SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barden* [2010] QCA 374
PARTIES:	**R** **v** **BARDEN, Tyson Alfred** (appellant)
FILE NO/S:	CA No 60 of 2010 SC No 124 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2010
JUDGES:	Margaret McMurdo P, Holmes JA and Chesterman JA Separate reasons for judgment of each member of the Court, McMurdo P dissenting
ORDER:	**The appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – appellant convicted of murdering deceased by assaulting him outside hotel – prosecution case was that appellant assaulted deceased intending to cause grievous bodily harm and assault caused death – not contested that appellant assaulted deceased – following question from jury, judge re-directed jury on intent – judge directed that if person does not appreciate consequences of his actions include causing grievous bodily harm they cannot have intent to cause grievous bodily harm – whether direction led jury to believe that if appellant appreciated consequence of his actions could include grievous bodily harm he intended to inflict grievous bodily harm under s 302(1)(a) *Criminal Code* 1899 (Qld)– whether judge misdirected the jury – whether misdirection amounts to a wrong decision of law under s 668E(1) *Criminal Code* – whether there has been a miscarriage of justice *Criminal Code* 1899 (Qld), s 23, s 301(1)(a), s 668E(1), s 668E(1A)

COUNSEL:	E S Wilson with E P Mac Giolla Ri for the appellant M J Copley SC for the respondent
SOLICITORS:	No appearance for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Tyson Alfred Barden, was convicted in the Supreme Court at Brisbane on 3 March 2010 of murdering Brian James Heathcote on 21 January 2007. He appeals against his conviction, contending that the learned trial judge, in response to a jury question, erred in redirecting the jury on the element of intent. The appellant contends the appeal should be allowed and the guilty verdict set aside because of either a wrong decision on a question of law or a miscarriage of justice under s 668E(1) *Criminal Code* 1899 (Qld).

[2] This ground of appeal is best discussed after considering the issue of intention in the context of the trial, particularly in counsel's final addresses and the judge's summing-up.

The trial

[3] The prosecution case was that the appellant followed the deceased out of the Royal English Hotel at Nundah in the early hours of 21 January 2007 and viciously assaulted him, intending to then cause him grievous bodily harm, and that this assault caused the death.

[4] The question of whether the appellant intended to cause the deceased grievous bodily harm at the time of his assault was one of two major issues in the trial. In response to the judge's invitation to give an opening address to the jury, defence counsel stated there were two significant issues at trial, the first of which was "what was the intention of [the appellant] at the time that he had an altercation with [the deceased]". Though the appellant did not make any formal admissions, he did not contest at trial that he assaulted the deceased. The appellant did not give or call evidence.

The prosecutor's final address

[5] During the prosecutor's final address to the jury, he referred to the following portion of the appellant's interview with police:

> "When you were assaulting him, what was your intention?-- Umm, teach him a lesson.
>
> What sort of injuries did you want when you were assaulting him? What sort of injuries were you intending on causing to him?-- All I intended to give him was maybe just a couple of broken ribs and a couple of bruises on the face, not what I gave him."

[6] The prosecutor continued:

> "It is that last phrase that I am concentrating on when I say, 'Fact five'. The [appellant] may well have left the hotel meaning to break some ribs, bruise [the deceased's] face, but what he actually did was much, much worse.

> The important issue for you is not his intention as he left the hotel or as he followed [the deceased] up the street and had a couple of cigarettes and thought about what was about to happen, what is important for you is his intention as [the deceased] was, in fact, assaulted and what the [appellant] did, even he admits, was much worse. He may have intended initially to only break a couple of ribs and give a couple of bruises to his face, 'Not what I gave him'. The [appellant] recognised that the assault that he, in fact, inflicted was something worse than he may have set off with from the hotel."

[7] The prosecutor submitted that, when the jury considered the whole of the evidence, they would conclude that the appellant "was at least intending to cause grievous bodily harm". After dealing with the issue of causation, the prosecutor continued:

> "You must then consider what was his intention at the time, because murder is an unlawful killing, accompanied by an intention to cause death or grievous bodily harm. So you must consider what was the [appellant's] intention at the time, and I say 'at the time' because that is the critical moment. It is not as he was sitting there - standing there at the pokies within feet of [the deceased], it's not as if he was staring at him in the hotel, it's not when he decides to follow him up the street, all of those matters are important in assessing his intention, but it is his intention at the time that is critical, at the time that he was inflicting what he estimates 30 to 50 punches, 10 kicks, that's when you assess his intention.
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> Well, members of the jury, no doubt you have all heard the expression 'one punch can kill'. Unfortunately, we live in a society where people do on occasions resort to violence. I am in no way condoning that, but it is a sad reality of life that sometimes people are harmed. *But my point is this that sometimes a person can resort to violence but without intending the drastic consequences which actually follow. Someone punches someone, just once, they fall over, they crack their head and they die. They may not have intended that drastic consequence that would follow when the punch was thrown. So if a person punches once, they may not have meant to cause the result that follows, serious injury, even death. So you can't reason, 'Well, someone's died, therefore that must have been intentional.' You have to look at the circumstances to assess what the intention was*, and you may have thought the more violence the person uses the greater the persistence of the assault, the more obvious is their intention to cause serious harm. To continue to punch and punch and punch, to kick in the head, when he's on the ground to stamp with your heel onto his chest, very clearly demonstrates his intention. He might have left the hotel with the intention to break some ribs, but when he continues to punch, to kick and stomp this man, his intention, what he meant to do, becomes very evident and you may have thought much more serious. *(my emphasis)*
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> Now, what the [appellant's] intention was is a question of fact and like all questions of fact it is entirely a matter for you, but obviously you can't get the CCTV images of inside the [appellant's] mind to see

what his intention was at the time, but you can assess his intention at the time and you may have thought the best way to do that is to look at what he actually did because actions sometimes do speak much louder than words. The [appellant] told the police early in his interview, while he was still trying to pretend that he came across [the deceased] coincidentally when he was returning from Kevin's[1] with this book stuffed up the back of his trousers - all lies, of course, but he was still trying to have that pretence – what he told them then at that early stage of the interview was that he intended to break some ribs and bruise his face. Now, you may have thought that what the [appellant] has admitted there is evidence of injury - sorry, is evidence of an intention to cause serious injury. But what he does, in fact, goes far beyond even that. In my submission, when you look at what he actually does, rather than what he has just admitted, you would have no doubt that he had an intention to at least cause grievous bodily harm.

…

But the other thing I have to say about intention is about alcohol and intoxication, because the [appellant] told the police that he had been drinking that night. But remember he also told them that he was not overly effected, that he was sober, that he was straight, although he did indicate he had consumed a considerable quantity of alcohol himself. But you may have thought his estimation of that is unlikely to have underplayed his level of intoxication. But because of what he said to the police you will have to consider the effect of his consumption of alcohol.

Now, members of the jury, drinking, even being drunk, is not an excuse. A drunken intention is still an intention. If he had drunkenly formed the intention to do grievous bodily harm he is guilty of murder. Some people when they drink become argumentative, some people become angry, some people become more promiscuous, perhaps less attune to the signals that are being given by others – [the deceased], you may have thought, may have fallen into that category that night - and some people become more violent, more likely to take offence and choose violence as an option. Perhaps if the [the appellant] had not been drinking then maybe he would have just let [the deceased] go and not have followed him. Perhaps he would have said to him in the hotel, 'Listen, mate, I think you're a bit out of line, better settle down.' But what he did do is to follow [the deceased] and he did assault him.

Now, of course, you can see the [appellant] on the CCTV, the images and he is not obviously drunk. He is certainly capable of walking and talking and capable, you may have thought, of forming an intention. He was capable of inflicting serious injury. [The deceased], on the other hand, seems incapable even of trying to defend himself.

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[1] The appellant initially told police he had been at the place of a mate called Kevin. He later admitted that "Kevin" did not exist: AB 478.

> Well, perhaps it was his drinking that night that is an explanation for why the [appellant] chose to follow [the deceased]. But, as I say, even a drunken intention is an intention and if the [appellant] had the intention to cause death or grievous bodily harm, then he is guilty of murder. That he may have been intoxicated is a fact that you must look at in assessing whether he, in fact, did have that intention but it does not and cannot afford him an excuse."

[8] The prosecutor emphasised the serious injuries suffered by the deceased and described by the pathologist:

> "… severe blood trauma that fractured the upper jaw from the other facial bones, fractured the cheekbones from the face, such that both of those areas of the bony structures of the face were free moving. With the swelling, the bleeding, the aspiration of blood into the lungs, he died because he couldn't breathe."

[9] After dealing with the question of causation (the second major issue at trial), the prosecutor returned to the question of whether the appellant had an intent to do grievous bodily harm:

> "Now, intending to cause grievous bodily harm is a serious issue, but when you look at the nature of the attack you could not come to any other conclusion than that the [appellant] was, indeed, intending to inflict serious injury.
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> If you look at those five facts again you get a very real picture of what the [appellant] was intending. Now, it is not my submission that the [appellant] was necessarily intending to kill, although the ferocity of the attack could well lead to that conclusion.
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> If he was intending to kill, indeed if you thought he had killed, then it is probably unlikely that he would have gone back to the hotel and loudly told Bourne that he had just bashed someone or told Cartwright, as he did - you will remember Ms Cartwright, she gave evidence on the second day, that he came back to the hotel and said, 'Well, 'I just kicked the shit out of that guy. He won't bother you any more.' That is at transcript page 2 - day 2 page 95, your Honour.
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> Realistically you may have thought it is probably more likely that he did not appreciate that he had killed, but that he knew he had done substantial damage. You may have thought, members of the jury, that the relevant intention for you is whether the [appellant] had the intention to cause grievous bodily harm.
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> Now, her Honour will tell you what that expression means, but an intention to cause grievous bodily harm is an intention to cause an injury, a bodily injury, of such a nature that if left untreated would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health. It is a serious intention. It must be an intention to cause an injury that is likely to endanger life or likely to permanently - cause a permanent injury to health.

> An intention to cause that sort of serious injury is an intention to cause grievous bodily harm. The [appellant] doesn't have to have contemplated the precise nature of the injury, but if he intended to cause that sort of serious injury, then he is guilty of murder.
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> Members of the jury, many things can amount to grievous bodily harm. It is something that could cause a permanent injury to health; for example, a broken jaw. You may have thought fractures of the bones of the face certainly you may have thought would amount to grievous bodily harm because untreated they would cause permanent injury, if not death. It is a matter for you, members of the jury.
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> …
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> … You know that … if a person punches and punches and punches - I'm not even saying the 30, which is the minimum the [appellant] admitted - he punches, punches and punches and kicks, with kicks directed to the head, and then stamps a bleeding man while he's on the ground, do you think he was intending to cause serious injury? Are you satisfied beyond reasonable doubt he was intending to cause grievous bodily harm?

[10] The prosecutor concluded by urging the jury to be satisfied beyond reasonable doubt of the two critical issues in the case: the appellant assaulted the deceased causing severe injuries which contributed to his death and he did so with an intent to cause grievous bodily harm.

Defence counsel's final address

[11] Unsurprisingly, defence counsel's address also focused on the two major issues at trial. As to the appellant's intention to do grievous bodily harm, he submitted:

> "You've heard a lot from my learned friend on the two main issues, intention and causation, and you're going to hear some more, but from a different perspective, and that probably won't surprise you. Now, when these incidents occurred, [the appellant] was just 19, and my learned friend has spoken to you about intention, and intention, you might think, ladies and gentlemen, is an intention, as he just finished with, to cause grievous bodily harm or to kill. *But it carries with it an inference that there is an understanding of the consequences of your actions and that is something that you might need to consider here*.
>
> My learned friend referred to the 'one punch can kill' campaign. That is a campaign aimed at, one would think, young males on the drink. And why is it so aimed? Because *it would seem that there is an understanding that those young males do not have the understanding of the consequences of their actions, and if you intend a particular result to occur, it means you must understand the consequences of your actions.*
>
> He was clearly, you might think, affected by liquor. But I'm not raising that as an excuse. But have a think about that when you are

> looking at the whole intention. About whether that young man, when you make a decision about what, in fact, he did do, understood. Because you might think - and it's inexplicable - but you might think that there are some things that he said to the police about what he did. I mean, my learned friend said he downplayed his role. What, 30 to 50 punches in 30 seconds? Sugar Ray Leonard would be proud of that. That's an exaggeration. The same as you might think Mr Bourne described back at the hotel.
>
> You might think from this young man there is still an incomprehension, if, in fact, he did cause the death, of the seriousness of his situation when he's talking to the police. …
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> …
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> … Even if you accept my learned friend's position that [the appellant] inflicted all of those injuries upon [the deceased], *an intention to cause grievous bodily harm implies an understanding of the consequences of your actions*." *(my emphasis)*

[12] After dealing with many of the prosecutor's contentions and referring to aspects of the evidence, defence counsel continued:

> "… but look at some of what [the appellant] said to the police and you might think, ladies and gentlemen, that it was fanciful. You might think that for whatever reason that there was a little bit of exaggeration and machismo coming in to what he told police. Perhaps it is naivety, perhaps it is still at that time the 30 to 50 punches in 30 seconds, not an appreciation of the trouble that he's in, not an appreciation of the fact that the police are accusing him of murdering somebody, not an appreciation that the police think that he has assaulted somebody and killed them and, indeed, not an appreciation that he may have because he says to the police, remember, 'I assaulted him, but I didn't kill him.' "

[13] Defence counsel urged the jury to separate the fact from the fantasy in the appellant's record of interview with police, referring in some detail to aspects of it. The appellant told police he had consumed "a fair bit of alcohol" but claimed that it did not affect him significantly. Defence counsel queried whether this was mere big-noting and exaggerating. The appellant was honest when he told police that he intended to bash the deceased but that did not necessarily mean that he had an intention to do grievous bodily harm. The appellant described the attack as "brutal", but defence counsel queried whether he understood the full implications of that word. After all, he told police that he intended to cause bruising and maybe a couple of broken ribs. Defence counsel submitted that the jury would be left with at least a significant question mark as to what the appellant intended when he assaulted the deceased.

The judge's directions to the jury

[14] The judge gave the following relevant directions to the jury:

> "Someone's state of mind is necessarily a matter of inference to be drawn from other facts established to your satisfaction. So when you are considering whether the [appellant] has been proved guilty of murder, you have to consider all of the circumstances to determine whether you are satisfied beyond reasonable doubt that he had the intention to kill or do grievous bodily harm, whether that is the only inference open on the evidence you accept.
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> I will come back to 'intention' in more detail shortly.
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> …
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> … Unlawful killing amounts to murder if it is done with intent to kill or to do grievous bodily harm.
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> …
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> In this case there are two principal issues for your consideration. … [The second is] are you satisfied beyond reasonable doubt that he did so with intent to cause grievous bodily harm or death?
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> …
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> Now, I will remind you of what the Prosecutor said about intention. He relied on intention to do grievous bodily harm, so you would need to be satisfied beyond reasonable doubt that the [appellant] intended to do [the deceased] grievous bodily harm. What is relevant is intention at the time of the assault. What happened at the hotel, what his intention was as he left the hotel, are relevant to your assessment of whether at the time of the actual assault he had the requisite intention. You can look at what he actually did. You may see that as a reflection of his intention. The prosecutor relied on the same five factors and reminded you that he died from facial wounds. He submitted that whatever Hardy[2] did didn't take away from it having been the [appellant's] intention at least to do grievous bodily harm."

[15] As to defence counsel's submissions on intention, the judge stated that they included:

> "that [the appellant] has consistently admitted that he intended to bash [the deceased] and to teach him a lesson, but he submitted you cannot be satisfied beyond reasonable doubt … that at the time of the assault his intention was even to do grievous bodily harm."

[16] The judge gave the following directions in respect of intoxication and intent:

> "There is another factor which you should take into account in considering whether the [appellant] did have the intention to cause

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[2] Darren James Hardy gave evidence that he saw the deceased's body, flat on its back, near the traffic lights in Bage Street, Nundah. He took a wallet from the deceased's hip area. He did not do any violence to the deceased. The next day, after hearing about the death, Hardy gave the wallet to police, falsely claiming that he found it in the middle of the road. Hardy, who had prior convictions including for violence, denied he assaulted the deceased.

> grievous bodily harm, and that is whether the [appellant] himself was intoxicated, and what effect that had. I have referred to his evidence of what he said he had drunk and his saying that he was still sober and still straight. Well, it is a matter for you, ladies and gentlemen, what you make of that evidence. It may be an indication that he wasn't adversely affected by what he had consumed, which may be very relevant to your consideration of whether he formed the intent to do grievous bodily harm, or it may have been bravado. We all know that alcohol doesn't affect everyone in the same way, or to the same extent. It depends on the level of concentration in the body, and on the individual's tolerance to it.
>
> If you find that the [appellant] was intoxicated, that is relevant to intent. If he was intoxicated, completely or partially, whether intentionally or unintentionally, that is relevant to whether he did in fact form the intent to do grievous bodily harm. Generally a person who is intoxicated can still have the capacity to form the intent, and if it exists a drunken intent is nevertheless an intent. A defendant can't escape criminal responsibility merely because intoxication may have reduced his resistance to giving effect to that intent. But, ladies and gentlemen, it is a very specific intent that has to be proved, and unless you are satisfied beyond reasonable doubt that the defendant did form the intent at least to do grievous bodily harm, you can't find him guilty of murder."

[17] The judge's final jury directions included:

> "So, ladies and gentlemen, before you could find the [appellant] guilty of murder, you would have to be satisfied beyond reasonable doubt that … at the time he assaulted [the deceased] he intended to do him grievous bodily harm or to kill him. If you are not satisfied of both of those elements beyond reasonable doubt, you must find him not guilty of murder. If you are satisfied beyond reasonable doubt that he killed [the deceased], but not satisfied to that standard of his intent, then you will find him guilty of manslaughter. Unlawful killing amounts to murder if it is done with the requisite intent, or otherwise to manslaughter."

[18] The jury first retired to consider its verdict at 11.00 am on the third day of the trial. The prosecutor applied for a redirection in respect of intention, noting that the judge:

> "should have given as a direction that it is intention at the time which is relevant and also when your Honour turned to the intoxication issue, that was at the end of the defence – a summary of the defence submission in relation to intention and may not have specifically identified that this was now a direction from your Honour rather than a summary of the defence."

[19] Although defence counsel submitted that the judge's directions were adequate, the judge gave the following redirection:

> "Ladies and gentlemen, there are two points which I wish to clarify for you. The first is with respect to intention. … The law is that the

> intention must be present at the time of the infliction of the injuries and, secondly, what I said about intoxication was intended as a direction to you as to how you should approach the evidence that the [appellant] had been drinking. It wasn't a summary of anything [defence counsel] had said."

[20] The jury retired again at 11.07 am. Counsel did not seek any further redirections. The appellant makes no complaint about any aspect of counsel's addresses or the judge's directions set out above. I have referred to these matters in some detail so as to place the impugned redirection in context.

The impugned redirection

[21] At 2.36 pm the court reconvened and the judge read out the following note from the jury: "Would ignorance of the consequences of his actions mean intent could not be GBH?"

[22] The judge discussed with counsel the terms of the redirection to be given. Both counsel stated they were content with the proposed redirection which was given in these terms:

> "The issue is whether you are satisfied beyond reasonable doubt that the [appellant] intended to do GBH. It's possible to do GBH without intending to do so. An act can be a willed act, that's a voluntary act, but nevertheless an act not accompanied by a specific intent, such as the intent to do GBH.
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> *If someone does not appreciate that a potential consequence of what he is doing is that he will inflict GBH on the victim, whether GBH constituted by injuries he actually inflicts or some other injury amounting to GBH, he cannot have the intention to inflict harm of that nature.*
>
> The issue, ladies and gentlemen, is whether you are satisfied beyond reasonable doubt that he intended to do GBH of some kind.
>
> Can I ask you, through your speaker, if that answers the question?
>
> SPEAKER: Yes, it does." *(my emphasis)*

[23] The jury retired again to consider its verdict at 2.53 pm. The jury returned with their verdict of guilty of murder just 25 minutes later.

The appellant's contentions

[24] The appellant contends that the impugned redirection was confusing. The final sentence in the first paragraph introduced concepts about willed and voluntary acts which had not featured previously in the trial and could only have distracted the jury from the real question of intent. More importantly, the appellant contends, the italicised passage (the middle paragraph of the redirection) would have led the jury to conclude that, conversely, if the appellant did appreciate that a potential consequence of his assault on the deceased was that he would inflict grievous bodily harm, then he intended to do grievous bodily harm. Whilst the third paragraph of

the redirection was correct, it merely restated the very concept about which the jury were seeking assistance. The appellant's intent was a central issue in the trial. The jury question clearly indicated that it troubled them. A misdirection on such a central issue has the result that the appellant has not had a fair trial according to law and the proviso in s 668E(1A) *Criminal Code* cannot be applied. The appeal must be allowed and a new trial ordered.

Conclusion

[25] It is true, as the respondent contends, that the experienced defence counsel who appeared for the appellant at trial did not submit the impugned redirection was wrong. But that will not assist the respondent if there has been a significant misdirection as to a critical aspect of the trial resulting in a miscarriage of justice.

[26] I consider there is merit in the appellant's contention. The passages from counsel's addresses and the judge's summing-up which I have set out earlier make clear that the question of whether the appellant intended to do grievous bodily harm was one of two major issues in the trial. The terms of the jury's inquiry of the judge indicated that the question of intent was causing them concern. When viewed in the context I have set out, it appears they were concerned about the concepts raised by counsel in the portions of their addresses which I have italicised.[3] Their inquiry seemed to focus on whether, when the appellant assaulted the deceased, he could have intended the consequences of his actions if he may have been ignorant of those consequences.

[27] The first two sentences of the first paragraph of the impugned redirection are correct. The last sentence of the first paragraph does, as the appellant contends, introduce concepts not previously raised in the trial and may have distracted rather than helped the jury, but it was also correct. It is the italicised middle paragraph that is problematic. It, too, is in its terms correct. But the problem is that, in the absence of further explanation, it suggests that, conversely, if the appellant appreciated that a potential consequence of his assault on the deceased was that he could do grievous bodily harm, then he intended to inflict grievous bodily harm. This is clearly wrong. Before the appellant could be convicted of murder under s 302(1)(a) *Criminal Code*, the jury had to be satisfied beyond reasonable doubt that when he assaulted the deceased and caused the death, he actually intended to do "some grievous bodily harm". The element of intention does not equate to a mere awareness at the time of the assault that grievous bodily harm might follow from the assault. After the italicised middle paragraph of the impugned redirection, the judge should have instructed the jury that, before convicting the appellant of murder, they had to be satisfied beyond reasonable doubt that the appellant actually intended to do some grievous bodily harm at the time he assaulted the deceased and caused his death; a mere appreciation at the time of the assault that his actions could have the consequence of causing some grievous bodily harm was not sufficient.

[28] As the appellant submits, whilst the final paragraph of the redirection was also in its terms correct, it merely restated the very concept about which the jury required assistance. It did not correct the critical misleading impression resulting from the italicised middle paragraph of the redirection.

[29] The impugned redirection clearly had an immediate impact on the jury. They returned with their verdict of guilty of murder after a mere 25 minutes. There is

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[3] See [7] and [11] of these reasons.

a real danger they may have done so on the basis that they considered the prosecution had established the element of intent if it proved beyond reasonable doubt that the appellant knew when he assaulted the deceased that his assault could cause grievous bodily harm. They may not have been satisfied beyond reasonable doubt that the appellant then actually intended to do some grievous bodily harm.

[30] In my view, the terms of the impugned redirection concerning the element of intention in the offence of murder amounted to a "wrong decision of any question of law" under s 668E(1) *Criminal Code*.

[31] The case against the appellant for murder was strong and even stronger for manslaughter. But the question of the appellant's intent at the time he assaulted the deceased and caused his death, despite the ferocity of the attack and the appellant's damaging statements to police, was a matter about which properly instructed reasonable juries could have reached different conclusions. The appellant was young, had consumed a lot of alcohol, and did not appear to be well educated or clever. A properly instructed reasonable jury may have found him not guilty of murder but guilty of manslaughter on the basis that the prosecution had not proved beyond reasonable doubt that at the time of the assault he actually intended to do some grievous bodily harm. In those circumstances, the judge's impugned redirection as to a critical element of the offence of murder, which was a major issue at trial, may have led the jury to convict the appellant on a wrong basis. They may have been satisfied beyond reasonable doubt only that he apprehended the assault on the deceased could cause grievous bodily harm without being satisfied beyond reasonable doubt that the appellant then actually intended to cause some grievous bodily harm. In these circumstances I am satisfied that there has been, in addition to a wrong direction on a question of law, a miscarriage of justice under s 668E(1). That being so, s 668E(1A) cannot apply.

[32] I would allow the appeal against conviction, quash the conviction and order a retrial.

[33] **HOLMES JA**: I agree with Justice Chesterman, for the reasons he gives, that the appeal should be dismissed. It is tempting to conjecture from the jury's request for re-direction and the speed with which the verdict was returned that the two were connected, so as to suggest a misapprehension of the direction given. But I do not think that inference can safely or properly be drawn. The direction which the learned trial judge gave was correct in its terms. There is no real basis for supposing that the jury misapplied it by acting on its converse, given that they were immediately reminded that the question was whether they were satisfied beyond a reasonable doubt of the intent to do grievous bodily harm. Nothing in their inquiry suggested that they had misunderstood that direction when it was given earlier; and it is pure speculation to posit that they did so when it was reiterated at this point. And, as Chesterman JA points out, the verdict was amply supported by the evidence.

[34] **CHESTERMAN JA:** The appellant was charged with the murder of Brian Heathcote on 21 January 2007. On 3 March 2010, after a seven day trial, he was convicted and sentenced to life imprisonment. He appeals against his conviction on the ground that the trial judge's charge to the jury misstated the law with the consequence "that the judgment of the court of trial should be set aside on the ground of the wrong decision of (a) question of law." He seeks a re-trial.

[35] Brian Heathcote died as a result of injuries inflicted on him by the appellant on a suburban footpath near the Royal English Hotel at Nundah. He had been at the hotel for some hours and had become quite drunk. The concentration of alcohol in his blood on *post mortem* examination expressed as a percentage was .24 per cent. His behaviour during his sojourn in the hotel was obnoxious to a number of female patrons. He stood near one and stared at her so fixedly that she became uncomfortable. A man in her group spoke to a hotel employee who moved him away. Heathcote pulled up the skirt of another female patron who passed, exposing her pants. He touched the appellant's girlfriend on the bottom and moved his hand to the inside of her leg.

[36] When the deceased left the hotel at about 1.15 am on 21 January 2007 the appellant followed 24 seconds later. When he returned to the hotel 13 minutes later the appellant said to another patron:

> "I bashed a fellow down the road …. He was going around touching women on the backside in the pub."

The appellant said to the woman whose skirt had been raised:

> "I just kicked the shit out of that guy. He won't bother you anymore."

[37] The cause of death was asphyxiation. The deceased's facial structures had been so severely damaged that he could not breathe. His upper jaw was badly fractured and had become separated from the skull and facial bones. Another fracture of the upper jaw had broken the bony connection between the upper jaw and the lower border of the eye. The forensic pathologist described the effect of the injuries as detaching "the whole upper jaw" from "the facial bones". At least "two, if not three … and possibly more" blows of severe force would have been necessary to cause the injuries. A likely mechanism was someone "stomping on the face".

[38] There were as well several large lacerations to the deceased's head and face. One four centimetres long, was located in the middle of the forehead between the eyes. A second laceration ran from the right side of the forehead into the eyebrow. These were consistent with force applied by the sole of a shoe. There was severe bruising in both eyes around which were further lacerations. There were deep abrasions to the right cheek and the right side of the nose and to the left cheek. There was another laceration between the nose and the upper lip. The inside of the deceased's mouth was lacerated.

[39] The injuries were caused by "multiple impacts" of "blunt trauma". The degree of force necessary to inflict the wounds was severe.

[40] The back of the deceased's head and his skull were severely bruised and the skin broken. These injuries were consistent with the deceased's head being compressed onto the concrete footpath on which he died. There were abrasions to his neck and throat consistent with having been caused by punches. Three of his right ribs were fractured and there was bruising over the chest. There were other internal injuries. There was a superficial laceration seven centimetres long on the liver and a smaller laceration to the right adrenal gland. The likely mechanism of these injuries was a severe kick to the deceased's back.

[41] As Heathcote lay dying the appellant stole his watch, mobile phone and some money. On his return to the hotel he gave the phone to a slight acquaintance.

[42] The appellant was questioned by police two days later, on the morning of 23 January 2007. The appellant said that he had left the hotel:

> "for a smoke" and to get "a book or something …" from someone when he saw "the guy that … I'd seen earlier and we ended up clashing together and when the fight was over, it took about … 5 minutes. … he was pretty mangalated but he was still walking … and then I walked back to the pub … ."

[43] When asked to describe the fight the appellant said that he asked the deceased why he had touched women in the hotel but got "no response". He pushed the deceased who "swung a couple of punches". The appellant "swung a couple back and pushed him on the ground … and then … laid into him." He estimated that he had landed between 30 and 50 punches with a closed fist which hit the deceased "in his face, and … jaw." The deceased fell to the ground after the first few punches. The appellant then punched him repeatedly when he was on the ground.

[44] He gave this account:

> "he rolled over … on his side to get up … and when he got up he rolled onto his side, to get back onto his knees … And then I kicked him about four times … In the face."

[45] The appellant elaborated that he had:

> "… kicked (him) a couple more times because I remember … he landed on his back … (I) kicked him in the chest a couple of times as well … and they were just downkickers."

[46] His intention was, he said, to "teach him a lesson" and "to give him … maybe just a couple of broken ribs and a couple of bruises on his face … not what I gave him."

[47] In answer to further questioning the appellant admitted that he had not left the hotel to smoke or collect a book but followed the deceased from the hotel in order to "bash him". His later description of his attack upon the deceased was that it was "Brutal". He described the deceased "trying to roll over and … to get up on his knees … to defend himself … ." The appellant said that he "kicked him one last time and … then … headed back to the … pub."

[48] At the trial two issues were agitated on the appellant's behalf. The first was whether the prosecution had established beyond reasonable doubt that it was the appellant who inflicted the fatal injuries, or whether an identified, opportunistic thief who stole his wallet might have done so. The second issue was whether the prosecution proved beyond reasonable doubt that the appellant intended to kill the deceased or intended to cause him grievous bodily harm.

[49] The jury resolved both issues against the appellant. Only the second issue was argued on appeal. The point taken on his behalf is that the trial judge gave a legally erroneous redirection on the question of intention.

[50] Relevant to that question were, of course, the number and severity of the deceased's injuries, the appellant's account given in the interview of what he said he subjectively intended as well as his description of the assault, his youth, (he was 19 at the time) and his intoxication. He said he had drunk "6 Cougars, 2 Coronas and 3 Jim Beams" but there was no evidence of the strength of the drinks, the period over which he drank them or their effect on his sobriety. In fact he said he was sober and denied slurring his words or "walking funny". He was, he said, a seasoned drinker and the amount consumed on the night in question was "not really that much for (him)".

[51] It is now accepted that the appellant killed the deceased. The killing was unlawful. Section 302(1)(a) of the *Criminal Code* made the killing murder if the appellant, when he killed, "intended to cause his death or intended to do the deceased some grievous bodily harm." Such harm is, for present purposes:

> "any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available."

[52] The trial judge directed the jury in terms which are not criticised. Her Honour said:

> "Someone's state of mind is necessarily a matter of inference to be drawn from other facts established to your satisfaction. So when you are considering whether the defendant has been proven guilty of murder, you have to consider all of the circumstances to determine whether you are satisfied beyond reasonable doubt that he had the intention to kill or do grievous bodily harm, whether that is the only inference open on the evidence you accept."

[53] Her Honour then reminded the jury of some aspects of the evidence and told them plainly that there were "two principal issues" to be decided. The second was whether if the jury was satisfied that the appellant caused Mr Heathcote's death "he did so with intent to cause grievous bodily harm or death."

[54] Her Honour then referred the jury to the evidence of the forensic pathologist who described the injuries suffered by the deceased. They were obviously of cogent relevance to the question of intention.

[55] Her Honour reminded the jury "of what the Prosecutor said about intention":

> "He relied on intention to do grievous bodily harm, so you would need to be satisfied beyond reasonable doubt that the defendant intended to do Mr Heathcote grievous bodily harm. What is relevant is intention at the time of the assault. What happened at the hotel, what his intention was as he left the hotel, are relevant to your assessment of whether at the time of the actual assault he had the requisite intention. You can look at what he actually did. You may see that as a reflection of his intention."

[56] Her Honour next turned to the submissions made on behalf of the appellant:

> "… defence counsel put it to you that his client had always admitted that his intention was to bash Heathcote and teach him a lesson. But he put to you that an intention to do grievous bodily harm implies

> some comprehension of the consequences of that action, and that given the defendant's youth and naivety, you would have some reasonable doubt about that."

[57] The trial judge then turned to other matters including the relevance of the appellant's intoxication to the question of intention. Her Honour concluded, on this point:

> "But, ladies and gentlemen, it is a very specific intent that has to be proved, and unless you are satisfied beyond reasonable doubt that the defendant did form the intent at least to do grievous bodily harm, you can't find him guilty of murder.
>
> …
>
> So … before you could find (the appellant) guilty of murder, you would have to be satisfied beyond reasonable doubt that he killed Mr Heathcote, and you would have to be satisfied beyond reasonable doubt that at the time he assaulted Mr Heathcote he intended to do him grievous bodily harm or to kill him. If you are not satisfied of both of those elements beyond reasonable doubt, you must find him not guilty of murder. If you are satisfied beyond doubt that he killed Mr Heathcote, but not satisfied to that standard of his intent, then you will find him guilty of manslaughter. Unlawful killing amounts to murder if it is done with the requisite intent, or otherwise to manslaughter."

[58] The jury retired at 11.00 am on the seventh day of the trial. Her Honour was asked by the prosecutor to give a further direction. That was done. Nothing turns upon the request or that redirection. At 2.36 pm the court reconvened to consider a question the jury had delivered to the judge. The question was:

> "Would ignorance of the consequences of his actions mean intent could not be GBH?"

[59] Counsel who appeared on the appeal but not at trial thought that the likely provenance of the question was an argument advanced at trial on behalf of the appellant that:

> "… intention … to cause grievous bodily harm or to kill … carries with it an inference that there is an understanding of the consequences of your actions and that is something that you might need to consider here. … young males do not have the understanding of the consequences of their actions, and if you intend a particular result to occur, it means you must understand the consequences of your actions.
>
> …
>
> Even if you accept (the prosecutor's) position that (the appellant) inflicted all of those injuries upon (the deceased), an intention to cause grievous bodily harm implies an understanding of the consequences of your actions."

[60] The jury's question appears to be directed to this argument and asks, in effect, whether, if the appellant did not know or understand that his actions might cause grievous bodily harm, it could be inferred from those actions that he intended to cause grievous bodily harm.

[61] The trial judge discussed the question with counsel and formulated a redirection with which they agreed. Upon the jury's return the trial judge instructed them:

> "The issue is whether you are satisfied beyond reasonable doubt that (the appellant) intended to do GBH. It's possible to do GBH without intending to do so. An act can be a willed act, that's a voluntary act, but nevertheless an act not accompanied by a specific intent, such as the intent to do GBH.
>
> If someone does not appreciate that a potential consequence of what he is doing is that he will inflict GBH on the victim, where GBH constituted by injuries he actually inflicts or some other injury amounting to GBH, he cannot have the intention to inflict harm of that nature.
>
> The issue, ladies and gentlemen, is whether you are satisfied beyond reasonable doubt that he intended to do GBH of some kind."

[62] Having delivered that charge the trial judge asked the jury whether it answered their question. The foreman replied that it did and the jury retired. Twenty five minutes later the jury convicted.

[63] It is the content of the redirection which is said to be wrong thus giving rise to an error of law vitiating the verdict. The appellant's criticism of the redirection resorts to a precise dissection and analysis of each sentence. The first paragraph was said to be:

- Repetitious;
- Dangerous;
- Confusing by introducing unnecessarily concepts taken from s 23 of the *Criminal Code*.

The complaint that the first sentence was mere repetition can be ignored. The complaint that the direction was dangerous comes from the explanation in the second sentence that "It's possible to do GBH without intending to do so." An intention to kill or cause grievous bodily harm is essential if murder is to be proved and the impugned sentence was said to suggest a permissible detraction from that requirement. The third complaint was that the reference to willed and voluntary acts was confusing and likely to disturb the jury's proper reasoning in relation to intention.

[64] The criticisms are not, in my opinion, valid. The first paragraph of the direction cannot fairly be read as an abrogation of the explanation given emphatically in the summing up that the appellant could not be convicted of murder unless the jury was satisfied beyond reasonable doubt that he intended to cause Heathcote grievous bodily harm. (The case was not put on the basis that he intended to kill). The second and third sentences of the paragraph cannot be separated. They were not offered as separate propositions, and would not have been understood as such.

[65] The clear meaning of the direction is that the infliction of grievous bodily harm does not, by itself, indicate that its infliction was intentional. What the trial judge conveyed by the charge was that one might intend to strike but not intend to wound. The direction pointed out that grievous bodily harm might be caused unintentionally as the result of an act, a blow, that was deliberate, intended, but unaccompanied by an intention to bring about the result that grievous bodily harm be suffered. That was the point of the reference to willed and voluntary acts. The concept was relevant to the question asked by the jury which would not have understood the terms to refer to s 23 of the *Code*. The use of the terms "willed, voluntary acts" was not, in the context in which they were used, confusing.

[66] The appellant's real criticism focused on the second paragraph. It was said to invite the jury to convict on an improper basis *viz*, that by referring to a "potential consequence" the trial judge invited the jury to consider that it was not necessary that the appellant intended to cause grievous bodily when he assaulted the deceased: he could be convicted if at the time of the assault he appreciated that grievous bodily harm was a potential consequence of his kicks and punches.

[67] The paraphrase does not do justice to what the trial judge said. Her Honour was addressing the point that had been debated in addresses. She was concerned to answer the question whether the jury could, or should, infer an intent to cause grievous bodily harm from the fact of the assault if the appellant during the assault was ignorant of what consequences might flow from it. The answer was favourable to the appellant. The jury was told that if an attacker did not appreciate that a potential consequence of his attack was the infliction of grievous bodily harm then it could not be inferred from the attack that grievous bodily harm was intended.

[68] As a matter of commonsense and the logic of experience the direction was correct. It would in the circumstances postulated be unsafe to infer that the attacker intended to cause grievous bodily harm if he did not understand that his blows might have that consequence.

[69] Counsel for the appellant who appeared *pro bono* and argued with earnestness and perseverance accepted the correctness of the direction but moved the point of attack. Ms Wilson submitted that the jury could misuse the direction and reason that its converse was true: if the appellant did appreciate that a potential consequence of his actions was that he would inflict grievous bodily harm he did intend to inflict that harm.

[70] The fundamental difficulty with the argument is that it finds an error of law in something the trial judge did not say. The redirection addressed a particular question and gave it a true answer. That the answer might have been wrong if altered and addressed to a different question is no basis for setting aside the verdict. The task of trial judges is difficult enough. If their obligations extend to ensuring that a jury does not err as a consequence of what the judge does not say I doubt human wit could devise a summing up which would satisfy a Court of Criminal Appeal.

[71] The redirection addressed the specific point which was troubling the jury: could they infer intent if they thought the appellant did not appreciate his blows might cause grievous bodily harm? Having given the negative answer the trial judge inquired specifically whether it addressed their concern and was told it had. There is nothing in the record to indicate that the jury had a different concern which they

had not communicated to the trial judge and to which they applied a different answer from that given to the question they had articulated.

[72] The "converse" proposition may be understood in alternative formulations. One is that if the appellant did appreciate that a potential consequence of his actions was that he might inflict grievous bodily harm he intended to cause that harm. The second is that if he had the same understanding his actions in commencing or persisting with the attack could give rise to the inference that he intended to inflict grievous bodily harm.

[73] The second formulation is not necessarily wrong though it is incomplete. If an attacker appreciated that a potential consequence of his attack was the infliction of grievous bodily harm, the fact that he commenced or continued the attack is a basis for inferring that he did intend to cause such harm. Whether the inference could, or should, be drawn in a particular case will depend upon other relevant circumstances: the degree of force, the use of a weapon, the number of blows, the existence of animosity towards the victim by the attacker, what the attacker said he intended, and the attacker's intoxication, to give some examples. The circumstances contained in the converse proposition is one of the relevant factors. It may not itself be sufficient to support the inference.

[74] The first formulation is wrong: it equates the requisite intention with the appreciation that grievous bodily harm might result from the attack. It replaces the statutory necessary intention with knowledge of a possibility.

[75] The appellant's submission invites the court to conclude that the jury understood the redirection to convey the first formulation of the converse proposition. This gives rise to the problem I mentioned earlier. There is nothing in the record of the trial that either formulation of the converse proposition ever occurred to anyone or played any part in the jury's deliberations.

[76] What is clear is that the trial judge gave comprehensive directions about what the jury had to be satisfied of before they could convict of murder. The jury was advised of the process of inference, the inference (intention) which had to be proved beyond reasonable doubt before the appellant could be convicted of murder and the circumstances, *pro* and *con*, relied on by prosecution and defence for drawing or not drawing the inference.

[77] There is no basis for thinking that the jury had forgotten those instructions when they considered their verdict after the redirection. If the jury reasoned in accordance with the instruction they could not have accepted either formulation of the converse proposition which is antithetical to the directions actually given.

[78] The redirection and the criticism of it must be seen in context. The verdict is not surprising. The case for murder was strong. The attack was brutal and callous, as shown by the theft from the dying man. The number of blows, the force of their delivery and their infliction on a supine victim speaks of the intention the jury found. The only indication against the inference was the appellant's intoxication, but he himself said he was sober. There is nothing to indicate error in the verdict. The criticisms of the summing up are without substance. The appeal should be dismissed.