SUPREME COURT OF QUEENSLAND

CITATION:	*R v Armitage; R v Armitage* [2019] QCA 149
PARTIES:	**In CA No 68 of 2017 and CA No 241 of 2017:** **R** **v** **ARMITAGE, Stephen John** (appellant) **In CA No 81 of 2017 and CA No 226 of 2017:** **R** **v** **ARMITAGE, Matthew Leslie** (appellant)
FILE NO/S:	CA No 68 of 2017 CA No 241 of 2017 CA No 81 of 2017 CA No 226 of 2017 SC No 973 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	In CA No 68 of 2017 and CA No 81 of 2017: Supreme Court at Brisbane – Date of Convictions: 21 March 2017 (Jackson J) In CA No 226 of 2017 and CA No 241 of 2017: Supreme Court at Brisbane – Date of Convictions: 26 September 2017 (Jackson J)
DELIVERED ON:	2 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2018; further submissions received from all parties on 25 June 2019
JUDGES:	Sofronoff P and McMurdo JA and Boddice J
ORDERS:	**In CA No 68 of 2017:** **1. The appeal against the conviction on count 2 on the indictment be allowed, the conviction on that count be quashed, and a retrial ordered on that count.** **2. The appeal against the conviction on count 3 on the indictment be dismissed.** **In CA No 81 of 2017:**

1. **The appeal against the conviction on count 2 on the indictment be allowed, the conviction on that count be quashed, and a retrial ordered on that count.**

2. **The appeal against the conviction on count 3 on the indictment be dismissed.**

In CA No 226 of 2017:

The appeal against the conviction on the indictment be allowed, the conviction be quashed, a verdict of guilty of manslaughter be substituted, and the matter be remitted to the trial division for the appellant to be sentenced for that offence.

In CA No 241 of 2017:

The appeal against the conviction on the indictment be allowed, the conviction be quashed, a verdict of guilty of manslaughter be substituted, and the matter be remitted to the trial division for the appellant to be sentenced for that offence.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellants were convicted of murder, torture and interference with the deceased's corpse – where the deceased disappeared after stealing drugs – where the deceased's burnt and partially buried remains were later found not far from the appellants' property – where an unidentified man was said to have been held and tortured at the appellants' property in the period between the deceased's disappearance and the finding of his remains – where the prosecution case was wholly circumstantial – where the prosecution alleged that the appellants were each guilty of murder because they caused the death of the deceased with the requisite intent, aided another in the murder of the deceased, or formed a common intention to prosecute the unlawful purpose of assaulting the deceased, a probable consequence of which was the deceased's murder – where there was evidence of a common intention of the appellants to assault the deceased for the purpose of getting information about stolen drugs – where the cause of death of the deceased was unknown but it was open to the jury to conclude that someone had killed him – whether it was open to the jury to find that the unidentified man was the deceased – whether there was sufficient evidence to prove that the deceased was killed by a bodily injury inflicted with intent to commit grievous bodily harm or to kill, to the exclusion of all other reasonable explanations – whether it was open to the jury to find that the deceased was killed by an injury inflicted upon him by the appellants, another aided by the appellants, or another in the course of prosecuting an unlawful common

purpose with the appellants – whether it was open to the jury to convict the appellants of murder

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWERS OF COURT ON APPEAL – POWER TO SUBSTITUTE VERDICT OR SENTENCE – GENERAL PRINCIPLES – where the appellants were convicted of murder but the Court of Appeal held that there was insufficient evidence to prove that the deceased was killed with the required intent – where the prosecution had alleged that the appellants were each guilty of murder because they caused the death of the deceased with the requisite intent, aided another in the murder of the deceased, or formed a common intention to prosecute the unlawful purpose of assaulting the deceased, a probable consequence of which was the deceased's murder – where it is not known whether all of the jurors decided that the appellants were guilty upon the same basis of criminal responsibility – whether it is a pre-condition to the application of an appellate court's power of verdict substitution that every fact found by the jury be known – whether the verdicts of murder should be substituted for verdicts of manslaughter

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL ALLOWED – where the appellants were convicted of murder, torture and interference with the deceased's corpse – where the prosecution alleged that the appellants were each guilty of murder because they caused the death of the deceased with the requisite intent, aided another in the murder of the deceased, or formed a common intention to prosecute the unlawful purpose of assaulting the deceased, a probable consequence of which was the deceased's murder – where the trial judge gave a direction that manslaughter was an alternative verdict to murder on the bases of actually doing the act and in the prosecution of an unlawful common purpose but instructed the jury not to consider manslaughter as an alternative verdict to murder on the basis of aiding another in the killing of the deceased – whether the trial judge misdirected the jury by failing to direct that the appellants could be found guilty of manslaughter, rather than murder, on the basis that the appellants aided another in the killing of the deceased

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL ALLOWED – where the appellants were convicted of murder, torture and interference with the deceased's corpse – where the prosecution alleged that there were several acts on which the

jury could convict the appellants of torture – where there were grounds for challenging the credibility or reliability of witness evidence – where the trial judge failed to instruct the jury that they had to be unanimous about which act was, or series of acts were, intentionally inflicted to cause severe pain and suffering in order to convict the appellants of torture – where the respondent concedes that the trial judge misdirected the jury but argues that the convictions should stand by the application of the proviso – whether the trial judge misdirected the jury by failing to instruct that the jury had to be unanimous about the act or acts that constituted the conviction of torture – whether the proviso should be applied

Criminal Code (Qld), s 7, s 8, s 576, s 668E, s 668F

R v Lowrie and Ross [2000] 2 Qd R 529; [1999] QCA 305, distinguished
R v Melling & Baldwin [2010] QCA 307, distinguished
Spies v The Queen (2000) 201 CLR 603; [2000] HCA 43, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, applied

COUNSEL: S C Holt QC for the appellant, Stephen Armitage
M J Copley QC for the appellant, Matthew Armitage
D C Boyle and J Ball for the respondent

SOLICITORS: Owens & Associates for the appellant, Stephen Armitage
Legal Aid Queensland for the appellant, Matthew Armitage
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and the orders his Honour proposes.

[2] **McMURDO JA:** On 10 April 2014, a man's skull and jaw were found in the Toolara State Forest off the Maryborough-Cooloola Road. Further searches of the area located other bone fragments in a burnt-out site nearby. The remains were identified as those of Shaun Barker.

[3] Mr Barker had been reported missing in January 2014. He was a drug user who was addicted to the drug ice. He disappeared after stealing drugs from a man called Scott Murphy at the Gold Coast. His ex-partner, who usually spoke to him daily, was finding it difficult to contact him and last saw him on 9 December 2013, when he told her that he was in trouble with the police and that he "had to take care of matters" with Mr Murphy in relation to a debt. On the following day, CCTV footage outside a service station in Broadbeach showed him being approached by two men and leaving the scene with them in their car.

[4] One of the appellants, Stephen Armitage, lived at a house at Cooloola Cove which he owned, and which was about 15 kilometres from where Mr Barker's remains were found. The other appellant, Matthew Armitage, who is his adult son, also lived there. Stephen Armitage had a commercial fishing business, and Matthew

Armitage worked with him. At the rear of the house was a shed, which contained a large number of items which were used in the business. Three witnesses, men who had worked at or visited the Armitage property in December 2013, gave accounts of having seen a man being detained there, by being kept in what was described as a large fishing esky. There were several containers of that type which Stephen Armitage kept on the property for his business. The witnesses described the cruel conditions in which this man was being held; for example, when he was supplied with water it was mixed with drugs.

[5] Another witness was Kane Ostwald. He is a nephew of Stephen Armitage and he was a user of ice, which he was sourcing from the Armitage property. He described a car trip one evening, taking 15 to 20 minutes, from the Armitage property to an area of forest where there was a group of men which included the appellants. There was a large fishing esky at the scene. Mr Ostwald said that he there saw a body lying about four metres away in front of a tree. He described the body as that of a man "on his side all kinked up." Mr Ostwald said that he checked for a pulse and performed some CPR before he, Mr Ostwald, passed out and the next thing that he could recall was waking up the next morning at the Armitage property. In September 2014, Mr Ostwald identified Mr Barker from a photo board as the man he had seen near the esky in the forest.

[6] The appellants, together with another man named William Dean, were charged with the murder of Mr Barker. They were further charged with torturing him, and interfering with his corpse. After a trial in March 2017, the jury convicted each appellant on the charges of torture and interference with the corpse. Dean was convicted of murder, but the jury was unable to agree on the murder charge against the appellants. In September 2017, the appellants were re-tried on the charge of murder, and each was convicted by the jury.

[7] Stephen and Matthew Armitage appeal against those three convictions. Each argues that the jury's verdict on the murder charge against him was unreasonable. Each argues also that there was a miscarriage of justice, by the trial judge misdirecting the jury about an alternative verdict of manslaughter.

[8] They challenge their convictions for the offence of torture, upon the ground that the judge did not direct the jury that they could convict only if all of the jury reached that conclusion on the basis of the same conduct. And they argue that the jury's verdict on the third charge, that of interfering with the corpse, was unreasonable.

The evidence

[9] I will discuss first the evidence given at the second trial.

[10] Some facts were the subject of formal admissions under s 644 of the *Criminal Code* ("the *Code*") including events leading up to the disappearance of Mr Barker in December 2013.

Events at the Gold Coast

[11] Mr Barker was a heavy user of methylamphetamine and, by late 2012, he was taking the drug six to eight times a day. By then, he had separated from his former partner, Lauren Jones, but they still spoke to each other every day. When she saw

him in mid-2013, he looked sick and had lost 15-20 kilograms in weight. In late 2013, he told her that he was also manufacturing drugs.

[12] In October 2013, Mr Barker, Ms Jones and another woman went to a hotel room in Broadbeach. It was a particular room which Ms Jones had booked at the request of Mr Barker, who had told her that there was "around $80,000 worth of ice that had been hidden" there. Mr Barker retrieved a tin from behind an air conditioning unit on the balcony, which he opened revealing a clip seal bag with a substance that had the appearance of the drug ice.

[13] Ms Jones last spoke with Mr Barker on 9 December 2013. On that evening, a white Toyota LandCruiser wagon, with registration 817-SBZ, was observed outside a house at 2 Montrose Court, Benowa Waters. That was a car used in the relevant period by William Dean.

[14] A credit card in the name of the appellant, Stephen Armitage, was used at Coomera on 10 December 2013. Stephen Armitage had had an operation on his back at a Brisbane hospital in November 2013. He attended a follow-up appointment with a doctor in Brisbane on 11 December 2013 and a further appointment in Brisbane a week later.

[15] There was evidence from a woman named Amber Denning, who was using ice which she would source from Stephen Armitage at his property. Here she met William Dean. In late 2013, she travelled with Stephen Armitage and Dean to the Gold Coast, where they met Mr Murphy at the Benowa Tavern. On the same day, she went with them to the property at 2 Montrose Court, Benowa Waters. This was Mr Murphy's house.

[16] It was also admitted that during the relevant period, certain telephone services were used by certain persons, including in some cases the appellants. A table of records of calls between those services was tendered. The fact of a call from one person to another was thereby proved, but not the content of the conversation.

[17] On the morning of 9 December 2013, Stephen Armitage called William Dean. That afternoon, Mr Barker called Mr Murphy. On that afternoon and evening, there were calls between Stephen Armitage and Mr Dean, and between Stephen and Matthew Armitage. There were further calls on the following morning, by Stephen Armitage to Mr Murphy and then Mr Dean. There were calls that afternoon by Stephen Armitage to Matthew Armitage and again to Mr Dean.

[18] There was evidence from a man who was working at a service station on the Gold Coast on the night of 10 December 2013 that a person he identified as Mr Barker came there at some time before 7.00 pm, saying that people were after him. Another witness, Daniel Jaffe, said that Mr Barker telephoned him at 8.00 pm and asked to be picked up. Mr Jaffe thought that he sounded a "bit frantic". Another witness, Brad Kelly, who knew Mr Barker, went to the service station on that night at about 9.30 pm, and spoke to Mr Barker who told him that there were people after him. The service station manager recalled that, subsequently, three people arrived in a car, two of whom walked into his shop and spoke to Mr Barker, who then left with them. The attendant estimated that this was between 9.00 and 10.30 pm. At 9.35 pm, Mr Murphy telephoned Mr Barker.

[19] Late on the evening of 10 December, or early on 11 December 2013, Mr Barker left the house at Benowa Waters, with Mr Dean, in his LandCruiser. The car was recorded passing a toll point at Murrarie, travelling north, on the morning of

11 December 2013. That evening, Mr Murphy's car travelled north on the same road.

[20] Mr Barker used to drive a Kia Rio car, which was registered in the name of Ms Jones. It was found, in a burnt-out condition, in bushland at Nerang State Forest in June 2014.

Events at Cooloola Cove and the forest

[21] There were five witnesses as to events at the Armitage property within the relevant period. They were Mr Ostwald, Matthew Dean, Ian Schutz, Corey Ballard and Rick Mitchell.

[22] The evidence of Mr Mitchell was as follows. He is a cousin of Stephen Armitage. In late 2013, he did some work at the Armitage property, repairing vehicles. He recalled seeing others at the property including Mr Schutz, Mr Ballard, Matthew Dean and William Dean.

[23] On one occasion, Mr Mitchell recalled, as he walked up the driveway, he saw the co-defendant William Dean apparently talking to an esky. He heard Mr Dean say "[s]orry, mate". He thought that this may have happened on 12 or 13 December 2013. Mr Mitchell then asked Stephen Armitage what was going on, and he replied that "they had a bloke in the esky" and that "they were trying to get information out of him." Stephen Armitage told him that this was about "something that he stole from the Gold Coast. Either some frank or some ephedrine or something." (The word "frank" is a word used for the drug gamma hydroxybutyrate, more commonly known as "fantasy".)

[24] Mr Mitchell also recalled an occasion when he was working in the shed at the property, when Stephen Armitage said something to the effect that the man in the esky was thirsty. Stephen Armitage went to the house and returned with a bottle, saying to Mr Mitchell that "this will fix him … it [is] fifty-fifty", which Mr Mitchell understood to mean that it was an equal mix of water and fantasy. During the investigation, Mr Mitchell took a sample of liquid from a container in that shed and provided it to police. The liquid was analysed and found to be a substance which converts to that drug if ingested.

[25] Mr Mitchell recalled another occasion, when he was working in the shed, when Matthew Armitage came and asked him "where the big black zip ties were". Matthew Armitage said to Mr Mitchell that he wanted to use "them to tie somebody to the tree or handcuff somebody or something like that [to t]ie somebody down".

[26] Mr Mitchell recalled a time, when Matthew Armitage and Matthew Dean were in the shed with him, when Stephen Armitage arrived and said he "had some dead weight out there and … needed a hand". Mr Mitchell said that he then heard the sound of a forklift.

[27] On another occasion, this time at Mr Mitchell's residence at Cooloola Cove, Stephen Armitage told him that he had to go to the Gold Coast about "the fellow in the esky", and that he "explain[ed] to them down the Gold Coast about the bloke in the esky."

[28] Mr Mitchell admitted that he was using ice during this period and it was not uncommon for him to have binges. He admitted that the drug affected his memory. He agreed that he did not like Matthew Armitage, and that he had not included what Matthew Armitage had said about the cable ties in his first statement to police.

[29] Corey Ballard lived near the Armitage house with his grandfather. Mr Ballard knew Matthew Armitage, having gone to school with him, and he also knew Stephen Armitage. He had worked for Stephen Armitage, doing net fishing and, in the relevant period, he was working at the Armitage property doing maintenance work on vehicles. He had met William Dean as one of Stephen Armitage's friends.

[30] On one occasion, he noticed that there was "an esky on the ground with a man trying to half stand up, or half on his hands and knees." The man was less than a metre from the esky. The Armitages, William Dean and Mr Schutz were there at the time: Matthew Armitage and Mr Schutz were in a shed and Stephen Armitage and Dean were near the esky. Later that day, Stephen Armitage spoke to Mr Ballard and told him that, if he said anything, he would "end up in the esky beside him."

[31] During this period, Mr Ballard was a user of marijuana and ice, which he sometimes used while working at the Armitage property. He agreed that he had probably smoked ice on the day of the incident which he described. He admitted to certain inconsistencies between his evidence and what he had told police. In particular, he accepted that he had not seen the esky being pushed off a utility, as he had described in a statement to police.

[32] Ian Schutz lived at Cooloola Cove. In the relevant period, he did maintenance work on vehicles and boats for Stephen Armitage. He had gone to school with Matthew Armitage and he knew William Dean from meeting him at the Armitage property.

[33] Prior to Christmas 2013, he recalled working on Stephen Armitage's purple LandCruiser in a shed at the rear of the property, where nearby there were eskies at the back of the shed. One day, when he was working at the shed, Stephen Armitage told him to "stay away from the eskies, that there was someone in there." Later that day, or on the day after, Mr Schutz heard cries for help, coming from outside the shed in which he was working. Mr Schutz went to the house and asked Matthew Armitage what was going on. Mr Schutz described Matthew Armitage's reply as follows:

> "[H]e just said, you know, "Well, dad wasn't joking." He was saying, "You know, someone up in them eskies has been caught drugging women" or something to that description, in a fucked-up drug deal or whatever the hell it was."

[34] On another occasion, when Mr Schutz was working at the shed, Stephen Armitage, who was then with Matthew Armitage and William Dean, asked him to go down to the house. As Mr Schutz walked down to the house, he turned around and saw a forklift, with an esky on its side, raised a metre off the ground by the forklift and a person on his knees underneath in front of the esky. The person had his head covered. Stephen Armitage was operating the forklift. He could not recall what Matthew Armitage was then doing.

[35] There was another occasion, when Mr Schutz was at the Armitage house with Matthew Armitage and William Dean, when something was said by one of them about honey being "put onto someone's testicles and ants were eating it off."

[36] On a further occasion, again at the Armitage house, Mr Schutz observed Matthew Armitage burning clothes and shoes.

[37] Mr Schutz admitted to being a heavy user of cannabis and ice, and said that he would consume "[e]very drug under the sun." In cross-examination, he agreed that he could not remember if Matthew Armitage was present when he saw the person and the forklift. And he agreed that he could not recall who was there at the time of the conversation about the honey. There were other things which he had previously said which he could not recall when giving his evidence.

[38] The witness named Matthew Dean lived at Tin Can Bay. He was unrelated to the co-defendant, William Dean. He had known Stephen Armitage for most of his life, and also knew Matthew Armitage.

[39] He recalled that, in December 2013, he was doing some work on his car and contacted Stephen Armitage to obtain some parts for it. It was arranged that he would go to the Armitage house to collect them. When he was there, he was asked by William Dean if he wouldn't mind "babysitting" someone who was "in the forestry." Stephen Armitage then came out of the house and said to him "[y]ou wouldn't believe how much of a flogging he's taken" and "[h]e won't talk."

[40] In January 2014, Matthew Dean had been told that a body had been found in the forest. He sent Stephen Armitage a text message, telling him to stay away from the forest because a body had been found there. After that, the two appellants spoke to him, and Stephen Armitage, with Matthew Armitage present, said "[d]on't worry about it, that bloke's still alive." Matthew Dean observed the appellants to be "[v]ery up on edge and guilty." In cross-examination, Matthew Dean admitted to using marijuana daily and also using ice.

[41] I have referred earlier to evidence from Kane Ostwald. He had been living in Moranbah and was a heavy user of ice. He had stopped using it for a while until he moved to Cooloola Cove to live with his mother (the sister of Stephen Armitage). He would obtain his ice from the Armitage property, where he did some work installing cameras and lights.

[42] Mr Ostwald described an incident where one night, when he was in the shed at the property, he heard "scratching or shuffling" from inside the shed. On another occasion, William Dean arrived and asked him to go for a drive. Mr Ostwald said he was fairly drunk at the time, having consumed a lot of alcohol and also ice. He went with Mr Dean in Mr Dean's white LandCruiser, along a dirt road in the forest. Mr Dean stopped his car near Stephen Armitage's purple LandCruiser utility. The headlights of Mr Dean's vehicle were on, and Mr Ostwald said he recalled Matthew Armitage and Mr Schutz being there, as well as Stephen Armitage. He recalled hearing someone say "[t]urn the lights off" when he saw a body, about four metres away. He also saw a "bit of hose stuff" and a large fishing esky. He said that the body was "on his side all kinked up" with "one leg … all twisted up [and h]is arm was angled like it shouldn't have been." The body was that of a man who had shorts on. The face had dirt or bruising on it. He checked for a pulse and performed CPR. The man's arm was stiff. He heard someone yell at him to get in

the car. He continued performing CPR, but said that he then passed out. His next recollection was waking up the next day in the lounge at the Armitage house, when William Dean was present and passed off the events of the previous night as a joke, in the presence of the appellants.

[43] As already noted, in September 2014, Mr Ostwald identified Mr Barker on a photo board as the man he saw with the esky in the forest.

[44] In cross-examination, at one point Mr Ostwald conceded that he did not believe that what he had recalled happening had actually happened. He said that at the time he was smoking ice and suffering from hallucinations, and had difficulty distinguishing what was real from what was not. He also said that he could not be certain that Matthew Armitage was at the scene in the forest.

Other evidence

[45] Dr Forde, a specialist pathologist, examined the remains, which she described as bones which were to some degree fragmented, with many of them showing exposure to the elements as well as many showing a degree of damage by fire. At the top of the skull there was a broad defect, which may have been the result of physical damage while being exposed to the elements and fire damage, although an underlying injury to the skull in that area could not be excluded. The various pieces appeared to have come from the one person, but she said that the bones were just too fragmented and burnt to make any assessment of whether there had been any injury suffered prior to death.

[46] There was evidence of a search conducted at the Armitage property in July 2014, during which a number of large eskies, an incinerator, a forklift, and cable or zip ties were found. A cable tie had been located during a search of the forest, which was compared with those found at the property, but there were no relevant similarities between them.

[47] There was evidence from Bryan Brown, who owned a vehicle wrecking business at Gympie, that in early 2014 he was called by Stephen Armitage about a white Toyota LandCruiser wagon that Armitage was dropping in to his yard, so that parts could be removed from it. Mr Brown thought it was Matthew Armitage who dropped the vehicle off. Parts of the vehicle were later recovered by police at the Gympie dump. There was evidence that police eventually located the LandCruiser in a modified state, in that the back cabin area had been cut off. The rear passenger seats were found at a dump.

[48] A police scientific officer, Senior Sergeant Stewart, described the places where the remains were found. Within a green forest there was an area, about 50 to 100 metres from where the skull and jawbone had been found, where there had been a fire and where further remains were found which had been burnt and buried.

[49] Neither appellant gave or called any evidence.

The prosecution case at the second trial

[50] The prosecution argued that it was clear that Shaun Barker had been killed, and that there was nothing in the evidence to indicate any kind of lawful excuse or justification for the killing; nor was there anything to suggest that any person had

been acting in self-defence or that this had been an accident. The prosecutor argued to the jury that the evidence established that the reason for his killing lay in Mr Barker's involvement in the stealing of drugs on the Gold Coast.

[51] The prosecutor made these concessions in his closing address:

> "[Y]ou are not going to be able to work out precisely what happened to Shaun Barker. You are not going to be able to work out on the evidence that you've heard, the circumstances exactly in which he was killed. You're not going to be able to determine whether it was Bill Dean, whether it was Stephen Armitage, whether it was Matthew Armitage or some combination of those three persons who did the physical acts which actually resulted in the death of Shaun Barker."

[52] The argument continued:

> "But … you don't have to determine that as a finding of fact. You don't have to make a decision as to exactly [how] Shaun Barker was killed in order to be satisfied that the defendants are criminally responsible for causing his death, and in circumstances which amount to the crime of murder. And that's because … they could be criminally responsible because they either did the physical act or acts themselves or because they are responsible as aiding the person who carried out the killing, or because they were part of a common unlawful purpose, a plan to assault Shaun Barker and it was a probable consequence of the plan that they engaged in that he would be murdered, or, as the case may be, that the crime of manslaughter would be committed. And on the evidence that you've heard, you would be persuaded of at least manslaughter and we say you would be persuaded of murder."

[53] In that second passage, the prosecutor was referring to the three possible bases of criminal responsibility, respectively deriving from s 7(1)(a), s 7(1)(c) and s 8 of the *Code*.

[54] The prosecutor asked the jury to infer that the white LandCruiser, which had been broken up and remodelled, was William Dean's car and that these things were done to it to remove any trace of the deceased from the vehicle.

[55] It was argued that if the jury accepted the testimony of the five witnesses, Mr Ballard, Mr Schutz, Mr Mitchell, Mr Dean and Mr Ostwald, they would have no doubt that the appellants were criminally involved in killing Mr Barker.

[56] After discussing the evidence of those witnesses, the prosecutor returned to the alternative bases for the appellants' criminal responsibility. On the s 8 case, he suggested that:

> "[T]here was a plan between at least the two defendants and William Dean to assault Shaun Barker, the purpose being, it seems, to get information about stolen drugs from down the Coast, and that the violence which was going to be used in that assault, the violence that was contemplated by each of the [defendants] was such that it was a probable consequence Shaun Barker would be murdered."

[57] The prosecutor again told the jury that they would not be able to "work out precisely on which basis guilt might arise" but said that "the evidence makes it clear that [the appellants'] involvement was such that they are criminally responsible for the killing of Shaun Barker."

[58] After addressing the jury on the subject of intent, the prosecutor said that, if intent had not been established, it would remain for the jury to consider a verdict of guilty of manslaughter. In that respect, the prosecutor made no distinction between the alternative bases of criminal responsibility, in s 7(1)(a), s 7(1)(c) and s 8.

The convictions of murder: unreasonable?

[59] The question is whether, upon a review of the whole of the evidence, it was open to the jury to hold that the appellants' guilt had been proved beyond reasonable doubt.[1]

[60] As is common ground, the prosecution case was wholly circumstantial, so that the circumstances had to bear no other reasonable explanation than that the defendants were guilty.[2]

[61] Clearly the prosecution proved that Mr Barker died at some time during the relevant period, namely between when he was last seen at the Gold Coast on 10 December 2013 and when his remains were found in April 2014. It was also established, by the condition in which his remains were found and the place at which they were found, that he had died in circumstances which others had gone to great lengths to conceal. There was no hypothesis which was open other than that he had been killed by someone.

[62] The jury had the evidence, from the witnesses Mr Mitchell, Mr Ballard and Mr Schutz, that there was a man being kept at the Armitage property in an esky. There were grounds for challenging the credibility, or at least the reliability, of this evidence. Nevertheless, especially when considered in combination, the evidence provided a sufficient basis for the jury to conclude that there was a man being detained there against his will, and who was being subjected to violence and other mistreatment.

[63] It was then necessary for the prosecution to prove that this man was Mr Barker. No witness was able to identify the man at the Armitage property as Mr Barker; in this respect also, the prosecution case was circumstantial. The jury heard the evidence of the circumstances of Mr Barker's departure from the Gold Coast. Mr Barker had stolen drugs, said to have belonged to Mr Murphy, which were worth around $80,000. By the evening of 10 December 2013, when he was at the service station, Mr Barker was described as "frantic" and saying that there were people after him. Three people then arrived in a car, two of whom walked into the shop, spoke to Mr Barker and left with him. At about this time, there was a telephone conversation between Mr Murphy and Mr Barker. Stephen Armitage and William Dean were then at the Gold Coast, where they had met Mr Murphy and they had gone to Mr Murphy's house at 2 Montrose Court, Benowa Waters. Late on 10 December, or early on 11 December, 2013, Mr Barker left that address with William Dean in his LandCruiser, and the car was recorded as passing a toll point at Murarrie, travelling north on the morning of 11 December.

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1 *SKA v The Queen* [2011] HCA 13 at [20]-[21]; (2011) 243 CLR 400 at 408-409 [20]-[22]; *GAX v The Queen* [2017] HCA at 25 [20]; (2017) 91 ALJR 698 at 702 [20].

2 *Martin v Osborne* [1936] HCA 23; (1936) 55 CLR 367 at 375.

[64] On that evidence, there was an association between (at least) Stephen Armitage, William Dean and Mr Murphy, from which it was open to the jury to conclude that Stephen Armitage, as well as Mr Dean, had been instrumental in abducting Mr Barker and taking him from the Gold Coast, where he was never seen again.

[65] The timing of those events coincided with when witnesses said that they saw the man being held in the esky. Mr Mitchell saw William Dean, apparently talking to someone in the esky, saying "[s]orry, mate", he thought, on 12 or 13 December 2013. Stephen Armitage then told Mr Mitchell that "they were trying to get information out of" what he described as "a bloke in the esky". According to Mr Mitchell, Stephen Armitage told him that this was about "something that he stole from down the Gold Coast. Either some frank or some ephedrine or something." If the jury accepted that evidence, it was a strong indication that the man was Mr Barker. There was also the evidence of Mr Mitchell that Stephen Armitage had said that the man had stolen drugs at the Gold Coast. And there was the evidence of Mr Schutz that Matthew Armitage had said that the man had been caught in a "fucked-up drug deal".

[66] There was then the evidence which linked the man who had been held at the Armitage property with the remains found in the forest. There was the evidence of Matthew Dean that Stephen Armitage referred to a "flogging" which had been given to a man in the forest. And there was the evidence of Mr Ostwald of seeing a man lying in the forest, whom he was unable to revive by CPR, after being driven there by William Dean and with Stephen Armitage and (he said at one stage) Matthew Armitage then present. The weight to be given to his evidence was affected by the concessions which Mr Ostwald made in cross-examination. Nevertheless, Mr Ostwald did identify Mr Barker on a photo board as the man he had seen. It was open for the jury to accept that there was an incident as Mr Ostwald described. If so, there was no real possibility that Mr Barker was not the man who had been kept in the esky.

[67] All of this evidence, in combination, sufficiently supported the case that the man who had been kept in the esky at the Armitage property was Mr Barker. Consequently, it was open to the jury to find that Mr Barker had been killed, either at the Armitage house or in the forest, whilst a captive of more than one person.

[68] The prosecution provided written particulars of its case that each of the appellants was guilty of murder. By those particulars the prosecution alleged that each was guilty of murder because he either:

1. Caused the death of Mr Barker while intending to cause death or grievous bodily harm (Section 7(1)(a)); or

2. By assaulting Mr Barker and/or detaining Mr Barker in an esky, aided another or others to cause the death of Mr Barker while the accused intended to cause either death or grievous bodily harm, or knew the person or persons who killed Mr Barker intended to cause either death or grievous bodily harm (Section 7(1)(c)); or

3. Formed the common intention to prosecute the unlawful purpose of assaulting Mr Barker, a probable consequence of which was the murder Mr Barker (Section 8).

[69] I will discuss first the case under s 8 of the *Code*, which provides:

> "Offences committed in prosecution of common purpose
>
> When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[70] The particulars referred to a common intention of the two appellants. But in the way in which the case was argued to the jury, without objection from defence counsel, it was said that there was a plan between the two appellants and William Dean, which was a plan to assault Mr Barker for the purpose of getting information about stolen drugs.

[71] The evidence strongly supported a finding that William Dean and Stephen Armitage had a common intention of that kind. There was the evidence of their involvement in bringing Mr Barker from the Gold Coast to the Armitage property, where Mr Barker was then detained in inhumane conditions and subjected to serious violence. The evidence which I have summarised, if accepted, proved that Stephen Armitage was causing Mr Barker to be detained and treated in that way. The reason why that was being done to Mr Barker was explained by Stephen Armitage to Mr Mitchell, namely that Mr Barker had stolen something from the Gold Coast, and other evidence supported a finding to that effect. The evidence supported Mr Dean's participation in this plan, in combination with Stephen Armitage.

[72] The case that Matthew Armitage was a party to this plan, if not as strong as that against his father, had a sufficient evidentiary basis. Matthew Armitage worked with his father in his father's fishing business and lived with his father in his father's house. Mr Mitchell testified that Matthew Armitage said that he was wanting to find "the big black zip ties" in order to tie somebody down, or to a tree, or to handcuff him. If the jury accepted that this was said by Matthew Armitage, then in the context of the evidence of the reasons for and the circumstances of Mr Barker's detention at the property, it was compelling proof of Matthew Armitage's participation in the common plan. There was the evidence of Mr Schutz of the presence of Matthew Armitage when the incident with the forklift occurred. There was evidence from the same witness that Matthew Armitage was seen burning clothes and shoes at the property and that he or William Dean, in the presence of the other, said something about honey having been put on a man's testicles. The witness, Matthew Dean, recalled that, when both appellants came to the house where he was staying, he was told by Stephen Armitage, in the presence of Matthew Armitage, "[d]on't worry about it, that bloke's still alive". Mr Dean gave evidence of his observation of the mood of the Armitages on that occasion. And there was Mr Ostwald's evidence that Matthew Armitage was present at the scene in the forest and also on the occasion on the following morning.

[73] The jury had to be persuaded, beyond reasonable doubt, that Matthew Armitage was himself a party to this plan, rather than a bystander. But the jury did not need to be satisfied that his involvement was in all respects equivalent to that of Stephen Armitage. The prosecution case could be proved even if the jury considered that Matthew Armitage was acting under the influence of his father. In my view it was

open to the jury to conclude that Matthew Armitage was a party to the plan which the prosecution alleged.

[74] What then had to be proved was that, in the prosecution of that unlawful purpose, Mr Barker was murdered and that the commission of such an offence was a probable consequence of the prosecution of that purpose. Alternatively, to establish that the appellants were guilty of manslaughter, it had to be proved that, in the prosecution of that purpose, Mr Barker was unlawfully killed, and that the commission of an offence of that nature was a probable consequence of the prosecution of that purpose.

[75] In order to prove that the appellants were guilty of murder, the prosecution had to prove that he had been murdered by someone. It had to prove that what was done in the mistreatment of Mr Barker, which caused his death, was done by a person or persons who intended to kill or do grievous bodily harm. It is argued that a finding to that effect was not open, because the cause of death, and the identity of the person or persons who killed Mr Barker, are unknown. It is suggested that Mr Barker may not have been killed by any bodily injury (as distinct from neglect), or that he may have been killed by an injury the effect of which was unintended on the part of the person who caused it. Therefore, there was a possibility, which could not be excluded, that Mr Barker was killed without an intention on the part of an assailant to do grievous bodily harm or to cause death.

[76] The jury had Mr Ostwald's evidence which described a body with "one leg … all twisted up" and an arm out of place. There was evidence that zip ties had been used. Matthew Dean testified that Stephen Armitage told him that he "wouldn't believe how much of a flogging he's taken." It was thereby open to the jury to conclude that Mr Barker was killed by the infliction of violence upon him. However, the effect of that violence may have been exacerbated by Mr Barker being, by then, in a very weakened condition, having been unwell when he left the Gold Coast and then being kept outside and in a box in mid-summer, without proper nourishment, and supplied with drinking water which had been mixed with a dangerous drug.

[77] The object of the violence was to extract information from Mr Barker, an object that would have been defeated by killing him. It is not unlikely that Mr Barker was assaulted by someone who intended to cause an injury that constituted grievous bodily harm. But, it is also not unlikely that those inflicting the violence were recklessly indifferent to Mr Barker's condition. But those things were not sufficient to prove the prosecution case. The prosecution had to prove that *what killed Mr Barker* was an act done by someone with an intention to, at least, cause grievous bodily harm, and that had to be proved beyond reasonable doubt. As the cause of death was unknown, in my view, it was not open to the jury to be satisfied, beyond reasonable doubt, that Mr Barker was killed by an act done with the requisite intent for the offence of murder. It follows that it was not open to convict the appellants of murder.

[78] I would add that, if it had been open to the jury to conclude that Mr Barker was murdered in the prosecution of the unlawful purpose, that offence would have been of a nature that it was a probable consequence of that purpose. In that respect, the

jury could have concluded that murder was a consequence which could well have happened.[3]

[79] The same obstacle applied to the prosecution's alternative arguments, that each defendant was guilty through the operation of s 7 of the *Code*. If the jury was persuaded that he was either a person who did the act or made the omission which constituted the offence (s 7(1)(a)), or a person who aided another to do so (s 7(1)(c)), still the jury had to be satisfied that the act or omission which killed Mr Barker was done with an intention to kill or do grievous bodily harm.

[80] For these reasons, the murder convictions must be quashed. I will return to the question of whether convictions for manslaughter should be substituted, under s 668F(2) of the Code. Before doing so I will discuss the other ground of appeal.

Misdirection as to manslaughter

[81] The second ground of the appeals against the murder convictions is that there was a miscarriage of justice, by the jury not being directed that it was open to the find the appellant guilty of manslaughter, rather than murder, through the pathway of s 7(1)(c).

[82] The trial judge provided the jury with a copy of the prosecution's particulars and his Honour referred to the document several times in the course of his summing up.

[83] The jury was directed first about s 7(1)(a). This included a direction that, if they found that a defendant did the act or acts which killed Mr Barker, but they were not satisfied that he intended to cause death or do grievous bodily harm, the jury would find him guilty of manslaughter.

[84] The trial judge then explained the second basis of criminal responsibility, namely that under s 7(1)(c). In that part of the summing up, the judge duly directed the jury on what had to be proved, beyond reasonable doubt, to convict a defendant of murder. However the judge did not mention the possibility of an alternative verdict of manslaughter through the operation of s 7(1)(c).

[85] Next the judge explained the third basis, namely that under s 8. This time the judge did explain the way in which the jury might convict of manslaughter, rather than murder.

[86] At the conclusion of the summing up, after the jury had retired to consider their verdicts, his Honour asked the prosecutor and defence counsel whether they had any applications for further directions, and each answered in the negative.

[87] On the following day, the jury sent a note to the judge as follows:

> "- Written definition of manslaughter
>
> - Recap 2 & 3 for particulars"

(Paragraph two of the particulars had stated the prosecution case in reliance upon s 7(1)(c), and paragraph three had stated the case in reliance upon s 8.)

[88] The trial judge discussed the note with counsel. In the course of that discussion, the trial judge said that "the section 7 liability case doesn't have a manslaughter element", and that "[i]n other words, if you're looking at liability under paragraph 2

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3 *Darkan v The Queen* [2006] HCA 34 at [72]-[81], [130]-[132]; (2006) 227 CLR 373 at 396-399 [72]-[81], 411-412 [130]-[132].

of the particulars … you only ask [the question under s 7] if you have a view … that the offence is murder." The prosecutor seemed to agree, saying that "if there's to be a consideration of manslaughter, it more conveniently arises under section 8." A little later in the discussion, the prosecutor added that "there might be available arguments about manslaughter by a section 7(1)(c) route, but I'm not pressing those arguments."

[89] More significantly, in a discussion between the trial judge and each of defence counsel, there was no objection to his Honour's suggestion that he could direct the jury that "they don't need to worry about paragraph 2 [s 7(1)(c)] if it's just manslaughter."

[90] The jury returned and they were provided with a document which contained a written definition of manslaughter, and his Honour then turned to what he described as their second question, which was a request for a "recap" of paragraphs two and three of the particulars. At that point the judge seems to have asked the jury whether they wished him to then "deal with the offence of murder, and the offence of manslaughter, or only one?" The jury's response is not recorded. His Honour then continued and, as to s 7(1)(c), the jury was directed that "unless there was someone who murdered Shaun Barker, meaning they killed him with the intention to cause his death or grievous bodily harm, then [s 7(1)(c)] does not apply. So it is a murder-only alternative in the circumstances of this case."

[91] His Honour continued his re-directions by reference to paragraph three of the particulars (s 8). As his Honour had done in the summing up, on this alternative, he directed the jury about the possibility of a finding of manslaughter by the operation of s 8.

[92] A few hours later, the jury returned with their verdicts.

[93] Consequently, at no time was the jury told of the ways in which they might find a defendant guilty of manslaughter, rather than murder, by the operation of s 7(1)(c). Indeed, by the re-direction, the jury could have thought that they were being instructed not to consider manslaughter as an alternative verdict, if they reasoned upon the basis of s 7(1)(c). In my respectful opinion, the jury was thereby misdirected.

[94] If manslaughter was an available verdict, although not one for which the defence contended, it had to be left to the jury as an alternative verdict.[4] There were two ways in which a verdict of manslaughter was open in this case, if the jury was reasoning upon the basis of s 7(1)(c). The first was by the jury being satisfied that the defendant aided another person to unlawfully kill Mr Barker, without being satisfied that the principal offender intended to kill or do grievous bodily harm. The second way was if the jury was able to find, and did find, that the principal offender held the requisite intention for murder, but the jury was not satisfied that the defendant aided with a knowledge of that intention.[5]

[95] I have concluded that it was not open to the jury to be satisfied that the person who killed Mr Barker also murdered him. Had I not reached that conclusion, I would have set aside the murder conviction, and ordered a retrial upon this alternative ground.

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4 *James v The Queen* [2014] HCA 6 at [21]-[23]; (2014) 253 CLR 475 at 485-486 [21]-[23].

5 *Gilbert v The Queen* [2000] HCA 15 at [2]; (2000) 201 CLR 414 at 416-417 [2].

Disposition of the appeals against the convictions of murder

[96] Section 668F(2) of the *Code* provides as follows:

> "Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[97] Here, the jury could on the indictment have found the appellants guilty of some other offence, namely manslaughter.[6] The Court may substitute a verdict of guilty of manslaughter for that of guilty of murder, if, on the finding of the jury, it appears that the jury must have been satisfied of facts which proved the appellant guilty of manslaughter.

[98] The jury was not misdirected about the facts to be proved, beyond reasonable doubt, for the jury to convict of murder. I have concluded that their verdicts cannot stand because it was not open to the jury to conclude that the act or omission which killed Mr Barker was done with the required intent.

[99] But as I have also concluded, it was open to the jury to find that Mr Barker was killed by an injury or injuries caused by the mistreatment and violence inflicted upon him. Therefore, the jury could have been satisfied, in the terms of s 8, that the offence of manslaughter was committed in the prosecution of the unlawful purpose, according to the appellants' common intention, of assaulting the victim. Further, it was open to the jury to conclude that the unlawful killing was a probable consequence of the prosecution of that purpose.

[100] Therefore, it was open to the jury to convict each of the appellants of manslaughter, by the operation of s 8.

[101] That is not sufficient for the application of s 668F(2). For another conviction to be substituted under this provision, it must appear from the finding of the jury that it must have been satisfied of facts which proved the appellant guilty of manslaughter. Section 668F(2) distinguishes between the finding of the jury, here its conclusion of the defendants' guilt of murder, and the facts of which the jury must have been satisfied in order to arrive at that finding, or as the High Court described them in *Spies v The Queen*,[7] the "fact (or facts) underlying the conviction".

[102] It is not known whether all of the jurors decided that the appellants were guilty upon the same basis of criminal responsibility. Conceivably, some jurors may have reasoned that an appellant was responsible under s 7 whilst others reasoned under s 8. But there was no submission at the trial, or in this Court, that this was a case where the jury had to be unanimous about the basis for criminal responsibility.[8]

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6 s 576(1) of the *Code*.

7 [2000] HCA 43 at [43]; (2000) 201 CLR 603 at 618 [43].

8 See *R v Leivers and Ballinger* [1998] QCA 99; [1999] 1 Qd R 649.

[103] It was not open to the jury to find, in each case, that the appellant was the person, or a person, whose act or omission caused the death of Mr Barker. That was frankly acknowledged by the prosecutor in his closing address and the trial judge directed the jury accordingly. It follows that there is no real prospect that a juror found an appellant guilty by the application of only s 7(1)(a). In order to convict by the path of s 7, a juror must have found that, if the appellant's own act or omission did not kill Mr Parker, the defendant aided another person to do so.

[104] As I have discussed, the jury was not properly instructed as to the availability of manslaughter, as an alternative verdict, by the operation of s 7(1)(c). But for present purposes, that does not matter if the verdicts imply that they were satisfied that Mr Barker was unlawfully killed and that each of the appellants, if not the killer, was a person who, by the operation of s 7 or s 8, was deemed to have done the act or omission which caused death.[9]

[105] The jury was given clear directions as to what might constitute an aiding in the commission of an offence. A juror who did not reason by the path of s 8 must have found that the appellant did something which aided another person to do that which caused death. It was legitimate for a juror to reason that the appellant aided the actual killer, if that appellant was not the killer himself, so that by one way or the other, the appellant was guilty of killing Mr Barker.[10] There was a sufficient evidentiary foundation for that reasoning. As I have discussed, the evidence supported a finding of fact that each of the appellants participated in the intentional mistreatment of Mr Barker. And a person might aid in the commission of an offence, not only by physical acts, but also by encouragement.

[106] It is not a pre-condition to the application of s 668F(2) that every fact found by the jury be known. What must appear, "to the point of certitude",[11] is that the jury must have been satisfied of facts which proved the appellant guilty of the other offence. In *Spies v The Queen*,[12] the plurality said that the power in question is "most likely to be exercisable in situations where the "other offence" is one which is wholly within the *ultimate facts* of the offence on which the accused has been convicted and which the court sets aside in the appeal" (emphasis added). Their Honours quoted the statement by Latham CJ, in refusing to grant special leave to appeal in *R v Vella*,[13] as follows:

> "All charges of assault, with whatever additional aggravating circumstances as compared with common assault, necessarily include the elements constituting the offence of common assault. Therefore it appears to me the section necessarily applies in such a case."

Citing that passage from *Spies v The Queen* (in *Zaburoni v The Queen*[14]), Kiefel, Bell and Keane JJ, in applying s 668F(2), said:

> "The jury must have been satisfied of proof of *the facts of the offence* of unlawfully doing grievous bodily harm to the complainant."

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9 *R v Barlow* [1997] HCA 19; (1997) 188 CLR 1 at 9-10; *R v Melling & Baldwin* [2010] QCA 307, where the jury was not instructed at all about s 7(1)(c).

10 *R v Lowrie and Ross* [1999] QCA 305; [2000] 2 Qd R 529.

11 *Spies v The Queen* [2000] HCA 43 at [49]; (2000) 201 CLR 603 at 621 [49].

12 [2000] HCA 43 at [23]; (2000) 201 CLR 603 at 611 [23].

13 [1938] St R Qd 289 at 290.

14 [2016] HCA 12 at [51]; (2016) 256 CLR 482 at 500 [51].

(Emphasis added.)

[107] The jury must have been satisfied of proof of the facts of the offence of manslaughter, whether by the path of s 7 or that of s 8. Their verdicts of guilty of murder were unreasonable, only because a necessary element of that offence, namely that the deceased was killed by an act or omission done with an intent to kill or cause grievous bodily harm, was not proved by the evidence. This is not a case where "the unreasonableness of the verdict depends on the overall quality of the evidence";[15] instead, it was open to the jury to find all elements of the offence charged as established, save for that one element on which the jury's finding was unreasonable.

[108] Consequently, this Court may substitute verdicts of manslaughter and, in my opinion, it should do so. It is then open to this Court to sentence the appellants for that offence. However, this Court has heard no submissions on that question which, conceivably, might require the resolution of some factual question. The appellants should be sentenced for this offence in the trial division.

Appeals against the convictions for torture

[109] Count two on the indictment alleged that, on various dates between 9 December 2013 and 11 April 2014, the appellants and William Dean tortured Mr Barker. Again, the prosecution case was put on alternative bases, in reliance upon s 7(1)(a), s 7(1)(c) and s 8 of the *Code*. There were several acts which were relied upon in the prosecution case: acts of assaulting Mr Barker, keeping him in the esky, depriving him of sustenance and/or depriving him of his liberty.

[110] Neither appellant now contends that the verdict on this charge was unreasonable. The appellants argue that the jury was misdirected, because the jurors were not instructed that, before they could convict of torture, they had to be unanimous about which act or series of acts was or were intentionally inflicted to cause severe pain and suffering. The respondent concedes that such an instruction was necessary,[16] and that it was not given.

[111] In summing up upon on this charge, the trial judge said:

> "You don't have to be satisfied that every incident or act alleged by the Prosecution actually occurred, but you must be satisfied as to the acts that did on the basis of beyond reasonable doubt."

[112] The respondent concedes that the trial judge did not go further, as was required, by directing that the jury needed to be unanimous as to the acts which intentionally caused the severe pain and suffering. But the respondent argues that the convictions should stand by the application of the proviso.

[113] In this earlier trial, there was evidence from the witnesses Mr Mitchell, Mr Ballard, Mr Schutz, Matthew Dean and Mr Ostwald, which was largely the same as that which they gave at the second trial, which I have discussed above. Notably, there was further evidence, in this earlier trial, from Matthew Dean that, on the occasion when he was asked whether he could "babysit" someone, Stephen Armitage said words along the lines: "[y]ou wouldn't believe how big a punishment this bloke's

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15 *Spies v The Queen* [2000] HCA 43 at [43]; (2000) 201 CLR 603 at 619 [43].

16 *R v LM* [2004] QCA 192 at [194]; *R v HAC* [2006] QCA 291 at [47] and [51].

taken", and described that they had "smashed his kneecaps in and smashed every bone in his hands and cut off a finger …"

[114] In *Weiss v The Queen*,[17] it was held that it cannot be said, under a provision such as s 668E(1A) of the *Code*, that there has been no substantial miscarriage of justice which has actually occurred, unless the appellate court is persuaded that the evidence properly admitted at the trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict.

[115] The question here is not whether it was open to the jury to convict the appellants. It is whether, on this Court's review of the evidence, this Court is persuaded of the appellants' guilt. The Court's task must be undertaken on the whole of the record of the trial, including the fact that the jury returned a guilty verdict.[18] However the verdicts in this case are of limited weight, because it is not known whether all of the jury accepted all of the evidence of those five witnesses, as to what occurred at the Armitage property.

[116] A fundamental difficulty for the application of the proviso is that this Court has not seen or heard the evidence as it was given. As I have discussed, there were grounds for challenging the credibility, or at least the reliability, of each of these witnesses.

[117] Further, it is doubtful this would be a proper case for the application of the proviso for another reason. In *Lane v The Queen*,[19] a jury had been misdirected, in a murder trial where either of two acts of the appellant may have caused the death of the deceased, by not being told that they had to be unanimous as to which act had caused death. The New South Wales Court of Criminal Appeal applied the proviso, but the High Court allowed the appeal and ordered a new trial, upon the basis that the error of the trial judge was one which could been seen to breach the "presuppositions of the trial", so as to be beyond the reach of the proviso.[20]

[118] The proviso should not be applied and the appeals against these convictions should be allowed, the convictions quashed and a new trial ordered.

The convictions on count three on the indictment

[119] Each appellant challenges his conviction on count three, the offence of interfering with a corpse, upon the ground that the verdict was unreasonable. Counsel for Matthew Armitage did not make submission in support of that appeal, although it was not abandoned and Matthew Armitage told the Court that he wished to adopt the submissions made by counsel for his father in that respect.

[120] There was no direct evidence that either appellant did something to interfere with the corpse. Undoubtedly there was an interference with the corpse, and the jury was asked to infer that each appellant did so, having been involved in the killing of Mr Barker. The submission for Stephen Armitage is that, upon the premise that it was not open to the jury to find that he was criminally responsible for Mr Barker's death, the jury could not infer that he was responsible for the interference with the corpse.

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17 [2005] HCA 81 at [44]; (2005) 224 CLR 300 at 317[44].

18 *Weiss v The Queen* [2005] HCA 81 at [43]; (2005) 224 CLR 300 at 317 [43].

19 [2018] HCA 28; 92 ALJR 689.

20 Ibid at [46]-[50] per Kiefel CJ, Bell, Keane and Edelman JJ (Gageler J holding that the proviso should not have been applied, for different reasons).

[121] As it was open to the jury to be satisfied that Stephen Armitage, and also Matthew Armitage, was a party to the unlawful killing of the deceased, the premise for the appellants' argument on this count is not established. Acting reasonably, it was open to the jury to find that the only rational inference was that, in the case of each appellant, he was a person who did things in the disposal of the body of the deceased, or at least aided others to do so.

[122] The appeals against the convictions on count three of the indictment should be dismissed.

Orders

[123] I would therefore order as follows:

1. In CA 68 of 2017:

   (a) The appeal against the conviction on count 2 on the indictment be allowed, the conviction on that count be quashed, and a retrial ordered on that count.

   (b) The appeal against the conviction on count 3 on the indictment be dismissed.

2. In CA 81 of 2017:

   (a) The appeal against the conviction on count 2 on the indictment be allowed, the conviction on that count be quashed, and a retrial ordered on that count.

   (b) The appeal against the conviction on count 3 on the indictment be dismissed.

3. In CA 241 of 2017, the appeal against the conviction on the indictment be allowed, the conviction be quashed, a verdict of guilty of manslaughter be substituted, and the matter be remitted to the trial division for the appellant to be sentenced for that offence.

4. In CA 226 of 2017, the appeal against the conviction on the indictment be allowed, the conviction be quashed, a verdict of guilty of manslaughter be substituted, and the matter be remitted to the trial division for the appellant to be sentenced for that offence.

[124] **BODDICE J:** McMurdo JA's comprehensive analysis of the cases presented at trial, which I gratefully adopt, allows me to briefly state my reasons.

[125] Having considered the evidence as a whole, it was not open to the jury to be satisfied, beyond reasonable doubt, that either appellant was guilty of murdering Shane Barker but it was open to the jury to be satisfied beyond reasonable doubt that each appellant unlawfully killed Mr Barker.

[126] I agree, for the reasons given by McMurdo JA, that this court should substitute verdicts of manslaughter, with each appellant to be sentenced for that offence in the trial division.

[127] Having considered the evidence as a whole, it was also open to the jury to be satisfied, beyond reasonable doubt, of each of the appellant's guilt of the offence of interfering with a corpse. Each of their appeals against the convictions of that offence should be dismissed.

[128] I agree, for the reasons given by McMurdo JA, that each of the appellant's appeals against their convictions of the offence of torture ought to be allowed, with their convictions quashed and a new trial ordered.

[129] I agree with the orders proposed by McMurdo JA.