SUPREME COURT OF QUEENSLAND

CITATION:	*R v Batchelor* [2003] QCA 246
PARTIES:	**R** **v** **BATCHELOR, Jason Grant** (appellant)
FILE NO/S:	CA No 335 of 2002 SC No 659 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	10 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2003
JUDGES:	McMurdo P, McPherson JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDERS:	**Appeal against conviction dismissed** **Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS - IMPROPER ADMISSION OF EVIDENCE - where appellant convicted of murder – where appellant made telephone admissions to police negotiator - where police officer tape-recorded the appellant's admissions in field interview - whether the learned trial judge erred in admitting the telephone and tape-recorded confessions CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – MISDIRECTION – where appellant intoxicated at time of offence – where jury concluded the appellant formed the intent to commit the offence - whether the learned trial judge's directions to the jury as to intoxication were inadequate *Criminal Code Act* 1899 (Qld), s 668E (1A), s 28(3) *Criminal Law Amendment Act* 1894 (Qld), s 10 *Police Powers & Responsibilities Act* 2000 (Qld), s 246, s 249, s 254, s 266

Cleland v The Queen (1982) 151 CLR 1, considered
Conway v The Queen (2002) 76 ALJR 358, applied
Festa v The Queen (2001) 76 ALJR 291, applied
R v Cho [2001] QCA 196; CA No 1 of 2001, 25 May 2001, considered
R v Nicholson [1956] St R Qd 520, considered
R v Swaffield (1998) 192 CLR 159, applied
Viro v The Queen (1976) 141 CLR 88, applied

COUNSEL: M J Bryne QC for the appellant
M J Copley for the respondent

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

[1] **McMURDO P:** The appellant was convicted in the Supreme Court at Cairns on 26 September 2002 of murdering Graeme Leslie Mills and John Andrew Ginnivan on 16 March 2001. He appeals from those convictions on three grounds. He contends that, first, the evidence of confessions in a conversation with police negotiator Senior Constable Paula Byrne was wrongly admitted; second, the tape recorded admissions made to Detective Hodgman in a field interview were also wrongly admitted, and, third, the learned primary judge's directions to the jury as to intoxication were inadequate.

The admissions to police negotiator Byrne

(a) The evidence

[2] At 6.56 am on 16 March 2001, the appellant rang the "000" emergency number which was answered at the Mareeba police station by Sgt Ewin. The appellant identified himself, said Sgt Meadows knew his address and requested that Sgt Meadows be told, "To come and fucking get me and lock me up." He spoke in a loud, aggressive tone using obscene and abusive language. Sergeant Ewin could make little sense of the conversation and hung up. The appellant rang back and continued his aggressive and abusive conversation with Sgt Ewin, adding:

> "Are you going to get to fucking get Sgt Meadows out here, cause I've shot two cunts?
>
> Who have you shot, Jason? – Graeme the fag, and John. Just fucking get out here and lock me up.
>
> What did you shoot them with, Jason? – A 12 gauge. Just fucking get out here.
>
> When did you shoot Graeme and John? – About six to eight hours ago.
>
> Where's Graeme and John now? – Out the back.
>
> Where's the gun now, Jason? – I broke it into pieces and put it out on the driveway.

Is there anybody else there with you, Jason? – No. Just fucking get Meadows out here and lock me up."

[3] Police ascertained that the phone call was from Graeme Mills' residence at Lot 3, Old Palmerston Highway, Milla Milla, near Ravenshoe. Sergeant Ewin rang that phone number and again spoke to the appellant and attempted to confirm his whereabouts:

"Yeah, I'm at the fags' place.

Is it Graeme you shot? – Yeah, Graeme the fag.

Have you shot somebody else? – Yeah, John.

John who? – I don't know his fucking last name.

Where's Graeme and John now? – Out the back.

What type of gun did you shoot them with? – A 12 gauge single barrel shotgun.

Where's the gun now? – It's on the driveway."

[4] Later in the conversation, the appellant again became abusive and said: "You fuckin' cunts had better get out here and lock me up because I shot the fuckin' fag."

[5] There is no objection to the admissibility of the appellant's conversations with Sgt Ewin.

[6] At 7.40 am, police negotiator Byrne dialled the appellant's phone number without success but at about 7.50 am a male answered the phone. The following conversation, the subject of the first ground of appeal, ensued.

"Is that you, Jason? – Yeh. Who's this?

I'm Sen Const Paula Byrne. I'm a police negotiator. I understand that you have rung, wanting the police to come out there. I've been ringing you for a while now and you didn't answer. – I've been sitting out on the road waiting for the police to come. Where the fuck are they?

They're on their way. Are you alright? Are you hurt? -- I'm OK.

Jason, is your father there? -- No, I rang Mum and Dad. I spoke to them and they're not happy with me."

She formed the opinion that he had been drinking or was under the influence of a drug. His speech was a little bit slurred and his moods were up and down. Their conversation continued:

"Do you need an ambulance out there? – No.

Jason, when the police get there, they'll want to meet you out on the road, away from the house, for safety reasons."

The appellant became angry and said, "When are they fuckin' getting here? I rang ages ago. It doesn't take that long to get here."

They made general conversation for a time and he talked to Jessie, the dog; he said he was going outside. Police officer Byrne asked him to stay on the phone but he said he was sick of waiting and was going outside.

At 8.07 am he put the phone down but Byrne stayed on the line and could hear him moving around and calling to the dog. She did not hear anything further until 8.32 am when the appellant returned to the phone. She said:

> "the sergeant that you spoke to, when you rang the police station, told me that you had a gun there. Do you still have it with you? – It's laying on the road.
>
> What sort of gun is it? – A 12 gauge.
>
> Who's is it? – My landlord's.
>
> Have you got any other guns? – You would've checked that out. I've got a pistol licence for a .45, .22 and .357. I was in the pistol club.
>
> Where are those guns now? – I've sold them.
>
> Do you want to talk about what's happened there today?"

The appellant laughed and said:

> "You have to read me my rights, you know.
>
> Jason, I'm not interested in the legal side of things. If you don't want to talk about it, that's fine. All I'm concerned about is that you are OK and that no-one gets hurt. – You're just saying that because you're a social worker.
>
> I'm not a social worker. I'm a police officer and all I want to do is make sure you're OK and make sure that when the police get out there, they're safe. You told the other officer that you had shot two people, so you can understand that the police would be concerned for their safety if they came out there. Do you want to talk about what happened there? – I shot the people I don't like. That's my day.
>
> Do they need an ambulance? – No, they're dead.
>
> Are you sure? How do you know they're dead? – They're dead. They're not moving – I kicked them a couple of times.
>
> Where did you get the gun? – From home. It is an illegal shotgun.
>
> Is home at 6 Carrick Road? – Yeh.
>
> What did you have the gun there for? – Shooting dingoes and hawks: they're coming after my chooks.

> Did you have any ammunition? – Yeh. I've got a pocketful of ammo.
>
> Why do you still have the ammo?"

The appellant laughed and said, "That's for you to find out.

> Can you tell me about where the gun is on the roadway? – I broke it down. It's in three pieces: the barrel, the hand piece and the breech. They're spread out about a foot apart. I'm going to get another drink."

He put the phone down on a hard surface but soon returned and continued his conversation with the police officer:

> "What are you drinking? – Shiraz – a new bottle.
>
> How many dogs are there? – There's three.
>
> Where are they? Are they tied up? – No. They're free roaming.
>
> Jason, where are the persons that you shot? – Outside, dead in the back yard."

The appellant was crying. Byrne said:

> "Do you want to tell me what happened? – I got cranky. They annoyed me, so I walked over and killed the cunts.
>
> Did you walk from your place? – Yeh.
>
> How long did that take you? – I walk for days if I'm cranky.
>
> Are you on any medication? – Yeh, Efexor.
>
> What's that for? – It is an anti-depressant.
>
> Should you be drinking alcohol when you're taking them? – No.
>
> When did you last take your medication?"

She could not remember the reply. He called out to his dog, put the phone down onto the hard surface, again talked to his dog and moved around. He hung up shortly afterwards at 8.54 am.

[7] At 9.00 am she rang back and they spoke about the gun and the description of the barrel. He was annoyed the police had not arrived and they discussed the reasons for the delay. She said:

> "Jason, who are the people that you shot? – That's up to you to find out.

> The other officer told me that one was called Graeme? Is that right? -- Maybe.
>
> What part of the body did you shoot Graeme? - In the chest – he's got fuckin' HIV.
>
> What about the other fellow. Where was he shot? -- In the head – it's splattered.
>
> Is he younger than Graeme? – Yeh.
>
> Can you see them from where you are? – Yeh. I can see them through the back door.
>
> Are you sure they're dead? – Yeh, the only good poofs are a dead poof. They fuckin' ripped me off, the cunts. I'm sick of fuckin' talking, get the cops here. I rang the coppers, told I shot someone and they don't even fuckin' bother coming.
>
> Jason, they'll be there, but there are a lot of safety issues for them to consider. None of them want to get shot. – If I wanted to kill the coppers I would have done it before now. Hurry up, get them here. I don't want to talk anymore."

The appellant hung up at about 9.16 pm.

[8] At 11.00 am, she again rang the number but got no reply; she continued to ring until 11.55 am when the appellant answered the phone. He seemed drowsy and said he had been asleep. She told him the police had arrived and gave him careful instructions as to his conduct to try to limit the risk of injury to all involved. Shortly afterwards, the appellant was apprehended by police from the Special Emergency Response Team (SERT).

(b) Should the admissions have been excluded?

[9] Mr Byrne QC for the appellant does not object to the logistic evidence from police officer Byrne but contends that the admissions made to her should be excluded because they were obtained unfairly. This objection was also made at the trial.

[10] The learned primary judge, in brief reasons, determined that, while in some circumstances it would be unfair to admit evidence of conversations between an accused person and the negotiator, there was nothing unfair about the position taken by Byrne; his Honour was not prepared to exclude the evidence in the exercise of his discretion and noted that it was in the interests of justice that it be admitted.

[11] Mr Byrne emphasises that the appellant had requested the police to attend at the residence from which he was telephoning because he had shot two people with a shotgun. Whilst Mr Byrne concedes it was essential for the police to find out whether the appellant was armed and his demeanour and attitude towards police and others so as to attempt to effect a peaceful surrender, it was unfair to use the conversation with police negotiator Byrne as an evidence-gathering tool. The appellant also places reliance on the facts that he was under the influence of liquor or drugs, was not always responding rationally and that police negotiator Byrne

represented that the purpose of their conversation was to negotiate rather than to gather evidence for use in court. The appellant contends that the admissions were in a sense induced by false representation or trickery.[1] Mr Byrne does not suggest the *Police Powers & Responsibilities Act* 2000 is relevant to this ground of appeal, conceding that as the appellant was not "in the company of a police officer"[2] that Part 3 of that Act[3] did not apply.

[12] The decision as to whether it is unfair to admit the confessions to police officer Byrne involves a consideration of the reliability of the evidence and the propriety of the police investigation: *R v Swaffield*.[4] It requires an exercise of discretion as to whether the admission of the evidence, or the obtaining of a conviction on the basis of the evidence, is bought at a price which is unacceptable, having regard to contemporary community standards and includes a consideration of the forensic disadvantage which might be occasioned by the admission of improperly obtained confessional statements[5] and whether the confession would have been made if the investigation had been properly conducted. It is also clear from *Swaffield* that a relevant consideration is whether there was a breach of the appellant's right to choose whether or not to speak to police.

[13] The appellant's obvious intoxicated and disturbed state would probably have affected his ability to make an informed decision as to whether he should speak to police officer Byrne and the context of any ensuing conversation. The appellant, nevertheless, had some real concept of his legal rights, reminding police officer Byrne that she had to inform him of his rights. He sometimes answered questions about the killings but at other times declined to answer and walked away from the phone or hung up at will. Whilst his drunken and emotional state could have affected the reliability of his answers, other evidence confirmed that at least some of those confessions were reliable, namely that the deceased were killed at the house by shots from an "illegal" (cut-down) 12 gauge shotgun in the possession of the appellant. Police officer Byrne was not questioning the appellant to trick him into confessing but to ascertain the pertinent facts to try to ensure his incident-free detention. The appellant had already confessed to killing the deceased in his conversation with Sgt Ewin so it is possible that even had police officer Byrne carefully warned the appellant and he had not been intoxicated, he would still have made the statements against interest; the desire to confess is strong and the case against him was compelling. The trial involved the serious matter of the killing of two citizens. The learned primary judge's decision involved an exercise of discretion which is not lightly overturned[6] and there is nothing to suggest that the judge acted on any wrong principle. The appellant has not persuaded me that the learned primary judge's discretion was unreasonably or wrongly exercised in all the circumstances. This ground of appeal fails.

The admissions to police officer Hodgman

(a) The field interview

[14] The appellant made admissions during a lengthy conversation recorded on a field tape by Det Snr Const Hodgman after the appellant's apprehension by the SERT.

---

1 *Cleland v The Queen* (1982) 151 CLR 1, 13, Murphy J.
2 S 246 of that Act.
3 Safeguards Ensuring Rights of and Fairness to Persons Questioned for Indictable Offences.
4 (1998) 192 CLR 159, 189-190.
5 Ibid, 194-195.
6 *House v The King* (1936) 55 CLR 499, 505.

The following excerpts from the tape-recorded conversation demonstrate the flavour, circumstances and extent of the admissions made to police officer Hodgman, during which the appellant complained to Hodgman about his treatment by the SERT. I have emphasised the most relevant conversation.

> "Alright mate, listen before you say anything I have to warn you that you have the right to remain silent. OK. Do you understand that? – Yeh.
>
> Anything you say or any statement you make will be recorded by me and may later be played in court as evidence. Do you understand that? – Yeh.
>
> …
>
> That's alright, listen, if I ask you any questions about what's happened here this morning you have a right to contact a solicitor and have them present with you whilst I speak to you. Do you understand that? – Yeh.
>
> You also have the right to a friend. – I won't tell you nothing.
>
> That's alright, that's alright, I understand that, but I have to tell you this, mate, OK. If I question you, you also have the right to contact a friend and have them with you. OK? (He's nodding.)"

The appellant then continued to complain about his earlier treatment by the SERT who were then searching the house. Hodgman asked:

> "You know the two blokes that are lying in the back yard up there? – Yeh. They're dead.
>
> Righto. Um, Graeme and John. Graeme and John, don't know their last names? – No, Mills or Wills or fucking dills. …
>
> *How do you know they're dead, mate? – Because I fucking shot them*.
>
> How long have they been dead? – *Because I kicked them*.
>
> *How'd you kill them? – Shotgun*.
>
> What's their names again, Graeme and John. Graeme and John, *how many times did you shoot them? -- Once*.
>
> *Once each? – Yeh. I fucking shot him, um, Graeme. I shot him once. I was just shooting in the dark.*
>
> *Who'd you shoot first? – John.*
>
> …

Where's the gun, mate? – Lying on the fucking driveway.

Whose gun is it? -- Um, me landlord's, I cut the fucking end off it when I come here.

OK, what were you doing here? -- Ah, fucking yesterday we got, fucking no, this is fucking, um.

Did you have a drink with them here, did you? – *This is fucking, ah, counsel shit, you know I've got to talk to a counsellor and that sort of shit*.

Ah, righto, your counsellor. No, no, your solicitor? – Yeh. This is pretty well, this is getting into your interrogating me and fucking.

That's fine, mate, if you want to speak to a solicitor, that's fine, OK. Pretty well. We can organise one for you. -- Can I have these …

No, you've got to keep them on, OK, don't try and take them off, otherwise I'll have to put them up tighter. – No, just in front of me. They're a cunt behind, fucking hurt me back.

That's alright, let me tell you if you play up, OK, they'll have to go behind and tighter, and hog-tie you and all that. (laughs).

Why did you kill them for, mate? – They fucking upset me day.

They upset your day. – Pretty well.

How did they do that? – Well, fucking you try it, you fucking upset me day and see what you get.

I'm just trying to figure out how they upset you. – Well, fucking how does someone upset you?

If someone upset me, I'd tell you they probably pick on my family or do something like that. – No, fucking don't ask me those questions. You'll fucking get me in trouble.

No. OK. That's alright, you don't want to talk about it anymore? – Pretty well not. No.

I just thought you might want to tell me what happened, that's all. Tell somebody. – No, I'll tell me Mum and Dad or fucking when I get around to it.

Did you speak to Ces this morning? – Yeh. *Rang him up and told him I shot some cunts. Yeh, you know I'm fucking done for the crime, that's alright*.

…

What sort of gun is it, a cut down shotgun, you said? Just a 12 gauge? – Oh, yeh. With the barrel cut off I reckon they're fucking pieces of shit I'll have to have me fucking head in.

Whose is it? – I fucking, got off me fucking mate. Oh fucking park on the fucking evidence you stupid fucking wankers that fucking kicked me fucking head in the ground. …

Was it dark when you shot them, or was it still light? – Ah, fucking really, really early morning.

Yeh, dark? – Yeh, like fucking early morning.

Sun wasn't up? – Maybe fucking one two o'clock.

Yeh, what did they just what did they run away from you or anything? – (inaudible comment)

Don't want to talk to me? – No (laughing). Put a mirror on it.

You've had a bit to drink, have you? – I'm fucking blind, mate.

Yeh. – Drunk people are fucking dangerous and fucking and (inaudible comment).

What have you been drinking? – (inaudible comment) like truly just fucking, I just don't want to sit in this car and fucking be annoyed by news …

…"

The tape recording was stopped at 12.20am and recommenced at 12.25am.

"… How much do you reckon you've had to drink? – All day and all night.

All day and all night? – I don't count.

How are you feeling now? – I farted a fair bit, how do you fucking smell, like drunk hey.

Have you understood everything I've said so far? – No, and I'll never claim that I did.

OK, fair enough. – Like your fucking name.

You haven't understood what I've said, you can't remember my name? – I wouldn't have a clue. Like fucking, no fucking I'm fucking don't care. I'm just ..

When did you have your last drink, you reckon? – I'm sitting here fucking having a vino fucking as youse come up the drive.

Yep. – Cracked a bottle and youse didn't turn up, so I cracked another bottle.

Bottle of wine? -- Yeh. I was drinking a nice Shiraz and fucking waiting for you fellows to turn up and youse didn't.

…

Ever been this pissed before? – I'm fucking drunk all the fucking time.

You're a drunk all the time? Are you an alcoholic? – I just drunk fucking week days.

Oh, righto. – Weekends I'm fucking pretty good.

You reckon you can handle your piss? – Like you're fucking like that these cunt questions all day.

I'm a jack mate, that's my job, I ask questions. You're a policeman you ask questions.

Am I asking the right ones? – For a policeman they're fucking good questions.

Pretty good, you like them? -- No, not really.

Alright, I'll shut up then. -- Ask all day, I don't care.

…

Might have a bit of a kip when you get back to Atherton, hey. You haven't slept all night. – Not really, no.

Feeling a bit tired? – Like I'm worn.

Worn? – Yeh.

…

You're making lots of sense to me. – No fucking you're a policeman. I tell lies all the time.

Nope. I'm sure. – Well fucking you know doesn't matter, doesn't matter.

> Doesn't matter at the end of the day, does it? – No really. You want a statement. *I shot two cunts and that's about as fucking dead as they get*.
>
> Well mate, see you reckon you're too drunk to talk to. – Am I?
>
> I don't know, that's why I tried to ask you before. – No I'm not. (unintelligible) talking to me.
>
> You're making sense to me but you said before you were really, really drunk. – Well, I am, but that's the best way to talk to me."

[15] Other portions of the tape were concerned with the appellant's anger at his treatment by the SERT and concern for the wellbeing of his dog which, at one point, jumped out of the police car.

[16] Police officer Hodgman agreed in evidence that the appellant was "clearly at a high level of intoxication". At committal, Hodgman said that, notwithstanding the appellant's statement to the effect that he did not want to be interrogated without a lawyer, he thought it prudent as an investigator to try and get whatever information he could from the appellant, regardless of whether it would be admissible in court.

(b) Other evidence

[17] The body of the deceased John Ginnivan was found at the back door to the residence with a gunshot wound to the chest. The body of the deceased Graeme Mills was found some distance away in the yard, also with a gunshot wound to the chest. The cause of death in each case was the gunshot wound. Scientific evidence established that there were three shots discharged from a 12 gauge single barrel shotgun which had been shortened. Ginnivan was shot first. The gun was owned by Mr Lavis, the owner of the property where the appellant lived as caretaker, 5.6 kilometres from the deceaseds' home. When Mr Lavis last saw the gun, it was complete.

[18] At about 4.30 am on 16 March 2001, when Paul Foster was travelling to work on the Old Palmerston Highway, he saw a person on the road edge who bent down to restrain what appeared to be a small blue cattle dog; this person did not appear to be carrying anything.

[19] Alan Guy was a friend of Mr Mills; he also knew Mr Ginnivan who lived with Mr Mills for about six months. He met the appellant about six weeks before the killings. On 15 March at about 8.30 am he met up with Mr Mills, Mr Ginnivan and the appellant in Atherton. Later, at about 2.00 pm, he was at Mr Mills' property, "Feral Farm", where the appellant was drinking red wine. Mr Guy went home where Mr Mills, Mr Ginnivan and the appellant visited him at about 6.00 pm. They brought with them a large quantity of alcohol, including stubbies, UDL cans and a bottle of wine. They were all stoned, drunk but happy, and not aggressive; they appeared to be getting on well together. He had a glass of chardonnay with them and they left about 8.30 pm. At that time they were slightly drunker than when they arrived but in good spirits with no signs of aggression or rudeness; they were spilling their drinks and falling over in the kitchen.

[20] The last contact between the deceased and others was at about 11 pm on 15 March 2001 when Mr Mills spoke to a friend.

[21] A government medical officer took a blood sample from the appellant shortly after 6.10 pm on 16 March 2001, 12 hours after the shootings and six to seven hours after being taken into custody. The blood contained .007 mg/kg of tetrahydracannabinol-9-carboxylic acid, a major, inactive metabolite of tetrahydracannabinol and 156 mg of alcohol per 100 ml of blood. The doctor noted a convincing smell of alcohol and the appellant's speech was slurred; he concluded the appellant may have been intoxicated at the time of the examination. He performed an anal examination but found nothing remarkable.

[22] The appellant gave evidence that he became acquainted with both deceased and they spent time together, drinking and smoking cannabis. During the day preceding the killings, he shared a few beers and smoked some cones of marijuana with them at Mr Mills' home. Mr Mills said he was a homosexual and was HIV positive. The television was on in the background showing some bisexual pornography; the appellant did not take much notice and went outside and played with the dog. During the day he drank some wine and a six pack of Jack Daniels and coke. He did not remember eating anything. Later, they visited Alan Guy where they drank more beer and wine. He agreed that they were pretty drunk and stoned at Guy's place. His next memory was waking up at home in the early hours of the morning lying on the tiles. He had been wearing a t-shirt, jeans and elasticised boots but he was then naked from the waist down, sore around the throat and his backside felt stretched and stung; he also had marks on the face and neck and had a recollection of having some sort of struggle with Mr Ginnivan. He thought he had been sodomised. He had never before been sodomised.

[23] He wandered around, cleaned up and decided he was going to get them for what they had done. He grabbed the shotgun, a hacksaw and brace and bit and within a few minutes "doctored the gun up". He untied his dog and set off with the gun and dog towards Feral Farm. He was unsure of the time. He was "just wild" and as he proceeded on his way he got crankier and wilder; the more he thought about it the wilder he got. When he arrived at the deceaseds' home he yelled out and Mr Ginnivan appeared. He lost control and did not know what was said or done but he shot him. He then went into the house and shot at Mr Mills, who was in his bedroom, but he missed. He did not know what happened next; he was not in control.

[24] When asked what his intention was at the time of the shootings, he said:

> "I didn't have any particular intention to do anything, really, like – I don't know. …
> I was still pretty drunk from – I'd had a huge day the day before. I don't know what time of the morning it was and what time I stopped drinking but I was still pretty drunk."

[25] He did not recall what he did after the shootings; he has regularly suffered blackouts from alcohol abuse. His first recollection was not knowing how to deal with what had happened. He drank beer and wine after the shootings but had no idea how much. He rang the police but no-one came. This made him angry and frustrated. He was distressed when the SERT arrived three or four hours later dressed in

balaclavas and armed with machine guns. When he spoke to police officer Hodgman he was drunk, tired, confused and "generally a mess".

[26] During cross-examination, he agreed that he thought the deceased had taken $140 from him because this amount was missing, but he denied that this and his concern about sharing a bong with an HIV positive homosexual were his real reasons for shooting the deceased. He was not particularly concerned about the missing money, but as the police were harassing him for answers, he said he was. He is disgusted by homosexuality; he has not been involved in homosexual activity in the past and did not feel able to talk to police officer Byrne about his fears of what had been done to him. He sawed the barrel off the shotgun and drilled a hole in the stock, through which he put a rope, to make the gun easier to transport. He carried it completely concealed under his coat to Feral Farm. He had six or seven rounds of ammunition in his pocket. After discharge, it was necessary to eject the shell and reload before discharging it again. He was really angry at the deceased and "wanted to do them harm, like, make them pay for what they'd done to me. … Not particularly with the shotgun." He was not entirely cooperative during the anal examination by the government medical officer because he did not want to be poked and probed in that part of his body.

(c) Should the evidence in the field interview have been excluded?

[27] The appellant contends that his statements against interest to police officer Hodgman should have been excluded because of non-compliance with ss 249 and 254 of the *Police Powers & Responsibilities Act* 2000 ("the Act"). An application was made at trial to exclude the evidence under the Act, but the judge was not referred directly to these sections, although mention was made of the Division of the Act in which they are contained. He was instead directed to s 266 of the Act; that section allows a written record of a confession which is not electronically recorded to be admitted into evidence if there are special circumstances within s 266(2) of the Act and it is in the interests of justice. As this conversation was electronically recorded, s 266 does not apply here. The application to exclude this evidence at trial seems to have been primarily based on s 10 *Criminal Law Amendment Act* 1894 (Qld) and the general discretion to exclude evidence unfairly obtained.

[28] Unsurprisingly in the circumstances, the learned primary judge did not specifically address any provisions of the Act. His Honour allowed the evidence to be given because it was voluntary, relevant to the issue of intent and the effect of alcohol and/or drugs on any intent and because its probative value outweighed any degree of uncertainty or unreliability. There is no appeal from his Honour's conclusion that the admissions were voluntary under s 10 *Criminal Law Amendment Act* 1894 (Qld). The appellant's argument on this appeal has been largely confined to the effects of the non-compliance with ss 249 and 254 of the Act.

[29] Section 249 of the Act relevantly provides:

> "(1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may –
>
> (a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and

(b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.

(2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in sub-section (1).

…"

[30] Section 254 of the Act provides:

"(1) This section applies if a police officer wants to question or to continue to question a relevant person who is apparently under the influence of liquor or a drug.

(2) The police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions."

[31] Section 246 of the Act relevantly provides:

"(1) This part applies to a person (**"relevant person"**) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence."

[32] The appellant, in being questioned by police officer Hodgman, was a relevant person under the Act and the questioning did not comply with either s 249 or s 254 of the Act for Hodgman did not delay the questioning to allow the appellant to contact a lawyer and continued to question him although he was plainly intoxicated. The Act does not provide consequences for non-compliance with these sections but one purpose of the Act is "to ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under [the] Act".[7] Comfortingly, it is Parliament's intention that police officers should comply with the Act;[8] contravention by police officers may result in disciplinary charges or more serious consequences.[9] Non-compliance with those sections means the evidence was unlawfully obtained. The tape-recorded confessions should only have been admitted if their admission was justified after a consideration of the competing issues of, on the one hand, the need for the citizen to be protected from illegal actions from the authorities and, on the other, the interest of the State to secure evidence relevant to the commission of serious crime (*Bunning v Cross*[10]), for convictions based on evidence obtained by unlawful acts may be obtained at too high a price: *R v Ireland*.[11]

[33] Police officer Hodgman frankly conceded that, despite the appellant's intoxication and indication that he did not want to answer questions without a lawyer, he continued the interrogation knowing that it may not be admissible in evidence. This suggests Hodgman acted in flagrant disregard of the Act. Police officers who act in this way cannot ordinarily expect to be able to use resulting evidence in court and courts will do everything reasonably possible to ensure police officers interrogate

---

7 Section 4(e) of the Act.

8 Section 5(1) of the Act.

9 Section 5(2) of the Act and the examples there set out.

10 (1977-1978) 141 CLR 54, Stephen and Aicken JJ 72-76, Barwick CJ 65; see also s 8 of the Act.

11 (1970) 126 CLR 321, 335.

suspects lawfully.[12] Undoubtedly the appellant's ability to understand his rights and make an informed decision as to whether he should answer questions was clouded by his intoxicated state. These factors all favour the rejection of the evidence.

[34] On the other hand, the investigation was of the most serious offence in the *Criminal Code*, homicide; police officer Hodgman formally warned the appellant of his right not to answer questions and his right to seek legal advice; the appellant had some comprehension of his rights despite his intoxication because he referred to these matters in the interrogation and sometimes chose not to answer questions;[13] as the learned primary judge pointed out, the interrogation touched on facts relevant to issues raised by the defence, namely whether the appellant may have been too intoxicated to form an intent to kill and, as it subsequently emerged from the appellant's evidence, whether the appellant acted under provocation.

[35] The competing interests to be considered when exercising the relevant discretion here as to whether to exclude the unlawfully obtained evidence are finely balanced and different judges could legitimately have reached different conclusions.

[36] A difficulty for the appellant is that this point was not clearly raised at trial and his Honour was not invited to exclude the evidence on this basis. His Honour found the evidence was voluntary and that conclusion was open on the evidence. This Court has held that the discretion to exclude evidence arising out of non-compliance with the Act can be subsumed into the broader discretion based on unfairness: *R v Cho*.[14] His Honour's brief reasons suggest he would have exercised any *Bunning v Cross* discretion to admit the evidence, again a conclusion open. In those circumstances, I am not persuaded the evidence should now be excluded on the appeal.

[37] In reaching that conclusion, I am comforted by the provisions of s 668E(1A) *Criminal Code* which provide:

> "However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

and the recent application of that section in *Festa v The Queen*[15] and *Conway v The Queen*.[16]

[38] Even had this evidence been excluded, the remaining evidence against the appellant presented an overwhelming case of guilt on each count. The appellant was really angry with both deceased and walked to the deceaseds' home, 5.6 kilometres away, in the early hours of the morning, with a loaded shotgun, which he had modified for easier carrying and concealed under his coat. He was angry with the deceased and wanted to harm them, to make them pay for what they had done to him. After fatally shooting Mr Ginnivan in the chest he found Mr Mills and shot at but missed him; he again shot at Mr Mills, this time fatally wounding him. These facts were established on the appellant's own evidence at trial; the only rational inferences open convincingly negated the defence of sudden provocation in the heat of passion

---

12 See, eg, *R v Smith* [2003] QCA 76; CA No 274 of 2002, 25 February 2003.
13 cf *R v Cho* [2001] QCA 196: CA No 1 of 2001, 25 May 2001.
14 Ibid, [29].
15 (2001) 76 ALJR 291
16 (2002) 76 ALJR 358, [6], [38].

before there is time to cool[17] and demonstrated an intention to kill or do grievous bodily harm, despite the appellant's intoxication.

[39] It follows that this ground of appeal also fails.

The judge's directions on intoxication

[40] There was ample evidence of the appellant's intoxication and it is common ground that s 28(3) *Criminal Code* was raised on the evidence. That section provides:

> "When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed."

[41] The appellant contends the direction was inadequate because it did not follow that set out in *R v Nicholson*,[18] namely:

> "That if the jury are not satisfied beyond a reasonable doubt that because of intoxication or otherwise the prisoner did have in fact either of the specific intents, they must acquit of … murder, but may convict of manslaughter."

The appellant also relies on the observations of Mack J, with whom Gibbs J (as he then was) agreed, in *R v Crozier*[19] that the correct direction as to s 28 in circumstances such as these is "if you are not satisfied beyond reasonable doubt that through (sic) [despite][20] intoxication the prisoner was capable of forming an intent or if you are left in doubt whether the prisoner did in fact form either of the necessary intents, then it is your duty to acquit of … murder."

[42] As the appellant gave evidence admitting the killings and the only defences raised were intoxication affecting intent and provocation, the sole question for the jury was whether the appellant was guilty of murder or manslaughter.

[43] The learned primary judge gave unexceptional directions to the jury as to the onus and standard of proof, and added:

> "In order to convict of murder in either case, you must be satisfied beyond reasonable doubt that the accused killed the man, the subject of the particular count, with intent to kill or to cause grievous bodily harm … . If you are not satisfied of the intention to kill or cause grievous bodily harm, you need go no further. The verdict in that case is manslaughter."

[44] His Honour repeated this direction on a number of occasions and made it abundantly clear that in considering whether intent was established, the jury must take into account intoxication as to the appellant's capacity to form the intent and also whether or not he did form the intent as required by *Viro v The Queen*.[21]

---

17 Section 304, *Criminal Code*.

18 [1956] St R Qd 520, 525 per Philp J, Mansfield CJ and O'Hagan J agreeing; cited with approval by Gibbs J in *Viro v The Queen* (1976) 141 CLR 88, 111.

19 [1965] Qd R 133, 134.

20 See the amendment to this direction suggested by Pincus JA in *Hughes* (1994) 76 A Crim R 177, 179.

21 (1976) 141 CLR 88.

[45] His Honour then reminded the jury of the evidence of intoxication and discussed intoxication at length. Those directions included:

> "In other words, an accused person doesn't escape responsibility because his or her intoxication has caused the formation of an intent that would not be formed when sober or has reduced the power to resist the temptation to carry out an intention formed in these circumstances.
>
> … Although intoxication doesn't excuse conduct when you're considering whether or not you're satisfied the accused had an intention to kill or cause grievous bodily harm you have to take into account among all the other circumstances whether the effect of alcohol and drugs bore on his capacity to form an intent and on his formation of the intent.
>
> … we hear people speak of someone being, for example, mindlessly drunk and … if you infer from that that it means that they're so drunk that they've got no capacity to have a directed activity of their mind to form any intention to do anything then obviously they're not capable of forming an intent to kill or cause grievous bodily harm, or if capable, they may be so inhibited by their – their vital state of mind that they don't do it.
>
> So you need to take into account your view of the level of intoxication and the effect it may have had on the accused person to form an intent to cause death or grievous bodily harm and on his capacity to give effect to that intent.
>
> But you look at it in the context of all the other activities and you've been taken through the course of events as to what he did between the time when he came to appreciate, as he tells you, that he's suffered some outrage at the hands of these individuals and he came and carried out a whole series of activities which culminated in the shooting.
>
> So, you look at all of those considerations in considering whether … you're satisfied that he had the relevant intent.
>
> So, that's the role that intoxication plays. It's simply a factor that you take into account in evaluating whether or not you are satisfied – in the light of the whole of the evidence that you're satisfied that he had an intent to kill or to cause grievous bodily harm."

[46] The court adjourned for the day and the next morning the judge continued his summing-up, reminding the jury of his earlier directions on intention and intoxication. In his concluding directions to the jury, his Honour said:

> "The first verdict open in each case is 'guilty of murder'. In order to return a verdict of 'murder' in each case, you have to be satisfied beyond reasonable doubt of an intent to kill or to cause grievous bodily harm. You infer intent from what people do and what they say. In this case the prosecution largely relies on the sequence of

> events which took place between the accused waking up on the tiles and the ultimate killing.
>
> Always consider and give effect and context to the whole of the evidence.
>
> …
>
> In considering intent, you have to take into account the effect of intoxication; on the capacity to form an intention and the formation of it. Intoxication does not otherwise operate to excuse the conduct here."

[47] No re-direction was sought on the issue of intoxication and s 28(3) *Criminal Code*.

[48] Although his Honour's directions did not repeat precisely and succinctly the exact words set out in *Nicholson*, *Crozier* and *Viro*, these are not incantations. When the summing-up is examined as a whole, the directions given were even-handed and sufficiently in compliance with *Nicholson*, *Crozier* and *Viro*. The jury could have been in no doubt that they could not convict the appellant of murder unless they were satisfied beyond reasonable doubt that, despite his intoxication, he intended to kill or do grievous bodily harm to each deceased when he shot him. This ground of appeal must fail.

[49] It follows that the appeal against conviction should be dismissed. The appellant has also applied for leave to appeal against his sentence. As the penalty for murder is mandatory life imprisonment, the application for leave to appeal against sentence is refused.

Order
Appeal against conviction dismissed.
Application for leave to appeal against sentence refused.

[50] **McPHERSON JA:** The appellant appeals against conviction at his trial in the Supreme Court at Cairns on counts of murdering Graeme Mills and John Ginnivan at Ravenshoe on or about 16 March 2001. He appeals against those convictions on grounds that include the failure of the learned trial judge on discretionary grounds to exclude the evidence of police officers that the appellant had made pre-trial confessions of having shot and killed the two victims. Those confessions were made in a series of telephone calls to the police in the early morning of 16 March in which the appellant reported his whereabouts and said that he had killed the two men; and again, later on the same day, when the police attended at the scene of the crime and conducted a tape recorded interview at the time of the appellant's arrest. The details of those confessions are set out in the reasons of the President, which I have had the advantage of reading.

[51] At the trial there were two issues of fact for the jury. One was whether the appellant had shot and killed the two men; the other was whether, despite his state of intoxication at the time, the appellant had formed the intention of killing, which is essential to the crime of murder. Murder under s 302(1)(c) involves as one of its elements the intention to cause death, which, within the meaning of s 28(3) of the Code, is an intention to cause a specific result. That being so, intoxication, whether

complete or partial and whether intentional or unintentional, may by s 28(3) be "regarded" for the purpose of ascertaining whether such an intention in fact existed. There are some authorities that suggest that in directing a jury on s 28(3), the judge will ordinarily say that, if satisfied that the accused was so intoxicated as not to be capable of forming the requisite intention, then the jury must acquit. As a matter of fact or inference, that must necessarily be so. For if, at the time, the accused was incapable of forming the intention to cause the relevant specific result, then he cannot have formed it in fact. But the question posed by s 28(3) remains one of whether, despite the effects of intoxication, the intention was formed rather than whether it was capable of being formed. Reference to the accused's capability to form it is perhaps one way of conveying the point to the jury, but it is not in law either a critical or essential, nor even a sufficient, direction under s 28(3). The direction given by the learned judge in this case satisfied the requirements of that provision of the Code in that it informed the jury that, before convicting, they must be satisfied beyond reasonable doubt that the appellant had the intention to kill when he shot his victims and that, in arriving at a conclusion on that question, they might have regard to the appellant's intoxicated condition as it was at the time.

[52] Bearing in mind what the prosecution had to prove, the fatal obstacle to the success of this appeal is that the appellant elected to take the stand and give evidence about what had happened. In his testimony at the trial, he admitted having shot his two victims at close range with a sawn-off shotgun. That left for the consideration of the jury only the issue of whether, despite the state of his intoxication at the time, he had formed the intention of causing their deaths.

[53] As to this element of the offence, his evidence in chief was that he had been drinking heavily during the previous day 15 May when in company with those whom he later killed. He went to bed and slept at his place, and woke with the impression that he had been sodomised during the night by one or both of those men. In what can only have been a spirit of revenge, he located his employer's shotgun and sawed off the barrel with a hacksaw. Using a brace and bit, he drilled a hole in the wooden stock of the gun. He then threaded a rope though the hole to fashion a sling with which to hold the gun and so carry it over his shoulder. Having concealed it under a coat which he put on, and having unchained his dog to accompany him, he then set out to walk the distance of 5.8 kilometres to the neighbouring farm where his two intended victims where sleeping.

[54] On arriving there, he called out, and when the deceased Ginnivan came to the door he shot him. The gun was a single shot weapon, and he ejected the spent cartridge case reloading it with another shell from a number that he had put in his pocket before setting out from the farm. Having done so, he found Mills coming out of the bedroom and fired a shot at him. He followed Mills, reloaded, and fired another shot at him. His intention, he said in cross-examination, was to "hurt" his victims. After that, he went and drank some wine, and telephoned the police.

[55] Quite apart from what he told the police either then or later on that day, the appellant's testimony at the trial could have left the jury in no doubt that he had formed the intention to kill the two men. He carefully planned and carried out his intention with a good deal of deliberation. If he was sober enough to cut off the barrel of the gun, drill a hole in the stock through which to thread a rope to carry the gun, and then walk nearly 6 kms in order to use the gun on his victims, his thinking cannot have been so impaired by alcohol or drugs as to impair his intention to kill or

from carrying it into effect. It was open to the jury to reach such a decision despite his state of intoxication. Any other conclusion would surely have been perverse.

[56] In these circumstances, it is difficult to see what, if any, further impact his confessions to police might have had on the minds of the jury. Their evidentiary significance was related mainly to the fact that it was he who had in fact killed the two men. It was the appellant's own testimony at the trial that demonstrated beyond doubt his intention to kill. If he had wished to avoid such an inference being drawn, he would have been wiser not to give evidence at the trial. The case against him might then have depended largely if not solely on the confessional evidence, and the submissions on appeal about the inadmissibility of some if it might have merited closer attention. But he cannot have it both ways. By giving evidence in an effort to raise a doubt about the state of his intention at the time, the appellant not only established the truth of what he had told the police about his having killed the two men but satisfied the jury that he intended to cause their death.

[57] There has been no miscarriage of justice. In so far as it is necessary to do so, I agree that the case is one for the application of the proviso (as it continues to be described) under s 668E(1A) of the Code. The appeal against conviction should be dismissed as well as the application for leave to appeal against sentence.

[58] **PHILIPPIDES J:** I agree with the reasons of the President and McPherson JA and with the order proposed.