SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pearson* [2015] QCA 157
PARTIES:	**R** **v** **PEARSON, Brian Frederick** (appellant)
FILE NO/S:	CA No 3 of 2015 SC No 5 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Toowoomba – Unreported, 27 November 2014
DELIVERED ON:	28 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2015
JUDGES:	Holmes and Morrison JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of murdering his wife – where a witness gave evidence that the appellant may have been in jail at a particular time – where defence counsel applied for the jury to be discharged – where the trial judge declined to discharge the jury and gave a direction to the jury to ignore the evidence – where the appellant argues that the trial judge applied the wrong test in considering whether to discharge the jury – where the appellant argues that the refusal to discharge the jury caused a miscarriage of justice – whether the trial judge erred – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant was convicted of murdering his wife – where the Crown adduced evidence pursuant to s 132B *Evidence Act* 1977 (Qld) of previous violence between the appellant and the deceased – where the appellant argues that the trial judge erred by failing to direct the jury as to how the evidence of prior domestic

violence could be used – where the trial judge had directed the jury that the evidence was put before them to explain the nature of the relationship between the appellant and his wife and might assist them in determining the appellant's state of mind at the time of the stabbing – whether the trial judge erred

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted of murdering his wife – where the Crown adduced evidence pursuant to s 132B *Evidence Act* 1977 (Qld) of previous violence between the appellant and the deceased – where it was not contested that the appellant had killed the deceased – where the appellant argues that the trial judge erred by not giving a general propensity warning – where defence counsel did not apply for such a warning at trial – whether the trial judge erred – whether there was a miscarriage of justice

Evidence Act 1977 (Qld), s 132B

Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22, applied
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
KRM v The Queen (2001) 206 CLR 221; [2001] HCA 11, considered
R v Fraser [2001] QCA 187, considered
R v Knape [1965] VR 469; [1965] VicRp 63, applied
R v Koller [2011] QCA 371, considered
R v Maddison [2013] QCA 132, cited
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12, cited
Wilson v The Queen (1970) 123 CLR 334; [1970] HCA 17, considered

COUNSEL: A W Collins for the appellant
M Cowen QC for the respondent

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

[1] **HOLMES JA:** The appellant was convicted by a jury of the murder of his wife, Delarece Pearson. It was not disputed that he had killed Ms Pearson; when arraigned, he pleaded guilty to manslaughter. The only issues at trial were whether the Crown had established that he had the intent necessary to murder – to kill or do grievous bodily harm – and whether the partial defence of provocation was available. The appellant did not give evidence. He now appeals his conviction on the following grounds:

> "1. That a miscarriage of justice has occurred as a consequence of the Primary Judge rejecting an application to discharge the Jury after prejudicial material had been given;

2. That the learned Primary Judge erred in the exercise of his discretion to not discharge the Jury by failing to consider whether "the irregular disclosure could not in any way affect the judgment of the jury in coming to their decision of guilty or not guilty" per *R v Knape* [1965] VR 469;

3. That the learned Primary Judge erred in misdirecting the Jury in respect of propensity evidence; and

4. That the learned Primary Judge erred in failing to direct the Jury in respect of the relevance of acts of prior domestic violence and discreditable conduct to the sole issue on trial, the requisite intention."

The Crown case

[2] The killing occurred in the late afternoon of 26 June 2011. The appellant and Delarece Pearson had stayed the previous night at the home of his mother, Ms McCarthy. The couple were upstairs in a lounge room when Ms McCarthy heard Ms Pearson call to her. She told Ms McCarthy that the appellant had threatened to cut her head off and put it in her parents' mailbox. Ms McCarthy remonstrated with her son; he turned back to his wife and accused her of causing trouble in the family. Ms Pearson got up on a couch, calling to Ms McCarthy to get help. From Ms McCarthy's perspective, her son seemed to be trying to knee his wife in the chest. A boarder in the house attempted to intervene, but the appellant pushed him down the stairs. From outside the house, he could hear Ms Pearson yelling, "Stop hitting me, Brian". Ms McCarthy saw the appellant go to the kitchen and heard her daughter-in-law scream that he was getting a knife. A neighbour said she heard a male voice from the house yelling, "I'll kill you, cunt".

[3] Ms McCarthy telephoned police, who arrived at around 5 pm and found the appellant inside the house, apparently trying to resuscitate Ms Pearson, who was dead. She was lying on her back with her shirt ripped off. The appellant was evidently in a state of considerable distress, unable to accept that his wife was dead and pleading for assistance in reviving her. Later that evening, another police officer spoke to him, under caution. The appellant said that Ms Pearson had tried to bite off his nose and his ear and had "busted [his] mouth". He had not worried, he said, because if she did not hit him he would think she did not love him. However, he later acknowledged that he had bitten his wife on the eyebrow because she had bitten him on the nose. Although he usually carried a knife in his trousers, he did not have one on that occasion, so he had got one from a drawer in the kitchen. After the incident, he had thrown it over a fence (where it was later located).

[4] Blood was found in the lounge room, kitchen and dining room, bathroom and hallway, suggesting Ms Pearson had been assaulted in a number of areas of the house.

[5] A forensic pathologist who conducted a post mortem examination of Ms Pearson's body gave evidence that she had suffered a variety of injuries, including a fracture to her eye socket, biting away of some flesh above an eyebrow and a stab wound through her right cheek, penetrating the lip. Bruising and abrasions to her neck suggested an application of finger pressure. The wound which killed her was a stab wound to her back which penetrated the chest wall and left lung to cut through the thoracic aorta and enter the right lung. The wound track indicated that the blade had been pushed

in up to the hilt. It would have required a moderate degree of force for the knife to pierce the skin; thereafter it would have been relatively easy for it to pass through the organs. The penetration of the aorta had caused massive bleeding into the chest cavity.

The refusal to discharge the jury and the direction given

[6] The Crown called a number of witnesses to previous episodes of violence between the appellant and the deceased woman. That evidence was adduced pursuant to s 132B of the *Evidence Act* 1977, which rendered admissible "relevant evidence of the history of the domestic relationship" between the appellant and his wife. In the morning of the second day of the four day trial, one of those witnesses was asked whether the couple were living together at a particular time, and answered in the negative. The next question and answer were as follows:

> "So that was one of their stages when they were separated?
>
> --- Yes. Or he was in jail. I'm not quite sure."

[7] That response led to an application for the discharge of the jury. The trial judge questioned defence counsel as to what prejudice could arise, given the appellant's plea of guilty to manslaughter and the evidence of a violent and volatile relationship. She suggested it would convey to the jury that the appellant had been so violent on other occasions as to warrant incarceration, which was likely to affect their consideration of his intent when he killed Ms Pearson.

[8] His Honour made this response, which was, in effect, his ruling:

> "I understand the concern. I think – and I appreciate the risk that prejudice does arise. But it does seem to me, in light of what the witness said, that the matter can be appropriately and sufficiently addressed by a direction to the jury. And I don't think that the prejudice reaches a level at which it would be unconscionable to continue with this trial before this jury. There may be any number of reasons why an accused person had been in jail in the past.
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> There are standard but quite forceful directions in the bench book summing up reminding juries about what inferences they can and cannot reasonably draw. I think that, combined with a warning and a direction to the jury now to ignore Ms McKellar's evidence that the defendant had on some previous occasion been in jail, would probably be sufficient."

[9] Defence counsel submitted that the direction to the jury to ignore the evidence should probably be given in the summing up, rather than draw further attention to the issue. The prosecutor suggested that it would be better immediately to give the direction, rather than raise the issue again in the summing up. The trial judge expressed his inclination to agree, and defence counsel said she had nothing further to say. She indicated, however, that she would discuss an appropriate direction with the prosecutor. After that discussion, defence counsel informed the trial judge of the points which it was agreed needed to be covered.

[10] In accordance with what was conveyed to him, his Honour gave the following direction:

> "Ladies and gentlemen, a little time before we adjourned, you heard the witness in the box, Ms McKellar, say something to the effect that the accused had been – I think the words she used were – "in jail". I want to remind you of the oath or affirmation that you took, that you would conscientiously try the charges – the charge against this defendant, and decide that charge according to the evidence. And I also want to remind you what I said to you at the beginning of the trial and that is how essential it is that you remain unbiased and impartial between the prosecution and the defence.
>
> I'm going to give you a specific direction now and that is a direction to ignore the reference in that witness's evidence to the defendant having been in jail. I'm going to also say to you that there can be all sorts of reasons why a person may have been incarcerated at some time in the past, and that you ought not speculate why the witness said that the defendant had been in jail, or if that was true, why he had been in jail. You should put it out of your minds. It is irrelevant to the deliberations that you will undertake in the course of deciding whether this defendant is guilty of the charge against him. So if I can repeat that direction to you, will you ignore that reference in the witness's evidence."

The test applied by the trial judge in refusing to discharge the jury

[11] The appellant's argument in relation to ground two of his appeal was that the trial judge had failed to consider whether he could be satisfied that the disclosure could not affect the jury's verdict. He relied on this statement by the Full Court of the Supreme Court of Victoria in *R v Knape*,[1] as to the approach to be taken by a trial judge where evidence of bad character is improperly given:

> "… unless it can be said, upon the evidence, that the irregular disclosure could not in any way affect the judgment of the jury in coming to their decision of guilty or not guilty, the trial judge should exercise his discretion in favour of the accused."[2]

The appellant contended that the trial judge, while acknowledging prejudice, had applied the wrong test, considering instead whether it would be unconscionable to continue with the trial.

[12] I do not accept that his Honour, a very experienced trial judge, was under any misapprehension as to what was to be considered in exercising his discretion as to whether to discharge the jury. It was not incumbent on him to articulate the relevant test. I would regard it as implicit in his reference to whether continuing would be unconscionable that his Honour was considering whether the evidence could possibly bear on the jury's verdict, because in that event it would be unjust to proceed. The *Knape* test does not require discharge simply because there is an identifiable risk of prejudice; what is to be assessed is the likely impact of the improperly adduced evidence on the jury's verdict. In that context, regard may properly be had to the corrective effect of a direction. His Honour's conclusion that the risk of prejudice could be sufficiently addressed by an appropriate direction indicated his satisfaction that the evidence would not lead the jury, properly directed, to draw any adverse inference and hence would not affect their decision. That was consistent with a proper approach to the question of whether the jury should be discharged.

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1 [1965] VR 469.

2 At 473.

Whether the failure to discharge the jury caused a miscarriage of justice

[13] The appellant identified the prejudice to him as the risk that the jury would assume, since he had been to jail, that he had indeed committed the previous acts of domestic violence alleged against him by the Crown. No direction could overcome that prejudice. Counsel referred to two decisions of this Court, *R v Fraser*,[3] and *R v Koller*[4] as illustrating the spectrum of possible results. In *Fraser*, a more tenuous indication that the appellant there had previously been a prisoner was held not to have required discharge of the jury. In *Koller*, evidence suggesting that the appellant might have committed sexual offences against children other than the complainant was held, in a case in which there were many reasons for doubt about the appellant's guilt, to have created a real risk of diluting that doubt. The relevant context was that the complainant, who had suffered from mental health problems including a psychotic episode, had given uncorroborated evidence of sexual offences committed against her as a child 30 years prior. A direction would, the Court said, merely have served to highlight the prejudicial effect of the evidence.

[14] However, while *Fraser* contains a useful review of the authorities in the judgment of White J (as she then was), both decisions turn on their facts, and neither contains any new point of principle. The approach to be taken by an appellate court in considering the effect of a trial judge's refusal to discharge the jury was set out in *Crofts v The Queen*:[5]

> "No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction desired to overcome its apprehended impact… [M]uch leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript.
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> Nevertheless, the duty of the appellate court, where the exercise of discretion to refuse a discharge is challenged, is not confined to examining the reasons given for the order to make sure that the correct principles were kept in mind. The appellate court must also decide for itself whether, in these circumstances, the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice. In other words, can the appellate court say with assurance that, but for the admission of the inadmissible evidence, the conviction was inevitable?"[6] (citation omitted)

[15] In the present case, the reference to the appellant's possibly having been in jail was made by a lay witness rather than someone more authoritative, such as a police officer. It was an inadvertent response, not something solicited by the prosecutor; it was brief; and it was made without further elaboration. The risk of the jury's

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3 [2001] QCA 187.
4 [2011] QCA 371.
5 (1996) 186 CLR 427.
6 At 440 – 441.

regarding the suggestion that the appellant had been in jail as confirming previous acts of domestic violence is all the less when one appreciates that the trial judge gave a direction that the evidence of earlier acts of violence could only be used if the jury were satisfied beyond reasonable doubt that they had occurred.[7]

[16] The witness' unfortunate remark must be seen against the background of a substantial amount of damaging evidence properly admitted in relation to the appellant's previous violent conduct to the deceased woman, which included evidence from police officers who had in the past responded to calls concerning assaults on her. The inadmissible evidence was not a critical matter in a fragile Crown case, as in *Koller*, so as to be incapable of cure by direction. In this case, the killing was not in dispute, and the intent to do at least grievous bodily harm could readily be inferred from the nature of the entire attack and the appellant's obtaining of a knife and use of it; with, in addition, the threat to kill which the neighbour heard. In context, little turned on the reference to jail.

[17] The trial judge was in a position to gauge the impact of the statement. I see no reason to suppose that he was wrong in his assessment that any prejudice could be remedied by direction. He gave an immediate and appropriate direction, and it may be assumed that the jury acted on it.[8] Subject to the validity of the appellant's other appeal grounds, I am satisfied that a conviction was inevitable with or without the contentious evidence.

Evidence of previous violent and/or discreditable conduct

[18] The appellant provided this list summarising the evidence of previous domestic violence and what was described as "disreputable" conduct:

> "1) Ms McCarthy's evidence that the deceased claimed that the appellant said he was going to '… cut her head off and put it in her parent's mailbox'
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> 2) All of the appellant and the deceased's children were placed into the Department of Child Safety;
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> 3) Ms McCarthy's evidence that she had seen the deceased with 'one black eye';
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> 4) Ms McKellar's evidence that the deceased would '…come home with black eyes or a cut mouth';
>
> 5) Ms McKellar's evidence that '… all the children were removed from Delarece's care on the 24th October 2008 by the Department of Child Safety;
>
> 6) Mr Wharton's evidence that in 2011 the deceased said to him that the appellant '…tried to cut my throat off – cut my head off';
>
> 7) Mr Crowell's evidence that on 26 August 2010 he had intercepted the appellant and the deceased in a car and the appellant had welts on him 'in the shape of a potato masher';
>
> 8) Mr Holgate's evidence that on 07 May 2007 he and another officer from the Oakey police were called to a disturbance at 56 Donely St, Oakey involving the appellant and the deceased;

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7 This may have been too generous a direction, given that the evidence was not essential to the jury's reasoning to a conclusion of guilt; see *Roach v The Queen* (2011) 242 CLR 610 at 626.

8 *Gilbert v The Queen* (2000) 201 CLR 414 per McHugh J at 425.

9) Mr Hagan's evidence that at a date unknown in 2010 the appellant and the deceased arrived at the home he shared with Ms Shillingsworth at 10 Musket Court, Toowoomba when the deceased had blood on her head and the appellant had a knife which he gave to Mr Hagan;

10) Mr Zirkzee's evidence that in April 2011 he was driving the appellant and the deceased from Toowoomba to Oakey when the appellant assaulted the deceased and threatened Mr Zirkzee with a knife;

11) Ms Shillingsworth's evidence of an occasion when she lived with Mr Hagan that the deceased and the appellant came to their house and the deceased was bleeding from the head;

12) Ms Bartholomew-McKellar's evidence of her seeing 'countless black eyes, busted lips, clothes ripped, hair pulled and bite marks on the deceased'. That the Department of Child Safety took all the children from the deceased. That at a date unknown in 2011 she saw a cut on the deceased's neck.

13) Ms Bateman's evidence that on 22 April 2011 she observed the deceased to have injuries to her arms and face."

[19] It can be seen that not all paragraphs concern events reflecting on the appellant: paragraph 7 concerns an allegation of violence inflicted on the appellant by the deceased woman, while paragraphs 5 and 12 refer to the children's being removed from her care, rather than the appellant's. A good deal of cross-examination for the defence was directed to establishing that Ms Pearson on occasion was physically aggressive to the appellant, so that the relationship was mutually violent.

The trial judge's directions concerning previous violence

[20] The trial judge said this to the jury in respect of evidence of previous domestic violence:

> "Next, I want to talk about the fact that in the course of the trial you have heard some evidence of prior domestic violence. You have heard evidence that the defendant had previously been violent towards the deceased and caused her injury. That evidence has been placed before you because it allows you to know what the relationship between the defendant and the deceased, husband and wife, was like. The defendant says that theirs was a loving relationship, even despite episodes of disagreement and violence from time to time. While the Crown says that it was a relationship of hostility and hate.
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> The Crown says that this body of evidence about things that had happened in the past shows a recurring hostility towards the deceased by the defendant, a recurring tendency to inflict violence upon her which might properly assist you to infer that on the 26th of June 2011 when he fatally stabbed her, that he did so intending to cause her grievous bodily harm. The Crown says that this body of evidence demonstrates that this wasn't just another occasion where the defendant simply wasn't thinking. It is evidence that might assist you in determining the defendant's state of mind at the time of the stabbing, in addition to

> the evidence as to the nature and extent of the injuries inflicted upon the deceased on the 26th of June. However, you can only use evidence of an earlier act of violence or a threat of violence towards the deceased in that way if you are satisfied beyond reasonable doubt that it occurred.
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> The Defence says that you should not be satisfied beyond reasonable doubt that certain injuries suffered by the deceased were caused by the defendant. In particular, the injury to the deceased's head which was caused by unknown means and was observed by Jaclyn Shillingsworth and Michael Hagan in 2010, some of the injuries photographed by Officer Bateman on the 22nd of April 2011, and an injury to the neck of the deceased reportedly seen in part by Malynda Bartholemew after the events of the 9th of May 2011.
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> The Defence also says that even if you are satisfied beyond reasonable doubt that one or more instances of earlier violence or threats of violence in fact occurred, you might infer from that body of evidence a history of violence which did not result in death and, therefore, a history of conduct on the part of the accused that meant he was unlikely on the 26th of June 2011 to have formed the intention to cause death or grievous bodily harm."

Those directions were the result of an agreed draft between defence counsel and the Crown. Not surprisingly, then, no redirection was sought on the topic.

Failure to direct as to the relevance of evidence of previous domestic violence to intent

[21] The appellant complained that the trial judge had not directed the jury as to how the evidence of prior domestic violence could be used in considering the real issue on the trial, intent. His Honour had simply repeated the submissions of defence counsel and the prosecutor. It was suggested that without proper directions the jury might not have understood the need to be satisfied as to intent at the time that the fatal wound was delivered. Thus, the jury might have considered that the appellant had the intention to do grievous bodily harm when he inflicted a non-fatal injury such as the biting of the eyebrow and regarded that as sufficient to prove murder, without being satisfied that at the time of the fatal stabbing the same intent was held. It was necessary for the trial judge to make it clear that evidence of previous domestic violence in relation to previous events was relevant only to intent at the time the fatal injury was caused.

[22] It is not correct, in my view, to say that the trial judge merely repeated the parties' submissions. His Honour had commenced the remarks set out at [20] above by explaining that the evidence was put before the jury to explain the nature of the relationship between the appellant and deceased, before going on to summarise the competing contentions in that regard. The later observation that the evidence might assist in determining the appellant's state of mind at the time of the stabbing and the caution that it could be used only if the jury was satisfied beyond reasonable doubt that it occurred also appear, despite the paragraphing, to be the trial judge's own comments.

[23] The history of previous violence was illustrative of a particular type of relationship between husband and wife which was relevant to the question of intent: *Roach v The Queen*.[9] The trial judge correctly identified the significance of the evidence in that respect. As in *Wilson v The Queen*,[10] evidence of the husband's past attitude to his wife was

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9 (2011) 242 CLR 610 at 624 – 625.

10 (1970) 123 CLR 334.

relevant because it demonstrated the "tense and bitter relationship" between them; which was relevant in *Wilson* in determining whether "whether the wife was murdered in cold blood or was the victim of mischance",[11] and, in the present case, whether the appellant intended grievous harm to his wife when he assaulted her.

[24] Evidence adduced pursuant to s 132B of a history of acts of domestic violence may go to show a particular propensity as well as being relevant to a specific issue such as intent. The two are distinct uses: *Roach v The Queen*.[12] The language of the Crown's submission, to which his Honour alluded, that the previous acts of violence showed a "recurring tendency to inflict violence" upon Ms Pearson held a hint of a suggested propensity, but it does not seem, given the form of the directions that the prosecutor agreed to, that the Crown at trial was seeking to rely on it in that way. That was appropriate. In this case, a propensity to commit violent acts against Ms Pearson was per se of no relevance, because it was not contested that the appellant had committed the assault that killed her. The only possible use of the evidence was, as the trial judge directed, in establishing the animosity in the relationship as relevant to intent. The directions given identified for the jury that purpose of the evidence.

[25] The submission that the jury was at risk of not understanding that the evidence was relevant to the appellant's intent at the time of the fatal stabbing, not at the time of delivery of any other blow, seems to me rather tangential to this ground of appeal. At any rate, the trial judge referred to the evidence as relevant to the appellant's "state of mind at the time of the stabbing". There were, it is true, two stab wounds, but later in the directions his Honour made it clear that it was necessary for the Crown to prove that the appellant held the requisite intent at the time of the act which killed Ms Pearson. The forensic pathologist had left it beyond doubt that it was the stab wound to her back which was lethal. There was no risk that the jury failed to appreciate that the relevant intent had to be established as existing when that injury was inflicted.

Failure to give a propensity warning

[26] The appellant contended that the trial judge had erred in not giving a warning against propensity reasoning; that is, a warning that the jury should not use the evidence of previous violent incidents to conclude that the appellant was someone with a tendency to commit violent offences, and thus reason that it was likely he committed the murder. The respondent suggested that the evidence was capable of showing a particular propensity on the appellant's part, and relied upon the statement of McHugh J in *KRM v The Queen*,[13] applied by this Court in *R v Maddison*[14] to argue that a general propensity warning was thus inappropriate:

> "In most cases, however, the need for a propensity warning arises from evidence concerned with subsidiary issues rather than the existence of a multiplicity of counts involving the same or similar offences or by reason of the admission of similar fact or propensity evidence in respect of some but not all counts. If evidence tendered to prove a subsidiary issue (including the relationship between the parties) reveals the criminal or discreditable conduct of the accused, the judge will often, but not always, have to give a propensity warning. In some cases, giving the warning may excite the very prejudice that it purports to eliminate. And if evidence has been admitted generally as *propensity*

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11 At 344.
12 At 624.
13 (2001) 206 CLR 221.
14 [2013] QCA 132.

> evidence, it is difficult to see how a propensity direction is ever required. In that class of case, the evidence is tendered to prove that the accused is the type of person who is likely to have committed the crime with which he or she is charged. To require a propensity direction would contradict the basis on which the propensity evidence is admitted."[15]

[27] For the reasons I have already given, I do not consider that the domestic violence evidence had any relevance other than as relationship evidence going to intent, or that the Crown at trial was seeking to rely on it in any other way. (The defence on the other hand, seems to have relied on a mutual propensity of Ms Pearson and the appellant to violent behaviour to argue, firstly, provocation and, secondly, that the death was to be regarded as an unexpected and unintended outcome, in the light of the history of previous assaults without serious consequence.) A general propensity warning might have been given in this case without conflict with any direction as to particular propensity of the kind referred to in *KRM v The Queen*. But there was no application at trial for such a warning, so it is necessary for the appellant to demonstrate that a miscarriage of justice resulted from its absence.

[28] For the very reason that made the evidence of previous acts of domestic violence irrelevant as showing any particular propensity, I do not think that the failure to give a general propensity warning led to any miscarriage of justice in this case. There was no risk of miscarriage were the jury to reason from the evidence that the appellant was therefore more likely to have killed Ms Pearson, because it was not in issue that he had done so. Insofar as the further element of intent was concerned, it was open to them to consider that the evidence did point to a particular frame of mind in the appellant, and they were directed as to how it might be used in that way. A general propensity warning would have been of little practical assistance and carried some risk of exciting prejudice, of the kind referred to in *KRM v The Queen*.

The cumulative effect

[29] Counsel for the appellant suggested that all of the matters relied on might have had a cumulative effect in producing a miscarriage of justice. I do not consider, however, that unpersuasive individual grounds gain force by being bundled together.

Order

[30] I would dismiss the appeal against conviction.

[31] **MORRISON JA:** I have had the considerable advantage of reading the draft reasons of Holmes JA. I agree with those reasons and the order her Honour proposes.

[32] **HENRY J:** I have read the reasons of Holmes JA. I agree with those reasons and the order proposed.

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15 *KRM v The Queen*, at 235.