

SUPREME COURT OF QUEENSLAND

CITATION: *R v Huxley* [2021] QCA 78

PARTIES: **R**
v
HUXLEY, Brent Malcolm
(appellant)

FILE NO/S: CA No 272 of 2019
SC No 141 of 2018

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Townsville – Date of Conviction:
18 September 2019 (North J)

DELIVERED ON: 23 April 2021

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2020

JUDGES: Fraser, Morrison and Mullins JJA

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty of murder by a jury – where there was evidence from a witness that the appellant admitted to him that he had killed the victim by dropping a rock on the victim’s head – where the witness did not make a statement to the police until after the witness had read a newspaper article that the appellant was charged with the murder of the victim who had been bashed and stoned to death – where the prosecution case depended on this witness’ evidence – where the trial judge directed the jury that they must accept the accuracy and reliability of the witness’ evidence as to the confession and find that the appellant was truthful in making the confession beyond reasonable doubt before they could convict the appellant of murder – where the appellant’s admission, if accepted, would have been considered in conjunction with the circumstantial evidence against the appellant – whether the jury’s verdict was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – where the appellant was found guilty of murder by a jury –

where the prosecutor in opening referred to the actions of a participant in the offending as part of plan involving the appellant and the participant and information provided by that participant to the police that assisted in the location of the victim's body – where at the time of the opening the prosecution did not expect to call this participant as a witness – where there was an application by the appellant after the opening to discharge the jury – where the trial judge ruled against discharging the jury – where the trial judge gave specific directions to the jury to ignore the statements made in the prosecution opening that made reference to the information provided to the police by the participant and the alleged plan – where the trial judge ruled that the prosecution case had to be confined to that based on the manner and place of killing that conformed with the appellant's alleged confession – whether the prosecutor's opening caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was found guilty of murder by a jury – where the prosecution case was that the victim was assaulted at a unit before being transported to a remote location by the appellant and another where it was alleged the appellant killed the victim – where a witness who was present in the unit had originally refused to give evidence – where this refusal occurred in front of the jury – where the witness eventually gave evidence in the trial – where the witness had admitted to consuming alcohol and methylamphetamine on the day of the relevant events – where the trial judge gave an extensive direction to the jury regarding the witness' evidence and a warning about acting on her evidence – where the witness gave the only evidence to the effect that the appellant was not present in the unit when the assault of the victim occurred – where the trial judge directed the jury that if they disbelieved the witness' evidence that did not constitute evidence that the appellant was present in the unit and there would be no evidence about that aspect – whether the witness' original refusal to give evidence in front of the jury and the trial judge's direction regarding the witness' evidence caused a miscarriage of justice

Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited

Pell v The Queen (2020) 94 ALJR 394; [2020] HCA 12, cited
R v Oliver [2020] QCA 76, cited

COUNSEL:

S J Hamlyn-Harris with N Edridge for the appellant
D Balic for the respondent

SOLICITORS: N R Barbi Solicitor Pty Ltd for the appellant
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **FRASER JA:** I agree that the appeal should be dismissed for the reasons given by Mullins JA.
- [2] **MORRISON JA:** I have read the reasons of Mullins JA and agree with those reasons and the order her Honour proposes.
- [3] **MULLINS JA:** Mr Huxley was tried before a jury on an indictment that charged him with the murder of Mr McCabe on or about 16 August 2015 at Crystal Creek or elsewhere in the State of Queensland. There were two co-accused on the same indictment who were tried with Mr Huxley, but they were charged with other offences. One co-accused, Mr Rewha, was charged with assault occasioning bodily harm in company that was alleged to have been committed against Mr McCabe on or about 15 August 2015 at a unit in Burnda Street, Townsville. The other co-accused, Ms Leonie Doyle, was charged with being an accessory after the fact to the murder of Mr McCabe committed by Mr Huxley and Mr Jason Douglas Taylor or, alternatively, being an accessory after the fact to the manslaughter of Mr McCabe committed by Mr Huxley and Mr Taylor. Mr Rewha was found not guilty. A directed verdict of acquittal of Ms Doyle in respect of being an accessory after the fact to murder was entered. Mr Taylor was not on trial with Mr Huxley, Mr Rewha and Ms Doyle. Ms Doyle was found guilty of being an accessory after the fact to manslaughter on the basis of assistance given to Mr Huxley.
- [4] Mr Huxley was convicted of the murder of Mr McCabe. Mr Huxley appeals against his conviction on the following grounds:
- (1) the verdict of the jury was unreasonable or cannot be supported having regard to the evidence;
 - (2) the prosecutor's opening address was improper and unfair, and as a result a material miscarriage of justice was occasioned which deprived Mr Huxley of a chance of acquittal;
 - (3) the learned trial judge erred in failing to discharge the jury after the prejudicial opening by the prosecutor;
 - (4) the trial judge erred in calling the witness Ms Greer to be sworn in the presence of the jury without first conducting a voir dire to determine whether she was prepared to give evidence in the trial;
 - (5) the trial judge erred, when he instructed the jury that it was open to them to disregard in its entirety the evidence of Ms Greer.
- [5] Grounds 2 and 3 are related and will be dealt with together. Grounds 4 and 5 are related and will be dealt with together. The latter grounds are relied on as supplementing the unfairness caused by the prosecutor's opening address that is the subject of grounds 2 and 3 which was a concession by Mr Hamlyn-Harris of counsel who appears with Mr Edridge of counsel for Mr Huxley that, even if grounds 4 and 5 showed unfairness to Mr Huxley in the trial, there was not sufficient unfairness to amount to a miscarriage of justice.

Evidence at the trial

- [6] In August 2015 Mr McCabe was living with his uncle Mr Gary Doyle in Charters Towers. Mr Doyle last saw Mr McCabe around 5.30 pm on Saturday, 15 August 2015 when he left in a white Commodore with a black bonnet (the white Commodore) with Mr Doyle's daughter, Ms Leonie Doyle, and a woman called Candis. Mr Doyle knew that Mr McCabe was a drug user. Another uncle, Mr Anderson, also gave evidence of seeing Mr McCabe in mid-August 2015, when Mr McCabe "mentioned Brett Huxley had been in contact with him and stated to him that him and a couple of other people that day he's coming up to collect". Mr Anderson also knew that Mr McCabe was a drug user. Mr Moore who was a cousin of Mr McCabe saw Mr McCabe at Mr Doyle's place when Ms Leonie Doyle and another woman with blonde hair in her early twenties called Candis were present. Mr Moore recalled that everyone at Mr Doyle's place when he was there was using "ice" and he described Mr McCabe as "wired" which meant he was "high on ice".
- [7] Mr Munns who was a cousin of Mr McCabe and also lived in Charters Towers saw Mr McCabe on 15 August 2015. Mr Munns' partner, Ms Bridges, had helped Mr McCabe prepare his tax return which resulted in a refund of \$3,042 which went into Ms Bridges' account. Mr Munns and Ms Bridges arranged with Mr McCabe for Mr McCabe to collect his tax refund money on Monday, 17 August 2015. Mr Munns also had a telephone call from Mr McCabe for a couple of minutes at 8.31 pm on the evening of 15 August 2015 when Mr McCabe said he was with Leonie Doyle and on his way to Townsville. Mr McCabe did not contact either Mr Munns or Ms Bridges on 17 August 2015.
- [8] On 15 August 2015 Mr Huxley was living at a unit in Burnda Street in Townsville that was rented by Ms O'Dell. Ms O'Dell went on a camping trip on 14 August 2015 and returned on 16 August 2015 about 4.30 pm or 5pm. On her return, she noticed "the blood on the ground and stuff like that" and that a mat was missing. When she was doing the bond clean a couple of weeks later, she noticed that the mop and mop bucket were missing.
- [9] In August 2015 Ms Sacha Lee was living in Townsville and knew Mr Rewha and Mr Huxley. She also knew Mr Taylor who was living in her house. In the early afternoon on a day in August 2015, Mr Rewha and Mr Huxley arrived in a dark blue Commodore. They stayed at Ms Lee's house for a short time and then Mr Rewha, Mr Huxley, Mr Taylor and Ms Lee all went to a hotel and stayed for an hour or so before returning to Mr Huxley's unit in the blue Commodore. They arrived at 4.00 pm or 4.30 pm. There was no one else in the unit. They all had a shot of methylamphetamine. Ms Lee stayed in the unit, when Mr Rewha, Mr Taylor and Mr Huxley then left for a couple of hours about 6.00 pm or 6.30 pm. They returned a bit later about 8.00 pm in the blue Commodore and were very agitated, pacing up and down in the lounge room. Then a red car and a bigger white one arrived and a white girl with blonde hair and a blue streak in her hair (who the jury would have inferred from other evidence was Ms Greer) walked into the apartment, Mr Rewha talked to her and they went into a bedroom. Ms Lee could see out the window that Mr Huxley was talking to a younger girl whom she described as a dark Murri girl (who the jury would have inferred from other evidence was Ms Leonie Doyle) and she and Mr Huxley then took off in the blue Commodore.

- [10] Ms Lee ended up leaving the unit. It was an admitted fact that Ms Lee placed a telephone call ordering a taxi to attend at the unit at 9.03 pm on 15 August 2015 whilst standing at the front of the unit complex. It was also an admitted fact that it was Mr Huxley's mobile telephone service that was used by Ms Lee. Ms Lee said that while she was waiting for the taxi, Mr Huxley pulled up in the blue Commodore and offered to give her a lift home. The dark Murri girl was in the front seat and she thought there was another person in the back seat. When she left the unit, Mr Rewha and Mr Taylor remained in the unit. It took about 15 minutes for Mr Huxley to drive Ms Lee home. It was an admitted fact that the taxi company sent an SMS at 9.08 pm to the telephone number used by Ms Lee to order the taxi, advising that they were close to the unit complex, but the passenger was not located and no fare was incurred. (This evidence was relied on by Mr Huxley as an instance of his mobile phone not being in his possession.)
- [11] Ms Greer's evidence was as follows. In 2015 her partner was Mr Rewha and on 15 August 2015 her relationship with him was "rocky". On 15 August 2015, Ms Greer went to Mr Huxley's apartment after lunch. Ms Greer consumed quite a bit of alcohol that day. Ms Greer then went in the white Commodore with Ms Doyle to Charters Towers. They went to a house where they met Mr McCabe. Ms Greer injected a shot of "ice". She had smoked ice previously, but that was the first time she had injected it and it was a lot different and "an overwhelming feeling". Ms Doyle and Ms Greer returned to Townsville with Mr McCabe in the white Commodore. A photograph was tendered (exhibit 26) that showed they stopped at a service station in Charters Towers at 6.39 pm. They arrived back at the apartment. Present were Ms Greer, Ms Doyle, Mr McCabe, an older fellow and an Aboriginal girl (who was identified by other evidence as Ms Lee). Ms Greer did not remember Mr Huxley being there. Ms Greer thought she may have then walked back to Mr Rewha's place, but then returned to Mr Huxley's apartment, when Mr Huxley accompanied by Ms Doyle and Mr Rewha picked her up in the blue Commodore.
- [12] On the return to the apartment, Mr McCabe was still there and Mr Rewha introduced himself. Ms Greer and Mr Rewha went out the back door to an area where they sat and talked. It mostly concerned that Ms Greer had used methylamphetamine intravenously that night. Mr Rewha then went inside and Ms Greer stayed outside finishing her cigarette. She could hear "A bit of commotion, rustling around. Squeak of his shoe." and possibly "a thud". She also heard a few voices "talking or something", but Ms Greer had no idea what was being said. She may have had a draw or two of her cigarette before she went back inside. When she walked through the back door, she saw Mr McCabe on the ground in the lounge room/kitchen area. Apart from Mr McCabe, it was only Mr Rewha and the older fellow in the lounge room. Mr Rewha was closest to the back door and the older fellow was on the front door side of Mr McCabe. Neither Mr Huxley nor Ms Doyle was present. Mr McCabe was lying on his right side with his face towards the ground and blood was coming from his facial area through either his nose or mouth and the blood was "hand size" or "palm size". When Ms Greer first walked in, she walked around Mr McCabe's feet and checked if Mr McCabe was breathing and he still had been at that stage. He was "coughing and spluttering, saying something", but she was not too sure what he said. Mr Rewha and the older fellow took Mr McCabe out though the interior garage door. Mr McCabe was not supporting himself. His legs were pointing towards the ground and his head and shoulders were up. Ms Greer did not see what happened to him after he was taken through the

door. The next thing she recalled was being at the hotel with Mr Rewha, Ms Doyle was also there, and they got there in the white Commodore. They returned to Mr Huxley's apartment. On this occasion Mr Huxley, the older fellow, Ms Doyle and Mr Rewha were present. Ms Greer remembered going home with Mr Rewha in the white Commodore and waking up a few days later.

- [13] Ms Greer's evidence in cross-examination included the following. It was a matter of seconds rather than minutes before Ms Greer followed Mr Rewha into the apartment. She saw the older fellow standing directly over Mr McCabe on the floor and this older fellow kick Mr McCabe and was also prodding him with something he had in his hand. At the same time the older fellow was laughing about it. Mr Rewha was quite a further distance away from Mr McCabe than the other fellow was. Mr Rewha did not go over to where Mr McCabe was, when the older fellow was kicking and prodding him. Mr McCabe was trying to talk, but he was not talking and he was not moving, so Ms Greer could not tell whether he was conscious or not.
- [14] Ms Greer had battled with methylamphetamine addiction for years. She regarded Mr Rewha and herself as having split up at that time in August 2015. Ms Doyle was sick of Mr Huxley and she and Ms Greer were going to have "a girls' day out". After they had been driving around, Ms Doyle suggested going to Cairns, but Ms Greer did not want to go to Cairns. Ms Doyle then suggested going to Charters Towers. They bought a 10 pack of premix cans of bourbon and cola and they also had Sambuca. Ms Greer was drinking a lot more than Ms Doyle, as Ms Doyle was driving. Ms Greer wanted to try injecting "ice" for the first time. It was Mr McCabe who administered the shot. Ms Greer could not remember whether or not Mr McCabe also had a shot. She accepted that when she made her statement to the police on 18 November 2015 that she stated that she and Mr McCabe had a shot in Mr McCabe's bedroom. It was dark when she had the shot. She had drunk at least half of the 10 pack and was also drinking shots of Sambuca. They stopped at a service station before leaving Charters Towers. They then stopped for a toilet break at a park outside Charters Towers. Ms Greer and Mr McCabe had been flirting. After the toilet break, Ms Greer got into the back seat with Mr McCabe at his invitation. He had unzipped or unbuttoned his pants. Ms Greer felt uncomfortable and returned to the front of the car.
- [15] When Ms Greer returned to Mr Huxley's apartment, she was annoyed that her car was no longer parked there. She called Mr Rewha on the phone and they argued, as Ms Greer wanted to know where her car was. When she made her way to his house, they continued to argue. She stormed off and was walking up the road, when she was picked up by Mr Huxley, Ms Doyle and Mr Rewha. Mr Rewha and Ms Greer argued about her being in the back seat of the car on the way back from Charters Towers. When they returned to Mr Huxley's apartment, Mr McCabe was sitting on a sofa. Mr Rewha walked over and introduced himself to Mr McCabe and then Ms Greer and Mr Rewha went out the back of the house. Ms Greer did not remember Mr Huxley and Ms Doyle walking into the apartment. Ms Greer and Mr Rewha were out the back for a few minutes. It could have been 10 minutes or it could have been 20 minutes. They had finished arguing and were talking. Ms Greer was smoking and then Mr Rewha got up suddenly and walked inside. Ms Greer said that she remembered "hearing commotion and a squeak of a shoe" and more than one thud. That is what she said she remembered telling the police (presumably because it was in her police statement), although she said when giving evidence it

was not what she could recall. Ms Greer saw the older fellow kick Mr McCabe once and poke him with a TV remote or black object something like that. Ms Greer would not describe the kick “as a kick that could do significant damage to another person” and it was a kick and not a stomp. It was after the kick that Ms Greer saw the older fellow walking around and poking Mr McCabe with the object. Mr McCabe did not react to it. The following exchange then took place in cross-examination by counsel appearing for Mr Huxley at the trial:

“You actually only heard him make a sound initially when you came into the room; isn’t that correct?---Yes.

And you’re not really sure what that sound was?---He was – he was – it was, like, cough and splutter, and then he was trying to say something. He – well, he had something. I just didn’t know what he said.

And then there was nothing after that, was there?---No, he was just laying there. I still watch – you know, still watched to see if he was breathing.

And you saw the blood on the tile floor near his face?---Yes.

And it was pooling, wasn’t it?---Yes.

And he was there for a period of time. You’re not sure now how long?---No.

Was the blood spreading out more on the floor?---Slightly, but, you know – maybe within a centimetre or two but not anything extravagant that was – I don’t mean that in a good way either. Nothing that was, you know, yeah, I don’t know. It wasn’t very large.

And then he was picked up and carried out, wasn’t he?---Yeah, I kind of just remember going to a door and going through the door.

Well, he was being carried, wasn’t he?---Yeah.

And his feet were dragging behind him, weren’t they?---Yes, something like that. They were touching the ground, yeah.

Yes. And was there blood on the floor as he was being carried out?---I don’t remember. There may have been. I remember seeing drops of blood in the garage but nothing – there’s drops of blood.

So you saw drops of blood in he garage?---Just after the garage door there was about two drops of blood. Nothing pooling, nothing large.”

- [16] When Ms Greer and Mr Rewha returned to Mr Huxley’s apartment after having been at the hotel, the older fellow was mopping up blood on the floor.
- [17] In re-examination, Ms Greer confirmed that she saw only one kick make contact with Mr McCabe and that was on his left side “in his torso, rib area” and there was no reaction from Mr McCabe to the kick that she could remember. She further refined her evidence on the extent of the blood pooling, estimating that it was the size of the palm of her hand, including half of her fingers.

- [18] A police scientific officer, Sergeant Griffiths, attended the Burnda Street unit on 11 September 2015 for the purpose of examining for evidence of blood. She discovered evidence of blood on the floor near the kitchen bench, near the steps to the garage and on the inside of the garage.
- [19] Sergeant Griffiths subsequently examined a single seater lounge chair that had been in the unit. Luminal examination of the seat was undertaken, but there was blood actually visible on the seat. Sergeant Griffiths described it as “a saturation stain” where there has been blood and it keeps soaking into the fabric. There was more blood on the chair than anywhere else that Sergeant Griffiths found.
- [20] CCTV footage of the Burnda Street unit complex from the evening of 15 August 2015 and into 16 August 2015 was adduced at the trial. It showed the blue Commodore coming and going from the unit complex. The blue Commodore arrived at 9.34 pm, then left at 10.22 pm, arrived back at 10.56 pm, and left again at 11.34 pm. It was an admitted fact that all CCTV data comprising exhibits accurately depicted events at the place, date and approximate time displayed on each recording.
- [21] The CCTV footage showed that after the blue Commodore left the unit complex at 11.34 pm, it stopped outside and the driver got out, walked to the back of the car and got back in and the passenger got out, appeared to turn around and then got back into the car. There was no evidence positively identifying those occupants of the blue Commodore. Contrary to what the prosecutor had opened about the identity of the driver and the passenger, it was ultimately submitted at the trial by the prosecutor that whether or not Mr Huxley could be identified as the driver from the video did not matter. It was submitted on behalf of Mr Huxley on this appeal that the quality of the CCTV footage did not enable either the driver or the passenger to be identified. That submission reflects accurately the very poor quality of this particular CCTV footage.
- [22] It was an admitted fact as to the mobile telephone service used by Mr Huxley. There was evidence of the mobile telephone towers in respect of which Mr Huxley’s mobile telephone was located on the evening of 15 August 2015 and during 16 August 2015. From 11.37 pm on 15 August 2015, the mobile telephone is shown as travelling in a northerly direction from Townsville, being shown in the vicinity of Forrest Beach at 12.46 am and then travelling south again from that time, until returning to Townsville at 1.28 am. There was no direct evidence that this mobile telephone was in Mr Huxley’s possession during this period.
- [23] CCTV footage from a garage at Kirwan at 11.42 pm on 15 August 2015 showed the white Commodore being filled with petrol. The driver of the vehicle was identified as Ms Leonie Doyle. There was a person in the front passenger seat. There was also a male passenger in the rear of the vehicle who got out of the vehicle and operated the pump to fill the car with petrol who the prosecution contended was Mr Rewha. That was consistent with Ms Greer’s evidence, as she said that she left the unit in the white Commodore with Ms Doyle and Mr Rewha late in the evening of 15 August 2015 and they went to a hotel. The significance of this aspect of Ms Greer’s evidence in conjunction with the CCTV footage from this garage was that it allowed the jury to infer that the male person in the white Commodore was not in the blue Commodore that was travelling north at that same time.

- [24] According to the CCTV footage of the Burnda Street unit complex, the blue Commodore returned at 1:39am, left at 2.21 am, returned at 2.58 am and left again at 4.10 am on 16 August 2015. The telephone evidence for Mr Huxley's mobile telephone service shows that the mobile telephone was still in Garbutt at 3.23 am but moved north again and was detected in Ingham at 9.19 am and at various other times throughout the day of Sunday 16 August 2015.
- [25] Two men and a woman checked into the Herbert Valley Motel in Ingham on the morning of 16 August 2015. The woman signed the registration card as Sky Doyle (exhibit 8). They were driving a blue Commodore and the registration of the vehicle was noted. They checked out on Monday, 17 August 2018. One of the motel proprietors identified Mr Huxley and Mr Taylor from photoboards (exhibits 10 and 11) as the men who checked into the motel, but was not able to identify the woman as Ms Leonie Doyle. It was not disputed at the trial by Mr Huxley that he had stayed at the motel. This proprietor described one of the men as "well-built" and the other man as smaller or more slender in stature. These descriptions corresponded respectively to Mr Huxley and Mr Taylor. This proprietor also described the more slender man as looking older than the other man. The other proprietor described the bigger fellow as "dark-skinned" and the other man as "lighter-skinned". The motel proprietors saw the blue Commodore at the back of the motel on the Tuesday morning.
- [26] Mr Huxley's half-brother, Mr Kailan Quabba, saw Mr Huxley with two other people when they visited Mr Quabba's home just outside Ingham in Trebonne Road on 16 August 2015. Mr Huxley introduced the woman as "Leonie", but Mr Quabba was not introduced to the male person who accompanied Mr Huxley and Leonie. They arrived in a blue Commodore. They stayed for a few hours. The male person washed the blue Commodore and burned some rubbish in a 44 gallon drum that was used to burn stuff on a daily basis. Mr Huxley left in the blue Commodore around midday.
- [27] Mr Huxley's sister, Ms Shannon Quabba, recalled seeing Mr Huxley on a Sunday around lunchtime when she returned home and he was with his girlfriend Leonie and "some other bloke" who was called Jason. Mr Huxley and Ms Doyle left in Mr Quabba's ute for a short time. The male person asked if he could wash the blue Commodore and light the fire. Mr Huxley and Ms Doyle returned in the ute.
- [28] Sergeant Smith was performing mobile patrols with Senior Constable Follett on 16 August 2015 around 12 noon when he saw the blue Commodore driving above the speed limit near Forrest Beach. Forrest Beach is to the east of Ingham, where Trebonne Road is to the west. There was only one occupant who appeared to be a person of Aboriginal or Islander descent, but Sergeant Smith did not see enough of the person to identify if he knew the person. Sergeant Smith activated the lights and siren of his vehicle and did a U-turn, in order to intercept the blue Commodore, but it did a U-turn and sped back towards Ingham.
- [29] Ms McKay who lived in Ingham had known Mr Huxley for a long time and he was a friend. She owned a black Holden Cruze. Mr Huxley telephoned her on 16 August 2015 and then saw him the next day at the back of Coles. Mr Huxley wanted to borrow her car and she gave him the keys.

- [30] Sergeant Smith then saw the blue Commodore on 17 August 2015 at about 9.20 pm in Ingham. The blue Commodore was following a black-coloured Holden sedan. Sergeant Smith put on the lights and siren of the police vehicle and attempted to intercept the blue Commodore, but it overtook the black Holden sedan and continued on. The black Holden sedan stopped. Senior Constable Follett spoke to the driver of the vehicle who identified herself as Skye Doyle. Sergeant Smith went to the passenger side of the vehicle and recognised Mr Huxley in the passenger seat.
- [31] Later on the evening of 17 August 2015, Sergeant Smith located the blue Commodore behind one of the units at the Herbert Valley Motel. It was unlocked. There was a satchel containing the birth certificate and Medicare card for Mr Taylor.
- [32] Mr Huxley attended at the Ingham Police Station on 18 August 2015 and provided a statement (exhibit 39) to Detective Barron in relation to his acquaintance with Mr Taylor and his knowledge about the blue Commodore. As Detective Barron spoke to both Mr Huxley and Mr Taylor, a photograph of Mr Huxley (exhibit 37) as he appeared at that time was tendered through Detective Barron and a photograph of Mr Taylor (exhibit 38) as he appeared at that time was also tendered through Detective Barron.
- [33] A number of the statements that were made by Mr Huxley in exhibit 39 were relied on by the prosecution at the trial as lies told by Mr Huxley in order to distance himself from the blue Commodore and the murder of Mr McCabe and were therefore lies told in consciousness of guilt of the offence of murder. (The directions given by the trial judge in relation to these lies were not challenged on this appeal.) Those specific statements were:
- (a) Mr Huxley met Mr Taylor by chance at the Kirwan Tavern on Thursday, 13 August 2015 at about 2.00 pm when Mr Taylor said that the blue Commodore was his new car;
 - (b) Mr Taylor drove Mr Huxley to Ingham that afternoon in the blue Commodore and dropped him off in town;
 - (c) Mr Huxley was staying at the motel in Ingham with his girlfriend Skye Doyle on the Sunday, when Mr Taylor arrived in the blue Commodore and Mr Huxley booked him a room for Sunday night;
 - (d) Mr Taylor told Mr Huxley that he had been chased in the car by police in Townsville;
 - (e) Mr Huxley did not drive the blue Commodore on Sunday and was not in the car when it was chased by police in Ingham;
 - (f) on Monday, 17 August 2015, Skye Doyle was driving Mr Huxley around in the black Holden Cruze;
 - (g) when the police pulled over the black Holden Cruze, Mr Taylor was following them in the blue Commodore, so they could show him the road out of town;
 - (h) Mr Huxley lied to police officer Smith about not knowing who was in the blue Commodore, because he did not want any drama;

- (i) Mr Taylor was the only person who had driven the blue Commodore; and
- (j) when Mr Huxley was in the blue Commodore, he was urged by Mr Taylor to drive it, in order to create confusion.

- [34] Senior Constable Trovato who is a scenes of crime officer examined the blue Commodore at the Ingham Police Station on 18 August 2015. He was doing a fingerprint examination and looking for DNA. He did not notice any bloodstains, but he was not doing a full examination for blood, as the examination was being conducted in connection with a charge of unlawful use of a motor vehicle.
- [35] The owner of the blue Commodore was Mr Daly who had known Mr Huxley since he was about 10 years old and would permit Mr Huxley from time to time to use the blue Commodore. He had not been asked in mid-August 2015 by Mr Huxley, if he could use the blue Commodore. He left the key to the blue Commodore in an accessible place. He had been away and believed that the blue Commodore was parked in front of his house in Townsville, when he received a telephone call from the police about the blue Commodore after it had been involved in an incident of evading police in Townsville at 2.45 am on 16 August 2015. It was then the subject of a police report. About a week or so later, Mr Daly collected the blue Commodore from Ingham. Subsequently, the police came and collected the blue Commodore from him.
- [36] There was evidence of significant blood stains in the boot of the blue Commodore that were consistent with Mr McCabe's DNA. There was no evidence of blood staining in the white Commodore.
- [37] Mr McCabe was later reported missing and his body was found by police on 17 September 2015 near Mount Spec Road and Maidenhair Fern Creek in a remote location in the Crystal Creek region which is north of Townsville. Officer Galvin discovered Mr McCabe's remains. Down on the bottom of a rocky embankment which was quite steep, Officer Galvin saw a pair of black board shorts and then, further down the creek, saw what he believed to be a body. There was no water flowing in the creek at that time. The terrain comprised boulders and rocks and debris from the creek area. Officer Galvin made a video recording of the remains of Mr McCabe, as located, which was played to the jury (exhibit 41). Officer Nalder took measurements that revealed that the distance from the roadway to where the body was found was some 26 metres at a slope of 32 degrees. The shorts were found some 14 metres from the road at a slope of 42 degrees.
- [38] Police scientific officer Sergeant Bartulovich was the first person to examine precisely where Mr McCabe's remains were located. The deceased was lying on his back and was partly skeletonised and partly mummified. Sergeant Bartulovich together with other officers carried out a visual examination of rocks and branches in the area where Mr McCabe's body was found. There were several dark-stained areas on some rocks which were screened for the presence of blood, but they provided a negative result. Because it was an outdoor scene and the body had been there for a certain amount of time, Sergeant Bartulovich stated that the chances of finding blood "would be very limited".
- [39] The prosecution case left to the jury was that Mr Huxley killed Mr McCabe at the location where his body was found, and that he did not die as a result of the assault

at the Burnda Street unit. The contentions advanced on behalf of the appellant at the trial were that it was a reasonable possibility that Mr McCabe died as a result of the injuries sustained during the assault in the unit and it was also a reasonable possibility that Mr McCabe died as a result of other causes, such as a methylamphetamine overdose.

- [40] Dr Samarasinghe, the forensic pathologist who did the autopsy, was equivocal about the cause of death. The body was in a state of advanced decomposition. Mr McCabe had very severe head injuries which Dr Samarasinghe described as multiple fractures to the right facial area “with a significantly large defect involving several bones of the facial skeleton” and there were fractures to the bottom of the skull under the base of the skull, some of which extended to the opposite side of the skull through the base. There were also fractures of the right second and third ribs and two fractures to the right forearm bones. Dr Samarasinghe could say the head injuries were consistent with having had a large rock dropped on his head, but Dr Samarasinghe could not say, whether Mr McCabe was alive or already dead, when the head injuries were inflicted. If he were alive, Dr Samarasinghe could say that the injuries from the large rock would be likely to have caused death very quickly.
- [41] Forensic anthropologist Ms MacGregor assisted Dr Samarasinghe in the autopsy for the purpose of assessing the skeletal remains. Her observations on the injuries to the bones accorded with those of Dr Samarasinghe. Ms MacGregor did not notice any healing to the bone fractures and was able to say that in terms of trauma that happened at or around the time of death it was difficult to say whether it was before, during or in what period after death.
- [42] Forensic dentist Mr Forrest examined the part of Mr McCabe’s skeletal remains concerned with teeth. There was one fracture on the upper right central tooth. The amount of force required to fracture it would have depended on whether the tooth had been weakened previously. If it was a normal tooth, it would take a significant blow to cause that kind of fracture. Mr Forrest was unable to age the damage to the tooth or say whether it occurred before or after Mr McCabe’s death.
- [43] Part of Mr McCabe’s decomposed liver was sent for toxicology. The toxicology results with respect to the liver tissue showed one milligram per kilogram of amphetamine in the liver and two milligrams per kilogram of methylamphetamine in the liver. Toxicology expert Professor Drummer said that those results were consistent with Mr McCabe having taken some methylamphetamine before death. He explained that the amphetamine found in the liver was likely to be the by-product of the use of methylamphetamine, as when a person uses methylamphetamine, some of it metabolises to amphetamine. The substantial decomposition meant that Professor Drummer was unable to draw a relationship between the toxicology results and the concentration of methylamphetamine in the blood and the liver at the time of Mr McCabe’s death. He could not exclude the possibility that the consumption of methylamphetamine had caused Mr McCabe’s death, but said that death directly from use of methylamphetamine was uncommon. Methylamphetamine use increases heart rate and blood pressure and if a person has a weakness in the blood vessel, it can cause a bleed. He said that long term use of methylamphetamine can cause premature heart disease or a major bleed in the brain.
- [44] Pharmacologist Professor Brown also gave evidence on the significance of the toxicology results from Mr McCabe’s liver. Professor Brown stated that the level of

two milligrams per kilogram of methylamphetamine was one which in other people had been associated with death, but whether that was the case for Mr McCabe would be a separate question. The variables that were relevant would be the length of time between the dose and death, how much dose he took and how well his cardiovascular system was working. The concentration in the liver did not indicate the blood level concentration, as the methylamphetamine accumulates in the liver.

- [45] Professor Duflou is a forensic pathologist who was called to give evidence by Mr Huxley. Professor Duflou was provided with the transcripts of the evidence of Dr Samarasinghe and Professors Drummer and Brown and the reports of Ms MacGregor and Mr Forrest. He considered there were three possibilities for the injuries to the head. The first one was significant force applied to the right side of the head that transmitted into the back of the skull and fractured both the front and the under surface of the back. The second possibility was that the deceased was on the ground and as a result of blows sustained to the right side of his head, he suffered impacts to the left side of his head at the back. The third possibility was that the injuries to the right side of the head and the back of the head were unrelated. It was not possible to identify which of the possibilities caused the injuries. Kicking was a possibility of causing the injuries, if the foot was shod with a shoe of some type and there was a stomping-type motion rather than a kicking motion. An implement such as a baseball bat could also cause the injuries.
- [46] Professor Duflou did not think the cause of Mr McCabe's death could be determined with any degree of certainty. There was nothing to exclude a methylamphetamine overdose, but the assessment of the liver level of the drug alone could not be used to determine with certainty whether a person died of an overdose or not. Although a regular user of methylamphetamine may become tolerant to some effects of the drug, the user does not become tolerant to the effects of the drug on the cardiovascular system, so the taking of the drug causes damage to the heart and there is a cumulative effect on blood pressure. In cross-examination Professor Duflou accepted that if the constellation of injuries to the front and back of the cranium occurred when Mr McCabe was alive he would have expected him to die within minutes or up to a couple of hours.
- [47] The case against Mr Huxley was largely circumstantial, but was supported by one piece of direct evidence which was an alleged admission made by Mr Huxley to one Mr Hess. Ultimately in the trial, the prosecution case was limited to Mr Huxley's killing of Mr McCabe in the manner in which Mr Hess said Mr Huxley described to him that he killed Mr McCabe. The jury were directed that, as a matter of law, if they did not accept beyond reasonable doubt the evidence of Mr Hess that the admission was made by Mr Huxley in the terms given in Mr Hess' evidence and that it was a true account by Mr Huxley of what occurred, there was no case against Mr Huxley. It was contended on Mr Huxley's behalf at the trial that the jury should not accept the evidence of Mr Hess. Apart from the significance of Mr Hess' evidence as to an admission by Mr Huxley of the manner in which he said he killed Mr McCabe, the admission was consistent only with Mr McCabe still being alive when the rock was dropped on him.
- [48] Mr Hess' evidence was to the following effect. As at August 2015, Mr Hess had known Mr Huxley for about 13 or 14 years. Mr Huxley "showed up" at his address in Townsville on three occasions in August 2015. Mr Hess' birthday was on 14 August and these visits were "around that time sort of thing". On the first visit

Mr Huxley was driving a blue Commodore and was with Ms Doyle and Mr Huxley introduced Ms Doyle to Mr Hess. The first visit lasted for 30 to 45 minutes. Mr Huxley had a shower, a chat and caught up. On the second of these visits Mr Huxley was driving a gold Land Rover and was there for about half an hour or an hour. They had “a bit of a talk out the back”. Mr Huxley was accompanied again by Ms Doyle. Mr Hess said that he asked Mr Huxley “what have you been up to?” and that Mr Huxley replied “the usual stuff” and then said “I done a hit on a bloke for \$10,000”. Mr Hess said that Mr Huxley showed him “how he picked the rock up and dropped it on him and he said the fellow went wahhhh – gone”. Mr Hess then did a demonstration of the action that Mr Huxley showed him with the rock, describing that Mr Huxley “pretended to pick the rock up and dropped it”. Mr Hess’ son was present, when Mr Huxley was telling Mr Hess about the “hit”, but Ms Doyle had gone back inside. There was a third occasion Mr Huxley visited Mr Hess, Ms Doyle was with him and he came in a blue Ford. On that occasion Mr Huxley asked Mr Hess “if the police had been there yet”, as he said “they were looking for him”. When asked whether on any of the visits, Mr Huxley said anything else about \$10,000, Mr Hess said that he asked Mr Huxley “if he did it sort of thing” and Mr Hess said he said “no, he didn’t do it” and “the 10,000 will come in handy, it’s going into his cousin’s account”.

- [49] In cross-examination, Mr Hess said the first visit might have been mid-morning or lunchtime. At first Mr Huxley and Ms Doyle were in the car at the front of the house, but then they got out and went inside out the back. Mr Huxley had a shower, they went out the back and talked for a bit more and then they left. Mr Huxley was Mr Hess’ friend and Mrs Hess “doesn’t talk ... too much to Brent” and was doing housework like she normally does. When Mr Hess was being cross-examined on the second visit by Mr Huxley, he said that Mr Huxley was sitting at the table talking to Mr Hess and his son (who was 18 years old at the time) and Mr Hess told Mr Huxley about a man who owed Mr Hess some money, when Mr Huxley said he knew him and took Mr Hess’ son with him for a quick five minute drive down the road to see the man and five minutes back. The man was not home. Mr Hess had not put that conversation in the statement he made to police, because he did not think it was relevant. He was owed the money at \$100 per box for six boxes of Sudafed which Mr Hess supplied to the man and said was the “one time deal”. Mr Hess explained that he did not say anything about that to the police, because he did not want to implicate his son. The conversation about the money owed for the Sudafed took place in the carport into which Mr Huxley drove to show the Land Rover. Mr Hess said Mrs Hess saw Mr Huxley pull up and they both had a conversation with Mr Huxley about where the car had come from and Mrs Hess then walked back inside. After Mr Huxley, Ms Doyle and Mr Hess’ son returned from trying to collect the debt, they all went out the back and Ms Doyle went for a shower while Mr Huxley was talking to Mr Hess. Mr Hess did not think that Mr Huxley had a shower on that day. They left not long after Ms Doyle came out of the shower.
- [50] Mr Hess was cross-examined on his criminal history for drug offences and stealing.
- [51] Mr Hess was also cross-examined on the proposition that he did not speak to the police about the allegations he made about Mr Huxley until he had read a story in the newspaper that mentioned Mr Huxley. Mr Hess said that after Mr Huxley had told him what he had done, one neighbour told him to look in the newspaper. Mr Hess conceded that he had not told the police that he had spoken to this

neighbour about the matter. Mrs Hess looked up the article online. The article was “something about someone got stoned to death” and that Mr Huxley was charged with murder. Mr Hess could not recall whether he spoke to another neighbour before or after he read the article. The partner of this other neighbour was a police liaison officer and after he spoke to that neighbour, the police contacted Mr Hess and, as a result, he made the statement of 15 October 2015.

- [52] During cross-examination, Mr Hess agreed that he had told police that when he asked Mr Huxley on the second visit “what have you been up to?”, Mr Huxley replied:

“The usual shit. We bashed this cunt who had a \$10,000 hit on him. I picked up a big rock, dropped it on him and the cunt went”

- [53] Mr Hess said that he could not remember everything that Mr Huxley said word for word. He did confirm that this conversation was in the presence of his son.

- [54] Mr Hess also confirmed in cross-examination that on the third visit Mr Huxley said the police were looking for him and “he said he didn’t do it”. Mr Hess thought his son was present again when he and Mr Huxley were sitting at a table out the back having a discussion. There was a further exchange in cross-examination on the conversation that took place on the third occasion:

“- - - what was the discussion there?---The last time? Oh, Brent was just saying the police were looking for him.

Yes?---Because they think he’d done a hit on Leonie’s cousin.

And what else was said – anything?---He said he didn’t do it, but the 10,000 got put into his cousin’s account.

Got put into his cousin’s account?---That’s what he said – or going to get put into his cousin’s account. It would come in handy.

Was it in the account or going in the account, or what was it?---I have no idea.

See, when you spoke to the police, in your statement you’d told them that he told you that 10 grand – ‘but 10 grand got put in my cousin’s account’?---Well, it was supposed to be going to – or ‘going to’ or ‘put in my cousin’s account’. It’d ‘come in handy’.

But that’s not what you’d told the police in your statement, is it?---Well, that’s what he said to me.

Well, you asked him did he do anything, and – do this offence, and he told you no?---Yeah.

He told you he didn’t do it?---He said no, he didn’t do it. But - - -

And then what? What was said?---Then he said, ‘The 10 grand’ll come in handy, but it got put into my cousin’s account,’ or ‘going to get put into my cousin’s account.’ Can’t remember exact word for word.”

- [55] Mr Hess was also cross-examined on evidence he had given in a previous hearing where he was asked whether it was correct that he was “commonly known amongst

people” who knew him well “as a big-noter” and he responded that “Yeah, I like to try and be the part big-noter, I suppose.”. It was put to him that he had then been asked:

“And as part of the big-noting, you often don’t always tell the truth; isn’t that correct.”

and that he had responded “I sometimes just stretch it a little bit.”.

- [56] Mr Hess agreed that those exchanges took place, but explained that it was “only in little things, like fishing tales and stuff” that he stretched the truth. Mr Hess was then reminded that he had been asked on this earlier occasion:

“You like to let people think that you know more about things sometimes than really is the truth; isn’t that correct.”

and he responded “Certain things, I suppose.”. He agreed that exchange took place.

- [57] In re-examination, Mr Hess’ criminal history was tendered (exhibit 20). Most of the entries were dated, as the offending was committed between 1992 and 2001. There was an entry for possession of dangerous drugs committed on 23 January 2012 for which Mr Hess was convicted and fined \$400. Mr Hess did not recall that there was any other information in the newspaper article other than about Mr Huxley being charged with murder and that the person who was dead was bashed and then stoned to death.
- [58] According to Mr Hess’ evidence, the source of the information he had that Mr McCabe was Ms Leonie Doyle’s cousin was from Mr Huxley.
- [59] Mrs Hess recalled the three visits by Mr Huxley. The first visit by Mr Huxley with a lady passenger occurred just after Mr Hess’ birthday. Mr Huxley was driving a blue Commodore. On that visit she greeted Mr Huxley when he got there, but she went and did her “own thing”, cleaning and hanging the washing. On the second visit, Mr Huxley was driving a gold Land Rover which was “a pretty expensive car”. Mrs Hess asked Mr Huxley “Where did you get a car like that from?” and he said it was his. Mrs Hess walked away and did “her own thing”. On the third occasion, Mr Huxley was driving a blue Ford sedan. She was not present for any conversation between Mr Hess and Mr Huxley on any of the three visits.
- [60] In cross-examination, Mrs Hess said Mr Huxley’s visits were quick visits. She thought the first visit was “probably” two days after Mr Hess’ birthday, but she was not too sure. The visit was only about 20 minutes. They pulled up at the front of the house and remained there. The second visit occurred four or five days later. Mr Huxley and his lady passenger stayed in the car, as far as Mrs Hess had seen. Mrs Hess did not remember whether her eldest son who was in grade 12 was home or not. She had no recollection of seeing Mr Huxley’s car come and go from the house twice on that occasion. As far as Mrs Hess knew, they did not come into the house and no one had a shower on that occasion. She was at the side of the house and did not know if they went out back. The third visit was after Mrs Hess’ sister’s birthday on 22 August and was four or five days after the second visit. Mr Huxley and Ms Doyle did not get out of the car on this visit which was a quick visit.
- [61] In re-examination, Mrs Hess said in respect of the first visit that after she said “hello” at the front, she then went out to the side of the house. When she was

coming back in, they were coming back into the carport and they were in their car getting ready to go. When Mrs Hess was out the side of the house, she was not in a position to see out the back of the house. On the second visit, Mrs Hess was out the front of the house for about 20 minutes after the visitors arrived and stayed out the front and the visitors stayed in the car. On the third visit, the visitors stayed in the car and did not stay for long.

[62] As the blue Commodore was driven to Ingham in the early hours of 16 August 2015 and, according to the evidence, remained in Ingham or the vicinity, until the police seized the vehicle on 17 August 2015, the first visit by Mr Huxley to Mr Hess in the blue Commodore that was during the daytime must have taken place prior to 16 August 2015.

[63] The trial judge gave the jury very strong and repeated directions about the various aspects of Mr Hess' evidence which they may wish to consider in deciding whether his evidence was accurate and reliable that are also relevant to the independent assessment undertaken of the evidence on this appeal. Mr Hess was one of the witnesses in respect of whom the jury were given specific directions for the purpose of assessing whether they accepted the evidence of those witnesses. The trial judge concluded his directions in the early part of the summing up in respect of Mr Hess as follows:

“Thus you will need to scrutinise the evidence of Mr Hess with great care before you could accept his evidence as accurate and reliable and use his evidence to arrive at a conclusion of the guilt in respect of Mr Huxley. As a matter of law, I instruct you that you can only act upon his evidence in the case against Mr Huxley if you are satisfied beyond reasonable doubt that his evidence is accurate and reliable. If you are not satisfied beyond reasonable doubt that the evidence of Hess is accurate and reliable, then you should disregard it. You should only act upon his evidence if, after considering it with the warning I have given in mind, and all the other evidence, that you are convinced beyond reasonable doubt of its truth and accuracy.”

[64] The trial judge then gave further directions in respect of Mr Hess' evidence in the context of considering they were satisfied beyond reasonable doubt that Mr Huxley had, in fact, made the statement to Mr Hess that Mr Hess reported as being made by Mr Huxley of how Mr Huxley killed Mr McCabe and that statement was a true account by Mr Huxley of what had occurred. The trial judge specifically reminded the jury that on the third occasion that Mr Huxley visited Mr Hess, Mr Hess stated that Mr Huxley denied killing Mr McCabe. The trial judge stated:

“And you may only act upon the evidence of Mr Hess if, having regard to this warning that I gave you, and having scrutinised the evidence carefully, you are satisfied beyond reasonable that Huxley says the – said the words Hess says he did, and of the truth and accuracy of that account. You should appreciate that, as a matter of law, if you do not accept, beyond reasonable doubt, the evidence of Hess, there is no case against Huxley; he is not guilty of both murder and manslaughter. If you accept that the statement was made by Huxley to Hess and that it is a true statement, well, it's not pencils down then because it's up to you then to consider and to decide what weight you give to all of it and what you think it proves because the

prosecution must still prove murder, beyond reasonable doubt. In this context, you should not overlook the account of Darren Hess, that Huxley, on the occasion of the third meeting, denied that he killed Michael McCabe in your deliberations upon the issue as to whether the admission alleged by Hess, if made, was truthful and accurate, do not overlook this circumstance.”

Ground 1 – unreasonable verdict

- [65] In light of the directions given by the trial judge, the jury must have accepted Mr Hess’ evidence of what he had been told by Mr Huxley to the effect that he killed Mr McCabe and the manner in which he did it. There are therefore two specific issues raised by ground 1. The first issue is whether it was open for the jury to accept the relevant evidence of Mr Hess as accurate and reliable beyond reasonable doubt as to what Mr Huxley told him about the manner in which he killed Mr McCabe and that Mr Huxley was telling Mr Hess the truth about what he did. The second issue is, if it were open for the jury to be satisfied as to the first issue, then in the context of the other evidence adduced in the trial, whether it was reasonable for the jury to return a guilty verdict.
- [66] The matters that are relied on by Mr Huxley in this appeal to assert that it was not open for the jury to accept Mr Hess’ evidence were the matters that were relied on by his counsel at trial for asserting that Mr Hess’ evidence should be rejected. These matters include that the content of the admission by Mr Hess had shifted over time; Mr Hess’ evidence was contradicted by the evidence of Mrs Hess; Mr Hess tended to minimise his criminal history; he had failed to tell police that his son and Mr Huxley had attempted on the day that he said Mr Huxley admitted to the killing to visit the man who Mr Hess said owed him money for boxes of Sudafed supplied by Mr Hess; Mr Hess did not report the admission by Mr Huxley until after he had read the newspaper article about Mr Huxley being charged with murder, after Mr Hess had talked to his neighbours, and after Mr Hess was contacted by the police; and Mr Hess’ evidence of the admission was not corroborated, despite the presence of his son.
- [67] Mr Huxley’s counsel in his closing address drew the jury’s attention to the fact that Ms Hess’ son who was present on the second occasion that Mr Huxley visited Mr Hess did not give evidence, but that matter was not taken further in submissions or in the directions of the trial judge. No request was made of the prosecutor during the trial to explain why Mr Hess’ son was not called, so there was no foundation for seeking a direction in accordance with *Jones v Dunkel* (1959) 101 CLR 298: see *R v Oliver* [2020] QCA 76 at [27]. The jury were therefore in a position where they could not speculate on what Mr Hess’ son could have said, if he had given evidence, despite Mr Huxley’s trial counsel emphasising that Mr Hess’ son did not give evidence.
- [68] The extensive cross-examination of Mr Hess gave the jury ample opportunity to assess his credibility and reliability. Mr Hess remained consistent in conveying the essence of the conversation with Mr Huxley on the second visit in which the admission was made. There are aspects of Mr Hess’ evidence that are not consistent with Mrs Hess’ evidence, but Mrs Hess does confirm the three visits by Mr Huxley accompanied by Ms Doyle to their home commencing about mid-August 2015. Some of the discrepancies between the evidence of Mr Hess and the

evidence of Mrs Hess can be explained by Mrs Hess moving to another part of the yard or house where she did not keep the visitors in sight. It was compelling that Mr Hess' account of the conversations with Mr Huxley on the second and third visits revealed information about the killing of Mr McCabe for which no other source was suggested on the evidence, apart from Mr Huxley. This was the information that Mr McCabe was Ms Doyle's cousin and that the manner in which he was killed was by a rock dropped on him. The reluctance of Mr Hess to reveal to police the involvement of his son in the second visit was explained by Mr Hess. It did not follow from the fact that there was no independent evidence of the payment of the sum of \$10,000 that Mr Huxley referred to on the second visit as being for the "hit" and referred to as being the sum paid or to be paid to his cousin's account on the third visit that Mr Huxley was not otherwise telling the truth to Mr Hess about killing Mr McCabe.

- [69] In these circumstances, it was therefore open to the jury to accept the evidence given by Mr Hess that Mr Huxley admitted to him that he had killed Mr McCabe by dropping a rock on him in the manner demonstrated by Mr McCabe, and reject the evidence of Mr Huxley's subsequent denial to Mr Hess that he killed Mr McCabe. That admission had to be considered in the context of the forensic evidence that was consistent with the boot of the blue Commodore being used to transport Mr McCabe after the assault in the unit, the phone evidence that suggested some travel out of Townsville, the inference able to be drawn from the evidence of the identity of the persons who were travelling in the white Commodore that Mr Huxley and Mr Taylor were in the blue Commodore, when it was travelling north of Townsville and returned to Townsville, so that there were periods in the early hours of 16 August 2015 when Mr Huxley and Mr Taylor were alone together, the consistency of the presence of rocks where Mr McCabe's remains were found with the mode of killing Mr Hess asserted was described by Mr Huxley, the forensic evidence that the injuries to Mr McCabe's head were consistent with a rock being dropped on him, and that would have caused his death if he had been alive when that occurred, and Mr Huxley's attempts to conceal his connection to the blue Commodore and to Mr Taylor.
- [70] Without acceptance of the critical evidence of Mr Hess about Mr Huxley's admission to him, the circumstantial case against Mr Huxley would not have been sufficient to support a verdict of guilty of murder. The support, however, from the matters identified by the respondent as part of the circumstantial case against Mr Huxley, in conjunction with the confession made to Mr Hess, mean that the verdict of the jury was reasonable and can be supported having regard to all the evidence. See *Pell v The Queen* (2020) 94 ALJR 394 at [39].

Grounds 2 and 3 – the prosecutor's opening

- [71] When the defendants were arraigned before the jury panel, Ms Doyle at that stage was also charged with being an accessory after the fact to murder where it was alleged that Mr Huxley and Mr Taylor murdered Mr McCabe. The alternative charge against Ms Doyle was expressed in terms that she was an accessory after the fact to manslaughter where it was alleged that Mr Huxley and Mr Taylor unlawfully killed Mr McCabe. When the prosecutor opened the case for the jury, he stated that the prosecution case was that Mr Huxley killed Mr McCabe through the application of force where his remains were found and with him at the time was Mr Taylor. The jury were also told that the prosecution case was that Mr Taylor assisted, or

aided, or did things for the purpose of helping Mr Huxley kill Mr McCabe in a number of ways. The prosecutor told the jury that the remains of Mr McCabe were found “with difficulty, by police conducting a search”. The prosecutor explained:

“They had received information from a Jason Douglas Taylor, but even with that information they had difficulty locating Mr McCabe’s remains.”

[72] By that stage, in reading out the list of proposed witnesses, the prosecutor had already indicated that the jury would probably not be hearing evidence from Mr Taylor.

[73] The complaint of Mr Huxley is that any statement by Mr Taylor to the police about the location of the body was inadmissible hearsay, unless Mr Taylor was called as a witness, but the prosecutor still referred to the information provided to the police by Mr Taylor after already indicating that Mr Taylor would probably not be called.

[74] After referring to the assault of Mr McCabe by Mr Rewha at the Burnda Street unit, the prosecutor opened that Mr Taylor helped carry Mr McCabe to the boot of a blue Commodore “and then rode in that car with Mr Huxley as he drove himself and Mr Taylor, with Mr McCabe in the boot of that blue commodore, to the location where his remains were found”.

[75] Later in the opening, the prosecutor stated:

“So the evidence will clearly establish, on the prosecution case, that Mr Taylor was present throughout. So why have I spent so much time dealing with Mr Taylor’s position. For this reason – if, at the end of the day, you’re satisfied that Mr McCabe was killed at that location, and you are satisfied that it was Mr Huxley that did it, or Mr Taylor, but you’re not sure which, then, on the prosecution case, it doesn’t matter, because if it was Mr Taylor then Mr Huxley has helped him and done things for the purposes of helping him.”

[76] The prosecutor then set out in some detail what he said was a “plan” by Mr Huxley to murder Mr McCabe which involved both Mr Rewha and Mr Taylor.

[77] The particulars that had been provided by the prosecution at the outset of the trial in respect of the case against Mr Huxley were that either Mr Huxley did the act that caused Mr McCabe’s death with the assistance of Mr Taylor or that Mr Taylor did the act that caused Mr McCabe’s death with the assistance of Mr Huxley. The case had never been particularised against Mr Huxley in reliance on s 8 of the *Criminal Code* (Qld).

[78] Immediately after the prosecutor finished his opening address, counsel who appeared for Mr Huxley at trial applied for the discharge of the jury on the basis of prejudicial statements made by the prosecutor in the opening. The trial judge requested written submissions and, in addition, oral submissions were made after the evidence in the trial was completed.

[79] After the prosecution case closed, the trial judge made a number of rulings as a result of some witnesses not giving evidence that had been anticipated by their witness statements. Relevantly a directed verdict of acquittal of Ms Doyle in

respect of the count of being an accessory after the fact to murder was entered which left only the alternative count on the indictment against Ms Doyle of being an accessory after the fact to manslaughter.

[80] The trial judge ruled against the discharge of the jury, on the basis that any prejudice caused by the prosecutor referring to the information the police had received from Mr Taylor that assisted them in locating the body and the details of the assistance Mr Taylor was said to have given to Mr Huxley could be addressed by directions to the jury. The reference to the plan by the prosecutor which was inconsistent with the particulars was also found to create an injustice by requiring Mr Huxley to meet a case different from the particulars and not necessarily consistent with the evidence anticipated by the statements and depositions of the prosecution witnesses. The trial judge concluded that the case against Mr Huxley required acceptance of the evidence of Mr Hess and proposed to direct the jury that they must be satisfied beyond reasonable doubt that Mr Hess' evidence was accurate and reliable and that would alleviate any prejudice that might have been occasioned by the reference by the prosecutor to the plan that he had outlined in his opening. In discussions with counsel, counsel for Mr Huxley indicated that he would not be advancing any suggestion that it was Mr Taylor who killed Mr McCabe at Crystal Creek and not Mr Huxley and on that basis the prosecutor agreed to limit his case against Mr Huxley to Mr Huxley killing Mr McCabe by use of the rock, as described in the evidence of Mr Hess.

[81] The directions given by the trial judge in the summing up accorded with the rulings and limited the prosecution case against Mr Huxley to the manner of causing Mr McCabe's death, being as described by Mr Hess in his evidence as to Mr Huxley's statement made to him. In fact, the jury were directed that the evidence of Mr Hess was "central to the prosecution case against Mr Huxley" and that if they were unable to accept the evidence of Mr Hess beyond reasonable doubt, there was no evidence that Mr Huxley assaulted and caused any injury to Mr McCabe. In order to address the prejudice caused by the opening of the prosecutor, the trial judge gave the following directions:

"More than once I have instructed you that what is said by counsel in an opening or closing address is not evidence. On a number of occasions in his opening the learned Crown Prosecutor mentioned a Jason Taylor. On one occasion he said police were acting on information from Mr Taylor. As a matter of law, that statement is not evidence. It should be ignored by you. In your deliberations you should ignore all that was said in the opening concerning Mr Taylor. He has been mentioned by witnesses in evidence. What witnesses say in evidence before you is evidence and you can consider it in your deliberations and accept it or reject it as you see fit, but what was said in the opening should be ignored.

...

There is another aspect of the Prosecution opening I must mention. One of the themes of the learned Crown Prosecutor's opening was, as he asserted it, a plan by Mr Huxley. He developed this theme by asserting a number of facts or matters or circumstances from which he asserted a plan could be inferred or concluded or – yes. The case before you upon which you have to consider is based, however, upon

the evidence before you. As a matter of law the Prosecution case before you is advanced not upon an asserted plan by Mr Huxley but that he murdered Michael McCabe in the circumstances and in the way the witness Hess said was described to him by Mr Huxley.

Ignore what was said about a plan in the opening. As a matter of law the evidence as it emerged from the witnesses does not support the assertion of an elaborate plan by Mr Huxley as was opened. The Prosecution case against Mr Huxley that he murdered Michael McCabe rests upon the confessional statement Mr Hess said that Huxley made in the conversation upon the second visit that Mr Hess spoke of. That evidence is the only direct evidence in this case that supports the Prosecution case of murder against Mr Huxley.”

- [82] Mr Huxley argues that his trial was unfair because of the objectionable parts of the prosecution opening in the trial which were the very first things the jury heard about the facts and the so-called plan constituted a theme of the opening address. It is argued that the reference to the inadmissible hearsay information given by Mr Taylor to the police that resulted in the location of Mr McCabe’s body invited the jury to deduce that information about the killing of Mr McCabe had come from Mr Taylor and the jury may also have inferred that information about the plan that was referred to by the prosecutor had also come from Mr Taylor. It is therefore submitted on behalf of Mr Huxley that there was a real risk in a trial where the jury’s decision as to whether or not to accept Mr Hess’ evidence beyond reasonable doubt was likely to have been finely balanced that what had been said by the prosecutor about the police receiving information from Mr Taylor and that there was a plan involving Mr Huxley and Mr Taylor may not have been forgotten by the jury and been used subconsciously by them.
- [83] Counsel for Mr Huxley and the prosecutor in their addresses to the jury abided by the trial judge’s rulings and there was no mention of what had been said in the opening concerning information from Mr Taylor to the police and there was no mention of any plan involving Mr Taylor and Mr Huxley. The tack that was taken by Mr Huxley’s counsel was that it was likely that Mr McCabe was already fatally assaulted at the Burnda Street unit by Mr Taylor.
- [84] This was a trial in which the evidence was given over 10 sitting days, but during the trial there were a number of days in which the jury were not required. The empanelment of the jury took place on 19 August 2019. The jury were not required for the rest of that day or 20 August 2019. The prosecution case was opened on 21 August 2019. Evidence was adduced on 21 to 23 August, 26 to 30 August and 2 September 2019 when the prosecution case was closed. There was further legal argument and the jury did not return until 4 September 2019 when the directed acquittal for count 3 was entered, Mr Huxley’s counsel opened the case for Mr Huxley and Dr Duflou’s evidence was given. Further applications were made before the trial judge on 5 and 6 September 2019, and the trial resumed before the jury on 9 September 2019, when Mr Huxley’s counsel addressed the jury from late morning on that day, all of 10 September 2019 and for a further hour on 11 September 2019. The prosecutor then addressed the jury for the rest of the day on 11 September 2019, all of the next day and until 3.30 pm on 13 September 2019.

- [85] By the time of the addresses, the evidence that then had the most prominence for the jury was that which was the focus of the addresses by counsel in the context of a prosecution case against Mr Huxley that had been confined to Mr McCabe being killed by Mr Huxley in the manner in which Mr Hess said Mr Huxley confessed to him. In addition, the very strong directions given by the trial judge to the jury about ignoring the statements made by the prosecutor in the opening (that are now the subject of grounds 2 and 3) in conjunction with the usual directions that the jury must act only on the evidence that is before them means that the impugned parts of the prosecutor's opening address could not have undermined the fairness of the trial. The risk perceived on this appeal on behalf of Mr Huxley of the jury ignoring the directions and acting on statements made by the prosecutor that were not part of the evidence is based on conjecture and not consistent with the approach that an appellate court must follow that a jury in a criminal trial generally acts on the evidence and in accordance with the directions of the trial judge: *Gilbert v The Queen* (2000) 201 CLR 414 at [13], [31]-[32] and [52].
- [86] Mr Huxley cannot succeed on grounds 2 and 3.

Grounds 4 and 5 – Ms Greer's evidence

- [87] To the extent Mr Huxley relies on these grounds only as supplementing the unfairness caused by the prosecutor's opening address, there is no utility in these additional grounds, when Mr Huxley has not succeeded in establishing prejudice due to the prosecutor's opening.
- [88] After the empanelment of the jury, there was legal argument and rulings that took place in the absence of the jury. During this period of legal argument, the prosecutor applied for a warrant for the apprehension of Ms Greer on the basis that she had been served with a subpoena and it was apparent from her response that she would not be answering the subpoena. The trial judge issued the warrant and Ms Greer attended the court the next day, when it was anticipated that she would give evidence. She was called by the prosecutor as the first witness in the prosecution case on the third day of the trial. When invited by the bailiff to indicate whether she would take an oath or an affirmation, she indicated that she was refusing evidence. This occurred in front of the jury.
- [89] On the next day, in the absence of the jury, Ms Greer was brought before the court again. She confirmed that she had obtained legal advice and maintained her position that she was not prepared to be sworn or affirmed as a witness. The trial judge charged Ms Greer with committing a contempt of court by wilfully and consistently refusing, whether by oath or affirmation, to be sworn as a witness and to answer questions before the jury and that her conduct impeded the administration of justice. The further hearing of the contempt charge was adjourned.
- [90] Ms Greer eventually gave evidence on the ninth day of the trial.
- [91] Ms Greer's evidence was central to the prosecution case against Mr Rewha, but it was also relevant to Mr Huxley's defence case, as Ms Greer gave evidence that Mr Huxley was not present when Mr McCabe was assaulted at the Burnda Street unit.

- [92] When summing up, the trial judge gave a very extensive direction about Ms Greer's evidence, including reminding the jury about Ms Greer's behaviour when she was first called to give evidence:

“The first person I will deal with is the witness, Candis Greer. I have already given you some specific directions concerning the care you need to take with respect to the accuracy and reliability of the evidence of a number of witnesses because of their drug consumption. This is particularly so in the case of the evidence of Ms Greer, who is an important witness. In fact, hers is the only evidence that Michael McCabe journeyed from Charters Towers to the unit at Burnda Street that night, or that Michael McCabe was at the unit that night, or of the circumstances of the assault.

You will recall that near the outset of her evidence, when she was called, Ms Greer admitted that she only had a recollection of bits and pieces of what occurred on 15 August 2015. It is plain that on that day, she consumed significant quantities of methylamphetamine combined with alcohol. She conceded that she may have even smoked three pipes of methylamphetamine in the morning of the 15th before she took up with the others and before she journeyed to Charters Towers with Leonie Doyle. You will recall her evidence about the first intravenous shot of methylamphetamine she had with Michael McCabe in the bedroom of Charters Towers and its effects on her. You will recall her evidence of the consumption of alcohol at hotels, and it seems during the journey to and from Charters Towers.

There is another reason for some concern with respect to the accuracy and her reliability, especially the reliability of Ms Greer's evidence. You will have seen her behaviour when she was first called to give evidence when she refused to enter the witness stand and refused to take an oath or affirmation and refused to answer questions. While this is entirely a matter for you in your assessment of a witness, you may well consider that her behaviour on that occasion reflects adversely on her as a responsible and reliable citizen and bring into issue her reliability and her willingness to obey the law. You might also consider her demeanour and the way in which she gave her evidence in evaluating whether she was a reliable witness. Did she present and behave as a witness with a reliable memory? In the result, you will need to scrutinise the evidence of Candis Greer with great care before you can accept the accuracy and the reliability of her evidence.

I have already outlined that there are a number of reasons for this, but the combined effect of the methylamphetamine and the alcohol which resulted in the need for her to sleep for a day or more after the 15th may leave you to conclude that her powers of perception and recollection may have been so distorted or compromised by the combined effects of methylamphetamine and alcohol that with the years that have been transpired since 15 August 2015, her evidence may not be based upon a true and reliable recollection, but a confabulation compromised by the effects of these substances.

You should only act upon her evidence if, after considering her evidence with the warning that I have given in mind, and all the other evidence in the trial, you are convinced of its truth and accuracy. In particular, consistent with the directions I will give you in relation to the case against Mr Rewha, as a matter of law, you should only act upon her evidence if you are satisfied beyond reasonable doubt that her evidence is truthful, reliable and accurate. If you are not satisfied beyond reasonable doubt that the evidence of Ms Greer is truthful, reliable and accurate, then you should disregard it.”

- [93] It was for the prosecutor to call the witnesses in the prosecution case. Although all parties had been informed (in the absence of the jury) of Ms Greer’s reluctance to give evidence, there was no demur from the trial judge or counsel for Mr Huxley or the other defendants to the prosecutor calling Ms Greer as the first witness in the prosecution case. It may have been preferable with the benefit of hindsight for the prosecutor in the absence of the jury to seek a voir dire to explore Ms Greer’s reluctance to give evidence, but that was not the path that was chosen and the position was that, when first called to give evidence, she refused to take the oath or affirmation and refused to answer questions. As the above passage shows, that was the subject of comment by the trial judge in his directions to the jury. That was merely the trial judge’s observation on a matter that could be relevant to the credit of the witness on which the jury were otherwise instructed was wholly within their province as the judges of fact.
- [94] No relevant unfairness arose from the trial judge not interfering with the prosecutor’s decision to call Ms Greer as the first witness when the prosecutor was aware of her reluctance to give evidence.
- [95] Without Ms Greer’s evidence, there was no basis for the jury to convict Mr Rewha of count 1. It was a joint trial and it was important in the trial judge’s summing up to give the warnings which the trial judge did in respect of Ms Greer’s evidence. It was of assistance to Mr Huxley’s case that Ms Greer did not place him in the unit when the assault of Mr McCabe occurred. The significance of that evidence was reduced, however, when the prosecution confined its case against Mr Huxley to Mr Huxley’s killing Mr McCabe in the manner in which Mr Hess said Mr Huxley described to him that he killed Mr McCabe by dropping a rock on him. The prosecution case was that event occurred in the Crystal Creek region and not at the unit.
- [96] The trial judge’s strong warnings to the jury about acting on any part of Ms Greer’s evidence (which may have affected the jury’s accepting Ms Greer’s evidence that Mr Huxley was not present in the unit when the assault occurred) was appropriately ameliorated by the trial judge reminding the jury in the summing up that Ms Greer gave evidence that neither Mr Huxley nor Ms Doyle were present when the event involving Mr McCabe in the unit occurred and then said:
- “Even if you disbelieve Ms Greer’s evidence ... that does not constitute evidence that they were there. There is simply still no evidence about that matter.”
- [97] Mr Huxley also relied on Ms Greer’s evidence at the trial of the state Mr McCabe was in after the assault, in order to advance the contention that the jury could not exclude as a reasonable possibility that Mr McCabe died as a result of the injuries

sustained during the assault in the unit. The direction given by the trial judge in respect of Ms Greer's evidence did not detract in any other way from the other evidence that supported the arguments about the severity of the assault at the unit. In fact, the trial judge in the summing up reminded the jury of the arguments on behalf of Mr Huxley about the soakage blood stain on the sofa chair, the forensic evidence of the blood in the boot belonging to Mr McCabe and that it was Mr Taylor who had cleaned the boot of the blue Commodore and that it was therefore a possibility that Mr McCabe may have suffered fatal injuries at the unit, so it was his body that was disposed of at Maidenhair Fern Creek.

[98] The trial judge's directions on matters that were relevant to the assessment of the credibility and reliability of Ms Greer arose from the manner in which Ms Greer gave her evidence and the content of that evidence. There was no basis for the trial judge to distinguish those observations, as to whether the jury was considering the case against Mr Rewha or the case against Mr Huxley. Ultimately, the observations of the trial judge about Ms Greer's evidence and the strong warning which he gave in respect of her evidence were matters of comment in respect of the jury's task. The trial judge qualified his comments with the observation that favoured Mr Huxley that, if Ms Greer's evidence was disbelieved, there was no evidence that Mr Huxley was in the unit, and fairly summarised the other evidence about the severity of the assault that was relied on by Mr Huxley. There was therefore no error in the directions that the trial judge gave in relation to Ms Greer's evidence.

[99] Mr Huxley has not established grounds 4 and 5.

Order

[100] It follows that the appeal must be dismissed.