submits that this was a legitimate forensic approach to have adopted.

[71] In developing this argument, the respondent referred to the following passages in defence counsel's address:[107]

> "…I think you'd come to a view that, in relation to her opinion about Ray's dislike for Sherelle, that has been significantly influenced by what has transpired; that there had, prior to this incident, been some

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101 The respondent argued in oral submissions that the term "domestic relationship" draws upon the definition of "relevant relationship" in s 13 of the *Domestic and Family Violence Protection Act* 2012 (Qld). Section 13 includes in its ambit a "family relationship", hence extending to the relationship between appellant and the deceased as his stepdaughter: AT1-50 ll8-18.

102 *R v Soma* [2003] HCA 13; (2003) 212 CLR 299 at [11], [42].

103 AT1-50 ll20-24.

104 Ibid ll28-29.

105 Respondent's Outline of submissions, para 3.9.

106 Ibid para 3.25.

107 Defence Counsel's Address, p 27 ll12-22.

> positives in the relationship. There had, equally, been significant frustrations and concerns.
>
> But nonetheless, that's not a complete and accurate version given by Marlene. An understandable version, an explainable version, but not accurate on my suggestion to you…
>
> That, in the circumstances, given the confusion in Marlene's evidence at that point in time, just prior to or just at the stabbing, are you satisfied that the respondent has proved that that was intention and not in the circumstances outlined in his letter?"

[72] The respondent also instanced the series of text messages to which I have referred (Exhibit 7), which were admitted without objection by defence counsel. Not to have objected to the evidence of this hostile exchange between Ms Locke and the appellant assisted in the portrayal of a prolonged and bitter relationship which was apt to cloud the recollection of the principal eyewitness.[108]

[73] The appellant's contention is, of course, that the admission of this evidence occasioned a miscarriage of justice because of its inadmissibility and its degree of prejudice against him. That contention tends to overlook that there was no objection to it by defence counsel.

[74] The judgment of McHugh J in *Suresh v The Queen*[109] reminds that the reason or reasons for not taking objection to inadmissible evidence can be relevant to determining whether the admission of it has resulted in a miscarriage of justice. His Honour observed:[110]

> "It would undermine the system of adversarial criminal justice if the admission of technically inadmissible evidence, not objected to for rational forensic reasons, could result in the quashing of a conviction because the forensic tactics had failed to bring about the accused's acquittal."

[75] Hence, as White AJA noted in *R v Simpson*,[111] "an appellate court should be slow to intervene when defence counsel has conducted the trial in a certain way".[112]

[76] The observations of Gaudron J in *TKWJ v The Queen*[113] are to similar effect. They provide useful guidance for identifying circumstances where counsel's conduct may have led to a miscarriage of justice. Her Honour said:

> "[26] The question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question "deprived the accused of a chance of acquittal that was fairly open".[114] The word "fairly" should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on the basis that it has or could have led to a forensic advantage may well have the

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108 AT1-50 l37 – AT1-51 l6.
109 [1998] HCA 23; (1998) 153 ALR 145.
110 Ibid at [23].
111 [2008] QCA 413.
112 Ibid at [50].
113 [2002] HCA 46; (2002) 212 CLR 124.
114 *Mraz v The Queen* [1955] HCA 59; (1955) 93 CLR 493 at 514 per Fullagar J.

> consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open.[115]
>
> [27] One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test. An appellate court does not inquire whether the course taken by counsel was, in fact, taken for the purpose of obtaining a forensic advantage, but only whether it is capable of explanation on that basis."

[77] Having regard to the observations of both McHugh J and of Gaudron J, there is, in my view, substance in the respondent's submissions. It is clear that defence counsel's closing address sought to undermine Ms Locke's testimony on the basis of her perceived confusion, rather than a deliberate retributive act for past wrongs. A first impression might well be that the impugned evidence would support the latter thesis only. However, on reflection, I accept the respondent's submission that to advance that thesis would potentially generate sympathy for Ms Locke and risk eliciting other evidence of the appellant's bad character.

[78] Instead, defence counsel painted a version of events whereby the chaos of the situation rendered Ms Locke confused, and the animosity she had towards the appellant, as a consequence of their violent relationship, led her to attribute culpability for her daughter's knife wounds to him. The decision not to object to evidence of the 2012 incident is therefore capable of explanation on that basis.[116]

[79] Given that there was a legitimate forensic purpose for not objecting to the evidence in question, I am hesitant to conclude that its admission led to a miscarriage of justice. However, if it did, I consider this to be an appropriate case for application of the proviso in s 668E(1A) of the Code.

[80] **The proviso argument:** Consideration of the application of the proviso involves the same approach as that adapted in deciding whether a jury verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.[117] The High Court in *Weiss v The Queen* observed:[118]

> "In cases like the present, where evidence that should not have been adduced has been placed before the jury, it will seldom be possible, and rarely if ever profitable, to attempt to work out what the members of the trial jury actually did with that evidence. In cases, like the present, where the evidence that has been wrongly admitted is evidence that is discreditable to the accused, it will almost always be possible to say that that evidence *might* have affected the jury's view of the accused, or the accused's evidence. And unless we are to return to the Exchequer rule (where any and every departure from trial according to law required a new trial) recognition of the possibility that the trial jury *might* have used wrongfully received evidence

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115 See *Doggett v The Queen* [2001] HCA 46; (2001) 75 ALJR 1290 at 1298 [55] per Gaudron and Gummow JJ; 182 ALR 1 at 12; *Suresh v The Queen* [1998] HCA 23; (1998) 72 ALJR 769 at 771 [6] per Gaudron and Gummow JJ; 153 ALR 145 at 147.

116 *TKWJ v The Queen* [2002] HCA 46; (2002) 212 CLR 124 at [27].

117 *Darkan v The Queen* [2006] HCA 34; (2006) 227 CLR 373, 399 at [84].

118 [2005] HCA 81; (2005) 224 CLR 300 at [36].

> against the accused cannot be treated as conclusive of the question presented by the proviso." (emphasis in original)

[81] The Court directed that the appellate court must, having regard to the whole of the record, be "persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty".[119]

[82] I have already reviewed the evidence properly adduced before the jury at the appellant's trial when considering Grounds 1 and 2 of this appeal. Notwithstanding the prejudice to the appellant implicit in the impugned evidence, I am persuaded that, after putting to one side the evidence of the 2012 incident, the properly admitted evidence available to the jury proved, beyond a reasonable doubt, the guilt of the accused.

[83] In my view, no serious miscarriage of justice arose from the admission of Ms Locke's evidence of the 2012 incident.

[84] For these reasons, this aspect of Ground 3 fails.

[85] **Dr Olumbe's evidence:** The appellant claims the opinion given by Dr Olumbe to the effect that he doubted the injury had been caused by an accident, should not have been admitted without "any form of re-enactment or testing" to substantiate the opinion given.[120] The appellant intimated in written submissions that he had engaged other forensic experts to provide a different opinion[121] but conceded at the hearing that he had been unable to do so.[122]

[86] Dr Olumbe's opinion satisfied the conditions for admissibility of expert evidence outlined by Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v Sprowles*.[123] As a forensic pathologist with 23 years' experience, Dr Olumbe was well within the purview of his expertise in providing an opinion on the mechanics of infliction of a wound based on the wound's physical characteristics. His observations of the wound included that it was "well measured and exacting", that there was an absence of a second wound track, and that the length of the wound exceeded the length of the knife by five centimetres. In stating these characteristics, the basis for his opinion was available for scrutiny by the jury. Further to this, the learned trial judge gave appropriate directions as to the use of this expert evidence.[124] Beyond that, there is no evidentiary basis for this Court to be satisfied that a re-enactment would be capable of replicating the circumstances of the offending; hence such evidence would be inadmissible in any event.[125]

[87] This aspect of Ground 3 must also fail.

Ground 4: Intoxication

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119 Ibid at [44].
120 Appellant's Outline of Submissions, p 8.
121 Ibid.
122 AT1-31 ll39-40.
123 [2001] NSWCA 305; (2001) 52 NSWLR 705.
124 AB288 Tr11 l21 – AB289 Tr12 l10.
125 *Scott v Nurmurkah Corporation* [1954] HCA 14; (1954) 91 CLR 300 at 316.

[88] The appellant submits that he was unable to form a murderous intent due to his intoxication at the time of offending.[126] The respondent concedes the learned trial judge did misdirect the jury on two occasions by suggesting that the issue was whether the appellant was capable of forming the requisite intent given his level of intoxication.[127] Nevertheless, the true issue, namely whether the requisite intent was actually held notwithstanding his intoxication, was correctly identified by her Honour on six other occasions.[128] She also clarified that that was the issue by a redirection given after a request from the prosecutor.[129]

[89] I am therefore unpersuaded that a miscarriage of justice has occurred in this instance. The correct directions given by the learned primary judge were appropriate and reflected the current state of the law. Evidence before the jury demonstrated that the appellant was physically in control when interviewed by police and was able to concoct a false account of the killing from which he subsequently resiled. It was open for the jury to conclude that the appellant had the requisite intent notwithstanding his intoxication.

[90] It follows that this ground is not made out.

Ground 5: Competence of representation

[91] The appellant claimed his legal representation at trial was incompetent for the following reasons:

(i) Counsel had only five weeks to prepare for trial;

(ii) No evidence raised by the appellant in his appeal was adduced (including a re-enactment, forensic testing and a "human movements expert"); and

(iii) Witnesses were not properly cross-examined.

[92] The appellant did not seek to adduce evidence to the effect that five weeks was an insufficient time to prepare for the trial, assuming that it was the case that defence counsel was briefed five weeks before the trial began. In any event, counsel did not seek to have the matter adjourned on that account. The appellant has failed to establish that his right to a fair trial was compromised in this instance.

[93] In considering counsel's approach to evidence and cross-examination at trial, it is clear that in each of the instances identified by the appellant, decisions made by defence counsel were explicable on the basis they could have led to a forensic advantage or, alternatively, avoided a disadvantage.[130] As was outlined in my reasons for rejecting Ground 3, to attack Ms Locke in cross-examination risked provoking sympathy for her from the jury. Further, the appellant has not sought to provide the court with any forensic evidence or "human movement evidence" which, if adduced at trial, in combination with other evidence, would likely have caused the jury to entertain a reasonable doubt as to the guilt of the appellant.[131]

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126 Appellant's Outline of Submissions, p 9.
127 Respondent's Outline of Submissions, para 3.20; AB283 Tr6 ll17-21; AB306 Tr13 l45 – AB307 Tr14 l2.
128 AB21 Tr1-9 ll12-16; AB307 Tr14 ll19-45; AB311 Tr17 ll17-18.
129 AB314 Tr21 ll5-14.
130 *TKWJ v The Queen* [2002] HCA 46; (2002) 212 CLR 124 at [24].
131 Ibid at [33] per Gaudron J quoting *Mickelberg v The Queen* [1989] HCA 35; (1989) 167 CLR 259 at 301 per Toohey and Gaudron JJ.

[94] The appellant has failed entirely to demonstrate that the conduct of his defence made the trial unfair or produced a miscarriage of justice. This ground of appeal must be rejected.

Disposition of appeal

[95] As none of the grounds of appeal has succeeded, the appeal against conviction must be dismissed.

Sentence application

[96] In written submissions prepared by Mr Copley QC, the appellant sought leave to amend the notice of application for leave to appeal his sentence by replacing the ground of manifest excess with the following:[132]

> "The learned primary judge erred in ordering that parole eligibility be deferred by six months."

I would grant leave accordingly.

Sentencing considerations

[97] The circumstances concerning Counts 1 and 2 have been outlined above. On the day of sentencing, the appellant pleaded guilty to an ex officio indictment charging him with an offence against s 119B(1)(b)[133] of the Code in that, between 10 February 2016 and 11 March 2016 at Wacol, he, without reasonable cause, caused or threatened to cause a detriment to Ms Locke in retaliation because Ms Locke provided evidence against him. He also pleaded guilty to three summary charges of offending against s 177(2)(B) of the *Domestic and Family Violence Protection Act* 2012 (Qld) by contravening domestic violence orders on 6 August 2013, 16 February 2014 and 10 March 2016 respectively. All of these offences were the subject of the sentencing hearing on 11 November 2016.

[98] The offence of retaliation against a witness related to the letters the appellant provided to Mr Weightman, and which he asked be forwarded to Ms Locke. Ms Locke received the letters on 10 March 2016. She gave them directly to police without opening the envelopes. The letters requested she withdraw her domestic violence complaints and contained threats that she would be "torn apart" in court and that lies she had told to "child safety" would be raised so that she would lose her children.

[99] The domestic violence offences were related to several domestic and family violence temporary protection orders which named Ms Locke as the aggrieved and the appellant as the respondent. The appellant was prohibited from committing acts of domestic violence against Ms Locke and from contacting or attempting to contact her. The first offence referred to an occasion where the appellant contacted Ms Locke's hairdresser and informed her that he wished to reconcile the marital relationship. The latter two occasions involved the night of the stabbing and the circumstances founding the retaliation offence.

[100] The appellant was 52 at the time of sentencing and between 49 and 51 during the offending period.

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132 Sentence Form, para 1. The appellant informed the Court he wished to rely upon Mr Copley QC's submissions by way of the filed Sentence Form: AT23-39.

133 The offence was charged as a domestic violence offences under s 564(3A) of the Code.

[101] In her sentencing remarks, the learned sentencing judge took the following circumstances into account by way of mitigation:[134]

(i) the appellant had six children with whom he remained in contact;

(ii) the appellant had a good employment history and a good work history including skills in relation to inventions;

(iii) the appellant suffered from gout, a history of depression and some hand issues;

(iv) at the time of sentencing, there had been no breaches of prison discipline during custody and the appellant had behaved well.

[102] Her Honour considered that the following factors aggravated the attempted murder:[135]

(i) the appellant had a criminal history including previous breaches of domestic violence orders taken out by his former partner;

(ii) during the entire period of offending, the appellant was subject to a domestic violence order naming Ms Locke as the aggrieved and the couple had a history of domestic violence dating back to 2008;

(iii) Counts 1 and 2 were committed while the appellant was on bail for the offence of contravening a domestic violence order on 6 August 2013;

(iv) the offence of retaliation against a witness and the most recent offence of contravention of a domestic violence order were committed while the appellant was in custody and on remand for Counts 1 and 2;

(v) the seriousness of the offence of retaliation against a witness;

(vi) the appellant had shown no remorse;

(vii) the appellant had delayed the finalisation of the sentencing proceedings;

(viii) the appellant lied about the offending for a prolonged period of time.

[103] The learned sentencing judge referred to the appellant's behaviour as "cowardly", and found it "particularly reprehensible" that Ms Locke was holding the appellant's two year old son at the time of the assault and was, as a consequence of the appellant's actions, prevented from rendering assistance to her daughter or calling an ambulance expeditiously.

[104] For Count 1, the appellant was sentenced to life imprisonment. For Count 2 and the offence of retaliating against a witness, the appellant was sentenced to concurrent terms of two years' imprisonment and one year's imprisonment respectively. The appellant was convicted and not further punished for the breaches of the domestic violence orders.

[105] As Count 1 requires a mandatory sentence of life imprisonment, the learned sentencing judge was unable to impose cumulative sentences for the appellant's other

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134 Sentencing Remarks, Sentence Book "SB" 50 Tr4 ll40-47.

135 Sentencing Remarks, SB51 Tr5 ll1-20.

offending. For this reason, the prosecution sought the postponement in the appellant's parole eligibility. As a consequence of the aggravating features identified above, her Honour found it appropriate to do so. The appellant's parole eligibility date was postponed by six months.

Discussion

[106] The appellant submitted that an observation made in the sentencing remarks that the appellant's guilty pleas were not "timely"[136] was incorrect and that, had the learned sentencing judge proceeded on the basis that they were timely pleas, her Honour would have made allowance for this cooperation.[137] This was so because the appellant pleaded guilty to Count 2 on the first day of his murder trial and to the retaliation offence on the day the indictment was presented. The indictment was an ex officio indictment demonstrating that the appellant had waived his right to a committal proceeding.

[107] The respondent argued that the learned sentencing judge's observation regarding the timing of the pleas was accurate. Although entered on the morning of the trial, the delay between the verdict on the murder charge and the sentencing disqualified that plea from being classified as "early" as it did not facilitate the early disposition of the matter. Equally, the application for an ex officio indictment and the application to transmit the summary charges came only after Counts 1 and 2 had twice been listed for sentence and then delisted at the request of the appellant.[138]

[108] The expression "early plea" is conventionally used to commend some benefit to witnesses or the public arising from the timing of a plea of guilty. The impact for sentencing in any particular case of a plea of guilty is better evaluated by reference to identifiable benefits resulting from the timing of it.

[109] Here, the pleas did little to either facilitate an early disposition of the matter or relieve witnesses from the ordeal of cross-examination. Her Honour also noted that the appellant was responsible for substantial delays in the finalisation of the sentencing proceedings and, by his own admission, lied for a prolonged period about the circumstances of his offending. Little, if any, identifiable benefit resulted from the pleas here.

[110] As explained above, her Honour listed a number of aggravating features of the appellant's overall offending as justification for extending the period of non-parole. Of particular note is the offence of retaliation against a witness, which her Honour correctly recognised as one that often attracts a cumulative sentence because it is viewed so seriously.[139] The head sentence imposed on the appellant, being life imprisonment, could not be increased or reduced as a consequence of factors of aggravation or mitigation. Similarly, her Honour was unable to impose a cumulative sentence for the retaliation offence.

[111] In the circumstances, delaying the appellant's parole eligibility date by only six months reflected the totality of the sentencing considerations for all the offences before the Court. It was well within the appropriate exercise of her Honour's sentencing discretion to do so.

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136 SB52 Tr6 ll39-40.
137 Sentence Form, paras 1, 11.
138 Respondent's Outline of Submissions, paras 8-9.
139 SB51 Tr5 l47 – SB52 Tr6 l8.

[112] For these reasons, the appellant has failed to establish that the learned sentencing judge erred in ordering that parole eligibility be deferred by six months. The application for leave to appeal the sentence must be refused.

Orders

[113] I would propose the following orders:

1. Appeal against conviction dismissed.

2. Leave to amend the application for leave to appeal against sentence in accordance with paragraph 1 of the appellant's Outline of Submissions on Sentence filed 16 May 2017 granted.

3. Application for leave to appeal against sentence refused.

[114] **PHILIPPIDES JA:** I agree with the reasons of Gotterson JA and with the orders his Honour proposes.

[115] **BODDICE J:** I have read the reasons of Gotterson JA and agree with those reasons and the proposed orders.