SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lafaele* [2018] QCA 42
PARTIES:	**R** **v** **LAFAELE, Isaac Junior Lemalu** (appellant)
FILE NO/S:	CA No 363 of 2016 SC No 53 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 15 December 2016 (Henry J)
DELIVERED ON:	23 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2017
JUDGES:	Fraser and Gotterson JJA and North J
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS - where the appellant was convicted of the offence of murder – whether on the evidence it was possible to infer intention because of intoxication – whether the appellant's capacities were so affected that he was deprived of the capacity to form an intention – whether the verdict was unreasonable because of the appellant's intoxication CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – whether the trial judge erred in his directions to the jury – whether the onus of proof in s 24 defence of mistake of fact rests with the prosecution or the defendant – where the respondent contended that s 304(7) of the *Criminal Code* had the effect of shifting the onus of proof onto an accused with respect to, not only provocation, but also mistake of fact when, as in this case, the circumstance of the asserted provocation are intertwined with a mistake of fact – whether the s 24 defence mistake of fact alters the onus of proof of the defence of provocation in s 304 of the *Criminal Code* *Criminal Code* (Qld), s 24, s 304, s 668E

Brimblecombe v Duncan, Ex parte Duncan [1958] Qd R 8, considered
Cesan v The Queen (2008) 236 CLR 358; [2008] HCA 52, considered
He Kaw Teh v The Queen (1985) 157 CLR 523; [1985] HCA 43, considered
Heaslop v Burton [1902] St R Qd 259, considered
Loveday v Ayre and Ayre; Ex parte Ayre [1955] St R Qd 264, considered
R v Lacey; Ex parte Attorney-General (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, considered
R v Perham [2016] QCA 123, considered
R v Sheehan [2001] 1 Qd R 198; [1999] QCA 461, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, considered

COUNSEL: AW Collins for the appellant
M Cowen QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of North J and the order proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the order proposed by North J and with the reasons given by his Honour.

[3] **NORTH J:**

Introduction

The appellant was convicted of murder of Gavin McLean following a trial before a jury in the Supreme Court of Cairns on 15 December 2016. He appeals that conviction on two grounds. Firstly, that the verdict of the jury was unreasonable having regard to the evidence concerning the appellant's level of intoxication. Secondly, that the learned trial judge erred in directing the jury as to the onus of proof in respect of the application of s 24 of the *Criminal Code*, to the jury's consideration of the defence of killing on provocation according to s 304 of the *Criminal Code*.[1] It may be noted that in argument counsel's focus in respect of the first ground of appeal shifted somewhat from intoxication to a broader consideration as to whether, on the evidence, it was possible to infer an intention to kill or to cause grievous bodily harm. This will be discussed further below.

The Evidence at Trial

[4] The incident in which McLean (the deceased) suffered the injury that subsequently caused his death occurred on 26 May 2015 at 10/69 Little Pease Street at a unit or townhouse in Cairns, which was the residence of one Anthony John Smith. A witness, Fensom, gave evidence that he met the appellant at Smith's residence in

1 Notice of Appeal filed 21 December 2016; ARB 274.

the afternoon of that day. Fensom's evidence was that the appellant had been drinking rum, beer and consuming methylamphetamine.[2] Fensom gave evidence that he heard a conversation between Smith and the appellant in which Smith claimed the deceased owed him $4,500 as a drug debt.[3] According to Fensom the appellant said "I'll contact him and try to get your money", and Smith replied "don't worry about it son. Don't worry about it. Just let it go. I'll sort it out myself".[4]

[5] Nevertheless, the appellant contacted the deceased by telephone and asked him to come to Smith's residence.[5] Fensom gave evidence that when the deceased arrived at the residence "everything was good at the start", that he noticed nothing unusual and that he went outside to the shed to smoke cannabis.[6] Following this, Fensom said there was a discussion between the appellant and the deceased in which the appellant said "you've got to pay the money Gavin, and Tony's broke", and "you gotta pay the fuckin' money you know".[7] On Fensom's account, the appellant then went into the kitchen and took something out of the top drawer and he "come back around whacked him – whack – just whacked him in the head".[8] It was described by Fensom as a round arm punch from behind.[9] During his record of interview, the appellant motioned a similar action.[10]

[6] In addition to the evidence about the stabbing and what preceded it Fensom gave some evidence bearing upon the potential intoxication of the appellant. He said that it was in the afternoon that the appellant with his two sons came to the unit.[11] And that the appellant was drinking alcohol and consuming drugs. Specifically his evidence was:[12]

> "… Was he doing anything else?...Drinking.
>
> Do you recall what he was drinking?...Rum and beer.
>
> Sorry?...Rum and beer.
>
> Was he consuming anything else other than rum and beer?...Yeah.
>
> What was it?...A bit of ice, maybe.
>
> Sorry?...A bit of ice.
>
> And what's ice?...Meth, crystal meth.
>
> And how was he consuming that?...Shooting it up.
>
> And when you shooting up, what do you mean?...Injecting."

[7] Further upon this topic Fensom said:[13]

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2 ARB 135.
3 ARB 136.
4 ARB 136.
5 ARB 260, l 50 (appellant's account), ARB 137 (Fensom's account) and ARB 97 (Smith's account).
6 ARB 137.
7 ARB 138.
8 ARB 139.
9 ARB 140.
10 ARB 269.
11 ARB 135.
12 ARB 135-136.
13 ARB 136.

> "And was Junior drinking at that point?...Yeah, he was pretty drunk.
>
> You said that Tony was saying don't worry about it; is that right?…Yeah."

[8] Other witnesses were called but none claimed to have seen the incident. Some of those who were present at times during the day or evening may not have been present at the time of the incident. Others simply said they did not see it. Some further evidence was given confirming that the appellant consumed alcohol on the day including the appellant's sons (Jerome and Isaac), both of whom admitted to being intoxicated or pretty drunk themselves. On the subject of intoxication Anthony John (Tony) Smith, the occupier of the unit in question, gave evidence that the appellant consumed alcohol and "was quite drunk".[14] Subsequently in cross examination he described the appellant as "really drunk"[15] and later on as "blind-drunk".[16] Curiously none of the other persons who were present at the unit some time on the day or evening in question who gave evidence said or identified that Fensom was present at any time. It was directly suggested to Fensom when cross examined that he was not present at the unit and that he did not see what he told the jury he saw of the incident.[17] But notwithstanding those instructions none of the other witnesses who were called were directly asked whether Fensom was present with the consequence that no other witness positively stated that Fensom was not present. The decision by experienced counsel at trial not to directly ask the other witnesses about this issue was conceded by counsel at the hearing of the appeal as an obvious and appropriate forensic decision.

[9] The deceased died on 7 June 2015 as a result of a single penetrating injury to the brain.[18] Forensic pathologist Dr Paul Botterill gave evidence that the penetrating injury was at least four to six centimetres long, and probably deeper.[19] The injury did "not indicate massive force", and only moderate force would have been required.[20] Dr Botterill said that had 'the blow' been to the surrounding areas where it actually hit, it may have caused a cut in the skin or a bruise, but it was unlikely that it would have penetrated the bone or the eye socket.[21]

[10] According to Dr Botterill the direction of the penetrating injury was: [22]

> "… roughly from the level of the bridge of the nose – just to the left of the bridge of the nose, towards the back of the left side of the head. So that is from front-to-back, going from the right side slightly to the left, and going roughly horizontal. That is not going particularly upwards and not particularly downwards".

[11] Dr Botterill gave evidence that the injury may have been caused by a 'round arm punch' from the deceased's right side, however it 'simply needs to have a thrust that's going from slightly right to left, front to back' and could have been from any position.[23]

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14 ARB 92.
15 ARB 102.
16 ARB 103.
17 ARB 146.
18 ARB 151.
19 ARB 152.
20 ARB 156.
21 ARB 157.
22 ARB 153.
23 ARB 153.

[12] It was admitted at the trial that on 27 May 2015 sometime after 12.07 pm the appellant provided a breath test reading of 0.119 per cent.[24] Dr Botterill said this level of intoxication, to the average person, would impair thought processes, judgement, fine motor skills and co-ordination.[25] Dr Botterill gave evidence that elimination rates of alcohol from blood can vary from person to person, that they can eliminate, depending upon the time since the last consumption of alcohol and whether there was unabsorbed alcohol in the stomach, at between 0.015 per cent and 0.025 per cent per hour and that "a rough rule of thumb" indicated an elimination rate at 0.02 per cent.[26] He said that in order to count back to accurately ascertain what a person's blood alcohol reading might have been required knowledge of at least when the particular person had last consumed alcohol.[27]

[13] On 27 May 2015 the appellant was interviewed by Sergeant McLeish in the form of an electronically recorded record of interview.[28] The appellant confirmed his consumption of what he thought was methylamphetamine the night before and alcohol into the early morning.[29]

[14] When asked about the injury to the deceased the following exchange took place:

"SGT MCLEISH:	Mate, what can you tell me about Gavin McLean being assaulted?
LEMALU:	Um, I whacked him last night.
SGT MCLEISH:	Okay, what did you whack him with, mate?
LEMALU:	Yeah, it was a butter knife I think, or – yeah, butter knife.
SGT MCLEISH:	And whereabouts did you whack him on his body?
LEMALU:	On the head. I just – yeah.
SGT MCLEISH:	On the head did you say?
LEMALU:	In the face.[30]
…	
SGT MCLEISH:	Okay. And when he [the deceased] arrived at Tony's house, what happened?
LEMALU:	Um, yeah, started, um, having words and everyone scattered I guess and, yeah, hardly no-one was around in Tony's anymore, so we went inside, and yeah, I – he went to threaten to fucking stab me and he reckons he's going to whack me. I said "Go on then". Yeah, I just lost

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24 Exh 2, ARB 237.
25 See ARB 157 l 40 – ARB 158 l 18.
26 ARB 158 l 40.
27 ARB 159 l 5.
28 Exh 10, see Transcript, MFI B ARB 254 ff.
29 ARB 257-258, 272.
30 ARB 259.

it and I just picked up the knife and whacked him with it and that was it.[31]

(At this point in the exchange, the appellant demonstrated and motioned how he picked up the knife and stabbed the deceased and the exchange continued).

SGT MCLEISH: Was, um – was Gavin sitting down … when you whacked him?

LEMALU: Mmm.

SGT MCLEISH: Yes?

LEMALU: Yeah. Well, he went to stand up.[32]

…

SGT MCLEISH: When you picked up the butter knife, mate, whereabouts was it sitting?

LEMALU: On the table.

SGT MCLEISH: On the table. So the coffee table?

LEMALU: On the coffee table, yeah. I guess, yeah.[33]

…

SGT MCLEISH: All right. Mate, why did you whack Gavin with the knife?

LEMALU: He threatened to stab me and, yeah, yeah, so I got angry straight up and launched at him.[34]

SGT MCLESIH: Okay. When he threatened to stab you, he was sitting down; is that correct?

LEMALU: Mmm.

SGT MCLEISH: And was he holding a knife of anything like that at the time?

LEMALU: No, he had his [indistinct] like that.[35]

SGT MCLEISH: Okay.

LEMALU: And he went [indistinct], yeah, just, yeah, I lost it."

[15] At this point the appellant demonstrated that the deceased's arms were crossed, and that he began standing up.

[16] The knife spoken of by the appellant and also Fensom used to inflict the fatal wound is plainly the knife photographed in the exhibits.[36] It was approximately 21

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31 ARB 261.
32 ARB 261.
33 ARB 262.
34 ARB 266.
35 ARB 266.
36 Exh 3.30, exh 3.31 and exh 3.32.

to 22 centimetres long with a blade approximately 12 centimetres in length judging from the measurements of that knife as depicted in photographic exhibits.[37] In turn it was admitted that DNA taken from the blade of the knife matched the DNA from the deceased.[38] It was common ground that a different knife found in a wheelie bin next to a utility vehicle was not the knife used by the appellant in any assault upon the deceased.[39]

Was the verdict of the jury unreasonable within s 668E(1)

[17] Earlier I noted that the first ground was that the verdict of the jury was unreasonable having regard to the evidence concerning the appellant's level of intoxication. However in argument at the hearing of the appeal counsel for the appellant shifted focus from that issue to a broader consideration of whether, on the evidence, it was possible to infer an intention to kill or cause grievous bodily harm. Counsel pointed to the choice of weapon (a dinner or table knife described as a "butter knife") rather than something like a carving knife,[40] that there was but one blow with the knife, related to that that this was not an instance of multiple wounds and to the appellant's degree of intoxication.

[18] It will be observed that the focus of the appellant's contention upon ground one was whether, on the whole of the evidence relating to intention, it was open to the jury to be satisfied beyond reasonable doubt that the appellant held the relevant intention.[41] The jury certainly had before it the evidence of witnesses that at times during the evening the appellant was intoxicated, described as "really drunk" and later as "blind drunk". On the other hand the evidence from Dr Botterill, while supporting the proposition that the appellant's thought process, fine motor skills, co-ordination and capacity to make judgements might have been impaired, fell well short of suggesting that it was likely that the appellant's capacities would have been so affected as to have deprived him of the capacity to form an intention. Further the jury had the advantage of the evidence of Fensom describing how the appellant stood, walked to the kitchen, gathered a knife and returned stabbing the deceased with a round arm blow from behind. Indeed the jury had before it the evidence of the appellant's own admissions in the record of interview describing and demonstrating how he stood, gathered a knife and stabbed the deceased.

[19] Having conducted a review of the evidence, particularly that relating to intention, which includes a viewing of the record of interview of the appellant, I conclude it was well open to the jury to be satisfied beyond reasonable doubt that the appellant had at the time that he stabbed the deceased an intention to kill or at the very least cause grievous bodily harm.

[20] This ground of appeal must fail.

His Honour's summing up

[21] In order to understand the issue that is raised by the second ground in the appeal it is necessary to make extensive reference to his Honour's summing up, not only to the

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37 See exh 7.1, exh 7.2 and exh 7.3.

38 See the Admissions in exh 2 at ARB 236. It will also be observed that the knife photographed in these exhibits appears to be blood stained.

39 Admissions exh 2 at ARB 237.

40 Appeal transcript 1–15.

41 See for example *R v FAL* [2017] QCA 22 at [38].

passage impugned by the appellant but to related or cognate aspects of the directions so that the issue raised can be understood in context.

[22] At the conclusion of the crown case, after the appellant was called upon, his Honour had a discussion with counsel so as to identify the issues that arose in light of the evidence.[42] The issues identified included self defence against unprovoked assault,[43] accident (foreseeability),[44] mistake of fact, relevantly being whether the appellant thought the deceased was coming at him or threatening him with a knife,[45] intoxication and provocation.[46] His Honour's summing up proceeded, at least at the outset, consistently with the introductory directions found in the Benchbook,[47] suitably adapted to the requirements of the particular case. Included in these remarks were the following:[48]

> "A few other introductory matters, the golden rules: the burden and standard of proof. The burden rests on the Prosecution to prove the guilt of the charged citizen. There is no burden on a charged citizen to establish any fact, let alone the citizen's innocence. The citizen is presumed to be innocent. The accused may be convicted only if the Prosecution establishes that he is guilty of the offence charged or its inherent alternative of manslaughter.
>
> As to the standard of proof, for the Prosecution to discharge its burden of proving the guilt of the defendant, it is required to prove that guilt beyond reasonable doubt. This means that in order to convict, you must be satisfied beyond reasonable doubt of every element or ingredient that goes to make up the offence charged. I will return to these elements that I briefly explained to you at the outset of the case shortly. It is for you to decide whether you are satisfied beyond reasonable doubt that the Prosecution has proved the elements of the offence. If you are left with a reasonable doubt about guilt, your duty is to acquit; that is to find the defendant not guilty. If you are not left with any such doubt, your duty is to convict; that is to find the defendant guilty."

[23] Following the introductory matters his Honour turned to the issues raised on the count of murder and its alternative, manslaughter.[49] His Honour introduced the topic by reference to a note his Honour had prepared for the jury relating to the charge comparing the elements of murder with those of manslaughter.[50] In the course of these directions his Honour explained to the jury that he proposed to direct them on what he described as the third and fourth elements of murder with directions upon the third element following the fourth element:[51]

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42 Earlier on the first day defence counsel had identified accident and self defence as issues that were likely to arise, see ARB 75.
43 s 271(1) and s 271(2).
44 s 23(1)(b).
45 s 24.
46 See s 304. See further ARB 160-161.
47 Queensland Supreme Court Criminal Benchbook.
48 ARB 170 l 14-30.
49 His Honour's directions commenced at ARB 173 l 20.
50 See exh 1 at ARB 235.
51 ARB 174 l 40 – ARB 175 l 10.

> "As to the third element, that the defendant caused the deceased's death unlawfully. Unlawful simply means not authorised, justified or excused by law. All killing is unlawful unless authorised, justified or excused by law, for example, where defences such as self-defence or accident might potentially arise. It will be necessary for us to give consideration to both such defences, accident and self-defence, and their potential application here. I will return to them later.
>
> For present purposes, the third element, the element of unlawfulness, unlike elements 1 and 2, is an element in issue, because it is necessary for you to consider whether or not defences of self-defence and accident are excluded. Rather than dwelling on those now, I propose to move the fourth element to explain it and then to deal with the issue relevant to it. Having done so I'll then return again to this third element of unlawfulness and discuss those particular defences.
>
> I confess, I'm motivated in turning to and then dwelling on the fourth element at the outset, really, because not only is it in issue, but it is the issue that was the primary focus of Mr Trevino's opening, and a substantial proportion of his closing address. That is not to say that any of the elements are less important than the others, but I propose to move now to element 4, anticipating that it is particularly in issue in this case."

[24] His Honour then instructed the jury, consistently with the Benchbook, upon the intent element of murder including directions concerning the drawing of inferences and those concerning a circumstantial case.[52]

[25] In that direction he said the following:[53]

> "…The extra element or ingredient which lifts unlawful killing from manslaughter to the more serious offence of murder is the mental element of intention. That is the added requirement of which you must be satisfied beyond a reasonable doubt, that the accused, in doing the act which unlawfully killed the deceased, intended to cause the death or to do some grievous bodily harm to the deceased. It is self-evident from what I say that an intention to cause grievous bodily harm will suffice in proof of this mental element. So too, of course, would an intention to kill."

[26] A little further on his Honour said: [54]

> "To bring in a verdict of guilty so based upon circumstantial evidence, it is necessary that guilt should not only be a rational inference, but also that it should be the only rational inference that could be drawn from the circumstances."

[27] Further to this his Honour directed the jury:[55]

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52 ARB 175 l 12 – ARB 177 l 13.
53 ARB 175 l 15 – 22.
54 ARB 176 l 12-14.
55 ARB 176 l 40 – ARB 177 l 12.

> "In considering circumstantial evidence, as you are for element 4, the element of intention, it is necessary not only that the hypothesis consistent with guilt – the guilty inference – be a rational inference, but that it be the only rational inference. For that to be so, it is necessary that any reasonable hypothesis consistent with innocence is excluded and excluded beyond a reasonable doubt. If there is an inference reasonably open which is adverse to the accused, one pointing to guilt, and an inference in his favour, one consistent with innocence, you may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.
>
> This is really just an illustration of the principle that guilt must be proved beyond a reasonable doubt. If there are two competing inferences, one consistent with guilt and one consistent with innocence and you are not sure which, well that is not proof beyond reasonable doubt. The inference consistent with guilt would have to be sufficiently powerful, not only to be in itself a rational inference, but to exclude any inference consistent with innocence. So in this case, for example, you could not be satisfied beyond reasonable doubt of the element of intention if there lingers, as a possibility which has not been excluded, the possibility that the accused committed the fatal act in a drunken, unthinking way, without any intention to harm or only an intention to inflict minor harm. The circumstances must be so strong as to exclude such possibilities and compel the inference that the accused must have intended to cause death or grievous bodily harm and to do so beyond a reasonable doubt."

[28] His Honour continued his summing up concentrating upon the issue of intention referring the jury to the evidence of witnesses and other evidence that bore upon it.[56] After his Honour provided to the jury copies of sections from the *Code* relevant to issues they would have to consider,[57] he started with the question of intoxication combining directions in conformity with the Benchbook with a review of the evidence of the witnesses, expert and lay, relevant to that issue. It was only after that extensive review of the evidence and combination of directions with the consistent theme of intention that his Honour turned to defences that were in issue or, to use the phraseology of his Honour to the jury, that bore upon whether the appellant's actions were unlawful. His Honour commenced with provocation. He introduced his directions with the following:[58]

> "…You recall that I've so far canvassed elements 1 and 2, which are no particular challenge here, you might think, and have dwelt in some detail on element 4, the element of intention – that being, perhaps, the aspect that was the focus at least in a major sense of submissions made before you in this case. Before leaving element 4, I need to explain a defence which is relevant to murder only. So this discussion is only relevant in the event that you're persuaded beyond reasonable doubt of all four elements.

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56 ARB 177 – 195.
57 Exh 14, which included s 28(3).
58 ARB 203 l 42 – 204 l 39.

> …In such a situation, before you could convict of murder you would need to consider the defence known as provocation.
>
> …Subsection (7) is an exception to the general principle that the prosecution, in bringing the charge, must prove everything related to the charge. This is an exception. If a defendant wants to rely on the defence of provocation, it's for the defence to prove that defence. I'll come to this in greater detail, but I want to make one point about that. When we speak about someone having to prove something, we don't mean they've got to get in the witness box to prove it. If there is evidence from which you would find something is proved, then they proved it. So it's quite unnecessary that the accused give evidence on this topic – or, for that matter, that his counsel even address on it. Indeed, some of what I will have to say to you about some of the provisions I'm touching on wasn't the subject of any particular lengthy focus in submissions. But that doesn't make it any less necessary, unfortunately, for me to have to explain all of this and for you to have to turn your mind to it so that we're dotting our i's and crossing our t's and making sure that justice is done and done thoroughly."

[29] His Honour then continued:[59]

> "Under our law, the defence of provocation operates in the following way: when a person kills another under circumstances which would constitute murder, and he does so in the heat of passion caused by sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter only. The defence therefore operates as a partial defence, not a complete defence. Because if it applies, its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter. You only need to consider the issue of provocation if the prosecution has proved beyond reasonable doubt the elements of murder, which I've already outlined.
>
> Providing you're satisfied beyond reasonable doubt of the elements of murder, it falls to the defendant to prove that the defence of provocation applies. To discharge this burden, the defendant must show that when he killed the deceased he did so in the heat of passion caused by sudden provocation and before there was time for his passion to cool. The defendant does not have to satisfy you of that beyond reasonable doubt, but does have to satisfy you that it is more probable than not that he so acted."

[30] His Honour continued with his directions consistently with the Benchbook combined with references to the evidence. It was in this context when directing the jury on provocation his Honour had reference to the question of whether the appellant had a mistaken belief that the deceased had a knife or possession of a knife and that he intended to assault him which in turn had the effect of provoking the appellant. In this context his Honour said:[60]

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59 ARB 204 l 41 – ARB 205 l 10.

60 ARB 207 l 34 – 208 l 41.

"To the extent that that physical action may have given rise to a belief that he was reaching for a knife, it's relevant to consider another provision of our Criminal Code at this point. Would you turn again to our extracts and go to the third paragraph, headed 24 – Mistake of Fact:

> *A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.*

The effect of this provision, members of the jury, is that where a person perceives something, even if erroneously, if they perceive it to be so and their error is the product of an honest and reasonable mistake of fact, then their criminal responsibility falls to be judged as if their perception was the true state of things. Now, let me enlarge a little upon that. If the defendant was under an honest and reasonable but mistaken belief that the deceased had a knife and was about to come at him, he's not criminally responsible to any greater extent that if the real state of things had been such as he believed to exist. In other words, that the deceased was still seated, had a knife and was about to come at him.

If you conclude the real state of things was that the deceased did not have a knife and was not at least – and/or was not at least immediately about to be utilising it, moving to use it, but that the defendant honestly and reasonably believed that that is what was about to happen, the defendant would not be criminally responsible to any greater extent than if that was the true state of things. A mere mistake is not enough. The mistaken belief must be both honest and reasonable. An honest belief is one which is genuinely held by the defendant. To be reasonable, the belief must be one held by the defendant in his particular circumstances on reasonable grounds. A reasonable belief is not a belief that is arrived at by reason of drunkenness, of course.

Finally, I must emphasise there is no burden on a defendant to prove that he made a mistake of fact *ordinarily*. The prosecution must satisfy you beyond reasonable doubt that he did not do so, *ordinarily*. Here though, bear in mind ultimately this issue relates to the question of provocation and as I've explained, in considering provocation, the question of whether or not it is to apply so as to mitigate murder down to manslaughter flows logically in the context of this case onto the question of whether or not there was provocation and whether or not there was a mistake. It wouldn't arise if you took the view there was no mistake; that in fact, you think the accused did have a knife and was about to come at him. But if you don't believe that but accept that it's possible the accused believed it, well, bear in mind reliance upon such a mistake in these circumstances involves ultimately the accused's side carrying the onus – admittedly, only on the balance of probabilities as I'll soon

> **explain – of proving provocation. In any event, *ordinarily* that is the way in which mistake of fact works and with that qualification just explained, it's the way it works in the context of provocation here.**
>
> Continuing with the defence of provocation, a further question is whether the defendant acted in the heat of the passion caused by sudden provocation and before there was time for his passion to cool. The expression "sudden" involves a consideration of whether the defendant acted in the heat of the passion unpremeditated and in a temporary loss of self control caused by the provocation. Provocation is not necessarily excluded simply because there is an interval between the provocative conduct and the defendant's emotional response to it. You must consider whether the defendant actually remained deprived of self control and killed the deceased while so deprived…"
>
> (Emphasis added).

[31] After completing his directions on provocation his Honour turned to "accident" and the defence provided by s 23(1)(b) of the *Code*. In this context his Honour said:[61]

> "Bear in mind it is not for the defendant to prove anything. Bear in mind, also, though, that in considering what an ordinary person may or may not have foreseen you are considering also that person to be sober. Unless the prosecution proves beyond reasonable doubt that an ordinary person in the position of the defendant would reasonably have foreseen the death as a possible consequence of his actions or that the defendant intended or foresaw that, you must find him not guilty, subject to a qualification I'll come to shortly.
>
> Even if you reject the accused's account of what happened, you must consider the possibility that the event occurred unforeseen and unintended. The defendant is under no obligation to prove any matters and before you can convict him, you must be satisfied by the prosecution beyond reasonable doubt either that the death was an event which the defendant intended or foresaw as a possible consequence or that an ordinary, sober person in the defendant's position would reasonably have foreseen it."

[32] Finally, in this narrative his Honour gave directions in self defence consistent with the directions contained in the Benchbook during the course of which he said:[62]

> "I turn, finally, in the defences to self-defence. If the prosecution can not to your satisfaction beyond reasonable doubt exclude the possibility that the killing occurred in self-defence, as the law defines it, that is the end of the case. The defendant's use of force would be lawful and you should find him not guilty. That, by the way, I remind you, is so, because it relates to the element of unlawfulness required to be proved for both murder and manslaughter. It's an element in both. So it would be not guilty of both if this defence, or,

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61 ARB 210 l 46 – ARB 211 l 10.

62 ARB 213 l 35-44.

> for that matter, accident, which relates to the element of unlawfulness, was left live and was not excluded beyond reasonable doubt to your satisfaction."

[33] And further his Honour said:[63]

> "Now, before I explained to you the law of mistake of fact. I did so in the context of provocation. Provocation, you recall, is a defence which is for the defence to prove on the balance of probabilities. This defence is a defence which is for the prosecution to exclude beyond reasonable doubt.
>
> So in considering this question of mistake of fact I discussed before you recall I spoke about the prospect of either the reality being that, in fact, the accused is correct that the deceased was about to come at him with a knife, even though he was still only seated and his hand doing something at his shirt and said he was going to [whack] him, or that he was mistaken; that – and this is the nub of the argument – he was honestly and reasonably mistaken in that belief, that this man, because of those clues, was indeed about to come at him with a knife.
>
> If the prospect of a mistake of fact as to that possibility has not been excluded beyond reasonable doubt, then you would have to judge the question of self-defence on the basis that it was the true state of affairs that the deceased was about to come at him in [sic] a knife and getting up in the process and whack him with it. So either the prosecution excludes that beyond reasonable doubt, that mistake – and it can do so by proving it wasn't a reasonable mistake to make or not an honest mistake to make – or, alternatively, his guilt would be assessed as if that were the true state of things and assessed in the context of considering self-defence."

Ground Two

[34] The appellant contends that that direction in respect of the application of s 24 to the defence of killing on provocation under s 304 was an error. It was submitted that the passage in the direction quoted with emphasis above[64] conveyed to the jury the impression that, in so far that s 24 might apply to provocation, the onus was on the appellant to prove beyond reasonable doubt mistake of fact, whereas the correct direction was that in relation to the application of s 24 the onus necessarily remained on the prosecution to disprove its application beyond reasonable doubt.

[35] In argument the attention was drawn to the use of the word "ordinarily", it was submitted that its use was apt to confuse the jury into concluding that the "ordinary" position did not apply and that the onus of proof moved from the prosecution to the appellant.

[36] No other error was suggested or pointed to. Indeed it was conceded that the other directions were correct.[65]

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63 ARB 214 l 34 – ARB 215 l 8.
64 See par [30].
65 Quoted at par [28] and [29].

[37] His Honour's direction must be read in context and it should not be overlooked that his Honour consistently emphasised to the jury, correctly, that the onus of proof lay upon the prosecution to prove beyond reasonable doubt the guilt of the appellant. His Honour's directions were careful and comprehensive, correctly directing the jury upon matters of law, and thoughtfully incorporating references to relevant passages of evidence designed to give assistance to the jury to understand their task in light of the law. It should not be overlooked that his Honour correctly and accurately directed the jury with respect to both the onus of proof and burden of proof in so far as it concerned s 23(1)(b),[66] and in this respect with respect to self defence and mistake of fact in the context of the defence of self defence.[67] While the use of the word "ordinarily" may be suggestive that reference was being made to an exception from the ordinary, that conclusion does not follow from a fair reading of what his Honour said.

[38] It should not be overlooked that in the concluding sentence of the impugned direction his Honour emphasised that the way in which mistake of fact worked in the context of the issue of provocation was that the ordinary position applied. So it is apparent that his Honour emphasised in the concluding words of the impugned passage that the law was that stated in the opening two sentences of the passage: that the burden was on the prosecution to disprove mistake of fact and to do so beyond reasonable doubt. His Honour had just before explained the law with respect to provocation, that the onus was on the appellant on the balance of probabilities,[68] and in light of this the directions given by his Honour complained of should be understood as an attempt to distinguish the position with respect to provocation from that applying to mistake of fact. I do not consider that a jury could have been confused about the law. Read as a whole his Honour's summing up was a model of clarity and instructive. He correctly stated the law and combined this with helpful references to the evidence. The isolated passage complained of did not misstate the law whether read in isolation or in context. This ground is not made out.

Mistake of fact – the onus of proof – Respondent's contention

[39] On behalf of the respondent it was contended that s 304(7) of the *Code* had the effect of shifting the onus of proof onto an accused with respect to, not only provocation, but also mistake of fact when, as in this case, the circumstance of the asserted provocation are intertwined with a mistake of fact. The submission, made as it was without reference to any authority, is unattractive. It flies in the face of the authorities.

[40] Notwithstanding the statement by Griffith CJ in *Heaslop v Burton*,[69] for over 60 years the authorities on s 24 of the *Code* have been consistent on its application and the relevant onus of proof. Philp J in *Loveday v Ayre and Ayre* relevantly explained:[70]

> "Whatever may be the position at common law, a mistake is not a defence in Queensland – it is not a matter which the defendant must prove on the balance of probabilities. Section 24 provides that a person is

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66 See par [31] above.
67 See for example par [32] and [33] above.
68 See par [29] above.
69 [1902] St R Qd 259 at 266.
70 *Loveday v Ayre and Ayre; Ex parte Ayre* [1955] St R Qd 264 at 267-268.

> "not criminally responsible" if he acts under an honest and reasonable mistake of fact; the onus then is on the prosecutor to satisfy the court beyond reasonable doubt of the non-existence of operative mistake."

[41] Philp J (with whom Mathews J agreed) repeated this view in *Brimblecombe v Duncan*,[71] and *Loveday v Ayre and Ayre* was cited with approval by Stanley J who summarised the onus of proof:[72]

> "[W]hen a defendant sets up the operation of the rule in s. 24 of *The Criminal Code* to relieve him from criminal responsibility and there is some evidence before the jury by reason of which the jury might believe that the defendant came within the rule, the defendant has not positively to establish the existence in him of a belief in terms of that rule; the onus is on the Crown, as part of its task to establish criminal responsibility in the defendant to negative the existence of the belief in him beyond reasonable doubt."

[42] Further, it might be noted that on appeal from the Supreme Court, the Court of Appeal considered the trial judge's directions on s 24 of the *Code* in *R v Lacey*.[73] The directions by the trial judge on s 24 were cited, and relevantly included:[74]

> "…there's no burden on the defendant to prove that he made a mistake of fact. It's the prosecution who must satisfy you beyond reasonable doubt that he did not do so."

No misdirection was identified, and the appeal against conviction was unanimously dismissed.

[43] More recently, the Court of Appeal considered the trial judge's directions on s 24 in *R v Perham*, who, in summing up to the jury said:[75]

> "Has the prosecution proved beyond reasonable doubt that there was no reasonable basis on the evidence for the defendant's assertion that he honestly and reasonably had a mistaken belief…"

While the Court considered a specific factual issue, it was held there was no misdirection on mistake of fact.

[44] The position at common law is similar. The onus of proof is upon the prosecution to negative a defence of honest and reasonable mistake of fact beyond reasonable doubt. Doubtless the position is subject to particular statutory exemption. This point was settled by the High Court in *He Kaw Teh v The Queen*.[76] In *R v Sheehan*,[77] McMurdo P and Thomas JA said:[78]

> "*He Kaw Teh* is clear, persuasive and binding authority in Australia that at common law the onus is ordinarily on the prosecution to

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71 *Brimblecombe v Duncan, Ex parte Duncan* [1958] Qd R 8 at 12.
72 Ibid at 23.
73 *R v Lacey; Ex parte A-G (Qld)* [2009] QCA 274. The matter considered whether the directions were inadequate and whether there was a failure to put the appellant's case to the jury.
74 Ibid at [64].
75 [2016] QCA 123 at [22].
76 (1985) 157 CLR 523 at 534-535.
77 [2001] 1 Qd R 198 at 208 ('*Sheehan*').
78 Ibid.

> negative the defence of honest and reasonable mistake of fact, once raised, beyond reasonable doubt."

It should be noted that in *Sheehan* their Honours noted the position under s 24 of the *Code* without any suggestion that the position established in *Brimblecombe v Duncan* might be doubted.[79]

[45] These authorities are clear and consistent: when raised on the evidence by a defendant, the onus is on the prosecution to disprove, beyond reasonable doubt, that the defendant had an honest and reasonable, but mistaken belief.

[46] Not only does the submission made by the respondent fly in the face of established authority it fails to confront the statutory context that s 304(7), which forms but one part of the section concerning provocation, on its face has no apparent connection with s 24 of the *Code* that concerns mistake of fact. It cannot go without comment that, in this case, mistake of fact arose in the context of not only provocation but also self defence. Thus the learned trial judge was obliged, as he did, to give directions upon both provocation (which because of s 304(7) there was an onus on the defendant) and self defence (where the onus was on the prosecution to negative it beyond reasonable doubt). Nothing in the drafting of s 304(7), nor in its context within the *Code*, suggests that it was part of the intention of Parliament that it was to have any effect upon the operation of s 24, and where the onus of proof lay in a trial on a charge of murder where the circumstances raised provocation in the context of an operative mistake of fact. Thus it was necessary, as his Honour recognised, for the jury to be directed that in the consideration of the asserted provocation the onus of proof in respect of whether the appellant killed the deceased in the heat of passion that s 304(1) speaks of lay upon the appellant, but that in considering whether the "heat of passion" was caused or brought about by a mistake of fact the onus was on the prosecution to prove, beyond reasonable doubt, that there was no mistake of fact. The contention made by the respondent should be rejected.

The proviso?

[47] What follows is, in light of my conclusions, strictly speaking, not necessary but I will address it out of an abundance of caution.

[48] Where there has been an irregularity at trial, (either by a misdirection by the trial judge, or the improper admission or exclusion of evidence, or otherwise) and an appellant may otherwise be successful in their appeal under s 668E(1) of the *Code*, the Court may dismiss the appeal if the proviso applies. Section 668E(1A) of the *Code* provides:

> "However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[49] The task for the court is to consider whether a substantial miscarriage of justice has actually occurred. Whether there has been a substantial miscarriage is *not* to be determined by "attempting to predict what a jury (whether the jury at trial or some

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79 Ibid at [44] at fn 51.

hypothetical future jury) would or might do".[80] As was formulated by the unanimous majority in *Weiss v The Queen*, there are no "absolute rules or singular tests that are to be applied", however, there are three "fundamental principles":[81]

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

[50] In deciding whether there has been a miscarriage of justice, the appellate court must take into account the whole of the record of the trial, including the guilty verdict of the jury,[82] and after making its own independent assessment of the evidence the appellate court must determine whether the accused was proved to be guilty beyond reasonable doubt. If the court cannot be satisfied to the requisite degree, the proviso cannot apply.[83] These statements were reinforced in *Cesan v The Queen*,[84] where Hayne, Crennan and Kiefel JJ said:[85]

> "125 In *Wilde v The Queen*, reference was made to the possibility that some errors occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the proviso. The appellants submitted, both in the Court of Criminal Appeal and in this Court, that these cases were of this kind. That is, the appellants submitted that the inattention of the trial judge at various times during the trial meant that there was no trial by judge and jury.
>
> 126 But just as the application of the proviso is not to be determined by deduction from expressions which attempt to describe the operation of the statutory language in other words, what was said in *Wilde* is not to be taken as if it were a judicially determined exception grafted upon the otherwise general words of the relevant statute. And the application of the proviso is not to be determined according only to whether the form of expression used in *Wilde*, or some other conclusive statement, appears to be an apt description of the course of the trial. Rather, it is necessary to have regard to the miscarriage of justice that has been identified.
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> 127 In these cases the miscarriage lies in the distraction of members of the jury from their task. And because that is the miscarriage of justice that occurred in these cases, it is not possible to conclude, on the written record of the trial, that the

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80 *Weiss v The Queen* (2005) 224 CLR 300; (2005) ALR 662; [2005] HCA 81 at [35] ('*Weiss*').

81 Ibid at [39], [42]. See also *Cesan v The Queen* (2008) 236 CLR 358; (2008) 250 ALR 192; [2008] HCA 52 at [123] ('*Cesan*').

82 *Weiss* at [43].

83 Ibid at [41].

84 *Cesan; Mas Rivadavia v The Queen* (2008) 236 CLR 358; (2008) 250 ALR 192; [2008] HCA 52.

85 Ibid at [125].

> evidence properly admitted at trial proved the appellants guilty beyond reasonable doubt. As noted earlier, forming that conclusion is a necessary condition for applying the proviso.
>
> 128 In *Weiss*, the Court pointed out that, in considering the application of the proviso, an appellate court's task "must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict" (emphasis in original). But in undertaking that task an appellate court must be conscious of the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record of the trial.
>
> 129 In many cases where the proviso is to be considered, the fact that the jury returned a guilty verdict will indicate rejection of any explanation proffered by the accused in evidence. In the present cases, however, the relevant hypothesis is that the jury did not pay attention to all of the evidence led at trial. In particular, the jury was distracted when one of the two accused persons was giving his evidence. In those circumstances, it is not possible, in these cases, to place any weight upon the fact that the jury returned its verdicts of guilty."
>
> (Footnotes omitted)

[51] I am not persuaded that if his Honour misdirected the jury that in the circumstances a miscarriage of justice has occurred. The particular issues of fact and law arose only if the jury had concluded beyond reasonable doubt that the appellant was otherwise guilty of murder, which was of course their verdict. To have reached that conclusion the jury necessarily had to be persuaded beyond reasonable doubt that the appellant did not act in self defence. In this case the defence of self defence was inextricably entwined with the contentious mistake of fact. This can be seen from the explanation of the appellant in his record of interview.[86] Thus consistent with his Honour's directions upon s 24 in the context of self defence the jury must have been persuaded beyond reasonable doubt that both the s 24 issue and self defence had been disproved by the prosecution. This is the same mistake that his Honour addressed in the context of provocation. His Honour correctly directed upon provocation thus the only direction impugned is that concerning an issue which the jury's verdict demonstrates was concluded against the appellant beyond reasonable doubt.

[52] To meet this conclusion it was contended that the jury might have resolved the issue of self defence upon another ground other than that mentioned. I have read the record of the trial, examined the exhibits and played the appellant's electronically recorded record of interview. To assert that the jury might have rejected the defence of self defence for a reason other than that the appellant was not operating under a mistake of fact is so remote as to be, in the context of the trial, metaphysical.

[53] The appeal should be dismissed.

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86 Quoted at [14] above.