SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robertson & Ors* [2015] QCA 11
PARTIES:	**R** **v** **ROBERTSON, Wayne Thomas** (appellant) **KNIGHT, Mark Dempsey** (appellant) **WILLIAMS, Wesley Robert** (appellant)
FILE NOS:	CA No 85 of 2012 CA No 86 of 2012 CA No 87 of 2012 SC No 188 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2014
JUDGES:	Holmes and Morrison JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss each appellant's appeal against conviction.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – HEARSAY – PARTICULAR MATTERS – STATEMENT OF VICTIM WHO LATER DIED – where the appellants argued error in a pre-trial ruling that statements of the deceased were admissible in evidence pursuant to s 93B of the *Evidence Act* 1977 (Qld) and that the trial judge erred in refusing to re-open the ruling – where the appellants contended that some of the statements were irrelevant and should not have been admitted – where s 93B applies to representations made in "circumstances" making it (if they are made shortly after the events they concern) unlikely that they are fabrications or (if not made shortly after) highly probable that they are reliable – where the appellants contended that there was no evidence that some of the statements were made shortly after the events they concerned – where the appellants contended that "circumstances" should be given an expansive meaning – whether the statements were both relevant and admissible as

exceptions to the hearsay rule by reason of the application of s 93B of the *Evidence Act* 1977 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellants were convicted of murder after a re-trial – where the appellants argued that a reasonable hypothesis consistent with innocence (suicide) had not been excluded – where there was no forensic evidence against the appellants – where the appellants argued that the evidence given by the witnesses was inconsistent and unreliable – where the appellants argued that the verdicts were not reasonably open to the jury upon the evidence – whether the verdicts were unreasonable

Criminal Code (Qld), s 7, s 590AA
Evidence Act 1977 (Qld), s 93B

R v Ambrosoli (2002) 55 NSWLR 603; [2002] NSWCCA 386, applied
R v Knight & Ors [2010] QCA 372, related
R v Knight & Ors (No 2) [2009] QSC 449, related
R v Lester (2008) 190 A Crim R 468; [2008] QCA 354, applied
R v Williams (2000) 119 A Crim R 490; [2000] FCA 1868, considered
Ratten v The Queen [1972] AC 378; [1971] UKPC 23, considered
Walton v The Queen (1989) 166 CLR 283; [1989] HCA 9, considered
Wilson v The Queen (1970) 123 CLR 334; [1970] HCA 17, cited

COUNSEL: C W Heaton QC, with J A Fraser, for the appellant Robertson
J R Hunter QC, with G M McGuire, for the appellant Knight
P J Davis QC, with D R Lynch, for the appellant Williams
A W Moynihan QC, with J Robson, for the respondent

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

[1] **HOLMES JA:** The appellants were convicted after a trial of the murder of Robert James Buckley on 16 June 1999. On that date, he and they were inmates of 10 Block at Etna Creek Correctional Centre. His body was found hanging in a shower cubicle at about 5.30 pm. The Crown case was that the appellants had assaulted and then killed Mr Buckley around lunch time that day, with suicide excluded as a rational hypothesis. The case against each appellant was put on alternative bases - as principal or aider - under s 7 of the *Criminal Code*. None of the appellants gave or called evidence.

[2] This was the appellants' second trial. They had previously been found guilty in a trial before McMeekin J, but their convictions were set aside on grounds concerning the summing up. At both trials, a number of inmates of Etna Creek Correctional Centre gave evidence. Most of them had been interviewed in the days following

Mr Buckley's death in June 1999; a number had given statements in 2003 and 2004; further accounts were given in evidence at committal proceedings in 2007; and, of course, there was a further round of evidence at the first trial, in 2009. The second trial, the subject of this appeal, took place in March 2012.

[3] The evidence given at both trials fell, broadly speaking, into two categories: evidence which went to Mr Buckley's state of mind prior to his transfer to 10 Block and evidence of events in 10 Block on the day of his death. The first category included evidence of statements Buckley had made as to his dealings with the appellant Williams and his concern about being moved to 10 Block, and was tendered as relevant to their relationship and whether Buckley had committed suicide.

[4] The appellants' grounds of appeal were that McMeekin J had erred in ruling that Mr Buckley's statements were "admissible in evidence pursuant to s 93B of the *Evidence Act* 1977" and in failing to exercise his discretion to exclude them from evidence; that the trial judge had erred in not reconsidering McMeekin J's rulings or excluding the evidence; and that the verdicts were unreasonable.

Evidence of Mr Buckley's circumstances and general state of mind

[5] Mr Buckley was 22 years old when he died. Prior to being taken into custody in February 1999, he had lived with his fiancée, Debra Lewis. They had a daughter, born on 22 December 1998. Buckley was charged and remanded in custody at Etna Creek Correctional Centre in relation to a burglary at Ms Lewis's parents' house. According to his co-accused, Ryan, he and Buckley had taken a safe containing guns, diamonds and gold from the house. After they had both been apprehended, Buckley told Ryan that he had hidden some of the gold in a remote-control car. The car was amongst his personal effects, which police had seized; after his death, three gold bars were found concealed in it. A solicitor, Mr Pearson, who had represented Mr Buckley on the burglary charge, recalled meeting him at the prison and observing that he was distressed and agitated; he felt some concern about the fact that he had stolen property belonging to a family member.

[6] There were ten cell blocks in the Etna Creek jail. On 16 March 1999, Mr Buckley was placed in 8 Block, where he spent almost three months before being sent to the jail's detention unit and from there to 10 Block. Ms Lewis visited Mr Buckley with their daughter while he was in 8 Block, once in April 1999, twice in May and again on 4 June 1999. She also spoke to him on the telephone from time to time. He had gotten into some trouble at the prison and was put in what she referred to as the "lock-down", so that she could not visit him in the period leading up to his death. At the time of his death they were still engaged and planned to marry. She had done nothing to suggest that the relationship was over.

[7] On 16 June 1999, Ms Lewis said, she and Mr Buckley had two telephone conversations, in the course of which he told her that he had been put into a different area of the jail and asked her to put some money into his account. The conversations ended with mutual expressions of affection and reference to their seeing each other at Ms Lewis' next visit. Prison records confirmed the making of the calls and Ms Lewis' transfer of money into Mr Buckley's account. Ms Lewis agreed, in cross-examination, that her fiancé's behaviour in stealing from her parents had caused their relationship considerable strain, but they were, she said, working things out.

[8] Ms Lewis received a number of letters from Mr Buckley while he was in custody. There was no dispute that those letters were admissible pursuant to s 93B of the

Evidence Act 1977 and were properly admitted. Two letters assumed particular importance. In one of them, Mr Buckley complains that he has "copped a few floggings" because of "that little fuckhead" (in context, presumably Ryan) who had told other prisoners that he, Ryan, had some stuff stashed and that Buckley knew where it was. When Buckley disavowed any knowledge and said that the police had everything, he had been given "a few fat lips and…sore ribs". The timing of that letter was in question. It referred to Buckley going to court on 19 March, but it seems possible that that was a mistake for 19 April, because the same letter can be dated by reference in it to the age of his infant daughter.

[9] The later letter was written when Mr Buckley was in the detention unit. He said that he was being breached for not moving to another yard when instructed to do so, and complained that "they" wanted to move him after it had taken him all this time to settle in; it was unfair. He said that he would stay in the detention unit until he was allowed to return to 8 Block.

Evidence challenged on admissibility grounds

[10] The appellant Williams was an inmate of 8 Block when Mr Buckley was transferred there in March 1999. On 29 April, Williams was transferred to 7 Block, but was placed once more in 8 Block between 14 May and 25 May, when he spent two days in detention before being moved to 10 Block. On 6 June 1999, Buckley was transferred from 8 Block to the detention unit. At that time, there were four other prisoners held there, one of whom was the appellant Knight. There was evidence that while in 8 Block and in the detention unit Buckley had told other prisoners of experiencing aggression from Williams and that he had told a prison officer and other prisoners that he feared moving to 10 Block. Those statements by Mr Buckley were the subject of rulings that they formed exceptions to the hearsay rule pursuant to s 93B of the *Evidence Act* and were relevant and admissible*;* the rulings which were challenged on this appeal. The relevant evidence is set out below.

Buckley's expressions of concern while in 8 Block

Prison Officer Weeks

[11] A prison officer, Phyllis Weeks, said that she was the supervisor of 8 Block in 1999. She had maintained the block log book. An entry for 24 May recorded that Mr Buckley and prisoners named Rees and Weir had requested to see an officer because Williams was making threats towards them. According to the entry, Williams was moved to the detention unit the next day. On 6 June, Ms Weeks had advised Buckley that he would be moved to 10 Block and his cellmate Donovan that he would be moved to 7 Block, because of noise they had made the day before. Buckley said that he could not go to 10 Block because he had received death threats from there; he said that he would be killed in 10 Block. Ms Weeks asked for more detail and, in particular, who had made the threats, but he responded that he could not tell her.

[12] Because he had refused to leave 8 Block, Mr Buckley was breached again and taken to the detention unit. According to Ms Weeks, he was happy to go to the detention unit rather than 10 Block. In cross-examination, Ms Weeks said that she did not observe any difficulties in Mr Buckley's interaction with other prisoners in 8 Block and he did not appear to be in fear of any other prisoner there.

Prisoner Ryan

[13] Mr Buckley's co-accused, Ryan, said that they were placed in 8 Block together. He described Buckley as a happy, smiling person, particularly after visits from his

girlfriend and daughter. He, Ryan, had disclosed to Williams that Buckley still had some of the gold from the robbery. Buckley told him that he and Williams then reached a deal under which Williams was to receive the gold in exchange for a couple of hundred dollars. Later, Buckley told Ryan that he had changed his mind and was getting a better deal from someone else. Ryan was aware of an assault by Williams on Buckley, but he could not recall whether he had actually seen it or been told about it. Buckley told him he, Buckley, should not have changed the deal with Williams.

[14] While Mr Buckley was in the detention unit, Ryan spoke to him through a fence. Buckley asked him to buy a pair of shoes for Knight but he was unable to do so. Buckley was unhappy with that outcome. Ryan recalled that on the second occasion Williams was moved out of 8 Block, he and Buckley, at Williams' request, had made a false complaint that Williams was threatening prisoners to ensure that he was moved; that was a common way of manipulating the system. He agreed also that when he and Buckley had the conversation about his inability to obtain the shoes for Knight, Buckley had said that he was "in sweet with the lads down in 10 Block".

Prisoner Donovan

[15] Mr Buckley's cell mate, Donovan, said that on first being placed in 8 Block he had shared a cell with Ryan and had later shared with Buckley for a month or two. Buckley was "pretty cheery considering the situation. Never depressed…" He spoke about spending time with his girlfriend and baby when he was released. Buckley had described stealing his girlfriend's father's safe and hiding gold stolen in the robbery in a remote-control car which was in his prison property. He told Donovan that he was intimidated by Williams and that they had had an altercation over the hidden gold. Both Donovan and Buckley were accused of making noises one night and were moved to the detention unit. Buckley had expressed concern that the prison officers wanted to move him to 10 Block, where Williams was; he did not want to be in the same block as Williams. Donovan and Buckley had discussed with prison officers the prospect of swapping their destination cell blocks, without result.

[16] The appellant Knight, also held in the detention unit, seemed to get along well with Buckley and offered to smooth things over with Williams for him. Knight and Buckley had discussed the gold secreted in Buckley's property: there was a proposal that Buckley would sign the property over to his girlfriend, who would hand it over to an acquaintance of Williams'. There was also some discussion about Buckley's buying Knight a pair of running shoes.

[17] Under cross-examination, Donovan agreed that he had never heard Williams or Knight threaten Mr Buckley. He conceded that in a police statement made on 19 June 1999, he had said that he was not aware of Buckley having any problems with other prisoners and that Buckley had not expressed any concerns about his safety or the prospect of being moved to 10 Block. Although he accepted that he had signed the statement as true and correct, he now said it was untrue. At committal proceedings in 2007, he said that he was worried about his safety when he made the statement, but when it was put to him that it would be an offence to sign an untrue statement, he reverted to saying that he had told the truth in it. He maintained in his current evidence that he made the (false) police statement through fear for his own safety.

[18] Donovan agreed, however, that the only dispute he had actually witnessed was between Buckley and Ryan. They were not getting along because they had different

views about what should happen to the stolen gold; at a previous trial he had agreed that the two had argued about whether the gold should be given to Williams. Donovan conceded that he had lied at the committal proceedings in saying that he abstained from drug use.

Prisoner Robinson

[19] Robinson had regular conversations with Mr Buckley. Buckley told him he had hidden gold from the robbery and planned to recover it when he was released. He had told his cell mate and Williams about it. At some point, Buckley informed Robinson that he had decided not to go on with a deal with Williams under which the gold was to be collected and sold, with the proceeds split 50/50. After that, the relationship between Williams and Buckley was no longer friendly. Robinson recalled an occasion when he was sitting with two other prisoners in the yard, and heard a noise which sounded like a "whack." Williams had walked past them and Buckley was sitting further up the yard. When Robinson looked around, he saw that Buckley had his head down and Williams was five or ten yards away. Buckley got up and walked back to his cell. He had not himself heard any conversations between Buckley and Williams.

[20] When Mr Buckley was removed to the detention unit, Robinson recalled him shouting that he did not want to be taken to the other end of the prison; his words were to the effect, "If you take me down there they'll kill me". At some stage after Buckley had been released from the detention unit, Robinson and other prisoners named Mason and McIlwain saw him at the 10 Block fence. Robinson asked how it was going, to which Buckley said that he hated it and urged them to get him out. In cross-examination, however, Robinson agreed with an earlier statement put to him in which he had said that Buckley's complaint was not so much about being moved to 10 Block, but about having to leave 8 Block, where his friends were.

Prisoner Mason

[21] Mason, who conducted Bible studies classes in 8 Block, said that he often spoke to Mr Buckley. On one occasion, Buckley had told him that Williams had slapped him because he had "opened [his] mouth a little bit too much". On Mason's recollection, that was shortly before Williams was moved out of 8 Block; he thought it was the day before. In cross-examination, he said he could not put a date on the incident but thought it was a week or so before Buckley died. He had heard Buckley talking about his theft and taking jewellery and a safe.

[22] Mason could recall Mr Buckley's arguing with a prison officer who had told him he would be moved to 10 Block. He was refusing to go, saying that he could not go there because he had "strife" there and there would be trouble for him. Despite other inmates supporting him in his protests against the move, he was surrounded by prison officers and escorted away. On the day Buckley died, he spoke to Mason through the wire. Mason saw no injury on him. Buckley was looking forward to a weekend visit from his fiancée and said that he would meet Mason at the football oval after lunch. The conversation ended when a Corrective Services officer told Buckley to move on. (The officer in question recalled the incident; she did also not notice any injury on Buckley.) Buckley did not arrive at the football oval.

[23] In cross-examination, Mason agreed that Buckley and Williams had got on well apart from the incident of the slap, which was about a week before Mr Buckley died. Buckley said that he had been "skiting" to Williams about his theft. Mason did not agree with the proposition that Mr Buckley was merely telling prison officers that he wanted to stay with his friends in 8 Block rather than go to 10 Block.

Prisoner Hill

[24] Hill said that he recalled Mr Buckley's coming back to the unit happy after visits. He got on well with everyone in 8 Block, except for Williams. One morning after the cells were opened, he saw Williams walk into Buckley's cell and then heard noises which included the sound of slapping. Subsequently, he saw that Buckley had a red mark on his face. Buckley informed him that Williams had slapped him for being noisy the previous night. He estimated that it was about a week before Williams was moved out of 8 Block, but he was unsure.

[25] When Mr Buckley was moved from 8 Block, Hill recalled him telling the prison officers that he did not want to be moved to 10 Block because there was trouble waiting for him there. He had seen Buckley once subsequently, walking along the path; the latter said that he was unhappy and wanted to return to 8 Block. Hill agreed that at committal proceedings in 2007, he said that he had not heard Buckley express any concern about going to 10 Block, but rather that he was protesting being moved to the detention unit, because he had not done anything wrong. In the previous trial, he had agreed with the proposition that Buckley was not complaining about being moved to 10 Block but wanted to stay in 8 Block because he had friends there. Now, he said, he could not remember back that far.

Prisoner McIlwain

[26] By agreement, the earlier statement and evidence of a prisoner named McIlwain was tendered; he was not called at the trial. McIlwain recalled Mr Buckley speaking about having stolen a safe from his girlfriend's parents and having hidden some of the proceeds amongst his property held at the Rockhampton Correctional Centre. Williams was pressuring him to sign the property over to someone associated with him. At one stage, Buckley said that he had "copped a touch up" from Williams. When Buckley was moved to the detention unit, he told the officers transferring him a number of times that he did not want to be shifted to 10 Block.

[27] The tendered evidence showed that Mr McIlwain had agreed in cross-examination that when interviewed by police on 21 June 1999, he said that he had been in 8 Block for about two weeks; but he acknowledged that a log book which showed his having been moved from 8 Block on 5 May 1999 and returned there on 7 June 1999 was probably correct. (Ms Weeks confirmed that entry.) However, he insisted that he had been present in 8 Block on 6 June when Mr Buckley was taken to the detention unit.

Prisoner Rees

[28] Mr Buckley told Rees that he had done a "job" and had some proceeds stashed. According to Rees, Buckley was a happy-go-lucky sort of man and was looking forward to getting out and raising a family. On the day he was moved out of 8 Block, Buckley put up a fight and had to be dragged away. He did not want to go to 10 Block; he was prepared to go anywhere else but not there. Rees recalled seeing Buckley at the 10 Block fence the day before he died. He did not appear to be injured. Rees asked whether Buckley was going to come out and play touch football; the latter said he did not know the rules but would come the next day. He did not, however, appear the following day.

[29] In cross-examination, Rees agreed that he was not aware of Buckley's having problems with anyone else in 8 Block. When he saw him in 10 Block he looked relaxed and happy. He had not given any particular reason for not wanting to go to 10 Block. He had heard him say that he wanted to stay in 8 Block where he had friends.

Prisoner Doyle

[30] Doyle remembered seeing Mr Buckley after he came out of the detention unit. Buckley said he had been told he was being moved to 10 Block, but he said he did not want to go there. He seemed "sort of depressed". In cross-examination, Mr Doyle agreed that Buckley was not complaining about being moved to 10 Block, but rather that he was not allowed to go back to 8 Block where his mates were.

Prisoner Bradden

[31] Bradden recalled seeing Mr Buckley sharpening a tooth brush which he said he was turning into a "shiv" because the appellant Williams was "hassling" him. That was "probably a few days before" Buckley and Donovan were taken to the detention unit. Bradden was also moved to the detention unit a few days later; Knight was already there. Buckley did not seem depressed and he had no injuries.

[32] Under cross-examination, Bradden acknowledged that in a statement made in 2004, while he had mentioned Buckley telling him about being "hassled" by Williams, he had said nothing about seeing him sharpening a tooth brush. At committal proceedings in 2007, he had agreed that it was possible he had mistaken that incident as relating to Buckley rather than someone else. In cross-examination, however, Bradden said that he was nervous when he made that concession and did remember seeing Buckley with the shiv. His memory was that the incident had occurred a couple of days before Buckley was taken to the detention unit and that Williams was still in 8 Block at the time.

Buckley's expressions of concern while in the detention unit

Prisoner Findlay

[33] Findlay had been in the detention unit with Mr Buckley, Donovan and Knight. Buckley spoke of having done some sort of job and having proceeds of $30,000 stashed somewhere. Knight had wanted to know the whereabouts of those proceeds, but Buckley had not revealed them. Findlay recalled Buckley saying that he was afraid of being moved into 10 Block because he had problems with people in there. He did not specify whom. Knight had told him that he would ensure he was looked after if he went to 10 Block.

Prisoner Devon

[34] Devon said that he had first met Mr Buckley in the detention unit. Buckley had been frightened of being placed in 10 Block; he said that he had "dramas" with Williams. Knight had endeavoured to reassure him and told him that he should go into the block and sort it out. In cross-examination, Devon said that while in the detention unit, Buckley was depressed. Buckley had also complained to prison officers about not wanting to go to 10 Block. Devon agreed that at the committal proceedings he could not recall Buckley having a conversation with any of the three appellants.

Prisoner Friedrichs

[35] Friedrichs recalled a conversation between Mr Buckley and a senior prison officer, in which Buckley was protesting at being moved to 10 Block. Buckley appeared to be afraid. Knight kept assuring him that he would be all right and that he would look after him. In cross-examination, Friedrichs agreed that he might only have been in the detention centre for two nights. At the previous trial he had maintained that he had been in the detention unit for seven days. He acknowledged that he could have been wrong about that; he accepted that the record showed his being

released on 12 June and that Buckley might still have been there when he was moved out of the detention unit. He agreed that Buckley had told the prison officers that he wanted to go to a block where he had friends.

Section 93B of the Evidence Act

[36] Section 93B of the *Evidence Act* creates exceptions to the hearsay rule relevant to the admission of evidence about Mr Buckley's statements. It provides:

> "93B Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable
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> (1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact –
>
> (a) made a representation about the asserted fact; and
> (b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.
>
> (2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was –
>
> (a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or
> (b) made in circumstances making it highly probable the representation is reliable; or
> (c) at the time it was made, against the interests of the person who made it.
>
> (3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding –
>
> (a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;
> (b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.
>
> (4) To avoid any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence.
>
> (5) In this section –
>
> ***prescribed criminal proceeding*** means a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 32.
>
> ***representation*** includes –

(a) an express or implied representation, whether oral or written; and
(b) a representation to be inferred from conduct; and
(c) a representation not intended by the person making it to be communicated to or seen by another person; and
(d) a representation that for any reason is not communicated.

The rulings at the first trial on evidence tendered under s 93B

[37] Before the first trial, the appellants made an application under s 590AA of the *Criminal Code* for a ruling that the conditions of s 93B(2) had not been met in respect of the evidence of some of the 8 Block prisoners and Ms Weeks. The Crown had argued that the evidence was exempted from the hearsay rule because it fell within both s 93B(2)(a) and s 93B(2)(b).

[38] McMeekin J found[1] that Mr Buckley's statements to prison officer Ms Weeks and prisoners Donovan, Robinson, McIlwain, Rees, Findlay, Devon, Friedrich, Colless, Sullivan and McLuckie[2] were made in circumstances which made it not only unlikely that they were fabrications but highly probable they were reliable, so as to meet the requirements in both sub-sections (a) and (b) of s 93B(2). It does not appear that the submissions made to him raised any issue about the timing, for the purposes of s 93B(2)(a), of the relevant representations vis-à-vis the happening of the incidents described in them.

[39] McMeekin J adopted the approach to reliability taken by the New South Wales Court of Criminal Appeal in *R v Ambrosoli*:[3] the test for any given representation was not whether it was reliable as to the matters asserted in it, but whether the circumstances in which it was made indicated a probability that it was. His Honour accepted the Crown's submission that the defence submissions went to the "asserted fact or issue" in, rather than the circumstances of the making of, the representations.

[40] McMeekin J ruled that the statements were, with the exception of particular paragraphs, admissible. Those concerning Mr Buckley's representations as to his experiences at Williams' hands were evidence of their relationship, one of hostility and intimidatory behaviour on Williams' part. The evidence of Williams' conduct towards Buckley made it reasonable to draw the inference that it was the cause of the latter's expressed fear of being sent to 10 Block; there was no other cause identified. That expressed fear of harm gave further perspective to the intensity of the relationship between the two. It also carried the implication that Buckley had a strong desire to live, which was inconsistent with suicide. Although the evidence was prejudicial, its probative value weighed against the exercise of the discretion to exclude. A propensity direction would be required to alleviate the prejudicial effect.

[41] At the close of the Crown case, the appellants sought to have the issue of the s 93B representations re-opened, on the basis that the evidence as given had differed from the statements relied on. The application was made in respect of the evidence the subject of the earlier ruling, but now encompassed also the evidence of Ryan, Hill and Mason. Again, it does not appear that any issue about timing for the purposes of s 93B(2)(a) was raised in the submissions made at that point. McMeekin J observed in

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1 *R v Mark Dempsey Knight & Ors (No 2)* [2009] QSC 449.
2 The last three were not called at the present trial.
3 (2002) 55 NSWLR 603.

passing that the statements were, in general, "made close in time to the claimed events being reported."

[42] McMeekin J, taking the view that there had been no significant changes to the circumstances in which the statements were made, declined to revisit his ruling. There were arguments to be made as to the creditworthiness of the witnesses, but that was not the relevant test. His Honour referred to his earlier finding that the pre-conditions of s 93B(2)(a) and (b) were satisfied. The evidence was admissible as shedding light on the relationship between Mr Buckley and Williams and showing it to be one of animosity on the part of the latter.

The first appeal against the s 93B rulings

[43] The appellants' appeal against their conviction at the first trial included a ground that the evidence of Weeks, Ryan, Bradden, Rees, Donovan, McIlwain, Doyle, Robertson, Mason, Hill, Devon, Friedrichs and McLuckie was wrongly admitted. This Court held[4] that the evidence was admissible under s 93B(2)(a). The representations were "made when or shortly after the asserted fact happened;" there appears to have been no contention on that point.

[44] There were, however, submissions that the criterion that the representations were unlikely to be a fabrication was not met, but the court concluded to the contrary. It could safely be inferred that Williams did, in fact, assault and harass Mr Buckley; there was evidence from witnesses, Ryan and Robinson, the former saying that Williams had punched Buckley a couple of times in his, Ryan's, cell and the latter saying that on one occasion when Williams walked past Buckley in the yard, he heard a thump and then noticed that Buckley was holding his head. If Mr Buckley had not been killed and were, instead, giving evidence in a hypothetical trial of the appellants for assaulting him, he could have given evidence about his relationship with them. The case differed from *R v Lester*,[5] in which the prosecution did not have to negate suicide.

The refusals at the second trial to re-open the s 93B rulings

[45] In the trial which resulted in the verdicts now the subject of appeal, a further application was made to re-open the ruling on the basis that the circumstances were not such as to make it unlikely that the representations were fabrications or to make it highly probable that they were reliable. The circumstances to be considered, it was submitted, included the evidence of Mr Buckley's having made a false complaint about Williams, so as to facilitate the latter's leaving 8 Block; inconsistencies in the various prisoners' accounts; evidence from some prisoners and Ms Weeks that the relationship between Williams and Buckley was not problematic; evidence that Buckley's complaint was not so much that he did not wish to go to 10 Block as that he did not wish to leave 8 Block; and the fact that there was a significant interval between the Buckley/Williams dispute and Buckley's saying he did not wish to go to 10 Block.

[46] It was acknowledged that the evidence in respect of each of those matters was no different from that given in the first trial, except for the letters which Mr Buckley had written to Ms Lewis. In one of them he referred to having been assaulted possibly as early as March, which went to the time interval question, and in another he suggested his reluctance to be transferred to 10 Block arose from his having settled into 8 Block.

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4 *R v Knight & Ors* [2010] QCA 372.

5 (2008) 190 A Crim R 468.

[47] The trial judge noted that in *Ambrosoli*, it was accepted that prior statements of the person making the representation in question could be considered, but only to the extent that they bore on the reliability of the circumstances of the making of that previous representation. He concluded that the fact that Mr Buckley could be said to have made statements on other occasions conflicting with those which the Crown sought to lead went to the reliability of the evidence itself, not to whether the impugned statements were "made in circumstances making it highly probable" that they were reliable. Because nothing had been pointed to which bore upon the circumstances surrounding the making of the representations, the application was refused; no special reason had been shown for re-opening the earlier ruling.

[48] At the close of the Crown case, a submission was made that the trial judge should withdraw from the jury's consideration the s 93B evidence as given by the 8 Block prisoners, because Ryan and Robinson had not spoken of witnessing any assault by Williams on Mr Buckley. Consequently, a factor relied upon by the Court of Appeal in determining that Mr Buckley's statements about his fear of Williams and of moving to 10 Block were unlikely to be a fabrication no longer existed. That was in a context in which there was evidence that Buckley had made a false complaint about Williams and other prisoners said that his real concern was that he did not want to leave 8 Block. The trial judge, however, ruled that the basis for the admissibility of the evidence had not changed.

The appeal to this Court

[49] The appeal grounds concerning the s 93B evidence were that McMeekin J had erred in ruling that Mr Buckley's statements about his fears were admissible under s 93B and in failing to exercise his discretion to exclude them and that the trial judge erred in refusing to re-open those rulings and in refusing to exclude the evidence. Those grounds are inaccurately expressed in some respects. The primary ruling was not that the statements were admissible under s 93B but that they were exceptions to the hearsay rule by reason of the application of that provision; they were then ruled admissible as relevant relationship evidence and as going to the possibility of suicide. The trial judge declined to re-open that ruling, in circumstances in which it had already been upheld by the Court of Appeal.

[50] The appellants' arguments here as to the application of s 93B turned on whether its conditions had been met. Beyond that, they argued that the evidence was not relevant, and hence not admissible, rather than that there was any error in McMeekin J's exercise of the discretion against its exclusion or that the trial judge erred in not exercising the discretion.

"Made when or shortly after"

[51] It was submitted, in relation to some of the representations, that there was no evidence that the representation was made when, or shortly after, the incident in question happened, so that a pre-condition for its admissibility under s 93B(2)(a) was not met. Examples were the evidence of the prisoner McIlwain, tendered by agreement, and the prisoner Bradden. McIlwain spoke in his statement of Mr Buckley and Ryan saying that they had "copped a touch-up off [Williams]", but there was no indication of when they imparted that information in relation to when the alleged assault happened. Bradden said that Buckley made the remark about Williams hassling him (while sharpening his toothbrush) a few days before he was moved to the detention unit, but there was no evidence as to when the alleged hassling actually occurred. Similarly, Donovan had spoken of Buckley having had altercations and problems with Williams without identifying when the relevant incidents took place,

and two witnesses, Robinson and Ryan, had said that Buckley told them he had a deal with Williams, on which he had reneged, but did not say when they were told, or when the event occurred. In *R v Williams*,[6] the Full Federal Court had regarded a lapse of five days between events connected with a robbery and the witness' account of them in a police interview as

> "tak[ing] the representations outside the likely temporal realm of statements that may be considered to be reliable because made spontaneously during, or under the proximate pressure of, events."[7]

[52] The difficulty with the argument is that when McMeekin J ruled that the representations fell within s 93B(2)(a), no question was raised about the contemporaneity of the representations and the events they concerned. This Court does not have the statements on which the Crown relied in the s 590AA application before McMeekin J, nor the evidence subsequently given at the trial before he declined to alter his ruling, so it is not known whether the evidence as to timing was clearer at that stage. There was no suggestion at the previous appeal that the ruling was wrong because the "made when or shortly after" criterion had not been met.

[53] In order to have McMeekin J's ruling re-opened at the re-trial the subject of this appeal, it was incumbent on the defence to establish special reason for doing so.[8] The arguments made, however, concerned the circumstances, not the timing, of the representations and the events they concerned. No submission having been made to the effect that the timing criterion was not met, there is no reason to conclude that the trial judge erred in declining to revisit the ruling on that basis.

[54] The submission made here, however, was that in the absence of proof at the trial that all the pre-conditions for the application of s 93B had been met, the evidence was inadmissible as hearsay. But the ruling that it fell within s 93B and was not hearsay had already been made, and its admissibility as an exception to the hearsay rule was not an issue the jury had to consider. The Crown did not have to re-establish that the pre-conditions for the ruling existed as part of its case at trial, although plainly the evidence would be more persuasive the closer the occurrence of the representations and the events.

[55] If there were evidence which actually showed a relevant discrepancy as to time, destroying the factual basis for the ruling, the appellants might have been in a position to persuade the trial judge to withdraw the evidence from the jury's consideration. However, no evidence positively demonstrated that the representations were made so distant in time from the events they concerned that they could not have been regarded as falling within s 93B(2), as opposed to some of the evidence being vague as to timing. The mere fact that the evidence as given did not, in some instances, specify the time which elapsed between the event and the representation did not make the original ruling wrong; nor did it require the trial judge to revisit it. Nor did the giving of the evidence without confirmation of the temporal relationship between representation and event produce any miscarriage of justice.

"In circumstances making it unlikely the representation is a fabrication"

[56] The appellant's second argument concerning s 93B(2) was that the scope of the term "circumstances" had been too narrowly construed. In *R v Lester*,[9] this Court

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6 (2000) 119 A Crim R 490.
7 At 502.
8 Section 590AA(3) *Criminal Code* 1899.
9 (2008) 190 A Crim R 468.

had referred to the trial judge's having applied the *Ambrosoli* interpretation without expressing any disapproval of that approach. In particular, the trial judge in *Lester* had proceeded on the basis that prior or later statements or conduct of the person making the representation could be considered only to the extent that they touched on the reliability of the circumstances of the making of the representation, but not if they simply concerned the "asserted fact" or "ultimate issue"; that was held on appeal to be correct.[10] *Lester* should be over-ruled, the appellants submitted, insofar as it endorsed a limiting of the evidence which the court could consider in determining that it was "unlikely that the representation [was] false" or that it was "highly probable the representation [was] reliable".

[57] The better view (it was contended) was that "circumstances" should be read as including all circumstances relevant to the likelihood the representation was not a fabrication or relevant to a high probability that the representation was reliable. In the second reading speech of the *Criminal Law Amendment Bill* 2000, the Attorney-General had said of the proposed exceptions under s 93B,

> "Before the evidence can be admitted there must be factors making it highly probable that the statement or representation is reliable, or unlikely to be a fabrication",[11]

suggesting that the court's task was to assess reliability. Circumstances which were relevant to whether the representations were true inevitably went to their reliability. Thus, the trial judge should, in considering whether the evidence fell within the s 93B exceptions, have taken into account various matters which cast doubt on the accuracy of the representations as reported by the 8 Block and detention unit prisoners; which were essentially those matters raised at trial in the attempt to have the trial judge re-open McMeekin J's rulings.

Should Ambrosoli and Lester be followed?

[58] In *Ambrosoli*, the New South Wales Court of Criminal Appeal reviewed apparently conflicting authorities as to the scope of the word "circumstances" in the equivalent provisions of the *Evidence Act* 1995 (NSW). The narrower view was represented by a ruling which Sperling J had given in *R v Mankotia*,[12] in which he had construed the term as limited to the circumstances of the factual setting in which a representation was made, to the exclusion of events subsequent to the representation or other representations made by the same person at other times. At the other extreme were decisions which suggested that anything which confirmed the accuracy of what was said could be taken into account as a circumstance.[13] Somewhere along the spectrum between the two approaches was *Conway v The Queen*,[14] in which the Full Federal Court considered it legitimate for a trial judge to have regard to evidence of what the maker of the representation had said at other times in determining whether it was highly probable that a particular representation was reliable.

[59] The court endorsed Sperling J's approach of treating the provision as directed at the circumstances in which the representation was made, but considered that events subsequent to the representation might nonetheless throw light on the circumstances of its making. Examples were an express retraction by its maker or evidence

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10 At 479, 480.

11 Parliamentary Debates 7 September 2000 at 3101.

12 [1998] NSWSC 295.

13 *R v Lock* (1997) 91 A Crim R 356; *R v Dean*, unreported, Dunford J, Supreme Court of New South Wales, No 70085 of 1995, 12 March 1997.

14 (2000) 98 FCR 204.

indicating that he or she could not have heard or seen the relevant matter. Prior or later statements or conduct of the person making the previous representation could be considered if they bore on the reliability of the circumstances of its making, but not if they merely went to the asserted fact.

[60] There is no doubt that the use of a term as general as "circumstances" makes the provision capable of being given a broader or narrower compass. But I would not depart from the *Ambrosoli* approach, as implicitly accepted in *Lester*, for two reasons. Firstly, and obviously, one would not lightly disagree with a decision of another intermediate appellate court, let alone overturn a decision of this Court. There is, with respect, nothing in the reasoning in *Ambrosoli* which would make me think that the construction given to the cognate provision must be wrong. Secondly, and unusually, some assistance can be gained as to the meaning of the provision from the Explanatory Notes for the *Criminal Law Amendment Bill* 2000, part of which concerned the amendment of the *Evidence Act* to introduce the s 93B exceptions to the hearsay rule. (I do not think that the Attorney-General's second reading speech points unequivocally in either direction; the reference to "factors" can be read as an allusion to the circumstances of the representation's making.)

The Explanatory Notes contain this passage:

> The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was –
>
> - made when or shortly after the asserted fact happened and in circumstances making it unlikely that it is a fabrication (for example, ***Ratten v The Queen*** [1972] AC 378); or
> - made in circumstances making it highly probable that it is reliable (for example, ***Walton v The Queen*** (1989) 166 CLR 283); or
> - against the interests of the person who made it.

[61] The significance of that passage, for present purposes, lies in the references to *Ratten* and *Walton*. In *Ratten*, Lord Wilberforce, delivering the Privy Council's reasons, reviewed a number of cases concerning spontaneous statements by victims and onlookers before saying,

> "These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."[15]

[62] The reference in the Explanatory Notes to *Walton* is likely to concern Mason CJ's consideration of whether evidence that a child referred to the man on the other end of the telephone as "Daddy", although hearsay, was nonetheless admissible as an implied assertion of the identity of the caller. His Honour observed,

> "…especially in the field of implied assertions there will be occasions upon which circumstances will combine to render evidence sufficiently

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15 [1972] AC 378 at 391.

> reliable for it to be placed before the jury for consideration and evaluation of the weight which should be placed upon it, notwithstanding that in strict terms it would be regarded as inadmissible hearsay."[16]

The extreme unlikelihood that the child would have concocted what he said was a factor favouring admission of his statement. Mason CJ noted that in *R v Andrews*,[17] the House of Lords, adopting the Privy Council's view in *Ratten*, had emphasised the importance of the spontaneity of an assertion rather than its contemporaneity. Both of those decisions accorded with his own view.

[63] The emphasis in both *Ratten* and *Walton* is very plainly on the immediate circumstances in which a representation is made, not some broader examination of unreliability. The use of those cases as illustrative of the proposed effect of the subsections strongly suggests a legislative intent that the narrower view - that is, that the focus regarding reliability is on the circumstances of the representation's making, not on the representation itself - is to be preferred.

[64] My conclusion, then, is that this court should adhere to the *Ambrosoli* approach. McMeekin J, and those who subsequently considered his ruling, were correct in refusing to have regard to evidence which went to the reliability of the facts asserted in Mr Buckley's representations.

Submission re Buckley's representations about his fear of going to 10 Block

[65] The appellants made a further submission that if the evidence did satisfy the s 93B test, while statements which Buckley had made about conflict between him and Williams would have been admissible, his statements as to his fear of being placed in 10 Block would not. In *R v Knight & Ors*,[18] the appellants' appeal against conviction after their first trial, McMurdo P observed that s 93B(4) did not prevent witnesses giving evidence about Mr Buckley's statements to them relevant to whether he might have been suicidal, where that was an issue in the trial; *Lester* could be distinguished because the Crown did not have to negate suicidal intent in that case. Here it was contended that statements which Buckley made indicating his fear of the appellants were not probative in respect of the issue of whether or not he was contemplating taking his own life. A comparison was drawn with the facts in *R v Lester*, in which evidence that the murdered woman had told others of her fear was ruled irrelevant and inadmissible.

Admissibility of the representations

[66] McMeekin J admitted the evidence on two bases: that it went to the intensity of the relationship between Williams and Mr Buckley, and that it was inconsistent with suicide, because it indicated that the latter had a strong will to live. The Crown at the present trial argued, and the trial judge left as issues for the jury's consideration, that Mr Buckley's expressions of fear of being killed if he were transferred to 10 Block both made it less likely that he intended suicide and concerned his relationship with Williams. Although I do not myself regard as a particularly compelling proposition the notion that fear of being harmed or killed directly negated the possibility of suicide, it was capable of being viewed in that way. Accordingly, I do not think that the trial judge was wrong in leaving it to the jury or that the evidence was wrongly admitted on that basis.

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16 (1989) 166 CLR 283 at 293.
17 [1987] AC 281.
18 [2010] QCA 372.

[67] In any event, the first basis for admitting the evidence was stronger. It was not in dispute that evidence going to the relationship between Mr Buckley and Williams was relevant and admissible as increasing the probability that the latter had killed the former. In *Wilson v The Queen*,[19] Menzies J (with whom Tiernan J and Walsh J agreed) referred with approval to a passage in the judgment of Kennedy J in *R v Bond*,[20]

> "The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial."

Barwick CJ expanded on that view:

> "it is not…only in those cases where the evidence of the relations of the accused with others tends to establish motive that it is admissible though that may be the commonest case of its use and the one with which the reported cases have had mostly to deal. If the evidence does tend to explain the occurrence or, as in this case, to assist the choice between the two explanations of the occurrence, then in my opinion on general principles because it is relevant, it is admissible."[21]

[68] Mr Buckley's protestations when he was removed from 8 Block were not to be viewed in isolation from the prior events involving Williams. They were made in a context in which Buckley had reneged on an agreement with Williams and had been assaulted by him. The victim in *Lester* was afraid, not because of any act or statement by the appellant, but because others had told her that a hit man had been hired to kill her. In contrast, Buckley's expressions of apprehension at the move to 10 Block were not attributable to any other cause than fear of Williams. A similar situation arose in *R v Clark*[22] in which Heydon JA observed that

> "…direct evidence of fear, direct evidence of the degree of intensity of that fear, and direct evidence of an assigned basis for the fear, coming from the deceased and reported to the court by another witness, were…relevant."[23]

The evidence was relevant in that case because it "rationally affected" the assessment of the probability that the deceased had been killed by the man whom she feared.

[69] In the present case, Mr Buckley's statements could not establish that he was in fact at risk of harm from Williams; but they did shed light on the intensity of Williams' animosity towards him and were relevant to the question of whether Williams had killed him. On either basis – as going directly to the issue of suicide or as illuminating the relationship with Williams – there was no error in the admission of the evidence, and no miscarriage of justice resulted from it.

The 10 Block layout and regime

[70] Mr Buckley was released from the detention unit and placed in 10 Block on 14 June 1999. Robertson and Williams had been in the block since May, while Knight was moved there on 15 June.

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19 (1970) 123 CLR 334 at 344.
20 [1906] 2 KB 389 at 401.
21 *Wilson v The Queen* (1970) 123 CLR 334 per Barwick CJ at 339.
22 (2001) 123 A Crim R 506.
23 At 577.

[71] 10 Block was a medium/high security block. It contained a mess hall, 24 cells and two shower blocks, one on either side of the mess hall. Those shower blocks were distinguished at trial by reference to them, respectively, as the left-hand and right-hand shower blocks. The left-hand shower block consisted of two urinals opposite the entry, a toilet cubicle, and three shower cubicles along the wall adjacent to the urinals. On the wall next to the entry were two wash basins. There were louvres (in which there was no glass) high on the wall at the end of the shower block farthest from the entry and next to the end shower cubicle. Through those louvres, below which was a bench, one could see into 9 Block.

[72] The daily prison regime began about 7.00 am, when two officers opened each cell and checked on each prisoner, performing a head count and reporting it to their supervisor. After the cells were unlocked, the inmates were allowed to go about their own activities, going to work or to the library or to the health centre. Any movement in or out of the block was recorded in a log book. Prisoners going to sporting activities would go to the activities building and then to the oval, with an officer recording their numbers and monitoring them.

[73] There were five head counts a day; the one at the cell unlocking, another around 11.00 am, a third at lunch time, another at the evening meal and then a final lock-up check. Prisoners were required to be in the block for lunch between 11.25 am and 1.30 pm. Throughout the day, inmates, other than those confined for disciplinary reasons, had unrestricted access to their own and other prisoners' cells. Inmates of one block were not permitted to enter another block. The block gates were always locked.

The 10 Block population on 16 June 1999

[74] The supervisor of 10 Block in June 1999 was Corrective Services Officer Bauer. He had observed that amongst the prisoners in 10 Block, the appellants "used to knock around the most – most together". The log book for the block showed that at the commencement of the day on 16 June 1999, there were 33 inmates in the block. One was discharged in the course of the morning. Mr Bauer had carried out a muster at 11.25 am, at which the count was 32. He had recorded at 2.20 pm that the appellant Knight left the block to be taken to a medical appointment, returning at 4.15 pm. A little later, another prisoner was moved to a different block. Mr Bauer, had performed another muster at 5.05 pm and counted 31 prisoners in 10 Block. His procedure was to shout "muster", at which point the prisoners would come to their cell gates and receive their food for dinner. He had counted them and was able to see the face of each prisoner.

The evidence of the 10 Block prisoners about the events of 16 June 1999

Prisoner Barlow

[75] Barlow had never spoken to Mr Buckley. On the morning of the day the latter died, Barlow said, he was sitting at the front of his cell with other prisoners, Tilberoo and Booth, when the three appellants arrived. Williams said, "We're going to get this white cunt down here". Later, Barlow said, as he went to the mess room for lunch, he looked into the left-hand shower block and saw Robertson at the urinal. He had not seen his face, but he recognised him by his size; he was the biggest man in the block. While Barlow was getting his lunch, which took perhaps five minutes, he had not seen Robertson come out of the shower block, which was visible from the mess room windows.

[76] Once Barlow had got his lunch he sat down outside the mess room with Booth. While he was sitting there, he saw Buckley go into the shower block and Williams

follow him. Then he heard scuffling noises and someone saying "Fuck off", "Leave me alone" and "Help me". He saw Buckley place his hand on the brick wall near the tap and mirror before he was pulled back by Williams. He did not see Williams' face but he recognised his arm because he was the darkest skinned man there and was wearing his blue football shorts. Barlow and Booth decided to go elsewhere, and moved to sit on the grass outside Tilberoo's cell.

[77] About half an hour later, Williams and Knight emerged wearing towels, and moved to the right-hand shower block for about ten minutes. Barlow thought Robertson came out later. Then the three men approached Barlow, Booth and Tilberoo and said, "We got that white cunt and we fucked him up". They instructed them not to go into the left-hand shower block but to use the other shower block, and not to say anything if the police interviewed them.

[78] Barlow said that the prison officer, Bauer, who was responsible for head counts would not necessarily sight the prisoners counted. He would accept being told, for example, that someone was in the shower.

[79] Barlow agreed in cross-examination that at the committal he had said that the person he saw at the urinal (Robertson) might have left well before he heard the noises, and he had agreed with the same proposition at the previous trial. Now, however, he said that was not so. He would have seen that person walk out, and he did not.

[80] In cross-examination, Barlow agreed that at the committal proceedings, he had given evidence of Williams making the statement about intending to "get" Mr Buckley in the absence of Knight and Robertson, and he had described the conversation as occurring about half way down the block, on the same side as Tilberoo's cell. In the first trial he had said that Robertson and Knight were present for the conversation, but it took place at the front of Tilberoo's cell; but he had also then accepted that Williams might have made the remark without Robertson or Knight being present. Barlow agreed that in a statement in July 2004 he said that he was uncertain as to whether it was William or Knight who made the statement. In re-examination, he confirmed the presence of all three appellants for the conversation, but now said that it occurred when he was in his cell with his cellmate, Campbell.

[81] It was put to Barlow that the statement to the effect that the three had "got" Mr Buckley and that he should not use that side of the shower block or tell the police occurred, according to his evidence at the first trial, in his cell. He said that he now recalled it was in his cell, with Campbell, not Booth, present. Knight had not spoken during the two conversations about dealing with Buckley. In the conversation after the assault, he simply stood behind the others. At the committal proceedings and the previous trial he had said that Knight's only involvement was his presence outside his, Barlow's, cell, when Williams first announced the intention to assault Buckley. Now, he said, he had lied on oath about those matters. He said that he could recall that Knight went to the hospital that day, but it was probably in the morning, not the afternoon.

[82] In a 2004 statement, Barlow had described seeing the three appellants walk out of the left-hand shower area and move to the right-hand shower block. It was when they emerged from there that Williams and Robertson were wearing towels. He had previously said that Williams was still wearing shorts when he moved from one shower block to the other. Barlow conceded that he had previously told police that when he showered that day, he did so in the left-hand shower block, but he now said that it was in the right-hand side, as directed by the appellants.

[83] Barlow accepted that when he was interviewed in 1999, he said nothing about seeing anything happen in the shower block. He said that was because he was young and afraid and he had been told not to speak. He agreed that in 2002, he was interviewed by a police officer in his uncle's presence, and did not then feel afraid. Nonetheless, he did not describe seeing anyone enter or leave the shower block. When he gave evidence at the committal in 2007, he was no longer in custody, but, asked about his previous statements that he could not remember seeing anyone go into the block, confirmed that he was telling the truth. Barlow said that he had deliberately told lies at the committal because he was afraid and he did not know whom to trust. In the previous trial, at a time when he was not in jail, he had said that he had seen Buckley's hand, but otherwise he had not seen anything. He maintained that he did not trust anyone at that time but was now ready to say what had happened. He had lied previously, but was now telling the truth.

[84] Barlow agreed that at the previous trial he acknowledged that he had a memory problem and was addicted to alcohol. He said that neither of those answers was true; he had simply wanted counsel to stop asking him questions. Barlow had completed a rehabilitation program, he accepted, but it was for his involvement in domestic violence, not for alcohol addiction. He admitted he had a long criminal history of assaults and domestic violence offences.

Prisoner Campbell

[85] Campbell, who shared a cell with Barlow, recalled that while he was eating lunch on the day Mr Buckley died, he heard the sound of thumping and fighting coming from the toilets on the left-hand side. He returned to his cell to eat his lunch; Barlow arrived a couple of minutes later. Campbell took his plate back to the mess hall. On the way, he saw that Robertson was sitting scrubbing his joggers. About five or ten minutes later, as he was smoking at the front of his cell, Campbell saw Knight walking, with a towel wrapped around him, from the vicinity of the left-hand shower block to the right-hand side of the yard.

[86] Campbell went to afternoon sports activities and returned, he thought, at about 3.00 pm. He went to shower in the left-hand shower block and noticed that the first two cubicles seemed to be being used, but there was no steam being emitted from the third. He took the cubicle to be free, but when he opened the door he saw Mr Buckley hanging with his face facing the wall, almost as though he were kneeling. He had a towel wrapped round his neck, tied to a rail on the louvres. There was no sign that he was alive. Shocked, Campbell moved to sit down outside the right-hand shower block. As he sat there, he heard a voice say "Don't look at that. Go and use your own showers". He thought that the speaker was Aboriginal, but he did not see who it was.

[87] Asked about Mr Bauer's musters, Campbell described them as "pretty relaxed"; prisoners could answer for others.

[88] Cross-examined, Campbell accepted that in 2007, when questioned about the speaker, he had agreed it was not Robertson. He did not recall Williams coming to the cell or saying anything about not revealing what had happened in the shower block in the period between his return from the mess hall and going to sporting activities. In 2003, he had given a statement to the police about hearing the fight and seeing Mr Buckley's body, but he had not mentioned in that statement seeing Robertson clean his shoes or Knight wearing a towel; he had given those details in a 2004 statement. He accepted as correct what he had said on an earlier occasion, that he had waited half an hour or so after returning from sport before going to shower that day.

Prisoner Bailey

[89] Bailey shared a cell with a prisoner named Broome. On the morning of 16 June 1999, Bailey had gone to a pottery class and returned to 10 Block at lunch time. The appellants were sitting together in the middle of the yard. After most of the prisoners had had lunch, the three were still sitting together. Bailey sat on his cell step and painted some pottery. Mr Buckley emerged from his cell and went into the shower unit. As he passed, Bailey said something to him about beating the hot water rush, to which Buckley responded, "Yeah". Robertson got up and followed Buckley into the shower block, followed shortly after by Williams.

[90] Bailey heard a commotion, with what sounded like punches being thrown and someone saying something like, "Get off me". Knight walked into the block with a towel around his neck. It was a yellow, prison issue towel, rolled up like a sausage. The commotion was continuing as he entered, but it stopped not long after. Things became quiet. Next, Bailey heard the shower running and then the three appellants emerged and walked to the right-hand shower block, where the showers commenced to run. Bailey returned to his cell for a cigarette. He walked down the pathway, past the shower entrance. He heard Robertson yell, "Stay the fuck out of there". He was sitting with the other appellants, near the other shower block. Bailey continued to the mess room. He had a shower that afternoon in the left-hand block, in the cubicle closest to the doorway.

[91] Bailey remembered that evening's muster. He did not see Buckley at it; indeed, he did not see him again after he entered the shower block. Bauer would often take the word of other inmates for the whereabouts of a prisoner. Prisoners sometimes plaited towels which they used to lift buckets filled with water as a form of exercise. The three appellants were among the prisoners who exercised in that way. On the following day, when police were interviewing prisoners, Knight came to his cell where he was sitting with another couple of other prisoners, and asked if any of them had seen anything. When one of them answered in the negative, he said something to the effect of "Oh yeah, keep it like that". Bailey was uncertain about the exact words.

[92] In cross-examination, Bailey confirmed that he had first provided a statement setting out his recall of events in March 2004. At the time, he was living in Victoria and there was a warrant for his arrest because he had absconded on bail. He acknowledged that part of his motivation for providing a statement was to assist him in respect of his outstanding Queensland matter, but he said that he thought it was time to tell the police what he knew.

[93] Bailey agreed that when he saw the three appellants sitting around, prior to Mr Buckley's entering the shower block, there were others there too. Robertson might have got up and walked into the right-hand shower block; he trained in that block. He had conceded at the committal proceedings that he could not be absolutely certain that it was Robertson's voice he heard (yelling "Stay the fuck out of there"), but in re-examination, he said he was reasonably certain that it was.

[94] Bailey agreed that at the committal proceeding, he had conceded that while he remembered Knight having a towel in the yard, he could not be sure that he still had it on when he went into the shower block; it was possible that he had left it on the chair he had been sitting in. At the previous trial he had acknowledged the possibility that he was mistaken as to who went into the shower block. He agreed with his recollection at the committal proceedings that by the time the third person went in, the noises of a struggle had stopped.

[95] Bailey guessed that he had his shower after 5.00 pm. When he showered, he did not notice a yellow towel tied to the louvres in the end cubicle, and he was surprised that he had missed it. In the 2004 statement, he had said that the other two showers were running when he had his shower. At the committal proceedings, he had said he could remember when he had his own shower seeing steam coming from the third shower cubicle. He accepted that he had previously said that he thought Mr Buckley was wearing a white remand shirt when he went into the showers, but he could not now remember whether that was so.

Prisoner Tilberoo

[96] Tilberoo gave evidence with the benefit of an undertaking from the Attorney-General that anything he said would not be used against him. He had never spoken to Mr Buckley. On the day Buckley died, after the lunch muster, Tilberoo was sitting on a chair at the front of his cell. Williams instructed him to, "Watch out for the screws, because I'm going to knock this young fella". Accordingly, Tilberoo kept a lookout for guards. He saw Buckley go into the left-hand shower block carrying his clothes and towel. He was followed by Williams, Robertson and Knight, in that order. The three spent five or six minutes in the left-hand showers before emerging and going to the right-hand shower block.

[97] Tilberoo walked some way down the row of cells. When he reached a point between cells 16 and 17, he glanced into the shower block. He saw a yellow towel round the bar on the window and part of Buckley's right leg; the door to the cubicle where he was hanging was slightly open. After that, Tilberoo went into the right-hand shower block and saw the three appellants washing their clothes in two sinks. (Quizzed in cross-examination about how the three were using only two sinks, he added the detail that one of them had a bucket placed on the bench.) The three were wearing towels. He saw some blood going down the sink. In cross-examination, he confirmed that he saw the three come out together, none of them carrying anything, as far as he could recall. Tilberoo was asked about Mr Bauer's practice of conducting musters; he said that if someone were in the shower, Bauer would just ask another inmate if he were there and accept an affirmative reply.

[98] Tilberoo was one of the prisoners spoken to by police on the day after Mr Buckley's death. He agreed he had told them he knew nothing of anybody wanting to harm Buckley. In 2003, he had made a statement to police and he had given evidence in 2009 at the earlier trial. At that trial, he said that when he started reading his statement he remembered a few things of what was in there. He agreed he did not have much of a memory "because of the alcohol". At the previous trial, his recall of Buckley was that he was 17 or 18, with curly hair. (A photograph showed that Mr Buckley had straight hair.) On the other hand, he said, he had never forgotten what he saw.

[99] Tilberoo's recall was that Mr Buckley had been in 10 Block for a month and a half. When Williams approached him, he was alone; neither Booth nor Barlow was there. He accepted that at the previous trial he had said Williams approached him before the muster, not after it. In his statement, however, he had said it was after the muster. At the earlier trial, he accounted for that discrepancy by saying, "I must have been pissed".

[100] When Tilberoo made the 2003 statement, he originally told the police that he had seen Williams, Robertson and a white man go into the shower block. The police showed him three photoboards, on the third of which was a group of twelve Aboriginal men.

The only one of those who had been in 10 Block at the relevant time was the appellant Knight. He pointed him out and then was asked by the police officer whether that was the third fellow he was talking about; he agreed. In his 2003 statement, Tilberoo said he said that he had claimed that the other man was white because he was not "game" to say it was Knight, but in the previous trial he had said it was because he "must have been pissed".

[101] In the 2003 statement, Tilberoo had described seeing one side of Mr Buckley's body hanging, facing towards the block kitchen. At the first trial, when asked about what he saw in the bathroom, he had said that he saw the rope on the louvres, but nothing of what was inside the cubicle; he "must have been pissed" when he said in his statement that he saw the body. At that trial, he had said that he knew that the body must be facing the kitchen because the towel was straight. He accepted that when he was interviewed by police in 2003, he said that there had been an interval of only a couple of minutes between his seeing the three appellants washing and another prisoner's seeing Mr Buckley's body and reporting it, with the result that the prison officers arrived to investigate.

Prisoner Cant

[102] When Mr Buckley was moved into 10 Block, he shared a cell with Cant, who described him as a "pretty cheerful" young man. The first night that Buckley was in 10 Block, the two had had a play fight, but it had not caused any injury to Buckley. On the day Buckley died, Cant had eaten his lunch and was walking towards the mess room when he glanced into the shower block and saw that Williams and Knight had Buckley on the ground. Both looked at him as he passed. He heard some banging and the sound of a couple of punches. Buckley was lying on his back with his feet towards the hand basins. Knight was at his upper body, kneeling over him. Williams was down towards his mid-section, kneeling on the ground. On his way to the mess room, Cant saw Robertson standing at the telephones outside the mess room, looking back up the yard.

[103] Cant went from the mess room to the cell of a prisoner named Edmonds. While he was in there, Williams and Knight, who looked as if they had just showered, appeared and asked him to go to Knight's cell to talk to them. Once there, they questioned him about what he had seen. Cant denied seeing anything. Robertson entered the room and told them to leave him alone, that he had seen nothing. He left with Robertson and went to the latter's cell, where he stayed three or five minutes. Robertson told him to keep out of everyone's way. As he walked back across the yard, Cant saw that Williams and Knight were in the shower block cleaning with a garden hose. Buckley did not appear at that evening's muster. Bauer, the Corrective Services officer, would accept the say-so of another prisoner as to where someone was. That evening he saw Corrective Services officers cutting Buckley down. He had not seen Buckley make any type of noose out of anything or tearing up towels. He had seen plaited ropes used for exercise in the prison.

[104] In cross-examination, Cant accepted that another prisoner named Roberts had been in jail with him in 2010. Roberts had probably told him his version of what he saw in the shower block. In a number of interviews and statements given in 1999, 2003, 2004 and 2009 and in giving evidence at committal proceedings in April 2008, Cant had not said anything about seeing an assault on Mr Buckley in the shower block. The first time he made any such statement was in January 2012. He agreed that on the day Buckley's body was found, he had been placed into a cell with another prisoner named McKinnon. McKinnon had noticed blood on his, Cant's, sock which caused him anxiety that he would be blamed for Buckley's death. He said

that while he was in jail or at risk of going back to jail, he was not prepared to say anything; now he had almost finished his parole and was a free man.

[105] Cant accepted that at the committal proceedings he had described the play fight and said that it was possible that Buckley had sustained some sort of scrape or scratch in it; he did not, however, think that Buckley had sustained any injury because he would have expected him to say something. He accepted that in the past, knowing he was on oath, he had deliberately lied, saying that the appellants had not spoken to him about what happened to Buckley and that he was unaware of any problem that Buckley had with any other inmate. He had a long history of convictions for property offences and offences of violence and indecent assault; he had been convicted of indecently assaulting another prisoner.

[106] Cant conceded that in his 2004 statement he claimed to have heard something happening in the shower block, but not to have seen anything. In that statement he said that he had glanced into the entrance to the shower block about half an hour later. The door to the last cubicle was closed and the shower was running; he could see a yellow towel hanging down from the bars into the shower. He now asserted that none of that was true. In the statement, he had recalled seeing Williams and Knight wearing towels; again, that was untrue. In his statement made in January 2012, he had described seeing Knight and Williams each using brooms to scrub the floor of the shower block, but now said he did not know whether they had any cleaning implements and could not say that he saw a broom. He had not seen Robertson go into the shower block with Williams or Knight.

Prisoner Shipp

[107] Shipp recalled seeing Mr Buckley on the day he died, when the prisoners went to the mess room for their breakfast. Buckley showed no sign of injury then. Shipp, whose cell was the third down from the mess hall on the western side of 10 Block, was spending the day painting in his cell, lying on his mattress on the floor to do so. Through the broken louvres of the window in front of him, he could see across the yard to the eastern side of the block and inside the left-hand shower block. The doors of the shower cubicles were visible, except for the last one, which was in darkness, and which he could not see properly. In the yard, he saw what he described as "some commotions". The three appellants, whom he described as the "big bosses of the yard", were walking up and down the block. They were "talking kind of serious".

[108] After his lunch arrived, Shipp saw Mr Buckley walk from the mess room into the shower block and go to the wash basin. The three appellants also walked from the mess room into the shower block, on his recall, separately, about a minute apart. Robertson hit Buckley and then both he and Knight kicked him. Subsequently in his evidence, Shipp said that at the commencement of the assault, Knight delivered "big hard combo hits" to Buckley. He saw Williams punch him before he fell to the ground. Sometimes Robertson emerged from the shower block, "puffing and panting", to act as a "cockatoo", looking out for prison officers. He stood at the front of the shower block, four or five metres from it.

[109] Buckley was lying on the floor on his back when Robertson kicked him. He tried to crawl forward, but Knight dragged him back. Shipp could see Buckley's white leg as he was being dragged to the last shower cubicle. He heard him call for help a few times. Shipp saw the three appellants leave the left-hand shower block, where they had probably spent between ten and twenty minutes, and walk into the other shower block. He noticed water running out onto the lawn. Buckley did not emerge, and he next saw him that night, on the floor, dead.

[110] In cross-examination, Shipp said that the assault of Mr Buckley was a "full on flogging"; it was the worst violence he had ever seen. It was Williams who punched Buckley, not Knight, although he might be mistaken about that. All he could remember of Knight's actions was that he had grabbed Buckley as he called for help and crawled forward, and had thrown him back towards the back wall. Shipp conceded, however, that he had not actually seen Knight grab Buckley, but assumed it was he, because he was the one of the three not in view. Nor did he see Buckley hit the back wall; rather, he assumed that he did, because he heard a bang. The assault had happened while most of the inmates were away from the yard, playing football. He did not go to the cell of another inmate named Roberts that afternoon. At some time later that day, a prisoner named Edward Malcolm had visited his cell.

[111] In 1999, Shipp agreed, he had told the police that he knew nothing about Buckley's death. In 2003, he mentioned hearing a "bit of a squeal", of which he had not taken much notice; he said that when he looked out he saw the prison officers in the shower block; and when it was suggested to him that the appellants were involved in Buckley's death, he said that was the first he had heard of it.

[112] Shipp admitted to problems with alcohol and his memory. He had used cannabis, even in jail. He might have used it on the day Mr Buckley died. Shipp had poor eyesight, but did not wear his glasses. He agreed that he had only seen the side and back of the three men, not their faces. It was put to him that it was possible that he was mistaken in thinking that Robertson was one of the three men. He said it was possible; it had been a very long time. He disagreed, however, with the proposition that Robertson, at the relevant time, was in the right-hand shower block. When it was put to him a second time that he might be mistaken about Robertson, he said he was not. He knew where Robertson was standing as a lookout. His build was recognisable.

Prisoner Roberts

[113] Roberts said that he had seen Mr Buckley in 10 Block but had not spoken to him. After he had finished lunch on the day Buckley died, he was walking to the mess room to wash his plates when he saw in the shower block Williams with his arm around Buckley's throat and Knight standing in front of Buckley, crouched over. Buckley was on his knees facing the showers, struggling and trying to get Williams' arm away from his throat. Roberts continued to the mess room where he washed his dishes and those of his cell mate. While he was there, Williams came to the doorway breathing heavily, stood looking at him for a couple of minutes and then walked away. That afternoon he saw Knight cleaning the shower block out with a hose. He could not be sure what time it was, but he thought it might have been around 2.00 pm or 3.00 pm, while most of the other prisoners were at sport. He did not see Buckley again.

[114] Under cross-examination, Roberts agreed that in 1999, when he was interviewed by police, he said that he had seen nothing relevant to Mr Buckley's death. In 2003 he gave a statement at a time when he was no longer in jail, but again denied seeing anything. Similarly, in a statement in July 2004, at a time when he was in jail for disqualified driving, he did not refer to seeing anything happen to Mr Buckley. In that statement, he had mentioned a conversation with Shipp, in which the latter had told him not to go to the shower block because someone was hanging there.

[115] The first time that Roberts told police he had seen an assault in the shower block was in a statement given on 2 October 2004. In that statement, he claimed that

Shipp had told him Williams and Knight had something to do with the murder. He conceded in cross-examination, however, that he had, on a previous occasion, said that Shipp had told him that he was himself responsible for it; he agreed that Shipp had told him that. He confirmed that he had not seen Robertson in the shower block, although he had previously claimed to another prisoner that he had. Roberts conceded that he did not recognise Buckley at the time he walked past; it was only later that he inferred that he was the victim of the assault. It was possible that Buckley was wearing a white remand shirt when he saw him. Asked whether he would accept that he could be mistaken about whether it was Williams he had seen and whether he had previously made that concession, Roberts answered that he could be, but he knew he was not.

Prisoner Lionel Malcolm

[116] Lionel Malcolm first noticed Mr Buckley in 10 Block on the morning of 16 June 1999. Malcolm organised sporting activities, particularly the touch football games. When he returned from those activities, he heard the sound of someone getting bashed in the shower block. That person was calling out, "Help". He had gone to the left-hand shower block where he saw Knight wiping something up on the floor with a piece of bread. When Malcolm entered, he did not look at the end shower cubicle; he used the first cubicle to shower. When he emerged from the shower, Knight was gone. Back in his cell, Malcolm heard his nephew, whose surname was Bloomfield, calling him from 9 Block. He went back into the left-hand shower block and spoke to him briefly, standing on the bench which ran across next to the last shower cubicle in order to do so. He thought the cubicle door was closed.

[117] Before he went to afternoon activities, Malcolm joined a group of inmates which included Williams. Someone said that somebody had been bashed and the other inmates should stay in their cells and act as though nothing had happened. One of the prisoners said, "What's happened in the block stays in the block". Later that afternoon, when he returned from sports he used the same shower, but took no notice of the end cubicle. Another prisoner was showering in the remaining cubicle. The same group of prisoners, including Williams, was talking when he finished his shower. They said that someone had hanged himself in the shower cubicle. Bauer did not insist on prisoners standing at their cell door before including them in a count.

[118] In cross-examination, Malcolm said that he had not noticed any towel tied to the louvres or anything else about the shower cubicle to his right, even though it would only have been a couple of metres away. He agreed that when he first gave a statement in March 2004, he had made no mention of seeing Knight, but in a further statement given four days later, he recalled seeing Knight doing something on the floor with the bread. He explained that he had just remembered that fact after he had spoken to the police. He admitted that when he made his second statement he was intoxicated.

[119] Cross-examined by Robertson's counsel, Malcolm said that he had not seen him in the left-hand shower block that day. He recalled telling Robertson to turn his music down. Robertson was in the habit of training in the right-hand shower block with the music playing. He said that he heard the punches before he heard Robertson's music, but he agreed that, cross-examined on a previous occasion, he had accepted that he had spoken to Robertson about his music only a few minutes before he heard the punches.

Prisoner Bloomfield

[120] Lionel Malcolm's nephew, Bloomfield, had given police a statement in 2004; he was deceased by the time of the trial. In the statement, he said that after lunch, a game of

touch football and a period in his cell, he had gone to the 9 Block showers which adjoined those in 10 Block and yelled for his uncle. Malcolm responded by coming to the window in the 10 Block showers; he appeared to be standing on the bench at the basin end.

Prisoner Edward Malcolm

[121] Lionel Malcolm's older brother, Edward Malcolm, was also in 10 Block. On the morning in question, he went into the right-hand shower block for a shower and shave. Robertson was working out in that shower block. Malcolm recalled hearing noises – screaming or fighting – from the left-hand shower block. He heard the sound of someone showering in that block. There was also the sound of the mess room television and of music from the right-hand side of the cell block. He went from there to the mess room for breakfast, where he could still hear the noises of fighting, and after that to Shipp's cell for a couple of minutes. He had not seen Robertson leave the right-hand shower block.

[122] Later that day, when Malcolm returned from touch football, he thought after lunch, he showered in the right-hand shower block. Robertson was not in the block then. He expressed himself uncertain as to whether it was in the morning or in the afternoon that he returned from touch football. In cross-examination, he agreed that he said he had heard noises when he was in prisoner Shipp's cell. When he left the right-hand shower block after hearing the noises, Robertson was still there. He did not see him move to the left-hand shower block. The music he heard was Robertson's, which he played whenever he was training.

Prisoner Broome

[123] Broome said that in June 1999, he was sharing a cell with Bailey. Bailey had returned from getting lunch and said something to him which made him go to the shower block. (In cross-examination, he said it was something to the effect that there was a young fellow hanging in the shower and that Bailey said he thought he had been killed for drugs and money.) He went to the end cubicle, the door of which was closed, and saw Mr Buckley hanging over to the left-hand side of the cubicle, with his chin against his chest. His back was against the wall. He was wearing a brown jumper. No part of his body was in contact with the ground. Broome closed the door, wiped his fingerprints off it and returned to his cell. Later that afternoon, on his return from football, he thought about 3.00 pm or 4.00 pm, he saw Robertson in the shower block, with a hose and broom, sweeping water around.

[124] In cross-examination, Broome admitted to a variety of serious offending. He had not said anything about seeing Mr Buckley's body in police interviews in 1999, 2003 and 2004 and in giving evidence in committal proceedings in 2007. He first disclosed it when he gave a statement in January 2012; in the course of the previous interviews he had been told which shower cubicle the body was found in. He had lied at the committal proceedings by saying that Bailey told him about the body only after its discovery, in order to distance himself from the events Broome acknowledged that he might have been mistaken as to whom he saw cleaning the shower block. His glimpse into the block was brief; it might not have been Robertson.

Prisoner Weribone

[125] Weribone had met Mr Buckley on the day he came into the block, when they spoke briefly. Around lunch time on the day the latter died, his cell mate, Nelson, had told him that there was someone hanging in the showers. He walked down to the left-hand

shower block and looked in to see Buckley hanging; he appeared to be dead. Weribone could not remember which way his body was facing. It looked as though his feet were off the ground, although he just saw "the top part of him". As Weribone returned to his cell, he saw the three appellants on the other side of the yard. Robertson and Knight were wearing towels, which was unusual at that time of the day. Earlier that morning, between 9.30 and 10.00, Knight had borrowed a towel from him. Officer Bauer was casual about doing a head count; he did not ensure that he could see each prisoner.

[126] Weribone had a long criminal history. In cross-examination, he agreed that when he spoke to police in June 1999, he denied any knowledge of Mr Buckley's death. He had provided statements to the police in 2004 and 2007. It was only in 2007 that he mentioned Knight borrowing the towel. At the committal proceedings, when asked what he had seen when he looked into the shower block, Weribone answered that he thought he had seen a young fellow, but he could not now remember it. He had not gone into the shower block. In his 2004 statement, he said that he had seen a white person hanging from a bar on the louvres on the furthest wall from the shower entrance, but at the committal proceedings he said that he could not remember seeing him.

[127] It was suggested to Weribone that from the position he claimed to have been in, he could not have seen Mr Buckley hanging in the shower cubicle; he maintained he was sure he had seen him. At the committal he had agreed that from the area where he had said he was standing he could not have seen the young man hanging and agreed that he must have made it up. At the previous trial, he was asked whether it was possible that he converted things he had been told into things that he had seen, and answered "Possibly".

Prisoner Nelson

[128] Nelson saw Mr Buckley on the day he came into 10 Block; he showed no sign of injuries. The following day, Nelson ate lunch at about 11.00 am or 11.30 am in his cell. When he walked to the mess room to clean his plate, he saw water running out of the left-hand shower block onto the footpath. After cleaning his plate, he returned to his cell, picked up his towel and went to have a shower. He opened the door of the last shower cubicle and saw Buckley hanging by a towel tied to a bar of the louvres. His back was against the left-hand side wall, as one faced into the cubicle; his legs were bent, his body crouched. This would have been between 11.30 am and midday. Nelson closed the door and returned to his cell.

[129] As he was leaving the shower block, Nelson saw the three appellants and another prisoner known to him as "Cowboy" (inmate Cant), standing in the right-hand shower block. He returned to his cell and told his cell mate, Weribone, what he had seen. The latter left the cell and returned a couple of minutes later. When prison officer Bauer took a muster, if someone were in the shower or in his cell, rather than at the front waiting to be counted, another prisoner could tell Bauer where he was and he would accept that.

[130] In cross-examination, Nelson agreed that in 1999 and 2003 and when first spoken to in February 2004, he had not revealed to police that he had seen Mr Buckley hanging. It was when he was spoken to again in February 2004 that he made a statement concerning seeing Buckley's body. He did not know whether Buckley was dead when he saw him, but he was not moving. Nelson had never previously mentioned Cant as being in the right-hand shower block, and at the committal he had said that the three appellants were outside that block, as were other prisoners.

The finding and state of Mr Buckley's body

[131] At about 5.30 pm on 16 June 1999, prison officers found Mr Buckley's body hanging in the end shower cubicle in the left-hand shower block in 10 Block. He was hanged with a yellow prison issue towel from a horizontal bar across the louvre windows. The towel appeared to have been torn or cut into a number of strips, which were plaited together to make a rope. The body was facing the wall, with knees bent and feet touching the ground. It was clothed in prison garb: dark brown, long-sleeved sweatshirt and cotton trousers.

[132] A prison officer involved in cutting the body down described it as cold and rigid; although that officer was demonstrated in cross-examination to have given inconsistent accounts of the positioning of the body. The registered nurse who worked at the jail was called to the scene at 5.28 pm. She recorded in her notes that Buckley's elbows were stiff, indicating rigor mortis, and blood had pooled in his hands. A visiting medical officer for the jail arrived at 6.20 pm and examined the body, noting that it was cold, with advanced rigor mortis.

[133] A substance like grease was found below Mr Buckley's right thumb and on his left palm, but no similar substance was located on the towel. There was blood on his right hand. Mr Buckley's blood was also found on a number of vertical surfaces: in smears above a wash basin, on the bottom of the partition and lower door hinge separating the end shower cubicle from the next cubicle, and on two walls inside the shower cubicle where his body was found. The positioning and distribution of the blood stains were consistent with his having been injured before entering the shower cubicle. No blood was found on the towel itself, except on that part which was around his neck.

[134] Dr Sinton, a pathologist, conducted an autopsy on Mr Buckley's body on 17 June 1999. He noted marks and indentations around his neck which would have been caused by the ligature formed by the towel. Mr Buckley had facial injuries consistent with his having been punched. Dr Sinton concluded that death was by hanging, although that could entail either suicide or third party involvement. It was possible that there had been more than one manual application of force by ligature around Mr Buckley's throat before he was suspended, but Dr Sinton thought it more likely that there had simply been a suspension mechanism. He reached that conclusion because of neck abrasions, an abraded mark behind the left ear and the absence of deep tissue damage in the neck.

[135] Marks on Mr Buckley's neck indicated that the rope had been in two positions. Dr Sinton accepted that it was possible that the marks indicated an unsuccessful attempt at suicide, followed by a successful one, but he thought that they were from a single hanging. Dr Sinton found no evidence of injuries on Mr Buckley consistent with sexual assault; cross-examined, he accepted that there were forms of sexual assault which would leave no mark.

[136] Dr Sinton said that rigor mortis was perceptible after about six hours after death; the visiting medical officer's finding of advanced rigor mortis indicated that death had occurred many hours prior to the latter's examination. In cross-examination, however, Dr Sinton acknowledged that rigor mortis was not a reliable indicator of a precise time of death, because of variables such as temperature and humidity. The studies on which the statistics and the six hour theory were based were performed in Western Europe. He could not discount the possibility suggested to him that some of those studies had shown the onset of rigor mortis within an hour or two of death.

However, he would expect that in colder climates, the onset of rigor mortis would occur more quickly. Dr Sinton would have expected to see some evidence of pooling of blood in the legs, however, if the body had been hanging for some hours; he saw no such changes.

[137] The autopsy was reviewed by Professor Ansford, a specialist forensic pathologist. He preferred to describe the cause of death as compression of neck, rather than hanging. The ligature marks, because they were horizontal rather than oblique, were more likely to have been the product of a murderous application of force, a deliberate strangulation, than the result of a hanging, although they did not rule out the latter possibility. Different marks made it appear that the ligature had been in different places at different times, resulting from separate applications of force. The multiple markings did not, however, exclude suicide, and it was common in suicidal hangings for the deceased to be in contact with the floor.

[138] Professor Ansford considered that the facial injuries were consistent with Mr Buckley's having been involved in an altercation around the time of death; they were, however, relatively superficial and did not indicate a sustained or forceful beating. There was some lividity below the knees, consistent with suspension. Pronounced lividity of the legs often appeared in a hanging case, but absence of that feature did not exclude a hanging. In Professor Ansford's view, the extent of lividity was a "very inaccurate [means of] assessment" of how long a person had been dead.

[139] The visiting medical officer's findings were consistent with well-established rigor mortis, so that Mr Buckley had been dead for a few hours. Characteristically, rigor mortis came on within four to six hours, although that might vary according to the ambient temperature and whether there had been violent exertion prior to death. Contrary to Dr Sinton's suggestion, Professor Ansford said that the hotter the temperature, the faster rigor mortis would set in. If there were hot water running in the shower cubicle where the body was found, it might induce rigor mortis more quickly. That sort of factor, however, would only vary the four to six hour estimate of onset by an hour or so. Professor Ansford accepted, in cross-examination, that one could not be specific about a time of death on the strength of rigor mortis being observed at a particular time.

The unreasonable verdict ground

[140] All three appellants submitted that it was not established beyond reasonable doubt that they had killed Buckley and that a reasonable hypothesis consistent with innocence (suicide) had not been excluded. They pointed to the absence of forensic evidence against them and the unreliability of the 10 Block witnesses, most of whom had long criminal histories and problems with alcohol or drugs. Almost all of them had given earlier contradictory statements or evidence. At the highest, the appellants submitted, their evidence indicated an assault on Buckley at around lunch time, but did not rule out the possibility of a later suicide by him. Many of the arguments made were common to all three appellants; others concerned the separate cases made against them.

The absence of evidence

[141] A number of admissions of fact were made, among which were admissions that no blood, DNA or fingerprints of the appellants were located in the shower block, on any item located in the shower block, on Mr Buckley's person or on his clothing. None of Mr Buckley's blood or DNA was located on any of the appellant's clothing and none of them bore any injury.

Unreliability of the Crown witnesses

[142] Barlow, it was submitted, had given contradictory accounts and admitted telling lies on oath; the trial judge had given a warning that it would be dangerous to act on his evidence. He had said different things on earlier occasions: that he had seen no-one go into or come out of the left-hand shower block; that Buckley entered the shower block ahead of Robertson, whereas he now said Buckley entered after Robertson; that he saw Robertson's face, whereas he now said that he had only seen his back. Previously, he had either said nothing about seeing Williams enter the block or simply that he recognised his legs entering the shower block; now he claimed to have seen his face. He had previously failed to mention Williams' saying that they would "get" Buckley; his account of where he had been where he saw Buckley enter the shower block had varied; he claimed to have seen Williams grab Buckley and drag him back, whereas previously he had said he could not identify the person who did that. On other occasions he had said that Knight's only involvement was being nearby in the conversation when Williams spoke to Barlow after the assault.

[143] Roberts, in earlier statements, had said nothing about seeing the assault and gave varying accounts of what he had been told by Shipp. He admitted to inventing details of what he had seen when he told others about it. Although he gave evidence of seeing Buckley being held by Williams in the shower block, he admitted that he worked out later that it was Buckley. When asked at the previous trial if he could be mistaken about whether he had in fact seen Williams, he had accepted the possibility. Cant had sworn on oath at the committal proceedings that he had no knowledge of anything happening to Buckley. On his version given at trial, he must have perjured himself and the trial judge had accordingly warned the jury that it would be dangerous to act on his evidence. His account varied from that of other prisoners as to Robertson's involvement.

[144] There was some question as to whether Shipp, lying on the floor in a cell on the opposite side of the block, could, looking through a louvre window, have seen the assault as he claimed. On his own admission, his eyesight was poor. He had given an earlier version to the police in which he had said he had not seen anything. Shipp accepted that it was possible that, as he had said to police in 2003, he heard a "squeal", looked around and could not see anything. He had had an alcohol problem for years, suffered hallucinations and might have smoked cannabis on the day in question. He admitted to a poor memory and conceded to some possibility of mistake about having seen Robertson.

[145] Tilberoo had received an undertaking from the Attorney-General that his evidence would not be used against him. His identification of Knight was suspect; he could not have seen the towel from the position which he claimed to have been in; and he admitted to having previously said that the prison officers arrived to find the body only minutes after he had seen Williams and Robertson washing their clothes. Bailey had conceded the possibility of being mistaken about who entered or left the shower block. He had showered in a cubicle next to where the body was found without seeing a towel tied to the bar.

[146] Each of the appellants also made submissions about the adequacy of the evidence relevant to him. Insofar as the evidence tended to exculpate Robertson, the other appellants relied on it as having a general detrimental effect on the Crown case. Williams' counsel pointed out that the evidence of a hostile relationship between him and Buckley was fraught with problems. No witness reported actually seeing any assault by Williams on Buckley. Buckley had made conflicting statements

about whether he was in fear of Williams. The credit and reliability of the prisoners reporting Buckley's statements was in question and in respect of two of them (McIlwain and Donovan), the trial judge had warned the jury of the danger of acting on their evidence.

[147] Knight's counsel submitted that his client had no motive to kill Mr Buckley, and was said to have been on friendly terms with him in the detention unit. Evidence of his involvement came from Tilberoo, who had identified him from a photo board in doubtful circumstances after he had described the third person with Williams and Robertson as a white fellow. Weribone spoke of Knight's borrowing a towel, but its description did not match the one used to hang Mr Buckley. Lionel Malcolm's account of Knight cleaning the shower block floor with a piece of bread was inherently incredible, and he had himself said that he put it into the statement on a day when he was intoxicated.

[148] Bailey claimed to have seen Knight go into the shower block with a rolled up towel around his neck but conceded the possibility of being mistaken as to the towel. He was vague about exactly what was said in the later conversation with Knight. Roberts claimed to have seen Knight hosing out the showers when the other prisoners were at sport, but the evidence showed that Knight went to hospital at 2.20 pm, returning at 4.15 pm, while sporting activities took place between 3.05 pm and 4.20 pm.

[149] Robertson's counsel said that he, like Knight, had no motive for the killing. The evidence inculpating him came from Shipp, who acknowledged the possibility of mistake; Bailey, who also accepted the possibility of being mistaken about who went into the left-hand shower block; Barlow, who conceded that the person he thought was Robertson could have left before he heard any noise; Tilberoo, whose evidence was of concern because of his purported identification of Knight and his status as an indemnified witness; and Broome, whose evidence only went to seeing Robertson cleaning, and who conceded that he might have been mistaken as to whom he saw.

[150] There was evidence exculpatory of Robertson. Roberts looked into the left-hand shower block and saw Knight and Williams assaulting Mr Buckley, but he did not see Robertson. Cant said that he saw Williams and Knight assaulting Buckley at a time when Robertson was standing by the phone out in the yard, near the mess hall. He later saw Williams and Knight, but not Robertson, cleaning the shower. Edward Malcolm said when he first heard noises, Robertson was in the right-hand shower block, and he did not see him move to the left side block. Lionel Malcolm had also seen Robertson training in the right-hand shower block and asked him to turn down the music, which was playing at the same time he heard noises from the left-hand block. There was no logical basis on which the jury could have rejected that evidence.

The time of death

[151] The appellants argued that various pieces of evidence contradicted the Crown case that Mr Buckley was killed about lunch time. Prison officer Bauer had recorded Buckley as alive and present at 5.05 pm; the jury could not properly reject what he said. Dr Sinton and Professor Ansford both acknowledged the unreliability of rigor mortis as an indicator of time of death, and Dr Sinton noted the absence of pooling of blood in the legs, which he would have expected in a body hanging for a period of hours.

[152] Nelson, Weribone, Broome and Tilberoo, who all reported having seen Mr Buckley's body hanging in the shower block at lunch time, gave descriptions which were not consistent with the position of the body as found. All but Weribone said that the

body was facing away from the wall, and according to Weribone and Broome, it was completely off the ground. Weribone, at committal, had accepted that in his position from outside the shower block, he would not have been able to see Buckley hanging. At the first trial, he admitted he might have taken things he had been told as things he had seen. Tilberoo's evidence was worthless because it was inconsistent as to whether he had or had not actually seen a body. Nelson had made no claim of seeing Mr Buckley's body in the shower until 2004, having previously denied it.

[153] The jury could not have acted on Broome's evidence, not only because his description of the position of the body was inconsistent with how it was found, but because he had, by his own acknowledgement, lied on oath when he claimed at the committal that he had seen nothing of the appellants that day and when he said he had been truthful in the police interviews. His statement that Bailey had told him something about the young fellow in the shower was contradicted by the latter, who said that he did not know of Buckley's death until shortly after the prison officers arrived.

[154] Campbell had given a correct description of the position of the body. Although he said that he returned from afternoon sports activities about 3.00 pm and saw the body when he went to shower then, the log book for 10 Block showed 12 prisoners returning from the oval at 4.20 pm. Campbell had accepted that he might have waited half an hour before showering. It was conceivable, then, that he had seen the body after the 5.05 pm muster.

[155] The evidence was that Lionel Malcolm had spoken to his nephew, Bloomfield, standing on the bench next to the last shower cubicle, after hearing the sounds of a fight in the shower block and himself showering. If Mr Buckley had been hanging at the time Malcolm spoke to his nephew, it was impossible that he would not have seen him.

The suicide hypothesis

[156] The appellants submitted that there was evidence to suggest that Buckley might have been in a suicidal frame of mind. He had been a drug user and had committed serious offences against his fiancée's parents, causing an initial fracture in the relationship. His own mother had had no contact with him while he was in custody. In an early letter to Ms Lewis, he had indicated that he expected a sentence of between three and five years. Letters were found in his cell from his solicitors, advising a sentence date in August 1999, and from the child support agency, advising that he had been assessed as liable to pay child support for his infant daughter. In addition, the prison's general manager had told a police officer that Mr Buckley might have received a "Dear John" letter. Such a letter might have been included in some letters returned unopened to Ms Lewis.

[157] Dr Sinton was unable to exclude the possibility of sexual assault. When first incarcerated, Mr Buckley had responded to a question, "Can you think of any problems that may cause you to consider hurting yourself while you are in prison?" with the answer "Sexual assault". (The nurse administering the questionnaire had, however, recorded that she had no clinical concerns as to his mental state.) Mr Buckley had been put into a cell with prisoner Cant, who had a history of committing sexual offences and who had acknowledged that he and Buckley had had a play fight the previous night. It was not put to Cant that the fight was anything more, but this court was, nonetheless, invited to draw an inference of a sexual assault, impelling Buckley to kill himself.

[158] Neither Dr Sinton nor Professor Ansford had ruled out the possibility of suicide. They agreed that the marks around Mr Buckley's throat were consistent with his

having been alive when he was suspended. The separate ligature marks could be explained by an unsuccessful attempt at suicide followed by a successful one. The body was found with the feet in contact with the floor and the knees just above the ground. Thus, Mr Buckley had only to stand to prevent death through hanging. A substance like grease was found on his hands, which could have been from the bars over the louvres to which the towel ligature was secured. Buckley's blood was found smeared about the wash basins in locations consistent with his having put his hands on the wall for support; that suggested he was alive after any assault.

[159] Roberts and Bailey both thought it was possible that Mr Buckley was wearing a white shirt when he was assaulted. His body was found clothed in a brown prison sweatshirt, which pointed to an interval between the assault and the death. Bailey had also said that he heard running water after the appellants left the block, which suggested that Buckley was still alive then. Nelson had described seeing Buckley hanging by a towel with his back to the left wall, and he did not know if he was dead. That was not the position of the body when the prison officers found it, so it followed that Nelson might have seen Buckley in the process of committing suicide.

The verdict was not unreasonable

[160] Mr Buckley's facial injuries, which were not apparent on the morning of 16 June, provided clear evidence in that he had been assaulted, and the blood found on the vertical surfaces in the shower block indicated that the assault had occurred there. The lack of forensic evidence implicating the three appellants was consistent with the cleaning and showering other prisoners described. The absence of blood on the shower block floor and the soaked ground outside the block (which can be seen on photographs put into evidence) confirm an attempt to clean the shower block so as to remove any evidence.

[161] There is no doubt that, taken one by one, there were to a greater or lesser degree discrepancies and inconsistencies in each prisoner's account. Some aspects of the evidence of particular inmates were clearly unreliable; a couple of them candidly admitted that they could no longer be sure what they had seen and what they had been told. More generally, though, given the circumstances of the prisoner witnesses, the jury may well have been prepared to infer that mistrust of authority had contributed to a lack of early frankness on their parts. The evidence was being given almost 13 years after the events described, so that some level of inaccuracy was inevitable; it did not necessitate a conclusion of dishonesty or the rejection of the entirety of the witnesses' evidence. The jury could properly assess the evidence of individuals in the context of all the other evidence given; notwithstanding that there were deficiencies, the jury were not obliged to reject their accounts out of hand.

[162] A number of prisoners described seeing all three appellants enter the shower block before Mr Buckley was assaulted. All of the witnesses to the assault - Bailey, Tilberoo, Shipp and Roberts - said that Williams was involved. There was strong evidence of Williams' animus against Buckley in the form of the latter's own statements that Williams had intimidated and assaulted him. Buckley's collusion with others, if indeed it occurred, to effect the removal of Williams from 8 Block was not inconsistent with a fear of Williams. Similarly, Buckley's references to wanting to stay with friends in 8 Block and being settled there were not inconsistent with his also being afraid, as Officer Weeks and the prisoners, Donovan, Mason, Rees, Findlay and Devon said, of being moved to 10 Block, where Williams was.

[163] As to Knight's role, Tilberoo, Bailey and Barlow implicated him as being in the left-hand shower block during the assault on Mr Buckley. According to Bailey,

Knight had a towel with him prior to entering the shower block, although he could no longer recall if he still had it when he went in. Cant was specific as to Knight's involvement with Williams in the assault, as were Shipp and Roberts. Campbell saw Knight coming from the direction of the left-hand shower block, clad in a towel. Both Bailey and Cant said that Knight had quizzed them about their knowledge of what had taken place. Knight's overtures to Buckley in the detention unit were capable of being construed as representing, not friendliness, but a desire to reassure him and lure him into 10 Block.

[164] Bailey conceded the possibility that Robertson got up and walked into the right-hand shower block, but he said that he believed, nonetheless, that Robertson, Williams and Knight went into the left-hand block. He did not think there was anyone else about when he heard the voice he believed to be Robertson saying, "Stay the fuck out of there." Tilberoo and Barlow saw Robertson go into the shower block; Shipp described seeing him taking part in the assault. His concession of the possibility that Robertson was not involved was followed by his saying that he was not mistaken.

[165] The evidence said to exculpate Robertson was questionable. Cant's sighting of him outside the mess hall looking back up the yard is consistent with Shipp's evidence that he came out of the shower block from time to time to look out for prison officers. The jury might, in any case, have inferred from Robertson's role in protecting Cant that the two had a relationship which could make the latter reluctant to implicate Robertson. Roberts, whose observations of Knight and Williams were made as he walked past, might simply not have seen Robertson if he were further inside the shower block. The jury would be justified in disregarding Lionel Malcolm's evidence entirely, given his description of Knight cleaning the floor with a piece of bread, and could reasonably have concluded that Edward Malcolm, who thought that the noises from the shower block coinciding with Robertson's training activities occurred at breakfast time, was either referring to a different altercation or was suffering from general confusion as to the timing of events.

[166] Campbell's evidence was of seeing the body after afternoon sport, but not after the evening muster. The jury could be confident, from the nurse's note of rigor mortis at 5.30 pm and the medical officer's observation that advanced rigor mortis had set in at 6.20 pm, that Mr Buckley's death did not occur between the 5.05 pm muster and the finding of his body at 5.30 pm. Plainly, Bauer's evidence as to seeing Mr Buckley at the muster was unreliable, possibly because the muster was performed in the casual way described by almost all of the prisoners.

[167] The evidence pointed overwhelmingly to Mr Buckley's death at about lunch time on 16 June 1999. The fact that prisoners other than Campbell were inaccurate about the positioning of the body when describing it 13 years later did not mean that they had not seen it, nor that they were wrong about the time of doing so; they were consistent in saying that it was at lunch time. The observations of Dr Sinton and Professor Ansford supported the view that Mr Buckley's death had taken place four to six hours before his body was cut down. Their concessions as to the significance of rigor mortis only extended to an acknowledgement that it was an unsatisfactory means of arriving at a precise time of death, not that it provided no guide. Professor Ansford, the more experienced pathologist, considered that if there were hot water running in the cubicle where the body was found (which was by no means established), rigor mortis might commence more quickly; but that would make a difference of perhaps an hour or so to the premise that it began four to six hours after death. He did not consider that the time of death could be accurately assessed by reference to the extent of lividity in the extremities.

[168] Suicide was not excluded as a physical possibility, but on all the evidence, the jury were entitled to rule it out as a real possibility. As the respondent pointed out, none of Mr Buckley's DNA or the grease found on his hands was found on the towel used to suspend him, nor any blood, except on the part of the towel round his neck; which would be surprising if he had plaited it and used it to hang himself. The nurse who spoke to Buckley on his reception into the prison found no cause for clinical concern about his mental state. He had said that the only circumstance in which he would contemplate suicide was sexual assault, and there was no evidence of that's having occurred. The theory that because Cant had a relevant criminal history and the two had had physical contact, there must have been some sexual assault, can be disregarded: that possibility was not so much as suggested to Cant.

[169] Generally, the evidence was that Mr Buckley was of a cheerful disposition. The possibility of a "Dear John" letter could readily be dismissed. Ms Lewis said she was certain she had not expressed doubts about the future of their relationship in any letters. Buckley had, the day before his death, foreshadowed seeing Rees and looked relaxed and happy when he spoke to him. Mason, whose credit was not challenged, said that on the day of Buckley's death, the latter said he was happy about an impending visit from his fiancée and that he would meet Mason at the football oval after lunch. That day, Mr Buckley referred to seeing Ms Lewis at her next visit, and asked her to put money into his account. All of that evidence points overwhelmingly to the conclusion that Mr Buckley did not expect to die on 16 June.

[170] Particular arguments that the appellants made in this regard could reasonably have been rejected by the jury. Bailey's and Roberts' recall that Mr Buckley might have been wearing a "white remand shirt" was of doubtful worth; Bailey had said in re-examination that he was unsure, that Buckley "may have had his browns on"; and Roberts put it no higher than a possibility. The blood smears above the basin in the left-hand shower block were indicative that Buckley was alive when they were made, but they might well have been placed there in the course of the altercation, not after it. Barlow had described, for example, seeing Buckley put his hand on the wall near the tap and mirror before Williams pulled him back, which would be consistent with the deposit of such a mark. The source of the grease on Buckley's hands was unclear, but there was no reason to suppose it was from the bars across the louvres; the maintenance officer for the jail gave evidence that he never applied grease to any part of the louvres or the bars across them. Whether Buckley was able to stand so as to prevent the compression of his neck would depend, of course, on whether he was conscious. None of those matters was such, in my view, as to cause the jury any real pause.

[171] There were undoubtedly points to be made for the appellants arising out of inconsistencies in the evidence, and the jury were warned about the danger of acting on some of the prisoners' evidence; but those were matters entirely within their province. It is not unusual to encounter unsatisfactory aspects of the evidence in a trial, but

> "Experience suggests that juries, properly instructed on the law … are usually well able to evaluate conflicts and imperfections of evidence."[24]

The jury could accept significant parts of the evidence, although having doubts about the accuracy of some of the detail.

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[24] *MFA v The Queen* (2002) 213 CLR 606 per McHugh, Gummow and Kirby JJ at 634.

[172] There was a body of evidence capable of supporting the conclusions that the three appellants were involved in the assault of Mr Buckley and that he was hanged very shortly after it, in circumstances where there was no reason to suppose he had killed himself; while the activities of the three in cleaning the shower block when his body was hanging in the shower cubicle, were capable of bearing an inference of consciousness of guilt of his murder. Added to that were the statements of intent and warning made by or in the presence of the three appellants. The jury were entitled to be satisfied beyond reasonable doubt of the appellants' guilt; the verdict was not unreasonable.

[173] I would dismiss each appellant's appeal against conviction.

[174] **MORRISON JA**: I agree with the order proposed by Holmes JA and with the reasons given by her Honour.

[175] **ATKINSON J**: I have had the advantage of reading the detailed reasons of Holmes JA. I agree that, for those reasons, the appeals should be dismissed.