SUPREME COURT OF QUEENSLAND

CITATION:	*R v Knight & Ors* [2010] QCA 372
PARTIES:	**R** **v** **KNIGHT, Mark Dempsey** **WILLIAMS, Wesley Robert** **ROBERTSON, Wayne Thomas** (appellant)
FILE NO/S:	CA No 199 of 2009 CA No 200 of 2009 CA No 201 of 2009 SC No 49 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	14 and 15 July 2010
JUDGES:	Margaret McMurdo P, Muir JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In each appeal:** **1. The appeal against conviction is allowed;** **2. The verdict of guilty of murder is set aside;** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – appellants were jointly tried and convicted of the murder of Robert James Buckley – deceased was found hanging dead in a prison shower cubicle in June 1999 – death originally considered suicide but in 2006 appellants were charged with murder – appellants were committed for trial to Supreme Court in July 2009 – many witnesses considered deceased was coping with prison life – many witnesses gave evidence of animosity between deceased and appellant Williams – many witnesses gave evidence of appellants' assault on deceased – prosecution prisoner witnesses gave inconsistent evidence – pathologists' evidence could not exclude suicide – whether, on whole of the evidence, it was open to jury to be satisfied

beyond reasonable doubt that each appellant was guilty – whether verdict was unreasonable or insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION _ CONSIDERATION OF SUMMING UP AS A WHOLE – trial was held over many weeks – evidence not optimally presented by too long a delay between alleged offending and trial – trial judge presented own solutions to issues raised by the evidence – trial judge correctly directed that facts were matters for jury to decide and they must not feel bound by judge's comments – whether judge overwhelmed jury with a certain view of the evidence – whether summing up amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTION AND PROSECUTOR – prosecution case was that appellants liable under s 7(1) and s 302(1)(a) *Criminal Code* 1899 (Qld) through strangling deceased with cable or towel then hanging the deceased from bars in shower – prosecution abandoned contention that cable used – judge articulated that prosecution case was appellants caused death by compression of neck causing asphyxiation by either strangling or hanging – whether change to case meant appellants were placed at tactical disadvantage causing unfairness and warranting appellate intervention

CRIMINAL LAW – EVIDENCE – HEARSAY – PARTICULAR MATTERS – MAKER OF STATEMENT NOT AVAILABLE – prisoners and prison officers gave evidence about deceased's statements that he was afraid of appellant Williams and did not want to move to appellants' block – trial judge ruled deceased's statements were unlikely to be fabrication and ruled them admissible under s 93B *Evidence Act* 1977 (Qld) – whether relationship evidence admissible – whether statements made in circumstances where likely to be a fabrication – whether evidence is admissible under s 93B(1) and (2)(a)

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – prison officer gave evidence of the temperature of the deceased’s body and the way the deceased’s limbs felt at 5.30 pm – trial judge invited jury to determine a time of death of between 11.30 am 1.30 pm based on officer’s evidence – trial judge suggested to jury that officer’s evidence could be used to corroborate evidence of other witnesses – whether trial judge’s comments

regarding officer's evidence were inaccurate and resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – prison officer's log book entry indicated deceased was alive at 5.05 pm – trial judge made comments to the jury regarding evidence of officer's incompetent record-keeping – whether trial judge wrongly strengthened the prosecution case by misstating evidence regarding officer's record-keeping – whether trial judge should have given a *Jones v Dunkel* type direction due to the prosecution's failure to call officer

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – appellants submitted that trial judge erred in directing the jury that the suicide theory was not supported by evidence that the deceased had grease and blood on his hands but neither substance was found on the towel from which he was hanging – whether trial judge so erred

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – pathologist gave evidence about the state of the deceased's body on the day he died – appellants submitted that the trial judge's comments suggested the jury should take an adverse view of pathologist's evidence – whether trial judge's comments resulted in unfairness to the appellants

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – trial judge, in summing up, repeated a comment made by the prosecutor regarding the truthfulness of witnesses – trial judge made comments regarding the evidence of a scientific officer – whether trial judge's comments offended the principles in *Palmer v The Queen* and reversed the onus of proof

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – trial judge, in summing up, identified

which witnesses were indigenous – many witnesses, indigenous and non-indigenous, were confused whilst giving evidence – both prosecution and defence placed considerable weight on evidence given by indigenous witnesses – judge gave direction that indigenous witnesses may agree with what was put to them and jury needed to decide whether agreement made by witnesses was a deliberate and thoughtful acceptance of proposition put to them – whether judge's directions about indigenous witnesses diminished effect of cross-examination of indigenous witnesses and caused unfairness to appellants – whether judge erred in giving direction

Criminal Code 1899 (Qld), s 632(3), s 668E(1)
Evidence Act 1977 (Qld), s 93B

B v The Queen (1992) 175 CLR 599; [1992] HCA 68, cited
R v Soloman (1980) 1 A Crim R 247; [1980] 1 NSWLR 321, cited
Broadhurst v The Queen [1964] AC 441, cited
Dyers v The Queen (2002) 210 CLR 285; [2005] HCA 45, cited
Green v The Queen (1971) 126 CLR 28; [1971] HCA 55, cited
Hoger v Ellas (1962) 80 WN (NSW) 869, cited
R v Cohen and Bateman (1909) 2 Cr App R 197, cited
R v Bentley [1998] EWCA Crim 516, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
Mears v R (1993) 97 Cr App R 239, cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, cited
R v Condren (1987) 28 A Crim R 261, cited
R v Durham (2000) 100 A Crim R 93; [2000] QCA 88, cited
R v Franco (2003) 139 A Crim R 228; [2003] SASC 140, cited
R v Lester (2008) A Crim R 468; [2008] QCA 354, cited
R v Fullgrabe (2002) 133 A Crim R 453; [2002] QCA 366, cited
R v Hulse (1971) 1 SASR 327, cited
R v Riscuta [2003] NSWCCA 6, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
Seymore v Australian Broadcasting Corporation (1977) 19 NSWLR 219, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
Stack v Western Australia (2004) 29 WAR 526; [2004] WASCA 300, cited
Stokes v R (1960) 105 CLR 279; [1960] HCA 95, cited
The Queen v Apostilides (1984) 154 CLR 563; [1984] HCA 38, cited
Whitehorn v The Queen (1983) 152 CLR 657; [1983] HCA 42, cited

COUNSEL:	S J Keim SC with G McGuire for appellant Knight P J Davis SC with D R Lynch for appellant Williams B W Farr SC with J Fraser for appellant Robertson M J Copley with R Pointing the respondent
SOLICITORS:	Legal Aid Queensland for the appellants Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** At about 5.30 pm on 16 June 1999, prison officers found inmate, Robert James Buckley, dead in a shower cubicle of a communal shower area of 10 Block of the old Rockhampton prison. He was hanging from a twisted yellow towel which was around his throat and tied to bars in front of a louvre window in the cubicle. He was 23 years old and on remand for an offence of burglary. Any suspicious death in custody is a tragedy for the family and friends of the deceased. It is also a concern to all citizens as it occurred whilst the deceased was under the control of the State. The death was originally considered a suicide, but in 2006 the appellants, Mark Dempsey Knight, Wesley Robert Williams and Wayne Thomas Robertson, were each charged with murder. They were committed for trial to the Rockhampton Supreme Court in July 2008.

[2] Three days of pre-trial hearing commenced on 27 May 2009. The judge ruled admissible the evidence of prison witnesses about the deceased's statements to them that the appellant Williams had assaulted him and his fear of moving to 10 Block.[1] The appellants pleaded not guilty on 10 June 2009 when their trial commenced before a jury. On 28 July 2009, after almost seven weeks, they were all convicted of murder. They have each appealed against their sentence, initially raising 29 identical grounds.

[3] At the hearing of this appeal, they each abandoned 14 of these and consolidated their remaining grounds of appeal into the following 11 contentions. The first is that the judge's summing-up to the jury was unbalanced; it made positive references to witnesses favourable to the prosecution, especially the witness, Geoffrey Campbell, and diminished witnesses favourable to the defence; it demolished defence counsel's arguments and advocated a position favourable to the prosecution. The second is that the judge's directions to the jury in relation to the evidence of the witness, Ross Hodda, were flawed. The third is that the judge erred in his directions to the jury about the evidence of prison officer Albi Bauer and the judge erred in the directions to the jury as to the inferences that may be drawn from evidence that the deceased was seen neither after lunch nor to leave the shower block. The fourth is that the judge erred in directing the jury to the effect that suicide was not supported by the evidence that the deceased had grease and blood on his hands but no grease or blood was found on the towel from which he was hanging. The fifth is that the judge erred in various ways in directing the jury as to how to assess the evidence of Dr Sinton. The sixth is that the judge erred in directing the jury as to how to assess the evidence of Indigenous witnesses. The seventh is that the judge erred in not directing the jury to disregard the submission by the prosecutor inviting the jury to consider why the witnesses who were prisoners in 10 Block would come to court to give evidence if they were lying. The eighth concerns a direction as to police scientific officer Hall's evidence. The ninth is that the prosecution case as particularised changed during the trial. The tenth is that evidence was wrongly admitted under s 93B *Evidence Act* 1977 (Qld). Finally, they each contend that the guilty verdict was not reasonably open on the evidence and should be set aside under s 668E(1) *Criminal Code* 1899 (Qld).

[4] There is merit in some, but by no means all, of the appellants' contentions. I have concluded that the appeals must be allowed, the verdicts of guilty of murder set aside, and retrials ordered. It is regrettable that this means that a trial of almost

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1 *R v Mark Dempsey Knight & Ors (No 2)*, unreported, Supreme Court of Queensland, 27 May 2009, McMeekin J.

seven weeks involving many witnesses before a judge and jury will have come to nought. But it is far more important to the criminal justice system that, if the appellants are to be convicted of murder or manslaughter, it is only after a fair trial according to law by a properly instructed jury. These are my reasons.

The particulars of the murder charge

[5] The prosecution provided the following particulars of the three murder charges:

> "The Crown case is to be based upon section 302(1)(a) of the *Criminal Code*. That is, that all of the [appellants] together intended to kill the deceased. In the alternative, at the very least they intended to cause some grievous bodily harm to him, although it seems clear from the material that [the deceased's] death was actually intended.
>
> They are each liable for the death pursuant to all limbs of section 7(1) of the *Code*.
>
> In essence, the deceased was attacked in the shower block by all of the [appellants] and strangled by the use of coaxial cable and/or a towel with the towel afterwards being used to hang the body from the set of bars in order to disguise the murder as a suicide."

The prosecution case

[6] The prosecution case as opened was that all three appellants attacked the deceased in a shower area of 10 Block, strangled him by use of some material (either the modified towel, a cord, rope or wire) and then suspended him from the bars of the louvre window with the modified towel to disguise the murder as a suicide. They each took part in the killing and intended to kill or do grievous bodily harm to the deceased at that time.[2]

[7] In order to deal with the appellants' eleven contentions, particularly the last, it is necessary to first set out the relevant evidence given during this lengthy trial. As one ground of appeal concerns the judge's directions on Indigenous witnesses, it is necessary to specify which witnesses are Indigenous. Where unspecified, it can be accepted the witness was apparently not Indigenous.

(a) Admissions of fact

[8] It is sensible to begin with the following admissions of fact made at trial.

> "1. (i) The body of the deceased Robert James Buckley was discovered by correctional officers hanging in a shower cubicle at about 5.30 pm on 16 June 1999.
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> (ii) At that time the body was found with the face against the wall, the knees bent and the feet touching the ground behind the body.
>
> (iii) What appeared to be grease was located below the right thumb and on the left palm of the deceased.

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2 See prosecution opening, transcript 2-6, 2-31.

(iv) No grease like substance was located on the lengths of towel retrieved from the shower block.

2. Blood of the deceased was located within the shower block at the following locations:

(a) in two separate smears below the left hand mirror;

(b) on the bottom of the partition and lower door hinge separating the end shower cubicle from the next cubicle which was approximately 24.5 centimetres from floor level;

(c) on two walls inside the shower cubicle where the deceased was located;

(d) no blood from anyone other than the deceased was located in the shower block or anywhere in the vicinity of the window area.

3. No blood or DNA from any of the accused was detected upon any item found within the shower block. Certain items located within the shower block were scientifically tested, those items being:

(a) a soap packet;

(b) 3 bags of soap;

(c) a green scourer;

(d) the lengths of towel removed from the window bar and around the deceased's neck.

4. No DNA from any of the accused was detected in the fingernail clippings taken from the deceased.

5. No DNA from any of the accused was detected upon the deceased's clothing or upon the deceased's person.

6. No blood or DNA of the deceased was detected upon:

(a) the clothing of any of the accused;

(b) the towel used to suspend the body of the deceased other than in the area of the portion of the towel surrounding the neck of the deceased.

7. (i) No fingerprints of any of the accused were located in the shower block where the deceased's body was found.

(ii) The right palm print of Geoffrey John Campbell was located on the wall above the bench seat adjacent to the shower cubicle where the deceased's body was found.

8. (i) Upon discovery of the deceased's body, the remainder of the inmates in 10 Block were locked in their cells. Inmate Cant (Buckley's cellmate) was later placed into a cell with inmate McKinnon.

(ii) Subsequently, all cells in 10 Block were searched and all inmates of I0 Block were inspected for signs of injury.

(iii) No weapons or items (including pieces of coaxial cable/cord and pieces of towelling) were located which were connected with the death of the deceased.

(iv) No injuries were detected upon any of the accused including upon their hands.

9. Inmate McKinnon provided a statement to police on 28 February 2004 which included the following extract:

33. I spent the next few hours in my cell smoking as many cigarettes as I could. There were people walking around everywhere. I'm not sure when but the screws locked us all down for about a day. 'Cowboy' was put in my cell.

34. Cowboy[3] *was laying on the top bunk and saw his sock. He started panicking and showed me some blood on one of his socks that he still had on. He showed it to me and it was only a speck on the end of his toe. He said, '1 have to get rid of this before 1 am interviewed.' He tried to wash it out but it didn't come out. 1 saw the ashtray and said rub ash on it. He did that and it came out. He didn't say anything about BUCKLEY. 1 don't know if it was his own blood or not.*

10. (i) Inmate Cant (nickname 'Cowboy') was interviewed by police on 17 June 1999. At that time Cant told police he had had a 'play wrestle' with the deceased whilst the two were cellmates in 10 Block.

(ii) Inmate Cant provided a statement to police on 6 July 2009 which included the following extract:

12. I can explain why I had this blood on my sock. I remember that at the time I was using amphetamines (speed) and I used to inject it into my arm using a '1 ml fit' which is smaller grade of needle (finer syringe) which was obtained from the surgery. I would have used this syringe to inject my arm. After injecting my arm there is always a little bit of spot of blood that comes out of the injected part of the arm. I used to use a sock as a tourniquet and then afterwards 1would also use it to wipe away any blood that had come out from taking out needle. This is exactly the same as when you get a needle for say a blood test and after the needle is removed a piece of cotton wool is applied to the arm to stop the bleeding.

13. So I was scared that my sock would be inspected and seen by correctional officers or police and questions would be asked about the blood on my sock. I was scared that I would have to tell that I was using drugs and then I would have to answer questions about where I got the drugs from.

14. I remember that I did not use any drugs while I was in 10 Block and the last time I had injected speed would have been when I was in 8 Block.

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[3] It is common ground that "Cowboy" is Cant.

15. I don't recall trying to wash it out or rubbing it out with ash but that is possible. I think I may have burned it off with a match. But whichever way I did it I ended up removing the speck of blood from the sock.

11. On 16 June 1999, Tennyson Bloomfield[4] was an inmate in 9 Block at Rockhampton Correctional Centre. Bloomfield (now deceased) was the nephew of 10 Block inmate Lionel Malcolm. Inmate Bloomfield provided police with a statement on 23 March 2004 which included the following extract:

18. On the day the young fella was hung, it was an ordinary day for me. I was housed in Slot 9 with Hedley TWADDLE. Slot 9 is on the Block 8 side of the Block 9 yard. Slot 9 is a double up cell. I remember that I had a shower as usual, and then had breakfast. After breakfast I did a workout in the yard near the front of my cell. There was a head count before lunch, and then we had lunc. After lunch I played touch footy on the oval. I played in a combine Block 9 and Block 10 team. We played the Block 8/7 team.

19. I remember we played with about 14 people on each side. I remember Lionel MALCOLM, Chris NELSON, John MURRAY, Elwyn TILBEROO, Ivan MUNNS, Hedley TWADDLE, Robin QUEARY, Kelly RAYMOND, Kevin HENRY, William MASON, Issac BARLOW, Willis McINNALLY and I were on the Block 10/9 team.

20. I remember after touch I went back to Block 9 and had a shower in my normal shower block. After my shower I went back to my cell and lay around for a bit.

21. After a while I went to the showers on the Block 10 side of Block 9 and yelled out for Lionel MALCOLM. I was standing on the bench in the shower block, and yelling through the window toward Block 10. I was standing at the shower cubicle end of the bench. The shower block in Block 10 that I was looking at was painted white besser brick and the bars in the windows were painted apple green. There is no glass in these windows.

22. After about 5 mins, Lionel came to the window in the 10 Block showers and asked what I wanted. Lionel was in the shower block closest to Block 9. He appeared to be standing on the bench in that shower at the basin end.

23. I asked Lionel for some smokes and a drink. He said he'd send it up.

24. I remember few minutes later one of the screws dropped off some tailor made smokes, some tobacco and a can of Coke for me.

12. The Rockhampton Correctional Centre prisoner telephone system records indicate that telephone calls using prisoner identification numbers were made from the 10 Block telephone on 16 June 1999 at the following times:

ISAAC BARLOW:

(a) 11:07 hours to David Powder for 5.57 minutes;

(b) 11:54 hours to David Powder for 5.59 minutes;

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4 Tennyson Bloomfield is an Indigenous man.

(c) 12:59 hours to Veronica Barlow for 2.10 minutes;

(d) 16:21 hours to David Powder for 5.59 minutes.

BRADLEY BOOTH:

(a) 12:41 hours to Sharron Booth for 5.52 minutes;

(b) 16:35 hours to Sharron Booth for 5.50 minutes.

JASON ROBERTS:

(a) 15:03 hours to Kailang Coleman for 0.08 minutes;

(b) 15:40 hours to Charlie Coleman for 2.48 minutes;

(c) 15:59 hours to Charlie Coleman for 3.01 minutes;

(d) 16:03 hours to Charlie Coleman for 5.37 minutes.

ELWYN TILBEROO:

(a) 13:02 hours to David Tilberoo for 3.51 minutes;

(b) 17:29 hours to David Tilberoo for 2.52 minutes.

WESLEY WILLIAMS:

(a) 10:50 hours to Trish Bond for 5.54 minutes;

(b) 12:11 hours to Trish Bond for 5.58 minutes.

MARK KNIGHT:

(a) 13:55 hours to Dempsey Knight for 0.46 minutes.

13. The 8 Block movements log records that inmate McIlwain was moved from 8 Block to the Low/Open side of the Rockhampton Correctional Centre on 5 May 1999. The log also records that inmate McIlwain returned to 8 Block on 7 June 1999. The log does not record inmate McIlwain as being present in 8 Block between 5 May 1999 and 7 June 1999.

14. Basic 10 Block dimensions are as follows:

(a) distance from front fence of block to front wall of mess room - 32.9 metres;

(b) distance from front of cell on one side of block to front of cell on opposite side of block - 19.8 metres;

(c) distance diagonally from front gate of 10 Block to opposite side shower entrance - 39.4 metres;

(d) height above floor of window bar in shower block upon which towel was tied - 2.2 metres.

15. The towel/rope by which the deceased was found suspended was constructed from half of a standard size prison issue towel, which had been cut/torn into six pieces and platted together. The total length of the towel/rope recovered measured 1.55 metres."

(b) Evidence of prison officers relevant to the death

(i) Prison Officer Ross Hodda

[9] **Ross Hodda** was a prison officer at the old Rockhampton prison in June 1999. At 5.30 pm he received a radio call requesting assistance at 10 Block and went with another prison officer, Clint Swadling, to a shower block there. The entrance was guarded by prison officers. He entered the 10 Block shower area and saw supervising prison officer Anderson struggling with a person hanging by a towel around his neck from the bars to window louvres in the last shower cubicle. Anderson asked Hodda and Swadling to assist. Hodda immediately took the weight of the hanging person and called for a knife to cut him down. After a time, he was handed a knife and he cut the towel. Hodda gave a demonstration of the position of the hanging body: the deceased's feet were underneath him; his hands were out to his side, quite bent towards the body in an upwards position and the arms were out from the body. He and Swadling carried the body out of the cubicle and laid it on to the communal area in front. Hodda did not think the body touched the floor, walls or door of the cubicle. He noticed blood around the mouth which seemed dry and old. No-one else was allowed into the area until the police arrived. The body seemed "very cold". There was no movement in the body as he carried it out of the cubicle to the communal floor.

[10] In cross-examination, he agreed he gave a statement to police the following day (17 June 1999). The body was hanging as if kneeling with the knees bent, almost but not quite touching the ground; the feet were behind the body with the toes pointed down touching the ground. When he and Swadling were cutting down the body there was no room for anyone else in the cubicle. The area outside the shower block was muddy. The communal area of the shower block was damp. He could not recall whether the floor inside the shower cubicle was wet or dry. Prison officer Albi Bauer was in 10 Block that evening, and was still working for Correctional Services in Rockhampton at the time of the trial.

(ii) Prison worker Paul Jorgensoen

[11] **Paul Jorgensoen** was also working at the prison on 16 June 1999. He was a qualified boilermaker. He maintained the prison buildings, including 10 Block. The shower areas in 10 Block had two rows of louvres with bars in front of them. He never applied any grease or lubricant to the mechanism working the louvres in all the time he worked at the old prison between 1995 and its closure in 2001. The louvre mechanism did not need any lubrication.

[12] Photographs of the bars to which the towel was fixed suggested the bars were rusty.[5]

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[5] See ex 9.

(c) Expert evidence

(i) Pathologist Dr Sinton

[13] Dr Sinton obtained his Bachelor of Medicine and Surgery in 1973 and became a specialist pathologist in 1984. He practised for 10 years as a specialist chemical pathologist and then re-qualified in anatomical pathology which incorporates autopsy work. He has worked full-time as an anatomical pathologist since 1997. Prior to June 1999 when he conducted the autopsy on the deceased, he would have conducted between 800 and 900 autopsies in his work as Director of the Northern Territory Forensic Pathology Unit. He estimated that about 5 per cent (or about 45) of his autopsies involved deaths by hanging.

[14] He could not remember whether he saw the deceased's body at the prison but he conducted an autopsy at the Rockhampton Hospital at 12.30 pm on 17 June 1999. He noted the time of death at 5.30 pm on 16 June 1999. Rigor mortis was present. The deceased was 174 cm in height and weighed 74 kg. He was 23 years old. There was no sign of disease. Both eyelids and the anterior surface of the right eye showed faint haemorrhages, in lay terms, red eyes. There was no blood in the ear canal or the nostrils. His lips appeared blue and his tongue was protruding.

[15] He had a ragged 10 mm abrasion on the right side of the lower lip with further abrasions around the gums on the right side. There were two rivulets of blood on the right side of the mouth. Blood around the mouth is very common in deceased people. Dr Sinton identified from photographs an area of bruising under the lining of the mouth and a laceration to the left lip. These mild to moderate injuries to the mouth were caused by some trauma or force, probably by two applications. They could have been caused by any form of trauma to the mouth, including hitting with an object or a punch or kicks. They were unlikely to have been caused by falling face down onto a hard surface because there were no other injuries to the face or nose. They were probably inflicted about 24 hours or perhaps less before death.

[16] There were signs of recent injury to the neck because of the presence of a ligature mark, consistent with being made by the towel which was tied around the deceased's neck. Although there were separate marks on the neck, Dr Sinton considered they were all made by the ligature, although he could not exclude the manual application of some other force such as manual strangulation rather than suspension strangulation. Suspension strangulation was more likely. It was common to find alterations and indentations on the skin after death, depending on the surface on which the body was lying; not all such marks could be relied on to indicate the cause of death.

[17] There was an area of ragged purple bruising on the right lower jaw, about 40 mm long and 30 mm wide, above which was an area of abrasion and some purple "cyanotic mottling". This was caused by trauma consistent with a light punch or a light kick or falling onto a hard surface. It was a relatively minor injury. The punctate abrasion above it was consistent having been made by something with a small round end such as a pen, pencil or nail. It was a mild injury caused by mild force. It was possible, but not likely, that it was caused by a knuckle.

[18] Rigor mortis usually starts to become obvious about six hours after death, peaking after about 36 hours, but these times were only estimates. In colder climates or in cool mortuary conditions, rigor mortis commences earlier than six hours. In hot

conditions such as in the Northern Territory, rigor mortis seldom sets in, except for a brief period. In Rockhampton in June, rigor mortis would probably occur within six hours of death.

[19] The deceased also had a laceration to the eyebrow which was caused by contact with a flat but not sharp edge. He had scattered areas of abrasions around the knuckles and in the webbing of the middle and ring fingers. They could have been caused by minor impact with a number of pointed objects or simply be insect bites or scratches. They were caused at about the time of death.

[20] On the right elbow there were numerous scattered areas of superficial abrasion and skin loss. These were two to three days old. The oldest was 20 x 15 mm.

[21] A superficial incision 50 mm long and 5 mm wide was apparent on the upper right thigh about 6" below the hip bone. It was caused by mild trauma, for example, knocking into furniture, probably with a fairly sharp edge. It may have been two to three days old and was at least 24 hours old.

[22] Some bruising to the right knee was probably caused by mild trauma, perhaps by a fall or kicking. The left knee had abrasions and contusions. This bruising was probably caused by trauma such as bumping into furniture or a rough surface. He could not exclude the cause as the dragging of the deceased over a tiled floor.

[23] The right ankle joint had an area of abrasion about 5 mm in diameter which had been caused by some sort of minor impact. Over the lower inside surface of the left lower leg (the tibia) there was an area of faint purple and pink bruising about 50 mm x 30 mm and an area of superficial abrasion 50 mm x 50 mm which appeared to be two to three days old. The bruising could have been caused by any application of force including a kick. It was difficult to age the bruising but he thought that it could have possibly occurred 24 hours prior to death. Other marks around the ankles and feet could simply have been caused by ill-fitting shoes or socks, although they could also have been caused by dragging.

[24] On the left ear there were two areas of bruising and subcutaneous haemorrhage which would have been caused by mild to moderate force by some sort of object with an edge, perhaps a kick.

[25] The palm of the left hand had a black mark on it which resembled oil or grease.

[26] An internal examination revealed a small area of haemorrhage on the right anterior part of the rib cage, 20 mm x 20 mm. It was caused by trauma, possibly a punch or a kick. It was not uncommon for there to be no corresponding external evidence of such trauma. A moderate amount of trauma was needed to produce that sort of injury.

[27] The various wounds and abrasions to the deceased may have bled sufficiently to leave smears of blood.

[28] Dr Sinton considered that the changes to the body, including the green discolouration present in the area around the appendix, were consistent with death occurring about 24 hours earlier, approximately lunch time on 16 June 1999.

[29] When he compiled his autopsy report he considered that the deceased died by suicidal hanging without the interference of any other party. This remained his

conclusion. At the time of the autopsy, he did not think he was told that the deceased's blood was found on a wall opposite to where his body was hanging and on the door jamb and door hinge of the shower cubicle in which he was found. He was unsure whether he was aware at the time of autopsy of evidence from others within the prison of a beating of the deceased at about the time of his death. Had he been aware of those matters, it would very likely have altered his view as to whether the deceased died by suicide or whether some other party may have been involved. He would have removed his observation in his autopsy report: "There was no autopsy evidence for the direct involvement of another party in this man's death."

[30] Dr Sinton gave the following evidence in cross-examination. He was still of the opinion that there was no autopsy evidence supporting the direct involvement of another party in the death. In January 2004, police told him they had witnesses who claimed the deceased was assaulted on the day of his death. He agreed that the fact that there were injuries on the deceased's body, did not mean they were caused at or around the time of death. The pathologist who performs an autopsy is in the best position to age injuries. Carrying out this exercise from photographs alone can be hampered by their colour variation and two dimensional nature.

[31] By the time he gave evidence at trial, he had conducted over 3,000 autopsies. In hanging suicides, it was common that the feet of the deceased remained in contact with the floor; it was not necessary for the feet to be off the ground for the hanging to be fatal. He was experienced in conducting autopsies in respect of other suicides committed within prisons where the various injuries present in this case were also present. Whilst it was possible that someone tied the ligature around the deceased's neck and that caused his death, it was more probable that his death resulted from him being suspended with the ligature around his neck. The injuries were also consistent with a failed attempt at suicide before a subsequent successful attempt. The ligature had a knot at one side. The indentation found behind the left ear of the deceased suggested death by suspension.

[32] There was no damage to the nails of the deceased and scrapings from underneath his nails were taken for analysis. The superficial abrasions caused to the deceased's feet and ankles could have occurred during a period of consciousness following the suicide attempt. There was nothing about the method of tying the ligature around the deceased's neck which made suicide impossible.

[33] If the deceased died at about lunch time on 16 June 1999, the injuries around and in his mouth could have occurred up to 12 to 24 hours earlier. The bruising around the jaw was hard to date and could have occurred up to three days earlier. He could not provide a reliable age for the punctate abrasion below the ear. Ageing of bruising is more difficult if it is done solely from colour photographs rather than from an autopsy examination. It was possible that the lacerations in and around the mouth could have meant that the deceased was bleeding freely at or about the time of his death. It was also possible that they were old injuries which re-opened because of raised blood pressure caused by the hanging. The injuries to the lips and the ear could have been caused in the course of a suicide. The window frame and window sill from which the deceased was hanging were items with which the deceased may have made contact in the course of the suicide and could have explained those injuries.

[34] The post-mortem examination did not reveal any sexual assault upon the deceased. Sexual assaults do not necessarily leave any injury, for example, minor penetration of the anus or forced oral sex.

[35] There were three possibilities: a suicide by hanging; a hanging by third parties; or a manual application of force around the throat followed by a suspension. He could not exclude any of those possibilities.

(ii) Pathologist Dr Ansford

[36] Dr Ansford graduated with a Bachelor of Medicine and Bachelor of Surgery in 1965 and became a specialist pathologist in 1975. He became Chief Forensic Pathologist and was Director of the State Health Laboratory by the time he temporarily retired in 2000. He returned in 2002 as consultant senior pathologist, conducting peer reviews of the work done by other pathologists and training pathology registrars.

[37] He has given evidence in several cases involving death by neck compression where the issue was whether the death was accident, suicide or homicide. By the time of trial he had had a great deal of experience in cases of hanging, manual strangulation and accidental neck compression, perhaps during sexual practices.

[38] In early 2004, police asked him to give his opinion about the findings in Dr Sinton's 1999 autopsy report on the deceased. He had Dr Sinton's original autopsy report and notes and his supplementary 2004 report; other medical reports; photographs; and statements taken by police from witnesses, including prisoners and prison officers. He also examined digital photographs of other hanging deaths in custody and homicidal deaths in custody, including one caused by strangulation with a coaxial cable.

[39] In respect of the deceased's case, he noted the following. The degree of abrasion on the neck was quite severe for a towel and he had not realised at first that the towel was braided. If rigor mortis was present in the body at 5.30 pm on 16 June 1999, this suggested that the time of death was four to eight hours earlier, but that varied greatly depending on ambient conditions.

[40] From the photographs of the deceased, Dr Ansford thought the blood around the mouth looked like "real blood" consistent with coming from the injuries inside the mouth rather than blood-stained purging fluid which was common around the mouth in most post-mortems. It was unusual in hangings to see the ligature mark encircling the neck in a virtually horizontal fashion. The injury to the ear and the bruising below it was consistent with one application of force to that area, such as a punch, kick or, less commonly, by that part of the body falling heavily onto a hard surface. The amount of force required would be mild to moderate. The trauma to the ear was caused before death. The abrasion near the jaw was also likely to have been caused by blunt force impact. The other injuries to the face were unlikely to have been caused in that discrete incident so that it was likely that there were several separate points of application of force to the face. The injuries suggested the deceased had been involved in an altercation immediately at or within a short time prior to death. If the injuries had been present a day earlier, they would have been observed by others. The lacerations inside the mouth were very recent prior to death but he could not say how recent without having seen them.

[41] The photograph of the left knee appeared to be of "pretty fresh" abrasions without scabs and fresh clean tags of skin. This suggested the leg had been abraded against something like the ground or a cement wall. The injuries to the other knee were similar. Minor scuff marks over the ankles also seemed recent and fresh. The injury to the right upper arm above the elbow appeared likely to have occurred at about the time of death.

[42] A photograph showed smears of blood on the base of the thumb and on the back of the deceased's right hand. There were some injuries on the hands that might have been a day or more old. In a typical suicidal hanging, blood is not usually seen, other than perhaps some frothy blood at the mouth.

[43] From looking at photographs without the autopsy reports, Dr Ansford considered the death may not be suicide. The ligature mark was horizontal and there was no abraded suspension mark. The other injuries on the deceased's body suggested that this may not be a simple straightforward suicidal hanging and required further investigation. The presence of blood on the deceased's right hand and on other parts of his body suggested that he had been involved in an altercation fairly close to the time of death and indicated that police should investigate the matter further. Findings of the deceased's blood on surfaces in the shower block elsewhere than in the cubicle where he was found hanging, also suggested that an altercation had taken place in that area.

[44] Dr Ansford gave the following answers in cross-examination. He disagreed with Dr Sinton's report which did not suggest the death was highly suspicious and required further police investigation. He agreed that, from a purely pathological view point, it was true to say, as Dr Sinton did, that "there was no autopsy evidence for the direct involvement of another party in this man's death". Dr Ansford would not have described the cause of death as "hanging", but rather used the more neutral expression "compression of the neck" which allowed for possibilities other than hanging. He could not rule out an assault at some time prior to the death and a later suicide hanging. It was not possible to say from the pathology that the deceased did not kill himself. Had the photographs shown a more abraded mark around the deceased's neck, he would be more comfortable in concluding that the deceased died by hanging; there was no classical suspension mark present. At some point when the deceased was hanging from the window frame he was alive because of the abrasion and bruising to his neck. Some of the deceased's injuries were consistent with an unsuccessful attempt at suicide and a fall to the ground, followed by a successful attempt. The towelling around the deceased's neck had been twisted to make it more like a rope and it had a number of knots tied in its length at different points. It was not tied in a slipknot or noose fashion.

[45] Dr Ansford originally told police that he thought the deceased had been garrotted with something like a coaxial cable. But he resiled from that view after examining photographs of marks on the neck of a deceased person who had been killed in that fashion. Abrasion type injuries like those found on the deceased were sometimes seen in suicides by hanging.

[46] It was a theoretical possibility that the injuries to the deceased's lip occurred during the hanging by hitting against the widow frame or sill, although he had never before seen such injuries caused in this way. There was no pathological evidence of a forceful or sustained beating of the deceased prior to death. There were no broken bones.

[47] In answering to questions from the judge, Dr Ansford agreed that, on the pathological evidence, even if the deceased had been assaulted, it was entirely possible that he then hanged himself.

(iii) Scientific Officer Bradley Hall

[48] Police officer **Bradley Hall** has a Bachelor of Science degree and over 20 years experience in the examination of crime scenes. In March 2004, long after the death,

he examined the shower cubicle where the deceased was found. The purpose of his visit was to assess and evaluate the area he had observed in photographs taken after the death in June 1999. He took possession of two pieces of angle iron which formed the edge of the doorway to the shower cubicle, and the deceased's blood-stained brown pullover worn by the deceased when found. He created a plastic overlay of the blood stains on the pullover. He created a "mockup" of the shower cubicle in his Brisbane workplace, positioning the blood stains on the walls as found in the shower cubicle in 10 Block after the death. He then placed the overlay of the blood stains on the pullover against the blood spots on the wall. He could not make a precise match.

[49] He next considered a series of photographs of blood stains on the angles of part of the door frame to the cubicle on the right hand side as you enter. He considered they demonstrated a swipe pattern, that is, a blood pattern formed when an object with blood on it comes into contact with an object that has no blood on it. Blood is transferred in the form of a swipe, distinguished by feathering, that is, a diminishing amount of blood in the direction of travel. He found an accumulation of blood on the leading edge of the metal angles. He conducted a number of experiments with blood on a piece of cloth applied to the metal angles to find the direction of the blood stains found in the shower cubicle after the death. They were consistent with the blood stains found in the shower cubicle after the death moving from outside the shower cubicle to inside it. He repeated the experiment four times and in each case got the same result.

[50] In cross-examination, he stated that the blood stains he examined in the shower cubicle were all contact stains, not blood spatter stains. There were two discrete blood stains on the metal angles and this made it impossible to say they were deposited contemporaneously; they could have been deposited at different times or they could have been connected. The direction of both contact blood stains was from the outside to the inside of the shower cubicle. In all, he conducted seven tests, six of which gave the same result. The test which gave a different result was flawed and unreliable.

(d) The evidence concerning whether or not the deceased suicided

(i) The deceased's mother

[51] The **deceased's mother** gave the following evidence. She gave birth to him in 1976 when she was married to his natural father. She subsequently divorced and remarried. Her new husband took on the role of the deceased's father and the deceased eventually changed his surname to the stepfather's. He was a normal child who became rebellious in his teenage years. He skipped school and this developed into minor trouble with the police. He eventually moved to Mareeba before travelling to Yeppoon to live with his grandparents for about two years. In 1997, he left his grandparents' house to move in with his fiancée. During the periods he was away from home, she saw him once or twice a year. The deceased talked about marrying his fiancée. By 1998, he seemed much more settled and he was looking forward to the impending birth of his child. She last saw him in October 1997 before his baby was born. He seemed troubled and they had "words". That was the last time she spoke to him, either personally or by telephone prior to his death, other than to talk to him about the birth of his baby. On that occasion, he was very excited about the birth.

[52] Her answers in cross-examination included the following. By the time he was 15 he had changed schools a number of times, been in trouble with the police and eventually left home. Whilst he was in Mareeba he was also in trouble with the police about drugs and firearms. Whilst visiting her in October 1997, he went out on a bender and crashed his fiancée's car. She was concerned he had fallen in with the wrong crowd. She confronted him about his cannabis use and he confirmed that he was using it. She phoned him when his baby was born in December 1998 and she may have phoned him on another two occasions. She learned from his fiancée that he had been imprisoned for a burglary of the home of his fiancée's father. She rang the father to apologise for the deceased's conduct. She did not want to talk to the deceased about his conduct and made no attempt to contact him for some time. This was his first time in prison. She understood that his fiancée was visiting him, not because she wanted to continue their relationship but because she wanted him to have some contact with their child.

(ii) The deceased's grandfather

[53] The **deceased's grandfather**, a 73 year old retired marine engineer, gave the following evidence. The deceased lived with his grandparents for about a year. During this period, the deceased was employed and was a happy young man. He left to set up house with his fiancée and the young couple kept in close contact. They planned to marry but the wedding was delayed when his fiancée became pregnant. She had their baby in late 1998, just before Christmas. The deceased was elated and was adjusting very well to fatherhood. In February 1999, he was informed that the deceased was in prison. He told the deceased he was very disappointed in his conduct.

[54] He and his wife tried to visit the deceased in prison but had difficulty obtaining permission from the authorities. They were eventually able to arrange a visit on 14 May 1999. The deceased seemed to have adjusted to prison life, was "quite happy", seemed normal, was coping and looking forward to getting out of prison and to trying to do everything right again.

[55] In cross-examination, the grandfather agreed he was very upset, disappointed and angry when the deceased was charged with the burglary of the house of his fiancée's father. He felt that the deceased had let down his family.

(iii) The father of the deceased's fiancée

[56] The **father of the deceased's fiancée** gave evidence that his home was burgled between 12 and 14 February 1999. Sapphires, coins, handguns, $1,800 cash and a pound of gold ingots were stolen. Later police told him that the deceased, together with Kevin Ryan, was responsible. About $22,000 worth of rare bank notes, coins, one handgun and one nugget of gold were not recovered. Prior to the burglary in 1998, the deceased had worked for his business, stayed at his house, and he thought him friendly, responsible and happy. He had treated the deceased as part of the family and was shattered to learn of his involvement in the burglary. His daughter, the deceased's fiancée, was upset and angry with the deceased. Before the death of the deceased, police returned four ingots which he was told had been secreted in a remote controlled car.

(iv) The deceased's fiancée

[57] The **deceased's fiancée**, who was 37 years old at trial, gave evidence that the deceased was the father of her first child, born in December 1998. She had been

concerned about the deceased's relationship with Kevin Ryan and their cannabis use. In early February 1999, the deceased disappeared with Ryan and she later found out they had burgled her father's house.

[58] When the deceased was first charged and imprisoned following this burglary she did not visit him. Eventually she relented and visited with their child. She was very upset with him, but they remained engaged. They planned to marry, although there were no definite arrangements. The deceased was an easy going person. A cell mate was trying to get him a job when he was released and she planned to then resume living with him. They sometimes spoke by telephone. He was "generally upbeat … normal". She visited him every week or two, as often as she could manage with a six month old child. He loved seeing his daughter and she and the deceased enjoyed seeing each other. He was looking forward to getting out of jail and having a future with her and their child. They exchanged letters. In some correspondence he expressed concern "about Kevin Ryan talking about the stuff that was still missing from the [burglary] and … he was a bit worried about that". He telephoned her twice on 16 June 1999, the day of his death. On the first occasion she was not home. He rang again later that morning. He was "in a great mood … just normal self, talking about general things. He was pretty good." He asked her to put money into his account for telephone calls and that afternoon she transferred $15 into his account. A couple of weeks before his death, she was unable to visit or speak with him because he was in detention. She had planned to visit with their child in the week following his death. Nothing had been said between them to suggest that their relationship was over. They had not had any disagreement. There was no reason for the deceased to think that his relationship with her was over or that he would have any difficulty in seeing his child in the future. They planned a future together; to marry and perhaps have more children.

[59] After the death, she took possession of the deceased's property from prison. Included was a remote controlled car which she handed to Ryan. Ryan had requested various items of property from her house and, as she did not want him to have any contact with her child, she gave him whatever items he requested.

[60] In cross-examination she agreed that whilst the deceased was in custody there were times when their relationship was very "shaky" and as of June 1999 it still required a lot of work. Shortly before her first prison visit on 23 April 1999, he wrote to her noting that he had hurt her very badly and was afraid she would never forgive him; his family now wanted nothing to do with him; he was concerned that he would get a minimum of three to four years imprisonment; and there was therefore "a very big question mark" over their future relationship. Whilst the deceased was in custody she had a conversation with him about another inmate whom they both knew called "Bobby" who had tried to hang himself a couple of weeks earlier.

[61] In re-examination, she reiterated that she said nothing to lead the deceased to consider that his relationship with her or with their daughter was over.

[62] A letter from the Child Support Agency informing the deceased of his financial obligations to his child was found in his cell.[6]

(v) Police Officer Brian Muirson

[63] Police officer **Brian Muirson** investigated the burglary of the home of the parents of the deceased's fiancée. Ultimately, both Ryan and the deceased confessed.

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6 Ex 4.

A large amount of the stolen property, including some gold, was subsequently recovered in Bundaberg. Further gold ingots were found in the remote control of a toy car which had been in the possession of either or both Ryan and the deceased. The gold was returned to the father of the deceased's fiancée. Mr Muirson sent the remote control and car either to the deceased to be held in his property at the prison or to the deceased's fiancée. He did not inform them that the gold had been removed.

(vi) Solicitor Michael Pearson

[64] Solicitor **Michael Pearson** acted for the deceased on the burglary charge. Police did not ask him to make a statement about his dealings with the deceased until early 2004 by which time the file relating to the deceased's case had been destroyed. He recalled that, at about the time of the deceased's death, he had a young male client who was agitated and was not coping very well in prison. He recalled informing the prison authorities about his concerns that this client may self-harm. He could not remember with certainty whether this was the deceased.

[65] In cross-examination, he accepted that his recollections of his dealings with the deceased were that the deceased was not coping well in prison; he was somewhat distressed and agitated by his imprisonment and by the fact that he had stolen property from a family member.

[66] A letter from Mr Pearson dated 15 June 1999 informing the deceased of his pending sentence on 20 August 1999 was found in his cell.[7]

(vii) Prison General Manager Kerrith McDermott

[67] Ms **Kerrith McDermott** was the general manager of the prison. When she learned of the death on 16 June 1999, the shower area was secured and protocols were instigated, including a lockdown of prisoners. By this time, the deceased's body had been cut down and was on the floor of the shower area in 10 Block. She accepted that she told a police officer something about a "Dear John" letter in connection with the deceased but she has no recollection of either seeing any such letter or telling any police officer about it.

(viii) Police Officer Gregory Jones

[68] Police officer **Gregory Jones** was the first police officer to arrive at the scene of the death. He received a phone call at about 7.00 pm on 16 June 1999 and arrived at the prison at about 7.20 pm. Ms McDermott informed him that she had heard the deceased had received a "Dear John" letter. She did not give the source of that information. He conducted a cursory search of the deceased's cell but was unable to find such a letter. He decided to leave a full search to more experienced investigators.

(ix) Police Officer James Sheehan

[69] Police officer **James Sheehan** did such a search the following day. Although he found a number of letters which he handed to other investigators, none of them amounted to a "Dear John" letter.

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7 Ex 4.

[70] The following year, he charged the deceased's cell mate in 10 Block, Shane Cant, with the offence of indecent assault to which Cant pleaded guilty. He followed another prisoner into the shower area of 10 Block, touched him on the chest, and tried to pull his pants down; Cant was naked and said "I'll root you later." A few days later, Cant approached the same victim, jumped on top of him, pinned his arms down, kissed him on the neck leaving a "hickey" and forced his fingers into the victim's anus through his clothing.

(x) Corrective Service Officer Daniel Frewen-Lord

[71] **Daniel Frewen-Lord** was an intelligence officer for Corrective Services at the time of the death and remained in this employment at trial. His task was to provide intelligence to the general manager on issues affecting safety, security and good order of the prison. The deceased first came to prison on 22 February 1999. On 16 March 1999, he was sent to 8 Block where he stayed until 7 June 1999. He then served seven days in the detention unit ("DU") as a result of two breaches for offensive behaviour. On 14 June 1999, he was moved to 10 Block. On the same day, the appellant Knight moved from the DU to 10 Block.

[72] In cross-examination, he agreed that when the deceased went through the admission process at the prison he was asked "Can you think of any problem that may cause you to consider hurting yourself whilst you are in prison?" He responded, "Sexual assault."

[73] Albi Bauer was ordinarily in charge of 10 Block. At lunch time, half the prison officer staff went to lunch. In accordance with regular practice, if Bauer went to lunch, he would hand his 10 Block keys to the 9 Block officer who would then take responsibility for 10 Block in his absence.

(e) The evidence of 8 Block prison and prison officer witnesses

(i) Deceased's co-offender Kevin Ryan

[74] **Kevin Ryan** was a co-offender with the deceased in the burglary. They divided up the stolen property. Ryan and his younger brother took much of the property, intending to travel by bus to Sydney. They were apprehended by police in Bundaberg. The deceased told him that he had secreted some gold ingots in the remote control of a toy car. The deceased and Ryan were both remanded in prison. The deceased was moved around the prison but they spoke every couple of days. After a while, they were both in 8 Block. The appellant, Williams, was Ryan's cell mate in 8 Block for a couple of months. Williams asked Ryan if he had anything stashed on the outside for when he got out. He told Williams to talk to the deceased about the gold he had stashed on the outside. He thought he was present when Williams spoke to the deceased about selling gold at $300 an ounce and the deceased agreed to sell the gold to Williams. The deceased later changed his mind. Williams was angry; they argued and had a bit of a fight. Ryan told the deceased that he should not have changed his mind. Williams had "got into" the deceased for reneging on their deal: he punched him to the head a couple of times in the deceased's cell. Williams then assaulted Ryan's new cell mate for talking about these matters and told him to tell the deceased to "shut his mouth". When Williams went to the deceased's cell, the deceased ran into the yard so that the prison officers could see what was happening. Williams asked Ryan to give him half the gold and Ryan agreed.

[75] The deceased was in trouble in 8 Block for swearing at prison officers and was locked in his cell for a week as the DU was full. Williams was placed in the DU.

[76] On one occasion when Ryan was travelling to court in the prison van with the appellant Knight, Knight offered to buy his shoes. He took his shoes off and gave them to Knight but the prison officers returned them to Ryan's property.

[77] The deceased was sent to the DU for making offensive comments to prison officers. Whilst he was there, he asked Ryan to buy a new pair of shoes for Knight. Ryan looked into this but could not afford to buy them.

[78] He last spoke to the deceased on the morning of his death. The deceased had moved from the DU to 10 Block. He seemed happy as always. He did not appear to have any injuries. After lunch time that day, he heard the deceased was dead.

[79] In cross-examination, he stated that the deceased was generally happy during the day but at times he was upset about his relationship with his fiancée, although he hid these feelings and maintained an appearance of being happy. As the deceased was in jail for the first time, he did not realise it was unwise to boast about having proceeds from his offending outside prison.

(ii) Prisoner Nathan Bradden

[80] **Nathan Bradden**, an Indigenous man, was serving a sentence in June 1999 for armed robbery. Since his release, he had stayed out of jail and at trial had been in steady employment for five years. He was in 8 Block with the deceased and the appellant Williams. He described the deceased as "a pretty quiet lad", outgoing for a young guy. The deceased told him that he was being harassed by Williams but did not say what this was about. He encouraged the deceased in his hobby of making models from match sticks. He noticed the deceased had been sharpening a toothbrush handle. The deceased was keen to get out of prison and stay out.

(iii) Prisoner Clifford Rees

[81] **Clifford Rees**, an Indigenous man, was serving a sentence for armed robbery. He met the deceased in 8 Block. He knew him by the nickname "Elvis" because when he was first admitted to prison he had big long sideburns. The deceased told him he was in prison because he had stolen a safe containing money, gold, jewellery or something. The deceased did not want to move to 10 Block but he did not know why, other than that he was happy in 8 Block. The deceased was removed from 8 Block by a number of prison officers after a struggle. On the last occasion he saw the deceased, he appeared physically OK and was in an alright mood.

(iv) Prisoner Jason Donovan

[82] **Jason Donovan** was serving an 18 month term of imprisonment for break and enter offences in June 1999. He was then 19 and, for a time, shared a cell with Ryan and, later, the deceased in 8 Block. The deceased told him he was in prison because he and Ryan had stolen a safe containing jewellery and gold. Knight spoke to the deceased about giving the gold to Knight. The deceased did not really want to hand the gold over and argued with Knight about it. He thought Ryan was prepared to hand over the gold but the deceased was not. The deceased was intimidated by Knight and obviously scared of him. Donovan supposed this had something to do

with the gold. The deceased told Donovan that he had stashed the gold inside a remote controlled car which was in the reception area at the jail. The appellant Williams was moved from 8 Block to 10 Block. Soon afterwards, the deceased was told he was transferring to 10 Block and Donovan was transferring to 7 Block. They were both pretty shocked and could not see any reason for this move. They tried to convince the block officer to reconsider. The deceased was scared about the transfer to 10 Block because Williams was there. Their protests resulted in them both being sent to the DU. When the deceased moved out of 8 Block, he and Ryan were not getting along because they were arguing over the gold.

[83] The deceased became friendly with Knight in the DU and trusted him. He heard them talking about the burglary and about what the deceased had done with the proceeds. The deceased thought that Knight had sorted out the problems between the deceased and Williams. The deceased did not want to go to 10 Block because Williams was there. The deceased seemed happy when he spoke about his baby daughter. Knight left the DU on a daily basis to visit 10 Block.

(v) Prisoner Mark McIlwain

[84] **Mark McIlwain** was in 8 Block with the deceased whom he saw on the morning he was moved from the DU to 10 Block. He asked how things were and the deceased said that everything was fine. He seemed "okay" physically and mentally. An extract from McIlwain's statement to police was tendered and read to the jury.[8] McIlwain stated that the deceased was under pressure from Williams to sign over gear hidden in a remote controlled car. The deceased and Ryan told McIlwain that they had "copped a touch up off" Williams. The deceased, McIlwain and others in 8 Block asked the prison officers to ensure the deceased came back to 8 Block. The deceased told prison officers on the day he moved to the DU that he did not want to go to 10 Block. He was very worried about the move to 10 Block.

(vi) Prisoner James Doyle

[85] **James Doyle** was housed in 8 Block with the deceased for about three months. The deceased seemed happy-go-lucky, spoke of his girlfriend and child and had a good attitude. They played football together. After the deceased left the DU, he spoke to him at the fence between 8 Block and 10 Block. The deceased was upset about his move to 10 Block and did not want to return there. That was the last time he saw the deceased. He was uninjured. He thought he died the following day.

(vii) Prisoner Henry Robinson

[86] **Henry Robinson** was serving a 12 month sentence in 1999 for cultivating cannabis. He had not been in trouble with the police since. He shared a cell with the deceased in 8 Block. They talked a fair bit at night. The deceased loved his wife and baby. He was a typical 20 year old, naïve and full of bravado, but generally a nice kid. He told Robinson that he had stolen a safe and kept some small gold bars. Robinson advised him to keep that to himself, but the deceased did not follow that advice. He seemed to come to some arrangement with Williams to share the gold, but later he cancelled the arrangement. Williams' relationship with the deceased then became strained and lacked camaraderie. On one occasion when Williams walked past the deceased in the yard, Robinson heard a thump and he noticed the deceased was

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[8] Ex 11.

hanging his head. The general feeling between them was not good. When the deceased was told he was moving to 10 Block, he was very distressed. He said, "Don't send me down there, I'll get killed down there". He was physically removed from the DU by about seven or eight prison officers.

(viii)Prisoner Alan Mason

[87] **Alan Mason**, an Indigenous man related to the appellant Williams, was serving a sentence for rape in June 1999. He knew the deceased in 8 Block where Mason conducted bible studies. The deceased was pretty happy-go-lucky and got on with everyone; he was a bit of a larrikin. He told Mason that he had been skiting about his crime and got slapped around and pulled into line by Williams. Williams left 8 Block for 10 Block. Mason and some others tried to stop the deceased's transfer to 10 Block as he knew the deceased was worried about it. On the morning the deceased died, just before muster at 11.20 am, probably about 10.50 am, he had a yarn with the deceased in 10 Block through the gate. Robinson and McIlwain were present. The deceased was in a pretty happy mood, looking forward to a visit from his girlfriend and baby.

(ix)Prisoner Marshall Hill

[88] **Marshall Hill**, an Indigenous man, was serving an 18 month sentence for unlawful wounding in June 1999. He was released in 2000 and has not been in prison since. He knew the deceased when they were both in 8 Block. The deceased got on well with everybody and cracked a few jokes. He always talked about his baby girl and his family whom he missed. He was happy when they visited. He overheard the deceased talking about his offending and that he had stolen some gold. On one occasion, he saw Williams walk into the deceased's cell and argue with him. He heard some muffled noises as if someone was getting hit or slapped. Immediately afterwards, he saw a big red mark on the side of the deceased's face. The deceased said that Williams had had a few words to him and slapped him. At lockdown, the prisoners would often make gorilla animal noises to stir up the prison officers. The deceased joined in, prison officers blamed him for the noises, and decided to move him out of 8 Block. The deceased did not want to go. Later when the deceased was in 10 Block, he "whinged" about it and said he did not want to be there. He did not see any injuries on the deceased. About a day later, the deceased was dead.

(x) Prison Officer Phyllis Weeks

[89] **Phyllis Weeks** was the permanent officer in the 8 Block yard. The deceased was to be moved to 10 Block for disciplinary action. She did not have any problems with him but he was a bit of a cheeky larrikin who "mouthed off" at other officers. He seemed to be on an equal footing with other inmates in 8 Block. One evening there was a lot of silly noise coming from the cell he shared with Donovan. Supervising officer Anderson decided to separate them and send them to other blocks. When she told the deceased he was moving to 10 Block he refused to go and was breached. He said he could not go because he feared for his safety, adding "They're going to kill me". But he would not specify whom he feared. He seemed to think that the DU would be safer. DU prisoners could call out across their cells to each other and to other prisoners in the gym and in 10 Block.

(xi) Prison Officer Sharon Williams

[90] **Sharon Williams** was a prison officer working in 8 Block on the day the deceased died. At about 9.50 am when she was moving 8 Block inmates to the library, she saw that the deceased was at the front of the unit having a conversation with an

8 Block inmate. The conversation appeared friendly and relaxed. As he was not supposed to be in 8 Block, she directed him to move back to 10 Block. His health seemed fine and she did not notice that he had any injuries.

(f) The evidence of DU prisoner and prison officer witness

(i) Prisoner Craig Findlay

[91] **Craig Findlay** was a prisoner in the DU. He was charged with murder in January 1999 and convicted in September 1999. He remembered the deceased who was in the DU with Donovan, Nicholas Sullivan and the appellant Knight. Findlay was in the DU because his urine tested positive for marijuana. The deceased was a pretty good lad who made him laugh a lot; he seemed down to earth and loved life. Although he did not discuss it with the deceased, he had heard he was in jail for "a safe job" involving $30,000 stashed away somewhere. The deceased mainly talked to the appellant Knight. The deceased did not have any physical injuries. He was worried about going to 10 Block but Knight told him that he had arranged for him to be safe there.

(ii) Prisoner Bobby Devon

[92] **Bobby Devon** was in prison for various offences. He was in the DU with the deceased. They had a couple of conversations. Devon was in protection and as the deceased spoke with him he thought he was a pretty nice guy. He was friendly but a bit stressed out. He spoke about his "missus and kid" and was looking forward to getting out to them. He did not want to go to 10 Block because he had "dramas". He was worried about getting bashed by Williams. Devon heard the deceased tell the prison officers, and also the appellant Knight, of these concerns. Knight told the deceased just to go to 10 Block, face the drama and he would be alright. Devon noticed no signs of physical injury to the deceased.

(iii) Prisoner Scott Friedrichs

[93] **Scott Friedrichs** was a protection prisoner in the DU because drugs were found in his urine tests. He knew the deceased, although only for one day. The deceased was scared; he did not want to leave the DU. The senior officer told him he was going to 10 Block. The deceased repeatedly said that he could not go there as he had "troubles". The deceased, Donovan and Knight talked all day. Knight told the deceased he would be alright if he went to 10 Block; he would be looked after. The deceased seemed pretty harmless, just a young kid trying to make his way. He did not recall seeing any injuries to the deceased.

(iv) Prisoner Brodie McLuckie

[94] **Brodie McLuckie** was in the DU with the deceased, Knight, Devon, Friedrichs and Donovan. He knew that the deceased had a girlfriend and young child whom he wanted to get out and see. He missed his girlfriend. He had stolen a safe from a stepfather (sic) and only about one-fifth of the items in the safe had been recovered by police. The deceased drew a map showing the location of the safe and gave it to Knight. McLuckie apprehended that the amount of property in the safe was valued at about $300,000. McLuckie understood that if the deceased had not "settled down" he would leave the DU for 10 Block. As Knight was released from the DU into 10 Block during the day he said he had spoken to others in 10 Block

and that, if the deceased went there, he would be looked after and not harmed. The deceased was still nervous about going to 10 Block despite Knight's reassurances but was more confident than he had been

(v) Prisoner Officer Ian Davis

[95] **Ian Davis**, a correctional officer, recalled the deceased. Davis was supervising 10 Block and the DU at the time of the death. As prisoners come and go from 10 Block, records are kept in the daily log book by the supervisor but it was often not kept accurately. He described the record keeping of prisoner officer Albi Bauer as "mediocre". The deceased had been in 10 Block for about three or four days before his death. He was in good health and had no injuries. He was released from the DU into 10 Block on 14 June 1999 at about 1.40 pm.

(g) The evidence of 10 Block prisoner witnesses

(i) Prisoner Edward Malcolm

[96] **Edward Malcolm**, an Indigenous man, was in prison in 10 Block on the day the deceased died. He went to the shower block at about 9.00 am. There was a lot of music. He thought he heard one or two people arguing or fighting. The noise seemed to be coming from the shower block on the left-hand side looking down 10 Block from the officers' donga. He continued on into the shower block on the right-hand side and then returned to his cell, probably after about 15 minutes. He had breakfast in the mess room and then returned to his cell. He could not remember what he did for the rest of the morning or at lunch time. He could not remember what he did that afternoon.

[97] In cross-examination, he agreed he gave the police a statement in March 2004. He agreed he knew the appellant Robertson whose cell was next to the right-hand shower block. Robertson worked out a lot in that shower block, morning and night, and would play his music whilst training. On the morning of the death, he saw Robertson training there. After Edward Malcolm had breakfast, he went to Alan Shipp's cell where Shipp was painting. He only became aware of the death when prison officers ran into 10 Block at the end of the day. He spoke to the police the day after and told them this. This was also his evidence at the committal proceedings in October 2007.

(ii) Prisoner Christopher Nelson

[98] **Christopher Nelson**, an Indigenous man, was imprisoned in 10 Block together with Patrick Weribone, Isaac Barlow, Bradley Booth and the three appellants. He did not know the deceased. He had never spoken to him but had recently seen him in 10 Block. He had not noticed any injuries on the deceased prior to his death.

[99] On the day of the death, Nelson played touch football, returned to his cell which he shared with Weribone, had a smoke and waited for lunch. He watched TV for about 20 minutes and at about 10.50 am went to the mess room, collected his lunch and returned to his cell. He took his lunch plates back to the mess room and noticed a lot of water coming from inside the left-hand shower block. He had never seen this happen before. He jumped over the water, washed his plates in the mess room and returned to his cell. There was always a muster at about 11.30 am. If

somebody was missing at a muster, another prisoner would sing out the missing prisoner's name, explaining he was in the shower or the toilet; this usually satisfied the prison officer. He played cards and smoked in his cell for about 20 minutes.

[100] At about 11.45 am he went to the left-hand shower block to shower. The door of the end shower cubicle was closed but he opened it and went in. He saw the deceased squatting in the corner, hanging from a towel running down off the louvre. The deceased was not moving. Nelson was in shock and only had a quick look. The deceased's feet were touching the ground with his backside about six inches above the ground. Nelson grabbed his towel and closed the door. Water was flowing out of the shower block from a tap in between two hand basins. As he walked out, he noticed the three appellants at the first wash basin in the shower block on the other side. He went back to his cell and told Weribone what he had seen. He thought Weribone went to have a look.

[101] In cross-examination, he agreed he did not tell the police officer who interviewed him the next day about seeing the deceased's body in the shower. Nor did he tell police officer Peachey in December 2003 that he had seen the deceased's body in the shower. This was because he did not want anything to do with the incident. He was very scared. He provided another statement to police when he was not in prison in February 2004 in which he said he saw the deceased in the lunch room at lunch time on the day he died. He did not think it was any later than 12.30 pm that he saw the deceased's body in the shower, although it might have been.

[102] He agreed that at the committal proceedings he had said that it was at the evening muster at about 5.00 pm that it first emerged that the deceased was missing. He denied that he saw the appellants at the right-hand shower block towards the evening muster. Robertson would often train for hours to loud music in the right-hand shower block, using makeshift weights from mops and buckets.

[103] He heard no unusual noises, disturbances or cries for help on the day the deceased died. If he played touch football in the afternoon, he would not have a shower until afterwards. When he left the left-hand shower block after seeing the deceased's body, he saw the three appellants at the other shower block. At one time, he said he saw them at the hand basins. At another time, he said he saw them near the entrance to the left-hand shower block on the step. On another occasion, he said he saw them outside Robertson's cell which was next to the right-hand shower block. He agreed that this showed his memory of the events that day was not good. He agreed he had deliberately given false versions of events that day to try and distance himself from the incident.

[104] He had a lengthy criminal history, mainly for offences of dishonesty, and had most recently been sentenced in October 2004 to 12 months imprisonment for offences including fraud and break and enters.

[105] In re-examination, he explained that the three locations he described in the right-hand shower block were only a pace or two apart from each other.

(iii) Prisoner Isaac Barlow

[106] **Isaac Barlow** was a 17 year old Indigenous prisoner in 10 Block. He shared a cell with Geoffrey Campbell, next to Weribone's and Nelson's cell. He knew the

deceased whom he thought was about 17 or 18. He remembered the day of the death. Barlow had played a game of touch football and returned to 10 Block about 11.00 am. There was usually a muster about 11.30 am and then lunch. Barlow was in the yard talking to Booth when Williams, in the presence of Knight and Robertson, said, "We're going to get this white cunt". Barlow did not know who he was talking to or about. Barlow went to his cell, shaken and a bit scared. He did not know what was going on.

[107] He got his lunch and sat outside with Bailey. They ate lunch, played guitar and then he saw the deceased enter the shower block with a toilet bag and towel. About five minutes earlier he had seen Robertson in the shower block. The appellant Williams then walked into the shower block. Barlow heard a lot of commotion, "just people fighting, you know, like rushing around. And then I saw the hand reach up gripping the brick wall, and I saw another hand grab him and pull him. And he said, Fuck off, leave me alone. Help me. Help." The hand grabbing the wall was a white hand and the hand dragging the white hand back was black or brown. He heard screaming, noise like people wrestling and some big bangs. He heard the words, "Fuck off. Leave me alone" and then "Help. Help me. Help me." He did not recognise the voice but it was a white man's voice: he knew all the Murri voices in 10 Block but he did not know this voice. Bailey told Barlow to move away from the area. Barlow was shaking and scared. He saw Williams and Knight walk out of the left-hand shower block and go to the right-hand shower block. Minutes later Williams and Knight came up with Robertson behind them. Williams said "We fucked him up down there. We fucked him up." Barlow was shaking and panicking and went to his cell. He was nervous. Williams, Robertson and Knight then followed him to his cell and said, "Don't say nothing to the police."

[108] When he was first interviewed by police, he did not tell them what happened because he was scared and frightened for his life.

[109] He was cross-examined for almost one full day and then well into a second day. He gave the following answers. A further reason why he did not tell the police the full story in December 2002 was that his cultural belief was that he must not talk about deceased people without approval from his Elders. He first told the police that he did not see anyone go in or come out of the shower block, but this was not true. He now wanted to tell the truth. He knew what he saw and heard. The memory of what he saw and heard was haunting his life. He agreed he lied in the Magistrates Court but then added, "I don't know if it's a lie, I don't know what – it's – I forget. But, sir, I got to live with the memories. You don't. I was there." When he lied at the committal proceedings, it was because he did not have permission to speak about the dead and also because he was scared and frightened and the barristers did not ask him the right questions. He had a memory problem and he drank a lot but he had just finished a 20 week rehabilitation course before the trial and was starting to remember things. He was stabbed in the head when he was a child and that affected his memory. His memory got worse over time, not better. He was an alcoholic. He was now telling the truth before the jury; his evidence at trial was true. He agreed he had given three different answers over time as to where in the yard of 10 Block he went after he heard the commotion. He said this was because he was frightened: he was a 17 year old in a big mainstream prison and he thought he had to just shut his mouth.

[110] The statement he gave police on 6 July 2004 reporting what Williams said was somewhat different from his evidence in court. These differences were not lies. He added:

> "Sir, if you understand all the pain my people have been through, and all what happened to us, of course I'm going to be afraid of police and stuff like that, sir. I have to live with that, all them stuff, all my people have lived that life. We afraid of government bloke, you know, blue shirts and stuff like that. But I have to be honest with this and tell everybody here now that that's the truth."

[111] When being cross-examined about discrepancies between his evidence in court and his previous statements, he said: "It is accurate here, because I'm a father, too, sir and I – you know – I'm stronger now. I just want to tell you the truth now." He admitted, however, that he had been a father since he was 16 years of age, that is, before the deceased was killed.

[112] He agreed he was convicted of unlawfully wounding his stepfather with a knife when he was 16 years old. When he was 17 he was placed on probation for assault occasioning bodily harm. In March 1994, he was convicted of aggravated assault on a female and sentenced to three months suspended imprisonment. He breached that suspended sentence by committing break and enter offences. He had numerous convictions for offences of dishonesty as well as arson and was sentenced to imprisonment when he was still 17 years old. He was sentenced to further terms of imprisonment for assault. He was later sentenced to four years imprisonment for torture when he assaulted his partner after she had a miscarriage and he was intoxicated. In March 2007, he was again sentenced to imprisonment for assaulting his partner and causing her bodily harm.

[113] In re-examination, Barlow said that, whilst he did not have his Elder's permission to speak about these matters at the committal proceedings, he had that permission at trial. He:

> "knew that if a jury and a Judge and everybody else was here and the families, then [he] could be truthful about everything, and tell exactly what [he] can say - .. what [he] seen and what [he] heard. Just to the best of [his] knowledge, you know? No, like, tell the truth in that way where I can actually let it out, man, like trust everybody."

[114] During the afternoon of the day the deceased died, Williams told him to have his shower on the opposite side of the block.

(iv) Prisoner Patrick Weribone

[115] **Patrick Weribone** was an Indigenous inmate of 10 Block at the time the deceased died. At trial, he was serving a sentence at Woodford prison for a domestic violence offence. He knew all the appellants. He had known the deceased for a "short moment" and spoken to him for about a minute only on the day he died. He was then uninjured; there were no injuries around his mouth and he could "talk okay". Weribone shared a cell with Nelson. The prison officer who usually looked after 10 Block was "Albi". Albi was the only prison officer who would let prisoners use the telephone in the officers' "donga". The prisoners were often locked in 10 Block at lunch time for an hour or an hour and a half during which time there

were often no prison officers around. Lunch normally began at 11.30 with a muster. The routine would depend on which officer was working. Albi would normally just do a head count at lunch time. If a prisoner was in the toilet or shower, other prisoners would often answer for them to ensure everyone was accounted for at muster. Weribone would only do this when Albi was on.

[116] He first heard of the death at about lunch time when his cousin, Nelson, came back from the mess room. Weribone then went to the shower block to have a look. He saw the deceased hanging up with his head leaning down and his arm down by his side. Weribone went back to his cell because he did not want anything to do with any of it. This happened around or just after lunch. Weribone did not go into the shower block; he stepped onto the grass and when he was near the mess room door looked in. He could not remember whether the shower cubicle door was open or closed. He looked at the deceased for only a short time. He could not remember how he was hanging because he tried to block it from his memory and did not want to think about it. He saw Barlow and Booth playing guitar at the top of the yard. He saw the three appellants around a table in Williams' cell. Robertson and Knight had towels wrapped around them but he could not remember what Williams was wearing. Robertson and Knight often had towels around them, mainly in the mornings and the afternoons, but not usually during the middle of the day. He could not remember when it became widely known that there was a body in the shower, but the sun was still up.

[117] In cross-examination, he agreed that he spoke to police the day after the death and later provided two statements, one in February 2004 and another the day before the committal proceedings in 2007. He was unsure about some details of what happened that day. He was pretty sure he spoke to the deceased on the day he died but he conceded that it may have been the day before; anything was possible. When he spoke to police shortly after the death, he told them nothing because he did not want to get stabbed or something; he said whatever came into his head and so he could get away faster.

[118] On the morning of the killing at about 9.00 or 9.30 am, Knight came to his cell and borrowed a towel. Knight often borrowed items from him, including towels. He did not mention this to the police until July 2007 but he remembered it because it was the day the deceased died. At the committal he conceded he may have been wrong about when Knight borrowed the towel. He was not sure whether Nelson had a shower before he told him of the death; he thought Nelson had gone to the mess room or something; he thought this was after lunch but he did not know. At the committal proceedings the following exchange took place:

> "When you went to there to look into the shower block, did you see the young fellow hanging in the shower or not?"
>
> Answer: I can't remember now.
>
> You can't remember?
>
> Answer: No.
>
> Why did you say originally, 'I thought the young fellow'?
>
> Answer: Probably because I did see him, and I just can't remember it now. I just tried to block it out.

> Well it'd be a pretty awful thing to see, wouldn't it, seeing somebody hanging up like that?
>
> Answer: Not in gaol, mate. You see it all the time.
>
> See it all the time?
>
> Answer: I do. I seen a lot of bashings and that.
>
> All right. So it wasn't something that stuck out to you?
>
> Answer: No. But it was wrong anyway.
>
> Well you can't remember whether you saw him or not?
>
> Answer: No I don't.
>
> All right. Did you go inside the shower block?
>
> Answer: No way."

[119] He could not explain why, at the committal, contrary to his evidence at trial, he effectively said that he did not remember seeing the deceased hanging in the shower block. He maintained that his evidence at trial, that he did see him there, was true. He gave the false answers at the committal because he thought "youse were going to try and get me for murder or something". He agreed at the committal that, from where he was standing when he saw the deceased, he could not have seen the deceased. To see the deceased, he would have had to go into the shower area and he did not. Weribone maintained, however, that he saw the deceased's head. He could not remember now whether he saw his arm. He agreed that he said at the committal that he had wrongly told the police he saw the deceased hanging in the shower. He could not explain why; he must have made it up. He was asked: "Well, is that the case that you made up seeing him?-- Oh, you got me all confused, man. I don't know nothing now." At the committal proceedings when he was asked to explain how he was able to accurately describe the manner in which the deceased was hanging, he answered:

> "I think everyone in the block would have known."
>
> Question: Everybody in the block would have known?
>
> Answer: Well, people talk there, you know."

[120] He agreed it was possible he may have converted things he had heard from other people into things he had seen. He was cross-examined about his lengthy criminal record for offences of dishonesty and violence.

[121] In re-examination, Weribone told the prosecutor that he was "pretty sure" he had seen the deceased's body hanging in the shower with his head down and his arms to his side.

(v) Prisoner Geoffrey Campbell

[122] **Geoffrey Campbell** shared a cell in 10 Block with Barlow. Campbell was serving a 12 month sentence for property offences. At trial, he was 30 years old, living with his partner and her children and working for Ergon as a meter reader. He did not

know the deceased well but had spoken to him in passing. On the day of the death, he did not notice any injuries on the deceased or any blood around his face. Lunch arrived about 11.00 or 11.30 am. He collected his lunch, sat down and made sandwiches. He heard sounds like fighting which he thought came from the toilet/shower block. He could not identify voices but there was some echoing, groans and fighting noises like a scuffle. He took his plate straight back to his cell where he ate lunch with Barlow, who seemed agitated. Campbell, too, was fairly shaken up. When Campbell went to the mess room about half an hour later at about 11.45 am to rinse his plate, he saw Robertson scrubbing or cleaning his shoes on the path in front of the mess room. Campbell returned to his cell until the prison officer announced afternoon sports activities.

[123] Shortly after, Campbell was standing outside his cell smoking when he saw the appellant Knight walk from the left-hand showers with a towel wrapped around him. Campbell then went to the oval for two hours of sport before returning to his cell to prepare for a shower. The two closest shower cubicles to the entrance were occupied. The end one was free but the door was closed. He entered and saw the deceased's body hanging from a towel tied around his neck to a railing in front of the window louvres. He was clothed. His knees were a couple of inches off the floor as if kneeling and his feet were just straight out behind him. Campbell sat down with his head between his knees. He heard an Aboriginal voice say, "Don't look in there" and "Go and use your own showers". It was a kind of warning. He got up and went back to his cell. He did not have a shower that afternoon. He thought there was a muster prior to lunch that day. Musters usually took two or three minutes. The head count was usually pretty relaxed as long as the officers could count the right number of people. He could not recall the muster at lunch time that day being any different from usual.

[124] He was cross-examined. The prisoners usually returned from afternoon exercise at about 3.00 pm. He did not go to the shower block straight away as there was an initial heavy demand for the showers and he usually waited for about half an hour. He was circumspect in his statement to police in November 2003 because he was on parole and trying to sort himself out. He did not include "Petty little things" like Robertson cleaning his shoes, as these were everyday matters. When police interviewed him in July 2004, he was asked if he remembered anything else and these were little additional details that came to mind. He was questioned about differences in detail between his evidence in court and his evidence in his previous statements to police. He agreed that his best memory was the evidence he gave in court but he conceded that his memory of some details of these events on earlier occasions was different to his present recollection. He agreed that he had read his statement dated July 2004 before giving evidence and this helped his recollection. When told that the logbook for 10 Block on 16 June[9] noted that prisoners went to the oval at 3.05 pm and returned at 4.20 pm, he agreed that that those times were definitely later than the usual regime.

[125] It was not suggested that he had subsequent convictions after his release from prison.

(vi) Prisoner Lionel Malcolm

[126] **Lionel Malcolm**, an Indigenous man and brother to Edward, was serving a sentence in 10 Block for attempted rape. His cell was three or four metres from the right-

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hand shower block, opposite the shower block where the deceased was found. He saw the deceased on the morning he was killed. He did not see any injuries to the deceased's face or lip but he "Never took no notice".

[127] That day was like any other. He thought he refereed a touch football game between breakfast and lunch. After he cooled down he had "a brew", a smoke and then a shower in the block on the left side. The showers were cleaned out every couple of weeks with scourers and a broom. Lunch was at about 11.00 or 11.30 am. He could not recall if there was a muster, but there normally was. Albi Bauer was ordinarily the prison officer for 10 Block and was present that day in the prison officers' donga. When Bauer conducted musters, he was not strict and sometimes there was no head count or even a muster. When there was a muster, prisoners would stand outside their cell door and answer as their names were called out.

[128] When he was in his cell after lunch, he heard some noise from the left-hand shower block. It sounded like someone getting bashed. He added: "When you heard things like that you just…stay in your cell" and "kept to yourself." He heard someone singing out for help. He stayed in his cell until the prisoners were allowed to play touch football on the oval for a couple of hours. He returned to the block, cooled down, had a "brew", a smoke and then went for a shower, this time on the left-hand side. He used the first cubicle closest to the entrance to the shower block. Another prisoner, John Murray, used the second cubicle. He had seen Knight earlier in the afternoon after lunch in the left-hand side shower cleaning up or something, "polishing the floor" with a piece of bread. He went into that shower block because his nephew in 9 Block, Tennyson, was calling out to him for tobacco and drink. He stood up on the bench in the shower block to talk to Tennyson. Then he returned to his cell to get tobacco and other items for Tennyson. By this time, Knight had left the shower block. As he spoke to Tennyson, he did not notice anything about the shower cubicle beside him but he did not look.

[129] Before the afternoon sports session, he heard from his brother, Edward, and from Williams, about the deceased's death: they all sang out to him after he had returned to his cell after lunch. Someone said, "One fella hung himself in the shower there." He felt cold all over because he had just come from that shower block. Someone said, "What happens in the block stays in the block… We all go out for sports as normal … and don't say anything to anyone."

[130] In cross-examination, he agreed that the bench in the shower block on which he stood to speak to his nephew, Tennyson, was right next to the shower cubicle where the body was found. When standing on that bench, he would have been able to see over the top into that shower cubicle. He did not look into that shower cubicle and did not notice anything. He could have seen into the cubicle and seen the towel tied to the bars from his position standing on the bench, but he did not notice it.

[131] He was intoxicated when he gave a statement to police on 22 March 2004 and when he gave a second statement four days later. He told police that Robertson was working out in the morning in the right-hand shower block where Malcolm went first to have his morning shower. As it was fully occupied, Malcolm took his morning shower in the left-hand shower block. He then returned to his cell and asked Robertson to turn down the music to which he was listening as he trained. When the music was not playing so loudly he heard the noises of fighting and the call for help. He did not see Robertson walk across to the left-hand shower. Even when he heard the fighting noises he could still hear Robertson's music playing.

(vii) Prisoner Darren Bailey

[132] **Darren Bailey** was serving a sentence in 10 Block for cultivating cannabis. He knew the deceased who was in the cell next to him. Bailey shared a cell with Steven Broome. The lunch time muster in 10 Block was held at about 11.30 am with another muster at about 5.00 pm. A prison officer called 'Albi' usually looked after 10 Block. Albi was "pretty lax"; he would not always write down the names of prisoners coming to and going from 10 Block and would not always do head counts; other prison officers were stricter.

[133] On the day of the death, he saw the deceased enter the shower block at about 11.30 am, just after muster and lunch. The appellants were all sitting in the middle of 10 Block yard with some others who were playing the guitar, maybe Booth, McInally, Barlow and Cant. Bailey was hand painting a pottery cup outside his cell. He saw the deceased leave his cell and walk to the showers. Robertson got up from the group and walked into the showers. Williams followed. Bailey heard some noises like a struggle and a fight and someone saying something like "Get off me" or "Fuck off and leave me alone", and "then like was trying to say something, you couldn't quite hear what was being said and that, sounds of blows being landed just sort of a struggle going on". He could not see what was happening. Knight then walked into the shower block. There was a bit more scuffling and then everything quietened down and all he could hear was water running, like a shower running. The three appellants then walked out, one at a time, back towards the other side of the yard. Knight had a towel wrapped around his neck. Robertson and Williams may have had their shirts off. The sounds he heard were "someone getting punched and a struggle happening and, you know, someone trying to yell out to be left alone … just the sounds of a struggle". Bailey kept painting his cup because he did not want to be seen.

[134] When Bailey went to get a coffee from the mess room and was passing the entrance to the left-hand shower block, he heard Robertson call out, "Stay the fuck out of there." At this time, water was running out of the shower block.

[135] The towel around Knight's neck was a prison issue yellow and blue one. Towels were often used in weight training and usually they would be torn and then plaited or rolled up very tightly. Prisoners in 10 Block often used them with mop buckets filled with water as a sort of free weight on broom sticks for weight training. The appellants regularly did this several times a week. Robertson, in particular, worked out a fair bit.

[136] Only rarely was a prison officer available to supervise 10 Block at lunch time. On the day the deceased died, Albi had gone to lunch and there was no prison officer around. That afternoon, there was a muster before the "hotbox" dinner at about 5.00 or 5.30 pm. The deceased was not out the front of his cell. Albi did the head count. He did not think the deceased's absence was noted. He agreed that as he was not in 10 Block during the afternoon, he would not have known if the deceased had moved out of 10 Block. Nothing was done during the head count about the fact that the deceased was not present. It was later discovered he was dead in the shower block.

[137] Bailey was in his cell with prisoners Russell Healy and Lukey Allison when Knight came to the door and said, "Did any of youse see anything?" Somebody answered, "Nah." Knight replied, "Well make sure you remember that" and walked away.

[138] In cross-examination, Bailey agreed that, when he gave a statement to police about this matter in March 2004, he was living in Victoria and knew that he had outstanding warrants in Queensland. At the committal, he agreed that it occurred to him that it might help if he cooperated with the police in this investigation. His outstanding matters were dealt with by way of a fine in the Magistrates Court. He agreed it was hard to remember the events of 16 June 1999 after so many years. Before giving evidence, he had refreshed his memory from his earlier statement. Rumours in jail are rife and "carry like the wind". Some people said the deceased had hanged himself; some said it was over "speed"; some said it was over jail politics: there were many different stories.

[139] He saw the deceased heading to the shower with, he thought, toiletries, change of clothes and towel. When Bailey went to have a shower in the afternoon, he noticed the deceased was not in his cell, but this was not then significant.

[140] In a statement he gave to police in 2004, he said that when he first moved to 10 Block he was in a double up cell and he bashed another prisoner who broke his television set. Fights were common in prison and the sound of an assault was not unusual. The shower block was a common place for assaults to occur. This day was just another day in jail. Plaited towels were commonplace as they were used to make weights for weight training.

[141] He noticed the deceased was not present at the afternoon muster at about 5.00 pm. Bailey was uncertain whether he had his shower before or after that muster. He noticed nothing unusual about his trip to the showers. It had not occurred to him that anybody had been killed there. Later he learned that the deceased was found hanging in the end cubicle; he may have been there when Bailey had his shower. He agreed that he was somewhat puzzled to think that he had his shower without noticing this. As he stated at the committal, when he had his shower he did not notice anything unusual. If the rope had been there at that time, he could not help but notice it. He was more than 80 per cent sure that the voice that said, "Stay the fuck out of there" was Robertson's voice.

[142] It was hard to be 100 per cent certain about anything after 10 years but he was about 80 per cent certain that Knight had a towel draped over his shoulders as he walked into the shower block.

[143] He had committed many crimes as a juvenile and had been in many different juvenile detention centres. In 1999, he was serving a sentence for cultivating a large crop of marijuana. He was serving an accumulation of sentences which totalled eight years imprisonment. He was eventually paroled. Whilst on parole and intoxicated, he was apprehended breaking and entering a shop through the roof. He had hundreds of convictions for break and enter offences so that he knew there was a good chance he was going back to prison. He absconded and moved to Victoria where the police contacted him in early 2004. He knew he had outstanding warrants in Queensland. By then, he was doing well in staying out of trouble and he wanted things finalised. He conceded that on some level he thought that if he cooperated with the police in giving them a statement about this matter, it may help him, although that was not the only reason he gave the statement. He returned to Queensland and pleaded guilty in the Magistrates Court to entering premises with intent, wilful damage and obstructing a police officer and received a $600 fine.

(viii)Prisoner Bradley Booth

[144] **Bradley Booth**, an Indigenous man, was serving 18 months imprisonment in 10 Block when the deceased died. He had known Williams for about 10 or 12 years, Knight for about six years and Robertson for about two or three years. He did not know and had never spoken to the deceased who had come to 10 Block from the DU at the same time as Knight. Knight told Booth in Robertson's presence, "I'm going to knock this fellow" as he was upset that the deceased had said, whilst standing right next to Knight, that he did not like him. Robertson was "wild about it too" and said, "Yeah, we'll knock him". Booth understood that "knock" meant "to kill". A few hours later, Williams, referring to the deceased, said "We'll do it", and "Do you want to do it?" One of the three appellants tried "to work out how they're going to kill him, hang him, stab him or drug overdose or whatever". In that context, they enquired whether, if they stabbed him, Booth would plant or bury the knife somewhere. He overheard the three appellants talking about how they might kill the deceased. Williams spoke to Booth about planting the knife. He could not recall who said what about the other things. He could not remember if anybody other than the three appellants was present. Booth was sitting close to the fence playing the guitar with Elwyn Tilberoo. The appellants used the term "hot shot" in relation to the deceased: this meant giving someone a drug overdose. Booth did not think anything was going to happen and did not worry about what he had heard.

[145] Later, perhaps the next day, he saw the deceased collect his meal on a plate. The deceased was dressed in prison issue clothes. Someone called out, "Here, mate, come here". The deceased walked straight into the left-hand shower block. He heard the deceased say "fuck off". He saw his hands coming around the corner wall, scratching the wall. Another hand pulled his hand back in. The deceased's bowl went flying. The deceased again said "fuck off". Then it was silent. He walked over to Barlow and grabbed him. Booth "knew it was going on". He glanced into the bathroom. He saw Williams holding the deceased's feet. Knight was in the middle holding down the deceased's chest and one arm. Robertson was choking him around the throat with a black cord of the type common in the prison and used to connect TVs to antennae.

[146] Booth played the guitar with Barlow and settled him down. He did not see the appellants leave the shower block. About 15 to 20 minutes after Booth saw the deceased with the three appellants in the shower block, he saw Robertson grab his towel, leave his cell and go for a shower. Booth played guitar until afternoon sport time. When he returned to 10 Block after sport he learned that the deceased was dead.

[147] In cross-examination, Booth gave the following answers. He was interviewed by police the day after this incident but he did not tell the police about what he had seen and heard the appellants do until he was picked up by police on a warrant in December 2002. The police took him from the Rockhampton watch house to the hospital where he had a tape recorded conversation with them. This was typed into a statement the following day. Booth understood the deceased's comment (that he did not like Knight) to mean that he did not like black people. Knight was upset by the comment and told Booth that the deceased was running him down to his face. This incident was well known in 10 Block and was the reason why Knight was going to "knock" the deceased.

[148] Booth conceded that there were discrepancies between his evidence at committal and his evidence at trial. These included whether Robertson was present at the time of some of the conversations before the deceased entered the shower block. At the committal, he had agreed that he did not hear the appellants talk of hanging the deceased. Although in his statement he had said the appellants talked of giving the deceased a drug overdose, at the committal he was unsure of this. He could not remember telling anyone that the appellants wanted him to cut the deceased's throat and stash the knife but he would not be in it. He conceded he might have told lies to the police when they interviewed him at the hospital in December 2002. At the committal, he said he falsely told the police that he heard the appellants talk about wanting to hang the deceased. He said this because he was nervous.

[149] Booth appeared confused by this cross-examination and the true effect of his answers at this time is unclear to me. The judge intervened, remarking that he did not think the witness was following the cross-examiner. Booth explained that, although he said at committal that what he told police in his statement was false, his statement to police was in fact true. He was mistaken and nervous at the committal. He agreed that in his statement to police and at committal he did not say he saw Robertson pulling on the cord. He added, "I couldn't hardly see him properly, because [Knight] was in the road … on his chest." He was subjected to three days of cross-examination at committal. He conceded he may have said different things in his statement or at committal but he was now sure the deceased was sitting down when he saw him. He could see Robertson from the stomach upwards. He was viewing what was happening from the side and it was a very quick view – about five seconds. In his statement to police, he said that he saw the appellants rush out of the shower block at afternoon sports time; but in his evidence at trial he said he did not see them all come out, only Robertson.[10]

[150] He agreed that when first questioned by police the day after the death he told them he saw and knew nothing about the death. It was only when he was picked up by police for an incident involving a taxi driver in Brisbane that he told them about it. It had been playing on his mind all the time. He told Mr Jarro, an Aboriginal liaison officer, that he was prepared to speak to the police and give them information about this incident if he got off his charges. The incident that he would discuss with the police was "a very serious thing" and that he was "the only fellow that knows about it". He agreed that, in fact, he was not the only person who knew about it and he was "big-noting like everyone else". He added that he still went to jail for it anyway and he did not get any favours. He admitted that in his mind he was hoping to get favours for the information about the death. Nobody asked him to cut the deceased's throat; this was part of his big-noting; trying to make the story more believable. He agreed that he told police officers that he saw the deceased being strung up over the shower, but this was wrong. He told police that "After [the appellants] choked the piss out of [the deceased], on the ground, then they put him in the block, and they hanged him from there, like he was dead". He could not remember exactly what he told the police. He agreed that he did not see the appellants string up the deceased. He told police, when they asked how the appellants hanged the deceased, "They put him on a shower hook and strung him up with a TV antenna cord" but he did not see this happen. When he spoke to the police about this incident at the hospital in 2004, he was "still shook up" and he

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[10] In fact, he said he did not see the appellants come out of the shower, but he later saw Robertson in his cell, leaving for a shower.

wanted to get off the charges. Much of what he first told Mr Jarro and the police was lies and "shit talk" from alcohol in an attempt to get off some charges but he still went to jail anyway.

[151] He initially gave his brother's name to the police who arrested him on the charges involving the taxi driver so that his brother would be blamed.

[152] Booth agreed he had many convictions and had been to jail many times for offences of dishonesty. It was most likely that he did say to police that he wanted them to help him out in his little court case. He insisted, however, that he got no favours and he still went to jail for his offending against the taxi driver.

[153] He was a heavy drinker, including at times methylated spirits. He had been hospitalised in a psychiatric unit for alcohol detoxification and had hallucinated. In 2002, he was in a serious car accident.

[154] In 2004, police officers took him back to 10 Block in the old Rockhampton prison which was by then closed. He told police that he did not see Robertson with a cord; he did not see Robertson pulling a cord; and he did not see a cord around the deceased's neck. Booth said he was not in his right mind at that time: he was sick, in pain, on crutches and could not concentrate. The true version was the version he gave in court. He agreed he had a lot of difficulty remembering what conversations had occurred before the deceased's death but he remembered Knight saying he was "going to knock him and all that".

[155] Another prisoner told Booth that he had seen the deceased strung up from the shower head. Booth did not have difficulty distinguishing between what he actually saw and what he was told by others. Everybody knew that the deceased had been strung up on the shower head and had a TV antenna cord wrapped around his neck. Willis McInally was a liar. He did not tell McInally, and he did not hear rumours, that the deceased claimed to have said he had stolen jewellery hidden in his Commodore which the three appellants were trying to get, and when the deceased did not cooperate with the appellants, they killed him. Booth agreed he was a chronic alcoholic but he was not a "druggie" like McInally.

[156] The following exchange occurred in cross-examination about why he told the police that he saw all the appellants rush out of the shower, but at trial he said he only saw Robertson come out of the shower:

> "My question is, why did you say something completely different to the police?-- Like I say, I can't remember. Everything's starting to come back slowly.
>
> … It's a long time ago, old mate.
>
> …
>
> Yes. Ten years ago, your memory's getting better, Mr Booth, is it?-- Yes, it is.
>
> How does your memory take things away?-- The alcohol takes it away.

> You see you say there you saw the three of them rush out of the shower block?-- Yeah. It was back then.
>
> What do you say, 'My memory is improving, I didn't see that at all, I only saw [Robertson]?'-- It was back then, yeah. It was back then.
>
> Your memory is no help at all as an explanation, is it?—Only - I'm here to tell you what I saw.
>
> You're here to look after yourself, aren't you, that's all you've ever been interested in?-- Yeah, I was subpoenaed here."

[157] In re-examination, Booth said he had not had an alcoholic drink for some days.

(ix) Prisoner Jason Roberts

[158] **Jason Roberts** was a prisoner in 10 Block when the deceased died. He knew the appellants as inmates of 10 Block. He did not know the deceased, but had seen him in 10 Block; they were about the same age. He saw him on the morning of his death walking up and down the yard of 10 Block. He appeared in good health and was uninjured. Lunch was usually available after the muster at about 11.30 am. After Roberts and his cell mate[11] finished their lunch, he took the plates back to the mess room. He saw Williams in the shower block trying to strangle the deceased with Knight slightly crouched in front of the deceased. The deceased who was "chucking a fit" or convulsing, was on his knees struggling with Williams. Williams was behind the deceased with his arm around his throat. Roberts only saw a glimpse of what was happening. He did not see Knight doing anything. Roberts was about half a metre from the mess room when he saw this. After a couple of minutes, Williams came into the mess room panting, like he had just finished a game of football. He looked around and then walked out without saying anything. Roberts returned to his cell and mostly stayed in it. When he stepped out for fresh air, he saw Knight hosing out the shower block.

[159] A prisoner officer called Albi usually conducted the muster. Albi was pretty relaxed at doing head counts: if somebody said a prisoner was in the toilet Albi took the attitude that "she'll be right". Albi was pretty laid back and sometimes left the officers' donga at lunch time. He did not think Albi was at 10 Block during lunch on the day the deceased died.

[160] In cross-examination, Roberts agreed that when he was interviewed by police the day after the death he told them he had no knowledge or information which could assist them. This was not true, but he would not call it a lie because he was in prison and protecting himself.

[161] He was next interviewed by police in January 2003 when he was no longer in jail. He again told police that he saw nothing that would assist them in respect of the death and his statement was truthful and voluntary. In his third statement of 28 July 2004, he again told police he did not see anything happen in the shower block on the day of the death. He told police he had seen the deceased that morning but did not pay much attention to him and did not look to see if he had any injuries. That part of his statement of 28 July 2004 was correct. He gave his present account of

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[11] Travis Leahy.

events only in his last statement to police in October 2004. He could not now remember all the details of what he saw the day of the death, only certain things, but the main events still stuck in his head.

[162] At the committal, Roberts said that on the day of the death Alan Shipp, another inmate of 10 Block, told him there was a person hanging in the shower block. Roberts did not think he had told Shipp what Roberts had witnessed there. Shipp told Roberts that he, Shipp, was responsible for the hanging. Roberts at trial said that Shipp told him that the appellants Williams and Knight were involved in the hanging; Shipp told him a few things, some of which he remembered and some of which he did not; it was over five years ago. Roberts did not believe Shipp was responsible for the hanging based on what he had seen.

[163] Roberts denied that he lied to police in his statement of 28 July 2004: he just did not want to say anything at that time or earlier because he did not feel safe. In response to the suggestion that he could not possibly have been able to see into the shower block where he claimed Williams held the deceased around the neck, he said, "I seen it. I seen what I seen in the shower block that day". This included seeing Williams holding the deceased's right hand with Williams' left hand.

[164] At the committal, Roberts said that he did not see the deceased's left hand; that was wrong; he was a little bit confused then, not about what he had seen but about where he was, and he was still concerned for his own safety. He agreed that his view of the deceased being assaulted by Williams was from behind and to the side. His view of the deceased was partially obscured by Williams. But he was sure that it was Williams who assaulted the deceased. The light was fading but there was enough light to see. He was also certain that Knight was present. The deceased made a murmuring noise. He agreed that at the committal and in his statement to police in October 2004 he said he did not hear the deceased make any noise.

[165] Roberts heard rumours that the deceased had been strung up with his hands tied behind his back and raped. Roberts told a prisoner friend, Ricky Familic, that he had seen the deceased with his hands tied behind his back when in fact he had not seen that. He told Familic that Robertson was involved in the assault on the deceased, even though Roberts had not seen Robertson participating in the assault. Roberts based this information on rumours around the jail. He agreed at the time he gave his statement to police on 28 July 2004, he told them he intended to apply for remission of his sentence, although he could not quite remember the conversation. He told police he would tell them what happened when he got out of jail. He subsequently got his remissions and was released. At the committal, he lied when he denied police officers had given him the shirt and tie he was wearing. He did not consider it was a lie; he simply did not feel right saying in court that he got a shirt from a police officer; it was a petty question.

[166] He agreed that he made four phone calls from 10 Block between 3.03 pm and 4.03 pm on the afternoon of the death. Although he saw the assault on the deceased in the shower, he had no idea about the hanging until Shipp told him. He did not know there was a man hanging in the shower block but he knew there was something in there that should not have been. Contrary to his earlier evidence, he then said that Shipp told him on the afternoon of the day of the death that someone was hanging off the bars in the end shower, and that Williams and Knight had something to do with it. Shipp also said "that he had done it". His evidence in court

was inconsistent on this point because he was ill; he just forgot. He added "I've got the frigging flu … I've got the runs, I've got everything." He agreed there were lots of rumours going around after the deceased's body was found and that he incorporated those rumours into facts, for example, he told Familic that it was not a suicide because the deceased's hands were tied behind his back. There were other rumours that the deceased was tied up and raped and put in a chair and counted at muster. He was pretty sure it was on the day of the deceased's death that he saw Knight hosing out the showers during the afternoon sports period.

[167] In re-examination, he stated that he was not given any favours or benefits from the police for providing them with information about this matter.

(x) Prisoner Alan Shipp

[168] **Alan Shipp**, an Indigenous man, was at the time of the trial employed as a groundsman at a caravan park in Rockhampton. In June 1999, he was a prisoner in 10 Block. He could not recall what he was imprisoned for or the length of his sentence. He knew the appellants. The deceased had recently come to 10 Block from the DU and he knew him to nod to.

[169] The usual prison officers in 10 Block were "Albi and Reidy … and [s]ometimes Sharon Williams". Albi usually left 10 Block at lunch to go to the officers' mess and he was not replaced. Shipp saw the deceased in the mess room probably about or before lunch on the day he died. He did not notice any injuries or blood on him. That morning, Shipp painted in his cell and then went to the gym.

[170] When he was lying on the floor of his cell painting a canvas after lunch, he saw the deceased walk into the left-hand shower block. He was carrying something like a toothbrush or razor. The deceased stood looking into the mirror which was positioned over a basin. Shipp could see into the three shower cubicles. It was a bit darkish and he was unsure if the lights were on. He saw the three appellants go into the shower block. Earlier, they had been pacing up and down in the yard. They went in one at a time with Knight going first. He saw Williams punch the deceased who fell to the floor. The appellants had their backs to Shipp and blocked his view. He could not say where in the shower block they were. He saw Williams punch the deceased twice: a short jab followed by a "combo hit, like in the boxing match … cross hook". The deceased fell onto the concrete on his back; he heard a couple of big thuds when both punches made contact. The deceased's head was facing towards the showers and his feet towards Shipp. He saw Robertson kick the deceased to the chest around the neck on the right of the body. He then saw Williams and Knight punching the deceased to the stomach. While this was happening, he thought Robertson was outside: he was puffing and panting as if he had been playing football and seemed to be keeping a lookout. He heard the deceased screaming for help and saying "fuck off". He thought the appellants came out of the left-hand shower block and went to the showers on the other side. This all happened about 15 or 20 minutes after lunch. The flogging of the deceased in the shower block seemed to go on for hours but it probably took about 10 or 15 minutes. He could not remember if there was any prison officer supervision during the lunch break.

[171] In cross-examination, he agreed that he did not tell police about having witnessed the assault in the shower block until November 2007, eight and a half years later.

He used to be a very bad alcoholic but now he did not drink very much. He had not been seriously intoxicated since mid-2008 when police were called and he was charged with an offence. He was a heavy drinker and had consumed methylated spirits in the past. This had affected his memory. He had suffered from "DTs" in rehab while detoxing. Jail had been difficult for him as he was "off the grog". He had suffered bumps to the head over the years from assaults with iron bars and had some scars on his head, a lump at the back, and a dent in his forehead. He was hospitalised for head injuries and had been knocked out many times in fights and in work accidents. He had been in some bad car accidents. His memory deteriorated after a car accident in 1986 and after his daughter died. He agreed that at the committal he had said "I'm fucked in the head".

[172] He had an extensive criminal history, mainly alcohol related, for offences of dishonesty, street offences and domestic violence. Whilst he was in prison in 1999, he smoked cannabis which was readily available in 10 Block: everybody, including Shipp, smoked it there. He could not recall whether he smoked cannabis on the day the deceased died because it was such a regular occurrence. He had poor eyesight and should wear prescription glasses for long distance at all times. He was half blind in one eye and had problems with the other. He did not wear glasses in jail because they could get broken in fights or if dropped. He also had problems with his hearing: he was a bit deaf.

[173] He could not remember what he first told police when questioned on 17 June 1999 about the death or whether he had two separate conversations with police. But he did not tell them about the assault he saw in the shower block.

[174] When he was questioned by police in December 2003, he told them he did not know of any trouble between the deceased and other inmates. He told them that he remembered hearing a bit of a squeal as if someone had jammed their hand in the door and was singing out. He looked in the mess room because that was where he thought the scream came from, could not see anything, and returned to his cell. He could not now remember if he told the police that, or if the events of 16 June 1999 happened in that way. When defence counsel suggested to him that, if they did happen in that way, his evidence at trial was not true, he responded "I seen it with my own eyes". It was put to him that both versions could not be true. He responded "Well, a man couldn't go to himself and bash himself up and hang himself." He maintained that he saw the deceased being assaulted; he saw a man go in and not come out. He said that if you see a man getting assaulted in the bathroom you stay out of it, you do not go near. He denied having a very poor view of the assault, adding "I seen what I seen". He agreed that in 2003 he told police that he did not know anything about the involvement of the appellants in the death. This was a lie as he wanted to keep his mouth shut in prison and he did not swear on the Bible when he was speaking to the police. It was not until eight and a half years after the death, in November 2007, that he first gave an account of what he saw in June 1999. He had seen people bashed in jail before but nothing like this. It shocked everyone. Robertson kicked the deceased in the head like kicking a football. It was a brutal assault.

[175] When police first spoke to him in 2007 about the death, he again told them he was not saying anything, but suggested they ask him when he got out of jail. He agreed he did not see the face of the man assaulting the deceased but thought it was Williams because of his size. As the person he described as Robertson went into the

shower block, he did not see his face. He insisted however that he knew them both because of their size. His memory had got a bit better since 1999, even though since his release from serving that prison sentence he went back to heavy drinking, experienced "DTs" after benders, and had suffered knocks to the head. There was no possibility that he was mistaken as to the identity of the person he described as Robertson. At first, he insisted that he saw the prison officers cut the deceased's body down but then conceded that he had assumed, but had not seen, the prison officers cut the body down.

(xi) Prisoner Elwyn Tilberoo

[176] **Elwyn Tilberoo**, an Indigenous man, was serving a two year sentence in 10 Block when the deceased died. The Attorney-General gave him an indemnity against prosecution for the murder of the deceased on 29 June 2009, only two weeks before he gave evidence at trial. He knew the three appellants and the deceased whom he described as a white fellow aged about 17 or 18.

[177] On the day of the death, after the lunch time muster he saw the deceased go to the left hand showers. He was carrying a towel and clothes. A few seconds later, Williams, Robertson and Knight went into the shower block. He did not hear anything. The appellants were in the shower block for about five or six minutes and then came out. They went in separately and came out separately, a few seconds apart. Tilberoo walked over to the shower block. He could see a yellow towel hanging from the louvres. The cubicle door was open a bit. He walked into the entrance of the shower block but did not go far in. Two people (he could not remember who) were washing blood out of clothes at the sink. They did not speak to him. He went back to his cell after a couple of seconds. This all happened well after muster and after lunch, although he did not eat his lunch that day. Before muster, Williams told him "Look out for the screws, cause I'm going to knock this young lad … young white fellow." This conversation took place outside Tilberoo's cell before morning muster. About a minute after the head count at morning muster, the deceased went into the shower. He did not see the deceased again.

[178] Albi was the prison officer in 10 Block that day. He was not there when all this happened; the prison officers left 10 Block at lunch time.

[179] The deceased had been in 10 Block for about a month and was of slim build with curly short hair. (In fact, photographs of the deceased depict a very short hair cut with no curls; he was 23 years old and had been in 10 Block for only two days.)

[180] Tilberoo was cross-examined for more than one full court day. At one point, he asked his cross-examiner to "Break it down so I understand. I told you before, I can't understand you white fellow talking." On another occasion, he told defence counsel not to raise his voice.

[181] Tilberoo had earlier told police:

> "I stayed where I was outside my cell sitting on a chair and the next thing I see [Williams] and [Robertson] and another person walk into the showers. The other fellow was a white fellow. The [deceased] was already in the shower, I saw him walk in straight after muster. [Williams] came just after that to me to ask me to look out. After

> talking to me he walked into the bathroom and then [Robertson] walked in right behind him. The other white fellow walked in a couple of seconds after [Robertson]."

[182] Tilberoo stated that he "must have been pissed" when he said that.

[183] When earlier cross-examined in court in the absence of the jury, Tilberoo's evidence was that Williams spoke to him before muster, whereas in his evidence before the jury he said this was after muster. Tilberoo again responded that he "must have been pissed". He insisted that the person he at first described as "a white fellow" was in fact the appellant Knight. He said he could not remember what he said in court two days ago because he drank heavily.

[184] In December 2003, Tilberoo told police that the third person who went into the shower block was a white person. Police showed him three pages of photographs on photo boards. He picked out Robertson and Williams. He told police that the third person was white. Police showed him 12 photographs of Aboriginal men, only one of whom, Knight, was in 10 Block at the time of the killing. Police asked him if he recognised anybody and he said he recognised Knight. Police reminded him that he said the third person was a white fellow. He responded "Yeah, I thought it was, but it's come back to me now."

[185] He did not see the deceased's body hanging; he only saw the towel. He maintained "I know who I seen … I know what I seen." He did not agree to keep a look out for Williams, although he conceded he was looking around. He would not have known what to do if some prison officers had arrived. He thought he probably would have been "the next one". He knew that if he had been keeping a look out for Williams, he would have been involved in the crime. He was also concerned that he might be "the next one hanging".

[186] He understood the word "knock" to mean "kill". The usual prison officer in 10 Block was Albi. Albi's usual practice was to leave 10 Block for his lunch. Albi counted all the prisoners at the morning muster and then left for lunch.

(h) Exhibit 62

[187] An extract from 10 Block's unit information log was tendered.[12] It recorded for Wednesday, 16 June 1999 the following entries:

> "11.25 MUSTER DU 3
>
> …
>
> 2.20 KNIGHT OFF STAT B TO RBH STATB 31
>
> 3.05 12 TO OVAL
>
> …
>
> 4.15 KNIGHT Frx RBH STATR 32
>
> 4.20 12 frX OVAL

[12] Ex 62.

4.50 DATAS TO L/O STATR 31

5.05 MUSTER 31 DU 4"

No case submission

[188] The appellants submitted that the evidence was insufficient to allow the case to go to the jury. In the course of responding to that contention, the following exchange occurred:

> "HIS HONOUR: Your case could be, they suspended him from the bar and held him in such a way as to cause him to die, or, they strangled [the deceased] first, and then suspended him from the bar.
>
> [THE PROSECUTOR]: That's right.
>
> HIS HONOUR: So that's primarily your case.
>
> [THE PROSECUTOR]: That's right.
>
> HIS HONOUR: What happened before may have disabled him, may not, may have nothing to do with how he died.
>
> [THE PROSECUTOR]: That's right.
>
> HIS HONOUR: Just that he was assaulted.
>
> [THE PROSECUTOR]: That's so, your Honour. Yes."

[189] The judge dismissed the appellants' application for the discharge of the appellants as they had no case to answer. The judge also dismissed their objection to the evidence led at trial the subject of the pre-trial application, despite the differences between the evidence that was anticipated to be given and the evidence in fact given at trial: see *R v Mark Dempsey Knight & Ors (No 3)*.[13] In the course of his reasons, the judge said:

> "[3] The prosecution case is that the accused caused the death of the deceased by compression of his neck in some manner so as to cause asphyxiation. The prosecution allege that he was either first strangled and then suspended, or simply suspended, by a towel from a louvre bar by the accused men. … It can be accepted that if the jury could be satisfied to the requisite standard that the accused did either of those things the prosecution will have discharged its onus of establishing causation of death"

Defence case

[190] None of the appellants gave or called evidence, save that counsel for Williams tendered some photographs. This was almost certainly done solely for tactical reasons so that he was required to address the jury before the prosecutor, whose address was followed by counsel's addresses for Robertson and then Knight.

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13 49/08 Supreme Court Rockhampton delivered 20 July 2009.

[191] The defence case in respect of each appellant was that the prosecution evidence was unreliable and confusing, especially in light of the long delay before a thorough police investigation, and the further delay between the death and the trial. The pathologists' evidence could not exclude suicide and was consistent with it. Even if the jury could be satisfied beyond reasonable doubt that each of the appellants was involved in an assault on the deceased in the shower block before his death, they could not be satisfied that the deceased did not suicide, perhaps because of sexual advances from Cant, perhaps because of the assault in the shower block, or perhaps for a combination of the many reasons he had to be unhappy. The jury should acquit each appellant of both murder and manslaughter.

The judge's directions to the jury

[192] The majority of the grounds of appeal concern the judge's directions to the jury. In order to discuss those contentions, it is necessary to next set out relevant aspects of those directions in sufficient detail to give their full context and flavour.

[193] The judge explained the different roles of judge and jury: if he commented on the evidence the jury were not obliged to accept the comment and should ignore it unless it coincided with their own independent view. Matters of fact were entirely for the jury: they must decide what evidence they believe, accept and act upon. They could accept or reject part or the whole of the evidence given by any particular witness. They must exclude anything they had heard about the case outside the court room and decide the case only on the testimony, the exhibits and the admissions made in the court room during the trial. The summing-up and the lawyers addresses were not evidence.

[194] The judge stated:

> "Now, this next comment is of some importance in this case. A jury does not have to resolve every discrepancy in the evidence before you can arrive at a verdict. Commonsense tells us that different people would ordinarily give different accounts of the same events.
>
> Here, the events happened 10 years ago. It would be astonishing if the witnesses did give accounts that matched in every detail. So it is not necessary for you to be unduly concerned by inconsistencies, but, if there is an inconsistency and a discrepancy in the evidence, which is on an issue which is of vital importance to your consideration, if it is an essential part of the prosecution case, then that inconsistency may result in your having a reasonable doubt, so that the appropriate verdict would be not guilty."

[195] The judge explained that they may draw inferences of fact from other facts. They must dismiss all feelings of sympathy or prejudice and approach their duty dispassionately, deciding the facts upon the whole of the evidence. In assessing witnesses, they must bear in mind that 10 years had passed since the events they were asked to recall and the credibility and reliability of witnesses was an important aspect of the case. They should take their impressions of witnesses as they gave their evidence into the jury room and discuss them as part of the process of reaching a verdict, adding: "… In the end, it is for you to assess the credibility and reliability of the witnesses." In listing the criteria that might help the jury decide if a witness was reliable, the judge invited them to ask:

> "Was the evidence given by the witness self consistent? Has the story that the witness told always been consistent? Did the story told by the witness vary from time to time in important respects?
>
> As a general proposition, if you find that there are significant differences between the prior statement of the witness and the evidence the witness gave in this Court, and you find that no acceptable explanation has been provided for the inconsistency, it may cause you to be hesitant about the witness' accuracy, honesty, reliability and credibility, generally."

[196] The judge gave this direction in respect of Indigenous witnesses:

> "One of the additional difficulties that you face, in this case, is in assessing the evidence of indigenous witnesses. Quite often English is not their first language. As well, some may have come from a different culture to your own, with differing customs and differing habits of dealing with aggressive questioning, and you might expect, in your own culture, or from your own experience, some had a habit of just agreeing with whatever was put to them, even though it might be contrary to what they had just said.
>
> You need to decide that any agreement was merely the witness giving up or acceding to the questioner, without any real adoption of the point and issue, or whether the agreement was a deliberate and thoughtful acceptance of the proposition put."

[197] His Honour continued:

> In this case, one thing that might assist you in resolving where the truth might lie, is if you find that a number of witnesses have said much the same thing about the subject in question. So even though the witnesses might have reported different versions of an event, if you consider that there is an overall consistency between the witnesses, that can tend to suggest that what they have to tell you is being both honestly recalled, and, to the extent of any consistency, accurately recalled."

[198] The judge explained that it was a feature of this case that many witnesses had criminal records as they were in prison with the deceased when he died. The jury must not reason that because each appellant was in prison at the time of the death that they must be guilty of the present offence. Whilst the criminal records of the prosecution witnesses who were cross-examined and gave evidence must be taken into account in assessing their credibility, simply because they had a criminal record did not mean they were not capable of giving a truthful or reliable account. Nevertheless, their criminal records meant that the jury:

> "should keep in mind the dangers of accepting them as truthful witnesses. You have to exercise caution before you act on their evidence. Two things might guide you, one is the extent to which a witness is supported by other persons. If two or more witnesses agree on some point, then that can add to the probability that they are reporting accurately what they have observed.

> Secondly, if the attack is on the witness's honesty, then it will be worth considering just what it is that the witness has said. Is it something that a witness is likely to make up. If after you have assessed the evidence of such a witness in the context of the other testimony available, and having given due weight to the dangers about acting on their evidence, you are satisfied that the witness is a truthful and accurate witness, you can act on his evidence, notwithstanding that he has previous convictions."

[199] The judge explained that the law allowed some witnesses to give evidence of conversations they had with the deceased. This particularly concerned the deceased's relationship with both the appellant Williams and with his girlfriend and child, and his attitude to the future and to moving into 10 Block. The judge warned that it was not possible to cross-examine and test the truth or accuracy of such evidence which could be unreliable. The jury did not have the opportunity to hear the deceased give evidence, be cross-examined and make their own assessment. His Honour continued:

> "The person reporting the conversation may not have reported it accurately for a start, even assuming that the deceased, who imparted the information in the first place, was being truthful. There may be misinterpretation of what was said, or a summary of it that is imperfect. There may be a change of the meaning, subtle or otherwise. In other words, the whole thing might have changed in translation, or it may simply have been misheard by the person who reports what was said.
>
> Also the statements, said to have been made, were not on oath. In saying these things, the deceased was not then under the same imperative to speak truthfully, as if here in Court, testified on oath. So there is need for caution in deciding whether to accept as reliable, the things relayed to you as hearsay, and, if you accept any of it, informing a view about the weight that ought to be given to this information.
>
> Further, the things that the deceased is alleged to have said, relate to the state of a relationship, for example, his relationship with his girlfriend and his relationship with [the appellant] Williams. It is particularly necessary to exercise caution before accepting what is said by one of the parties to a relationship.
>
> Evidence given in that sort of situation is one kind of evidence where it is notoriously difficult to find out precisely what is the objective truth. Each party often has his or her own perception of what is true, when a neutral might think that neither version represents what we call the objective truth, if there is such a thing.
>
> Now, having said that by way of caution, provided you give due weight to the possible difficulties of such evidence that I have been discussing, you are entitled to have regard to the evidence and give it such weight as you think it deserved. Further, in relation to the evidence that has been led, touching upon the state of the relationship

> between the [appellant] - the deceased, sorry, and the [appellant] Williams, there was some mention of acts of physical violence by Williams towards the deceased.
>
> The only relevance of that evidence was to give you a full picture of the state of the relationship between the deceased and the accused man. It would plainly be wrong to say that because Williams may have used violence towards the accused on one occasion, he therefore has a potential to use violence towards the accused on the occasion on which we are discussing in this case.
>
> The acts described were, of course, of very different character to the acts that the prosecution relies on as establishing guilt in this case. One witness mentioned hearing a thumping, which he thought was consistent with some form of assault. Another witness spoke of the deceased telling him that he had been 'bitch-slapped', I quote. I assume, a slap across the face. That could mean one or more slaps across the face.
>
> Ryan, his fellow robber, spoke of Williams hitting him twice across the head. Do not think for one moment that that sort of evidence establishes that Williams has some sort of potential for violence, and also increased the prospects of him being a person ready to kill.
>
> The fact is that the precise circumstances surrounding each of those incidents is very much a matter of debate and to some extent surmised, and you may use it only for the purpose of determining what was the state of the relationship between the accused [sic] and Williams." (errors as in the original)

[200] His Honour next explained that the case involved three separate trials against each appellant. The evidence of the 8 Block prisoner witnesses about Willliams had no bearing on the cases against Knight and Robertson and must be ignored when the verdicts in their cases were being considered. The witness' evidence was that the relationship between the deceased and Knight was friendly. There was no evidence that Robertson had ever spoken to the deceased.

[201] The judge then discussed the issue of motive. Motive was not material to intent and the prosecution did not necessarily fail if it could not establish a motive. But the question of whether there was a motive was obviously important in the case. If there was no motive to kill the deceased, then it was less likely that the jury would draw an inference of guilt. But if there was a motive, that might explain what would otherwise be inexplicable. Simply because an accused person may have motive to commit a crime, it did not mean that the accused person actually committed it. In the absence of other compelling evidence, evidence of motive alone would not be sufficient to convict. Evidence of motive was simply a form of circumstantial evidence; one piece of evidence that the jury could consider along with other evidence in deciding whether they "are prepared to infer beyond reasonable doubt, to the exclusion of all reasonable probabilities consistent with innocen[ce], that the [appellants] are the persons who caused the death of the deceased … ".

[202] The prosecution case was that one possible motive was that the appellants were after the proceeds of the break and enter committed by the deceased. The defence case was that the value of the unrecovered proceeds was only a few hundred dollars and

provided no motive. But the judge told the jury that the question was what may have been thought to be the value. McLuckie had heard $300,000 had been stashed. Although the defence did not make this point, they no doubt would say McLuckie's evidence was suspect generally, and specifically on this point. Findlay had heard $30,000 had been stashed. The deceased's co-offender, Ryan, gave evidence that the deceased had kept a five ounce nugget of gold. The judge added:

> "Whilst all questions of fact are for you, you might think that there is ample evidence that both the [appellant], Williams, and the [appellant], Knight were well aware of the supposed existence of this store of stolen property."

[203] It seemed unclear, the judge observed, what the appellants' beliefs were and there was no evidence that Robertson had any knowledge of the proceeds of any robbery although the Crown case was that he was friendly with Williams and Knight when they were in 10 Block. The judge again stressed that there was no onus on the prosecution to prove a motive.

[204] The judge next dealt with the concept of expert witnesses, explaining the exceptional nature of their evidence and that the jury did not have to accept it: they were the sole judges of fact.

[205] Turning to what he termed important directions on the law that the jury must follow, the judge continued: the burden of proof was on the prosecution to prove each and all of the elements of the offence beyond reasonable doubt; that each appellant was presumed to be innocent until proven guilty; that the appellants had no onus to prove their innocence. If the jury at the end of the trial had a reasonable doubt as to any element of the charge, it was their duty to acquit. The judge continued:

> "The expression 'beyond reasonable doubt' is frequently used and well known, and well understood in our community. It means what it says. If you reach the stage in your deliberations where you are left with no reasonable doubt but that the [appellant] is guilty, then you should convict. There have been people in the course of their addresses, and perhaps in their enthusiasm, reaching their hands up to the sky and discussing this. Well, it is not an impossible standard for the prosecution to attain. If, after considering all the evidence, you are left with a reasonable doubt as to any element of the charge, or as to any fact which is an essential part of the prosecution case you should acquit."

[206] None of the appellants gave evidence. This was their right. There was no obligation on them to give evidence and no inference adverse to any appellant could be drawn from the fact that they did not. The jury's verdict must be unanimous. They must consider separately the case and the evidence against and for each appellant.

[207] The judge explained the elements of the offence of murder under s 302(1)(a) *Criminal Code* and that the prosecution case was that the acts of the three appellants were a direct cause of death. Manslaughter, unlawful killing in circumstances that did not constitute murder, was an alternative charge.

[208] The judge framed the essential questions for the jury to decide in this way:

> "The first is, has the prosecution excluded beyond reasonable doubt the hypothesis that [the deceased] committed suicide? If the prosecution have, then the only alternative is that he was killed and so the necessary element of a killing has been established.
>
> The second question is, assuming that [the deceased] was killed, has the prosecution established beyond reasonable doubt that the three [appellants] caused his death? Again, you address the case against each of them individually.
>
> If that is so, then the third question is, has the prosecution established beyond reasonable doubt that the three [appellants] has the intent to cause death or grievous bodily harm at the time they did the act which caused [the deceased's] death?" (errors as in the original)

[209] No witness gave direct evidence that they observed the deceased being killed by the appellants and there was no direct evidence of an intent to kill or cause grievous bodily harm. The case against the appellants was circumstantial. They must be satisfied that the appellants' guilt was the only rational inference that could be drawn from the circumstances; if there was any reasonable possibility consistent with innocence they must find the appellants not guilty. They may only draw an inference of guilt if it so overcame any other possible inferences as to leave no reasonable doubt in their minds.

[210] The prosecution case depended on the accuracy of the identification of one or more of the appellants as being the men seen by 10 Block prisoner witnesses (Booth, Bailey, Shipp, Tilberoo, Barlow and Roberts) in the left hand shower block assaulting the deceased at about lunch time on the day of the death. The judge then gave uncontroversial directions about the dangers of identification evidence about which there is no complaint.

[211] His Honour next turned to discuss the evidence, observing that the jury had been listening to counsel and the judge for "the whole week, speech after speech". He was taking a different approach to counsel and would endeavour to marshall the facts in a logical way. There were four issues:

> "… first, can the prosecution establish, beyond reasonable doubt, that the time of death was around lunchtime? If the death could have happened at some other time, say, after evening muster, then the prosecution must fail, as there is no evidence of the [appellants] doing anything, at some later time, to the deceased.
>
> Second, can the prosecution exclude suicide beyond reasonable doubt? If they can't, then again, the prosecution will fail.
>
> Third, if you are satisfied that the deceased did not commit suicide, and so was killed, then the question is, can the prosecution satisfy you beyond reasonable doubt that these three men caused his death?
>
> Fourth, if you reach that point then the final question is, are you satisfied beyond reasonable doubt that at the time they killed him, the [appellants] had an intent to kill or cause grievous bodily harm?"

[212] Turning to the first of these issues (the time of death), his Honour reminded the jury that the defence emphasised the extract from the 10 Block log book.[14] This showed that at 5.05 pm all prisoners were present in the block. Further, when Lionel Malcolm went to the end of the shower block to talk to his nephew through the window, he saw no towel over the bar. The judge added:

> "There are several features of the evidence that I want to bring to your attention about that argument. First, that argument of course depends on the accuracy of the muster performed by Mr Albi Bauer. Every single witness called was asked about Mr Bauer, says that he was notorious for his lax[ity]. Weeks told you that some officers did not do their job properly. Prisoners told you that if there was one officer where you could simply sing out a name and he would not check the presence of the prisoner, it was Bauer. Not one of these witnesses was challenged on this point.
>
> The prosecution was criticised for not calling Mr Bauer, but you might use your commonsense. What is he going to say? And if he admitted to being lax, what would happen to his job? Do you seriously think that there is an adverse inference to be drawn from his absence? Second, witnesses were called who were at that evening muster, it was not suggested to one of them that [the deceased] was at it. Bailey said expressly, he was not. Bailey lived in the cell next to [the deceased], and he wasn't challenged on that point. Thirdly, not one witness spoke of seeing [the deceased] after he was seen entering the shower block at lunchtime.
>
> Fourthly, there is the evidence of Mr Campbell." (error in the original)

[213] The judge placed some emphasis on Campbell's evidence, stating:

> "I'm going to suggest to you that Mr Campbell is a key witness to think about. The defence contentions depend to a large degree on criticisms of the witnesses because of their criminal records, or alcoholism, their drug taking, the possibility that they had something to gain by telling the authorities what they wanted, and because of their inconsistent prior statements. Now, many of these criticisms are fully justified and I'll explain them to you. But one witness was not the subject of that sort of an attack.
>
> That witness was Mr Geoffrey John Campbell. [Williams' counsel] told you that he would not for a moment call Mr Campbell a liar. [Robertson's counsel] said that he was probably the most presentable of the prisoner witnesses. By the time he gave - came to give his evidence, you might recall he was a meter reader employed by Ergon in the Glenella area, near Mackay." (errors as in the original)

[214] His Honour then summarised Campbell's evidence in chief and noted that, in cross-examination, Campbell made no mention to police in his statement of 26 November 2003 that he saw either Robertson or Knight. His Honour continued:

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[14] Ex 62.

"Now, everything I say about the facts is a matter for you. If you don't accept any view you think I'm expressing, reject it. What you might think is that Mr Campbell gave a clear, coherent account of what he saw and heard. If you accept his evidence, then the significance of it is, that there were sounds of an assault around lunchtime consistent with an assault occurring in a shower block. It is a matter for you to weigh up whether an incident such as seeing Knight walking from one shower block to another wearing a towel is a reliable memory. For my part, and indeed, I don't bind you on anything but someone recalling what someone else was wearing 10 years ago, sounds to me to be a big effort.

I will say, that one aspect of this day, is that a death in the block made it far from an ordinary day. And it may be the details do stick in the mind, that would not otherwise do so. The fact that he did not mention the matter in a statement four and a-half years later needs to weighed in the scales.

It is a matter for you whether the fact that he has a criminal record involving break and enter offences when he was 20 has any bearing on his reliability or honesty now. Ten years later, with a family, a responsible job, speaking of things the outcome of which does not impact on his life and which you might think he is indifferent to.

The relevant point is, that if you do accept Campbell as reliable, then it gives you a starting point for your analysis. You have an assault going on at lunchtime and what he hears is consistent with one going on in the shower block. The body is seen by him hanging there, before evening muster during the time the men are showering.

All these facts are for you. But if you accept Campbell, that resolves several issues. One, there were sounds consistent with an assault. Two, that assault happened at lunchtime. Three, [the deceased] was not at evening muster, but already hanging dead in the cubicle. Acceptance of Campbell reflects too on the likelihood of the body being already in place when Lionel Malcolm came in to chat to his nephew Bloomfield. The defence admitted to you that it was improbable that Malcolm would miss it only a few feet away, if it was there. If [the deceased's] body is not hanging there when Malcolm comes in and is hanging there when Campbell comes in, what does that tell us? You understand, I hope that I'm talking about the theory.

According to the times Bloomfield relates, and the defence rely on, then [the deceased] must have suicided sometime in the 45 minutes between getting back from the football and muster at 5.05. Why then, because the only chat Bloomfield recalls with Mr Malcolm is after he gets back from the afternoon football. You will see his account in the agreed facts. And Campbell finds the body before muster. Those pieces of evidence set the time limits. The records show the footballers returned at 4.20 and the muster at 5.05.

> Now, that is at the peak time of the day, for the use of the showers. Campbell told us that he didn't rush to have a shower because it was a popular time after sports. You might think that makes a lot of sense. The point of this analysis is this, and is a matter for you. Is it a credible theory that the deceased committed suicide during the evening rush hour for showers? Is it a credible theory that he waited until all were back from the sports field and then suicided? That is the one time that you could almost guarantee people would be in the shower block.
>
> To explain the various injuries, and the blood in various places in the shower block. One theory advanced, was that he tried to suicide twice, fell and injured himself the first time, washed his face to get the blood off at the basin, goes back into the cubicle, at some point smearing blood 24 and a-half centimetres, or 10 inches above the floor surface, on the doorjamb. For some reason, reties his towel and tries again to hang himself, all with prisoners around him, having their showers, on this theory.
>
> On this theory, Malcolm is in the shower block some time after Bloomfield has got back from football, had his shower and had a lie down, according to the agreed facts. The available time for all this to happen without Malcolm or Campbell seeing any of it, is very narrow.
>
> The alternative is that Mr Malcolm missed seeing the towel when he perched on the ledge for the minute or two that he chatted to his nephew. Which do you think probable? Remember that this theory depends on the records being right, Bloomfield being right, and acceptance of Campbell's account. You have to use your commonsense.
>
> A further consequence of an acceptance of Campbell, if that is what you decide, is that it provides corroboration for the accounts that seven witnesses gave of hearing or seeing things, consistent with an assault, going on in the left-hand shower block at lunchtime. I refer to Booth, Barlow, Roberts, Bailey, Shipp and the two Malcolms.
>
> There were legitimate criticisms made of each of them, and there are a number of warnings I must give you about acting on their evidence, but on the fact of an assault, and at lunchtime, on this, they are corroborated by Campbell, and corroboration, on material particulars, by a witness of credit, if that is what you find Campbell to be, can be of significance in your assessment of them. Campbell does not identify who was involved in this assault, nor can he fix the time of death, to say that it was some time before he walked into the shower block."

[215] The judge returned to the question of the time of death:

> "The evidence is in three categories. First, there is Mr Hodda's evidence as to the state of the body when he cut it down. Second,

there is the evidence of the pathologist as to the timing of the onset of rigor mortis. Third, there is the evidence of the eyewitnesses, Nelson, Weribone and Tilberoo.

You will recall that Mr Hodda, the correctional officer, described the state of the body when he saw it at around 5.30 p.m. He told you two things. First, the limbs were stiff, and they did not move out of position. Second, and very importantly, he told that the body was cold. He said, and I quote, 'Very cold.'

The inference the Crown ask you to draw is that the deceased had been dead for some time, and rigor mortis had commenced to set in. Mr Hodda's evidence was not challenged on this. A photo won't tell you how cold the body was. Is it credible that the deceased could suicide after evening muster at 5.05, and be very cold at 5.30?

Now, Mr Lynch tendered a photograph, Exhibit 67. It's a photograph of [the deceased's] body on the floor of the shower block, and [Williams' counsel] argued that it showed that the limbs were not stiffed. That photo was not put to any witness for comment, so we have no evidence about it.

There are two things about the photo you might consider. First, we don’t know when it is taken, but presumably, sometime after 7.40, when the Scenes of Crime people arrive at the prison. That is more than two hours after [the deceased] was cut down.

We know nothing as to what has happened in the meantime, nor do we have any evidence as to the effect that gravity might have on a deceased person who's laid on the floor, in respect of which, the limbs may have commenced to stiffen. No question was directed to the pathologists to lay any foundation for an attack on Mr Hodda's honesty or reliability.

Secondly, have a look at the photo. You haven't seen it, yet. [Williams' counsel] claims it shows you that the body is lying flat. Well, all I will say is, have a look at the photo, and decide for yourself what it shows.

If you accept Mr Hodda as a witness of credit, and again, these are questions for you, then that provides a basis for the next step, the pathologist evidence. One matter they agreed upon was that the signs of rigor mortis would become evident, on average, within about six hours of death.

Dr Sinton was the man who came to Rockhampton on the day following the death and, indeed, visited the very shower block. He said the average was six hours from death to the onset of rigor mortis. That was a statistical average. He did not qualify that opinion in any way. If he observed anything that would falsify the average, you might think that he would tell us.

> He was asked, specifically, about Rockhampton in winter, and he gave his evidence, as it turned out, on the 23rd of June, 10 years and one week after he'd come here to perform the autopsy, and his answer, in response to the Rockhampton winter, was that it was likely that the statistical average applied, that is, the six hour figure.
>
> Professor Ansford said that the range was four to six hours of death. On the averages, then, the inference is that the time of death, if you accept Mr Hodda's evidence, was around 11.30 a.m., and 1.30 p.m., at the latest.
>
> You'll recall the evidence of a number of witnesses, that they observed things consistent with an assault on the deceased around lunchtime, which came after the muster, at 11.25 a.m.
>
> If you accept Hodda as a witness of credit, and the opinion of the pathologists, then you might think that there is substantial corroboration of the time of death at around lunchtime, being around the time that witnesses are reporting an assault going on, in the left-hand shower block, involving the deceased.
>
> The third category of evidence that the prosecution point to concerning the time of death are the eyewitnesses, Nelson, Weribone and Tilberoo. They were called to establish that the deceased was hanging in the cubicle a short time after the assault by the [appellants].
>
> Each was a prisoner witness. Each had given different accounts in the past. Each may have been influenced by a wish to gain something from the authorities. You will need to scrutinise their evidence with great care before acting on it, and not act on it unless satisfied it is corroborated.
>
> I will remind you of their evidence, but the point you might consider is that the body of evidence in the first two categories, Mr Hodda and the pathologists, provides substantial corroboration of a death at about the time they speak." (errors as in the original)

[216] The court adjourned for the weekend and the summing-up recommenced on the following Monday morning with the judge repeating the proposition that, if the jury accepted Hodda's evidence as to the state of the body at 5.30 pm and the pathologists' evidence about the timing of rigor mortis, then the time of death was about lunch time. The judge continued:

> "… If you are satisfied beyond reasonable doubt of those things, then the Crown will have established the first essential thing, that is that [the deceased] died at about the time the Crown says that he was being assaulted in the shower block. If you have a reasonable doubt about Hodda's evidence, then you will need to determine whether the evidence of the three eyewitnesses, Tilberoo, Nelson and Werribone removes that doubt. If it does, then again the Crown will have established that first plank in its case.

> If after considering all of this evidence, you still entertain a reasonable doubt as to whether [the deceased] died at about lunchtime, or whether it remains a logical, rational possibility that he may have died much later in the day, then it would seem to me that you must acquit all the [appellants].
>
> I now turn to those three witnesses, Tilberoo, Nelson and Werribone, who speak as to seeing things consistent, the prosecution say, with [the deceased] being deceased at lunchtime. If you are satisfied by the evidence of Hodda and the pathologists that he did die around that time, then logically these witnesses are not needed on the issue. If that is your decision, then what they can do is assist in determining in how narrow is the timeframe between the assault that Campbell and the six witnesses say occurred, and the first proof of death? The point of course, is that the narrower the timeframe, the more unlikely it is that there is time for there to be both an assault and a suicide. The pathologist evidence cannot be accurate to the minute, so to speak." (errors as in the original)

[217] The judge next dealt with Nelson's evidence. He had not offended for four and a half years, but because of his long criminal history the jury should scrutinise his evidence with care and exercise caution before acting on it. Nelson had given several statements about the matter which he said were false. The jury should weigh up the factors which might have influenced Nelson to give false statements which operated at that time but which no longer operated.

[218] His Honour next dealt with Weribone's evidence. The judge reminded the jury of the defence submission that Weribone may have converted things he had been told into things he had seen; he had an extensive criminal history and so his evidence had to be scrutinised with care and caution before acting on it. Weribone's evidence was consistent with his cell mate Nelson's account, that Nelson told Weribone what he had seen. Even so, Weribone only had a quick glance when he went down to the shower block and there was a real issue as to whether he imagined rather than actually saw something. If the jury accepted Weribone, it tended to confirm Nelson's account of a body hanging in the cubicle.

[219] The judge next summarised Tilberoo's evidence. The defence contended that Tilberoo only had a quick look from a distance of more than 20 metres into a darker room than outside. The judge reminded the jury of the dangers of identification evidence and emphasised the particularly unsatisfactory nature of Tilberoo's identification of Knight to police. Tilberoo described the third person with Williams and Robertson as a white fellow. Police then showed him a photoboard of 12 photos, all of whom were Indigenous and only one of whom was in 10 Block. It is not suggested that the judge's strong warning to the jury about this outrageously unsatisfactory police conduct was inadequate. The judge referred to Tilberoo's alcoholism; his inconsistent statements to police; and the possibility that he may have told the police what they wanted to hear to end the questioning. The judge gave the jury the following directions about Tilberoo's indemnity against prosecution:

> "Another aspect of Mr Tilberoo's evidence that you will need to bear in mind is that he's received indemnity from prosecution, provided that he gives truthful evidence here. There was a risk, of course, that

> having been protected from prosecution in that way, he may have an incentive not to depart from the statement he gave to the police, whether it is right or wrong, so as not to arouse any suspicions of untruthfulness, and he may wish to ingratiate himself with the authorities to ensure he maintains his indemnified position.
>
> Those are the terms of the standard warning that I've just given you. The odd thing here is that Tilberoo did depart from his statement, and adversely to the Crown, in denying that he saw the body, but maintaining he saw only the towel rope.
>
> Nonetheless, given all these problems, you should scrutinise his evidence with great care. You should only act on it if, after considering it and all the other evidence in the case, you are convinced of its truth and accuracy."

[220] The judge then pointed out matters favouring the reliability of Tilberoo's evidence: he had known the appellants for some time; the lighting across the yard was good; the prison yard held only 32 men; he had consistently identified Williams and Robertson, whose shapes might be thought distinctive; if Williams had asked him to keep a lookout because Williams was going to "knock" someone, he had a reason to take notice of what was happening. The judge again warned the jury that they must not convict the appellants based on Tilberoo's evidence alone because of his criminal history, his alcoholism and its effect on his memory, his inconsistencies in prior statements and the inappropriate way in which he identified Knight. There was a discrepancy between the evidence of Booth and Tilberoo as to whether Booth was present when Williams told Tilberoo he was going to "knock the lad". The judge continued:

> "*In a final analysis on this question of the timing of the death, you have the expert opinion, which puts the death at around 11.30 up to 1.30 p.m.* You have the coincidence of these two people telling you that they saw a body hanging in the cubicle at around that time. As I say, if you accept Nelson, that if you accept that it's a dead body that he saw, then you have a dead body in place at 12.15 to 12.30, more or less." *(my emphasis)*

[221] The judge suggested that, if the jury were satisfied beyond reasonable doubt that the timing of the death was at about lunch time, they might next consider whether the prosecution had excluded suicide beyond reasonable doubt. Was the deceased likely to commit suicide? Did anyone in 10 Block have animosity towards him so as to make it likely he would be killed? Does the physical evidence fit with suicide? And the final issue was the evidence of eyewitnesses that an assault was perpetrated on the deceased in the shower block, he was not seen alive after that time and, coincidentally, he is found dead in the shower block later that day.

[222] The defence contended, his Honour noted, that the deceased felt abandoned and alone and was a troubled young man, isolated from his immediate family without real support and in prison for the first time. He had not been visited by his mother, and was ashamed and embarrassed about his conduct. He was in trouble with the prison authorities. There were difficulties with his relationship with his fiancée before his imprisonment. He had recently received a letter from the child support

agency pointing out his responsibilities to his child, and from his solicitor advising him of the date of sentence. There was a possibility that he may have received a letter from his partner ending their relationship. He was in a cell with Cant, who was known to have subsequently perpetrated sexual assaults on another prisoner. The deceased had indicated that a circumstance in which he could harm himself was if he was sexually assaulted. The defence suggested that any one or more of these things could have caused him to suicide. The defence did not have to prove any of these things. It was for the prosecution to exclude them. The question was whether the suicide hypothesis remained reasonable and rationally open; mere speculation was irrelevant.

[223] The prosecution argued that many people face the problems that the deceased faced but do not suicide. Many witnesses spoke of his happy nature and demeanour whilst in prison. As to the defence contention that Cant claimed he had a play wrestle with the deceased and Dr Sinton's evidence of the deceased having injuries two to three days old, there was no evidence that the deceased complained to the authorities about an assault by Cant and no evidence of any sexualised behaviour by Cant until over a year later. The judge read out the allegations subsequently made against Cant. There was no medical evidence to support any sexual assault on the deceased.

[224] The judge reviewed the evidence about the deceased's state of mind. As to the suggestion that the deceased received a "Dear John" letter, the prosecution submitted it was an untraceable rumour. It depended on a note in a police officer's notebook two hours after the conversation. The judge warned of the dangers of hearsay evidence which was inherently untestable. The police officer's record was a double hearsay statement. The deceased's fiancée was insistent there was no "Dear John" letter. Her last visit to him with their child was happy and they kept in regular contact. On the very day he died, she spoke to him twice on the phone and put money in his account. The judge suggested the jury consider this evidence and "how it impacts on this aspect of the suicide theory".

[225] His Honour next referred to the evidence from the deceased's grandfather, noting:

> "If you accept their evidence and that of the fellow prisoners who knew him, the deceased seems to have been embracing the future responsibilities of parenthood. It is a matter for you as to whether a letter from a Child Support Agency advising him of those responsibilities, would, in these circumstances, be a sufficient concern to trigger suicide."

[226] The judge then summarised the competing prosecution and defence contentions as to whether suicide was a reasonable possibility.

[227] Dealing with the evidence of the 8 Block prisoner witnesses as to the relationship between Williams and the deceased, the judge noted:

> "… If the choice is between a killing and a suicide, then it is relevant to ask whether anyone in the block had any animosity towards the deceased. If such animosity existed, then the prospects of a killing becomes more likely."

[228] The judge referred to the evidence of correctional officer Weeks. The defence contended that the deceased may have simply been trying to manipulate the guards into letting him stay with his mates in 8 Block, adding:

"… Well, there are some points you will need to think about in assessing that argument. First, if your wish is to get your own way in a prison, it doesn't make any sense to buck authority. To not only disobey a direct order, but what is more, as some evidence suggests, to struggle against the officers when they come to move you. It would be hard to think of a method less likely to get what you want.

Secondly, you have the evidence of acts of physical violence by Williams towards to the deceased, either seen or reported. Now, you will recall I said, this has nothing to do with any propensity for violence in Williams, but merely goes to their relationship and whether it is one of animosity or not.

You are taken by defence counsel to the evidence of Mr Mason, to the effect that he thought that all was well between the deceased and Williams. The cogency of his opinion, of course, depends entirely on how familiar he is with the deceased. The difficulty with Mason's evidence is the consistent body of evidence from the detention unit prisoners.

We know that there is evidence from Findlay, Devon and Donovan of the deceased expressing his fears about Williams, when in the detention unit and after Mason's contact with him. Does that suggest that Mr Mason may not have understood the full picture? According to Mr Mason these fears did not exist. Well, you might ask why they are being talked about in the detention unit.

[The deceased's] mate, Donovan, told you that Williams intimidated the deceased. That the deceased told him that he was scared of Williams, was glad when Williams left 8 block and was scared to go to 10 block when the move was announced, because William's was there. In cross-examination, Mr Donovan agreed that he'd given conflicting accounts about some of these matters in the past, but again, you have this body of evidence about the deceased's express concerns about Williams, so you have to weigh up the inconsistencies.

Later, in the detention unit, Donovan said that [the deceased] became friendly with Knight, and Knight told the deceased that he, Knight, had sorted stuff out with [Williams] for him. You might ask, if there is no conflict, what is there to sort out? Is there some inherent consistency in this account? As well, there was evidence of conversations between the deceased and Knight about the burglary that the deceased had done, and about the hidden proceeds.

You'll need to determine whether you find these accounts credible, and whether they put into context the statement made to Weeks. There was no evidence that the deceased was on bad terms with any other prisoner, and indeed, the evidence was that he got on well with everyone else. Indeed, there was no evidence that he even knew any other prisoner in 10 block, other than Williams, at the time of his protest.

> You know that for his protest of his move, he ended up in the detention unit for seven days, a not very pleasant place to be. Does that suggest how strongly he felt about the move to 10 block?
>
> Finally, you know that the deceased was in 10 block for only a day and a-half to two days. He didn't have much time to make enemies there.
>
> If you are satisfied that there was animosity towards the deceased by Williams, then that tells in favour of a killing, but it's hardly decisive, of course, it is simply a factor.
>
> There are many people in the word that we may not like, but we don't necessarily kill them.
>
> Allied with this evidence is the evidence of motive that I've already discussed. If there was a deal about the outstanding proceeds and anger at the reneging on the deal, that, too, is something in the scales in favour of a killing.
>
> The defence points out that it was only over an ounce of gold, that it was worth only about $300, and that the acts of violence that were actually witnessed were few in number and not severe. The prosecution points out that it was about power within the prison and that any acts of violence were likely to be performed more often out of sight. Again, the existence of a motive does not prove guilt, and the absence of one does not mean the prosecution fails." (error as in the original)

[229] The judge then turned to the third category of evidence, the physical evidence about the suicide theory: the towel around the deceased's throat without blood on it; the 24.5 cm blood smears above the floor on the cubicle door hinge and on the neighbouring cubicle; and the blood smears below the mirror. The prosecution submitted that the accumulation of improbabilities overcame the suicide theory.

[230] The judge commented that it was not possible for a man with blood on his hands to tie a towel tightly around his neck and onto the bar without getting blood on the towel, stressing "no one fact is conclusive of any theory".

[231] The judge commented that the deceased had grease marks on his hands but there were no grease-like marks on the towel.

[232] The defence submitted that there was none of the appellants' DNA on the towel, but nor was the deceased's DNA on the towel, apart from under the abrasion mark.

[233] Scientific officer Hall's evidence meant that some part of the deceased with blood on it – either his face, his hands or his pullover – must have come into contact with the door jamb 24.5 cm above the floor of the cubicle, with the blood going into, not out of, the cubicle. This was consistent with the deceased being either dragged, or crawling, into the cubicle. If he was crawling into the cubicle, the judge queried whether he could have been strong enough to tie the towel tightly around his own neck and hang himself, all without getting his blood on the towel. The judge made the following comment:

> "The defence argue that Senior Sergeant Hall's tests do not support the inference of directionality. [Williams' counsel] pointed out that one of the seven tests proved the falsehood.
>
> It is a matter for you as to whether you accept the officer's explanation that one of the tests was marred by he being off-balance as he applied the cloth. You'll recall that Mr Hall was a senior sergeant of police with the Forensic Services Branch and a scientific officer with appropriate qualifications.
>
> If the officer wished to lie to you about his tests, you might wonder why he didn't simply do them again and get rid of the inconvenient test. Quite apart from that, as a matter of commonsense, does it appear probable that there would be a concentration of blood at the point of entry and trailing away - I'm sorry, rather than point of entry, point of first contact and trailing away in the direction of movement? That was the premise that the officer adopted.
>
> We know that on six of the seven occasions when the officer did his tests, that is what happened, but whether you accept Senior Sergeant Hall or not, the theory, to be reasonable, must fit the known facts. For some reason, the deceased's blood is at a low height above the floor. If he is crawling at that time, what does that tell us about his physical condition and the possibilities? He has to tie this towel tight - tight enough to leave abraded marks on the back of his neck on the opposite side to the suspension marks on the front of his neck."

[234] The judge then reminded the jury about the smears of the deceased's blood below the mirror in the common area of the shower block. He queried why the deceased would wipe the blood off his face if he was intent on suicide, and how he could have the strength to suicide if he in fact crawled into the shower cubicle.

[235] The judge pointed out that the finding of the deceased's blood in various locations in the shower block was consistent with and capable of corroborating that he was assaulted in the shower block. The defence theory of an assault followed by a suicide was inconsistent with the mild to moderate force involved in causing the injuries to the deceased. Those injuries did not explain how there were blood smears 10 inches off the floor in two locations near where the deceased was hanging. His Honour added:

> "As I've said, depending on what evidence you accept, Campbell's evidence is capable of corroborating an assault at about the time of death. On the suicide theory, if it was not the deceased being assaulted, then we have someone else being assaulted in the same shower block, and if you accept Hodda and the pathologist, at the time of, or within an hour or two at most, at the time that the deceased is committing suicide."

[236] The judge next discussed the competing defence and prosecution hypotheses as to whether the death was an assault followed by a suicide or an intentional killing. If suicide, then there were only two possibilities: either the deceased had already decided to commit suicide and went to the shower block with a rope towel prepared,

or, after the assault, he left the shower block and got the rope towel to hang himself. But no-one saw him leave the shower block. (The judge did not refer to a third possibility, namely, that the deceased impulsively decided to hang himself whilst in the shower cubicle after seeing a towel rope there (such towel ropes were common in the prison), with the assault being the last of many immediate unhappinesses in his life and acting as a final overwhelming catalyst triggering the suicide.)

[237] The judge then referred to aspects of the evidence of Bailey and Nelson which were inconsistent with suicide.

[238] The defence emphasised, the judge pointed out, the inconsistent evidence that the deceased was wearing a white shirt when he went into the shower block but was in prison browns when his body was found. The judge reasoned that this was of no consequence, particularly as the evidence as to what the deceased was wearing at the time he went into the shower may not have been reliable.

[239] As to the evidence of the disputed 10 Block witnesses (other than Campbell) who claimed to have seen or heard an assault, the judge said:

> "All this is for you to decide, but does the evidence you have, quite apart from them, get you to the point of accepting that an assault occurred at about lunchtime, based on Campbell's account?
>
> And an assault on the deceased at about lunchtime because of the inherent probability of there being both an assault in the same bathroom on the same day at about the same time on someone else, but leaving no traces or marks on anyone in the block.
>
> *And [the deceased's] death at about lunchtime because of the evidence of Hodda and the pathologist. If that is so, firstly, does that provide corroboration of these contested 10 block witnesses when they say it was [the deceased] who was attacked in the shower block that day?*
>
> Secondly, you might ask, is that a useful background to weigh up to the suicide hypothesis? The defence contention is that the known facts are more than speculation about [the deceased] being suicidal, but provide a real basis for concern. If you accept that then you have a potentially suicidal person, and if you accept that he was assaulted, then the defence point is that an assault in those circumstances increases the pressure, if you like, on the vulnerable individual.
>
> If you reject Tilberoo's account as unreliable, but accept that Nelson sees a dead body at about the time he says he does, then [the deceased] is dead within about half an hour or so of the assault, consistent with that increased pressure. There is time enough for him to have suicided after the assault.
>
> If you accept Tilberoo's uncorroborated account about the presence of the rope, there is not enough time, one would think, for [the deceased] to have suicided.
>
> The prosecution say that there is no evidence to support any suicidal intent. If you come to that view, and it's entirely for you, that the

> evidence regarding the mental side is, as the prosecution contends, and that might lead you to think that the prospect of the competing theory becomes more unlikely, acquiring as it does, not only the coincidence of both an assault and a suicide so close in time in a person of apparently normal fortitude, but also an assault unlikely to significantly affect such a person as it apparently did not involve any forceful or sustained beating.
>
> In considering whether the hypothesis of a suicide remain rationally and reasonably open then, the question you must address is whether the pathologist evidence and the eye witness evidence from the 10 block witnesses excludes beyond reasonable doubt this competing theory of an assault followed by a suicide." *(my emphasis)*

[240] The judge next discussed the pathologists' evidence. The prosecution case was that death occurred by either manual strangulation followed by suspension hanging, or death by a suspension hanging inflicted by third parties. Professor Ansford had the advantage of greater experience than Dr Sinton, but Dr Sinton had the advantage of actually examining the body. Dr Sinton's evidence had:

> "the complication that he's written something down about this in the past. That of course can be a tremendous advantage as it a contemporaneous record. But it can be a disadvantage too, as we human beings don't like to depart from a view we have written down previously. It's entirely a matter for you as to whether you consider that he relied to a very large extent on what he'd written down in the past that his three to four years experience and whether in giving his evidence he was exercising any new judgment.
>
> I'll remind you too that Dr Sinton conceded that he, on reflection, would alter his report by removing a paragraph that appears in it where he said that there was no evidence of any third party involvement in the death. The fact that he did write such a thing might indicate his level of inexperience at the time.
>
> His position was that in terms, what he wrote was strictly accurate, but it tends to suggest to the lay mind that he favoured the suicide theory. You will recall that his position was that his findings were neutral, they were consistent with either theory.
>
> The significant difference between Professor Ansford and Dr Sinton is that Professor Ansford was prepared to say that in his opinion there were features from the pathological study and from other evidence which made him suspicious that this was not a straightforward suicidal hanging.
>
> I stress, none of these features were conclusive. His opinion was that the most likely cause of the compression on the neck was a form of ligature strangulation rather than hanging by suspension. Dr Sinton disagreed." (errors as in the original)

[241] The judge next dealt with detailed aspects of Professor Ansford's evidence, finally stating that none of these matters were conclusive and merely raised a suspicion about whether the death was a suicide. The jury would need to look to other

evidence to determine whether the prosecution had discharged its onus beyond reasonable doubt.

[242] The judge next turned to the evidence of the 10 Block prisoner witnesses. If the jury found the assault on the deceased occurred at about lunch time and that the deceased died at about lunch time, this provided corroboration for the evidence of these witnesses. His Honour summarised the evidence of Barlow. In weighing up his evidence, the jury should bear in mind that Barlow had convictions for offences of dishonesty; given differing accounts to police; was an alcoholic; his drinking had affected his memory; he had been stabbed in the head as a child and this, too, affected his memory; he tried to put a lot of this out of his mind; he accepted he did not have a good memory; and he accepted that he deliberately lied to police at times. The judge continued:

> "In weighing up his evidence, there are many aspects that you'll need to keep in mind. At times, I wondered whether Barlow accurately understood what he was being asked. As well, he's an indigenous man, he says, with certain cultural beliefs and customs, and he says they were relevant to him.
>
> It's plain to us all that his method of dealing with cross-examination was on many, many occasions simply to say, 'Yes, sir.' It's a matter for you, but you might think that it was evidence that he said, 'Yes, sir,' on many occasions with things that he plainly disagreed with.
>
> Further, it's a matter for you to weigh up what utility there is in any answer he gave, when he was being shouted, or when he was being asked questions that depended on he having a reliable memory of conversations that took place with police officers, or statements that he gave to police officers years in the past. Complicating the assessment of his evidence is that in the past he was antagonistic towards authority. He clearly, did not trust either the police or the Court system. As well, when he gave these various statements he was in and out of prison throughout that period of 10 years. And plainly any prisoner, speaking up against another prisoner might well be worried about the repercussions of doing so.
>
> A further complicating aspect of the assessment is what intellectual resources Barlow could bring to handle cross-examination. For example, when asked about why he lied in the past, did he have the capacity to put himself in his own shoes at the time that he gave these statements, years ago? Or in his own shoes when he gave evidence at the committal to work out why it is that he gave the evidence that he did give? For example, when questioned on the day following the incident he told the police officer that he went into that left-hand shower block in the afternoon and had his shower as usual and didn’t see anything that was unusual. He said that he did that to protect himself.
>
> He was attacked vigorously in cross-examination for claims at this time. Perhaps you can endeavour to place yourself in Barlow's shoes, on the day following [the deceased's] death? On his account, there

> was the very real prospect that [the deceased] was killed by someone in his cell block. From his perspective, it doesn't buy him protection if he tells the police a lie, that all was well, in that shower block, on that afternoon, thereby covering for the possible killer. If it became known within the cell block that he had told the police what he now tells you, was it possible that he held the belief then, that he might be exposing himself to possible harm?
>
> And conversely, that if he lied to protect the killer, he might be safe. Or if he tells a police officer what he knew, did he have the all too real fear that he might be charged by these officers with the murder of [the deceased]? These officers, of course, are people that he didn't trust. Did he have the capacity to withstand all these pressures when he came to give evidence at the committal, or explain his thinking to you?
>
> Mr Barlow gave a lot of reasons why he'd given different accounts over the years. In weighing up what he said, here you might bear in mind all these things. That's for you to decide whether he was deliberately lying on previous occasions, which is a proposition that he agreed with when put to him by defence counsel, many, many times. Or whether he was simply mistaken about details, or whether he was overawed by the occasion when giving evidence, or scared by the police, or by the Court system. All of these things you'll need to weigh up.
>
> As with any witness your task is to assess their honesty and reliability. Now, whilst considerations of these various issues that I have mentioned to you might enable you to understand Barlow's attitudes, and assess as best you can, whether he's being honest, there remains the question of whether he is reliable. He made some very significant concessions in cross-examination which should not be overlooked.
>
> One is that he conceded that he could not be sure whether Robertson and Knight were with Williams when Williams first approached the group and talked about doing the white fellow over. He conceded too that he might have been wrong in saying that Robertson and Knight were with Williams, when Williams came to his cell after the event, and told him not to tell the police anything. Because of the many discrepancies between the versions that he has given, it would be unsafe to convict the [appellants] on the basis of Barlow's evidence alone. You will need to look for corroboration from other sources of his evidence before you rely on it."

[243] The judge pointed out that Barlow's evidence was given some support by the evidence of Booth, Campbell and Lionel Malcolm. If Barlow was going to make up an account, his Honour queried why he would not have made up a more direct story in which he claimed to have seen the actual killing. Did the sparseness of the detail of his account make it more credible? The judge noted a defence counsel submission that criticised the police investigation as possibly involving the manipulation by those in authority of Indigenous witnesses. Whilst observing that counsel was right to make that point, the judge added: "It applies, of course, to skilled Barristers, as well, when they ask their questions."

[244] During his detailed summary of Booth's evidence, the judge referred to inconsistencies between his evidence and other witnesses, and the possibility that Booth and Barlow had discussed these events over the years. Booth's evidence was inconsistent with Professor Ansford's evidence which was that the deceased had not been choked with a cable. Booth had given dramatically different accounts, sometimes after drinking alcohol. He had a motive to give a false account to police because he was facing charges. The judge warned the jury not to act on Booth's evidence without carefully scrutinising it and only if convinced of its truth and accuracy; it would be unsafe to act on his evidence alone.

[245] After summarising Lionel Malcolm's evidence, the judge commented in general terms:

> "The real difficulty, especially with indigenous witnesses, is their readiness to agree to leading propositions put to them. That might, of course, infect the statement as much as the oral evidence, now matter how careful the taker of the statement might try to be."

[246] The judge referred to defence counsel's submissions about Lionel Malcolm's inconsistent evidence five years earlier in a statement to police:

> "It's a matter for you to weigh up, whether Mr Malcolm's account, given to you in evidence-in-chief, is more reliable than his adoption of things put to him in the course of cross-examination. You might think there was a deal of force in [counsel for Knight's] point, that if he had been told that there was a body hanging in the shower block when he'd just had a shower, he would be very unlikely to go back and have a second shower in that same block, as he said he did in his evidence-in-chief.
>
> Finally, on Mr Malcolm, you'll recall that he accepted the proposition that Mr Robertson worked out every day in the right-hand side shower block, that he had his music going, and that he was training, at some stage, when Mr Malcolm saw him. You might recall that Mr Malcolm had some hesitation at times in agreeing with propositions put to him, but his answer to this point was that - to whether Mr Robertson was training, was, 'I think so.' He agreed with the proposition that he asked Robertson to turn his music down, and he agreed with the proposition that shortly after he did that, he heard the noise from the other side shower block.
>
> You'll recall that on a number of occasions he responded that when he heard the noises from the shower block, the stereo was no on, nevertheless, at other times, he agreed with the proposition that the stereo was on. The inference, of course, that [counsel for Robertson] asked you to draw was that the stereo coincided with Mr Robertson training." (errors as in the original)

[247] The judge noted:

> "Again, you have the difficulty of dealing with an indigenous witness in determining to what extent his apparent acceptance of propositions put to him reflect what he truly means to say."

[248] His Honour summarised Bailey's evidence and warned the jury about the weakness in its identification aspects. Bailey had a criminal history, including for offences of dishonesty, although none since May 2001. He may have fabricated his evidence to receive a more lenient sentence on outstanding matters when he spoke to police in 2004:

> "… Detective Byram raised his outstanding criminal matter with him and all, and you will recall that there was no suggestion at all, made to Detective Byram, that he had suggested to any of the witnesses that they would get favourable treatment if they answered his questions, or answered them in a certain way."

[249] The judge then directed the jury that it was dangerous to act on Bailey's evidence without attendant supporting evidence; it must be scrutinised with great care.

[250] The judge next summarised the evidence of Roberts, again warning the jury of the dangers of its identification aspects. Roberts had given inconsistent accounts to police because, he said, he feared for his life. He had also given a false account to his friend, Familic.

[251] After summarising the evidence of Shipp, the judge warned the jury to exercise caution before acting on it because of Shipp's convictions for offences of dishonesty; his alcoholism; the effect of alcoholism on his memory; his eyesight and hearing problems; his inconsistent versions and his motive for giving false evidence. It was obviously unsafe to convict the appellants solely on Shipp's evidence and the jury could act on it only if, after considering it in light of those warnings, they were satisfied of its truth and accuracy.

[252] The judge added:

> "That concludes my analysis of the 10 block prisoners. They gave you the issues of whether there was an assault on the deceased, and if so, who assaulted him? It's a matter for you, but you might think that there is a consistent body of evidence that it was the deceased who was the victim of the assault the Campbell reported hearing. As to who did the assault that several witnesses report seeing or hearing, then you must assess these 10 block witnesses.
>
> In assessing your evidence, you, of course, look at the case as a whole. You bring into account the relationship evidence, that is, the animosity that the prosecution says existed between Williams and the deceased, if you consider that to be worthy of weight. You consider the evidence about motive. You consider the significance of the fact that they identify, to the extent they do, the [appellants], and no ones else.
>
> You should bear in mind the warnings that I have given you about identification evidence. While assessment of these witnesses is entirely your decision, could I suggest that you start with Mr Bailey's account. Mr Bailey is only a few metres from the shower block door. He is in as good or a better position to see than anyone. He was, you might think, reasonably articulate and not easily manipulated.

> You must bear in mind the possibility of him deliberately lying to please the authorities, but he has to know who the police are after, and there is no allegation made against Detective Byram, who took his statement, that any hints were dropped.
>
> If you think he was honest, then the question is his reliability and accuracy. His is a sidelong glance. He said that he could be wrong. Does the other evidence in the case, the relationship evidence, the motive evidence, and the concurrence of the evidence of the 10 block witnesses, remove that doubt that he, himself, has expressed?
>
> Of those other witnesses, some valid submissions were made about the possible way, or in fact the way, in which evidence was obtained or possibly obtained from these indigenous witnesses. Roberts does not fall into that category, and he identified Williams and Knight. Again, you might think that Roberts is not a person so easily manipulated. Is he, however, honest and reliable on this? The issue for you is, taking all of the evidence together, are you satisfied beyond reasonable doubt that the identification of [the appellants] is accurate? If you are not, then you should acquit.
>
> To recap on the suicide point, the prosecution must exclude the hypothesis of suicide, the defence have no onus. If it remains a rational, reasonable hypothesis in your mind, then you must acquit. The relevant matters are first, the mental element, was he likely to commit suicide; second, the relationship evidence, did anyone in 10 block have any animosity towards the deceased so as to make the prospect of a killing more likely; thirdly, the physical evidence, does it fit with a suicide; and fourthly, the evidence of eyewitnesses that there was an assault being perpetrated on the deceased in that same shower block where he's found dead and he's not seen after that time. You have to make up your mind whether you accept those eyewitnesses. If you do, there is the coincidence of both an assault and a suicide to consider." (errors as in the original)

[253] The judge then turned to the question of intent. After reading s 7 *Criminal Code* to the jury, the judge explained that it extended criminal responsibility to any person who was a party to an offence, adding:

> "Here, the Crown cannot prove who did what in the shower block. The prosecution case is that this is a joint illegal enterprise. No matter who did the physical acts involved, the prosecution case is that the others were present, had knowledge of the intent to kill or cause the deceased grievous bodily harm, and intentionally assisted the others to commit the crime.
>
> Now, you may find each of the [appellants] guilty of murder only if you're satisfied beyond reasonable doubt of three things. The first is that one or more of the [appellants] committed the offence, that is, that one or more of them unlawfully killed the deceased and had an intent to kill him or causing grievous bodily harm at the time he was killed. The second is that the [appellant] in question, whose case

you're considering, in some way assisted the others to commit the offence. The third is that when he assisted the other or others to do so, the [appellant] in question knew that those others intended to kill the deceased or cause him grievous bodily harm.

The prosecution case is that their identification witnesses put all three in the shower block at the time of the attack on the deceased, that is, taken as a whole, they do, that he was killed in the course of that attack and that all three were involved in some way. There are three accounts of observations of what went on in the shower block. You have Booth, who has two of the three holding the deceased and Robertson pulling back on the cord; Roberts, who has Williams applying a chokehold of some sort to the neck of the deceased, with Knight crouched in front; and Shipp, who has the assault that I described to you a few moments ago.

However, the [appellant] whose case you are considering can be found guilty of murder only if you are satisfied beyond reasonable doubt that when he was present in the shower block, if that is what you find, he knew the others were going to attack and kill or cause grievous bodily harm to the deceased. The prosecution case is that you should draw an inference from all of the facts that there was some arrangement between the three [appellants] to kill the deceased, and that they entered the shower block with that joint enterprise in mind. If you are not satisfied that the [appellant] in question whose case you are considering knew that the other or others meant to kill or cause grievous bodily harm to the deceased, or if you have a reasonable doubt about it, then you must find that [appellant] not guilty of murder.

The facts from which the prosecution ask you to draw the necessary inference are very much an issue. They include:

1. Williams' animosity towards the deceased.

2. Williams' friendship with the other two [appellants].

3. The claims that words were said by Williams, or on another account, by Williams, Knight and Robertson, prior to the attack on the deceased to the effect that Williams said the three of them were going to knock him.

4. Their entry into the shower block, apparently in concert, according to some accounts.

5. The sound of the assault commencing immediately after entering the shower block, that is, there's no initial argument or debate.

6. If it was a killing, then necessarily a prepared towel was taken into the shower block.

7. Their presence throughout the attack.

> 8. The tying of the towel tightly around the deceased's neck and suspending him, one or both of which caused such compression of his neck so that he could not breath and until he was dead. Of course, that fact must be measured against the suicide hypothesis.
>
> 9. Any cleaning up of the shower block after the event by Knight.
>
> 10. The warning by Robertson, if that is who you find it to shout out the warning to Bailey to stay away from the shower block.
>
> If you're satisfied beyond reasonable doubt by these various facts or by such of them as you find established, that the three [appellants] acted in concert pursuant to some prearranged plan, then the considerations seem, with respect, to be straightforward. Whoever applied the ligature to the neck of the deceased, assuming that this was a killing, did so very tightly and then suspended him. This was done in such a manner that he could not breath and one or both actions caused him to die." (errors as in the original)

[254] After summarising the evidence relating to each appellant, the judge dealt with the competing prosecution and defence submissions. As to Robertson's case and the evidence of Edward Malcolm, the judge said:

> "Again, if you have - again, you have the difficulty of dealing with an indigenous witness and determining to what extent his apparent acceptance of propositions put to him in a leading fashion in cross-examination is reliable. Nonetheless, that is plainly what the Malcolm brothers have said."

[255] Finally, the judge reminded the jury that the prosecution must establish the elements of the offence of murder and exclude beyond reasonable doubt the alternative hypothesis of suicide. He invited the jury to request his assistance if needed on either the evidence or legal matters. The jury retired to consider their verdict at 2.45 pm on day 32 of the trial.

The judge's redirections to the jury

[256] Counsel for Knight, in a lengthy and particularised submission, immediately applied for the discharge of the jury because the judge's summing-up lacked balance and amounted to, in effect, "a skilful prosecutorial address … with the weight of [the judge's] position." Counsel for Williams and Robertson adopted those submissions, joined in the application to discharge the jury and made additional particularised submissions in support of it.

[257] The prosecutor submitted, with an apparent absence of enthusiasm, that, whilst the summing-up contained a number of sometimes pointed comments on the evidence, they were in the end nothing more than observations and were reasonable, particularly after a seven week trial. The judge had made it sufficiently clear to the jury that they were observations only. It was not necessary to discharge the jury.

[258] The judge refused the application to discharge the jury or to redirect them in respect of his comments about prison officer Bauer; as to the self-evident fact that not every witness from 10 Block was called to give evidence; and as to his comments on Dr Sinton's evidence. The judge noted:

> "I was asked to redirect in relation to my comments on the available options to the Crown. It was said that there had been a change in the Crown case and that I should redirect to point that out or, at least, to retract, perhaps, what I've said. It's a peculiarity to me, sitting here and not being as aware of the materials as counsel, I'm sure, were, it was perfectly obvious to me that the Crown case covered all three possibilities. The questions that I directed the jury's attention to that I put to Dr Sinton, and his answers, left all those options open.
>
> It seems to me that given that my analysis to the jury, effectively, is that a pathologist's evidence is neutral, this is simply argumentative submissions, matters that counsel can raise if they like but I have no intention of reinforcing them. I'm quite confident counsel were well aware of the possibilities, the three possibilities, being open from the outset. Counsel on the defence side were well aware that the Crown evidence was very limited as to what happened inside the shower block. And if the implications were clear to me of that, I'm sure it was clear to experienced defence counsel. I see no reason, or point, to any such redirection." (errors as in the original)

[259] The judge, however, did give some redirections at 5.25 pm. They included the following. In using the term "unchallenged evidence" the judge was not suggesting that the onus of proving that evidence was on the defence: it was still a question for the jury whether they accepted that evidence. The judge then referred to his earlier comment about "a body of evidence that Mr Bauer was lax in his practices" and the judge's commendation to the jury to think closely about Campbell's evidence concerning Bauer. Campbell said there was a muster at about lunch time which took a couple of minutes and it was "pretty relaxed"; "as long as the officers could count, you know, the right number of people … you didn't have to actually be … standing out the front of your own cell". The judge continued:

> "Now, on Mr Campbell, the reason, or one of the reasons I asked you to look at his evidence closely, was about this timing of him finding the body, as it set a sort of a limit. Now counsel have pointed out to me that the way in which I've put it to you seems to assert as a fact that Campbell saw the body before the evening muster at 5.05. There is no evidence of when Campbell saw the body, in relation to the evening muster, at least, directly.
>
> So, it would overstate the case to say that he saw the body before the evening muster, if you're thinking in terms that he said that. What he did say was that about half an hour after he returned from sport, he had his shower. The evidence was, as you might recall, that the men came back from their sport at 4.20, according to the logbook, I'm talking about, and that the muster was at 5.05. So if he had his shower about half an hour after he came back from sports, that's at about 10 to 5. So, that would be consistent with the view that he did have his shower before muster but, in terms, he didn't say that."

[260] The judge gave some further uncontroversial directions about "the white shirt theory" and about Bailey's evidence.

[261] His Honour told the jury that the absence of a grease-like substance on the towel was consistent with either the prosecution or the defence case and did not take matters very far.

[262] The judge added that Tilberoo's description of the deceased as having curly hair was clearly wrong as was demonstrated by the photographs of the deceased. Booth's evidence which he gave to the police in a video-taped walk around at the prison was in direct conflict with his account in court. In his evidence at trial, Booth said that he told police at the prison that he did not see Robertson at all with a cord. Lionel Malcolm conceded in cross-examination that the conversation he had about the body occurred at the end of the day, not before the second sports session. The effect of Roberts' evidence was that he lied on oath in relation to his account of what Shipp had told him about the attack on the deceased. Tilberoo gave evidence in cross-examination which was directly contrary to his evidence in chief as to when he saw the rope in the shower block. The fact that counsel for Williams said that he was not calling Campbell a liar did not mean he was accepting his evidence; Campbell's reliability was still attacked by the defence.

[263] Defence counsel's submission, the judge explained, was that the photograph of the deceased's body after it was cut down, ex 67, might suggest that the deceased's limbs had some movement in them because they were not as described by Hodda. The time of the photograph was unknown but the "Scenes of Crime people" arrived at about 7.40 pm, more than two hours after the deceased's body was cut down.

[264] The judge then gave the following further directions as to s 7:

> "I told you about the section of our Code; I read it out to you about the parties to an offence. I told you the three things that had to be proved. You'll have to add to that list one further thing. The Crown case is such that the Crown can't prove what went on inside the shower block. To convict the accused you have to be satisfied beyond reasonable doubt that if they were present within the block, that presence was deliberate and designed for the purpose of aiding the others.
>
> So it's not enough just that they're there, for example, Mr Robertson, on Mr Barlow's account, was there somewhere between five and 20 minutes before. But you have to be satisfied, beyond reasonable doubt, that the presence there, at the time these acts are done, if that's what you find, to the [appellants], if you so find that it caused his death, was deliberate and designed for the purpose of aiding whoever was doing the acts." (errors as in original)

[265] The jury retired again to consider their verdicts at 5.43 pm. They returned with their verdicts of guilty of murder in respect of each appellant at 4.06 pm the following day.

Was the summing-up unfair?

[266] The appellant's first contention is that the judge's summing-up to the jury was unbalanced and unfair.

[267] A judge in directing a jury in a criminal trial, is entitled to comment on the facts and evidence, particularly where to do so will assist the jury in understanding how the evidence relates to the relevant law. But a judge must not overawe the jury with the judge's view of the facts. A direction to the jury that the decision on the facts is for them alone may not be sufficient to provide a fair trial where the judge's language is

so forceful that the jury may be left with the impression that it would be disrespectful or imprudent for them to disagree with the judge's views: see Brennan J's observations in *B v The Queen*,[15] approving observations of the Full Court of the Supreme Court of South Australia in *R v Hulse*[16] and the Privy Council's earlier statement in *Broadhurst v The Queen*.[17] Brennan J also noted in *B v The Queen*,[18] relying upon *Green v R*,[19] and *Stokes v R*,[20] that a summing-up "must exhibit a judicial balance" so that the jury is not deprived "of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence". This Court has long adopted that approach: see *R v Durham*;[21] *R v Fullgrabe*.[22]

[268] Before discussing the appellants' general contention critical of the fairness and balance of the judge's summing-up, it is sensible to first discuss their specific complaints concerning the summing-up.

(a) The judge's directions concerning prison officer Hodda's evidence

[269] The appellants' second contention is that the judge's comments in respect of prison officer Hodda's evidence, set out at [215] of these reasons, were inaccurate and have resulted in a miscarriage of justice.

[270] The judge's conclusion as to the effect of Hodda's evidence appears to have informed his Honour's italicised observations at [220] of these reasons when discussing the relevance of the evidence of 10 Block prisoner Tilberoo. Later, the judge indirectly used his views of Hodda's evidence and what the judge perceived to be its relevance to establishing the time of death as being between 11.30 am and 1.30 pm, as evidence able to corroborate the critical evidence of the 10 Block prisoner witnesses.[23] The judge's redirections on this aspect of Hodda's evidence are set out at [263] of these reasons. Hodda's evidence is summarised at (b)(i) and [10] of these reasons.

[271] In my opinion, the judge's comments to the jury in respect of Hodda's evidence were inaccurate and gave the evidence undue emphasis and weight. There was no evidence that Hodda was trained or was in any way expert in dealing with dead bodies. There was no expert evidence as to how soon after death a body became cold or, in Hodda's words, "very cold" in Rockhampton in winter at about 5.30 pm. The pathologists were not asked to comment on the relevance of Hodda's description of the body temperature and the way the limbs felt to the question of whether rigor mortis was then present, and to then relate that to the time of death. Hodda's evidence certainly did not establish that rigor mortis had set in by the time he assisted in cutting down the body. It was wrong to invite the jury to determine the time of death from it.

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15 (1992) 175 CLR 599, 605-606.
16 (1971) 1 SASR 327, 335.
17 [1964] AC 441, 464.
18 (1992) 175 CLR 599, 605-606.
19 (1971) 126 CLR 28, 34.
20 (1960) 105 CLR 279, 284.
21 [2000] QCA 88, Pincus JA [21]-[23]; McPherson JA agreeing [27]; Byrne J agreeing [33]; see also [34]-[36].
22 [2002] QCA 366, Mackenzie J [22]-[28]; Davies and Jerrard JJA agreeing.
23 See [239] of these reasons.

[272] The judge's comments to the jury on Hodda's evidence invited speculation, and misstated its effect in a way which wrongly strengthened the prosecution case by filling in gaps, quite unfairly to the appellants. This was the last comment the judge gave the jury before they returned home for the weekend. The judge reminded them of it immediately on their return to the court room the following Monday.[24] His Honour wrongly used Hodda's evidence to establish that the death occurred between 11.30 am and 1.30 pm and then suggested to the jury that this evidence could be used to corroborate the disputed and critical evidence of the 10 Block prisoner witnesses. That unfairness was not corrected in the redirection, which simply restated the defence contention as to photograph ex 67. The judge did not correct his earlier misstatement in the main body of the summing-up that Hodda's evidence could help establish the time of death as between 11.30 am and 1.30 pm. Nor did his Honour correct his direction, based on his misconception as to the effect of Hodda's evidence, that, if the death was between 11.30 am and 1.30 pm this could corroborate the evidence of the 10 Block prisoner witnesses whose evidence was central to the prosecution case and vigorously challenged by the appellants.[25]

[273] In my opinion, the appellants' second contention, that the judge's comments relating to prison officer Hodda's evidence were inaccurate and have resulted in a miscarriage of justice, is made out. That is sufficient to allow the appeal (see s 668E(1) *Criminal Code*) but in case I have overstated the effect of this error, I will also deal with the appellants' remaining contentions on the summing-up.

(b) The judge's directions concerning prison officer Bauer

[274] The appellants' third contention is that the judge erred in his directions to the jury about prison officer Albi Bauer and in the directions as to inferences that may be drawn from evidence that the deceased was seen neither after lunch nor to leave the shower block. The judge's directions in respect of the evidence are set out at [212] of these reasons. The judge refused to redirect the jury on this aspect of his summing-up.

[275] The extract from the 10 Block log book, ex 62, set out at [187] of these reasons, was apparently made by Bauer. It was evidence that the deceased was present, and therefore alive, at the evening muster at 5.05 pm. There was a body of other evidence, including that of many 10 Block prisoner witnesses, from which a strong competing inference could be drawn that the deceased was dead before 5.05 pm. It was also true, as the judge told the jury, that no witnesses saw the deceased either after lunch or after he entered the shower block where he was later found dead. The jury were certainly entitled to conclude that the entry in the log book at 5.05 pm was wrong but it was not inevitable they would reach that conclusion. The log book entry as to the evening muster was of considerable importance in the defence case in that it raised confusion and uncertainty as to the time of death, a critical issue for the jury's consideration. There were many prisoners in 10 Block on the day the deceased died who were not called to give evidence. And Lionel Malcolm's evidence suggested that the deceased was not hanging in the shower cubicle after lunch.

[276] The judge's comments to the jury as to the evidence of Bauer's incompetent record-keeping were inaccurate. Prison officer Weeks did not give evidence that "some

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24 See [216] of these reasons.

25 See [239] of these reasons.

officers did not do their job properly" and she was not questioned about Bauer. Neither prison officers Hodda, Weeks, Sharon Williams, nor Frewen-Lord, nor the general manager of the prison, Kerrith McDermott, were asked to express any opinion as to the quality or efficiency of Bauer's record-keeping or conduct of musters. Contrary to the judge's directions, no prison witness said that Bauer was the "one officer where you could simply sing out a name and he would not check the presence of the prisoner" and not "[e]very single witness called was asked about Mr Bauer and said that he was notorious for his lax[ity]". Even if the transcript of the judge's summing-up is inaccurate and it should read "every single witness called *who* was asked about Mr Bauer, says that he was notorious for his lax[ity]", not every witness who was asked about Bauer made that statement. Perhaps that inference, arguably, could have been drawn from the evidence of prison officer Davis,[26] 10 Block prisoner witnesses Weribone,[27] and Lionel Malcolm;[28] and to a lesser extent from the evidence of 10 Block prisoner witnesses Bailey,[29] Roberts,[30] Shipp[31] and Tilberoo.[32] On the other hand, 10 Block prisoner witnesses Edward Malcolm, Nelson, Barlow, Campbell and Booth did not give evidence concerning Bauer's practices. Further, about 15 of the 30 or so prisoners in 10 Block at the time the deceased died were not called to give evidence at all.

[277] The judge's comments to the jury about Bauer's evidence misstated its effect in a way which wrongly strengthened the prosecution case and unfairly undermined the defence case. The appellants' third contention is made out.

[278] The appellants further contend that not only were the judge's comments about Bauer unfair but the judge should have given the jury a *Jones v Dunkel*[33] type direction to the effect that, as the prosecution did not call Bauer, the jury could infer that his evidence would favour the appellants.

[279] Such a direction may not be given in favour of the prosecution against an accused person: *Dyers v The Queen*.[34] But, in appropriate circumstances, such a direction may be given in favour of an accused person against the prosecution where the interests of justice require it: *R v Riscuta*.[35] Such a direction in favour of the appellants in respect of the prosecution's omission to call Bauer could have been given in this case. Some judges would have done so out of an abundance of caution. But the interests of justice did not require that it be given in this case as a matter of law.

[280] Further, the prosecutor's decision not to call Bauer has not caused a miscarriage of justice: see *The Queen v Apostilides*.[36] One of the appellants could have called Bauer in their case if they wished. But more significantly, the extract from the log book, ex 62, was tendered in the prosecution case with the consent of all counsel. None of the appellants' counsel required the document to be proved through Bauer.

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26 See (f)(v) of these reasons.
27 See (g)(iv) of these reasons.
28 See [127] of these reasons.
29 See (g)(vii) of these reasons.
30 See [159] of these reasons.
31 See (g)(x) of these reasons.
32 See [178] of these reasons.
33 (1959) 101 CLR 298.
34 (2002) 210 CLR 285.
35 [2003] NSWCCA 6, Heydon JA (as his Honour then was), [96].
36 (1984) 154 CLR 563, 575.

It is difficult to see that Bauer's evidence could have been more favourable to the appellants than ex 62. These aspects of the appellants' third contention are not made out.

(c) The judge's directions as to the evidence of Indigenous witnesses

[281] The appellants' sixth contention is that the judge erred in directing the jury as to how to assess the evidence of Indigenous witnesses. The judge's general direction to the jury as to evidence of Indigenous witnesses about which the appellants complain is set out primarily at [196] and also at [245], [247] and [254] of these reasons. The judge identified which of the witnesses to whose evidence he referred in his summing-up were Indigenous. It should also be noted that the three appellants are Indigenous.

[282] Judges must be circumspect about giving directions of this kind; see *Stack v Western Australia*.[37] Depending on its terms and the pertaining circumstances, such a direction may contravene s 632(3) *Criminal Code*.[38]

[283] The evidence of Indigenous witnesses, like the evidence of non-Indigenous witnesses, varies greatly as to honesty, reliability and credibility. Indigenous witnesses, like non-Indigenous witnesses, range from the not well educated, through the inarticulate and the dishonest, to the highly educated, the honest and the reliable, and with every combination and shade of grey in between. In this case all the Indigenous witnesses were prisoners who did not appear to be well educated. But it did not automatically follow that they were all likely to succumb to suggestions put to them by defence counsel, a recognised phenomena known as gratuitous concurrence,[39] common amongst some Indigenous people. A broad general statement like that given by the judge[40] was contrary to the spirit of the terms of s 632(3). More importantly, it tended to suggest that evidence of Indigenous witnesses, especially in cross-examination, may be less reliable than evidence of non-Indigenous witnesses. The judge invited the jury to consider whether his general proposition in respect of Indigenous witnesses applied to the evidence of a particular witness. But even so, the judge's general direction was not helpful to the jury and wrongly encouraged a stereotypical approach to the evidence of Indigenous witnesses, especially in cross-examination. If the judge considered the interests of justice required a warning about a particular Indigenous witness's evidence, for example, because the witness may have been disadvantaged for cultural reasons or may have given answers through gratuitous concurrence, the judge should have given that direction in respect of that individual witness's evidence. Indeed, the judge did exactly that on occasions. For example, the judge gave such a direction as

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37 (2004) 29 WAR 526.

38 **632 Corroboration**

(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*." *(my emphasis)*

39 Eades, Diana, *Aboriginal English and the Law* (1992) Qld Law Society Inc, 56.

40 See [196] of these reasons.

to Barlow's evidence.[41] His Honour then added an additional comment that the defence submission, that Barlow may have been manipulated in giving his statement to police, was an observation which may also have been apposite to Barlow's cross-examination by skilled barristers.[42]

[284] Whilst specific directions where warranted were apposite, the judge's general direction,[43] exacerbated by the later directions,[44] was unhelpful, inappropriate, and should not have been made. My summary of the evidence of the Indigenous witnesses demonstrates that most of them, though not well-educated, were assertive when cross-examined and none seemed to be answering questions by way of gratuitous concurrence. Certainly some were at times confused during cross-examination, but only when the cross-examination was itself confusing. Their confusion did not seem to me to be related to the fact that they were Indigenous. On these occasions, the trial judge rightly intervened and ensured questions were reframed in a more comprehensible way. The evidence of the Indigenous 10 Block witnesses, Nelson, Barlow, Weribone, Lionel Malcolm, Edward Malcolm, Booth and Shipp, was a critical part of the prosecution case. The appellants' counsel also placed considerable weight on parts of the evidence of Indigenous witnesses, especially in cross-examination. For example, the evidence of Lionel Malcolm and Edward Malcolm in cross-examination was particularly helpful in Robertson's defence case. The judge's general directions as to Indigenous witnesses tended to diminish the effect of the cross-examination of the Indigenous witnesses by the appellants' counsel. It was another aspect of the judge's summing-up which caused unfairness to the appellants. The appellants' seventh contention is made out.

(d) Other impugned aspects of the judge's summing-up

[285] The appellants' fourth contention is that the judge's comment, that the absence of any grease-like substance on the towelling from which the deceased was hanging was inconsistent with suicide as there was a grease-like substance on his hands when he died, was flawed. The judicial comments to which the appellants object are set out in [231] of these reasons.

[286] This contention, in my view, is not made out. It was a comment which favoured the prosecution, but the judge subsequently gave the redirection set out in [261] of these reasons. The redirection neutralised any lack of balance arising from the earlier comment.

[287] The appellants made a similar complaint about the judge's comment as to blood being found on the deceased's hands and no blood being found on the towel: see [230] of these reasons.

[288] The judge in making that observation may have been merely restating a prosecution contention for the jury. But in any case, he immediately observed that "no one fact is conclusive of any theory". That observation made the preceding impugned comment fair. This aspect of the appellants' contentions is not made out.

[289] The appellants' fifth contention is that the judge's comments as to the evidence of pathologist Dr Sinton suggested the jury should take an adverse view of his evidence. Dr Sinton's evidence was important to the defence because he described

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41 See [243]of these reasons.

42 See [242] of these reasons.

43 See [196] of these reasons.

44 See especially [247] of these reasons.

some of the deceased's injuries as being a couple of days old, and he considered that death by suspension was more likely than manual strangulation. The comments about which this complaint is made are set out at [240] of these reasons. The judge declined to give a redirection in this respect.[45]

[290] I was a little surprised at the judge's directions on Dr Sinton's evidence. Dr Sinton's evidence was more favourable to the appellants than that of pathologist Dr Ansford: Dr Sinton's opinion seemed to slightly favour suicide over a third party killing; initially placed the time of death at 5.30 pm; and was that some of the deceased's injuries were a day or two old. Although Dr Ansford was apparently a more experienced pathologist than Dr Sinton at the time of the autopsy in 1999, Dr Sinton was then unquestionably a pathologist of considerable experience. He had conducted many hundreds of post mortems, 40 or 50 of which concerned hanging deaths. Importantly, Dr Sinton had the advantage of examining the body soon after the death and considered it to be a suicide. But in the end, as the judge rightly recognised in refusing to give the redirection sought on this aspect of his summing-up, the evidence of both pathologists was neutral. Neither could rule out either suicide or a killing by third parties and neither could give a clear opinion as to the time of death. It follows that this aspect of the judge's directions, though not helpful to the jury and certainly not to the appellants, has not resulted in any unfairness to the appellants. It is, however, another example of the judge's tendency in his summing-up to undermine evidence relied on or emphasised by the appellants.

[291] The appellant's seventh contention is that the judge erred in repeating to the jury a comment made by the prosecutor in the prosecutor's final address, namely:

> "[The prosecutor] submitted to you that it was hardly likely that so many witnesses would come here and lie. That the only plausible explanation for the fact that they did come and did give their evidence, despite many of them being prisoners and long term prisoners, and liable to be looked down upon by their fellow prisoners, or worse, is that they came to tell the truth."

[292] The appellants contend that this was effectively an invitation to the jury to question why a witness would lie in giving their evidence and was contrary to the High Court's instructions in *Palmer v The Queen*.[46]

[293] I am unable to accept that contention. The judge was restating the prosecutor's submission and not giving his own view. Nor was he giving a direction of law to the jury with the authority of the judge. The prosecutor's submission to the jury was no more than to urge them to accept the 10 Block prisoner witnesses as truthful. Unlike the impugned statements in *Palmer*, the prosecutor's submissions did not amount to an invitation to speculate and nor did it tend to reverse the onus of proof by casting it upon the defence to establish a motivation for the 10 Block prisoner witnesses to lie. The appellants' eighth contention fails.

[294] The appellants next contend the judge erred in his comments to the jury as to scientific officer Hall's evidence. Those comments are set out at [233] of these reasons. They essentially relate to the judge's following observation: "If the officer wished to lie to you about his tests, you might wonder why he didn't simply do them again and get rid of the inconvenient test."

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45 See [258] of these reasons.

46 (1998) 193 CLR 1, 7 [8].

[295] In my opinion, the judge's impugned comment on Hall's evidence was not such as to reverse the onus of proof or to offend the principles discussed in *Palmer*. Nevertheless, it was a comment that ordinarily would be more associated with a prosecution address than a trial judge giving directions to the jury in a finely balanced case.

(e) Conclusion as to whether the summing-up was unfair

[296] I now return to the appellants' first contention, that the summing-up as a whole was unbalanced.

[297] The evidence in this trial of the three appellants accused of a prison murder was presented over many weeks. The long delay between the death and the principal police investigation, and the further delay to trial, meant that recollections of witnesses and physical evidence were not able to be optimally presented. Whilst the delay probably disadvantaged the prosecution, it may also have disadvantaged the appellants: see *Longman v R*.[47] The task faced in this trial by prosecutor, defence counsel, judge and jury was daunting.

[298] The judge made a conscientious effort to organise his presentation of the evidence for the jury in a way that he apprehended would assist them in their difficult task. In his enthusiasm, he seems to have sought his own solution to the puzzles which emerged during the trial and to convey those views to the jury. But that is not the primary function of a judge in directing a jury. The judge's role was to explain the law as it applied to the relevant evidence in the case against each appellant, and to fairly put the competing prosecution and defence contentions. In doing so, the judge was entitled to comment on the facts. And the judge correctly directed the jury that matters of fact were issues for them to decide and they must not feel bound by his comments on the facts: see, for example, the directions at [193], [204] and [214] of these reasons. But that will not save a summing-up to a jury from appellate intervention where the judge, even inadvertently, has overwhelmed the jury with his own view of the evidence: *B v The Queen*.[48]

[299] The prosecution case against each appellant had many weaknesses. Dr Sinton originally thought the death was a suicide, that the time of death was 5.30 pm and his expert opinion ruled out any involvement of third parties. A body of other evidence also supported the possibility of suicide but a considerable amount of evidence contradicted the likelihood of suicide. The deceased and the appellant Williams appeared to have a poor relationship; the deceased seemed frightened of him. There was some, but not overwhelming, evidence of a motive to harm the deceased on the part of Williams, and perhaps Knight. The death was not investigated as a possible murder until many years later. By then, if there were eyewitnesses, their memories would have become less reliable. The evidence of the 10 Block prisoner witnesses was essential to the prosecution case. It was capable of establishing that each appellant was knowingly involved in a fatal attack on the deceased. But that evidence was problematic. All those witnesses had convictions for dishonesty. They all had made inconsistent statements close in time to the death to the effect that they had seen nothing of interest. Almost all had given further inconsistent accounts. The recollections of some 10 Block prisoner witnesses were

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47 (1989) 168 CLR 79, Brennan, Dawson and Toohey JJ 91.

48 (1992) 175 CLR 599, 605-606.

inconsistent in a number of respects with the recollections of other 10 Block prisoner witnesses. Some were severe alcoholics with associated memory problems. Some had suffered head injuries and had other social problems which affected their memory. Many had reasons for telling the police what they apprehended the police wanted to hear, for example, to gain benefits in the court or prison system by way of early release or lighter sentences for useful cooperation. One had poor eyesight and hearing and yet gave an eyewitness account of critical events which he claimed to have seen and heard from a considerable distance. Some accounts appeared implausible. There was a real danger that some or all of the 10 Block prisoner witnesses were giving, perhaps honestly, evidence that was not a credible recollection but an unreliable reconstruction based on prison yard gossip, rumour and innuendo. Exhibit 62 provided some evidence that the deceased was alive at 5.05 pm and so could not have been assaulted or killed by the appellants. Lionel Malcolm did not see the deceased's body in the shower cubicle in the early afternoon, apparently after the assault on the deceased, in circumstances where he almost certainly would have if it were there. The appellants' DNA was not linked to the deceased and none of the deceased's DNA nor any injuries were found on the appellants.

[300] Different jurors could reasonably have reached different conclusions as to whether the prosecution proved beyond reasonable doubt that the deceased did not suicide and that each of the appellants killed the deceased, intending to at least cause him grievous bodily harm.

[301] In those circumstances, it was essential that the judge direct the jury in an accurate, measured and balanced way as to the application of the relevant law to the pertinent evidence in the case against each appellant, and as to the competing prosecution and defence contentions. The judge's general comment about and direction to the jury as to Indigenous witnesses was, for the reasons I have given, wrong. It was capable of causing injustice to the appellants whose defence placed some reliance on answers given in cross-examination by Indigenous witnesses. The judge's observations about the evidence of prison officer Hodda tended to undermine, with the authority of the judge, the defence contentions, and, as I have explained, in itself amounted to a miscarriage of justice. The evidence of the conduct of prison officer Bauer was also wrong. As the appellants submit, the judge placed great emphasis on the evidence of the 10 Block prisoner witness, Campbell,[49] in a way which supported the prosecution case and undermined the defence case. The judge also presented a strong and detailed argument to the jury which undermined the suicide theory.[50]

[302] There are other aspects of the summing-up which I have set out in context which seemed to me to have this effect. It is not necessary to list them all. The result is that, after carefully considering the summing-up as a whole, I am finally persuaded that the jury would have concluded from it that the judge's clear view was that the appellants should each be convicted of murder. I emphasise that where the evidence against all three appellants could have supported either a conviction or an acquittal of murder, and it would have been obvious to the jury that the appellants had prior convictions as they were in prison at the time of the death, in these circumstances a trial judge had to take particular care to ensure the summing-up was balanced and

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49 See [213] and [214] of these reasons.

50 See [215] to [225], [227] to [237], and [239] to [252] of these reasons.

both factually and legally accurate. Despite the judge's directions that the facts were for the jury and they should ignore his comments if they did not agree with them, I consider that the errors in the summing-up to which I have referred, combined with the judge's clearly apparent disposition towards a finding of guilt in each case, amounted to a miscarriage of justice.

[303] It follows that the appellants' first contention, in combination with their second, third and sixth contentions, is made out. As a result, their trial has miscarried. The appeal against conviction must be allowed and the verdicts of guilty of murder in each case set aside.

Did the prosecution case change during the trial?

[304] The appellants' ninth contention is that the prosecution case as particularised changed after the close of the prosecution case when the prosecutor made his submissions in response to the defence contention that the appellants had no case to answer.

[305] The prosecution case as particularised and opened is set out in [5]and [6] of these reasons. It is that the appellants were each liable under s 7(1) and s 302(1)(a) *Criminal Code* in that they each attacked the deceased in the shower cubicle and strangled him by the use of a coaxial cable and/or a towel with the towel afterwards being used to hang the body from the set of bars in order to disguise the murder as a suicide. They each did this intending to kill or to do grievous bodily harm to him at that time. During the trial, the prosecution abandoned the alternative contention that a coaxial cable was used, as this was dismissed as a possibility by Dr Ansford. Nothing turns on this minor amendment to the particularised prosecution case. More significantly, during the prosecutor's submissions in response to the appellants' contention of no case to answer, the exchange set out at [188] of these reasons occurred. In rejecting the no case submission, the judge articulated the prosecution case as being that each appellant caused the death by compression of the neck in some manner so as to cause asphyxiation, either by first strangling and then suspending or simply suspending the deceased by a towel from a bar in front of louvres.[51]

[306] The appellants contend that, had they been aware that the prosecution case was being conducted in this way from the commencement of the trial, they may have cross-examined witnesses differently, particularly the pathologists: the evidence of both Dr Sinton and Dr Ansford suggested that the more probable cause of death was by hanging. In his final jury address, the prosecutor adopted the alternative case posited by the judge and the judge summed-up on this basis. The appellants' counsel sought the discharge of the jury after the summing-up, in part on the basis of the change in the prosecution case. Their applications were refused.

[307] The concerning aspects of this case to which I have referred, and the finely balanced nature of the evidence,[52] made it particularly important for the appellants to understand the case they had to meet. Of course, not every change to the prosecution case will result in a successful appeal against conviction. The appellants will only succeed in their appeal on this discrete ground if the change to

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51 See [189] of these reasons.

52 See [299] of these reasons.

the prosecution case has meant that they were placed at a tactical disadvantage causing unfairness and warranting appellate intervention: *R v Solomon*;[53] *R v Franco*.[54]

[308] The change to the prosecution case here was not monumental. But it was more significant than the abandonment of the alternative possibility that death could be caused by the use of a coaxial cable. As the appeal must be allowed on another basis, it is not necessary to express a concluded view as to the appellants' ninth contention. I consider, however, that there may be some basis for the appellants' claim that they have been disadvantaged by this late, but not great, change in direction of the prosecution case after its close. They may have conducted their cross-examinations differently if aware of the broader base of the prosecution case. It certainly provides further support for concluding that the appeals against conviction must be allowed.

Are the jury verdicts unreasonable?

[309] The appellants' eleventh contention is that the jury verdict of guilty of murder in each case was unreasonable and cannot be supported by the evidence: s 668E(1) *Criminal Code*. The question for this Court is whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that each appellant was guilty: *M v The Queen*;[55] *MFA v The Queen*.[56] As the appeal is to be allowed and the convictions quashed on another basis, if this contention is made out in respect of any of the appellants, a verdict of acquittal must be entered. If it is not made out, a retrial must be ordered.

[310] I have thoroughly reviewed the large body of evidence in this case: see these reasons [8] to [187]. As I have noted, the prosecution case against each appellant faced many difficulties.[57] But there was also a deal of evidence supporting the prosecution case against each appellant.

[311] The jury could have been satisfied beyond reasonable doubt that the deceased did not suicide. Many witnesses considered he was coping with prison life and planning his future with his partner and their baby on his release from prison. There was evidence of animosity between the deceased and the appellant Williams, and some evidence of motive on the part of the appellants Williams and Knight. Some prisoner witnesses claimed to have heard one or more of the appellants, in the presence of one or both of the other appellants, express an intention to harm or kill ("knock") the deceased.

[312] Some 10 Block prisoner witnesses claimed to have seen various combinations of the appellants assault the deceased in various ways in the shower block on the day he died. No-one gave evidence that they saw the deceased again after he entered the shower block. It is true that the evidence of the 10 Block prisoner witnesses was riddled with problems for the prosecution. But there was a good deal of it. Their overwhelming evidence was that the deceased was assaulted by a 10 Block prisoner or prisoners in the shower block on the day he died. The positioning of the

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53 (1980) 1 NSWLR 321, Street CJ, 327.
54 (2003) 139 A Crim R 228, [19]-[27].
55 (1994) 181 CLR 487, 493-495.
56 (2002) 213 CLR 606, [25] and [59].
57 See [299] of these reasons.

deceased's blood in the shower block and the recent injuries to the deceased supported no other rational conclusion. It is true that no DNA evidence or injuries to the appellants implicated them in this assault, and the appellants' counsel made considerable headway in undermining the honesty and reliability of the 10 Block prisoner witnesses who implicated the appellants in the assault. But the jury could have accepted the large body of evidence from 10 Block prisoners that the appellants were responsible for the assault on the deceased.

[313] Barlow claimed that the appellant Williams, in the presence of the appellant Knight, and perhaps the appellant Robertson, later said, "We fucked him up down there." The jury could have accepted that this was an admission in respect of all the appellants as to their involvement in a serious attack on the deceased. Although that inference was less strong in Robertson's case, it was still able to be drawn. Police officer Hall's evidence, that the inward direction of the dried blood found low on the door of the shower cubicle where the body was found hanging, supported the inference that the appellants dragged the deceased into the shower cubicle. The 10 Block prisoner witnesses, Nelson, Weribone and Tilberoo, claimed they saw the deceased hanging in the shower cubicle shortly after he was assaulted by the appellants.

[314] True it is that a reasonable jury, properly instructed on the law, could have come to the contrary conclusion. But the evidence as a whole was well capable of supporting the drawing of the inference beyond reasonable doubt that each of the appellants was involved in a fatal attack on the deceased in the shower block, intending to do him, at least, grievous bodily harm. It follows that the appellants' eleventh contention fails. A new trial must be ordered.

The evidence admitted under s 93B *Evidence Act* 1977 (Qld)

[315] Whether there will be a retrial will be a question for the prosecuting authorities. But as there may well be one, it is prudent for this Court to deal with the appellants' tenth contention, that the judge erred in admitting evidence under s 93B *Evidence Act*.

[316] Section 93B relevantly provides:

> "**93B Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable**
>
> (1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact—
>
> (a) made a representation about the asserted fact; and
>
> (b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.
>
> (2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was—
>
> (a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or

> (b) made in circumstances making it highly probable the representation is reliable; or
>
> (c) at the time it was made, against the interests of the person who made it.
>
> (3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding—
>
> (a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;
>
> (b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.
>
> (4) To avoid any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence."

[317] The appellants' contention relates to the following evidence: prison officer Weeks (that the deceased told her he did not want to go to 10 Block as "they [would] kill me"); 8 Block prisoner Ryan (that the deceased told him that Williams punched the deceased for reneging on a deal to sell gold); 8 Block prisoner Bradden (that the deceased told him he was harassed by Williams); 8 Block prisoner Rees (that the deceased told him he did not want to go to 10 Block); 8 Block prisoner Donovan (that the deceased told him the deceased had spoken to Williams about gold, was scared of Williams, that the gold was stashed in a remote controlled car in his property at jail reception and the deceased was scared to go to 10 Block because Williams was there); 8 Block prisoner McIlwain (that the deceased told him he did not want to go to 10 Block, that Williams pressured the deceased to give the gold to him, that Williams assaulted the deceased and Ryan, and that the deceased did not want to go to 10 Block); 8 Block prisoner Doyle (that the deceased told him he did not want to return to 10 Block); 8 Block prisoner Robinson (that the deceased told him he did not want to be moved to 10 Block, saying, "I'll get killed down there"); 8 Block prisoner Mason (that the deceased told him he was "bitch slapped" by Williams and had "got a kick"); 8 Block prisoner Hill (that the deceased told him that he did not want to move out of 8 Block); DU prisoner Devon (that the deceased said he did not want to go to 10 Block because he had dramas there and was worried about being bashed by Williams); DU prisoner Friedrichs (that the deceased repeatedly said he did not want to go to 10 Block because he had "troubles"); and DU prisoner McLuckie (that the deceased told him that the value of property stolen during the offence which had resulted in his imprisonment was about $300,000).

[318] The appellants contend that, had the deceased been alive to give evidence of these statements, it would have been inadmissible. In those circumstances, s 93B does not apply and the evidence remains inadmissible. This, they contend, follows from the terms of s 93B(4) and this Court's discussion of s 93B in *R v Lester*.[58] Further,

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[58] [2008] QCA 354.

they contend that s 93B(2) does not assist the prosecution because any representations made by the deceased to these witnesses may have been a fabrication or unreliable; he may have been making up excuses to stay with his friends in 9 Block.

[319] The contentious evidence summarised above was hearsay evidence of statements made to witnesses by the deceased prior to his death and so was only admissible if it came within the exceptions to the hearsay rule listed in s 93B. The terms of s 93B, particularly sub-s (4), and the discussion of s 93B in *Lester*, make clear that the section only provides for exceptions to the hearsay rule. It does not make admissible evidence from a deceased person which, had the deceased person notionally been available to give evidence, would not have been admissible. Had the deceased not been killed, in a hypothetical trial of the appellants for assaulting him he could have given admissible evidence about his relationship with the appellants. Much of the impugned evidence would have been admissible from the deceased in this way as relationship evidence. This case differs on its facts from *Lester*, where suicide was not an issue which the prosecution had to negate. In my opinion, s 93B(4) does not prevent witnesses giving evidence about the deceased's statements to them relevant to whether the deceased may have been suicidal, where that is an issue in the trial, and the evidence otherwise comes within the exceptions to the hearsay rule in s 93B.

[320] I now turn to the question of whether the impugned evidence comes within the exception to the hearsay rule in s 93B. The evidence which the appellants contend was inadmissible consisted of representations made by the deceased who had personal knowledge of them about asserted facts (s 93B(1)(a)); and the deceased was unavailable to give evidence of them because he was dead (s 93B(1)(b)). Under s 93B, the hearsay rule does not then apply to evidence of such representations, given by a witness who saw, heard or otherwise perceived the representation (the witnesses giving the contentious evidence are in this category), if the representation was within s 93B(2)(a) or (b) or (c). The disputed evidence concerned representations "made when or shortly after the asserted fact happened" within those terms in s 93B(2)(a).

[321] But the appellants contend the disputed evidence does not meet the next criterion of the terms of s 93B(2)(a): it was not "unlikely the representation is a fabrication". Further, they contend, it could not be said under s 93B(2)(b) that the representation was "made in circumstances making it highly probable the representation is reliable". It is common ground that s 93B(2)(c) has no application.

[322] The primary judge was right to conclude that, on the basis of all the admissible evidence, the deceased's statements about his fear of Williams and of moving to 10 Block where Williams was housed, were unlikely to be a fabrication. This is because of the further evidence of witnesses such as 8 Block prisoner witnesses Ryan and Robinson from which it could be safely inferred that Williams did in fact assault and harass the deceased, not long before the deceased expressed his fears about being moved to 10 Block where Williams was then housed. It follows that, in my opinion, the representations in the evidence the subject of this contention were made in circumstances making it unlikely that they were a fabrication. The evidence is admissible under s 93B(1) and (2)(a). It is therefore unnecessary to determine whether the representations were "made in circumstances making it highly probable the representation is reliable" under s 93B(2)(b). It follows that the hearsay evidence was admissible under the exceptional provisions of s 93B(1), (2)(a) and (4). The appellants' eleventh contention fails.

Summary

[323] This was a challenging trial for all involved, not least for the judge and jury. It took almost seven weeks. It concerned the tragic death of a young man in custody who had either suicided or been killed by other prisoners. There were many weaknesses in the lengthy prosecution case. Whilst the judge correctly instructed the jury on most of the complex legal matters arising, his Honour made some errors which, in context, were, in my opinion, significant. These were in his generalised comments to the jury as to how they should treat the evidence of Indigenous witnesses; in his specific comments on prisoner officer Hodda's evidence; and in summarising the evidence about prison officer Bauer. This was a finely balanced case, where a properly instructed jury could have either acquitted or convicted. The judge in his summing-up undermined the defence contentions and filled in gaps in the prosecution contentions. The jury must have perceived from the judge's summing-up that his Honour considered that each of the appellants should be convicted of murder. Further, the prosecution case changed after its close. Initially, it alleged the appellants killed the deceased intending to kill him or do him grievous bodily harm and then hanged his body from the bars by towelling to disguise the killing as a suicide. It changed to include an alternative case that the appellants killed the deceased by suspending him by towelling from the bars. These matters in combination amount to a miscarriage of justice in each case. It follows that each appeal must be allowed, the verdict of guilty of murder set aside and a retrial ordered.

[324] There are some additional observations I wish to make. Commonly judges discuss with counsel before the commencement of jury addresses the matters of law that have arisen in the case and the directions the judge should give. In complex lengthy cases like this, some judges prepare a draft summing up which they provide to counsel and invite submissions upon it. That course can often be useful in avoiding appellable errors. The young deceased was on remand in jail for the first time when he died. Although he had a concerning criminal history, he was not without promise. His death was a tragedy for his then partner, and his family, especially his baby daughter who will never know her father. His death is also of grave concern to the State in whose custody he was when he died. This Court is not a coronial enquiry and I anticipate that not all the material relevant to such an enquiry has been placed before this Court. But the evidence that is before this Court establishes that the deceased had told prison authorities he could self-harm if sexually assaulted and that he was afraid for his life if transferred to 10 Block. He was nonetheless transferred to 10 Block and put in a cell with a man later convicted of sexual assaults in prison. He was dead within days of that transfer. Whether his death in custody in 1999 was a suicide, or at the hands of other prisoners, I hope that it has led to improvements in the management of Queensland prisoners and in the investigation of all violent deaths in custody in Queensland.

ORDERS:

In each appeal, the appeal against conviction is allowed; the verdict of guilty of murder is set aside; and a retrial is ordered.

[325] **MUIR JA:** I agree with Margaret McMurdo P that, in each appeal, the appeal against conviction should be allowed, the guilty verdict should be set aside and a retrial should be ordered. Having regard to Margaret McMurdo P's careful and

extensive exploration of the evidence and of the content of the summing-up, it is possible for me to give the following relatively brief reasons in which I have adopted Margaret McMurdo P's subject headings.

The judge's directions concerning Prison Officer Hodda's evidence

[326] Counsel for Williams criticised the summing-up for the primary judge's reliance on the evidence of Mr Hodda, a prison officer, that when he saw the deceased's body at about 5.30 pm, the deceased's limbs were stiff, did not move out of position and his body was cold, "very cold". The primary judge asked rhetorically, "Is it credible that the deceased could suicide after evening muster at 5.05, and be very cold at 5.30?" Counsel for Williams submitted that in the absence of medical evidence as to the significance of the temperature of the deceased's body, Mr Hodda's evidence on the point was "all but irrelevant to the timing of the death". There was criticism also of the primary judge's comment that this evidence of Mr Hodda was unchallenged. This comment, it was submitted, elevated Mr Hodda's evidence to a significance which it did not have.

[327] Counsel for the other appellants joined in these submissions. Additionally, counsel for Knight was critical of what he asserted was the primary judge's criticism of the cross-examination of Mr Hodda by defence counsel. The criticism was said to have been expressed in these passages in the summing-up:[59]

> "Now, Mr Lynch tendered a photograph, Exhibit 67. It's a photograph of [the deceased's] body on the floor of the shower block, and Mr Lynch argued that it showed that the limbs were not stiffed. That photo was not put to any witness for comment, so we have no evidence about it.
>
> There are two things about the photo you might consider. First, we don't know when it is taken, but presumably, sometime after 7.40, when the Scenes of Crime people arrive at the prison. That is more than two hours after [the deceased] was cut down.
>
> We know nothing as to what has happened in the meantime, nor do we have any evidence as to the effect that gravity might have on a deceased person who's laid on the floor, in respect of which, the limbs may have commenced to stiffen. No question was directed to the pathologists to lay any foundation for an attack on Mr Hodda's honesty or reliability.
>
> Secondly, have a look at the photo. You haven't seen it, yet. Mr Lynch claims it shows you that the body is lying flat. Well, all I will say is, have a look at the photo, and decide for yourself what it shows."

[328] The alleged criticisms of defence counsel's approach appear to me to amount to no more than legitimate and mildly expressed observations on factual matters. The remark about Mr Hodda's evidence not being challenged no doubt could have served to bolster the jury's perception of the reliability of Mr Hodda's evidence, but the primary judge was requested to redirect on this and other references to "unchallenged evidence" and did so. In that regard, he pointed out that he did not

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59 Vol. 6, R 2601.

mean by his comments that there was any reversal of the onus of proof. Referring specifically to Mr Hodda's evidence about the body being cold he said:

> "So all that it is, is a comment that the evidence is, as I describe it; unchallenged. It does not, of course, mean that the point in issue, whatever it might be, is necessarily accepted by the defence as accurate and in assessing any piece of evidence you have to weigh it up in the context of the whole to see whether or not you accept it, or not."

[329] When the redirection is taken into account, any possibility of unfairness as a result of the subject observation has been obviated. It is apparent from the evidence that only Mr Hodda was in a position to speak of what he saw and felt and there was little, if any, evidence to which the appellants could point to challenge the accuracy of his recollection. In that regard it is significant that Mr Hodda's evidence-in-chief was not challenged in cross-examination by reference to Exhibit 67. Mr Lynch did have a point in relation to Exhibit 67 which the primary judge overlooked but the primary judge dealt with it fairly in another redirection.

[330] Counsel for the respondent pointed out that the primary judge's rhetorical question concerning the temperature of the body was merely by way of comment. It could have had little, if any, significance in the scheme of things having regard to the expert opinion evidence of Professor Ansford that rigor mortis would have set in between four and six hours after death and that of Dr Sinton that rigor mortis set in, on average, six hours after death. If Mr Hodda's evidence about the stiffness of the body was to be accepted, the deceased could not have died after the 5.05 pm evening muster.

[331] Asked if he noticed any blood on the deceased's body, Mr Hodda said that there was blood around his mouth area which "was dry and seemed old". Asked about whether any of the deceased's feet, knees and arms had moved from the position in which he had seen them before moving the body he said, "No". He had previously described how the deceased's feet and arms were positioned when he first saw the body.

[332] The pathologists were not asked to comment on Mr Hodda's evidence. They were called before Mr Hodda and not recalled. No application for the recall of either of the pathologists was made and it is not suggested that there was any unfairness to the defence arising from the order in which these witnesses were called.

[333] It appears to me that Mr Hodda's evidence, coupled with that of the pathologists, as to the timing of the onset of rigor mortis, strongly supports the conclusion that the deceased could not have died after roll call but must have died some hours earlier. Mr Hodda gave cogent evidence from which it could be inferred that rigor mortis had set in by the time he moved the body. If I am wrong about the probative weight of Mr Hodda's evidence in that regard it was, nevertheless, appropriate for the primary judge to remind the jury of the evidence. In my respectful opinion, this ground of appeal was not made out.

The judge's directions concerning Prison Officer Bauer

[334] The primary judge, in discussing what he referred to as "the first issue" (the timing of the deceased's death), said that it was an essential plank in the prosecution case

that the jury accept that death occurred at around lunchtime. He then referred to the defence argument that there were two pieces of evidence which showed that it could not be established that the death occurred at that time. The primary judge said that there were several features of the evidence he wished to bring to the jury's attention in that regard. The first matter he raised was that the defence argument depended on the accuracy of the muster performed by Mr Bauer. He said:[60]

> "Every single witness called was asked about Mr Bauer, says that he was notorious for his lax[ity]. Weeks told you that some officers did not do their job properly. Prisoners told you that if there was one officer where you could simply sing out a name and he would not check the presence of the prisoner, it was Bauer. Not one of these witnesses was challenged on this point."

[335] The primary judge went on to refer to the defence criticism of the prosecution for not calling Mr Bauer. The primary judge in that regard said:[61]

> "… but you might use your commonsense. What is he going to say? And if he admitted to being lax, what would happen to his job? Do you seriously think that there is an adverse inference to be drawn from his absence? Second, witnesses were called who were at that evening muster, it was not suggested to one of them that [the deceased] was at it. Bailey said expressly, he was not. Bailey lived in the cell next to [the deceased], and he wasn't challenged on that point. Thirdly, not one witness spoke of seeing [the deceased] after he was seen entering the shower block at lunchtime."

[336] A fair reading of the transcript, requires it to be read as if "who" appeared between "called" and "was". That addition is required to make the sentence grammatically correct and, to my mind, is also far more likely to accord with what was probably said. Counsel for the respondent accepted that no witness actually said that Mr Bauer was notorious for his laxity in conducting musters and recording their results but there is a body of evidence which supports the conclusion that Mr Bauer was notorious for his laxity and mediocre in his record-keeping.[62] A witness, Mr Bailey, who gave evidence that he did not see the deceased at evening muster, was not challenged on that point.[63]

[337] It does not seem to me that the primary judge's directions were impugned in any way by the fact that some of the 10 Block prisoners who gave evidence did not comment on Mr Bauer's practices, or that about 15 of the 30 or so prisoners in 10 Block at the time of the deceased's death were not called to give evidence. The prosecution was not obliged to call as a witness all inmates of 10 Block at relevant times. Nor was it obliged to ask every 10 Block inmate who was called as a witness if he had a relevant recollection. There was no contention by the defence that any one or more of the absent 10 Block inmates should have been called or that the failure to call them gave rise to any procedural unfairness. It was open to the defence to call such persons had the defence wished to do so.

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60 R 2592, 2593.

61 R 2593.

62 Nelson, R 798.40-50; Werrivan, R 1112.50-1113.10; Malcolm, R 1347.25-1348.10; Bailey, R 1436.13-1445; Roberts, R 1486.60-1487.33; and Campbell, R 1684.18-60.

63 R 2593.20.

[338] Also, it was not submitted that there was any lack of fairness in the prosecution's failure to call Mr Bauer and it was open to the appellants to call him.

[339] The primary judge was criticised for not giving the jury a direction of the type referred to in *Jones v Dunkel*[64]concerning the prosecution's failure to call Mr Bauer. Such a direction would have informed the jury that it would be proper for them to draw the inference that Mr Bauer's evidence would not have assisted the prosecution.[65] It may be doubted that such a direction would have been of much benefit to the defence. The jury was aware that Mr Bauer was the maker of the record which was quite detrimental to the prosecution case and the primary judge's comments were obvious enough.

[340] It does not appear to me that the primary judge's robust comments in relation to Mr Bauer's evidence or his failure to give the direction sought amounted, in themselves, to an error of law or gave rise to a miscarriage of justice. The primary judge's approach, however, is relevant to the complaint that the summing-up was unbalanced.

The judge's directions as to the evidence of indigenous witnesses

[341] The observations complained of in relation to indigenous witnesses commenced with this passage:[66]

> "One of the additional difficulties that you face, in this case, is in assessing the evidence of indigenous witnesses. Quite often English is not their first language. As well, some may have come from a different culture to your own, with differing customs and differing habits of dealing with aggressive questioning, and you might expect, in your own culture, or from your own experience, some had a habit of just agreeing with whatever was put to them, even though it might be contrary to what they had just said.
>
> You need to decide that any agreement was merely the witness giving up or acceding to the questioner, without any real adoption of the point and issue, or whether the agreement was a deliberate and thoughtful acceptance of the proposition put."

[342] The primary judge's subsequent commentary went further than the above remarks in asserting that indigenous witnesses all had the characteristic of readily agreeing with leading questions. In that regard, his Honour, when discussing Mr Malcolm's evidence, said:[67]

> "The real difficulty, especially with indigenous witnesses, is their readiness to agree to leading propositions put to them. That might, of course, infect the statement as much as the oral evidence, now (sic) matter how careful the taker of the statement might try to be.
>
> It's a matter for you to weigh up, whether Mr Malcolm's account, given to you in evidence-in-chief, is more reliable than his adoption of things put to him in the course of cross-examination. You might

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64 (1959) 101 CLR 298.
65 *Jones v Dunkel* at 308 and 312.
66 Vol. 6, R 2569, 2570.
67 V6, R 2691-2692.

> think there was a deal of force in Mr McGuire's point, that if he had been told that there was a body hanging in the shower block when he'd just had a shower, he would be very unlikely to go back and have a second shower in that same block, as he said he did in his evidence-in-chief.
>
> …
>
> Again, you have the difficulty of dealing with an indigenous witness in determining to what extent his apparent acceptance of propositions put to him reflect what he truly means to say. I'll return to this aspect of the matter later."

[343] The same approach was taken later in the summing-up where the primary judge, referring to Mr Malcolm's evidence, said:[68]

> "Again, if you have - again, you have the difficulty of dealing with an indigenous witness and determining to what extent his apparent acceptance of propositions put to him in a leading fashion in cross-examination is reliable. Nonetheless, that is plainly what the Malcolm brothers have said."

[344] There were seven indigenous witnesses from 10 Block. Plainly, there were many inconsistencies in the evidence given by each of them, as the primary judge pointed out. What was to be made of those inconsistencies was important, yet, as Margaret McMurdo P remarks in her reasons, at least some of these witnesses appeared quite ready to defend their respective positions when it suited them to do so and exhibited little, if any, tendency to agree with leading questions. The directions to the effect that the evidence of this large and significant body of indigenous witnesses should be approached differently to that of other witnesses had the potential to disadvantage the defence. The directions implied, for example, that concessions made in cross-examination should be scrutinised more carefully than would be the case with other witnesses.

[345] Counsel for the respondent identified no evidentiary foundation which would have entitled the primary judge to give the broad directions which he did. The problem with those directions is identified in the following passage from the reasons of Macrossan J, as he then was, in *R v Condren*:[69]

> "Ordinary jurors may well accept that a person's use of language will be influenced by his educational standard, his cultural background and his life experience but, while being generally aware of this, if expert evidence can point out more precisely than general experience would reveal just how such factors can operate on language choice, then there may be scope for the introduction of expert testimony when, in a case, it is relevant for a jury to know how an individual's peculiar choice of language may be identified. The general rule is that opinion evidence is inadmissible but expert evidence, if otherwise relevant, is generally admissible if the tribunal of fact needs the benefit of expert assistance to form a correct judgment on a question at issue …

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68 V6, R 2728.

69 (1987) 28 A Crim R 261 at 266.

[346] He went on to say:[70]

> "I do not consider that evidence of the alleged general characteristics of the speech of persons of Aboriginal descent and the general pattern of their response to questions is admissible in the present case in proof of the way in which the accused would, or might, have replied to questions asked of him if they had been put in the form seen in the record of interview. There are difficulties in defining the class of Aboriginals in any helpful way since it is necessary to include such a diverse range of individuals within it and one would think there are difficulties in accounting for the variations in speech characteristics which might be observed amongst all the members of that large class. The verbal response characteristics of a class is not a matter at issue but only the alleged responses of the applicant. Eades has conferred with the applicant and, as it is claimed, has had an opportunity to detect any of his idiosyncratic speech characteristics which are relevant for mention. To the extent that he may share these speech characteristics with other Aboriginals or other persons in general is not relevant and to the extent that other Aboriginals have alleged speech patterns which differ from the applicant's then that is even more obviously irrelevant. These observations apply both to Eades' evidence about the alleged structure of Aboriginal speech patterns and to her evidence of the tendency of Aboriginals in general to make what is called 'gratuitous concurrence' to propositions put to them."

[347] The above passage was referred to with apparent approval by Steytler J, in *Stack v Western Australia*.[71]

[348] It is not immediately obvious to me, however, that the comments of the primary judge under consideration caused unfairness to the appellants so as to cause a miscarriage of justice.[72] The learned prosecutor, as emerges from his address, had the perception that there was a tendency among the indigenous witnesses to agree with what was put to them. The primary judge, it would seem, shared that perception. It was not suggested by counsel for the appellants that such a perception was not justified in relation to some witnesses.

[349] Consequently, it was appropriate that the primary judge raise with the jury the possibility that the evidence of specified witnesses may have been affected by a disposition to agree with what was put to them. It was not suggested that it was impermissible to attribute this willingness to the witnesses' cultural background. If the primary judge had taken this course, it is difficult to accept that the jury would not have had the observations of the judge in mind when considering the evidence of indigenous witnesses who had not been so singled out. Of course, any tendency to treat all witnesses as having similar characteristics or propensities could have been minimised by appropriate observations. Finally, in this regard, I note that the primary judge, unlike this Court, was in a position to assess whether the same tendency to agree or make concessions was present in all of the indigenous witnesses and to what degree. In view of my conclusion that the next ground of

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70 At 267-268.

71 [2004] WASCA 300 at paras [115]-[116].

72 C.f. *Simic v The Queen* (1980) 144 CLR 319 at 327, 328.

appeal has been made out, it is unnecessary for me to express a concluded view on this ground.

Was the summing-up unbalanced so that it deprived the appellants of their right to a fair trial?

[350] The appellants submitted that when taken as a whole the summing-up was unbalanced and unfair. It was contended that it "constituted a prosecutor's address that no prosecutor would have been permitted to deliver". Counsel for Knight submitted that much of the summing-up was devoted to demolishing the appellants' respective cases. Reliance was placed by all appellants on the alleged deficiencies in respect of indigenous witnesses, Prison Officer Hodda and Prison Officer Bauer.

[351] The primary judge's summing-up commenced at 2.23 pm on 24 July 2009. The Court adjourned at 3.21 pm and the summing-up recommenced at 10.04 am on 27 July. The jury retired at 2.45 pm that day and redirections were given at 5.25 pm. There had been about 23 days of evidence and some 43 witnesses had been called. After giving general directions, the primary judge identified for the jury what he described as "three essential questions" for the jury to decide. The questions were:

1. "… has the prosecution excluded beyond reasonable doubt the hypothesis that [the deceased] committed suicide?"

2. "… assuming that [the deceased] was killed, has the prosecution established beyond reasonable doubt that the three accused men caused his death?"

3. If yes to the above, "… has the prosecution established beyond reasonable doubt that the three accused men had the intent to cause death or grievous bodily harm at the time they did the act which caused [the deceased's] death?"

[352] The primary judge then dealt with circumstantial evidence and identification evidence in some detail. Having done so, he explained that he proposed to marshall the facts "in some logical way" and suggested that the jury consider four issues and in this order:[73]

> "… first, can the prosecution establish, beyond reasonable doubt, that the time of death was around lunchtime? If the death could have happened at some other time, say, after evening muster, then the prosecution must fail, as there is no evidence of the accused doing anything, at some later time, to the deceased.
>
> Second, can the prosecution exclude suicide beyond reasonable doubt? If they can't, then again, the prosecution will fail.
>
> Third, if you are satisfied that the deceased did not commit suicide, and so was killed, then the question is, can the prosecution satisfy you beyond reasonable doubt that these three men caused his death?
>
> Fourth, if you reach that point then the final question is, are you satisfied beyond reasonable doubt that at the time they killed him, the accused had an intent to kill or cause grievous bodily harm?"

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73 R 2591-2592.

[353] The primary judge took the jury to the evidence in relation to each of the four identified issues in considerable detail. In so doing, the primary judge did not merely state the evidence relevant to the issues but referred to arguments advanced by the defence and identified deficiencies in the defence case. He also identified deficiencies in the evidence given by defence witnesses frequently and, at times, at considerable length. There was no criticism, for example, of the way in which the primary judge dealt with inconsistencies in the evidence given by prosecution witnesses and the warnings given concerning acceptance of the evidence of prosecution witnesses as a result of matters such as: a witness's interest in obtaining favourable treatment from prison or prosecutorial authorities; convictions for dishonesty; the possibility of memories being distorted or created by discussion with others and conditions bearing on the extent and reliability of memories, such as alcohol abuse.

[354] The summing-up was carefully assembled and presented in a logical, digestible manner. It provided the jury with a clearly expressed reminder of the evidence of relevant witnesses in a useful context accompanied by commentary on concerns relating to that evidence. For example, in dealing with the witness Nelson, the first of the 10 Block prisoners who gave evidence, the primary judge: described the witness' physical appearance and attire; identified whether the witness was an indigenous person; described the witness' prior convictions; cautioned about accepting his evidence as a result of those convictions; referred to a concession by the witness that he had previously given false statements in the matter; identified inconsistencies in his evidence and referred to the witness' stated reasons for his conflicting accounts.

[355] However, other aspects of the summing-up give rise to a concern that the primary judge's approach may have resulted in a lack of balance which caused unfairness to the appellants. In order to address this question I will refer to parts of the summing-up which provide examples of the approach in the summing-up complained of by counsel for the appellants.

[356] In the course of dealing with the issue of suicide, the primary judge referred to the defence contentions. One of these was that a reason for suicide could have been the failure of the deceased's relationship with Ms Chapman, a woman with whom he was in a de facto relationship. In that regard, the primary judge said:

> "As to the relationship with his de facto, the defence contentions require that you find that Ms Chapman is either a liar or very much mistaken, so her credibility and reliability must be assessed by you. You will recall that the defence pointed you to various passages in the evidence about the state of the relationship and how strained it was.
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> In particular you might recall being told about a letter where the deceased wrote to Ms Chapman and spoke of his family wiping him, or words to that effect, and that he said, and I quote, 'And now this.' Ms Chapman said she didn't know what the reference to 'this' was. The inference you were asked to draw, contrary to her sworn evidence, was that she had told him that the relationship was at an end. The point that was not mentioned, and the crucial point for any assessment of evidence about relationships, is when was this written? When are we talking about?

> In re-examination Mr Pointing took Ms Chapman to another letter that she said accompanied the one that the defence had cross-examined her on, in which [the deceased] had spoken of his future with his child. That letter can be dated very precisely, as he refers to his daughter as three months old.
>
> So if you accept her account, his reference to 'And now this.', is in late March or early April. His death is months later. It is a matter for you whether that is significant, but after early April he had the visit from his grandparents and the visits commenced from Ms Chapman. There are letters sent and phone calls.
>
> We know for a fact that he doesn't suicide or attempt suicide when he is not receiving visits and is feeling abandoned by his family. Does it make sense that he despairs when he is receiving visits? If the 'this' is news that his relationship is at an end and he finds it devastating, then there is no evidence of that from the fellow prisoners.
>
> Every prisoner who is questioned about the matter, said that the deceased appeared to be a happy fellow with a happy go lucky nature. Every witness asked, and who have had a chance to observe him, said that he seemed to be healthy and that his mood seemed normal. A number spoke of [the deceased] mentioning his girlfriend and child."

[357] The primary judge then discussed other evidence which was inconsistent with the deceased having a reasonable reason for or inclination towards suicide. After dealing again with the deceased's relationship with Ms Chapman, the primary judge referred to Ms Chapman's evidence that on the day of the deceased's death, Ms Chapman had spoken to him twice over the telephone, had been requested by him to put money in his account so that he could make telephone calls and that she had done so. Her evidence, the primary judge pointed out, was that on that day, the deceased "was in a great mood". Also in the course of addressing the topic of suicide, the primary judge said:[74]

> "You are taken by defence counsel to the evidence of Mr Mason, to the effect that he thought that all was well between the deceased and Williams. The cogency of his opinion, of course, depends entirely on how familiar he is with the deceased. The difficulty with Mason's evidence is the consistent body of evidence from the detention unit prisoners."

[358] In addressing theories advanced by the defence to support a rational hypothesis that the deceased committed suicide, the primary judge said:[75]

> "If you're going to adopt an hypothesis as rational and reasonable, it must fit the known facts. On the suicide theory of the case, you need to consider whether it is improbable that a man with blood on his hands can tie a towel tightly around his neck and on the bar without any blood getting on the towel. Whatever assumption you adopt,

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74 R 2637.

75 R 2641.

> whether it be that the deceased injured himself in a failed attempt at suicide or was assaulted and then suicided, he must tie or retie that towel. We know that he had blood on both his hands when found dead. Again, I stress no one fact is conclusive of any theory.
>
> As well, if there were two attempts at suicide, that being one theory advanced, then the fact that there is no grease-like substance on the towel must also be put into the scales. The deceased must have handled the towel, on that theory, after tying it to the bar, and he clearly has the substance on his hands when he died. If someone else tied the towel, it explains the absence of blood and the grease-like substance on the towel, and so fits the known facts."

[359] His Honour continued to comprehensively demolish the defence contentions:[76]

> "The third piece of physical evidence is the presence of the smears of blood under the mirror. Again, if you adopt a theory, it must fit the facts. The suggestion made to you based on the suicide theory was - at least one suggestion was that he wanted to clean the blood off his face after first attempting suicide, it failing, he injur[ed] himself and then wanting to clean himself before having another go, so to speak.
>
> Alternatively, it is said he could've wanted to clean his face after being assaulted or simply to check the damage. This man of course must, unless a hypothesis, also leave blood low down on the doorjamb going in or out of the cubicle, and he does this whilst getting to or from the sink because he's concerned about the blood on his face.
>
> If he has the strength to get to the basin and wash his face, why is he on the floor as he passes the cubicle door, whichever way he is going? Now, I don't say for one moment that any one fact on its own proves the case either way. You have to take them together and exercise your commonsense and your experience at life and determine if there is a reasonable, rational hypothesis that fits all the facts."

[360] Addressing an argument that the deceased must have left the shower block after being assaulted, if he was assaulted, because he had changed a white shirt a witness had said he had been wearing when entering the shower block, his Honour said:[77]

> "There are three things to say about that argument. The first, the evidence that he was wearing a white shirt is hardly compelling. Second, Bailey, who is next door, didn't see or hear it happen. Third, there are other possibilities, for example, someone else took the shirt away.
>
> There is no reason to think that third parties didn't have access to the shower block throughout that afternoon. In fact, on some accounts is it (sic) certain that people did go in there. For example, if you accept Malcolm about Mr Knight and the bread, it is said that Knight went

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76 R 2645-2646.
77 R 2650-2651.

> in there. If the accept the account of Bailey and Nelson about the water running, then someone sometime turned the tap off.
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> I'll finish off what I want to say about the white shirt theory. The real problem with it is its foundation. I said the evidence wasn't compelling that he was ever wearing a white shirt, and I remind you of the three pieces of evidence I could find in the transcript about it."

[361] Other defence theories in relation to suicide were peremptorily dismissed:[78]

> "Mr McGuire made a submission that on balance the pathological evidence supported suicide. It did no such thing. Dr Sinton said that on balance he favoured suspensory hanging as the cause of death, but that is a very different statement to one that he favoured suicide.
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> Mr McGuire submitted that it was fanciful to suggest that [the deceased's] hands and legs could be held. He didn't say why. Certainly no witness said that it was fanciful. The question is whether, on the Crown case, these three men between them could so restrain a 74 kilogram, 23 year old man?"

[362] Counsel for the appellants also relied on the passage from the summing-up quoted in paragraph [11] above in which the primary judge dismissed the appellants' complaints about the prosecutor's failure to call Mr Bauer.

[363] A judge in a jury trial "may comment (and comment strongly) on factual issues"[79] provided that the summing-up remains balanced and fair.[80] In *B v The Queen*,[81] Brennan J said:

> "A trial judge has a broad discretion in commenting on the facts and in choosing the strength of the language employed in commenting on the facts, but the comment must stop short of overawing the jury. It must exhibit a judicial balance so that the jury is not deprived 'of an adequate opportunity of understanding and giving effect to that defence and the matters relied upon in support of the defence'. I agree with the observations of the Full Court of the Supreme Court of South Australia in *Reg v Hulse*:
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> > '[T]o use the words of the Privy Council in *Broadhurst's Case*, there is a danger of the jury being overawed by the judge's views, where, even though the jury are told that the decision on the facts is for them, the language of the judge is so forceful that they may be under the impression that there is really nothing for them to decide or that they would be fatuous or disrespectful if they disagreed with the judge's views.'" (footnotes omitted)

[364] Whether expressions of opinion on the facts in a summing-up exceed permissible bounds depends on the impression formed by a reading of the summing-up as a whole[82] and may be difficult to determine. The following discussion in the

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78 R 2656.

79 *RPS v The Queen* (2000) 199 CLR 620 at 637 and see also *Seymour v Australian Broadcasting Corporation* (1977) 19 NSWLR 219 and *Hoger v Ellas* (1962) 80 WN (NSW) 869 at 875.

80 *Green v The Queen* (1971) 126 CLR 28 at 34.

81 (1992) 175 CLR 599 at 605, 606.

82 *B v The Queen (supra)* at 606.

judgment of the Court in *R v Cohen and Bateman*,[83] referred to with apparent approval in the reasons of Lord Bingham in *R v Bentley (Deceased)*,[84] is pertinent:

> "The learned judge is said to have interfered improperly in the conduct of the case, and not to have put it fairly to the jury, and not to have stated the law properly. The latter would be fatal unless the case came within the proviso of the section. The other observations of the learned judge only become grounds of appeal if they have in fact caused substantial miscarriage of justice. In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevancy of questions of fact, and it is therefore right that the jury should have the assistance of the judge. It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident expressions in the summing up does not show that it is an improper one. When one is considering the effect of a summing up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact. No doubt the learned judge did express himself very strongly. But on the main question we think him right."

[365] The permissible limits of judicial comment were considered in the following passage from the advice of the Judicial Committee of the Privy Council in *Mears v R*,[85] also referred to with approval by Lord Bingham in *R v Bentley (Deceased)*:

> "The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the defendants submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words this was to use a test which by present day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd observed in *Gilbey* (unreported) January 26, 1990:
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> > 'A judge … is not entitled to comment in such a way as to make the summing up as a whole unbalanced … It cannot be said too often or too strongly that a summing up which is fundamentally

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83 (1909) 2 Cr App R 197 at 208.

84 [1998] EW CA Crim 2 516.

85 (1993) 97 Cr App R 239 at 243.

> unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'
>
> Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views. Whether this is what has happened in any particular case is not likely to be an easy decision. Moreover, the Board is reluctant to differ from the Court of Appeal in assessing the weight of any misdirections. Here, their Lordships have to take the summing up as a whole, as Mr Andrade submitted, and then ask themselves in the words of Lord Sumner in *Ibraham v R* [1914] AC 599, 615, whether there was:
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> > 'Something which … deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.'
> >
> > Their Lordships consider that the judge's comments already cited went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting."

[366] Not without hesitation, I have concluded that the summing-up, considered as a whole, lacked balance and was unfair to the appellants despite the primary judge's obvious aim of achieving both balance and fairness. The overall approach of the summing-up was to investigate the four issues set out in paragraph [28] above, and to state express or implicit views on the manner in which they should be resolved and on the merits of the arguments mounted by the defence. Viewed in its totality, and notwithstanding the primary judge's many and careful criticisms of the evidence led by the prosecution as well as reminders that the jury were free to disregard his comments on the facts, there was a sufficient departure from a trial judge's proper role to warrant the conclusion that the appellants were denied a fair trial and that, in consequence, the trial miscarried.

[367] The consequence of following the course devised by him to give order and digestibility to his rehearsal of relevant facts, was that the primary judge strayed from the role of impartial arbiter and sought, to an impermissible extent, to guide the jury to ~~a~~ particular conclusions. The summing-up, in my respectful opinion, lost its balance and favoured the prosecution, principally through the persistent rebuttal of defence arguments.

[368] The following explanation of the criminal trial process by Dawson J in *Whitehorn v The Queen*[86] is apposite:

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[86] (1983) 152 CLR 657 at 682.

> "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and **the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations.** It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. **If a prosecution does succeed at a trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel.**" (emphasis added)

[369] There are two additional matters which are relevant to my conclusion. The first is that defence counsel were not given the opportunity of considering the contents of the proposed summing-up before addressing. Having regard to the form of the summing-up, that put the defence at a disadvantage.

[370] The second relevant consideration is the nature of the trial. Because of the length of the trial and the number of witnesses, it was likely that the jury would tend to have far more dependence on the primary judge's rehearsal of the facts than in the case of a shorter trial with fewer witnesses. I consider it probable that in such circumstances the jury also would have placed more than usual reliance on the judge's expressed or implied views of the facts. The way in which the facts were marshalled, of course, also had the distinct potential, in itself, to influence the jury's determination.

[371] In my view the prosecution case was not weak. The evidence against suicide was reasonably strong. Once suicide was rejected as the cause of death the obvious suspects were Williams and, to a lesser extent, the other appellants. There was no evidence suggesting that any other inmate may have been wholly or partly responsible for the deceased's death. The evidence revealed that the deceased had a pleasing manner and disposition and was either liked or not disliked by other inmates. There was a large body of reasonably consistent evidence given by 10 Block prisoners and others which linked the appellants to the killing. The circumstances of the deceased's death, including the location of blood stains, provided ample evidence of an intention to kill.

[372] The principal weaknesses in the prosecution case were: the original conclusion by the authorities that the deceased had taken his own life; the delay in properly investigating the killing and in taking statements and the manifest deficiencies in the evidence of critical inmate witnesses. Virtually all such witnesses had convictions for offences of dishonesty; most had given prior inconsistent statements or evidence; some made important concessions in cross-examination; it was possible that some had significant memory deficiencies and some had good reason to cooperate with the authorities. However, many of the critical inconsistencies in the evidence of such witnesses were capable of being explained by their reluctance, for reasons of self-preservation or prison culture, to give evidence against another inmate whilst they were inmates themselves. In my view it was open to the jury to have reached either a verdict of guilty or not guilty and for that reason it is appropriate that a retrial be ordered.

Conclusion

[373] In view of the foregoing it is unnecessary for me to consider any other grounds of appeal.

[374] **DOUGLAS J:** I respectfully agree with the President's necessarily extensive and very helpful analysis of the evidence and the legal issues in this case and with the orders she proposes to make. I also agree with Muir JA's reasons for concluding that the summing up lacked the appropriate degree of balance and that there should be a new trial.

[375] All that I wish to add is in respect of the President's observations at [324] about the desirability, at least in lengthy and difficult cases such as this, of the preparation of a draft summing up and the invitation to make submissions about it. Not only does it help avoid appellable error but it should assist the jury by avoiding the need for re-directions on issues that should have been dealt with initially.

[376] It seems to me to be desirable to try to avoid having to bring the jury back into the courtroom some time after the intended conclusion of the summing up to correct or amplify aspects of it. Correction or amplification out of context, especially in a lengthy case, may confuse the jury or wrongly emphasise the importance of issues that should have been the subject of proper directions to begin with, in the appropriate context.