

SUPREME COURT OF QUEENSLAND

CITATION: *R v Novley* [2022] QCA 21

PARTIES: **R**
v
NOVLEY, Daniel Andrew
(appellant)

FILE NO/S: CA No 247 of 2020
SC No 95 of 2018

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Townsville – Date of Conviction:
9 November 2020 (Holmes CJ)

DELIVERED ON: 25 February 2022

DELIVERED AT: Brisbane

HEARING DATE: 9 June 2021

JUDGES: McMurdo and Mullins JJA and North J

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was found guilty of murder – where the appellant, the victim and the other participants in the relevant events were under the influence of drugs and/or alcohol – where the appellant admitted to striking the victim three times with a bed slat – where there was evidence that before the appellant struck the victim with the bed slat the appellant and/or others had punched the victim in the face causing his nose to bleed and that the victim had hit his head – where the critical issue for the defence case at trial was the cause of death – where the forensic pathologist determined the cause of death as head injuries – where the forensic pathologist conceded that there were alternative possibilities as to the mechanism that caused death – where the question for the jury was whether there was a reasonable possibility that it was an earlier incident that caused the victim’s death rather than the appellant’s striking the victim with the bed slat – where the trial judge summarised the evidence that was relevant to possible sources of injury to the victim, apart from the blows with the bed slat inflicted by the appellant – whether a miscarriage of justice occurred when the primary judge directed the jury that the forensic pathologist’s evidence as to alternative possible

causes of death “was really a theoretical possibility” and that the jury had to consider the possibilities on the basis of all the evidence and what they concluded from it

McKell v The Queen (2019) 264 CLR 307; [2019] HCA 5, considered

COUNSEL: A W Collins for the appellant
N Rees for the respondent

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

- [1] **McMURDO JA:** I agree with Mullins JA.
- [2] **MULLINS JA:** The appellant was convicted after trial in the Supreme Court before a jury of the murder of Mr Ferrar.
- [3] There is one ground of appeal that a miscarriage of justice occurred when the learned primary judge erred in law in directing the jury that Professor Williams’ evidence as to alternative possible causes of Mr Ferrar’s death “was really a theoretical possibility”.

Background

- [4] Sturt Lodge is a four storey building in Townsville that provides budget accommodation. The police were called around 9 pm on the evening of 2 August 2016 and found Mr Ferrar’s body in room 418A under the covers on the bed. They inspected an adjacent bathroom/toilet where they found shorts stained by faeces, faeces on the toilet seat and a wooden bed slat and noticed the strong smell of bleach. The appellant who was the occupier of room 418B was questioned at the scene by an officer wearing a body worn camera. The appellant and one Mr Swan were taken into custody and subsequently questioned. On 14 October 2019 Mr Swan was convicted after trial of the manslaughter of Mr Ferrar. Before being sentenced, Mr Swan provided a statement to the prosecution and an undertaking to give evidence against the appellant.
- [5] Mr Collins of counsel who appears for the appellant concedes that the case against the appellant was strong with the following features:
- (a) the appellant’s presence in the vicinity of room 418A at Sturt Lodge on 2 August 2016;
 - (b) the appellant being observed cleaning blood off his hands in the communal bathroom on 2 August 2016;
 - (c) there was evidence that the appellant cleaned a wooden bed slat with bleach;
 - (d) evidence from Mr Swan that prior to entering room 418A, the appellant said “let’s finish the job”; and
 - (e) evidence from Mr Swan that the appellant requested him to cover a closed-circuit television camera.

The issue

- [6] The critical issue for the defence case at the trial was the cause of death. The appellant admitted to striking Mr Ferrar three times with a bed slat and the question for the jury was whether there was a reasonable possibility that it was an earlier incident that caused Mr Ferrar's death.
- [7] The primary judge was directing the jury on the element of the offence of murder of whether they could be satisfied beyond reasonable doubt that the appellant killed Mr Ferrar in that he caused or substantially caused Mr Ferrar's death. The primary judge referred to the admission of the appellant that he struck Mr Ferrar three times with a bed slat, but then referred to the issue that arose out of the cross-examination of Professor Williams which the primary judge expressed as "Is there a reasonable possibility that it was an earlier incident that was the cause of Mr Ferrar's death?" The impugned direction was then given in the following terms by the primary judge expressly in dealing with this issue that arose out of Professor Williams' cross-examination:

"Professor Williams said he couldn't exclude as a reasonable possibility that punches to Mr Ferrar's face could have caused him to aspirate blood, so that he effectively drowned in his own blood, or that, because of being punched, he struck the back of his head on a hard surface, causing lethal bleeding and swelling to the brain, or that a punch itself could have caused him bleeding and swelling to the brain, or that a combination of the punch and hitting the head could have caused death. Now, Professor Williams was answering questions as to what was really a theoretical possibility, because he doesn't know anything about what happened at Sturt Lodge that day. He didn't see any evidence other than Mr Ferrar's body. You have. So you've got to consider the possibilities on the basis of the evidence you've seen and what you conclude from it."

- [8] The appellant relies on the observations of Bell, Keane, Gordon and Edelman JJ in *McKell v The Queen* (2019) 264 CLR 307 at [35] and [48] to raise as an issue whether the primary judge went beyond permissible judicial comment on the defence case and, in particular, whether the characterisation as "theoretical possibilities" of the concessions by forensic pathologist Professor Williams (who gave evidence in the prosecution case) of alternative possible causes of death relied on by the appellant at the trial unfairly undermined the defence case and thereby caused a miscarriage of justice. The appellant's complaint is that the primary judge referred in the impugned direction only to those parts of Professor Williams' evidence of alternative possible causes of Mr Ferrar's death that were relied on by the appellant at the trial and not those parts of the evidence of Professor Williams relied on by the prosecution.

Summary of evidence relevant to the cause of Mr Ferrar's death

- [9] A hand drawn floor plan of the top floor of Sturt Lodge that was not to scale, was prepared by a forensic officer of the Queensland Police Service and identified the relative position of the various rooms was tendered as exhibit 2. There was a storage room between rooms 418A and 418B, a communal bathroom next to room 418B and a communal kitchen next to room 418A.

- [10] Ms Butler, who is an Aboriginal woman, had been Mr Ferrar's partner for almost four years and lived with him in room 418A as at 2 August 2016. Her evidence included the following. She and Mr Ferrar had drug and alcohol problems and had been to rehabilitation before moving into the lodge. They had been at the lodge for about a month. In the afternoon of 2 August 2016, they started to drink alcohol (cask wine and beer) in the downstairs communal area with Robert Smith and Michael Binjunda who was a distant relative.
- [11] Ms Butler was drinking cask wine. Mr Ferrar had a few beers and then was drinking wine. Mr Ferrar went upstairs. His back was aching from an accident he had tree logging. Ms Butler then followed him. Mr Ferrar was putting together a better bed for them. The new bed had wooden slats that sat in the frame of the bed. After the bed had been made up and the mattress was in place, Ms Butler went back downstairs for alcohol. When Ms Butler returned, Mr Ferrar was sitting in the room with two men and it looked to her that Mr Ferrar was smoking marijuana through a bong. Ms Butler was upset at Mr Ferrar and they had an argument. They moved into their room and Ms Butler went back downstairs. When she came up next her relative, Michael, was in the corridor with Mr Ferrar and they were arguing. Ms Butler slapped Mr Ferrar with an open hand across his left cheek for being disrespectful to a member of her family. She did not notice any injuries. The guy with the tattoos (the appellant) came over her shoulder and hit Mr Ferrar in the face in the centre and "a bit of the side". She described that he "king hit" him with his fist. Ms Butler then saw blood around Mr Ferrar's nose and mouth area. Mr Ferrar fell back and hit the door behind him with his head and body. The appellant then said "I'm in love with your missus" and Ms Butler responded that she was not interested in him. He then said "I'm going to stab you, Brus" and repeated that about three times. Ms Butler explained that "Brus" was equivalent to "bro". The manager of the lodge came onto the floor and told them to quieten down. Ms Butler and Mr Ferrar then went into their room. Mr Ferrar washed his face in the bathroom. Mr Ferrar had a cut on the back of his head, Ms Butler took off her singlet and put it on the cut to see if it was still bleeding and Mr Ferrar lay down, because he said he was feeling tired and sore. Ms Butler went downstairs to grab their drinks. The appellant spoke to her as she was leaving to go downstairs. She felt intoxicated and Mr Ferrar was also intoxicated. Mr Ferrar did soil himself when drinking, but that was due to his back injury. Ms Butler did not return to the fourth floor until the police came and got her.
- [12] Ms Butler's evidence in cross-examination included the following. Ms Butler slapped Mr Ferrar, as Michael had said that Mr Ferrar had hit him and she believed what Michael said. Ms Butler denied striking Mr Ferrar with her knee relatively soon after she had seen him with the bong. After she had slapped Mr Ferrar, she was embracing him, when the appellant came over her shoulder. After Ms Butler saw Mr Ferrar with the bong, she tried to get him out of the appellant's room and they went back into their room. Ms Butler denied grabbing Mr Ferrar by the back of the head and kneeling him in the facial area. Mr Ferrar did not try to hit Ms Butler at all. Mr Swan, who was the other occupant of room 418B, was in the vicinity when this was happening.
- [13] Mr Binjunda, who was residing at the lodge on 2 August 2016, was having a beer during the afternoon with his "long distance" niece, Ms Butler, and her boyfriend Mr Ferrar in the downstairs communal area. At some point Ms Butler and Mr Ferrar had left, Mr Binjunda went up to the fourth floor and he saw Mr Ferrar

smoking drugs and said “That’s it. No more”. Mr Ferrar was in the kitchen or hallway outside his room with the white tattooed fellow (the appellant) and a dark fellow (Mr Swan) and had a bong in front of him. Mr Binjunda pushed Mr Ferrar out the door. Mr Ferrar was heading down the corridor to go back downstairs punching all the brick walls with his fist. Mr Binjunda stood in front of him and stopped him and tried to take him back to his room. Mr Ferrar was facing into his room with his arms on the two sides of the doors to stop himself from going into the room. The other two men came along and Mr Ferrar turned around to look at them. Mr Binjunda’s niece was with him. The appellant “slung a punch” at Mr Ferrar. Mr Ferrar ducked and Mr Binjunda got hit, but laughed it off. Mr Ferrar did not get struck at all. Mr Binjunda heard the appellant saying to Mr Ferrar “that he’s killed twice already and you next”. After Mr Ferrar released his grip from the door, Mr Ferrar fell over the bed. Ms Butler was in the room with them. Mr Binjunda told the two men to wait outside.

- [14] Mr Binjunda’s evidence in cross-examination included the following. During the afternoon, Mr Binjunda came up to the appellant’s room with Mr Robert Smith who was Mr Binjunda’s nephew. Ms Butler came up at the same time. Mr Ferrar was in the room and that was when Mr Binjunda took the bong out of his hand and tried to take Mr Ferrar out of the appellant’s room. Mr Ferrar did not want to go into his room. Mr Binjunda was on the inside of him trying to pull him and get his hands off the doorframe of his room and Ms Butler was trying to push him from the outside. Mr Binjunda knew that somebody hit him at that time and thought it was Mr Ferrar. There was no second punch. When the appellant threw a punch over Ms Butler’s shoulder, he got Mr Binjunda in the jaw. Mr Binjunda agreed that in his police statement he did not say the appellant hit him, but said that Mr Ferrar hit him. When this was all happening, Mr Smith and Mr Swan were also present.
- [15] Mr Swan was squatting in the appellant’s room in Sturt Lodge on 2 August 2016. It was room 418B. The appellant and Mr Swan had bought Red Bull and a bottle of Jagermeister that morning and when they returned to the lodge, they had a couple of drinks and a couple of smokes. Mr Swan went to room 418A and asked for a cigarette and got one from the occupants. The occupants, who were Ms Butler and Mr Ferrar, came into room 418B for a bit. The appellant and Mr Swan were drinking the Jagermeister mixed with Red Bull. Later on Mr Swan went downstairs. Ms Butler was there and introduced him to Mr Binjunda and Mr Smith. Mr Swan returned to his room and Ms Butler came back a bit later. There was the appellant, Ms Butler, Mr Ferrar and Mr Swan in the room. The appellant said to Ms Butler “I’ve been trying to get with you ... for three years”. Ms Butler replied that “You know my man’s sitting right there?”. A bit later Mr Ferrar became upset and started swinging punches at the appellant. Ms Butler took Mr Ferrar out of the room.
- [16] Shortly after Mr Ferrar and Ms Butler came back to the appellant’s room to drink a bit more with them. Mr Smith then came to the room. Ms Butler had left, but came back with Mr Binjunda. Mr Binjunda was talking to Mr Ferrar out in the hallway. When Mr Ferrar was having a bong in room 418B, Ms Butler came in and took the bong off him and took Mr Ferrar back into their room. Mr Swan could hear a bit of “shuffling of furniture and this and that” coming from their room. The appellant and Mr Swan went over and then the appellant and Mr Ferrar had a small scuffle in the corridor between the kitchen and the bathroom area. It involved pushing and shoving and Ms Butler and Mr Swan tried to break it up. Mr Ferrar was swinging

wildly at the appellant. Mr Swan held Mr Ferrar's forearms down in front of him and they moved back into an alcove where there was a storeroom. Mr Swan let go of Mr Ferrar's hands and he swung at Mr Swan and connected with his mouth and this is when the appellant came over from behind Mr Swan from the left-hand side and with full power punched Mr Ferrar in the face twice – once in the nose and once in the mouth. Mr Ferrar was bleeding from the lip and cuts to the nose. He was knocked to the back wall and he fell to the ground. It was around this time that the appellant said to Mr Ferrar, "I've killed two people. Done 15 years. You're next."

[17] Mr Ferrar and Ms Butler went back to their room. Mr Swan and the appellant went back to their room and had another drink and cigarettes. The door of their room was open. They could hear the toilet in use in the communal bathroom. The appellant said to Mr Swan "Who's that in the toilet?" and his next words were "Come on. We should finish the job.". The appellant was "agitated" and "pumped up". He went out into the hallway and came back and said to Mr Swan "Cover camera, bro". Mr Swan walked up to the camera and covered it with his baseball cap. Mr Swan saw the appellant pick up a piece of wood that was used for a bed frame and was located in the area outside the storeroom. Mr Swan stayed near the camera for a period of time. The appellant took the plank of wood into room 418A and closed the door. Mr Swan went back to room 418B and heard "shuffling furniture" and what sounded like a struggle from room 418A. The appellant went past him into the bathroom holding the plank of wood that had blood on one end. Mr Swan saw the appellant in the bathtub trying to clean off the plank of wood by bleaching and scrubbing it. The appellant went back to room 418A, grabbed a handful of clothes and wiped the blood trail that went from room 418A to the bathroom. Mr Swan went back to the camera and the manager of the lodge, Mr Stokes, told him to take the cap down from the camera which he did. On his way back to room 418B, Mr Swan observed the shower was on in the bathroom and the appellant was still trying to clean the log and the floor. There was faecal matter on the toilet. There was a strong smell of bleach. Mr Stokes also saw this and asked "What's going on here". Both Mr Stokes and Mr Swan left the scene, but then Mr Swan went back to the bathroom and saw the detachable shower head still going and the log with blood on it where the shower curtains were. There was bleach on the bathroom floor. Mr Swan went back to the room to sit on the bed and was joined by the appellant a bit later.

[18] Mr Swan's evidence in cross-examination included the following. On the replaying of the CCTV footage, Mr Swan conceded that he did not fix the cap on the camera, but was standing underneath the camera with his hand in the air holding the cap over the camera. He and the appellant were drunk at the time. The appellant had more alcohol than Mr Swan by that stage. The appellant had also smoked marijuana during the day. Mr Swan's cross-examination was adjourned until the next day. When his cross-examination resumed, he then conceded that he had been dishonest in his evidence the previous day. He accepted that in the written statement he provided to police before he was sentenced for manslaughter that he did not tell the police that Ms Butler beat up Mr Novley that afternoon or evening. On the morning of 3 August 2016, he told the police, referring to Ms Butler, "You should see her fight. It's crazy.". He conceded that a couple of hits were thrown by Ms Butler and he saw one connect with Mr Ferrar's face. The assault took place inside room 418A. Only Ms Butler and Mr Ferrar were in the room. Mr Swan was in room 418B with the appellant and they heard what was going on. Mr Swan peeked out the doorway and saw the assault. Mr Swan conceded that he had not put

anything in his statement about Ms Butler assaulting Mr Ferrar, as he wanted to put blame on the appellant, so Mr Swan would get a reduced sentence for manslaughter.

- [19] As at 2 August 2016 Mr Robert Smith lived in room 421 of the lodge. His evidence included the following. He had been drinking beer between 2 pm and dusk on the ground floor with others and was intoxicated. He returned to the fourth floor when he heard a commotion. The appellant and Mr Swan were in the corridor with Ms Butler and Mr Ferrar and they were arguing. The appellant threw the first punch that connected with Mr Ferrar's face around the cheek and nose area. Mr Swan punched Mr Ferrar in the mouth, jaw corner region. There was blood coming from Mr Ferrar's mouth and nose. Mr Smith saw marks on Mr Ferrar's face, before he saw the punches thrown. He heard the appellant say to Mr Ferrar "I've killed two people and you're gonna be the next." Mr Smith then returned downstairs. Ms Butler came back downstairs. Mr Smith went upstairs again and saw Mr Swan and the appellant standing in the kitchen area beside their room. They invited him to have a drink which he accepted and stayed for 15 to 20 minutes. The cleaner, Mr Stokes, came up and he asked about a piece of plywood lying on the bathroom floor. The appellant then ran into the bathroom and locked the door. Mr Smith went back downstairs.
- [20] Mr Smith's cross-examination included the following. Before Mr Ferrar was struck by the appellant and Mr Swan, he had a busted mouth, a split under the eye and blood was covering certain parts of his face. Mr Smith did not know how he got those injuries. When Mr Ferrar and Ms Butler had gone back upstairs, Mr Smith could hear male and female voices screaming and swearing. Mr Smith accepted that in his police statement he had said that he had seen the appellant throw a punch at Mr Ferrar and hit him on the left-hand side of the face in the cheek area. After Mr Ferrar had been punched by Mr Swan in the mouth, the jaw area, his head "jolted back" and he hit the wall of the hallway. Ms Butler said that she was going to put Mr Ferrar back into the room.
- [21] Mr Stokes who lived on the third floor of the lodge and was the cleaner went to the fourth floor on 2 August 2016 at about 4.35 pm, as there was a lot of noise, yelling and slamming of doors. There were four persons in dispute over something. The male from room 418A had a blood nose. The man with the tattoos (the appellant) said he was protecting the women. Mr Stokes left. He returned to the fourth level when he heard banging like a piece of timber hitting the floor and shouting. He saw the appellant standing next to his room with a piece of timber and there was a Torres Strait Islander male (Mr Swan) standing outside his room. Mr Ferrar and his girlfriend were in the vicinity. Mr Stokes told the appellant to put the timber back in the room. Mr Stokes left, but was disturbed by a loud bang about 10 or 20 minutes later and went back upstairs. Mr Swan was holding up a cap over the TV camera. He pulled the cap down and returned to room 418B. The appellant was in the bathroom in a pair of underpants, the shower was running into the bathtub, he was holding a piece of timber that was covered in blood and his hands and the floor were covered in blood. Mr Stokes left and called the police.
- [22] Professor Williams did the post-mortem examination of Mr Ferrar. He observed facial injuries, including bilateral black eyes and two lacerations to the left ear, a damaged upper incisor tooth and small amounts of blood present in the mouth. The nose was reddened which was consistent with bruising of the nose. There were a few linear abrasions around the shoulder and the top of the head consistent with

being struck with a linear object repeatedly. There was “abnormal mobility” of the upper nose and this area appeared to be the source of blood which had been found to be inhaled in the lungs. The left ear had been subjected to a blow by a flat instrument that caused the two lacerations. There was about three centimetres between the two lacerations. He observed severe fracturing at the floor of the skull and the left side and less severe fractures on the right side of the base of the skull. The same type of force as a motor vehicle accident was needed to cause the fracture to the left side of the skull. The site of the fracture was the site of the application of force for both right and left sides. Internal examination showed extensive bruising at the front and left side and the skull fracture at the left side was over an area measuring up to 10 centimetres that involved the base of the skull and the left parietal bone. It was a straight fracture consistent with being hit with an object.

- [23] Professor Williams observed an acute subdural haemorrhage and an acute subarachnoid haemorrhage. The brain had started to swell. The fractures to the left side, the right side and the base of the skull could not have been caused by one blow. There were probably between two and 10 blows to each side of the skull. The blood alcohol concentration (BAC) was 0.216 which was over four times the legal limit for driving. Professor Williams described the head injury as “an acute head injury with minimal survival” which meant that Mr Ferrar was not going to be alive for very long after sustaining the head injury. He also observed the lungs to have a degree of aspiration of blood which meant that blood had been inhaled into the lungs. Professor Williams determined the cause of death as head injuries.
- [24] In cross-examination, Professor Williams made concessions which included the following. The fractures to the right side base of Mr Ferrar’s skull could have been the result of his hitting a solid wall with the back of his head. One blow could have caused the fractures on the right side of the skull, but there were probably more blows to the left side of the skull. A number of the haemorrhages could have been caused as a consequence of the force which caused one or more of the fractures to the right side of the skull. If the forces to the left-hand and right-hand sides of the skull were applied at different times, the forces applied to the right-hand side of the skull may have been applied before the forces that were applied to cause the fractures to the left-hand side of the skull. Although Professor Williams accepted that proposition, he qualified it by pointing out that he was not there and he was not too sure when individual injuries were caused. It was fair to say that Mr Ferrar died of complications from head injuries.
- [25] A person who was highly intoxicated with a BAC 0.216 was more likely to stumble and fall than a sober person. Professor Williams accepted that if a person fell onto a hard surface (like a hard floor or wall) with their head, they could fracture their skull and that, if a person fell and struck a hard floor, they could fracture their skull such that they would cause a brain injury as well, including brain contusions and haemorrhages. Professor Williams accepted in theory that an intoxicated person would be less able to prevent themselves from stumbling and falling as a result of suffering the application of force like a push. Another consequence of being intoxicated is that the person who is injured may not realise that they are injured. Professor Williams was asked, if a person were intoxicated, would they be less able to protect their airways than a person who was not intoxicated. The example was given that an intoxicated person would be less able to respond and get rid of blood running down his larynx and throat and into his lungs. Professor Williams accepted that proposition “in theory”. Professor Williams accepted that the upper nose area

was likely to be the source of the blood which was inhaled into Mr Ferrar's lungs. He considered that Mr Ferrar died of his injuries, rather than "just" inhalation of blood. In response to the proposition that he could not exclude that Mr Ferrar may have died of inhalation of blood alone, Professor Williams stated:

"I can't really exclude it, no. But it seems logical for me that when he's got so many injuries to the head, including fractures left and right sides, as well as the front, that a weapon has been used on him, and he's died as the consequence of having these head injuries."

- [26] Professor Williams accepted that the injuries to the nasal area on the front of the face could have been caused by one or more punches to that area. It was possible those blows could have caused the bleeding which resulted in the blood in his lungs. Putting aside those injuries to the left-hand side of the skull which Professor Williams identified as having been caused by some linear implement, Professor Williams accepted it was a reasonably possible mechanism of death for Mr Ferrar to have died from the blood in his lungs. Punches to the nasal area of the face could have caused Mr Ferrar to aspirate blood down his nasal passages into his airways. Those punches could have also caused him to strike a heavy wall and to fall onto a heavy floor and injure his head in that way. It is possible those punches could have caused one or more of the haemorrhages found in his brain. The punches could have caused some of the contusions Professor Williams found in Mr Ferrar's brain, but Professor Williams felt it was more likely to be linked to the violence inflicted on the side of the head.
- [27] The appellant's trial counsel explained to Professor Williams that when he was talking about "what is reasonably possible" that was not necessarily "what is most likely". Professor Williams accepted that it was reasonably possible for the punches to have caused, directly or in consequence of Mr Ferrar striking his head after being punched on some hard object, the haemorrhages or one of them and the punches could have directly or indirectly caused the contusions or some of them. The punches to the glabella (which is the smooth part of the forehead above and between the eyebrows) could have caused the bleeding from the nose down to the lungs. On the basis that Mr Ferrar began to aspirate blood and also began to suffer from the effects of the injuries to his brain caused by the punches, Professor Williams accepted that would have had a negative effect on his consciousness and his ability to appreciate what was happening to him. Professor Williams accepted it was possible when Mr Ferrar lay down on a bed sometime after, that he could have died as a result of the blows to the face and the bleeding down the throat into the lungs perhaps in combination with some brain injuries, but the weight of the lung was not particularly heavy and Professor Williams' experience was that people who died from the aspiration of blood had very heavy lungs. Professor Williams conceded that he could not exclude as a reasonable possibility that Mr Ferrar died by that mechanism, but he was saying that it was part and parcel of having a head injury. On the basis Mr Ferrar received the injuries to the face before he received the injuries with the linear hard object to the back of the left side of the skull, Professor Williams accepted that it was reasonably possible, even if it was not the most likely cause of death, that he died as a result of the consequences of the facial injuries before he was struck in the back of the head with the linear object. Professor Williams conceded that he could not exclude as a reasonable possibility that one or more of the haemorrhages was as a result of the application of force to the front of Mr Ferrar's face. Professor Williams confirmed there was damage to the brain stem

which may be the consequence of brain swelling. On the assumption that Mr Ferrar was struck in the face half an hour or an hour before he was struck to the left-hand side of the head with a linear object and as a result of the earlier incident received the injuries to the nasal area and the fractures to the skull at the rear right-hand side (from being propelled as a result of the punch into the wall), Professor Williams conceded that a brain haemorrhage could happen from the punches to the face and/or the hitting of the wall. Professor Williams accepted that the subarachnoid haemorrhage may also have been caused as a result of that mechanism and that haemorrhaging could have caused the brain to swell sufficient to kill Mr Ferrar. Professor Williams therefore accepted that the mechanism of death could have occurred before, and independently of, the injuries that Mr Ferrar may have later received to the left rear side of his skull when a linear hard object was applied to it. Professor Williams accepted that, in general terms, it would be more likely that a person who was intoxicated would die of that mechanism than a person who was not intoxicated. In re-examination, Professor Williams clarified that, if the underlying haemorrhages that caused his death were due to being hit on the right side of the skull, he would have expected that the person may have been comatose or unable to speak and he would not have expected the person to be able to walk.

- [28] The appellant gave evidence that included the following. He stayed at the lodge in room 418D with Mr Swan from 29 July 2016 until 1 August 2016 when they moved into room 418B. He bought bleach to clean rooms 418D and 418B, so he could move into 418B. He woke around 9 am on 2 August 2016 and smoked about six cones of marijuana and took his medication. He had met Ms Butler in late July and saw her and Mr Ferrar on the morning of 2 August 2016. He asked her for a cigarette which she gave to him. He flirted with her over that day, as did Mr Swan. He had finished cleaning around 4 pm, when he and Mr Swan went and bought a bottle of Jagermeister and Red Bull which they mixed and drank. He saw Mr Ferrar at about 5 pm out the front of their rooms head butting the wall and punching it with the side of his hand. Mr Ferrar accused the appellant and Mr Swan of cheating with Ms Butler. Mr Ferrar returned to his room.
- [29] By 7 pm the appellant and Mr Swan had finished the bottle of Jagermeister and went out to buy another bottle and more Red Bull. They returned by 7.30 pm. Before they had put the drinks on the table, Mr Ferrar was out the front of their room and had a pine bed slat that he was waving around. The appellant thought Mr Ferrar was going to attack Mr Swan and him. The appellant grabbed the piece of timber with both hands while Mr Ferrar was still holding onto the piece of timber at each end. The appellant twisted it and the piece of timber dropped and they both got tangled up in it. At that stage Mr Stokes came up and the appellant picked up the timber and put it in his room behind the door. Mr Ferrar left.
- [30] The appellant did not see Mr Ferrar until around 8 pm. The appellant and Mr Swan were in their room when Mr Ferrar accused them again of cheating with Ms Butler. Mr Swan grabbed Mr Ferrar by the arms. Mr Ferrar tried to grab the piece of timber from behind the door. Mr Swan took the timber from Mr Ferrar. Mr Swan put Mr Ferrar on the bed and sat next to him and the appellant told him that no one was having sex with his partner and offered him a cone which he took. Ms Butler and Mr Binjunda then arrived and Mr Binjunda took the bong off Mr Ferrar. It was passed to the appellant who put it on the table. Ms Butler asked him why he was smoking the bong. Mr Binjunda tried to get Mr Ferrar to go back to his room. Mr Ferrar put his hands on the doorframes and Mr Binjunda pushed him and then Ms

Butler grabbed him and pulled him out. The appellant saw Ms Butler kneeling Mr Ferrar in the face three times. She had one hand behind his back and one more to the side of his head, as she kned him and it looked “pretty hard”. She did this as Mr Ferrar had his hand on the doorframes of room 418A. The appellant went over and pulled Ms Butler away from Mr Ferrar. Mr Ferrar went to throw a punch at Ms Butler, but it missed her and Mr Ferrar stumbled forward and hit Mr Binjunda on the side of the face. Mr Binjunda then poked Mr Ferrar with his cane. Mr Ferrar tried to throw another punch at Ms Butler and the appellant punched him with his closed right fist on Mr Ferrar’s cheek and Mr Ferrar fell inside his door. The appellant said something to the effect that “You shouldn’t hit women” and told Mr Ferrar (which was not true) that he had done 15 years in prison and killed two people and then said “And you’ll be next if you don’t pull your head in”. The appellant said that to scare him. Mr Swan was in the vicinity but did not throw any punches. Mr Stokes arrived and the appellant said that he was protecting the woman there and that everything was under control, but Mr Stokes should call the police. Mr Ferrar did not say anything. The appellant returned to his room. Ms Butler and Mr Ferrar went to their room and the appellant could hear what sounded like a physical fight. He heard something hit the ground that sounded like a piece of timber. Ms Butler was screaming at Mr Ferrar who was crying. The appellant saw Mr Ferrar about 10 minutes later, when he tried to leave room 418A, but Ms Butler got there and said she would put him to bed.

- [31] Ms Butler then returned to room 418B and invited the appellant and Mr Swan to go clubbing. The appellant went to shower and saw faeces all over the toilet and a soiled pair of shorts and underwear. As he had seen Mr Ferrar wearing the shorts, he went into room 418A to get him to clean up the bathroom. He could see Mr Ferrar’s feet sticking out of the end of the bed and he was half covered with a blanket. The appellant yelled at Mr Ferrar to get up. There was no response. There was a piece of timber leaning up against the wall in room 418A. The appellant used that to prod Mr Ferrar on the feet. There was no movement. The appellant hit Mr Ferrar three times with the piece of timber to wake him and at the same time yelled at him to get up. He hit him hard enough to wake him and maybe leave a bruise. There was no response. The appellant noticed there was a bit of blood on the end of the timber and panicked. He left the room and told Mr Swan to cover the camera. Mr Swan stood under the camera with his hat and held it there. The appellant went back to room 418A, got the piece of timber and went to the bathroom. He put the timber in the tub and turned the shower on and then went out and told Mr Swan to take his hat from the camera. Mr Stokes was walking up the stairs and also told Mr Swan to take the hat from the camera. The appellant went back to the bathroom to have his shower and get ready to go out. Mr Stokes told the appellant to clean the blood off the toilet, but he was mistaken about it being blood. Mr Stokes asked him what was on his hands, but there was nothing on his hands. There was no blood in the bathroom at that time. It was faeces. The appellant grabbed the bleach and poured it everywhere, because of the smell of the faeces. He poured bleach in and around the toilet. He dropped the bottle of bleach and it went everywhere, so he got into the shower. He put bleach on the piece of wood, because he wanted to wash away his DNA and fingerprints. He did not want to get into trouble for assaulting Mr Ferrar with the piece of timber when he tried to wake him up. In cross-examination, the appellant stated he did not see Mr Swan punch Mr Ferrar, when Ms Butler and Mr Binjunda were also present.

The summing up

- [32] After the impugned direction, the primary judge foreshadowed that the summing up would deal with evidence relevant to what the primary judge described as “the reasonable possibilities scenario”. The primary judge reminded the jury of the sequence of the evidence: the accounts of the confrontations on the fourth floor of the lodge on the afternoon and the evening of 2 August 2016, the appellant’s conduct with the police, and the expert evidence about bloodstains (from forensic officer Mr Bartulovich) and injuries (from Professor Williams). The primary judge directed the jury that when they were reaching conclusions in the case about any aspect, including about reasonable possibilities, they should do so “on the basis of all the evidence” and “not compartmentalise the evidence”.
- [33] The primary judge gave the usual direction about expert witnesses that applied to the evidence of Professor Williams and the forensic officer Mr Bartulovich.
- [34] The primary judge for the purposes of the “reasonable possibility scenario” reminded the jury of Professor Williams’ evidence both in-chief, in cross-examination and in re-examination. This part of the summing up concluded with this observation:
- “So those are the anatomical possibilities that Professor Williams conceded, but as he said, he knew nothing of what had actually happened, and that’s where you come in.
- When you consider reasonable possibilities, you consider them in light of all the evidence you’ve heard, and we’ll turn to some of that evidence now.”
- [35] The primary judge then summarised the evidence that was relevant to possible sources of injury to Mr Ferrar, apart from the blows with the bed slat inflicted by the appellant.
- [36] The first question posed by the primary judge as a reasonable possibility was:
- “Is there a reasonable possibility that a punch to the face from Candice Butler caused Mr Ferrar to suffer brain bleeding and swelling or made him hit his head, sustaining fractures, or damage the bridge of his nose so that he inhaled blood and died effectively by drowning in it?”
- [37] After referring to evidence from Mr Swan and the appellant about violence inflicted by Ms Butler to Mr Ferrar, the primary judge posed a second question as a reasonable possibility scenario based on the evidence of the appellant that he saw Ms Butler knee Mr Ferrar in the face:
- “Professor Williams wasn’t asked about the mechanism of a knee to the face as opposed to punches, but I think you’d have to say the sort of damage a fist could inflict could similarly be inflicted by a knee. So you need to consider also whether there’s a reasonable possibility that Candice Butler, by kneeling Mr Ferrar, caused his death through brain bleeding or bleeding into the lungs.”
- [38] After referring to the submissions of counsel in their addresses on the evidence relevant to this reasonable possibility scenario, the primary judge re-framed the issue involving Ms Butler in the reasonable possibility scenario in these general terms:

“So you’ll have to consider whether, on all of the evidence, it’s reasonably possible Candice Butler inflicted the injuries that killed Mr Ferrar.”

- [39] The primary judge then dealt with another reasonable possibility scenario based on Mr Smith’s evidence that he saw Mr Swan punch Mr Ferrar and then described Mr Ferrar hitting his head hard on the wall. The question was posed to the jury:

“Is it a reasonable possibility that either Candice Butler or Richard Swan or blows by the two in combination – well, not in combination, exactly, but both of them doing it – fatally injured Mr Ferrar before he was ever struck with the slat?”

- [40] The next possibility was dealt with in these terms:

“And now, another possibility, which is that Mr Novley caused or substantially contributed to Mr Ferrar’s death by punching him so that he was already dead from the results of that at the time he went into his room and struck him with the slat.”

- [41] The primary judge then explained to the jury that if they thought it was a reasonable possibility that a punch or punches from the appellant caused Mr Ferrar’s death or, if they thought there were other relevant blows by other people, so that the appellant’s punch or punches substantially contributed to Mr Ferrar’s death, they would have to look at the case on that basis which was a different basis from the appellant’s going into room 418A and hitting Mr Ferrar “with a piece of pine”.

Did the impugned direction undermine the appellant’s case at trial?

- [42] The impugned direction must be considered in the context of the summing up as a whole and the purpose of the direction. Unlike the comments made by the trial judge that were the subject of consideration in *McKell* which expressed the trial judge’s view on aspects of the evidence adversely to the defendant which was solely a matter for the jury, the impugned direction was given by the primary judge to ensure that the jury did not use Professor Williams’ answers in cross-examination as to other possibilities that may have caused Mr Ferrar’s death as a substitute for their consideration of that issue by reference to all the evidence placed before them relevant to the possibilities for injury to Mr Ferrar before the appellant struck him with the bed slat.

- [43] The appellant submits that the impugned direction was unfair as it was made in respect of that part of Professor Williams’ evidence relied on by the appellant at the trial and not Professor Williams’ evidence relied on by the prosecution at the trial. The answer to this submission is that, as the primary judge made clear before giving the impugned direction, it was the evidence of Professor Williams that arose out of the cross-examination that gave rise to a potential and impermissible shortcut in reasoning by the jury that the primary judge was seeking properly to foreclose. The purpose of the impugned direction was to avoid the jury deciding the issue by reference to Professor Williams’ evidence without considering all the relevant evidence from the lay witnesses about the incidents that preceded Mr Ferrar’s being struck by the appellant with the bed slat.

- [44] The use of the word “theoretical” in the impugned direction highlighted the problem the primary judge was alerting the jury to avoid. As was apparent from the

extensive directions that the primary judge then gave by reference to the evidence of the lay witnesses on each of the reasonable possibility scenarios, but after summarising Professor Williams' evidence on the "anatomical possibilities", there was no undermining of the appellant's case at trial by the impugned direction. The appellant's contention that nothing that was said by the primary judge after the impugned direction overcame the effect of the impugned direction overlooks the proper purpose of the impugned direction and the fair and balanced summing up of the primary judge of the various "reasonable possibility scenarios" raised by the evidence.

Order

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

[46] **NORTH J:** I agree with the reasons of Mullins JA and the order proposed by her Honour.