

SUPREME COURT OF QUEENSLAND

CITATION: *R v Hill; R v Young* [2014] QCA 107

PARTIES: **R**
v
HILL, Bradley David
(appellant)

R
v
YOUNG, Kerryn Anne
(appellant)

FILE NO/S: CA No 154 of 2013
CA No 152 of 2013
SC No 6 of 2013

DIVISION: Court of Appeal

PROCEEDING: Appeals against Conviction

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 16 May 2014

DELIVERED AT: Brisbane

HEARING DATE: 20 February 2014

JUDGES: Chief Justice and Fraser and Morrison JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Leave be granted to Hill to adduce the further evidence.**
2. Hill's appeal be dismissed.
3. Young's appeal be dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –
VERDICT UNREASONABLE OR INSUPPORTABLE
HAVING REGARD TO EVIDENCE – APPEAL DISMISSED
– where the appellant Young and the appellant Hill were in
a relationship – where Hill and the deceased used to be good
friends but had fallen out – where Young found out that Hill
was sleeping with another woman – where on Friday
8 October 2010 Hill was in Brisbane and Young and the
deceased were in Gladstone – where on the evening of Friday
8 October and the morning of Saturday 9 October Young and
the deceased communicated to Hill via text messages and
phone calls that they were sleeping together – where in
response Hill made death threats via text messages and phone
calls against the deceased – where on Saturday 9 October Hill
travelled to Gladstone allegedly acquiring heroin en route –
where on Saturday 9 October Young and Hill reconciled –

where on the evening of Saturday 9 October Young and the deceased arranged for the former to deliver the latter a syringe containing a pre-mixed drug – where on the evening of Saturday 9 October or the morning of Sunday 10 October Hill arranged for Weston to place an envelope in the deceased’s letterbox – where on Sunday 10 October the deceased injected himself with a syringe containing a pre-mixed drug and died – where medical evidence determined that the deceased died from an overdose of heroin – where there was evidence that the deceased used amphetamines but not heroin – where Hill was convicted after trial of the murder of the deceased – where Hill contends that the verdict is unreasonable and cannot be supported having regard to the evidence – where *inter alia* Hill contends that Hill’s hostility toward the deceased did not continue after he arrived in Gladstone and the deceased injected the drugs on a voluntary and informed basis – whether the verdict against Hill is unreasonable and insupportable

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where Young was convicted after trial of the murder of the deceased pursuant to s 7 of the *Criminal Code* – where Young contends that the verdict is unreasonable and cannot be supported having regard to the evidence – where Young contends that the lethal dose of heroin did not come from the envelope Hill had placed in the deceased’s letterbox – where Young contends that Hill was not with her for all of her text message communications with the deceased on Saturday 9 October – where Young contends that the deceased did not take Hill’s threats seriously – where Young contends that she did not have actual knowledge that Hill had an intention to kill or do grievous bodily harm to the deceased – where Young contends there is insufficient evidence to conclude that she aided Hill to supply heroin to the deceased – whether the verdict against Young is unreasonable and insupportable

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where Hill contends that there was a miscarriage of justice in that a contradictory statement by McNeil, relevant to the reliability of that witness as to the deceased’s knowledge of the drug supplied to him, was not before the jury – where that contrary statement was available to Hill’s representatives at trial – where Hill contends that McNeil should have been cross-examined on the disparity of the statements – where Hill applied for leave to adduce that evidence before this Court – whether this resulted in an unfair trial and deprived Hill of a fair chance of acquittal – whether leave to adduce the evidence should be given

CRIMINAL LAW – APPEAL AND NEW TRIAL –

MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where Hill contends that inadmissible evidence of an accusation that Hill improperly interfered with children, and that Hill was a drug dealer, was before the jury, and the prejudice thereby occasioned could not be cured by direction – where the witness Hardwick gave evidence that the deceased and Young had taunted Hill about “doing things to children” – where the learned trial judge dealt with this evidence in summing up – where a witness referred to Hill as a drug dealer – where Hill and many of the witnesses were at the time of the deceased’s death part of the Gladstone drug scene – whether either reference caused any prejudice to the deceased – whether the reference to Hill “doing things to children” could be cured by directions – whether the jury should have been discharged

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where on Sunday 10 October after learning of the deceased’s death Hill told Watson to “shut your mouth” – where Hill contends there was a miscarriage of justice in that the jury were wrongly directed that post-offence conduct by Hill was capable of amounting to evidence of consciousness of guilt of murder – whether this evidence was capable of demonstrating a consciousness of guilt

Chamberlain v The Queen (No 2) (1984) 153 CLR 521; [1984] HCA 7, considered

Flora v The Queen [2013] VSCA 192, cited

Hayes v The Queen (1973) 47 ALJR 603, considered

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered

R v Ciantar (2006) 16 VR 26; [2006] VSCA 263, cited

R v Ferguson (2009) 24 VR 531; [2009] VSCA 198, cited

R v Grills (1910) 11 CLR 400; [1910] HCA 68, considered

R v Martindale [\[2009\] QCA 24](#), cited

R v Taylor (2004) 8 VR 213; [2004] VSCA 98, cited

R v Williams [1987] 2 Qd R 777, cited

SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, considered

Woon v The Queen (1964) 109 CLR 529; [1964] HCA 23, cited

COUNSEL: C W Heaton QC, with K Prskalo, for the appellant, Hill
C Chowdury for the appellant, Young
B J Merrin for the respondent

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

- [1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Morrison JA. I agree that the appeals should be dismissed for those reasons. (I also agree with His Honour's order as to further evidence.)
- [2] The prosecution case was factually complex, and a lot depended on the meaning of the text messages and the inferences to be drawn from them. I am grateful to Morrison JA for his detailed analysis of the evidence.
- [3] That analysis powerfully demonstrates the deference which should in this particular case be accorded the jury's determination.
- [4] This jury's advantage, having heard and seen the evidence, should not lightly be gainsaid.
- [5] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Morrison JA. I agree with those reasons and with the orders proposed by his Honour, and I also agree with the additional observations made by the Chief Justice.
- [6] **MORRISON JA:** On 4 June 2013 each of the appellants ("**Hill**" and "**Young**") were convicted after a trial on one count of murder. The alleged offence took place on or about 10 October 2010 at Gladstone. The essential nature of the case was that Hill delivered a lethal dose of heroin to the deceased, with the aid of Young. Young was contended to have actual knowledge that Hill intended to cause the deceased's death, or cause grievous bodily harm.¹ The deceased independently injected the drug and died shortly afterwards. The Crown case was that the deceased thought he was taking amphetamines,² when in reality the syringe he was using contained heroin.

Grounds of appeal

- [7] The main ground of appeal argued by Young³ was that the verdict was unreasonable, cannot be supported by the evidence, and is thus unsafe and unsatisfactory.⁴
- [8] Hill's grounds of appeal are:⁵
- (1) that the verdict is unreasonable and cannot be supported having regard to the evidence;⁶
 - (2) there was miscarriage of justice in that a contradictory statement by Alicia McNeil ("**McNeil**")⁷, relevant to the reliability of that witness as to the deceased's knowledge of the drug supplied to him, was not before the jury;⁸
 - (3) there was a miscarriage of justice in that inadmissible evidence of an accusation that the appellant improperly interfered with children, and that the appellant was a drug dealer, was before the jury, and the prejudice thereby occasioned could not be cured by direction;⁹

¹ *Criminal Code*, ss 7, 300 and 302.

² See The Merck Index Online. Amphetamines.

³ Young's Submissions, filed 3 February 2014, at paras 5.18 and 5.20; AB 523.

⁴ A second formal ground was that the learned trial Judge erred in holding that there was a prima facie case. However it was accepted that this was subsumed in the main ground.

⁵ Hill's Submissions, filed 28 January 2014, at para 2.

⁶ See paragraphs [9] to [88].

⁷ Only those witnesses whose first names will appear in relevant parts of the evidence, or who feature frequently, will be identified this way.

⁸ See paragraphs [145] to [156].

⁹ See paragraphs [157] to [176].

- (4) there was a miscarriage of justice in that the jury were directed, wrongly, that post-offence conduct by the appellant was capable of amounting to evidence of consciousness of guilt of murder.¹⁰

Young’s Ground of Appeal & Hill’s First Ground of Appeal – Verdict unreasonable

- [9] Each of Hill and Young contend that the verdict against them is unreasonable and cannot be supported having regard to the evidence. There are common elements to the appeals, and separate aspects as well. It will be convenient to deal with them together, but highlighting the different arguments where necessary.
- [10] Any analysis of this ground of appeal must be carried out with the statement by the High Court in *M v The Queen*¹¹ in mind:

“In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.”¹²

- [11] The reference to the advantages enjoyed by the jury refers to the position of the jury as the body entrusted with the primary responsibility of determining guilt or innocence. In *M v The Queen* the Court stated:

“... the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.”¹³

¹⁰ See paragraphs [177] to [193].

¹¹ *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63.

¹² *M v The Queen*, at 494-495 (internal references omitted); *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, at 405-406.

¹³ *M v The Queen*, at 493 (internal references omitted); *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521; [1984] HCA 7, at 621.

- [12] In *Chamberlain* the necessity for an appellate court to pay “full regard” to the consideration that the jury has had the benefit of having seen and heard the witnesses was referred to by Deane J.¹⁴ His Honour went on:

“On all but “rare occasions” (see per Street C.J., *Smith*¹⁵), those considerations will make it impossible for an appellate court to conclude that the verdict of a jury that the guilt of an accused has been proved beyond reasonable doubt is unsafe or unsatisfactory.”¹⁶

- [13] The “rare occasions” referred to by Street CJ is a reference to what was said by Barwick CJ¹⁷ in *Hayes v The Queen*:¹⁸

“Consequently, I have come to the conclusion that it would not be dangerous in the administration of justice to allow the jury’s verdict to stand. In considering the matter, I have not taken the view that, so long as there is some evidence on which reasonable jurymen might be entitled to convict, there is no responsibility in a Court of Criminal Appeal in any case to consider whether [nonetheless] it would be dangerous in all the circumstances to allow the verdict of guilty to stand. I agree with what was said in the joint judgment of Dixon C.J., Fullagar J. and Taylor J. in *Raspor v. The Queen*¹⁹, and what was said by Sir Owen Dixon in *Plomp v. The Queen*²⁰. These expressions of opinion were made in relation to courts of criminal appeal constituted under statutory provisions containing the formula ‘if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence’. In exercising its powers under such a formula, the court of criminal appeal must, of course, act on that view of the facts which in its opinion the jury were entitled to take, having seen and heard the witnesses. ...

Occasions when a verdict can be set aside upon such considerations as I have mentioned will no doubt be relatively rare. But, in my opinion, the court of criminal appeal under the formula in the Criminal Appeals Acts or provisions obtaining in Australia has the responsibility to which I have referred, taking the facts to be as the jury were entitled to accept them, that is to say, of satisfying itself on the facts as so found that in the administration of justice in criminal matters it would not be dangerous to allow the verdict to stand.”

- [14] The test in *M v The Queen* was adopted in *Jones v The Queen*.²¹ Having referred to the test the Court went on to say:

“The majority emphasised, however, that it was not the function of the court to answer that question merely by examining the transcript of evidence and the exhibits. Their Honours said that:

¹⁴ *Chamberlain* at 621, citing *R v Coolwell* [1982] 7 A Crim R 368, at 375 per Campbell CJ and Matthews J.
¹⁵ *R v Smith* [1979] 2 NSWLR, at p. 310.

¹⁶ *Chamberlain* at 621.

¹⁷ The balance of the Court concurring.

¹⁸ *Hayes v The Queen* (1973) 47 ALJR 603, at 604-605.

¹⁹ (1958) 99 CLR 346, at pp. 350-352.

²⁰ (1963) 110 CLR 234, at p. 244.

²¹ *Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 56, at 450-451 per Gaudron, McHugh and Gummow JJ.

“in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.”²²

General synopsis

- [15] It will assist in consideration of this and other issues if a general synopsis of the case is understood.
- [16] The deceased²³, Hill²⁴ and Young²⁵ were all known to each other. Hill and the deceased had been friends for some time, including living in the same premises. Shortly before the events the subject of this appeal there had been a falling out. The falling out had several aspects to it:
- (a) the deceased and Darlene McClure (“**McClure**”) had known each other for many years (since McClure was about 13 years old) and had been friends; they had since fallen out and the relationship was acrimonious;
 - (b) McClure and Hill entered into a sexual relationship; McClure had known Hill for some years;
 - (c) Hill was also in a relationship with Young;
 - (d) Young was upset because Hill was having a relationship with McClure;
 - (e) McClure and the deceased had fallen out, as a result of which there was a deal of animosity from McClure, directed at the deceased and Young;²⁶
 - (f) the deceased and Young went out drinking on Friday 8 October, during which time they rang or sent texts²⁷ to Hill, pretending that they were in a relationship and sleeping together; and
 - (g) Hill was upset at what the deceased and Young had been alleging they had done, seeking to know from various contacts whether it was true, and making threats against both Hill and Young.
- [17] On Friday 8 October, Hill was in Brisbane. So was Leigh Vanbreeman (“**Vanbreeman**”). That night was when the deceased and Young sent messages to Hill pretending that they were in a relationship and sleeping together. Hill decided to return to Gladstone, which he did in the company of Vanbreeman, Naomi Phillip (“**Phillip**”), and Ian Robinson (“**Robinson**”).²⁸ The evidence is that they drove in convoy; Hill travelled with Vanbreeman, him driving her car, while Phillip and Robinson were travelling together in another car.

²² Jones at 451, quoting from *M v The Queen* at 493.

²³ Usually referred to in evidence by his first name, Luke.

²⁴ Usually referred to in evidence as Brad, or Hilly.

²⁵ Usually referred to in evidence as Kerry.

²⁶ See AB 74 and 85. McClure was angry with the deceased because she believed he had told Young about her (McClure’s) relationship with Hill.

²⁷ The words “SMS”, “text”, “message” and “text message” will be used interchangeably to refer to text messages sent from one mobile phone to another.

²⁸ Where it is necessary to refer to Robinson’s father I will refer to him as Shane Robinson.

- [18] During the course of the evening of 8 October, Hill made a number of threats directed at the deceased and Young. Some of the threats were by calls to various of the witnesses, and others were by text to the deceased and to McClure. The threats were that he would kill the deceased, and Young as well.
- [19] Hill arrived in Gladstone and checked into the Amber Lodge Motel (“**the motel**”). That was at about 6.30 am on 9 October. Hill contacted Thorgood who collected Hill at about 9.00 am and took him to buy drugs. At about this time Hill was arguing with Young on the telephone.
- [20] On the morning of 9 October Young (who was at Malcolm’s house) went to see Hill at the motel. She was taken there by Thorgood, who had been asked (by Hill) to collect her.
- [21] When they arrived at the motel, Hill asked Thorgood if he wanted any amphetamines. He accepted some, which he ingested by eating. Malcolm rang Young a few times to make sure she was okay and safe, having been concerned for her safety at the time she agreed to go and see Hill. Young said she was safe and that she was in a motel with Hill.
- [22] Later in the afternoon of Saturday 9 October, Young returned to Malcolm’s house, where they sat on the verandah drinking alcohol. Malcolm asked Young how things were with Hill, and the answer was that they had all calmed down and “it’s good now”.²⁹ Some time at about 6.00 pm to 6.30 pm on 9 October, Irwin arrived at Malcolm’s house. Malcolm asked him to take her to the shop, and Young asked for a lift. Young was taken to Ann Street, the next street over from the motel. At that point, from what was said by Young to Irwin, Young was looking forward to getting some amphetamines.
- [23] Some time between 8.00 pm and 8.30 pm on Saturday 9 October, Young called Malcolm to ask if they could borrow her car. Malcolm refused. Malcolm sent a text back to Young saying that they could not borrow the car, but that “If he³⁰ wants my car then pay me the \$300 they owe me for that weed & 2p & I’ll drop it off”.³¹ The reference to “2p” meant two points of amphetamines. That text was sent to Young, but it was Hill who replied (about 14 minutes later) from his own phone.³²
- [24] There was a series of texts between Hill, Young and the deceased, tendered as an exhibit. Because they will be referred to frequently the contents of the relevant texts are set out below:
- (a) between 9.00 pm and 9.11 pm the deceased and Young exchanged texts asking where the other was and what they were doing;³³
 - (b) at 9.13 pm Young texted the deceased saying that she had “Got on got a room”;³⁴ the phrase “got on” was accepted on the appeal as meaning that she had obtained drugs;
 - (c) when the deceased responded “True u and billy”,³⁵ Young replied “Just me and my gear”;³⁶

29

AB 75.

30

Referring to Hill.

31

AB 490.

32

AB 492.

33

AB 492-493.

34

AB 494.

35

Which was accepted as a reference to Hill.

36

AB 494.

- (d) Young then asked the deceased “Want to get fried with me”, and when the deceased asked where she was, Young replied: “In a room fried up you comin to be my fried friend only my friend”;³⁷
- (e) the deceased’s response at 9.54 pm was “Is this set ups”,³⁸ to which Young replied “What do you think I want to be knocked as well”;³⁹
- (f) at 10.13 pm Young asked the deceased what movies he was watching, and the deceased responded at 10.33 pm: “Iron man 2. weres billy”;⁴⁰
- (g) Young responded at 10.35 pm: “Fucks me why that”;⁴¹
- (h) at 10.39 pm the deceased called Young, leaving a message asking why she was not answering;⁴²
- (i) Young did not respond until 11.08 pm when she said: “Sorry Trippin out a bit what you doin”;⁴³
- (j) at 11.12 pm Young asked the deceased: “Are you comin I need company”, to which the deceased responded two minutes later: “Nar sorry Kizza”;⁴⁴
- (k) at 11.15 pm Young asked the deceased “Why you sleeping or got better offer”, to which the deceased responded nine minutes later with: “Yer Im gunna b. You catch a cab come chill with me for a bit. Rattal me up”;⁴⁵
- (l) at 11.26 pm Young asked where the deceased was, and he responded that he was going to be at his mother’s place soon but it was “cool for ya to come around. I’ll pay for ya cab”;⁴⁶
- (m) at 11.30 pm Young texted that the deceased’s parents’ place was “Not real private for when we get rattled up and freaky”;⁴⁷ and then she asked “What about where you are”;
- (n) at 11.32 pm the deceased told Young that he was leaving his friend’s place and going to sleep, and then at 11.40 pm he texted: “Yer well. Might just leave it then hey. Tex me if u wana come shout me a shot. X”;⁴⁸
- (o) at 11.46 pm Young responded: “Well that knock back really made my day cheers fuck I have really lost the know how”;⁴⁹

³⁷ AB 495.

³⁸ AB 495.

³⁹ AB 496.

⁴⁰ AB 496; the reference to ‘weres billy’ was accepted as meaning where was Hill.

⁴¹ AB 497.

⁴² AB 497.

⁴³ AB 498.

⁴⁴ AB 499. The terms “rattal”, “rattled up” and “rattling” were accepted as meaning to take drugs.

⁴⁵ AB 499.

⁴⁶ AB 499.

⁴⁷ AB 500.

⁴⁸ AB 501.

⁴⁹ AB 501.

- (p) at 11.55 pm Young texted the deceased saying “Ill still drop you a shot if you want I wouldn’t feel comfortable rattling at your mums”; and then asked one minute later, “Have you got any clean ones”;⁵⁰
- (q) at 11.57 pm the deceased texted: “Yer I can understand that. Yer if ya want ill pay for ya to get here and back” and then responded that he did not have any clean ones⁵¹ but suggested she go to the hospital;⁵²
- (r) two minutes later, now after midnight, the deceased texted Young: “Whats happen” and she replied a few seconds later: “Do you mind if I mix it, I don’t have scales”, to which the deceased replied “What ever”;⁵³
- (s) a few seconds later the deceased asked Young: “When u coming”, to which the response was almost immediately: “Just trying to get myself together”;⁵⁴
- (t) the deceased’s response at 12.28 am was: “Ok. Well tex me when u on ya way”, and Young agreed.⁵⁵

[25] The sequence of texts can be interrupted at that point to introduce events established by oral evidence.

[26] The deceased told Malcolm that Young had rung him or texted him, saying “she was in a motel room and could he go and see her”.⁵⁶ According to Malcolm, as relayed by the deceased, Young would not give the name of the motel but offered that if the deceased wanted to go, she would send a taxi to pick him up.⁵⁷

[27] At about 11.30 pm Weston was asked by Hill to buy some clean syringes, which he did.⁵⁸ When he got the syringes back to the motel room, Hill and Young were present together. Hill mixed up a mixture of drugs, apportioning it into three syringes.⁵⁹ He gave Weston one, who used it to inject himself, one to Young and kept one for himself. Weston recalled there having been five syringes in the packet. There is no mention of what became of the other two syringes. When Weston injected himself, he understood it to be amphetamines and the effect on him confirmed that. Weston then went outside to the car, preparatory to driving Hill to the power house.⁶⁰ Hill remained inside, with Young, packing up. Hill followed a short time later.

[28] On the way to the power house Hill asked Weston to divert so that something could be dropped off.⁶¹ Hill gave a series of directions to Weston which resulted in them

⁵⁰ AB 501.

⁵¹ A reference to syringes.

⁵² AB 502.

⁵³ AB 502.

⁵⁴ AB 503.

⁵⁵ AB 503.

⁵⁶ AB 70.

⁵⁷ AB 71.

⁵⁸ AB 26.

⁵⁹ AB 27.

⁶⁰ AB 28. The prosecutor clarified with the Weston that this was “an actual power station”. The words “power house” and “power station” will be used interchangeably to refer to this landmark.

⁶¹ AB 28.

pulling up next to a low set brick house with a letterbox close to the gutter.⁶² This was the house where the deceased was living. When they had pulled up Hill threw an envelope onto Weston's lap and asked him to put it in the letterbox. He did so, after which they drove on towards the power house.⁶³

[29] The text sequence resumes:

- (a) at 12.41 am Young texted the deceased: "Pretty smashed after that me mate goin to drop it off now for I can't move he's in blue magen on way now";⁶⁴
- (b) from that point, at 12.41 am, there was a series of 10 calls by the deceased to Young's phone which were missed calls, and three texts, all trying to get an answer from her; during that time Hill also made two calls to Young, which were both missed calls; at the same time as Young was missing the deceased's phone calls, Hill texted Young, at 12.51 am, asking: "Is this going in letter box";⁶⁵ to which Young responded "Yes"; then Hill texted Young to say "Done", and Young responded "Sweet";⁶⁶
- (c) then at 12.56 am Young texted the deceased saying "In your letter box sorry cant move".⁶⁷

[30] On the way to the power house Weston was contacted by Robinson, who was in a car behind him.⁶⁸ They both pulled over and Hill switched cars, following which Weston drove back to Shane Robinson's house.

[31] Some time at about 1.00 am or shortly afterwards the deceased injected himself with a syringe that contained a heroin based mixture. The consequence was that he died.

[32] At about daylight on Sunday 10 October Robinson, Phillip, Hill and Young arrived at Shane Robinson's house, where Weston was staying.⁶⁹ Hill said he needed to talk to Weston, and took him down to Shane Robinson's bedroom. Once in the bedroom Hill said to Weston that: "our mate that we dropped that thing off to last night's dead. This is the first one I've had anything to do with it and you need to shut your mouth".⁷⁰

Hill's First Ground of Appeal – Contention (a): Hill's hostility towards deceased did not continue

[33] One of the main points raised by Hill was that there was no acceptable basis for the jury to conclude that the hostility evidenced by Hill towards the deceased, in his threats and texts, continued after he arrived in Gladstone. Central to that contention was the fact that the threats ceased once Hill arrived in Gladstone, and Hill reconciled with Young, who had also been the subject of the threats.

⁶² AB 28, 33. Bailey gave evidence that the house had two letterboxes, one right next to the gutter: AB 301.

⁶³ AB 29.

⁶⁴ AB 503. The word "magen" was a typographical error for Magna.

⁶⁵ AB 506.

⁶⁶ AB 507.

⁶⁷ AB 507.

⁶⁸ AB 29.

⁶⁹ AB 30.

⁷⁰ AB 65.

[34] It is necessary to examine the conduct of Hill in some detail. Relevantly it commences with the events on Friday 8 October, when the deceased and Young went out for drinks in Gladstone. During that time they made phone calls to Hill, saying that they were out together and were sleeping together. When Young and the deceased arrived back at Malcolm's house they told Malcolm about the calls to Hill, and that they were "shit stirring him".⁷¹ They said that they had told Hill that they were sleeping together, and they were together, and that Hill was not happy about it. The deceased and Young talked about the texts that he had sent them, and told Malcolm that Hill had said "Youse can all get fucked".⁷² According to Malcolm, the reason that Hill was not happy about it was "Kerryn was his supposedly missus and Luke was his mate".⁷³

[35] The test messages reveal the correspondence between Hill, the deceased and Young:

Friday 8 October		
7.29 pm	Deceased to Hill	Sorry, I'll call u back in 10 I'm in meeting
7.42 pm	Hill to deceased	I let u go once lets see who talks shit I just killed goose your next ⁷⁴
7.46 pm	Deceased to Hill	Man get off the shit and worry about ya let. U fucked me over enuf. I have no ideas what u r on about. Chill out she's not ya girl so what r u on about. Its not the first time
7.48 pm	Hill to deceased	Missed Call.
8.58 pm	Hill to deceased	Missed Call.
9.17 pm	Deceased to Hill	Go away
9.18 pm	Hill to deceased	Never by Im going to hurt u and anyone dear to u tel that to the police
9.24 pm	Deceased to Hill	What ever
9.44 pm	Hill to deceased	Nothing bar dying myself is gona get me out of the mind state I'm in I'm going to kill u luke
9.49 pm	Hill to McClure	Darlene nothn matters any more im going to shoot luke
Saturday 9 October		
3.25 am	Hill to deceased	U have pushed me too far this time I no longr care about anything I wil kil Luke and u 2 if your with him u 2 laughin at me and how u got me then rub it in my face because u think I can't do anything about cause Im disabled im gona show u how wrong

⁷¹ AB 30.

⁷² AB 30.

⁷³ AB 30.

⁷⁴ The reference to "Goose" was to a dog jointly owned by either Hill and Young (AB 246), or by Hill and the deceased (AB 82, 116 and 244).

		u are u 2 took everything from me while I lay in hospital fuckn each other the whole time I have nothing. I swear to whoever you see as god I'm going to kil luke and if the police don't have me I'm going to kill u. U think hiding behind brent wil save u u don't know me at allo. I have so much hate in my heart right now I will shoot straight into that house kids or no kids. I'm not letn this one go I wil die first I have my gun and unlike u il use it and this time I won't miss ⁷⁵
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- [36] By about 6.30 am on 9 October Hill had arrived in Gladstone, and checked into the motel.⁷⁶ After that there was no direct contact between Hill and the deceased.
- [37] The oral testimony of various witnesses also referred to the threats by Hill. On a number of occasions it was a case of the relevant witness relating what the deceased had told them about Hill and what they had told him. However, some were direct. Thus:

Saturday 2 October		
	Hardwick	She gave evidence that Young was staying at her house in the week leading to 9 October, ⁷⁷ and during that week Young revealed that she had been receiving texts from Hill making threats. One threat was that he was going to kill the dog, and another that Young and the deceased were considered by Hill to be “lying, thieving bastards”, and Hill “would come and kill her and Luke, yeah.” ⁷⁸
Friday 8 October		
8.00/9.00 pm	Fryburgan	The deceased telephoned Fryburgan saying that he was going out nightclubbing with Young, and that Hill had called “and told him that he was dead ... Because he was going out [with] Kerry”. ⁷⁹
10.30 pm	Cherie Malcolm (“ Malcolm ”)	Young and the deceased said they had made phone calls to Hill and were “shit stirring him”. They said they had told him they were sleeping together and they were together. Hill “wasn’t happy”. They

⁷⁵ There are several different ways to view this text. On its face, it was obviously intended for Young. However, it was not sent to her, but twice to the deceased, 24 seconds apart. It may be that Hill entered the wrong number by mistake. Alternatively he may have wanted the deceased to think Young had received it. Then again, he may have intended that the deceased would tell Young about it rather than threaten her directly.

⁷⁶ Elmer, AB 93-94.

⁷⁷ AB 240.

⁷⁸ AB 246.

⁷⁹ AB 59. The reference to “Kerry” is to Young.

		told her that Hill had sent a text saying “Youse can all get fucked”, and that Hill just wanted to know what was going on with them sleeping together. Later in the evening Malcolm spoke to Hill, telling him that what Young and the deceased had said was not true, and they were just playing games. Hill “was wild, he was angry”. ⁸⁰ Hill said “they can get fucked and he’ll come and see them in the morning”. ⁸¹ Hill told Malcolm “If these two fuckers think they’re going to do this shit to me and then wake up tomorrow with no piss in them, they’ve got another thing coming.” ⁸² Hill said that he was coming up that night, that “we could get fucked and he was going to kill everybody”. ⁸³ During this time, Malcolm heard the deceased tell Hill that he [the deceased] “was at my place and to come get him”. ⁸⁴
Midnight	The deceased’s mother	The deceased told her that he and Young had been texting Hill, and stirring him up, and that Hill was making threats to the deceased. The threats were that Hill “was on his way from Brisbane and he was going to do this and do that” – she could not remember the details. ⁸⁵
Friday night/ Saturday morning	McClure	Hill told her that he was going to kill the deceased. He was angry and he was going to shoot him. ⁸⁶
Saturday 9 October		
1.30 am	Malcolm	Hill called Malcolm and by his tone of voice he was a little bit angry. ⁸⁷ He wanted to know who was at Malcolm’s place, in particular if the deceased was still there.
9.30 am	Malcolm	She overheard Young and Hill arguing on the phone. ⁸⁸ At one point Young said: “If you think I’m fucking that stupid, Brad, that I’m going to get in a car with you and your mates for you to give me a hot shot, then you’re fucking kidding yourself”. ⁸⁹
Lunchtime	Malcolm	Young said she was going to see Hill at a motel. Malcolm feared for her safety and rang her a few

⁸⁰ AB 65.

⁸¹ AB 65.

⁸² AB 66.

⁸³ AB 66.

⁸⁴ AB 66, 74.

⁸⁵ AB 164.

⁸⁶ AB 82.

⁸⁷ AB 66.

⁸⁸ AB 67.

⁸⁹ AB 68.

		times to make sure that she was okay and that she was safe. ⁹⁰ In those calls Young mentioned that she was at a motel in Hill's company.
5.00 - 6.00 pm	Hardwick	Young told her that she and the deceased had got drunk and were stirring Hill. Hill was "pretty wild". ⁹¹
6.00 pm	The deceased's mother	The deceased asked his parents to go around the block and see if there were any cars parked around the area, because he knew that Hill was coming after him. ⁹²
9.30 pm	The deceased's mother	When she and her husband came home the deceased told her about the texts that he was getting on his phone, namely that Hill was texting and making threats that he was going to kill him, and he would take down anyone else in the house that was there. ⁹³ The threats concerned the deceased's mother enough that she asked the deceased to promise that he would not go near the motel.
Time unspecified	McNeil	She spoke to the deceased who told her that Hill "was apparently on his way from Brisbane to kill Luke". ⁹⁴ The deceased told her about some text messages he had received from Hill, about Hill coming to kill him. In one of the text messages Hill had said that he had killed the dog. ⁹⁵ The deceased told her about another text message from Hill which said "I don't care if you're at your parents' house. If there's kids around, I will kill you". ⁹⁶
10.34 pm	McNeil	The deceased told McNeil about messages he had received, including that Hill had killed Goose and that he intended to kill the deceased. ⁹⁷
About 5.30 am	Phillip	She gave evidence that she and Robinson (in one car) and Hill and Vanbreeman (in another car) drove from Brisbane to Gladstone. They stopped at a toilet station near Bororen. She overheard Hill talking to Robinson "about getting rid of Luke". ⁹⁸ Hill said "He needs to be taught a lesson, I need to teach him a lesson". ⁹⁹ She offered an opinion and was told to keep quiet and get in the car, but then

⁹⁰ AB 68.

⁹¹ AB 247.

⁹² AB 165.

⁹³ AB 166.

⁹⁴ AB 116.

⁹⁵ AB 116.

⁹⁶ AB 117.

⁹⁷ AB 126.

⁹⁸ AB 334.

⁹⁹ AB 334.

		overheard Vanbreeman say: “If you just want to scare him, there’s the stuff I have.” ¹⁰⁰ That was a reference to heroin which Vanbreeman had. ¹⁰¹
Time unspecified	The deceased’s father	He spoke to the deceased, who told him that Hill had threatened to harm him and his parents. ¹⁰²

- [38] As shown above, Hill made threats orally and by text, commencing early on Friday evening and continuing through until 3.25 am on Saturday morning. The threats were direct and specific. They were that he would kill the deceased by shooting him, kill Young as well, and was not concerned if children were injured or killed in the process. Just by the texts alone the threat to kill the deceased was repeated four times. In addition the evidence establishes that he made the same threat orally. By the texts alone the threats were maintained over a period of nearly eight hours between 7.42 pm on 8 October until 3.25 am on 9 October. Within that time period Hill left Brisbane intending to go to Gladstone, a trip which, on the evidence, was for the purpose of causing harm to the deceased.

Hill’s First Ground of Appeal – Contention (a) – Discussion

- [39] I do not accept the submission that merely because the threats were not continued during the course of Saturday, either orally or by text, that meant that Hill’s anger against the deceased had abated. If that were truly so then there would be no reason why Hill would not have contacted the deceased when he was delivering the envelope of drugs to the letterbox. If the evidence of Phillip was accepted, Hill continued to express a desire to kill or harm the deceased, after the delivery of the drugs. According to that evidence when Hill got into Robinson’s car after the delivery he said, “That’s one mess taken care of”, and when asked to clarify what he meant, said “it’s either going to hurt him or kill him” and “I gave him that whole bag I got off Leigh”.¹⁰³
- [40] Nor do I accept the submission that just because Hill reconciled his differences with Young that meant that he no longer bore ill will towards the deceased. The two are not necessarily connected and the reasons given above apply equally.
- [41] The evidence of Phillip was, if accepted, quite telling against Hill. There was no doubt a considerable attack upon her credit, based not only on her drug taking history, but also contradictory statements, a propensity to lie and the fact that she had been given an indemnity by the Attorney-General, and therefore had reason to implicate the others. However, when Phillip’s evidence is compared with that of Robinson,¹⁰⁴ Vanbreeman,¹⁰⁵ Weston¹⁰⁶ and Thorgood,¹⁰⁷ there are substantial areas where her evidence was corroborated by those witnesses named below, in circumstances where there was no suggestion whatever that their evidence had been modified. Thus:

¹⁰⁰ AB 334.

¹⁰¹ AB 334, 357.

¹⁰² AB 177.

¹⁰³ AB 336, 364. The reference to “Leigh” is to Vanbreeman.

¹⁰⁴ From AB 133.

¹⁰⁵ From AB 14.

¹⁰⁶ From AB 24.

¹⁰⁷ From AB 37.

- (a) her evidence as to her relationship with Robinson – corroborated by Robinson;¹⁰⁸
- (b) that when they were on the Gold Coast one of the purposes was to meet a person called “Joseph” – corroborated by Robinson;¹⁰⁹
- (c) that the car they were in was a Suzuki Swift and silver in colour – corroborated by Weston, and (partly) Robinson;¹¹⁰
- (d) that she drove to Gladstone with Robinson, and that they were on the run – corroborated by Robinson;¹¹¹
- (e) that Robinson had guns in his possession at the time – Robinson;¹¹²
- (f) that the other vehicle belonged to Vanbreeman and was white in colour – corroborated by (partly) Robinson and Vanbreeman;¹¹³
- (g) that Vanbreeman did not have a licence – corroborated by Vanbreeman;¹¹⁴
- (h) how Weston dropped Hill to Robinson and Phillip in the early hours of Sunday morning – corroborated by Weston;¹¹⁵
- (i) the location of where that occurred, and that Weston was driving a Mitsubishi Magna – corroborated by Weston;¹¹⁶
- (j) the manner of the transfer, namely that Hill got out of one car and got into the car of Robinson and Phillip – corroborated by Weston;¹¹⁷
- (k) the manner of the next transfer, namely that Hill was dropped to a mate on the roadside near Mount Larcom – corroborated by Thorgood;¹¹⁸
- (l) the events the next morning, in terms of Hill, Young, Phillip and Robinson meeting and then travelling to Shane Robinson’s home, where Weston was present – corroborated by Weston;¹¹⁹
- (m) that Hill wanted to speak to Weston, at Shane Robinson’s house – corroborated by Weston;¹²⁰
- (n) the way in which that contact occurred, namely that Hill took Weston down to Shane Robinson’s bedroom, in order to speak to him alone – corroborated by Weston.¹²¹

¹⁰⁸ AB 330, 332; AB 133.

¹⁰⁹ AB 331; AB 141.

¹¹⁰ AB 331; AB 29. Robinson said a different colour.

¹¹¹ AB 331-332; AB 137, 140.

¹¹² AB 331; AB 138.

¹¹³ AB 332; AB 15, 138. Phillip had a different make of car from that said by Vanbreeman.

¹¹⁴ AB 332; AB 22.

¹¹⁵ AB 335; AB 29.

¹¹⁶ AB 335, 336; AB 25, 27.

¹¹⁷ AB 336; AB 29.

¹¹⁸ AB 336; AB 44.

¹¹⁹ AB 337; AB 30.

¹²⁰ AB 337-338; AB 30.

¹²¹ AB 337; AB 30.

[42] Therefore, in my view, whilst it is true to say that there was reason to doubt Phillip’s evidence, equally there were reasons why the jury might conclude that significant parts of her evidence were correct. That could well have led the jury to accept her evidence as to the conversations she referred to, both on the way up to Gladstone,¹²² and after the drugs had been delivered to the deceased’s house.

[43] It is important to note one concession made by Young. It is that the evidence of Young’s son, Watson, “was sufficient to establish that [Young] had knowledge that the “*shot*” being delivered to the deceased was heroin”.¹²³ The importance of this concession lies not only in its impact upon Young, but its impact upon the way in which the jury might have accepted the evidence of witnesses at the trial. The concession accepts that it was open to the jury to find that Young knew that the shot being delivered to the deceased was heroin. If it was open to the jury to make that finding, it was open to the jury to conclude the following about some of the evidence:

- (a) that the source of the heroin was Hill; there was no evidence at all that Young had access to heroin independently of Hill;
- (b) that Hill’s source of heroin was, as Phillip said, Vanbreeman; she was a heroin addict who, on Phillip’s account, travelled with them from Brisbane to Gladstone and offered heroin to Hill; the text messages reveal contact between Hill and Vanbreeman while he was in Gladstone, at 8.11 pm and 8.19 pm on Saturday;¹²⁴
- (c) if Phillip’s evidence was accepted on that part, and given that her evidence was corroborated in the ways identified above, it was open to the jury to accept Phillip’s evidence of the conversations that were had been Hill, Robinson and Vanbreeman, concerning Hill’s intention to cause harm to the deceased;
- (d) it could also lead to an acceptance by the jury of Phillip’s evidence as to what was said when Hill joined them after the delivery; that included comments by Hill: “That’s one mess taken care of”, and “it’s either going to hurt him or kill him”;¹²⁵
- (e) those comments also included, according to Phillip’s evidence, Hill saying, in response to Phillip asking him what he had done, “I gave him that whole bag I got off Leigh”;¹²⁶
- (f) Weston’s evidence of what occurred after he obtained new syringes and returned to the motel is affected as well; Hill mixed some drugs and filled three syringes; Weston injected himself with one, and could tell from its effects that the drugs were amphetamines; the concession that Young knew the shot was heroin means that none of those three syringes were part of what was delivered to the deceased’s letterbox;
- (g) that being the case, Weston’s evidence of what happened the following morning, when Hill took him to Shane Robinson’s

¹²² Particularly at the Bororen rest stop area.

¹²³ Young’s Outline of Submissions, filed 3 February 2014, at para 5.17.

¹²⁴ AB 489, 490.

¹²⁵ AB 336, 364.

¹²⁶ AB 336, 364. The reference to “Leigh” was to Vanbreeman.

bedroom in order to tell him to keep his mouth shut because, “Our mate that we dropped that thing off to last night’s dead. This is the first one that I’ve had anything to do with it ...”,¹²⁷ takes on a new significance; once it is accepted that the thing that was dropped off to the deceased was actually heroin, the jury could reasonably conclude that Hill’s statement to Weston that morning was generated by more than concern about being peripherally involved in the delivery of drugs to someone who had died;

- (h) the evidence from McNeil as to the deceased tasting the drugs, saying it tasted foul and dry retching, and then referring to the drugs as amphetamines, also takes on a different significance; whether the word “amphetamines” was used or the word “gear”,¹²⁸ the deceased did not identify the drugs as heroin; Johnson’s evidence was that the deceased used the term “Harry” for heroin;¹²⁹ that does not, of course, mean that the deceased did not have other terms for heroin, but the only identified term that he used for heroin was not a term used when referring to what he had tasted in conversation with McNeil.

[44] The assessment of this area of the evidence, as with many others, is affected by the fact that the jury had the chance to see and hear the witnesses, whereas this Court has not. The jury, therefore, had a considerable advantage in terms of the assessment of what evidence was believable or not.

[45] In this particular case that advantage is compelling. Acceptance by the jury that Young knew that it was heroin that was delivered turned on the way in which the jury viewed the evidence generally, but specifically that of Watson and Phillip. The concession by Young lends weight to the view that the jury probably accepted the evidence of Watson. However, once they reached that view, it meant acceptance of relevant parts of Phillip’s evidence was likely, with the impacts noted above. This is quintessentially the type of case to which *M v The Queen* and *Jones v The Queen* referred, where the Court should give due weight to the advantages enjoyed by the jury, and recognise that the jury was the body with the primary responsibility of determining guilt or innocence.

Hill’s First Ground of Appeal – Contentions (b), (c) and (d): deceased injected drugs on voluntary and informed basis

[46] There were three related contentions advanced by Hill: first, that the deceased’s injection of the drugs just prior to his death was on a voluntary and informed basis; secondly, there was no attempt by Young to disguise the effect upon her of the drugs she had taken, and her description was consistent with opiates, not amphetamines; and thirdly, that the deceased’s statement to McNeil, that he would only take half of the drugs that had been delivered, contained an implicit admission that he knew that the drugs were something other than amphetamines, and care needed to be taken. These three contentions may be conveniently dealt with together. They all centre on a contention that it was likely that the deceased knew that he was taking something other than amphetamines.

¹²⁷ AB 30.

¹²⁸ This was the alternative term in McNeil’s first statement: Statement of A McNeil, dated 10 October 2010.

¹²⁹ AB 227.

- [47] The evidence in this respect contains a number of strands. The first is the evidence of Weston as to what took place prior to the delivery of the drugs. At Hill's request he purchased some syringes, and then Hill mixed up a solution which was put into three syringes, and shared one each. Weston injected himself and knew from the effect that it was amphetamines. He saw, or thought he saw, Hill and Young doing the same.¹³⁰ Immediately following that Weston went to the car, leaving Hill packing up inside. He and Hill left in the car and made the delivery to the deceased's house.
- [48] Secondly, the evidence of Thorgood was that on Saturday when he dropped Young to the motel, Hill offered him some amphetamines, which he ate.¹³¹
- [49] Thirdly, the evidence of Lindsey Mastroieni ("Mastroieni") was that in a conversation with the deceased on Saturday night, he said that the drugs had been dropped off into his mail box and he was going to take them. She urged him not to because he said it was already made up.¹³²
- [50] Fourthly, the evidence of McNeil as to her conversations with the deceased on Saturday night. He said he was getting "stuff dropped off to him" by one of Young's friends, who he identified as Malcolm.¹³³ When he revealed that it was already in liquid form, she advised him not to take it, saying that she "didn't think it was a wise idea and that [she] thought he was basically being set up".¹³⁴ At her urging to taste it, he did so, saying it tasted "foul", and he had never tasted amphetamines before so he did not know what it would taste like.¹³⁵ He said he would ring Young, and for McNeil to call him back in 10 minutes.¹³⁶ In the end the deceased said he was only going to have half of it.¹³⁷
- [51] Fifthly, the evidence of Fox was that at about 1.00 am or 1.30 am on Sunday morning, she listened in on a conversation between Mastroieni and the deceased.¹³⁸ The deceased said that Young had phoned to try and get him to meet her at a motel room, but he was concerned it was going to be a set up with Hill, so he did not go. However, he said that Young was coming over to his house in a taxi to drop off a package containing "Gear. Pre-mixed shot."¹³⁹ Mastroieni had told him that he should not take the pre-mixed shot, but the deceased said that "they'd been too good of friends for too long for them to do such a thing to him".¹⁴⁰
- [52] Sixthly, the evidence of Watson¹⁴¹ was that Young had spoken to him eight days after the death of the deceased. In an hysterical and crying telephone call Young said that she and the deceased "were going to take heroin together, that she had taken it, ... she got sick from it, so she told Luke that she was no longer going to see

¹³⁰ In his evidence-in-chief he said that Hill and Young were both half facing away from him: AB 27. Counsel for Hill established in cross-examination that in a prior statement Weston had said that he "saw Hilly and [Kerryn] doing the same thing [as he had done] at the same time": AB 32.

¹³¹ AB 43.

¹³² AB 102.

¹³³ AB 117-118.

¹³⁴ AB 118.

¹³⁵ AB 118-119.

¹³⁶ AB 119.

¹³⁷ AB 128.

¹³⁸ The telephone was on loud speaker in the centre of the table.

¹³⁹ AB 201-202.

¹⁴⁰ AB 202. In the circumstances the reference to "they" and "them" must have meant Young. If it meant both Young and Hill, that does not assist the appellant's case, as it would reinforce the view that the deceased did not think he was getting anything that might harm him.

¹⁴¹ Young's son.

him, and to take it on his own.”¹⁴² In the same conversation Young said that “she was going to have heroin with [the deceased] and have sex with him to get back at Brad”, and then “she told me that she had taken it and got sick from it and didn’t proceed with seeing him”.¹⁴³

[53] Seventhly, the evidence from the paramedics that they had seen puncture marks on the deceased’s abdomen or just below the left nipple,¹⁴⁴ and the forensic evidence that the only drugs in the deceased’s body were morphine and 6-monoacetylmorphine, which are derivatives of heroin, and codeine, which was likely from a painkiller the deceased had taken.¹⁴⁵

[54] In addition the contention relies upon the texts sent by Young and the deceased late on the Saturday night: see paragraph [24] above.

Hill’s First Ground of Appeal – Contentions (b), (c) and (d) – Discussion

[55] The contention seeks to advance that when Young told the deceased, at 12.41 am that she was “pretty smashed after that”, and later that she could not move, that would have been understood by the deceased to be signifying the effect of opiates, not amphetamines. I do not accept that contention:

- (a) from as early as 9.13 pm Young had told the deceased that she had “got on”, which was accepted as meaning that she had obtained drugs;
- (b) there was no evidence to suggest any history of heroin use by Young, so when she said at 9.14 pm, in answer to whether the room was occupied or held by Young and Hill, “just me and my gear”, the phrase “gear” could not have been reasonably understood as meaning anything other than amphetamines;
- (c) then at 9.52 pm when Young said that she was in a room “fried up”,¹⁴⁶ there is nothing in that communication to suggest anything other than their usual drug taking, namely amphetamines rather than heroin;
- (d) then at 11.08 pm Young texted to say that she was “trippin out a bit”; nothing in that description would betray any drug other than what she normally took; in any event the references at this point by Young to her having taken drugs, are all earlier than the episode where Weston arrived and they shared amphetamines; that being immediately before Hill and Weston left on the journey that involved delivering the drugs to the deceased’s residence;
- (e) the next reference is the “pretty smashed” comment at 12.41 am; given what had been said up to that time, I am by no means convinced that the deceased would have understood that to mean something other than the drugs she normally ingested;
- (f) the same applies to the reference at that moment to “I can’t move”, and then the comment to the same effect 15 minutes later; in my view it is too much of a stretch to say that those phrases should be understood as signifying the use of opiates rather than amphetamines.

¹⁴² AB 214.

¹⁴³ AB 214.

¹⁴⁴ AB 276, 281, 283 and 286.

¹⁴⁵ AB 208, 370-372, 472.

¹⁴⁶ A phrase accepted as meaning that she had taken drugs.

[56] The other evidence does not, in my view, compellingly point to the conclusion contended for by Hill. The evidence was that, unusually, the deceased took delivery of drugs in a pre-mixed form. That concerned McNeil enough to urge him not to take it because he would be doing so sight unseen. Indeed, counsel for Hill cross-examined McNeil in an attempt to establish that there was an unwritten rule in the drug scene that one did not inject drugs if you had not made them up yourself, or seen them made up yourself,¹⁴⁷ and got acceptance to the proposition from Mastroieni.¹⁴⁸ The exchange between McNeil and the deceased about whether he should or should not take the drugs has to be seen in that light. Similarly, when McNeil urged the deceased to taste it first, he did so, dry retching and saying that it tasted foul. His comment at the time explained the reaction. He had not tasted amphetamines previously, even though he had injected them. The jury could reasonably conclude that also applied to heroin.¹⁴⁹ In my view the same applies to the deceased's suggestion that he would only take half. Whilst this might betray a suspicion about the general circumstances, namely his concern about a set up and taking drugs pre-mixed when he had not seen them mixed, there was a counter balancing factor, namely that he trusted Young and expressed that trust to McNeil at the time.

[57] In my view that does not go far enough to establish that there was a voluntary and informed taking of the drugs which had been delivered. It was open to the jury to conclude that it merely demonstrated that there were some suspicions held by the deceased, but they were allayed by his trust in Young. Even the fact that he may have injected some of it into his stomach first does not go so far as to show that he knew it was heroin, or at least something that was not amphetamines.

Hill's First Ground of Appeal – Contentions (e), (f) and (g): “gear” could mean heroin; Crown mistakenly told jury they could be certain deceased did not use heroin; and unlikely deceased had not tasted amphetamines

[58] Three further contentions raised on Hill's appeal were that: first, in the text message from Young when she referred to “gear”, that could have referred to heroin; secondly, there was a misstatement by the Crown to the jury when it submitted that it they could be confident that the deceased did not use heroin,¹⁵⁰ because there was some evidence that the deceased did use heroin or could have used heroin; and thirdly, the evidence by McNeil, that the deceased had not tasted amphetamines before, was unlikely. These three points can conveniently be dealt with together.

[59] The evidence as to how the term “gear” was used was relatively short in compass. Vanbreeman used that term to refer to “heroin”.¹⁵¹ Robinson referred to speed or amphetamines as either “dope” or “gear”.¹⁵² Robinson gave evidence that, with reference to amphetamines, “so many people call it so many different things”.¹⁵³ He clarified that, saying that, to him, the word “gear” meant methamphetamines or ice.¹⁵⁴

¹⁴⁷ AB 128.

¹⁴⁸ AB 107.

¹⁴⁹ There as no acceptable evidence at the trial that the deceased had ever used heroin before. Johnson's evidence did not go so far: see paragraphs [61] to [62].

¹⁵⁰ Supplementary Record, AB 2.

¹⁵¹ She also used the term “dickie” for heroin: AB 21.

¹⁵² AB 141-142.

¹⁵³ AB 142.

¹⁵⁴ AB 142. It should be noted that Amphetamine (molecular formula: C₉H₁₃N) is distinct from Methamphetamine (molecular formula: C₁₀H₁₅N), which is also known speed, meth and ice: *The Merck Index Online*.

Hill's First Ground of Appeal – Contentions (e), (f) and (g) – Discussion

- [60] Apart from the evidence by Watson¹⁵⁵ as to the conversation with his mother, namely when she said eight days after the event that she and the deceased were “going to take heroin together”,¹⁵⁶ there was no evidence to suggest that Young had been or was a heroin user at the time. There was certainly evidence that she was an amphetamines user. Therefore, it was open to the jury to find that when she referred to “gear” she was referring to amphetamines. There is no compelling basis to think otherwise. Indeed, given that she was texting the deceased, who was an amphetamines user and supplier, it is likely that she was referring to amphetamines.
- [61] The evidence in relation to the deceased’s heroin use was sparse, to say the least. Reliance was placed upon the evidence given by Johnson, but when examined closely that evidence was hardly persuasive:
- “Is it right you were aware that Luke – Luke told you that he used drugs? --- Yes.
- What sort of drugs? --- Amphetamines.
- Now, in relation to heroin, what terminology did he use for heroin? --- Harry.
- Did Luke ever **talk** about heroin? --- He had a couple of times, but not much. I didn’t think that he used it much.”¹⁵⁷
- [62] It can be seen that the only reference to heroin was: first, the word that the deceased used for it, namely Harry; and secondly, the answer to a question about whether the deceased ever **talked** about heroin. Johnson’s added comment that “I didn’t think that he used it much” was quite vague and amounted to no more than rank speculation.
- [63] It is true that other witnesses described the deceased as taking a variety of drugs, but none of them referred to heroin. Thus, the jury were left in the position that there was simply no evidence that the deceased had ever used heroin. In those circumstances, given the evidence that Young and Hill were or had been close friends of the deceased, and drug users themselves,¹⁵⁸ it was, in my view, open for the prosecution to invite the jury to find that both appellants would have known that the deceased did not take heroin. Indeed, on the state of the evidence as to the deceased’s drug use, it was open for the jury to make that finding.
- [64] Complaint is made that in his own summing up the learned trial judge did not correct the alleged misstatement,¹⁵⁹ and did not refer to defence counsels’ observations about the deceased’s broader drug use. However, the observations about the deceased’s broader drug use fell into two categories. The first was a reference to his use of amphetamines, cannabis and ecstasy.¹⁶⁰ The second was to refer to Johnson’s evidence about heroin.¹⁶¹
- [65] In my view there was nothing of substance in this complaint. The evidence of heroin use was non-existent, even if one had regard to the evidence of Watson about

¹⁵⁵ Young’s son.

¹⁵⁶ AB 214.

¹⁵⁷ AB 227 (emphasis added).

¹⁵⁸ In the case of Hill, he was also a supplier of drugs.

¹⁵⁹ About the deceased’s not using heroin.

¹⁶⁰ Supplementary Record, AB 28.

¹⁶¹ Supplementary Record, AB 28 and 35.

what Young told him eight days after the event.¹⁶² I do not consider that the jury was misled in any material way.

- [66] The contention that McNeil's evidence (namely that the deceased said he had never tasted amphetamines before) was an unlikely claim, does not advance Hill's appeal. McNeil gave evidence that he said it, and it was for the jury to assess whether they believed McNeil, and whether that statement had any veracity. Critical to that assessment was the fact that the jury got to see and hear the relevant witness, an advantage which this Court does not have. Looked at objectively, if a person was a long time amphetamines user, and administered those drugs by injection, it is not beyond the realms of likelihood that the person would not know what the drug actually tasted like.
- [67] Further, the fact that when he did taste the drug it caused him to dry retch, does not advance the matter. It is urged that that reaction was consistent with "the commonly understood possible nauseous side effect of morphine".¹⁶³ However, if one did not know what amphetamines **tasted** like, nor what heroin **tasted** like, why would dry retching at the taste be telling one way or the other? Further, the deceased only tasted the mixture at the urging of McNeil, who told him not to try it without testing it. Had the deceased been accustomed to tasting amphetamines, or even had he been an occasional taster of amphetamines, one would have expected him not to have made the comment which McNeil related.
- [68] The final point in this area of consideration is the contention that because the deceased said to McNeil he would only take half of the drugs, that was an implicit admission that he understood the drugs to be something other than amphetamines and care needed to be taken.¹⁶⁴ McNeil's evidence was that the deceased said he was only going to have half of the drugs.¹⁶⁵ The context was that there was a series of phone calls between the deceased and McNeil that night which included these elements:
- (a) the deceased revealed that he might be in some trouble, because Hill was apparently on his way from Brisbane to kill him;¹⁶⁶
 - (b) the deceased told McNeil why Hill was going to kill him, and that was because of what he and Young had done while they were out, calling Hill to say that they had slept together;¹⁶⁷
 - (c) the deceased talked about the texts he had received from Hill, revealing that Hill was coming to kill the deceased, and had killed the dog;¹⁶⁸
 - (d) the deceased revealed the conversations or texts with Young, who was trying to get him to go to a hotel room to have sex;¹⁶⁹ McNeil urged him not to do that because "there was something going on and that Hilly was trying to kill him really".¹⁷⁰

¹⁶² That was simply a statement of intention, rather than evidence of use.

¹⁶³ Hill's Outline of Submissions, filed 28 January 2014, para 54.

¹⁶⁴ Hill's Outline of Submissions, filed 28 January 2014, para 55.

¹⁶⁵ AB 128.

¹⁶⁶ AB 116.

¹⁶⁷ AB 116.

¹⁶⁸ AB 116.

¹⁶⁹ AB 117.

¹⁷⁰ AB 117.

- (e) at her urging he reconsidered and decided not to go to Young;¹⁷¹
- (f) McNeil urged him not to trust Young, but the deceased said he had been out with her the night before, and shouted everything, and “thought that Kerry was someone he could trust”;¹⁷²
- (g) McNeil said she was worried for him, and urged him to take the texts quite seriously, and the deceased indicated that he may not sleep in his bedroom that night but instead may sleep in the lounge room;¹⁷³
- (h) the deceased said that he was “getting stuff dropped off to him” by “one of [Young’s] friends”;¹⁷⁴ he identified that friend as Malcolm;¹⁷⁵
- (i) the deceased said he was going to take the drugs which were in liquid form, and they had been dropped in his mail box;¹⁷⁶
- (j) McNeil urged him not to take them, but the deceased said he would; McNeil said it was not a wise idea, and told him she thought “he was basically being set up”;¹⁷⁷
- (k) she urged him to at least taste it, which he did, saying it tasted foul; he said that he had never tasted amphetamines before so that he did not know what it would taste like;¹⁷⁸
- (l) in that context the deceased said that he would only have half of it.¹⁷⁹

[69] When seen in its proper context, the deceased’s statement that he would only take half of the drugs was prompted by the urging of McNeil, which was largely centred on her concern that there may be a set up involving Hill, and that the deceased should be very cautious about the delivered drugs. In that sense, one can understand that an inference might be drawn that the deceased thought the drugs were something other than amphetamines. Equally available to be drawn is the inference that the drugs were amphetamines, but possibly contaminated in some way. In any event, McNeil’s evidence was that the deceased tasted the drugs, reacted by saying that they were foul and he was dry retching, but made a comment that was consistent with him thinking they were amphetamines; that is, the deceased said he had never tasted amphetamines before so he did not know what it would taste like.

[70] In my view it was open for the jury to conclude from that evidence that whilst the deceased acknowledged he should take care, nonetheless he reposed trust in Young, and his concession was to taste the drugs first and to take only half. That does not necessarily point to knowledge that the drugs contained heroin, rather than amphetamines. It was open to the jury to conclude that whilst he had reservations about the circumstances of the delivery, and Hill’s possible involvement, he trusted Young and thought what he had was a syringe of amphetamines.

¹⁷¹ AB 117.
¹⁷² AB 117.
¹⁷³ AB 117.
¹⁷⁴ AB 117.
¹⁷⁵ AB 118.
¹⁷⁶ AB 118.
¹⁷⁷ AB 118.
¹⁷⁸ AB 118-119.
¹⁷⁹ AB 128.

Hill's First Ground of Appeal – Contentions (h) and (i): no plan to lure deceased to motel; and Hill not complicit

- [71] The final two points advanced on behalf of Hill were: first, that the deceased's request for a supply of drugs from Young was contrary to the theory that Young was trying to lure him to the motel; and secondly, there was no evidence that Hill was complicit in Young's supply of the drugs. These two points may be considered together.
- [72] The text messages set out at paragraphs [23] and [24] are important to a consideration of these issues. Relevantly they commence at 8.26 pm on Saturday night, 9 October. At that time Malcolm declined to let Young use her car, complaining to Young that if Hill wanted the car then he should pay her the \$300 that he owed her.¹⁸⁰ It was not Young who responded, but rather Hill, at 8.40 pm, and directly by text to Malcolm.¹⁸¹

Hill's First Ground of Appeal – Contentions (h) and (i) – Discussion

- [73] It was open to the jury to conclude that Hill's 8.40 pm response to Malcolm's text signified that Young and Hill were together, as Hill saw Malcolm's text. Equally it is possible that Young telephoned Hill and mentioned the text from Malcolm, but nonetheless that would suggest Young and Hill being in contact.
- [74] At 8.49 pm Hill texted Powell saying: "I only wanted a lift to toolooa im right now anyway".¹⁸² It was argued that the reference to "toolooa" referred to a part of Gladstone on the other side of town from where the motel was. However, the motel itself was in Toolooa Street. The jury may well have accepted that this text meant that Hill wanted a lift back to the motel, and was there.¹⁸³
- [75] Immediately thereafter, at 9.00 pm, the first of the texts between Young and the deceased, concerning where he was, what he was doing and would he come to the motel, commenced. Whilst the ensuing text conversation was going on between Young and the deceased, Hill texted McClure at 9.09 pm asking "U with Luke".¹⁸⁴ A few minutes after that, at 9.13 pm, Young texted the deceased to say that she had "Got on got a room". The deceased's response was to ask her whether it was she and Hill, by the phrase "True u and billy".¹⁸⁵ In my view it was open to the jury to understand that as meaning the deceased was asking not "are you with Hill right now", but whether she and Hill had got the room. Young's response at 9.14 pm was "Just me and my gear". It was open to the jury to understand that response as being a lie. On any view her answer that it was just herself who had got or was using the room was untrue.
- [76] Three minutes after that response, at 9.17 pm, was the first direct invitation by Young to the deceased, namely "Want to get fried with me".¹⁸⁶ Twenty-four minutes later the deceased asked Young where she was, and Young responded about 11 minutes later, at 9.52 pm: "In a room fried up you comin to be my fried friend

¹⁸⁰ AB 490.

¹⁸¹ AB 492.

¹⁸² AB 492.

¹⁸³ See further discussion of this at paragraph [111].

¹⁸⁴ AB 493.

¹⁸⁵ AB 494.

¹⁸⁶ AB 495.

only my friend”.¹⁸⁷ About two minutes later, at 9.54 pm the deceased asked: “Is this set ups”.¹⁸⁸ The jury were entitled to conclude that was a question by the deceased, indicating that he wanted to know whether Hill was at, or would be at, the room from which Young was texting. Young’s answer three minutes later at 9.57 pm was: “What do you think I want to be knocked as well”.¹⁸⁹ It was undoubtedly open for the jury to conclude that answer to signify at least three things, namely: that Hill was still hostile and intending harm towards the deceased; that if the deceased was caught at the room with Young, Hill would harm her as well; and that wherever she was, Hill was absent.

- [77] But even if Hill was then absent, how could Young know that he would remain away if the deceased accepted the invitation to come over? Young’s invitation was to come over and get “fried”, which was accepted at the trial as meaning to take drugs. If Hill were truly absent at the time she was making these statements, and she intended that she and the deceased would be together in the motel room and in a drug induced state, how could she possibly be sure that Hill would not return and cause harm to both of them? In the circumstances it was open to the jury to infer that these statements were also untrue, and that Hill was present.
- [78] The exchange between the deceased and Young continued. At 10.13 pm Young asked what movies the deceased was watching. The answer, 20 minutes later at 10.33 pm was “Iron man 2. weres billy”.¹⁹⁰ It is significant that the deceased again asked about the presence of Hill. In the context of the previous comments, that would hardly have been asking about where his lately reconciled friend was, as opposed to asking about where a hostile opponent was. After all, the deceased and Hill each had the other’s phone number and had exchanged texts before. However, the deceased did not correspond with Hill, but with Young, querying where Hill was.
- [79] Young responded two minutes later at 10.35 pm: “Fucks me why that”.¹⁹¹ That response may have meant that Hill was not present at that time, and that Young did not know where he was. However, that may not be particularly significant as it was then still an hour and a half before the time when Weston said he went to the motel and met Hill and Young there.¹⁹² The other alternative is that the answer by Young was deceptive.
- [80] There followed a period of about half an hour where Young did not respond to the deceased. The deceased tried to call her, rather than texting, and left a message at 10.39 pm, asking why she was not answering.¹⁹³ The silence was broken at 11.08 pm when Young texted saying “Sorry Trippin out a bit what you doin”.¹⁹⁴ Young did not wait for an answer, texting four minutes later at 11.12 pm: “Are you comin I need company”.¹⁹⁵ At that point Young clearly still requested the deceased to come and join her. That was over two hours after her first invitation. During that time the deceased had queried whether Young was with Hill and where Hill was, including asking whether the invitation was a set up. In response to this last

187 AB 495.

188 AB 495.

189 AB 496.

190 AB 496.

191 AB 497.

192 Which Weston put as midnight.

193 AB 497.

194 AB 498.

195 AB 499.

invitation the deceased declined, explaining that he would be going to his mother's home, but that Young could join him there.¹⁹⁶ That explanation was given at 11.28 pm. That is about the time that Weston says he went to the motel, and Hill was there, with Young. It was therefore open to the jury to accept that at about this time Hill was at the motel, with Young.

- [81] At 11.24 pm the deceased suggested to Young that she catch a taxi, join him and "Rattal me up".¹⁹⁷ The deceased then suggested that she join him at his mother's place, which was where he was going shortly. At 11.30 pm that was declined by Young on the basis that it would not be private enough. At that point the deceased sent a text which, on any view, signified he was certainly not going to go over to the room where Young was. He said: "Yer well. Might just leave it then hey. Tex me if u wana come shout me a shot. X".¹⁹⁸
- [82] At that point, namely 11.40 pm, the evidence of Weston shows that Young and Hill were together at the motel. It was the deceased who had suggested that rather than him going to where Young was, she join him and take some drugs. It was in that context that at 11.55 pm Young texted the deceased to say: "Ill still drop you a shot if you want".¹⁹⁹ At that point there is no question that Hill and Young were together. At about that time Hill asked Weston to go and buy some clean syringes which he did. In that context, Young texted the deceased, at 11.56 pm, asking him, "have you got any clean ones".
- [83] However, the more significant aspect of the text by Young at that time is that **Young** is the one who was asked to bring the deceased a shot, and it is **Young** who offered to bring it herself.²⁰⁰ Indeed, the offer by the deceased to pay for the cab was so that **Young** could go to his place to bring the drugs, then go back to where she was.²⁰¹ In all of those responses by Young there was no mention of Hill, either being present or being involved at all. Yet on Weston's evidence that was clearly at a time when Hill was present at the motel, and requesting Weston to get syringes so that drugs could be mixed up and supplied.
- [84] In the context of the exchanges as outlined above, at 12.06 am the deceased asked Young what was happening, and Young responded 11 minutes later saying, "Do you mind if I mix it, I don't have scales".²⁰² It was another 24 minutes before Young announced to the deceased that the drugs were on their way, but it was only at that point that Young said that it would not be **her** taking the drugs, but rather "me mate" who was in a blue Magna.²⁰³ While she did not mention Hill, Weston's evidence establishes that it was Hill who was delivering the drugs. Weston did not know where they were going and expected that Hill would get out of the car when they pulled up. It was only at that point that Hill gave Weston the envelope to put in the letterbox. It was, in my view, open to the jury to understand Young's response at that time as continuing to conceal Hill's involvement.

¹⁹⁶ AB 499.

¹⁹⁷ This was accepted to be a reference to taking drugs; AB 499.

¹⁹⁸ AB 501. It is notable that this text ended with an "X", the usual symbol for a kiss. The jury may well have concluded that this revealed the deceased's fondness for, and trust of, Young.

¹⁹⁹ AB 501.

²⁰⁰ AB 501.

²⁰¹ AB 502.

²⁰² AB 502.

²⁰³ AB 503.

- [85] Then follows the period of time from 12.43 am to 12.56 am, during which time the deceased tried to call Young eight times and sent her three texts, all of which went unanswered. Indeed, during that time the deceased texted on both of his telephones, which could have been accepted by the jury as signifying that he was concerned that he was not getting an answer.²⁰⁴ During that period Young answered Hill's texts, while still ignoring the phone calls and texts from the deceased. The exchange between Hill and Young was Hill asking "Is this going in letter box", being told "Yes", and then telling Young that he had done so.²⁰⁵ At that point Young texted the deceased, breaking the period where she was not responding, telling him, "In your letter box sorry cant move".²⁰⁶
- [86] The sequence of communications revealed above and specifically their timing, demonstrate there was ample evidence on which the jury could conclude that Hill was complicit in Young's agreement to supply drugs to the deceased. It was Hill who asked Young whether the delivery was to go in the letterbox. He was not directly communicating with the deceased at all, and the only rational explanation of the exchange with Young is that Hill was working on the basis that Young would liaise with the deceased about the delivery. Hill's actions in not communicating with the deceased,²⁰⁷ donning a form of disguise,²⁰⁸ and asking Weston to actually exit the car to put the delivery in the letterbox, are all consistent with Hill appreciating that if he was seen to be involved in any way, the deceased would be suspicious about what he had been given. That is wholly consistent with the questions asked by the deceased in his various texts to Young, about where Hill was, and was the invitation to go to the motel a set up. Young's exchanges with the deceased served to conceal Hill's involvement. If there was a truly innocent connotation to be put on what was occurring, why did Hill not directly communicate with the deceased?
- [87] In my view there was ample evidence upon which the jury could conclude that Hill was complicit in Young's arrangement with the deceased to supply the drugs. Further, when the sequence of communications is understood, the request by the deceased for Young to supply him some drugs is not inconsistent with the theory of trying to lure the deceased to the motel. She had tried that, and it did not work. The deceased was suspicious about whether Hill was involved or present, and it seems plain that Young appreciated that. She had resisted his invitation to join him and share drugs, and it was in that context that he suggested that she might deliver a shot to him.

Hill's First Ground of Appeal – Conclusion

- [88] For the reasons given above I do not consider that Hill's first ground of appeal has been made out. I would therefore dismiss Hill's appeal.

Young's Ground of Appeal – Contentions

- [89] Two principal arguments were advanced on behalf of Young. First, that there was simply insufficient evidence to enable a conclusion beyond reasonable doubt, that

²⁰⁴ The text records show that the deceased used two telephone numbers, 0749784045, and 0458656944.
²⁰⁵ AB 506-507.

²⁰⁶ AB 507.

²⁰⁷ Whose number he clearly knew because he had texted threats to him only a day or so before.

²⁰⁸ Weston gave evidence that even though it was a warm night Hill had put on a hoodie and pulled it over his head when they left to make the delivery.

Young had actual knowledge, as opposed to constructive knowledge, that Hill intended to kill or do grievous bodily harm. Secondly, it could not be established, as a matter of law, that any acts of Young caused the death of the deceased.

[90] Within those contentions a number of identifiable points were advanced, and, as will be apparent, there was a deal of overlap with the points advanced on behalf of Hill. Thus, Young's submissions included the following:

- (a) there was no evidence that Young was present with Hill for all of the text messages that were sent;
- (b) the text message sent by Young, saying that the delivery had been made into the letterbox, occurred at the same time as the deceased was on his phone to McNeil;²⁰⁹ McNeil's evidence was that the deceased said that he had already received the drugs, and he said he would call Young following that conversation; the fact that he did not do so was an indication that the morphine that he took did not come from whatever was dropped in the letterbox by Weston;
- (c) Mastroieni's evidence was that the deceased told her at about 8.00 pm or 8.30 pm on Saturday 9 October, that the drugs had been dropped off already in the mailbox; her last conversation with the deceased was at about 12.15 am on Sunday morning; therefore it was possible that there was "another delivery of heroin by persons unknown";²¹⁰ that was supported by the witness Harriden;
- (d) in circumstances where the deceased was aware of the threats made by Hill, that Hill was in Gladstone, his belief that Hill was with Young, and the exhortations from Mastroieni and McNeil not to take the drugs, the deceased "voluntarily chose to ingest the drugs";²¹¹ it was a voluntary and informed decision;
- (e) the evidence did not establish that the deceased believed the drugs were amphetamines;
- (f) there was no acceptable evidence that Young knew the deceased did not use heroin; in this respect Johnson's evidence was relied upon;
- (g) there was no acceptable proof of actual knowledge on the part of Young, that Hill had an intention to kill or do grievous bodily harm; further, there was insufficient evidence to justify a conclusion that, with that knowledge, Young knowingly aided Hill to supply heroin to the deceased;
- (h) the evidence of Hill's intention was to be doubted, especially given the reconciliation with Young;
- (i) there was nothing to indicate that Young took Hill's threats towards the deceased seriously, and there was no animosity as between Young and the deceased.

²⁰⁹ Admission at AB 324-325.

²¹⁰ Young's Submissions, filed 3 February 2014, at para 5.8.

²¹¹ Young's submissions, at para 5.9.

- [91] As mentioned above, a number of the points have an overlap with those advanced on behalf of Hill. Thus, those that relate to whether the deceased voluntarily took the drugs in an informed way, whether he believed the drugs were amphetamines, whether Young or Hill knew that the deceased did not use heroin, and the impact of the reconciliation between Young and Hill, are all matters dealt with in the reasons above, dealing with Hill. There is no necessity to repeat what was said there.

Young’s Ground of Appeal – Contention (a): morphine did not come from letterbox drop – Discussion

- [92] Young contends that, in light of the deceased telling McNeil (in the telephone call at about 1.00 am on Sunday morning) that he would call Young, his failure to do so “is an indication that the morphine that the deceased took did not come from whatever was dropped in the letterbox by Leigh Weston”.²¹² I do not accept this submission. It is not apparent why the deceased’s failure to call Young would indicate that. It may be the deceased had a change of mind, or was simply saying something to appease McNeil in her expressions of concern for him. The change of heart may have come about because the deceased had tried to call Young, and text her, in an approximate period of 10 minutes following Young saying she was “Pretty smashed”.²¹³ That lack of success may explain why the deceased said to McNeil that he would call Young, but didn’t.
- [93] Mastroieni’s evidence was that the deceased started telling her about Young’s supplying him with some drugs at about 8.00 pm that night.²¹⁴ When cross-examined she said that at about 8 pm or 8.30 pm the deceased had said that the drugs had been dropped off in the mailbox.²¹⁵ According to Mastroieni, the deceased asked her if he should take the drugs, and she told him not to. She said that the last call she had with the deceased was at about 12.15 am on Sunday 10 October.²¹⁶ This evidence was relied upon to suggest “The possibility of another delivery of heroin by persons unknown to the deceased”.²¹⁷ Support was also sought to be gained from the evidence of Harriden, a taxi driver, who recalled that on Saturday night she took a number of people to the street in which the deceased lived.
- [94] One of the difficulties with this contention is that according to Mastroieni the deceased said that the drugs which had been dropped in the mailbox were “Already made up into a needle so he didn’t even see what was in the bag”.²¹⁸ It was partly for that reason, and partly because of what Mastroieni understood as to Hill’s threats against the deceased, that she urged him not to take the pre-mixed drugs. That evidence makes it more difficult to accept the possibility advanced in this contention. It would mean that two quite separate deliveries four or five hours apart were made to the deceased, each consisting of a pre-mixed quantity contained in a syringe. It would then require acceptance that on each occasion, four or five hours apart, the deceased, faced with a pre-mixed syringe of questionable provenance, was urged separately by Mastroieni (in relation to the earlier drop off) and McNeil (in relation to the latter drop off) not to take the respective drugs.

²¹² Young’s submissions, at para 5.7.

²¹³ AB 503-506.

²¹⁴ AB 101.

²¹⁵ AB 107.

²¹⁶ AB 102, 107.

²¹⁷ Young’s submissions, at para 5.8.

²¹⁸ AB 102.

- [95] The difficulties are readily apparent. In my opinion it was open to the jury to conclude that Mastroieni had the time wrong. If her timing was right, one might have expected to see something said as between the deceased and Young after 8.30 pm, on that topic. However, the text messages reveal nothing of the kind. Starting at about 9.00 pm Young commences by asking what the deceased is doing and whether he was at home or having dinner with Mastroieni.²¹⁹ Then follows a series of conversations which are set out above at paragraph [24]. Specifically, the texts after 11.00 pm where the deceased suggested that Young might shoot him a shot, and Young offered to “drop you a shot if you want”²²⁰ do not seem to fit with Mastroieni’s timing.
- [96] Support is sought to be drawn from Harriden’s evidence. She was a taxi driver who gave a statement four days after the death of the deceased. She collected a fare on Saturday night and took them to Satinay Street, which is the street in which the deceased lived. The circumstances of the fare were curious, in that two females were picked up at the start, and one of them directed her to go to Satinay Street.²²¹ On the way there three more people were collected, namely, two men and a woman. They had been standing at a bus stop and one of the men hailed the taxi. One of the women in the taxi said it was alright to collect those people, and that happened.²²²
- [97] Harriden was directed to stop at a service station, where one of the men went inside. The man came back into the cab and then said he would show Harriden where to go. Following that he gave directions to a particular place where one of the men got out and spoke to another man standing near a tree. The first man got back into the cab, appeared annoyed and said something to the others like, “He isn’t coming”.²²³ Directions were then given to take a number of streets and turns including effectively doubling back on streets that had already been travelled. Eventually Harriden was directed to stop at a point at one end of Satinay Street.
- [98] At that point the man who had been giving directions got out. So did the two women who had been picked up with him. The women stood at the side of the taxi and the man walked “back a few houses away, back into the darkness”.²²⁴ The man was gone for some time, but then came back and directed Harriden to take them back into town. The two women who were outside the taxi did not rejoin them, but were walking. The remaining woman in the taxi said to the man who had walked down the road, “Did you drop it?”, and the man responded, “Sh”.²²⁵
- [99] Harriden was then given a set of confusing directions which took her back into the town.
- [100] About two years later, Harriden was spoken to by one of the investigating police officers. Photographs were shown to her which, according to the police officer, had been taken from inside the taxi. Harriden could not recognise the people shown in the photographs.²²⁶ A police officer then told her that the GPS had been checked and it did not match the location she had identified. Harriden said the GPS at that

219 AB 492.
 220 AB 501.
 221 AB 218.
 222 AB 219.
 223 AB 220.
 224 AB 221.
 225 AB 221.
 226 AB 222.

time was completely inaccurate. She gave examples of how the GPS had suggested she was in one place, when in fact she was somewhere else.²²⁷

- [101] Following that discussion, the police officer took another statement from Harriden during which she said: “From seeing the still pictures, it appears I’ve mixed the days up”.²²⁸ The last paragraph of this statement expressed an apology for misleading the police with wrong details and offering a reason, namely, that she was confused and suffering health problems at the time of the first interview.
- [102] Pressed in cross-examination as to her first memory, four days after the event, it was apparent that Harriden was quite diffident about whether her memory on the first occasion was accurate or not. To the suggestion that she was confident then, that the fare to Satinay Street had happened on Saturday night, she said, “Maybe back then, yeah”,²²⁹ and after being pressed through the sequence of events, she was asked whether it may well have been the Saturday and the answer was: “I don’t know; it could have been”.²³⁰ In re-examination she said that the events could have happened in the early hours of Friday, Saturday or Sunday.²³¹ She emphasised that she was “really sick” at the time and that when she first spoke to the police she still had the flu. When pressed on whether she could clarify which night it was, the answer was, “Honestly, I’m still not sure”.²³²
- [103] Looked at in total, Harriden’s evidence does not provide much support. She herself expressed doubt as to whether the events occurred on the Saturday night. Further, even though she stopped at one end of Satinay Street, the man walked off behind the taxi, into the darkness. There is no certainty at all that he went to the deceased’s house. Assuming he was dropping off drugs, it could have been to someone else in the street. Further, since he was gone for some time he could have walked to another street. Therefore it was open to the jury to conclude that they could not rely upon that evidence.

Young’s Ground of Appeal – Contention (b): Hill was not with Young for all of the text messages – Discussion

- [104] A further point is raised on Young’s appeal, connected with the series of text messages. It is said that the prosecution’s case was that Young was with Hill for **all** of the text messages that were sent to the deceased’s phone, but that there was no evidence for that contention.
- [105] Thorgood picked Young up, at Hill’s request, from Malcolm’s house; Thorgood did not put a time on it, but Malcolm thought it was around lunchtime.²³³ Shortly after that Malcolm rang Young a few times to make sure she was okay and safe. Young said she was in a motel with Hill.²³⁴ At about 2.00 pm Young had returned to Malcolm’s house, where she stayed until about 6.00 pm.²³⁵ At that point Irwin took Malcolm and Young in his car and at about 6.45 pm dropped Young off at Ann Street which was the next street over from the motel.²³⁶

²²⁷ AB 222.

²²⁸ AB 222.

²²⁹ AB 222.

²³⁰ AB 223.

²³¹ AB 223.

²³² AB 224.

²³³ AB 68.

²³⁴ AB 69.

²³⁵ AB 69.

²³⁶ AB 97.

- [106] That Young was going back to the motel seems to be confirmed by the text messages. At 5.42 pm on 9 October she texted Hill saying, “Tryin to get a way there”.²³⁷ At 6.46 pm Young texted Hartnett that she needed a lift and asked if Hartnett could help her.²³⁸ At 7.00 pm Young texted Hill saying “Im here”.²³⁹ It was open to the jury to conclude, in relation to that text, that Young was announcing to Hill that she had arrived at the motel.
- [107] Thereafter, that night it is evident from the text messages that Young was in the motel. By 9.00 pm she texted the deceased asking where he was and what he was doing, and at 9.13 pm she texted the deceased that she had “got a room”.²⁴⁰ She was still in that room at 9.52 pm when she texted the deceased to say that she was “In a room fried up.”²⁴¹ There is nothing in the texts thereafter to suggest that Young was at any different location.
- [108] At about 11.30 pm Weston was directed to go to the motel, where Hill was present.²⁴² Apart from when Weston left to get the syringes, they were together until after the package had been dropped in the letterbox at the deceased’s house. Young was at the motel at the same time.
- [109] Therefore, the evidence established several definite time periods when Young and Hill were together, and a longer time period when they may have been, but, it is argued, the texts suggest otherwise. The definite periods are: between midday and 2.00 pm²⁴³ on Saturday 9th;²⁴⁴ 7.00 pm when Young texted Hill to say “I’m here”; and 11.30 pm until about 41 minutes past midnight.²⁴⁵
- [110] Less certain is the period between 7.00 pm and 11.30 pm. Whilst there can be a degree of assuredness that Young was at the motel, the submissions for Young questioned whether there was evidence to conclude Hill was there for all of that time. They point to texts which suggest that Hill was either looking for a lift elsewhere or looking for a lift back to the motel. At 8.11 pm and 8.23 pm Hill asked Penny Powell whether she could give him a lift.²⁴⁶ It seems that Young had already asked Malcolm if she (or she and Hill) could borrow her car. Malcolm put that call at about 7.00 pm.²⁴⁷ That time may be a little uncertain as there is a text at 8.26 pm by Malcolm to Young, saying that she would not lend the car.²⁴⁸
- [111] At 8.49 pm Hill texted Powell saying that, “I only wanted a lift to toolooa im right now anyway”.²⁴⁹ It is uncertain how that should be understood. Part of Gladstone is called Toolooa, but the motel was on Toolooa Street. However, whatever it refers to, it signifies that Hill: had wanted to go to Toolooa (the suburb) and had done so; or no longer wanted to go; or had been out somewhere, and wanted to get back to Toolooa St, and had since done so.

²³⁷ AB 485.

²³⁸ AB 487.

²³⁹ AB 488.

²⁴⁰ AB 494.

²⁴¹ AB 495.

²⁴² AB 25.

²⁴³ See discussion at [105].

²⁴⁴ The time period is identified by Malcolm, to whom Young said she was at the motel with Hill.

²⁴⁵ That is when Young texted the deceased to say that, “me mate” was on his way to drop off the drugs.

²⁴⁶ See AB 503.

²⁴⁷ AB 489, 490.

²⁴⁸ AB 70.

²⁴⁹ AB 490.

²⁴⁹ AB 492.

- [112] Even if Hill was absent for some of the time between 7.00 pm and 11.30 pm, I am not satisfied that his absence makes a material difference. During that period of time the texts and calls from Young exhibited a degree of secrecy about her location, and who she was with, such that the jury could infer that she was suppressing the fact that Hill was with her. At about 7.45 pm Malcolm had a conversation with the deceased in which he related that Young would not give him the name of the motel, but that if he was to go there, “they would send a taxi to go pick him up”.²⁵⁰ I have mentioned before the texts between 9.13 pm and 9.14 pm where Young said that she had “got a room”, then when asked, “u and billy”, replied, “Just me and my gear”.²⁵¹ In the circumstances the question being asked by the deceased was whether the room was for Young and Hill, and her answer could easily be understood as disguising that fact.
- [113] The subsequent responses over the next two hours could be understood as likely responses in the absence of Hill, but that could not be the case with those sent from around 11.30 pm. According to Weston’s evidence Hill was at the motel at about that time, but Young’s responses continued as if Young was on her own. That included the protest when the deceased said, “Might just leave it then hey”, namely, “Well that knock back really made my day cheers fuck I have really lost the know how”.²⁵² It is at that point that Young offered to “drop you a shot if you want”. The texts thereafter are all in the vein of **Young** being the person who will deliver the drugs, and **Young** being the person who would mix the drugs. No mention is made of heroin even though Young knew it was heroin that would be delivered.²⁵³ Then Young texted saying that “me mate” was the person going to drop it off. In truth, it was Hill who was delivering the drugs, albeit being driven by Weston. That the deceased understood it was **Young** who was coming, has support in the evidence of Fox,²⁵⁴ Mastroieni,²⁵⁵ and Watson.²⁵⁶ According to McNeil she understood from the deceased that it was one of Young’s friends who was going to drop it off, namely, Malcolm.²⁵⁷ However, even though on that account it was not Young who was going to make the delivery, McNeil said that she had been told by the deceased that Young was going to arrange for the delivery.²⁵⁸
- [114] In my opinion, it does not matter that Hill may not have been there for the entire time that Young was present at the motel. It was open to the jury to find that the texts which were made, even if Young was alone at the time they were made, were nonetheless part of an arrangement to deliver drugs to the deceased, with the requisite intent on the part of Hill. In my view, it was open to the jury to accept that to be the case.

Young’s Ground of Appeal – Contention (c): Threats were not taken seriously – Discussion

- [115] A further point made in Young’s submissions²⁵⁹ was that whatever the threats were, they were not taken seriously by the deceased. Various accounts suggested that the

²⁵⁰ AB 71.

²⁵¹ AB 494.

²⁵² AB 501.

²⁵³ See the concession at Young’s Submissions, at para 5.17.

²⁵⁴ AB 201.

²⁵⁵ AB 101, 107.

²⁵⁶ AB 214-215.

²⁵⁷ AB 117-118.

²⁵⁸ AB 127.

²⁵⁹ And also by Hill.

deceased was laughing at the threats, unconcerned by them, and in some cases thought they were hilarious. Therefore, the argument ran, how could the jury be satisfied that Hill had the requisite intent to kill or cause grievous bodily harm to the deceased.

- [116] I do not accept the submission. In my opinion, what matters is an assessment of the intention of the person making the threats. It may well be that a threat is made in deadly earnest, but those hearing it do not realise it, or treat it too lightly. Even though those in the deceased's circle of acquaintances may have indulged themselves in outlandish language, and directed abuse to one another, I do not accept the contention that, thereby, Hill did not have a serious intention when he made these particular threats. They were repeated and explicit, and made both orally and by text. Moreover, there was evidence which the jury could accept, which pointed to the threats being backed up. For example, the evidence from Phillip as to Hill acquiring a gun from Robinson,²⁶⁰ and heroin from Vanbreeman for the purpose of scaring the deceased, teaching him a lesson or "getting rid of Luke".²⁶¹

Young's Ground of Appeal – Contention (d): Knowledge of Hill's intention and aiding Hill – Discussion

- [117] The central point raised by Young's appeal was whether there was sufficient evidence upon which a jury, properly instructed, could conclude that Young had actual knowledge that Hill had an intention to kill or do grievous bodily harm. A second aspect of that contention is whether there was sufficient evidence to justify a conclusion that, with that knowledge, Young knowingly aided Hill to supply heroin to the deceased.
- [118] It is important to bear in mind when considering this contention that Young knew that the drug that was being delivered to the deceased on that night was heroin.²⁶² Further, it needs to be borne in mind that there is no evidence that the deceased was a heroin user at any prior time, let alone at the time of these events. Further, insofar as McNeil's evidence established that the deceased identified what he thought had been delivered, it was amphetamines rather than heroin.²⁶³
- [119] The evidence concerning Young's state of knowledge of Hill's intent comes from a variety of sources, but principally the text messages and the oral evidence of Malcolm and Thorgood.
- [120] Thorgood was asked by Hill to pick Young up on Saturday 9 October. Young came out of the house with another woman,²⁶⁴ and got in the car. As she got in the car Young made "a comment about putting her in the boot and taking her out the bush".²⁶⁵ Thinking back, Thorgood said, "I think it was just meant as a bit of a joke, sort of thing." However, he did not say that the comment struck him that way at the time. Taken at face value, Young's comment indicates some concern for her own safety. In my view, the jury could accept it as having that connotation.
- [121] Fryburgan spoke to the deceased on Friday, 8 October, at about 8.00 pm or 9.00 pm. The deceased said he was going out nightclubbing with Young, and that Hill had

²⁶⁰ AB 334.

²⁶¹ AB 357, 367.

²⁶² Young's outline, at para 5.17; paragraph [43] above.

²⁶³ On either version of McNeil's statements he used the words "amphetamines" or "gear", but not "Harry", which was the term he used to refer to heroin: Johnson at AB 227.

²⁶⁴ Though Thorgood did not know who it was, it was Malcolm.

²⁶⁵ AB 43.

just called him and told him that he was dead because he was going out with Young.²⁶⁶ Given that the deceased and Young were very friendly, going out nightclubbing, and the joint taunting of Hill that they engaged in later that night, it is, in my view, highly probable that the deceased related Hill's threat to Young. In my view, the jury could accept that as a probable event.

- [122] Malcolm's evidence was that when the deceased and Young came back on Friday night, they told Malcolm about having made "some phone calls and contact with Brad and they were shit stirring him".²⁶⁷ They said that they had told Hill that they were sleeping together, and Hill's reaction was that he was not happy. Young and the deceased told Malcolm about a text from Hill where he said, "Youse can all get fucked", and he wanted to know what was going on between them.²⁶⁸
- [123] Later that night Malcolm spoke to Hill. He was wild and angry and said "they can get fucked and he'll come and see them in the morning".²⁶⁹ He also said: "If these two fuckers think they're going to do this shit to me and then wake up tomorrow with no piss in them, they've got another thing coming".²⁷⁰ Hill went on to say that he was coming up that night, and he was going to kill everybody.²⁷¹ Though Malcolm took the comment about killing everybody as a figure of speech, she still took the threat seriously enough to be concerned about Young's welfare. This became evident, in terms of her direct evidence, from what occurred on Saturday.
- [124] By Saturday morning there were a series of missed calls from a private number, and Malcolm woke Young up "to ring [Hill] so he'd stop ringing my phone".²⁷² Malcolm then heard Young and Hill arguing, "yelling about people" and fighting, with Young still saying the same things to Hill that she had said the previous night, namely, that Young and the deceased were together.²⁷³ During that argument she heard one particular comment made by Young, namely, "If you think I'm fucking that stupid, Brad, that I'm going to get in a car with you and your mates for you to give me a hot shot, then you're fucking kidding yourself".²⁷⁴ The arguments between Young and Hill went on for between one and two hours. There were a number of calls involved in that argument, because when they got angry one would hang up on the other. However, later that day, around midday, Young left to go and see Hill. Malcolm "told her not to because I feared for her safety".²⁷⁵ Malcolm was concerned enough about Young's safety to walk out of the house with her to the car,²⁷⁶ and to tell Thorgood, "to make sure that she keeps her phone on her and tell Brad the same thing, that I'll be ringing to make sure she's okay and make sure nothing fucking happens to her".²⁷⁷ Malcolm did ring Young a few times to make sure she was okay and that she was safe.²⁷⁸
- [125] On that evidence it must have been plain to Young that Malcolm took Hill's threats seriously, at least to the point of being quite concerned for Young's safety.

²⁶⁶ AB 59, 61.

²⁶⁷ AB 65.

²⁶⁸ AB 65.

²⁶⁹ AB 65.

²⁷⁰ AB 66.

²⁷¹ AB 66.

²⁷² AB 67.

²⁷³ AB 67.

²⁷⁴ AB 68, 78.

²⁷⁵ AB 68.

²⁷⁶ This was being driven by Thorgood.

²⁷⁷ AB 72. Thorgood did not recall this, but it was open to the jury to accept Malcolm's evidence.

²⁷⁸ AB 68, 75.

Not only did she tell Young not to go and see Hill at the motel because she feared for her safety, but she made a point of saying something to Thorgood, and then ringing a few times to make sure that Young was in fact safe. Thus, the jury could accept that Young knew Hill's threats were being taken seriously by Malcolm.

- [126] At 3.25 am on Saturday 9 October, Hill sent the deceased a text message which threatened to kill both the deceased and Young including a threat to "shoot straight into that house kids or no kids".²⁷⁹ It seems plain that the deceased told Malcolm about that text message. Counsel for Hill cross-examined Malcolm about a text message that Hill had sent "that incorporated a threat to shoot at your house or something".²⁸⁰ Her reaction was one of anger and outrage.
- [127] When Young and the deceased arrived home after nightclubbing they had engaged in an abusive verbal exchange with some women living across the road from Malcolm.²⁸¹ Malcolm rang Young while she was at the motel, "to come back – to apologise to the neighbours".²⁸² When Young arrived back at Malcolm's home, Malcolm was not there as she was over at her sister's place.²⁸³ The time of this event can be established fairly precisely as Young texted Malcolm at 2.43 pm saying, "At your place can you come across the road with me".²⁸⁴ Malcolm's evidence was that when she got back at her house, Young was sitting on the verandah, and they then went over together to apologise to the neighbours.
- [128] Given the close friendship between Malcolm and Young,²⁸⁵ and given her concern the previous day resulting from Hill's threats, and her outrage at Hill's threat (conveyed by the deceased) to shoot into her house, it is extremely unlikely that Malcolm would have said nothing of that to Young when she saw her on Saturday afternoon. That, of course, assumes that the content of the threat was conveyed by the deceased to Malcolm at some time between 3.25 am and 2.30 pm. Given the friendship that existed between Malcolm and the deceased,²⁸⁶ and given that they had all shared news of some of the threats the night before, that seems to me to be highly likely. Indeed, it may have been conveyed earlier than the afternoon, and prompted Young's comment when she got in the car with Thorgood, about being put in the boot and being taken out to the bush.
- [129] Notwithstanding there are a number of possibilities, in my view the jury could reasonably conclude that Malcolm shared with Young what she knew of Hill's threats.
- [130] The text messages can be reasonably understood as adding to that body of knowledge. In response to Young's invitation for the deceased to join her, he asked if it was a set-up.²⁸⁷ Her response was: "What do you think I want to be knocked as well".²⁸⁸ Clearly, Young apprehended that Hill would do something to the deceased as well as to her, if he found them together. The jury could reasonably understand

²⁷⁹ AB 482; see paragraph [35] above.

²⁸⁰ AB 76. There was only one such text, namely that sent at 3.25 am.

²⁸¹ AB 73.

²⁸² AB 75.

²⁸³ AB 75.

²⁸⁴ AB 483.

²⁸⁵ Malcolm had known Young all her life: AB 62.

²⁸⁶ She had known him on and off for years: AB 62.

²⁸⁷ AB 495.

²⁸⁸ AB 496.

that as indicating a consciousness on the part of Young as to Hill's threats to do the deceased harm.

[131] Further, the deceased's preoccupation with where Hill was, and whether he was with Young, could well be understood as highlighting to her that the deceased was apprehensive about Hill's intentions. The deceased asked whether Young and Hill had, "Got on got a room", and when invited to join Young, asked where Hill was.

[132] The matters noted above form a foundation upon which, in my opinion, the jury could reasonably draw the conclusion that Young was aware of the threats by Hill to kill or harm the deceased.

Young's Ground of Appeal – Contention (e): No evidence that Young aided Hill – Discussion

[133] The contentions advanced for Young raised the question of whether there was sufficient evidence upon which the jury, properly instructed, could conclude that Young aided Hill in committing the offence. That focused on two aspects, namely, whether Young actually assisted Hill to commit the offence or did any act with the purpose of assisting him, and whether Young knew that Hill intended to kill or cause grievous bodily harm to the deceased.

[134] Consideration of these matters must also take place bearing in mind the concession that the evidence was sufficient to establish that Young knew that the shot being delivered to the deceased was heroin.

[135] The evidence of assistance is found in the text messages. However, they must be read against the background of the other evidence given at trial. The relevant text messages occur in the context where:

- (a) Young was upset with Hill for having some form of relationship with McClure;
- (b) Young and the deceased engaged in a course of conduct designed to enrage Hill, namely, by taunting him that they were sleeping together and were together as a couple;
- (c) the taunts succeeded in enraging Hill to the point where he made a series of explicit threats to kill not only the deceased, but also Young;
- (d) Hill announced that he was coming to Gladstone in order to see Young and the deceased;
- (e) according to the evidence of Phillip, on the way to Gladstone, Hill discussed killing or causing harm to the deceased, at which time the question of using heroin for that purpose was raised;
- (f) Hill apparently reconciled with Young, but had no contact at all with the deceased;
- (g) Young knew of Hill's threats either directly, or because the content of them was likely to have been disclosed to her by Malcolm and/or the deceased; and
- (h) the deceased was not a user of heroin, a fact which was likely known to Young who was, herself, an amphetamines user and not a heroin user.

[136] The text message exchange between Young and the deceased, starting at 9.00 pm on Saturday 9 October revealed Young's involvement:

- (a) having ascertained that the deceased was at a mate's house, watching a movie, Young revealed she was in a motel room somewhere, and invited the deceased to join her to get "fried";
- (b) Young appreciated that the deceased was apparently concerned about Hill, because he asked about his presence on more than one occasion;
- (c) further, the deceased's reaction to being invited to join Young (wherever she was) was to ask if it was a set-up;
- (d) Young's response to that was designed to allay any fears by saying, "What do you think I want to be knocked as well";
- (e) when the deceased again asked as to the whereabouts of Hill, Young's response was to the effect that she had no idea and to ask, "why that?"; that response could be seen as designed to allay any fears that Hill was then present, or would be present at any relevant time in the future;
- (f) the invitation to join Young was repeated at 11.12 pm, by which time Young had made it clear that she was "fried" and "tripping out";
- (g) the deceased declined to join Young where she was, but invited her to come over to wherever he was, and engage in drug taking;
- (h) on the basis that the deceased would be at his parents' house, Young declined, but enquired about perhaps joining him "where you are", referring to somewhere other than his parents;²⁸⁹
- (i) finally, the deceased declined the invitation to join Young at all, saying, "Might just leave it then hey"; however, the deceased left the door open to Young's participation by saying, "Tex me if u wana come shout me a shot. X"; clearly the deceased was inviting no-one but Young;²⁹⁰
- (j) Young then offered to "drop you a shot if you want"; importantly this was an offer that **Young** would bring the shot to the deceased;²⁹¹
- (k) it was understood so, because the deceased offered to pay Young's cab fare to his location, then back again;
- (l) Young asked if the deceased had any clean syringes, only to be told that the deceased did not;
- (m) Young then asked, "Do you mind if I mix it, I don't have scales";²⁹² this clearly conveys that it is **Young** who will mix the drugs, not anyone else;

²⁸⁹ AB 501.

²⁹⁰ AB 501.

²⁹¹ AB 501.

²⁹² AB 502.

- (n) nine minutes later when the deceased asks Young when she is coming, she answers, “Just trying to get myself together”;²⁹³
- (o) the deceased then asks her to text him when she is on her way; clearly, the deceased was of the understanding that it was **Young** who would deliver the drugs;
- (p) the next text from Young is to announce that the drugs were already on their way, but being delivered by a “mate” rather than Young; Young did not identify Hill as being the delivery person, though she did identify that it was to be delivered by a man in a blue Magna: “he’s in blue magen on way now”;²⁹⁴
- (q) Young was then uncontactable by text or telephone call for over ten minutes; during this time the deceased tried to contact her repeatedly, by text and by telephone;
- (r) at 12.51 am Hill asked Young, “Is this going in letter box[?]”; clearly, this could be understood as Hill and Young cooperating in the delivery;
- (s) Young told Hill that it was to go in the letterbox;
- (t) that is where it was put, albeit by Hill unexpectedly asking Weston to do so;
- (u) Hill then told Young “Done” and Young responded, “Sweet”;²⁹⁵
- (v) the next thing Young did was to text the deceased to say, “In your letterbox sorry cant move”.

[137] In my view, that evidence could be accepted by the jury as establishing Young’s involvement by way of assisting Hill. Her responses went to allay the deceased’s concerns over Hill’s presence or involvement. Her responses also served to allay the deceased’s concerns that there might be a set-up involved. Young then made it clear that it was **she** who would “drop a shot” to the deceased, and that it was **she** who would mix the drugs. In none of those responses was Hill mentioned, even though Weston’s evidence clearly establishes that Hill was present at the motel from about 11.30 pm.²⁹⁶

[138] An important aspect of that exchange is that the drugs were to be pre-mixed, so there was no question of delivering something that the deceased might recognise in powder form. At no point did Young reveal that it was heroin that was being delivered, when she knew that to the case. Then Young explained that she could not make the delivery after all, but that the delivery was already on its way, being delivered by a “mate”. Once again, Hill’s involvement was not revealed, even though it was the case that Hill was taking the drugs to put them in the letterbox. That Young knew that to be case is demonstrated by the fact that it was Hill who texted her, asking was it to go in the letterbox, and she told him yes. Once the delivery had been made, Young then told the deceased it had been put in his letterbox, again without revealing Hill’s involvement.

²⁹³ AB 503.

²⁹⁴ AB 503.

²⁹⁵ AB 507.

²⁹⁶ He may have been there earlier, but this period is the important period.

- [139] It was plainly open on that evidence to conclude that Young was assisting Hill. Further, that evidence, combined with the evidence of the threats that she actually knew about, was enough for the jury to conclude that at the time Young was assisting Hill to make the delivery of heroin, she knew of Hill's intent. After all, whilst Hill might have reconciled with her, there was no evidence that he had moderated his attitude towards the deceased.
- [140] More importantly, the evidence was more than enough for the jury to conclude that Young knew of the deceased's concern over any involvement by Hill. Twice he asked about Hill's presence or involvement, and on one occasion asked whether her invitation was a set-up. Her response to that indicated her continuing knowledge that Hill was hostile towards the deceased, and would be towards Young if she and the deceased were discovered by Hill. That makes the innocuous flavour of the texts more significant. What is significant is the fact that Young did not reveal that Hill was involved, either by his presence at the motel from about 11.30 pm, or in delivering the drugs. It was open for the jury to conclude that if she had done so, the deceased would have been put on guard. Further, even though she knew that the syringe being delivered contained heroin, no mention of that was made in any of the texts. Given that the deceased was not a heroin user, and it is most likely that Young knew that,²⁹⁷ the absence of any mention that the drugs consisted of a syringe of heroin rather than amphetamines, supplies a basis for believing the assistance was done with knowledge of Hill's intention. To reveal that it was heroin would probably also put the deceased on guard.
- [141] I pause to note that whilst the evidence of Phillip was largely tendered against Hill, and not Young,²⁹⁸ that evidence, if accepted by the jury, goes a considerable way to establishing Hill's intention to kill or cause grievous bodily harm. More importantly, once it is accepted that the delivery to the deceased's letterbox was of heroin, Phillip's evidence takes on an added significance. The evidence did not reveal that Young had any access to heroin, either in the past or at the time of these events. However, Phillip's evidence did establish a potential source of heroin for Hill, namely Vanbreeman. Furthermore, the conversations to which Phillip was party (in the absence of Young) supported the fact of which Young was aware, namely that it was heroin that was delivered to the deceased. The fact that Young knew that heroin was delivered would, if that was found by the jury, make it easier to accept Phillip's evidence.
- [142] The consequence is that the jury had sufficient evidence to accept that both Young and Hill knew that they were about to deliver a syringe of heroin to the deceased. None of Hill's conduct revealed his involvement; indeed, he even went some way to using a disguise at the time of delivery, by wearing a hoodie which he pulled up, and getting Weston to make the physical delivery. Young's responses to the deceased also concealed Hill's involvement, and went a considerable way towards reassuring the deceased, in the face of his expressed concerns, that Hill was not involved and that it was simply Young who was preparing and delivering the drugs. If there was truly no animus involved on the part of Hill, why did he not text the deceased (whose telephone number he knew) and reveal that it was the deceased's old friend, Hill, who was delivering the drugs? Further, when Hill asked Young whether the drugs were to be placed in the letterbox, the only rational inference for the jury to

²⁹⁷ On the evidence, Young herself was an amphetamines user and not a heroin user.

²⁹⁸ The conversations to which Phillip was party were in Young's absence. The same is the case of Weston's evidence of his conversation with Hill on the morning after the death of the deceased.

draw, in the circumstances, was that Hill knew that Young would contact the deceased to let him know that it had been done.

- [143] In my opinion, it cannot be demonstrated that there was an insufficient foundation for the jury to conclude that Young was guilty of the offence with which she was charged. On the contrary, there was a deal of evidence which the jury could accept as establishing that Hill's delivery of the heroin was a substantial or significant cause of the deceased's death, that Young assisted Hill to commit the offence by her conduct in the text exchange with the deceased and particularly with reference to the delivery of the drugs to the deceased's letterbox, that Young did act to assist Hill with the intention of assisting Hill to fulfil his threat to the deceased, and that she knew that Hill intended to deliver the heroin for the purpose of intending to kill or cause grievous bodily harm to the deceased.

Young's Ground of Appeal – Conclusion

- [144] For the reasons set out above, Young's appeal on this ground fails. I would dismiss the appeal.

Hill's Second Ground of Appeal – Omission of material evidence

- [145] The appellant contends that there was a miscarriage of justice in that a contradictory statement made by McNeil, relevant to the reliability of that witness as to the deceased's knowledge of the drugs supplied to him, was not before the jury. An application was made for leave to adduce that evidence.

- [146] This ground concerns evidence given by McNeil in relation to a conversation she had with the deceased shortly before he died. McNeil said she had a series of telephone calls with the deceased, during which he told her that Young was trying to get him to go to a hotel room to have sex. McNeil urged him not to go because of the danger that was present from Hill. The deceased expressed the view that Young was someone he could trust. The deceased then said that he was "getting stuff dropped off to him"²⁹⁹ by one of Young's friends. He identified that friend as Malcolm.³⁰⁰ The deceased said that a package had been dropped off and he was going to take it. He referred to it as being in liquid form and that it had been dropped in his mail box.³⁰¹ McNeil said that she could not talk the deceased out of taking the drugs and so she told him to at least taste them. Then followed this evidence:

"All right. Prior to that did anything happen in relation to the liquid?
 --- Yes, Luke said that – after I couldn't talk him out of taking it, I said at least – at least taste it. I didn't know what form it was in and Luke said – Luke said it tasted foul.

Did he – was there any mention of what he was tasting? --- He assumed it as amphetamines.

Did he – could you tell us exactly what he said in relation to the part about tasting? --- Okay. He said that it tasted foul. I could hear him dry retching. Once again, I asked him not to take it.

...

²⁹⁹ AB 117.

³⁰⁰ AB 118.

³⁰¹ AB 118.

All right. So back to this part of the conversation about tasting it, tell us what Luke told you and what you heard? --- He said – he said that he had never – never tasted amphetamines before, so he didn’t know what it would taste like.

And then what did you hear? --- He was dry retching.

All right. And did he tell you about what it tasted like? --- He said it tasted foul.”³⁰²

[147] There was no cross-examination of McNeil about that part of her evidence where she recorded the deceased as saying that he had not tasted amphetamines before.

[148] In the course of preparing the appeal the legal advisers for Hill obtained a copy of the file held by Hill’s legal advisers during the course of the trial. That file contains two statements made by McNeil. The first was given on 10 October 2010 and relevantly recorded that part of the conversation to which reference has been made as: “He said, “I don’t even know what gear tastes like, I’ve never eaten it”.”³⁰³ In a second statement, given a month later to a different police officer, McNeil recorded his comment as being: “Alicia that tested [sic] really fouled [sic]. Alicia I don’t even know what Amphetamines even taste like”.”³⁰⁴

[149] It was common ground at the trial, and on appeal, that the word “gear” was one used by drug takers to refer to certain drugs. However the use of the term varied:

(a) Vanbreeman used the term to refer to heroin;³⁰⁵ and

(b) Robinson used that phrase to refer to amphetamines.³⁰⁶

[150] The passage of evidence from McNeil was dealt with by counsel for Hill when he addressed the jury.³⁰⁷ It was attacked in two ways: first, as to the unlikelihood of the deceased using the word “amphetamines” rather than words such as dope, gear or speed; secondly, to suggest by the course of questions that the word “amphetamines” had been introduced into McNeil’s head by the way in which the questions were asked by the prosecutor, and therefore the prosecutor’s submission that the jury could be sure that the deceased thought he was taking amphetamines, was to be doubted.

[151] The contention on the appeal was that McNeil should have been cross-examined on the disparity in the statements,³⁰⁸ with a view to suggesting that if she used the wider term “gear”, then that introduced the possibility that he thought he was taking some drug other than amphetamines. The contention was that one could not discern a rational forensic reason for failing to cross-examine on the disparity. The failure to cross-examine, it was said, had resulted in an unfair trial and deprived Hill of a fair chance of acquittal.

³⁰² AB 118-119.

³⁰³ Statement of McNeil, dated 10 October 2010, at para 8.

³⁰⁴ Statement of McNeil, dated 10 November 2010, at para 78.

³⁰⁵ AB 21.

³⁰⁶ AB 141-142.

³⁰⁷ Supplementary Record, AB 36-37.

³⁰⁸ Acknowledging that there was no doubt that Hill’s legal advisers were aware of both statements at the time of the trial.

Hill's Second Ground of Appeal – Discussion

- [152] I do not accept the submission. Counsel for Hill was obviously aware of the disparity in the statements at the time of the trial and it must be assumed that he made a forensic decision not to cross-examine on it. One can readily understand why. He could not possibly have known what answer he would get from McNeil, and an entirely probable outcome of asking that question was that she would have ascribed to the deceased a statement referring to gear which she understood, in the circumstances, to be amphetamines. A question such as was postulated could easily result in the answer that McNeil and the deceased always used the term “gear” to refer to amphetamines. Eliciting any sort of response of that nature would have destroyed the forensic advantage which counsel for Hill was trying to gain in his address to the jury, namely that the use of the word “amphetamines” by McNeil was derived from a shaky foundation, having effectively been suggested by the prosecutor’s questions, and therefore one should doubt that the deceased thought he was taking amphetamines.
- [153] Insofar as there is any evidence about the terminology used by the deceased, Johnson’s evidence was that when the deceased referred to heroin he used the term “Harry”.³⁰⁹ That provides a further reason why one would not cross-examine on the difference in McNeil’s statements.
- [154] In this context it is pertinent to note the statement of Gleeson CJ in *TKWJ v The Queen*:³¹⁰

“It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K.

Trial counsel made a decision not to call certain evidence. Viewed objectively, it was a rational tactical decision, made in order to avoid a forensic risk. It did not make the trial unfair, or produce a miscarriage of justice.”

³⁰⁹ AB 227.

³¹⁰ *TKWJ v The Queen* (2002) 212 CLR 124, at 130-131.

- [155] In my opinion there was a sound tactical reason for Hill’s counsel to refrain from cross-examining on the disparity in the statements. To do so ran the high risk that the responses would confirm that the deceased believed the syringe contained amphetamine, thus destroying the tactical advantage that counsel obviously thought he had to exploit.
- [156] I am by no means satisfied that any unfairness was produced or that Hill, lost the fair chance of an acquittal. Ground two therefore fails.

Hill’s Third Ground of Appeal – Jury should have been discharged

- [157] This ground is concerned with two aspects of the evidence. The first concerns the testimony of the witness Hardwick. The second is not directed to a particular witness, but concerns the reference to Hill being a drug dealer.³¹¹ In each case the contention was that the jury, having heard the impugned evidence should have been discharged, and the mistake in letting the jury continue could not be cured by further directions.
- [158] Hardwick gave evidence of conversations with Young in the week before the death of the deceased, when Young stayed in Hardwick’s house. During her evidence Hardwick seemed to depart from a statement which she had given and the Crown was given permission to explore her hostility on a voir dire.³¹² After the voir dire she resumed evidence before the jury. Young told her that she had received threats from Hill to the effect that he was going to kill their dog,³¹³ and that Hill would come and kill Young and the deceased.³¹⁴
- [159] Hardwick referred to comments by Young at about 5.00 pm or 6.00 pm on Saturday 9 October. She told Hardwick that Hill was in town and she seemed very upset.³¹⁵ Young said that she and the deceased had been getting drunk, the deceased was:

“... stirring Brad and I think, if I remember correctly, [the deceased] to the point of saying that Brad was in some way doing things to children and he was pretty – pretty wild”.³¹⁶

That evidence was referred to again in cross-examination in these terms:

“When Luke and Kerryn had – had been drinking, Luke was ringing and taunting Brad, basically accusing him of doing, yeah, not good things to children, yeah.”³¹⁷

- [160] Then followed cross-examination on a voir dire, following which an application was made to discharge the jury. That application was rejected, and Hardwick’s evidence resumed before the jury.
- [161] During cross-examination Hardwick was questioned about her drug use, previous untrue statements, and the fact that she had not previously mentioned the comment about the deceased taunting Hill about doing something to children.³¹⁸

³¹¹ For example, AB 110.

³¹² AB 244.

³¹³ AB 246.

³¹⁴ AB 246.

³¹⁵ AB 247.

³¹⁶ AB 247.

³¹⁷ AB 248.

³¹⁸ AB 269.

- [162] No other witness mentioned anything in relation to Hill doing things to children.
- [163] In the course of summing up the learned trial judge dealt with that evidence in this way:³¹⁹

“While it is no part of my function to tell you what to accept and what to reject, I want to give you the strongest warning that I can about acting on at least one piece of her [Hardwick’s] evidence. She said in her evidence that Young had told her that [the deceased] had told Young that he, [the deceased], had taunted Hill with a claim of interfering with children. Now, for a start you should understand this is not even admissible evidence against Hill, an out-of-court statement by a person about another and not on oath is hearsay and inadmissible. It is, in fact, double hearsay in this case. So it adds nothing to the case against Hill and cannot be used in judging the case against him and his likely level of animosity towards [the deceased].

But what I want to warn you is that it is not reliable evidence at all. Hardwick had given two statements before. She’s given evidence in the Magistrates Court about these matters on the committal hearing where she was expressly asked if she had any new information to add and she said she had not. The one significant thing she was asked to speak about were threats and taunts between Hill and [the deceased], and then two and a half years later after these events, she introduces for the first time what you might think would, if true, be a very important fact and one hard to overlook, no matter how drug-affected you were. There is not the slightest hint of any other witness supporting that part of her testimony. While all facts are for you, it seems to be me to be wise, to put that allegation completely to one side, ignore it and look at the other evidence to determine what, if any threats were made and the nature of those threats.”

Hill’s Third Ground of Appeal – Discussion

- [164] When one looks at what was actually said by Hardwick³²⁰ the learned trial judge’s characterisation of the evidence is plainly correct. Hardwick was purporting to recall what Young had told her, and in turn these were things not said by Young, but by the deceased. The whole context was that the deceased was “stirring” Hill, “to the point of saying that [Hill] was in some way doing things to children ...”. On the second occasion it was mentioned³²¹ the context of the comment was that the deceased was “ringing and taunting” Hill and “accusing him of doing ... not good things to children ...”. Given the nature of the witness, and the admissions made as to her drug affected state at the time, as well as her history of telling lies, and finally the fact that no other witness gave any evidence to support the suggestion, in my view it is fanciful to think that that piece of evidence played any part in the jury’s consideration. Particularly is that so, when one has regard to the terms in which the learned trial judge addressed that evidence in summing up.
- [165] As to the second part of this ground, namely the reference to Hill as a drug dealer, I do not consider that there is anything of substance in this point. There was direct

³¹⁹ AB 444.

³²⁰ AB 247 and 248.

³²¹ AB 248.

evidence of Hill's use and supply of drugs. For example, Weston gave evidence that Hill asked him to get some syringes and if he did so "he'd shout me a shot",³²² meaning a shot of amphetamines. Weston purchased syringes and took them back to Hill, who mixed up the drugs, filled three syringes and gave one of them to Weston who injected them. Weston said he knew from the effect of the drugs, that it was amphetamines.³²³ It was Weston who was asked, by Hill, to put an envelope in the deceased's letterbox. Later when it was discovered that the deceased had died, Hill told Weston that "our mate that we dropped that thing off to last night's dead. This is the first one I've had anything to do with it and you need to shut your mouth."³²⁴

[166] Cross-examination of Weston commenced with trying to establish, and successfully so, that various witnesses in the trial were drug takers, drug producers or drug distributors. Thus, Weston identified himself as serving a period of imprisonment for amphetamine production,³²⁵ and Shane Robinson was identified as a distributor of speed, as was his son, Robinson.³²⁶ The same was said of Phillip and a person called Maslin.³²⁷

[167] Thorgood gave evidence that on Saturday 9 October he picked Hill up from his motel and at Hill's request, took him to the Botanical Gardens to meet a man called "Wog",³²⁸ from whom he purchased drugs.³²⁹ Thorgood's evidence was that when he met Hill later at the motel, Hill offered him some of the drugs, and he accepted.³³⁰

[168] Fryburgan was cross-examined by Hill's counsel as to the fact that she used drugs frequently with Hill and would shoot up methylamphetamine.³³¹ The witness Malcolm was cross-examined by counsel for Hill as to a text she sent, where she referred to Hill's request to borrow her car:

"No, mate, sorry, but, hey, fuck him and the rest of them. If he wants my car, then pay me the 300 they owe me for that weed and two P and I'll drop it off."³³²

The reference to "two P" meant two points of amphetamine.

[169] Malcolm was also questioned³³³ as to the fact that the deceased had been a drug dealer.³³⁴ A number of witnesses gave evidence of the fact that the deceased and Hill had been good mates, and indeed had lived together, prior to falling out earlier in October 2010.³³⁵

[170] Mastroieni gave evidence of conversations with the deceased on Saturday 9 October, where the deceased referred to the fact that Young had drugs to give him

³²² AB 26.

³²³ AB 27.

³²⁴ AB 30.

³²⁵ AB 31.

³²⁶ AB 31.

³²⁷ AB 31.

³²⁸ The nickname for Paul Mastroieni.

³²⁹ AB 41.

³³⁰ AB 43.

³³¹ AB 60.

³³² AB 76.

³³³ By counsel for Young.

³³⁴ AB 77.

³³⁵ For example, McClure at AB 80.

and that she was going to “shout him a shot”.³³⁶ Cross-examination of Mastroieni by counsel for Hill included her own drug use on a long-standing basis and the deceased’s drug use and selling of drugs.³³⁷ That cross-examination also included exploring the fact that many threats had been made against the deceased by persons involved in the drug trade.³³⁸

- [171] There was no objection when Shirley Mastroieni³³⁹ gave evidence that Hill was a drug dealer.
- [172] McNeil was also cross-examined by counsel for Hill in relation to her own drug use, convictions for drug related matters and how she took drugs.³⁴⁰ Cross-examination also included exploring phone calls between McNeil and the deceased shortly before his death, concerning the fact that Young was going to arrange for some drugs to be dropped off to the deceased.³⁴¹
- [173] Hardwick was cross-examined by counsel for Hill, part of which included establishing what she knew of the rumours and talk “in the drug circles in Gladstone” about what had happened to the deceased.³⁴² Further, she was cross-examined about the fact that over a period of time she had received drugs from Paul Mastroieni, whose nickname was “Wog”.³⁴³ Then Edwards was cross-examined as to her participation in the drug scene in Gladstone and as to the fact that she used to obtain her “pot” from the deceased.³⁴⁴ To similar effect was the cross-examination of Brown, to establish his connection with the drug scene in Gladstone and his obtaining of amphetamines from the deceased.³⁴⁵
- [174] In a trial where the bulk of the lay witnesses seem to have been involved in the drug scene to one degree or other, some as drug users and others as drug dealers, it is difficult to see how the one line reference to Hill having been a drug dealer could possibly prejudice him. There was already unquestioned evidence from Weston to the effect that Hill supplied him with drugs, and from Thorgood to the effect that Hill was buying drugs from “Wog”.
- [175] However, there was other evidence to which objection was not taken, either at trial or on appeal, which would go to establish that Hill was a drug dealer. In the summary of text messages taken from the various phones in the possession of the participants, including Hill, there are a couple of entries which, on their face, record Hill offering drugs to others. On 9 October, at about 8.36 pm, Hill texted a person called Powell, stating “I can give u sum pure”.³⁴⁶ Then at 9.08 pm Hill texted a person called Noy, saying “U want any pure”.³⁴⁷ There can be little doubt what those texts are about. The jury in this particular trial would have had no difficulty understanding those references to be Hill offering drugs to others. Indeed, counsel for Hill referred to one of those texts in his address to the jury.³⁴⁸ Consequently,

³³⁶ AB 101.
³³⁷ AB 103.
³³⁸ AB 105-106.
³³⁹ Lindsey Mastroiene’s mother.
³⁴⁰ AB 123-124.
³⁴¹ AB 127.
³⁴² AB 264.
³⁴³ AB 265.
³⁴⁴ AB 270.
³⁴⁵ AB 296.
³⁴⁶ AB 491.
³⁴⁷ AB 493.
³⁴⁸ Supplementary Record, AB 44.

I cannot see that the reference by one witness to Hill being a drug dealer could, in any way, have prejudiced Hill in his trial.

[176] For the reasons above ground three fails.

Hill’s Fourth Ground of Appeal – Consciousness of guilt

[177] This ground contended that there was a miscarriage of justice in that the jury were directed, wrongly, that post-offence conduct by the appellant was capable of amounting to evidence of consciousness of guilt of murder.

[178] The ground relates to the evidence of Weston concerning the events on Sunday 10 October, some hours after the death of the deceased. Some short context is necessary. Weston’s evidence included these features:

- (a) Weston received a phone call from Robinson, asking whether Weston could pick somebody up and drop them out at the power house;
- (b) Weston was not told who he was being asked to pick up but was directed to the motel;
- (c) he drove to the motel, arriving late, “probably 11.30”;
- (d) he saw a door to one of the rooms open and Hill came out; Hill opened the car door and asked if Weston had any syringes, saying that if Weston could get some syringes Hill would “shout [Weston] a shot”;
- (e) Weston went to the community health building, purchased a pack of syringes, and then went back to the motel;
- (f) Weston got out of the car, announced himself at the door (out of which Hill had originally come), then went in;
- (g) the time was near midnight;
- (h) he saw Hill and Young inside, and Hill proceeded to mix up a shot using white powder from a plastic bag, mixed with water; Hill then divided the mixture into three syringes;
- (i) during this time Young was fiddling with her phone or playing on a phone;
- (j) Hill gave a syringe to each of Weston, Young and himself and Weston injected the drugs into his arm; Weston could tell from the effect that they were amphetamines;
- (k) both Young and Hill were half facing away from Weston and they appeared to inject the drugs themselves;
- (l) at that point Hill asked if Weston could give him a lift out to the power house, at which point Weston went out to the car and left Hill “gathering the stuff in front of him, like, packing things up”;³⁴⁹ Hill proceeded to follow him about 30 seconds later;
- (m) Hill got in the car and Weston proceeded to drive towards the power station;

- (n) at some point Hill asked if it was all right if they stopped and “just dropped something off to somebody”;³⁵⁰ Hill then gave directions to Weston as to which roads to turn into; Weston did not know where they were going;
- (o) Hill told Weston to pull up on the right hand side of the road, near a low set brick house on the corner; the house had a letterbox close to the gutter;
- (p) Weston expected Hill to get out of the car, but Hill threw an envelope onto Weston’s lap and asked him to drop it in the letterbox; Weston did so;
- (q) Weston thought that the envelope had something in it, but “I couldn’t feel anything distinguishing”;³⁵¹ it was light, and not bulky; he did not feel anything that would have suggested a syringe as opposed to a small bag of powder; he only held the envelope for a few seconds;
- (r) after putting the envelope in the letterbox, Weston proceeded towards the power house but pulled over when Robinson telephoned, saying that he was driving behind Weston;
- (s) Weston pulled over; Robinson was in a silver Suzuki Swift, with Phillip; Hill got out of the car and got into Robinson’s car;
- (t) Weston then went back to Shane Robinson’s house.

[179] Weston next saw Hill on the following morning, at about daylight. Robinson, Phillip, Hill and Young turned up at Shane Robinson’s house. Weston described the events:

“And what happened? --- Ian Robinson, Naomi Phillip, Brad Hill and Kerryn Young have turned up about daylight and come up into the house. Brad Hill’s said we need to talk.

Who did he say that to? --- To me. He’s led me down to Shane Robinson’s bedroom. Once in the bedroom he’s said [“]our mate that we dropped that thing off to last night’s dead. This is the first one I’ve had anything to do with it and you need to shut your mouth[”].

Who – who did he say that to, [“]you need to shut your mouth? [”] --- To myself.

Where was Kerryn Young when this conversation ---?--- I believe she was in the lounge room.

All right. What did you do? --- I was – I was a bit stunned at what was said. It was – it was a bit of a shock.”³⁵²

[180] There was no objection to the evidence being led as to what Hill said to Weston the following morning.³⁵³ That evidence was not challenged, nor was there any

³⁵⁰ AB 28.

³⁵¹ AB 29.

³⁵² AB 30.

³⁵³ It was accepted at trial that evidence was not admissible against Young.

substantive challenge to Weston in respect of the matters recorded above, namely Weston's account of the events from when he met Hill at the motel through to when Hill changed cars after the envelope was dropped off in the letterbox.

- [181] In the prosecutor's address to the jury the following was said about Weston's evidence of the conversation with Hill the following morning:

"Why would – ask yourself this – and this is unchallenged – that Mr Hill threatened him to keep his mouth shut, I don't know, 4 or 5 o'clock the following morning.

What are we asked to believe? That Bradley Hill, overcome with sudden generosity to the deceased, delivered a little packet of methylamphetamine and then he had to go and threaten Leigh Weston to keep his mouth shut about that. Or did he really have to threaten Leigh Weston to keep his mouth shut about delivering a syringe which Bradley Hill knew contained heroin that he got from – I wonder who he could've got it from? We actually had – if she can be deemed an expert – probably one of the most authoritative figures on heroin abuse in the state, Leigh Vanbreeman. She had been a heroin addict for 27 years. She had heroin with her. She had given or sold or swapped some to Ian Robinson and Naomi Phillips. So Brad Hill has got the means. He's got the stated intention. He drops the heroin off. [The deceased] dies and what's he got in his system? Morphine. Stated intention. Motive. Desire. Opportunity. And that's one mess sorted.

That's why he has to threaten Leigh Weston to keep his mouth shut. This is the circles that they were all in at the time. I mean, Leigh Weston told you that he's in prison and he's got parole coming up but his evidence, essentially, wasn't particularly challenged. So from that you can be satisfied comfortably that Brad Hill delivered heroin or morphine in a syringe, and the same type of syringe with an orange cap was found in the room containing morphine, the same type of syringe that Leigh Weston went and got from Gladstone Hospital."³⁵⁴

- [182] Counsel for Hill dealt with the post-death conduct fairly shortly. Having referred to the fact that it was a circumstantial case that the jury was hearing, and the inference of guilt must be the only rational inference, this was said:

"So any post-death conduct of Mr Hill panicking, being shocked, need not relate to the delivery of heroin with an intention to kill. Any death of any drug user must cause panic in any person who thought they may have supplied the drug. Well, a man is dead and any death is a tragedy, but let's not romanticise the life of [the deceased]. He chose to become an intravenous drug user."³⁵⁵

The learned trial judge dealt with the post-killing conduct in his summing up, in these terms:

"Post killing conduct. The prosecution asks that you draw an inference from the defendant's conduct on the next morning.

³⁵⁴ Supplementary Record, AB 5-6.

³⁵⁵ Supplementary Record, AB 38.

There are two pieces of evidence relevant here: the prosecution point to the attendance on Weston at his home at daybreak on the morning after [the deceased's] death and he had been told to stay quiet. Both defendants go there, but Young remains in the lounge while Hill takes Weston to a bedroom, and, as I have said on Weston's account tells her to keep quiet about the drop-off.³⁵⁶

Now, on its own this evidence does not take the case very far at all. At the most it indicates a concern by Hill about his involvement in the death. Bear in mind that before you could use this conduct as indicative of guilt you would first have to find that the defendants acted in this way because they knew they were guilty of the offence charged, and not for any other reason. Recall Young is in the lounge room, not the bedroom where the conversation takes place.

You must remember in relation to this sort of evidence that people do not always act rationally and that conduct of this sort can often be explained in other ways. For example as a result of panic or fear or other reasons having nothing to do with the offence charged. You must have regard to what has been said to you by the defendants' counsel as to the other explanations for his behaviour. Effectively that it is as consistent with panic at an innocent involvement in a death following the delivery of amphetamines as any other hypotheses. All of these matters must be considered by you in deciding whether you can safely draw any inference from the fact of the attendance on Weston.³⁵⁷

- [183] The contention on this ground is that in the particular circumstances of the case, the conduct of Hill on the morning after the death of the deceased was not capable of amounting to consciousness of guilt of murder. Further, that on the issue of an intention to kill or cause grievous bodily harm, the conduct was equivocal and intractably neutral.

Hill's Fourth Ground of Appeal – Discussion

- [184] At the trial there was no challenge by Hill to the fact that something was delivered to the deceased's letterbox, by Weston at the request of Hill, some time after midnight. There was, however, considerable contest on the part of Hill as to whether the envelope contained a syringe with heroin in it, or something else. Considerable effort was taken in cross-examining a variety of witnesses to establish that the deceased had a number of persons who had reason to cause him harm, that there was a second delivery of drugs to the deceased's house that night, and that if Hill delivered anything it was more likely some amphetamines, rather than heroin. Further, Hill's defence contended that one scenario was that the deceased was seeking a shot, asked for the drugs to be delivered, and then simply received what he intended, namely amphetamines.³⁵⁸ As it was put to the jury, the text from Hill to Young, namely "is this going in the letterbox", was "indicative of a simple drop off of a drug that someone obviously keen for a shot. He was chasing it."³⁵⁹

³⁵⁶ The reference to "her" clearly meant "him", as there was no suggestion that Young was present during the conversation between Hill and Weston. Further, the conversation took place at Shane Robinson's home, not that of Weston. Neither error is significant.

³⁵⁷ AB 450.

³⁵⁸ Supplementary Record, AB 45 and 55.

³⁵⁹ Supplementary Record, AB 55.

- [185] Thus, Hill’s case put in issue whether he had unlawfully killed the deceased, challenging the factual events (particularly as to the nature of the delivery of drugs), as well as whether the conduct amounted to criminal offences. In those circumstances the respondent contends that the evidence of the conversation between Hill and Weston the following morning was admissible to prove Hill’s deliberate involvement in the unlawful killing of the deceased, and that its relevance was not limited to demonstrating Hill’s intention. I accept that submission. Given the challenge to establish that there had been a second delivery of drugs by unknown persons and the (relatively innocuous) nature of the drugs likely to have been delivered by Hill,³⁶⁰ the evidence of Weston as to Hill’s conduct the following morning was relevant on more than one front. What Hill told Weston had several elements: first, that the deceased was, in fact, the person for whom the delivery to the letterbox was intended; secondly, that he knew that the deceased had died; thirdly, that Hill had something to do with it, signified by the phrase “this is the first one I’ve had anything to do with it”; and fourthly, that Weston needed to keep quiet about it. To that one needs to add the fact, conceded on appeal, that Young knew that the drug delivered was a pre-mixed shot of heroin.³⁶¹ Once those elements are understood, it becomes clear that Weston’s evidence as to what was said goes further than mere guilt, and establishes Hill’s involvement in the unlawful killing of the deceased. It connects the delivery of drugs to the deceased with the deceased’s death and that Hill had something to do with it.
- [186] The learned trial judge referred to the use of Hill’s conduct in terms of whether it might be “indicative of guilt”. When it is said that conduct might demonstrate a “consciousness of guilt”, the reference is normally to the way that phrase was used in *Woon v The Queen*.³⁶² In that case Kitto and Taylor JJ referred to the High Court decision in *R v Grills*³⁶³ which dealt with the admissibility, as a matter of law, in certain circumstances of statements made in the presence and hearing of another. In *Grills*, Griffiths CJ said:³⁶⁴
- “The fact that such a statement has been read is often admissible in evidence, and the reason for its admissibility is well known. The statement itself is not evidence of the facts alleged in it. The evidentiary fact consists in the conduct of the accused when it is read to him, whether by way of spoken words, which may amount to an admission or denial in whole or part, or by silence. The circumstances of the case may show that such conduct is evidentiary of some fact relevant to the question of his guilt, e.g., his untrue denial of some relevant fact proved *aliunde*. If it is not evidentiary of any such fact the evidence is irrelevant, and inadmissible on that ground.”
- [187] As is clear from that passage, the evidence from which a consciousness of guilt might be drawn, is not considered in isolation. It is to be considered in the circumstances of the case. In other words, post-offence conduct must be judged in the light of other circumstances in the case and, where the case depends upon circumstantial evidence, in the totality of that circumstantial evidence.³⁶⁵ Thus, the

³⁶⁰ In the sense that Hill, Young and the deceased were all users of amphetamines, so that amphetamines would have been, from their perspective, an innocuous delivery.

³⁶¹ See paragraph [43]. If she knew that, it is, in the circumstances, inconceivable that Hill did not know it too.

³⁶² *Woon v The Queen* (1964) 109 CLR 529; [1964] HCA 23.

³⁶³ *R v Grills* (1910) 11 CLR 400; [1910] HCA 68.

³⁶⁴ *Grills* at 408-409.

³⁶⁵ *R v Williams* [1987] 2 Qd R 777, at 780 and 786; *R v Ciantar* (2006) 16 VR 26, at [40], [67]-[72]; *Flora v The Queen* [2013] VSCA 192, at [79]-[82].

evidence of Hill's conduct must be seen in the light of other evidence that the jury might accept. That evidence includes:

- (a) the express threats made by Hill to kill or harm the deceased, the evidence of Phillip suggesting that Hill had access to heroin and discussed using it against the deceased;³⁶⁶
- (b) the evidence that the deceased was concerned to know the whereabouts of Hill earlier that evening and whether Young's invitation to go to the motel room was a set up;
- (c) the sequence of text messages from Young indicating that it was she who was going to mix the shot and deliver it;³⁶⁷
- (d) the fact that even though Young and the deceased knew Hill well, Hill was not mentioned in the texts as being the person who would deliver the shot, the fact that Young and Hill knew that it was heroin being delivered;
- (e) the fact that the deceased's text indicated that he had no syringe at his home and the only syringe that was found after the event was one which contained morphine.

[188] Seen in the light of that evidence, it is in my view impossible to say that Hill's conduct the next morning was equivocal or intractably neutral.

[189] In *R v Taylor*³⁶⁸ the Victorian Court of Appeal referred to "intractable neutrality" in commenting upon distress evidence. Winneke P said:

"The applicant submits that the evidence which was left to the jury was "intractably neutral" in the sense that it could not be regarded as more consistent with guilt than with innocence. In those circumstances, it was submitted, it was incapable of amounting to supportive evidence. For my own part, I do not regard the evidence to be "intractably neutral" whatever that may mean. If it means evidence can never be regarded by the jury as confirming the complainant's evidence, then I do not believe this evidence falls into that category. The mere fact that it might be regarded as consistent with guilt as with innocence, does not prevent it, in my view, from being evidence which is capable of amounting to corroboration. There can be no doubt that circumstantial facts can combine to provide evidence supportive of that of the person required to be corroborated, in as much as they amount to circumstances leading to an inference that it was probable that advantage would be taken of an opportunity presented, or to show that the misconduct alleged was probable. For example, evidence of distress, or injury to, or torn clothing of a girl complaining of having been raped is often left to juries as evidence capable of providing corroboration even though it is equivocal per se. That, of course, does not mean that the evidence

³⁶⁶ Though this evidence was contradicted by other witnesses, it was a matter for the jury as to what they believed.

³⁶⁷ In other words, not Hill.

³⁶⁸ *R v Taylor* [2004] VSCA 98.

is not capable of being corroborative; all it means is that it is a question for the jury to determine whether it is corroborative or not.”³⁶⁹

[190] In a later case, *R v Ferguson*³⁷⁰ the Victorian Court of Appeal said:

“Some evidence is characterised as ‘intractably neutral’ and therefore incapable in law of amounting to corroboration. However, evidence is not ‘intractably neutral’ merely because it can be regarded as supporting competing hypotheses. It is a matter for the jury, properly instructed, to determine whether the hypothesis for which the Crown contends should be accepted. And merely because the accused suggests that some particular fact is not in issue does not render it ‘neutral’ in the sense described.”³⁷¹

[191] In *R v Martindale*³⁷² this Court considered a question concerning the admissibility of evidence from a complainant’s mother of an appellant’s request to give a false alibi by lying as to whether the appellant was asleep at the time of the offences. The trial judge ruled that the attempt to manufacture a false alibi was relevant and admissible, a ruling upheld by the Court of Appeal. In that context the following was said:

“As with other forms of circumstantial evidence which are not indispensable steps in the proof of guilt, it is not an essential condition of the admissibility of such evidence that it should be consistent only with the conclusion that the accused is guilty of the offence charged. As a result, there is a danger of unfair prejudice to the accused in such evidence because there may be reasons why an accused might seek to manufacture proof of his innocence other than a consciousness of his guilt of the offence charged. Because of the risk that the prejudicial value of the evidence may exceed the probative value of the evidence, directions to the jury are required to ensure that they weigh the probative value of the accused’s attempt to manufacture evidence of innocence in the light of possible explanations consistent with innocence of the offence charged. But, ultimately, the value of the evidence in any particular case should usually be a matter for the jury.”³⁷³

[192] In my opinion the evidence from Weston as to Hill’s conduct the morning after was, when looked at in the light of other evidence in the case, capable of demonstrating a consciousness of guilt. Whether that was so was a matter for the jury to determine. No complaint is made as to the direction given in respect of the jury’s use of that evidence.

[193] For the reasons above ground four fails.

Conclusion on both appeals

[194] It will be apparent from the reasons above that there was a substantial body of evidence from which the jury, properly instructed, could conclude that Hill and

³⁶⁹ *Taylor* at [13] (internal references omitted).

³⁷⁰ *R v Ferguson* (2009) 24 VR 531.

³⁷¹ *Ferguson* at [110] (internal references omitted).

³⁷² *R v Martindale* [2009] QCA 24.

³⁷³ *Martindale* at [48] (internal citations omitted).

Young were guilty of the offences charged. It is true that there were various discrepancies and inadequacies in the evidence, different recollections of events, different meanings that might be attributed to texts, and reasons to doubt some of the testimony because of the drug related effects on witnesses, or the passage of time. However, the jury, which is the body entrusted with the primary responsibility of determining guilt or innocence,³⁷⁴ had the considerable advantage of seeing and hearing all the witnesses, and that placed them in the best position to assess where the truth lay.

[195] That is an advantage which this Court did not enjoy. This Court must assess all the evidence but without disregarding or discounting that advantage, and on the basis that it acts on the view of the evidence which, in its opinion, the jury were entitled to take.³⁷⁵

[196] In *SKA* the High Court affirmed that the test for determining appeals such as these is that laid down in *M*, requiring the Court to make “an independent assessment of the evidence, both as to its sufficiency and quality”.³⁷⁶

“In reaching such a conclusion the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, ‘none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand’.”

[197] In my opinion the various criticisms that have been levelled at the sufficiency and quality of the evidence do not reach the point that the jury’s particular advantage is overcome. I do not consider that the verdicts are unreasonable or unsupported; it was open to the jury to be satisfied beyond reasonable doubt that Hill and Young were guilty.

[198] I would order that:

1. Leave be granted to Hill to adduce the further evidence.
2. Hill’s appeal be dismissed.
3. Young’s appeal be dismissed.

³⁷⁴ *M* at 493; *Chamberlain* at 621; *SKA* at [12]-[13]

³⁷⁵ *Hayes* at 604-605; *Chamberlain* at 621.

³⁷⁶ *SKA* at [14] (quoting from *M*).