SUPREME COURT OF QUEENSLAND

CITATION:	*R v Koko* [2022] QCA 216
PARTIES:	**R** **v** **KOKO, Soan Adrian** (appellant)
FILE NO/S:	CA No 193 of 2020 SC No 42 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 17 September 2020 (Henry J)
DELIVERED ON:	4 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2022
JUDGES:	Mullins P, Dalton and Flanagan JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where the appellant was on trial for murder – where the appellant pleaded guilty to manslaughter – where the only issue at trial was the intention of the appellant – where the appellant beat the deceased to death on potentially four separate incidents of violence – where the violence and circumstances in totality caused death rather than an individual blow – where the judge's direction concerned cause of death – where the judge's direction concerned intent in circumstances where there were multiple acts of violence – where the trial judge directed the jury that if they could not be unanimous as to which of the defendant's acts of violence actually contributed substantially to death, then they had to at least be unanimous as to which of those acts may have contributed substantially to death – where the trial judge directed the jury that, once they identified which acts may have contributed to death, they needed to be satisfied that when the accused committed those acts he committed all of them intending to kill or do grievous bodily harm – whether the trial judge failed to direct the jury that they had to be unanimous as to which act or acts of violence the appellant committed against the deceased – whether the trial judge

wrongly directed the jury that, if they could not be unanimous as to which of the appellant's acts caused the deceased's death, then they must be unanimous as to which of those acts may have caused the deceased's death

Criminal Code (Qld), s 302, s 303

Country Care Group Pty Ltd v Director of Public Prosecutions (Cth) (2020) 275 FCR 342; [2020] FCAFC 30, considered
Lane v The Queen (2018) 265 CLR 196; [2018] HCA 28, cited
Magnus v R (2013) 41 VR 612; [2013] VSCA 163, cited
Pratten v R [2014] NSWCCA 117, cited
R v Cramp (1999) 110 A Crim R 198; [1999] NSWCCA 324, cited
R v Walsh (2002) 131 A Crim R 299; [2002] VSCA 98, cited

COUNSEL: S C Holt KC for the appellant
C W Heaton KC for the respondent

SOLICITORS: Alexander Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MULLINS P:** I agree with Flanagan JA.

[2] **DALTON JA:** I agree with the order proposed by Flanagan JA and his reasons.

[3] **FLANAGAN JA:** After a four day trial before Henry J, the appellant was convicted by a jury on 17 September 2020 of one count of murder. The count was that on 12 October 2018 at Mapoon, the appellant murdered Bonita Zeanna Claudie.

[4] At the commencement of his trial, the appellant entered a plea of "not guilty" to the offence of murder, but "guilty" to the offence of manslaughter. That plea was not accepted by the Crown in full discharge of the indictment.

[5] The appellant appeals his conviction on the ground that a miscarriage of justice occurred because:

(a) the trial judge failed to direct the jury that they had to be unanimous as to which act or acts of violence the appellant committed against the deceased; and/or

(b) the trial judge wrongly directed the jury that, if they could not be unanimous as to which of the appellant's acts caused the deceased's death, then they must be unanimous as to which of those acts may have caused the deceased's death.

The Crown's case

[6] The Crown's case was that the deceased was beaten to death by the appellant on the night of 12 October 2018. They had been in a relationship in the course of which the appellant had been violent towards the deceased. At the time of her death the deceased was 22 years of age and the appellant was 38.

[7] Around lunchtime on 12 October 2018, the appellant and the deceased together with the witness KB, drove from Mapoon to Weipa in order to purchase alcohol. They then drove to IN's house where they drank for approximately three hours before attending a party at the home of the witness AM, where they continued to consume alcohol. They departed in the car with the appellant driving. The deceased was in the passenger seat with the witness KB and another witness MP in the backseat. What occurred thereafter was the first of four incidents of violence committed by the appellant on the deceased. The witness KB gave evidence that the appellant started hitting the deceased as they were driving off in the car. He grabbed her hair and slammed her head into the dashboard more than three or four times.

[8] When they arrived at the next house, the second incident of violence occurred, which was described by the witnesses KB, MP and perhaps from afar by another witness HH. KB observed the appellant punching the deceased and kicking her in the head "really hard" approximately three or four times. The appellant also kicked the deceased in the chest while she was in a foetal position on the ground, as well as throwing her head first into the car. MP's description of the second incident of violence is less detailed. She observed the appellant pulling the deceased into the car by grabbing her shirt and slamming the deceased twice into the dashboard. As she was walking away from the car MP observed the appellant pulling the deceased out of the car and both of them falling on the ground. She did not see what occurred when they were on the ground. The witness HH did not have a clear vision of what was occurring because the appellant and the deceased were on the other side of the car. He observed KB however, trying to "put herself over" or trying "to cover" the deceased.

[9] The third incident occurred while the car was parked on Clermont Street. The witness MR, who was driving at 40 kilometres an hour, observed the appellant grabbing the deceased and hitting her head against the steering wheel five or six times. In his address to the jury defence counsel suggested that the jury may have difficulty in accepting MR's description given he was driving. Defence counsel further suggested to the jury that given the state of the evidence both in relation to the second and third incidents of violence, they may consider it impossible to discern exactly what happened, what actions were involved and what was the appellant's intention.

[10] As to the fourth incident of violence, the appellant admitted to a nurse who attended the house and performed CPR on the deceased, that when he and the deceased arrived home they discovered they were locked out. The appellant admitted that he punched and kicked the deceased.

[11] A forensic pathologist, Dr Botterill, gave evidence as to the nature and extent of the injuries inflicted on the deceased as well as her cause of death. The injuries included internal injuries, recent rib fractures, a laceration to the back of the head, bruising underneath the lower part of the left cheek, bruising under the centre part of the front chin and under the tissues on the inside of the lip. There was also bruising on the left side of the scalp as well as multiple abrasions on both sides of the face. Blood was located between the lung and chest wall and in the belly cavity space. Dr Botterill accepted that at least some of the rib fractures may have been caused by CPR being administered. The laceration to the back of the head required the application of moderate force. His examination did not reveal any fractures to

the skull, eye sockets, cheek bones or any other bones. He did observe brain swelling. The deceased's blood alcohol content was .244 per cent.

[12] As to the cause of death, Dr Botterill gave the following evidence:

> "…in this case, I gave the cause of death as the combined effects of blunt force head, chest, and abdominal injuries and alcohol intoxication. Most people with the sort of head injury that this lady had, in other words, with multiple areas of abrasion and bruising, with a laceration at the back of the scalp, with no bleeding over the brain but with some brain swelling, would not be expected to die from that alone. Most people who have multiple rib fractures and areas of bleeding into the chest cavity as in this lady's case, and if that were their only injuries, you would not expect them to die from them. And similarly, if you simply had the belly and back injuries this lady had, alone, you would not expect a person to die from that. And also, a person with this blood alcohol would not be expected to die from it. However, if a person has all of these together for the reasons that [I] mentioned before, they all contribute to the problem of the underlying lack of normal consciousness, particularly in the circumstance where somebody is not in a position to be monitored in a hospital along those lines, means that it's most likely it's the combination of these factors together that has resulted in the death."

Dr Botterill in the following exchange with defence counsel considered a scenario involving the deceased's airway being compromised:

> "A possible scenario was a period of unconsciousness where the airway was blocked or restricted - - -?---I think - - -
>
> - - - leading to death?---I think that's a – a very likely situation, that a person who has – who is already intoxicated has sustained a head injury which would not otherwise have been fatal but has resulted in that person's airway being compromised, either by simply being at an impaired level of consciousness and the neck obstructing the airway, or excessive fluids from the lungs in part blocking the airway, and, unfortunately, made worse by the presence of the other injuries that were present."

Dr Botterill accepted in cross-examination that the precise cause of death was difficult to determine and he was unable to say with absolute certainty that only one factor had caused the death.

The directions

[13] The learned trial judge directed the jury that the appellant, by his plea of guilty to manslaughter, had admitted that he caused the death of deceased. In this context, his Honour identified the critical issue as being whether the appellant intended to cause death or grievous bodily harm. Later in the summing up, his Honour returned to the appellant's plea of guilty to manslaughter:

> "Despite the doubt as to the precise role of the blunt force head, chest and abdominal injuries and alcohol intoxication in causing death, you might think it implausible the deceased's death was solely a product of intoxication and you might conclude that at least some of those

> injuries must have contributed substantially to her death. Such a conclusion is, of course, consistent with the defendant's admission that he unlawfully killed the deceased; for that admission constitutes an acceptance that his acts or actions were a substantial cause of the deceased's death.
>
> It follows you would be safe to conclude element 2 has been proved beyond reasonable doubt. Note, however, that the admission does not identify which acts of violence by the defendant upon the deceased were the acts which were a substantial cause of death. One would doubt the defendant would be in a position to know. It is unsurprising. Indeed it would be surprising if you would know for sure which specific acts of violence were causative of death. That is a point that I will return to shortly in dealing with element 4."

The reference to the elements is to the four elements of murder, with element 2 being that the appellant caused the death of the deceased and element 4 being intention.

[14] It was in the context of the element of intention that his Honour reminded the jury of the four incidents of violence:

> "As to this element of intention, a person intends to cause death or grievous bodily harm if that is what he meant to do. That intention must be held at the time of the act or acts of the defendant which caused the deceased's death.
>
> This raises a consideration of importance. There is evidence that the accused engaged in potentially four separate occasions of infliction of allegedly significant violence upon the deceased. This depends, of course, on what evidence you accept, but that is the potential."

His Honour then outlined the four incidents of violence. The jury was reminded that the evidence of Dr Botterill could not assist as to which of these four incidents of violence which involved the infliction of various injuries, together with intoxication, was causative of death.

[15] His Honour directed the jury that it was a matter for them as to what acts of violence occurred:

> "So you have got four potential occasions where there is potential source of injury. You may take the view you do not. You may think some of those occasions are the blurring together of some other things that people may have seen. You may think some of it is just unreliable and not act on it. You might even pare it back potentially to only two occasions that you are particularly confident about, for example, the episode outside [JP's] and depending on what you make of his admissions to the nurse of what he said happened when he got home.
>
> I use that simply to illustrate by example. I do not in any way intend to indicate my thinking on the matter at all. I hold no view about it. I do not have to. These are your decisions to make, but the point is fact-finding is important in working out what you accept actually happened."

[16] The impugned direction concerns his Honour's instruction to the jury that if they could not be unanimous as to which of the defendant's acts of violence actually contributed substantially to death, then they had to at least be unanimous as to which of those acts *may have* contributed substantially to death. The alleged misdirection has as its corollary a failure on the part of the trial judge to direct the jury that they had to be unanimous as to which act or acts of violence the appellant committed against the deceased. It is important to place the impugned direction into the context which was provided by his Honour to the jury. The relevant impugned direction is underlined:

> "There may be no doubt that he inflicted the collection of injuries which caused death in that scenario, but it may be uncertain which acts of violence were causative of death. Now, that does not matter in the proof of manslaughter. The jury can say, "Well, I'm not sure which acts were the substantial contributors to death, but hey, it doesn't matter because I know he did all of them." But it matters for the proof of murder because the jury needs to be persuaded beyond reasonable doubt that whichever the acts contributing substantially to death were, those acts were committed with the requisite intent to cause death or grievous bodily harm.
>
> In such a case, and this is such a case, the jury needs to decide what collection of the acts of violence by the accused on the night in question contributed substantially to death, or at least cannot be excluded as contributing substantially to death. I add at least that qualification because on the evidence you may not be able to reach a unanimous conclusion as to which acts of the acts of violence you were satisfied beyond reasonable doubt were committed upon the deceased were definitely causative of death.
>
> <u>If you cannot be unanimous as to which of the defendant's acts of violence upon the deceased actually contributed substantially to death, then you must at least be unanimous as to which of those acts may have contributed substantially to death; in other words, which are on the short list of potential acts that may have done it.</u>
>
> <u>Therefore, you can set aside those acts which could not have contributed substantially to death and do not need to worry about whether the defendant held the requisite intention in committing them, but if it remains possible that an act of the defendant – an act of violence by him on the deceased – may have been causative of death, you are just not sure one way or the other, then you would need to be satisfied beyond reasonable doubt that it was committed with the intent to cause death or grievous bodily harm.</u>
>
> I pause to point out in a practical sense that may not be as difficult as it sounds because you have four discrete occasions and you have sets of evidence about each of those and probably once you engage in your fact-finding about what you believe as to whether they happened and how they happened, that really tends to give your answer about which acts are in your short list of those that either did or may have been substantially causative of death.

> You will therefore need to reach a unanimous conclusion as to which of the various acts of violence you were satisfied beyond reasonable doubt occurred either substantially contributed or may have substantially contributed to causing the deceased's death. It may, of course, be that some of you are satisfied beyond reasonable doubt that a particular act contributed substantially to death. The rest might simply not be sure one way or the other; that is, that it may have so contributed, you just cannot be sure.
>
> The key legal point which I now direct you of is that you must be unanimous as to which acts either did or may have substantially contributed to death. Having determined that, you would then ask yourself whether you were satisfied beyond reasonable doubt that when the accused committed those acts he committed all of them intending to kill or do grievous bodily harm.
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> So to use a practical example, if you end up centring in particular upon the combination of evidence about outside Jack Pitt's combined with the combination of the admissions about what was done at the house when they arrived back there, then he would need to have the requisite intent in inflicting violence on both of those occasions. It is not enough that he held the intention to kill or do grievous bodily harm for only some of those acts – whichever acts you find may be the ones that are in the short list of either causing death or potentially causing death – that is because there would linger the risk that those acts alone might not have been enough to contribute substantially to death."

[17] Prior to giving the direction, his Honour discussed the issue of unanimity with counsel in the following terms:

> "HIS HONOUR: Do I have to tell them anything beyond that about unanimity? Whether they've got to find one – whether or not they've got to find the same set of actions happened before acting on it? I'm just contemplating this theoretical possibility: the jury might convict him on the basis that six jurors thought the episode outside Jack Pitt's solely caused death, another three might convict him because they think it's the – at their house, and they were locked out and the admissions he made to the nurse about that, and another three might think it's a mixture of both those episodes. I don't think this is necessary but I'm raising it: do they need to be unanimous about which episodes they're returning a verdict on?"

The following exchange occurred between his Honour and defence counsel:

> "MR TREVINO: In my submission, they need to be unanimous about the incidents because the intention – they have to be satisfied the intention was held from whenever the altercations that they find began to whenever it ended. So - - -
>
> HIS HONOUR: They need to be unanimous as to the presence of the intention at the time of the commission of any of the relevant acts that they consider were a substantial cause of death. Therefore, they

> need to be unanimous as to which of the acts that were a substantial cause of death."

Defence counsel did not seek any re-direction in relation to the impugned direction. The fact that no re-direction was sought does not relieve this Court from determining whether a miscarriage of justice occurred.

Consideration

[18] The ground of appeal has two components which the parties addressed separately while acknowledging that there is some overlap. The first is that the trial judge failed to direct the jury that they had to be unanimous as to which act or acts of violence the appellant committed against the deceased ("the first alleged error"). The second is that the trial judge misdirected the jury that, if they could not be unanimous as to which of the appellants acts caused the deceased's death, then they must be unanimous as to which of those acts may have caused the deceased's death ("the second alleged error").

(a) The first alleged error

[19] The appellant submits that the jury should have been directed that they had to be unanimous as to the actual conduct which the accused engaged in "because everything else flowed from that". That is, once the jury were unanimous as to what acts of violence the appellant inflicted on the deceased, they were then able to consider whether those acts were causative of death and what intention the appellant had at the time those acts were committed.

[20] Mr Holt KC, who appeared for the appellant, acknowledged that but for the failure to give this direction, the alleged misdirection "would not have caused any practical injustice, indeed was probably a sensible way through". This acknowledgement recognises that the forensic pathologist, Dr Botterill, could not identify any one particular injury as causative of death.

[21] The failure to give the direction, according to the appellant, resulted in the jury determining the question of intention on the basis of conduct of the appellant which had not been proved beyond reasonable doubt to the unanimous satisfaction of the jury. This proposition is expressed in the appellant's written submissions as follows:

> "35. This omission mattered. It was the act or combination of acts that the jury settled on to which the truly contested issue of intention had to attach.
>
> 36. This problem was not solved by the direction that the jury needed to assess the question of intention against a "shortlist" of potentially causative acts. Because the jury was not directed that they needed to be unanimous beyond reasonable doubt as to the act or acts committed by the appellant, the permission given to them to create a shortlist of acts that "may" have caused death creates the risk those acts were not the subject of unanimous agreement."

[22] This submission should not be accepted. No principle of unanimity, in the circumstances of the present case, required the jury to be directed in the terms contended.

[23] The relevant principles concerning the need for a unanimity direction were recently considered by the Full Court of the Federal Court in *Country Care Group Pty Ltd v Director of Public Prosecutions* (Cth) [2020] FCAFC 30; (2020) 275 FCR 342 where the Court observed:

> "77. The authorities concerning the need for unanimity directions tend to distinguish between two types of cases where the issue has arisen. The first type of case is where the prosecution advances alternative legal formulations of liability, but those alternative legal formulations are based on the same, or substantially the same, facts. The typical cases where this arises are cases where the prosecution case relies on the same facts to allege either murder or manslaughter. In such a case there is generally no need for a unanimity direction; see for example *R v Cramp* (1999) 110 A Crim R 198 (*Cramp*). The accused did not contend that the prosecution case in respect of charges 1 to 3 advanced alternative legal formulations of liability. They accordingly did not suggest that this case fell to be determined in accordance with the principles expounded in *Cramp* and like cases.
>
> 78. The second type of case arises where there are said to be alternative factual bases for liability. The typical case where this issue arises is where the accused is charged with obtaining a benefit by deception, or a similar offence, and the prosecution relies on a number of discrete particulars to prove the deception and any one of those particulars would be sufficient to prove that element. In those circumstances, the need for any form of unanimity direction will depend on the nature of the charge and the factual issues presented by the evidence having regard to the way the prosecution and defence put their respective cases.
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> 79. In *R v Walsh* (2002) 131 A Crim R 299 (*Walsh*), the principles applicable in this type of case were neatly summarised by Phillips and Buchanan JJA (Ormiston JA agreeing) in the following terms (at [57]):
>
> > The second situation is where one offence is charged, such as obtaining property by deception, but a number of discrete acts is relied upon as proof and any one of them would entitle the jury to convict. If those discrete acts go to the proof of an essential ingredient of the crime charged, then the jury cannot convict unless they are agreed upon that act which, in their opinion, does constitute that essential ingredient. In this type of case, much will depend "upon the precise nature of the charge, the nature of the prosecution's case and the defence and what are the live issues at the conclusion of the evidence". When the charge is obtaining property by deception by means of misrepresentation, the making of the misrepresentation has been regarded as an essential ingredient of the crime charged. It is otherwise,

> however, where the crime is conspiracy to defraud and the means agreed upon by the conspirators to achieve that end is the making dishonestly of false representations. The agreement to make any particular representation is not regarded as an essential element of the crime, but merely a path to arriving at the objective of the conspirators, namely, obtaining an advantage by fraud.
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> 80. This statement of principle in *Walsh* has been applied or cited with approval by the High Court and numerous intermediate courts of appeal: *Lane v The Queen* (2018) 265 CLR 196 (*Lane*) at [45]; *Magnus v The Queen* (2013) 41 VR 612 (*Magnus*) at [32] and the cases cited at [33]; *Pratten v The Queen* [2014] NSWCCA 117 (*Pratten*) at [45]-[46] and the cases cited at [47]."

[24] The Court's analysis, and in particular the reference to *Walsh*, identifies two propositions. First, whether a unanimity direction is required will depend upon the precise nature of the charge, the nature of the prosecution's case and the defence and what are the live issues at the conclusion of the evidence. The second proposition is that the necessity for a unanimity direction will depend on whether the relevant acts go to the proof of an essential ingredient of the crime charged. The application of both these propositions to the present case leads to the conclusion that such a direction was unnecessary.

[25] The appellant's plea of guilty to manslaughter constituted an admission that he had unlawfully killed the deceased. That admission encompassed that at least some of the injuries inflicted by the appellant on the deceased in the course of the evening of 12 October 2018 were a substantial cause of her death. The evidence of the forensic pathologist could not identify with any precision which injuries were the direct cause of the deceased's death and as observed by his Honour in his directions to the jury, the appellant's plea of guilty to manslaughter did not identify which acts of violence were the acts which were a substantial cause of death. In those circumstances, the jury was not in a position to know which specific acts of violence were causative of death. The jury was however instructed that there was no doubt that it was the appellant who inflicted the collection of injuries on the deceased which caused her death. As his Honour explained to the jury, any uncertainty as to which acts of violence were causative of death would not matter in proof of manslaughter, but it did matter for proof of murder "because the jury needs to be persuaded beyond reasonable doubt that whichever the acts contributing substantially to death were, those acts were committed with the requisite intent to cause death or grievous bodily harm."

[26] In light of the issues at trial, the only requirement for unanimity was in relation to the element of intention. As submitted by the respondent, "the Crown had to prove the requisite intention at *each* point the appellant was assaulting the deceased where an injury substantially contributing to death *could* have been caused". This requirement resulted in the following direction:

> "The key legal point which I now direct you of is that you must be unanimous as to which acts either did or may have substantially contributed to death. Having determined that, you would then ask yourself whether you are satisfied beyond reasonable doubt that

> when the accused committed those acts he committed all of them intending to kill or do grievous bodily harm."

[27] The unanimity direction given by his Honour therefore addressed those acts which went to the jury's considerations of the only relevant "essential ingredient" for the count of murder.

(b) The second alleged error

[28] The appellant submits that the direction highlighted at [16] above constituted a misdirection because once the "shortlist" was compiled it was possible that some of the jurors, for example, might have convicted on the basis of the second incident of violence while others may have convicted on the fourth incident of violence which was admitted conduct. While the appellant accepts that the Crown was not required to establish a particular cause of death, he submits that the jury still needed to be unanimous that an act of the appellant did cause the deceased's death – not just that it may have.

[29] These submissions cannot be accepted. The direction given by his Honour ensured that the jury was unanimous as to which of the appellant's acts of violence either did or may have substantially contributed to death. That is, the jury was instructed that they had to be unanimous that each act on the "shortlist" had the quality that it was an act that either did or may have contributed to death. The direction implicitly required the jury to be unanimous as to which act or acts of violence the appellant committed against the deceased and which act or acts of violence either did or may have contributed to death. The direction required the jury to be unanimously satisfied that at the time the appellant committed any act which did or may have contributed substantially to death, that the appellant had the requisite intention for a conclusion of guilt of murder. As correctly submitted by the respondent, it cannot be said that the appellant has been convicted of murder on the basis of any act which was done without an intention to cause death or grievous bodily harm.

Disposition

[30] The appeal should be dismissed.