SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pearce* [2016] QCA 126
PARTIES:	**R** **v** **PEARCE, Blaze Seaton** (appellant)
FILE NO/S:	CA No 307 of 2014 SC No 9 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Mackay – Date of Conviction: 3 November 2014
DELIVERED ON:	10 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 February 2016
JUDGES:	Fraser and Morrison JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant was found guilty by a jury of murder – where the appellant killed the deceased, an acquaintance of his, in an attack in the deceased's unit, whilst the deceased's housemate was in the shower upstairs – where the appellant inflicted numerous injuries on the deceased, both non-fatal and fatal – where the prosecution case was that the appellant launched an unprovoked attack, beating the deceased with a frying pan, then fatally stabbing him – where the defence case was that the appellant confronted the deceased about having been previously sexually assaulted, when the deceased reacted violently and attacked the appellant, who killed the deceased in self-defence – where the appellant gave evidence at trial – where the jury rejected the evidence given by the appellant as to what occurred inside the deceased's unit, and thus rejected the argument of self-defence – whether the verdict was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION

– where the appellant contends that the learned trial judge misdirected the jury on a number of factual matters – where the appellant contends that it was put to the jury by the prosecution that the deceased had been stabbed after he had been rendered unconscious, when there was no evidence to support that proposition – where the appellant contends that this should have been criticised by the learned trial judge – where the prosecution at trial proffered the opinion that self-defence should be rejected because the appellant suffered no injuries – where the appellant contends that the learned trial judge should have corrected that opinion and directed the jury that the absence of injury was not consistent with the deceased having attacked the appellant and being unable to injure him – where the learned trial judge referred to the evidence of an expert witness, a pharmacologist, by referencing the normal behaviours of a person who had taken methylamphetamine – where the appellant contends that this remark by the learned trial judge led the jury to believe he was thinking rationally and that this amounts to a misdirection – where the appellant contends that a direction by the learned trial judge as to the placement of a blue garbage bin found in the accused's unit led the jury to believe that the bin had been brought into the unit before the event took place and therefore that the killing was premeditated – where the appellant contends that a question put to an expert witness, a pharmacologist, by the prosecution about the normal behaviours of a person after taking the drug cannabis carried with it the suggestion that the appellant had not taken the drug – where the appellant contends the learned trial judge should have made a direction to the jury on this matter – where the appellant contends that there was evidence that tended to corroborate his argument but that were not left to the jury as matters of corroboration – where the appellant contends that statements made by him threatening the housemate of the accused should have been the subject of a direction by the learned trial judge that said statements did not evidence an intention on the part of the appellant to kill the deceased – where the appellant contends that there was a misdirection by the learned trial judge as to intention – whether there were misdirections by the learned trial judge which amount to a miscarriage of justice

Criminal Code (Qld), s 28

Gipp v The Queen (1998) 194 CLR 106; [1998] HCA 21, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
R v Middleton [2003] QCA 431, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: M J McCarthy for the appellant (pro bono)
M R Byrne QC for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

[2] **MORRISON JA:** On 18 December 2012, Pearce killed an acquaintance of his, Gelens, in a savage attack carried out in Gelens' unit. During the attack Pearce's flatmate, Drabsch, was upstairs having a shower, and Pearce and Gelens were alone together.

[3] Pearce stabbed Gelens in the neck, severing his carotid artery, caused significant blunt force injuries by beating him with a frying pan, and inflicted non-fatal stab wounds to his neck. Gelens had black eyes, multiple lacerations over his forehead, a large laceration over his cheek, a laceration to his upper left ear nearly severing it from the head, his left zygoma (cheekbone) had been "shattered", as had the facial bones making up the nose, and the upper jawbone on both sides.

[4] Pearce used alcohol and drugs before the incident, and more drugs afterwards. Traces of methylamphetamine and THC[1] were found in his blood the following morning.

[5] The prosecution case was that Pearce launched an unprovoked attack, beating Gelens unconscious with a frying pan, then fatally stabbing him. The defence case was that Pearce confronted Gelens about having previously been sexually assaulted by Gelens, Gelens reacted violently and attacked Pearce, who killed him in self-defence.

[6] Self-defence, provocation, and intoxication affecting intention, were left for the jury. Pearce was found guilty of murder.

[7] Pearce seeks to challenge the conviction on the grounds that:

(a) the verdict is unreasonable or cannot be supported by the evidence; and

(b) a miscarriage of justice occurred because of errors in the directions to the jury, specifically those in relation to provocation, intoxication and intention, which deprived Pearce of a real chance of being acquitted of murder.

[8] The first ground was particularised: the evidence did not exclude manslaughter; while the jury could have rejected self-defence on the basis that the entirety of the violence was excessive, there was evidence to establish that provocation and intoxication caused the violence to escalate such that the injuries were caused before the heat of passion cooled or without the intention to cause death or grievous bodily harm.

[9] As to the second ground, there were eight alleged errors particularised.[2] All the complaints as to the directions were not raised at trial. Counsel for Pearce contends that is not fatal, and the question remains whether there has been a miscarriage of justice. In that respect reliance was placed on *Gipp v The Queen*.[3]

Ground 1, unreasonable verdict – legal principles

[10] The relevant test on an appeal where the ground is that the verdict is unreasonable is that in *M v The Queen*:[4]

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1 Tetrahydrocannabinol, the active ingredient in cannabis.

2 The eighth being added by leave at the hearing of the appeal.

3 (1998) 194 CLR 106.

4 (1994) 181 CLR 487, at 493; internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400. (***SKA***)

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[11] In *M v The Queen*, the High Court also said:[5]

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

[12] In applying those tests the Court must make an independent assessment of the whole of the evidence, both as to its quality and its sufficiency.[6]

Circumstances of the offending

[13] A number of witnesses gave evidence that related to the circumstances of Gelen's death.

Evidence of *Drabsch*

[14] Drabsch had been living at the unit where Gelens was killed, for about four months. He had known Pearce for that time but was not a friend. As to the events, his evidence was:

(a) Pearce came over to Gelens' unit, uninvited, about lunchtime; at that time two girls from next door were present;[7] Gelens was not there at that time;[8] Pearce and one of the girls went to a bottle shop to buy alcohol;[9]

(b) when they came back Pearce had a small amount of wine;[10] as to Pearce's demeanour, he said "he was fine that day";[11]

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5 *M v The Queen* at 494. Internal citations omitted.
6 *SKA* at [14].
7 AB 32.
8 AB 33.
9 AB 33.
10 AB 34, 43-44.
11 AB 34.

(c) sometime towards dark Gelens arrived home from work;[12]

(d) subsequently, Pearce and the girls left leaving only Gelens and Drabsch; they drank some wine;[13]

(e) Drabsch said he was going upstairs to have a shower; when he left Gelens was by himself and uninjured;[14]

(f) while he was upstairs he heard "some banging and stuff like that, but I thought it was from the unit next door…";[15]

(g) as he was getting dressed Pearce said to him: "It's okay. Come down"; as he walked downstairs he started to see blood on the floor, then more blood, and then Gelens lying on the floor at the end of the couch;[16]

(h) Gelens "didn't look well and [Drabsch] knew he needed help"; he was lying on the floor with his head tilted up against the couch, not moving; there was blood everywhere; Pearce was standing in front of Gelens;[17] Pearce was calm;[18]

(i) Drabsch was going to walk over to go to Gelens but Pearce would not let him; Drabsch asked if Gelens was okay, and Pearce replied "Does it look like it?";[19]

(j) Drabsch tried to ring 000 but Pearce tried to get his phone;[20] Pearce told him that if he called the police "probably the same thing would happen to me";[21] at that time Pearce was speaking in a calm voice, not yelling;[22]

(k) the girl, Ms Steedman, was at the front door asking for a phone charger; Drabsch suggested where one might be;[23] when Pearce went to retrieve a phone charger, Drabsch walked outside to make the call;[24] Pearce was yelling at him to come back;[25]

(l) a blue bin which Drabsch had cleaned and left out the front, was lying down near the window;[26] Pearce said something about putting Gelens in the bin.[27]

Evidence of Steedman

[15] Ms Steedman had been in the unit with Gelens and Drabsch during the day, before the altercation occurred. She was visiting a friend at the time. She met Pearce for the first time that day. Her evidence as to the events was:

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12 AB 34, 35.
13 AB 35, 45.
14 AB 36.
15 AB 36.
16 AB 37, 45-46.
17 AB 38.
18 AB 41, 42.
19 AB 39.
20 AB 39-40, 46.
21 AB 40.
22 AB 46.
23 AB 41, 42.
24 AB 39, 41, 42.
25 AB 41, 42.
26 AB 37, 38, 40.
27 AB 40.

(a) she and Pearce went to get some wine;[28] when they got back to the unit there was just herself, Drabsch and Pearce;[29] Pearce had some wine, "he wasn't having much";[30] Pearce was "very nice and very calm";[31]

(b) Ms Steedman went back and forth to her friend's unit,[32] but was at her friend's unit after 5 pm, when she was watching the news;[33] she saw Pearce going into Gelens' unit; at one point she went to Gelens' unit where he tried to cook some food for her, but she returned to the friend's unit; at that time there were just Pearce and Gelens there, sitting next to each other on the couch;[34]

(c) she only saw Pearce act aggressively on one occasion when he kicked a table into Drabsch's knees, which smashed a cup;[35]

(d) after a while she heard "loud thumping noises";[36] the noise was a "kind of hollow hitting noise", a "hollow big bang";[37]

(e) she was standing outside and could see into Gelens' unit;[38] she could see Pearce moving his arm, with a saucepan;[39] he moved his arm in a hitting motion; she could not see Gelens;[40]

(f) she told the boys at her unit that something was happening and they should go with her to check it out, but no-one wanted to come;[41] she went over partly because her phone charger was there;[42]

(g) she went to Gelens' unit and looked inside; there was blood everywhere all over the couch and on the floor; Gelens was on the floor near the couch;[43]

(h) Pearce was standing over Gelens, spitting on him;[44] Pearce walked toward her with a knife in his hand;[45] in cross-examination she maintained it was a knife;[46] at this time Pearce was "very calm";[47] Ms Steedman asked if Gelens was all right and Pearce responded, "can't you fucking see he's not all right?"; then Pearce said "he fucking deserved – I knew he was at it again, Mick";[48]

(i) Ms Steedman said that Pearce called out to Drabsch, and when Drabsch came down and saw the blood and the body he asked "Is he all right?", to which Pearce responded: "does he fucking look all right? Do you want to be next? … do you want to be like that?";[49]

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28 AB 61.
29 AB 62.
30 AB 79.
31 AB 63.
32 AB 80.
33 AB 63.
34 AB 70, 82.
35 AB 81, 82.
36 AB 70.
37 AB 71.
38 AB 71.
39 AB 72.
40 AB 73.
41 AB 84, 88.
42 AB 88.
43 AB 73, 88.
44 AB 74, 76, 88.
45 AB 75, 76, 77.
46 AB 84-87, 88.
47 AB 77.
48 AB 77. The reference to "Mick" is to Gelens.
49 AB 77, 88.

(j) then Drabsch tried to see if Gelens was okay, but Pearce wouldn't let him; Drabsch tried to call the police or the ambulance, and Pearce tried to take the phone; she asked Pearce to give her a "phone charger or the scissors or something" and Pearce went to get it.[50]

Evidence of others

[16] Ms Lawton was staying in a neighbouring unit. She returned home from shopping at about 5.30 pm, when she saw Pearce out the front of one of the units. About 6.30 pm she heard "thumping noises", but no voices, coming through the wall. It went on for five minutes and then music was heard. About 20 minutes to half an hour later Pearce walked up to her gate. He was wet on his hair and face.[51] In cross-examination she said the noises sounded like fighting.[52]

[17] Ms Weiske was staying in a neighbouring unit. Ms Steedman came in with some food, told her to be quiet, and she heard "big movements of bodies being hit", like "body slam movements". Afterwards she heard somebody "at the laundry sink washing, water being splashed, coughing, spitting".[53]

[18] Mr J Briggs was visiting the units. At one point he heard noises which he described as "somebody getting hit … or falling off a bed or off a chair … somebody in a boxing fight … somebody getting thumped … hit, ... like a thumping noise".[54] It went on for about five minutes, and after that there was music.[55]

[19] Ms Steedman was worried and they suggested she call the police. She said she needed her phone charger and "she went next doors ... she asked my brother to go with her, but we didn't want to, so we only went as far as the front … and she went in". Briggs then described how she returned crying, and when they were outside having a smoke trying to calm her down, they heard "a tap running like … somebody washing their hand".[56]

[20] Mr P Briggs said he was at the neighbouring unit with his brother. While there he could hear noises from the neighbouring unit. He described them as "constantly hearing … loud noises… someone constantly being hit, because we could feel the impact from next door, through the wall, coming into our unit… I could also hear someone … as they're constantly beating someone". Ms Steedman wanted to get her charger from the other unit and asked him to go with her, but he only went as far as the gate.[57] She came back and started crying. Afterwards when they were outside for a smoke he could hear someone washing their hands, and loud music playing.[58]

[21] Mr Irwin was with the Briggs brothers. He said he could hear someone yelling and then pounding, and music being played.[59] The noises came after it was dark.[60] Ms Steedman wanted to get her phone charger, went next door, then came back crying and shaking. She said "he just killed him".[61]

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50 AB 77.
51 AB 94.
52 AB 95.
53 AB 97.
54 AB 107.
55 AB 108.
56 AB 109.
57 AB 115, 121.
58 AB 116.
59 AB 124.
60 AB 126.
61 AB 125, 127.

[22] Various police officers gave evidence as to what they observed when entering the unit after the event, and the seizure of items of clothing. Further, evidence was given as to Pearce's behaviour when arrested. Descriptions included that he was easy going, compliant, and able to follow instructions.[62] One said he "appeared nonchalant, very arrogant".[63]

Expert and scientific evidence, and admissions

[23] Certificates revealed that blood tests done on Pearce at 7.12 am on 19 December showed:

(a) alcohol was not detected;

(b) less than 0.01 micrograms per kilogram of amphetamine, 0.07 micrograms per kilogram of methylamphetamine, and 0.003 micrograms per kilogram of tetrahydrocannabinol.

[24] A forensic expert, Mr Padget, tested Pearce's shoes and board shorts. Blood was found on both, though diluted. He also examined the blood spatter at the unit, and items located there, including a coffee grinder and saucepan found on the couch, and various knives. The results were:

(a) blood was found on a steak knife that was found in soapy water on the kitchen bench;

(b) blood was found on the blue bin near the front of the room;

(c) bloodstains were all over the room where the couch was, including on the fridge, in the kitchen, TV cabinet, the ceiling and ceiling fan; and

(d) the trajectories of the blood spatters showed that there were two main areas of impact, one above the main staining on the front of the couch, and the other where the body was.[64]

[25] Dr Buxton, a forensic pathologist conducted the autopsy on Gelens. His findings were:[65]

(a) there were several big lacerations; several smaller ones, on the right forehead, over the left eyebrow, at the end of the left eyebrow, upper left cheek, and left side of the mouth;

(b) the large laceration on the cheek was 115 mm by 30 mm and the skin flap had lifted off the underlying tissue; another large laceration below the chin (150 mm by 30 mm);

(c) the left ear was almost severed from the head;

(d) there was extensive bruising over the forehead, and right and left sides of the head, but no fracture of the skull; extensive bruising to the sternomastoid muscle on the left side of the neck;

(e) the mouth had been severely disrupted with multiple fractures of both the upper and lower jaw; the left zygoma had been shattered, as had the facial bones and bones making up the nose; the upper jawbone was shattered, both left and right; the facial fractures could have been caused by the frying pan;

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62 AB 134, 139, 173.
63 AB 139.
64 AB 168.
65 AB 21-26.

(f) there were three stab wounds in the left side of the neck; two were minor in comparison to the other; the minor ones did not appear to penetrate the neck;

(g) the major stab wound was at the front of the neck above the left sternum, 30 mm by 10 mm; the carotid artery and jugular vein had been cut; that would have caused major bleeding; this was the only fatal injury; Gelens bled to death from this injury;

(h) there was a blood alcohol level of 0.11;

(i) he said that he had "never seen injuries quite this catastrophic done with bare fists", such injuries are "usually associated with some sort of implement", and "it takes a lot of force to shatter the face that severely";[66] he had never seen that degree of injury caused by a bare fist, and believed that they were caused by an instrument;[67]

(j) the three stab wounds were likely caused by a bladed weapon; the deep gashes and wound to the ear were more likely caused by a shearing force, or blunt force; and

(k) the injuries with extensive bruising occurred while Gelens' heart was still beating; the facial fractures occurred about the same time as the fatal stab wound.

[26] Professor Brown, a pharmacology expert, was called by the defence. His evidence was as to the effect of certain drugs:

(a) as to speed or methylamphetamine, at low doses it is a mild stimulant which will increase awareness of the surrounding; as the dose increases so do the effects, leading to hyperactivity, excessive sweating, tremors and hallucinations; the more experienced the user, the more is needed to achieve the same result; concentrations above 0.15 mg per litre will produce toxicity in naïve patients;[68] extreme excitement in a chronic user requires higher levels than the 0.3 or 0.4 mg per litre needed in a naïve patient;[69]

(b) the rate for methylamphetamine to clear out of the system is for half of the remaining drug to clear every 10 hours;[70] the reading for Pearce (0.07 mg at 7.12 am) was a snapshot at that time and he could tell little from it; likewise the low level of amphetamine (0.1 mg) told him only that that drug had been taken;[71]

(c) working back 12 hours from the test, and assuming no other drugs had been taken in the interim, 0.07 mg would suggest a reading (about 7.12 pm the night before) of 0.15 mg; on a tolerant user it would be impossible to predict whether that level was going from therapeutic to toxic levels;[72] if extra methylamphetamine had been taken in the interim it would invalidate the estimation of value at 7 pm;[73]

(d) if the methylamphetamine was in the concentrations reported at 7 am, assuming that there was no other drug taken, at 7 pm it would have been in the "sort of upper level of therapeutic, maybe touching the initial part of the toxic";[74]

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66 AB 25-26.
67 AB 27.
68 AB 203-204.
69 AB 205.
70 AB 205.
71 AB 206.
72 AB 207.
73 AB 208.
74 AB 212.

(e) if somebody who had taken methylamphetamine, while being arrested was compliant, able to follow instructions, and was not behaving in an excitable fashion, they were unlikely, at the point of arrest, to be suffering from a severe episode, and the concentration of 0.07 mg was consistent with that as well;[75] and

(f) the level of THC (0.003 mg) was very low; THC is rapidly removed, in the range of half removed in one to two hours;[76] if THC had been in the blood at 7 pm the night before it would likely be gone by 7 am.[77]

[27] Photographs were taken of Pearce on the morning of 19 December. They show he was uninjured.

[28] Relevant parts of a formal admission that was made are that: (i) Pearce's DNA was found on Gelens' left chest area; and (ii) Gelens' DNA was found on the shoes and board shorts belonging to Pearce.[78]

Evidence of Pearce

[29] Pearce gave evidence in his defence. Material aspects of that evidence are as follows:

(a) he had known Gelens for about one month;[79]

(b) he could recall a time at Gelen's place when he had a couple of drinks, described as sips from a cup; he woke up in the laundry of his friend's unit, "just standing there all dazed, in and out of a daze"; he was falling over and could not keep his balance, so he knew that something was wrong; Drabsch was there on that occasion;[80]

(c) he said when he came to on that occasion "the n[oo]dles[81] were all over my belly and … all over the couch and yeah, I woke up with a sore arse"; he likened the effect of "whatever had been given to [him]" as similar to Rohypnol;[82]

(d) he went back to Gelens' unit a couple of times after that because he "wanted answers";[83] Gelens asked him questions like, "Can you remember what happened the other day?", and "Can you remember funny – anything funny happened the other day?"; Pearce just made out that he did not know;[84]

(e) on the few occasions he went back to Gelens' unit, Pearce said: "I'd go there, … I just made out still I didn't know what happened and that and I just wanted answers, really, so I just let on that I didn't know … whatever's happened";[85]

(f) in the weeks leading up to the incident at Gelens' unit, Pearce had taken drugs; a "fair bit" of amphetamines, injecting "a shot during the day and a shot at night", some marijuana, methylamphetamine, and a little bit of ecstasy;[86]

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75 AB 212.
76 AB 208.
77 AB 210.
78 AB 177-178.
79 AB 180.
80 AB 181.
81 The Transcript records this as "needles", but this is likely a typographical error. Upon listening to the recording, and in the context, the word is more likely to be "noodles".
82 AB 182.
83 AB 183.
84 AB 182.
85 AB 183.
86 AB 183-184.

nonetheless, before the incident he was feeling all right;[87] he had some methylamphetamine the night before;[88]

(g) in cross-examination he said that he could not remember when he took the drugs, but took drugs "on and off", and he took methylamphetamine every day;[89]

(h) on the night of 18 December 2012, he and Gelens were sitting and had some wine; then "I just asked him what had happened … why he's done this. Just get him to own up. He's just started getting all upset and stuff … and I just kept asking him and he's … just come at me in a rage and somehow he's had a knife and I've just, sort of, like, just tackled him and that's all I can, sort of, remember then. Just wrestling with him, trying to stop him from stabbing me with the knife";[90]

(i) he said he could not remember any of the details of what happened in the struggle, "just trying to stop him from stabbing me and I was just in a panic, really";[91]

(j) Gelens was sitting on the three seater couch and he was on the two seater; Gelens came at him with a knife but he could not say where he got that knife from, nor what sort of knife it was;[92] later he asked if he could remember seeing Gelens with a knife, and he said "sort of", and "he's come at me with a weapon", which must have been a knife because he was stabbed; it was a sharp object;[93]

(k) he said he did not know how the head injuries occurred, nor the facial fractures; he could not remember having a frying pan; nor could he remember washing himself;[94] he could not explain how Gelens received the laceration on his face, bruising on his head, or the partially severed ear;[95] he could not say how the frying pan or coffee grinder got to the couch;[96] he could not remember where Gelens was when he was stabbed in the neck;[97]

(l) he did not remember why he took the blue bin into the room, nor threatening Drabsch that he would be next;[98]

(m) as Pearce was going home after the incident, he took some methylamphetamine; he also took cannabis;[99]

(n) he said that he feared for his life from Gelens, from when he thought he had been drugged and raped.[100]

Discussion – ground 1 - unreasonable verdict

[30] At trial the defence case accepted that Pearce had caused the death of Gelens, counsel for Pearce stating that when he opened the defence case on the first morning of the trial, and again in his address to the jury.

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87 AB 184.
88 AB 188.
89 AB 193.
90 AB 185.
91 AB 185.
92 AB 189, 190.
93 AB 190.
94 AB 186.
95 AB 199.
96 AB 200.
97 AB 200.
98 AB 196.
99 AB 187.
100 AB 191-192.

[31] On appeal, counsel for Pearce conceded that the jury could have rejected self-defence on the basis that the entirety of the violence used was excessive.[101] That, in truth, is a concession that the killing by Pearce was unlawful.

[32] In my view, the jury could have rejected self-defence on another basis, that is, that they rejected Pearce's evidence.

[33] The central evidence as to what occurred in Gelens' unit came in a number of tranches. First there is the evidence of the sounds of the altercation. Secondly, the evidence of Drabsch as to what occurred from when he came down the stairs until he left to call the police. Thirdly, the evidence of Ms Steedman as to what she saw, and what Pearce did and said. Fourthly, the forensic evidence of the blood spatter and autopsy results, position of the knife, the frying pan and the blue bin. Fifthly, Pearce's evidence.

[34] The only eyewitness account of the altercation was that of Pearce. His was the only source of evidence that: Gelens may have drugged and raped Pearce; Gelens had asked about Pearce's memory of that occasion; on the day of Gelens' death Pearce asked Gelens what happened; Gelens became upset and attacked first; Gelens had a knife or other sharp object in his hand; and Gelens attacked in a way that made Pearce think he had to defend himself.

[35] If the jury rejected Pearce's evidence that still did not relieve the prosecution of the need to exclude self-defence since it was raised as a defence during the trial, and the jury would still be required to examine the balance of the remaining evidence to decide whether that had been excluded beyond reasonable doubt. However, if they rejected Pearce's account as to what happened **inside** the unit, the balance of the evidence constituted a powerful basis to reject self-defence:

(a) the evidence of the contact between Gelens and Pearce in the weeks leading up to the event did not suggest any attitude on Gelens' part other than cordiality;

(b) before he went inside the unit he appeared calm and rational; on his way to the unit he paused to ask of the Briggs brothers and Irwin, "what's the boys in the hood doing?";

(c) after the event he was calm and rational, displaying no lack of self-control;

(d) he was uninjured whereas Gelens had sustained severe injuries;

(e) the injuries included severe facial fractures probably done with the frying pan; they were described as "catastrophic" injuries that required "a lot of force";

(f) the vast bulk of the injuries were above the shoulder level, to the head and neck, which might suggest a targeted attack;

(g) he was seen hitting something (which was clearly Gelens) with the frying pan, while Gelens was on the floor or couch;

(h) immediately after the attack he was seen spitting on Gelens and had a knife in his hand;

(i) nothing he said after the event suggested he had been attacked in such a way as to make him fear for his life; Ms Steedman said Pearce told her " … he fucking deserved – I knew he was at it again, Mick";

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101 Appellant's outline paragraph 3.

(j) his demeanour afterwards, especially as described by the police witnesses, does not suggest anything betraying a reaction consistent with having been attacked by Gelens;

(k) he threatened Drabsch with the same thing if Drabsch called the police;

(l) he tried to prevent Drabsch going to Gelens' aid or calling the police; and

(m) he put the knife into a dish of soapy water, washed himself and his clothes, then changed his clothes.

[36] The same evidence provided a strong basis for the jury to find the requisite intent.

[37] Having reviewed the evidence it was, in my view, open to the jury to be satisfied beyond reasonable doubt that Pearce was guilty of murder. I have not reached the conclusion that there is a significant possibility that an innocent person has been convicted.[102]

Discussion – ground 2 - provocation excluded

[38] Counsel for Pearce contended that the evidence at trial "did not disprove that [Pearce] first acted in self-defence, albeit only initially, and was then either provoked such that the confrontation escalated and resulted in the death of Mr Gelens before the heat of passion cooled, or was intoxicated to such an extent that he acted without intending to kill or cause grievous bodily harm, or both."[103]

[39] However, rejection of Pearce's evidence would have had a significant impact on the ability of the defence case to persuade the jury about provocation.

[40] There were, in my view, many reasons as to why the jury could have rejected Pearce's account that he was attacked suddenly and violently by Gelens:

(a) the account that, believing he had been drugged by his drink being spiked by Gelens, and then raped by Gelens, he would voluntarily go to Gelens' unit and drink with him again on (about) five occasions in the next four weeks, might well have been viewed as inherently unbelievable;

(b) he had no injuries at all; if he had, as he said, been suddenly attacked with a sharp weapon, by a bigger man,[104] the jury may have thought it unlikely he would have escaped entirely unscathed;

(c) at no time was there any contemporaneous comment that would support that Pearce was attacked first, or acted in self-defence; nor was any such thing said to the police some few hours later; Ms Steedman's evidence that Pearce said "… he fucking deserved – I knew he was at it again, Mick", is consistent with Pearce attacking Gelens because of some grievance; the "at it again" comment is inconsistent with just one occasion if the "it" is understood as a reference to an occasion of spiking a drink and raping;

(d) he could offer no explanation as to how Gelens came to have the severe facial fractures that he did, beyond speculating that "I must have just lost the plot and just panicked and, I don't know";

(e) he could offer no explanation for how various instruments, such as the coffee grinder and frying pan, came to be where they were, or why Gelens would have had them;

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102 *M v The Queen* (1994) 181 CLR 487, at 493-494.

103 Appellant's outline paragraph 36.

104 AB 199 line 36.

(f) he could offer no explanation for how the knife came to be where it was, or why Gelens would have had it;

(g) he could offer no explanation for how the blue bin came to be inside;

(h) there was no denial of, or explanation for, the comments attributed to him, namely the threat to Drabsch, that if he phoned the police the same thing would happen to him;[105] the jury may have wondered at what the innocent explanation for that might be, when on Pearce's account the object of his anger was Gelens, not Drabsch;

(i) there was no denial of, or explanation for, the comment that Gelens deserved it;[106]

(j) there was no denial of, or explanation for, his attempt to get the phone from Drabsch when Drabsch was trying to call 000;

(k) there was no denial of, or explanation for, the fact that Pearce attempted to prevent Drabsch from going closer to Gelens' body;

(l) no witness supported Pearce's evidence that a female was shouting out to him to run away because the police were coming;

(m) Ms Steedman's evidence that Pearce was standing over Gelens and spitting on him may have been taken by the jury to indicate that Pearce had not just been defending himself against an attack, but was the aggressor;

(n) Pearce's account was that there was a girl shouting to him to run because the police were coming, and he then left because the police were coming;[107] this was, on his account, immediately after he had been involved in a bloody fight to the death, in which he was suddenly and violently attacked with a knife, and responded in a state of panic; yet, he behaved in a calm and rational manner, taking the time to put the knife in soapy water on the bench, go to the laundry to wash himself and his clothes, and then have a calm conversation with a neighbour, Ms Lawton, and her daughter;

(o) his calm demeanour afterwards may well have been seen as unlikely if his account were true.

[41] Further, there was no evidence that Pearce had, in fact, been drugged and raped by Gelens. It is true that he describes an occasion where he believed he had been drugged and said he woke up with a "sore arse". However the evidence from Pearce was not that it did happen, but that he thought it must have happened. However, it was not clear as to whether he woke up at his friend's (Kiwi Dave) house, or at Gelens' unit.

[42] The first version is that he had been drinking at Gelens' unit, then he came to at Kiwi Dave's:

> "I remember waking up at Kiwi Dave's place at the back of his laundry just standing there just all dazed, in and out of a daze. I couldn't find my balance. I was falling all over the place, but I wasn't drunk, so I knew that something else was wrong";[108]

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105 Ms Steedman's version: "Do you want to be next? Then, do you want to be like that?": AB 77, 88.
106 Ms Steedman's version: "Then he said … he fucking deserved – I knew he was at it again, Mick": AB 77.
107 AB 191.
108 AB 181.

> "I would be able to stand up, and then I would just blank out, and then I would just, like, grab myself up against the walls and get my balance again and just kept doing that on and off";[109]
>
> "I was trying to make noodles. I seen noodles in the kitchen, so I was falling all over the place trying to make noodles, and I could hear people laughing, I think it was Kiwi Dave and his missus";[110]
>
> "I just woke up standing up".[111]

[43] The second version was that he woke up on Kiwi Dave's couch:

> "I woke up on the couch and I had – the n[oo]dles were all over my belly and that and all over the couch and yeah, I woke up with a sore arse."[112]
>
> …
>
> "Well, you woke up on the sofa?---That's right.
>
> In Kiwi Dave's house?---Yes.
>
> And it's at that stage that you felt you had something wrong with your back passage?---That's right.
>
> Right. What was wrong with it?---Oh, that's what I went – went and found out.
>
> Well, what was wrong with your anus?---Like I said, it was sore."[113]

[44] It was not put to Drabsch that this occasion had occurred, even though, on Pearce's account, he had been there.[114]

[45] Pearce's suggestion was that he had been to Gelens' unit about five times subsequent to being drugged and raped.[115] On several occasions when at Gelens' unit, he was asked by Gelens whether he remembered anything funny about the night in question. The questions were: "Can you remember what happened the other day? Anything?" and "Can you remember … anything funny happened the other day?"

[46] He said he "just made out still I didn't know what happened", and he "just let on that I didn't know", and Pearce answered "No, what do you mean?" On that account, Gelens was probing about Pearce's memory of the event, and Pearce told him he knew or remembered nothing.

[47] On the day of the assault Pearce said he asked Gelens: "I just asked him – went to ask him … what had happened", and "I just went to go and ask him … why he's done this. Just get him to own up." To that point, on Pearce's account, he had told Gelens that he (Pearce) did not remember anything about it, so the jury may well have wondered why Gelens would react as Pearce said he did, suddenly and with deadly violence.

[48] In my view, there is no merit in this ground.

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109 AB 181.
110 AB 181.
111 AB 182.
112 AB 182.
113 AB 194.
114 AB 181.
115 AB 193.

Discussion – alleged misdirections

[49] The contention on appeal was that the learned trial judge misdirected the jury on a number of factual matters. It was said that the "verdict can only have been reached by acceptance of incorrect factual propositions that were advanced in the course of the trial, which propositions were not supported by or were contrary to the evidence".[116] None of those matters were the subject of complaint at trial or a request for a redirection.

Timing of the fatal wound

[50] The contention was that it was put to the jury that Gelens had been stabbed **after** he had been rendered unconscious, when there was no evidence to support that proposition, and the judge should have criticised it.[117]

[51] Reliance was placed on a passage in the cross-examination of Pearce:[118]

> "The reality is this: you attacked him on the sofa, didn't you?---That's not true.
>
> And you rendered him unconscious, isn't that right?---That's not true.
>
> And then when he was on the floor, you intentionally targeted his neck with a knife, isn't that right?---That's not true."

[52] I do not accept the contention that the learned trial judge had to criticise the proposition in that line, nor canvas alternative options. All that was being put in that passage was one possible sequence, not necessarily based on Ms Steedman's evidence. No reliance was put on Ms Steedman's evidence for it at the time of cross-examination.

[53] In address the prosecutor asked "is there evidence before you for you to make the logical deducement (sic) of the order of events how they happened inside the house?"[119] He then commenced a precis of what was available, starting with Ms Steedman's evidence. The sequence of deduction proposed to the jury was: (i) the first thing seen by Ms Steedman was Pearce hitting something with the frying pan; (ii) from that they could infer that Gelens was being hit with the frying pan; (iii) violence was inflicted on Gelens on the three seater sofa because of the blood there; (iv) he died from his carotid artery being cut, and until then his heart must have been pumping; (v) his artery must have been cut when he was on the floor as the most blood was on the floor near the sofa; (vi) by deduction, that must have been after the frying pan was used; (vii) the jury could deduce that the last weapon he used was the one he got rid of, i.e. the knife that was put in the kitchen, whereas the frying pan was left on the sofa.[120]

[54] What is plain from that passage is that reliance was not placed on Ms Steedman's evidence alone. Further, the prosecutor accepted that her evidence may not be fully accepted.[121]

[55] That suggested sequence of events had some support from the evidence of Dr Buxton, the forensic pathologist. His opinion was that the injuries that caused extensive bruising, over the forehead and right and left sides of the head, were caused while

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116 Appellant's outline paragraph 35.
117 Appellant's outline paragraph 39-44.
118 AB 197 lines 29-34.
119 Transcript of addresses, T 1-34.
120 Transcript of addresses, T 1-34 to 1-35.
121 Transcript of addresses, T 1-35 line 31.

Gelens' heart was still beating. He said that the facial fractures occurred about the same time as the fatal stab wound. Once the carotid artery was cut it would have been a very short time before the heart stopped.

[56] Further, defence counsel referred to the sequence put in cross-examination, and telling the jury that "… you might think there's no evidence of that. There's no evidence as to the sequence of things".[122]

[57] The jury were directed, as was the case, that they were not obliged to act on the case of either party, nor did they have to accept all of any witness's evidence, but may use the evidence as they saw fit.[123]

Unsupported opinion on injuries

[58] The contention here was that the prosecutor proffered an opinion that self-defence should be rejected because Pearce suffered no injuries. That, it was said, was based on a flawed assumption that if Pearce had been called on to defend himself he would necessarily have been injured. The contention was that the learned trial judge should have corrected the opinion and directed the jury that the absence of injury was not inconsistent with Gelens having attacked Pearce and being unable to injure him.[124]

[59] This was a topic upon which both counsel addressed. Defence counsel referred to it in the context of self-defence, saying "So it's not a matter of saying, 'Well, [Pearce] hasn't got a scratch on him. This bloke's got all these injuries'".[125]

[60] In his summing up the learned trial judge referred to what the prosecutor had said:

> "The prosecution's case upon that issue, or submission, is that you would not believe that the deceased attacked the defendant as the defendant would have it and that there was no evidence of an attack by the defendant - by the deceased upon the defendant. In that regard the prosecution points to the absence of any injuries apparently sustained by the Defendant."[126]
>
> and
>
> "He pointed to the number and severity of the blows and submitted that the evidence suggested a sustained bashing; that the Defendant did not act in panic. He submitted that this was consistent with an intention to cause death or grievous bodily harm and that the evidence of the photographs of the Defendant suggested that there were no defensive injuries on his forearms and no bruises to his chest, which suggests that he was not acting in self-defence in a fight initiated by the deceased with an attack with a knife."[127]

[61] They were merely references to the prosecutor's submission, and were not endorsed as opinion that might be part of the evidence.

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122 Transcript of addresses, T 1-27 lines 35-41.
123 *Stevens v The Queen* (2005) 227 CLR 319, at [30].
124 Appellant's outline paragraphs 45-52.
125 Transcript of addresses, T 1-28 line 1.
126 AB 265.
127 AB 268.

[62] I do not accept the submission that the learned trial judge should have said more about this issue. To do what is submitted would have run the risk of countermanding the effect of an early direction to the jury, namely that what counsel puts to a witness is not evidence.[128]

Unsupported opinion on rational thinking

[63] This ground focussed on the evidence of Professor Brown, the pharmacologist. In summing up his evidence, the learned trial judge ended with this remark:[129]

> "He agreed that if a person was seen to be speaking with a voice that was at a normal pace, it will be inconsistent with a severe effect from methylamphetamine; also, if the person was showing perfectly normal, rational thinking, then it would suggest the methylamphetamine had not been taken at a high dose."

[64] That was an accurate reference to the evidence of Professor Brown in cross-examination, when he was being asked to consider the apparent indicia of the effects of methylamphetamine. Having referred to the levels in the blood, and the rate at which it was removed by the body, this exchange occurred:[130]

> "Now, if somebody was suffering from severe effects at the time of an event, they're unlikely to be seen by others to be calm; is that right?---Again, there's – yeah, there's a gradation in effects, here. A very tolerant patient seen by an observer who was excited at the time because of what was happening, for example, may not recognise it. Certainly, a naïve patient with a high dose: it's very obvious to everyone.
>
> So if the voice was at a normal pace, that would be inconsistent with a severe effect?---Yes. I mean, the severe effects are – yeah – as you've seen in the report: the talking a lot, excitability, hyperactivity.
>
> What about rational thought? If somebody's capable of demonstrating rational thought, is that inconsistent with having a severe effect?---Rational thought is, yeah, a difficult concept to measure. But, yeah, if someone is showing perfectly rational thinking, yes, it does decrease the – yeah, there can't have been a high dose, there.
>
> What about if they are fully coordinated, so physically coordinated?---Amphetamines don't have a major effect on coordination, unlike ethanol. So amphetamines don't have those effects. So the person is excited, but they're not uncoordinated.
>
> All right. But you would expect to see some intoxic effect – some volubility or hyperactive reflexes?---Yes, I would, if there was sufficient drug in the system."

[65] The complaint was that the direction encouraged the jury to compare Professor Brown's evidence on that point to the evidence of demeanour on Pearce's part, when Professor Brown was not asked to comment on the evidence of Pearce's demeanour at any point. Therefore, it was said, the jury were left to assume that when witnesses referred to Pearce's demeanour in terms such as calm, fine, nice, compliant or nonchalant, they were describing the rational thinking to which Professor Brown was referring.[131]

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128 AB 232 lines 29-43.
129 AB 243.
130 AB 211.
131 Appellant's outline paragraph 54.

[66] I do not consider that this contention should be accepted. Professor Brown's evidence was that the rate for methylamphetamine to clear out of the system is for half of the remaining drug to clear every 10 hours.[132] Pearce's evidence was that prior to the killing, he last consumed methylamphetamine on the night before the killing.[133] On that evidence the level of methylamphetamine in Pearce's blood was reducing, as were the intoxicating effects.

[67] During addresses defence counsel referred to Pearce being intoxicated and Professor Brown's evidence:

> "[Pearce] clearly affected by drugs and alcohol, you might think, to some extent. It's a bit hard to say exactly to what extent, but we don't have to."[134]

> "The effect of drugs on him is not completely clear, although there is evidence that the effects of methylamphetamine – you heard from Professor Brown – can cause confusion, paranoia, excitement, hyperactivity, talkativeness, hallucinations etcetera, and that a chronic user, someone using regularly, can end up in what he referred to as a drug-induced psychosis so that there are all of these hallucinatory or severe effects. It's not possible to look at the blood sample and say, "Well, there you are; there's the effect on him." He was someone who was a chronic user, on his own evidence, and so it's not clear. What we can say from that evidence is that the effect on him wouldn't have been the same as someone who was naïve, who never used it before or just had a single dose."[135]

[68] The prosecutor told the jury that there was no evidence that Pearce was significantly intoxicated by either drink or drugs. Then he referred to Professor Brown's evidence:[136]

> "Well, you would expect if he was having some severe episode of methylamphetamine toxicity through his repeated use that that would have manifested itself in the way that the expert Professor Brown said that people generally behave, putting on a turn when they're arrested and non-compliant etcetera. But the evidence in this case is that he was calm. he was calm at the point that he was detained. And he was also calm when he was seen by [Ms Steedman]."

[69] The prosecutor then referred to a number of instances where the evidence might be thought to suggest a lack of significant intoxication and Pearce being aware of what he was doing, or displaying rational thought: (i) spitting the blood out of his mouth because he did not want someone else's blood in his mouth meant Pearce was "orientated in time and space" and not "off his chops on drugs";[137] (ii) getting rid of the knife showed "he was aware of what he was doing";[138] (iii) bringing the blue bin in showed "thought" and "preparation", "recognising the [bin] for what it is", and that "isn't somebody off their chops on drugs";[139] (iv) the words spoken to Drabsch were

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132 AB 205.
133 AB 188.
134 Transcript of addresses, T1-28.
135 Transcript of addresses, T1-30.
136 Transcript of addresses, T1-33.
137 Transcript of addresses, T1-34.
138 Transcript of addresses, T1-36.
139 Transcript of addresses, T1-36.

"consistent with somebody who knows what they've done, they're orientated in space and time";[140] (v) the acts of dealing with the knife and washing himself showed "he's not intoxicated to the extent that he couldn't form a specific intent" and that he was "orientated in time and space;[141] and (vi) all those things showed he was "somebody who knew exactly what they were doing at the time",[142] and "all thought process of somebody who was orientated in time and space and is not intoxicated".[143]

[70] The passages above serve to demonstrate that both counsel sought to use Professor Brown's evidence for their own purposes. Defence counsel used it to say that any non-agitated behaviour on Pearce's part could be explained by the fact that he was a chronic user, and Professor Brown's evidence supported that. The prosecutor used it to say that Pearce was not experiencing a severe episode of methylamphetamine intoxication, pointing to his conduct as indicators of that, i.e. that he was "not off his chops".

[71] In my view, it is quite probable that counsel for Pearce would not have wished the jury to have been reminded, more than they were, as to whether the conduct referred to was indicative of what the prosecutor called "rational thinking", that is the thought process of somebody who was orientated in time and space and not intoxicated.

[72] Further, what was said in address, and the summing up, did not invite the jury to compare one form of rational behaviour with another, let alone that mentioned in Professor Brown's evidence. It was evident that the prosecutor was using that phrase in the sense of the acts being indicative of a person orientated in time and space and not intoxicated.

Incorrect proposition concerning the blue bin

[73] This contention focussed on part of the summing up where the learned trial judge said, during the summation of the prosecutor's address:[144]

> "He submitted that the circumstance that there were a few blood deposits or splatters on the spot where the blue barrel apparently was positioned suggested thoughtful preparation by the Defendant; that he had brought the barrel in, intending to use it to dispose of the body, before the event."

[74] The contention was that this left the theory with the proposition that the blue bin had been brought into the unit before the killing in a way that demonstrated premeditation.[145] The vice was said to be that there was no evidence that it had been brought inside before the confrontation,[146] and it was pure speculation that the bin had been brought into the unit by Pearce and not Gelens.[147]

[75] What was said by the prosecutor in address was this, as to whether Pearce was aware of what he was doing at the time of the killing:

> "And it also involved something very important to show that he was aware of what he was doing and what he wanted to happen to

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140 Transcript of addresses, T1-37.
141 Transcript of addresses, T1-37.
142 Transcript of addresses, T1-39.
143 Transcript of addresses, T1-40.
144 AB 268.
145 Appellant's outline paragraph 59.
146 Appellant's outline paragraph 62.
147 Appellant's outline paragraph 63.

> Mr Gelens at that point. Because you know from Drabsch that the blue barrel was outside when Drabsch went into the shower. He would have remembered if somebody had brought the barrel in front of the television. And there was no blood anywhere at that stage.
>
> So, inferentially, [Pearce] either brought the barrel in when he came in, or in between or after the violence he went outside and got the barrel. That requires thought. That requires preparation. And that requires recognising the barrel for what it is, [indistinct] some utensil or some item that you're going to be able to hide a body in. That requires thought. That isn't somebody off their chops on drugs. That is a thought process. So he's brought the barrel in. If he was frightened, if he was panicking, if he was off his chops on drugs, would he have been able to go through that process."[148]
>
> then
>
> "And he knew what he was doing. And he's used a variety of weapons. And he's taken a fair while to do it. And it's multiple blows. And he's washed himself. And he's hidden the knife. And he's got the barrel to try and dispose of the body. And he's washed his shorts. All of that bespeaks of somebody who knew exactly what they were doing at the time that they were committing the acts."[149]
>
> and
>
> "It's not an instinctive reaction to go and get a barrel in order to hide a body."[150]

[76] What is plain from those passages is that the prosecutor was not asserting that the jury should conclude that Pearce brought in the blue bin **before** the violence started. Rather, that it could have happened before, during or after the violence, but the significance was that it showed Pearce to be orientated in time and space, and not reacting instinctively.

[77] That was consistent with what had been put in cross-examination, namely that the bin was brought in after the event.[151]

[78] Therefore, the passage from the summing up was incorrect in so far as it attributed to the prosecutor the submission that Pearce had brought the barrel in, intending to use it to dispose of the body, **before the event**.

[79] However, I do not consider that the jury could have been misled in any relevant way. The submission of the prosecutor was plainly directed at contending that various acts, of which bringing the bin in was one, signified a person orientated in time and space, and not one intoxicated or acting instinctively. I do not consider that the learned trial judge's summing up would have left a different impression.

Incorrect opinion on cannabis use

[80] This contention focussed on a question put to Professor Brown as to the presence of THC in Pearce's blood. Pearce was tested at about 7 am the morning after the killing.

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148 Transcript of addresses T1-36.
149 Transcript of addresses T1-39.
150 Transcript of addresses T1-40.
151 AB 197.

Professor Brown's evidence was that the level of THC (0.003 mg) was very low; THC is rapidly removed, in the range of half removed in one to two hours;[152] and if THC had been in the blood at 7 pm the night before it would likely be gone by 7 am.[153]

[81] The complaint here was that the question and answer carried with it the suggestion that the level of THC at 7 am proved that Pearce had not used cannabis before 7 pm the night before. It was accepted that THC fades from the body within six to 12 hours, in which case the THC detected at 7 am must have been the result of cannabis use after 7 pm the night before.[154] However, the submission went, that was not evidence that cannabis was not also used before 7 pm the night before, as that use would have left no trace by 7 am.

[82] In my respectful view, the contention misses the point of the question and answer. The thrust of the questions was to establish that if there was THC in Pearce's blood at 7 am then it must have been from cannabis use after 7 pm, which was something he did not refer to in his evidence when asked about taking drugs after the event.[155] Thus the line of questions was directed at the reading done at 7 am and whether **that reading** related to cannabis use post 7 pm the night before. That is why Professor Brown agreed, saying that "anything that was there before that six to 12 hours would've been out of the body".[156]

[83] Defence counsel addressed on the basis that there had been cannabis use the day of the killing, but made no assertion of cannabis use after the event.[157] The prosecutor only referred to methylamphaetamine use after the event.[158] In those circumstances it is not difficult to understand that defence counsel would not seek a redirection, as to do so would potentially emphasise a point that told against the client's credit.

[84] This ground does not succeed.

Failure to identify evidence tending to corroborate Pearce's claims

[85] This contention was that there was evidence that tended to corroborate the claim that Pearce had been drugged and raped, but which were not left to the jury as matters of corroboration. They included: (i) Ms Steedman's evidence that Pearce was spitting on Gelens; (ii) he was heard to say "he deserved it" and "was at it again"; (iii) the evidence of Dr Buxton as to a bruise on the capsule of Gelens' right testis.[159]

[86] As to the first two items, in my view there were reasons why defence counsel would not have sought a direction in the terms suggested. First, they came only from Ms Steedman, whose reliability was under sustained attack by defence counsel in his address, describing her as "a witness of little value".[160] Secondly, the evidence could well supply a motive for wanting to kill Gelens, if Pearce's account of having been drugged and raped was accepted. Thirdly, the "was at it again" comment may have been construed as indicating that Gelens made some form of sexual advance on Pearce and that triggered Pearce's attack, again providing a motive to kill.

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152 AB 208.
153 AB 210.
154 Appellant's outline paragraph 68.
155 AB 187.
156 AB 210.
157 Transcript of addresses T1-29 lines 30-46.
158 Transcript of addresses T1-33 lines 16-18.
159 Appellant's outline paragraph 71.
160 Transcript of addresses T1-5 to 1-7; T1-7 line 25.

[87] As to the bruise to the capsule of the right testis, the injury was of such a minor nature that, in my view, not much could be made of it. One can well understand there were reasons why defence counsel would leave it aside and not seek a direction such as is suggested. First, in my view, there was little to portray that as corroborative evidence. For that to be the case it would have to be suggested that the particular injury (to the capsule of the testis) was linked to the previous rape, or a new sexual advance by Gelens. The first of those invites the question of motive to kill. The other also raises motive, but is contrary to Pearce's version of events, in which Gelens reacted to questioning about the previous incident.

[88] Secondly, to do so would inevitably invite a comparison between the level of severity of the other injuries, and that to the capsule of the testis. Thirdly, it would invite the enquiry, why only the right testis, why not both? Fourthly, it would have to overcome the inevitable counterpoint that would have to be made, that since there was no evidence as to when that bruise occurred, it may have occurred before Pearce attacked Gelens.

[89] In my view, there were good forensic reasons why defence counsel did not seek a direction such as is now suggested. In that circumstance there was no miscarriage of justice even if there was a failure to give the direction.[161]

Other post-confrontation conduct

[90] This contention focussed on the evidence of Drabsch and Ms Steedman, that Pearce had warned or threatened Drabsch that he would be next or have the same thing done to him if he called the police. It was said that the learned trial judge should have directed that those statements did not evidence an intention to kill Gelens.[162]

[91] In my view, this contention suffers in the same way as the previous one. To have sought the direction that those statements did not evidence an intention to kill Gelens would have highlighted the evidence in such a way as to counter the argument that Pearce acted in self-defence or had been provoked. It is more than likely that a forensic decision was made by defence counsel to leave those statements alone.

[92] This ground does not succeed.

Error to have directed as to capacity to form an intention

[93] This particular of ground 2 was added by leave at the hearing of the appeal. Relying on *R v Middleton*,[163] the contention was that in so far as the learned trial judge's directions referred to the capacity to form an intention, that was a misdirection and distracted the jury from the real question, as the defence case was not about the capacity to form an intention, but whether the requisite intention had been formed in fact.

[94] It is the case that defence counsel raised the question, in the context of memory of the events, of the fact that Mr Pearce "was affected by whatever he'd been taking up till that point".[164] Further, having referred to parts of the evidence relevant to self-defence, defence counsel turned to the question of intention, saying:[165]

> "So that when you come to consider the question of intention you don't just have to look at what was the result, therefore, what was his

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161 *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, [16], [25]-[28], [32]-[33], [108]-[109].
162 Appellant's outline paragraphs 72-74.
163 [2003] QCA 431, at [23]-[29].
164 Transcript of addresses T 1-10 line 41.
165 Transcript of addresses T 1-20 lines 13-17.

> intention? He must have intended that result. We know as a matter of common experience that people react without thinking, especially if they're intoxicated with alcohol, drugs or whatever."

[95] Shortly thereafter, defence counsel told the jury that the evidence he had been reviewing, in the course of which the statement in the previous paragraph was made, "addresses a lot of the issues that are raised … [including] the intention issue … and so when you consider those things you'd have regard to the evidence".[166]

[96] Finally, having spent some time on the self-defence issues, defence counsel returned to the question on intention, saying:

> "[Mr Pearce] just reacted. He was clearly affected by drugs and alcohol, you might think, to some extent. It's a bit hard to say exactly to what extent, but we don't have to."[167]
>
> "[Section 28 of the Criminal Code] doesn't say that [Mr Pearce] has to be so drunk or so off his face on drugs that he can't talk to people in the street or talk to the police when he was arrested, or talk to anyone when he was there at the unit. It doesn't say that. It says intoxication, whether complete or partial, you can have regard to decide whether or not he actually formed an intention."[168]
>
> "The effects of the drugs on him is not completely clear, although there is evidence that the effects of methylamphetamine … can cause confusion, paranoia, excitement, hyperactivity, talkativeness, hallucinations, etcetera, and that a chronic user, someone who uses regularly, can end up in what he referred to as a drug-induced psychosis so that there are all of these hallucinatory or severe effects.
>
> …
>
> On the evidence, there is evidence of [Mr Pearce] being significantly intoxicated, and his own patchy memory might also be consistent with that state of affairs. … [The Crown must] prove that there was an intention."[169]

[97] In the course of dealing with the issue of intoxication and intention, the learned trial judge's directions referred to the capacity to form an intention:

> "You would understand that, ladies and gentlemen, typically in the case of alcohol, that it is possible to be affected by alcohol **but still be able to form an intention**. Whether that applies in this case is a matter for you, using your experience and judgment on the evidence relating to the drugs and the alcohol consumed."[170]
>
> …
>
> "And you will have to consider that evidence and consider whether the prosecution has satisfied you beyond reasonable doubt that he was not

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166 Transcript of addresses T 1-21 lines 29-32.
167 Transcript of addresses T 1-28 lines 44-46.
168 Transcript of addresses T 1-29 lines 19-23.
169 Transcript of addresses T 1-30 lines 12-29.
170 AB 262; emphasis added.

> so affected by drugs on the occasion when he caused the death of the deceased; that he was not so affected, **so that he was capable of forming the intention**. Remember, the prosecution must prove that he had the intention; [Mr Pearce] doesn't have to disprove the fact"[171]
>
> …

Then, referring to defence counsel's address:

> "And he submitted that the evidence pointed to the circumstance that [Mr Pearce] may have been suffering from the combined chemical effects of the alcohol and the drugs **so as to deprive him of the capacity to form** an intention to kill or to cause grievous bodily harm."[172]
>
> …
>
> "He reminded you that upon these issues it wasn't for [Mr Pearce] to prove the matters; that the Prosecution had the onus of proving that [Mr Pearce] did not act in self-defence and had the onus of proving that [Mr Pearce] was not so affected by drugs or alcohol **that he was capable of forming an intention**."[173]

[98] The two passages from the summing up, referring to defence counsel's address, were incorrect in so far as they suggested that defence counsel had explicitly raised the question of capacity with respect to intention. However, in my view, the passages in paragraphs [94] and [95] above could have left the learned trial judge with the impression that incapacity to form an intention was being left open, as the jury were told by defence counsel that the effects of Mr Pearce's intoxication may have been such that he reacted without thinking, that is that he did not form an intent because he could not.

[99] However that may be, the passages referred to above from the summing up told the jury that the prosecution had to prove two things: first, the capacity to form an intention; and secondly, that the intention was, in fact, formed.

[100] After those passages the learned trial judge said this:

> "May I suggest it is convenient, then, to consider the issues of intention and the related issue of drug effects or drug intoxication. The issue is, has the Prosecution satisfied you beyond reasonable doubt that [Mr Pearce], when he stabbed the deceased, intended to kill the deceased or to cause him grievous bodily harm."[174]

[101] Thus even if it were right that capacity was not part of the defence counsel's address, the jury were told that two things had to be proved, the first was capacity to form an intention, and the second was that the intention was, in fact, formed. In my view, there was no misdirection that caused prejudice to Mr Pearce.

[102] *R v Middleton*[175] does not compel the contrary conclusion. In that case the jury were directed that: "If you are not satisfied beyond reasonable doubt that he was capable

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171 AB 263; emphasis added.
172 AB 266-267; there referring to the address of defence counsel; emphasis added.
173 AB 267; again referring to the address of defence counsel; emphasis added.
174 AB 269.
175 [2003] QCA 431. (***Middelton***)

of forming such an intention and did in fact form that intention, then you must find him not guilty of murder on that basis." The Court held that such a direction was unexceptional.[176]

[103] However the jury were also directed: "So if you are satisfied that he had the capacity to form an intention, then intoxication plays no other part in your consideration"; and "If you are left with a reasonable doubt as to whether [the appellant] … was incapable of forming the intention, then you would find him not guilty of murder but guilty of manslaughter."

[104] It was these statements that the Court held to be a misdirection, as the first was simply wrong, and the second did not properly address the purpose of s 28(3) of the *Criminal Code* 1899, which is that intoxication "may be regarded" for the purpose of ascertaining whether the requisite intent exists.[177]

[105] The Court said:[178]

> "In this case, the various directions both correctly and incorrectly identified the issue for the jury. Were the directions left as enunciated in the first part of the summing-up the balance would, in our view, favour not interfering."

[106] That was a reference to the direction that both capacity and actual intention had to be proved: see paragraph [102] above. That is the state of the directions in this case.

[107] Therefore, this ground does not succeed.

Conclusion

[108] For the reasons above, all grounds of the appeal have failed. I would order that the appeal be dismissed.

[109] **MARTIN J:** I agree with Morrison JA.

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176 *Middelton* at [24].
177 *Middelton* at [25].
178 *Middelton* at [30].