SUPREME COURT OF QUEENSLAND

CITATION:	*R v George* [2013] QCA 267
PARTIES:	**R** **v** **GEORGE, Donald Tommy** (appellant)
FILE NO/S:	CA No 125 of 2012 SC No 7 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Mt Isa
DELIVERED ON:	20 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2013
JUDGES:	Margaret McMurdo P and Holmes JA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against convictions dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – OTHER MATTERS – where the appellant was convicted of murdering an elderly couple in their home pursuant to s 302(1)(b) *Criminal Code* 1899 (Qld): causing death by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life (felony murder) – where the unlawful purpose was particularised as burglary with an intent to either steal or sexually assault – where the appellant contended that there were others with significant criminal histories for burglary and violence in the vicinity of the deceased's house on the relevant night – where the appellant contended that there were rational inferences open on the evidence that had not been excluded such as the reasonable possibility that the appellant may have gone into the deceased's house after another person had committed the murders without any assistance from him – where no DNA from any person other than the appellant was located inside the deceased's house – whether verdicts unreasonable or cannot be supported having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where the trial judge admitted propensity evidence of an attempted burglary at a house across the street from the deceased's residence on the night of the killings on the basis that there was no other reasonable explanation for the conduct of the appellant in the attempted burglary other than the inculpation of the appellant in the murders – where the appellant contended that the trial judge's reasoning was circular and flawed and that the evidence could support an exculpatory inference that the appellant was too intoxicated to form an intent to commit an indictable offence – where the appellant contended that the trial judge's decision was inconsistent with an earlier refusal to join the attempted burglary and murder charges – whether the trial judge erred in admitting the evidence of the attempted burglary

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – APPLICATION OF PROVISO TO PARTICULAR CASES – where there was ample evidence that the appellant was intoxicated on the night the deceased were killed – where, pursuant to s 28(3) *Criminal Code*, intention to cause a specific result is an element of an offence, intoxication may be regarded for the purpose of ascertaining whether such an intention in fact existed – where the "unlawful purpose" for the purpose of murder under s 302(1)(b) was particularised as burglary with an intent to steal or sexually assault – where an intent to commit an indictable offence is an element of burglary – where the trial judge failed to direct the jury on the relevance of intoxication to murder under s 302(1)(b) – where the appellant contended that this failure amounted to an error of law – where the respondent contended that as s 302(1)(b) speaks of "unlawful purpose" and not "offence", s 28(3) has no application to s 302(1)(b) – where the Court held that intoxication is relevant to s 302(1)(b) where the unlawful purpose is particularised as offence including, as an element, an intent to cause a specific result – where the trial judge erred in not directing the jury as to intoxication under s 28(3) when considering murder by way of s 302(1)(b) – whether proviso in s 668E(1A) *Criminal Code* applies – whether the guilty verdicts amount to a substantial miscarriage of justice

Criminal Code 1899 (Qld), s 28(3), s 302(1)(b), s 419(1), s 668E(1A)

Baker v The Queen (2012) 245 CLR 632; (2012) 86 ALJR 906; [2012] HCA 27, followed
BBH v The Queen (2012) 245 CLR 499; (2012) 86 ALJR 357; [2012] HCA 9, considered

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
R v Edwards, Heferen and Georgiou [2002] 1 Qd R 203; [2002] QCA 206, considered
R v Hayes [2008] QCA 371, considered
R v K; Ex parte Attorney-General (Qld) (2002) 132 A Crim R 108; [2002] QCA 260, cited
R v Martin (2002) 134 A Crim R 568; [2002] QCA 443, cited
R v Rigney [1996] 1 Qd R 551; [1995] QCA 571, cited
R v Zullo [1993] 2 Qd R 572; [1993] QCA 208, cited
Raw v The Queen (1984) 12 A Crim R 299, cited
Seiffert and Stupar v The Queen (1999) 104 A Crim R 238, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Viro v The Queen (1978) 141 CLR 88; [1978] HCA 9, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited
Zecevic v Director of Public Prosecutions (Vic) (1987) 162 CLR 645; [1987] HCA 26, cited

COUNSEL: J Treviño for the appellant (pro bono)
M Cowen for the respondent

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

[1] **MARGARET McMURDO P:** The appellant was convicted on 24 April 2012 of murdering both Frederick Mabb and Phillis Mabb at Mount Isa in August 2009. He has appealed against his convictions on three grounds. The first is that the verdicts were unsafe and unsatisfactory, that is, they were "unreasonable or cannot be supported having regard to the evidence" in terms of s 668E(1) *Criminal Code* 1899 (Qld). The second is that the trial judge erred in his instructions to the jury on intoxication. The third is that the trial judge erred in allowing evidence to be given surrounding an attempted burglary on 15 August 2009 of a house neighbouring the deceased's house. The respondent contends that none of the grounds of appeal are made out and that, even if ground 2 or ground 3 succeeded, this Court would dismiss the appeal under s 668E(1A) *Criminal Code* as it would be satisfied "that no substantial miscarriage of justice has actually occurred."

The evidence at trial

[2] A consideration of the first ground of appeal and the respondent's contention under s 668E(1A) requires this Court to consider the whole of the evidence at trial.

[3] The deceased's daughter, Mrs Judith Prosser, gave evidence that just before 9.00 am on Monday 17 August 2009 she visited her frail, elderly parents' home at 78 Pelican Road, Townview, Mount Isa. She found them both lying on the floor. Mr Mabb was in the hallway between the bedroom and lounge room. Mrs Mabb was on her

back on the lounge room floor in front of the television with congealed blood on her face. She moaned and tried to speak. Her skirt and petticoat were raised and her pants were removed; she was naked from the waist down.

[4] Mrs Prosser called an ambulance but Mr Mabb was already dead. He had at least five blunt force injuries to his head and had other bruises, lacerations and abrasions. The head injuries were likely to have rendered him unconscious. He died as a result of asphyxia caused by loss of consciousness.

[5] Mrs Mabb had six major blunt force injuries to her head consistent with the application of mild to moderate force. She had broken ribs and a traumatic dissection or tear to her right coronary artery. She died in hospital eight days later as a result of heart failure caused by a blockage of the coronary artery resulting from the tear.

[6] The appellant's DNA profile was found at over 30 locations in the deceased's house. It was on Mrs Mabb's underpants found on top of a vacuum cleaner on the lounge room floor. The probability of this not being his DNA was 1 in 9.5 million. His DNA was also found on the clothes Mrs Mabb was wearing: her skirt, the outside of her bra and her shirt. It was found on her blue cardigan lying close to her body and on the handles, opening zipper and an inside compartment of her handbag. It was also found on a step leading into the house, the main bedroom door, a walkway frame, the TV in the lounge room, carpet near Mrs Mabb's body, a fan heater, and a power board in the lounge room. His bloodied palm print was located on that power board. The blood in the palm print contained Mrs Mabb's full DNA profile. An elliptical-shaped blood stain travelling in a downwards direction was found on a door hinge next to Mr Mabb's head. The blood stain contained the appellant's full DNA profile.

[7] A candlestick holder may have been the weapon used to attack Mrs Mabb. The appellant's DNA was not identified on the candlestick, but a DNA profile was identified and he could not be excluded as a contributor to it. Mr Mabb's walking stick was broken in three places and may have also been used as a weapon but only the Mabbs' DNA profiles were found on it. A third possible weapon, a terracotta mosquito coil holder, had traces only of Mrs Mabb's DNA. The appellant's fingerprints were not found on any of those items. The police took possession of the appellant's clothes on 18 August 2009. The deceased's DNA was not found on them.

[8] All identified DNA found in the deceased's house belonged to either them or the appellant. The only identified fingerprints belonged to the appellant. An old unidentified fingerprint was found on a glass door. No forensic evidence linked anyone other than the appellant to the crime scene.

[9] The deceased's son-in-law spoke with Mr Mabb at about 7.30 pm on Saturday, 15 August. On the Sunday, neighbours did not see them observing their usual morning routine. It seems they were killed some time between the Saturday night phone call and early Sunday morning.

[10] Richard Fogarty gave evidence that his partner, Daphne Gilbert, was the appellant's aunt. On 15 August 2009, the appellant had been living with them at 72 Pamela Street, Townview, Mount Isa for a couple of weeks. On one occasion, the appellant

turned off the switch on the power board to Mr Fogarty's flat, but it was quite common for people to do this, for example, when the music was too loud; others often did it.

[11] Kara Gilbert was drinking rum with her sister, Kelly, on Saturday 15 August. She went to Mr Fogarty's where she drank with a group of people, including the appellant. She later visited Ronnie Aplin and Debra Morrison on Pelican Road and from there went to SR's house, taking a half-full cask of moselle wine given to her by Mr Aplin. The appellant arrived. At about 8.30 pm, he ran off with the cask of wine. He was wearing a black shirt with a "DG" logo and long black pants. She did not see him again that evening. She saw the appellant when she woke up at about midday on Sunday at Mr Fogarty's. The appellant gave her about $26 and she bought another cask of moselle.

[12] In cross-examination she agreed that she had never seen the appellant turn the power off at Mr Fogarty's; Mr Fogarty sometimes turned the power off there. When she returned to Mr Fogarty's, she fell asleep; she did not know whether the appellant was there. When she saw him at Mr Fogarty's on Sunday morning, she did not see any blood spatters on him or his clothing. The appellant was wearing the same clothes when apprehended by police the following Tuesday as he was wearing on the Saturday. She did not see him change his clothing or wash either his clothes or himself. She had seen both Ashley Lorraine and Mikel Diamond wearing a black jumper with a hood. Mr Lorraine was wearing his black hooded jumper on the Saturday night when he and the appellant had a fight at Pamela Street. Mr Lorraine had his silver CD Walkman with him. She did not see Mr Diamond on the Saturday night. She saw Mr Diamond and Mr Lorraine at Mr Fogarty's house on Sunday. Both Mr Lorraine and Mr Diamond had silver Walkmans with them. She did not see the appellant wearing a hoodie.

[13] In re-examination she stated that the appellant and Mr Lorraine were fighting at about 6.00 pm but then added that she did not see the fight; the appellant told her about it. She saw Mr Lorraine at SR's house with his CD player and headphones.

[14] Ronald Aplin gave evidence that on 15 August 2009 he had been living at 43 Pelican Road, Mount Isa with his mother-in-law, his partner, Debra Morrison, their children and grandchild for two weeks. When he arrived home at about sunset he saw Kara Gilbert. She had been drinking alcohol but was not intoxicated. The appellant arrived later and introduced himself as a member of Kara Gilbert's family. Mr Aplin gave Kara Gilbert a half-full wine cask of moselle and Kara Gilbert and the appellant left. Mr Aplin did not see them again. The appellant seemed drunk and looked like he had been drinking all day. He was much "drunker"[1] than Kara Gilbert.

[15] A number of other witnesses also described the appellant as intoxicated on the Saturday evening. SR had lived at 80 Pelican Road, Mount Isa, next door to the deceased, for about two years but she did not know them well. On Saturday, 15 August 2009, she was living there with her three children. She had family around for a quiet get together. The appellant arrived with Kara Gilbert. SR knew one of the appellant's parents from Doomadgee but had not met him before. He poked her friend Patricia Nead in the ribs. As he was annoying Ms Nead, SR asked him and Kara Gilbert to leave. She did not see him leave. She had been drinking

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1 T3-99.22 (AB 298).

alcohol and went to bed. She woke up at about 9.00 am on Sunday. The appellant returned to her house in the morning but she did not speak to him. In cross-examination, she described the appellant as drunk on the Saturday evening but not "unconscious drunk".[2] He had a Walkman and headphones and was wearing a black t-shirt and black pants. She agreed she was very drunk.

[16] Others present at 80 Pelican Road also gave evidence about the appellant's state of intoxication that evening. Aaron Anderson, who was sober, agreed the appellant was staggering around drunk. Leah Fowlestone, who was also sober, described the appellant as drunk, stumbling around and slurring his words. Lisa Morrison was a visitor from Tennant Creek and attended the party with her partner. She saw the appellant wearing a black t-shirt and rolled up track suit pants which looked like shorts. When he returned to the house the next morning, he was wearing the same clothes. He seemed drunk and was staggering around and slurring his words, but he was not paralytic.

[17] Over defence counsel's objection, the judge allowed the following evidence to be given concerning an incident on the Saturday night at the home of Vivian and Christine Parter and their two daughters. They lived at 51 Pelican Road, across the road from the Mabb residence. The Parters' premises backed on to Pamela Street. At about 10.30 pm, they heard an intruder trying to enter their house after the power was turned off and on. Mr Parter went out the front door and picked up a steel bar. He saw a dark, wiry male, about 20 and no older than 25, perched halfway over the fence looking at him. Mr Parter was about five feet seven inches tall; the intruder was taller but not more than six feet. As Mr Parter got closer, the man fled up Pamela Street.

[18] While Mr Parter went out the front door, Mrs Parter and her daughters moved onto the verandah. She told the girls to stay there while she went into the yard to investigate. A male figure with a blue hood pulled over his head came straight towards her from the left side of the house. He punched her in the mouth and grabbed her in a bear hug, lifting her slightly off her feet and dragging her. She thought he was about five or six inches taller than she because she was looking up into his eyes. He looked about 19 or 20. Her daughter shouted at him to let her go. He ran across the road to SR's front carport. The incident happened very quickly. The next morning she found the silver bladder of a wine cask in the front yard near the family car. Her daughter threw it in the bin. She was unable to later identify the appellant as her assailant from a photoboard.[3]

[19] Rikki-Lee Parter added in her evidence that their power came back on only after her father went outside. From the front verandah, she saw a man come around the side of their house to the front yard, walk towards her mother and punch her mother in the mouth. He was very dark, tall and skinny. She described him as wearing a dark jumper with a hood over his head, three-quarter pants, barefoot and he "stunk."[4] When she ran to assist her mother, he fled and she pursued him. He ran through SR's front gate at 80 Pelican Road and up the side of the house.

[20] BR, who was 15 years old at the time, gave evidence under s 93A *Evidence Act* 1977 (Qld) by way of his statement to police on 17 August 2009, the day

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2 T2-41.6 (AB 120).
3 Ex 14.
4 T5-4.32 (AB 425).

Mrs Prosser discovered her dead father and her fatally injured mother. He was also cross-examined at trial by which time he was 18 years old. He told police that he lived with his mother, SR, at 80 Pelican Road. On the previous Saturday evening, he was out the front of his nana's at 43 Pelican Road, waiting for his little brother who was then about five years old. He had not been drinking alcohol. He saw a man listening to a Walkman fall over drunk on the street. The man went across the road to a tree near the light pole. His hair was dark and short and he was not wearing a hat. He was wearing a dark blue or black t-shirt and three-quarter length dark coloured shorts. He thought he was either barefoot or wearing thongs. He had seen this man a couple of years earlier in Doomadgee when BR was at school there. His first name was Donald and in August 2009 was aged about 18 or 19. Donald's skin was dark and he was not Aboriginal. He saw him run into the yard of 51 Pelican Road (the Parters' residence). The man who lived there (it is uncontentious this was Mr Parter) and a woman (it is uncontentious that this was Rikki-Lee Parter) chased Donald across Pelican Road to outside number 80. Mr Parter and Rikki-Lee Parter threw rocks at Donald. He saw Mr Parter speak to BR's older brother. BR identified the appellant to police from a photoboard containing 12 photographs of Aboriginal men[5] as the person whom he saw that evening and whom he knew as Donald.

[21] In cross-examination at trial, he described Donald as looking like he was drunk; he stumbled and fell as he walked towards the Parters'. It was dark and for much of the time he could not see Donald's face. He saw him a little bit underneath the streetlight and recognised him, but accepted that he did not see Donald's face under the streetlight. He had not seen Donald for three years before Saturday, 15 August 2009. The person he recognised as Donald was wearing the same clothes as the appellant was wearing earlier in the night and he was carrying a Walkman, as was the appellant earlier in the night.

[22] In re-examination, BR said that in 2009 when he spoke to police he recognised the person under the light as the appellant.

[23] The senior investigating police officer, Detective Senior Sergeant Guy Harvey, was cross-examined without objection about hearsay statements he had obtained to the effect that people other than the appellant may have been responsible for the killings.[6] He agreed that Mr Diamond had a criminal history for break and enter offences and had been to jail for rape. He described Mr Lorraine as a 175 cm tall, slim Aboriginal man with a criminal history. The appellant was 150 cm tall. Mr Lorraine was with the appellant earlier on the Saturday. Sean Karyuka was released from prison a few days before the killings and had made his way to Mount Isa. He had a criminal history which included an incident when he turned off the power at a hotel; when the publican challenged him, he attacked him with a pool cue and threatened to kill him because Mr Karyuka hated white people. Mr Karyuka arrived in Mount Isa at 7.00 pm on Saturday, 15 August and flew to

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5 Ex 11.

6 This evidence was inadmissible. In *Baker v The Queen* (2012) 86 ALJR 906, [51]-[60], a decision handed down after this trial, the High Court unanimously held that third party confessions are not admissible as an exception to the hearsay rule, specifically disapproving *R v Zullo* [1993] 2 Qd R 572; *R v K; Ex parte Attorney-General (Qld)* (2002) 132 A Crim R 108 and *R v Martin* (2002) 134 A Crim R 568 insofar as they may be authority to the contrary. This evidence was hearsay upon hearsay evidence of third party confessions. The error of law in admitting this evidence, however, was one which favoured the appellant.

Mornington Island on Tuesday, 18 August. When police questioned him in Mount Isa on 22 August 2009, he was highly intoxicated and uncooperative. When they questioned him again on 23 August 2009, he became aggressive and vehemently refused to provide a statement of his whereabouts or fingerprints. Police officer Harvey did not arrange for photos of Mr Diamond, Mr Lorraine or Mr Karyuka to be included on the photoboards shown to the Parter family. He did not investigate whether any of them had a Walkman or a hoodie or take the clothing they were wearing on Saturday, 15 August for testing as he did not consider them to be suspects.

[24] The prosecution made Eric Burns available for cross-examination. He was released from prison on Friday, 14 August 2009, together with Peter Jacob and Mr Karyuka. He and Mr Karyuka left by bus for Mount Isa on the Friday, arriving about 6.30 pm Saturday. Mr Karyuka said he was going to a relative's place in central Mount Isa. Mr Burns went to Mr Fogarty's flat at Pamela Street where he drank with Mr Fogarty. Mr Burns was not wearing a black long sleeved shirt with a hood and did not have a silver Walkman. His criminal history included numerous entries for assaults, some occasioning bodily harm; unlawful wounding; breaches of domestic violence orders; and street offences such as drunkenness. In 2005, he was sentenced to nine months imprisonment for two counts of assault, one of them whilst armed with a weapon.

[25] Mr Diamond gave evidence that on 15 August 2009 he was living with his uncle and auntie, Alby Luff and Marion Braun, at 75 Pamela Street, Mount Isa. He was drinking alcohol during the day and in the evening he was "grog sick";[7] hung over. He did not leave the house that evening. He told Oscar Gregory, Howard Cubby and Mr Lorraine that he killed the old people[8] but he had been drinking alcohol and was only "gamin",[9] that is, joking. He did not kill them. He had never been to Pelican Road and did not know where it was.

[26] In cross-examination, he said he could not remember whether he had told other people that he had killed the old couple. He "sort of"[10] remembered telling Rearnah Gregory that he had bashed the two old people. He did not know if he had told Loretta Shadforth this, adding that "[t]hey must have just overheard something."[11] He denied telling them that he had turned the electricity off before the old man came out. He did not know whether he had told them that he had stolen money from the old couple. He did not remember what he was wearing on Sunday, 16 August 2009. He thought he once owned a long sleeved dark shirt with a hood but he lost it a couple of years ago; he could not remember when. He thought he owned a silver Walkman in 2009 but he was unsure. In January 2007, he was sentenced to five years imprisonment to serve 18 months for raping a woman whilst she was asleep. He also had convictions for consuming alcohol in a public place and for entering premises with intent.

[27] In re-examination, he stated that he pleaded guilty to the rape which occurred in Doomadgee; the victim was his age. His conviction for entering premises was a break-in of a pub at Gregory Downs to steal alcohol. He had never owned a Walkman.

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7 T 5-23.13 (AB 444).
8 See footnote 6.
9 T5-25.11 (AB 446).
10 T5-26.8-9 (AB 447).
11 T5-26.23-24 (AB 447).

[28] The prosecution made Rearnah Thimble (also known as Gregory) available for cross-examination. Her father and uncle were good friends with Mr Diamond. She agreed that Mr Diamond spoke to her father and Ms Shadforth about the killing of the deceased on two occasions, first on 19 August and then on 21 August. She was inside "with the kids",[12] did not hear everything and did not remember what he said. In re-examination she said she remembered on the first occasion she heard him say "they was blaming him for the murder of the two old people. … [a]nd that he stole some money – they're blaming him that [he] stole some money too."[13] That was all she heard.[14]

[29] The prosecution made Gayleen Spain available for cross-examination. It was put to her that she had a conversation with Ms Thimble about what Mr Diamond had told her. She could not remember the conversation; she may have been intoxicated.[15]

[30] The prosecution made Nicole O'Keefe available for cross-examination. She said that Ms Spain told her that Mr Diamond told Ms Thimble that he and Mr Lorraine had bashed two old people and taken their money. Ms Thimble had told Ms Spain that Mr Lorraine and Mr Diamond turned off the electricity and the old man came out and they bashed him. This conversation gave Ms Thimble goose bumps all over.[16]

[31] Grayson Williams gave evidence that on the weekend commencing Friday, 14 August 2009 he was staying at 104 Pamela Street with relatives. He commenced drinking wine at 8.00 or 9.00 am on the Saturday and continued drinking throughout the day. In cross-examination he agreed that he was too drunk to remember anything after about 6.30 or 7.00 pm. He had previous convictions for assault occasioning bodily harm and breaches of domestic violence orders for which he had been sentenced to terms of imprisonment. He had also been sentenced to 12 months imprisonment for going armed so as to cause fear and weapons offences.

[32] The prosecution made Mr Lorraine available for cross-examination. He spent the night of Saturday, 15 August 2009 asleep on a couch at Mr Fogarty's. The appellant was there sleeping on an adjoining bed. Mr Lorraine woke up on Sunday morning before the appellant. On Saturday night, Mr Lorraine was wearing a black hat and a zipped up, mostly black long sleeved coat with red pockets and a hood. He was listening to music on a silver Walkman. At the time of the trial, Mr Lorraine was serving a term of imprisonment in Townsville for stealing motor cars. He had prior convictions for entering a dwelling and committing an indictable offence, assault occasioning bodily harm, behaving in a riotous, violent or disorderly manner and for numerous episodes of entering dwellings and premises, and alcohol-related street offences. In re-examination, he said it was the Thursday before 15 August that he was wearing the black top with a hood and red pockets and added that he asked the appellant to hold onto his Walkman. In further cross-examination, he added that he took back the Walkman from the appellant and kept it. In further re-examination, he said that the appellant had his Walkman when he asked for its return. On the Saturday night after Mr Lorraine left 15 Pamela Street, he got a fright to see the appellant running behind him from the Townview corner shop.

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12 T5-59.16 (AB 480).
13 T5-59.35-40 (AB 480).
14 See footnote 6.
15 Above.
16 Above.

[33] The appellant did not give or call evidence.

The competing contentions at trial

[34] The prosecution case was that the only rational inference the jury could draw from the evidence was that the appellant murdered each deceased on one of two bases. The first was that under s 302(1)(a) *Criminal Code* he attacked each deceased intending either to kill or cause grievous bodily harm. The second was that he caused each death by doing an act in the prosecution of an unlawful purpose which was of such a nature as to be likely to endanger human life under s 302(1)(b) *Criminal Code*. The unlawful purpose was the burglary of the deceased's home with the intention to either steal or sexually assault. The prosecutor called this second basis "felony murder". In opening the prosecution case, he stated:

> "The important distinction with felony murder is it doesn't matter how drunk he is, and it doesn't matter whether he has no intent to harm anybody, it's just the act that it is likely to endanger life."[17]

[35] The defence case was that someone other than the appellant may have killed the Mabbs. There were many others in the neighbourhood that evening with criminal histories for burglary and violence. Mr Karyuka had a criminal history which included an episode when he turned off the power to a building to lure a victim outside and he had expressed a loathing of white people. Mr Lorraine and Mr Diamond had confessed to others that they had killed the Mabbs[18] and each either owned or was wearing that night a dark top with a hood. The appellant's DNA and fingerprints were not found on any murder weapon. No blood or DNA from either deceased was found on his clothing or on his body.

[36] The defence emphasised that Kara Gilbert and Mr Fogarty did not see blood on either the appellant or his clothes on Sunday, 16 August. It was unlikely the killer would not have had the deceased's blood on his body and clothing. BR's identification evidence was unreliable because he was too far away to see who went into the Parters' premises. The Parters' description of the intruder at their house did not match that of the appellant. He was not wearing a hoodie and was neither tall nor agile and quick, but rather drunk and staggering. The violent intruder at the Parters' was not the appellant. The prosecution could not exclude the reasonable possibility that someone other than the appellant killed the Mabbs and that the appellant came into the house after the killing, leaving behind his DNA.

The jury directions on intoxication

[37] It is convenient to first discuss the appellant's contention that the judge's directions to the jury on intoxication were inadequate. The appellant accepts that the trial judge correctly directed the jury as to the relevance of intoxication to the prosecution case of murder under s 302(1)(a) *Criminal Code*. The appellant's concern is that the judge gave no such direction as to the relevance of intoxication to the offence of burglary upon which the prosecution's case of murder under s 302(1)(b) was based.

[38] It is true that it was not the defence case that the appellant killed the deceased whilst so intoxicated that he did not form an intent. But that did not relieve the trial judge

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17 T1-14.37-40 (AB 93).

18 See footnote 6.

from directing the jury as to all defences fairly raised on the evidence. There was certainly ample evidence that the appellant was intoxicated on the Saturday evening at about the time the deceased were fatally attacked. The DNA evidence unequivocally placed the appellant inside the deceased's house in close proximity to them at about the time of the killing. Although not relied on by the defence, intoxication was very much an issue at trial. It follows that if intoxication was relevant to the prosecution case under s 302(1)(b), the judge should have directed the jury on it and corrected the prosecutor's opening statement that "with felony murder … it does not matter how drunk he is".

[39] Section 28 *Criminal Code* is the relevant provision dealing with intoxication and provides:

> "**28 Intoxication**
>
> …
>
> (3) 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."

[40] Section 302(1)(b) *Criminal Code* relevantly provides:

> "**302 Definition of *murder***
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> (1) Except as hereinafter set forth, *a person who unlawfully kills another under any of the following circumstances, that is to say—*
>
> (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;
>
> (b) *if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life*;
>
> (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
>
> (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);
>
> (e) if death is caused by wilfully stopping the breath of any person for either of such purposes;
>
> is guilty of ***murder***.

> (2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.
>
> (3) *Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person*.
>
> (4) *Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result*" (my emphasis).

[41] Under s 419(1) *Criminal Code*, the indictable offence of burglary is committed when a "person … enters or is in the dwelling of another *with intent to commit an indictable offence in the dwelling*" (my emphasis). The prosecution case was that the appellant entered or was in the deceased's dwelling with intent to either steal or sexually assault.

[42] The issue for determination is whether the jury should have been directed that the appellant's intoxication may be regarded for the purpose of ascertaining whether, under s 302(1)(b), the deaths were caused by means of the appellant's act done in the prosecution of a burglary with the intention to steal or sexually assault.

[43] The terms of s 419(1) make clear that, to establish the offence of burglary, one element the prosecution must establish beyond reasonable doubt is that the appellant had an intention to commit an indictable offence in the dwelling, either at the time of entry or whilst in the dwelling. If authority be needed for this statement of the terms of s 419(1), see *R v Rigney*.[19] The prosecution particularised that the act done in the prosecution of an unlawful purpose under s 302(1)(b) was burglary of the Mabbs' dwelling and that the appellant's intention under s 419(1) was to steal or to sexually assault.

[44] Neither counsel, surprisingly, has found any authority from code jurisdictions as to the interaction between s 28 and s 302(1)(b). In the course of argument, reference was made to this Court's decision in *R v Hayes*[20] and the parties seemed to place reliance on it. Hayes' principal contention on appeal was that the trial judge erred in directing the jury that they might consider any of four alternative unlawful purposes in determining whether he was guilty of murder under s 302(1)(b). Hayes contended that the unlawful purpose must be confined to the offence of arson as that was the only offence charged on the indictment. This Court rejected that argument.[21] Hayes also contended on appeal that the primary judge's direction on intoxication was flawed as it did not adequately direct the jury as to the onus of proof. The Court rejected that submission as the defence case at trial was that the appellant did not light the fire which caused the deaths.[22] My additional observations[23] merely identified paths to conviction under s 302(1)(b) open to the jury in that case by way of an act done in the prosecution of unlawful purposes, which were offences without an element of an intention to cause a specific result. *Hayes* is of no assistance in the present case where the act done in the prosecution of an unlawful purpose was particularised as burglary which has an intention to cause a specific result (to commit an indictable offence) as an element.

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19 [1996] 1 Qd R 551, 552-553.
20 [2008] QCA 371, [6].
21 Above, [1], [73]-[77].
22 Above, [1], [61]-[67], [107].
23 Above, [4]-[6].

[45] In contending that the judge was not required to direct the jury in terms of the relevance of s 28 to the prosecution case of murder based on s 302(1)(b), the respondent placed reliance on this Court's decision in *R v Edwards, Heferen and Georgiou*.[24] In *Georgiou*, one appellant, Edwards, was convicted of murder under s 302(1)(b) on the basis that the death was caused by means of an act done in the prosecution of a burglary. Edwards argued that, as the burglary was complete before the act of shooting the deceased, the shooting was not an act done in the prosecution of an unlawful purpose under s 302(1)(b). After referring to two Western Australian decisions, *Raw v The Queen*[25] and *Seiffert and Stupar v The Queen*[26] this Court rejected that argument,[27] noting:

> "It is, however, important to recognise that the section speaks of 'unlawful purpose' and not 'offence'. The unlawful purpose is therefore not limited to the strict elements of an offence. Any act done in the course of attempting to get away after the commission of an offence would be an act done for an unlawful purpose."[28]

[46] The respondent contends that as s 302(1)(b) refers to "an act done in the prosecution of an unlawful purpose" and not an "offence" it follows from *Georgiou* that s 28(3) has no application to s 302(1)(b). I cannot accept that contention in the present case where the acts of attacking each deceased were particularised as having been done in the prosecution of the unlawful purpose of burglary with the intent to either steal or sexually assault. As *Georgiou* makes clear, the unlawful purpose in terms of s 302(1)(b) refers to an act done in the prosecution of an offence. In the present case, the appellant would not escape liability under s 302(1)(b) if the appellant killed the deceased to effect his getaway after the burglary was completed. But, where, as here, an offence which has an intention to cause a specific result as an element is particularised as the unlawful purpose under s 302(1)(b), *Georgiou* is not authority for the proposition that s 28 has no application.

[47] In this case, before convicting of murder, the jury must have been satisfied that death was caused by means of an act done in the prosecution of the burglary. The offence of burglary has an intention to cause a specific result as an element, namely an intent to commit an indictable offence in the dwelling particularised here as an intent to steal or sexually assault. This required the jury, before convicting of murder under s 302(1)(b), to be satisfied that the appellant did the act which caused each death while prosecuting a burglary, that is, while entering or being in the deceased's house intending to steal or sexually assault in the house. If follows that the prosecution had to prove that the appellant intended to either steal or sexually assault in the deceased's house whilst entering or in the house in order to establish each charge of murder by way of s 302(1)(b). That does not mean that where there is evidence of intoxication, s 28(3) will always have application to a charge of murder brought under s 302(1)(b). For example, if the prosecution case under s 302(1)(b) was that death was caused by means of an act done in the prosecution of a rape, as intent is not an element of the offence of rape under s 349 *Criminal Code*, s 28(3) would have no application.

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24 [2002] QCA 206 ("*Georgiou*").
25 (1984) 12 A Crim R 299.
26 (1999) 104 A Crim R 238.
27 [52]-[56] (McPherson and Williams JJA and Atkinson J).
28 Above, [53].

[48] This view of the interaction between s 28(3) and s 302(1)(b) sits comfortably with the plain meaning of the terms of those subsections. It also sits comfortably with the terms of s 302 read as a whole. Certain specified intentions are expressly excluded in s 302(3) and (4). In the absence of clear words, there is no reason to conclude that a murder charge brought under s 302(1)(b) will never have a intention to cause a specific result as an element. Some support for this view is also found in Gibbs J's observations in *Viro v The Queen*.[29] *Viro* did not concern a felony murder under the *Criminal Code* but rather a felony murder under s 18(1)(a) *Crimes Act* 1900 (NSW). The prosecution case was that the Viro's acts which caused the death were done under s 18(1)(a) in an attempt to commit, or during or immediately after the commission of a crime punishable with life imprisonment (armed robbery). The prosecution did not have to establish an intent to kill or do grievous bodily harm under s 18(1)(a) but they did have to establish an intent to rob. It followed that Viro's use of heroin was relevant to his state of intoxication which in turn was relevant to whether the jury considered he formed the requisite intention to rob. If they were not so satisfied he could not be convicted of felony murder.

[49] In the present case, where burglary was the particularised unlawful purpose under s 302(1)(b), the judge erred in not directing the jury as to intoxication under s 28(3) when considering murder by way of s 302(1)(b). The judge was required to inform the jury that the appellant's intoxication may be regarded for the purpose of ascertaining whether he did an act causing each deceased's death whilst entering or inside the deceased's house with an intent to steal or sexually assault.

[50] The judge's omission to give this direction was an error of law. The appeal must be allowed unless, as the respondent contends, this Court is satisfied under s 668E(1A) *Criminal Code* that the appeal should be dismissed as the guilty verdicts do not amount to a substantial miscarriage of justice. Before discussing that issue, I will deal with the remaining grounds of appeal.

The admissibility of the evidence as to the attempted burglary of 51 Pelican Road

[51] The appellant contends the judge erred in allowing the Parters to give evidence of the incident at 51 Pelican Road late on 15 August. This evidence is summarised in [17]-[19] of these reasons.

[52] At the commencement of the trial, his Honour ordered that a charge of attempted burglary of 51 Pelican Road on 15 August 2009, would not be joined with the two murder charges. If the attempted burglary charge was joined with the murder charges, there was a risk that a properly instructed jury might consider the compelling DNA evidence, relevant only to the murder charges, admissible as proof of identity of the offender on the attempted burglary charge. The jury might not properly evaluate the evidence solely relating to the attempted burglary charge.[30] His Honour noted, however, that the issue of identification evidence tending to prove that the appellant was present in or around Pelican Road on or about 15 August 2009 was a different matter to the joinder question. The evidence of the attempted burglary was probative and admissible on the murder charges.

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29 (1978) 141 CLR 88, 106-113. Although *Viro* was not followed on the issue of self-defence by *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, the correctness of Gibbs J's comments on the relevance of intoxication to intent in felony murder were not questioned.

30 T 1-2–1-4.

[53] Later in the trial, the judge admitted the evidence of the attempted burglary as propensity evidence, noting that this was consistent with the principles outlined in *Pfennig v The Queen*.[31] His Honour recognised there were weaknesses in that evidence but considered that these were for a properly instructed jury to evaluate. For the purposes of determining its admissibility, the evidence should be looked at in the most favourable way a jury could construe it. His Honour concluded:

> "Viewed in the light of a prosecution case of felony murder, … assuming the evidence of Mr and Mrs Parter and the identification evidence [relating to the appellant], relied upon by the Crown, I can detect no reasonable explanation for the conduct of the [appellant] as the alleged intruder and burglar at 51 Pelican Road, other than the inculpation of the [appellant] in the offence of murder."[32]

[54] His Honour also declined to exclude the evidence in the exercise of his discretion, noting:

> "… The probative force of the evidence sought to be tendered by the prosecution transcends the potentially prejudicial effect to a fair trial. The jury can be instructed of the issues going to identification, of the limitations of that evidence, and the use that can be made of the evidence.
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> …
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> … and I have not … formed a view that a fair trial of the murder counts cannot occur if the evidence of the events at 51 Pelican Road is admitted into evidence. For these reasons, I rule that the evidence is admissible."[33]

[55] The appellant contends that his Honour's reasoning was circular and flawed. The DNA evidence established beyond doubt that the appellant was in the deceased's house. The sole issue at trial was his purpose there. The evidence relating to the attempted burglary could only inculpate him in the murders under s 302(1)(b) if the jury reasoned that the appellant burgled the deceased's house. The evidence inculpating the appellant in the attempted burglary could support an exculpatory inference, namely, that the appellant was so intoxicated that his behaviour outside 51 Pelican Road demonstrated his inability to form an intent to commit an indictable offence. The appellant contends that his Honour's impugned ruling was inconsistent with his earlier refusal to order that the charge of attempted burglary of 51 Pelican Road be joined with the murder charges.

[56] The evidence from the Parters was somewhat confusing. Their descriptions of the intruder did not closely match the description of the appellant. On its own it did not significantly bolster the prosecution case on the murder charges. But BR's recognition of the appellant as the person whom the Parters chased from their yard made it more persuasive. The Parters' evidence in combination with BR's evidence, with appropriate judicial warnings, was capable of being accepted by the jury as proof beyond reasonable doubt that, when disturbed in an attempted burglary of the

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31 (1995) 182 CLR 461.

32 T2-4.15-21 (AB 83).

33 T2-4.33-51 (AB 83).

neighbouring premises shortly before the deceased were killed, the appellant used violence towards a person whom he encountered. The judge fairly and comprehensively warned the jury of the weaknesses in BR's recognition evidence[34] and reminded them that they could only conclude that the appellant was the intruder at the Parters' house if satisfied of that fact beyond reasonable doubt. His Honour also warned the jury of the limited use to be made of the Parters' evidence and warned them against general propensity reasoning.[35] No complaint is made of the adequacy of those or, indeed, any other judicial directions.

[57] As the Parters' evidence in combination with BR's evidence was capable of being accepted by a jury beyond reasonable doubt as demonstrating that the intruder at the Parters' was the appellant, the Parters' evidence was relevant and admissible. It placed the appellant in the immediate vicinity of the killings at around the time the deceased were attacked. There was evidence that the appellant was highly intoxicated at this time. The Parters' evidence as to the intruder's agility and reactions were relevant to the issue of intoxication and whether the prosecution established the necessary elements of intent. The Parters' evidence, taken at its highest in combination with BR's evidence and the evidence of the appellant's DNA at the deceased's house, was also admissible to show that, shortly before the deceased were fatally assaulted in the course of a burglary, the appellant attempted to enter a neighbouring house and before fleeing the premises violently assaulted a female. The Parters' evidence was circumstantial evidence, which, depending on the jury view of it in combination with the rest of the evidence, was capable of showing the appellant killed both deceased. If the jury took that view, there was no reasonable explanation for the appellant's conduct at the Parters other than that he was also involved in the later killing of the deceased during a burglary. The judge's decision to admit the evidence was an unexceptional application of the well-established principles expounded by the High Court in *Pfennig* and more recently re-affirmed in *BBH v The Queen*.[36]

[58] The judge's earlier refusal to allow the attempted burglary charge to be joined with the murder charges was not inconsistent with his Honour's decision to allow this evidence to be admitted as propensity evidence. The earlier ruling was to ensure the jury did not wrongly convict the appellant of attempted burglary because of the strength of the DNA evidence against him on the murder counts. The fact that the evidence of the attempted burglary standing alone had considerable weaknesses did not mean the jury could not accept it beyond reasonable doubt when combined with other prosecution evidence. The impugned evidence was both relevant and admissible.

[59] This ground of appeal is not made out.

Unreasonable verdict

[60] The appellant contends that the jury verdict was unreasonable and not supported by the evidence. It was not open to the jury to be satisfied on the evidence beyond reasonable doubt of his guilt of the two offences of murder. There was ample evidence that others with significant criminal histories for burglary and violence were in the vicinity of the deceased's house on 15 August 2009. There were other

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34 T11-16–11-19.

35 T11-20–11-21.

36 (2012) 86 ALJR 357, [59], [61], [68]-[71], [106], [107], [130]-[134], [154]-[157], [172].

rational inferences open on the evidence which had not been excluded. The evidence leaves open the reasonable possibility that the appellant may have gone to the deceased's house after another person had committed the murders without any assistance from him.

[61] The determination of this ground of appeal requires this Court to review the whole of the admissible evidence at trial and determine whether it was open to the jury to convict the appellant on both counts: see *M v The Queen*[37] and *SKA v The Queen*.[38] I have summarised the evidence earlier in these reasons.

[62] Both Mr and Mrs Mabb died after being violently attacked sometime after 7.30 pm on Saturday, 15 August 2009. There was ample evidence that the appellant was in the vicinity at the time. It is true that others with significant criminal histories, including for violence, were also in the vicinity. No DNA, however, from any other suspect was found in the deceased's house. Evidence of third party confessions and rumours about them was liberally given at trial. In *Baker v The Queen*,[39] which was delivered after the trial in the present matter, the High Court unanimously held that third party confessions are not admissible as an exception to the hearsay rule, specifically disapproving *R v Zullo*,[40] *R v K; Ex parte Attorney-General (Qld)*[41] and *R v Martin*[42] insofar as they may be authority to the contrary. The evidence of the third party confessions was inadmissible and cannot be taken into account by this Court. Although the appellant's DNA was not positively found on the candle stick likely to have been used in the attack on Mrs Mabb, a DNA profile from which the appellant's DNA profile could not be excluded was found on it. The fact that his DNA and fingerprints were not found on suspected murder weapons did not mean he was not involved in the lethal assaults. The prosecution case was not that the appellant necessarily acted alone. His DNA on the clothes Mrs Mabb was wearing and Mrs Mabb's DNA in his bloodied palm print found on a power board in the deceased's house, closely linked him to the violent attack on Mrs Mabb. The appellant's DNA in the blood stain near Mr Mabb's head closely linked him to the violence perpetrated on Mr Mabb.

[63] There was ample evidence of the appellant's heavy intoxication at about the time of the killings. A jury, however, would be entitled to conclude that he formed a drunken intention to burgle the deceased's house in the course of which he assaulted each deceased in a way likely to endanger each of their lives. Such a conclusion would be consistent with the finding of his DNA on the handles, opening zipper and interior of Mrs Mabb's handbag and with the finding of his DNA on her skirt which had been raised, with the removal of her pants and with his DNA on her bra. It is also true, as the appellant contends, that no blood was found on either the appellant or his clothes when he was apprehended several days after the killing and that the evidence suggests he was then wearing the same clothes he wore on the preceding Saturday and Sunday. But it is likely the frail and elderly deceased were easily overpowered. The prosecution did not have to establish that no one else was involved. More significantly, the crime scene was not so covered in blood and the violence done there of such magnitude that it was inevitable the killer would

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37 (1994) 181 CLR 487, 493-495.
38 (2011) 243 CLR 400, [11]-[12].
39 (2012) 86 ALJR 906, [51]-[60].
40 [1993] 2 Qd R 572.
41 (2002) 132 A Crim R 108.
42 (2002) 134 A Crim R 568.

have had blood on him and his clothes. In any case, the appellant's DNA was located in blood stains at the crime scene closely linked to both deceased.

[64] The jury were entitled to reject the hypothesis beyond reasonable doubt that the appellant was so intoxicated that he did not form an intention to burgle the deceased's house. In the absence of any competing evidence, the jury were also entitled to reject the hypothesis beyond reasonable doubt that the appellant entered the house only after someone else had fatally assaulted each deceased and that only then did he leave behind extensive amounts of his DNA, including in blood stains at the crime scene. The jury were therefore entitled to conclude beyond reasonable doubt that the appellant fatally assaulted each deceased after entering their house with an intention to burgle; that the assaults were of such a nature as to be likely to endanger human life; and that he was therefore guilty of murder under s 302(1)(b).

[65] It follows that this ground of appeal is not made out.

Section 668E(1A) *Criminal Code*

[66] The appellant has successfully established an error of law in relation to the trial judge's directions on intoxication. The appeal must be allowed and a retrial ordered unless, under s 668E(1A) *Criminal Code*, this Court considers that no substantial miscarriage of justice has actually occurred. The respondent contends that this is a suitable case in which to apply the proviso in s 668E(1A). Accordingly, this Court must review all the admissible evidence and determine whether, making due allowance for the natural limitations arising from proceeding wholly on the appeal record, it is satisfied beyond reasonable doubt of the appellant's guilt on each count. The question is not whether, because of the error of law, the jury may have taken a wrong path to convict the appellant: see *Weiss v The Queen*.[43]

[67] In rejecting the unreasonable verdict contention, I have summarised my view of the evidence at trial and I will not repeat it. The presence of the appellant's DNA closely linked him to the violence perpetrated against both deceased. The only rational inference from the evidence was that the appellant entered and was in the deceased's house with an intention to at least steal. Whilst he was plainly intoxicated, I am satisfied beyond reasonable doubt that he was not so intoxicated that he did not form an intent to burgle the deceased's house in order to at least steal. It is true that others with extensive criminal histories for burglary and violence were also in the vicinity that night but, unlike in the appellant's case, there is no DNA evidence whatsoever linking them to the crime scene or to the violence perpetrated on the deceased. In the absence of any competing evidence, I am satisfied beyond reasonable doubt that the appellant did not enter the deceased's house after someone else had killed them without assistance from him. I am satisfied beyond reasonable doubt that the appellant assaulted each deceased whilst overcoming their resistance after entering their house in the course of a burglary; that the assaults were of such a nature as to be likely to endanger human life; and that he was therefore guilty of murder under s 302(1)(b). It follows that, under s 668E(1A), I have concluded that the guilty verdicts of murder have not resulted in a substantial miscarriage of justice, despite the judge's omission to direct the jury as to the relevance of intoxication to the prosecution case of murder under s 302(1)(b). The appeal against the convictions for murder should be dismissed.

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43 (2005) 224 CLR 300, [41], [44].

ORDER:

Appeal against convictions dismissed.

[68] **HOLMES JA:** I have had the advantage of reading the reasons for judgment of the President and Henry J. I agree with the President, for the reasons she has given, that the jury should have been directed on intoxication in connection with the offence of burglary, relevant as it was to the Crown case of felony murder under s 302(1)(b) of the *Criminal Code*. However, like the President and Henry J, after a review of the evidence, I have come to the conclusion that no substantial miscarriage of justice has resulted and that this court should exercise its power under s 668E(1A) to dismiss the appeal.

[69] Like their Honours, I have reached the view, after a review of the record, that the evidence at trial proved the appellant's guilt of murder of Mr and Mrs Mabb. In particular, the evidence that the appellant had left his DNA on Mrs Mabb's handbag, including an inside compartment, indicating that he had rifled through it, points to a directed and deliberate course of conduct; which in my view rules out intoxication to such an extent that he could not form the necessary intent for burglary or, indeed, murder. The evidence outlined by the President overwhelmingly inculpated the appellant as the perpetrator of the assaults on both the deceased. As Henry J pointed out, the extent of those assaults was consistent only with an intention to do at least grievous bodily harm.

[70] I am satisfied, beyond reasonable doubt, that the appellant is guilty of murder, both as intending to do at least grievous bodily harm to both the deceased and as having carried out the lethal assaults in the prosecution of an unlawful purpose. I agree that the appeal against conviction should be dismissed.

[71] **HENRY J:** I have read and agree with the reasons of the President.

[72] The learned trial judge, consistently with the position taken by both counsel at trial, did not direct the jury that intoxication was relevant to the case of murder under s 302(1)(b) of the *Criminal Code*. This was an error because the unlawful purpose the prosecution elected to rely upon involved an element of intention and the jury were therefore entitled pursuant to s 28 of the *Criminal Code* to have regard to the appellant's intoxication in determining whether the intention critical to proof of the unlawful purpose in fact existed. It is therefore necessary to consider whether no substantial miscarriage of justice has actually occurred.

[73] I have reviewed the whole of the trial record including the exhibits to make my own assessment of that evidence. The strength of the prosecution case is readily apparent from the President's review of the evidence. The circumstantial evidence inculpating the appellant as the killer, particularly the DNA evidence, was overwhelming. While there was undoubtedly evidence of the appellant's intoxication the evidence also conveyed the presence of obviously purposeful conduct. This included multiple applications of blunt force trauma to the heads of both deceased as well as trauma to the chest of the female deceased sufficient to dissect her coronary artery. The degree of force used bespoke an intention to at least do grievous bodily harm. Moreover this was not a case of some apparently spontaneous, drunken, unthinking behaviour. It occurred in the context of the appellant having broken into the Mabbs' home during the night and also having

attempted to break into a neighbouring house and assaulting a female there. I am satisfied beyond reasonable doubt that when entering and while in the Mabbs' house the appellant intended to steal and that his fatal assaults upon the Mabbs were committed in the prosecution of the unlawful purpose of burglary as alleged. I am also satisfied beyond reasonable doubt that in perpetrating those assaults the appellant intended to do grievous bodily harm to the Mabbs. The appellant was proved beyond reasonable doubt to be guilty of murder pursuant to both s 302(1)(a) and (b) of the *Criminal Code*.

[74] I agree with the order proposed by the President.