SUPREME COURT OF QUEENSLAND

CITATION:	*R v Handley* [2011] QCA 361
PARTIES:	**R** **v** **HANDLEY, Clint Owen** (appellant)
FILE NO/S:	CA No 134 of 2011 SC No 135 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2011
JUDGES:	Muir and White JJA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of one count of murder – where the appellant stabbed the deceased once in the abdomen with a knife and then fled the scene – where the appellant threatened the deceased immediately after the stabbing – where there was evidence that the deceased was also armed with a knife at or around the relevant time – where a number of witnesses testified that the appellant was the aggressor – where the appellant was intoxicated at the relevant time – whether the jury could be satisfied beyond reasonable doubt of the appellant's intention to kill or cause grievous bodily harm – whether the verdict was unsafe or unsatisfactory CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the primary judge directed the jury on intent – where the appellant submitted that the primary judge erred in failing to relate the direction to the facts of the case – where the appellant argued that the jury should have been told to

consider intoxication – whether the primary judge inadequately directed the jury on intent – whether the failure to give certain directions gave rise to a miscarriage of justice

Criminal Code 1899 (Qld), s 620

Cutter v The Queen (1997) 71 ALJR 638; [1997] HCA 7, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Dunrobin [2008] QCA 116, cited
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v Rope [2010] QCA 194, cited
R v Willmot (No 2) [1985] 2 Qd R 413, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, considered

COUNSEL: S M Ryan for the appellant
D C Boyle for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** The appellant was convicted of the murder of Rafal Jagoszewski on 25 May 2011 after a six day trial in the Supreme Court in Brisbane. He appeals on grounds that:

(a) The conviction is unsafe and unsatisfactory and cannot be supported having regard to the evidence; and
(b) There was a miscarriage of justice in that the primary judge's directions about intention were inadequate.

The evidence

[2] In order to give due consideration of the first ground of appeal, it is necessary to analyse the evidence in some detail. The deceased was killed at 8 Schmidt Road, Eagleby on 3 September 2008 in a house owned by Ms Jenny Bryant. She lived there with her partner, her daughters, Yasmine, Hope, Theresa and Dana Church, and others, including the deceased.

[3] On 3 September 2008, the appellant drove himself and three companions to the house. He and his co-accused, Kevin Turbill, got out of the car. The appellant entered the yard of the house and called out for the deceased, who appeared. They argued about motor bikes in the front yard. The appellant punched the deceased once and then noticed that the deceased had a flick knife. The appellant called for a knife and Kevin Turbill brought one to him from the car. The deceased and the appellant continued to argue. There was some controversy about whether the appellant pursued the deceased into the house or whether the appellant was retreating from the deceased. The appellant stabbed the deceased once in the abdomen and the deceased died from loss of blood after surgical attempts to repair his injuries.

[4] I shall now summarise the evidence of the key witnesses.

[5] **Hope Church** was born in November 1991 and was one of Ms Bryant's four daughters. She said that the deceased had been staying in the house for about two

weeks as of 3 September 2008. At about 4.00 pm that day, a car pulled up outside the house. The appellant jumped the fence into the front yard and called out the deceased's name. Looking through a window of the lounge room, she saw the deceased come around the side of the house. He was punched in the face by the appellant and fell down. He got back up and the appellant called out for a knife.

[6] Two females and a male had arrived in the car with the appellant. In response to the appellant's request, the male who had been in the car took a knife from the boot of the car, jumped the fence and gave it to the appellant. While this was happening, the deceased walked back inside the house, which was lowset. After being given the knife, which had a blade about 20 centimetres long and was "[l]ike a hunting knife", the appellant came to the front screen door, which she and the deceased were trying to lock and stabbed it with his knife. She and the deceased jumped back. The appellant entered the lounge room and stabbed the deceased. She did not see the deceased act in a threatening way towards the appellant.

[7] In cross-examination, she accepted that she had informed police on 3 September 2008 that the deceased was carrying a small pocket knife in the front yard of the house when struck by the appellant. She accepted that, at the committal hearing, she had said words to the effect that she thought that the deceased probably had his pocket knife in his right hand when stabbed and that she thought that the knife was closed at the time. It was suggested to her that the deceased was swinging the knife held by him towards the appellant. She responded, "If you say so". She accepted that she had agreed at the committal that before calling out for the deceased, the appellant had called out for Ms Bryant. From her observations, she believed that the appellant was under the influence of drugs. She accepted that after the stabbing, the appellant said words to the effect, "If [the deceased]'s still here tonight, I'm going to bomb this house". She denied that the deceased swung the knife he was carrying towards the appellant and that the appellant "backed up to the front patio area outside the front door of the house".

[8] **Yasmine Church**, who was born in March 1990, was Ms Bryant's eldest daughter. She was lying down when she heard the appellant, who was known to her, say, "Where the fuck is [the deceased]?" She got off the bed and walked into the front yard of the house. She observed that there were three people in the car. The appellant was facing the deceased in the yard. The deceased said something to the effect that "he didn't have the motorbikes up here". The appellant started "yelling more" and punched the deceased in the face. He then called out, "Get the gun". She saw a man get out of the car. The appellant called out, "No, get a knife. He's got a knife". The other male then jumped the fence and handed the appellant a knife, which had a gold handle and looked like a hunting knife.

[9] The appellant was "yelling and screaming" saying, "I want my motorbikes". She and the deceased walked to the front door and went inside, despite the other male trying to prevent the deceased's departure. The appellant was "yelling and screaming and trying to open the front door". He eventually succeeded. The yelling and screaming continued. The appellant went inside, walked towards the deceased with the knife in his hand and said something along the lines of, "You better get this cunt out of here, otherwise I'm going to blow the house up tonight". She said, "Get the fuck out of the house. You're scaring Dana. There are kids in here". The other male was at the screen door holding it open. The appellant moved towards where the deceased was standing and stabbed him in the lower stomach.

She did not see the deceased "doing anything of an aggressive nature towards [the appellant]", who then ran out of the house.

[10] In cross-examination, she agreed that in a statement given to police on 3 September 2008 she had said that when the deceased and the appellant were inside the house the deceased had a pocket knife in his right hand and that both of his hands were down beside his body. She agreed that she had said, at the committal hearing, that she did not see the deceased with a knife at the time. She agreed that at the committal hearing she had said that when the appellant was arguing with the deceased in the front yard, she had seen that the deceased "had a knife down beside him".

[11] She accepted that, at the committal hearing, she had agreed that she recognised the knife which the deceased had during the incident as Taylor Walpole's. She said that the appellant's eyes were bloodshot and glassy, she had difficulty in making out what he was saying at times and he "appeared affected by drugs or alcohol or both". After the stabbing, the appellant ran back to the car.

[12] **Taylor Walpole** said that on the afternoon of 3 September 2008, he was in the backyard of the house with the deceased who had carved his initials into a tree with Mr Walpole's Smith and Wesson flick knife. He heard a car pull up followed by a person or persons "yelling … aggressively". He and the deceased walked to the front yard. Two men ran to the deceased. He walked into the house through the back door to "tell the kids to stay inside and to see if they were okay". He then went to the front door and stood in the doorway. He saw the appellant punch the deceased in the face. The appellant called out, "Get the knife". The other man jumped the fence, went to the car and came back over the fence. By this time, the deceased had moved to the front door of the house. The appellant had wedged the deceased between the doorframe and the door saying, "I want my bikes. I want my bikes".

[13] When the appellant turned around to grab the knife from the other man, the deceased entered the house. The appellant called out, "I want my bikes, come outside and fight me". The deceased said, "I'm not coming outside with you and your friend". The appellant pulled the door open. The deceased jumped backwards as the appellant came inside waving the knife. The appellant then lunged forward and stabbed the deceased. He was pretty sure that at the time Mr Turbill was holding the screen door open.

[14] After the deceased was stabbed, the appellant and Mr Turbill ran off. He did not see the deceased doing anything aggressive towards the appellant in the house, "He was just telling him to get out". He admitted that in a statement provided to police on the evening of the incident, he said that when the deceased went around to the front yard of the house he was concealing the flick knife in his left hand. He accepted that he had said in the statement that he did not see the deceased holding anything in his hands when he was stabbed. He agreed that at the committal hearing he had said that he saw the deceased put the knife on the computer table. He said that he had seen the deceased smoking cannabis on the day he was killed. He agreed that at the committal hearing he had said that it looked as if the deceased was trying to grab the appellant to take him outside, but the appellant would not go.

[15] **Joshua Meyers** was 15 at the time of the incident. He was in the lounge room of the house when he saw "a guy [the appellant] walking towards everyone … yelling stuff out". He had a friend with him and he had a knife. The appellant was saying something about bikes to the deceased. The deceased came to the screen door, went inside and closed it. The argument continued with the deceased inside and the appellant outside and the appellant tried to stab the deceased through the door. The deceased stepped back. The appellant "ripped it open, and he's inside waving the knife around and saying stuff". Yasmine and Taylor came in and told "everyone to get out of the house". He went into the kitchen and when he returned to the lounge room the deceased had been stabbed and was lying on the couch.

[16] In cross-examination, he denied seeing the deceased holding a knife. He accepted that an argument had taken place between the deceased and the appellant over bikes. He recalled that the deceased had smoked cannabis through a bong that day.

[17] **Peter Hoggren**, also 15 at the time, was at the house that day. In an interview with a police officer on 3 September 2008, he said that a person jumped the fence. The deceased came out from the back yard and he heard someone get hit. The deceased came in through the door. He saw a knife come through the front door and then he and Joshua Meyers went into the kitchen. He heard Yasmine screaming and ran back to the lounge room where he saw the deceased lying on the couch. In his oral evidence, he said that the appellant ripped the screen door open and that on entering the room, made slashing motions with the knife. He heard the appellant say, "I want me bikes back and I want 'em now" at about the time the door was ripped open.

[18] **Nicholas Hudson**, who was 13 years old at the time, was at the house fixing his bike when two men arrived asking for the deceased. At one stage, one of the men asked for a gun and was given a knife. The deceased went inside the house and one of the males stabbed through the screen door. At some stage, the appellant said, "If this idiot isn't out of your house by (indistinct), then we'll come back tonight and they'll blow it up".

[19] The deceased "had like a pocket knife". The appellant was saying to the deceased, "stab me right here" as he lifted up his shirt. Then the appellant quickly stabbed the deceased who fell backwards and the appellant and the other man ran out to the car and left.

[20] **Cassandra Stegman**, who was 21 at the time of the trial, said that at the invitation of the appellant, Kassandra Mengel and Mr Turbill, who were then complete strangers, she got in a car with them. They went to a house in Crestmead where they had a drink. Later in the day they drove to the house after she and the appellant had taken "speed". The appellant and Mr Turbill got out of the car and a girl opened the front door. She heard an argument taking place. A man came out of the front door. She was not sure whether she and the other occupants of the car had got out of it by this stage. She heard the appellant call out, "Get the knife". Mr Turbill came back, obtained a knife and a knuckleduster and took the knife to the appellant.

[21] Kassandra said to her, "Oh, my God, he did it". Mr Turbill was trying to pull the appellant away and to get him back to the car. They were all yelling, "Get back in the car, get back in the car". The appellant, who had driven to the house, returned to the car with a knife in his hands and drove off. She accepted that drugs had affected her recollection of relevant events. She accepted that when he got back to the car, the appellant said, "Look, it didn't go in too far. The knife didn't go in too deep".

[22] **Kassandra Mengel**, who was a close friend of the appellant, was 20 years of age at the time of the incident. She gave evidence to the following effect.

[23] She, the appellant, Ms Stegman and Mr Turbill drove to the house. She saw the appellant punch the deceased and the deceased go inside the house. The appellant and the deceased were standing at the door for a while. By then, she was standing at the fence in a very intoxicated state so that she could not be certain of her recollection. She described her condition as "pretty wasted". She thought that the deceased had something in his hands, but could not be certain, "… he was like slashing it like it was a knife at [the appellant] and [the appellant] kept stepping back or [the deceased] would have got him". She continued:

> "That went on for a bit and then they both lunged at each other and that's when I noticed that [the appellant] had a knife as well and that's when [the deceased] got stabbed."

[24] The deceased hunched over and fell backwards into the house and there was a lot of screaming. She jumped into the car because Mr Turbill was jumping the fence. The appellant jumped into the car and drove off.

[25] In cross-examination, she accepted that the appellant seemed "to have some unexplained mood swings". She accepted that, at one stage when the deceased was making a slashing movement, it looked as if the deceased was advancing on the appellant, who had to step back. She said, "[the deceased] lunged and just before he got close enough to [the appellant], that's when [the appellant] lunged". She then saw the deceased "hunch over". She accepted that when the appellant lunged towards the deceased, the deceased was moving towards him.

[26] **Jade Davidson** gave evidence that about four hours after the appellant and others went to her house, the appellant returned and used bleach to wash a knife in a laundry sink.

[27] **Joshua Jackson** said that the blade was blunt such that "you couldn't cut yourself" with its edge. In cross-examination, he accepted that the knife came to a point at the end, but said, "you'd have to apply pressure for it to do anything".

[28] **Dr Milne**, the pathologist who conducted a post-mortem examination of the deceased, said that the deceased's most significant injuries were cuts to the aorta which resulted in blood loss. The wound, as well as cutting the aorta, injured the deceased's liver. He said that the application of at least moderate force was required to make such a wound and that in this case the most significant factor in determining the force required was the sharpness of the tip of the knife. The knife was not recovered. He accepted that "in some instances a mild force could also penetrate the abdomen".

[29] **Dr Du Flou**, a forensic pathologist called by the defence, stated that the amount of force required to inflict a wound of the nature of the subject wound was dependent on the knife and, in particular, on the sharpness of its point. With a sharp knife, the application of a relatively minor amount of force may have caused such an injury. That would not exclude, of course, the possibility that significantly more force was in fact used.

The appellant's evidence

[30] Interviewed by police on 3 September 2008, the appellant said that he used to get calls from the deceased threatening him and his family and that he had gone to the

deceased's place to confront him about it. He said that the deceased started swinging a knife at him and: [1]

> "Just left with my life, mate. I've been stabbed before, he had a fucking knife in his hand and he was telling me he wanted to kill me, he, you know what I mean.
>
> …
>
> Well I was threatened mate so I got, I got a knife and yeah I've got him.
>
> …
>
> Yeah he was swinging for me head, swinging for me throat like trying to cut me. I ran and I swang forward with my knife, like with my knife like and just got him once in the stomach and then, yeah."

[31] The appellant said he was furious because of the threats made to his children. He said in relation to the deceased's conduct:[2]

> "He was fucking swinging it at me mate, calling me a fucking dog and whatever else he was carrying on about. It was bloody terrible because I was freaked out for my life mate. I've been stabbed before, I've been the victim of a stabbing before and I thought fuck that shit mate."

[32] The appellant's oral evidence on the trial was to the following effect. He was 29 at the time of the trial. He had previously been stabbed and had spent 10 days to two weeks in hospital, some of which was spent on life support. He had known the deceased since about mid-2007 and had had business dealings with him to "help him out". When the deceased's relationship with a woman broke up in around mid-2008, the deceased was taking drugs. Although he was still friendly with the deceased, he was receiving threatening phone calls which he could tell were being made by the deceased. They included threats to "get" his children. He knew that the deceased had "guns and stuff… [i]n his safe in his bedroom".

[33] On 3 September 2008, having taken "speed" and consumed a considerable quantity of alcohol, he drove to Jenny Bryant's house because he wanted to see if she wanted some "speed". He asked the other occupants of the car if they wanted to come into the house with him. The girls said they would stay in the car but Mr Turbill agreed to come in with him. He knocked on the front door and asked for Jenny. Either Yasmine or Hope answered the door and said that she was not there. He yelled out, "Is [the deceased] there?" and was told "No". He then noticed the deceased and walked over to him saying:

> "What's with the phone calls? What's with the dirt bikes? Where's the money, you know what I mean? I thought we were mates, stuff like that."

[34] He became angry and punched the deceased in the face. He then noticed that the deceased had a knife in his hand. The blade was out and the deceased started swinging it at him. He jumped back and then walked backwards to avoid it. He called out, "Grab the gun" to Mr Turbill to try and scare off the deceased. He then called out, "No, not the gun. Grab the knife". By the time he was given the knife, he was standing just to the left of the door. The deceased was coming towards him,

---

1 Record 433.

2 Record 443.

swinging. He was "freaking out" as he had been stabbed before. He backed up against the wall. It looked as if the deceased was going to lunge at him and "that's when [he] poked the knife forward". He did not realise that he had stabbed the deceased at first, but he heard the deceased say, "Ah" and saw blood on the knife's tip. He freaked out and took off. He denied intending to injure or kill the deceased.

[35] In cross-examination, the appellant said that his purpose in going to the house was to supply Jenny Bryant with "speed" or amphetamines. He accepted that he was a dealer in methylamphetamine at the time. He accepted that he had told police that he had gone to the house to confront the deceased. He accepted also that "a couple of points of speed really didn't affect [him] that much" and that he was an experienced drinker at the time.

The inadequacy of directions in relation to intention – The appellant's argument

[36] The substance of the complaint made by the appellant is that the primary judge, in directing on intention, failed to relate her direction to the facts of the case. It was submitted that the jury should have been told to consider not only intoxication, but whether, intoxicated or not, the appellant was lashing out in fear or anger or with bravado or aggression, without an intention to cause any particular result or without thought of producing any particular result.

[37] There was evidence which suggested that the appellant may have been acting without an intention to cause grievous bodily harm or death. He entered the yard without a weapon. He inflicted only one wound to the deceased's abdomen. He threatened to blow up the house if the deceased was still there the next day. That threat reflected the appellant's state of mind immediately after the stabbing.

[38] The primary judge's summary of the defence arguments was in very general terms and was no substitute for an explanation by the primary judge of how the law of intention applied to the facts of the case.[3] In particular, the primary judge should have drawn to the attention of the jury those facts relevant to the jury's determination of whether the requisite intention existed. There was no application for re-direction, but given the significance of the issue to the appellant's chance of acquittal on a count of murder, the inadequacy of the directions led to a miscarriage of justice.

The inadequacy of directions about intention – Consideration

[39] The primary judge directed the jury on several occasions that the prosecution had to prove beyond reasonable doubt that the appellant intended to cause death or grievous bodily harm to the deceased.[4] The primary judge provided the jury with written directions which included reference to the element of intention and her Honour gave a standard direction[5] concerning the relevance of intoxication to intent.

[40] The primary judge summarised the prosecutor's and defence counsel's submissions in relation to intent in some detail. In relation to the latter, she referred to defence counsel's reliance on: there being only one stab wound; the evidence suggesting that the force applied was no more than mild to moderate; the evidence that the appellant

---

3 See *R v Mogg* [2000] QCA 244; *R v Dunrobin* [2008] QCA 116; *R v Rope* [2010] QCA 194; and s 620 of the *Criminal Code* 1899 (Qld).

4 Record 350, ll 50; 370, ll 50; 371, ll 45; 393, ll 49 (in which there was a reference to intoxication); 401, ll 50.

5 Record 385-387.

was "backed in"; the absence of evidence of a drug debt; the evidence that the appellant asked for Ms Bryant first and the appellant's history of having been stabbed himself.

[41] The primary judge then summarised the prosecutor's treatment of intention and the matters from which he submitted an intention to cause grievous bodily harm or to kill could be inferred. He relied on the nature and extent of the injury, the nature of the knife, the appellant's alleged motive for going to the house, the location at which the stabbing occurred and the appellant's statement in his police interview that he was not afraid of the deceased.

[42] Counsel for the respondent referred to the following passage from the joint reasons in *RPS v The Queen*:[6]

> "It is for the jury, and the jury alone, to decide the facts. As we have said, in some cases a judge must give the jury warnings about how they go about that task. And, of course, it has long been held that a trial judge may comment (and comment strongly) on factual issues. But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel."

[43] With regard to these observations, it was submitted that it was preferable for the primary judge to have proceeded as she did and this avoided speculation about the appellant's motivations for stabbing the deceased.

[44] "Intention" is a common word in everyday usage and was not difficult to comprehend in the context in which it was used. It is normally thought undesirable to explain its meaning unless the jury seeks assistance or where it is necessary to distinguish between intention and, for example, the accused's motives, desires, reasons or expectation.[7] It was referred to many times during the summing up and, in some instances, in a context which must have conveyed its meaning to the jurors, if any were in any doubt about it. In this regard, I have in mind the discussion of intoxication and the summary of the respective submissions of the prosecutor and defence counsel.

[45] The fact that the concept which the jury had to apply was straight forward is relevant to the question of whether the primary judge erred in law in not following the course the appellant suggested. It would have been desirable, in my view, for an explanation to have been given of ways in which intention may be inferred or deduced along the lines of the pro-forma in the bench book. That would have assisted the jury and ensured jurors understood ways in which the existence or non-existence of intent could be determined. I am not persuaded, however, that the failure to give such a direction constituted an appellable error.

[46] Although the evidence was spread over a few days, the evidence of each witness was fairly brief. The facts were also in short compass and far from complex. The critical evidence, apart from the medical evidence about which there was no

---

6 (2000) 199 CLR 620 at 637 [42].

7 *Cutter v The Queen* (1997) 71 ALJR 638 at 648; and *R v Willmot (No 2)* [1985] 2 Qd R 413 at 418-419.

material controversy, concerned what had happened at the house between the deceased and the appellant within a matter of minutes. The many references in the summing up to intention and the discussions relating to it, in my view, served to relate the issue of intention to the facts of the case. It is apparent from the summing up that the addresses, as one might expect, dealt with the ascertaining of intention by means of the drawing of inferences from particular facts and circumstances. In the circumstances, there was no obvious need for an explanation, which had the authority of the Court behind it, of a matter about which there was unlikely to be doubt or confusion.

[47] Defence counsel perceived no difficulty with the directions and there was no request for a re-direction. That, one might think, was not particularly surprising having regard to the matters discussed shortly in relation to the other ground of appeal. Considered objectively, it would have been a sound forensic decision to avoid a re-direction which would have presented the jury with a balanced view of the facts relevant to the determination of the issue of intention. In my view, the matters complained of by the appellant were not productive of any unfairness to him.

[48] As counsel for the respondent pointed out, it was the appellant's own evidence that he had in mind at the time the serious consequences of being stabbed in the abdomen as a result of his own previous experience. That, coupled with the very act of stabbing a person in the stomach with a knife, pointed strongly to an intention to inflict, at least, grievous bodily harm. This ground was not made out.

The unsafe and unsatisfactory ground

[49] The argument advanced by counsel for the appellant centred around the question of intention. It was submitted that, even if the evidence about the appellant following the deceased into the house was accepted by the jury, that did not conclude the issue of intention against him. Having regard to the evidence about the nature of the wound and the appellant's statements after it was inflicted, including his statement that the knife did not go in too deep, and the unlikelihood of the deceased disarming himself, a reasonable jury ought to have been left with a reasonable doubt about the intention with which the appellant acted. In this regard, it was submitted that the evidence of many of the eye witnesses in the house should have been regarded unreliable. It was pointed out that the Church sisters avoided any mention in their evidence-in-chief of the flick knife held by the deceased. And it was said to reflect adversely on the prosecution evidence that a person or persons within the house removed both the flick knife and the evidence of the smoking of cannabis before the police arrived.

[50] Counsel for the respondent submitted that the weight of the evidence before the jury was to the effect that the appellant, having called for and obtained a knife, pursued the deceased who was trying to escape from him, entered the house and stabbed the deceased once in the abdomen before absconding. It was submitted that it was open for the jury to conclude that when the appellant inflicted the wound on the deceased he had an intention to kill or to do grievous bodily harm.

[51] The appellant's conduct was singularly aggressive. The thrust of the bulk of the evidence was that he was angry on arrival at the house. He berated the deceased about bikes, and possibly other matters, and punched him in the face. Undeterred by the knife held by the deceased, he sought his own weapon and pursued the deceased with it.

[52] Even on the appellant's own evidence, he thrust his knife at the deceased and, as counsel for the respondent submitted, the weight of the evidence was that the

appellant pursued the deceased into the house brandishing his knife and displaying obvious signs of anger and aggression before delivering the fatal blow.

[53] There were some unsatisfactory aspects of the evidence of the Church sisters, but their evidence generally received substantial corroboration from the evidence of Taylor Walpole, Joshua Meyers, Nicholas Hudson and Peter Hoggren. The last three witnesses just mentioned reported the appellant making stabbing motions or brandishing the knife through the door of the house. Their evidence is consistent with the stabbing of the deceased inside the house. Like the evidence of the Church sisters, it is not consistent with the deceased being the aggressor or even behaving aggressively at or about the time of his stabbing.

[54] The fact that evidence of cannabis use was removed says little if anything about the credibility of any witness, let alone the substantial number of witnesses who saw or heard the whole or part of the incident. Similarly, the removal of the flick knife cannot be used to impugn the credibility of the eye witnesses generally. There was no evidence of a general conspiracy between people in the house to present false evidence and the Church sisters, Taylor Walpole and Nicholas Hudson all told police, when interviewed after the incident, about the knife held by the deceased.

[55] Kassandra Mengel admitted being very intoxicated at relevant times and Cassandra Stegman did not see a great deal of what happened during the incident. The appellant's evidence suffered, not only from its general inconsistency with that of the great bulk of the other witnesses, but from the inconsistency between his evidence on the trial and what he had told police on 3 September 2008. In particular, he gave different accounts of his reason for going to the house.

[56] The question to be determined on appeal is whether it was open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt.[8] In answering that question, this Court must have regard to the advantage enjoyed by the jury as a result of seeing and hearing the witnesses and thus being able to evaluate what they had seen and heard as part of a continuing process supplemented by addresses and the summing up.

[57] It was well open to the jury to assess the conflicting evidence and the credibility and reliability of the various witnesses. That is a jury's traditional role. Even if they accepted that the statement about blowing up the house was made after the stabbing, it demonstrated an extreme level of animosity and was not inconsistent with an intention to do grievous bodily harm.

[58] I am not persuaded that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. This ground of appeal was not made out either and I would order that the appeal be dismissed.

[59] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with those reasons that the appeal should be dismissed. I wish to make only a brief comment about the complaint that the primary judge's directions about intention were inadequate.

[60] In the early part of her summing up her Honour gave the standard direction about drawing inferences or conclusions from proved facts.[9] Later, her Honour told the jury that:

---

8 *M v The Queen* (1994) 181 CLR 487 at 494-495.

9 AR 356.

> "When I say the prosecution must prove that the accused intended to cause death or grievous bodily harm, that's not about motive or desire, it's what he meant to do. That's what they must prove, that he meant to cause death or grievous bodily harm. So that's murder."[10]

As Muir JA has commented, her Honour directed about intoxication and its possible impact upon the formation of the requisite intention[11] but nowhere did her Honour identify for the jury the several facts which, if proved to their satisfaction, might have led the jury to infer or conclude an intention either to kill or to do grievous bodily harm.

[61] While the Supreme and District Court Benchbook is not mandatory it operates, at least, as a useful check. The entry on intent reads:

> "Intent" and "intention" are familiar words. In this legal context, they carry their ordinary meaning. In ascertaining the defendant's intention, you are drawing an inference from facts which you find established by the evidence concerning his state of mind.
> Intention may be inferred or deduced from the circumstances in which [the death eventuated], and from the conduct of the defendant before, at the time of, or after he did the specific act which [caused the death]. And, of course, whatever a person has said about his intention may be looked at for the purpose of deciding what that intention was at the relevant time."[12]

[62] The various pieces of evidence relevant to this exercise were amply canvassed with the jury in the context of full directions about self-defence, provocation and intoxication. There can be no sensible concern that an important fact going to the issue of the appellant's intention had not been identified. Any weakness in not directing that a consideration of those facts might assist in reaching a conclusion about the appellant's intention, in this case, was made good by the clear and full recounting of defence counsel's address: in particular the facts which would leave a doubt about the appellant's intention – that there was only one wound, the appellant's own experience of surviving a multiple stab attack, and the expert's assessment that mild to moderate force would have been sufficient to cause the fatal injury.

[63] Furthermore, her Honour's summary of the prosecution's address served to remind the jury that there was another way of looking at those facts from which intention might be inferred. In those circumstances the failure of the primary judge to draw to the jury's attention those of the facts which might assist them in reaching a conclusion about the appellant's intention, independent of her summary of the addresses, did not mean there was a miscarriage of justice.

[64] **MARGARET WILSON AJA:** The appeal should be dismissed. I respectfully concur with Muir JA's reasons for judgment and those of White JA.

---

10 AR 371.
11 AR 387-6.
12 Supreme and District Court Benchbook, No. 56.1.