



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

BRENT MALCOLM HUXLEY
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

- 20 2. Whether the Court of Appeal erred by finding the direction that a witness' evidence in a joint trial could only be used by the jury if they were satisfied that the evidence of that witness was truthful, reliable and accurate beyond reasonable doubt, did not constitute a miscarriage of justice.

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

3. The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and does not consider it necessary.

Part IV: Citation of judgment below

4. *R v Huxley* [2021] QCA 78.

Part V: Narrative statement of the relevant facts

5. On 18 September 2019, in the Supreme Court at Townsville, on day 23 of a trial before His Honour Justice North and a jury, The appellant was convicted of the murder of Mr McCabe (the deceased).¹
6. The appellant was charged with murder on a joint indictment which charged:
 - 6.1. Mr Mathew Rewha with assault occasioning bodily harm in company (Count 1).
 - 6.2. Ms Leonie Doyle with accessory after the fact to murder (Count 3), alternatively
 - 6.3. Ms Leonie Doyle with accessory after the fact to manslaughter (Count 4).²
7. Rewha was found not guilty of count 1. Doyle was found guilty of count 4. A directed verdict of acquittal was entered on day 13 to count 3.
- 10 8. Mr Jason Taylor was tried for murder separately from Huxley.³ The co-defendant Taylor was not a Crown witness on the trial of the appellant.
9. The case against the appellant was that the deceased was killed at or near where his decomposed body was located at Crystal Creek, being a remote location north of Townsville.
10. Although count 1 was constituted by an assault committed upon the deceased at a unit located at Burnda Street in Townsville (the unit), the prosecution contended that the deceased did not die as a result of injuries caused in that assault.⁴
11. The appellant contended that it was a reasonable possibility that the deceased died as a result of injuries suffered during the assault in the unit.⁵
- 20 12. The appellant accepts the summary of the facts contained in the judgment of Mullins JA at paragraphs [6]-[62].⁶ The evidence that is relevant to the disposition of this appeal is set out in the paragraphs that follow.

The assault of the deceased at the unit (Count 1)

¹ Transcript of Verdict, CAB p113, at line 33.

² *R v Huxley* [2021] QCA 78, CAB p128, at [3].

³ *R v Taylor* [2021] QCA 15. Mr Taylor was convicted of murder on 15 May 2019. His appeal against conviction was dismissed on 12 February 2021.

⁴ *R v Huxley*, CAB p136, at [39].

⁵ *Ibid.* It was argued that it was also a reasonable possibility that Mr McCabe died as a result of other causes, such as methylamphetamine overdose. That alternative hypothesis is not maintained in this Court.

⁶ *R v Huxley*, CAB p128–141. The summary is incomplete regarding the evidence of Dr Samarasinghe (a forensic pathologist) and Justin Howes (the forensic scientific officer), see paragraphs 19-20 and 22 below.

13. The deceased was last seen alive on 15 August 2015. He left Charters Towers in a white Commodore driven by Doyle and Candis Greer (Greer). The last known contact with the deceased was at 8.31 pm on 15 August 2015 during a phone call between the deceased and Munns.⁷
14. On 15 August 2015 the appellant was living in the unit in Townsville which was rented by O'Dell. The appellant was a sub-tenant of O'Dell. O'Dell went on a camping trip on 14 August 2015 and returned to the unit on 16 August 2015 about 4.30 pm or 5 pm. On return O'Dell noticed blood on the ground, a mat was missing and a couple of weeks later, that a mop and bucket were missing.⁸
- 10 15. Sasha Lee (Lee) lived in Townsville at the time. She lived with Taylor and knew Rewha and the appellant. Lee's evidence placed Rewha, the appellant, Taylor, Greer, and Doyle at the unit on the day the deceased was allegedly killed. Lee did not refer to seeing the deceased at the unit and gave no evidence of a potentially fatal assault.⁹ Lee was taken from the unit to her home by the appellant.¹⁰
16. The witness Greer had consumed alcohol and methylamphetamine that day and had been addicted to methylamphetamine for some years.¹¹
17. Greer gave detailed evidence of her transit from Charters Towers to the unit in a white commodore including that she had been in the back seat with the deceased and they had been flirting.¹² In addition, Greer gave evidence of a serious assault upon the deceased
20 by Taylor and/or Rewha at the unit:
- 17.1. When Greer arrived at the unit, the people present were Greer, Doyle, the deceased, an older fellow and an Aboriginal girl (identified by other evidence as Lee). Greer did not remember the appellant being there.¹³
- 17.2. Greer left the unit and made her way to Rewha's house. She and Rewha argued and she left Rewha's house on foot. She was picked up in the blue commodore by the appellant, Rewha and Doyle and driven back to the unit. On the way Greer

⁷ *R v Huxley*, CAB p128-129, at [6] - [7].

⁸ *R v Huxley*, CAB p129, at [8].

⁹ *R v Huxley*, CAB p129, at [9] - [10].

¹⁰ *R v Huxley*, CAB p129, at [10].

¹¹ *R v Huxley*, CAB p130-131, at [11] and [14].

¹² *R v Huxley*, CAB p131, at [14]; Transcript of evidence Greer, AFM p43, lines 22-30; p65, line 26 to p66, line 16.

¹³ *R v Huxley*, CAB p130, at [11]; Transcript of evidence Greer, AFM p44, at lines 1-13.

and Rewha argued about her having been in the backseat with the deceased on the journey back from Charters Towers.¹⁴

17.3. On arrival back at the unit Rewha introduced himself to the deceased. Greer and Rewha then had a conversation outside regarding her intravenous use of methylamphetamine. Greer did not recall the appellant or Doyle entering the unit.¹⁵

17.4. Rewha then went inside while Greer finished her cigarette. She heard a bit of commotion, rustling around, squeaking of a shoe and possibly a thud, or more than one thud.¹⁶

10 17.5. Seconds later Greer entered the lounge room through the back door. The deceased was on the ground in the lounge room/kitchen area. Rewha and the older fellow were present in the lounge room. Neither the appellant nor Doyle were present. The deceased was lying on his right side with his face towards the ground and blood coming from his facial area through his nose or mouth. He was coughing and spluttering but Greer was not too sure what he said.¹⁷

17.6. Rewha and the older fellow took the deceased out through the interior garage door. The deceased was not supporting himself.¹⁸

20 17.7. Greer saw the older fellow stand over the deceased on the floor, as well as kick and prod him with something. The older fellow was laughing. The deceased was trying to talk, but he was not talking and not moving so Greer could not tell whether he was conscious or not. Greer saw blood pooling around the deceased's face on the ground.¹⁹

¹⁴ *R v Huxley*, CAB p130-131, at [11] and [15]; Transcript of evidence Greer, AFM p68 at lines 16-45; p69 at lines 23-24.

¹⁵ *R v Huxley*, CAB p130-131, at [12] and [15] ; Transcript of evidence Greer, AFM p45 at lines 17-33; p54 at lines 5-7 and lines 12-15.

¹⁶ *R v Huxley*, CAB p130-131, at [12] and [15]; Transcript of evidence of Greer, AFM p45 line 29 to p46 line 21; p70 at lines 30-43.

¹⁷ *R v Huxley*, CAB p130-131, at [12] and [15]; Transcript of evidence of Greer, AFM p45 line 46 to p47 line 39; p54 line 32.

¹⁸ *R v Huxley*, CAB p130-131, at [12] and [15]; Transcript of evidence Greer, AFM p49 line 26 to p50 line 29.

¹⁹ *R v Huxley*, CAB p131, at [13], [15] and [17]; Transcript of evidence Greer, AFM p54 line 35 to p56 line 18; p76 lines 1-10.

17.8. Greer saw one kick to the left side of the deceased “in his torso, rib area”. There was no reaction from the deceased to that kick.²⁰

17.9. Greer and Rewha left the unit. When they returned to the unit after being at the hotel, the older fellow was mopping up blood on the floor.²¹

18. Importantly, on the evidence of Greer, neither the appellant nor Doyle were present for that serious assault.²²

19. The precise cause of death was unable to be determined due to the decomposition of the deceased prior to examination.²³ The possible mechanisms of death included a rock being dropped on the deceased²⁴ or by kicks or stomps to the deceased’s head.²⁵

10 20. Dr Samarasinghe opined that death resulting from facial fractures could have been instantaneous or could have taken some time.²⁶ The injuries sustained had the capacity to be fatal and to render the victim unconscious immediately.²⁷ Dr Samarasinghe agreed that the injuries would have been likely to cause bleeding from the nose and mouth of the deceased.²⁸

21. Professor Duflou accepted that if the constellation of injuries to the front and back of the cranium occurred when the deceased was alive he would have expected him to die within minutes or up to a couple of hours.²⁹

22. The forensic evidence within the unit was consistent with a grave assault being committed upon the deceased:

²⁰ *R v Huxley*, CAB p132, at [17]; Transcript of evidence Greer, AFM p78 lines 1-34.

²¹ *R v Huxley*, CAB p132, at [16]; Transcript of evidence Greer, AFM p76 line 45 to p77 line 14.

²² *R v Huxley*, CAB p130, at [12]; Transcript of evidence Greer, AFM p47 lines 1-4; p50 lines 25-29; p69 line 43 to p70 line 4; p78 lines 1-6.

²³ *R v Huxley*, CAB p136, at [40] (Dr Samarasinghe); p138, at [46] (Prof Duflou). Transcript of evidence Dr Samarasinghe, AFM p24 lines 34 – 40; Transcript of evidence Professor Duflou, AFM p98 line 38 to p99 line 10.

²⁴ *R v Huxley*, CAB p136, at [40] (Dr Samarasinghe); Transcript of evidence Professor Duflou, AFM p112 lines 7-12.

²⁵ *R v Huxley*, CAB p137-138, at [45] and [46] (Prof Duflou); Transcript of evidence Dr Samarasinghe, AFM p27 lines 1 – 22; p28 line 35; p32 lines 22-30; Transcript of evidence Professor Duflou, AFM p95 line 1 to p96 line 10; p111 lines 15-27.

²⁶ Transcript of evidence Dr Samarasinghe, AFM p12 lines 1-12.

²⁷ Transcript of evidence Dr Samarasinghe, AFM p13 lines 1-14.

²⁸ Transcript of evidence Dr Samarasinghe, AFM p21 lines 43-45.

²⁹ *R v Huxley*, CAB p138, at [46]; Transcript of evidence Professor Duflou, AFM p90 line 46 to p91 line 15.

- 22.1. Blood was discovered in the unit on the floor near the kitchen bench, near the steps to the garage and inside the garage.³⁰
- 22.2. A ‘saturation stain’ of blood was visible on a lounge chair from where blood had soaked into the fabric. There was more blood on the chair than anywhere else.³¹ The major single source contributor of that blood stain was the deceased.³²
- 22.3. Samples from eight places on or near the kitchen bench matched the deceased. One DNA sample from underneath the kitchen bench suggested contributions by the appellant and the deceased. A sample from the lounge floor showed a mixed profile from the deceased and Taylor.³³
- 10 23. There was evidence of significant blood stains in the boot of the blue Commodore that were consistent with the deceased’s DNA. There was no blood staining in the white Commodore.³⁴
24. There was evidence consistent with the deceased being taken in the blue commodore to the site of where the body of the deceased was found, including CCTV footage and data obtained from mobile towers.³⁵
25. The prosecution led post-offence conduct which linked the appellant to Taylor, Doyle and the blue Commodore in the days following the death of the deceased.³⁶ However, this evidence was incapable of establishing that the appellant did any act which caused the death, or was present in the unit when the deceased was assaulted.
- 20 26. The Crown case relied upon an alleged admission to Mr Darren Hess (Hess) on the second and third of three visits to Hess’s address around the time of Hess’s birthday.³⁷

³⁰ *R v Huxley*, CAB p132, at [18].

³¹ *R v Huxley*, CAB p132, at [19].

³² Howes estimated the mixed DNA profile obtained from the lounge chair is greater than 100 billion times more likely if the deceased was a contributor, compared to if he was not: Transcript of evidence Howes, AFM p130, at lines 29-38.

³³ Transcript of evidence Howes, AFM 128, at line 45 – p130 line 12.

³⁴ *R v Huxley*, CAB p136, at [36].

³⁵ *R v Huxley*, CAB p133, at [20], [21], [22] and [24].

³⁶ *R v Huxley*, CAB p133-135, at [25] to [31], [33] and [35].

³⁷ *R v Huxley*, CAB p138-141, at [48]-[58].

27. The reliability and credibility of Hess was in issue.³⁸ There were internal contradictions within Hess' account and evidence from his wife that tended to refute the circumstances surrounding the alleged confessional statements.³⁹ In particular, the adult son of Hess was identified as being present for the confession. This fact was not supported by the Hess' wife and the adult son was not called by the Crown.⁴⁰
28. The appellant did not give evidence, but called Professor Duflou, an expert in forensic pathology.⁴¹ The effect of Professor Duflou's evidence is summarised at paragraphs [19] and [21] above.

The summing up

- 10 29. The trial Judge commenced summing up to the jury on day 21 of trial.
30. The jury were directed that they may accept the whole, part or none of a witness' testimony.⁴²
31. The jury were instructed to take care before accepting the testimony of witnesses who used methylamphetamine. This category of witness included Greer.⁴³
32. His Honour gave a *Robinson* direction specifically in respect of Greer to the effect that the jury must '*scrutinize the evidence with great care before you can accept the accuracy and the reliability of her evidence*'.⁴⁴ This was to the benefit of each co-defendant who were specifically inculpated by her evidence.
- 20 33. The direction was given as a result of Greer's admitted use of methylamphetamine and alcohol, as well as Greer's initial refusal to be sworn and answer questions when called by the prosecutor. His Honour emphasised that even if the jury were to disbelieve Greer's evidence, there was no evidence that the appellant was present at the unit during the alleged assault (Count 1):⁴⁵

Can I just emphasise some of what I have just said in connection with one aspect of part of the evidence of this case, but it is on an important issue. Recall that part of the direction I have just given you is that in general disbelief of a witness's evidence does

³⁸ *R v Huxley*, CAB p139-140, at [49] – [56].

³⁹ *R v Huxley*, CAB p141, at [59] – [61].

⁴⁰ *R v Huxley*, CAB p138-139, at [48]-[49], p141, at [59]-[61], p143, at [67].

⁴¹ *R v Huxley*, CAB p137, at [45]-[46].

⁴² Summing up, CAB p25, line 1; p29, lines 13-16.

⁴³ Summing up, CAB p26, line 14.

⁴⁴ Summing up, CAB p29, lines 17-30.

⁴⁵ Summing up, CAB p19, lines 30-39.

not provide evidence of the opposite. Now, Ms Greer gave evidence that neither Mr Huxley or Ms Doyle were present when the events she spoke about involving McCabe in the unit occurred. So her evidence was that those two were not there then. Even if you disbelieve Ms Greer's evidence, and I will be coming to all of that, that does not constitute evidence that they were there. There is simply still no evidence about that matter. I just wanted to emphasise that point at this stage in context with what I was speaking about in a general sense.

The Impugned Direction

10 34. As stated at paragraph [32] herein, the unfairness to the co-accused, consequent to the evidence of Greer, was addressed in specific directions.⁴⁶ However, in that context, a direction was then given to the jury in terms that was detrimental to the defence case of the appellant:⁴⁷

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

35. His Honour summed up the case specific to Rewha, including that ‘*as a matter of law you must be satisfied beyond reasonable doubt that Ms Greer's evidence is accurate and reliable before you can find Mr Rewha guilty*’.⁴⁸

36. His Honour then summed up the case specific to the appellant, emphasizing that conviction depends upon acceptance of Hess' evidence as reliable and accurate beyond reasonable doubt.⁴⁹ Also, that the jury should consider the possibility that the injuries were caused in the assault that was spoken of by Greer.⁵⁰

⁴⁶ *R v Huxley*, CAB p149, at [92].

⁴⁷ Summing up, CAB p30, lines 19–26.

⁴⁸ Summing up, CAB p67, line 41 and especially p68, lines 12-22.

⁴⁹ Summing up, CAB p75, line 42 top83 line 20.

⁵⁰ Summing up, CAB p83, line 15.

37. Although the effect of Greer's evidence was summarized,⁵¹ the misdirection in respect of Greer's evidence was never corrected. The impugned direction was unambiguously applicable to each co-defendant, expressed as a matter of law, and was *consistent with* the directions given in respect of the case against Rewha.⁵²

Part VI: Argument

38. The misdirection had the effect of reversing the onus of proof, by introducing a tripartite test whereby Greer's evidence should be disregarded, as a matter of law, unless the jury were satisfied beyond reasonable doubt that her evidence was truthful, reliable and accurate.
- 10 39. As a result of the direction concerning Greer, the jury were required to accept Greer's evidence beyond reasonable doubt or reject it entirely.
40. Had the jury been properly instructed, they would not have faced this binary choice. In the case against the appellant, the jury should have been entitled to accept some, all or none of her evidence.
41. The effect of the direction given was to place an impermissible evidential hurdle to its use by the jury in raising a reasonable doubt as to the guilt of the appellant and, in particular, to the body of evidence of a potentially fatal assault at the unit in which the appellant was not implicated. The direction was contrary to law and took away a real pathway to acquittal.
- 20 42. The Court of Appeal was wrong to reason that the prejudicial effect of the trial judge's direction was appropriately ameliorated by the trial Judge reminding the jury in the terms described above, at paragraph [33], that '*even if you disbelieve Greer's evidence, that does not constitute evidence that they were there*'.
43. Dismissal of Greer's evidence did not operate neutrally in the appellant's case. That is because her evidence had the capacity to affect acceptance of the evidence of Hess and counterbalance his described mechanism of death.
44. Greer's evidence was consistent with the forensic evidence of blood staining at the unit and her account of the deceased bleeding from the mouth and being immobile following the assault. This aspect of her account was consistent with expert evidence that the blow

⁵¹ Summing up, CAB p38, lines 24 to p41, line 40.

⁵² Summing up, CAB p30, lines 19-26.

which caused the facial fractures may have caused bleeding from the mouth and nose of the deceased and immediate unconsciousness or death.

45. It is therefore submitted that the evidence of Greer was capable of advancing the appellant's case, namely that the deceased was fatally assaulted by Rewha and/or Taylor, whilst the appellant was absent. The necessary corollary of this proposition is that the evidence was capable of leaving the jury in a state of reasonable doubt that the deceased was alive when transported from the unit to Crystal Creek in the boot of the blue Commodore.

10 46. The Court of Appeal was wrong to reason that no miscarriage of justice was caused by the misdirection. There is a reasonable possibility that an innocent person has been convicted of murder.

47. The direction was a misdirection which constituted a miscarriage of justice.⁵³ A re-trial should be ordered. The proviso cannot be applied in this case,⁵⁴ in which the only evidence of an act by the appellant which caused the death was an unreliable confession.

Part VII: Orders sought

48. Appeal allowed;

49. Conviction is quashed; and

50. Order a new trial.

Part VIII: Time required for oral argument

20 The appellant estimates that he will require 1.5 hours to present his oral argument.

Dated: 12 May 2023



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⁵³ *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69 [12], citing *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J and *Weiss v The Queen* (2005) 224 CLR 300 at 314 [35].

⁵⁴ *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15], citing *Castle v The Queen* (2016) 259 CLR 449.



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