SUPREME COURT OF QUEENSLAND

CITATION:	*R v Craig* [2016] QCA 166
PARTIES:	**R** **v** **CRAIG, Ronald Michael** (appellant)
FILE NO/S:	CA No 86 of 2014 SC No 385 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 24 April 2014
DELIVERED ON:	21 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2016
JUDGES:	Fraser and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was convicted of murder, having pleaded guilty to manslaughter – where it is alleged that the appellant was not adequately advised at trial as to whether he would be cross-examined on his criminal history which included a prior conviction for unlawful killing in the Northern Territory – where it is alleged that the legal advice given, namely, that if the appellant testified in order to advance defences of self-defence or provocation, it was likely that he would be cross-examined on his criminal history, was incorrect – where it is alleged that the way the advice was conveyed effectively deprived him of the option of giving evidence – whether there was error in defence counsel's advice – whether, if error exists, a substantial miscarriage of justice was occasioned CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION– EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of murder, having pleaded guilty to manslaughter – where it is alleged that the learned trial judge ought to have directed the jury with respect to a possibility that some of the 40 identifiable injuries to the deceased were not recent and could not be used as evidence of intent – where, separately, it is alleged that the

	learned trial judge erred in failing to properly direct the jury concerning the alleged act of domestic violence committed by the appellant on the deceased months prior to the killing and in collectively referring to that and stealing from the deceased's bank account via an ATM as 'discreditable conduct'– where, with respect to this alleged error, it is submitted that the learned trial judge failed to give the proper propensity direction required for the evidence of the SMS messages between the appellant and the deceased admitted under s 132B of the *Evidence Act* 1977 (Qld) – where, separately, it is alleged that the jury were left to consider the defence of provocation 'in a vacuum', that is, the directions with respect to provocation were unbalanced, not referring to relevant points in favour of the appellant – whether the directions given with respect to the recent appearance of the deceased's injuries and to domestic violence were sufficient – whether the directions referring to 'discreditable conduct' were deficient – whether there was incompleteness in the directions on provocation
	Criminal Code (Qld), s 668E *Evidence Act* 1977 (Qld), s 132B
	Nudd v The Queen (2006) 80 ALJR 614; (2006) 162 A Crim R 301; [2006] HCA 9, cited *R v Reed* [2014] QCA 207, cited *R v Shoesmith* [2011] QCA 352, cited *Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12, considered *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, cited
COUNSEL:	E P Mac Giolla Ri with K M Hillard for the appellant (pro bono) M Cowen QC for the respondent
SOLICITORS:	Fisher Dore Lawyers for the appellant (pro bono) Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with those reasons and with the order proposed by his Honour.

[2] **GOTTERSON JA:** The appellant, Ronald Michael Craig, was tried over three days in March 2014 in the Supreme Court at Brisbane, on a count of murder. He was charged with having murdered Kylie Anne Hitchen at Esk on or about 21 January 2011. At the commencement of the trial, he pleaded guilty before the jury to the lesser charge of manslaughter of Ms Hitchen. The plea to the lesser charge was not accepted by the prosecutor.

[3] A guilty verdict was returned by the jury. On 24 April 2014, a conviction was recorded and the appellant was sentenced to life imprisonment. No order was made as to a parole eligibility date. A declaration was made that 1,186 days of pre-sentence custody be deemed to be time served under the sentence.

[4] The appellant filed a notice of appeal against his conviction on 11 April 2014.[1]

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1 AB232-233.

The deceased's injuries and admissions at trial

[5] Extensive admissions were made by the appellant at his trial pursuant to s 644 of the *Criminal Code* (Qld).[2] They consisted of the following admissions concerning the deceased, her relationship with the appellant, her communications with others on 20 January 2011 and events, including those in which the appellant participated, that occurred on 21 January 2011:

> "1. Kylie Anne Hitchen was born on 6 July 1975.
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> 2. In early to mid-2009, Kylie Hitchen entered into a relationship with the defendant.
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> 3. Some months later Kylie Hitchen and the defendant began living together. Initially she and the defendant lived in a caravan and travelled in rural Queensland, including living in their caravan at Esk. Then in mid 2010, they moved into a rented house at 60 Creek St, Esk.
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> 4. Both Kylie Hitchen and the defendant drank alcohol heavily on occasions while they were in a relationship together.
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> 5. On or about the 21st of April 2010 at St George, Kylie Hitchen suffered a fractured right cheekbone.
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> 6. On 3 May 2010, Kylie Hitchen made a formal complaint to police alleging that the defendant had caused this injury to her. Kylie Hitchen stated that the injury occurred when she and the defendant were sleeping together in a caravan they resided in together at the time. She described how the injury was caused in the following way: 'In the middle of the night I woke up and climbed over him to get out to go to the toilet. He woke up and said, 'What's your problem bitch?' and then just punched me twice in the right side of the face and once on the left side.'
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> 7. On 3 May 2010, the defendant was informed of the allegation by police and he stated to police that the injury had been caused 'when we were play wrestling.'
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> 8. The defendant was charged with causing the injury to Kylie Hitchen and he was granted bail to await trial.
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> 9. An order was made under the Domestic Violence legislation and it was a condition of the defendant's grant of bail that the defendant not have any contact with Kylie Hitchen. Both orders were made at the request of the Queensland Police.
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> 10. The defendant did continue to have contact with Kylie Hitchen, however text messages from Kylie Hitchen to the defendant in January 2011, which were recovered from her mobile phone and which will be tendered as evidence in the trial, indicate that Kylie Hitchen and the defendant continued to contact each other and spend time together despite the Bail and Domestic Violence orders.
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> 11. The defendant was charged with an offence of breaching those orders by having contact with Kylie Hitchen.

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2 Exhibit 1; AB192-194.

12. On 17 or 18 May 2010, Kylie Hitchen attended the St George police station and requested the charge against the defendant relating to the injury suffered by Kylie Hitchen on 21 April 2010 be withdrawn. Several months later, in mid to late 2010, Kylie Hitchen attended the Gatton Police station and again requested that the charge against the defendant be withdrawn. The charge was not discontinued by police.

13. The reference by the defendant in text messages to Kylie Hitchen on 9 and 10 January 2011 of 'R those police still lurking' and 'R the police still watching ur place?' are a reference to the prior police involvement in enforcing the non-contact order under his grant of bail and the Domestic Violence legislation.

14. As at January 2011, the defendant's grant of bail included a condition that the defendant report to the Mango Hill North Lakes Police station. The reference by the defendant in a text message to Kylie Hitchen to 'signing book' is a reference to the defendant having to sign the 'bail book' when he reported to police as required by his bail.

15. On 17 January 2011, Kylie Hitchen and the defendant completed and signed documentation to obtain a six month tenancy for a house in Esk which was to commence on 22 January 2011.

16. On 20 January 2011, Kylie Hitchen worked at the Esk Bakery until approximately 4.30pm.

17. At approximately 6.30pm on 20 January 2011, Kylie Hitchen spoke with her brother Edward Hitchen for five minutes in relation to his providing a trailer to assist Kylie Hitchen and the defendant to move their property from the rented house at 60 Creek St, Esk to another address at Esk. Edward Hitchen heard the defendant's voice thanking him for his offer of assistance.

18. At 9.34 and 9.35pm on 20 January 2011 Kylie Hitchen's mobile phone called the number of Gary Norman's mobile phone. The calls were missed calls and no messages were left. Gary Norman is Kylie Hitchen's ex de facto partner, with whom Kylie Hitchen's 15 year old daughter [M] lived.

19. At 3.23am on 21 January 2011 an attempt was made to withdraw $1000 using Kylie Hitchen's key card at the ANZ ATM at Kilcoy. The attempt was unsuccessful because the incorrect PIN was used.

20. At 3.24am on 21 January 2011, the correct PIN was used and $1000 was withdrawn from Kylie Hitchen's bank account at the ANZ ATM at Kilcoy. CCTV footage of the defendant making this withdrawal will be tendered as evidence in the trial.

21. At approximately 3.54am on 21 January 2011, the defendant attended the BP service station at Wamuran and purchased fuel. CCTV footage of the defendant at the BP Wamuran will be tendered as evidence in the trial.

22. At 7.53am on 21 January Kylie Hitchen's keycard was used by the defendant to withdraw $300 from Kylie Hitchen's ANZ bank account at an ATM at Kallangur.

23. At 11.38am on 21 January 2011, CCTV footage from the Brunswick Hotel at Brunswick Heads shows the defendant present in the bar of the hotel.

24. The defendant spent the night of 21/22 January 2011 at the Brunswick Hotel at Brunswick Heads. He registered using the name of Jason Hetherington. The registration form will be tendered as evidence in the trial."[3]

[6] The appellant presented at the Brunswick Heads police station on the morning of 22 January 2011. He disclosed that he had cut the deceased's neck with a kitchen knife. Police attended at the Creek Street Esk address indicated by the appellant and there discovered the deceased's body. She had died from knife wounds inflicted at her throat. More than one blow had been struck. Her left and right carotid arteries were wholly severed as was her left jugular vein. The incisions to her neck penetrated to the vertebrae. Various other injuries were observed, notably two stab-type incised wounds to the front right shoulder.

[7] Further admissions were made at trial. They included that the appellant's DNA was discovered on the fingernails of the deceased's right and left hands,[4] and that his finger prints were found on a stubby bottle located in the kitchen.

The record of interview

[8] The appellant did not give evidence at trial. He had been interviewed by Detective Senior Constable Tutt, a New South Wales police officer based at Byron Bay Detectives, and Senior Constable Hayward, also a New South Wales police officer, based at Bangalow Police. The interview had been recorded. The recording was played to the jury in the prosecution case on the second day of the trial.[5] Copies of a transcript of the recording[6] were supplied to the jury to assist in listening to it.

[9] During the interview, the appellant gave the following account of the circumstances in which the deceased was injured:

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CRAIG:	I just, we were drunk, and sh-, Kylie went to the toilet, and she was forcing me to scull beer and keep up with her, and I didn't wanna drink, I just wanted us to go to sleep, you know, and give her a cuddle and go to bed. And she just wanted to keep drinkin and drinkin. And I said, you gotta pull up, you know, she, she had about fifteen beers or whatever, and I said you can't just keep drinkin like this all the time. And we had a big fight over it, and I went outside to cool down, I was lookin at the stars and when I went back in

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3 AB192-193.

4 The possibility that it might have been the DNA of someone else was infinitely small.

5 AB111; Tr2-23 l6. The DVD recording of the interview, Exhibit 8, was tendered during DSC Tutt's evidence-in-chief: AB53; Tr1-34 l44.

6 Exhibit "MFID"; AB215-231.

	five minutes later, she accused me of bein on the phone to some other sheila. I was just sittin there, she's always thinkin that I was havin another, another couple of other sheilas on the go, and I never did. But she's always accused me of cheatin on her, and I never did. And she wouldn't let it go, every night, every time she gets drunk, she tells me [i]'m a cheatin bastard, I never cheated on her! This went on for fuckin, eighteen months, I never cheated on her! Then when I said I don't wanna drink anymore, she got real angry, and she - Kylie grabbed the knife first and I took the knife off her and she cut her, in the process of that she cut her hand. And then blood went everywhere, and then it just, it, it exploded, you know? She just lost the plot, and she's throwin stuff, and broken tv's, blood everywhere, and in the heat of the moment, I just fuckin cut her on the neck, and it was just, there was no thought, it['s] just, drunkenness, you know?
TUTT:	Ok.
CRAIG:	And it wasn't premeditated, it was just somethin that happened, and if she didn't pick the knife up in the first place, it wouldn't have happened.
TUTT:	Ok. Are you able to tell me how you cut her?
CRAIG:	Oh, I disarmed her, and in the process the knife come around on her fingers and then it bled pretty seriously and obviously needed stitches. Then as soon as the blood went everywhere, she just lost it and started attackin me again, throwin stuff at me and I just tackled her into the corner, and she's just goin off and losin it. All I wanted to do was fuckin keep her quiet and fuckin calm down and clean her, clean her hand up, and get it seen to.
TUTT:	And so, then what's happened?
CRAIG:	UI, it was just temporarily, you know, temporarily fuckin in the heat of the moment fuckin drunk insanity, you know? I just fuckin cut her fuckin throat, ya know? I'd no, no intentions of doin it, it's just somethin that just fuckin happened, ya know. We really wanted to make this fuckin relationship work, and she just wouldn't get off me back about rootin some other sheila and I never did.
TUTT:	Ok.

CRAIG:	And she just kept kickin me down, makin me feel like shit, every night she'd drank she made me feel like shit. And this went on for fuckin eighteen months,
TUTT:	Ok.
CRAIG:	and I put up with her, and I loved her. She just wouldn't fuckin let it go, she wouldn't let it go!
HAYWARD:	Alright, calm down.
TUTT:	Ok. What's what ...
CRAIG:	Fuck!
TUTT:	What happened after you cut her?
CRAIG:	I sat there and fuckin cried for a fuckin hour.
TUTT:	Yep.
CRAIG:	I couldn't believe what I saw on the kitchen floor, it was just, it's me fuckin girlfriend!
HAYWARD:	Mate, when you said you cut her throat, can you say how you did that?
CRAIG:	UI
HAYWARD:	I know that sounds like a silly question.
CRAIG:	UI it was a kitchen knife, I just, cut it like I was cuttin a loaf of bread, you know? I didn't even think it was her at the time, honest to god!
TUTT:	Did um,
CRAIG:	Ya know.
TUTT:	Did she pass away soon after?
CRAIG:	Yeah, a couple of minutes I'd say, less, probably, I heard, heard the gurgling sound, you know, from her throat.

"[7]

[10] Later, the appellant said:

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CRAIG:	Just a standard, everyday fuckin kitchen knife, and, I just, it was on the bench, in the dryin up rack and ... UI Ya know, Kylie fuckin produced it first, I, I disarmed her, but she didn't fuckin do it. UI

[7] AB219-221 ll110-187.

HAYWARD:	Well, when you say that, which hand did she have it in?
CRAIG:	Would have been her right hand, cause she's right handed.
HAYWARD:	And then you took it off her, and somehow she cut her hand, how did that work?
CRAIG:	I dunno. Just she was movin it, hands were movin everywhere, and, and I grabbed the back of the knife n it spun around and hit her fingers.
TUTT:	That's ok. Is it; um, how long is the knife?
CRAIG:	Um, bout nine, ten inches, probably, kitchen knife.
TUTT:	Ok. And what kind of handle does it have?
CRAIG:	Uh, had a silver handle.

"[8]

The appellant also told police that he had thrown the knife into the Tweed River as he was crossing it in his vehicle.[9]

[11] At trial, and conformably with what the appellant had told police, the defence was that the appellant had not intended to kill the deceased or to do grievous bodily harm to her. Allied to intent was the contested issue whether the appellant was intoxicated by alcohol at the time. A partial defence of provocation was raised which, if successful, would have required a verdict of manslaughter only.[10] Neither accident nor self-defence was raised.

Grounds of appeal and written submissions

[12] Counsel for the appellant and their instructing solicitors represent their client pro bono. Their involvement post-dated the filing of the Notice of Appeal.

[13] Leave was granted to the appellant on 5 February 2016 to substitute three grounds of appeal for the single ground stated in the Notice of Appeal. Those grounds are:

1. The learned trial judge erred in failing to properly direct the jury concerning the alleged act of domestic violence.

2. The learned trial judge erred in failing to properly direct the jury concerning provocation.

3. The conduct of the appellant's trial occasioned a miscarriage of justice.

[14] An appellant's outline of submissions filed on 10 November 2015 anticipated an application to amend the Notice of Appeal to rely on Grounds 1 and 2 only. Submissions on these grounds were made in that document. Later, on 13 January 2016, a supplementary outline of submissions was filed anticipating two further grounds of appeal, Grounds 3

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8 AB225-226 l1362-377.
9 AB217 ll50-55.
10 Code s 304(1).

and 4, for which submissions were then made. Ground 4 was abandoned on 5 February 2016. On 6 April 2016, a third set of appellant's submissions titled "Appellant's Reply and Further Outline" was filed. This document substantially modifies submissions that had been made with respect to Ground 1 in the outline and Ground 3 in the supplementary outline.

[15] The respondent relies on an outline of submissions filed on 13 January 2016 which responded to the appellant's outline and on a supplementary outline of submissions filed on 21 January 2016 which responded to the latter's supplementary outline.

[16] The appellant was given leave at the hearing of the appeal to file an amended application for leave to adduce new or fresh evidence in relation to Ground 3.[11] That evidence included an affidavit of the appellant filed on 5 February 2016 and a document titled "Further Affidavit of Ronald Michael Craig". It was apparently signed by the appellant on 31 March 2016 but was not duly witnessed. It is Exhibit "TF4" to an affidavit of Mr T Fisher, solicitor, filed on 6 April 2016, also subject to the leave application.

[17] The appellant's first affidavit traversed his mental health history and advice given to him by his trial counsel, Mr R Taylor, and his solicitor, relating to defences potentially available and the decision that he not give evidence. Mr Taylor made an affidavit filed on 22 February 2016 in which he responded to matters raised in the appellant's first affidavit. The appellant's "Further Affidavit" document is intended to be responsive to Mr Taylor's affidavit.

[18] Both the appellant and Mr Taylor were required for cross-examination. That occurred at the hearing of the appeal on 13 April 2016. Having regard to that and to the fact that most of the time in addresses was devoted to Ground 3, it is convenient to deal with that ground first.

Ground 3

[19] The basis of this ground, as modified by the Appellant's Reply and Further Outline, was summarised in that document in the following two paragraphs:

> "2. The Appellant's case on this issue turns on whether he was adequately advised about whether he would be cross examined on his criminal history, where that history included a prior conviction for unlawful killing. Other errors referred to in the Appellant's earlier outlines, namely, the failure to follow instructions, the plea of guilty to manslaughter, the failure to call certain witnesses and the failure to pursue alternative defences all flowed from this incorrect advice.
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> 3. The Appellant's earlier outlines also referred to the Appellant's mental health and his lawyers' inadequate response to his mental health issues. These aspects are not relied on as establishing incompetence that would amount to a ground of appeal, however, they remain relevant in assessing the care with which the Appellant's case was handled and are relevant to the Appellant's

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[11] The evidence the subject of the leave application consisted of the affidavits of Scott Brown, Deborah Greene and Carolyn Craig respectively, all filed on 15 January 2016, the affidavit of Terence Fisher filed on 21 January 2016, the affidavit of the respondent filed on 5 February 2016 and the further affidavit of Terence Fisher filed on 6 April 2016.

> circumstances in the relevant period, and, it is relevant to Mr Taylor's credit."

[20] This ground was further modified at the hearing of the appeal. After the cross-examination of witnesses had concluded, counsel for the appellant stated that the mental health issue was unreservedly abandoned.[12] He accepted that the crux of this ground is encapsulated in the first sentence of paragraph 2 set out above.[13] As counsel put it in oral submissions, the ground involves two propositions. The first is that the advice as to the appellant's criminal history was incorrect. The second is that the way the advice was conveyed to him left him effectively with no option to give evidence.[14] Absent his testimony, the opportunity to pursue other defences was foregone.

[21] It is common ground that the appellant had a criminal history and that it was made known to Mr Taylor and his instructing solicitor. As later described by the learned trial judge at sentence, the history consisted of some offences of violence in Queensland but of a scale which did not compare with his offending in the Northern Territory. There, he had been convicted and sentenced to relatively short periods of imprisonment, twice for offences involving assault and obstruction of police.[15] His Honour continued:

> "…However, the significant event in terms of your prior criminal history is the series of charges and convictions which follow four events which occurred on the 8th of November 1995.
>
> On that occasion, you were sentenced in respect of six different counts on indictment before the Supreme Court of the Northern Territory. The first count was one of unlawful entry with intent to commit an offence with circumstances of aggravation in the nature of an assault, and on that you were sentenced to eight years imprisonment. There were lesser sentences on the other counts, however, the circumstances of the offending included a very significant assault on a number of victims, including stabbings of more than one, and one of the victims was killed as a result of having been stabbed. It appears, though, from the sentencing remarks on that occasion, that the killing was treated as being one that was unintended in the sense that there's a description of the circumstances which includes that that victim was a man with whom you collided, accidentally stabbing him with the knife you were holding in your right hand as you were fleeing the premises in which you'd previously assaulted the other victims, including stabbing them, but in a less serious way."[16]

[22] In a document titled "Instructions for Pre-Trial" dated 20 January 2014, the following instruction was given to the appellant's instructing solicitor:

> "5. I am not relying on self defence or provocation as defence for tactical or legal reasons. Firstly, I did not raise these defences in my interview to police and secondly it would require me to give further evidence if such defences were to be raised. I have

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12 Tr1-35 l32 – Tr1-36 l5. In light of the abandonment of that issue, it is not necessary to decide the leave application insofar as it relates to the many affidavits filed relevant to it.

13 Tr1-36 ll7-10.

14 *Ibid* ll25-28.

15 AB185 ll39-46.

16 *Ibid* l46 – AB186 l16.

> already given my preliminary view that I do not wish to give evidence as I do not want to be cross-examined about my previous criminal history."[17]

[23] In his affidavit filed on 5 January 2016, the appellant accepted that his signature appears on this document. He said that Mr Taylor told him in conference, in essence, that he could not raise provocation or self-defence because they were not in his record of interview and that he would be cross-examined on his criminal history.[18] This instruction was repeated in a second document titled "Instructions for Trial" signed by the appellant with the additional words "or the incidents of the night in question" at the end of it.[19]

[24] It is also common ground that Mr Taylor gave the appellant advice about cross-examination on his previous criminal history. Initially, they differed as to the content of the advice in respect of the likelihood that the appellant would be cross-examined on it. The appellant said in his first affidavit that he was advised by Mr Taylor that he would be cross-examined on it.[20] Mr Taylor denied that. However, he accepted that he did advise the appellant that it was likely that he would be cross-examined about his previous criminal history and that he did not advise the appellant that the Crown would be unlikely to be granted leave to cross-examine upon it.[21]

[25] However, the difference dissipated at the hearing of the appeal. In cross-examination, the appellant conceded that Mr Taylor told him that cross-examination on his previous criminal history was likely.[22] In light of that evidence, cross-examination of Mr Taylor on the topic was on the footing that the advice that he had given was that it was likely that the appellant would be cross-examined on his previous criminal history.[23]

[26] I would add that, in cross-examination, the appellant said that it was his solicitor who advised him that he would "most certainly" be cross-examined on his previous criminal history.[24] I do not accept that evidence as reliable. The appellant had not sworn to such advice having been given in either of his affidavits. It was first claimed by him to have been given during the course of the cross-examination.

[27] An integral component of this ground of appeal is that the advice Mr Taylor gave on the topic was wrong. Before addressing that issue, I shall refer to a related matter in order to give context to the advice Mr Taylor swore that he gave the appellant with respect to giving evidence.

[28] The appellant gave the instructing solicitor a handwritten account of the incident dated 25 September 2012. Significantly, in that account, the appellant spoke of his being greatly alarmed by the sight of the deceased holding the knife out in front of her, swearing and "moving her hands about rapidly". She threatened to have him

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17 Appellant's Affidavit filed 5 February 2016; Exhibit "RC-2".

18 *Ibid* paragraph 111.

19 *Ibid*; Exhibit "RC-3". Mr Taylor swore that this document dated 4 March 2014 was signed by the appellant in his presence at the Arthur Gorrie correctional Centre on 9 March 2014, the day prior to the commencement of the trial: paragraph 11. The appellant claimed that he did not sign this document on that date but may have signed it on 13 or 14 March 2014, after his conviction: paragraphs 134-137.

20 Appellant's Affidavit filed 5 February 2016 paragraph 111.

21 Affidavit of R Taylor paragraph 77.

22 Appeal Transcript 1-10 ll29-30.

23 For example, at Appeal Transcript 1-32 ll17-18.

24 Appeal Transcript 1-10 ll28-29.

"knocked". She came at him. He threw a punch at her face to distract her in the hope of seizing the knife. His tactic worked. They grappled for control of the knife, face on face, against the sink. He managed to position the sharp edge of the knife "very close to, if not intermittently touching," the deceased's neck. He wanted to "shut her mouth" so the neighbours would not hear. She kneed him in the groin. He "released what control he did have of the knife" and with his left hand, he caught the back of her right knee. He dragged her sideways. They both "lost their combined balance" and fell to the floor. They were drunk, disoriented and in virtual darkness. It was at the point of impact with the floor that the first incision to the deceased's neck happened. Warm blood squirted into the appellant's eyes and face. He reacted clumsily and it was then, he believed, that the second incision was made.

[29] In a second set of handwritten instructions dated 28 September 2012 and titled "Chronological Movements After the Fact", the appellant stated "quite vehemently" that the deceased was not holding anything in her left hand. Specifically, the deceased's handbag was not near her left hand. Photographs taken by the police depicted the deceased's left hand clutching a cigarette lighter and her handbag around her left wrist. They were tendered at trial in due course.[25]

[30] Mr Taylor's evidence was that, in essence, the handwritten version was adhered to by the appellant in conference with him on 18 November 2013. Mr Taylor continued:

> "51. From my memory, and by way of a brief summary, I identified with the Appellant the following significant features of his case, namely:
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> (a) the nature of the injuries to the deceased;
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> (b) the Appellant's criminal history from the Northern Territory, which might be relevant in the event that he raised 'accident' or sought to impugn witnesses for the prosecution or put character in issue;
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> (c) the history of domestic violence between the Appellant and the deceased;
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> (d) the photographs of the deceased and in particular the position of the lighter and the handbag;
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> (e) the Appellant's conduct after the death;
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> (f) the Appellant's version of events contained in the interview with police;
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> (g) intoxication and its potential relationship with various defences; and
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> (h) the potential for the prosecution attempting to join the pending charge of Grievous Bodily Harm with the count of murder.
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> 52. During the various discussions I had with the Appellant we spoke of the relative merits of potential defences and their compatibility with one another. It is my recollection that from the outset the Appellant acknowledged to me that he recognised

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[25] Exhibit 3. The photographic evidence would have put in question the appellant's version that the deceased was moving both hands about rapidly.

there was significant tactical merit in running a narrow defence that was not inconsistent with the version of events he had given to the police.

53. Consequently, I recall that the Appellant told me that he wished me to conduct the case on the narrow issue of 'intent'. I remember telling the Appellant that I could try to leave open other potential defences but that he would need to make a more definite decision regarding his defence before the trial as such would affect how I conducted the trial. The Appellant consistently maintained his abandonment of other potential defences and advised me to conduct the trial on the narrow issue of intent based upon intoxication.

54. Although my discussions with the Appellant would on occasions naturally wander to a more expansive defence case, the Appellant consistently reaffirmed the decision to run a more narrow defence. I reassured the Appellant that the decisions were for him to make and that I would follow his instructions and that such is my deliberate habit with all those I represent.

55. I should note again here that the version/s of events given to me by the Appellant appeared to be inconsistent with the interview he gave to police. The most significant inconsistency appeared to me be that the Appellant told the police he had disarmed Ms Hitchen, however, his versions to me included an assertion that the two were struggling for possession of the knife.

56. Further, in contrast to a claim of self defence, provocation and accident, the Appellant instructed me on 8 November 2013 that he pressed the knife to Ms Hitchen's throat in attempt to shut her up. In his interview with police the Appellant claimed the cutting of the throat occurred in the heat of the moment and he also made the unfortunate comment that: ' … I just cut it like I was cutting a loaf of bread …'.

57. When the potential difficulties in the Appellant's case, such as identified above, were raised by me with him, I advised the Appellant regarding the implications associated with giving evidence to explain them. I say again that the Appellant, from a very early stage in my dealings with him, indicated a disinclination to give evidence."

[31] Mr Taylor's evidence is supported by his handwritten diary note of the conference which sets out aspects of the appellant's version and the comment "problem not told to police".[26] It is also supported by comments in the instructing solicitor's note of the conference, namely, "client gave a diff version" and "risk at trial".[27]

[32] Mr Taylor explained to the appellant that his defence at trial could be run on issues of intent and intoxication consistently with the version that he had given to police. In

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26 Affidavit of R Taylor; Exhibit B.

27 *Ibid*; Exhibit A.

doing so, Mr Taylor further explained, the appellant could avoid giving evidence which, in all probability, would be viewed as inconsistent with that version.[28]

[33] It remains to note that the appellant accepted in cross-examination that he had been given advice to the effect that he would be "in some difficulty" if he gave evidence on account of the differences in the versions.[29] This concession is consistent with the appellant's acknowledgement in the "Instructions for Trial" document that a reason for his not wishing to give evidence was his preference not to be cross-examined about the incidents on the night.[30]

[34] I return to the prior criminal history. In his affidavit, Mr Taylor gave the following reasons for the advice which he accepted he gave with respect to cross-examination on that topic:

> "(a) the Appellant informed me that his evidence carried the direct imputation that police may have tampered with the crime scene by manipulating the placement of the deceased's handbag and lighter;
>
> (b) if he gave evidence, the Appellant intended to give evidence placing the deceased's character in issue by reference to his own good character as a victim of domestic violence at the hands of the deceased;
>
> (c) that depending upon how the Appellant conducted his case, there was potential that the Deceased's statements could be introduced into evidence and there was potential argument that she could be regarded as a witness for the purposes of the *Evidence Act* 1977, section 15;
>
> (d) despite how carefully evidence might be led from the Appellant, no definitive advice that it would be 'unlikely' the court would permit the use of his criminal history was possible until after the Appellant had been cross-examined; and
>
> (e) in the event that accident was raised, the earlier incident from the NT recorded on his criminal history might become admissible on the grounds of coincidence."[31]

[35] Mr Taylor was not cross-examined on these reasons. However, they were challenged in submissions by counsel for the appellant. It was contended that, notwithstanding his vehemence on the subject, the appellant could have given evidence with reference to the handbag and lighter which was limited to how the scene appeared to him when he left. He could have done so without disparaging the police – any question about who might have moved them was not something that was admissible or that he could be forced to answer.[32] Secondly, to have attributed domestic violence against him to

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28 *Ibid* paragraph 67.

29 Appeal Transcript 1-15 ll29-33.

30 In light of this concession, it is unnecessary to make a finding as to when the appellant signed the document. My impression is that his claim that he signed it after his conviction is improbable and tailored to suit the inconvenience for this ground of appeal of the reference in it to cross-examination on those incidents.

31 At paragraph 77.

32 Appeal Transcript 1-43 ll23-26.

the deceased would not have constituted character evidence on his own part.[33] Thirdly, the deceased could not have been a witness in the proceedings with the consequence that the suggested route for admissibility of her statements under the *Evidence Act* 1977 (Qld) was not available.[34] Fourthly, the evidence of the Northern Territory convictions would not have been admissible as propensity evidence in the prosecution case, were accident to have been raised. That was so having regard to the dissimilarity between the accidental stabbing which resulted in the Northern Territory death and the intended stabbing which was alleged to have caused the deceased's death.

[36] I would accept that there is merit in the appellant's third and fourth points. The first is rather problematic and tends to disregard how the appellant might have responded in cross-examination on that topic, especially having regard to his demonstrated vehemence towards it. The second, too, is problematic given that the appellant's police record of interview conveyed a self-description of a person who reacted with patience towards, and stood by, the deceased, notwithstanding all her flaws.

[37] Counsel for the respondent explicitly acknowledged the correctness of the third and fourth points, but ventured that it was possible, but "probably not likely", that, given the levels of violence involved in these offences, cross-examination on the Northern Territory convictions might have been permitted if the appellant were to have testified that he was frightened of the deceased.[35]

[38] In my view, it was correct for the appellant's trial counsel to have adverted to cross-examination on the prior criminal history, particularly the Northern Territory convictions. However, the tenor of the advice given – that cross-examination on them was likely, was not correct. At the highest, the degree of likelihood was no more than a possibility. It was not probable as the word "likely" suggests.

[39] The error in this advice having been established, the question that next arises is whether it occasioned a substantial miscarriage of justice as would require this Court under s 668E of the *Criminal Code* to allow the appeal and set aside the conviction of murder. In *TKWJ v The Queen*,[36] Gaudron J, with whom Gummow and Hayne JJ agreed, observed:

> "25 Where decisions taken by counsel contribute to a defect or irregularity in the trial, the tendency is not to inquire into counsel's conduct, as such, but, rather, to inquire whether there has been a miscarriage of justice, or, if the proviso to the criminal appeal provisions is engaged, whether 'no substantial miscarriage of justice has actually occurred'. In that exercise, the question whether the course taken by counsel is explicable on a basis that has or could have resulted in a forensic advantage is a relevant, but not necessarily a decisive, consideration.
>
> 26 The question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in

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33 AB1-44 ll21-26.

34 Appeal Transcript 1-45 ll26-28.

35 Appeal Transcript 1-63 ll15-24. Counsel also suggested a basis for admission of the deceased's statements about the appellant's prior offending against her but conceded that, in view of the admissions made at trial, it was unlikely that that would have been allowed.

36 [2002] HCA 46; (2002) 212 CLR 124.

> question 'deprived the accused of a chance of acquittal that was fairly open'. The word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on [the] basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open."[37]

[40] Later, in *Nudd v The Queen*,[38] Gleeson CJ explained the preparedness of courts of criminal appeal to acknowledge that defence counsel's conduct at trial might result in a miscarriage of justice in these terms:

> "Because of the impossibility of predicting every form of misfortune or error that may result in a miscarriage of justice; because there are cases where an understanding of why something happened, or did not happen, may be material to a conclusion as to whether there was unfairness; and because such an understanding may reveal that there is no explanation for what occurred other than counsel's ineptitude or inexperience, courts of criminal appeal do not overlook the possibility that the conduct of counsel may result in such a failure of process that there is a miscarriage."[39]

A little later, his Honour made this observation:

> "There will be some cases in which it is not possible to decide whether injustice has occurred without knowing why a particular course was taken at trial. To take an extreme example, if an accused person failed to give evidence because counsel wrongly advised that an accused is not entitled to give evidence, it is difficult to imagine that a court of criminal appeal would not intervene. The example shows that, although, as a general rule, the test of whether a forensic decision has resulted in an unfair trial is objective, one cannot eliminate the possibility of exceptional cases in which it is relevant to know why a certain course was or was not taken."[40]

[41] I do not mean to imply, by citing this observation, that Mr Taylor advised the appellant that he was not entitled to give evidence. There is no suggestion that that occurred. However, the example given in it serves to illustrate how it can be relevant to know why a particular course was taken at trial.

[42] Here, the appellant instructed Mr Taylor that he did not wish to be cross-examined about his previous criminal history or the incidents of the night in question. He gave those instructions after Mr Taylor had given him advice with respect to the likelihood of cross-examination on the criminal history and on the incidents during that night. The advice with respect to the former was not correct.

[43] However, the advice with respect to the latter was correct. There were stark differences between the version in the handwritten notes and in the police record of interview concerning the crucial matter of whether or not the appellant had wrested the knife

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37 Internal footnotes omitted.
38 [2006] HCA 9; (2006) 162 A Crim R 301.
39 At [15].
40 At [17].

from the deceased's control before her neck was cut. Had his oral testimony accorded with his handwritten version, then the appellant would have been cross-examined on the basis that he had given a different version to police and that version would have been proved. Evidence in that form would have had a pronounced adverse impact on the appellant's credibility. It would have severely undermined the scope for defences of accident or self-defence.

[44] There was then a sound forensic reason for the appellant not to testify. He was correctly advised about that reason. His decision not to testify, insofar as it was justified by that advice, was not the consequence of his having been misled by incorrect advice. That he did not give evidence in these circumstances did not result in a miscarriage of justice. The fact that he was given an additional, but inaccurately expressed, reason not to testify did not diminish the role of the former as a rational reason not to testify, or, of itself, give rise to a miscarriage of justice.

[45] I would add that there was also a sound forensic reason for advising the appellant to plead guilty to manslaughter given his instructions that he would not testify. On appeal, the appellant's counsel acknowledged, correctly, that absent testimony from his client, a defence to manslaughter could not have been run.[41] In such circumstances, a conviction for manslaughter would have been inevitable, were the appellant not convicted of murder. The guilty plea would have benefited the appellant on sentence for manslaughter.

[46] For these reasons, this ground of appeal cannot succeed.

Ground 1

[47] The alleged act of domestic violence to which this ground is particularly referenced is the occasion referred to in paragraph 5 of the Admissions when on 21 April 2010, the deceased sustained a fractured right cheek bone to which the events set out in paragraphs 6 to 12 thereof were a sequel.[42] During oral submissions, counsel for the appellant raised an allied point relating to injuries. It is convenient to deal with that point first.

[48] The prosecution relied on evidence of more than 40 injuries to the deceased's body as evidence of intent on the murder count. In his closing address, the prosecutor described them as "strong evidence of an intention to cause at least serious harm".[43] At trial, evidence was given by a pathologist. His opinion was that the incised wounds to the deceased's neck were the cause of her death[44] and that a severe amount of force would have been required to cause the observed damage to the bone structure of the vertebrae.[45] The pathologist also gave evidence with respect to other observed injuries including bruising, abrasions and incisions to the deceased's body.[46]

[49] I accept that there was no evidence as to when, or in what order, the injuries were sustained. So much was brought to the jury's attention during the summing up when, in relation to a submission for the prosecution that that number of injuries was

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41 Appeal Transcript 1-42 ll13-17.
42 Appellant's Outline paragraphs 10, 11.
43 Addresses 1-6 ll42-44.
44 AB139; Tr2-51 ll46-47.
45 AB138; Tr2-50 ll41-42.
46 AB140; Tr2-52 l1 – AB142; Tr2-54 l32.

relevant to whether the appellant could rely on provocation, the learned trial judge told them that they should not assume that "the forty injuries were inflicted, effectively, in a frenzied attack at the end of the time sequence, because there's no evidence one way or the other about that".[47]

[50] Plainly, his Honour did not mean to imply that one or some of the injuries might have been sustained during a separate and unrelated encounter between the deceased and the appellant. His point was that all of them might not have been sustained in the same attack at the end of that encounter.

[51] The pathology evidence and the photographs of the deceased's body to which I have referred were adduced on the basis outlined in the prosecutor's opening and were consistent with it. It was not put in cross-examination that any of the injuries might not have been recent. In these circumstances, I do not accept the appellant's contention that the learned primary judge ought to have directed the jury with respect to a possibility, not suggested by the evidence, that some of the injuries were not recent and that such injuries could not be used as evidence of intent. The directions given were not deficient on account of such a direction not having been given. Moreover, the direction proposed by the appellant could not have applied to the lethal wounds which were evidently recent.

[52] I return to the evidence of the domestic violence in April 2010 and its sequel. As well, evidence was adduced without objection of the content of SMS messages between the appellant and the deceased between 9 and 20 January 2011.[48]

[53] It was not submitted on appeal that any of this evidence was inadmissible. Section 132B of the *Evidence Act* 1977 (Qld) authorised its admission subject to relevance. The substance of the complaint underlying this ground of appeal is that the learned trial judge did not give the "proper propensity direction" which, it was submitted, was required in relation to that evidence.

[54] Whether such a direction ought to have been given falls to be determined with reference to the purpose for which the evidence was adduced, how that was explained to the jury, and the directions that were given to them about it. As to those matters, the record reveals the following.

[55] In his closing address, the prosecutor mentioned the history of the appellant's relationship with the deceased as a discrete topic. Speaking of it, he said:

> "Now, it's important for me to provide reasons why this evidence is before you, and his Honour will give you directions about this evidence. Now, exhibit 15, the record of the calls, you might've thought that it was somewhat terrible that messages that were not meant to be seen by the wider world were being seen by the wider world, but I – they're before you because it is necessary to do so for this trial, and it's necessary to do that because when, in a domestic relationship, a person kills the other, their prior history is relevant to assess the defendant's account of events and his actions after the deceased's death, and, in this particular case, it's also relevant to an issue – and this is perhaps only a very minor issue – but it is open to

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47 AB161 ll20-22.
48 Exhibit 15; AB196-204.

> you to conclude that the defendant held some residual anger or ill will before Kylie Hitchen because of the fact that he was signing the book, as he called, that he was charged with causing the injury to herself."[49]

[56] Having remarked that this evidence was part of the overall matrix, the prosecutor continued:

> "… But what you cannot use this evidence for – and I'm sure you wouldn't in this particular case – is to say the defendant has caused some injury to her in the past, albeit in circumstances where there is a contest about how that occurred, and that therefore he was more likely to have had an intent in this case. Now, his Honour will give you directions to say that would be inappropriate reasoning, and it is not before you for that purpose. The evidence is before you because it would be impossible for you to understand the defendant's interview, and it would place the events of that night in a vacuum if you weren't aware of their background."[50]

A little later, he said:

> "What, effectively, the situation is is that the relationship between the defendant and Kylie Hitchen was of reasonably longstanding. An injury occurred to Kylie Hitchen on about 21 April 2010. There are differing versions as to how that injury occurred. You should not place any weight on that injury and the causation of that injury, per se, but it's common to both versions that the injury occurred during an interaction between the defendant and Kylie Hitchen. You'll remember that his account was that he had caused the injury "when we were play wrestling".
>
> Now, the defendant was charged with a criminal offence after Kylie Hitchen made a complaint to police, but, despite that, they continued their relationship, and she sought to withdraw her complaint on two occasions. And, of course, you'll see in the interview – in the real evidence, that is, the calls between them, that the relationship was continuing. There doesn't seem any doubt of that because, of course, she was prepared to move into a new house with him at Esk. So provide you with the necessary context to understand or gain an appreciation of what happened that night and the motives that may have acted on the defendant's mind, and I stress it's not said that he's done this wholly and solely because of her complaint. One can see in the calls that there is a degree of resignation by him towards it, although you'll see in the calls that he blames her for his situation of having to sign in, and that is a fact – a small fact, perhaps – but a fact in the overall matrix that you could conclude the defendant had some degree of residual anger or ill will towards her because of those charges."[51]

[57] In summing up, the learned trial judge noted that defence counsel had not referred to the defence of provocation in his closing address and explained that, notwithstanding that, he would sum up on it. In the course of so doing, his Honour said:

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49 Addresses 1-8 ll4-15.

50 *Ibid* ll19-27. Notwithstanding a suggestion in oral submissions to the contrary, it is clear from this portion of the address that the prosecutor did not rely on that evidence as evidence of intent.

51 *Ibid* l36 – 19 l10.

> "In considering whether the alleged provocative conduct caused the defendant to lose control, you've got to consider the gravity or the level of seriousness of the alleged provocation so far as the defendant is concerned, from his perspective. And this involves assessing the nature and degree of seriousness for the defendant of the things that the deceased said and did just before the fatal attack. The things you're entitled to take into account as part of this assessment include the defendant's habits, the relationship with the deceased, even matters as broad as – as their relative age. And you must appreciate that conduct which mightn't be insulting or hurtful to one person may be extremely hurtful to another because of those sorts of attributes, including their personal attributes, their personal relationship or their past history. So you have to consider the gravity of the suggested provocation to the defendant in this case."[52]

[58] After the jury had retired to consider their verdict, the prosecutor reminded the learned primary judge that he (the prosecutor) had told the jury that the judge would direct them that they should not reason from the past conduct that the accused was more likely to commit any offence, and queried whether such a direction might be given out of caution.[53] The prosecutor alluded to a Bench Book warning to that effect but was not sure what it was. In discussion with counsel, a warning against propensity reasoning in general terms was identified but both the prosecutor and defence counsel agreed with his Honour that its wording was not appropriate for the present case.[54]

[59] Discussion then turned to the appellant's admitted stealing from the deceased's bank account via the ATM. His Honour indicated a re-direction that he proposed to give on that topic, at which point, the prosecutor suggested that the jury also be directed not to reason that the appellant intended to kill or cause grievous bodily harm from the evidence of the prior relationship, particularly the incident on 21 April 2010.[55]

[60] In the course of redirecting the jury, the learned trial judge said:

> "… There were two other matters that I wanted to raise with you in – as well at the same time. You recall Mr Power, in referring to the defendant taking cash from the ATM machines, used the word that he stole the money.
>
> Can I direct you that you're not to treat that word as meaning that a legal conclusion of stealing that involves particular legal elements is implied or meant to follow from it. If you are of the view, however, that that was discreditable conduct that's a matter for you – not for any definition of stealing. But the point about discreditable conduct of that kind is it doesn't enable you to reach the conclusion that the defendant intended to kill or cause grievous bodily harm. It's not something which assists you in that part of the reasoning in coming to your conclusions. Similarly, the same point applies when you look at the admissions that are in exhibit 1 – that list of admissions about the prior relationship and conduct between the defendant and Kylie Hitchen.

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52 AB162 ll27-38.
53 AB165 ll30-38.
54 AB167 ll20-40.
55 AB175 ll11-20.

> So there is reference to a prior event and charge of the defendant in relation to an assault on Kylie Hitchen that's alleged and a domestic violence order or DVO that's referred to about those things. You may think of those things as discreditable conduct but they don't go into factor in terms of whether you form the view that the defendant, at the time in question, intended to kill or cause grievous bodily harm because you think that's discreditable conduct. …"[56]

Both counsel responded in the negative to his Honour's question whether any further redirection was required.[57]

[61] The redirection had begun with an answer to the one question that had been asked by the jury. Once the redirection had concluded, the jury retired. The guilty verdict was delivered two hours later.

[62] By way of criticism of the redirection, the appellant submitted, first, that it did not tell the jury why the evidence was before them. Second, it was submitted, it did not spell out what was meant by discreditable conduct.

[63] As to the second criticism, in the redirection, the learned trial judge referred to the admissions concerning the prior relationship and conduct between the appellant and the deceased, including the injuries sustained by her in April 2010 and their sequel. His Honour then commented that the jury might think of "those things" as "discreditable conduct". It would have been obvious to the jury what his Honour meant by that expression. The criticism does not withstand scrutiny.

[64] In *Roach v The Queen*,[58] French CJ, Hayne, Crennan and Kiefel JJ held that where evidence is admitted pursuant to s 132B, it is necessary that the trial judge give a clear and comprehensible warning against the misuse of the evidence as evidence of propensity and an explanation of the purpose for which it is tendered. The first criticism falls to be assessed against that prescription.

[65] As to it, I note that the redirection made it explicitly clear to the jury that, as the prosecutor had told them in his closing address, they could not misuse that conduct by reasoning from it that the appellant had intended to kill the deceased or to cause grievous bodily harm to her.[59] Moreover, the prosecutor gave an explanation to the jury, in general terms, of the purpose for which the evidence of that conduct was adduced. The learned trial judge developed this explanation by illustrating how the jury might use the evidence in considering the provocation defence.[60] In light of that, his criticism is unwarranted, in my view.

[66] I would add that, in a similar vein, the jury were directed that they could not use the evidence of the ATM theft as evidence of intent. They were told that they might take it into account in considering the appellant's claim that he was intoxicated at the time when the deceased was killed.[61]

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56 AB178 l40 – AB179 l12.

57 AB179 ll12-19.

58 [2011] HCA 12; (2011) 242 CLR 610.

59 See the comparable direction given in *R v Reed* [2014] QCA 207 which was held to be a sufficient warning against propensity reasoning from antecedent domestic violence: at [57], [60].

60 In this significant respect, the direction given differed from that criticised in *R v Shoesmith* [2011] QCA 352 for its failure to explain to the jury the purpose of putting the domestic violence evidence before them: at [69]-[71].

61 AB159 ll15-19.

[67] In summary, the directions given by the learned trial judge with respect to domestic violence were, in my view, sufficient. The specific criticisms made of the directions that were given are unpersuasive. The broader criticism that a more full direction on it was not given, when none was sought, is no less unpersuasive. This ground of appeal is not made out.

Ground 2

[68] The appellant contends that the "jury were left to consider the defence of provocation in a vacuum". However, the development of the ground in the Appellant's Outline reveals that the complaint is not that the jury were not directed with respect to provocation, but that the directions given on it were unbalanced.[62]

[69] It is argued that the imbalance arose in the following way. Whilst the learned trial judge referred in his summing up to statements in the appellant's record of interview that the deceased had a knife; that she was "losing the plot" and throwing things around and breaking the television set; that she picked up the knife again and attacked him; that her hands were going everywhere; and that the appellant had a scratch and some bruises on his ribs, back and arms, no reference was made by him to the following:

(a) the cut to the deceased's hand which the appellant said was from her coming at him;

(b) the appellant's statement in his interview that the deceased was violent when drunk;

(c) the SMS messages consistent with the deceased "having a go" at him, that is to say, accusing him of sleeping with other women; and

(d) the appellant's statement that he just wanted her to stop and that he never intended to kill her.

[70] It is relevant to this ground of appeal that the factors which could be said to raise provocation were contained in the appellant's record of interview and the SMS messages. The jury had the transcript of the former and the texts of the latter with them. It was a relatively short trial. They were not presented with a large number of exhibits for their deliberations.

[71] The learned trial judge told the jury that they must consider the conduct of the deceased, "the things she did or said or both", and form a view as to whether they caused the appellant to lose self-control.[63] That part of the direction on provocation which I have already cited, was given. Then, his Honour observed that, notwithstanding that defence counsel had not relied on any particular act or acts, if they paid regard to the interview with Detective Tutt, they would find that there were a number of statements made by the appellant which could raise the question of provocation.[64] He then took the jury through the main aspects of the interview which touched upon that question.[65]

[72] I acknowledge that the learned trial judge did not refer to three of the four matters identified by the appellant as having been omitted. However, the cut to the deceased's hand was mentioned in the context of provocation when his Honour reminded the jury that they had heard both the prosecutor and defence counsel address on the

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62 At paragraphs 37-40.
63 AB162 ll19-20.
64 *Ibid* ll40-45.
65 *Ibid* l45 – AB163 l9.

footing that that had occurred earlier in the sequence of events. That is to say, at a time when the deceased, and perhaps also the appellant, was seated on, or near, a couch in the lounge room.[66]

[73] His Honour did not refer directly to the appellant's assertion that the deceased was violent when directing the jury. To have done so might well have drawn attention to the appellant's statement immediately thereafter that he was not much better.[67] As to the accusations of infidelity, the jury had the exhibit of some eight pages which set out the texts of SMS messages. On the first page there is the text of a message sent on 10 January 2011 which makes such an accusation in quite candid language. The last mentioned matter concerned a statement which was relevant to intent, but not to provocation.

[74] In light of these considerations, the complaint made by the appellant of incompleteness in the directions on provocation is not one of substantial shortcomings in them which impaired their effectiveness in a materially significant way. There was no complaint about their adequacy at trial. Further, to have elaborated overly on provocation risked detraction from the case of absence of intent on which the defence run had centred. This ground of appeal also is not made out.

Disposition

[75] As none of the grounds of appeal has succeeded, this appeal must be dismissed.

Order

[76] I would propose the following order:

1. Appeal dismissed.

[77] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.

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66 AB163 ll13-16.
67 Exhibit 8; AB216 l27.