SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hayes* [2008] QCA 371
PARTIES:	**R** **v** **HAYES, Errol Graham** (appellant)
FILE NO/S:	CA No 8 of 2008 SC No 981 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2008
JUDGES:	McMurdo P, Keane JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against convictions dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted upon the verdict of a jury of one count of arson – whether the directions given by the learned trial judge to the jury in relation to the charge of arson were appropriate CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where the issue of intoxication was raised on the evidence at trial – where the learned trial judge gave directions to the jury as to the operation of intoxication and its potential impact upon their deliberations – whether the directions given by the learned trial judge to the jury on the issue of intoxication were appropriate CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – TEST TO BE APPLIED – whether it was on all the evidence reasonably open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offence of arson

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MURDER – where the Crown at trial sought to rely upon four distinct unlawful purposes as grounds for the conviction of the appellant of murder as defined under s 302(1)(b) of the *Criminal Code* 1899 (Qld) – whether the learned trial judge erred in directing the jury that they may, in finding the appellant to be guilty of the offence of murder, rely upon any of the four unlawful purposes put to them

CRIMINAL LAW – EVIDENCE – CORROBORATION – WARNING REQUIRED OR ADVISABLE – POTENTIALLY UNRELIABLE WITNESS OR EVIDENCE GENERALLY – whether the learned trial judge erred in failing to direct the jury that it would be dangerous to convict on the uncorroborated evidence of certain witnesses

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where the appellant was convicted upon the verdict of a jury of one count of arson and three counts of murder – where the appellant was sentenced to concurrent terms of life imprisonment on each of the counts of murder – where it was ordered that the appellant not be released until he has served 24 and a half years in prison – whether the non-release period imposed by the learned sentencing judge was in all the circumstances manifestly excessive

Criminal Code Act 1899 (Qld), s 28(3), s 302(1)(a), s 302(1)(b), s 305, s 461, s 462(b)

AM v The State of Western Australia [2008] WASCA 196, cited
Burns v The Queen (1975) 132 CLR 258; [1975] HCA 21, cited
Carr v The Queen (1988) 165 CLR 314; [1988] HCA 47, considered
FGC v The State of Western Australia [2008] WASCA 47, cited
JJB v The Queen (2006) 161 A Crim R 187; [2006] NSWCCA 126, cited
McKinney v The Queen (1991) 171 CLR 468; [1991] HCA 6, cited
Melbourne v The Queen (1999) 198 CLR 1; [1999] HCA 32, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
Pollitt v The Queen (1992) 174 CLR 558; [1992] HCA 35, cited
R v Cronau (1980) 3 A Crim R 460, considered
R v Faure (1993) 67 A Crim R 172, distinguished
R v Maygar; ex parte A-G (Qld); R v WT; ex parte A-G(Qld) [2007] QCA 310, considered
R v Sinclair & Anor, unreported, Court of Criminal Appeal, SA, SSCRM 351 and 352 of 1996, 29 April 1997, considered
R v Smith (No 2) (1995) 64 SASR 1, considered

R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, applied
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, applied
Stuart v The Queen (1974) 134 CLR 426; [1974] HCA 54, applied
Tully v The Queen (2006) 230 CLR 234; [2006] HCA 56, applied

COUNSEL: A J Kimmins, with Y Chekirova, for the appellant
M J Copley for the respondent

SOLICITORS: John D Weller & Associates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for refusing the appeal against convictions and the application for leave to appeal against sentence.

[2] I wish only to add some brief additional observations on ground 2 of the appeal: that the learned primary judge erred in failing to properly instruct the jury on intoxication.

[3] Section 28(3) *Criminal Code* 1899 (Qld) provides:

> "When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed."

[4] The appellant was charged with one count of arson and three counts of murder. The prosecution alleged that he lit the fire which caused the deaths of his infant son, of his former partner and mother of his son, and of her new partner and which burned the house in which all three victims were living. The prosecution case on the three counts of murder was that he was guilty either under s 302(1)(a) *Criminal Code* because, in lighting the fire he intended to cause the three deaths, or under s 302(1)(b) *Criminal Code*, because he killed the three victims by lighting the fire, "an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life". The prosecution case on the charge of arson was that the appellant "wilfully and unlawfully set fire to a … dwelling house". In *R v Lockwood; ex parte A-G*[1] the word "wilfully" in Ch 46 *Criminal Code*, which incorporates the offence of arson under s 461, was found to have the following meaning. The accused person must either have had an actual intention to do the particular kind of harm that in fact was done or deliberately have done a willed act, aware at the time of doing the act that the result charged in the indictment was a likely consequence of the act and that the accused person did the act regardless of the risk.[2] In this case, the appellant acted wilfully under s 461 if the prosecution established beyond reasonable doubt either that he intended to set fire to the house; or that he deliberately did an act which set fire to the house, aware when he did the act that setting fire to the house was a likely consequence of his act and yet he recklessly did the act regardless of the risk.

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1 [1981] Qd R 209.

2 [1981] Qd R 209 at 217 (Lucas J, with whom Matthews J agreed), 221-222 (Douglas J), 223 (D M Campbell J).

[5] The defence case was that the appellant did nothing to set fire to the house and cause the three deaths; it was not that the prosecution had not established that the appellant intended to commit each offence of murder or the offence of arson because he was intoxicated.

[6] The primary judge's directions on intoxication are set out in Keane JA's reasons at [51]. In giving those directions, the judge rightly recognised that the issue of intoxication, although not part of the defence case, was raised on the evidence and so obliged him as trial judge to direct the jury on it. The directions given were appropriate in this trial. A more complex direction would not have assisted the jury in understanding the real issues in the case. Nor would it have assisted the appellant. This was because, on the prosecution case, there were alternative paths to convictions on all four offences "without the prosecution having to prove an intention to cause a specific result" as an element of any offence. The three offences of murder were capable of being established under s 302(1)(b). The offence of arson was capable of being established if the jury was satisfied that the appellant was aware when he lit the fire that the burning of the dwelling house was a likely consequence of his lighting the fire and that he recklessly lit the fire regardless of the risk to the house. If the jury were considering the case against the appellant on the three murder counts under s 302(1)(b) or on the arson count by way of the second limb of the concept of wilfulness, then "an intention to cause a specific result" was not an element of those offences and s 28 had no application.

[7] The primary judge's directions on intoxication were adequate and appropriate in the circumstances. They were neither a "wrong decision of any question of law" nor "a miscarriage of justice" within s 668E *Criminal Code*.

[8] **KEANE JA:** On 7 December 2007 the appellant was convicted upon the verdict of a jury of one count of arson and three counts of murder. On 12 December 2007 he was sentenced to six years imprisonment on the arson count. He was sentenced to concurrent terms of life imprisonment on each of the counts of murder. In respect of these sentences, a period of 534 days pre-sentence custody was declared to be time already served. It was ordered that he not be released until he had served 24 and a half years in prison.

[9] The charges of which the appellant was convicted arose out of the death, on 20 February 2006 in a house fire at 103 Horatio Street, Annerley, of Theresa Marchetti, the appellant's former lover, Joshua Hayes, the appellant's infant son, and Mark Christensen, Ms Marchetti's new lover.

[10] The appellant seeks to appeal against his convictions on the following grounds:

> "1. The learned trial judge erred in failing to properly direct the jury on the offence of arson.
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> 2. The learned trial judge erred in failing to properly direct the jury on intoxication.
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> 3. There was a miscarriage of justice in that the verdict of the jury on count 1 (the count of arson) was unsafe and unsatisfactory.
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> 4. The learned trial judge erred in directing the jury with respect to s 302(1)(b) of the *Criminal Code*, that it would be

sufficient to found a conviction for murder if the act of setting fire to the house was done in the prosecution of any of the following unlawful purposes:

a. Arson;
b. The offence commonly known as 'attempted arson';
c. Wilful damage;
d. Threatening violence.

5. The trial judge erred in failing to provide a proper direction and adequate warning regarding the evidence given by an indemnified witness.

6. The learned trial judge failed to adequately warn the jury about acting upon the evidence of the witness Peters."

[11] The appellant also seeks leave to appeal against the sentence imposed on him on the ground that it is manifestly excessive.

[12] I will discuss the contentions advanced on the appellant's behalf after summarising the competing cases advanced at trial, the evidence adduced and the relevant directions given to the jury by the learned trial judge.

The cases at trial

[13] The appellant had been in a relationship with Ms Marchetti which was interrupted when he was sent to prison. Upon his release he expressed suspicions that Ms Marchetti had formed an intimate relationship with Mr Christensen. The Crown case was that the appellant, motivated by jealousy and possessiveness, set fire to the house where Ms Marchetti and Mr Christensen were living with Joshua, the little boy who was the child of the previous relationship between the appellant and Ms Marchetti. All three of them perished in the fire.

[14] The Crown case of murder was that the appellant set the fire which caused the deaths in question with the intention of killing or causing grievous bodily harm to at least one of the victims of the fire. On this basis he was said to be guilty of murder under s 302(1)(a) of the *Criminal Code* 1899 (Qld) ("the *Criminal Code*").

[15] The Crown case of murder was based, in the alternative, on what is often called the "felony murder" provision in s 302(1)(b) of the *Criminal Code*. That provision makes a person criminally responsible for murder if that: "… person … unlawfully kills another … by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life".

[16] The case put for the appellant by his Counsel at his trial was that he was not the person who set the fire in question.

The evidence at trial

[17] Joshua Hayes was born to the appellant and Ms Marchetti in August 2004. The appellant went to prison in November 2005. Subsequently, Ms Marchetti and Joshua moved into Mr Christensen's house at 103 Horatio Street, Annerley.

[18] The appellant was released from gaol on 14 February 2006. Upon his release, he stayed at the house of Ms Marchetti's friend, Ms Scott. Ms Marchetti seems also to have spent some time at Ms Scott's house after the appellant's release from prison.

[19] The day of the fatal fire, 20 February 2006, was a Monday. Ms Scott said that on the preceding Saturday, she witnessed an argument between the appellant and Ms Marchetti in which they screamed at each other. The appellant left the house at Ms Scott's request. On the Sunday morning, the appellant screamed out from outside Ms Scott's house, where Ms Marchetti was then staying, that they would "burn alive".

[20] Ms Scott gave evidence that at about 10.00 pm on the Sunday evening, she received a telephone call from Mr Christensen. He asked if she and her friend, Newman, could come over because the appellant was there and Mr Christensen was scared. Ms Scott could hear Ms Marchetti screaming at someone in the background. Ms Scott agreed to go to Mr Christensen's house, but before she could go she received a text message advising her that the appellant had left, so she stayed home.

[21] In cross-examination of Ms Scott, it was suggested to her that the appellant made no such threat, but Ms Scott adhered to her testimony.

[22] Ms Davison, another friend of Ms Marchetti, said that she saw the appellant a couple of days after his release from prison. He asked her what she knew about Ms Marchetti and Mr Christensen and whether they had been in a relationship.

[23] Ms Davison also said that at lunch time on the Sunday before the fire, she and Ms Marchetti picked the appellant up in a car, and the appellant and Ms Marchetti argued about her relationship with Mr Christensen. Ms Davison testified that when Ms Marchetti drove back to Ms Scott's house, the appellant was burning one of the car seats. Ms Marchetti told him to get out of the car, at which point he said: "Whatever, I'll fucking burn you and the whole fucking house".

[24] In cross-examination of Ms Davison, it was established that she was a user of drugs who had a criminal history of credit card fraud for which she had been sentenced to imprisonment. She accepted that the consequences of her drug use meant that she sometimes had difficulty in differentiating between her recollection of events she actually recalled and what she had been told about those events. It was also established in cross-examination that she had been given an indemnity from prosecution although it was not clear to which conduct this indemnity applied. It is pertinent to note, however, that the only piece of Ms Davison's evidence-in-chief which was actually challenged in cross-examination was her evidence of the appellant's threat to "burn you and the whole fucking house".

[25] Mr Tallack, a neighbour of Mr Christensen who lived at 99 Horatio Street, Annerley, gave evidence that on the Sunday night he heard two male voices arguing sometime between 10.00 pm and 11.00 pm. The noises came from a vacant block nearby. Mr Tallack said he recognised one of the voices as that of the male person who lived at 103 Horatio Street.

[26] Ms Elayouby, a taxi driver, gave evidence that on the Sunday evening she had been directed by her control to pick up a person at 103 Horatio Street, Annerley. She could not find number 103 in Horatio Street, but as she completed a U-turn, having driven down the street, a male person came to the window of her taxi and told her he wanted to go to the Boomerang Café at Kangaroo Point. As she was driving him there, he told her that his name was Errol. She dropped him off at 10.22 pm.

[27] Mr Jason Peters gave evidence that he had been a close friend of the appellant for about 15 years. Mr Peters said that after the appellant was released from prison, he expressed concern that Ms Marchetti had slept with Mr Christensen. He told Mr Peters that he had taken the SIM card from Ms Marchetti's mobile phone because he wanted to check her messages to see what she had been up to while he was in gaol.

[28] Mr Peters said that three days prior to the fire, he had met the appellant at a shopping centre. The appellant showed Mr Peters a text message which Ms Marchetti had apparently sent to Mr Christensen which suggested that they were engaged in a sexual relationship. Over the next few days, the appellant asked Mr Peters if he and some other men would be prepared to rob Mr Christensen or to report him to police because Mr Christensen had stolen motor bikes under his house. Mr Peters did not act on these requests. I pause here to note that other evidence tended to confirm that Mr Christensen did have motorbikes under his house.

[29] Mr Peters saw the appellant on the Sunday after Mr Peters had been arrested for unlicensed driving while driving around in a Ford Fairlane. When Mr Peters was released on bail, he rang the appellant to arrange a lift. Mr Peters made his way to Kangaroo Point and rang the appellant who agreed to drive him to the north side. The appellant arrived at Kangaroo Point by taxi. The appellant was wearing a long-sleeved silk shirt with blue and black stripes when he arrived at Kangaroo Point to pick up Mr Peters.

[30] Mr Peters and the appellant drove to the house of Emma Dindas and Leonie Lewis. Mr Peters waited outside and the appellant returned with some drugs. They then drove to the house of Ian Doyle, a friend who lived at Aspley. The three of them had a shot of drugs.

[31] After Mr Peters and the appellant parted company with Mr Doyle, they drove back towards Annerley. Mr Peters had his washing in the car and wanted to go to a laundromat. The appellant said that he was going to see Ms Marchetti. He called her on his mobile phone. On the way back to Annerley, they stopped at the Caltex Service Station at Annerley so that Mr Peters could get change for the laundromat. They both went into the shop, and Mr Peters identified himself and the appellant from security film footage from the service station. They then drove to a roundabout near 103 Horatio Street, Annerley. The appellant got out and walked off in the direction of the house. It was only in relation to Mr Peters' evidence of driving to the roundabout near 103 Horatio Street and the appellant getting out at that point that Mr Peters' evidence of events to this point was challenged. It was put to him that this did not occur. Mr Peters did not resile from his evidence.

[32] Mr Peters' evidence in this latter regard did not stand alone. Mr Peters said that the car was stopped in a way which impeded the passage of another motorist. Mr Mooney gave evidence that he lived nearby and had left home at 4.45 am on the Monday morning. He was impeded at the roundabout by a motor vehicle. Mr Mooney saw two people near the car; one of them was stationary on Horatio Street.

[33] Mr Peters said that he drove off from Horatio Street to go to a laundromat. He needed more change for the laundromat, and so he went to get change from a

Matilda Petrol Station on Ipswich Road. While he was there a person came into the shop and asked the shopkeeper to call the fire brigade. The shopkeeper gave evidence confirming this aspect of Mr Peters' account.

[34] Mr Peters said that he returned to the laundromat and was there when the appellant ran in. The appellant said: "You got to get me fucking out of here." At this time the appellant was wearing a black T-shirt. Mr Peters drove the appellant to the house of Ms Dindas and Ms Lewis; and then returned to the laundromat where, when he was depositing some rubbish in a bin, he saw the shirt that the appellant had been wearing on the previous evening. He did not touch it. Police retrieved the shirt the following day. It was suggested to Mr Peters in cross-examination that he had put the shirt in the rubbish bin, but he denied this suggestion.

[35] The first report of the fire at 103 Horatio Street occurred at 5.34 am. It was made by Mr Power who lived in Franklin Street, Annerley, behind Mr Christensen's house.

[36] On the Tuesday after the fire, the appellant telephoned Mr Peters and told him that he wanted him and Doyle to say that they had dropped the appellant at Mr Lewis' house earlier on the Monday morning.

[37] Mr Ian Doyle gave evidence that, after the fire, the appellant asked him to say that Doyle drove the appellant to Ms Lewis' house and dropped him off there at 3.15 am on the Monday.

[38] Mr Peters also said the appellant visited him at a motel where Peters was staying and told him that he should "shut his mouth". On the Wednesday morning, when the appellant and Mr Peters had taken some drugs, Mr Peters asked the appellant: "How could you do that to Joshua?" In response the appellant said that he did not mean to hurt anyone, that he only started a small fire, that he intended to scare Christensen and that it got out of hand. The appellant said that it "was God's work".

[39] Mr Peters also gave evidence that the appellant told him that when he got to the house, he had seen a table pushed up against the back door.

[40] Mr Peters was cross-examined on his criminal record. It emerged that he has a history of drug offences and offences of dishonesty such as stealing.

[41] Forensic evidence was called to the effect that the fire began either on the back veranda or under it at ground level as a result of human action. There was access to the back of the house from Horatio Street. Mr Channels, an officer of the Fire Brigade, gave evidence that he thought that the fire started downstairs near pallets which constituted a temporary flooring. Police Constable Tysoe said that she thought that the fire began either on or underneath an upstairs deck. The external wall facing the deck had been heavily charred and left the "V" pattern said to be typical of fires lit against a wall. Constable Tysoe accepted that it was possible that the fire began under the house. It was not, however, suggested to either of these witnesses who gave this evidence that the fire might not have been caused by human action.

[42] Ms Leonie Lewis said that the appellant visited her house for a couple of hours on the Sunday evening leaving at between 11.00 and 11.30 pm. He was dressed in new clothes including a long-sleeved shirt. She saw him in the house at 7.00 am the next

morning. She said that neither she nor Ms Dindas, who also lived in her house, had supplied the appellant with drugs on the Sunday evening.

[43] Ms Emma Dindas said that the appellant visited her house at about 10.00 pm on the Sunday. He stayed for about an hour. She did not see any indicia of drug or alcohol consumption by him. When she awoke at about 6.45 am on the Monday, he was back in the house.

[44] Mr Doyle gave evidence that the appellant and Mr Peters arrived at his house at Carseldine at about 11.00 pm on the Sunday. The appellant was wearing a smart dress shirt with long sleeves. Mr Doyle said that they made a number of trips in Mr Peters' car to obtain drugs. Mr Peters said that he wanted to do his washing, and Mr Doyle parted company with them at about 4.15 am.

[45] The bodies of the victims were found in the same bedroom in the house. The learned trial judge summarised the evidence relating to the cause of death of each of the victims. The accuracy of his Honour's summary is not disputed. His Honour said:

> "Briefly, the evidence of the forensic pathologist who did the post-mortem on Joshua was that the death was caused by smoke inhalation. He had soot in the lungs and the stomach that showed that he was still alive when the fire was burning. He had a fatal level of carbon monoxide in his blood. One to two per cent would be the normal range for a non-smoker. He had 65 per cent in one sample, 86 in another; and 50 per cent is considered generally, for a healthy person, a fatal level. He had a very low level of methylamphetamine but that, in his case, was of no significance at all.
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> In the case of Mark Christensen, the pathologist, Dr Milne, said that there was evidence that he was alive during the fire. He also had soot in his trachea and bronchi, which are part of the breathing system, for want of a better phrase, and he also had a characteristic pink colour that is found in the internal organs in cases of carbon monoxide poisoning. He had a CO level of 55 per cent, which was beyond the fatal level. He also had a very high level of methylamphetamine of 1.6 millimetres per kilogram, which is about 10 times, I think it was said, what was potentially a fatal level. However, you heard the evidence about the potential to build up a tolerance to the drug by continually using it and Dr Milne, you may think, although it's finally a matter for you, was clearly of the view that even if the methylamphetamine level may have played a part in the time at which Mark Christensen had died, the carbon monoxide poisoning was the primary cause of death, smoke inhalation.
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> He also gave evidence with regard to Teresa Marchetti. She also had soot particles in the trachea, bronchi and lungs which led to the conclusion that she was alive during the fire and had died from smoke inhalation. Her CO level was 59 per cent, which is above the 50 per cent level which is considered fatal. Her methylamphetamine level was 1.1, about seven times the potentially fatal level, but the same explanation was in his opinion applicable in her case with regard to tolerance and his ultimate opinion was that death was

caused by smoke inhalation and that methylamphetamine was not the primary cause of death."

[46] At trial the appellant did not call or give evidence.

The learned trial judge's directions to the jury

[47] In relation to the count of arson, the learned trial judge directed the jury as follows:

"Now, if you go to the indictment you will see that the first count on the indictment is a count of arson. Now, to prove an offence of arson the prosecution has to prove, firstly, that the accused set fire to the house, secondly, that he did so wilfully and, thirdly, that he did so unlawfully. Wilfully, so far as the law is concerned, means that the person either had an actual intention to set fire to the house at the time he did so or, alternatively, he deliberately did an act and he was aware at the time he did the act that it was a likely consequence of his act that the building would be set on fire and that he did the act regardless of the risk. And a likely consequence so far as the law is concerned is one that is a real and substantial possibility of happening. One that is a remote possibility is not a likely consequence.

So far as unlawfully is concerned, an act which causes injury to the property of another done without the owner's consent is unlawful unless it is authorised, justified or excused by law. Now, there's no suggestion that the owner of the house consented to the house being set fire to and no other authorisation, justification or excuse is suggested. So you would have no doubt, I suspect, that you would find, whatever happened, if it was humanly set, was unlawful.

So it comes down to this, I suppose, with regard to the offence of arson, itself: since the house obviously caught fire, if you were satisfied beyond reasonable doubt that the accused used some means of igniting the house and it caught fire as a consequence of what he did, he set fire to it for the purposes of the law. The remaining two elements are, either, the actual intention to set fire to the house or, alternatively, deliberately doing an act when he knew it was a likely consequence of the act the building would catch fire and that he did that act regardless of the risk that it would happen, and finally there's the issue of unlawfulness which you may think is the easy one among all of those.

Now, if you are satisfied of all of those elements, that would exclude any defence of accident. This would be because the finding that the person had an actual intention to set the building on fire necessarily implies that the defendant foresaw that the building would be set alight, and a finding that the offender was aware that it was a likely consequence of doing the act the building would be set on fire would also necessarily imply that the offender had foreseen that that might happen.

If you have a reasonable doubt whether any one of the elements that has been proved, your verdict would be not guilty, but if you were

> satisfied that all of the elements that are necessary to constitute the offence of arson have been established, then you would find a verdict of guilty."

[48] In relation to the bases on which the jury might convict the appellant of murder, the learned trial judge directed the jury:

> "So, as I have said, there are two possible ways a verdict of murder can be arrived at. The first is this one: it would be that if you found that the fire was unlawfully lit by the accused and that at the time he did so he had an intent to kill the victim named in the particular count in the indictment or some other person. The second way is if the death is caused by means of an act of such a nature as to be likely to endanger human life, done in the prosecution of an unlawful purpose.
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> I will tell you more about those in a moment, but the point I'm making at the moment is that when you're asked for your verdict on each of the three individual counts of murder, you will not be asked whether you have reached your verdict on a particular basis, you will just be asked in respect of each count whether you find the accused guilty or not guilty of murder."

[49] His Honour then expanded upon his direction to the jury in relation to murder involving the intention to kill or cause grievous bodily harm. It is not necessary to set out these directions because they are not controversial.

[50] His Honour then returned to the issue of felony murder directing the jury relevantly:

> "This second basis of murder requires the following: an act likely to endanger human life, that the act is done in the prosecution of an unlawful purpose and that the death is caused by the act done in the prosecution of the unlawful purpose.
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> Now, it's also important to note that in respect of this particular offence, the Criminal Code says that it is immaterial that the offender did not intend to hurt any person, so it doesn't matter that the person didn't intend to hurt any person if he does an act likely to endanger human life, it's done in the prosecution of an unlawful purpose and death is caused by that act.
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> The act relied on by the prosecution which it says is likely to endanger human life is the lighting of a fire at the premises at Horatio Street. If you're satisfied that the accused lit the fire that burned the house, that would be capable of qualifying as an act likely to endanger human life. The prosecution says that the act caused the death of the three victims because it generated the smoke that caused them to die from the smoke inhalation or the CO perhaps – the carbon monoxide, rather, to be more precise.
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> The law is, as I have said, that a person kills another person if the death is caused either directly or indirectly so it doesn't matter if the death was caused by smoke inhalation as a result of the fire.

Also, I should say it's not necessary there be only one factor involved in the death occurring, as long as the act done by the accused is a substantial contributing factor to the death. That would be sufficient.

…

Now, prosecution of an unlawful purpose simply means taking a step towards carrying out an unlawful purpose. Now, there are a number of offences that in a way merge into one another and it's a lit [sic] difficult sometimes to draw the boundary between one and the other that might be considered to be an unlawful purpose relevant to this case.

The first is arson which I've already defined to you as wilfully and unlawfully setting fire to a building or structure. That would be capable of being an unlawful purpose for the purpose of this offence, and that offence requires the building itself to be set on fire.

The second is wilfully and unlawfully setting fire to anything which is so situated that a building or structure is likely to catch fire from it. That would cover a case where something that was not necessarily in a position where it would inevitably catch fire was set on fire, but it was still likely that the building would catch fire from the fire that had been lit. 'Likely' in that context means that it's a real or a substantial possibility that the house would catch fire from it and a remote possibility would not be enough.

The third would be wilful damage to property, the elements of which are that the accused person damaged or destroyed property and that he did it wilfully, which simply means an actual intention to do the particular kind of harm that was, in fact, done or that he did [sic] deliberately did an act aware at the time that he did it that the result was a likely consequence of his act and that he, nevertheless, recklessly did the act regardless of the risk.

There is also in addition to that one other possibility and that is the offence of threatening violence, which I will come to in a moment, but so far as the ones that are concerned, as I say, as a group of three of related offences, those are the ones that could be relied on as an unlawful purpose.

Now, you have got, as I have said, the evidence of two of the investigators, Ms Tysoe and Mr Channels about where the fire started. In the end it's a matter for you to decide where the fire began and whether the offence of arson was committed or the unlawful purpose for which it was set was arson, whether there was a lesser unlawful purpose of setting fire to something where it was likely the house would catch fire from it and, thirdly, whether there was simply an unlawful purpose of doing wilful damage to something under the house.

> The other unlawful purpose of threatening violence would arise in this way: what the Criminal Code says is that it is a crime to do an act likely to cause any person in the vicinity to fear bodily harm or damage property with intent to alarm a person. The concept that is involved in this is that if someone intended to cause alarm or which simply means give a significant fright to somebody, that they did an act that was likely to cause any person in the vicinity to fear bodily harm to any person or damage to property, they would have committed a crime.
>
> I only mention this one because of Peters' evidence that the accused said to him that he only started a small fire to scare Christensen and it just got out-of-hand and it was God's work. It's a matter for you to decide whether you think that is a reasonably possible explanation of what happened or whether you reject it but, as I say, that's a matter for you.
>
> I also remind you that with regard to accident, if you can't eliminate the possibility that the accused didn't foresee the deaths, and an ordinary person wouldn't have done so either, as a consequence of setting a fire, the deaths would be accidental and the accused would be entitled to an acquittal of murder on that basis, but if you think that he actually foresaw it as a possibility they might die as a result of setting the fire, or if he didn't actually foresee it, but an ordinary person would have foreseen the possibility of death by fire, then you move on to the next step.
>
> If you think that it might be a possible explanation of events that the fire was simply set to scare Christensen, you would have to consider whether, if someone saw him setting a fire where the fire was lit, it would cause a person in the vicinity to fear that it would cause - sorry, it would cause a person in the vicinity to fear that bodily harm or injury would be caused to someone and, if that was the case, it would be done in the prosecution of an unlawful purpose for the purposes of that particular species of murder.
>
> So just to recap, you have to find an act likely to endanger human life, the act is done in the prosecution of an unlawful purpose and death is caused by the act to constitute that species of murder."

[51] In relation to the issue of intoxication, the learned trial judge said:

> "Now, one other issue which I raise, perhaps largely because there is a fairly flimsy basis in the evidence that requires it to be mentioned, is that of intoxication. It is necessary to give you a direction with regard to this even though the evidence, you may think, is very slight in that regard. As I recall it, it wasn't relied on in Mr Hunter's address and that would probably not be surprising because his case essentially is that it was not the accused who was responsible for the fire.
>
> In any event this evidence really depends on two things: firstly, Peters said that the accused consumed some speed about five hours, I

think, before the incident happened. The second is whether after five hours there would be any appreciable effect still there of an ingestion of speed at an earlier time, as early as that.

If you exclude it as a reasonable possibility that the accused was affected by amphetamine at the time of the fire, if you find that he is involved in it, if you exclude that possibility you don't really need to consider intoxication further. But I should, as I say, because it has at least only one basis in the evidence, I have to mention it. What it says is that:

> 'Where an intent to cause a specific result is an element of the offence intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention, in fact, existed.'

Now, you can take it for the purposes of the argument that arson and murder and wilful damage to property and the other offence that I will refer to of setting a fire to something so close to a dwelling-house would all have to have this factored in, but as I say it's a matter for you whether you think it's a relevant consideration at all.

For an offence where a specific intent is a necessary element which must be proved beyond reasonable doubt by the prosecution before you can convict, in deciding whether you find that that intention did exist in fact you have to consider the evidence of consumption of drugs. Intention is a state of mind. Whether you are satisfied that the accused had a necessary intention depends on your assessment of the evidence. In deciding that, you have to have regard to anything that he may have said about his intention and what you infer it was from other evidence.

Now, if at the end of that process you are satisfied beyond reasonable doubt that the person had the necessary intention the element of intent is proved. The question to be answered is: whether notwithstanding the consumption of drugs he did, in fact, have the necessary intent at the time. The question is not whether he was so intoxicated that he could not form intent. Nor is it relevant, if you are satisfied that he did form the intent, that you think he might not have formed such an intent but for the consumption of drugs.

Now, common experience will remind you that people sometimes intentionally do things they wouldn't ordinarily do even if their normal control mechanisms have been inhibited by the consumption of alcohol or drugs. The question is whether you are satisfied beyond reasonable doubt after weighing all the evidence, including the evidence of consumption of drugs, that he did have any necessary intent at the time that he set the fire."

[52] In relation to the evidence of Mr Peters, the learned trial judge said to the jury:

"Mr Hunter submitted to you that you had to be particularly careful to suppress the emotions that the case might engender and look at the matter very clinically.

He submitted also that the evidence of Mr Talic [sic], the neighbour, was no more than hearing an argument and that was all it amounted to. He didn't identify anybody.

He submitted to you that Mr Peters' evidence should be carefully scrutinised. Far from being a person who was incapable of making up a story, it was submitted that he was a person with a degree of native cunning and may have made up the story with a view to getting the best deal that he could out of what was happening in the circumstances.

He also submitted to you that the evidence of Lewis was important in the scheme of things and you have heard what I have said already about her and the timing issue as to when the accused got back. I don't intend to go through that again.

He submitted to you that the making of the threats which Mr Martin had referred to in reliance on the evidence of Scott and the other female witness [Davison], were ones which you would be sceptical about. He pointed out that it is often the case that it is said that people say things that they do not intend to do in that context. He submitted to you that if you thought that he had lied to Scott, he had already heard that the word on the street was that he was involved and he may well have lied for the purpose of distancing himself from that.

He also reminded you of the evidence of Lewis about what she called lovey-dovey calls or texts to the accused, which was far from indicative that he would go around and do what eventually happened.

He submitted to you that there were a number of other issues which you would have heard yesterday. He submitted that it would be unlikely that he would wish to kill his own son. He submitted that it would be unsafe to draw a conclusion that he had intended to kill from the circumstances and that you would not be persuaded that the felony murder basis, that's the second basis that I referred you to, was made out.

He reminded you that the relationship was undoubtedly a volatile one but often flared up and died away as quickly as it began and in addition to that, the argument was not a one-sided fight because the deceased woman was capable of giving as good verbally as she got and in those circumstances it was not a kind of ongoing resentment that lingered after the argument had finished."

[53] Following a request for assistance from the jury, the learned trial judge said:

"Having said that, what I want to say to you is this: that if you were to find a verdict of guilty of arson that would mean that you had found the accused guilty of wilfully and unlawfully setting fire to the house.

Now, a finding of guilty, if there was a finding of guilty of arson you would have to go on to consider the issue of felony murder. You just can't set it aside and not make any decision about it. Now, you have to make a decision on it.

Now, felony murder, as I told you previously involves the following elements: that the accused person did an act likely to endanger human life, that the act was done in the prosecution of an unlawful purpose and the death is caused directly or indirectly by that act.

To be satisfied beyond reasonable doubt that the death was caused by the act that was done you would have to be satisfied beyond reasonable doubt that the victims died as a result of the accused person setting the house on fire.

I've been through with you the evidence of the pathologists in that regard and it is a question for you as the jury to resolve whether you are satisfied beyond reasonable doubt that death was caused by the act of setting fire to the house, whether directly or indirectly in relation to the causation.

Now, the next proposition is that applying a source of ignition to a house is capable of being an act done in the prosecution of an unlawful purpose. Whether you are satisfied beyond reasonable doubt of that element is once again a matter for the jury. The unlawful purpose is wilfully and unlawfully setting fire to the house. So you have the application of a source of ignition to the house in the prosecution of an unlawful purpose of wilfully and unlawfully setting fire to it.

Once again that's a matter for you to decide whether you're satisfied about it and it's also a matter for you whether setting fire to the house in the circumstances that prevailed at the time was an act likely to endanger human life. You have to be satisfied of all of those elements to return a verdict of felony murder.

Now, with regard to manslaughter the process of taking the verdict in respect of manslaughter would be this: that if that was what you ultimately found, on each count in turn you would be asked - on each murder count in turn you would be asked, 'Do you find the accused guilty or not guilty of murder?' Now, if and only if you said not guilty of murder you would be asked whether you found the accused guilty or not guilty of manslaughter. That's the process if that's what you wanted to know.

If you want to know anything further in respect of manslaughter I won't go beyond that at this moment, but you can send another note

> to us and we will see how we can help you further in that regard. Okay. We'll just get you to retire and consider your verdict further."

[54] The evidence showed that Ms Davison had been given an indemnity against prosecution. In relation to Ms Davison, the learned trial judge said to the jury:

> "I should say to you too that there was mention in cross-examination of one of the witnesses being an indemnified witness. Now, an indemnified witness; there is no great mystery about that. It means that the Attorney-General, who is politically responsible for the administration of the criminal law, has promised on behalf of the State not to prosecute the witness in respect of things that the person might say in giving evidence that reveal further offences committed by the witness for which the witness has not previously been dealt with.
>
> Now, that kind of decision is usually made on public policy grounds to encourage a person who knows something about a very serious incident to give evidence of what that witness knows without fear that the witness will be exposed to prosecution, if it is necessary to reveal that the witness has committed offences for which there might be a prosecution if further offences are revealed during the giving of evidence and there had been no indemnity given. The usual public policy reason for giving an indemnity in a particular case is that a judgment is made by the Attorney-General that it is in the public interest that the person accused of committing a very serious offence is tried for the offence on the most complete available evidence. And if a person who can add to the available evidence is reluctant to do so for fear of prosecution for offences committed by him or her that he or she may have to reveal while giving evidence, then the public interest in having the person charged with a very serious offence tried on all the potentially available evidence is put at risk and that's why an indemnity is sometimes given.
>
> But you should factor the fact that the person is an indemnified witness into your consideration in deciding whether you find that the evidence is truthful and reliable. The problem is sometimes said to be that once an offender has committed themselves to giving certain evidence there is an obvious incentive not to depart from the evidence that the person has promised to give. So, as I say, you take into consideration that issue as well when you are deciding whether an indemnified witness's evidence is truthful and reliable."

[55] I turn then to a consideration of the arguments in relation to the grounds of appeal against conviction.

Ground 1 – directions in relation to the offence of arson

[56] In relation to the offence of arson, s 461 of the *Criminal Code* provides relevantly as follows:

> "Any person who wilfully and unlawfully sets fire to any of the things following, that is to say–
>
> (a) any building or structure whatever, whether completed or not;

…
is guilty of a crime, and is liable to imprisonment for life."

[57] The appellant's contention upon this ground of appeal is that the learned trial judge's directions to the jury were apt to suggest to the jury that the appellant could be found guilty of arson if the jury accepted that the appellant set a fire at some distance away from the house and the house caught fire as a result. The appellant's argument on this point seemed to involve the proposition that, as a matter of law, a person cannot be guilty of arson under s 461 of the *Criminal Code* unless he or she applies "fire" directly to the building in question so as to set it alight. There is, not surprisingly, no support in authority for such an artificially narrow view of what is involved in setting fire to a building. Whether or not a person has set fire to a structure is a question of fact, and the jury were correctly instructed to that effect.

[58] The appellant argued that his Honour's direction, whilst appropriate to a charge of attempted arson under s 462(b) of the *Criminal Code*, was deficient as a direction in relation to s 461 of the *Criminal Code*. Section 462 of the *Criminal Code* is relevantly in the following terms:

"Any person who–

…

(b) wilfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in section 461 is likely to catch fire from it;

is guilty of a crime, and is liable to imprisonment for 14 years."

[59] The appellant's criticism of his Honour's direction to the jury on this point fails to recognise that his Honour expressly directed the jury that, to convict of arson, they had to be satisfied beyond reasonable doubt that the appellant "used some means of igniting the house and it caught fire as a consequence of what he did". This direction was an accurate statement of the law. The jury would have understood from his Honour's direction that they could not convict the appellant of arson unless they were satisfied to the requisite degree that the appellant intentionally set fire to the building. It was not necessary for his Honour to contrast the terms of s 461 with the terms of s 462 in order to make this point.

[60] This ground of appeal is without substance.

Ground 2 – direction on intoxication

[61] The gravamen of the appellant's complaint on this ground is that the learned trial judge did not adequately direct the jury in relation to the onus of proof on this issue. The passage from the learned trial judge's direction to the jury which I have set out at paragraph [51] above shows that there is no substance in this complaint.

[62] An aspect of the criticism advanced against the learned trial judge under this heading is that his Honour did not follow the terms suggested in the Benchbook, Item 79B.1. This criticism misunderstands the purpose of the Benchbook. The Benchbook is not intended to be applied as if it were a statute; it is a guide which may be employed by judges to the extent that it is useful in the circumstances of a particular case. A departure from the Benchbook is not itself an error on the part of a trial judge. The sufficiency of a trial judge's directions depends on the circumstances of each case. Having regard to the circumstances of this case, the

learned trial judge's directions in relation to intoxication were accurate and appropriate.

[63] As Mr Copley of Counsel, who appeared for the respondent to the appeal, pointed out, the defence case at trial was that it was not the appellant who set the fire, and that, so far as the defence case was concerned, the jury were entitled to conclude that the house was set on fire by someone who intended to do so. The appellant's Counsel at trial did not seek to suggest that if it was the appellant who set fire to the house, he was so intoxicated that he did not have the intention to do so.

[64] In *Melbourne v The Queen*,[3] Hayne J, with whom Gummow J relevantly agreed,[4] explained that the way in which trial counsel for an accused chooses the issues on which a case goes to the jury will inevitably have a bearing on the directions which the trial judge is obliged to give the jury. Hayne J went on to say:

> "It is trite to observe that the jury, not the judge, are the sole judges of questions of fact. But that does not mean that a trial judge can leave all questions of fact to the jury without giving them any directions. The trial judge in a criminal trial must instruct the jury about some matters that affect how they set about finding the facts. Thus in some cases the judge must warn the jury of dangers of which they must beware when they are considering the facts. Directions about the dangers of identification evidence (*Domican v The Queen* (1992) 173 CLR 555) or about accepting uncorroborated evidence in some circumstances (eg, *Longman v The Queen* (1989) 168 CLR 79) provide ready examples. But it is always necessary to bear steadily in mind that it is the jury that decide the facts – not the trial judge. Especially is this necessary when the question is (as it is in this appeal) whether a trial judge is bound to direct a jury on some matter that touches how the jury finds the facts in the case. The warnings about factual issues that I have mentioned are given to the jury not just because they relate to one or more of the issues in the case but because, if they are not given, the jury may omit consideration of important matters (of which they may be unaware) and wrongly conclude that guilt has been demonstrated beyond reasonable doubt."[5]

[65] In *Tully v The Queen*, Hayne J emphasised that it is an essential aspect of the role of the judge in a criminal trial to identify for the jury the "real issues" in the case. It is essential to the proper administration of criminal justice that the jury's attention be focused on the "real issues", and that the jury not be distracted by non-issues. Hayne J said:

> "A criminal trial is an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt (*RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34] per Gaudron, Gummow, Kirby and Hayne JJ). If an accused person pleads 'not guilty', the

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3 (1999) 198 CLR 1 at 52 – 53 [140] – [143].

4 (1999) 198 CLR 1 at 23 [59].

5 (1999) 198 CLR 1 at 53 – 54 [144] (citations footnoted in original).

accused puts the prosecution to proof, beyond reasonable doubt, of every element of the offence or offences charged.

In a trial by judge and jury, the tasks of the trial judge and the jury are different. As the standard directions to juries say, it is the jurors who are the judges of the facts in the case. It is for the jury, and the jury alone, to decide whether the accused is guilty or not guilty of the crime that is charged.

The tasks of the trial judge are different. They include those identified in the well known and now oft-repeated passage from the joint reasons of this Court in *Alford v Magee* ((1952) 85 CLR 437 at 466. See also, eg, *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [143]; *De Gruchy v The Queen* (2002) 211 CLR 85 at 96 [44]). It is for the judge to explain to the jury so much of the law as they need to know in deciding the real issue or issues in the case (See, eg, *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49]). But no less importantly, it is for the trial judge to *decide* what those real issues are, and to *tell the jury*, in the light of the law, what those issues are (*Alford v Magee* (1952) 85 CLR 437 at 466).

It is to be noted that reference is made in *Alford v Magee* to the 'real' issues in the case. The word 'real' is no mere verbal flourish. It is important. By hypothesis, the accused has pleaded not guilty and, by that plea, has put in issue *every* element of the offence or offences charged. But it by no means follows that there is a 'real' issue about every one of those elements. Leaving aside cases in which an accused makes some formal admission of one or more elements of an offence charged, by the time the judge comes to instruct the jury, it will often be apparent that evidence adduced by the prosecution in respect of one or more of the elements of the charge is not challenged, and that there is, therefore, no real issue about that element or those elements. To take a simple example, in a murder trial there will very often be no dispute that the victim is dead. There may be no dispute about how, when or where the victim died. In order to prove the case, the prosecution will lead evidence about those matters but it will be apparent, by the end of the trial (if not much sooner), that there is no 'real' issue about those matters.

A fundamental part of the task of the trial judge is to decide what are the 'real' issues in the case. And another, no less important, part of that task is to tell the jury what those real issues are. It is in respect of those issues (and only those issues) that the judge must instruct the jury about so much of the law as the jury must understand to decide the case.

Identifying the real issues in a case will not always be easy. In some jurisdictions, legislative provisions have been made for procedures evidently intended to reveal what are the real issues in a case before the trial begins (See, eg, *Crimes (Criminal Trials) Act 1999* (Vic), ss 6-8). But even where there are such procedures, and they are applied, it is inevitable that, at many criminal trials, no positive

> defence case will be advanced and the accused will go to the jury on the basis only that the prosecution has failed to prove its case beyond reasonable doubt. It must be accepted, therefore, that there will be cases (including, but not only, those in which no positive defence is advanced) in which it may not be at all clear whether there is a real issue about some particular aspects of the matter. The trial judge must nonetheless decide what are the real issues, and must tell the jury what they are.
>
> It is of the first importance to the proper administration of criminal justice that trials not be made longer or more elaborate than they need to be. That object is defeated if trial judges do not focus the minds of the jurors upon what are the real issues in the case and confine the instructions that are given to the jury to only so much of the law as the jury needs to decide those issues. Prudence may well be said to suggest that the judge should err on the side of stating more rather than fewer issues. But it is important to recognise that doing that tends to defeat the object of confining the length and complexity of criminal trials to what is necessary for the attainment of justice. The trial judge must, therefore, steer a difficult course between stating only the real issues in the case, and stating too many issues for the jury's consideration, with consequent over-elaboration and prolongation of the trial. As Owen J said in *Commissioner for Road Transport and Tramways v Prerauer* ((1950) 50 SR (NSW) 271 at 277), the first duty of the trial judge is 'to explain to a jury in a *simple, understandable* fashion the law which is applicable to the particular case before them' (emphasis added).
>
> Because deciding what are the real issues in a case is a matter of judgment to be made in the context of the particular trial, there will be cases where minds may differ about what those issues are. There will, therefore, be cases where, on appeal, it is said that the trial judge failed to recognise that there was a real issue about some aspect of the matter. In that regard it may be that a deal of importance should be attributed by the appellate court to what was done at trial, having regard not only to the advantage a trial judge has in understanding the way in which a trial has been conducted, but also the responsibility of counsel (on both sides of the record) to draw attention to any omission in the trial judge's instructions to the jury. But these are questions that do not now arise and need not be examined here." [6]

[66] In this case, the learned trial judge gave the jury a direction on intoxication and its bearing on whether, if it was the appellant who set fire to the house, he intended to do so. No doubt the able and experienced Counsel who represented the appellant at his trial appreciated that, having regard to the totality of the evidence the prospect of persuading the jury that, if his client did start the fire, he did not intend to set fire to the house, was so remote that it was not worthwhile pressing the point. No doubt it was for this reason that he sought no further direction from the learned trial judge in relation to whether the house was intentionally set afire or whether the appellant

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6 (2006) 230 CLR 234 at 256 – 258 [73] – [80] (citations footnoted in original).

was so intoxicated as not to have formed the requisite intention for the offence of arson.

[67] Having regard to the basis on which the appellant's Counsel at trial had fought the case, no more complicated or elaborate direction from the trial judge on the issue of intoxication was necessary to ensure that the jury did not "omit consideration of important matters … and wrongly conclude that guilt has been demonstrated beyond reasonable doubt."

Ground 3 – an unsafe verdict on count 1

[68] The contention advanced in support of this argument is that the evidence did not support the conclusion that the appellant intentionally set fire to the house. This contention is based on the propositions of fact that the appellant started a fire in the pallets under the house, and that these pallets were not attached to the house, and that the appellant did not intend to set fire to the house as opposed to scaring Mr Christensen by setting fire to the pallets. This contention is also based on the erroneous proposition of law to which I have already referred, namely, that a person "sets fire" to a building only if the person applies flame directly to the fabric of the building.

[69] As to the factual assertions involved in the appellant's argument, neither of the investigators who gave evidence about the seat of the fire actually said that the fire began in the pallets to which the appellant's argument refers. At trial, it was not put to either of these witnesses that the fire commenced in the pallets. No attempt was made to suggest that anything turned on whether the fire, started by whoever started it, was applied directly to the house structure or under and in proximity to the house structure. The appellant's assertion to Mr Peters that he did not mean anyone to be hurt cannot be regarded as a denial that he set fire to the house. Nor does it suggest that he did not intend to set fire to the house.

[70] To the extent that the issue for this Court is whether the jury were entitled to conclude that whoever lit the fire intended to set fire to the house structure, it is a hopeless task now to suggest that the jury were not entitled to conclude that the arsonist (whoever he might have been) intentionally set fire to the house on the basis of a view of the facts which was not even the subject of hypothesis raised by the defence at trial.

[71] In accordance with the decision of the High Court in *MFA v The Queen*,[7] the question which must be addressed under this ground of appeal is whether it was reasonably open to the jury on all of the evidence in the case to be satisfied beyond reasonable doubt of the appellant's guilt of the offence of arson. Having regard to the circumstance that it was common ground that the fire was the result of human action, the evidence of the marks of the fire left on the walls of the house, the evidence of the appellant's opportunity to set the fire, the absence of any other hypothetical arsonist, the appellant's threats to Ms Marchetti before the fire and his conduct after the fire had been set, it was reasonably open to the jury to conclude that the appellant intentionally set fire to the house.

[72] This ground of appeal should be rejected.

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7 (2002) 213 CLR 606 at 614 – 615 [25] and 624 [59].

Ground 4 – the direction on unlawful purpose

[73] The appellant's contention is that the learned trial judge erred in directing the jury that it might consider any of the four alternative kinds of unlawful purpose put to them in the course of his directions. The bases for this contention is that the prosecution case of unlawful purpose, so far as felony murder was concerned, was, or was required to be, confined to the offence of arson, this being the only other offence charged on the indictment. These contentions must be rejected.

[74] The prosecution case was not required to be, and was not, confined in the way the appellant's contention would suggest.[8] The appellant at trial did not seek to confine the prosecution case of unlawful purpose by insisting upon particulars, nor did the appellant's Counsel at trial object to the Crown advancing its case in conformity with the directions of which the appellant now complains. From the outset it was made clear by the Crown Prosecutor that the Crown was advancing the unlawful purposes referred to by the learned trial judge in his directions to the jury.

[75] The assertion made on the appellant's behalf that the prosecution case of unlawful purpose for the purposes of s 302(1)(b) of the *Criminal Code* was actually confined to arson is quite wrong. No doubt it was because it was clear that the Crown case covered the four purposes discussed by the able and experienced Counsel who appeared for the appellant at trial that no redirection was sought from the learned trial judge in respect of this aspect of his Honour's directions to the jury.

[76] On the appellant's behalf it was acknowledged that no authority could be found to support the proposition that the Crown may not advance more than one unlawful purpose in relation to a charge under s 302(1)(b) of the *Criminal Code*. The appellant made the point, however, that there was no decision which supported the course taken by the Crown in this case.

[77] Mr Copley of Counsel for the respondent was, however, able to refer the Court to the decision of the Court of Criminal Appeal in *R v Cronau*[9] from which it appears that the Court treated it as unremarkable that the Crown might seek to rely upon a number of unlawful purposes as elements of a charge of felony murder. That the Court of Criminal Appeal should have proceeded in this way, and that there is no authority supporting – or even discussing – the proposition advanced on the appellant's behalf, is not surprising. Just as the Crown may rely upon several acts of the accused as having caused the death in a charge of felony murder, so it may rely upon several unlawful purposes. To say this is simply to give effect to the usual rule of statutory interpretation embodied in s 32C of the *Acts Interpretation Act* 1954 (Qld) that "in an Act … words in the singular include the plural".

[78] The appellant's submission in support of this ground of appeal is without substance.

Ground 5 – the indemnified witness

[79] In written submissions filed on the appellant's behalf, it is said that the learned trial judge's directions to the jury were inadequate in that they failed to caution the jury against reliance on the evidence of Mr Peters. A caution was said to be necessary because Mr Peters was an indemnified witness. The evidence showed that Mr Peters had not been given an indemnity by the Crown. On the evidence, the only Crown witness who had been given an indemnity against prosecution was

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8 Cf *Stuart v The Queen* (1974) 134 CLR 426 at 439 – 440.

9 (1980) 3 A Crim R 460 esp at 462 – 463.

Ms Davison. When this was pointed out in the written submissions filed on behalf of the respondent, the appellant's submission was then "redirected" to relate to Ms Davison. This redirected submission should be rejected.

[80] The first thing to be said here is that, on the evidence adduced at trial, it was not apparent that the indemnity given to Ms Davison could have acted as any sort of incentive to give or adhere to false evidence against the appellant. Any charges pending against Ms Davison were said to have been dealt with. It is far from clear that a direction to the jury that Ms Davison had an incentive to bear false witness against the appellant would have been accurate.

[81] As is readily apparent from the summary set out above, Ms Davison's evidence was largely unchallenged; and it drew significant support from other evidence. It may be mentioned here that, as well, there were photographic exhibits which showed what appeared to be burn marks on the seat of the car that the appellant, Ms Marchetti and Ms Davison had been in on the Sunday before the fire. Ms Davison's evidence was uncontradicted, and it was unchallenged in any material respect, save for her evidence of the threat made by the appellant to "burn you and the whole fucking house". There was other evidence which supported the proposition that the appellant had expressed this intention.

[82] In these circumstances, no occasion for the giving of a mandatory warning arose because Ms Davison had been given an indemnity. Further, it is difficult to conceive that the appellant would have been advantaged in his prospects of an acquittal by a direction to the jury that it would be dangerous to convict on the uncorroborated evidence of Ms Davison and that they should, therefore, scrutinise Ms Davison's evidence closely before acting upon it. If his Honour had done this he would have been obliged, in the interests of accuracy, to remind the jury of the other evidence which supported Ms Davison's evidence. One can readily understand why the appellant's Counsel at trial did not press for such a direction.

[83] It is necessary to say something further in relation to the arguments advanced by the appellant relating to the need for a judicial warning as to the reliability of Ms Davison, but it is preferable to do so in the context of a discussion of ground 6 to which I now turn.

Ground 6 – Mr Peters' evidence

[84] On the appellant's behalf, it is said that the learned trial judge's directions to the jury were deficient in failing to caution the jury against reliance on evidence given by Mr Peters who should be regarded as a "potential accomplice".

[85] At the hearing of the appeal, the appellant's Counsel persisted in describing Mr Peters as a "potential accomplice" even though they acknowledged that there did not seem to be any sensible basis for so describing him.

[86] The appellant's Counsel made the submission that the jury should have been warned that it would be dangerous to convict the appellant on the uncorroborated evidence of Mr Peters bearing in mind his criminal record, drug dependency, his release on bail at the time of the offences in question and the circumstance that he gave evidence of a confession by the appellant. As a result, so it was said, the jury should have been warned to scrutinise his evidence carefully in these respects before deciding that it was safe to act upon his evidence.

[87] It is difficult to understand this submission if for no other reason than that Mr Peters' evidence did not stand alone. It was supported in many material particulars by other evidence. A direction that the jury should proceed on the basis that it would be dangerous to convict on the basis of Mr Peters' uncorroborated evidence would necessarily have been contradicted by a reminder to the jury of the other evidence that supported Mr Peters' account of events. It seems nonsensical to suggest that a mandatory warning was required when it is obvious that the basis for the warning would have to be contradicted by the judge. And it is readily understandable why a course, so adverse to the appellant's interests, was not pursued by the experienced and able Counsel who appeared for him at trial.

[88] In *Carr v The Queen*,[10] Brennan J (as his Honour then was) explained the rationale of judicial warnings to juries and how the need for such warnings is consistent with the institution of trial by jury in which the jury is the constitutional tribunal of fact:

> "Trial judges give warnings to juries in many situations to guard against perceptible risks of justice miscarrying. The warnings may relate to the jury's contact with the public, the need to disregard information obtained outside the courtroom, the dismissal of prejudice or a variety of other matters occurring in the course of a trial. A warning may be needed to ensure that the jury attributes the appropriate significance and weight to the evidence. That is a central aspect of the jury's function. In the majority of cases the assessment of the evidence can be left to the jury's experience unaided by judicial warnings but there are some occasions when a warning is needed. A warning is needed when there is a factor legitimately capable of affecting the assessment of evidence of which the judge has special knowledge, experience or awareness and there is a perceptible risk that, unless a warning about that factor is given, the jury will attribute to an important piece of evidence a significance or weight which they might not attribute to it if the warning were given. It is not possible to define *a priori* the circumstances in which a warning is necessary: the circumstances which show whether a perceptible risk of miscarriage of justice exists in relation to the assessment of evidence include the charge, the evidence and the conduct and atmosphere of the trial. Although no rule of law postulates *a priori* the cases in which a warning is needed, a failure to give a warning when one is needed leaves the proper significance and weight of the evidence in doubt. A guilty verdict founded on that evidence alone may have to be set aside by an appellate court as a miscarriage of justice because the jury, in the absence of a warning, may have reached their verdict by attributing to the evidence an erroneous significance or weight."

[89] As is apparent from this passage, the question which must be addressed is whether there was some feature of the evidence which gave rise to a perceptible risk of miscarriage of justice if the assessment of the evidence was left to the jury's experience unaided by judicial warnings. The concern is whether "the circumstances of the case are such as to suggest that the evidence of a [witness] may be unreliable and the jury may not appreciate the risk of acting on that evidence

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[10] (1988) 165 CLR 314 at 324 - 325.

without special scrutiny being given to it".[11] It is only where this concern arises that a trial judge is obliged to interfere with the authority of his or her office in the function of the jury as the constitutional tribunal of fact. In this regard, the argument advanced on behalf of the appellant harked back to a time when the *Criminal Code* provided by s 632:

> "A person may be convicted of an offence on the uncorroborated testimony of an accomplice or accomplices, but the Court shall warn the jury of the danger of acting on such testimony unless they find that it is corroborated in some material particular by other evidence implicating that person."

[90] This provision was repealed and replaced in 1997 by provisions which are set out in the following passage from the reasons of Kirby J in *Tully v The Queen*:[12]

> "*Corroboration warnings*: Under the common law, as was explained in *Robinson* ((1999) 197 CLR 162), certain categories of witnesses were considered to suffer from intrinsic lack of reliability, requiring trial judges to warn the jury of the danger of convicting upon their uncorroborated testimony. The categories concerned included the evidence of accomplices, of victims of a sexual offence and the sworn evidence of children (*Carr v The Queen* (1988) 165 CLR 314 at 318-319; cf *B v The Queen* (1992) 175 CLR 599 at 615-617; *R v Link* (1992) 60 A Crim R 264 at 270-271). It was to remove this approach of the common law that legislation was enacted throughout Australia to abolish the categories of evidence presumed to be unreliable. In Queensland, the relevant provisions on corroboration are found in s 632 of the Code (See also *Evidence Act 1995* (Cth), s 164; *Evidence Act 1995* (NSW), s 164; *Evidence Act 1929* (SA), s 12A; *Evidence Act 2001* (Tas), s 164; *Crimes Act 1958* (Vic), s 61; *Evidence Act 1906* (WA), s 50; *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 69; *Evidence Act* (NT), s 9C). That section reads:
>
> > '(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
> >
> > (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
> >
> > (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses.'
>
> This section existed in Queensland, in an earlier form, at the time that *Robinson*, also a Queensland case, was decided. However, inferentially in response to the criticism of the language of s 632, the section has been amended. In response to this Court's comment that some witnesses who formerly required corroboration were not

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11 *AM v The State of Western Australia* [2008] WASCA 196 at [127].

12 (2006) 230 CLR 234 at 247 [40] – [41] (citations footnoted in original).

> 'complainants' (such as accomplices) (*Robinson* (1999) 197 CLR 162 at 170 [23]), the word 'complainants' was deleted and the word 'persons' substituted. Nevertheless, the substance of s 632 remains the same."

[91] The enactment of the present s 632 of the *Criminal Code* in 1997 involved a decisive legislative rejection of judicial stereotyping of witnesses because of their membership of a particular class. It meant that it was no longer proper for trial judges to warn juries against the reliability of particular classes of witnesses. And, yet, on the appellant's behalf, reliance was placed on the 1993 Victorian decision in *R v Faure*[13] in support of the submission that Mr Peters – and Ms Davison (and also, as an afterthought, Ms Scott) – were the kind of witnesses about whom the jury should have been warned that it would be dangerous to convict on their evidence alone.

[92] The South Australian Court of Criminal Appeal declined to follow *R v Faure* in *R v Smith (No 2)*[14] and in *R v Sinclair & Anor*[15] noting that "in some cases the danger of convicting an accused person upon the uncorroborated evidence of a potentially unreliable witness is so obvious that the jury is fully alive to it without a warning." More importantly for present purposes, *R v Faure* was not decided under a statutory regime which included provisions such as the current s 632 of the *Criminal Code*.

[93] As the High Court explained in *Robinson v The Queen*[16] and in *Tully v The Queen*[17] and as this Court has said in *R v Tichowitsch*,[18] consistently with the rationale stated by Brennan J in *Carr v The Queen* set out above, the need for and the nature of any judicial warning to the jury and the terms of that warning will depend upon a judgment by the trial judge as to what is necessary to avoid a perceptible risk of a miscarriage of justice from a conviction because of matters personal to the uncorroborated witness upon whom the Crown relies.[19]

[94] The appellant's submission on this point is flawed in a number of respects. The legislature has decisively rejected the judicial stereotyping of certain categories of witnesses as unreliable; yet the appellant's submission seeks to draw support from cases decided before the introduction of the present s 632 of the *Criminal Code* which depend upon that stereotyping. Indeed, the appellant's submission seeks to introduce new categories of suspect witnesses which were not recognised as such by the common law. And it fails to recognise that insofar as these categories of witnesses, such as those with a criminal history, or a history of drug abuse, may be unreliable, any reservations which ought to attend the weight to be accorded to their evidence in any particular case are likely to be at least as apparent to a jury as they may be to a trial judge. There are, of course, cases where the circumstances are such as to create a risk of miscarriage of justice perceptible as to the trial judge for reasons other than an assumption about the unreliability of a witness in a particular

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13 (1993) 67 A Crim R 172.
14 (1995) 64 SASR 1.
15 Unreported, Court of Criminal Appeal, SA, SCCRM 351 and 352 of 1996, 29 April 1997.
16 (1999) 197 CLR 162 at [20] – [21].
17 (2006) 230 CLR 234.
18 [2006] QCA 569.
19 See also *FGC v The State of Western Australia* [2008] WASCA 47 at [3] – [4], [120] – [121]; *AM v State of Western Australia* [2008] WASCA 196 at [127].

category, but the circumstances of this case were not such as to give rise to the kind of risk described by Brennan J in *Carr v The Queen* or considered by the High Court in *Robinson v The Queen*.

[95] So far as Mr Peters was concerned, he had a criminal history for drug offences and offences of dishonesty. He was on bail when he was driving around with the appellant before the offence. No authority supports the view that these circumstances gave rise to a risk of unreliability which would have been apparent to a judge but not to a jury. So far as Mr Peters' drug problems are concerned, this Court should be wary of accepting invitations to engage in a renewal of the kind of stereotyping of witnesses which led to the enactment of the current s 632 of the *Criminal Code*. And Mr Peters' evidence was supported by other evidence on many material points – especially relating to the appellant's opportunity to commit the offences. There was not, in these circumstances, the risk of a miscarriage of justice, perceptible to the judge but not the jury, which called for a mandatory warning to the jury suggested on the appellant's behalf.

[96] So far as Ms Scott and Ms Davison are concerned, the likelihood that drug users might be unreliable as witnesses is not an insight exclusive to the judiciary. And, once again, it is quite unrealistic to suggest that the learned trial judge should have given a direction to the jury on the basis that the evidence of each of them in relation to the appellant's state of mind stood alone.

[97] On the appellant's behalf it was said that the circumstances that each of Ms Scott and Ms Davison gave evidence of a threat made orally by the appellant before the offences were committed and that Mr Peters gave evidence of a confession made orally by the appellant after the event, were circumstances which, together with the other circumstances to which reference has been made, required a mandatory warning from the trial judge. But no authority[20] supports the view that the overwrought warnings which it is now said on the appellant's behalf were necessary were required to avoid a perceptible risk of a miscarriage of justice.

[98] Once again, it is not at all surprising that they were not sought by the able and experienced Counsel who appeared for the appellant at trial; and it is not a legitimate criticism of the learned trial judge's address to the jury that he did not, unbidden by the defence and on his own initiative, give the warning now said to have been necessary.

[99] The learned trial judge's directions to the jury reflect a sound appreciation that the testimony of each of these witnesses did not present such a risk of injustice, apparent to the judge but unlikely to be apparent to the jury, as to require the trial judge to attach the "unmistakeable authority of the Court"[21] to a specific warning that it would be dangerous to act upon the testimony of any of these witnesses.

[100] This ground of appeal should be rejected.

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20 Cf *Burns v The Queen* (1975) 132 CLR 258 at 261; *Carr v The Queen* (1988) 81 ALR 236 esp at 244 – 245 and 253 – 254. See also *McKinney v The Queen* (1991) 171 CLR 468; *Pollitt v The Queen* (1992) 174 CLR 558.

21 *JJB v The Queen* (2006) 161 A Crim R 187 at 195.

Sentence

[101] By virtue of s 305 of the *Criminal Code*, the learned sentencing judge had no alternative but to sentence the appellant to life imprisonment on each of the counts of murder. The appellant's only complaint in relation to sentence is that the learned sentencing judge ordered that the appellant not be released until he had served 24 and a half years in prison. This order was made pursuant to s 305(2) of the *Criminal Code*, and extended by 4 and a half years, the non-release period which would otherwise have applied.

[102] The appellant was 38 years old at the time of the offences in question. He has a criminal history which includes drug offences. He has on four occasions been convicted of assault occasioning bodily harm.

[103] The appellant murdered three people. One of his victims was an innocent little boy who was his own son. The appellant exhibited no remorse: he was prepared to regard the death of his infant son which resulted from his act of vengeance and jealousy as "God's work". If the appellant had pleaded guilty to the crimes of murder, and so demonstrated at least some remorse, he would have been sentenced to life imprisonment with a mandatory non-release period of 20 years. That he should be required to serve a further non-release period of four and a half years in circumstances where he has shown no remorse at all for the consequences of his crimes cannot be said to be manifestly excessive.

[104] Even if the appellant's responsibility for the three murders is to be seen as based on felony murder rather than an intentional killing, it was open to the learned sentencing judge in the exercise of his discretion to conclude that the proper denunciation of the appellant's crimes on behalf of the community and the vindication of his three victims – including the wholly innocent victim who was his own infant son – required the imposition of a non-release period greater than the irreducible minimum applicable to the murder of more than one person in circumstances which do not call so powerfully for the denunciation of the crime.[22] No authority suggests otherwise.

Conclusion and orders

[105] The appeal against the convictions should be dismissed.

[106] The application for leave to appeal against sentence should be refused.

[107] **McMEEKIN J:** I have read the reasons of Keane JA in draft. I agree with his Honour's reasons and the orders that he proposes.

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22 Cf *R v Maygar; ex parte A-G (Qld); R v WT; ex parte A-G (Qld)* [2007] QCA 310 at [64] – [68].