SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kruithof* [2018] QCA 119
PARTIES:	**R** **v** **KRUITHOF, Dallin James** (appellant)
FILE NO/S:	CA No 23 of 2017 SC No 1034 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 9 February 2017 (Ann Lyons J)
DELIVERED ON:	12 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2017
JUDGES:	Sofronoff P and Fraser JA and Boddice J
ORDER:	**Dismiss the appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant was convicted by a jury of murder – where the appellant formally admitted at trial that the appellant fired the four shots and that they caused the death of the deceased – where there were a number of recordings of conversations between the police and the appellant – where one recording was relied upon at trial by both the Crown and defence as evidencing that the appellant said the word "No" – where the appellant argued it was an error to rely on the recording when it was "objectively equivocal and ambiguous" – where the appellant claimed it was "kill or be killed" – where intention remained in issue but the key issue was self-defence – where the Crown argued they relied on post-offence conduct to negative self-defence, not to prove intent – where a key witness gave section 13A evidence to the police and was on drugs at all relevant times – whether there was a miscarriage of justice caused by the primary judge's directions in relation to that particular witness – whether there was a miscarriage of justice caused by the primary judge's failure to direct the jury that they could not use evidence of post-offence conduct as proof of the appellant's intention to kill – whether there was a miscarriage of justice caused by treating a recording as

evidencing that the appellant said the word "No"

Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited

COUNSEL: S Holt QC for the appellant
G P Cash QC for the respondent

SOLICITORS: Bosscher Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** At about 3.30 am on 6 February 2014 residents in a residential street in Tingalpa heard five quick gunshots. A car sped off into the distance without lights. They found a man lying on the road. His name was Russell Mark Johnstone and he had been shot four times. He died from his wounds.

[2] The unchallenged evidence at the trial was that it was the appellant who had shot Russell Johnstone to death and the jury convicted him of murder.

[3] Four bullets, of the five that the appellant had fired, had hit his victim. One bullet had entered the top of Johnstone's head. It had travelled downward through his brain to the base of his skull. Another bullet had entered his upper back between the shoulder blades near the base of the neck. This bullet had also travelled in a downwards direction, towards the right, and towards the front of the chest. The trajectory of these two wounds suggested that Johnstone had been on his knees or seated or bending forward when he was shot. A third bullet entered low down on the left side of Johnstone's chest. It too had travelled in a downwards direction. The fourth bullet had grazed Johnstone's shoulder. The fifth bullet could not be found.

[4] On the night of the shooting the appellant and Johnstone met with one Calvin Clack. The appellant had known Clack from about 2009 and had been seeing him regularly since 2014. He used to purchase ice from him. Clack also knew Johnstone. Clack owed the appellant money and had arranged to meet him on the night of 6 February to repay it. The appellant arrived driving a blue Jaguar. Johnstone was with him. Clack paid the appellant his money and tried to buy more ice from him. The appellant said that he had no drugs to sell. The drugs he had, he said, were missing. In cross-examination Clack said that Johnstone wanted to buy a pump action shot gun. Clack did not have one to sell him but took them to somebody else that night in an ultimately fruitless attempt to buy such a weapon. Clack then went his own way and the other two went theirs.

[5] Late in the afternoon of the next day, Clack and the appellant arranged to meet again. The appellant arrived in the same blue Jaguar. He asked Clack if he had watched the news. He said that he had shot his friend. Clack said, "What over? The missing drugs?" The appellant said, "Yeah." He told Clack that he had found the drugs later in "the kitchen".

[6] He told Clack about the shooting. Clack's evidence was as follows:

> "Did he tell you anything about the shooting?---He said that – yeah – he said that "After you left, they pulled over somewhere and that

> Russell had a gun", and, obviously, he must've had a gun, and that "When they pulled over, they both got out of the car. As they were walking to the back of the car, Russell reached to his shirt to pull out his gun and, before he could pull out his gun, Dallin quickly got out his gun and shot Russell.
>
> Did he say where he'd shot Russell?---In the head.
>
> Did he say anything about shooting Russell?---He said that his gun wasn't big enough.
>
> Why did he say his gun was not big enough?---Because he didn't die quickly enough, I guess, I think.
>
> Is that what Dallin said?---Something on those terms, yeah.
>
> Well, as best you can recall, what was it that Dallin said?---"The gun wasn't big enough". "Cunt wouldn't die", something like that.
>
> Did he say anything else about what had happened between the two of them?---Not that I can recall."

[7] Sometime later, Clack and the appellant met again. The appellant told Clack that he had burned the car and had buried the gun he had used to kill Johnstone.

[8] In cross-examination the appellant's counsel put to Clack that some parts of his memory "may be a bit distorted or a bit mixed up in your recall". Clack gave no distinct response to that proposition but admitted that he might have been mistaken in his evidence that the appellant had said that he had found drugs in the kitchen. He was asked to reaffirm that the appellant had told him that the argument with Johnstone had been about drugs and he did so. He accepted a suggestion that he himself was affected by drugs at the time. Clack reaffirmed that he had been told that there had been "a bit of a standoff" and that the appellant had said that Johnstone "went for his gun, into his pocket or something, to go for his gun" and that the appellant "pulled out his gun and shot him".

[9] The appellant did not go home on the day after he had killed Johnstone. Instead he arranged for family members to look after his dogs and stayed in a motel at Mt Ommaney and then another at Kangaroo Point until 17 February 2014. He bought an airline ticket to Amsterdam and on 17 February 2014 he left Australia and headed to Amsterdam via China. In China he was refused entry and was forced to return to Australia. He was detained by police upon his return here the next day.

[10] It was not until 10 September 2014 that police arranged to interview the appellant. He had been held in custody at Wolston Correctional Centre and was brought to Cleveland Police Station for the purpose of the interview. Senior Constable Warren Gibbs interviewed him. The following exchange took place:

> "SCON GIBBS: Alright. Mate you've also got the right to telephone or speak to a Lawyer of your choice to let 'em know where you are, ah that you're being questioned by Police and attempt to arrange to have one of those persons present during any questioning. You also have the right to telephone or speak to a friend or relative to let 'em know where you are, ah and also that Police wish to speak to you in relation to a matter and to arrange or attempt to arrange to have one of those persons present during any questioning. If you want to speak

to any of those sort of people, whether it's a Lawyer, friend or relative we can postpone any recording for a reasonable time to make those arrangements. Do you understand that?

…

KRUITHOF: I'm just gonna say for the purpose of the interviews um from a big-, a big period of my life before I was arrested-

SCON GIBBS: Mmm.

KRUITHOF: I was using heavily, heavily with Ice.

SCON GIBBS: Mmhmm.

KRUITHOF: And Marijuana and just, it is literally just a blur. My life is just a blur, like I just can't even explain what Ice has done to my brain for those periods of time which I was-, which I was on it, so.

SCON GIBBS: Mmm.

KRUITHOF: I'm gonna be honest and I'm gonna say I-, I cannot say anything further in this interview. I cannot answer any questions because it'll just, yeah it'll, I just can't make sense of anything of my life. I'm innocent of the charge, I know that. I'd remember that. Russell, he was a good mate, love him to death. Love him, you know what I mean? But um yeah. I just cannot comment any further in all respect.

SCON GIBBS: Mmhmm. Is it that um you'd like to speak to someone further?

KRUITHOF: Nah.

SCON GIBBS: No? Do you want to speak to a Lawyer?

KRUITHOF: Nah.

SCON GIBBS: Do you want to speak to a friend or relative?

KRUITHOF: Nup.

SCON GIBBS: No? Okay. So when you say, just explain to me further you said you can't comment further because of how drugs have affected you, your life up until now?

KRUITHOF: I just can't --

SCON GIBBS: Yep.

KRUITHOF: Comment any further than what I just said then.

SCON GIBBS: Okay.

KRUITHOF: Can't talk anymore.

SCON GIBBS: Alright. Alright.

KRUITHOF: Sorry.

SCON GIBBS: No.

KRUITHOF: Sorry fellas."

[11] Senior Constable Gibbs made some open-ended overtures to the appellant to encourage him to keep talking but the appellant said nothing more and the interview ended.

[12] On 24 June 2015 the appellant let police know that he wished to speak to them again. By that stage, as appears from some of the contents of the interview that took place on that day, he had become aware that he would be charged with murder. An indictment charging him with murder was later signed on 30 November 2015. Senior Constable Chris Kidd and Sergeant Marcus Edwards attended at Wolston Correctional Centre and met the appellant. Again, they gave him the necessary warnings. The appellant wanted to know why the process of charging him was being delayed. The two police officers explained that various things had to be done in order to ensure that the brief of evidence was comprehensive and accurate. Senior Constable Kidd said that:

> "…we go to the nth degree to find out, ah, everything that's happened. Okay? Um, and as a result of that, there might be a few bits and pieces that are still outstanding."

[13] The following exchange then took place:

> "KRUITHOF: Yeah, right. [INDISTINCT] anyway, doesn't, at the end of the day, it doesn't really matter. 'Cause I'm [INDISTINCT], going to own up to what I did, you know. And, um , yeah I don't really deserve to be free, to be honest. You know what I mean? So, yeah, I'm s-, I'm just going to take that and just take it on the chin, that is now pretty much.
>
> SCON KIDD: Yeah.
>
> KRUITHOF: Pretty much, yeah. I did shoot my mate Russell.
>
> SCON KIDD: Okay.
>
> KRUITHOF: Yeah.
>
> SCON KIDD: What, what led to it mate? What happened?
>
> KRUITHOF: Oh, just, um, what led towards it? Pretty much drugs.
>
> SCON KIDD: Yep.
>
> KRUITHOF: And we weren't in the right frame of mind. And, um, yeah.
>
> SGT EDWARDS: Is, is there any--
>
> KRUITHOF: There's no real, um, [INDISTINCT] plan wasn't, um, um, [INDISTINCT]. Yeah.
>
> SGT EDWARDS: Was there any particular fight or anything that led to him actually being shot?
>
> KRUITHOF: What's that, what do you mean?
>
> SGT EDWARDS: W-, was there a particular argument or something right at that time that, that led to it?
>
> KRUITHOF: Yeah. Yeah it was over, um, it was over drugs. Yeah. I don't really want to go too really much into it. You know what I mean?

> Like I just, yeah. So that's what happened. I did pull the trigger. And, um, I left because I panicked. Um, I just fucking [INDISTINCT]. When you're on ice, I'm on that much, you know what I mean? Like, you just --
>
> SGT EDWARDS: Mmm.
>
> KRUITHOF: I can't blame it all on the ice. 'Cause I was the only o-, I was the one that pulled the trigger at the end of the day.
>
> SGT EDWARDS: Mmm.
>
> KRUITHOF: But, um, had a big, big role to play in it. The [paranoia] and the, you know, it's fucking, that's what happens when you, when you're in that game and you've got to carry around a fucking gun with you all the time. You know what I mean? Something's going to happen.
>
> SGT EDWARDS: Mmm.
>
> SCON KIDD: Yep.
>
> KRUITHOF: You know?
>
> SCON KIDD: Dangerous combination, hey?
>
> KRUITHOF: It's a dangerous combination. Ego, guns, and fucking--
>
> SCON KIDD: Drugs.
>
> KRUITHOF: It's just drugs. It's just the fucking [INDISTINCT]--
>
> SCON KIDD: Yeah.
>
> KRUITHOF: Yeah [INDISTINCT], like he's, he's [INDISTINCT], he's, I don't know where he is. But hopefully he's in a good place, he might be in a bad place. But why do I deserve to be free. You know? [INDISTINCT] be free."

[14] Senior Constable Kidd suggested that the appellant might be willing to return to Cleveland to speak to Detective Sergeant Gibbs who was the officer actually responsible for compiling the brief of evidence. The appellant would not do that. Sergeant Edwards, in a play upon the appellant's conscience, suggested that the appellant might wish to reveal "the actual truth of the matter so that, you know … it is known so that [Johnstone's family] can have some peace about just how it happened".

[15] This suggestion had some effect. The appellant said:

> "KRUITHOF: Like I was going to, um, I was going to write a letter to Russ's mum, but I s-, I ended up just throwing it out half way through. 'Cause she doesn't want to hear from me. You know what I mean? I took h-, took her son's life. All I think she can know is that I, I got, that, um, that, you know, he did love her. You know what I mean? I, I've read the statement that she said that the last time, he spoke to her was, you know, a bad thing. You know. Wasn't [INDISTINCT] like that. 'Cause we had a conversation about it, but yeah.
>
> SGT EDWARDS: Mmhmm.

KRUITHOF: And she came to peace with, he was at peace with her.

SGT EDWARDS: Mmm.

KRUITHOF: And that's all I've really got to say. [INDISTINCT] say anything else about it."

[16] Sergeant Edwards expressed his disappointment and the appellant said, "Come on, I'm being straight up with youse."

[17] The following exchange then took place:

"SGT EDWARDS: Well, w-, one of the things that's burned a hole in, in the back of my head, is, you know, w-, was Russ shooting at you? Or did Russ, you know, have a go at you first?

KRUITHOF: No. So I'll leave it at that, you know.

SGT EDWARDS: 'Cause that's pretty important obviously as you'd be well aware.

KRUITHOF: No he didn't have a gun on him, no he didn't [INDISTINCT]. [INDISTINCT] a lot of stuff, you now, a lot of them guys [INDISTINCT] a lot of stuff. And obviously he was off his fucking, off his head. [INDISTINCT]."

[18] The appellant then said that he would reveal where he had buried his gun.

[19] After some badinage about whether the police could guess where the gun had been buried, the appellant again expressed his impatience with the pace of progress of his case. The interview ended as follows:

"KRUITHOF: Look at the end of the day, we're all going to get judged on what we done in this life. And the next. Whether you believe it or not, you know. Not, yeah. I reckon what youse do is good, is a good job. You know? Like, fucking, might sound rich coming from me, but, fucking murder's not a good thing. You know what I mean? End someone's life.

SCON KIDD: Yep.

KRUITHOF: As you know, like, we get judged on this life, or the next, or both. You know? It's going to happen.

SCON KIDD: Yep.

KRUITHOF: [INDISTINCT] that's all I have to say."

[20] The appellant together with Senior Constable Kidd and Detective Sergeant Gibbs went to retrieve the buried gun. Detective Sergeant Gibbs recorded everything said during that trip. Two parts of the conversation between police and the appellant were tendered at the trial. The following is the first part. It took place about 22 minutes after recording began:

"UNIDENTIFIED MALE OFFICER: So what's changed [INDISTINCT].

KRUITHOF: [INDISTINCT]. You know like, um, in my mind I was acting out of self-defence. I know that I was fucking, that it was self-defence.

UNIDENTIFIED MALE OFFICER: Right.

KRUITHOF: You know what I mean? It was kill or be killed, like, the end of the day Russell's, you know, he's dead. You know what I mean? So h-, it's just pretty much something for him, we can, just letting him know that don't worry, I'm doing time, don't worry bro. You know what I mean? 'Cause I do fucking, I do love him. You now, that might seem hard to understand for youse or whatever, you know --

UNIDENTIFIED MALE OFFICER: Mmhmm.

KRUITHOF: After what happened, but, you know. Wherever he is I d-, I don't think he's probably in a good place, so you know, fuck, why should I be? So just, yeah.

UNIDENTIFIED MALE OFFICER: Mmhmm.

KRUITHOF: But at the time of the shooting, it was, it was dead set kill or be killed.

UNIDENTIFIED MALE OFFICER: What do you, what do you mean? Like, kill or be killed [INDISTINCT]?

KRUITHOF: It just was, it was, the whole scenario. The way everything was. It was a-, you know. He was going to get me, I was, I had to get him, you know.

UNIDENTIFIED MALE OFFICER: You mean he was going to get you then and there, or --? How was he going to do that?

KRUITHOF: Oh, just, I don't even want to talk about it.

UNIDENTIFIED MALE OFFICER: Yeah.

KRUITHOF: To be honest.

UNIDENTIFIED MALE OFFICER: That's alright."

[21] The second relevant part of the exchange between them took place some time later. The appellant had said that he had been speaking to his lawyer. In the context of referring to his chance of getting bail the following exchange took place:

"KRUITHOF: That's the thing you know, [indistinct] it's not like. It wasn't a murder, you know what I mean, [indistinct].

UNIDENTIFIED MALE OFFICER: I don't know what you mean mate. Tell me, tell me how that it is.

KRUITHOF: [indistinct] it was self-defence.

UNIDENTIFIED MALE OFFICER: How is that?

KRUITHOF: It was kill or be killed, you know. I thought I was going to die.

> UNIDENTIFIED MALE OFFICER: Can you explain that to me? I mean I know what that means, but talk me through that.
>
> KRUITHOF: [INDISTINCT] 'cause I fled the scene. I would have stayed there and waited for the ambulance. I just panicked. I would have stayed there waiting for the ambulance and just told youse what happened, you know, I probably wouldn't be in this predicament. But, yeah. There's no use now.
>
> UNIDENTIFIED MALE OFFICER: [INDISTINCT] tell us how it happened?
>
> KRUITHOF: Oh, just leave it at that mate.
>
> UNIDENTIFIED MALE OFFICER: Alright."

[22] The appellant elected not to give evidence at the trial.

[23] As I have said, the evidence showed that Johnstone had been shot in his head, in his back, in the chest and in his shoulder. The inference from that evidence was that the appellant shot Johnstone intending to kill him.

[24] The appellant's case did not dispute that he had intended to kill Johnstone (or at least to cause him grievous bodily harm). Rather, the appellant relied upon self-defence as an answer.

[25] The appellant's statement to Clack had been simple and clear. It is convenient to restate that part of Clack's evidence:

> "… he said that 'After you left, they pulled over somewhere and that *Russell had a gun*' and, obviously, he must've had a gun, and that 'When they pulled over, they both got out of the car. As they were walking to the back of the car, Russell reached to his shirt to pull out his gun and, before he could pull out his gun, Dallin quickly got out his gun and shot Russell'."

[26] It will be noticed that the appellant did not say that he had been mistaken. He said, "Russell had a gun." But there was no gun found.

[27] The appellant's second statement was to Senior Constable Gibbs and Senior Constable Lafferty on 10 September 2014. The appellant declined to give police any information about what had happened but declared, "I'm innocent of the charge, I know that."

[28] His third statement was to Senior Constable Kidd and Sergeant Edwards on 24 June 2015. That time there was no reference to Johnstone having a gun. Instead the appellant said that there was an argument over drugs and, "I did pull the trigger." He went on to say, "I can't blame it all on the Ice. 'Cause I was the only o-, I was the one that pulled the trigger at the end of the day." In case anybody mistook the substance of what he was trying to say, in his closing remarks to the two police officers the appellant emphasised what he had done:

> "Look at the end of the day, we're all going to get judged on what we done in this life. And the next. Whether you believe it or not, you know. Not, yeah. I reckon what youse do is good, is a good job. You know? Like, fucking, might sound rich coming from me, but, fucking

> murder's not a good thing. You know what I mean? End someone's life."

[29] In the first of the two exchanges recorded on 2 July 2015 the appellant said that, "It was kill or be killed." He declined to explain what that meant. During the second exchange he asserted, "It wasn't a murder, you know what I mean," and said that, "It was self-defence." He repeated his earlier statement that, "It was kill or be killed." However, when asked to explain what he meant by that he declined to do so. He did not suggest that he had made some kind of mistake.

[30] Two observations should be made. First, the appellant never said or implied that the killing was unintentional. On the contrary, his assertion that he was defending himself was accompanied by his justification that it was "kill or be killed". This was an admission of intentional killing. In any event, in a case in which the victim had been killed by a shot to the top of the victim's head as well as into the back and chest, intent could hardly have been a real issue for the jury to consider.

[31] The second matter is that the appellant never said or implied that he mistakenly believed that Johnstone had a gun. In each of his statements the threat he described was not an imagined one, it was a real one. In his statement to Clack he asserted that Johnstone actually had a gun but the appellant was faster.

[32] Of course the appellant's statement to Clack that, "Russell reached to his shirt to pull out his gun," connotes his belief that Johnstone had a gun. However, the mere holding of a belief is not enough to raise s 24 for the jury's consideration. There must also be some evidence that the belief was a reasonable one to hold.

[33] There was no evidence of any grounds for any belief. That is not surprising because the appellant never said he was mistaken. His statement to Clack was that, "Russell *had* a gun." He told police that it was, "Dead set *kill or be killed*," and that, "He was *going to get me* … I had to get him."

[34] The appellant's counsel's closing address to the jury also emphasised self-defence. He put to the jury that there were two "scenarios on the facts". The first "scenario" was based upon what he told the police at the end: that Johnstone "had his gun and, right there and then – and somehow he must have taken it off him, and he shot him because he believed [INDISTINCT] going to be killed – kill or be killed".

[35] The problem with that "scenario" is that there was no evidence at all to support it. During the course of recovering the buried gun, police asked the appellant whether anybody's DNA would be on the gun other than the appellant's. He said Johnstone's DNA would be on the gun. He was asked when Johnstone handled the gun. His answer was:

> "Um, yeah [INDISTINCT] right, right before it happened, he was holding it."

[36] The appellant did not tell anyone, and there was no evidence otherwise, that Johnstone had threatened the appellant with the gun. Nor was there any evidence that he had taken the gun from the appellant surreptitiously. Nor was there any evidence that the appellant managed to recover the gun and, in self-defence, shot Johnstone.

[37] Consequently, the "scenario" put by the appellant's counsel to the jury was just that – a construct founded in counsel's imagination not supported by any evidence.

[38] The "second scenario" put by defence counsel was that:

> "…[I]t was a stand-off. He went – that is, Johnstone put his hand in his pocket to go for his gun or a gun he thought he had. Now, there was no gun. We accept that. That's what we call an honest and reasonable but mistaken belief …"

[39] In fact, that is not what we call an honest and reasonable but mistaken belief because there was no evidence of the reasonableness of any such belief. On the contrary, according to Clack, Johnstone had asked Clack for assistance in order to obtain a shotgun.

[40] The version the appellant gave to Clack, in which Johnstone began to draw his own gun, could only be understood as meaning that Johnstone actually did have a gun. However, the appellant seemingly abandoned that "scenario" and he never again mentioned Johnstone going for his gun. Nor did he ever explain upon what possible grounds he might have mistakenly believed that there was a gun in Johnstone's pocket. Of course, the later versions were given to police, who knew what Clack did not know, that there was no second gun.

[41] As to Clack, defence counsel told the jury that a lot of the things that Clack had said were common ground. But, importantly for the purposes of this appeal, he warned the jury that they should be careful before they accepted the truth of all of the things that Clack had said. He reminded them that he had challenged some of them in cross-examination. Relevantly (excising matters not material to illustrating this point), defence counsel submitted to the jury:

> "But I still say this to you. You have to take into account a number of issues. Do you accept everything he said. Because even though he might be doing his best, is it reliable. For instance, this. He told police somethings in his statement so it could be put up into court that could help him to get a lesser sentence. So you ingratiate yourself to the police, tell them what they want to hear. Might be the truth. Might not be the truth. I'm just saying it might not be reliable. Just be careful of everything he said. …
>
> … he was under the influence of drugs. The next day he was under the influence of drugs. So his memory's affected. And he agreed his memory may be affected in some way to a certain extent. He conceded there might be some little things that aren't quite right. So – you know – when it's said he – somethings that he did say, just be careful. Do you accept it. It's up to you. …
>
> … he told the prosecutor he went on to say he found the missing drugs in the kitchen. I said, 'you're wrong about that. You could be mistaken about that'. He said 'I don't know. It was that long ago'. So you got [*sic*] to take that into account, that he might be mistaken about some things."

[42] Defence counsel took some time to deal with the pathology evidence relating to the wounds and their location. This is understandable because those wounds constituted powerful evidence of intentional killing. Remarkably in the circumstances of this case, intent remained in issue. Defence counsel told the jury

that the Crown needed to establish intent by way of inference. He suggested that the number of shots might have evidenced no more than a desire to get Johnstone away from him. He said that there was evidence that Johnstone had a high level of methamphetamine in his bloodstream when he died and said that that drug is known to be capable of causing aggressive, violent and unpredictable behaviour. Somewhat confusingly, defence counsel then submitted:

> "He admitted to police he shot him, but not murder. He said it was kill or be killed. That is, he shot to stop him from killing him, he thought: paranoia. Did he have an intent to kill him? It was to stop him. You know the gun was fired in quick succession."

[43] It is difficult to see how the jury could have regarded this as anything other than a case where the accused had intended to kill in self-defence. Nevertheless, the issue remained alive and the Crown had to prove intent.

[44] Finally, defence counsel dealt with the passage of the appellant's statement to police in which he was asked directly whether Johnstone had been shooting at the appellant or whether Johnstone had "had a go at you first". He made the following submission:

> "Now, just in one of the submissions made by my learned friend – and it's contained in the interview of the 25th of June 2015. It's on page 7, but just be a bit careful about this submission. It's only a matter for you to consider, but it says this – the defendant said:
>
> *What – what does, like – I'm telling you I done it, you know, indistinct.*
>
> Sergeant Edwards says:
>
> *Well, one of the things that burnt a hole in – in the back of my head is, you know, was Russ shooting at you, or did Russ, you know, have a go at you first.*
>
> Now, there's two questions there. Now, he says:
>
> *No. So I'll leave it at that, you know.*
>
> What was he saying no to? The two questions were:
>
> *Was Russ shooting at you, or did Russ, you know, have a go at you first?*
>
> So [indistinct] was he saying no? "No, he wasn't shooting me,." Or, "No, he wasn't having a go at me first," because you might think he was saying, "No, he wasn't shooting at me," because if you read on in the context, Sergeant Edwards says:
>
> *Because that's pretty important, obviously, as you'd be well aware.*
>
> And he says:
>
> *No. He didn't have a gun on him.*
>
> So you might think he was saying no, he didn't shoot him. He didn't have a gun on [indistinct] that's what he's referred to, not he didn't have a go at me first. So just be a bit careful [indistinct] the prosecutor was saying, you know, he didn't say – he didn't – or he never had the – or said that he had a go at him"

[45] During the course of the trial the learned trial judge raised the question with counsel, in the absence of the jury, whether the word "no" followed by "so – I'll leave it at that" had actually been said. The prosecutor said that she had heard the word "no". Defence counsel's response is not recorded (if he gave a verbal one). Her Honour said that she would leave it to counsel to deal with the matter. As appears from defence counsel's address, it was in fact common ground between prosecution and defence that the word "no" had been said.

[46] It is in those circumstances that the appellant now raises three grounds of appeal. First, he contends that the learned trial judge's directions in relation to the evidence of Clack resulted in a miscarriage of justice. Second, he submits that the learned trial judge's failure to direct the jury that they could not use the evidence of post-offence conduct as proof of the appellant's intention to kill resulted in a miscarriage of justice. Finally, he submits that the treatment of the recording as evidencing that the appellant said the word "No" was wrong and caused there to be a miscarriage of justice because the recording was "objectively equivocal and ambiguous".

[47] It is convenient to deal with these grounds in reverse order.

[48] As is usual, the jury was directed to regard the actual audio recording, and not the transcript, as evidence of the conversation. In circumstances in which both counsel took the same view that the word "No" had in fact been spoken it would hardly have been right for the learned judge to offer her own contrary view, especially when defence counsel made submissions in aid of his client upon the express basis that the word "No" had indeed been used. That auditory interpretation by both counsel was understandable anyway when regard is had to the whole context of the relevant passage. Not only did the appellant seemingly say, "No. So I'll leave it that, you know," he immediately followed up that statement by an assertion that, "No he didn't have a gun on him, no he didn't."

[49] In circumstances in which the trial was conducted upon the common ground that a particular word had been used, and in which the defence relied upon that word having been used, it can hardly now be concluded that the trial miscarried.

[50] There is nothing in this ground and I would reject it.

[51] By his second ground of appeal the appellant contends that the learned trial judge failed to direct the jury that they could not use the evidence of the appellant's post-offence conduct as proof of his intention to kill. That depends upon the course of the trial. In this particular case, although intent remained in issue throughout, it was not the substantial issue that the jury had to consider. The substantial issue was self-defence. The issue of self-defence was not raised upon the basis that the appellant intended to assault Johnstone by way of defence in a manner that did not involve causing death or grievous bodily harm. On the contrary, self-defence was raised as a defence to murder in a case in which the force used involved shooting four bullets into the head and body and attempting to shoot a fifth into that body. In those circumstances the jury could hardly have been troubled by the issue of intent.

[52] Accordingly, the Crown never sought to rely upon post-offence conduct in order to prove intent. It relied upon post-offence conduct to negative self-defence.

[53] On the question of intention the Crown prosecutor simply pointed to the way in which Johnstone had been killed. She submitted:

> "You then need to go on and consider whether that – whether he killed Russell Johnstone intending to do so or intending to cause grievous bodily harm, remembering that grievous bodily harm is a life-threatening injury or an injury that, if left untreated, would lead to permanent injury. So it's a very serious injury. So you have to consider whether he intended to kill Russell Johnstone when he shot him, and to that, I say this: well, you shoot somebody four times, in the back, in the head, in the left side, in the right shoulder – there's only one thing that was going through his mind: kill. Kill Russell Johnstone. That's why he continued to shoot him. He meant to kill him, and that's why he kept shooting him."

[54] Defence counsel understood that case on intent perfectly. Accordingly, he submitted:

> "And the prosecution seems to draw [indistinct] because its four shots – well, in fact, it's five, but once you've shot once in this quick, quick, bang, bang, bang, one would think one pales into significance [*sic*]. So you might think it's [indistinct] thought he was going to be – 'thought I was going to be killed – not killed [indistinct] killing, but I just fired [indistinct] get him away'."

[55] He then suggested that the jury might think that the appellant himself had been affected by methamphetamine in a way that might affect intent – although there was no evidence to support such a submission. Finally, he suggested that the jury might conclude that the appellant merely wanted to "stop him" and not "to kill him".

[56] The evidence of post-offence conduct was not relied upon by the Crown to prove intent. That this was appreciated by defence counsel can be seen from his closing address. It was unnecessary for her Honour to direct the jury on a point that had not arisen and no miscarriage of justice has been shown. If I am wrong about that then, in any case, the evidence of intent was, in my view, overwhelming and was inherent in the appellant's own assertion that he had killed in self-defence. I would then hold that, if there has been a miscarriage, it was not a substantial miscarriage of justice.

[57] Finally, the appellant complains about the learned trial judge's directions concerning the reliability of Clack's evidence. Her Honour pointed out that Clack had acknowledged that he had previous convictions and that he had been in jail previously. She reminded the jury that Clack had accepted that he had been affected by drugs on the night in question. Her Honour reminded the jury that Clack had obtained a reduction in his own sentence by agreeing to give evidence in this case and so he might, as a consequence, have a strong incentive to implicate another person in order to assist himself. Her Honour concluded that the jury should only act on the evidence of Clack if "after considering it, and all the other evidence in the case, that you are convinced of its truth and accuracy". In so directing the jury, her Honour was giving a judicial *imprimatur*, as she was obliged, to defence counsel's own arguments to which I have referred.

[58] The appellant complains that the direction was "in substance a *Robinson* direction" but that there were two "departures" from the "words of the standardly [*sic*] given *Robinson* direction".

[59] The first of these is that the phrase "scrutinise with care" rather than "scrutinise with great care" was used. The second departure was that her Honour did not make clear that the warning was limited to the use of the evidence for the purposes of arriving at a conclusion of guilt. It was submitted on appeal that the direction actually had the effect of inviting the jury not to act on *exculpatory* evidence in circumstances in which the Crown did not dispute the evidence at all.

[60] There is, in truth, no such thing as a "standard" *Robinson* direction. *Robinson v The Queen*[1] was an appeal to the High Court from the Queensland Court of Appeal. The appellant had been convicted on two counts of unlawful anal intercourse with a child under 12 years of age. The complainant gave evidence. The complainant child's mother and father also gave some evidence but they were not cross-examined. A paediatrician also gave some brief evidence and was not cross-examined. The appellant gave evidence amounting to a simple denial of any offending conduct. Defence counsel then addressed the jury for a mere three minutes. The Crown prosecutor addressed for 24 minutes. The summing up took 15 minutes. The summing up contained no warnings of any kind about how to assess credibility of witnesses but no objection was taken to it on that or any other grounds.

[61] On 1 July 1997 s 632 of the *Criminal Code* had been enacted and was applicable. It changed the law in a significant way. It provided that a person may be convicted of an offence on the uncorroborated testimony of one witness unless the Code provided expressly to the contrary. It provided that a judge was not required by any rule of law or practice to warn the jury that it was unsafe to convict the accused on the uncorroborated testimony of one witness. Finally, it provided that the section was not to be read so as to prevent a judge from making a comment on the evidence in the trial that it was appropriate to make in the interests of justice so long as the judge did not warn or suggest in any way that the law regarded "any class of complainants as unreliable witnesses". The new section applied to the case.

[62] The first ground of appeal in the Court of Appeal concerned the trial judge's omission to give the jury an appropriate warning in relation to the complainant child's credibility. Cullinane J, with whom Williams J agreed, held that s 632 prohibited the giving of such a warning. In a lengthy and comprehensive judgment, Lee J dissented. His Honour analysed the history of the requirement to give a warning about the reliability of a witness's evidence. His Honour drew attention to the distinction between, on the one hand, warnings against convicting upon the evidence of witnesses without corroboration and, on the other hand, warnings given about convicting on the evidence of certain witnesses because the witnesses were traditionally regarded as "suspect". As his Honour demonstrated, the reasons for giving such warnings will differ according to different circumstances. Lee J listed a catalogue of factors which made it important, in his view, to warn the jury about the reliability of the complainant's evidence in the case before him. Those factors gave rise, in his opinion, to a need to make the jury aware of the dangers of convicting on such evidence. Lee J referred to the *dictum* of Gibbs CJ in *Bromley v The Queen*[2] where his Honour had said:

> "What is required, in a case where the evidence of a witness may be potentially unreliable, but which does not fall within one of the established categories in relation to which the full warning as to the

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1 (1999) 197 CLR 162.

2 (1986) 161 CLR 315 at 319.

> necessity of corroboration must be given, is that the jury must be made aware, in words which meet the justice of the particular case, of the dangers of convicting on such evidence."

[63] Lee J also referred to the following statement by McHugh J in the *The Queen v Longman*:[3]

> "If, however, the evidence discloses any circumstance which suggests that the evidence of the complainant may be unreliable, the trial judge has a duty to make the jury aware of the dangers concerning that person's evidence. As in any case where the prosecution depends solely upon the evidence of one witness, the trial judge is entitled to point out that the evidence of the complainant requires careful scrutiny before acting upon it. But cases would frequently arise where the circumstances would require a stronger warning. The terms of that warning will depend upon the particular circumstances of the case. …"

[64] Lee J held that s 632 did not prohibit an appropriate warning being given and that a warning should have been given. His Honour would have set aside the conviction and ordered a re-trial.

[65] A unanimous High Court allowed an appeal from that decision of the Court of Appeal. The sole question in the case was whether s 632 did or did not preclude the giving of a warning. It was held, consistently with the view of Lee J, that s 632:

> "… is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence. …"[4]

[66] Their Honours considered the factors collected by Lee J in his reasons concerning the complainant's credibility and agreed that those were the kinds of matters that meant that a warning was required "which brought home to the jury the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt".[5]

[67] *Robinson* says nothing about the terms of any warning that might have been appropriate in this case or the terms appropriate in any case. It was a case about the effect of s 632. *Robinson* did not alter the law about the circumstances when a jury should be directed about risks attendant in accepting a witness's evidence. It established that, in that respect, s 632 had *not* changed the law.

[68] In this case the Crown and the defence both sought to rely upon most of what Clack had reported the appellant as having said. The Crown relied on Clack to prove an admission by the appellant that he had killed Johnstone. The appellant sought to rely upon Clack to prove that he had made the statements about self-defence and sought to persuade the jury that what Clack said and what the appellant had said to Clack were both true.

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3 (1989) 168 CLR 79 at 107.
4 *Robinson*, *supra*, at [20].
5 *Robinson*, *supra,* at [26].

[69] However, there were parts of Clack's evidence that were challenged by the appellant. Probably in order to neutralise evidence of a motive to kill, the evidence about stolen drugs was challenged. Accordingly, when counsel was asked by the learned trial judge whether he wanted "the *Robinson* direction" the following exchange took place:

> "MR MARTIN: Only to this extent, that – probably not – don't need it – I don't. I just need the general direction about the witness that he has – he has …
>
> HER HONOUR: Just the general credibility/reliability issue.
>
> MR MARTIN: He corroborated with the police and he's on drugs at the time, you know.
>
> HER HONOUR: Well that was what I was going to put in the *Robinson*, that he – I thought I had to say that he has – and you indicated that he had agreed to give evidence in exchange for a lesser sentence.
>
> MR MARTIN: Yes.
>
> HER HONOUR: I think I have to, don't it [*sic*]?
>
> MS LOURY: Yes. But you don't need to go on and say, scrutinise his evidence his evidence with great care and don't …
>
> HER HONOUR: And I give you this warning that …
>
> MS LOURY: Yes.
>
> HER HONOUR: Yes alright.
>
> MS LOURY: You don't need to give them the warnings that are associated with the *Robinson* direction."

[70] Later, before embarking on the summing up, her Honour informed counsel:

> "I'll give a version of *Robinson* incorporating it with bad character, so that's just the 13A part, and just saying if they – despite those warnings – they can – if they're satisfied he's a credible witness, they can rely on it."

[71] Understandably, there was no dissent by defence counsel from that suggestion. Defence counsel then addressed the jury in the terms that I have set out, including inviting the jury to reject as unreliable the part of Clack's evidence which he had challenged. Accordingly, her Honour directed the jury to "scrutinise Mr Clack's evidence with care" and only to act on it if "convinced of its truth and accuracy" and she later made the same points that Mr Martin had made for his client.

[72] It follows that the directions complained of were given because those were the very points that the defence, not the Crown, wished to place in front of the jury for its consideration. It was the defence, for its own reasons, which wanted the jury to reject part but not all of Clack's evidence for the reasons identified by the appellant's counsel. These directions were not given, as the appellant now argues, in circumstances in which exculpatory evidence might wrongly have been disregarded by the jury. The directions were given upon the implicit invitation of

the appellant to ensure that evidence which he wanted the jury to reject would be rejected.

[73] The ground is misconceived and should be rejected.

[74] For these reasons I would dismiss the appeal.

[75] **FRASER JA:** I have had the distinct advantage of reading in draft the reasons of the President and the reasons of Boddice J. For the reasons given by the President, I would dismiss the appeal.

[76] **BODDICE J:** On 9 February 2017, the appellant was convicted by a jury of having murdered Russell Mark Johnstone. The appellant appeals that conviction.

[77] Three grounds of appeal are relied upon by the appellant. First, that a miscarriage of justice was caused by the trial judge's directions in relation to the evidence of a witness, Calvin Clack. Second, that a miscarriage of justice was caused by the trial judge's failure to direct the jury that they could not use evidence of post-offence conduct as proof of the appellant's intention. Third, that a miscarriage of justice was caused because the recording of a claimed statement against interest was objectively equivocal and ambiguous but treated at trial as having been made by the appellant.

Background

[78] The appellant was born on 17 August 1990. He was aged 23 at the time of the offence. The deceased was born on 9 February 1990. He was aged 24 years at the date of his death. The deceased weighed 122 kilograms and was 182 cm tall. At trial the pathologist described the deceased as "quite a solid, muscular person".[6]

[79] The deceased and the appellant knew each other and were together in the early hours of 6 February 2014, when the deceased sustained four gunshot wounds. The weapon was a .38 Smith and Wesson calibre five shot revolver. All five rounds were discharged by the appellant at the deceased. Four bullets struck the deceased. The fifth missed its target.

Admissions

[80] The appellant formally admitted at trial that the appellant fired those four shots at about 3.30 am and that they caused the death of the deceased on 10 February 2014. The appellant also admitted that he and the deceased travelled together to the scene of the shooting in his dark blue Jaguar sedan and that late on the night of 11 February 2014 the appellant set fire to and destroyed that vehicle.

[81] The appellant admitted at trial that after the deceased was shot he placed the revolver in a small safe which he later buried in bushland. On 2 July 2015, the appellant took police to that location. The safe and its contents, including the revolver, were recovered by police.

[82] Relevantly the appellant also admitted that at about 7.32 am on 6 February 2014 he instructed his younger brother to advise their sister to retrieve her dogs from the appellant's house as he could no longer live there for a while; that between 6 February 2014 and 17 February 2014, the appellant stayed at accommodation in Mt Ommaney and Kangaroo Point; that on 13 February 2014, the appellant purchased

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6 AB 93/34.

tickets to Amsterdam flying on China Southern Airlines; that at about 6.00 am on 17 February 2014, the appellant travelled to the airport and later departed for Amsterdam via China; that upon arrival in China the appellant was refused entry and returned to Australia; and that the appellant arrived in Australia on the morning of 18 February 2014 when he was detained by police.

Trial

[83] The Crown case was that the appellant intentionally shot the deceased believing the deceased had stolen four ounces of methylamphetamine from the appellant. The Crown relied not only on this motive but also on the deceased's post-offence conduct including hiding the cartridges in the roof of the house, burning his motor vehicle, burying the gun and ammunition, leaving his residence and ultimately fleeing the country.

[84] The defence case was that the appellant shot the deceased either because he at one point was holding the gun or in circumstances where the deceased went to reach into his jacket and the appellant believed the jacket contained a gun. The appellant contended that he acted in self-defence, either in response to an unprovoked assault with a gun, or in circumstances where the appellant believed on reasonable grounds that he could not otherwise save himself from death or grievous bodily harm.

Evidence

Scene

[85] At around 3.30 am on the morning of 6 February 2014, residents in Jarrow Street, Tingalpa were awoken by five noises in quick succession. Shortly after, the deceased was found lying on the roadway.

[86] Nathan Little described the noises as sounding a bit like a cap gun. Four were straight after each other. There was a pause for a millisecond and then another noise.[7] The period between the first and the fifth shot would not have been more than about two seconds.[8] Little looked outside and saw a darker coloured sedan. The car sped off down the road without lights about 20 seconds after he heard the noises.

[87] Little heard a moaning noise, more human than the cats in his neighbourhood. He saw someone in the street. He called emergency services at 3.32 in the morning. Little went outside and saw a man lying on the road, face down. He had trauma to the back of his head. He was wearing a grey jacket, dark sports pants and had a bum bag on him.

[88] Everton Dacosta was awoken by something that sounded like gunshots. There were about five of them fairly continuously, one after the other. The period from the first to the fifth shot was very short. They just went "bang bang bang bang bang".[9] About a minute or so after the gunshots he heard a car drive off up the street. He did not hear any slamming of doors or heavy acceleration of the motor vehicle. He then heard groaning.

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7 AB 36/45.
8 AB 41/30.
9 AB 47/30.

[89] Dacosta went out into the street. One of his neighbours said there was a person. Dacosta saw a person lying on the street with his head towards the gutter. His legs were towards the centre of the road diagonally. The moaning was coming from that person. Dacosta observed a slight injury to the top left side of the person's head and another injury on the right side of the body under the arm.

[90] Scott Mullaly was also awoken by five bangs in the early hours of 6 February 2014. He described a short pause, not longer than half a second, between the second and third shots. It was "a bang, bang and then bang, bang, bang".[10] About 10 seconds after the bangs Mullaly heard a car door close and a car take off. The time was 3.35 in the morning.

[91] Mullaly heard a moaning noise. He went outside and could see a figure on the ground in the distance. It was a man moaning. He was close to the gutter, facing across the road itself. The man had a blue Mt Franklin water-bottle top in his left hand. Mullaly noticed injuries to the left hand side of the head. The man was wearing white Nike shoes, a dark hoodie and had a bum bag on him around his waist.

[92] The first police officer on the scene, Constable Luke Anderson, arrived between five and ten minutes after receiving a communication that there might have been some shots fired in Jarrow Street, Tingalpa. Anderson attended to a male lying on the ground. The male was approximately six feet tall, fairly chubby build and of Islander appearance. The male was still conscious and breathing and making groaning noises. Anderson noticed a bleeding injury to the top of his head which appeared to be a gunshot wound. There was also blood in the chest area.

[93] Paramedics arrived soon after Anderson. One of the paramedics told Anderson there was a bullet underneath the person. Anderson retrieved the bullet and placed it in a specimen container. He also retrieved a bum bag.

Investigation

[94] Detective Sergeant Christopher Lafferty arrived at the scene somewhere between 3.40 am and 3.45 am after receiving information at approximately 3.35 am from the radio communications network. He followed an ambulance into the street. That was the first ambulance on the scene. Constable Anderson was already present. Lafferty approached a male on the road. The male was not able to speak. He observed the male had a bum bag around his waist. It contained some money and an ipod. On 10 February 2014, Lafferty received information the male had died.

[95] Lafferty participated in a search of the appellant's residence on 19 February 2014. Lafferty located some shell casings in the master bedroom and some unused ammunition in a second bedroom. The appellant was not present during that search.

[96] Lafferty ascertained the appellant had left the country on 17 February 2014. Lafferty understood the appellant had stayed at a hotel on the night of 6 February 2014 and thereafter at an apartment at Kangaroo Point prior to leaving the country.[11]

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10 AB 48/45.
11 AB 62/35.

[97] Briana Modolo, a travel consultant, booked flights and accommodation for the appellant on 13 February 2014. The appellant was travelling from Brisbane to Amsterdam on 17 February 2014, returning on 17 March 2014. The appellant paid for the flights and accommodation in cash. The total cost was $9,189. She confirmed the flight was booked for the appellant by checking his passport.

[98] Senior Sergeant Shane Everist undertook a forensic examination of the scene on the morning of 6 February 2014. That examination included the use of a metal detector to find any components of ammunition. He did not locate any bullets, discharged cartridge casing or fragments of a projectile in that area. He was aware a projectile had been located under the deceased and placed in a specimen jar before he arrived at the scene.

[99] Everist also examined a grey hooded jacket. He noted three defects. One in the upper mid-back of the jacket, one to the left side of the jacket and a small defect to the right upper sleeve. Testing with a chemical revealed the presence of lead around the margin of all three defects. That indicated a lead object had been responsible. The bullets located were lead bullets.

[100] The defect in the right side of the jacket should corresponded with a defect he observed in the sleeve of T-shirt. There was no secondary hole on either garment to indicate that something had entered and exited.[12] If the deceased had an injury to his right shoulder that was not a penetrating injury but was consistent with a graze that could have been caused by a bullet, the defect in the right upper sleeve could be consistent with the deceased having been shot at and a bullet hitting him, and perforating his clothes and remaining in the vicinity of those clothes. That bullet may well have been the projectile which was found on the roadway under the deceased.[13]

[101] Everist examined the garments for any indication of soot or propellant patterns around the defects. He found nothing conspicuous to indicate contact or very close contact with the garments. He also did not observe any unburned propellant lodged in the garments. He could not comment at all upon what range the gun might have been at the time it was fired at the deceased.

[102] Everist was also present when the safe was located on 2 July 2015. It was buried less than 30 cm into the ground. There was water in the safe. There was a reasonable amount of mud lining the inside of it.[14] Inside the safe was located a gun inside a sock. The gun had a mother of pearl type handle. It had the general appearance of a Ivor Johnson .38 calibre automatic revolver. That was not a particularly common weapon. The revolver was loaded with five bullets, all .38 Smith and Wesson calibre produced by Magtech.[15] There were two other items in the safe. One was a sock containing a number of rounds of .38 Smith and Wesson Magtech ammunition. The other was a sock containing bullets.

[103] Everist said the items within the safe were wet. He was unable to undertake a test fire of the revolver. The spring providing the thrust for the hammer had corroded to the point where it was no longer useable. Once he obtained a similar spring from another firearm he was able to test fire the revolver. He also had to clean mud and

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12 AB 131/28.
13 AB 131/35.
14 AB 133/40.
15 AB 135/40.

debris that had accumulated on the firearm. He successfully discharged the weapon on 11 occasions.

[104] On eight of those occasions the weapon was loaded with Magtech bullets. On no occasion did the weapon misfire.[16] Everist said in one of the socks located in the safe there were 22 rounds of .38 Smith and Wesson calibre Magtech ammunition. When he dismantled one of those bullets he found it possessed a blue lubricant similar to that encountered with the bullet found below the deceased on the roadway.

[105] Everist also tested the grey hoodie for the presence of gunshot residue. Everist accepted that he did not examine the grey hoodie for gunshot residue until 1 November 2016. At that time he took samples from each sleeve cuff and from inside the left and right pockets of the hoodie.

[106] Gunshot residue found inside a pocket could indicate that a user of the revolver had put their hand in the pocket or that a person who had been in close proximity to the firearm when it was fired had placed their hand in the pocket.[17] It could also be transferred by a person having placed the gun in that pocket. On that scenario, it does not necessarily have to have been fired before being placed in the pocket.[18]

[107] Everist later received a projectile that had been removed from the deceased during surgery. He also received bullets that were removed from the deceased's body on autopsy, as well as five cartridge cases that were subsequently located at the deceased's residence. His examination of the projectiles revealed they were consistent with a .38 calibre, most likely a .38 Smith and Wesson. The bullets were likely Magtech brand. Everist could not say the cartridges definitely came from the firing of a Smith and Wesson Ivor Johnson revolver. They may have come from that weapon. Only four bullets were recovered. If five shots were heard, one bullet missed everything. No ricochet was found in the area.

[108] Everist examined the bullets he received for rifling marks. Some of the bullets were too damaged to see the complete set of rifling. The one discovered under the deceased on the roadway was quite intact, as was one of the projectiles recovered from the deceased during post-mortem. The rifling was consistent with those projectiles having been discharged from a firearm with a five right rifling. There was nothing about the projectiles to suggest more than one firearm had fired them. The rifling marks were consistent with those produced by a .38 calibre Smith and Wesson Ivor Johnson revolver, the type of firearm recovered by police from the safe buried by the appellant.

[109] In cross-examination, Everist accepted that whilst the revolver never misfired on testing, it was certainly a possibility that one of the chambers did not align properly. With older guns there could be play or swap in the movement of the cylinder. In that event, when a person fires it quickly there could be something which prevented the cylinder fully rotating and aligning the next round of ammunition allowing it to fire.[19]

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16 AB 137/10.
17 AB 151/40.
18 AB 152/5.
19 AB 147/1.

[110] Everist said it was possible that a bullet fired from the .38 Smith and Wesson Ivor Johnson revolver could have had its movement retarded by striking the deceased's shoulder area. Sometimes clothing material such as heavy denim can stop projectiles.[20]

[111] Everist accepted that on his testing he found no gunshot residue on the outside of any of the deceased's clothing. Gunshot residue was located inside the pockets of the grey hoodie. Whilst it was impossible to say accurately the distance the weapon was from the deceased at the time it was fired, you would not expect to detect gunshot residue once the weapon was beyond 20 cm or 30 cm away.[21] You also would not expect to detect any individual unburned propellant once the weapon was beyond 40 cm to 50 cm away

[112] Everist accepted that this particular type of revolver was a very rare weapon. As at 1 May 2014, there were 55,658 registered handguns in Queensland with only seven of those being an Ivor Johnson revolver. Everist agreed that the .38 calibre Smith and Wesson can be purchased from a number of outlets in Brisbane and on the Gold Coast including the Rebel gun shop at Woolloongabba. He accepted police purchased ammunition from that outlet.

[113] Senior Constable Lisa Weller undertook a crime scenes examination of the appellant's residence on 20 February 2014. She located in the roof space a small clipseal plastic bag containing what appeared to be projectiles wrapped in a rubber band. Five rounds of cartridges which were Magtech .38 Smith and Wesson calibre ammunition were found in the ceiling area of the appellant's residence.

[114] Gary Asmussen, principal forensic scientist, undertook an analysis of samples taken from the deceased when Senior Constable Grant Noonan attended the Princess Alexandra Hospital on 6 February 2014 to obtain swabs from the deceased's hands. At about 4.00 pm he took samples from both of the deceased's palms and from the back of both hands. Asmussen also analysed samples from the deceased's clothing.

[115] Two particles characteristic of gunshot residues were detected on the palm of the right hand. The back of the left hand contained some characteristic gunshot residue particulars. The left and right cuffs of the grey hoodie also had evidence of characteristic gunshot residue particulars, as did the inside of the right and left pockets.

[116] In Asmussen's opinion, the amount of particles found on the hands of the deceased did not permit a conclusion that he discharged a firearm. There are other methods by which a person can get gunshot residue on their hands. Handling a gun is one source, particularly if the gun is not regularly cleaned. If a person was shot in close range it was possible for gunshot residue to be deposited around the wound. If that person clutched the wound it could also be deposited onto the palm of their hand. If the gun was kept in the pocket of the hoodie, that would accumulate gunshot residue within that material which could transfer onto the hands if they were placed into the pockets. As the right pocket was found to have highly characteristic gunshot residue, a plausible scenario was that there was a gun inside that pocket. However, gunshot residue will persist for a long period of time within pockets as they are a protected area. The weapon could have been there months, weeks or even years before.[22]

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20 AB 148/20.
21 AB 150/20.
22 AB 168/20.

Medical

[117] Death was attributed to a gunshot wound to the head. The pathologist, Dr Forde, accepted it was difficult to be conclusive as to the respective positions of the appellant and the deceased at the time of the shooting. The angles of the wounds could support a number of different, equally feasible, theories.

[118] The four wounds were described on post-mortem as wounds 1, 2, 3 and 4. Wound 1 was a penetrating wound to the head. The bullet entered the top of the deceased's head through the parietal bone. The bullet travelled almost downwards through the brain to the base of the skull.

[119] Wound 2 was a gunshot wound to the central upper back between the shoulderblades at the base of the neck.[23] The bullet entered the deceased's central upper back just below his neck and a little to the left of his spine. The bullet travelled to the front of the chest in a slightly downwards direction and towards the right. The bullet struck bone creating the possibility of a deflection.

[120] Wound 3 was a gunshot wound to the left lateral chest. The bullet entered the deceased's left lateral chest on the side of his body, low down on the chest. The bullet travelled into the centre of the deceased's body in a downwards direction. It lodged beside the aorta in the middle of the deceased's abdomen. Wound 4 was a superficial wound to the right shoulder. It was consistent with a grazing bullet.

[121] Dr Forde observed the deceased was quite a tall man. The almost directly downward angle of the bullet wound to the top of the head (wound 1) suggested the deceased was lower than the weapon, potentially on his knees or seated or bending forward. As the injury to the upper back (wound 2) also had a downward projection, it was more feasible the deceased was again kneeling or seated or bending but the pathologist was not as confident on that scenario as with the head injury.

[122] In cross-examination, Dr Forde accepted that if a gunshot was fired very close to a person and the person was able to be examined straight away, you might expect to see gunshot residue on the skin of the person if the shot was in very close range. If there was clothing that the bullet went through, the gunshot residue would be on the clothing as opposed to the skin. However, as the deceased received medical intervention which included removing his clothing and cleaning the wounds you would expect that some gunshot residue could come off, although on occasions some can become deeply embedded. No gunshot residue was found in any of the wound sites on the deceased.

[123] Dr Ian Mahoney was provided with an analysist's certificate of the results of an analysis of a blood sample taken from the deceased at 4.50 am on 6 February 2014. It revealed a level of methylamphetamine in the top five per cent. That level did not mean there had been recent use. It could either be a dose taken a couple of hours ago or a very large dose that was taken a couple of days before. A regular user of methylamphetamine will build up a tolerance. Methylamphetamine was associated with aggression, violence and unpredictable behaviour. The development of tolerance would impact on the drug's effect on a particular individual.

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[23] AB 93/45.

[124] In cross-examination Mahoney accepted the blood sample was taken some 80 minutes or so after the shooting. It is unlikely the deceased's blood level would have been lower at the time of the shooting. It might have been a bit higher. Depending on tolerance and other matters, methylamphetamine could produce paranoia in people. The deceased's level was a high level. Mahoney would expect him to be affected in some way.

Other

[125] Calvin Clack gave evidence that he had known the appellant since about 2009. He was regularly seeing the appellant in 2014. Clack purchased ice from the appellant. He had seen the appellant in possession of a silver pistol with a white handle.

[126] Clack also knew the deceased. The appellant introduced him to the deceased. Clack had met the deceased twice. The second time he met the deceased was on the night of the shooting. Clack had arranged to meet the appellant to obtain some drugs. They agreed to meet near the Carindale shooting range.

[127] Clack said the appellant arrived driving a blue Jaguar around midnight. The deceased was with him. Clack owed the appellant money. He handed the appellant money that night. Clack accepted he had been imprisoned in the past for possession of guns including a .22, a pump action, and a handgun.

[128] Clack tried to obtain more ice from the appellant that night. Clack did not have the money for those drugs. The appellant said he had no drugs on him – these were missing. Clack understood four ounces of ice had gone. Clack estimated it was worth around $40,000.

[129] Clack described the appellant as "just stressed". He did not notice anything about the mood between the appellant and the deceased. After 15 minutes to half an hour Clack left the area. The appellant and the deceased also left. Clack next spoke to the appellant on the afternoon of the same day. He had arranged to meet him near Clack's girlfriend's house. It was around sunset. The appellant was driving the same blue Jaguar. The appellant asked Clack if he had watched the news that morning. Clack replied "no". The appellant said he had shot his friend. Clack asked "what over, the missing drugs?". The appellant replied "yeah". The appellant said he had found the drugs in the kitchen.

[130] Clack said the appellant told him the following about the shooting:

> "After you left, they pulled over somewhere and [the deceased] had a gun. … When they pulled over, they both got out of the car. As they were walking to the back of the car, [the deceased] reached to his shirt to pull out his gun and, before he could pull out his gun, [the appellant] quickly got out his gun and shot [the deceased]."[24]

[131] The appellant said he shot the deceased in the head and that his gun was not big enough because the deceased did not die quickly enough. Clack's best recall of the appellant's words were "the gun wasn't big enough … cunt wouldn't die".[25] Clack thought the appellant told him the deceased was in intensive care.

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24 AB 111/25.

25 AB 111/40.

[132] Clack said they spoke for roughly 10 to 20 minutes before going their separate ways. He had no further conversation with the appellant until he met the appellant some time later. The appellant no longer had the blue Jaguar at that meeting. The appellant told him he had burned the car. The appellant also told Clack he had buried the gun.

[133] In cross-examination, Clack accepted the gun seen in the appellant's possession was stored in a sock in the appellant's motor vehicle. The appellant was not carrying it on him. On the second occasion Clack saw the gun in the appellant's backpack. The appellant told him one of the chambers of the gun did not align properly. Clack had never fired that gun.

[134] Clack accepted that the deceased was "a big bloke".[26] He agreed he had given a statement to police to the effect he was willing to give evidence against the appellant on the basis it be put up in Court that he had helped the police so that he could obtain a lesser sentence. Clack accepted he had been in prison in the past on a number of occasions.

[135] Clack accepted that he described the deceased to the police when he first met the deceased as having "a gaol look" due to the clothes the deceased was wearing: sports gear. There was no reason for the appellant to introduce the deceased to Clack. Clack denied he was a person that supplied guns. Clack accepted the deceased on that occasion wanted a gun. To his knowledge, the deceased wanted a shotgun, a pump action shotgun.

[136] Clack gave the appellant and the deceased a lift in a car to go see somebody. He denied that when he dropped them off he knew they were going to buy a gun. Clack said he was asked to take them somewhere. A gun was only mentioned when they arrived at that place.[27] Clack said when they arrived at the place the deceased asked a third party if he could get him something. That person said he did not have it. No-one went home with a gun.

[137] Clack accepted that in his police statement he said that when they met, he found out the deceased wanted to buy a gun and that was why they had come to see him. The deceased wanted a pump action shotgun. Clack said the sale did not happen because they did not have a gun to sell him. Clack said when he gave that statement to police he was not affected by drugs.

[138] Clack said there was never an intention by him to sell a gun or to line up a sale of a gun. The purchase of a gun by the deceased from the third party had nothing to do with him. He was just the taxi driver that night. Clack accepted that on that night he found out the deceased was on parole. The deceased was worried about getting back to his dwelling in New South Wales to report for parole.

[139] Clack accepted that when he met the appellant and the deceased in the early hours of 6 February 2014, it may have been as late as 3 o'clock in the morning. All he remembered was it was dark and late at night. He agreed that in his statement he said they left that area because someone came out of a nearby house or made a noise. The area was not isolated. It was suburban with houses on both sides. He could not remember the exact amount. He accepted it may have been $8,000.

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26 AB 113/30.

27 AB 114/45.

[140] Clack accepted that when he met the appellant and the deceased on 6 February 2014 he was under the influence of drugs. His memory may have been affected to some extent by those drugs. The appellant and the deceased were also affected by drugs at that time. When Clack saw the appellant on the afternoon of 6 February 2014, the appellant was clearly stressed, in an agitated state and had a worried look. The appellant as "white as a ghost".[28] The appellant could have been affected by drugs.

[141] Clack also could well have been affected by drugs. Clack accepted he may have been mistaken in his recollection that the appellant told him he had found the drugs in the kitchen. Clack said the appellant told him something along the lines that there had been a stand off between the appellant and the deceased when they got out of the car. The appellant said the deceased "went for his gun into his pocket or something to go for his gun". The appellant said he pulled out his gun and shot him.

[142] The appellant did not give or call evidence at trial. However, recorded interviews between the appellant and the police on 10 September 2014 and 24 June 2015 were played to the jury. In the first, the appellant told police that for a big period of his life before he was arrested he was heavily using ice and marijuana. His life was just a blur. He could not explain what ice had done to his brain for those periods. He declined to speak further to police at that time.

[143] In the second interview, the appellant told police he was going to own up to what he did and take it on the chin.[29] The appellant said he did shoot the deceased. The appellant said "I did pull the trigger".[30] Drugs led towards it. The deceased and the appellant were not in the right frame of mind. They argued over drugs. Ice had a big role to play in it.

[144] The appellant referred to his paranoia and said that was what happened when you carried around a gun with you all the time. The appellant said it was a dangerous combination "ego, guns and fucking drugs".[31] Thereafter, the appellant was asked:

> "Well one of the things that's burned a hole in, in the back of my head, is, you know, was Russ shooting at you or did Russ, you know, have a go at you first."

[145] The transcript of the interview recorded the appellant as responding "No, so I'll leave it at that"[32] and thereafter saying "no he didn't have a gun on him, no he didn't … a lot of stuff you know a lot of them guys … a lot of stuff and obviously he was off his fucking, off his head …". However, it was in dispute at trial and on appeal whether the defendant did say "no" before the words "so I'll leave it at that you know".

[146] The appellant was interviewed again on 2 July 2015. On that occasion he told police that in his mind he was "acting out of self defence". The appellant said "you know what I mean it was kill or be killed".[33] The appellant was later recorded as saying "but at the time of the shooting it was, it was dead set kill or be killed" and

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28 AB 121/7.
29 AB 259/10.
30 AB 259/50.
31 AB 260/18.
32 AB 262/50.
33 AB 268/9.

that the deceased "was going to get me I had to get him you know".[34] The appellant told police he thought he was "going to die" and he left the scene because he "just panicked".

Appellant's submissions

Ground 1

[147] The appellant submits the defence case was put on the basis the deceased "had unlawfully assaulted the applicant by way of threats with a gun or that the applicant honestly and reasonably believed that he had a gun and intended to use it".[35] The trial judge commented to the jury that they may consider there was evidence the deceased unlawfully assaulted the defendant by threats with a gun. The trial judge also noted there were two scenarios. The first, based on the appellant's statement to police, to the effect the deceased had the appellant's firearm just before the shooting. The second, based on the appellant's account to Clack, that the deceased was reaching for what the appellant believed was a firearm.

[148] The appellant submits that, as the defence case invited the jury to prefer the second scenario and there was no evidence the appellant provoked an assault in either scenario, there was an interwoven s 24 issue, namely, whether the appellant mistakenly believed the deceased was threatening him with a firearm and, if so, if that belief was based on reasonable grounds. In those circumstances, it was necessary for the Crown to negative s 271(2) of the *Criminal Code*. The Crown did so by seeking to prove beyond reasonable doubt that either: (1) the deceased did not unlawfully assault the appellant by threatening him with a gun and that the appellant did not mistakenly believe on reasonable grounds that the deceased assaulted him in that way, or (2) that the appellant did not actually believe on reasonable grounds he could not otherwise save himself from death or grievous bodily harm.

[149] The appellant submits that in that context, the giving of a *Robinson* direction in relation to the evidence of Clack had the effect of permitting the jury to put to one side exculpatory evidence which was not disputed by the Crown. The Crown argued the jury would find Clack truthful and reliable. There was no meaningful challenge either to his credibility or to the content of his conversation with the appellant. The Crown prosecutor submitted a *Robinson* direction ought not to be given in relation to the evidence of Clack.

[150] The effect of giving the jury a *Robinson* direction to the effect that they act diligently on the warning as to the need to scrutinise Clack's evidence raised the potential the jury considered the case only on the basis of the first scenario, thereby depriving the appellant of a reasonable prospect of an acquittal. The consequent miscarriage of justice arises notwithstanding no exception was taken to the warnings by defence counsel. There was an obvious forensic disadvantage in the warnings being given and no discernible advantage.

Ground 2

[151] The appellant submits that at trial, the Crown accepted that evidence of post-offence conduct, namely hiding the firearm, ammunition and fleeing the jurisdiction was not admissible as going to the appellant's intention. The trial judge therefore directed

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34 AB 268/32.

35 Appellant's submissions, para 26.

the jury to the effect that post-offence conduct could be used to support a conclusion that the appellant was conscious he had committed an unlawful killing.

[152] A cornerstone of the basis for directions as to the use of evidence of post-offence conduct is the prevention of a miscarriage of justice. As such, the form of the relevant direction needs to be tailored if its usual terms will itself give rise to a miscarriage of justice.

[153] Here, the direction given had that potential. The account given by the defendant to Clack was temporally connected to the events, it was also to some extent consistent with his account to police that it was "kill or be killed".

[154] Whilst the defendant's account to police negated any suggestion the deceased actually had a gun, it did not necessarily negate the existence of an honest belief the deceased had a gun. To that extent the account given to Clack was of central significance. The direction given potentially undermined the jury's acceptance of that evidence when the accuracy of the content of that conversation was not in dispute.

[155] Whilst that direction given by the trial judge was correct and complete in the terms of the usual form of such a direction, the trial judge erred in not at any stage warning the jury they could not use the post-offence conduct to support the Crown case on intention. A direction as to how to use the evidence in relation to one element was insufficient to prevent the jury from impermissibly using the evidence in respect of another element, namely, intention. The acquiescence of defence counsel at trial does not prevent a miscarriage of justice.

[156] The appellant submits the failure to so direct gives rise to a miscarriage of justice in that he has been deprived of a fair chance of acquittal. The Crown case on intention was not overwhelming. It would have been entirely rational for the jury to have concluded the Crown had not proved the requisite intention.

Ground 3

[157] The appellant submits a significant feature of the prosecution case was the following exchange in the appellant's police interview:

> "SERGEANT EDWARDS: Well, one of the things that's burned a hole in, in the back of my head, is, you know, was Russ shooting at you or did Russ, you know, have a go at you first?
>
> KRUITHOF: No. So I'll leave it at that you know."

[158] In the course of the trial, the trial judge specifically queried whether the word "no" was actually said by the appellant. The trial judge had not heard it. The prosecutor indicated she had heard it. The transcript does not record a response from defence counsel. The appellant submits that listening to the recording confirms the trial judge's concern.

[159] Whilst the jury was reminded it was the sounds on the recording that was the evidence, not the transcripts, the jury was permitted to keep the transcript. At one point, the jury was invited to make an agreed correction to an unrelated entry. Against that background it was reasonable for the jury to have proceeded on the

basis that "no" was said by the appellant. The failure to direct the jury to consider whether that word was said deprived the appellant of a fair chance of acquittal. A miscarriage of justice arose, notwithstanding no objection was taken by defence counsel.

Respondent's submissions

Ground 1

[160] The respondent submits that no miscarriage of justice arose from the giving of the *Robinson* direction. Whilst the prosecutor did submit that the jury would find Clack a truthful and reliable witness and did not invite the jury to reject any part of his narrative, it does not follow that narrative contained evidence exculpatory of the appellant. Clack's evidence that the appellant said the deceased pulled a gun on the appellant was contradicted by the appellant's own statements to police.

[161] Against that background, the trial judge's direction to the jury that they should scrutinise Clack's evidence with care could not have led the jury to think they should ignore his evidence. The trial judge, in the course of that direction, expressly referred to the fact the Crown prosecutor contended the jury might consider that Clack was endeavouring to give a truthful account of what happened on the night and directed that the jury, if so satisfied, they could act on Clack's evidence notwithstanding the warnings.

Ground 2

[162] The trial judge correctly directed the jury in relation to the use of the post-offence conduct. In directing the jury that they could consider if the post-offence conduct indicated guilt of "unlawful killing and not a killing that could be excused because it was self-defence", regard had to be had to the trial judge's directions as to the phrase "unlawful killing". Those directions, which expressly referred to whether it was proved beyond reasonable doubt that the appellant intended to kill or cause grievous bodily harm, were sufficient to direct the jury that they could only rely upon the appellant's hiding of the gun and cartridges, burning of the car and fleeing of the country as going to the offence of manslaughter and not tending to prove murderous intent.

[163] In any event, the respondent submits the prosecution case on intent was very strong. Clack recorded that the appellant told him he needed a bigger gun as the deceased would not die. There was uncontested evidence the appellant fired five shots in quick succession, four of which struck the deceased. The wounds to the head and upper back indicated an intention to kill.

Ground 3

[164] The respondent submits there was no miscarriage of justice in the trial judge's failure to raise this aspect of the transcript. The jury was repeatedly directed that the transcripts did not constitute evidence, it was the sounds on the recording that is the evidence. The fact that the jury was permitted to have the transcripts during the trial and before deliberating did not detract from those directions. The correction of the transcript reinforced to the jury the need to rely on the recordings, not the transcript.

[165] In any event, the trial judge's acceptance of the correctness of the appellant's negative response was contextually and probably actually correct. After the impugned statement the appellant was recorded, after a long pause, to have said:

> "No he didn't have a gun on him. No he didn't …"

That answer removed any possible uncertainty as to the earlier answer. The appellant was recorded as saying that Clack "made a lot of stuff up" which would have been relevant to the jury's assessment of that part of Clack's testimony. Finally, if the manner in which the trial judge dealt with this issue produced a miscarriage of justice, it was not a substantial miscarriage of justice.

Consideration

Ground 1

[166] The trial judge, after making general observations in the summing up as to the acceptance of a witness' evidence, directed the jury:

> "… Mr Clack gave evidence that he has previous convictions and he has been in jail before. We also know that he said he was affected by drugs on the night, so you can take that into account. The fact that someone has previous convictions does not necessarily mean his evidence is to be rejected. It is a matter for you what weight you give his evidence given the fact he has accepted he has been in jail and he has got previous convictions.
>
> He also agreed that he has agreed to give evidence in this case and the effect of that is it will reduce his own sentence when he is sentenced for other charges. Under Queensland sentencing law, sentences may be reduced by the Court where the offender undertakes to co-operate with law enforcement authorities by giving evidence against someone else. If an offender receives a reduced sentence because of that co-operation and then does not co-operate, in accordance with his undertaking, the proceedings can be reopened and a different sentence imposed. You can see, therefore, that there could be a strong incentive for a person to implicate another person when giving evidence, so you should scrutinise Mr Clack's evidence with care. You should only act on it after considering it, and all the other evidence in the case, that you are convinced of its truth and accuracy.
>
> So, having giving you those warnings, it is for you to look at that evidence, but I would suggest to you, having considered Mr Clack in the witness box, as Ms Loury said, he clearly did not want to be here, but you might consider that he was endeavouring to give a truthful account of what happened on the night, so, whilst I have given you those warnings, of course, you have to take that into account, you saw him, what did you think in relation to his evidence?
>
> You might consider that he was answering carefully and that, indeed, he did not try to paint himself into a good light, but he was genuinely trying to recall what was said and what occurred. If, after you had considered his evidence, you are satisfied he is a truthful and

> accurate witness, you can act on his evidence notwithstanding those matters I have already referred you to."

[167] Whilst that direction was largely in accordance with the direction to be given in the case of witnesses who give evidence in circumstances where they have an interest in the giving of that evidence, the prosecutor at trial specifically submitted there was no need to give a *Robinson* direction as Clack's evidence was not challenged to any great extent and the evidence was of use to the appellant.[36] Further, defence counsel submitted such a direction was probably not needed and that all that was required was a general direction about the credibility and reliability of witnesses.

[168] Importantly, in response to a query by the trial judge as to whether it was necessary to give a *Robinson* direction having regard to the fact that Clack was giving evidence in exchange for a lesser sentence, the prosecutor accepted that a direction was to be given but submitted there was no need to give a warning in relation to scrutinising his evidence with great care or the warnings that were associated with the *Robinson* direction. Defence counsel accepted that course.[37]

[169] In *Robinson v The Queen*[38] the High Court recognised that the necessity for a warning in respect of acting on the evidence of a particular witness arose in the context of an accused person being able to be convicted on the evidence of one witness only. In order to address the problem of unreliability which could arise from matters personal to a witness or from the circumstances of a particular case, the law requires a warning to be given "whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case".[39]

[170] As the giving of such a warning is designed to specifically address a perceptible risk of miscarriage of justice, flexibility in the terms of that warning is essential. In the present case, the need to give a warning arose because the witness was to receive a reduced sentence reflective of co-operation. However, neither the Crown nor the defence challenged the accuracy of the witness's account of the appellant's statements regarding the circumstances in which the shooting occurred. The adding to that warning of a reference to scrutinize the witness's evidence with great care carried the significant risk the jury would reject that witness's account even though it was not in dispute at trial.

[171] As that account included reference to potentially exculpatory statements, the giving of that warning in the particular circumstances of this case gave rise to a perceptible risk of a miscarriage of justice. There is a significant danger the jury, notwithstanding the trial judge's subsequent references to the Crown's contentions that they would find the witness reliable, rejected that witness's account of that conversation.

[172] Having regard to the importance of Clack's evidence in the context of a live issue as to whether the shooting occurred in self-defence, the possibility that the jury impermissibly rejected Clack's account of that conversation by reason of that direction potentially deprived the appellant of the prospect of an acquittal of the offence of murder.

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36 AB 143/5-20.
37 AB 143/40 – AB 144/10.
38 (1999) 197 CLR 162 at 168.
39 *Robinson* at 168 [19] citing with approval *Longman v The Queen* (1989) 168 CLR 79 at 86.

Ground 2

[173] The trial judge expressly directed the jury as to the use that may be made of the appellant's post-offence conduct. The jury were directed that it could be used to support a conclusion that the appellant was conscious that he had committed an unlawful killing. Such a direction was important in the context of a case in which the jury were asked to consider the question of self-defence.

[174] However, once the jury rejected self-defence and found beyond reasonable doubt that the appellant had unlawfully killed the deceased, the jury still had to consider whether that unlawful killing occurred with the requisite intent. On that issue, the Crown having considered such conduct was not admissible to prove intent, it was important for the jury to be specifically instructed that the appellant's post-offence conduct could not be used to support a finding that the unlawful killing was intentional.

[175] The need to instruct a jury as to the use that may be made of post-offence conduct can include a requirement to direct the jury as to how such conduct may not be used by the jury. As was recognised by Philip McMurdo JA in *R v Murray*[40] it is important for a trial judge in directing a jury in respect of the use of post-offence conduct to explain why that conduct would not be consistent with a consciousness of guilt for the particular offence where an unlawful killing can be either intentional or unintentional.

[176] There was a material risk in the present case that the direction given to the jury, as to the use that may be made of that post offence conduct to support a conclusion that the appellant was conscious that he had committed an unlawful killing, was insufficient to prevent the jury from using that conduct to reason further that the unlawful killing occurred with the requisite intention.

[177] Whilst there was nothing in the trial judge's directions which would have encouraged the jury to undertake that course, there was equally nothing in those directions which expressly directed the jury they could not use that post-offence conduct for that purpose.

[178] The possibility of such reasoning, in a case where the Crown expressly accepted the evidence of post-offence conduct was not admissible as going to the appellant's intention,[41] gives rise to a risk the evidence of post-offence conduct was incorrectly used by the jury to find the appellant guilty of murder.

[179] That conclusion does not, however, mean the appellant has been deprived of a fair chance of acquittal of the offence of murder by reason of the omission of such an express direction. Once the jury had excluded self-defence beyond reasonable doubt, as it must have done to reach a conclusion that the appellant had unlawfully killed the deceased, the evidence of the requisite intent was overwhelming. The deceased was shot four times, one being in the head and another in the upper back.

Ground 3

[180] There is substance in the appellant's contention that a significant feature of the prosecution case was the exchange in which it was recorded that the appellant had

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40 [2016] QCA 342 at [28].

41 AB 173/15 – AB 174/29.

replied "no" to a question whether the deceased was shooting at him or had had a go at him first. However, it was a matter ultimately for the jury as to whether that word was actually said by the appellant. The jury was reminded that it was the sounds on the recording that was the evidence, not the transcript.

[181] Importantly, that answer did not occur in isolation. Shortly thereafter the appellant was expressly recorded as saying that the deceased did not have a gun on him. Against that background it cannot be said the trial judge's failure to direct the jury to specifically consider whether the word "no" was said was of material significance to the jury's deliberations as to whether the appellant was guilty of the offence of murder or manslaughter.

Conclusions

[182] The appellant has established that the directions the subject of ground 1 of the appeal did deprive him of the chance of an acquittal. The loss of that chance gives rise to a miscarriage of justice. The acquiescence of Counsel to the directions given in the summing up do not prevent such a miscarriage of justice.[42]

[183] The deprivation of the prospect of an acquittal did give rise to a substantial miscarriage of justice. The Crown case, although strong, cannot be said to have been so overwhelming that the jury must have excluded beyond reasonable doubt that any killing occurred in self-defence. Although the appellant's statements excluded the possibility that the deceased actually had a gun, they did not exclude the appellant's contention that he reasonably believed at the time of the shooting that the appellant had a gun.

Orders

[184] I would order:

1. The appeal be allowed;
2. The verdict of guilty of murder be set aside;
3. There be a re-trial.

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42 *R v Murray* at [36].