



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 Jun 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: B19/2023  
File Title: Huxley v. The Queen  
Registry: Brisbane  
Document filed: Form 27D - Respondent's submissions  
Filing party: Respondent  
Date filed: 09 Jun 2023

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

**BRENT MALCOLM HUXLEY**

Appellant

and

**THE QUEEN**

Respondent

### **RESPONDENT'S SUBMISSIONS**

#### **Part I: Certification**

[1] The respondent certifies that these submissions are in a form suitable for publication on the internet.

#### **Part II: The issues the Respondent contends the appeal presents**

[2] The appellant proceeded to trial conjointly with Mr Rewha and Ms Doyle, although each were alleged on the indictment to have committed different offences. Relevantly therefore, the prosecution case against Mr Rewha turned, as foundational, on the evidence of Ms Greer. The prosecution case against the appellant however, required the jury to be satisfied beyond reasonable doubt of the evidence of Mr Hess. As a consequence, the jury required particular directions as to the respective cases.

[3] The appellant contends that the learned trial Judge, in summing-up to the jury, impermissibly introduced a *tripartite test* by which the evidence of Ms Greer could only present an obstacle to the appellant's conviction if the jury accepted her, to the criminal standard, as truthful, reliable and accurate. This is said to be so by reference to a single passage within in the summing up.<sup>1</sup>

---

<sup>1</sup> CAB 30 ln 19-26.

[4] The respondent submits that there was no misdirection. What was said by his Honour, in the context of the whole of the summing-up, could not have been understood by the jury in the way advanced by the appellant. The respondent submits that a proper review of the summing-up reveals that the impugned direction was constrained to the case of Mr Rewha and the *tripartite test* did not affect the directions relevant to the appellant.

[5] However, if this Court concludes that the impugned direction was a misdirection, the respondent submits that the appellant suffered no prejudice and as a corollary, no miscarriage of justice was occasioned.<sup>2</sup> That is so because the appellant has failed to demonstrate, in the absence of a request for redirection, that there is a “*real chance [that] the failure to direct the jury may have affected the verdict*”.<sup>3</sup>

**Part III: Section 78B of the *Judiciary Act* 1903 (Cth)**

[6] The respondent does not consider any notice pursuant to s78B of the *Judiciary Act* 1903 (Cth) is necessary.

**Part IV: Narrative statement of the relevant facts**

[7] The respondent does not contest any material facts within the appellant’s narrative of facts or chronology. The respondent, however contends the following factual matters are relevant to the disposition of the appeal.

[8] The appellant moved into the unit at Burnda Street in June or July 2015 with Ms O’Dell.<sup>4</sup> At approximately 4.00pm on 14 August 2015, Ms O’Dell left the unit she shared with the appellant and returned on 16 August. The appellant and Ms Doyle were at the unit when she left.<sup>5</sup>

[9] On 15 August 2015 the appellant invited Ms Greer to his home and she arrived there in her car. Her memory of that day was “*a bit all over the place. I remember small bits and pieces. Not sure what order they kind of go in, yeah*”.<sup>6</sup> This was at least in

---

<sup>2</sup> *Hofer v The Queen* (2021) 291 A Crim R 114 per Kiefel CJ, Keane, and Gleeson JJ at [41], Gageler J at [106], [116], [118]; (2021) 95 ALJR 937; [2021] HCA 36; *Weiss v The Queen* (2005) 224 CLR 300; *Nudd v The Queen* (2006) ALJR 614; *Kalbasi v Western Australia* (2018) 264 CLR 62; *Edwards v The Queen* (2021) 273 CLR 585.

<sup>3</sup> *Dhanhoa v The Queen* (2003) 217 CLR 1 per McHugh and Gummow JJ at p13 [38], 15 [49]; *Hofer v The Queen*.

<sup>4</sup> RFM 6 ln 17.

<sup>5</sup> RFM 7 ln 04.

<sup>6</sup> AFM 37 ln 26.

part because she had consumed “*quite a bit*” of alcohol on the day, before injecting methylamphetamine with the deceased for the first time.<sup>7</sup> It was this evidence that led to the learned trial Judge directing the jury to “*scrutinise*” Ms Greer’s evidence with “*great care*”.

[10] Ms Greer gave evidence that she left the unit in the afternoon with Ms Doyle, in a white commodore with a black bonnet.<sup>8</sup> They travelled to Charters Towers where they met the deceased and the three injected methylamphetamine together,<sup>9</sup> before travelling back to the appellant’s unit. Later, Ms Greer left the unit and returned with Mr Rewha.

[11] Sometime after they arrived Ms Greer and Mr Rewha went out to the back patio and had a cigarette before Mr Rewha returned inside alone. While Ms Greer finished her cigarette she heard rustling around, “*maybe a thud*”, and a squeak of a shoe and went inside. She saw Mr Jason Taylor standing over the deceased who was lying on the loungeroom / kitchen area tiled floor on his right-hand side “*more face towards the ground*”<sup>10</sup> with a palm sized amount blood coming from his mouth or nose.<sup>11</sup> The blood was described as pooling on the floor near the face of the deceased, and while it was “*spreading out*” it “*wasn’t very large*”.<sup>12</sup>

[12] Ms Greer saw Mr Taylor kick the deceased while “*prodding him*” with an object later described as being “*about the size of a TV remote*”.<sup>13</sup> The kick itself was described as being delivered to the “*torso, rib area. On the left side more so*”<sup>14</sup> and not being particularly forceful and that it would not be a kick “*that could do significant damage to another person*”.<sup>15</sup> The object was said only to have made contact with the deceased’s backside.<sup>16</sup> Mr Rewha was not seen to assault the deceased at all while Ms Greer was present.<sup>17</sup>

---

<sup>7</sup> AFM 39 ln 34 – 46.

<sup>8</sup> AFM 38 ln 20.

<sup>9</sup> AFM 39 ln 22.

<sup>10</sup> AFM 47 ln 12; 49 ln 09 – 24.

<sup>11</sup> AFM 47 ln 17 – 23.

<sup>12</sup> AFM 75 ln 07.

<sup>13</sup> AFM 74 ln 37.

<sup>14</sup> AFM 79 ln 13.

<sup>15</sup> AFM 75 ln 01.

<sup>16</sup> AFM 79 ln 21 - 31.

<sup>17</sup> AFM 55 ln 37 – 56; ln 01.

- [13] Ms Greer approached the deceased and confirmed that he was still breathing, and he was “*coughing and spluttering; saying something*”.<sup>18</sup>
- [14] Mr Rewha and Mr Taylor held the deceased and took him from the unit through the garage. Ms Greer assisted in cleaning blood from the floor of the unit a few days later.<sup>19</sup> After this the appellant, in Ms Doyle’s presence, told her to tell anyone who asked that the deceased had been dropped off at a friend’s or ex-partner’s house.<sup>20</sup>
- [15] On Ms O’Dell’s return to the unit there was no one present. Ms O’Dell inspected the unit and noticed blood on the tiles,<sup>21</sup> on the back sliding door,<sup>22</sup> the curtains,<sup>23</sup> in the garage<sup>24</sup> and on the kitchen bench.<sup>25</sup> Further, she noted that the mat, ordinarily located in front of her three-seater lounge, was missing<sup>26</sup> along with a mop and bucket.<sup>27</sup> Ms O’Dell, a professional cleaner, set about cleaning the unit. The following week Ms O’Dell spoke to the appellant, and he told her he and Mr Rewha had had a fight leading to him disposing of the mat as it had blood on it.<sup>28</sup>
- [16] The scientific evidence adduced at trial was consistent with Ms Greer and Ms O’Dell’s evidence that there was blood in the unit and there had been some cleaning undertaken. Swabs were taken from various locations which were identified as possible locations of blood, including a “*saturation stain*” on the lounge chair.<sup>29</sup> On analysis the deceased’s DNA was found on the kitchen bench, garage step, garage floor, loungeroom floor, and on the lounge chair.<sup>30</sup> While the DNA analyst, Mr Howes, was unable to state where the DNA had come from in the body,<sup>31</sup> that is from blood, skin cells or saliva for example, the combination of evidence allowed the jury to infer that the areas swabbed, and where the DNA was located, were areas where the deceased had bled.

---

<sup>18</sup> AFM 47 ln 38.  
<sup>19</sup> AFM 51 ln 36.  
<sup>20</sup> AFM 53 ln 01.  
<sup>21</sup> RFM 77 ln 17.  
<sup>22</sup> RFM 26 ln 36.  
<sup>23</sup> RFM 27 ln 10 – 15.  
<sup>24</sup> RFM 10 ln 37.  
<sup>25</sup> RFM 11 ln 31.  
<sup>26</sup> RFM 13 ln 16.  
<sup>27</sup> RFM 17 ln 07.  
<sup>28</sup> RFM 14 ln 37.  
<sup>29</sup> RFM 102.  
<sup>30</sup> AFM 129.  
<sup>31</sup> AFM 134 ln 21 – 47.

- [17] Over the course of August and/or September 2015 the appellant visited Mr Hess three times. During these visits the appellant confessed to the killing of the deceased ultimately showing Mr Hess how he had “*picked the rock up and dropped it on [the deceased] [who] went wahhh – gone*”.<sup>32</sup>
- [18] The remains of the deceased were located in an area that was described as “*quite steep*” and difficult to traverse.<sup>33</sup>
- [19] A blue Holden Commodore associated with the appellant was found and examined by police. During the examination Officer Griffiths located blood stains on the “*roof of the boot*” of the vehicle.<sup>34</sup> She opined, based on her experience, that the pattern of blood located was not inconsistent with the expiration of blood from the mouth of someone, for example when they coughed or sneezed.<sup>35</sup> The deceased’s DNA was located in the blue Commodore’s boot<sup>36</sup> in the location of the blood pattern.<sup>37</sup>
- [20] Dr Samarasinghe observed that there were multiple fractures to the right facial area of the deceased with a significantly large defect involving several bones, and fractures to the base of the skull. The fractures to the cheekbone and maxilla required severe force,<sup>38</sup> which came from the front of his face to the back.<sup>39</sup> Part of the zygoma was in fact separated from the rest of the skull<sup>40</sup> along with two other fragments that were found separately.<sup>41</sup> A fracture was located extending from the front of the base of the skull to the rear left of the base of the skull, which Dr Samarasinghe opined was the product of “*severe*” to “*extremely severe force*” delivered to the front right of the face.<sup>42</sup> Ms MacGregor, a forensic anthropologist, supported the proposition that the direction of the force to the face of the deceased was from the front right side.<sup>43</sup>

---

<sup>32</sup> RFM 30 ln 09.

<sup>33</sup> RFM 75 ln 06.

<sup>34</sup> RFM 106 ln 23 – 33.

<sup>35</sup> RFM 133 ln 01 – 11.

<sup>36</sup> AFM 128 ln 24.

<sup>37</sup> AFM 132 ln 19. Scientific officer, Kirsty Griffiths confirmed the presence of blood staining around the edges, on the lid and on the roof of the blue commodore – RFM 106 ln 23.

<sup>38</sup> AFM 09 ln 15.

<sup>39</sup> AFM 10 ln 42.

<sup>40</sup> AFM 08 ln 31.

<sup>41</sup> AFM 09 ln 01.

<sup>42</sup> AFM 09 – 11.

<sup>43</sup> RFM 99 ln 30.

- [21] Dr Samarasinghe gave evidence that the fractures to the deceased's face could not have been caused by a punch alone.<sup>44</sup> He stated that they could though have been caused by a heavy blunt object, including a rock.<sup>45</sup> Without the internal organs Dr Samarasinghe was unable to say if the injury was caused before or after death, nor whether death was instantaneous or if it took some time for him to succumb to his injuries if he had been alive at the time of his facial injuries.<sup>46</sup> He could say that those injuries would have been fatal<sup>47</sup> and he would expect the deceased to have become unconscious immediately.<sup>48</sup>
- [22] There were two fractures to the right second and third ribs, and a fracture to each the radius and ulna in his right arm.<sup>49</sup> These injuries were not explained within the substance of the confession said to have been made to Mr Hess.
- [23] Professors Drummer and Brown gave evidence as to the presence of amphetamine and methylamphetamine found within a liver sample of the deceased. The combined effect of their evidence was that methylamphetamine and amphetamine in the levels found, had been seen, in other cases, to have caused death.<sup>50</sup> As a consequence Professor Drummer indicated that while uncommon in cases absent a bleed in the brain, he could not exclude methylamphetamine overdose as a cause of death. This was because "*its impossible [to say] that a [the deceased] didn't have a major bleed or didn't have some pre-existing heart disease*".<sup>51</sup>
- [24] Forensic dentist Dr Forrest gave evidence that the deceased was missing six teeth, one of which had suffered a direct fracture which required "*a certain amount of force*".<sup>52</sup>

---

<sup>44</sup> AFM 13 ln 33.

<sup>45</sup> Which was consistent with the maxilla fracture showing a "*ragged and saw-toothed-like appearance*".

<sup>46</sup> AFM 12.

<sup>47</sup> AFM 13 ln 05.

<sup>48</sup> AFM 13 ln 08.

<sup>49</sup> AFM 07 ln 03.

<sup>50</sup> RFM 146 ln 16.

<sup>51</sup> RFM 91.

<sup>52</sup> RFM 139.

[25] Professor Duflou, called by the appellant, opined three possible scenarios which might account for the constellation of injuries seen to the deceased. Ultimately, there was concurrence between Professor Duflou and Dr Samarasinghe on at least one of the mechanisms seeing death within minutes to hours of the application of significant force, likely with an object or shod foot. Professor Duflou's could not exclude either an assault at the Burnda Street unit, or methylamphetamine overdose, as being the cause of death. Beyond that Professor Duflou introduced other speculative causes of death given the state of decomposition of the deceased's body.<sup>53</sup>

***The summing up***

[26] The summing-up by the learned trial Judge commenced shortly after midday on 16 September, 2019 and concluded late in the afternoon of 17 September, 2019.

[27] Early in the summing-up the learned trial Judge directed the jury, in a conventional way, that any resolution of the facts in the case was a matter exclusively for the jury.<sup>54</sup> A short time later his Honour explained the respective cases in the following terms:<sup>55</sup>

*“The Prosecution case against [the appellant] that he murdered [the deceased] rests upon the confessional statement Mr Hess said that [the appellant] 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 [the appellant]”*

...

*central to the Prosecution case is the evidence of Hess and its reliability. Because of that you must be persuaded beyond reasonable doubt that the evidence of Mr Hess is reliable and accurate.*<sup>56</sup>

...

*In the case of Mr Rewha, for reasons I will go into when I give you directions and review the case against Mr Rewha, the extent to which circumstantial evidence is relevant is very minor because the heart of the case against him is the evidence of Ms Greer and what she says she heard and saw...<sup>57</sup>*

---

<sup>53</sup> AFM 99 ln 01.

<sup>54</sup> CAB 18 ln 26; 25 ln 02.

<sup>55</sup> CAB 23 ln 19.

<sup>56</sup> CAB 23 ln 33.

<sup>57</sup> CAB 24 ln 20.



- [28] As part of the summing-up his Honour emphasised to the jury that while the appellant, Mr Rewha and Ms Doyle were “*facing trial together*”, the jury were to consider each separately by reference to evidence admissible against each,<sup>58</sup> whether such evidence was against their interest, or “*in his or her favour*”.<sup>59</sup>
- [29] Recognising the centrality of Ms Greer’s evidence, early in the summing-up his Honour gave the impugned direction to the jury.<sup>60</sup> The direction recognised that to “*act upon*” Ms Greer’s evidence the jury were required to be satisfied of its truthfulness and accuracy. Once so satisfied the jury were directed that they were to turn to the question of accessorial liability.
- [30] After giving the impugned direction his Honour turned to the evidence of Mr Hess reminding the jury, as was already apparent, that his evidence was “*the only direct evidence that [the appellant] may have been involved in causing injuries that may have resulted in the death of [the deceased]*”.<sup>61</sup> Shortly thereafter his Honour directed the jury that they would need to “*scrutinise [his] evidence with great care before [they] could accept his evidence as accurate and reliable and use his evidence to arrive at a conclusion of the guilt of [the appellant]*”.<sup>62</sup> Immediately following this, his Honour emphasised the need to consider the evidence of Mr Hess in light of “*all the other evidence*” and only if they were satisfied of its truthfulness and accuracy could the jury “*act upon [it]*”.<sup>63</sup>
- [31] In directing the jury in relation to the case against Mr Rewha his Honour instructed the jury that while Ms Greer’s evidence was of central importance, it was not conclusive as to Mr Rewha’s guilt.<sup>64</sup> It was made clear that in order to convict Mr Rewha the first stage in the jury deliberations was to determine whether they, the jury, were satisfied beyond reasonable doubt of the accuracy, reliability and truthfulness of Ms Greer’s account. Only on satisfaction of this were the jury to determine whether the prosecution had established Mr Rewha’s accessorial liability, namely his “*encouraging by presence*”.<sup>65</sup>

---

<sup>58</sup> CAB 97 ln 19.

<sup>59</sup> CAB 97 ln 22.

<sup>60</sup> CAB 30 ln 19.

<sup>61</sup> CAB 30 ln 28.

<sup>62</sup> CAB 31 ln 05.

<sup>63</sup> CAB 31 ln 13.

<sup>64</sup> CAB 68 ln 04 – 41.

<sup>65</sup> CAB 68 ln 09; 70 ln 08.

[32] In directing the jury in these terms his Honour, on no less than three occasions, reminded the jury of the need to be satisfied of Ms Greer's evidence beyond a reasonable doubt, before they could convict Mr Rewha.<sup>66</sup> His Honour made plain that *"if [the jury] do not accept Ms Greer's evidence beyond a reasonable doubt, there is no case against Mr Rewha. The rejection of a person's evidence [though] does not constitute evidence to the contrary"*.<sup>67</sup>

[33] Finally, his Honour concluded the necessary undertaking confronting the jury before they could convict Mr Rewha was:<sup>68</sup>

*"...to be persuaded beyond reasonable doubt that Ms Greer's evidence is accurate and reliable beyond reasonable doubt and you—you have to be satisfied beyond doubt that Taylor assaulted [the deceased] and caused him bodily harm. And you have to satisfied beyond reasonable doubt that by his presence... encouraged Taylor and aided him with the intent and the expectation that I have mentioned."*

[34] Turning to the case against the appellant the learned trial Judge limited the jury's task, appropriately, to two issues. First, whether the appellant caused the death, and second whether it was done with the requisite intent.<sup>69</sup> Each of these issues turned upon a body of circumstantial evidence said to support the confession allegedly made to Mr Hess,<sup>70</sup> who was *"central to the prosecution case against [the appellant]"*,<sup>71</sup> and without whom there was, as a matter of law, no case against the appellant.<sup>72</sup>

[35] Before instructing the jury that there were seven (7) matters to consider as part of their deliberations the trial Judge reminded the jury of the defence case that *"it's not possible to conclude what caused the death of [the deceased] and "that it's a reasonable possibility that [the deceased] died as a result of the injuries sustained in the event Greer speaks of...[or] other causes, such as methyamphetamine overdose."*<sup>73</sup>

---

<sup>66</sup> CAB 68 ln 04 – 41.

<sup>67</sup> CAB 71 ln 27.

<sup>68</sup> CAB 74 ln 39.

<sup>69</sup> CAB 77 ln 31.

<sup>70</sup> CAB 77 ln 44 – 78; ln 7.

<sup>71</sup> CAB 78 ln 13.

<sup>72</sup> CAB 80 ln 39.

<sup>73</sup> CAB 81 ln 04 – ln 12.

[36] To this end, his Honour returned to the essential nature of the circumstantial case against the appellant and instructed the jury that in order to convict the appellant the jury were required to exclude all *reasonable possibilities consistent with innocence* and this was relevant to “*the cause of death*”.<sup>74</sup>

[37] The learned trial Judge in directing the jury as to the admissibility of evidence in the respective cases said of Ms Greer’s evidence:<sup>75</sup>

“...one other aspect of the evidence in the case against Mr Huxley and Miss Doyle, the evidence of Miss Greer is that neither Mr Huxley nor Miss Doyle were present when the alleged assault upon [the deceased] occurred. There is therefore no evidence that either were present or were aware that the – of the assault when it occurred. It is relevance in the case against Mr Huxley and Ms Doyle is that the evidence Ms Greer about the assault is limited to being part of the narrative of the events which explains the presence of blood and DNA of [the deceased] in the unit and in the garage, and may be some part of the evidence explaining how and under what circumstances the blood and DNA of [the deceased] may have come into the boot of the blue Commodore”.

[38] His Honour went on to make observations of Ms Greer’s evidence and posited to the jury that what Ms Greer had witnessed was not in fact the whole of the physical violence metered out on the deceased inside the Burnda Street unit. The importance of this was said by his Honour to arise in the following way:

“Does the evidence exclude the reasonable hypothesis that a kicking or stomping to the unprotected head and face on the right side of [the deceased] was inflicted when he was on the floor and before Ms Greer entered the room. Is it possible that [the deceased] was moved about before Greer entered – for example, from near the curtains, or from the sofa to the floor. Consider whether the evidence suggests that assaults and injuries to [the deceased] occurred before Greer entered the room and whether it’s safe to conclude that what she saw is the entirety of what happened<sup>76</sup>

...

---

<sup>74</sup> CAB 95 ln 36; 96 ln 07; 96 ln 23.

<sup>75</sup> CAB 98 ln 32.

<sup>76</sup> CAB 101 ln 24.

*Remember, in this sort of case, this sort of circumstantial case, in order to bring in a verdict in a case such as this, it's necessary that guilt should not only be a rational inference, but it should be the only rational inference that can be drawn from the circumstances".*<sup>77</sup>

[39] In summing up the rival contentions his Honour emphasised that the appellant's case was that it was "*more likely that the death-causing injury was occasioned at the unit than at another place*".<sup>78</sup> In contrast his Honour reminded the jury of the prosecution contention that while there was an assault said to have occurred at the Burnda Street unit, it was not such as to cause the death of the deceased, this it was said was supported by the other evidence, including the confession to Mr Hess. Relevantly his Honour recognised that "*with respect to the case against Mr Rewha [it was conceded by the prosecutor] that it all depended on acceptance of the evidence of Ms Greer*".<sup>79</sup>

[40] No redirections, relevant to the ground of appeal in this Court, were sought by either the appellant's counsel or the Crown Prosecutor.

### ***The Court of Appeal***

[41] The appellant appealed to the Court of Appeal (Fraser, Morrison and Mullins JJA) advancing five discrete grounds. Relevant to the appeal before this Court, the appellant contended that "*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*".

[42] In considering this ground Mullins JA (as her Honour then was) with the concurrence of the other members of the Court, stated, correctly, that:<sup>80</sup>

*"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 [the appellant]".*  
(emphasis added)

---

<sup>77</sup> CAB 102 ln 09.

<sup>78</sup> CAB 104 ln 18.

<sup>79</sup> CAB 108 ln 05.

<sup>80</sup> *R v Huxley* at [98] – CAB 150.

[43] The above observations were made in the context that the jury were directed not only that a “*general disbelief of a witness’s evidence does not provide evidence of the opposite*”<sup>81</sup> but also that his Honour “*fairly summarised the other evidence about the severity of the assault that was relied on by [the appellant]*”.<sup>82</sup>

**Part V: The Response**

[44] The appellant’s contention in this Court, which was not that advanced in the Court of Appeal, centers on a singular direction taken, it is submitted, out of context. The foundation of the argument advanced in this Court turns, largely, if not exclusively, upon the way in which the impugned direction was delivered to the jury, assuming intonations, and grammatical exactitude. To that extent the appellant interpolates into the direction an essential connection between the resolution as to acceptance or otherwise of Ms Greer’s evidence and the use of her evidence in all three *cases* the jury was called upon to consider. The respondent submits however, that a full review of the summing-up is essential to an understanding of how the direction was delivered to, an understood by, the jury.<sup>83</sup>

[45] From the beginning, and permeating to the end of the summing up, the jury were directed to determine the respective *cases* separately. It was apparent from the directions that while there were separate cases being litigated coterminously, there was evidence which was relevant to all. To that end, while each case relied on overlapping evidence, the jury were to consider the question of guilt separately; and this was to be done by reference to the evidence admissible against the individual and by reference to the way in which the prosecution case was advanced.

[46] The use to be made of Ms Greer’s evidence in the respective cases was made abundantly clear to the jury in his Honour’s directions. These included the jury’s function in the determination of the facts and their understanding of what was to be established before they could convict.

[47] In the context of the whole of the summing up the impugned direction focused upon the centrality of Ms Greer’s evidence in the case against Mr Rewha. It did not suggest that the approach to her evidence was the same before it could be utilised in

---

<sup>81</sup> CAB 19 ln 33.

<sup>82</sup> *R v Huxley* [2021] QCA 78 at [98] – CAB 150.

<sup>83</sup> *Hargraves v The Queen* (2011) 245 CLR 257 per French CJ, Gummow, Hayne, Crennan, Kiefel, and Bell JJ at [46]; *Awad v The Queen* (2022) 296 A Crim R 561 per Steward J at 587, [114].

the case for the appellant. This is so because the direction was such that the need to be satisfied of her evidence to the criminal standard was only in circumstances that it was to be *acted upon* to advance the prosecution case rather than if it was to be accepted generally.

[48] That such a distinction was made is amplified by the fact that at each juncture where his Honour spoke of Ms Greer's evidence in the *case against* Mr Rewha it was punctuated with the requirement for the jury to accept her evidence to the criminal standard. Such a requirement though was never advanced where his Honour came to direct the jury in relation to the case against the appellant.

[49] While Ms Greer's evidence was of foundational importance to the prosecution case against Mr Rewha, it did not have the same importance to the prosecution case against the appellant. Importantly though it was never contended that the assault said to be witnessed by Ms Greer did not occur. In fact, such a contention was contrary to the objective evidence.<sup>84</sup> Instead the dispute, in relation to Mr Rewha, was whether he was an accessory to the conduct of Mr Taylor, and the dispute in the appellant's case was whether he caused the death of the deceased himself.

[50] If there was any confusion created by the impugned direction, by the time his Honour came to direct the jury as to the *case against* the appellant it was resolved by reference to the seven (7) matters to be proved by the prosecution before the jury could convict the appellant.<sup>85</sup> Among these seven (7) essential matters the jury were told that two were of particular importance; first that the appellant did an act that caused the death of the deceased, and second, that he did so with a murderous intent.

[51] In grappling with these essential aspects, the jury were directed that they were required to exclude all rational inferences consistent with innocence, beyond reasonable doubt. Beyond the assault at the Burnda Street unit the jury were confronted with other possible causes for the death of the deceased. Each of those possibilities, like the assault itself, the jury were directed, had to be excluded by them beyond reasonable doubt before Mr Hess' evidence could be accepted.

---

<sup>84</sup> *R v Huxley* [2021] QCA 78 at [97] – CAB 150.

<sup>85</sup> CAB 81 ln 15.



[52] As such, the directions identified that, in order to convict the appellant, the jury had to exclude death having been caused by one, or any combination of events, unconnected with the appellant. These directions made clear that there was no need to be satisfied to the criminal standard of Ms Greer's evidence before it could present an obstacle to the prosecution case against the appellant. That the direction drew the necessary distinction sits comfortably with the absence of a request for re-direction on the point.

[53] That the jury did not convict Mr Rewha does not of itself demonstrate that Ms Greer's evidence was not accepted beyond reasonable doubt, and thus that the jury discounted the fact of the assault at the Burnda Street unit. Instead, the conclusion arrived at is simply redolent of a doubt being experienced as to Mr Rewha's accessorial liability. Such a conclusion sat comfortably with the objective and largely uncontested evidence.

[54] Properly understood, a full review of the summing up reveals that the impugned direction did not invite the jury to adopt a *tripartite test* before they could use the evidence of Ms Greer in the case for the appellant. Instead, the learned trial Judge, by the impugned direction, did nothing more than observe the circumstances which might affect Ms Greer's evidence. While these observations applied to both cases, the totality of the directions still identified the necessary distinction drawn between the way in which the evidence could be used. The impugned direction could only have been understood to apply to the *case against* Mr Rewha and as a corollary would not have affected the jury's approach to the *case for* the appellant.

[55] Applying the observations of this Court in *Hargraves v The Queen*,<sup>86</sup> a consideration of the whole of the summing-up reveals that the jury were not deflected from its proper task, that is whether they could exclude all possibilities consistent with innocence before they could act on Mr Hess' evidence. Thus, the impugned direction was not, as the appellant contends, a misdirection.

---

<sup>86</sup> (2011) 245 CLR 257 per French CJ, Gummow, Hayne, Crennan, Kiefel, and Bell JJ at [46], [49].

*A miscarriage of justice?*

[56] If the Court concludes that the impugned direction was a misdirection, the respondent submits that it nevertheless does not amount to a miscarriage of justice.

[57] In *Mraz v The Queen*<sup>87</sup> Fullagar J said:

*“It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him being acquitted, there is, in the eye of the law, a miscarriage of justice.”*

[58] The above proposition has been clarified by this Court in *Weiss v The Queen*,<sup>88</sup> *Nudd v The Queen*,<sup>89</sup> *Kalbasi v Western Australia*,<sup>90</sup> *Hofer v The Queen*,<sup>91</sup> and *Edwards v The Queen*.<sup>92</sup> The combined effect of this line of authority requires, in this case, an assessment of the capacity for the misdirection to affect the verdict. It is only where the misdirection operated to the prejudice of the appellant that a miscarriage of justice is thereby established.<sup>93</sup> So much is consistent with the observations of this Court in *Dhanhoa v The Queen*,<sup>94</sup> that in order for the appellant to succeed in a case of misdirection it must be shown that there is a “*real chance [that the misdirection] may have affected the verdict*”.

---

<sup>87</sup> (1955) 93 CLR 493 at 514 per Fullagar J.

<sup>88</sup> (2005) 224 CLR 300 at 308, [18].

<sup>89</sup> (2006) ALJR 614 at 622 [24].

<sup>90</sup> (2018) 264 CLR 62 at 69, [12].

<sup>91</sup> (2021) 291 A Crim R 114 at 127, [41]; (2021) 95 ALJR 937; [2021] HCA 36.

<sup>92</sup> (2021) 273 CLR 585 per Edelman and Steward JJ at 609, [74].

<sup>93</sup> *Hofer v The Queen* per Kiefel CJ, Keane, and Gleeson JJ at [41], Gageler J at [106], [116], [118], [123], Gordon J at [130]; *Weiss v The Queen* at [18], *Kalbasi v Western Australia* at [12].

<sup>94</sup> *Dhanhoa v The Queen* (2003) 217 CLR 1 per McHugh and Gummow JJ at p13, [38]; 15, [49].



- [59] The respondent submits that the impugned directions did not have the capacity to affect the verdict for two reasons. First, the evidence of Ms Greer did not give rise to the only obstacle to the acceptance of Mr Hess' evidence and thus the guilt of the appellant. Second, the learned trial Judge directed the jury that a rejection of Ms Greer's evidence did not constitute proof to the contrary.
- [60] While the assault at the Burnda Street unit, for the purposes of the case for the appellant, relied in part on the evidence of Ms Greer, her evidence as to what she observed was incapable of presenting a rational alternate possibility as to the cause of death.
- [61] In the above context the learned trial Judge, as the Court of Appeal identified, "*fairly summarised the other evidence about the severity of the assault that was relied on by [the appellant]*". This evidence was unaffected by the acceptance or rejection of Ms Greer's evidence.
- [62] As a consequence, the impugned direction, in light of the direction that rejection did not constitute proof of the contrary (ie. that there was no assault), did not have the capacity to remove the defence contention that it was the assault at the Burnda Street unit which caused the death of the deceased. As the Court of Appeal observed:<sup>95</sup>

*"[The appellant] also relied on Ms Greer's evidence at the trial of the state [the deceased] was in after the assault, in order to advance the contention that the jury could not exclude as a reasonable possibility that [the deceased] 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 [the appellant] about the soakage blood stain on the sofa chair, the forensic evidence of the blood in the boot belonging to [the deceased] and that it was Mr Taylor who had cleaned the boot of the blue Commodore and that it was therefore a possibility that [the deceased] may have suffered fatal injuries at the unit, so it was his body that was disposed of at Maidenhair Fern Creek"*

---

<sup>95</sup> R v Huxley [2021] QCA 78 at [97] – CAB 150.

[63] The objective evidence, in addition to the evidence of Ms O'Dell and the presence of the injuries to the arm and torso of the deceased, presented a persuasive case that the deceased had been the subject of a serious and bloodletting assault at the Burnda Street unit. It was apparent that the expert medical witnesses could not positively exclude the assault as being, either alone or in combination with methylamphetamine ingestion, the cause of death. While that evidence did not ultimately undermine acceptance of Mr Hess' evidence, it was nevertheless clear to the jury that they had to, even absent Ms Greer's evidence, exclude the possibility of that serious assault being the cause of death, beyond reasonable doubt before they could convict.

[64] Where acceptance or rejection of Ms Greer's evidence did nothing to remove from the jury's consideration the reasonable possibility of an assault in the Burnda Street unit, the misdirection could have had no effect on the verdict. In those circumstances the appellant has not been prejudiced and a miscarriage of justice has not been established.

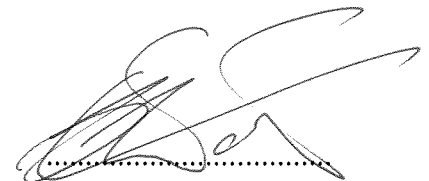
**Part VI: Notice of contention / Cross-appeal**

[65] There is no notice of contention filed by the respondent.

**Part VII: Time required for oral argument**

[66] The respondent estimates a total of not more than 2 hours to present oral argument.

Dated 09 June, 2023



CW Wallis and EL Kelso

Counsel for the respondent

Telephone: (07)3738 9770

Email: [DPP-HC-Appeals@justice.qld.gov.au](mailto:DPP-HC-Appeals@justice.qld.gov.au)