SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lovell* [2016] QCA 151
PARTIES:	**R** **v** **LOVELL, Corey John** (appellant)
FILE NO/S:	CA No 254 of 2013 SC No 9 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Bundaberg – Date of Conviction: 5 September 2013
DELIVERED ON:	10 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2016
JUDGES:	Morrison and Philip McMurdo JJA and Boddice 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 ALL THE EVIDENCE – where the appellant and his mother were convicted of murdering his mother's stepfather – where the appellant and his mother travelled from Toowoomba to the deceased's house in Burnett Heads to kill the deceased – where the appellant and his mother entered the deceased's house and, after a struggle, the deceased was killed – where the alleged motive for that killing was that the appellant's mother would inherit the bulk of the deceased's estate, part of which she promised to give to the appellant if he assisted in killing the deceased – where the prosecution relied on lies told by the appellant as to his location on the night of the murder, CCTV footage contradicting the account he gave to police and forensic evidence placing the appellant at the deceased's house at the time of a struggle with the deceased – where the prosecution also relied on direct admissions made by the appellant to the effect he had deliberately killed the deceased, made to his sister, girlfriend and a friend – where the admissions to the appellant's sister were the subject of retraction by her at the trial – where the appellant's girlfriend altered her version of events in evidence at trial – where the appellant challenged the accuracy of the evidence given by the

appellant's friend regarding admissions made to him by the appellant – whether the verdict is unreasonable or insupportable having regard to all the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the trial judge did not give any specific direction to the jury that the evidence given by the appellant's sister and friend was unreliable – where the appellant submits that directions in relation to the appellant's sister were necessary having regard to her closeness to the periphery of the crime, her retraction of significant parts of her testimony in circumstances where she had previously given false versions to police and the inconsistencies between her evidence and s 93A statement – where the appellant submits that a direction in relation to the appellant's friend was necessary having regard to his use of cannabis and inconsistencies between his evidence and other evidence, including the evidence of the forensic pathologist – where the trial judge gave directions as to the need for the jury to be satisfied that the admissions made to the appellant's sister and friend were in fact made and that they were truthful before the jury could rely and act upon them – where the appellant argues the trial judge ought to have given a direction in relation to the evidence admitted under s 93A of the *Evidence Act* 1977, being the statement of the appellant's sister – where the trial judge gave a direction under s 21AW of the *Evidence Act* 1977 – where that direction appraised the jury of the central features that would be covered in a direction as to evidence admitted under s 93A of the *Evidence Act* 1977 – where the appellant submits the trial judge ought to have directed the jury as to the use to be made of the evidence of the appellant's assent to participate in a plan to kill the deceased by suffocation – where the appellant did not at trial seek any of the directions he now argues ought to have been given – whether there was any miscarriage of justice as a consequence of the failure to give any of the directions

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: T Ryan with D V Nguyen for the appellant
G J Cummings for the respondent

SOLICITORS: Black & Co Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Boddice J and the additional reasons of Philip McMurdo JA. I agree with what has been said by each of their Honours. I agree also that the appeal should be dismissed.

[2] **PHILIP McMURDO JA:** I have read the reasons for judgment of Boddice J and am grateful for his detailed analysis of the evidence and the submissions. I agree that the appeal should be dismissed substantially for the reasons given by his Honour.

[3] On the night in question, the appellant and his mother drove nearly 500 km to the house of the deceased, which they entered at about 2.00 am and where, after a violent struggle, the deceased was killed. Clearly they drove to the house on that night, each intending to kill the deceased. Neither at the trial nor in this court did counsel for the appellant argue otherwise.

[4] At the trial there was an issue about whether the appellant had materially contributed to the victim's death. The prosecution argued, in the alternative, that the appellant was criminally responsible for the murder committed by his mother, if she was the person who had killed the deceased. In this court, however, it is conceded that it was open to the jury to find that the appellant did materially contribute to the victim's death.

[5] The question then is whether it was open to the jury to conclude that at the time of the violence in the laundry, the appellant still intended to kill. On this question, despite the criticisms now made in the appellant's argument about the evidence of Emma Taylor and Tamika Lovell, their evidence supported the appellant's case. On their evidence, there was no indication that the appellant had used the knife. And each of them ultimately testified that, on the following morning, the appellant had said to her words to the effect that by the time of the violence in the laundry, the appellant was intent upon escaping the scene and not killing the victim.

[6] There was other evidence which provided some support for that argument. The neighbour, Mr Gramm recalled seeing the appellant's mother, and not another person, leaving the house. This provided some support for what the appellant was said to have told Ms Taylor, which was that the victim was still alive when the appellant left the house.

[7] However the jury also had the evidence of Mr Paterson. On his evidence, the appellant had admitted to him that he had stabbed the deceased and had not said that he had abandoned his intention to kill. As is argued, there were several bases for criticism of that evidence. However the jury was not bound to reject it.

[8] Apart from the evidence of Ms Taylor and Ms Lovell, there was no substantial evidentiary support for an argument that the appellant abandoned the intention with which he had travelled to and entered the deceased's house. This evidence did not require the jury to acquit the appellant of murder. The jury may have rejected their evidence as to what the appellant had said to them upon his return to Toowoomba. Alternatively, they may have accepted that the appellant did make statements to them to that effect, but reasoned that he had not been truthful in doing so.

[9] As to the other grounds of the appeal, the appellant's counsel at the trial did not seek any of the directions about the evidence of his sister which, it is now said, should have been given. The explanation for that is clear: it was in the appellant's interest not to discredit her evidence when it was so important to the case which was argued to the jury, namely that he was no longer intent upon killing the victim when he encountered him in the laundry. In this respect, the trial was conducted upon the basis of a clear and rational forensic choice by the appellant's then counsel and there was no miscarriage of justice.

[10] According to ground 5 of the appeal, the trial judge ought to have directed the jury in accordance with the draft direction at para 37.1 of the Bench Book, meaning that

Mr Paterson should have been characterised as an accomplice. But there was no submission here to that effect: rather the submission was that for many reasons, the evidence of Mr Paterson was so unreliable that the trial judge should have told the jury that they should carefully scrutinise it before treating it as reliable. But the jury could not have thought otherwise. Not only did they have the trial judge's directions as to how to assess the evidence generally, they had his Honour's extensive reference to the many arguments which the appellant's counsel had made to the jury about the evidence of Paterson. No further direction was necessary in this case and, unsurprisingly, none was sought. Similarly, as to ground 6, there was no risk that the jury could have impermissibly used the fact of the appellant's intention to kill, as it was when he entered the house, in deciding whether, some minutes later when he assaulted the victim, his intention was unchanged.

[11] **BODDICE J:** On 5 September 2013 a jury convicted the appellant of the murder of Robin Lawrence Behrendorff on 22 April 2011. The appellant, and his co-accused Samantha-Ann Brownlow, were sentenced to life imprisonment.

[12] The appellant appeals that conviction. There are six grounds of appeal. At issue is whether the verdict of the jury was unreasonable in all the circumstances and whether the trial judge failed to give appropriate directions to the jury as a consequence of which there has been a miscarriage of justice.

Background

[13] The deceased's body was found by a concerned neighbour on the afternoon of 22 April 2011. It was located inside the laundry of his home, surrounded by broken furniture. The deceased appeared to have been dead for some time. A knife blade was lying on his chest.

[14] Samantha-Ann Brownlow and the appellant were subsequently arrested and charged with the deceased's murder. Brownlow was the stepdaughter of the deceased. The appellant was Brownlow's son.

[15] On 29 August 2013, Brownlow pleaded guilty to murdering the deceased. The appellant pleaded not guilty. The central issues in the trial were whether the appellant killed the deceased and whether the appellant had the intention to kill the deceased or do him grievous bodily harm at the time of the deceased's death.

Prosecution case

[16] The prosecution alleged that Brownlow masterminded the murder of the deceased for financial gain. Brownlow had attended the office of the Public Trustee in Bundaberg with the deceased on 1 July 2010 when he executed a Will in which he left Brownlow a bequest estimated to be worth almost $550,000 at the time of the execution of the Will. The prosecution alleged the appellant agreed to be involved in the deceased's murder for financial gain. Brownlow promised the appellant $50,000 from her inheritance if he helped kill the deceased.

[17] The prosecution contended the appellant was guilty of murder in one of two ways. First, he did an act that caused the death of the deceased, intending to cause that death or do the deceased grievous bodily harm. Alternatively, the appellant aided Brownlow in murdering the deceased and was thereby liable as a principal offender pursuant to ss 7 and 8 of the *Criminal Code* (Qld).

Admissions

[18] The appellant made a number of admissions at trial. Those admissions included:

- That Brownlow had attended the office of the Public Trustee in Bundaberg with the deceased on 1 July 2002 when he executed a Will which left Brownlow the rest and residue of his estate which, after deductions for specific requests, would have resulted in Brownlow inheriting almost $550,000.
- That on 3 August 2010 the deceased executed a further Will in which he left the whole of his estate to his brother. The deceased was not in the company of any person when he executed this will.
- That Brownlow lived in rented accommodation in Toowoomba in 2009, 2010 and 2011, and in Bundaberg between 4 February 2011 and 20 April 2011.
- That Brownlow rented a unit in Toowoomba from 21 April 2011, having arranged to do so over the preceding two months. The belongings of Brownlow and her daughter were delivered to that unit on 28 April 2011.
- That Brownlow and Tarnika left Bundaberg at about 4.15 am on 21 April 2011 and arrived in Toowoomba at about 10.00 am having travelled 410 kilometres in Brownlow's 1999 golden coloured Pulsar sedan. They travelled to the unit Brownlow had rented in Toowoomba. The appellant joined them later that day.
- That on the evening of 21 April 2011, Brownlow and the appellant travelled in Brownlow's 1999 Pulsar sedan from Brownlow's unit in Toowoomba to the deceased's residence in Burnett Heads before returning to Brownlow's unit in Toowoomba, a distance of approximately 960 kilometres.
- That during that return trip, Brownlow and the appellant stopped at service stations in Toowoomba, at 8.34 pm on 21 April 2011, Childers, at 12.30 am on 22 April 2011, east Bundaberg, at between 2.17 and 2.24 am on 22 April 2011 and Goomeri, at between 5.47 and 5.55 am on 22 April 2011.

Evidence

[19] The deceased lived alone in a house at Burnett Heads near Bundaberg in the State of Queensland. He was aged 62 at the time of his death, having been born on 2 March 1949. The deceased's brother saw the deceased two or three times a week prior to April 2011. He described his health as good. The deceased did not need assistance for mobility. The deceased's brother last spoke to the deceased by telephone on 20 April 2011. The deceased seemed very happy.

[20] The deceased's brother said that when Brownlow was staying with the deceased in the middle of 2010 the deceased decided to put her in his Will. Some weeks later the deceased was talking about Brownlow as if she was his wife. The deceased told his brother that the night before Brownlow left he had asked her to sleep in his bed. Brownlow declined and left the following morning.

[21] Jodie Griffiths, a friend of Brownlow, had lunch with Brownlow in Bundaberg on 9 April 2011. Brownlow discussed moving back to Toowoomba. Brownlow said the deceased had just made her sole beneficiary of his Will. Brownlow said all she needed to do was to bump him off to get the money. She said it was better if he "carked it" sooner rather than later.

[22] Tammy Lee Jordan, a hairdresser in the Bundaberg area, had known Brownlow for a number of years prior to April 2011. Brownlow came to her house with Tarnika on 19 April 2011. Brownlow discussed moving back to Toowoomba. Brownlow said the deceased had changed his Will so that she was the only beneficiary. Brownlow said she needed the deceased dead as her daughter was getting married and she needed the money. Brownlow "just ranted about wanting this money, and she needed her stepfather gone".[1]

[23] Brownlow's sister, Lee-Ann Higgins, received a Facebook post at about 1.00 pm on Thursday, 21 April 2011, indicating that Brownlow had arrived in Toowoomba. She was unaware of any plans by Brownlow to visit Bundaberg after that date. When Brownlow lived with the deceased in 2010, she had indicated she was uncomfortable about advances made by the deceased and left the deceased's residence. There had also been family arguments about property belonging to her mother after the mother's death. The deceased would not give them any of the mother's keepsakes.

[24] Jennifer Towers lived adjacent to the deceased for about 11 years, until a house was built between her residence and the deceased's residence. She recalled seeing Brownlow at the deceased's residence from time to time. Ms Towers last saw the deceased alive on 20 April 2011. The deceased appeared happy. The deceased would talk to her about things in his life. One of the issues he raised was that he felt Brownlow should sleep with him. He attempted to justify that on several occasions. Ms Towers made it clear it was inappropriate.

[25] Ms Towers went to bed on the evening of 21 April 2011 and was awoken on three occasions; at 2.00, 2.10 and 2.30 am on the morning of 22 April 2011. She went to the window because her dog would not stop barking. She did not see anything. On the third occasion, at 2.30 am, she heard a car near the school at the corner of her street. It was heading towards Bundaberg.

[26] Early on the morning of 22 April 2011 the deceased's neighbours, Kenneth and Debora Gramm, were awoken by loud noises. Mrs Gramm was initially awoken by her dog barking and making growling noises. She then heard banging and noises like falling furniture. She went back to bed but was awoken again by more banging and the sound of breaking glass. Her dog was growling again. Mrs Gramm looked out her front door. She did not see anyone but heard a car drive off towards the school.

[27] Mr Gramm was awoken from his sleep at about 10 past 2 in the morning on 22 April 2011 by his wife getting out of bed. His wife had heard broken glass. As Mr Gramm got out of bed he heard a thump. He was not worried as there were always "blues" going on at the house on the left-hand side of their house. The deceased's house was on the right-hand side of the Gramms' residence.

[28] Mr Gramm said when his dog continued barking, Mr Gramm went outside into his backyard. He spent a few minutes there. He did not see anyone. Mr Gramm returned into the house and went to the front door. As he did so he saw a woman go diagonally across his driveway. The woman could only have come from the deceased's residence. She appeared to be wearing a black jumper or pullover and dark tracksuit pants. He was not able to notice any footwear.

[29] Mr Gramm knew it was a woman by the outline of her breasts. Her body stature was the same as Brownlow's build. The woman was moving very casually, just walking

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1 AB 205/40.

like she was going up the street. There was no reaction by the woman to Mr Gramm's barking dog. Mr Gramm lost sight of the woman as she went up the street. Mr Gramm put on some clothes and went outside. There was no-one in sight on the street. He saw lights on in the deceased's house. That was not unusual as the deceased was often up at the different hours of the night. Mr Gramm then returned to his own home.

[30] At around 3.00 pm on the afternoon of 22 April 2011, Mrs Gramm took her dog for a walk. She noticed the deceased's wheelie bins were still outside. This was unusual. She asked Mr Gramm to check on the deceased. He went around the side of the house and called for her to ring the police. Mrs Gramm went over to the deceased's house to see if she could help as she was a registered nurse. When she saw the deceased she knew he was dead.

[31] Mr Gramm, who last saw the deceased alive on 20 April 2011 walking in their street, described the deceased as a sizeable man who walked with a cane. The deceased appeared to be very fit for his age. He would regularly work for the whole day in his yard. When he was asked by Mrs Gramm to check on the deceased on 22 April 2011 he initially rang the deceased's front door-bell. There was no answer and Mr Gramm went around the back of the house. He noticed the security screen door was open, as was the sliding glass door behind it. There was broken glass on the ground. He observed blood in the bottom of the curtain on the right-hand side. He became alarmed. He slowly opened the curtain and saw the deceased on the ground, with blood on the left side of his face. There appeared to be a glass shard, or a knife's edge, on his right shoulder. He asked Mrs Gramm to call the police.

[32] Shane Tutton, an advanced care paramedic, attended the deceased's residence on the afternoon of 22 April 2011. He received a dispatch at approximately 12 minutes to 4.00 that afternoon, and arrived at the residence at four minutes to 4.00. He was greeted by the Gramms who took him to the back door. He could see the deceased inside. The deceased was cold and stiff. There was a lot of blood. He noticed a knife blade sitting on the deceased's chest with a broken or missing handle.

[33] Michael Formica, an ambulance officer, attended the deceased's residence with Mr Tutton. He observed smashed glass at the back of the residence. He saw what he thought was the deceased's hand underneath the curtain. He observed a laceration to the neck of the deceased and pooling of blood around the head area. There was a blood stain around the mouth. The blood was old blood. The carpet was messed up. He also noticed something on top of the washing machine and noticed a broken stool.

[34] Stephen Wilson, a police officer, attended the deceased's residence at 4.05 pm on 22 April 2011. Tutton and Formica were present when he arrived but had not entered the residence. He observed the glass door was smashed but could not see inside. When the curtain was moved he observed a male person lying on his back, with a pool of blood beneath the body. The body had a shirt on but no pants. There was a knife blade on the right side of the chest, lying flat. There was also a broken wooden chair. The carpet edges were upturned. There was a set of spectacles at the back of the room, near a door that entered from inside the dwelling. There was a bucket near that door. The front screen door of the residence was unlocked but the wooden door behind it was locked.

[35] Amanda Cormick, a forensic officer, attended the deceased's residence on the afternoon of 22 April 2011. She was the first officer to go inside the house. Before

doing so, the outside of the house was checked and only one other window was open. It was ajar behind the fly-screen. It did not appear to have been interfered with in any way. She entered the house through the main bedroom window. There was a light on in that bedroom. There were no other lights on in the house. There was no-one else present in the house. The bedroom light did not illuminate the laundry area.

[36] Nicole Tysoe, a forensic officer, attended the deceased's residence on 23 April 2011. The deceased was still on the laundry floor. The glass lower pane of the back sliding door had been smashed, with the majority of the glass being on the inside. The location of the glass suggested the glass panel was not broken in the course of opening the door. It was either broken during an altercation or after blood had been located on the floor. She observed projected blood just above the level of the deceased's head, which indicated there had been some force applied to an area of blood in that location no higher than his head.[2] She observed some cast-off blood on the side of the laundry tub above his head and some projected blood on a bucket in the room.

[37] Ms Tysoe said the deceased's socks had no blood on the bottoms, which indicated he had not been upright or stood in any blood prior to being located on the floor. There was a knife blade with no handle attached sitting on his right shoulder. Blood was found on the knife blade and in various parts of the laundry. Some of the blood was projected blood. The fact the knife was found on the deceased suggests that was the final position he was laying in before use of the knife. Ms Tysoe could not say when the knife blade was placed on the deceased and whether it was connected with any struggle.[3] No glass was located underneath or on top of the deceased.

[38] On the washing machine was the timber leg of a stool. There was blood on that leg. The rest of the stool was located in the laundry in pieces. Parts of the broken stool were located above the deceased's head.[4] Blood was also located on an upturned bin in the laundry. Some of the blood was contact blood. There was projected blood on its base.[5] Blood was also found on a bucket and on glass fragments. Blood found on the floor was consistent with a flow as a result of the deceased lying in the location for a significant amount of time.[6] There was a large pool of blood under the deceased's head and shoulders.

[39] Some of the patterning of the blood found in the laundry was consistent with projected blood droplets as a result of a stomp or some object falling into blood to create blood droplets that are flung outwards.[7] The blood patterns were also consistent with a possible struggle in the area. There was blood located on the top of shards of glass consistent with it being deposited after the door was broken.[8] The splatter pattern located on the vertical surfaces was consistent with a blow or blows to the deceased's face when there was a quantity of blood present on the front of that face.[9] It was not consistent with that blow being received whilst the deceased was standing.

[40] There were shoe patterns facing towards the deceased's head, with the right shoe facing out the door.[10] The shoe patterns did not match those of a brown and white

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2 AB 145/15.
3 AB 189/35.
4 AB 174/15.
5 AB 174/15.
6 AB 165/30.
7 AB 166/30.
8 AB 168/1.
9 AB 171/40.
10 AB 177/20.

pair of Nike shoes or a Reebok shoe examined by police.[11] They were identical to the patterns on a pair of lady's gold sandals subsequently examined by Ms Tysoe. The blood patterns consistent with the gold coloured sandals suggested they were likely worn inside the house. The shoe impressions were consistent with a person lifting their right foot and stomping in the direction of the deceased's head[12] before heading in the direction outside. The presence of blood on the top of the gold sandals is consistent with a projected blood stain from some type of blunt force injury, including from a very severe stomp.[13]

[41] An examination of some spectacles located on the laundry floor revealed two tiny areas of blood-staining on the frames. Those tiny droplets of blood would be consistent with blood splatter from the stool hitting the head of the deceased. There were some transfer patterns on the floor in-between the deceased and the stairs in what appeared to be partial shoe impressions and what appeared to be a different partial shoe impression in the laundry area. The impressions had to have been made from blood located at the back of the laundry, which was walked through up the stairs to the house. No blood was revealed in any other location in the house. A search of the kitchen did not reveal any evidence of blood or any evidence of movement of somebody into the kitchen area with blood on their shoes. There could have been other shoe impressions in the laundry area. It is also possible someone was walking with bare feet in the area but no foot impressions were located in the area.

[42] Ms Tysoe concluded, as a consequence of her examination, that there had possibly been a struggle towards the toilet and shower area near the laundry tub, before it moved towards the glass door. This conclusion was supported by the location of the spectacles and pieces of stool, and evidence of a struggle over several metres, with things being knocked over and movement of the carpet.[14] There was no evidence of any kind of disturbance elsewhere in the house.[15] All the scientific findings were located in the area of the laundry and the back door. The fact no blood was found on the deceased's hand area could be consistent with the deceased laying his hands around somebody's neck.[16]

[43] Ms Tysoe agreed there were other impressions in the blood that could possibly be shoe sole impressions. As there was no front portion or rear it was impossible to say it was definitely a shoe. A similar herringbone pattern was located outside the laundry, which would be consistent, if it was a shoe sole, with somebody leaving that area.[17] It is possible there were similar herringbone-style patterns in the blood pool under the deceased's head which could have been there before the deceased landed in his final position. The finding of a shoe impression with blood at the top of the stairs was only consistent with somebody having moved from the laundry area into the house. There were no markings beyond the stairs onto the timber floor.

[44] Emma-Jayne Caunt, a forensic scientist, gave evidence that the appellant's DNA profile was found on the sample taken from the deceased's left hand. This profile was only partial, meaning it could have come from the appellant or somebody else

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11 AB 177/35
12 AB 183/45.
13 AB 184/20.
14 AB 183/20.
15 AB 179/10.
16 AB 179/40.
17 AB 185/1.

with the profile, although the probability of that occurring was approximately one in 410 million.[18] Swab samples from a pair of shorts and a t-shirt matched the DNA profile of the deceased, with the probability that it came from someone unrelated to the deceased, being approximately one in 1,100,000 billion. A fabric sample from the t-shirt also revealed the DNA profile of the appellant, with the probability it was from somebody else being approximately one in 5,100 billion.[19] Samples from the knife, underside of the timber stool leg and laundry floor in various places adjacent to the washing machine and dryer were all consistent with the deceased's DNA profile, with the probability it came from somebody else being approximately one in 1,100,000 billion.

[45] A subsequent autopsy revealed the deceased had a total of 23 injuries, including four stab wounds to the right of the neck, with a depth of no more than three to three and-a-half centimetres. One of those injuries partially penetrated the windpipe and cut a small to medium-sized artery. There were no stab wounds to the chest or to the head. The knife was not located in the head. The deceased also had multiple injuries to the face region, which were consistent with having been caused by blows by the timber stool leg found near the deceased's body. The whole middle face was fractured away. The force required was described as moderate to severe. A blow by the timber stool leg could cause this injury if swung hard enough but it was more likely it was more than one blow.

[46] The deceased also had a laceration at the base of the back of his head, with trauma to the brain in that area. It was likely that injury was caused when the deceased's head was vertical and off the ground and as a consequence of a single blow of moderate to severe force. That injury could have been caused by a blow by the timber stool leg.

[47] Dr Buxton, a forensic pathologist, opined that the deceased was unlikely to have received less than eight blows, apart from the stab wounds. Death was caused by a combination of the blow to the back of the head and the wound piercing the windpipe. It was likely the injury to the base of the skull was the first significant injury. It is possible that the deceased was subsequently struck or stomped on on the front of his face and thereafter stabbed. The injuries were consistent with the deceased being subjected to an assault of some duration which left him dazed or semi-conscious, and then being struck across the back of the head with the stool leg before being stabbed in the throat and stomped on the face. It would however take several blows to the face to do the injury to the middle third of the face.

[48] A fingerprint examination of the deceased's residence on 23 April 2011 did not reveal any prints. A subsequent examination of a satchel of nine documents in Brisbane found the deceased's fingerprints on some of those documents. No fingerprint of Brownlow or the appellant was found on any of those documents. An examination of the spectacles found in the laundry, and of a red torch also located in the laundry revealed no fingerprints on either of them.

[49] Katie Brunton, a police officer, attended Brownlow's unit in Toowoomba on 23 April 2011, with another officer Christopher Proudlock. Brownlow was talking to a male person. Brownlow observed her approach and continued to talk to the male person but walked towards a wheelie bin. Brownlow placed what appeared to be a grey shopping bag into the bin. Mr Proudlock took the appellant's details and had a general

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18 AB 197/10.
19 AB 198/20.

conversation with him. He subsequently observed the grey coloured shopping bag in the bin. He secured the bin until the arrival of other police officers who recovered the plastic bag.

[50] Michael Mitchell, a scenes of crime officer, retrieved the plastic bag from the wheelie bin on the afternoon of 23 April 2011. It contained a pair of shorts and a shirt. He also examined a pair of size 8 gold-coloured lady's sandals at the Toowoomba police watch-house on 23 April 2011. Mr Mitchell later examined a pair of blue denim pants, size 87 regular fit shorts. The legs had been cut off. He noticed a smear and some faint spots on the front in the area of the fly and some faint spots on the back tag. A presumptive test for blood was positive.

[51] Melissa Bell, a scientific officer, examined the blue pants and a brown t-shirt for blood. She undertook a similar process with the set of gold sandals. Presumptive tests revealed a positive response for the presence of blood. Ms Bell was later asked to examine two pairs of three-quarter jeans and a red shirt, and a pair of jeans and shirt. None of those revealed any signs of blood.

[52] Andrew Self, a police officer spoke to Brownlow on 23 April 2011. He described her as being approximately 150-160 cms tall and weighing 80-85 kilograms. She did not have any apparent injuries.

[53] Cody Neville, who attended the Caltex service station at Childers just after midnight on 21 April 2011, recalled seeing a chubby lady with a red shirt walking from the roadway towards the fuel pumps. He did not see a car on the side of the road.

[54] Matthew Ward and Michael Parkinson each gave evidence of meeting two girls named Tarnika and Emma at a bus stop in Toowomba on the evening of 21 April 2011. They returned to an address in Toowoomba with those two girls around midnight. Ward thought he spent most of the night with Emma. Parkinson spent most of the time with Tarnika. There was no-one else at the house throughout the night. They left about 5 or 6 o'clock in the morning. Parkinson remembered looking at his phone when they left in the morning. It was about 6.00 am. They left at that time because people were expected back at the house. When they left the two girls remained at the house. There was only an inflatable mattress on the floor in the living or dining room and no other furniture. There were clothes all over the place.

[55] Tyson Paterson was a friend of the appellant's. Sometime in 2011, the appellant told him that Brownlow had offered him $50,000 "to murder his grandfather out of the will".[20] He asked the appellant if he was going to do it and the appellant said "probably not". This conversation occurred around the time Brownlow moved from Toowoomba to Bundaberg. Paterson said the conversation occurred in "March/May … it was mid-year, end of the year sort of thing".[21] The appellant asked him did he want to go halves in it. He said no.[22]

[56] Paterson said that around 7.30 or 8 o'clock on the morning of 22 April 2011, he returned from a camping trip and went to the appellant's residence. Brownlow, her daughter Tarnika and Emma Taylor were at the house with the appellant. Brownlow's car was parked outside. Whilst at the residence the appellant told him he had

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20 AB 221/40.
21 AB 228/35.
22 AB 229/5.

"murdered my grandfather".[23] The appellant said Brownlow and he had driven to Bundaberg and parked their car at the school. They went around to the house to see if anything was open and opened the back sliding door. Brownlow took her shoes off at the sliding door. The appellant went into the laundry and Brownlow went into the bathroom. The deceased walked downstairs and noticed the sliding door was open. As he shut it he saw the shoes on the ground.

[57] The appellant told Paterson he picked up a chair and smacked the deceased over the back of the head. He hit the deceased with it until it broke. The deceased grabbed the appellant by the testicles really hard as he was hitting him. The appellant said he could not recognise the deceased when he stood up and looked at him. The appellant and the deceased fell to the ground and the appellant kept punching the deceased in the jaw. The appellant said he could feel the deceased's jaw break as he was punching him. Brownlow then told the appellant to stab the deceased. The appellant told her to go and get a knife. Brownlow returned with a knife and the appellant repeatedly stabbed the deceased in the chest. The appellant said he had snapped the knife in his chest and left it in his head. The appellant said Brownlow and he left and stopped at Goomeri to fuel up before returning to Toowoomba. The appellant mentioned his hand was bruised. The appellant said there was a struggle but never said they were fighting together. The appellant showed him a mark on the top left-hand side of his chest. It was badly swollen and orangey red in colour.[24]

[58] The appellant also mentioned that when they arrived at the deceased's house the neighbour's light was on next door. Paterson said the appellant was dressed differently that day to when he had seen him the previous day. He described the appellant as looking completely different. He was shaking and puffing repeatedly on a cigarette. The appellant said that he had cut his jeans off because he had blood on them. He had thrown them out the window. He said he had seen the neighbour's lights still turned on as they returned to their car.

[59] Paterson agreed he was using cannabis "a fair bit" at that time. He denied it affected his memory about things. Paterson agreed he could have arrived at the appellant's residence earlier on 22 April. He may have told police that when he arrived Brownlow and Tarnika were asleep on the futon bed in the lounge-room. He said the appellant and Emma were in the kitchen. It is possible he had previously said they were in the bedroom. He agreed he may have said that he left by half past 7 that morning.

[60] The appellant gave a statement to police on 23 April 2011. The appellant said Brownlow got on "fine" with the deceased. She called him all the time. Until recently, Brownlow had been living with Tarnika in Bundaberg. She had moved to Toowoomba on 19 or 20 April 2011. About a week before Brownlow moved to Toowoomba she telephoned the appellant and said she was moving back to Toowoomba. She wanted his help to move but ended up getting a removal truck.

[61] The appellant said on the morning of 21 April 2011 Brownlow and Tarnika came to his residence in Toowoomba. He had a few mates there including Michael Jarvis, Tyson Paterson and Jake (he did not know his last name). Around lunch-time Brownlow drove the appellant, Tarnika and the appellant's girlfriend Emma Taylor to Brownlow's new house. They helped her unpack her gold Pulsar hatchback. Later that evening, they ate dinner together. The appellant and Emma went to bed around

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23 AB 223/10.

24 AB 233/25.

8.00 pm. They woke the next day, 22 April 2011, at about 9.00 am. Brownlow drove them back to the appellant's house. Around lunch-time she picked them up again in the Pulsar and drove them to her house. The appellant had a sleep and was awoken at around 4.00 pm by Brownlow. They had something to eat in the lounge-room. The appellant then went to bed with his girlfriend. When he awoke on 23 April 2011, he had a shower. He was outside having a cigarette when he heard the mower man. The police arrived some time later. The only times the appellant had been in Brownlow's gold Pulsar were those referred to in his statement. The appellant had not driven the car since Brownlow returned to Toowoomba.

[62] In an addendum statement provided later on 23 April 2011, the appellant said he was not sure what day his mother had moved into her house in Toowoomba. The first day he saw Brownlow since she returned to Toowoomba was 21 April 2011. He had not seen her for about a month and-a-half before then, although he would talk to her about once a week on the telephone. During a telephone conversation about a week prior Brownlow told him she was moving back to Toowoomba but did not say when she would move.

[63] On 21 April 2011, Brownlow texted him at around 9.00 am or 9.30 am to say she was coming around. Brownlow and Tarnika arrived about 9.30 am or 10.00 am. Around lunch-time Brownlow, Tarnika, the appellant and Emma Taylor went to Brownlow's new unit in Brownlow's gold Pulsar. Brownlow drove, with Tarnika in the front passenger seat. When they returned to Brownlow's unit that night Brownlow again drove the Pulsar. They ate at Brownlow's house. The appellant and Emma stayed overnight. When he went to bed, Brownlow and Tarnika were in the lounge-room. He went to bed at about 8.00 pm. Emma came in about five or 10 minutes later. He fell asleep almost straight away. He did not get up throughout the night.

[64] The appellant said later on 22 April 2011 Emma and Tarnika left the house. He noticed the car was still in the driveway. Emma and Tarnika arrived about 10 to 15 minutes later. At one point Brownlow said the deceased was not answering his telephone. She said something about not being able to get in touch with him for the last few days. He was not aware of anybody having any problems with the deceased. He was not aware of any arguments between the deceased and anyone in his family.

[65] Nigel Koy and Peter Robb, police officers, interviewed Tarnika Lovell on 30 May 2011. They had located Tarnika and Emma Taylor at the same place of work. They did not threaten Tarnika Lovell and did not see any police officer threaten her in any way or demonstrate any form of violence, such as slamming a door or slamming a desk.

[66] During that interview, Tarnika said Brownlow asked her to purchase some gloves before Brownlow and the appellant drove to Bundaberg on the night of 21 April 2011. Brownlow had a key to the back screen door of the deceased's house. The deceased used the back door as a front door. When they returned from Bundaberg they were "all quiet". The appellant had a big scratch on the side of his neck. Brownlow told Tarnika the deceased was dead. The appellant told her they had arrived at the deceased's house at about 2 o'clock in the morning. Brownlow used her key to open the sliding door. At that point, the appellant wanted to leave but Brownlow said no, "you're here to do it otherwise I'm going to kill you too".[25]

[67] The appellant said the deceased came downstairs and Brownlow ran into the shower. Brownlow screamed, "If you don't do it I'm going to do the exact same thing that I'm

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[25] AB 412/56.

going to do to [the deceased]".[26] The appellant then hit the deceased with the stool on the side of the face. The appellant started laying into the deceased. The deceased was trying to fight him off but the appellant was too strong. The appellant suffered the scratch to his neck when the deceased tried to grab him. Tarnika said the appellant had no choice but to kill the deceased. Brownlow had run and left him there.

[68] Tarnika said when the appellant realised the deceased was dead, Brownlow ran out and said, "Good boy" and "that's my son".[27] Brownlow then stepped in the blood. As Brownlow and the appellant were returning to Toowoomba the appellant took off his shorts as they had blood on them and threw them out the window. He also threw his shoes out the window. The appellant had brought a second pair with him. The appellant threw them out the window because he was told to do so by Brownlow. They were covered in blood. Tarnika had been told these things by the appellant when he dragged her into the bathroom. After the appellant told her what happened Tarnika "went off my nut to mum". Brownlow said don't call me a murderer, "it was your brother".[28]

[69] The appellant told Tarnika that he had "reefed" open the glassed door before going inside the deceased's house. The deceased got up with his torch. Brownlow went into the shower and the appellant hopped against the wall downstairs. The appellant wanted to get out the house but could not because the deceased was standing there with the torch. The appellant said he picked up something and later realised it was a stool that broke into two pieces. The appellant hit the deceased on the side of the face with a stool. He did not knock the deceased over so the appellant hit him a few more times. The appellant then started laying into him. The appellant then punched the deceased two more times and the deceased dropped to the ground. The appellant continued punching him.

[70] The appellant said the deceased was choking the appellant and grabbed his crotch. The deceased was hanging onto his penis. The appellant "just lost it". The appellant was trying to make the deceased let go of his crotch. The deceased had grabbed on with a good grip. The appellant was punching the deceased and kicking him constantly until he did not breathe and until there was blood everywhere. The appellant did not say where the blood was coming from, just that there was blood everywhere. The appellant stopped when the deceased let go. The appellant stood up and said at that point the deceased had to be dead because there was too much blood for him not to be dead. Brownlow came over and said, "You're a good boy, that's my son." The appellant and Brownlow then left, shutting the door. Brownlow just laughed like it was some big joke. Brownlow laughed the whole way home. She kept saying, "I'm going to be rich".[29]

[71] Tarnika said about two weeks before, when Brownlow and Tarnika were still living in Bundaberg, she had observed a "really big knife" under a tea-towel near the car keys. Tarnika hid the car keys but Brownlow said if she did not give her the car keys she was going to slit her throat "then and there". Brownlow asked Tarnika to go with her to the deceased's to kill him. She said, "Let's go in there and slit his throat." Tarnika refused to do so. Brownlow then called the appellant. Brownlow said if he did not do it she was going to kill Tarnika and the appellant at the exact same time.

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26 AB 413/4.
27 AB 429/13.
28 AB 453/5.
29 AB 469/20.

[72] Tarnika said Brownlow had first started talking about killing the deceased about a month before when they were still in Bundaberg. Brownlow said she was in the deceased's Will and would get the house and everything. She said she would give the children money. Tarnika said not to worry, he was going to die in his own time. Brownlow said she hated the deceased and wanted him dead. She was going to kill him so she would get her inheritance. Tarnika told Brownlow she was not doing it. Brownlow said she would slit her throat. Brownlow also physically threw things at her. Brownlow said if Tarnika shut her mouth she would give her $50,000. Tarnika described Brownlow as a manipulator. Tarnika told Emma about the offer of money to Tarnika but did not tell the police because she was scared of Brownlow's threats. Brownlow threatened her all the time. On about four occasions Brownlow made Tarnika steal money out of the deceased's wallet.

[73] Tarnika said on 23 April 2011 Brownlow wanted to go to the police station and say she had not heard from the deceased in four days. Brownlow was going to tell the police she had kept ringing the deceased, but that was not true. Brownlow had only rung him twice. Brownlow told Tarnika to lie to police. Tarnika did not want to lie to police but had no choice. Tarnika said, "Of course I'm going to do it 'cause she's my mum. And like if you piss her off then that's the, yeah that's it, you're done".[30] Brownlow told Tarnika everything to say to police. Brownlow said if Tarnika told the truth Brownlow would do something Tarnika would "really regret". Brownlow said she did not want to go to jail and Tarnika owed her so much as she had raised her for 15 years.

[74] Tarnika said Brownlow had shown her a newspaper article on 28 May 2011 which featured a photograph of Brownlow and the appellant at a service station in Goomeri. The appellant cried when he saw the article. He asked how Brownlow could do this to her children. Tarnika said Brownlow's reported responses in the article were "bullshit". Tarnika identified a photograph of a pair of cut-off jeans and a brown t-shirt as being the clothes the appellant was wearing when he left for Bundaberg on the evening of 21 April 2011. When he returned he was wearing different shorts that were lighter in colour. Brownlow and the appellant both had a shower. After the appellant had a shower he gave her the clothes in a plastic bag and told her to put it in the bin. She identified a photograph of the plastic bag in the bin as the plastic bag in question. Tarnika also identified the red top and jeans shown in the photograph as the clothes Brownlow was wearing when she left that evening. Brownlow washed them upon her return.

[75] Tarnika said after Brownlow and the appellant left for Bundaberg Emma and Tarnika went to McDonald's. Later they met two boys who returned back to their residence. Tarnika did not speak to her mother or the appellant that night. Brownlow had told her not to call her before she left for Bundaberg. Brownlow said they were going to have the deceased remove a dint in the side of Brownlow's car. She next saw Brownlow and the appellant at 8.30 or 9 o'clock the following morning. She saw a scratch on the appellant's neck. Brownlow's gold sandals had noticeable blood on them. The shoes were the same as Brownlow was wearing in the CCTV footage taken at the service station.

[76] Tarnika said Brownlow had told her when they were still living in Bundaberg she was going to break into the deceased's house and suffocate him, either by choking him or

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30 AB 432/55.

putting a pillow over his face. Brownlow then planned a way for Tarnika to kill the deceased. She told Tarnika to go in, stab him a couple of times and slit his throat. Another suggested plan was to drug the deceased using big depression pills or blood thinners that could be put in the deceased's drink. Tarnika told Brownlow she was not getting involved – "I'm not going to jail".[31] Brownlow kept calling her "a little slut, my daughter's a bitch".[32] Tarnika recalled Brownlow talking to Tammy Jordan about hating the deceased and wanting him dead. Brownlow made a number of postings on Facebook by Brownlow which contained untrue statements about going to Bundaberg to get the radiator fixed or the car door fixed and about the appellant losing his temper and fighting the deceased. Tarnika said Brownlow was money hungry.

[77] In evidence, Tarnika accepted she told police lies about where she was on the night of 21 April 2011 and the morning of 22 April 2011 when police interviewed her on 23 and 24 April 2011, and in the initial part of her interview on 30 May 2011. She told those lies because Brownlow asked her to lie about the whereabouts of Brownlow and the appellant on the night of Thursday, 21 April 2011. The appellant had never asked her to lie to anybody. Tarnika agreed she spent the night with Emma, Ward and Parkinson. The two men left early the following morning. Tarnika and Emma remained in the house until Brownlow and the appellant returned home around half past 8 or 9 o'clock in the morning. Tarnika did not see Tyson Paterson come to the residence that morning.

[78] Tarnika said she started to tell the truth in the interview on 30 May 2011 because a police officer started banging on the table and slamming doors and saying they knew the truth about Brownlow and the appellant. She felt scared and frightened as a result. By that stage she had been told things by the appellant, by Brownlow and by Emma. She was also under a great deal of stress. Tarnika said when the appellant arrived home on the morning of 22 April 2011 she saw a big scratch on the side of his neck. He was obviously not happy with Brownlow. He appeared upset. Initially he would not talk about the scratch on his neck. Later, the appellant told her that Brownlow and he arrived at the deceased's residence at about 2 o'clock in the morning. Brownlow's key opened the screen door but did not open the other door. The appellant told Brownlow at that point he wanted to go home, that he had changed his mind about the whole thing. Brownlow replied, "No, no, we're here to do it, we're going to do it."[33] Emma told Tarnika the appellant also was told by Brownlow that otherwise she was going to kill him too.

[79] Tarnika agreed that the appellant told her that the sliding door could not be opened with a key and he had ripped it open. They went inside the house and then a light came on so they ran back down the stairs. The appellant tried to hide in a dark area standing against a wall but the deceased had a torch and saw him. The appellant told her he did not want to do anything to the deceased and wanted to sneak out of the house. Brownlow had left him, and did not know where Brownlow had gone. He later found out she was hiding in the bathroom. Tarnika was later told by Emma that at that point Brownlow had screamed out, "If you don't do it, I'm going to do the exact same thing that I'm going to do to Rob."[34]

[80] Tarnika said the appellant told her the deceased grabbed him and they struggled together. The deceased grabbed the appellant around the neck and started choking

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31 AB 473/50.
32 AB 476/30.
33 AR 26/12.
34 AR 27/18.

him. That was when he obtained the scratch on his neck. The appellant never told her he had hit the deceased with a stool. Emma told her the appellant struck the deceased with the stool. The police had used the word "stool" during a break in the interview. She understood the difference between a stool and a chair was that a chair has a back.

[81] Tarnika said that when she told the police the appellant had hit the deceased for 15 minutes to half an hour, and later for five to 10 minutes, that was based on what she had been told by Emma. The appellant never told her how long he had been punching the deceased. The appellant did tell her that he punched the deceased quite a few times to try and get the deceased down on the ground and get him off him. The appellant also told her the deceased grabbed his testicles or crotch or penis and squeezed hard and did not let go. That was why the appellant kept punching him. The appellant said he wanted to knock the deceased out so he could get out of the house. The appellant told her there were no lights on in the house but he could see blood on the deceased. He kept punching until the deceased let go.

[82] Tarnika did not know whether the appellant and Brownlow left the house together or separately. The appellant told her that when he got back to the car he was by himself until Brownlow joined him. The appellant was upset and crying when he told Tarnika what happened to the deceased. At no stage did the appellant tell her he had killed the deceased. Emma told her the appellant had told Emma that he killed the deceased and that the deceased was trying to fight him off but the appellant was too strong. Most of what Tarnika told the police the appellant had told her was also told to police by Emma.

[83] Emma Taylor was also interviewed by police on 30 May 2011. She told police Brownlow had offered the appellant $50,000 if he murdered the deceased. The appellant did not want to do it at first but then went along with it. The appellant told her he was going to get $50,000 and that he had to kill somebody. She told him not to but the appellant said he was going to do it because they needed the money. Brownlow said the deceased had put her in his will. He was going to give her the house and she would sell the house. Emma said the appellant thought he had to do it because it was for his mother and she needed the money.

[84] Emma said Brownlow and the appellant drove to Bundaberg, leaving at 7 o'clock on the evening of 21 April 2011. They returned about 9 o'clock the next morning. At the deceased's house, they could not get through the front door so they went through a window. The light came on and they ran downstairs. Brownlow hid in the bathroom. The deceased saw the appellant. There was a fight. Brownlow and the appellant had decided to get gloves so they would not leave anything behind but when they returned from Bundaberg Tarnika saw blood on Brownlow's gold sandals. That was when Emma knew they had done it. Emma ran into the bathroom and cried and Brownlow kept saying she did not do anything but Emma knew she had done it. Brownlow was the one organising it. Brownlow was going to go there with a knife. Brownlow kept trying to talk Tarnika into doing it but Tarnika would not stab the deceased. Emma identified the CCTV footage taken from the service station as showing Brownlow and the appellant.

[85] Emma said two boys named Matt and Michael came over to the unit the night Brownlow and the appellant were away. Tarnika went into the bedroom with one of them. The two boys left the house at about 5 or 6 o'clock in the morning. She had not told the truth in an earlier statement when she said she had asked the boys to leave at 9 o'clock at night and that Brownlow and the appellant came back at 11.30 that

night. She also lied when she said Brownlow and the appellant had left in the afternoon to go to Bundaberg to get a radiator fixed in the car but they had to turn back.

[86] Emma knew when Brownlow and the appellant left that evening that they were going to Bundaberg "to do that thing with Rob".[35] They were driving Brownlow's gold Nissan Pulsar. She did not have any contact with Brownlow or the appellant after they left for Bundaberg, except for a telephone call from the appellant who said he was still driving. The call was only an hour or so after they had left Toowoomba. When the appellant arrived back from Bundaberg he did not seem very happy. Brownlow just did not care. Tarnika purchased gloves before Brownlow and the appellant left for Bundaberg. Brownlow told her to buy them. Tarnika thought they were doing some gardening and needed some gloves. That was the day they left for Bundaberg.

[87] Emma said that earlier on 21 April 2011 Brownlow and the appellant were talking in the car about what they were going to do to the deceased. Brownlow mentioned suffocating him. It would be smoother and would not leave any evidence.[36] The appellant did not want to do it. She thinks someone also mentioned stabbing the deceased. Brownlow did most of the talking but the appellant agreed to some of it. He agreed to suffocating and killing the deceased. They were going to suffocate him while the deceased was asleep by putting a pillow over his face. The appellant was going to put the pillow on his face. Brownlow suggested he sneak in the bedroom and put the pillow over his face while the deceased was asleep so that he would not wake up. The appellant just agreed to do it.

[88] Emma said Brownlow and the appellant were supposed to do it together but when the deceased confronted them they both ran away. Brownlow hid in the bathroom. The appellant hid somewhere else. The deceased saw the appellant and then "it all happened".[37] The appellant "freaked" because he thought Brownlow had left him there and ran at the deceased with a stool. He hit the deceased with the stool and then started beating the deceased. He was punching the deceased. The stool was just next to him when he grabbed it. After the appellant finished punching the deceased they left the house. Brownlow was in the bathroom and came out when all was quiet.

[89] Emma said the appellant was crying when he told her what happened. The appellant did not want to talk about it but Brownlow kept bringing it up. She kept saying she could not believe the deceased was dead. Brownlow started to blame the appellant, saying it was his fault. She started saying something like that on Facebook to others. Brownlow was now trying a court case to get the house when she found out she was not in the Will. Brownlow found out about two months after the deceased's death and was "devastated".[38] The appellant said it was just "all bullshit" now that they had not even got anything out of it. He did it for no reason and he wished he never did it.[39] Emma said the appellant never wanted to kill the deceased. Brownlow made him do it. Emma lied to police initially as she did not want the appellant to go to jail.

[90] Emma said Brownlow and the appellant were really worried when an article appeared in a newspaper in late May 2011 about them being at a service station in Goomeri the day the deceased was murdered. Afterwards they did not care. Brownlow said they

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35 AB 373/15.
36 AB 383/27.
37 AB 385/22.
38 AB 391/36.
39 AB 391/56.

were going to get the car fixed by the deceased, which Emma said was "a load of bullshit".[40] When Brownlow and the appellant left to travel to Bundaberg Brownlow was wearing a red t-shirt with blue three-quarter pants. The appellant was wearing jeans and a t-shirt. When the appellant returned his jeans were all cut. The appellant liked the jeans he cut off. He had put Emma's name on them.[41] The appellant said he cut the pants and threw them out the window on the way home because they were covered in blood. After Brownlow and the appellant returned from Bundaberg, Tarnika took Brownlow's clothes to the laundromat to wash them.

[91] In evidence, Emma agreed she had not told the appellant about Ward and Parkinson coming to the residence on the night he was in Bundaberg. She worried the appellant would think she had cheated on him. That was another motive for lying to police when she was initially interviewed by police on 23 April 2011. However, once she decided to tell the truth, she had done the best she could at that time. She knew the appellant was suffering from a form of depression at the time and had been getting medication. He was also smoking cannabis and was at a low point in his life. The only adult person in his life was his mother, who was pressuring him to kill the deceased. The appellant said he had to do it for his mother as she needed the money. Brownlow came up with various plans to kill the deceased. It was her idea to leave no evidence. The appellant was devastated when he told her what had happened in Bundaberg.

[92] Emma agreed the appellant told her they had a key but could not get the front door open. It is possible the appellant told her they gained access through a sliding door. The appellant did not tell her what happened after they left the house. The appellant told her the deceased was alive when he last saw him. He also told her Brownlow was alone in the house with the deceased after he left the house. Tarnika told her Brownlow had said the blood was on her shoes because Brownlow had stomped on the deceased's head.[42] Emma said Brownlow made up the story about going to Bundaberg to get the car fixed after the article on the front page of the newspaper. The appellant had nothing to do with that story. The appellant never said he was covered in blood. The appellant did say he had blood or blood spots on his clothes.

[93] Emma described Brownlow as a really manipulative person who kept pressuring the appellant, asking him to do it. The appellant kept saying no. Eventually he said yes, saying they needed the money. Emma agreed they were smoking cannabis every day. The appellant told her he thought the deceased was still alive when he left because the deceased was still moving a little bit when he ran out of the house.[43] The appellant did not know where Brownlow was when he ran out of the house. He thought Brownlow had left him. Brownlow came out of the house five or 10 minutes after the appellant.[44]

Appellant's submissions

[94] The appellant submits the prosecution specifically relied on Tarnika's evidence as to admissions the appellant made to her that he had killed the deceased. However, Tarnika expressly retracted those admissions in evidence. This retraction ought to have caused the jury to entertain a reasonable doubt about the reliability of her

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40 AB 393/1.
41 AB 142/10.
42 AB 131/20.
43 AB 139/33.
44 AB 140/10.

evidence and in particular, in relation to the appellant's admission he had killed the deceased. That admission was at odds with Emma's evidence that the appellant had told her the deceased was still alive when he left the house. The description given by the appellant to Emma was also not consistent with the appellant inflicting violence with an intention to kill or do grievous bodily harm. It was in reaction to being confronted by the deceased while separated from Brownlow. Tarnika's evidence that the appellant and Brownlow left the house together was also inconsistent with the evidence of Emma and Mr Gramm.

[95] The appellant submits Tarnika's admittedly false initial accounts to the police and her subsequent retraction of the alleged admissions made to her by the appellant meant a jury should treat her evidence with caution and only act upon it if satisfied beyond reasonable doubt that the admissions attributed to the appellant were in fact made by him and were true. Having regard to Tarnika's evidence that she was asked by Brownlow to lie to police, a reasonable jury ought to have entertained a reasonable doubt about the reliability of her evidence of the alleged admissions. A finding of guilt based on that evidence was unreasonable in the circumstances.

[96] The appellant submits the evidence of Paterson was also unreliable. His testimony as to the timing of his conversation with the appellant on the morning of 22 April 2011 was contradicted by Emma and Tarnika. Those contradictions ought to have caused a reasonable jury to entertain a reasonable doubt about the reliability of his evidence the appellant admitted to him on the morning of 22 April 2011 that he had killed the deceased. There was also evidence Paterson was using cannabis at the time, giving further reason to doubt the reliability of his evidence.

[97] The appellant submits that for the jury to be satisfied beyond reasonable doubt that the appellant caused the deceased's death with the requisite intention, the jury must be satisfied that the deceased was dead when the appellant left the house. However, the evidence as a whole did not exclude beyond reasonable doubt the possibility that the appellant inflicted violence on the deceased whilst retreating from the house and that the deceased was still alive when the appellant left the house. Mr Gramm's evidence strongly supported a finding that the appellant left the house before Brownlow. Those pieces of evidence contradicted the accuracy of the evidence of Tarnika and Paterson that the appellant had admitted killing the deceased and leaving the house with Brownlow.

[98] Once those admissions were found to be unreliable, the balance of the prosecution case could not exclude the reasonable possibility that the violence inflicted on the deceased by the appellant in the laundry was for the purposes of enabling his retreat from the house. That conclusion was supported by the appellant's spontaneous grabbing of a stool to strike the deceased in the context of a struggle, during which the deceased grabbed the appellant by the testicles. If the evidence of Emma was accepted, Brownlow was responsible for the use of the knife and for the stomping injuries. The presence of blood on Brownlow's sandals and the absence of evidence that the appellant used a knife supported the conclusion that the appellant's statements to Emma were true. The evidence did not establish that the death of the deceased was caused by the blow to the back of the head.

[99] The appellant submits the evidence of the forensic pathologist rendered it open to the jury to find the appellant materially contributed to the deceased's death but was incapable of establishing beyond reasonable doubt that, at the time of the infliction of

violence on the deceased by the appellant, the appellant had the requisite intention capable of constituting the offence of murder. The evidence as a whole was also incapable of establishing beyond reasonable doubt that Brownlow was in the laundry at the time of the alleged assault. Accordingly, a verdict of manslaughter should be substituted for the verdict of murder.

[100] The appellant submits the trial judge failed to give requisite warnings as to the unreliability of the evidence of Tarnika. It was incumbent upon the trial judge to warn the jury of that risk. Tarnika was so closely involved in the periphery of the crime that it was appropriate to give an accomplice warning. Tarnika was responsible for washing the clothes worn by the appellant and Brownlow, thereby bringing herself within the description of an accessory after the fact to the homicide. Tarnika also may have been motivated to falsely exculpate Brownlow. The retraction of significant parts of her testimony, in the context of previously giving false versions to police, also warranted a warning to the jury about the risk of the unreliability of her evidence. Significant prior inconsistent statements warrant such a warning. The combination of these factors required a direction in accordance with Direction 37.1 of the Benchbook.

[101] The appellant further submits that, as the task of assessing the reliability of Tarnika's evidence was difficult having regard to her previous lies and the retraction in her sworn testimony of critical assertions adverse to the appellant, it was incumbent upon the trial judge to formulate a specific direction referable to the terms of s 102 of the Evidence Act 1977 and Benchbook Directions 44.1 and 44.2. It was necessary for the trial judge to identify to the jury the significance of the change in story as it related to the jury's assessment of Tarnika's reliability. The pressure brought to bear on Tarnika by Brownlow to give a false story to police raised whether Tarnika had an incentive to conceal or misrepresent the facts. The appellant was disadvantaged by the trial judge's failure to specifically alert the jury to this issue. This disadvantage resulted in a miscarriage of justice despite such directions not being sought by trial counsel.

[102] Tarnika's retractions, to the effect that it was Emma not the appellant who had made statements to her about the appellant's involvement in the killing of the deceased, meant a direction in accordance with s 102 was necessary, to the effect that the jury could only act on Tarnika's evidence if they were satisfied beyond a reasonable doubt that the contents of the statement were true. The trial judge gave the jury no instruction as to the weight to be given to the prior inconsistent statements and, as a consequence, there had been a miscarriage of justice.

[103] The appellant submits the trial judge also had an obligation to give a direction in accordance with Direction 10A of the Benchbook regarding the use of Tarnika's s 93A statement. Tarnika was giving evidence in a different form to other witnesses. It was incumbent upon the trial judge to expressly disabuse the jury of the notion that her statement should be accorded greater weight and that no inference about the appellant's guilt should be drawn from the fact the evidence was received in that way. The failure to do so resulted in a miscarriage of justice, as that statement constituted a substantial part of the prosecution case.

[104] The appellant submits a specific direction as to the unreliability of Paterson's evidence was necessary, as Paterson was using cannabis at the time and the reliability of his recollection was firmly in issue, given the inconsistencies which emerged during cross-examination. The alleged admissions by the appellant to Paterson were also inconsistent with the findings of the forensic pathologist. It was incumbent on the trial judge to point out the particular features and emphasise the need for careful scrutiny of that evidence before it be treated as reliable.

[105] The appellant further submits the trial judge failed to direct the jury as to the proper use to be made of evidence of the appellant's assent to participate in a plan to kill the deceased by suffocation. Emma's s 93A statement contained evidence that the appellant expressed agreement with a plan by Brownlow to suffocate the deceased whilst he was asleep. When that plan did not proceed, Emma said the appellant told her he panicked and struck the deceased with a stool and began punching him. As the initial plan did not involve the infliction of violence by use of any weapon, it was incumbent upon the trial judge to direct the jury to exercise caution in too readily concluding that at the time of the physical altercation the appellant had an intention to kill the deceased, even though he may previously have agreed to a plan to kill the deceased in a different way. It was incumbent upon the trial judge to alert the jury to the risk of impermissibly attributing an intention to kill the deceased to the application of force to the deceased after the collapse of the earlier plan. The failure to do so resulted in a miscarriage of justice.

Respondent's submissions

[106] The respondent submits that each of the matters raised as the basis for a finding that the guilty verdict was unreasonable was advanced at trial and rejected by the jury. That rejection was properly within the province of the jury. Even if the jury had rejected the evidence of Tarnika, Emma and Paterson as being unreliable, there was sufficient evidence to convict the appellant of murder. The appellant gave police entirely fictitious accounts of his and Brownlow's movements on or about 21 April 2011. There was CCTV footage establishing they had travelled from Toowoomba to Bundaberg and back on the evening of 21 April 2011. There was forensic evidence of the appellant's presence in the deceased's house. The appellant cut his jeans and disposed of them because they were covered in blood. The deceased sustained significant physical injuries, including a blow to the back of the head consistent with being struck by the broken stool leg.

[107] The respondent submits the defence made a tactical decision to leave the evidence of Tarnika, Emma and Paterson in play in order to submit to the jury that they would have a reasonable doubt in relation to the entire prosecution case. Tarnika conceded she had told lies but subsequently said her evidence was truthful. It was in the defence case interest for her evidence before the jury to be accepted as truthful. The failure of defence counsel to seek directions of the type now sought as to Tarnika's unreliability was entirely consistent with a tactical decision that the defence wanted the jury to find Tarnika now a truthful and reliable witness, despite her admitted lies early in the police investigation. It was for the jury to accept or reject her evidence.

[108] Similarly, the jury were entitled to accept or reject Emma's evidence. Her evidence revealed Brownlow had discussed a number of methods of killing the deceased with the appellant, not just suffocation. Emma's statement that the appellant had told her the deceased was still alive when he left the house was given in response to a leading question. Her further answers revealed no such detail when not the subject of leading questions. In any event, the appellant's assertion that the deceased was still alive was not inconsistent with an intention to cause death or grievous bodily harm. There was evidence of motive, planning, participation, the infliction of a blow to the back of the deceased's head and extreme violence associated with the other injuries sustained in the attack on the deceased. The other evidence allowed the jury to reject an account whereby the appellant had left the residence well before Brownlow. The verdict of the jury was in accordance with the evidence and was not unreasonable.

[109] The respondent further submits there was good reason defence counsel did not seek directions in relation to the reliability of Tarnika and there was no obligation on the trial judge in the circumstances to give those directions. Such directions would only serve to highlight the unreliability of Tarnika generally, thereby reducing the force of the appellant's major defence, which was that Tarnika's evidence in the witness box was a truthful account. In any event, the trial judge focussed the jury's attention on the reliability of Tarnika in a meaningful and effective way and in accordance with the law.

[110] For the same reasons, there was no obligation on the trial judge to give the directions in respect of Paterson's evidence. Paterson denied his use of cannabis affected his memory. This denial was not challenged by the defence. The matters raised in relation to Paterson's reliability were squarely left before the jury. The directions given by the trial judge in relation to the assessment of the credit of witnesses were more than adequate in the circumstances of this case.

[111] The respondent submits there was no obligation on the trial judge to give a direction in relation to the use of evidence of the appellant's agreement to a plan to suffocate the deceased. The trial judge specifically directed the jury on intention, properly focussing on the state of the appellant's mind at the time he inflicted the violence upon the deceased. It was a question for the jury as to what intention was established beyond reasonable doubt. A direction of the kind sought would have unnecessarily constrained the jury's fact-finding function. There was no miscarriage of justice in the circumstances.

Discussion

Ground 1: Unreasonable verdict

[112] The appellant accepts that there was ample evidence to support a finding that he was guilty of manslaughter. At issue is whether the jury's finding of guilty of murder was an unreasonable verdict. In considering such a ground of appeal, the question for this Court is whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that at the time the appellant killed the deceased he had the intention to kill the deceased or do him grievous bodily harm.

[113] In determining that question this Court must make an independent assessment of the whole of the evidence, both as to its quality and its sufficiency.[45] In undertaking that assessment, this Court must not disregard or discount that the jury is entrusted with the primary responsibility of determining guilt or innocence or that the jury had the benefit of having seen and heard the witnesses. Full regard is to be had to those considerations.[46]

[114] The applicable approach, having regard to these considerations, was enunciated in *M v The Queen*[47]:

> "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

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45 *Morris v The Queen* (1987) 163 CLR 454 at 473 per Deane, Toohey & Gaudron JJ; *SKA v The Queen* (2011) 243 CLR 400 at 406 [14].

46 *M v The Queen* (1994) 181 CLR 487 at 493.

47 *M v The Queen* (1994) 181 CLR 487 at 494.

> 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 leave 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." (Citations omitted)

[115] Whilst the prosecution case against the appellant was presented in the alternative, a central feature for a finding of the appellant's guilt to the offence of murder was that Brownlow had arranged for the appellant and her to travel to Bundaberg on the evening of 21 April 2011 for the purpose of killing the deceased. The motive for that killing was that Brownlow stood to inherit the bulk of the deceased's estate. Lovell was also involved for financial gain. Brownlow promised him $50,000 if he assisted her in the killing of the deceased.

[116] The prosecution case against the appellant relied on both direct evidence and circumstantial evidence. The direct evidence included admissions made by the appellant at trial that he had travelled with Brownlow to Bundaberg on the night of 21 April 2011, returning to Toowoomba on the morning of 22 April 2011. That trip included stopping at service stations in Toowoomba, Childers, East Bundaberg and Goomeri. It was admitted that CCTV footage at the service stations in Toowoomba and Goomeri recorded the appellant purchasing items but wearing different pants.

[117] The direct evidence also included forensic evidence which was consistent with the appellant being present in the deceased's residence at the time of a struggle with the deceased at or in the vicinity of the location of the deceased's body. The forensic evidence established there had been a violent struggle between the deceased and his assailant and that at least two weapons were used in the course of that struggle; a wooden stool leg and a knife. Both weapons were found on or near the deceased's body. The prosecution case also relied on medical evidence which established that the deceased had been subject to a sustained assault which inflicted two potentially fatal injuries, one being a blow to the back of the head consistent with being made by the wooden stool leg, and the other being a knife injury to the neck and windpipe consistent with being made by the knife located on the deceased's body.

[118] In addition to that evidence, the prosecution relied on lies told by the appellant as to his location on the night of 21 April 2011, which the prosecution contended were consistent with a consciousness of guilt. There was also surveillance evidence of comments made by the appellant consistent with his guilt. There was also the fact the deceased had cut off the legs of his favoured jeans and discarded them on the return trip from Bundaberg.

[119] Finally, the prosecution relied on direct admissions made by the appellant to the effect he had deliberately killed the deceased. Those admissions were made to his sister Tarnika, his girlfriend Emma and his friend Paterson. The admissions to Tarnika were that the appellant had killed the deceased, that the deceased was trying to fight him off and the appellant had hit the deceased over the side of the face with a stool

which broke, and that he punched him until he realised the deceased was dead. The admissions to Emma were that the appellant agreed to kill the deceased for money, as they needed the money, and that when he was confronted by the deceased he hit the deceased with a stool and then began punching him. The admissions to Paterson were that he had murdered the deceased, having hit him over the head with a chair and having kept hitting him until the chair broke. The appellant also admitted to punching the deceased and then stabbing the deceased repeatedly, breaking the knife in his chest before leaving it in his head.

[120] The admissions to Tarnika were the subject of retraction by her at the trial. She gave evidence that the appellant had not made those admissions. She had been told those statements by Emma. Tarnika said the appellant told her he had punched the deceased in order to get the deceased to release his genitalia, after the deceased had confronted him in the downstairs area of the deceased's house. The appellant wanted to knock the deceased out so that he could escape the house. Tarnika also said the appellant told her he went to the car first and was later joined by Brownlow.

[121] Emma also altered her version of events in evidence at trial. The appellant had told her he panicked and hit the deceased with the stool and started punching him after he thought Brownlow had left him. Further, the deceased was still alive when the appellant left the house. Brownlow remained in the house and joined him about five to 10 minutes later. Paterson largely maintained his version of events but other evidence called into question the reliability of his account. First, the appellant and Brownlow did not return to the residence until later than the time Paterson alleged the appellant made his admissions. Second, the medical evidence was inconsistent with any suggestion of the deceased being stabbed in the head or of the knife breaking in his chest. Further, Paterson was a user of cannabis at the time the admissions were made to him by the appellant.

[122] The retractions by Tarnika, and the altered version given by Emma were matters which called into question their reliability. Further, challenges to the accuracy of Paterson's evidence in relation to the timing of his conversation with the appellant, the inconsistency between the appellant's account to Paterson and the medical evidence, and Paterson's continued use of marijuana at or around that time, also called into question the reliability of Paterson's evidence. But each of those matters was the subject of detailed submissions by both the prosecution and defence counsel.

[123] Further, the trial judge specifically directed the jury as to the need for the jury to be satisfied that the appellant had made the admissions to Tarnika, Emma and Paterson. The trial judge specifically directed the jury that if they were not so satisfied they could not use the evidence as admissions against the appellant. Importantly, these directions occurred before and after the trial judge undertook a thorough review the evidence of Tarnika, Emma and Paterson on these matters.

[124] The initial direction was specific:[48]

> "In virtually every instance, Emma Taylor and Tarnika Lovell agreed with propositions that the crucial parts of these accounts did not come from the defendant, despite the fact that they appeared to tell the police that they did come from the defendant. If you're of the view that these accounts did not come from the defendant, then they wouldn't be evidence against him, because they're not admissions made by him."

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48 AB 309/22.

[125] The latter direction was equally specific:[49]

> "The defence contend that to the extent that the conversations with Taylor and Lovell consisted of admissions that the defendant killed the deceased, they were retracted by both witnesses in the course of their cross-examinations. Paterson rejected the suggestion that the defendant had not told him the things he related to you. It's a matter for you to decide what effect the cross-examinations had. There are two things to consider about these statements that the prosecution relies on as indicating guilt. This is an important part of the case, and please listen carefully. One is, were they made, and the second thing is, were they true and accurate. It's up to you to decide whether you are satisfied that those things said by the defendant which would tend to indicate that he is guilty of the offence were true, because if you're not satisfied, you cannot rely on them as going to prove his guilt."

[126] The directions given by the trial judge amply and properly left for the consideration of the jury the reliability of the evidence given by Tarnika, Emma and Paterson. Those directions properly directed them as to the need to be satisfied that the appellant made the admissions and that they were true. It was ultimately a question for the jury as to whether they accepted those witnesses as reliable and truthful witnesses.

[127] Further, whilst Emma gave evidence at trial that the appellant told her the deceased was still alive when he left the house and that Brownlow remained in the house after he had left it, the jury was entitled to be satisfied beyond reasonable doubt that the appellant killed the deceased having regard to his admissions to Emma as to the infliction of sustained violence on the deceased until the deceased was no longer moving and was surrounded in blood. The forensic evidence supported the accuracy of those admissions.

[128] The medical evidence also allowed the jury to be satisfied beyond reasonable doubt that the appellant inflicted the blow to the back of the deceased's head and that that blow was causative of the deceased's death, even if Brownlow had remained after the appellant left the residence and had stomped on the deceased and stabbed him. Dr Burton opined it was a combination of the blow to the back of the head and the knife wound to the wind pipe which caused the deceased's death.

[129] Once the jury reached that conclusion, it was open to the jury to be satisfied beyond reasonable doubt that the appellant intended to kill or cause grievous bodily harm to the deceased when he inflicted that injury. The appellant had agreed to travel a great distance to Bundaberg to kill the deceased in return for a substantial financial sum. Emma never retracted her evidence that the appellant told her he was going to kill the deceased as they needed the money.

[130] In any event, it was open to the jury to convict the appellant of the offence of murder even if they rejected each of Tarnika, Emma and Paterson as unreliable. There was compelling direct evidence of the appellant's involvement in the infliction of brutal and repeated acts of violence on the deceased, in circumstances where an intention to kill or do grievous bodily harm to the deceased was the overwhelming inference. The appellant had agreed to kill the deceased for financial reward. He travelled to Bundaberg under cover of night. He lied as to his whereabouts thereafter.

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[49] AB 317/14.

[131] A consideration of the evidence as a whole amply supports the conclusion that the jury, properly instructed, could find the appellant guilty of the offence of murder. The jury's verdict was not unreasonable. This ground fails.

Ground 2

[132] The appellant submits that it was incumbent upon the trial judge to warn the jury of the risk that Tarnika's evidence was unreliable and that the jury should scrutinise her evidence with great care before acting upon it for two reasons. First, Tarnika was so close to the periphery of the crime as to warrant an accomplice warning. Second, she had significantly retracted significant parts of her testimony in circumstances where she had previously given false versions to police. The direction that is sought, in accordance with Direction 37.1 of the Benchbook, was not sought at trial.

[133] Whilst Tarnika gave evidence that she was prevailed upon by her mother to participate in a plan to kill the deceased, she immediately denounced such a plan. There is no evidence to suggest she at any stage was prepared to participate in such a plan. Further, there was no evidence that Tarnika washed clothes worn by the appellant and Brownlow in order to assist the appellant or Brownlow from being detected by police. Against that background, there is no basis to properly find that Tarnika's involvement was so close to the periphery of the crime as to justify a warning in accordance with Direction 37.1 of the Benchbook. There was no obligation of the trial judge to so warn the jury.

[134] In respect of the second basis for such a warning, there is no doubt that Tarnika undertook significant retractions in evidence from parts of her account given in the s 93A statement. There is also no doubt that she initially lied to police. However, each of those matters were the subject of address by the defence and the Crown. The jury was also specifically directed by the trial judge as to the relevance of those retractions and of the need for the jury to be satisfied that the alleged admissions were made and were true and accurate.

[135] Whilst significant prior inconsistent statements may sometimes justify the giving of a specific warning by a trial judge as to the unreliability of a witness, there was a compelling reason for the trial judge not to give such a warning in the present case. It was a central part of the defence case that Tarnika's evidence at the trial, whereby she retracted the alleged admissions made by the appellant, was truthful, accurate and reliable. It would have been of significant disadvantage to the defence case had the trial judge given such a direction. For good reason, experienced defence counsel sought no direction from the trial judge as to the unreliability of Tarnika's evidence. Against that background, there was no obligation on the trial judge to do so and no miscarriage of justice has resulted from the failure to give such a direction.

Ground 3

[136] The appellant submits the trial judge was obliged to direct the jury in accordance with Directions 44.1 and 44.2 of the Benchbook having regard to the retractions made by Tarnika in her evidence and the inconsistencies between her evidence and s 93A statement. Again, no such direction was sought by experienced defence counsel.

[137] Whilst significant prior inconsistent statements will, in appropriate circumstances, give rise to an obligation on a trial judge to give a specific direction in relation to

those prior inconsistent statements and any reasons for the inconsistencies, no such obligation arose in the circumstances of this case. On the contrary, for the trial judge to have undertaken such a task is very likely to have adversely impacted upon the defence case at trial to a very significant extent. It was a central feature of the defence case that Tarnika's evidence at trial was truthful, accurate and reliable. Importantly, the trial judge directed the jury as to the differences between the prior statement of Tarnika and her evidence in Court and as to the need to be satisfied beyond reasonable doubt that the admissions said to have been made by the appellant in her earlier statement were in fact made by the appellant and that they were true.

[138] This is not an instance where it can be said that the need for the direction was overlooked or that the circumstances of the case overall imposed an obligation on the trial judge to give the direction notwithstanding any request by defence counsel. There were good forensic reasons for defence counsel not to seek such a direction. No miscarriage of justice resulted from the fact that such directions were not given by the trial judge.

Ground 4

[139] The appellant submits the trial judge ought to have directed the jury in accordance with Direction 10A.1 one of the Benchbook, in relation to Tarnika's evidence admitted under s 93A of the *Evidence Act* 1977. That direction serves to inform the jury that the fact that the evidence is given in a different way to other witnesses is routine practice and that they are not to place undue weight on that evidence.

[140] The need for such a direction must be viewed in context. The trial judge had specifically given a direction in relation to s 21AW of the *Evidence Act* 1977 regarding evidence admitted under s 21AK of that Act.[50] That direction, whilst given in accordance with s 21AW, appraised the jury of the central features the subject of any direction under 10A of the Benchbook, namely, that it was routine practice for evidence to be given in this way and that such evidence was not to be afforded undue weight over other evidence. There was no need for the trial judge to give a similar direction in relation to Tarnika's s 93A statement. There was no miscarriage of justice as a consequence of the failure to give any such direction.

Ground 5

[141] The appellant submits the trial judge ought to have directed the jury in accordance with Direction 37.1 of the Benchbook in relation to the unreliability of Paterson's evidence, having regard to his admission that he was using cannabis at the time of the alleged offences and the fact that the admissions allegedly made to Paterson by the appellant were inconsistent with the other evidence (including the evidence of the forensic pathologist).

[142] Paterson's evidence as to the use of cannabis was accompanied by a specific assertion that his reliability was not affected by that use. That assertion was not the subject of challenge by experienced defence counsel. There was in those circumstances no need for a specific warning as to unreliability on the basis of the use of that illicit substance.

[143] As to the remaining matters, they were the subject of address by counsel and specific directions by the trial judge as to the need for the jury to be satisfied that the

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[50] AB 249/15.

admissions were in fact made and that they were truthful before the jury could rely and act upon them. A direction in accordance with 37.1 of the Benchbook would have added nothing to the factors to be considered by the jury in undertaking their analysis of whether they accepted Paterson's evidence as truthful and reliable. There was no obligation on the trial judge in those circumstances, particularly having regard to the fact that experienced defence counsel sought no such direction, to direct the jury in accordance with Direction 37.1 of the Benchbook. The failure to do so has not resulted in any miscarriage of justice.

Ground 6

[144] The appellant submits the trial judge ought to have directed the jury as to the use to be made of the evidence of the appellant's assent to participate in a plan to kill the deceased by suffocation. That assent arose out of evidence contained in Emma's s 93A statement. Again, such direction was not sought by experienced defence counsel.

[145] The trial judge specifically referred to the fact that the plan to suffocate the deceased came to a sudden end when the appellant was confronted by the deceased and that there was no plan B. This reference was made when canvassing defence submissions that the jury could not be satisfied beyond reasonable doubt that the appellant had the requisite intention at the time he struck the deceased with the wooden stool leg and with his fists. That reference was sufficient in the circumstances of this case as a consideration of Emma's evidence was that the appellant, having been counselled by Emma not to participate in killing the deceased, advised Emma he was going to do it because they needed the money. Against that background, it was not incumbent upon the trial judge to direct the jury as to the use to be made of Emma's evidence as to the appellant's assent to participate in a plan to kill the deceased by suffocation. No miscarriage of justice arose as a consequence of there being no such direction given to the jury at trial.

Conclusion

[146] There was ample evidence upon which the jury could convict the appellant of murder. Such a conviction did not need to rely upon an acceptance of the truthfulness and reliability of the evidence of Tarnika, Emma or Paterson. The verdict of guilty of murder was not unreasonable.

[147] There was no obligation on the trial judge to give any of the directions sought by the appellant in Grounds 2 to 6 inclusive. No miscarriage of justice resulted in the failure to give any or all of those directions.

[148] The appeal should be dismissed.