SUPREME COURT OF QUEENSLAND

CITATION:	*R v Murray* [2018] QCA 57
PARTIES:	**R** **v** **MURRAY, Hamish Stewart** (appellant)
FILE NO/S:	CA No 103 of 2017 SC No 34 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 20 April 2017 (Henry J)
DELIVERED ON:	29 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2018
JUDGES:	Morrison and Philippides JJA and Boddice J
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was charged with one count of murder and manslaughter in the alternative – where the appellant was found guilty of murder – where the trial judge left the defence of compulsion for the jury's consideration for the charge of murder and the alternative charge of manslaughter – whether it was a misdirection to leave the defence of compulsion to the jury for the charge of murder and the alternative charge of manslaughter – where trial counsel could not identify any disadvantage to the appellant in leaving the defence of compulsion to the jury CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the trial judge directed the jury that for the defences of self-defence, compulsion and accident to apply, the jury must accept the appellant's account as true or possibly true – whether it was a misdirection to tell the jury that they must accept the appellant's account as true or possibly true having the result that the jury were not able to engage in their crucial

role of making their own determination of the facts

Criminal Code (Qld), s 31

Liberato v The Queen (1985) 159 CLR 507; [1985] HCA 66, considered
Murray v The Queen (2002) 211 CLR 193; [2002] HCA 26, considered
Pickering v The Queen (2017) 91 ALJR 590; [2017] HCA 17, considered
R v Murray [2016] QCA 342, cited
R v Pickering [2016] QCA 124, considered
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, considered
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: A Edwards for the appellant (pro bono)
D C Boyle for the respondent

SOLICITORS: Lucas Chambers for the appellant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with the reasons of Philippides JA and the order her Honour proposes.

[2] **PHILIPPIDES JA:** On 20 April 2017, after a six day trial,[1] the appellant was convicted of one count of murder. The appellant appeals that conviction on the grounds that the trial judge:

1. erred in giving truncated and inadequate directions as to s 31 of the *Criminal Code Act* 1899 (Qld) (the Code), thereby occasioning a miscarriage of justice; and

2. erred in directing the jury that the defences of self-defence, compulsion and accident could only apply in circumstances where the jury accepted the appellant's account as true or possibly true.

The evidence at trial

[3] There was no dispute at the trial that the deceased was killed by the appellant on 28 November 2012 in a converted garage at Hartley Street, Cairns. The real issue for determination by the jury concerned the circumstances in which the deceased was killed.

[4] The Crown case on that issue turned largely on the evidence of Marnie Peckham. She lived in the converted garage at Hartley Street together with her 17 year old son, Jacob Elliott. Ms Peckham gave two statements to police. In the second statement, given about three weeks after the first, she stated that her previous statement had been false and provided an account of what occurred, which she said was the truth. She also directed police to a secluded location in an area of mangroves where she said the deceased's body had been dumped and where the skeletal remains of the deceased were located.

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1 The hearing was a retrial following the decision in *R v Murray* [2016] QCA 342.

[5] Ms Peckham entered a plea of guilty to being an accessory after the fact to murder on the basis of her admission made in the second statement that she helped dispose of the deceased's body and clean up the garage. She received a reduced sentence for cooperation in the prosecution of the appellant of five years imprisonment with parole eligibility after two years, reduced from nine years imprisonment with parole eligibility after three years.[2]

[6] Ms Peckham gave evidence that she met the appellant and the deceased about three weeks before the deceased's death and that they had become associated through the use of methylamphetamine. Ms Peckham and the appellant were sporadically engaged in a sexual relationship. About two weeks before the deceased's death, all three, together with others, travelled to Mareeba to sell $1,300 worth of drugs to a person who lived there called Jackie Taylor (a friend of Ms Peckham). On returning from Mareeba, Ms Peckham stayed at the appellant's place, sleeping on the lounge, from that Sunday evening until the morning of the deceased's death on the following Wednesday.

[7] Ms Taylor gave evidence that, on the Sunday night, she was with the deceased when he had a conversation over the phone with the appellant. The deceased appeared to have an oral disagreement with the appellant which continued over text messages. Ms Taylor said the deceased showed her a text message, saying that the appellant's wife would find out what the appellant was up to with Ms Peckham. She said the deceased was very angry after the exchange.

[8] Ms Peckham's evidence was that, on the following Monday, the appellant spoke to her about the text messages. The appellant told Ms Peckham that the deceased had sent him a text message saying that he was "going to tell everybody what he [the appellant] was". She said that the appellant was angry. The next day, Tuesday, the appellant told Ms Peckham he had received another text message from the deceased apologising and asking to meet up. Ms Peckham said the appellant was still unhappy. That night, the appellant spoke to Mick Green, who said that he was at Ms Peckham's place with the deceased. Ms Peckham did not want anyone at her place while her son and his friends were there. She told the appellant to tell Mr Green that no one was to be there while she was gone. Ms Peckham said that that night, she and the appellant, and another person named Mark, all used drugs at the appellant's place and that she and the appellant stayed up all night.

[9] Jacob Elliott gave evidence that, on the Tuesday night, the deceased slept at Ms Peckham's place on a recliner.

[10] Ms Peckham said that at about 6.00 am on Wednesday, the appellant told her he wanted to go and speak to the deceased about the text messages. She, the appellant and Mark went in the appellant's four-wheel drive to Ms Peckham's place, stopping off on the way at Mark's place and at a service station. Ms Peckham said that, at the service station, the appellant gave her some money telling her to give it to the boys (Jacob and his friends) and get them out of the house. The service station was near Ms Peckham's house and she walked the rest of the way home. (On the appellant's version, he then dropped Mark off to meet a friend.) When she got home, Ms Peckham saw the deceased was asleep on a recliner chair near the dining table.

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[2] She had also received a use-derivative-use undertaking to cover her evidence in relation to her illicit drug activity.

[11] Soon after, Ms Peckham went outside and found the appellant parked around the corner (on the Crown case, in a position to see people coming and going). This was unlike previous visits when he had parked out the front. She spoke to him and said that the deceased was there and to "come in and see [him]". He said "No" and that he wanted her "to get the boys out of that house". They argued about that a bit, but the appellant told her, "You've got to get them out of the house". Ms Peckham went back inside and gave Jacob money and told him and the other boys to go out for an hour, which they did. Ms Peckham and Jacob both gave evidence that at that stage the deceased was still asleep on the recliner.

[12] After the boys left, Ms Peckham went upstairs to her mother and sister and talked for about 15 minutes. She looked out a window and saw the appellant had reversed his car close up to where the garage door space was. She said she saw the appellant talking with Mark on the driver's side. (The appellant's evidence was that he had dropped Mark somewhere else earlier. Ms Peckham did not give evidence of seeing Mark again.)

[13] About half an hour later, Ms Peckham went downstairs. She had not heard anything from downstairs in that time. She saw the appellant with blood on him and a hammer in his left hand staring at the deceased, who was seated in the recliner chair covered in blood and moaning. The deceased had silver duct tape, about eight to 10 centimetres wide, wrapped around his eyes and around his head. The recliner was in the upright position and was also bloody. It was near a table and in the centre of the room. There was "a fair bit of blood everywhere". The deceased was moaning "fairly softly, not very loud".

[14] Ms Peckham asked the appellant what had happened but he did not respond. Ms Peckham went into the garage, closed the door, and sat there for 10 minutes. Whilst there, she heard "a thumping sound" and the deceased's moaning "would either get louder or it would change". She heard about five thumps. When Ms Peckham returned to the room, the deceased was off the recliner and lying on her bed, face-up, still taped. She could hear him breathing. He was starting to make a "gurgling sound". The appellant was "picking stuff up" (clothes, blankets) which had blood on it and putting it in bags. The appellant told her that she had to help him clean up. She said that, when she was cleaning up, she saw the hammer on the table and hid it in a bag. The appellant asked her where the hammer was and he retrieved it. Her son knocked on the roller door of the garage and she went outside to him and tried to talk him out of coming inside, but he refused to listen. She said that there had been a fight and took him inside to the bathroom. While in the bathroom with Jacob, she could hear the appellant hitting the deceased, which she described as a loud thumping noise. She heard that about four times and also heard the deceased crying. He was not moaning but making a gurgling sound. She did not notice any injuries on the appellant, nor that he had a strained voice or that his voice was any different from his usual voice.

[15] Jacob Elliott gave evidence that when he went into the garage, he noticed the motorbike was gone. He also saw blood on the ground as he walked to the bathroom, where he smoked marijuana to try to calm himself. He could hear moaning coming from the direction of the lounge room and then heard a hitting noise. (He agreed in cross examination that he had not mentioned hearing a hitting sound in his police statement or at the committal proceeding where he had testified that he heard only moaning but not a hitting or striking sound.) Jacob Elliott also

gave evidence that, in the aftermath, he saw a hammer that he had stolen was on the floor and that it had blood and skin on it. He said he had last seen it hanging from the metal bracket of the ceiling rafter in the downstairs room.

[16] Ms Peckham gave evidence that the appellant had rolled the deceased up in a rug and then she helped to load him into the rear of the appellant's truck (parts of this were seen by Jacob). Ms Peckham said she drove the truck and the appellant directed her where to go. At some stage of the trip, he said something about putting the deceased where someone might find him. On her evidence, both she and the appellant thought the deceased was still alive at this stage. She said that, when the appellant got out and opened up the back of the truck, he said words that tended to indicate his surprise that the deceased was dead. The appellant removed the deceased from the back of the car and dragged him towards the mangroves. He removed the deceased's clothing and gave it to Ms Peckham. The clothing had blood on it and she put it in the back of the car. Ms Peckham said she and the appellant then returned to her place at Hartley Street.

[17] Jacob Elliott saw their return. He said that they cleaned up, moved furniture that had blood on it and mopped up blood. He said blood was all over the house, all through the living room and all through the kitchen.

[18] Ms Peckham gave evidence that the appellant used bleach to clean the walls, floor and recliner and was wearing latex gloves from his car at one stage. She went and bought more bleach and a mop on the appellant's request and then helped clean. The appellant found the deceased's phone in the recliner and kept it. The appellant had a shower with his clothes on and later changed into some of Jacob Elliott's clothes. She said that the appellant collected together the bloodied items, including the bed mattress, and took them away and burned them. She went with him, but stayed in the car when he did so, and saw the smoke.

[19] Ms Peckham stayed at the appellant's place through to the Friday when they returned to Hartley Street and removed the beds and recliners using a white ute.

The forensic evidence

[20] The deceased's remains were largely skeletal, the soft tissues being, for the most part, no longer in existence.

[21] The forensic pathologist, Dr Botterill, gave evidence that the cause of death was several fractures to the skull. There were fractures to both cheek bones. One fracture to the skull was an especially large defect (hole) over the left side of the skull and about 14 centimetres, extending from underneath the left temple region to just behind the left ear. There were factures of the skull that extended in a radiating direction from that hole. One fracture radiated to the back of the skull. Some fractures were secondary fractures occurring from force applied to an already fractured area. Dr Botterill described the force required to cause the injuries as "usually quite significant" and "more than moderate force".

[22] Dr Botterill preferred, as the more likely explanation, that the head injuries were the product of a number of contacts; he thought at least five or six points of contact. Dr Botterill agreed that blows with the side of the hammer could have generated multiple points of contact and thus multiple fractures. It was suggested, in cross examination, that the collection of injuries was consistent with a scenario of two

contacts to the left side of his head with the side of the hammer, followed by the deceased hitting the back of his head against the wall (as a result of being pushed hard against the wall) and, falling headfirst onto the edge of a low table, and then onto the tiled floor. Dr Botterill said that it was "possible" that two contacts with the hammer to the side of the skull might explain the large hole, and that in "an extraordinary circumstance" there would be radiating fractures associated with such contact. His view was that it "would be unusual for two blows alone" to explain the radiating fractures (in three directions). He described it as "very unlikely… but … conceivable".

[23] The toxicology results detected that the deceased had consumed methylamphetamine and, most likely, that it was recent use. The recognised side effects included agitation, aggression, paranoia, and disordered thinking.

[24] Sergeant Leslie Walker gave evidence of a forensic examination of the downstairs of the house which revealed blood staining, including projected blood, on the walls. There was evidence of a clean up. Swabs of the appellant's car found the deceased's blood on the back of the seat directly behind the driver's seat. Disposable gloves were found at the Hartley Street residence. Property belonging to the deceased located there included two syringes. She also located the remnants of some furniture at a bush location near Taylor Point Lookout, including the remains of mattresses and recliner chairs down a cliff face.

The appellant's evidence

[25] The appellant gave evidence that he met the deceased in late 2011 and assisted him with finding work and that the deceased had stayed with him for a short time. He gave evidence that the deceased texted him again in late 2012. The appellant gave evidence of going on the trip to Mareeba. His evidence, however, was that he was going for a swim and that it was Ms Peckham and the deceased who were there to sell drugs.

[26] The appellant gave evidence of speaking with the deceased on the Sunday night but said that there was no unpleasantness involved; the deceased was simply asking him if there was any work. He denied any text communication and conversations with Ms Peckham about any text messages.

[27] The appellant accepted he was a user of methylamphetamine, but denied using drugs or staying up all night the night before the killing.

[28] The appellant said the purpose of the trip to Ms Peckham's house on the Wednesday was in response to Ms Peckham asking for a lift home and that it was an opportunity for him to get a mini motorcycle, in which he had some interest, from her house. The appellant said the money he gave to Ms Peckham at the service station was payment for the motorcycle. He denied parking around the corner or telling Ms Peckham to get the boys out of the house. He said that he reversed straight up to the residence at Hartley Street to pick up the motorcycle. The appellant said that, when he went inside, he saw the deceased in the kitchen in the process of injecting drugs. He told the deceased he was looking for the motorbike and that Ms Peckham was not happy with the deceased being there. He said he could see that the deceased had an immediate reaction to the drugs. The deceased became belligerent and aggressive in response to the appellant's remarks. He attacked the appellant, punching him in the

sternum and winding him. The deceased then grabbed the appellant in a choke hold until the appellant lost consciousness. When the appellant came to, he was on the floor.

[29] The appellant said he started to get up, but the deceased put his knee in the appellant's chest, keeping him down and then held the appellant down. The appellant said the deceased began to choke the appellant with both hands and that he was suffocating and could not free himself. The appellant saw a hammer on the ground nearby and hit the deceased in the head with the side of the hammer head. He said that that seemed to enrage the deceased even more and that the deceased choked him harder, even though blood was coming out of the side of the deceased's head. The appellant said that "[o]ut of desperation" he struck the deceased again with the hammer as "hard as [he] could". He said that he hit the deceased on each occasion to save his own life. The second blow seemed to stun the deceased. At that stage, the deceased released his grip and stood up bleeding profusely. The appellant then stood up and dropped the hammer, backing away from the deceased.

[30] The appellant said that the deceased "then fixated" on him again and charged at him. The appellant said he instinctively used "a hip and shoulder football-style bump" to knock the deceased away. The appellant's evidence was that the deceased "flew backwards with great force" into a concrete wall. There was a heavy thud and the back of the deceased's head made a whiplash-type motion as it struck the wall. The deceased's eyes rolled back and he "freefell forwards", with his face hitting a small table. He then fell to the ground, which was tiled.

[31] The appellant said that the deceased was unconscious and that he sat him up against the bed. He was breathing quite heavily and making "a snoring-type sound". As the deceased was bleeding, he applied a sock to the bleeding area, using tape from the kitchen to secure it to the deceased's head. The appellant said that Ms Peckham came downstairs, but denied still being armed at that stage. He also denied inflicting any further blows.

[32] The appellant said that, when Ms Peckham arrived, he was wiping up some blood from the floor. He said he did that because he "felt obliged to, sort of, clean up some of the mess that was there". Ms Peckham asked what had happened and he told her that the deceased had tried to kill him. He was not able to speak in a normal voice because his "voice box was still quite affected from … being choked". He said he initially wanted to leave straight away and get as far away as possible. However, Ms Peckham said she wanted the deceased out of the house, saying "We need to get him out". The appellant said he moved the deceased onto a rug and into his car. His evidence was that the deceased was unconscious but breathing. He said he did not think the deceased's life was in danger. He thought the deceased was experiencing symptoms similar to football field concussions.

[33] The appellant said Ms Peckham drove the car because he was scared that the deceased "would come to again and start attacking [him] again" and so he sat in the back seat. He said he thought they were taking the deceased to the nearest bus stop. He said he was in a great deal of shock at the time and was not thinking clearly. The only direction he gave Ms Peckham was that they should head out of Cairns on the southern access road. Within a few minutes, they had come to a dead end street where there was a grassy area and trees. He said that at that stage he panicked; he just wanted the deceased as far away from him as possible. He mentioned to Ms

Peckham that "[they'd] put him next to the trees in the shade". When the car stopped, he checked on the deceased and found he was no longer breathing. He pulled him out of the car and began CPR compressions and "conducted a few breaths". The deceased was unresponsive, pale and motionless. He dragged the deceased's body to an embankment at the edge of the tree line. They then returned to Hartley Street with the appellant driving.

[34] The appellant said he did not call an ambulance or call for help because he was in an "absolute – greatest state of shock [he'd] ever been in [his] life" and "wasn't thinking at all" due to the trauma he had experienced "from being choked unconscious" and his life being "in extreme peril". When they arrived at Ms Peckham's house, he saw Jacob. He was yelling and screaming at his mother. The appellant cleaned up blood on the floor using a mop and some cleaning products. At one stage he wore gloves. He also showered with his clothes on to wash off the blood on them. He left with Ms Peckham, taking two bags of the towels they had used.

[35] Two days later, he returned to Hartley Street. Ms Peckham told him to return to dispose of the mattress and the recliner chairs, which he burnt at Taylor's Point.

Ground 1 - Error in directions on compulsion

[36] Ground 1 was understandably not pressed strenuously in oral argument and may be disposed of briefly. At the time of the trial, the law, as stated by this Court in *R v Pickering*,[3] that compulsion should not be left to the jury in a manslaughter or murder case, was the subject of a reserved decision in the High Court. The trial judge refused an adjournment of the trial pending the delivery of the High Court's decision but determined, with some hesitation, to leave the defence of compulsion for the jury's consideration in relation to the counts of murder and manslaughter. Prior to doing so, however, his Honour sought counsel's submissions, being concerned to ensure no unfairness in the conduct of the trial. Trial counsel could not identify any disadvantage to the defence in the proposed course. A direction on compulsion had not been sought by defence at trial and no redirections were sought following the summing up.

[37] The subsequent decision of the High Court in *Pickering v The Queen*[4] confirmed the defence was properly left for the jury's consideration in respect of manslaughter but was not available in respect of the murder count.

[38] The appellant criticised the compulsion direction as "brief and made little reference to the facts". However, as the respondent submitted, the directions on compulsion followed detailed directions on self-defence. In the circumstances, it was unnecessary to repeat the same factual matters. There can be no basis of complaint in respect of the sufficiency of the directions given on the manslaughter count. As to the count of murder, while it was an error to leave the defence of compulsion, that course was favourable to the appellant and no prejudice to the appellant has been identified by the directions given in that regard. Ground 1 is without substance and must fail.

Ground 2 – Misdirection as to the appellant's account as true or possibly true

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3 [2016] QCA 124.

4 (2017) 91 ALJR 590.

The appellant's submissions

[39] The appellant argued that it was a misdirection to tell the jury that, for any defences to apply, they must either accept the appellant's account as true or possibly true. It was submitted that the direction had the result that an alternative position was not explained to the jury, being that, as the final arbiters of the facts, they were entitled to accept part of the appellant's version as true and reject other parts and that they were to apply the law, particularly in relation to defences, according to the facts as they found them to be, taking into account those parts of the prosecution case which they accepted and those parts of the appellant's evidence which they accepted. The contention made was that, in relation to the issue of the defences required to be excluded by the prosecution, at no stage was it left open to the jury to decide whether they accepted *parts* of what the appellant said and rejected other parts or to come to their own determination of the facts to which the defences should then be applied.

[40] Acknowledging that the trial judge took the jury through the evidence in some detail and reminded them that there were real differences between the version of the appellant and, in particular, Ms Peckham, which he identified, the appellant argued, citing *Murray v The Queen*,[5] that the trial judge, nevertheless, by his directions "effectively and impermissibly invited the jury to decide between the appellant's version as a whole when compared with the prosecution's version". The directions did not leave open the jury's entitlement, recognised in *Stevens v The Queen*,[6] to refuse to accept the cases of the parties and "work out for themselves a view of the case which did not exactly represent what either party said".

[41] In advancing this ground of appeal, counsel referred to the following directions, given by the trial judge when dealing with the defences:

> "In turning to self-defence, compulsion and accident, I make the point, if it's not already clear, that I'm doing so in the context of you either accepting the [appellant's] account, or being left in a state of doubt and considering it remains possibly open as true. That is, that it's not excluded beyond a reasonable doubt. It's in that context that these potential defences arise. The fact that I'm explaining them should not be taken as any endorsement by me of whether or not you should accept the Crown case or the defence case. It's simply my job to explain all potential scenarios because I'm not to know what you're thinking."

[42] The trial judge also directed in his summing up:

> "Here, members of the jury – and this really, I think, makes it quite simple for you in considering the defence, which I've taken the time to break down, but … here, the prosecution seek to exclude self-defence by arguing that the [appellant's] account is just a concoction, dreamt up to weave in an account to match the known facts. That it's a lie. That the truth is, as Marnie Peckham's evidence suggests by inference, namely that the [appellant] attacked and blindfolded [the deceased] while he was defenceless in the recliner chair. This is not

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5 (2002) 211 CLR 193 at 201, 212.

6 (2005) 227 CLR 319 at 330.

> a case of the prosecution saying, well, if it happened like the [appellant] says, the description still falls short of self-defence. You might think, and this is a comment, because ultimately this is a matter for you, but you might think if it happened as the defence says it did, then he did act in self-defence, as defined, and ought be acquitted."

[43] The appellant pointed to other similar directions given by the trial judge when dealing specifically with self-defence, compulsion and accident, inviting the jury to decide between the appellant's account and, largely, Ms Peckham's account and directing that the defences only applied if the appellant's account was accepted as true or possibly true. The appellant accepted that, at other points of the summing up, the trial judge did tell the jury that they were to decide the facts and, if they rejected the appellant's account, that that did not lead inexorably to a finding of guilt. It was, nevertheless, contended that, in relation to the defences, his Honour specifically directed the jury that to apply they would have to accept the appellant's account as true or possibly true.

[44] It was argued that the appellant's account enjoyed some support from the prosecution evidence. Thus, consistently with the appellant's evidence that the deceased had just used methylamphetamine, the toxicology evidence supported the presence of methylamphetamine in the deceased's system. The jury would have been entitled to reason, it was argued, that that was probably inconsistent with a suggestion that he was asleep in the recliner the whole time, and attacked there whilst asleep or defenceless as was the Crown case. Further, the Crown case was that the appellant had not brought the hammer with him to the scene, and, additionally, Ms Peckham supported the appellant's account that he was surprised the deceased was dead. Moreover, it was submitted that the descriptions of Ms Peckham and Jacob Elliott that blood was everywhere, not just near the recliner, may also have entitled the jury to conclude that the appellant's evidence in part enjoyed some support, particularly in relation to the earlier blows.

[45] It was also submitted that the evidence of blows being struck fell into two relatively distinct categories. There was a period of half an hour, while Ms Peckham was upstairs and Jacob Elliott was absent, when no prosecution witnesses saw or heard what occurred. There were further blows alleged in the period after Ms Peckham and Jacob Elliott were in the bathroom, which were denied by the appellant. It was argued that when the fatal blows were struck was a matter for the jury. It was argued that, whether the jury accepted part of what the appellant said and rejected other parts, would necessarily have had an effect on the application of the defences. The jury were told that they could either accept the appellant's version as true or possibly true, or reject it, but not told they could accept only part of it as true. That was a misdirection and did not allow the jury to engage in their crucial function of determining the facts.

[46] In those circumstances, it was contended that the misdirection caused a substantial miscarriage of justice in that the appellant thus lost a real chance of an acquittal.[7] It was not possible to conclude that "on the whole of the facts and with a correct

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7 *TKWJ v The Queen* (2002) 212 CLR 124 at [65]-[68].

direction, the only reasonable and proper verdict would be one of guilty".[8] This was said to be particularly so in the present case, where there is the natural limitation on this Court in not having seen the appellant or Ms Peckham give evidence.[9] Accordingly, it was submitted that the verdict should be quashed and a retrial ordered.

Consideration

[47] The appellant's contention that the trial judge misdirected the jury is unfounded.

[48] In the general directions, the jury were correctly directed as to the burden and standard of proof. The oral and written directions made it clear that the Crown was required to prove each element of the offence and to negate any defence beyond a reasonable doubt. There is no complaint made by the appellant in that regard. The appellant acknowledged that the trial judge gave the usual, orthodox directions as to *Liberato v The Queen*,[10] and that it was for the jury to accept all, part or none of what a witness said.

[49] The difficulty for the appellant in relation to ground 2, is that the directions given as to the appellant's evidence reflected the fact that the defences could only reasonably arise from the evidence of the appellant; that is, the only basis on which the defences could not be excluded was if the appellant's evidence was accepted or not able to be rejected. There was no evidence from any of the Crown witnesses which independently established the basis for the applicability of any defence. It may be accepted that there was Crown evidence which supported aspects of the appellant's case, but it did not independently raise any defence. With that qualification, the relevant defences, as counsel correctly conceded on appeal, rested on the evidence of the appellant, that he was attacked by the deceased and acted in self-defence in the scenario described by him, being accepted as true or possibly true. This was not a case like *Stevens* or *Murray* where a part of the appellant's evidence and a part of the contrary prosecution evidence could be combined by the jury to form a view of the facts whereby a reasonable doubt as to guilt resulted.

[50] That reality was reflected in the trial judge prefacing his summing up concerning the matter of the defences by observing:

> "Can I highlight some general principles and general matters. Firstly, the conversation I'm about to have arises out of the evidence given by [the appellant]. It doesn't arise by implication from the account of Ms Peckham, which suggests that rather than [the appellant] being attacked, [he], instead assailed a defenceless man in a recliner chair."

[51] The trial judge thus continued his direction by adding:

> "So in the event you consider that the [appellant's] account of what occurred between he and [the deceased], is credible and reliable, or if you're in that grey zone I mentioned earlier, wherein you're in a state of reasonable doubt either way, so that it still remains possibly true,

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8 *Simic v The Queen* (1980) 144 CLR 319 at 331 referring to *R v Cohen and Bateman* (1909) 2 Cr App R 197 at 207.

9 *R v Murray* [2016] QCA 342 at [39] per McMurdo JA.

10 (1985) 159 CLR 507.

> it would be necessary for you to consider certain defences that arise on his account."

[52] The reference to a "grey zone" was a reference to an earlier direction concerning the position where the defence evidence was not accepted as convincing but left the jury "in a state of reasonable doubt as to what the true position was". As the respondent submitted, there was no misdirection in directing the jury that the appellant's account needed to be excluded beyond a reasonable doubt to exclude the defence. To that extent, the statements of "possible" truth were qualified by his Honour emphasising that the prosecution was required to prove its case, and negate any defence, beyond a reasonable doubt.[11]

[53] Given that the defences arose on the appellant's evidence, his Honour directed the jury in the following terms:

> "In turning to self-defence, compulsion and accident, I make the point, if it's not already clear, that I'm doing so in the context of you either accepting the [appellant's] account, or being left in a state of doubt and considering it remains possibly open as true. That is, that it's not excluded beyond a reasonable doubt."

[54] The trial judge directed the jury in such terms in respect of each defence. After giving specific directions on the three defences, his Honour stated:

> "Pulling back, all three of them arise out of his account. And their potential application and your view of whether they've been excluded beyond reasonable doubt, turns very much upon whether or not you accept his account is true, or you are of a view that it may possibly be true, in other words, that his account has not been excluded beyond reasonable doubt. I remind you, it is for the prosecution to exclude such defences. Not for the charged citizen to prove them. And the prosecution must exclude them beyond reasonable doubt."

[55] The jury were directed on numerous occasions that they were the sole judges of the facts. In the general directions, the jury were told they could accept all, part or none of what a witness says. It was unnecessary to repeat that direction when dealing with each specific defence, the real question was that which the quoted directions addressed; whether the appellant's evidence was able to be accepted or, at least, left the jury with a reasonable doubt as to whether a defence could be excluded beyond a reasonable doubt. As the trial judge correctly directed the jury:

> "So you can see, members of the jury, that throughout there are elements of what are said that are in plain competition with each other, and they are of some significance in telling the story as to what actually happened downstairs. Deciding where the truth lies, as to what evidence you find reliable, who you believe and who you do not believe, whose evidence you act on, and what parts of the evidence you act on is your province."

Order

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[11] cf *Murray v The Queen* (2002) 211 CLR 193 at [23] and [57].

[56] In my view, the appeal should be dismissed.

[57] **BODDICE J:** I agree with Philippides JA.