SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dean* [2019] QCA 254
PARTIES:	**R** **v** **DEAN, William Francis** (appellant)
FILE NO/S:	CA No 64 of 2017 DC No 973 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 21 March 2017 (Jackson J)
DELIVERED ON:	19 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2019
JUDGES:	Holmes CJ and Gotterson and Morrison JJA
ORDERS:	**1. The appeal against conviction on count 1 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.** **2. The appeal against conviction on count 2 on the indictment be allowed, the conviction on that count be quashed, and a retrial ordered on that count.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MURDER – INTENTION TO KILL OR CAUSE SERIOUS NON-FATAL INJURY – where the appellant was convicted on three counts: count 1, murder; count 2, torture; and count 3, improper interference with a corpse – where the deceased's remains were discovered charred and scattered three months after he was reported missing – where the deceased had been kidnapped and taken from the Gold Coast to Cooloola Cove by the appellant – where the evidence supported a finding that the deceased was being held for the purpose of discovering where missing drugs or money were kept – where witness evidence indicated that the deceased was assaulted and kept in an fishing esky by the appellant and others – where the assaults and treatment to the deceased was said to include smashing his kneecaps and bones in his hands and cutting off of a finger – where the evidence indicated that the appellant had been present and participated in the assaults

upon the deceased – where the subjection of the deceased during his imprisonment to violence and other mistreatment culminated in his death – where the appellant tended a fire pit for two days where clothing and shoes were fed into it – where the appellant burnt the body of the deceased by putting it into a fire pit – where the cause of death of the deceased could not be established – where it was contended that the appellant did not hold the requisite intent to cause death or grievous bodily harm to the deceased – whether the deceased's death was resultant of the intentional actions of the appellant – whether the jury was able to find the appellant guilty of murder – whether there was a rational hypothesis consistent with innocence of the offence of murder

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant challenges his conviction on the ground the verdict was unreasonable and could not be supported having regard to the evidence – where it was submitted that the jury could not have been satisfied that the deceased was killed by an act done by the appellant with the requisite intent – where it was contended that it was not open to the jury to find intent – where the submission was made that the rational hypothesis of manslaughter was not excluded by the Crown – where it was submitted that a reasonable hypothesis was that the deceased died while in the control of the appellant and the co-accused albeit in circumstances where none of them held the requisite intent to cause death or grievous bodily harm – where it was submitted that there was post-offence conduct which was relevant to the conclusion of the requisite intent – whether the jury could have been satisfied that the deceased was killed by an act done by the appellant with the requisite intent – whether it was open to the jury to find intent – whether it can be established that the appellant intended to kill or cause grievous bodily harm to the deceased – whether the post-offence conduct of the appellant could infer intent

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – where the appellant challenges his conviction of torture on the ground that a miscarriage of justice has occurred on count 2 – where it was contended that the miscarriage has occurred due to a misdirection by the learned trial judge – where it is submitted that the jury should have been instructed that they had to be satisfied unanimously about which act or which series of acts was/were intentionally inflicted to cause severe pain or suffering – whether there had been a miscarriage of justice – whether a retrial should be ordered

CRIMINAL LAW – APPEAL AND NEW TRIAL –

PROCEDURE – POWERS OF COURT ON APPEAL – POWER TO SUBSTITUTE VERDICT OR SENTENCE – GENERAL PRINCIPLES – where the appellant was convicted of murder – where the cause of death of the deceased was unable to be proven – where the Court of Appeal held that there was insufficient evidence of intent by the appellant to kill the deceased and that the conviction for murder must be quashed – where the appellant adopted in their submissions the reasoning of the Court of Appeal in *R v Armitage; R v Armitage* on the issue of substitution of verdict of murder to one of manslaughter – whether the reasoning from *R v Armitage; R v Armitage* should be followed – whether the verdict of guilty of murder should be substituted with a verdict of guilty of manslaughter

Criminal Code (Qld), s 7(1)(a), s 7(1)(c), s 8

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Armitage; R v Armitage [2019] QCA 149, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: A Hoare with R I E Lake for the appellant (pro bono)
D C Boyle with J M Ball for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Morrison JA and with the orders his Honour proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** On 10 April 2014 the charred and scattered remains of Shaun Barker were discovered in a heavily forested and remote part of the Toolara Forestry, near Cooloola Cove and Tin Can Bay. He had been reported missing by his sister about three months before.

[4] Part of Barker's skull and the jaw bone were discovered first, then numerous fragments of burnt bone. A fire pit was located containing his burnt bones, bone fragments, burnt timber and some mill timber. Eventually other more substantial parts of Barker's skeleton were found.

[5] Four months earlier, on 10 December 2013, Scott Murphy, Scott Healy and the appellant took Barker to Murphy's house where the appellant and Healy punched him and hit him with a golf club. Some carpet was then wrapped around his face and his hands were duct-taped to his head. He was put in the boot of Healy's car, and driven to a park. There the appellant and Murphy assaulted Barker. He was then taken back to Murphy's house, tied with rope and put into the passenger side of the appellant's LandCruiser. The next day the appellant drove his LandCruiser north from the Gold Coast to Cooloola Cove.

[6] The next time Barker was seen (in the sense of someone at the trial being able to identify a person as Barker) he was on the ground in the Toolara Forestry, in the presence of the appellant (and others). He was dead.

[7] After the remains were found it was not possible to determine the date of death or cause of death.

[8] The appellant was charged on three counts: count 1, murder; count 2, torture; and count 3, improper interference with a corpse. After a trial he was convicted on all three counts.

[9] The appellant challenges his convictions on counts 1 and 2 only. That challenge is on two grounds advanced on his behalf by Mr Hoare and Mr Lake of Counsel, each commendably appearing pro bono:

1. the verdict was unreasonable and could not be supported having regard to the evidence; and

2. a miscarriage of justice occurred on count 2 because the jury was not instructed that before they could convict of torture they had to be unanimously satisfied about which act or which series of acts was/were intentionally inflicted to cause severe pain or suffering.

[10] The appellant also appeared on his own behalf on an application to adduce fresh evidence. That application was heard and dismissed on the same day as the appeal.

[11] As will appear, the appellant concedes that the jury could find that he improperly interfered with Barker's corpse.

Summary of evidence

[12] The essential events concerning Barker's death involve a number of people, most or all of whom were involved in drug dealings of one sort or another.[1]

[13] Barker, a drug dealer and methylamphetamine (**ice**) user, had drug dealings which led, in October 2013, to his retrieving about $80,000 worth of ice from a hotel room. Barker told his ex-girlfriend, Jones, that the ice belonged to Scott Murphy.[2]

[14] Soon after that Romhegyi[3] saw the appellant and Jaffre[4] come to the house Romhegyi lived in, with Barker. Barker had been assaulted so badly that he could not hold himself up, and remained slumped and sleeping on the sofa for two days, during which time the appellant and Jaffre fed him pills. Romhegyi understood Barker was there because of a debt. The appellant told Romhegyi to stay away from Barker and not talk to him.

[15] After two days Murphy arrived and spoke to Barker. From Murphy's voice it sounded like Barker was in trouble. Murphy then left with Barker in Murphy's silver Audi, and the appellant and Jaffre left in the appellant's vehicle (a white Toyota LandCruiser wagon).

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1 For ease of reference only I shall use surnames for all participants, except two Armitages (father and son) and one Matthew Dean (not related to the appellant).

2 A dealer in, and heavy user of, ice; referred to as "Mr Big" by Stephen Armitage.

3 Ice user and tenant in a house owned by Murphy.

4 Ice dealer who worked for Murphy in a pizza shop.

[16] Afterwards Barker had sporadic contact with Jones, saying he was becoming more paranoid, looking over his shoulder and thinking people were following him. Jones last saw him on 9 December 2013. He said he had to take care of matters with Murphy. She understood that Barker owed a debt to Murphy.

9 December 2013

[17] On 9 December there were calls between Stephen Armitage[5] and (i) his son, Matthew Armitage, and (ii) the appellant. Barker called Murphy in the afternoon, following which Stephen Armitage attempted to call both the appellant and Matthew Armitage. There were further calls between Stephen Armitage, Matthew Armitage and the appellant. The appellant's mobile service registered use at the Gold Coast.

[18] The appellant's LandCruiser was at Murphy's house at 10 pm, as was Murphy's Audi and Healy's silver Holden sedan.

10 December 2013

[19] On 10 December there were multiple calls between Stephen Armitage and the appellant, Murphy and Matthew Armitage. At 2.32 pm the appellant's LandCruiser was seen driving south along the Bruce Highway, near Burpengary.

[20] Healy drove up from Coffs Harbour to the Gold Coast to assist his ex-girlfriend Hill. Barker had left Hill at a hotel and not paid the $2,000 bill. Healy sent messages to Barker telling him he had only hours to pay before Healy arrived. Barker had also been using someone else's drugs and suggesting that Healy had stolen them. As a result Healy was angry and wanted to bash Barker. On the way up Healy received a call from a man saying that he was to leave Barker alone. By the time Healy dropped Hill back to rehab it was night. He later met Murphy who told him to leave Barker alone.

[21] At about 7 pm that night Barker was at a service station at Broadbeach, nervous and walking back and forth. He called Jaffre at 8 pm, saying that he was in trouble, could not get to his car, he thought people were following him, and he needed to be picked up. At about 9 pm Stephen Armitage sent texts to the appellant and tried to call him. The appellant was then at the Gold Coast.

[22] By 9.30 pm Barker was still at the service station where he told another person that some men were after him and he was waiting to be picked up. At 9.35 pm Murphy called Barker.

[23] At about 10 pm Barker went into the shop at the service station and, on being asked to leave, told the attendant, "I won't go out there. They will kill me because they have a gun." About 30 minutes later Healy, Murphy and the appellant arrived. Murphy and the appellant entered the shop and spoke to Barker. Barker then left with the appellant and was taken back to Murphy's house. Healy and Murphy arrived first and went into the garage. The appellant and Barker arrived after that and also went into the garage, where Murphy and Healy were waiting.

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5 A dealer in, and heavy user of, ice; involved in mullet fishing industry; lived at Cooloola Cove.

[24] Barker was on a chair in the garage. In the presence of Murphy and the appellant, Healy punched Barker and hit his legs with the handle end of a golf club. The appellant joined in the assault, hitting Barker.[6] He was bleeding. Some carpet was wrapped around his face and his hands were duct-taped to his head. The appellant could have been involved in taping the carpet around Barker's head.[7] He was then put in the boot of Healy's car, and Healy drove to a park. There the appellant and Murphy assaulted Barker.[8] Healy, the appellant and Murphy were trying to get information about where the drugs or money were.[9] Barker did not respond. He was taken back to Murphy's house, tied with rope and put into the passenger side of the appellant's LandCruiser.

11 December 2013

[25] At 10.20 am the next morning, 11 December, the appellant's LandCruiser travelled north on the Gateway Motorway. That afternoon there were calls between Stephen Armitage and the appellant. In the evening there was a call between Stephen Armitage (in Benowa on the Gold Coast) and Matthew Armitage (who was in Cooloola). Later in the evening there were calls between Stephen Armitage and the appellant.

[26] At 9.56 pm Murphy's Falcon sedan drove north on the Gateway Motorway.

12 December 2013

[27] In the morning of 12 December 2013 the phone service of Stephen Armitage was registering at Mount Goomboorian.[10] There were calls between Stephen Armitage and the appellant. In one of the calls both the services of Stephen Armitage and the appellant were registering at Mount Goomboorian. Stephen Armitage also called Matthew Armitage in the early hours.

[28] Later that afternoon and evening there were further calls between Stephen Armitage and Matthew Armitage, and late in the evening Stephen Armitage tried to call both the appellant and Matthew Armitage. Then there was another call between Stephen Armitage and Matthew Armitage.

13 December 2013

[29] This evening there were calls by Stephen Armitage to Lissa Couchman,[11] Ian Schultz[12] and the appellant. Stephen Armitage attempted to call Matthew Armitage that day and evening.

Prior to 16 December 2013

[30] Late one night prior to 16 December 2013, Stephen Armitage called Couchman looking for Matthew Armitage who, he said, would soon be there. Stephen Armitage said Matthew Armitage was going to Couchman's house because it was a "safe call". Matthew Armitage arrived with Schultz and Stephen Armitage called

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6 This was said by Healy in 2014: AB 169 line 45 to AB 170 line 13.
7 AB 172 lines 3-9.
8 AB 173 lines 38-46.
9 AB 174 lines 5-10.
10 In the vicinity of Cooloola Cove.
11 Sister of Stephen Armitage, and mother of Kane Ostwald
12 Heavy ice user; worked with Stephen Armitage fishing and at his property doing maintenance work.

back. Couchman overheard Matthew Armitage say that "Rick was at Woolworths".[13] Both Matthew Armitage and Schultz left.

16 December 2013

[31] On 16 December 2013 Kane Ostwald arrived in Cooloola Cove and moved into Couchman's house.

December 2013 – no date assigned

[32] After Ostwald moved in he was picked up by Stephen Armitage, Mitchell, Matthew Armitage and Schultz at different times. Stephen Armitage said he was required to "help him lift things and also to help him go and collect some money from someone, to be there for support".

Ballard's evidence

[33] In December 2013 Corey Ballard[14] was working at Stephen Armitage's property when he heard a loud bang. He saw an esky[15] on the ground and a man fall out of it. The man was on the ground and "sort of half getting up" when he looked. He was near an orange esky and Stephen Armitage's purple LandCruiser ute. Stephen Armitage and the appellant were near the esky. Ballard went back to work. Stephen Armitage later told Ballard that if he ever repeated what he had seen, he (Ballard) would be in with the man in the esky.

[34] Schultz later told Ballard that he (Schultz) had witnessed a man fall out of an esky. Ballard told him to go to the police.

Mitchell's evidence

[35] One afternoon Mitchell saw the appellant crouched down and talking to an orange esky at Stephen Armitage's property. He heard the appellant say something like "I'm sorry mate". Mitchell asked Stephen Armitage what the appellant was doing. He replied that they had a "fellow in the esky, that they were trying to get information out of" and the man had "raped some girl down in the Gold Coast and he stole some ephedrine". They were "trying to get information out of him" as to where the drugs were. Mitchell laughed it off, thinking it was untrue.

[36] On a later occasion Mitchell saw Stephen Armitage in the shed when, according to Stephen Armitage, the person in the esky said he was thirsty. Stephen Armitage said he would fix him, got a bottle mixed 50:50 with water and the drug Fantasy,[16] and said he would give it to him. Mitchell thought the appellant, Matthew Armitage and Schultz were at the property at the time. There was a bottle in the shed containing what Mitchell understood to be Fantasy. He took a sample that afternoon or the next day and much later gave it to police. It proved to contain Fantasy.

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13 An evident reference to Rick Mitchell, a heavy user of ice and cousin of Stephen Armitage, who did maintenance work on Stephen Armitage's vehicles.

14 An ice and cannabis user who worked for Stephen Armitage in commercial fishing and maintenance; in December 2013 he was working at Stephen Armitage's property at Cooloola Cove.

15 The esky being referred to was the type of esky used on a commercial fishing boat, and of the following dimensions: 1.045m by 1.33m by 91cm high.

16 Gamma-hydroxybutyrate (GHB); also referred to as "Fanta" by some witnesses.

[37] On another occasion Matthew Armitage came into the shed at midnight and asked Mitchell for some cable ties. He said he wanted them "to tie a bloke to a tree", to "tie his hands up".

[38] Sometime later, the appellant walked in the side door of the shed with a two-pound lump hammer and asked Mitchell to burn it. Mitchell told him to put it on the ground. Mitchell moved it out of the shed with his foot. He subsequently saw the appellant make a fire and try to burn the hammer.

[39] On another occasion Mitchell heard the appellant say to Matthew Armitage that "the guy that they had in the esky, when they took him out … he shit in the back of [the appellant's LandCruiser] and they … need to clean it up … or it stunk or something like that". Matthew Armitage told him that the "fellow shat and all in the back of it" and to clean it.

[40] Mitchell asked Stephen Armitage to take his vehicle to Mitchell's residence so he (Mitchell) could work on it. Stephen Armitage drove it down and the appellant drove his LandCruiser wagon down. Around that time Stephen Armitage said "they tied the fella up in the forestry … to a tree overnight". The appellant switched vehicles, from the LandCruiser wagon to a white van, sometime after he saw the appellant talking to the esky.

Matthew Dean's evidence

[41] Matthew Dean[17] was working on a truck one day (before the school holidays which commenced on 14 December 2013) when the appellant asked him if he wanted to babysit someone tied up in the forestry. He declined. The appellant then asked him to clean "piss and shit off the back seat[18] that the bloke left there". During the conversation Stephen Armitage approached and said that "they'd tied him up and out in the forestry as they needed him to talk and they were going to put him in an esky", and "you wouldn't believe how big a punishment this bloke's taken", and "they'd smashed his kneecaps in and smashed every bone in his hands and cut off a finger". Matthew Dean thought it was a joke.

[42] Matthew Dean went up the back to talk to Mitchell. While doing so Stephen Armitage came up and asked him to pass his hammer to Mitchell. He said he wanted Matthew Dean's fingerprints on it.

[43] Some days later Matthew Dean left a message for Stephen Armitage to stay away from the forestry because police had found a body there. About 5 am the next day Stephen Armitage and Matthew Armitage went to the house where Matthew Dean was staying. Stephen Armitage told him "the bloke in the forestry was still alive and never to talk about it again".

Schultz's evidence

[44] Prior to Christmas 2013 Schultz was doing maintenance work at the Armitage residence. He was in the shed on the purple LandCruiser one day when Stephen Armitage told him to stay away from the eskies because there was somebody in

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17 Not related to the appellant. A marijuana addict and ice user, who knew Stephen Armitage, Matthew Armitage and Schultz, and knew the appellant through fishing with Stephen Armitage.

18 Of the appellant's white LandCruiser wagon.

there. Stephen Armitage said something like "the man that was in the esky was … drugging women down here on the coast and was a pretty bad person".

[45] A couple of days later Schultz heard a muffled voice coming from the direction of the eskies, calling for help and saying they were "hungry or thirsty". Schultz asked Matthew Armitage what was going on, and he said that "previously when his father had told us that there was someone in the esky that dad wasn't bullshitting". Matthew Armitage then moved over to the eskies and threatened the voice that "if it didn't shut up he was going to stick a hose in there". He then turned up the music.

[46] A couple of days later Schultz went to the property. He was asked by Stephen Armitage to go down to the house. From there he saw Stephen Armitage operating a forklift and there was an orange esky on its side on the forklift tynes, and a person on the ground in front of the esky. The person's face was covered up with a sock or balaclava, or "something around them". The appellant pushed the person over.

[47] On another occasion Matthew Armitage and the appellant returned in the appellant's white LandCruiser wagon. The appellant put a container of honey down and he and Matthew Armitage were "having a bit of a laugh about the fact that they'd just put honey on someone's testicles and watched ants eat it off". Stephen Armitage was there at the time.

[48] Schultz later saw the appellant trying to hide a small mallet sized hammer. He also saw the appellant sitting in front of the incinerator stoking the fire and Matthew Armitage putting clothing and shoes into the fire.

[49] After Christmas Schultz overheard Stephen Armitage and Matthew Dean talking about a body that had been found. Matthew Dean asked Stephen Armitage if it was the person in the esky. Stephen Armitage said that person was back down on the Coast.

Denning's evidence

[50] Before Christmas 2013 Stephen Armitage, the appellant, Amber Denning[19] and a friend drove from Gympie to the Gold Coast to get some ice. Denning and her friend were dropped off at a tavern. Stephen Armitage and the appellant returned with Murphy. After lunch they all went to Murphy's house and smoked ice. After dark they went for a drive. During the drive Stephen Armitage got a phone call from a man he called Matt. After talking Stephen Armitage hung up and said something like "the crab's boiled over in the pot". He appeared "uneasy". The car stopped and Stephen Armitage, the appellant and Murphy got out and spoke together. They then went back to Murphy's house where the appellant had some Fantasy, and they then drove back to Gympie.

Ostwald's evidence

[51] Ostwald would often go down to Stephen Armitage's property to get drugs. He did some work for him putting lights in. On one occasion he was there at night in the shed when he heard "some shuffling up in the back corner", which "sounded like something big shuffling across", like "a man laying on concrete, scuffling their legs or someone laying on concrete, moving their legs to hide". He was "spooked" and did not investigate.

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19 A habitual heavy ice user who knew Stephen Armitage, Matthew Armitage and the appellant.

[52] On another night Ostwald was at the Armitage house. Stephen Armitage, Matthew Armitage, Ballard, Schultz and the appellant were there as well. The appellant asked him to go for a drive. He got in the right of the rear seat of the appellant's white LandCruiser. The appellant was driving and Ballard was in the front. On the way the car stopped and the appellant got out and walked in the direction of a house. He returned after about 20 minutes and they drove on, ending up on a dirt road.

[53] It was dark and the appellant's headlights were on. Ostwald saw Stephen Armitage's purple LandCruiser ute and a blue esky. The esky was on its side in front of the car, off to the side near a tree, and with a hose running back to the car. The esky was about three metres away from the LandCruiser. Schultz, Stephen Armitage, the appellant and Matthew Armitage were there. Stephen Armitage was on the left side of the purple LandCruiser doing something in the toolbox.

[54] The appellant got out and walked over to Stephen Armitage. Ostwald got out and went to the back of the appellant's LandCruiser to have some ice. He heard "swearing, like a commotion" and looked up. Someone screamed "turn the fucking lights off". Ballard turned them off. He ran over and saw the esky tipped over and a man was lying beside the tree. He was on his back and "mangly looking", "twisted up" like "legs crossed up … just like they shouldn't be laying like that". The man's face looked like it had dirt on it and he could not see the eyes properly. He thought it could be dirt or bruising on the face and hands.

[55] Ostwald attempted to perform CPR. The man felt cold and stiff. He could hear swearing, scuffling and running away. He thought Stephen Armitage said he would be left behind if he did not hurry up. Then he heard the cars taking off. He was "scared out of my life" and panicked, but continued CPR until he blacked out.

[56] When Ostwald awoke he was on the lounge at Stephen Armitage's house. Stephen Armitage, Matthew Armitage, Matthew Dean and Schultz were there. Later that day Stephen Armitage called him a "dickhead" and "he was breathing the whole time", and that Stephen Armitage had been on the phone and "almost drowned him". Schultz was there at this time.

29 December 2013

[57] On 29 December 2013 Barker's burned out vehicle was found by police in the Pacific Pines Forest.

January 2014 and following

[58] In early 2014 Stephen Armitage had Matthew Armitage deliver the appellant's white LandCruiser wagon to a 4WD wrecking business. In March 2014 that business handed it on to another person to do work on it. When recovered by police in October 2014, the LandCruiser had been effectively cut in half and dismantled, sand blasted, and the seats removed.

[59] On 14 January Barker was reported missing.

[60] On 10 April 2014 Barker's skull and jaw bone were found in the Toolara Forestry. Further searches found further bone fragments in a burnt out area. It was likely that the site had been dug out, remains and timber placed, a fire lit and then soil placed on top.

[61] A pathologist examined the remains which were fragmented with fire damage and charring. A broad defect in the skull could have been from the fire or environmental exposure afterwards. It was not possible to determine if there were injuries prior to death. It was not possible to say what the cause of death was.

[62] Searches of the property owned by Stephen Armitage in July 2014 revealed eskies, cable ties, an incinerator and forklift. No DNA matches were achieved, and there were no relevant matches with objects such as cable ties.

[63] On 5 September 2014 Ostwald identified Barker in a police photo board interview as the man on the ground near the esky in the forestry.

Legal principles – ground 1

[64] The main ground of appeal was that the verdict was unsafe. The principles governing how that ground of appeal must be approached are not in doubt.

[65] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[20] requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[66] In *M v The Queen* the High Court said:[21]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[67] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[22] As summarised by this Court recently in *R v Sun*,[23] in *Baden-Clay* the High Court stressed that the setting aside of a jury's verdict on the ground that it is unreasonable is a serious step, because of the role of the jury as "the constitutional tribunal for deciding issues of fact",[24] in which the court must have "particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[25] The High Court said:[26]

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20 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493.
21 *M v The Queen* at 493; internal citations omitted. Reaffirmed in *SKA v The Queen*.
22 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.
23 [2018] QCA 24, at [31].
24 Citing *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.
25 *Baden-Clay* at 329, citing *M v The Queen* at 494, and *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56]; [2002] HCA 53.
26 *Baden-Clay* at 330 [66].

> "With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[68] Further, as was said by this court in *R v PBA*,[27] in the course of elucidating the applicable principles:

> "The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if 'it would be dangerous in all the circumstances to allow the verdict of guilty to stand'. The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted."

Submissions – ground 1

[69] It was submitted on behalf of the appellant that there were three bases upon which the prosecution advanced the charges on all three offences. The first was that the appellant did the relevant acts: s 7(1)(a) of the *Criminal Code* 1899 (Qld). The second was that the appellant had aided another of the co-accused: s 7(1)(c) of the *Code*. The third was that the appellant had formed a common intention with another of the co-accused to prosecute an unlawful purpose: s 8 of the *Code*. In the appellant's trial Stephen Armitage and Matthew Armitage were co-accused, and therefore relevant for the second and third basis upon which the offences were prosecuted. However, it was submitted that because the jury in the appellant's trial could not reach a conclusion of guilt in respect of either Stephen Armitage or Matthew Armitage, the only basis upon which the jury could have found the appellant guilty of murder was that the appellant did the relevant acts with an intention to kill or an intention to cause grievous bodily harm. In other words, it was submitted that the jury's conclusion of guilt could only have been upon the basis of s 7(1)(a) of the *Code*.

[70] That being the case, it was further submitted that the cause and circumstances of death were unknown, as was acknowledged in the prosecution's opening and as the jury were reminded in the summing up:[28]

> "So that left as Mr Cash – in summarising his case at the beginning – in his opening said, 'The exact circumstances in which Shaun Barker's death was caused is a matter which is not established by direct evidence. There was no eye-witness, no video, no audio', as Mr Cash said. There's no medical or other scientific evidence as to the circumstances of his death, beyond what was given about the bones that constitute his remains, and where they were found."

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27 [2018] QCA 213 at [80].

28 Appeal Book (**AB**) 675 lines 3-9.

[71] The submission continued, that it followed that the jury could not be satisfied that Barker was killed by an act done by the appellant with the requisite intent. In the course of oral submissions that was linked to various possibilities, such as the use of a hammer or by physical attack, but again pointing out that in the absence of knowing the cause of death, and in the absence of knowing the circumstances of the death, it was simply not possible for the jury to conclude that the appellant did any particular thing which was the cause of death. Therefore the jury could not make a conclusion about whether that particular thing was done with the requisite intent.

[72] On the second basis of ground 1, it was submitted that the jury had to be satisfied that guilt of murder was the only rational inference that could be drawn from the circumstances.[29] If there was a rational hypothesis consistent with innocence of the offence of murder, the jury's duty was to acquit on that charge.[30] It was submitted that manslaughter was a rational inference that could be drawn from the circumstances. The evidence supported a finding that Barker was being held for the purpose of discovering where missing drugs or money were kept, the inference being that it was in the interests of all of the others to keep him alive. The evidence also supported a finding of fact that the appellant was a friend of Barker, and had expressed regret to him when he spoke in the direction of the esky, saying something like "I'm sorry, mate". Additionally, it was submitted that the preponderance of the evidence was that the appellant was not the controlling mind for what occurred at Stephen Armitage's property.

[73] Therefore, it was submitted, a reasonable hypothesis was that the deceased died while in the control of the co-accused, albeit in circumstances where none of them held the requisite intent to cause death or grievous bodily harm.

[74] The jury in the first trial having been unable to reach a verdict on the count of murder, Stephen Armitage and Matthew Armitage were retried and convicted on 26 September 2017. They appealed their convictions in respect of both trials. That is to say, they appealed their convictions for torture and interference with a corpse (counts 2 and 3) upon which there was a conviction in the first trial, and their convictions for murder in the second trial. Their appeals were successful.[31] The convictions for torture were quashed and a retrial ordered. The appeal in respect of the convictions for interfering with a corpse were dismissed. On the murder convictions, the appeal was allowed, the convictions were quashed, and a verdict of guilty of manslaughter was substituted.

[75] Mr Boyle, appearing for the Crown, submitted that this Court's task should not be conducted by reference to the decision in respect of the Armitage's appeal on their retrial. The respondent submits that the evidence relevant to the count of murder on the second trial was different from that which was given at the first trial. That and a contended misdirection in the second trial mean that this appeal should ignore the second trial and the appeal from it.

[76] Referring to the summary of evidence, the core of which appears above in paragraphs [13] to [63], it was submitted that the five main witnesses[32] provided

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29 Referring to *Shepherd v The Queen* (1990) 170 CLR 573 at 578.
30 Referring to *R v Perera* [1986] 1 Qd R 211 at 217; and *R v Owen* (1991) 56 SASR 397 at 406.
31 *R v Armitage*; *R v Armitage* [2019] QCA 149.
32 Mitchell, Ballard, Schultz, M Dean and Ostwald.

evidence relevant to the requisite intention. That included the following in respect of the appellant:

(a) he was crouched down talking to one of the orange eskies, saying words to the effect of "I'm sorry mate";[33]

(b) he was near an orange esky with Stephen Armitage when Ballard observed it on the ground and a man nearby;[34]

(c) he was near an orange esky on a forklift and pushed over a person who was on the ground underneath it;[35]

(d) he said something about the man in the esky making a mess in the back of his vehicle, and they needed to clean it;[36]

(e) he asked Matthew Dean if he wanted to babysit someone tied up in the forestry, and asked him to clean his vehicle which had been messed up by that man;[37]

(f) he returned in his vehicle with Matthew Armitage to the Armitage house, sat at the back table, placed honey on it and spoke about putting honey on someone's testicles and watching the ants eat it off;[38] and

(g) he drove to the forestry and met Stephen Armitage with his ute, the esky and the man who appeared injured.[39]

[77] It was submitted that in the context of the whole of the Crown case, and considering the evidence of each witness together rather than in isolation, the jury could conclude that the appellant held the requisite intent in respect of Barker's death. In addition to that which is referred to above, it was submitted that the evidence showed the appellant's allegiance to Murphy, in that he committed acts of torture to get information on Murphy's behalf and acted on Murphy's behalf by torturing and acting to conceal the torture. Further, Barker owed a significant debt to Murphy and the appellant acted on Murphy's behalf in seeking to regain it. That was evidence of motive, it was said, from which the jury might properly infer intention.[40]

[78] It was also submitted that there was post-offence conduct which was relevant to the conclusion of the requisite intent. In this respect it was submitted that the evidence concerning the appellant asking Mitchell to burn a two-pound lump hammer, and trying to hide the hammer, as well as stoking a fire for two days where clothing was being burnt, was a relevant post-offence conduct.[41]

Discussion – ground 1

[79] Although ground 1 of the Notice of Appeal was that the verdict on count 1 was unreasonable, that ground was advanced on two specific bases. The first was that it

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33 Evidence of Mitchell at AB 416 lines 25-46, and AB 417 lines 12-14.
34 Evidence of Ballard at AB 208 lines 12-23.
35 Evidence of Schultz at AB 487 lines 1-46.
36 Evidence of Mitchell at AB 424 line 20 to AB 425 line 2.
37 Evidence of M Dean at AB 369 lines 18-28, AB 370 lines 6-9.
38 Schultz's evidence at AB 489 line 43 to AB 490 line 17.
39 Evidence of Ostwald at AB 281-287.
40 Referring to *R v Baden-Clay* (2016) 258 CLR 308 at 331 [70].
41 Respondent's outline at paras 3.13-3.14 and 4.8-4.10.

was not open to the jury to find intent.[42] The second was that the rational hypothesis of manslaughter was not excluded by the Crown.[43] Self-evidently those two bases are linked. If intent to kill or at least do grievous bodily harm was not open, a conviction of murder could not follow.

[80] The case for the appellant being confined in that fashion, several things follow. First, there is no need to examine the evidential foundation for the jury's conclusion that Barker was dead. That, of course, is the first element in the offence of either murder or manslaughter.

[81] Secondly, because of the way the case is framed, there is no challenge to the evidential foundation for the conclusion of the jury that the appellant caused the death of Barker, under one of s 7(1)(a), 7(1)(c) or s 8 of the *Code*. All that is in issue is whether he caused that death with the requisite intent for murder, an intention to kill or cause grievous bodily harm, or that the death was caused with some lesser intention or no intention at all.

[82] Thirdly, as observed above, there is no challenge to the appellant's conviction on count 3, that of unlawfully interfering with Barker's corpse. There is therefore no requirement to examine the evidential foundation for that conclusion. Indeed, Mr Hoare and Mr Lake of Counsel, appearing for the appellant, made a concession in the course of oral argument that there was sufficient evidence for the jury to find that the appellant did dispose of Barker's body.[44]

[83] Fourthly, in light of those matters there is no necessity to review the trial evidence beyond that which is relevant to the issue of intent and the alternative rational hypotheses postulated on the appeal. Thus, the exercise for this Court is different from that which often applies where the unreasonable verdict ground is advanced in a general attack on the verdict. The repeated stipulation that where the verdict is attacked on the basis that it is unsafe or unsatisfactory the appellate Court's task is to examine the whole of the evidence and determine whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, has been expressed in those terms because generally the challenge to the conviction is open-ended.

[84] Here the confined issues do not require that. However, an appellant is entitled to select the grounds upon which the verdict will be attacked, and to confine them in the way the appellant chooses.[45] Where that occurs the requirement is to review the whole of the evidence relevant to the issues raised on the appeal. There is nothing in *SKA v The Queen*,[46] *M v The Queen*,[47] *MFA v The Queen*,[48] *R v Baden-Clay*,[49] or *GAX v The Queen*[50] which requires the Court to do otherwise.

Basis of the jury's verdict of guilty

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42 Appellant's outline paras 23-25.
43 Appellant's outline paras 26-27.
44 Appeal Transcript T1-10 line 18.
45 *Nudd v The Queen* (2006) 80 ALJR 614; [2006] HCA 9 at [9]; *TKWJ v The Queen* (2002) 212 CLR 124 at [8].
46 (2011) 243 CLR 400, [2011] HCA 13.
47 (1994) 181 CLR 487.
48 (2002) 213 CLR 606, [2002] HCA 53.
49 (2016) 258 CLR 308, [2016] HCA 35.
50 [2017] HCA 25, (2017) 91 ALJR 698.

[85] I do not accept the submission that the jury's verdict means that the appellant was found guilty on the basis that he did the acts himself, that is under s 7(1)(a) of the *Code*.

[86] The particulars relied upon by the prosecution put the case on three alternatives. The first was that each of the defendants, and here the appellant is the relevant one, did the relevant acts for the purposes of s 7(1)(a) of the *Code*. The second was that there had been an aiding of another co-accused, thus bringing s 7(1)(c) into play. The third was the forming of a common intention with another of the co-accused, to prosecute an unlawful purpose: s 8 of the *Code*.

[87] The jury were instructed as to what was required for proof of the second alternative, that of aiding another co-accused. They were directed that proof of aiding the person who commits the offence involved proof of acts or omissions by the relevant defendant, intentionally directed towards the commission of the offence by the perpetrator, and proof that the defendant who was aiding was aware of, at least, the essential matters that constituted the offence.[51] The learned trial judge continued in the summing up:[52]

> "**The Prosecution doesn't need to prove that the perpetrator has been convicted already. It is enough if the Prosecution proves that someone was the perpetrator and that the Defendant aided that person to commit the offence**. The Prosecution must prove that the Defendant who aids knew that the type of offence which was, in fact, committed was intended, but not necessarily that the particular offence would be committed on a particular day or at the particular place. But it is not enough for the Prosecution to prove that the Defendant who aids knew only of the possibility that the offence might be committed."

[88] The learned trial judge then embarked on a more specific breakdown of what was required for the particular elements of the offence of aiding another to commit an offence. His Honour told the jury that four things must be proven beyond reasonable doubt. They were:

(a) that a perpetrator, who may be unidentified, committed the offence;

(b) that the defendant aided the perpetrator to commit the offence;

(c) that when the defendant aided the perpetrator, he did so intending to help the perpetrator to commit the offence; and

(d) that the defendant who aids the perpetrator had actual knowledge or expectation of the essential facts or the offence committed.[53]

[89] Finally, the learned trial judge finished this part of the directions in this way:[54]

> "Now, for the offence of murder, the Prosecution alleges that, although it cannot identify the Defendant who did the acts to commit the offence as the principal offender or the perpetrator, each of the

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51 AB 703 lines 35-39.
52 AB 703 line 42 to AB 704 line 2; emphasis added.
53 AB 704 lines 4-13.
54 AB 704 lines 15-18.

> Defendants is guilty of murder because he aided the perpetrator to commit the offence of murder."

[90] As is apparent from those passages, the jury could have been satisfied of the appellant's guilt of murder on the basis that the appellant aided the person who actually committed the murder, that being one or other of Stephen Armitage and Matthew Armitage, though the jury may not have been able to decide which of Stephen Armitage or Matthew Armitage was the murderer. That would explain the inability of the jury to reach a verdict in respect of the Armitages, but nonetheless reach a verdict of guilty in respect of the appellant, as an aider of the actual but unknown perpetrator.

[91] The same would apply in respect of the common purpose basis under s 8 of the *Code*. That is to say, the jury may have been satisfied that the appellant shared a common intention to prosecute the unlawful purpose of assaulting Barker, a probable consequence of which was Barker's murder, but not been satisfied as to which of Stephen Armitage and Matthew Armitage was the actual perpetrator.

[92] It is, of course, not possible to know upon which alternative the jury reached its conclusion of guilt in respect of the appellant. For reasons which will become apparent, not much turns upon this issue.

Proof of intent

[93] The first thing to note is what follows from the failure to appeal against the conviction for improperly interfering with a corpse, and the concession on the appellant's part "that there was sufficient evidence for the jury to find that [the appellant] did dispose of the body".[55] Those two factors mean that this Court must proceed upon the basis that it was open to the jury to find that it was the appellant who burned the body in the fire pit, and not merely as an aider to others.

[94] The evidence against the appellant as to his involvement consisted of the following:

(a) by Healy: that the appellant was involved in the assault of Barker on 10 December at Murphy's house, and in the park;[56]

(b) Healy gave evidence that Barker got into the appellant's car when they left Murphy's house; he (and inferentially, Barker) then drove north on the morning of 11 December;

(c) Ballard said that the appellant was present when he saw the man on the ground near the esky; Ballard identified the appellant as that person, correctly selecting his image in a photo line-up;

(d) Ostwald said the appellant drove him and Ballard out into the forest, where an esky was on its side on the ground, and a person lying in a twisted state; despite the multitude of criticisms as to the quality of Ostwald's evidence, it is the fact that he subsequently correctly identified the person on the ground as Barker, by reference to a photo line-up;

(e) Matthew Dean said it was the appellant who asked him whether he wanted to babysit a person tied up out in the forest; and the appellant was present when

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55 T1-10 line 18.

56 That evidence came from a previous statement by Healy which was put to him after he was declared hostile.

Stephen Armitage said that the person had been tied up out in the forestry as they needed him to talk and they were going to put him in an esky, and the man had been severely assaulted including having "smashed his kneecaps in and smashed every bone in his hands and cut off a finger";

(f) Mitchell said that Stephen Armitage's explanation that they were keeping a man in the forest was prompted by the fact that the appellant had been speaking to or at an esky, saying words to the effect of "I'm sorry, mate";

(g) Mitchell also said that it was the appellant who gave him a lump hammer and asked him to burn it, and then when Mitchell did not do so, attempted to burn it himself;

(h) Schultz said that he saw a man on the ground near where Stephen Armitage was operating a forklift, which had an esky on its side on the forklift tynes; Schultz said that the appellant was present at that time and that the appellant pushed the person; and

(i) Schultz also saw the appellant sitting at an incinerator, stoking the fire over a period of two days while Matthew Armitage fed shoes and clothes into it.

[95] To that list must be added that it was the appellant who burned Barker's body by putting it in a fire pit.

[96] The appellant's case before this Court proceeded on the basis that it was open to the jury to accept that evidence, notwithstanding the various inconsistencies, discrepancies and adverse matters impacting upon the quality of the witnesses. On that basis there can be little doubt that the appellant either carried out himself or was a party to the kidnapping of Barker on 10 or 11 December, his transport from the Gold Coast to the Armitage property, his incarceration in a fishing esky, and the various assaults carried out on Barker in the process over the days following that until he died. As is effectively conceded by the way in which the appellant's appeal has been conducted, the appellant caused the death of Mr Barker, or aided those who did, or shared the common purpose with the Armitages, which had that probable consequence.

[97] The more difficult question, however, is that of whether the appellant held the requisite intent for the offence of murder. In that respect the successful appeal by Stephen Armitage and Matthew Armitage in respect of their convictions for murder has an impact. It having been determined by this Court, albeit in a separate appeal, that it was not open to find that Stephen Armitage or Matthew Armitage had the requisite intent for the offence of murder, there can be no basis upon which the appellant could be found guilty of murder on the basis of being an aider under s 7(1)(c) of the *Code*. If those whom the appellant was aiding did not hold the requisite intent for the offence of murder, the appellant was merely aiding manslaughter. Similarly, the common purpose basis under s 8 is affected, as the probable consequence is a death caused without the intent necessary for murder.

[98] The summary of evidence above shows that the appellant participated in the imprisonment of Mr Barker on 10 December 2013, and the assaults upon him, for the ostensible reason of extracting information from him about the location of drugs or money. Further, the inference available on that evidence is that he was doing so in order to assist Murphy, to whom Barker owed the debt, or from whom Barker had stolen drugs.

[99] Further, the evidence shows that the appellant participated in the kidnapping of Barker on the morning of 11 December, when he drove Barker north and (inferentially) to the property owned by Stephen Armitage.

[100] Close contact between the appellant and Stephen Armitage is also demonstrated by the evidence of the phone calls between 10 December and 13 December, as well as the evidence of what physically occurred at the Armitage property. Plainly, on that evidence, the appellant was aware that Barker was being held in an esky. He was there on the occasion Ballard witnessed, when Barker fell out of an esky in the presence of Stephen Armitage and the appellant. The only available inference from Mitchell's evidence as to the appellant apologising to someone in the esky, is that it was Barker in the esky and the appellant was apologising for his mistreatment.

[101] The appellant's direct involvement in the assaults on Barker while held at the Armitage property could be inferred from his attempt to destroy the two-pound lump hammer. The circumstances were sufficient to cause Mitchell to avoid involvement, even to the point of avoiding touching the hammer beyond using his foot to move it out of the shed. The appellant's subsequent attempt to destroy the hammer himself raises an inference that the hammer was used in the mistreatment of Barker. And, Matthew Dean's evidence was that the appellant was present when some of the assaults on Barker were described, including smashing his kneecaps and bones in his hands, and cutting off a finger.

[102] The appellant's direct involvement in taking Barker out into the forest where he was tied to a tree is able to be inferred from Mitchell's evidence of what the appellant said to him. It was that "the guy that they had in the esky", who was Barker, had defecated in the back of the appellant's LandCruiser when he was taken out into the forest. The appellant sought to have Mitchell clean it up, and soon after changed from driving that LandCruiser to an alternate vehicle.

[103] The appellant's direct involvement with the imprisonment of Barker in the forest is also to be inferred from the evidence of Matthew Dean and what the appellant said to him. He was asked if he wanted to "babysit someone tied up in the forestry". That was an evident reference to Barker. Though Matthew Dean declined to babysit, the appellant asked him to clean the back seats of his vehicle because of what had been left by Barker.

[104] The appellant's direct involvement is also to be inferred from the evidence of Schultz as to the occasion when he saw a human being on the ground in front of an esky which was then being held on a forklift. The appellant pushed that person over. The only available inference is that it was Barker.

[105] Although there was evidence that there was a relationship between the appellant and Barker, the acts to which I have referred above, and to which I will now refer, belie that. Schultz's evidence was that the appellant returned with Matthew Armitage, put a container of honey down, and laughed about the fact that they had just put honey on someone's testicles and watched ants eat it off. The only inference available is that that was Barker.

[106] Schultz's evidence also supported that of Mitchell, in that Schultz saw the appellant trying to hide a small mallet sized hammer. Schultz also saw the appellant stoking the fire in the incinerator over a couple of days, during which time clothing and shoes were fed into the fire.

[107] Finally, the evidence of Ostwald directly links the appellant to the death of Barker. It was the appellant who drove Ostwald (and Ballard) out to the middle of the forest, stopping with his headlights revealing an esky lying on its side in the vicinity of the purple LandCruiser ute owned by Stephen Armitage. The esky was on its side, with a hose running back to the car. The appellant walked over to Stephen Armitage, who was standing at his LandCruiser utility, in close proximity to the esky. Ostwald saw a man, twisted and mangled, who he was later to correctly identify as Barker. There is no question about his correct identification, as he not only picked Barker out in a photo line-up, but the DNA evidence proved that the bones retrieved from that site were those of Barker.

[108] In the appellant's presence Ostwald attempted CPR on Barker who was lying twisted up with his legs crossed. The appellant and the others abandoned Ostwald, though someone obviously retrieved him later.

[109] That evidence, taken in combination, justifies the acceptance on the appeal before this Court that the appellant was directly involved in the kidnapping and imprisonment of Barker, and his subjection to violence and other mistreatment culminating in his death.

[110] However, the difficulty which confronts the ability to draw an inference of the requisite intent for the offence of murder, is that the prosecution had to prove that whatever killed Barker was an act done by the perpetrator with an intention to either cause death or cause grievous bodily harm. In other words, it had to prove beyond reasonable doubt that something done in the mistreatment of Barker caused his death, and that thing was done with the requisite intent.

[111] The difficulty which arises is because the cause of death cannot be proved. It is therefore simply not possible to say what killed Barker. True it is that it is tempting to conclude that someone or other of the appellant, Stephen Armitage or Matthew Armitage assaulted him while he was imprisoned with the intention, at least, of causing an injury which would come within the definition of grievous bodily harm. However, tempting though that may be, it is not possible to do so. The forensic evidence does not permit it. Nothing can be identified as the cause of death. It is therefore not possible to identify what it was that killed Barker, and whether that was done with the then held intent to cause death or cause grievous bodily harm.

[112] In my respectful view, equally open on the state of the evidence is the hypothesis that Barker died because of a reckless indifference to his welfare. Also open is the possibility that Barker succumbed to his mistreatment because of neglect, even if it was not reckless indifference.

[113] Therefore, in my respectful view, it was not open to convict the appellant on the offence of murder, and that conviction must be quashed.

Alternative verdict

[114] The appellant's contention was that the appropriate disposition of the appeal against the murder conviction was that a verdict of guilty of manslaughter be substituted and the matter remitted to the trial division for a sentence for that offence.[57] In doing so the appellant adopted the reasoning in *R v Armitage; R v Armitage*[58] on

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[57] Appellant's outline paras 6 and 32.

[58] [2019] QCA 149 at [96]-[108].

this issue. For that purpose it was contended that there were no material differences in the substantive effect of the evidence presented to the jury on the appellant's trial, and on the Armitage second trial, so as to distinguish between the criminal liability of the Armitages on the one part and the appellant on the other.

[115] Plainly, there were some differences in the evidence at the two trials. There is no need to dwell upon them. In my respectful view, the appellant's submission is correct insofar as it asserts that there is no material difference in the substantive effect of the evidence at each trial.

[116] There is one difference that I should mention between the appellant's trial and appeal, and the second trial for the Armitages and their subsequent appeal. On the Armitages' appeal one issue successfully raised was a misdirection as to whether it was open to find guilt on the basis of manslaughter rather than murder.[59] However, except to the extent that that conclusion is referred to in the reasons for the substitution of the alternative verdict of manslaughter in *R v Armitage*, the reasoning is otherwise applicable and I would respectfully adopt it.

[117] The consequence is that this Court should substitute a verdict of manslaughter, and remit the matter to the trial division so that the appellant can be appropriately sentenced.

Ground 2 – misdirection on the torture count

[118] This ground can be dealt with shortly. In *R v Armitage; R v Armitage*[60] this Court held in respect of this issue, which arose at the same trial at that of the appellant, that the appeal should be allowed and that the proviso in s 668E(1A) of the *Code* did not apply. Mr Boyle, for the respondent, accepted that for the same reasons the appellant's appeal on this ground should be allowed and that there should be a retrial on count 2 on the indictment. Those orders are appropriate.

Conclusion

[119] I would order as follows:

1. The appeal against conviction on count 1 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.

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

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59 *R v Armitage* at [81]-[95].

60 [2019] QCA 149 at [109]-[118].