SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mischewski* [2019] QCA 56
PARTIES:	**R** **v** **MISCHEWSKI, Brandon John** (appellant)
FILE NO/S:	CA No 13 of 2018 SC No 741 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 18 December 2017 (Lyons SJA)
DELIVERED ON:	9 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2018
JUDGES:	Sofronoff P, Fraser JA and Mullins J
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – TEST TO BE APPLIED – where the appellant was convicted after trial of one count of unlawful striking causing death – where the appellant admitted to a friend that he had punched the victim in the head and kicked him whilst he was down and admitted to an undercover police officer that he had punched someone and they died – whether the admissions distinguished between criminal liability as a principal or as a party – where there were inconsistencies in the evidence of the witness who was present with the appellant when the victim was assaulted – where the witness gave evidence that it was the appellant who struck the victim – whether there was sufficient evidence to dismiss the reasonable possibility that the appellant's criminal liability arose as a party and not as principal – whether an independent assessment of the whole of the evidence supports the verdict of guilty CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where there were various drugs detected in the victim's blood – where the forensic pathologist could not exclude the possibility that the drugs killed the victim before the fatal injury to the brain from the assault, but considered it unlikely

– whether there was sufficient evidence for a jury to be able to exclude the reasonable possibility the deceased died by way of drug toxicity – where the scientific and legal standards as to the question of causation are different

R v Heginbotham, McCartney & Room [2008] QCA 47, distinguished
R v Summers [1990] 1 Qd R 92, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: P J Wilson for the appellant (pro bono)
P J McCarthy for the respondent

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

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

[2] **FRASER JA:** I agree with the reasons for judgment of Mullins J and the order proposed by her Honour.

[3] **MULLINS J:** The appellant was convicted after trial of one count of unlawful striking causing death. The victim was Mr Williams. There was no challenge to any aspect of the summing up by the learned trial judge. The appellant appeals against the conviction solely on the ground the verdict of the jury was unreasonable or cannot be supported having regard to the evidence.

[4] There are two specific complaints made by the appellant to show the verdict was unreasonable:

(1) given the way that the prosecution particularised its case, there was insufficient evidence for a jury to be able to exclude the reasonable possibility that the appellant's criminal liability arose as a party as opposed to a principal offender; and

(2) there was insufficient evidence for a jury to be able to exclude the reasonable possibility that the deceased died by way of drug overdose.

[5] The task of this court on the appeal is to make an independent assessment on the whole of the evidence to determine whether the verdict of guilty could be supported: *SKA v The Queen* (2011) 243 CLR 400 at [13]-[14], [22].

Prosecution case at trial

[6] The prosecution case at trial was that the appellant was the principal offender in that he was the person who delivered the blow that killed Mr Williams. The prosecution case was put on the basis of two alternative scenarios: the first, that during the altercation between the appellant and Mr Williams, the appellant struck Mr Williams in the head or face which caused him to hit the wall and then fall to the floor, striking his head, which caused the fracture and the extradural haemorrhage, or, the second, that Mr Williams fell to the floor during the altercation with the

appellant and, whilst on the floor, the appellant stomped on his head, causing the fracture and the haemorrhage. The prosecution did not seek to prove guilt of the appellant on the basis that he was liable as a party to the act of another person. The prosecution identified for the jury from the outset of the trial that the critical issues were by whom, and by what means, Mr Williams' death was caused.

The evidence adduced at the trial relating to the altercation

[7] The main witness relied on by the prosecution was Mr Ratima. His evidence when he first gave evidence-in-chief can be summarised as follows. Mr Ratima was born in New Zealand. In January 2016, he was 40 years old and had been living in Australia for 19 years. Mr Ratima had known Mr Williams for three months prior to Mr Williams' death through the "drug scene". Mr Ratima was on a lot of drugs at that time. On Saturday 23 January 2016 the appellant told Mr Ratima that he needed to speak to Mr Williams. Mr Ratima and the appellant travelled from Maroochydore to the unit of one Mr Wells at Buddina. Both Mr Ratima and Mr Williams were staying at the home of Mr Wells at the time. In the days before his death, Mr Williams was using a fentanyl patch. Mr Williams also used heroin, whereas Mr Ratima used methylamphetamine. Mr Ratima had a telephone registered to him at that time, but also used Mr Wells' mobile telephone with his permission from time to time.

[8] When Mr Ratima and the appellant arrived, Mr Ratima went into the unit first. There were people other than Mr Williams present in the living room (Ms Morcom, Mr Banfield, Ms Dawson and Mr Wells) and Mr Ratima said that the appellant wanted to speak to Mr Williams and asked the others to leave which they did by going into the bedroom. When the bedroom door closed, the appellant walked into the living room, so that Mr Ratima, the appellant and Mr Williams were present in the living room.

[9] The appellant was angry "straightaway" with Mr Williams and argued with him. Both men threw punches, but Mr Ratima could not remember who threw the first punch. Mr Williams was slow, shaky and slurring and "all over the paddock" and it was apparent to Mr Ratima that Mr Williams just had a shot of fentanyl patch.

[10] The fight started in the vicinity of the bedroom door and ended up by the kitchen. Mr Williams slipped over and hit his head on the wall and then on the tiled floor. He hit the top of the back of the head. After Mr Williams hit the floor and was "kind of knocked out", Mr Ratima screamed at the appellant to get out. The appellant did not do anything to Mr Williams when he was on the ground. When Mr Ratima screamed, the others started coming out of the bedroom. The appellant left and Mr Ratima and Mr Wells picked Mr Williams up and put him on the mattress in the bedroom. Mr Williams was "groggy", but Mr Ratima cleared his airways and he regained consciousness and said he was "fine". Mr Ratima left after 15 minutes.

[11] Mr Ratima gave further evidence-in-chief on the next day of the trial when his version altered in significant respects. His evidence on this occasion can be summarised as follows. It was the appellant who threw the first punches in the altercation with Mr Williams, and Mr Williams was trying to block them. The appellant continued throwing punches at Mr Williams, whilst he tried to block them and Mr Williams threw two or three punches. Not a lot of the appellant's punches

were "hitting their mark", but the appellant was striking Mr Williams on the head. Mr Williams hit his head twice as he went to the ground, once against the wall and once on the ground. The appellant then used his foot to stomp twice on the side of Mr Williams' head, when his head was on the tiled floor. It was then that Mr Ratima intervened by yelling at the appellant to get out. Mr Williams was alive, but he was knocked out. Mr Ratima with Mr Wells picked up Mr Williams and Mr Ratima cleared his airways, tilting his head back and checking he was breathing. If there was a dog at the unit, it was on the verandah. When Mr Ratima left the unit, he met Mr Buchanan who was in his car at the front of the unit complex and drove him to Maroochydore.

[12] In cross-examination, Mr Ratima explained that he told the truth when he gave evidence on the second day and on the previous day he was "confused" and "a bit worried". He was not "thinking straight" yesterday. It was a slip more than a punch that caused Mr Williams to fall to the ground and "as soon as [Mr Williams] slipped, [the appellant] quickly come in, stomped them twice and then lights out". Mr Williams' eyes rolled back in his head. Mr Ratima could not recall where on Mr Williams' head the appellant stomped him twice, but Mr Williams was lying on his back and facing the ceiling. Mr Ratima saw the back of Mr Williams' head hit the wall on the way down. Mr Ratima did not remember what the appellant was wearing on his feet.

[13] When it was suggested to Mr Ratima that it was he who had the fist fight with Mr Williams on the night he died, his answer was "No". When it was suggested to Mr Ratima that he struck Mr Williams a number of times, he responded "That's a lie". Mr Ratima had a similar response to the suggestion that it was he who inflicted the damage to Mr Williams. Mr Ratima accepted that it was fair to say he had a temper, but he disagreed with the suggestion that he has "a short temper". Mr Ratima agreed that "to dog on someone … means to tell the authorities about the person". When it was suggested to Mr Ratima that in respect of both the appellant and him, he was the one with the New Zealand accent, Mr Ratima responded that Mr Wells did too. Mr Ratima could recall going with Ms Morcom to Ms Holcom's house during the day of 24 January 2016, but does not remember Mr Bishop being there.

[14] Mr Ratima admitted that in January 2016 he was functioning primarily to get drugs and explained that he had been "on a 36-month fuelled drug bender". He was cross-examined on his criminal history and admitted to a number of offences for which he had been convicted between November 2015 and November 2016. He conceded he was untrustworthy.

[15] In January 2016, the appellant was staying with one Mr Bishop whose evidence-in-chief was as follows. Mr Bishop had known the appellant since Mother's Day in 2015. As at January 2016, Mr Bishop had known Mr Ratima for a few months. The appellant arrived at Mr Bishop's home about 5.30am or 6am in the morning of 24 January 2016 and told Mr Bishop that "he had just gotten in a fight, and he'd punched [Mr Williams] in the face and also kicked him while he was down. And at that point, him and [Mr Ratima] had an argument and that's when [the appellant] had left." The appellant told Mr Bishop that "he was worried about … whether [Mr Williams] was alive or not when he left". Mr Bishop clarified his evidence that the appellant told him "He punched [Mr Williams] in the head" and the appellant said "that [Mr Ratima] got aggressive towards him after he kicked [Mr Williams]

while he was down, and that's when the appellant and Mr Ratima had an argument over … the situation, and that's when the appellant left the unit and left [Mr Ratima] and [Mr Williams] there". The appellant told Mr Bishop that "[Mr Williams] was on the ground, and then he and [Mr Ratima] argued, and then he left".

[16] Mr Bishop's evidence in cross-examination included the following. Mr Bishop knew that Mr Ratima was a drug user who frequently used drugs and had used them at Mr Bishop's house. When it was suggested to Mr Bishop that he was at Ms Holcom's flat in the morning of 24 January 2016, when Mr Morcom and Mr Ratima were visiting, he did not remember being there. Mr Bishop was taken by surprise by the appellant's confession. After the appellant had told him what he had done to Mr Williams, Mr Bishop asked whether anyone called an ambulance and the appellant replied "I don't know. I just left". When Mr Bishop then asked "Was he breathing?", the appellant answered "I think so. I don't know". When it was put to Mr Bishop that he had put in his police statement that the appellant's confession was made to him at 5.30pm, Mr Bishop confirmed that he had spoken to the appellant in the morning and that he was wrong in his statement to police when he said it was 5.30pm. Mr Bishop disagreed with the suggestion that the appellant had never said to him that he did not know if Mr Williams was alive or dead when he left. Mr Bishop also disagreed with the proposition that the appellant never confessed to him that he had hit or kicked Mr Williams. Mr Bishop had a close relationship with Mr Ratima at the time and Mr Ratima was an aggressive and intimidating person who was quick to anger and to resort to violence.

[17] Mr Austin resided in the block of units that was directly behind the block containing Mr Wells' unit. Mr Austin could not get to sleep on the evening of 23 January 2016. He heard a male voice with a New Zealand accent in the unit directly across from his unit saying "Come over. Turn right, bro. And then its next – then right again". About 15 minutes or half an hour later, he heard a dog bark and a male voice say "Get the fucking dog". Mr Austin heard the muffled sound of people talking and then heard somebody saying repeatedly "I'm your friend". Mr Austin then heard a sound like "stomping on the ground" and then heard a male swearing followed by "Couldn't you knock him out with one punch?". He could not say whether the latter statement was spoken with a New Zealand accent.

[18] Mr Wells' examination in chief was as follows. Mr Wells used Mr Williams' mobile telephone at 12.27pm on 24 January 2016 to dial 000 when he realised that Mr Williams had died. Mr Wells' unit was a one-bedroom unit with an open lounge/ kitchen area, a verandah and a bathroom. Mr Wells had known Mr Williams only for a couple of weeks before Mr Williams' death. Mr Wells had allowed Mr Williams to reside at the unit, and he had stayed for two nights. Mr Ratima had been residing with Mr Wells for about three months. Mr Wells had known the appellant for about one and one-half months. Mr Wells got along well with the appellant, but it was different with Mr Ratima who was "full of aggression, agitation".

[19] On the evening of 23 January 2016, Mr Williams was at the unit from about 4pm. He thought a neighbour from a nearby block of units, Mr Banfield, arrived with his partner, Ms Dawson, around 6pm to 7pm. Mr Wells was close friends with Ms Dawson. Ms Morcom arrived between 8pm and 9pm. Mr Ratima and the appellant arrived about 10.30pm to 11pm. Mr Ratima told Mr Wells to go to his room. Mr Banfield, Ms Dawson and Ms Morcom went with him. Mr Williams

remained in the lounge area. The door to the bedroom was shut. Mr Wells could not hear anything while he was in the bedroom. About 30 seconds to a minute later, Mr Wells opened the door to about a quarter of the way and the only person he could see was Mr Ratima standing at the bedroom door who told him to close the door which Mr Wells then did. Mr Wells could not hear anything, until after a couple of minutes he heard Mr Ratima yell out to him for help. Mr Wells came out and saw Mr Ratima bending over and holding Mr Williams' legs. Mr Wells did not see the appellant. Mr Wells helped Mr Ratima carry Mr Williams who was unconscious to a couch. Ms Morcom left the unit straightaway, as did Mr Ratima. Mr Banfield and Ms Dawson left about 30 to 45 minutes later.

[20] Mr Wells was watching television, when he heard Mr Williams say something. Mr Wells saw Mr Williams sitting on the floor of the kitchen leaning back on the oven. Mr Wells told him to go to bed. Mr Wells fell asleep on the couch. When Mr Wells got up at about 5.15am next morning, he looked at Mr Williams who was on his bed and thought he was "okay". After Mr Wells had coffee with a neighbour, the appellant arrived and asked Mr Wells to make sure that Mr Williams was okay. That was when Mr Wells discovered that Mr Williams' body was in rigor mortis and rang the ambulance. It was after the police arrived that Mr Wells noticed the handle to the griller on the oven was damaged.

[21] Mr Wells' cross-examination elicited the following. When Mr Wells came out of his bedroom and saw Mr Ratima holding Mr Williams' feet, Mr Williams' feet were on the tiles in the kitchen, but his upper body was on the carpet. Mr Ratima had been at the unit in the afternoon of 23 January 2016 about 3.30pm for a couple of hours. During the evening before Mr Ratima and the appellant arrived, Mr Williams asked Mr Wells to keep the appellant away from him. Mr Wells could not explain the discrepancy in time between his waking up at 5.15am and the ambulance not being called until 12.27pm, when according to his recollection there was only about a half an hour between his first checking on Mr Williams when he got up and calling the ambulance. (In contrast to Mr Wells' evidence about the timing of his coffee with his neighbour, Mr Wells' neighbour gave evidence that it was when he woke around 9am or 9.30am on 24 January 2016, Mr Wells came down to see him and they had a coffee.)

[22] Ms Dawson's evidence-in-chief was as follows. She had known Mr Williams for about five years and they were close friends. She had known Mr Wells for about six months and organised for Mr Williams to stay at Mr Wells' unit. She takes a lot of Seroquel and has a bad memory. In the week preceding Mr Williams' death, Ms Dawson was experiencing difficulties in her relationship with Mr Banfield and was spending time with Mr Williams and temporarily staying at Mr Wells' unit. On 23 January 2016, Ms Dawson and Mr Williams went swimming at a nearby beach. Mr Ratima was also at the beach with them. Ms Dawson and Mr Williams returned to the unit. She cooked a roast meal. When shown a photograph of the oven that showed the handle of the griller had come away from the door, Ms Dawson observed that it was not like that when she was using the oven. She and Mr Wells ate the roast, but Mr Williams did not join in the meal. Mr Williams was upset at the time, because someone had taken his car that night. Mr Banfield came over after dinner. At some stage Mr Ratima came to the unit with another male and a female, neither of whom Ms Dawson had met before. Ms Dawson was "shoved" into the bedroom by Mr Ratima. She cannot recall where Mr Banfield was, but she recalls that Mr Wells was in the bedroom with her and that the female would not let

them out. She heard Mr Williams yelling out "Bro, what was that for?". She also heard him say "ah" that must have been loud for her to hear it through the door. She thought she was in the bedroom for about 10 or 15 minutes. When she came out of the bedroom, Mr Williams was sitting down on a wooden chair at the table and he was not making much sense and said he was in pain. He fell backwards off the chair and hit the back of his head on the oven. Mr Wells helped him up and brought him to bed. Ms Dawson left with Mr Banfield and said "goodnight" to Mr Williams and he replied "goodnight" to her.

[23] In cross-examination, Ms Dawson accepted that she had told the police that when she was in the bedroom, she heard Mr Ratima and the other male yelling and swearing at Mr Williams and the male saying "I'll take your car" and that Mr Williams pleaded "Please don't take my car. It's all I've got left". She and Mr Banfield and Mr Wells came out of the bedroom together. She did not see Mr Williams lying on the ground.

[24] Mr Banfield was an acquaintance of Mr Wells who was a friend of his then partner Ms Dawson. On the evening of 23 January 2016, when it was dark, Mr Banfield went around to Mr Wells' home to contact Ms Dawson, if she were there. Ms Dawson, Mr Wells and a person by the name of Frank (whom he did not meet) were there. Mr Banfield did not remember anything else. He was on Seroquel and under the influence of cannabis at the time.

[25] Ms Morcom's evidence-in-chief was as follows. In January 2016 she had been an acquaintance of Mr Ratima for a year. She was asked by Mr Ratima to go around to Mr Wells' unit on the evening of 23 January 2016 to speak to Ms Dawson who she was told was upset about something that had happened to her the night before. When she arrived, Mr Ratima, Ms Dawson and her boyfriend, Mr Wells and Mr Williams were there. The appellant whom she had known for six months arrived about 20 minutes after she did. She went into the bedroom with the others at Mr Ratima's request, because he said they were going to have a talk with Mr Williams. Mr Ratima told them to shut the door which Ms Morcom did. Whilst in the bedroom with the door shut, Ms Morcom could hear quite a few thumping noises for about 15 minutes. She heard Mr Ratima say "can't you knock him out in one hit" and then there was another big thump. Mr Ratima then called out to Mr Wells to help him put Mr Williams on the lounge. Mr Wells went out and then Ms Morcom opened the door. She saw Mr Williams on the lounge and the appellant had gone. She thought Mr Williams had a footprint on his face and his speech was a bit slurred. He was speaking with Mr Ratima and Mr Ratima said "you know it had to happen, Frankie, because you can't put people on the dog". She heard Mr Williams respond "I didn't do it. I wouldn't do it". Mr Ratima and Ms Morcom then left about 10 minutes after Ms Morcom came out of the bedroom which was about 1.30am and they drove in her car to her friend Ms Holcom's house.

[26] Ms Morcom's evidence in cross-examination was that it was about midnight when she arrived at Mr Wells' unit. Whilst in the bedroom with Mr Wells, Ms Dawson and Mr Banfield, Ms Dawson did not try to leave the bedroom and Ms Morcom did not hold the door to stop her from leaving. Ms Morcom did not observe the others chatting amongst themselves in the bedroom. Ms Morcom did not remember Mr Bishop turning up at Ms Holcom's house. "Putting the dog on people" means telling the police about things. There was a dog in Mr Wells' unit that night. The dog got taken out by Mr Ratima, as soon as the appellant arrived.

[27] Mr Buchanan was a good friend of Mr Williams whose evidence-in-chief was as follows. On the evening of 23 January 2016 Mr Buchanan received a number of messages and telephone calls from Mr Williams. As a result, about 2am or 2.30am on 24 January 2016 Mr Buchanan drove his vehicle to collect Mr Williams and a woman at Kawana and drove them a couple of blocks to Mr Wells' unit. Mr Buchanan stayed in his car while Mr Williams went into the unit. About 20 or 25 minutes later Mr Williams came down and spoke to Mr Buchanan, saying he would be another 15 minutes. Mr Williams was fine at that time, but he did not return. Mr Buchanan was doing some work on his vehicle, when Mr Ratima whom he had not met previously came down and told him that Mr Williams had passed out. Mr Buchanan gave Mr Ratima and his dog a lift to Maroochydore.

[28] In cross-examination, Mr Buchanan estimated that he left outside the unit with Mr Ratima at sunrise between 5am and 6am. There were police at the place in Maroochydore where Mr Buchanan dropped Mr Ratima off. When it was put to Mr Buchanan that he was spoken to by police at 8.10am, he agreed that it must have been later than he thought when he left outside the unit.

[29] Ms Holcom was a friend of Ms Morcom whose evidence-in-chief was as follows. Ms Morcom visited her on the evening of 23 January 2016 around 9pm or 10pm. Whilst there, Ms Morcom received a telephone call from Mr Ratima and left around midnight. Ms Holcom went to sleep. Ms Morcom then returned with Mr Ratima about 6am or 6.30am on 24 January 2016. Mr Ratima and Ms Morcom left after a couple of hours.

[30] In cross-examination, Ms Holcom recalled that, after Ms Morcom left on being telephoned by Mr Ratima, she came back to Ms Holcom's house with Mr Ratima after about an hour. Ms Holcom sat up with them having drinks and coffee. Ms Holcom recalled that before Mr Ratima talked about the fight that had happened, he said "I really had to psych myself up. I didn't want to". After they left, Ms Holcom went to bed. When it was put to Ms Holcom that Mr Bishop was at her place, when Ms Morcom and Mr Ratima were, she answered "I know Neil Bishop came to my house around that time, but I don't know if that's exact … time, yes."

[31] A police officer gave evidence that he spoke to one Ms Dalgleish on 25 January 2016 who was in possession of the keys to a silver Ford Falcon sedan registered to Mr Williams. Ms Dalgleish provided the keys to the officer and the vehicle was located at Redcliffe.

[32] A Law Enforcement Participant (LEP) recorded a conversation he had with the appellant at the watchhouse on 27 January 2016. The appellant told the LEP: "I punched someone the other day and they died hey." The appellant also made a statement to the LEP to the effect that the victim was a "dog".

[33] Exhibits 5.1 and 5.2 contained admissions by the prosecution and the appellant as to the telephone records for identified mobile telephones between 23 and 24 January 2016, including the content of text messages and the identity of the person in whose name the telephone was registered and, in the case of one mobile telephone, that it was in the possession of Mr Buchanan. At the trial the prosecution relied on an analysis of text messages and calls between the appellant, Mr Williams, Ms Dalgleish and others throughout the evening of 23 January 2016 and into the

following day. There were a number of calls made over a short period by Mr Williams to the appellant on 23 January 2016, where it appears the appellant did not answer, and finally at 5.22pm Mr Williams sent a text "Stop hanging up me and lets talk like men ok". After a number of further unanswered calls made by Mr Williams to the appellant, Mr Williams sent a text at 5.31pm asserting that "Bro ur friend has just stole me car". It appeared from this message that Mr Williams was accusing Ms Dalgleish, as a friend of the appellant, of stealing his car. Ms Dalgleish sent a text to Mr Williams at 5.40pm saying "better work out how to get me $400 really quickly because I am not being used by two blokes". Ms Dalgleish sent another text to Mr Williams at 5.42pm saying "Just get the money". There were further inflammatory texts then sent by Mr Williams to the appellant. By 1.40am on 24 January 2016 Mr Williams had sent a message to Mr Ratima asking him where he was, as he had "all the money". The text messages and telephone calls also showed that 2.28am on 24 January 2016 was the time of the last telephone call that Mr Williams made to Mr Buchanan and that at 2.30am there was a successful telephone call from Mr Wells' telephone (that was in the possession of Mr Ratima) to the appellant. The telephone calls Mr Ratima made from Mr Wells' phone to Mr Williams at 2.36am were unanswered. (It was the prosecution contention that the assault on Mr Williams took place between 2.30am and 2.36am.)

[34] Exhibit 25 contained admissions by the prosecution as to what various witnesses had said in their sworn statements to the police which evidence the particular witness either did not recall or denied when giving evidence in the trial. These included that Ms Morcom did not mention in her police statement seeing a footprint on Mr Williams' face and that she did mention in her police statement that when she and Mr Ratima had a coffee with Mr Holcom, Mr Bishop turned up and stopped for a chat.

[35] There were many inconsistencies in the details of the various versions of the events given in evidence which were no doubt contributed to by the fact that many of the witnesses admitted to using drugs or prescription drugs at the relevant times. Although there was a suggestion through the content of Ms Morcom's police statement that Mr Bishop may have heard about the incident from Mr Ratima before Mr Bishop had the conversation with the appellant about the incident, that was not supported in evidence by Mr Bishop, Mr Ratima or Ms Morcom and there was little support for it from Ms Holcom. It was open to the jury to conclude that Mr Ratima's evidence about getting angry with the appellant after he stomped on Mr Williams was consistent with the confession by the appellant to Mr Bishop that Mr Ratima was aggressive towards him after he kicked Mr Williams on the ground.

Was there a reasonable possibility that the appellant was a party rather than the principal offender?

[36] Mr Wilson of counsel who appeared for the appellant *pro bono* conceded that if the court did not accept his submission that the admissions made by the appellant to Mr Bishop and the LEP were equivocal as to whether the appellant himself inflicted the killing blow, the appellant's argument based on the rejection of Mr Ratima's evidence cannot be sustained.

[37] It is difficult to see how the statement made by the appellant to the LEP could in any way be considered equivocal. As a matter of common sense, when a person was talking about his involvement in a fight, he would not have done so with the

effect of s 7 of the *Criminal Code* (Qld) in mind. Even allowing for bravado in the context of one prisoner speaking to another, the appellant's statement to the LEP is unequivocal about his being the person who punched the victim who died and the reason why the victim was punched. The reason given by the appellant for punching Mr Williams to the LEP is consistent with the evidence at trial as to a reason for the appellant's anger towards Mr Williams leading up to the incident. The statement to the LEP is also consistent with the appellant's confession to Mr Bishop. Similarly, even though there was some confusion on Mr Bishop's part about the timing of the conversation between the appellant and him during which the confession was made, the content of the admission to Mr Bishop was consistent only with the appellant being the one who inflicted the violence on Mr Williams. These admissions are therefore not equivocal about the appellant's role in the assault of Mr Williams which removes a key part of the appellant's argument on this aspect of the unreasonableness of the verdict.

[38] The essence of the argument advanced on behalf of the appellant is that the evidence of Mr Ratima was so adversely affected by an accumulation of credibility issues that a jury could not have safely accepted his evidence. The defence case at trial was that it was Mr Ratima who struck the blow that killed Mr Williams and the jury could not be satisfied that the prosecution had excluded beyond reasonable doubt the possibility that the appellant played some lesser role in the offending than as the principal offender who delivered the blow that killed Mr Williams. It is therefore argued that, if it were accepted that the evidence of admissions were not specific enough to distinguish between criminal liability as a principal or as a party and it were accepted that the evidence of Mr Ratima could not have reasonably been accepted by a jury, then the conclusion must be reached that the jury did not have sufficient evidence to dismiss the reasonable possibility that the appellant was a party to the offending, rather than being the principal offender.

[39] Mr Wilson seeks to draw an analogy in respect of Mr Ratima's evidence and the scenario that was considered in *R v Heginbotham, McCartney & Room* [2008] QCA 47. Each of the defendants in *Heginbotham* appealed against their convictions for counts arising out of break-ins. The fact of the break-ins had been admitted at the trial and the issue for the jury in each case was whether the particular defendant accused of the offence was, in fact, an offender. The prosecution case in respect of three counts depended almost entirely upon the evidence of an accomplice Ms Sanchez and the prosecution case in respect of another count depended largely upon her evidence. In her evidence-in-chief in respect of the count that depended largely on her evidence, Ms Sanchez swore that the participants were herself, McCartney, Heginbotham and one Matysiak. Her evidence-in-chief in respect of the other count against Mr McCartney and Mr Heginbotham implicated them in the break-in. Her evidence-in-chief in respect of the other two break-ins implicated all three defendants. When cross-examined by counsel for Mr McCartney, Ms Sanchez said that he was not involved in any of the break-ins. In cross-examination by counsel for Mr Heginbotham, Ms Sanchez said that Mr Heginbotham was not involved in the offences. In relation to the matters in respect of which Mr Room had been charged, Ms Sanchez also retracted her evidence against him in respect of the only counts of which he was convicted. At the conclusion of Ms Sanchez' cross-examination, a statement agreed to by all counsel which became an exhibit at trial recorded that Ms Sanchez conceded to cross-examiners that none of the three defendants had been involved in the offences for which they were on trial. Mr Matysiak also gave evidence in respect of the count that depended largely upon Ms

Sanchez' evidence, but there were significant inconsistencies between Mr Matysiak's version and Ms Sanchez' version. The evidence of Mr Matysiak was not sufficient to justify a conclusion that it was open to the jury to be satisfied beyond reasonable doubt of the guilt of Mr Heginbotham and Mr McCartney. In re-examination after Ms Sanchez had an opportunity to obtain legal advice, Ms Sanchez contradicted that she had conceded that none of the defendants had been involved in the offences for which they were on trial and conveyed that what she meant by her retraction was that she did not see any of the defendants specifically doing anything. In further cross-examination, Ms Sanchez contradicted her evidence in re-examination, explaining that in light of the legal advice she had received, the departure from her evidence in cross-examination might help avoid a charge of perjury being laid against her.

[40] Fraser JA (with whom the other members of the court agreed) observed at [71]-[73]:

> "[71] The evidence of Sanchez lacked credibility not only because of "the manner in which it was given" but because she later retracted it entirely in cross-examination, and that, taken together with the other matters affecting her credibility, demonstrated the manifest danger of relying on any of her evidence.
>
> [72] Sanchez's retraction of her earlier evidence implicating the appellants created an inconsistency in her evidence of the most serious character imaginable. The damaging effect of the retraction was aggravated, if that were possible, by her later contradictory evidence about her reasons for it.
>
> [73] The effect of the retractions by Sanchez of the evidence she had earlier given implicating each of the appellants is, in my opinion, so to weaken her evidence as to render it unsafe to rely upon it. Sanchez's initial evidence implicating the appellants was, as my summary of it indicates, little more than a bare accusation that the appellants committed the offences, unaccompanied by much in the way of circumstantial detail. The retraction of that version came at the end of a cross-examination that was neither particularly lengthy nor aggressive, but which did first elicit admissions of the facts giving rise to the serious credibility issues I have mentioned."

[41] Fraser JA concluded at [78] that the effect of Ms Sanchez' retraction of her evidence implicating the defendants, when assessed in the context of the other evidence, gave rise to a reasonable doubt about their guilt which was not capable of being resolved by reference to the jury's advantage of seeing and hearing the witnesses. The appeal was allowed in respect of the convictions of the defendants of the counts which depended almost entirely upon Ms Sanchez' evidence or largely upon her evidence and a verdict of acquittal entered in respect of those counts.

[42] There are a number of distinctions that can be made between Mr Ratima's evidence in this matter and Ms Sanchez' evidence in *Heginbotham*. First, there was no explanation offered by Ms Sanchez of why during cross-examination she retracted her earlier evidence implicating the defendants. In contrast, Mr Ratima gave an explanation for why there were differences in his evidence on the second day

compared to the first day of his evidence. Second, whereas Ms Sanchez made a complete retraction of her evidence implicating the defendants, some of the evidence given by Mr Ratima on the first day remained his evidence, when he gave further evidence during the second and third days. Third, there was no independent evidence in *Heginbotham* in respect of the four counts which depended upon Ms Sanchez' evidence, whereas important aspects of Mr Ratima's evidence about the course of the fight between the appellant and Mr Williams were supported by the evidence of disharmony between the appellant and Mr Williams preceding the incident, the appellant's admissions, and the evidence of Mr Williams' injuries that were consistent with a fight following the course described by Mr Ratima. There was also support from Ms Morcom's identifying Mr Ratima as the person who said "can't you knock him out in one hit?" and that it was Mr Ratima who was standing at the bedroom door, when Mr Wells opened it slightly soon after going into the bedroom. The statement that Ms Holcom recalled Mr Ratima making about having to "psych" himself up was consistent with Mr Ratima blaming himself for bringing the appellant to Mr Williams, so that that incident could take place.

[43] *Heginbotham* was an exceptional case. The circumstances of the retraction of evidence by the critical witness in that case are not analogous with the changes in Mr Ratima's evidence against the appellant. Despite the way the appellant's argument was compartmentalised on this issue of whether there was a reasonable possibility the appellant was a party, rather than the principal offender, it is still appropriate to consider all the relevant evidence on whether the prosecution had excluded beyond reasonable doubt the reasonable possibility that the appellant was a party only to the assault on Mr Williams by Mr Ratima. When Mr Ratima's evidence is considered in conjunction with the admissions made by the appellant, there was evidence to support the rejection of the possibility that it was Mr Ratima who inflicted the violence on Mr Williams, rather than the appellant.

Dr Urankar's evidence on causation

[44] Dr Urankar is a consultant neuropathologist and forensic pathologist. Neuropathology is a specialty in the consequences of trauma to the head and diseases to the brain that result in death, as a result of affecting the brain. Dr Urankar examined Mr Williams' body commencing at 11.55am on 25 January 2016.

[45] On external examination, Dr Urankar found five separate injuries to the head: an abrasion to the right cheek, a small bruise on the right upper lip measuring 1 centimetre, a larger area of bruising about 3 by 2 centimetres to the inside of the lower lip, an abrasion in the crease of the chin measuring 1.2 centimetres by about 7 millimetres, and a vertical abrasion on the left forehead measuring 8 millimetres. Dr Urankar identified those injuries as caused by three distinct applications of blunt force. Dr Urankar also described a number of different injuries across the hands and the arms of Mr Williams. There were bruises on the back of the left forearm and the left wrist consistent with a person standing with palms forward and thumbs out. Dr Urankar expressed the opinion that a number of the bruises and small abrasions on the left hand and forearm were as a result of a direct application of force, such as from another person's fist or part of the other person's body. There were similar injuries to the right arm. There was bruising across the knuckles of the left hand, but they were unlikely to be caused by fending off blows.

[46] On internal examination of the head, Dr Urankar observed bruising beneath the scalp over the left temple bone and further bruising of the temporalis muscle underneath that. Underneath the muscle, there was a linear fracture coming from a point with one fracture running down the bone and onto the base of the skull and another one running backwards onto the parietal bone on the side of the head. The temporalis muscle on the right side of the head under the scalp had the same bruising as the muscle on the left side. The skull fracture on the left side was "a large complex skull fracture". There was also a fracture starting at the left squamous temporal bone and extending onto the base of the brain and another extension of going onto parietal bone. In order to cause that pattern of injuries on the left side of the skull, there had to be impact on the left side. A severe amount of force would have been required to cause the fractures. There was a substantial extradural haemorrhage, as a result of the skull fracture causing the meningeal artery to tear. The pooling of the blood caused the brain to compress ultimately leading to death of the brain stem, because the vessels that supply the brain stem were compressed.

[47] On the internal examination, there was an area of bruising of the soft tissues overlying the left jaw which was consistent with application of blunt force and potentially part of the same injury that cause the lip bruising, even though there was no evidence of bruising on the skin over the left jaw. Internal examination also revealed an area of bruising over the lateral part of the right eye that was not evident on the skin surface. Despite there not being any injuries to the skin surface of the neck, there was bruising in the deep tissues on the left and on the right. The injuries to the neck could have been sustained in a single application of mild to moderate blunt force. There was a tear in the mesentery that caused some bleeding into the abdominal cavity that would have been the result of a modest amount of force to the abdomen either from a punch or a stomp or a foot or an object inflicting deep compressive force. On internal examination of the hands and arms, Dr Urankar observed areas of bruising where there was not a skin lesion on the front of the left forearm, the front and the back of the left wrist, and the back of both hands. That confirmed Dr Urankar's opinion there had been multiple small applications of blunt force to the back of the hands and the forearms.

[48] Dr Urankar examined samples of the tissues from Mr Williams' body under the microscope. There were neutrophils within the extradural haemorrhage which was consistent with a survival period for at least 30 minutes and up to three hours. There were no changes in the brain consistent with lack of oxygen which occurs where death is due to lack of oxygen after about six to eight hours of survival.

[49] Dr Urankar explained that the two injuries on the left and right side of the temporal lobe were coup and contrecoup injuries, as a result of an outside force to one side of the brain causing the brain to accelerate and hit the other side of the skull.

[50] Evidence had been given by forensic medical officer Dr Mahoney of the effects of the various drugs detected in Mr Williams' blood. The following was Dr Urankar's opinion on the effects on Mr Williams of those drugs. The level of methylamphetamine and amphetamine detected in Mr Williams' blood of 0.47 milligrams per kilogram (of blood) was much higher than the therapeutic level of 0.02 to 0.05. There are reports of people dying from methylamphetamine use at the level of 0.1 milligrams per kilogram. The more a person uses the drug, the person's tolerance is greater and the person may be able to cope with higher levels

than 0.1 milligrams per kilogram. The presence of amphetamine with the methylamphetamine indicated that Mr Williams' body had commenced to breakdown the methylamphetamine. The detected levels of benzodiazepines in Mr Williams' blood were in the therapeutic range. The detected level of morphine at 0.06 milligrams per kilogram was at the therapeutic level which would produce side effects above pain relief of slowing of breathing and decreased consciousness. The level of fentanyl detected was 0.005 milligrams per kilogram and people had been known to succumb at the level of 0.003 milligrams per kilogram, but there is an overlap between therapeutic and fatal levels as it is a rapidly metabolised drug. The drugs in Mr Williams contributed to his death by causing a further decrease in his level of consciousness which was also occurring at the same time as the decreasing level of consciousness from the fatal injury to the brain.

[51] Dr Urankar expressed the opinion that the head injury on its own and its consequences resulted in Mr Williams' death. Because Dr Urankar was not aware of how much drugs or medications Mr Williams could normally tolerate, she could not say that the level of drugs in his system would definitely have killed him, although it would have killed some people. Dr Urankar stated:

> "But it's more like, given the serious injury and its consequences, that it just depressed his consciousness and contributed to death."

[52] Dr Urankar explained that death from a trauma causing a fracture leading to the extradural haemorrhage leading to the secondary pressure effects on the brain takes time to occur and as the blood accumulates and the pressure effect builds that reduces the level of consciousness, so the person would appear tired or drowsy. Dr Urankar considered a fall into the oven door was a less likely scenario for causing the skull fracture.

[53] In cross-examination, it was put to Dr Urankar that she could not exclude that Mr Williams died from toxicity from methylamphetamine, but Dr Urankar responded that:

> "If it killed him a quarter of a second before, then I wouldn't see the haemorrhages in the brain stem because he still had to be alive to get the haemorrhages in the brain stem, which are then fatal. So you – he had to be alive all the way up until that point to get the haemorrhages in the brain stem."

[54] Dr Urankar described Mr Williams being on a downward slope to death from his head injury and he reached the point at the end of the downward slope.

[55] Dr Urankar could not rule out that the injury to the brain was about to kill Mr Williams, when the methylamphetamine killed him, although Dr Urankar observed that was "something that's just impossible to actually tell". What Dr Urankar did conclude was that, although she could not exclude the possibility that the methylamphetamine killed him before the injury to the brain, it was "unlikely".

[56] The test to be applied on whether there was sufficient evidence for a jury to be able to exclude the reasonable possibility that Mr Williams died by way of drug overdose was explained by McPherson J in *R v Summers* [1990] 1 Qd R 92, 98-99:

> "The first is that the standard of proof in criminal proceedings is not proof beyond doubt but proof beyond 'reasonable' doubt. What is required of the prosecution in discharging the onus of proof of guilt is not that every possibility of innocence be excluded by the evidence but only that every reasonable possibility be excluded. It is only if the jury 'think there is that reasonable possibility' of innocence that 'it is one which to the jury would raise a reasonable doubt as to the guilt of the accused': *R v McKenna* (1964) 81 W.N. (Pt 1) (N.S.W.) 330, 334 per McFarlane J. The existence of an admitted possibility but one that is assessed by experts in the field as being 'extremely unlikely', or 'very remote', or the result of a 'very rare coincidence' is not sufficient to introduce a reasonable doubt precluding the jury from being satisfied to the requisite standard of the proof of guilt."

See also the observations made by Macrossan CJ at 95 to the effect that the jury should form its judgment on the question of causation "using its own common sense" and that the scientific and legal standards are different.

[57] In *Summers* the defendant assaulted the deceased who died as a result of the rupture of an aneurysm within the cranium with consequential bleeding into the brain that caused the victim to collapse during the assault and die. There was medical evidence that a person with an intracranial aneurysm was at risk of a spontaneous rupture. The defence had therefore argued that the possibility of the spontaneous rupture prevented the jury from concluding beyond reasonable doubt that the defendant's actions had cause the death of the victim, despite the correlation between the assault and the victim's collapse. The defendant's appeal was unsuccessful, as proof of guilt beyond reasonable doubt was not equated with the requirements of complete scientific accuracy.

[58] Dr Urankar could not rule out the possibility that the level of drugs in Mr Williams' system would have caused his death, before the injury to his brain did, and therefore conceded a theoretical scientific possibility that drug toxicity may have caused Mr Williams' death. That did not preclude the jury from being satisfied beyond reasonable doubt on the basis of the evidence about the incident and how Mr Williams appeared after the incident and Dr Urankar's opinion that Mr Williams had to be alive for there to be the fatal haemorrhages observed in the brain stem due to the skull fracture that any reasonable possibility that Mr Williams' death was caused through drug toxicity, rather than the injury to his brain, was excluded.

Conclusion

[59] An independent assessment of the evidence does not impugn the verdict of the jury as either unreasonable or not supported by the evidence. It was open to the jury to be satisfied to the requisite standard by accepting Mr Ratima's evidence that it was the appellant who punched and stomped on Mr Williams and to be satisfied on the basis of all the evidence that Mr Williams died from the fatal injury to the brain inflicted as a result.

Order

[60] It follows that the order which should be made is:

Appeal against conviction dismissed.