

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Stewart* [2015] QCA 231

PARTIES: **R**  
v  
**STEWART, Breck**  
(appellant)

FILE NO/S: CA No 208 of 2014  
SC No 708 of 2013

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 25 July 2014

DELIVERED ON: 17 November 2015

DELIVERED AT: Brisbane

HEARING DATE: 16 April 2015

JUDGES: Morrison JA and Atkinson and Applegarth JJ  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **The appeal is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of murder – where the appellant was a drug user who had purchased drugs from the deceased on numerous occasions – where the appellant had run out of money and drugs – where the appellant was angry with the deceased for failing to provide a discount on an earlier drug transaction – where the appellant was in a psychotic and intoxicated state and broke into the deceased’s unit for the purpose of robbing him – where the appellant carried a metal bar with him and used it to assault the deceased in the course of prosecuting the robbery – whether the jury could be satisfied beyond a reasonable doubt that the appellant had the requisite intention to cause death or grievous bodily harm or to rob at the material time – whether the verdict was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the trial judge directed the jury on the issue of the appellant’s alleged unlawful purpose – where the appellant contends that the trial judge erroneously directed the jury to consider the appellant’s intent at the time

of entering the deceased's unit rather than at the time of the assault – where the trial judge did not direct the jury on the definition of “robbery” – where the trial judge did not direct the jury on circumstantial evidence in respect of intent – whether the alleged misdirection and/or failures to direct resulted in a miscarriage of justice

*Criminal Code* (Qld), s 302(1)(b), s 409, s 668E(1A)

*Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; [2012] HCA 14, cited

*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited

*Patel v The Queen* (2012) 247 CLR 531; [2012] HCA 29, cited

*R v Dolley* (2003) 138 A Crim R 346; [\[2003\] QCA 108](#), cited

*R v George* [2014] 2 Qd R 150; [\[2013\] QCA 267](#), cited

*R v Georgiou & Ors; Ex parte Attorney-General (Qld)* (2002) 131 A Crim R 150; [\[2002\] QCA 206](#), cited

*R v Perera* [1986] 1 Qd R 211, cited

*R v Simpson* [2013] QCA 250, cited

*Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56, cited

*SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: T A Ryan for the appellant  
D C Boyle for the respondent

SOLICITORS: Howden Sagers for the appellant  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MORRISON JA:** In the early hours of 8 September 2012, Mr Sullivan, a dealer in amphetamines, was asleep in his unit when one of his drug customers, Mr Stewart, broke in. Mr Stewart went there intending to rob him of amphetamines, which he believed were in a cupboard in the bedroom.
- [2] Mr Stewart had prepared himself by wearing particular clothes to disguise his appearance and taking some Allen keys to pick the lock on the front door. He had also armed himself with a heavy iron dumbbell bar, which he put down his pants.
- [3] As Mr Stewart was crawling past Mr Sullivan's bed, Mr Sullivan woke up. A fight ensued, which started in that bedroom, then went down the hallway into another bedroom, and ended in the kitchen. Mr Stewart hit Mr Sullivan on the head a number of times, using the heavy iron bar. The blows fractured Mr Sullivan's skull, jaw and zygomatic bone, and killed him.
- [4] Mr Stewart took Mr Sullivan's wallet, the amphetamines, some cash and a set of scales. He drove away from the unit, disposed of his T-shirt, shirt and the iron bar, and threw away the wallet. After arriving back at his own unit he washed all items of his clothing and his shoes.
- [5] On arraignment Mr Stewart pleaded not guilty to a charge of murder, but guilty of manslaughter. At the trial there was no issue that Mr Stewart had broken in and killed Mr Sullivan in the manner described above.

- [6] However, Mr Stewart said that on the night of 7 September he was hearing the voices of demons, which were telling him to go and rob Mr Sullivan, and they would protect him.<sup>1</sup> Evidence was led from a psychiatrist (Dr Schramm) that at the time of the assault Mr Stewart: (i) had a low grade psychiatric condition best described as a schizotypal personality; (ii) was suffering a delusional experience when he heard the voices; (iii) was suffering a florid episode related to the amphetamine use; and (iv) had a disordered kind of thought connection, and was not reasoning with a moderate degree of sense and composure, but may well have had the ability to form an intention to inflict injury upon Mr Sullivan.
- [7] Mr Stewart was convicted of murder. He seeks to challenge that conviction on four grounds:
- (a) the verdict was unreasonable or unsupported by the evidence;
  - (b) the learned trial judge misdirected the jury as to the requirements of proof under s 302(1)(b) of the *Criminal Code* (Qld), resulting in a miscarriage of justice;
  - (c) the failure of the trial judge to correctly direct the jury as to the definition of “robbery” under the *Criminal Code*, given that robbery was particularised as the unlawful purpose forming the basis of the appellant’s responsibility under s 302(1)(b) of the *Criminal Code*, resulted in a miscarriage of justice; and
  - (d) the failure of the trial judge to direct the jury in accordance with direction 46.1 of the *Supreme and District Courts Bench Book* resulted in a miscarriage of justice.

### **Unreasonable and unsupported verdict**

- [8] Where the ground of appeal is that the verdict was unsafe and unsatisfactory, the question for this Court is that which has been expressed in *M v The Queen*:<sup>2</sup>

“Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.”

- [9] This consideration has to proceed at all times on the basis that the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In considering that question the court is performing a function “within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials.”<sup>3</sup>

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<sup>1</sup> “Go in, go in we’ll protect you”; “Go in. We will protect you”; “Rob him and we’ll protect you”: Appeal Book (AB) 212, 241, 244, 263.

<sup>2</sup> (1994) 181 CLR 487 at 493. Internal footnotes omitted.

<sup>3</sup> *MFA v The Queen* (2002) 213 CLR 606, at 623–624; see also *SKA v The Queen* [2011] HCA 13.

*Evidence of surrounding circumstances*

[10] A number of witnesses were called and they established the following:

- Mr Sullivan was a drug dealer;<sup>4</sup>
- on 7 September Mr Stewart was at Mr Sullivan's unit when Mr Sullivan was discussing the cash he received for selling a car; Mr Sullivan had about \$3,000 in cash with him;<sup>5</sup>
- Mr Stewart had purchased some drugs (amphetamines or speed) from Mr Sullivan on 7 September;<sup>6</sup>
- at about midnight on 7 September Mr Sullivan was alive, and his unit looked normal;<sup>7</sup>
- Mr Sullivan kept drugs in his room;
- at about midnight neighbours heard noises like furniture being bumped around, coming from what they thought was the unit above them;<sup>8</sup> that was not caused by the person occupying the unit next to Mr Sullivan's unit;<sup>9</sup>
- Mr Sullivan was discovered in the early hours of 10 September, dead on the floor in his unit;<sup>10</sup>
- the whole unit was covered in blood;<sup>11</sup> there were bloody shoeprints on the floor, and blood on the floor and walls;<sup>12</sup>
- Mr Stewart's fingerprints were found in the kitchen of Mr Sullivan's unit;
- in the week before Mr Stewart was arrested he was seen to have an injury to a finger on his right hand;<sup>13</sup> at the time he was irrational and "not good to be around" because he had taken speed;<sup>14</sup>
- on the morning of 8 September Mr Stewart was erratic, disorientated, and seemed to be under the influence of drugs;<sup>15</sup> later that afternoon he was very aggressive and upset, and his movements were disjointed and erratic;<sup>16</sup> and
- in August 2012 Mr Stewart was working and was unreliable and seemed to have a short attention span, and erratic physical movements.<sup>17</sup>

[11] There is no need to refer to a number of other witnesses, such as those from the police whose evidence was merely to establish such things as the taping of interviews, the seizure of evidence or the handling of samples.

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<sup>4</sup> M Puime, AB 19; Kennedy, AB 28.

<sup>5</sup> D Puime, AB 15; M Puime, AB 19; Jackson, AB 31.

<sup>6</sup> M Puime, AB 19.

<sup>7</sup> Kennedy, AB 28.

<sup>8</sup> Kean, AB 22; Allie, AB 24.

<sup>9</sup> Haji, AB 26–27.

<sup>10</sup> Martyn, AB 34; D Puime, AB 16–17.

<sup>11</sup> D Puime, AB 17.

<sup>12</sup> Martyn, AB 34–35.

<sup>13</sup> Livingstone, AB 107.

<sup>14</sup> Livingstone, AB 108, 110.

<sup>15</sup> Austin, AB 115.

<sup>16</sup> Livingstone, AB 110–111; Austin, AB 115–116, 119; James, AB 123.

<sup>17</sup> Arkouzis. AB 127, 129.

## Expert evidence

### *Blood analysis*

- [12] An expert witness<sup>18</sup> showed that the blood marks found in and outside the unit were caused in a variety of ways, including drip blood stains, transverse stains where a hand was moved on the handrail, shoeprints on the landing moving away from the unit, transfer stains on the edge of the steps. The blood patterns on Mr Sullivan showed he had been bleeding when upright at some point.<sup>19</sup> There were shoe impressions around Mr Sullivan's body.<sup>20</sup>
- [13] There was blood spatter throughout the kitchen,<sup>21</sup> and on the pantry doors.<sup>22</sup> A fingerprint was found in the blood,<sup>23</sup> and impressions from the shoe prints revealed that the pattern was from a Converse All Star shoe.<sup>24</sup> Mr Stewart had Converse All Star shoes in his unit which correlated to the imprints.<sup>25</sup>
- [14] An expert from the police scientific section<sup>26</sup> provided analysis which revealed that:
- the fight started in Mr Sullivan's bedroom, then moved to the second bedroom down a small hallway;<sup>27</sup> in the second bedroom the wardrobe doors were off their tracks, and there was blood spatter on the wall;<sup>28</sup> the wall had indentations in it;<sup>29</sup>
  - then the fight moved out of the second bedroom into the hall, where there were bloodstained indentations in the wall;<sup>30</sup> as well, the stains showed blood being wiped, swiped, spattered and expelled with force;<sup>31</sup> there were droplets of blood in the bathroom;<sup>32</sup>
  - then the fight moved down the hall to the lounge area, where there was a large number of bloodstains;<sup>33</sup> the transfer of blood indicated someone rolling around, and being there some time;<sup>34</sup>
  - then the injured person moved into the kitchen area, where they ended up on the floor;<sup>35</sup> bloodstained shoe prints showed a person walking around that area, into the bedroom, back to the kitchen, through the lounge and back out the front hallway entrance;<sup>36</sup>

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<sup>18</sup> Howard, forensic scientist, AB 47–76.

<sup>19</sup> AB 58-59.

<sup>20</sup> AB 61.

<sup>21</sup> AB 63.

<sup>22</sup> AB 63.

<sup>23</sup> AB 63-64.

<sup>24</sup> AB 69.

<sup>25</sup> AB 70, 75.

<sup>26</sup> Tysoe, AB 76–100.

<sup>27</sup> AB 80.

<sup>28</sup> AB 81.

<sup>29</sup> AB 82.

<sup>30</sup> AB 86–87.

<sup>31</sup> AB 88.

<sup>32</sup> AB 89.

<sup>33</sup> AB 89.

<sup>34</sup> AB 90.

<sup>35</sup> AB 91.

<sup>36</sup> AB 92.

- the bloodstain patterns outside the second bedroom indicated several impacts to Mr Sullivan there, and the height indicated that his head was about 110 cm from the floor when the injury occurred;<sup>37</sup> the pattern showed another impact in the hallway near the linen cupboard;<sup>38</sup>
- there were at least five impacts, probably more, to Mr Sullivan's head.<sup>39</sup>

[15] Police extracted a fragment of an Allen key from the lock that was in the front door of Mr Sullivan's unit.<sup>40</sup>

### ***Forensic pathology evidence***

[16] Evidence from the forensic pathologist<sup>41</sup> showed that:

- Mr Sullivan died face down;
- he had 22 lacerations to his head, some deep enough that the skull was visible underneath; they were caused by several applications of force;
- his skull had multiple fractures which shattered it into multiple portions: at the left eye socket, front of the skull, nose, complex at the right eye, very complicated and quite complex at the right rear, and to the base of the skull;
- there was a tear of the brain itself; the brain had been subjected to severe force;
- he had lacerations, abrasions and bruises to his arms and hands, consistent with defensive injuries;
- he had blunt injuries to his knee, thigh and chest; and
- the cause of death was the severe head injuries, breaking the skin, fracturing the skull and doing internal damage to the brain.

### ***Mr Stewart's evidence***

[17] The first time he was spoken to by police Mr Stewart said that he did not mean to kill Mr Sullivan, and he was breathing when he left.<sup>42</sup> After the formal interview Mr Stewart accompanied police to Kookaburra Park at Moorooka, where he said he had thrown the dumbbell bar, a T-shirt, a shirt which he had ripped up, and Mr Sullivan's wallet.<sup>43</sup> The dumbbell bar and pieces of the ripped shirt were located where he said he had thrown them.<sup>44</sup>

### ***Police interviews and trial evidence***

[18] What follows is an amalgam of the evidence given at trial, and what was said to police in Mr Stewart's interviews on 16 and 17 September 2012. Where the evidence differs, in a way that is material to the issues on appeal, that has been or is identified.

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<sup>37</sup> AB 94.

<sup>38</sup> AB 95.

<sup>39</sup> AB 98.

<sup>40</sup> AB 160–161.

<sup>41</sup> Storey, AB 172–195.

<sup>42</sup> AB 135.

<sup>43</sup> AB 139–141.

<sup>44</sup> AB 151, 153, 154–157, 170.

- [19] Mr Stewart was a drug addict who had bought a lot of drugs from Mr Sullivan, spending “a lot of money there over two weeks”.<sup>45</sup> In the nine days prior to 7 September 2012 Mr Stewart saw Mr Sullivan almost every day to buy drugs, except when he ran out of money and had to wait for his Centrelink payment so he could start again.<sup>46</sup> On one day after he had purchased drugs, Mr Sullivan was “really friendly to me”. It was the only day he was like that, and the rest of the time he was “a total fuckwit”.<sup>47</sup> Mr Sullivan walked him to the door, talking about “eight balls”. Mr Stewart understood the conversation to mean that he would be selling drugs. Mr Stewart said he would try to get some money together, and Mr Sullivan said that he would “get you started, or something like that”.<sup>48</sup>
- [20] The next day he obtained money from Centrelink and returned to Mr Sullivan’s unit. He tried to get Mr Sullivan to give him more drugs for his money but Mr Sullivan refused, calling him “a pretty bad name”.<sup>49</sup> Mr Stewart felt that Mr Sullivan had gone back on his word.<sup>50</sup> In cross-examination he said that Mr Sullivan “was saying, I’m not going to make you a deal but he’s gone back on what – kind of what he said that – well, he’s forgotten about what we’d spoken about”.<sup>51</sup> Further, he agreed that part of his anger was about being ripped off: “I was just angry... it made me kind of irritable”.<sup>52</sup>
- [21] On 6 September Mr Stewart paid \$400 for six points, which included an extra one thrown in. He used all the drugs on that day and up to 9.00 am the next morning.<sup>53</sup> He did not sleep between then and 8 September when the incident occurred.<sup>54</sup>
- [22] Mr Stewart said that when Mr Sullivan went back on his word he “started to hear voices” or at least “a voice, and it was outside of my head, and it was it’s not us, it’s not us, it’s not us”. He felt it was “demons talking directly to me”, saying that “... we’ve already ruined your life. This time I promise you it’s not us. Figure it out.” He interpreted that to mean that Mr Sullivan “has no demonic power”.<sup>55</sup>
- [23] On Friday 7 September Mr Stewart went to Mr Sullivan’s unit in the morning, with an iron bar in his pocket or down his pants as “part of my uniform”. He said he was “on a mission” that morning to “find out who he was”. However “... I didn’t do anything, yeah, just thought you cunt... So every time I stood up, I just had to make sure that like, no one saw it, yeah”.<sup>56</sup> The demon voices were saying “it’s not us, it’s not us”. He said as soon as Mr Sullivan opened the door “my mission... just... disappeared and... everything was normal again”.<sup>57</sup>
- [24] In cross-examination this was explained further. He said that he did “have a weird thought like belt them all and... do you reckon you’d do them all”, and “how do you reckon you’d go?”<sup>58</sup> It was put to him that he felt like belting Mr Sullivan on that Friday, and he answered “not... after they opened the door”.<sup>59</sup>

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45 AB 417.  
 46 AB 202.  
 47 AB 418.  
 48 AB 418.  
 49 AB 203, 205.  
 50 AB 205.  
 51 AB 236.  
 52 AB 236.  
 53 AB 203–204, 207.  
 54 AB 205.  
 55 AB 205.  
 56 AB 422.  
 57 AB 207.  
 58 AB 238.  
 59 AB 238.

- [25] Mr Stewart bought drugs that morning, and helped Mr Sullivan's brother to inject some drugs, for which he was allowed to share the drugs. Later that day he went to Cash Converters to borrow \$300. Then he went straight back to Mr Sullivan's unit to buy drugs again.<sup>60</sup>
- [26] At about 9.00 pm or 9.30 pm that night Mr Stewart went back to Mr Sullivan's unit. He said that he felt "an urge or an impulse" to go round, like he was being pushed. It was "like someone whispering I want to go, find something out, go – go and have a look, go round there".<sup>61</sup> Mr Stewart had his hands under his shirt or jumper, and Mr Sullivan seemed nervous or scared, asking what Mr Stewart had in his hands. Mr Stewart answered nothing, and Mr Sullivan told him his flatmate was in hospital.
- [27] Mr Stewart said that once again he tried to persuade Mr Sullivan to give him more drugs for his money, but Mr Sullivan "didn't seem too bothered about it", and refused him.<sup>62</sup> That response made him angry.<sup>63</sup> Mr Stewart described his reaction to that: "I was pissed off with him and I did want to go round there and flippin' belt him", and "You know, not belt him but, you know, just take rob him kind of thing, yeah, that's what I wanted to do, rob him".<sup>64</sup>
- [28] Mr Stewart bought one point, and was just about out of money.<sup>65</sup> As Mr Stewart was leaving Mr Sullivan said "I'll give you a call when... I hear about [the flatmate], and I looked at him, I thought, hey fuck, no you won't... and that's when it started comin' in my head". He added: "I just had to figure out how to do it".<sup>66</sup>
- [29] Mr Stewart accepted that at that time he knew that Mr Sullivan had drugs and a lot of cash, and that his flatmate was not at the unit.<sup>67</sup>
- [30] After buying the drugs from Mr Sullivan on Friday night, Mr Stewart then sat in his car for a few hours, with thoughts running through his head to do with Sudanese men who he had seen going into Mr Sullivan's unit. He described it: "Like, it was like a comic strip. It was real and we were, like, just combatting crime and drugs and just arrogant Australian males. That's what it was. Yeah, and we were overpowering them and, like, it's just weird. It was weird, yeah, very strange."<sup>68</sup>
- [31] He then drove home, and (in cross-examination) he accepted that on the way he started to form the thought about robbing Mr Sullivan.<sup>69</sup> Mr Stewart said he started to hear the demons say "Go in, go in, we'll protect you".<sup>70</sup> He said; "Each time I heard that was an outside voice, and I think that's the only time I can remember hearing an outside voice from a demon or demons."<sup>71</sup> Once at home he said the voices continued.<sup>72</sup>

"What was happening was they were saying, 'Go in. Go in, we'll protect you.' And then something was happening in my head I've never

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<sup>60</sup> AB 208–209.

<sup>61</sup> AB 209.

<sup>62</sup> AB 210, 239.

<sup>63</sup> AB 239.

<sup>64</sup> AB 240 (trial), AB 420.

<sup>65</sup> AB 211.

<sup>66</sup> AB 421; AB 241 (trial).

<sup>67</sup> AB 241.

<sup>68</sup> AB 211–212, 241.

<sup>69</sup> AB 241.

<sup>70</sup> AB 212, 241.

<sup>71</sup> AB 212.

<sup>72</sup> AB 213.

experienced before, and I don't know how to explain it. Yeah. It wasn't - I was - I wasn't happy. I wasn't having any benefits of amphetamine or whatever you want to call it. And I had to make it - I had - the only way I could stop it, and I'm not saying this for any - any reason to lie in court or I'm not sure how to explain it. But I said, 'Look, nothing can make me go around there. Nothing - I'm not - nothing can make me get in my car. Nothing can make me break in or go in, or go in whatever that means. And nothing can make me go to Paul's or drive there or get in my car or get off this lounge. Nothing.' And that was - so the only way I had any peace of mind was to start figuring out, 'Okay, okay. If I'm going to - if I was going to do that, how would - how would I do it?' That sounds - might sound a bit weak, but that's - that's - that's what happened."

- [32] He explained that what he was referring to was going into Mr Sullivan's unit. He said the only way to get peace from the voices was to plan how to break in and so he started to do that.<sup>73</sup> He recalled a friend showing him how to use Allen keys to open his car, and that was a solution to his planning. He called it a "brainwave"<sup>74</sup> and explained:<sup>75</sup>

"When - when I remembered - when allen keys came into my head I was on my feet. I was - I - I was pacing in front of the little lounge chair thing. I got dressed up like a kind of ninja. I found some allen keys in the thing and it seems like it - like this is some guy going go and do whatever, but I don't - I don't understand what happened there."

- [33] Mr Stewart used the drugs he had bought, leaving him with none, and with not much money. He accepted that he wanted more drugs.<sup>76</sup>
- [34] As to the events on the night, Mr Stewart said that at about 2.00 am the drugs wore off,<sup>77</sup> and he started thinking about going back to Mr Sullivan's unit. He described his thought process: "I was just off the planet... I was pretty... psychosis".<sup>78</sup> He said that "I just had this brainwave, like, Allen keys... so I went round there with the Allen keys and... I did take an iron bar there... I was gonna go and belt him with an iron bar like, not belt him but just rob him".<sup>79</sup>
- [35] Mr Stewart agreed that he put a lot of thought into breaking into Mr Sullivan's unit.<sup>80</sup> He put on Thai fishing pants and "shirts and stuff... that I thought were like a uniform or... ninja clothes".<sup>81</sup> He also wore a jumper and hoodie.<sup>82</sup> He agreed that was to disguise himself, so he would not be recognised by Mr Sullivan or anyone.<sup>83</sup> He took some Allen keys, and put the iron bar down his pants, as "part of my uniform".<sup>84</sup> He then drove to Mr Sullivan's unit. He said he "couldn't stop myself".<sup>85</sup>

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<sup>73</sup> AB 214.

<sup>74</sup> He had called it a "brainwave" when speaking to police: AB 243.

<sup>75</sup> AB 214.

<sup>76</sup> AB 242.

<sup>77</sup> AB 243.

<sup>78</sup> AB 467.

<sup>79</sup> AB 241.

<sup>80</sup> AB 245.

<sup>81</sup> AB 215.

<sup>82</sup> AB 223.

<sup>83</sup> AB 244.

<sup>84</sup> AB 207.

<sup>85</sup> AB 215.

[36] Asked what he was going to Mr Sullivan's for, he said; "Drugs. In my head. Yeah. Just going in. There was no plan. Like, the only thing was the allen keys".<sup>86</sup> It was some time before he started to break in. Meanwhile he had a couple of cigarettes, and walked around the block a few times, each time triggered by hearing a noise that he thought was "just so loud that everyone in Moorooka heard it", and "just made me freak out". He accepted that walking around the block was so that he could avoid anyone becoming suspicious of what he was doing.<sup>87</sup>

[37] He finally used an Allen key to open the door, but it broke making a lot of noise. Once again he walked around the block, because he thought he had woken Mr Sullivan up, and "I was shittin' myself".<sup>88</sup> He then went back to the unit and had a cigarette. He thought, "I've got fuckin' broke... I got to do somethin'... so I went to the window", and waved "just in case someone was watching". He "made it look like I was waving to him through the window and saying come here... made it look like someone's watchin' like, I got his attention and he was coming to the door".<sup>89</sup>

[38] In cross-examination Mr Stewart was asked about the purpose for going there, and what he told police, and this exchange took place:<sup>90</sup>

"My question though, was what you told the police was that you went around to Paul's to rob him. You agree with that?---That I said that?

Yes?---Yes.

And that was true?---I – I refuse – I refuse to answer that."

[39] Mr Stewart realised that someone might come in the front door so he went back and locked it. He walked inside and into the flatmate's room to see if he was there, then to Mr Sullivan's room, where Mr Sullivan was snoring.

[40] Once inside the unit he felt empowered, like he "wasn't afraid of anything".<sup>91</sup> When he walked up to Mr Sullivan's bedroom and looked in, he was feeling "a very powerful fearlessness".<sup>92</sup> He knew Mr Sullivan was asleep.<sup>93</sup> Mr Stewart was not creeping around, he said, but he "just blatantly walked up there and stared into the room".<sup>94</sup> He went to Mr Sullivan's bedroom because that was where Mr Sullivan used to go to get the drugs he sold.<sup>95</sup> He did not go straight in, however, because "part of me... didn't want to go in there and I didn't know what... was going to happen... or what I was going to do".<sup>96</sup>

[41] Mr Stewart decided to crawl into the bedroom and find out if Mr Sullivan was facing the wall, because if he was then Mr Stewart might be able to get the drugs from the cupboard and then leave. He crawled in, almost on his belly and lower than the bed,<sup>97</sup>

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<sup>86</sup> AB 215.

<sup>87</sup> AB 246.

<sup>88</sup> AB 215-216, 245-246.

<sup>89</sup> AB 246 (trial), AB 423, 445.

<sup>90</sup> AB 244.

<sup>91</sup> AB 217.

<sup>92</sup> AB 217.

<sup>93</sup> AB 246.

<sup>94</sup> AB 218.

<sup>95</sup> AB 218, 247.

<sup>96</sup> AB 218.

<sup>97</sup> AB 248.

to see which way his head was facing, and ascertained that Mr Sullivan was facing the wall.<sup>98</sup> As he crawled on the floor he had the iron bar in his hand,<sup>99</sup> and had turned his phone on so as to see from the light given off by the screen. Then as he crawled back around the other side, and tried to open the cupboard, Mr Sullivan woke up.<sup>100</sup>

- [42] Mr Stewart hit him with the iron bar. A fight started between the two of them. He said “I just jumped up and I was all over him, boom”.<sup>101</sup> At one point while still in Mr Sullivan’s bedroom, he dropped the bar when Mr Sullivan was holding onto him.<sup>102</sup> Mr Stewart got Mr Sullivan down on the ground, and “I whacked him”.<sup>103</sup> He said he “went to grab it and it wasn’t there... it’s like I was seein’ things, and I mean it was hearing in my head all day, go round there and flippin’ rob him”.<sup>104</sup> Even though that “sort of freaked me out a bit” he was really calm and not scared. He said he was scared when he went into the unit, but “when it all started I wasn’t scared”. Whilst in a state of calmness Mr Stewart said he thought how it would end, wondering if they were going to “sit down and have a bong or are we going to laugh”.<sup>105</sup> He found the bar, worked out where Mr Sullivan’s head was, and hit him on the head with the bar.
- [43] At a point when Mr Sullivan was on the floor in his room Mr Stewart was worried about Mr Sullivan’s mates, bkie mates and dealers, coming round to kill everyone in his house.<sup>106</sup> He said that he was thinking “how’s this gonna turn out, are we gonna have coffee or something ... it was just stupid thought, and I thought, fuck, what am I doin’ ... I’m gonna get... I’m dead”.
- [44] Mr Stewart said that he felt Mr Sullivan’s face with both of his hands, as Mr Sullivan was on the bed or floor. He said “so I was in a psychosis and I was just really sort of like, calm at that point”.<sup>107</sup> He felt where Mr Sullivan’s eyes were and pushed his thumbs into them.<sup>108</sup>
- [45] The fight went into the flatmate’s bedroom, and Mr Stewart said he could “remember following along behind him up towards... where... the bathroom door would be”.<sup>109</sup> He said Mr Sullivan turned the light on, and he followed him because he thought Mr Sullivan might get a weapon.<sup>110</sup> Mr Stewart felt “absolutely fearless” and because he had the bar “I was kind of winning”.<sup>111</sup> He added in cross-examination that Mr Sullivan had asked who it was, and pulled the hoodie down, but Mr Stewart “wasn’t afraid of anything”.<sup>112</sup>
- [46] In the flatmate’s room Mr Stewart “whacked him a few more times”, or “whacked him a couple of times in the head”, with the iron bar. At one point Mr Sullivan said something like “let’s have a break or let’s chill out”, to which Mr Stewart responded,

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98 AB 219.

99 AB 221–222.

100 AB 219–220.

101 AB 221–222.

102 AB 423.

103 AB 424.

104 AB 424, 237 (trial).

105 AB 424.

106 AB 453.

107 AB 429.

108 AB 222 (trial), 429.

109 AB 223.

110 AB 249.

111 AB 223. He emphasised that it was clear that he was winning at all times in the fight.

112 AB 249.

- “yeah, that’ll do”. Mr Sullivan said “I haven’t got any gas”, which Mr Stewart understood to refer to speed. At that time Mr Sullivan walked out near his bedroom. Mr Stewart “walked up behind him and... thought fuck this bullshit, and just whacked him”; “I smashed him on the back of the head... just went straight boom”; “I whacked him on the head a few times”.<sup>113</sup> Mr Sullivan fell down. While Mr Sullivan was on his knees he was hit again, this time on the back of his head, and he went down on the floor.<sup>114</sup>
- [47] Mr Stewart said, “It was bad, I knew I’d made a mistake”.<sup>115</sup> When Mr Sullivan fell over Mr Stewart said “I could tell that I had a chance to get away and... I was kind of hoping that... he wasn’t going to remember it”.<sup>116</sup> While Mr Sullivan was on the ground, Mr Stewart saw the wallet and money on the kitchen bench, and a box with drugs in it and some scales. He took them, putting the drugs down his underpants. He explained, “I wanted to get reimbursed in some way”.<sup>117</sup>
- [48] When Mr Stewart left he said Mr Sullivan was breathing in a raspy way, but not moving. He went out through the front door, wiping it with his jumper. He checked out the window that no-one was there, and left. He got in his car and drove out of the car park without headlights on, to avoid being caught.<sup>118</sup> He turned the lights on when he got onto the road. He drove slowly or normally. He drove to a park where he washed his hands, threw the bar, scales and the wallet into a creek, ripped his shirt into pieces and scattered them in the bushes, and removed his T-shirt and disposed of it.<sup>119</sup> He put the money under the carpet in the back trunk of the car, and the drugs under the foot rest next to the accelerator. He accepted in cross-examination that he was disposing of the items because they might link him to the unit.<sup>120</sup> He then went home and washed his clothes and shoes.<sup>121</sup>
- [49] In cross-examination Mr Stewart described the blows he dealt as “vicious”<sup>122</sup>, and that he was filled with “an unquenchable rage coming inside me”.<sup>123</sup> He also said, in answer to it being put that he hit as hard as he could, that it “wouldn’t have been a tap”.<sup>124</sup> Mr Stewart agreed that everything he did in going to the unit, and inside the unit, was for the purpose of robbing Mr Sullivan of drugs.<sup>125</sup> He said that when he left the unit he was terrified because he knew he had done the wrong thing.<sup>126</sup>
- [50] Once home he washed all his clothes and shoes. He bought some ammonia and washed the areas of the car where the bar had been.
- [51] As to the things heard in his head, he said “I was kind of hearing like, an angel... rob him and we’ll protect you. That’s what they were saying”,<sup>127</sup> when he said he had made a mistake, he added “whoever was flippin’ talkin’ to me, they were full of shit”.<sup>128</sup>

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113 AB 426.

114 AB 224, 250, 427.

115 AB 427.

116 AB 429.

117 AB 463.

118 AB 255.

119 AB 230-231.

120 AB 256.

121 AB 229-233, 257-258, 260-261.

122 AB 250.

123 AB 253.

124 AB 265.

125 AB 252, 264.

126 AB 253.

127 AB 424.

128 AB 427.

When driving away from the unit he was “still thinking about these things protecting me and stuff, what were talking to me but I didn’t, wasn’t... hearing anything... any more, not there, and... I just thought... they promised me that, you know”.<sup>129</sup> At the park “that’s when all this flippin’ things talkin’ in my head, well... it was just all bullshit, ‘cause reality really kicked in when I was in the park”.<sup>130</sup>

- [52] In cross-examination Mr Stewart accepted that he had told Dr Schramm that he heard no voices between leaving home to break into Mr Sullivan’s unit and after the assault was completed.<sup>131</sup>

### *Evidence of Dr Schramm*

- [53] Dr Schramm, an expert psychiatrist, interviewed Mr Stewart twice, on 24 July and 21 August 2013. Prior to doing that he examined much of the evidence collected by the police, including the audio tapes of interviews with Mr Stewart. He also had the transcripts of Mr Stewart’s evidence at the trial. He gave evidence as to Mr Stewart’s mental condition.<sup>132</sup>

- [54] His overview was that Mr Stewart probably suffered from a chronic low grade psychiatric condition. He classified it as a “schizotypal personality”. He described it as a condition along the spectrum of schizophrenia, characterised by the person having:<sup>133</sup>

“... an idiosyncratic way... of communicating, of interpreting the world. They are often uncomfortable around other people. They often have unusual experiences, which are reminiscent of psychotic but maybe not quite psychotic.”

- [55] Dr Schramm was careful to say that he was not diagnosing Mr Stewart as having schizophrenia.<sup>134</sup> The only connection between a schizotypal personality disorder and schizophrenia was that they shared some pathological thinking patterns.<sup>135</sup>

- [56] Dr Schramm accepted that some of the disturbance Mr Stewart exhibited could be attributed to substance abuse, and the “more crazy... psychotic experiences” until the days leading up to 7 September could be explained by substance use, especially amphetamines.

- [57] At the time of the offence Dr Schramm considered that Mr Stewart’s amphetamine use led him into a “florid psychotic episode”:<sup>136</sup>

“... he was suffering from... a psychotic episode, a florid psychotic episode, which was unheralded in his experience, probably related... to the fact that his use of substances, amphetamines, had been unheralded until the days leading to that, and he was in a florid psychotic state. I think that would probably best be called a substance-induced psychosis.”

- [58] When Dr Schramm used the term “psychotic” he meant disordered thought processes, such as hallucinations, delusional ideas, misinterpreting things, and disordered connection

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<sup>129</sup> AB 430.

<sup>130</sup> AB 431.

<sup>131</sup> AB 264.

<sup>132</sup> AB 271–301.

<sup>133</sup> AB 273.

<sup>134</sup> AB 290.

<sup>135</sup> AB 291.

<sup>136</sup> AB 273–274.

of thoughts. He explained that the term “florid psychotic state” applied to someone who was experiencing psychotic symptoms that dominated their existence.<sup>137</sup>

[59] Dr Schramm considered that even when he was not abusing substances Mr Stewart “still had some disturbance in the way that he appreciated the world, thought about things, connected his thoughts, [and] was able to communicate”.<sup>138</sup>

[60] Dr Schramm referred to the religious ideas that Mr Stewart had expressed in evidence, relating to the existence of demons,<sup>139</sup> and said that he wondered “whether they represent low grade psychotic symptoms”. He added:<sup>140</sup>

“It doesn’t mean that if you have those ideas you’ve got a mental illness but there are – many think people who become psychotic, who hold delusional beliefs, there are many different themes that that can take, but I’d say that spiritual and religious themes would probably be the most common type of delusional idea that – that I would see, that people in this country would see.”

[61] In cross-examination Dr Schramm accepted that Mr Stewart’s thoughts about the angels and demons had been held since childhood, and were not truly delusional. However, he said that delusions need to latch onto some beliefs, and therefore it was not surprising that when it came time to develop real delusional beliefs the same theme was carried on.<sup>141</sup>

[62] He also accepted that whilst he did not see actual thought disorder, he saw “something that approached formal thought disorder”, which he described as “woolly thought connection”.<sup>142</sup> Further, as to Mr Stewart’s problems in explaining what happened at the apartment, Dr Schramm accepted that part of the explanation might be the fact that the brain can disassociate violent or traumatic events.<sup>143</sup>

[63] It was Dr Schramm’s opinion that the hearing of voices described by Mr Stewart were hallucinations and he went on to express his view as to how Mr Stewart understood them:<sup>144</sup>

“... he understood that experience in terms of his existent unusual religious type of thinking. He saw them as demons. It made sense to him given his long held belief that demons had a special interest in him and was stymieing his efforts to give up drugs and to lead... a pious life that, when he started having these experiences that they were demons... and then as happens the content that he heard was in line with that as well.”

[64] In cross-examination Dr Schramm agreed that the hearing of voices was a common symptom of a drug-induced psychosis.<sup>145</sup> He also agreed that Mr Stewart did not

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<sup>137</sup> AB 275.

<sup>138</sup> AB 274.

<sup>139</sup> That was that the Bible says that “our war is not against flesh and blood but against the powers and dominions of darkness constantly at war with our souls”, and one third of angels that were in heaven are demons: AB 205–206.

<sup>140</sup> AB 277.

<sup>141</sup> AB 292.

<sup>142</sup> AB 292.

<sup>143</sup> AB 293–294.

<sup>144</sup> AB 278.

<sup>145</sup> AB 294.

report hearing any voices: (i) during the events at the unit; and (ii) after he had left home until after the assault in the unit, i.e. until after the assault was completed. Dr Schramm added this qualification:<sup>146</sup>

“But again, we shouldn’t take the account that I took from him as gospel. I mean there are reasons why I might not have heard that story, or that I didn’t appreciate that story. But I think that was the case; that he told me that he was hearing voices in the days beforehand and certainly when he was at home before he left to return to Paul’s flat. And then again, not until, I think, he was inside the flat. That was the story that I elicited.”

- [65] Dr Schramm related some commonly described prior delusional experiences that Mr Stewart revealed,<sup>147</sup> but said:<sup>148</sup>

“... it’s important to emphasise that those psychotic symptoms, other than this kind of chronic vague belief that maybe he was special in the eyes of God as more florid ones, didn’t seem to be a prominent part of his existence until that period when he was on that amphetamine bit.”

- [66] Dr Schramm said that the amphetamine use would exacerbate the unusual thoughts or hallucinations, “like throwing petrol on... embers and suddenly the flames rise up”, but he could not say that it was the exacerbation of a psychotic illness per se.<sup>149</sup>

- [67] As to Mr Stewart’s police interview, Dr Schramm said that he came across as disjointed in thought connection, but “not quite to the point where I’d say that he was floridly formally thought disordered”.<sup>150</sup> His own assessment of what Mr Stewart was saying was that: “he certainly was admitting to going there to rob him, but he had no intention of killing him. And that was the story that he came to tell me when I interviewed him as well.”<sup>151</sup>

- [68] Dr Schramm was asked to comment on Mr Stewart’s criminal responsibility. He emphasised that it was not a matter for him but offered this:<sup>152</sup>

“... my impression, looking at the totality of the story, was that he fulfilled part of that test in that he was not able to reason with a moderate degree of sense and composure, which there may be some argument from the table, but my understanding is that that’s generally accepted as the test for when someone is deprived... of a capacity to know what they’re doing is wrong and applying that test I considered that in the state that Mr Stewart was in he wasn’t reasoning with a moderate degree of sense and composure by any stretch, but that mental state was as a result, in my opinion, to a significant degree by intoxication. So... it’s not a question for me, it’s a question for the Court, but I know from my experience that it would’ve been unlikely that he would’ve

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<sup>146</sup> AB 295.

<sup>147</sup> Such as believing that something on TV, or a song being played, was being transmitted just for him, to give a message.

<sup>148</sup> AB 278.

<sup>149</sup> AB 279.

<sup>150</sup> AB 279.

<sup>151</sup> AB 280.

<sup>152</sup> AB 283.

been found of unsound mind... in those circumstances. So he was insane but the reason for his being insane meant that he wouldn't be given a defence in the Queensland Criminal Code."

- [69] In that passage Dr Schramm was addressing two issues. The first, which is not relevant to this appeal, was the question whether voluntary intoxication would exclude the defence of insanity. The second, which is relevant, was whether Mr Stewart lacked capacity to know what he was doing was wrong, on the night of 7 September and the next morning. Dr Schramm concluded he did not lack that capacity. He went on to say that it may have been that the underlying schizotypal disorder alone would not have come anywhere near to depriving of his capacity. He explained it this way:<sup>153</sup>

"There is some tricky legal arguments that come into play in the Mental Health Court where this is usually teased out where sometimes defence will argue that if someone was unwell enough by their illness alone to get them over the line to being insane, then the fact that there's icing on the cake that they were even madder than that, to use the vernacular, because of intoxication and therefore they should be found of unsound mind, I don't think that this was one of those situations. There's no way his baseline level of mental illness would've encroached on, in any significant way, let alone complete deprivation, of any of those capacities."

- [70] Dr Schramm was asked to comment on Mr Stewart's ability to form intention at the time of the killing. He explained that one should not treat it as a simple linear story about being upset by being ripped off or teased, and to do so would ignore the plethora of psychotic symptoms such as seeing Mr Sullivan as a crime figure and helping the African people in Moorooka. However, Dr Schramm's view was:<sup>154</sup>

"All of those things go very much towards his judgment to reason whether it was wrong to go into that place with a weapon and potentially to hit the deceased over the head to rob him. So that's why I say that he didn't have... a moderate degree of sense in composure to realise that it was wrong in those moments. You also asked whether or not he had the ability to form intent. It's a very difficult question to answer, but it seems to me that you can't confidently suggest that he was so out of touch with what was going on that he did not have the intent. ... I'm saying that he may well have had, still, the ability to form intent to inflict some injury upon him. ... I'm not here to pass any kind of judgments, not for me to say, at all... my opinion on whether or not he did go there with intent to kill. He tells me he didn't. It's wrong for me to say whether I believe him or not, but I can't say that he wouldn't have been able to form the intention or to have known that to swing... that bar would have caused at least serious harm, grievous bodily harm, which is my understanding is good enough for when it comes to murder."

- [71] He was then asked for further comment and gave this as his opinion:<sup>155</sup>

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<sup>153</sup> AB 283.

<sup>154</sup> AB 284.

<sup>155</sup> AB 284–285.

“I can’t say, and I won’t say, whether he had the intent... to kill, but I think he said to me and to the police that at certain points in the struggle that he wanted to put Paul down. He wanted to put him on the ground. He wanted to cause him some kind of injury. So he knew what he was doing. He knew that... to hit someone would - could - could have caused significant harm to him. What I’m saying, though, is that his judgment about going there in the first place and being in that situation and his judgment even in the middle of that fracas was not the judgment of moderate sense and composure.”

[72] He was asked in cross-examination about whether, in his opinion, Mr Stewart knew the consequences of his actions. His response was: “I think that he was able to appreciate that to strike someone with a bar is liable to cause him serious injury”.<sup>156</sup>

[73] Dr Schramm was questioned about the elements of planning that were evident, such as the weapon and taking the Allen keys. He said:<sup>157</sup>

“... he wasn’t so psychotic to believe that he could just waltz in there and get away with this... that it was something that he had to figure out. If he was going to get in, how would he get in, and that given that Paul was seen as somewhat as a threatening figure that maybe he was liable to put up some kind of fight he if was going to go in and rob him. So he was able to go... he took that weapon with him. It’s... wrong to assume that when someone is psychotic that means that they are acting as a complete robot and that they can’t appreciate some things in reality. I mean, he was able to drive over there, you know, obey the road rules and put his pants on to get dressed, you know, to be aware of all sorts of things. That’s... doesn’t exclude the fact that he was also psychotic.”

[74] Dr Schramm cautioned strongly against trying to reason why steps were taken by a psychotic person, or to make sense of things in an ordered logical way to get a nice neat story out of things. He explained it was wrong to expect logic when in psychosis “there is little logic or bizarre logic”.<sup>158</sup>

“And by and large, when people are intoxicated or psychotic, it’s reasonable to do that, to say, ‘Well, someone did this because of that, and then this happened and then that happened’, and there’s a logical step. But when people are psychotic those rules go out the window. So... I think that’s the danger there, to, you know... it doesn’t make sense. It didn’t make sense to him and it shouldn’t make sense to us and that’s the nature of psychosis.”

[75] Dr Schramm was asked in cross-examination about Mr Stewart’s motivation in going round to the unit. He said that robbing Mr Sullivan was “certainly part of it, but there was more to it than that”.<sup>159</sup> He then explained what he meant in these terms:<sup>160</sup>

“There was a sense that there was some kind of test or some kind of mission that he had to do it. There was a sense that he was being

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<sup>156</sup> AB 296.

<sup>157</sup> AB 285–286.

<sup>158</sup> AB 288, 289.

<sup>159</sup> AB 295.

<sup>160</sup> AB 295.

driven, that he had a loss of control of what he was doing. This kind of delusion of passivity which is a not uncommon psychotic symptom. There was a drive of an idea - a notion that had come to him that if he did what the demons were suggesting he was doing, that maybe he could be forevermore not a slave to drugs, which is something that was... quite a prominent theme in our interview, that... he hates the fact that he keeps on going back to using drugs and he... hates himself for keeping on going back... to using drugs. And it was an attractive proposition to him that if he could do this, well, maybe, you know, if he goes and passes this test somehow - and, again, I reiterate that I might be trying to make it clear and make sense of it because that's what minds do, but I don't think any of this is quite as clear and as logical. I don't think he's sitting at home thinking, right, okay, if I do this then this will happen and then that might happen. I think that he's got a jumble of drives, a jumble of thoughts, and some of which he can tell us about and some of which he can't tell us about."

[76] Dr Schramm accepted in cross-examination that the events in the unit can be seen as fulfilling the purpose of robbing Mr Sullivan of drugs. He said that "certainly part of his mission there was to rob [Mr Sullivan]".<sup>161</sup>

[77] He then reiterated that whilst robbing was an important part of the purpose, it was not the whole picture:<sup>162</sup>

"And the purpose here, can I suggest, was his desire to steal the drugs?--- I - I think that's too narrow. I think that's - that may well have been part of it. Not only - no, I'll go beyond that and say that certainly seemed to be an important part of it. But to leave it at that ignores the rest of the story, the other parts of the story as well. So... I can't just let it go at that."

[78] In cross-examination Dr Schramm was asked about Mr Stewart's pattern of behaviour after leaving the unit, when he disposed of various items in the park. He said his opinion was:<sup>163</sup>

"He was concerned about getting caught. I think he very much appreciated that he had caused some serious harm to Paul. He tells me that he didn't appreciate that Paul had died. I don't know whether that's true or not. I can't tell you. It's not for me to say, but he was certainly aware that he had done a terrible thing."

[79] Finally, Dr Schramm gave these answers at the end of cross-examination:<sup>164</sup>

"Nonetheless, you accept that despite him being in a drug-induced psychosis inside the unit and before and afterwards, he was still able to think reasonably clearly about what he was doing. Would you agree with that?---I wouldn't say his thinking was clear.

He was able to act with purpose though?---Yes.

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<sup>161</sup> AB 296.

<sup>162</sup> AB 299.

<sup>163</sup> AB 298.

<sup>164</sup> AB 300.

And you say that he was capable of forming an intent - - -?---Yes.

- - - to do certain things?---Yes.”

***Admissions by Mr Stewart***

- [80] Formal admissions were made at the trial. They included that: (i) Mr Sullivan’s flatmate was hospitalised at 9.30 pm on 7 September 2012 and remained there until 10 September 2012; (ii) Mr Sullivan’s DNA was found on fabric and a dark blue shirt found in Kookaburra Park, Moorooka, and on the driver’s seatbelt of Mr Stewart’s car; and (iii) Mr Stewart was paid \$888 by Centrelink on 6 September 2012.<sup>165</sup>

***Discussion***

- [81] Mr Stewart’s contention is that it was not open to the jury to be satisfied beyond reasonable doubt that he intended:

- (a) to kill or do grievous bodily harm at the time of the blows to Mr Sullivan’s head; or
- (b) to rob Mr Sullivan, and in the prosecution of that purpose hit him with the bar.

- [82] The contention concerning Mr Stewart’s intention focuses on the time when he hit Mr Sullivan, and advances these points:

- (a) Mr Stewart’s thought processes were disordered because he was in a psychotic state, and intoxicated with amphetamines; and therefore
- (b) it was a rational hypothesis that when he struck Mr Sullivan it was merely to subdue him (by knocking him unconscious) without the specific intention to kill or do grievous bodily harm;
- (c) equally, it was a rational hypothesis that Mr Stewart was not pursuing an intention to rob Mr Sullivan at the times he hit him; and
- (d) those hypotheses could not be excluded beyond reasonable doubt.

***Intention to rob***

- [83] The thesis here is that while an inference was open that Mr Stewart intended to rob or steal from Mr Sullivan at various times **before** he went into the unit, and even at times while inside, at the time he hit Mr Sullivan with the bar the jury could not exclude the inference that he may not have had that intent.

- [84] In my view, it was open to the jury to reject that inference beyond reasonable doubt. The evidence reveals this of Mr Stewart’s conduct, from which the jury could infer his intention to rob:

- (a) in the days leading up to 7 September he had spent most or all of his money on buying drugs from Mr Sullivan, in circumstances where he felt he should have been given a better price;
- (b) he resented Mr Sullivan’s refusal to give him a better price; he felt Mr Sullivan had gone back on his word; the resentment was such that he thought of Mr Sullivan with quite a degree of bitterness;

- (c) that resentment prompted him to hide the iron bar down his pants when he went to the unit on Friday morning, 7 September; he said he felt like belting them all, and when that was put to him, he answered “not... after they opened the door”; he did nothing on that occasion;
- (d) about 9.00 pm that night, he returned to the unit to buy drugs, again asking for a better price, only to be rebuffed by Mr Sullivan; at that time Mr Stewart started to think about robbing him; he was “pissed off” with Mr Sullivan and said he wanted to go round and rob him, and he had to decide how to do it;
- (e) he heard voices in his head saying, “Rob him and we’ll protect you”, and “Go in, we’ll protect you”;
- (f) he put a lot of thought into how to break in, and had a “brainwave”, which was to use Allen keys to open the lock;
- (g) he then set about dressing in a “uniform” which included Thai fishing pants, a t-shirt, a work shirt, jumper and a hoodie; this was done so as to disguise himself so he would not be recognised by Mr Sullivan;
- (h) he put the iron bar down his pants, as “part of my uniform”;
- (i) he said his purpose in going there was to rob Mr Sullivan of drugs, and that is what he also told the police later;
- (j) at the unit he took steps to make it appear to others that he was being invited in, by waving through the window of the unit;
- (k) once inside he locked the door in case someone else came in;
- (l) he went into Mr Sullivan’s bedroom, having ascertained that he was asleep, in order to take the drugs from a cupboard where he knew, or suspected, that the drugs were kept;
- (m) he decided to crawl past Mr Sullivan’s bed to get to the cupboard; at that time he had taken out the iron bar, and had it in his hand;
- (n) he was crawling to the cupboard, or trying to open it, when Mr Sullivan woke up; he hit Mr Sullivan with the iron bar and a fight started;
- (o) he hit Mr Sullivan with the bar when the fight started in the bedroom; he described it as getting Mr Sullivan down on the floor, working out where his head was, and hitting him; he said, “I was all over him, boom”;
- (p) as the fight progressed from place to place within the unit, he continued to “whack him” with the bar;
- (q) once the fight started he was calm; he described the blows as “vicious” and that he was filled with an “unquenchable rage coming inside”;
- (r) in cross examination, he agreed that everything he did in going to the unit, and inside the unit, was for the purpose of robbing Mr Sullivan; and
- (s) once Mr Sullivan was subdued, Mr Stewart stole a wallet, money, the drugs and a set of scales.

[85] It is true that he described hearing voices telling him to go in and rob Mr Sullivan. Dr Schramm concluded that Mr Stewart was experiencing a florid psychotic episode at the time of the offence, part of which was revealed by his hearing angelic or demonic voices. However, Dr Schramm’s evidence qualified the nature and impact of that episode:

- (a) Mr Stewart had “woolly thought connection” falling short of formal thought disorder;
  - (b) Mr Stewart did **not** report to him that he had heard any voices between when he left home to go to the unit, and after the assault on Mr Sullivan was completed;
  - (c) Mr Stewart was admitting that he went there to rob Mr Sullivan, but said he had no intention to kill him;
  - (d) whilst Mr Stewart was not able, at the time of the offence, to reason with a moderate degree of capacity, his condition was not such that he could not form an intent to inflict injury; he affirmed that Mr Stewart was capable of forming intent at the time;
  - (e) his conclusion was that during the fight, Mr Stewart wanted to put Mr Sullivan down, and wanted to cause him an injury; “he knew what he was doing” and “he knew that... to hit someone would... could have caused significant harm to him”,<sup>166</sup> and
  - (f) part of Mr Stewart’s mission at the unit was to rob Mr Sullivan.
- [86] In my view, it was open to the jury to conclude that Mr Stewart’s intention was to rob Mr Sullivan. He was angry at Mr Sullivan’s refusal to sell him drugs at a better price. That anger was such as to cause him to arm himself with the iron bar earlier in the day when he went to Mr Sullivan’s unit. He decided to rob Mr Sullivan, and the voices he heard encouraged that course, saying he would be protected if he did go in and rob him. He told the police and Dr Schramm that he intended to rob Mr Sullivan, and gave evidence to that effect at the trial.
- [87] Further, when he was at the unit, Mr Stewart entered through the front door in order to rob Mr Sullivan of drugs, and crawled into Mr Sullivan’s bedroom to reach the cupboard where he knew or thought that the drugs were kept. On one of his versions of events, he tried to open the cupboard to get the drugs. After Mr Sullivan was eventually subdued, Mr Stewart took the drugs as well as other items.
- [88] The contention put forward by Mr Stewart is that his thought processes were so affected that his intention wavered from time to time, such that he may have entered with the intention to rob, but lacked that intention a few minutes later when he struck Mr Sullivan.
- [89] That contention cannot be accepted. The whole course of Mr Stewart’s actions was driven by the intention to rob Mr Sullivan. As Mr Stewart himself said, he had run out of money and drugs, and when he stood outside the unit he thought, “I’ve got fuckin’ broke... I got to do somethin’... so I went to the window”,<sup>167</sup> and waved in a pretence that he was being invited in. More importantly, he accepted in cross-examination that everything he did going to and in the unit was for the purpose of robbing Mr Sullivan.<sup>168</sup> Then, with reference to stealing the drugs, cash, wallet and scales, Mr Stewart said, “I wanted to get reimbursed in some way”.<sup>169</sup>
- [90] This ground of appeal does not succeed.

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<sup>166</sup> AB 285.

<sup>167</sup> AB 445.

<sup>168</sup> AB 252.

<sup>169</sup> AB 463.

### **Intention to cause grievous bodily harm**

- [91] For present purposes, I can put to one side the several occasions where, in his account to the police, Mr Stewart referred to an intention to go and “belt” Mr Sullivan. On each occasion he qualified it by saying that actually was not the intention, but the intention was to rob.
- [92] Mr Stewart had armed himself with a weapon that, on any view, was going to inflict serious injury if used, particularly if used to strike the head. I have inspected the iron bar which was made an exhibit at the trial. There can be no doubt it would have been obvious to anyone that to hit someone with it, in vicious strokes, would cause serious harm. Even more obvious would have been the prospect of serious harm if it was used that way to hit someone in the head. Mr Stewart’s own evidence as to the events when the fight started in Mr Sullivan’s bedroom show that he intended to do serious harm. He got Mr Sullivan on the floor, worked out where his head was, and hit him in the head with the iron bar. Those blows were repeated as the fight progressed, in a way described by Mr Stewart as “vicious”, and to the head.
- [93] Mr Stewart’s intention to cause such harm is, in my view, easily inferred considering that he not only armed himself with the iron bar, but secreted it down his pants when he went to the unit, on two separate occasions. Once he was inside the unit, and more particularly at Mr Sullivan’s bedroom, he had taken the iron bar out of his pants, and was holding it in his hand as he crawled in past the bed. When the fight started, Mr Stewart dropped the bar, but then specifically looked for it, retrieved it, worked out where Mr Sullivan’s head was, and struck him in the head with the bar. He continued to strike blows to the head, including to the back of Mr Sullivan’s head as he walked away.
- [94] There were at least five blows to the head, administered in various parts of the unit. Mr Stewart described the blows as “vicious”, and the result of his being filled with “an unquenchable rage”. In a response full of understatement, when it was put to him that he hit as hard as he could, Mr Stewart said it “wouldn’t have been a tap”.<sup>170</sup> The forensic medical evidence, and photographic exhibits showing the injuries to Mr Sullivan’s head, eloquently show the ferocity of the blows, and the inevitability of serious physical harm from them.
- [95] Dr Schramm’s opinion was that Mr Stewart was capable of forming an intention, notwithstanding the disordered and woolly nature of his thought processes. More importantly, Dr Schramm said that Mr Stewart was “able to appreciate that to strike someone with a bar is liable to cause him serious injury”, and that Mr Stewart knew that.
- [96] In my view, there was ample evidence upon which the jury could conclude that at all times in the unit Mr Stewart had the intention of causing grievous bodily harm to Mr Sullivan. In my view that conclusion was the only rational conclusion to draw.
- [97] This ground does not succeed.

### **Misdirection – s 302(1)(b) of the Criminal Code**

- [98] The contention here is that the direction to the jury was to the effect that the critical intent was Mr Stewart’s intent **at the time he entered the unit** and not at the time when he struck the blows which caused Mr Sullivan’s death.

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<sup>170</sup> AB 265 line 15.

[99] The relevant directions were in two parts. The first was in these terms:<sup>171</sup>

“The basis of this ground is set out in section 321(1)(b) of our Criminal Code. It says that a person who unlawfully kills another is guilty of murder if the death is caused by a means of an act done in the prosecution of an unlawful purpose which act is of such a nature as to be likely to endanger human life. For the purpose of murder B, you do not need to concern yourselves with the question of whether the defendant intended to kill or cause grievous bodily harm to Mr Sullivan. It’s enough if you are satisfied of these three things: firstly, that the defendant did an act by means of which the death of Mr Sullivan was caused; secondly, that the defendant’s act was of such a nature as to be likely to endanger Mr Sullivan’s life; and, thirdly, that he did that act in carrying out the purpose of robbing Mr Sullivan.”

[100] Then, by way of further directions on the third element referred to in that passage, the learned trial judge said this a few lines later:<sup>172</sup>

“The third matter requires a little more discussion. The prosecution case is that the defendant entered Mr Sullivan’s unit with the intention of robbing it, of stealing drugs and perhaps money and that, while he was there, he struck Mr Sullivan and Mr Sullivan subsequently died. If you are satisfied that those things happened, then it is open to you to find that Mr Sullivan’s death was caused by means of an act done by the defendant in carrying out an unlawful purpose, that is, stealing from Mr Sullivan’s unit or what our criminal law calls robbery. It is an offence under our criminal law to enter a dwelling of another with intent to commit an indictable offence in the dwelling. That’s section 419 of our Criminal Code and it’s called ‘robbery’. Again, the prosecution says the defendant entered Mr Sullivan’s unit intending to rob him.”

[101] Thus it is contended that the jury were directed to focus on the time when “the defendant entered Mr Sullivan’s unit with the intention of robbing it, of stealing drugs and perhaps money”.

[102] The sequence of what the jury was told is important to resolving this issue:

- (a) first, the third element they had to be satisfied about was that the act which caused the death was done “in carrying out the purpose of robbing Mr Sullivan”;
- (b) secondly, the prosecution case was that Mr Stewart “entered Mr Sullivan’s unit with the intention of robbing it... and that, while he was there, he struck Mr Sullivan and Mr Sullivan subsequently died”; the prosecution said Mr Stewart “entered Mr Sullivan’s unit intending to rob him”;<sup>173</sup>
- (c) thirdly, the prosecution had to prove beyond reasonable doubt “that [Mr Stewart] intended to rob Mr Sullivan when he entered his unit”;<sup>174</sup> this was described as the intention “that took [Mr Stewart] into Mr Sullivan’s unit”;<sup>175</sup>

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<sup>171</sup> AB 317 line 43 – AB 318 line 5.

<sup>172</sup> AB 318 lines 17–27.

<sup>173</sup> AB 318 lines 17–27.

<sup>174</sup> AB 318 lines 32–35.

<sup>175</sup> AB 318 line 32.

- (d) fourthly, the prosecution’s case was that Mr Stewart entered Mr Sullivan’s unit intending to rob him; the jury had to be satisfied beyond reasonable doubt that Mr Stewart intended to rob Mr Sullivan “when he entered the unit”; once again this was explained as being the intent “that took [Mr Stewart] into Mr Sullivan’s unit”;<sup>176</sup>
- (e) fifthly, although the jury were addressed in terms of considering intention “when he entered the unit”, they were also told that “if you are satisfied beyond reasonable doubt that the defendant entered the unit intending to rob Mr Sullivan and, while there, did an act which endangered his life, you may find him guilty of murder”.<sup>177</sup>

[103] The jury were plainly directed that the unlawful purpose was robbery. More importantly they were directed that if Mr Stewart entered the unit with the intent to rob, and while he was there did the act which caused the death, that was enough to convict of murder. That direction was in conformity with what was said in *R v George*.<sup>178</sup>

“[47] In this case, before convicting of murder, the jury must have been satisfied that death was caused by means of an act done in the prosecution of the burglary. The offence of burglary has an intention to cause a specific result as an element, namely an intent to commit an indictable offence in the dwelling particularised here as an intent to steal or sexually assault. This required the jury, before convicting of murder under s 302(1)(b), to be satisfied that the appellant did the act which caused each death while prosecuting a burglary, that is, while entering or being in the deceased’s house intending to steal or sexually assault in the house. It follows that the prosecution had to prove that the appellant intended to either steal or sexually assault in the deceased’s house whilst entering or in the house in order to establish each charge of murder by way of s 302(1)(b).”

[104] I do not consider that the jury could reasonably have understood the directions as requiring them to focus only on intent at the point of entry. It was clear that the intention being referred to was the intention “that took the defendant into Mr Sullivan’s unit”. A reading of the relevant parts of the directions to the jury on this issue made it clear that the comments were not intended to be confined to the moment of entry, and would not have been understood that way. The jury were told that if robbery was the intent when Mr Stewart entered, and while prosecuting that purpose the lethal act was done, that was enough to convict of murder. In light of that, two pieces of evidence in Mr Stewart’s case are significant:

- (a) Mr Stewart’s evidence was that the purpose did not alter from the time he entered until the time he left; everything he did in going to the unit **and inside the unit**, was for the purpose of robbery;<sup>179</sup> and
- (b) Dr Schramm’s evidence was that the events in the unit could be seen as fulfilling Mr Stewart’s “mission” or purpose, namely robbing Mr Sullivan.<sup>180</sup>

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<sup>176</sup> AB 330 line 33.

<sup>177</sup> AB 331 lines 3–18.

<sup>178</sup> [2014] 2 Qd R 150 at [47], per McMurdo P, Holmes JA and Henry J concurring.

<sup>179</sup> AB 252, 264.

<sup>180</sup> AB 296, 299.

[105] It must also be recalled that the initial blows occurred when Mr Stewart was in the process of trying to steal the drugs in the bedside cupboard in Mr Sullivan’s bedroom. What followed was a progression of blows to subdue Mr Sullivan and permit Mr Stewart to fulfil the purpose and intent with which he entered the unit, and while he remained in it.

[106] I also note that no redirection was sought on this issue.

[107] I do not consider that it has been demonstrated that a miscarriage of justice occurred. This ground of appeal fails.

**Failure to direct as to the definition of “robbery”**

[108] The contention here is that a miscarriage of justice occurred because the jury were not directed as to the definition of “robbery” under s 409 of the *Criminal Code*. It is contended that the learned trial judge directed on the basis that the jury had to be satisfied that Mr Stewart broke and entered the unit with the intent to steal (the offence of burglary, not robbery).

[109] There is little doubt that the prosecution case was that the unlawful purpose was robbery, and not burglary. The learned trial judge was told as much at the point of discussing the draft directions with counsel: “The unlawful purpose I’m alleging is robbery, not burglary”.<sup>181</sup>

[110] The text of the direction given is set out above in paragraphs [99] and [100] above. The phrases used are:

- (a) “entered [the unit] with the intention of robbing it, of stealing drugs and perhaps money”;
- (b) if the jury are “satisfied that those things happened” it was open to find the death was “caused by means of an act done... in carrying out an unlawful purpose, that is stealing... or what our criminal law calls robbery”;
- (c) “it is an offence... to enter a dwelling... with intent to commit an indictable offence... it’s called ‘robbery’”; and
- (d) the prosecution says he entered “intending to rob him”.

[111] The jury were not being asked to consider whether the acts came within the definition of “robbery” or “burglary”, nor whether what was done was “stealing” as defined in the *Criminal Code*. Rather they were directed to consider whether the lethal acts were done in the prosecution of an unlawful purpose. That unlawful purpose was plainly identified for them as being robbery.

[112] In my view, the jury were left in no doubt that the unlawful purpose was robbery. The references to “stealing” were identified as being “what our criminal law calls robbery”. In other words, they were directed that the prosecution case was an intent to commit a particular kind of stealing, identified in the criminal law as the offence of robbery.

[113] That the jury were directed in terms of being satisfied as to the “unlawful purpose”, rather than “offence” brings the case within what was said in *R v Georgiou & Ors; Ex parte Attorney-General (Qld)*,<sup>182</sup> where this Court said of s 302(1)(b):

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<sup>181</sup> AB 302 line 32.

<sup>182</sup> (2002) 131 A Crim R 150 at [53].

“It is, however, important to recognise that the section speaks of ‘unlawful purpose’ and not ‘offence’. The unlawful purpose is therefore not limited to the strict elements of an offence. Any act done in the course of attempting to get away after the commission of an offence would be an act done for an unlawful purpose. In particular cases, a question may arise as to when the ‘unlawful purpose’ associated with the commission of an offence had ended, but such an issue does not arise here. The killing occurred very shortly after the breaking and entering of the chemist shop, on the street outside the shop, before the burglars had left the scene, and with a view of avoiding apprehension for the offence.”

- [114] In the circumstances it was not necessary to direct in terms of the definition of offence of “robbery”. The jury were directed to consider whether the unlawful purpose was robbery, and whether the death was caused in the prosecution of that unlawful purpose.
- [115] Further, it has to be noted that no redirection was sought at the time. Given the prosecutor’s clarification of the unlawful purpose,<sup>183</sup> that lends support to the conclusion that the jury were not likely to have misunderstood their task.
- [116] This ground of appeal fails.

#### **Failure to direct in accordance with direction 46.1 of the Bench Book**

- [117] The contention here is one which builds upon the previous grounds in which the question was raised as to whether the jury had to confront a fluctuating intention on the part of Mr Stewart. The contention is that the jury should have been directed in accordance with direction 46.1 of the Bench Book that:
- (a) guilt should be the only rational inference that should be drawn from the circumstances,<sup>184</sup> and
  - (b) “if there is any reasonable hypothesis consistent with innocence, the jury’s duty is to acquit”.<sup>185</sup>
- [118] The contention accepts that the jury must have rejected the evidence of Mr Stewart insofar as he denied holding an intention to kill, an intention to do grievous bodily harm, or an intention to rob.<sup>186</sup> However, it was argued that the prosecution still had to exclude, beyond reasonable doubt, the hypothesis that the Mr Stewart might have struck Mr Sullivan to the head “whilst he was intoxicated and in a psychotic state holding delusional thoughts, without any specific intention to kill or do grievous bodily harm or to rob”.<sup>187</sup>
- [119] There are a number of reasons why this contention cannot succeed.
- [120] First, it is correct to say that in the absence of admissions, intention, as a state of mind, must be proved by inference.<sup>188</sup> The High Court stated the proposition in *Shepherd v The Queen*:<sup>189</sup>

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<sup>183</sup> AB 302 line 32.

<sup>184</sup> Relying on *Shepherd v The Queen* (1990) 170 CLR 573 at 578. (*Shepherd*)

<sup>185</sup> Relying on *R v Perera* [1986] 1 Qd R 211 at 217.

<sup>186</sup> In truth, for the reasons outlined earlier, Mr Stewart’s evidence admitted an intention to rob Mr Sullivan.

<sup>187</sup> Appellant’s outline, paragraph 76.

<sup>188</sup> *R v Simpson* [2013] QCA 250 at [25].

<sup>189</sup> *Shepherd* at 580 per Dawson J, Mason CJ, Toohey and Gaudron JJ concurring.

“Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof.”

- [121] In this case, Mr Stewart gave evidence of his intentions which the jury could have accepted as an admission of an intention to enter the unit in order to steal, accompanied by violence if necessary. That evidence has been rehearsed earlier in these reasons in the section dealing with intention to rob: see paragraphs [83] to [89] above. On Mr Stewart’s evidence, and that of Dr Schramm, Mr Stewart intended to break into Mr Sullivan’s unit in order to steal drugs (at the least), and for that purpose he armed himself with the iron bar. Having entered the unit, and in particular Mr Sullivan’s bedroom where the drugs were kept, Mr Stewart extracted the iron bar from down his pants, and had it in his hand. When the fight started Mr Stewart dropped the bar temporarily, but looked for it, retrieved it, got Mr Sullivan on the floor, worked out where his head was, and hit him in the head. As the fight progressed, vicious blows continued, principally to the head and the back of the head, such that Mr Sullivan was overcome. Once that was done, Mr Stewart proceeded to steal money, a wallet, the drugs and a set of scales.
- [122] There was, in my view, no possible innocent explanation for Mr Stewart’s taking the iron bar, much less extracting it from where it was hidden in his pants, and having it in his hand at the very time he was manoeuvring to steal the drugs. In those circumstances, it is difficult to understand what would be added to the directions which were given on intention by the addition of those proposed on this contention.
- [123] Secondly, the learned trial judge directed on intention in a way which made it clear to the jury that they had to be satisfied beyond reasonable doubt that Mr Stewart had the requisite intent.<sup>190</sup> In redirections the jury were reminded of what had been said as to the requirement to be satisfied beyond reasonable doubt of the requisite intent.<sup>191</sup>
- [124] Given the state of the evidence concerning intent, to which I have referred earlier, and in particular Mr Stewart’s acceptance that everything he did in the unit was for the purpose of robbing Mr Sullivan, this case comes within what the High Court said in *Shepherd*:<sup>192</sup>

“The learned trial judge gave the customary direction that, where the jury relied upon circumstantial evidence, guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances. Whilst a direction of that kind is customarily given in cases turning upon circumstantial evidence, it is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt. In many, if not most, cases involving substantial circumstantial evidence, it will be a helpful direction. In other cases, particularly where the amount of circumstantial

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<sup>190</sup> AB 312 line 45, AB 313, AB 316 line 34 – AB 317 line 31, AB 318 line 29 – AB 319 line 18.

<sup>191</sup> AB 330–331.

<sup>192</sup> At 578. Internal citations omitted.

evidence involved is slight, a direction in those terms may be confusing rather than helpful. Sometimes such a direction may be necessary to enable the jury to go about their task properly. But there is no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence. It will be for the trial judge in the first instance to determine whether it should be given.”

- [125] Thirdly, accepting that a circumstantial evidence direction is not always necessary, this is a case where the fact to be inferred, namely intent, is but one element of the offence. In such circumstances, there is authority that a circumstantial evidence direction does not have to be given. In *R v Dolley*,<sup>193</sup> de Jersey CJ stated:

“Counsel for the appellant submitted that the judge should have given the full circumstantial evidence direction, including the warning that the inference should not only be a rational inference, but the only rational inference which could be drawn from the circumstances. That direction was not given.

I do not, however, accept that submission. The judge clearly instructed the jury that proof of the relevant awareness was an essential element of the charge to be established beyond reasonable doubt. The direction concerning the need to exclude other rational hypotheses consistent with innocence is but a logical elaboration upon the Crown’s obligation to establish guilt beyond reasonable doubt.

Certainly that is an essential direction where what is sought to be inferred involves a matrix of facts and circumstances, as, for example, how or whether a murder has been committed in a case where no body has been found. That is but one example, but in a case like this, where the fact to be inferred is itself but one element of the offence, the direction that, in order to convict, that fact must be inferred beyond reasonable doubt, adequately directs the jury to the test to be applied, because obviously, if the inference is drawn beyond reasonable doubt, then, ipso facto, all other reasonable possibilities must have been excluded.”<sup>194</sup>

- [126] This case does not involve a matrix of facts and circumstances of the kind referred to in *Dolley*. Mr Stewart either had the intent or he did not. For the reasons given earlier, there was no credible suggestion of a fluctuating intention, at least from the time Mr Stewart actually entered the unit. Further, based on what was reported to Dr Schramm, the voices were not driving Mr Stewart after he left home to go to Mr Sullivan’s unit.
- [127] Fourthly, no such direction was sought at trial by counsel for Mr Stewart.
- [128] In the circumstances of this case, I do not consider that it was necessary to have given the further directions. The jury were reminded a number of times about the necessity to be satisfied beyond reasonable doubt as to whether Mr Stewart had the requisite intent. They were told that in ascertaining whether Mr Stewart held the requisite intent, they could draw reasonable or rational inferences from facts which they found

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<sup>193</sup> (2003) 138 A Crim R 346. (*Dolley*)

<sup>194</sup> *Dolley* at 349; McMurdo P and White J concurring.

were established. They were also directed that if they were not satisfied beyond reasonable doubt that Mr Stewart held the necessary intent, then they had to acquit. These directions were reiterated in the course of redirections.

[129] In my view this ground of appeal fails.

**Application of the proviso under s 668E(1A) of the *Criminal Code* 1899 (Qld)**

[130] Even if I had taken the view that the additional directions, the subject of the grounds of appeal, should have been given, I am of the view that no substantial miscarriage of justice has resulted, and this Court should exercise the power which it has under s 668E(1A) of the *Criminal Code* (Qld), to dismiss the appeal.

[131] The evidence which I have reviewed above satisfies me, beyond reasonable doubt, that Mr Stewart is guilty of murder, both on the basis that he intended to cause grievous bodily harm to Mr Sullivan, and on the basis that he administered lethal blows to Mr Sullivan's head in the prosecution of an unlawful purpose, namely robbery.

[132] Whilst there was evidence from both Mr Stewart and Dr Schramm of disordered thought processes and amphetamine intoxication, there was ample evidence to conclude that Mr Stewart was capable of forming the intent, which he did, of going to rob Mr Sullivan. That intent is demonstrated in the ways mentioned above, but is coupled with the quite deliberate steps taken by Mr Stewart to arm and disguise himself in order to carry out the purpose. Having secreted the iron bar until he was inside the unit, Mr Stewart took it out at the very time he crawled past Mr Sullivan's bed in order to take the drugs from the cupboard. What followed was a vicious assault designed to overcome Mr Sullivan so that Mr Stewart's purpose could be fulfilled. As Mr Stewart agreed in cross-examination, everything he did in going to the unit, and in the unit, was for the purpose of robbing Mr Sullivan.

[133] The references by Mr Stewart to the moments during the fight when he wondered how it would end, and whether they would share a bong or a laugh together, does not alter my conclusion. They were momentary disordered thoughts, preceded and followed by the attack with the bar. In my view they go nowhere to displace the overriding and ongoing unlawful purpose of the entry into the unit and the attack on Mr Sullivan.

[134] My review of the evidence satisfies me, beyond reasonable doubt, that the only rational inference is that Mr Stewart intended at all times from when he entered the unit to steal from Mr Sullivan by the use of actual violence if that was necessary. Further, I am equally satisfied that the only rational inference that can be drawn from Mr Stewart's arming himself with, and use of, the iron bar, is that at all times when he was in the unit he intended to inflict grievous bodily harm if and when he was confronted by Mr Sullivan.

[135] Therefore, under s 668E(1A) of the *Criminal Code*, I have concluded that the guilty verdict of murder has not resulted in a substantial miscarriage of justice.<sup>195</sup>

**Conclusion**

[136] For the reasons given above, the appeal ought to be dismissed.

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<sup>195</sup> *Patel v The Queen* (2012) 247 CLR 531 at [126]–[128]; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [27].

[137] **ATKINSON J:** I have read the reasons of Morrison JA. I agree that, for those reasons, the appeal should be dismissed.

[138] **APPLEGARTH J:** I agree with the reasons of Morrison JA and with the order proposed by his Honour.