SUPREME COURT OF QUEENSLAND

CITATION:	*R v Keys* [2012] QCA 319
PARTIES:	**R** **v** **KEYS, Callum Joseph** (appellant)
FILE NO/S:	CA No 91 of 2012 SC No 767 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2012
JUDGES:	Margaret McMurdo P and White JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where appellant was convicted of one count of murder – where, at trial, the prosecution relied on two out of court statements by the appellant to police – where appellant contends that the trial judge inadequately instructed the jury about the reliance it could place on those statements – whether the jury was inadequately instructed CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant contends that it was not open to the jury to be satisfied that he held the requisite intent – whether the jury's verdict was unreasonable or insupportable *Criminal Code* 1899 (Qld), s 668E *Burns v The Queen* (1975) 132 CLR 258; [1975] HCA 21, cited *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited

R v Baker [2001] QCA 326, cited
R v Perera [1986] 1 Qd R 211, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: M J Copley SC for the appellant
A W Moynihan SC for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Applegarth J's reasons for dismissing this appeal against conviction.

[2] **WHITE JA:** I have read the reasons for judgment of Applegarth J. I agree with his Honour's reasons and the order which he proposes.

[3] **APPLEGARTH J:** This is an appeal against a conviction for murder. The first ground of appeal relates to the adequacy of instructions to the jury about reliance on certain out of court statements. The second ground is that the verdict was unreasonable in all the circumstances.

Background

[4] On the night of Friday, 1 May 2009 the appellant went to The Pit Nightclub at the Alexandra Hills Hotel with a group of friends. Some of them had been involved in a fight at that venue the previous Friday night. On 1 May 2009 the appellant went to the hotel with a hunting knife in a sheath tucked into his pants.

[5] Staff at the entrance to the nightclub scanned identity cards. On Friday, 24 April 2009, the appellant had produced his own "18+ card" to enter the hotel. However, on 1 May 2009 he used a false identity card that he had obtained prior to his eighteenth birthday. The "18+ card" that he produced to enter the hotel was in the name of Christopher David Wirth, but contained the appellant's photograph.

[6] A fight or fights broke out on the dance floor of the nightclub around midnight. The appellant stabbed Phillip Steven Halipilias ("the deceased") in the chest, cutting through the aorta and the pulmonary artery. The damage to these major blood vessels caused massive bleeding. The deceased fell to the dance floor. Paramedics and a doctor were unable to save him. He died very quickly.

[7] After stabbing the deceased, the appellant left the dance floor and went to a toilet where he hid the knife and its sheath in a cistern. He removed the black shirt that he had been wearing and returned to the dance floor in a white singlet. The venue was quickly cleared of patrons.

Police interviews

[8] Police began their investigations early on the morning of 2 May 2009. The appellant and many other people who had been at the nightclub were interviewed. In a written statement dated 2 May 2009 the appellant described seeing the fight that

broke out, but stated that he did not know what happened and then someone told him that someone had been stabbed.

[9] On 6 May 2009 the appellant, in the company of a solicitor, participated in a lengthy interview with police. He told many lies in that interview, including denying that he had any contact with the deceased. He denied having been involved in any "punch up" and said the closest he ever got to the deceased was "about three or four people back", being a couple of metres. He denied ever having seen the knife that police located or having had possession of it.

[10] Towards the end of the interview police showed the appellant images that had been taken from CCTV cameras. They showed how the appellant had removed his dark shirt and returned to the dance floor in his singlet. The police disclosed how the weapon had been found in the toilet and that they would be having DNA tests taken. The appellant was again asked whether he stabbed the deceased, and he denied doing so. The interview terminated at 2.18 pm. He was then charged and arrested. By this time the appellant must have appreciated the substantial case which the police had assembled against him.

[11] That evening the appellant told police that he wanted to be re-interviewed. He was told, and accepted, that he did not have to speak to the police if he did not want to. The appellant was in a tearful state and his conversation with police was brief. He said, "I didn't mean to do it". He explained, "I went to cut his arm ... and somebody pushed me." The appellant was returned to his cell at 5.45 pm. It is convenient to refer to this conversation as the "watchhouse statement". Acting on legal advice, the appellant did not participate in a further interview with police.

[12] Upon being arraigned for murder at his trial on 29 March 2012, the appellant pleaded not guilty to the charge of murder, but guilty of manslaughter. The prosecution did not accept that plea in discharge of the indictment.

[13] The issue at the trial was whether or not at the time he inflicted the stab wound the appellant intended to kill the deceased or at least that he intended to cause grievous bodily harm to him. The prosecution case relied on a number of facts which collectively were said to prove beyond reasonable doubt the requisite intent. Further, the appellant's claim of being pushed was said to be unsupported by direct evidence, and the prosecution pointed to evidence that the appellant and the deceased had separated from the main group that was fighting, so that only the appellant could be responsible for the deceased being stabbed in the chest. Even on the appellant's account in the watchhouse statement, he was trying to cut the deceased's arm. The principal matters that the prosecution relied upon may be summarised as follows.

[14] The first was that the appellant had a reason to anticipate violence that night. He had been present at the hotel the previous Friday when there was a fight between some of his friends and another group. The prosecution's argument that the appellant believed that there might be a fight on the night of 1 May 2009 was based largely upon statements made by the appellant in his lengthy interview with police on 6 May 2009. It will be necessary to return to what he told police because it is this aspect of his statements which is the subject of the first ground of appeal.

[15] The second aspect of the evidence was that the appellant armed himself with a knife. It was a sharp hunting knife and plainly capable of being used as a weapon.

The prosecution posed the question: what possible reason could there be for taking the knife to the nightclub?

[16] The third aspect was the appellant's use of a false identification card when he had used his own identification card the week before. Why try to hide his true identity that night?

[17] The fourth aspect of the evidence was the nature of the injury. The depth of the wound could not be measured with precision. A pathologist measured its depth as 8.5 centimetres, but said that this measurement could be a couple of centimetres out. The knife had a blade of 10 centimetres and the evidence permitted the jury to conclude that the knife penetrated up to the hilt. A purple bruise and two red linear abrasions on the deceased's chest at the site of the entry wound strongly supported this conclusion. The location and trajectory of the wound and the degree of force required to cause it was said by the prosecution to be consistent with a deliberately aimed stab to the chest, and inconsistent with one aimed for the arm.

[18] The accumulation of these matters was relied upon to prove beyond reasonable doubt that the appellant intended to kill the deceased or at least cause him grievous bodily harm. It will be necessary to return to these matters in later considering the appellant's second ground of appeal, namely that the verdict was unreasonable.

[19] The prosecution and the defence also addressed other issues such as intoxication. The prosecution case was that the appellant was not so intoxicated that he could not form the required intent. The appellant's conduct in concealing the knife in the toilet, removing his shirt and lying in text messages he sent shortly after the event was said to be rational and logical.

The appellant's out of court statements about his anticipation of another fight

[20] This topic relates to the first aspect of the prosecution's case. In his lengthy recorded interview with police the appellant told them about discussions on 1 May 2009 concerning the fight the previous week and the possibility that there would be another fight. The relevant questions and answers are as follows:

> "Q: Was there any discussion about a fight that happened the previous week up to that point? [This refers to the point of time when the group were walking to a bowls club on the evening of 1 May 2009]
>
> A: Yeah. The boys had all got in a fight the week [beforehand] with a group of guys. I stood back because it's not my beef [it's] theirs.
>
> Q: Oh so you were there last Friday were you?
>
> A: Yeah. But I stood back and just let it go because [it's] not my fight to be in. Because I am not from around here.
>
> ...
>
> Q: ... [So] was there a discussion about the Anzac Day fight?
>
> A: Yeah. They were saying that the guys wanted to fight them again or something, something along those lines.

Q: Who was saying that?

A: Um I can't recall who was saying it but some Luke fellow called Dan who he was already at the Alex and say that they wanted to fight again or some shit. Pardon my French.

Q: Yeah that's fine. Um okay. So was there any of that talk before you went to the Alex though about fighting again I mean.

A: Um not that I can recall. They said if they tried to start anything that they were going to smash them but.

Q: This is before the Alex.

A: Yeah."

In another part of the same interview the following was said:

"Q: Do you know a bloke called um Luke.

A: Luke?

Q: He's a tall guy um longish black hair.

A: That's the fellow.

Q: Surfi sort of look?

A: Yeah that was the fellow who texted Daniel to tell him about the fight earlier.

Q: Ah how do you know?

A: Cause he was, cause Dan was saying that that he was at the Alex. **I know they wanted to fight again**. And I seen him the week before in the fight." (emphasis added)

The appellant told police about "the guy" who "texted Dan" something about "this guys wanting to get it on". A few questions later the appellant was asked:

"Q: ... So Asian Luke's texted him saying that the boys, what did he say? Do you remember what Dan said to you when he got the text.

A: No he just said the fags from last week wanted to fight again.

Q: Ah okay.

Q: How did they have each others phone numbers?

A: Ah they met at the Pit and

Q: So they are not mates or anything?

A: Ah they're mates but not good mates.

Q: Okay.

Q: The fags the fags from last week want to fight again, is that right?

A: Yeah.

> Q: Was there much more discussion other than that?
>
> A: No really.
>
> Q: Did the boys discuss whether they were going to accommodate them in that regard, do you know what I mean by that, like box on with them.
>
> A: They said if they started anything they were.
>
> Q: Yep. Did they use stronger words than that? You know I not putting words in your mouth or that I just mean like can you remember what said exactly?
>
> A: Um. No I can't really recall what they said exactly just if they started anything they were going to get them."

[21] In his summing up the learned trial judge quoted relevant passages from and summarised these questions and answers.

The trial judge's directions on out of court statements

[22] The trial judge gave general directions to the jury about statements made by the appellant to the police, and also addressed separate parts of those statements, including the watchhouse statement. In doing so he reminded the jury that the defence submissions were that the lengthy interview with police was "a tissue of lies" and could not be relied on. Both the prosecution and the defence pointed to lies in that statement, and the trial judge told the jury in respect of that statement that is was beyond doubt that the appellant "did tell a number of untruths to the investigating police officers". It was said to be a matter for the jury "to determine whether they were lies".

[23] The trial judge also explained to the jury the relevance of lies to the appellant's credibility, particularly concerning his "ultimate statement to the police at the watchhouse."

[24] The trial judge returned to the issue of out of court statements and gave a general direction that it was a matter for the jury to determine what was said in those statements.

[25] Next the trial judge addressed the watchhouse statement and said:

> "Now, if you accept that the accused made a statement to that effect and that it is true it is up to you to decide what weight you give to that statement and what it may prove."

His Honour proceeded to give further directions about statements which might be regarded as self-serving, and the weight that the jury might give to answers relied upon by the prosecution and answers relied upon by the appellant.

[26] The terms and substance of the directions given about the watchhouse statement were that the jury was required to be satisfied that the relevant statement was made and that it was true.

[27] After dealing with the watchhouse statement, the trial judge dealt with other out of court statements relied on by the prosecution and prefaced his remarks by saying,

"I have told you of the way in which you may approach such statements ...". This was referable to the earlier direction in the context of the watchhouse statement about being satisfied that the statement was made and that it was true, and the weight that could be given to such a statement.

[28] After reading passages from the interview that the prosecution relied upon to submit that the appellant had a reason to anticipate violence, the trial judge said, "So he said, you may think, members of the jury, those things to the police officers." The relevant recordings were played to the jury and the transcript of the lengthy interview was provided to the jury, with suitable warnings concerning its accuracy. After addressing the question of whether the relevant statements were made, the trial judge turned to evidence about whether what was said was true. He referred to the evidence of a number of witnesses who said there was no talk of a plan to fight on that night.

[29] The trial judge summed up the rival contentions of the prosecution and the defence about the reliability of this part of what the appellant said in his police interview. In short, the prosecution contention was that it was not surprising that various witnesses might say that there was no prospect of a fight that evening, given what happened, and that they wanted to distance themselves from it. The prosecution submitted that there was no reason for the appellant to have lied to the police about what was said before the group went to the hotel.

[30] The defence contention was also summarised. It was that there was no reason for the jury not to accept the account of various witnesses who said there was no discussion of any prospect of a fight that evening, and there was no text message or telephone records to confirm that there had been the alleged communication. The trial judge reminded the jury of the possibility that the appellant's statements about what his friends had said simply might be further lies told by him, and that it was possible that he was attempting to deflect suspicion to someone else about what might have occurred at the nightclub.

[31] The trial judge's directions about these parts of the police interview were effective to highlight to the jury that it had to be satisfied that what the appellant said about anticipation of another fight was true. Other general directions served to explain that the probative value of each of the statements was a matter for the jury to assess. The appellant's counsel at trial did not seek a re-direction about his out of court statements in general or his particular out of court statements about the anticipation of another fight.

The first ground of appeal: did a miscarriage of justice occur because of an inadequate instruction?

[32] Ground 1 of the amended notice of appeal is:

> "A miscarriage of justice occurred because the jury was inadequately instructed about the need for satisfaction that an out of court statement was a true acknowledgment of the belief the accused claimed to have had before reliance could be placed on it as a circumstance tending to assist in proof of guilt."

[33] The appellant points to the fact that the prosecution relied on his claim that he knew that the other group wanted to fight again and believed that there might be violence as an admission or statement against interest. In the circumstances, the jury was

required to be directed that it had to be satisfied that what was said was true.[1] Unless the jury was satisfied that what was said was true, namely that the appellant believed that violence might occur, it could not rely on those parts of the police interview as proof of the prosecution case.

[34] The appellant submits that the trial judge's directions did not make it explicit that before it could act upon these statements the jury had to be satisfied that they were true. The explicit statement about being satisfied that a statement was true was said to be confined to the statement made at the watchhouse. Senior counsel for the appellant acknowledged that it was not necessary on each occasion the trial judge referred to a separate part of the interview to have used the word "true". However, the word "true" was used only in relation to the watchhouse statement and the appellant submitted that the later directions did not implicitly direct the jury that it needed to be satisfied that these other statements were true.

[35] The trial judge did not use the words "you must be satisfied they are true" in respect of the statements about anticipating violence, but he conveyed the substance of that requirement. First, he referred to what the jury had already been told about the way to approach out of court statements. This was apt to remind the jury of what he had just said in the context of the watchhouse statement. Second, he canvassed in some detail the issue of whether the appellant's statements about anticipating violence were true or not. His directions were adequate, when viewed in the context of the summing up as a whole, to direct the jury that it had to be satisfied that what was said about anticipating violence was true before the jury could rely on it.

[36] There was no miscarriage of justice in not repeating in terms the general direction given in respect of the watchhouse statement, which I have earlier quoted, or in not saying in terms, "You must be satisfied that what was said was true." The substance of this was conveyed, and this may explain why the appellant's experienced trial counsel did not seek a redirection.

[37] The directions were adequate to ensure a fair trial. The miscarriage of justice ground of appeal is not established.

The second ground of appeal: was the verdict unreasonable?

[38] To succeed on this ground the appellant must show that it was not open to the jury to be satisfied of guilt beyond reasonable doubt on the whole of the evidence. This Court must independently assess the sufficiency and quality of the evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant intended to cause at least grievous bodily harm to the deceased.[2]

[39] Senior Counsel for the appellant fairly acknowledged that a significant obstacle to success on this ground is the circumstance that the appellant was armed with a sharp knife and had that knife in the nightclub. In addition, the location and nature of the wound was acknowledged to provide evidence demonstrative of intent. Moderate force was employed and the knife penetrated to the hilt. Still, no witness said that they had seen the knife in the appellant's hand as he stabbed the deceased, and this left open the possibility that someone pushed the appellant's arm as he was

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1 *Burns v The Queen* (1975) 132 CLR 258 at 261; *R v Perera* [1986] 1 Qd R 211 at 217; *R v Baker* [2001] QCA 326 at [22] – [24].

2 *MFA v The Queen* (2002) 213 CLR 606 at 614-615 [25] and 623-624 [58]; *SKA v The Queen* (2011) 243 CLR 400 at 406 [14].

attempting to cut the deceased's arm with the knife. Having regard to the range of versions given by the witnesses who saw or may have seen the deceased involved in the fight, the appellant submitted that it was not open to the jury to be satisfied that the fatal act was done with the prescribed intent.

[40] Numerous witnesses gave evidence about the fight or fights that occurred on the nightclub's dance floor. Their evidence about the number of individuals who were fighting at any one stage varied. A number of witnesses described how a circle would form around the individuals who were fighting. The state of the light affected the identification of participants. Some witnesses knew the appellant or the deceased. Others did not. Individuals who were fighting were sometimes described by reference to what they were wearing or other aspects of their appearance.

[41] Despite the scope for witnesses to have different recollections about the number of people involved in the fight or fights and the sequence of events, there was reliable evidence about the individuals who initially became involved in the fight. The evidence did not suggest that the appellant instigated the fight. Instead, there was evidence that a fight had already begun when he ran in and made contact with the deceased. There also was some evidence that the physical encounter between the appellant and the deceased occurred away to one side of where others were fighting.

[42] The prosecution placed particular reliance on the evidence of Ms van der Laan. She described how Kyle Luke, a good friend of the deceased, was approached by another person who said, "You want a go?". Mr Luke also gave evidence about being approached by an individual and words being exchanged about the fight that occurred the previous weekend. Mr Luke gave evidence about being hit. A fight then developed and a circle formed around it. Ms van der Laan also gave evidence of the crowd on the dance floor forming a circle which she thought would have been about two and a half or three metres wide. The deceased was about a metre in front of her and Kyle Luke was about two metres away. She did not recognise the person who was fighting with the deceased. She then noticed from her right someone running past her at the deceased. By that time the person with whom the deceased had been fighting was not there. Ms van der Laan described the person who came running towards the deceased as having "lunged at Phil and then they struggled for a bit". She said that the deceased tried to stop that person from coming towards him and put both his arms up in front of his body. After the two struggled for a while the deceased dropped to the floor. She described the other individual's appearance. She noticed a pool of blood with a trail leading to the deceased's body.

[43] Under cross-examination Ms van der Laan confirmed that she saw the other individual running for a few steps as he crossed the three metre circle. She was taken to evidence she gave at the committal proceeding in which she described the two individuals and how they "came together". Counsel at the committal asked, "Well, you put hands together, you clasped your hands together. You mean they collided", to which she was recorded as saying, "Yes". She accepted that she gave this answer at the committal. She also gave evidence at the committal that the deceased was "trying to push him away".

[44] Hannah Barnes knew the appellant from high school. She gave evidence about the night in question. She spoke to the appellant that night and took a photograph of him. She could not say whether he appeared to be affected by alcohol. At some point Ms Barnes noticed a fight on the dance floor. She stated, "There was a couple

[of] guys fighting and then I saw Cal go in ...". She described how she "just saw him run in to go in". He went past people who formed a circle. The fight was broken up by security and at the end there were two individuals on the floor. One was restrained by security. The other was bleeding.

[45] Another witness, Vance Cowsell, gave evidence of an individual running in to the fight. Mr Cowsell noticed that things between Daniel Dwyer and Kyle Luke were becoming serious and they were starting to yell at each other. He then noticed Mitchell Loutitt push someone and a circle started to form that was about two to three metres wide. He recalled that Mitchell Loutitt had been inside the circle. Mr Cowsell saw someone run in. He did not know who it was. There was someone in a dark shirt and he saw "an arm swing, like a punch" as that person ran in. He thought that there were three or five people inside the circle at that stage. Mr Cowsell could not recall what the person who had run in and hit someone did afterwards. He saw someone on the ground motionless and thought that person had been knocked out. He noticed this about 10 or 15 seconds after he had seen the man run in and swing his arm. He then noticed blood on the floor and, with others, tried to assist the man, who had a very light pulse. Police and paramedics arrived shortly afterwards.

[46] Under cross-examination Mr Cowsell was taken to evidence which he had given at a committal proceeding in 2010 at which he was asked, "And who was the person who ran in?", to which he replied, "I believe it to be Justin Moores." Mr Cowsell knew of the appellant through mutual friends. He did not know the deceased.

[47] Included amongst the numerous witnesses called by the prosecution were Benjamin Laker, Leigh Costello and Andrew McQuie. They each gave evidence of an episode apparently involving the deceased in which he received what appeared to be uppercut punches to his chest. Mr Laker gave evidence of the fight erupting in front of him and his friends. He described a large number of people swinging arms and pushing each other around. Just as the bouncers were running in to break up the fight he noticed one person hunched over, who was in a "one-on-one fight". The larger individual appeared to be punching into the stomach and chest region of the other individual who ended up injured. Mr Laker described it as an "uppercut motion". He saw at least two or three hits. He then looked away for a brief time. Mr Laker did not see anyone outside of the people who were fighting pushing in on the people who were inside the fight.

[48] As to the uppercut punches, Mr Laker saw the hand hit the chest region. When it was put to him in cross-examination that he saw no weapon in that hand he replied, "I can't say I saw a weapon. I can't say I didn't see a weapon. I saw a hand striking the chest." During re-examination he clarified that he did not see any members of the crowd or the spectators coming into contact with or pushing against people who were in the fight.

[49] Mr Costello gave similar evidence. He saw at least four punches which connected. The crowd had formed a circle and he saw two males inside the circle. After he saw the uppercut punches the individual in the white shirt dropped to the ground, face down, and Mr Costello saw a lot of blood seeping out. He did not see anything in the hands of the individual in the black shirt. The four uppercut hits that he saw happened in quick succession and they looked like an uppercut with just a fist. There was no pause in between these punches.

[50] Mr McQuie described about eight people being involved in the fight, with two individuals breaking off from the others and becoming separated. He described the taller individual swinging with his right hand towards the centre of the other individual's chest and seeing four or five blows connect. No-one else was near these two: the crowd had dispersed around them. Under cross-examination Mr McQuie described how the original fight was moving around, and he accepted that there also was some pushing in on the fight at times from the crowd.

[51] As the trial judge pointed out to the jury, and as the defence at the trial submitted, the evidence given by Mr Laker, Mr Costello and Mr McQuie of at least two or three uppercut punches being delivered to the chest region of the deceased in quick succession would not explain how a single stab wound could be delivered by one of these blows. On the hearing of the appeal the Director of Public Prosecutions submitted that it was possible that the appellant delivered these uppercut blows before delivering the fatal blow. It was possible that the knife was in one hand and only one uppercut blow was delivered with that hand so as to stab the deceased. Alternatively, even if all of the uppercuts were delivered by the one hand, the knife may have been in that hand pointed to the side with the final blow being the one that delivered the fatal wounds.

[52] In my view, a jury would have had a reasonable doubt about whether the fatal blow with the knife was delivered during one of the three, four or more punches that were observed by Mr Laker, Mr Costello and Mr McQuie.

[53] It was open to the jury, however, to conclude that the fatal blow was delivered at a different time and in the way that Ms van der Laan described. Her acceptance at the committal that the appellant and the deceased collided was not inconsistent with her evidence that the other person involved in the collision came running in, lunged at the deceased, and that the two struggled. The description that she gave of the deceased putting both his arms up in front of his body so as to protect himself from the person who was running towards him is consistent with her acceptance under cross-examination at the committal that there was a collision.

[54] Neither Ms van der Laan nor any other witness saw the appellant being pushed as he stabbed the deceased. In his brief statement to the police at the watchhouse on 6 May 2009 the appellant did not say whether he was pushed in the arm, in his back or somewhere else. He simply said, "I went to cut his arm ... and somebody else pushed me".

[55] The appellant points to evidence given by some witnesses about pushing. There was Mr Laker's evidence at the committal in which he accepted that the crowd was pushing in on the fight, but his evidence in that regard, like other evidence given by him and by others, gave the impression that the crowd on the dance floor formed a circle around most of the participants in the fight, with a constraint on how far the circle could expand because of the presence of so many other people on the dance floor.

[56] The appellant also points to the evidence of Mr Loulanting, who accepted that when the brawl or melee started there were people rushing in to get involved, pushing people out of their way, and people pushing in to see what was happening. At the same time there were people coming the other way who did not want to be involved. However, this evidence has little bearing upon the physical encounter between the

appellant and the deceased. Mr Loulanting did not give evidence about that. None of the witnesses who saw the physical encounter between the appellant and the deceased gave evidence of seeing anyone push the appellant.

[57] The various descriptions of the physical contact between the appellant and the deceased did not describe the two as being close to other individuals who might have pushed the appellant. On one account, the two were separated from the main fight. If as some witnesses indicated, the appellant came running in, and if the fatal blow was struck immediately thereafter, then someone who pushed the appellant probably would have needed to have followed him at a similar speed. No-one, including Ms van der Laan, saw such a push or even someone close to the appellant at that time who was in a position to push him.

[58] The depth of the wound, its trajectory and the injury left on the deceased's chest when the knife went in up to its hilt support the conclusion that the appellant ran in and delivered a stab directed to the deceased's chest.

[59] Any reasonable jury would have had serious reservations about the appellant's credibility. A jury was entitled to reject the accuracy of his short watchhouse statement about being pushed.

[60] It was also open to a jury to consider, even if it accepted the appellant's final account of events, that he was trying to cut the deceased's arm and intended to cause grievous bodily harm.

[61] Appropriate caution was required not to over-estimate the amount of force required to inflict the wounds that were in fact caused. The knife was a sharp one, and as a pathologist explained to the jurors and as the trial judge reminded them, if the knife did not hit any cartilage or bone, its blade would go in very easily. There was, however, evidence of the cartilage part of the fourth rib being cut in two. This and the bruising on the skin of the chest explained why Dr Milne, the pathologist, concluded that a "moderate" (as distinct from "mild" or "severe") degree of force was required.

[62] The nature of the injury was one of a number of matters which together strongly supported the conclusion that the appellant intended to cause at least grievous bodily harm to the deceased. Even without resort to that part of the long interview in which the appellant said that he knew that the groups wanted to fight again, the appellant's conduct in taking a hunting knife with him to the hotel and using a false identification card to gain access to it indicated that the appellant was ready to use the knife if a fight broke out, possibly in self-defence.

[63] The prosecution did not seek to prove that this was a premeditated attack and that the appellant always intended to use the knife in the event a fight broke out. The critical issue was his intent at the time of the act which caused the death. The evidence indicated that this act occurred some time after a fight or fights had broken out. Ms van der Laan saw the appellant run in the direction of the deceased, who was no longer engaged in a fight. According to her evidence, the appellant lunged at the deceased. She did not suggest that anyone else was in close proximity to the appellant when he lunged at the deceased. Her evidence of this encounter, whether described as a collision or otherwise, along with the other evidence meant that it was open to the jury to be satisfied beyond reasonable doubt that the appellant intended to cause at least grievous bodily harm.

[64] It was open to the jury to be satisfied of this on either of two bases. The first was that the appellant deliberately stabbed the deceased by aiming the knife at his body so that he intended to kill or intended to cause grievous bodily harm. The second was that he intended to cut the deceased's arm with a sharp hunting knife, and, in the circumstances, intended to cause at least grievous bodily harm.

[65] The verdict of guilty was not unreasonable within the meaning of s 668E(1) of the *Criminal Code*. I would dismiss the appeal.