

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, STEWARD, GLEESON AND JAGOT JJ

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BRENT MALCOLM HUXLEY

APPELLANT

AND

THE QUEEN

RESPONDENT

*Huxley v The Queen*  
[2023] HCA 40  
*Date of Hearing: 7 September 2023*  
*Date of Judgment: 6 December 2023*  
B19/2023

## ORDER

*Appeal dismissed.*

On appeal from the Supreme Court of Queensland

### Representation

A M Hoare with S G Moon and N J Edridge for the appellant (instructed by Bressington & Partners Solicitors)

C W Wallis with E L Kelso for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Huxley v The Queen**

Criminal practice – Trial – Directions to jury – Where appellant tried with two co-accused – Where appellant charged with murder, one co-accused charged with assault occasioning bodily harm and other co-accused charged with accessory after fact to murder or manslaughter – Where evidence from witness incriminated one co-accused but had potential to exculpate appellant – Where trial judge gave direction that witness' evidence should not be used unless jury satisfied beyond reasonable doubt that witness' evidence was truthful, reliable and accurate – Where direction expressed as "consistent with the directions" to be given in relation to case against one co-accused – Where appellant did not seek redirection – Whether direction would have misled jury in relation to defence case for appellant – Whether misleading in context of summing-up as a whole – Whether trial miscarried – Whether direction constituted error of law.

Words and phrases – "beyond reasonable doubt", "circumstantial evidence", "error of law", "failure to seek a redirection", "joint trial", "miscarriage of justice", "misdirection", "multiple accused", "murder", "obstacle to conviction", "reasonable possibility", "Robinson direction", "summing-up", "truth, reliability and accuracy", "wrong decision of any question of law".

*Criminal Code* (Qld), ss 632, 668E.



1 GAGELER CJ AND JAGOT J. This appeal concerns an alleged misdirection by a trial judge in a joint criminal trial. The impugned direction, said by the appellant (Huxley) to be wrong in law, involves the jury's use of evidence of a witness (Greer) alleged to exculpate Huxley from the offence of murder in circumstances where the same evidence inculpated a co-accused (Rewha) in the offence of unlawful assault occasioning bodily harm in company.

2 The case for Huxley is that the trial judge wrongly directed the jury that it could use Greer's evidence in the cases against both Rewha and Huxley only if satisfied beyond reasonable doubt that Greer's evidence was truthful, reliable, and accurate and, if not so satisfied, must disregard that evidence. Huxley's case is that while correct in the case against Rewha (where Greer's evidence was the only evidence inculpating Rewha in the commission of the offence and therefore had to meet the criminal standard of proof), the impugned direction was wrong in law in the case against him (where Greer's evidence provided a reasonable hypothesis consistent with Huxley's innocence of the offence). In answer, the respondent contends that: (1) the impugned direction, construed in the context of the entirety of the summing up, concerned the case against Rewha only, not the case against Huxley; and (2) if not, and the impugned direction applied to the case against Huxley (which the respondent accepted would have been wrong in law), the effect of the direction was effectively corrected by the balance of the summing up, with the consequence that there was ultimately no misdirection of the jury.

3 For the reasons given below, the appeal should be allowed.

### **The facts and circumstances**

4 Huxley was one of three co-accused charged on indictment. Huxley was charged with the murder on 16 August 2015 of McCabe. A second co-accused, Rewha, was charged with the unlawful assault occasioning bodily harm in company on 15 August 2015 of McCabe. A third co-accused, Doyle, was charged with being an accessory after the fact to manslaughter of McCabe.

5 The prosecution alleged that Rewha assaulted McCabe occasioning bodily harm in company on 15 August 2015 in a unit in Burnda Street, Townsville, and that Huxley murdered McCabe on 16 August 2015 at Crystal Creek or elsewhere in Queensland. The evidence of Greer was essential to the conviction of Rewha, as it was the only evidence that McCabe travelled to and was assaulted in the Burnda Street unit on 15 August 2015 and of Rewha's presence at the unit. Greer's evidence was also relevant to the allegation against Huxley, as it included evidence that Huxley was not present in the unit when McCabe was assaulted and as to the severity of the assault. The main prosecution evidence against Huxley was evidence of admissions that Huxley was alleged to have made to another witness, Hess. According to Hess, Huxley told him that he had "done a hit" on McCabe for \$10,000 by dropping a large rock on him.

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6 Huxley's defence included that Hess's evidence was unreliable and unbelievable and that the assault on McCabe in the Burnda Street unit, when Huxley was not present, inflicted potentially fatal injuries on McCabe from which he subsequently died. As part of this defence, it was argued for Huxley that Greer's evidence established both Huxley's absence from the Burnda Street unit when the assault occurred and the seriousness of the assault on McCabe in that unit (over and above the effect of the forensic evidence). In Huxley's defence, accordingly, Greer's evidence was said to provide a reasonable doubt about Huxley's guilt, contrary to the challenged evidence of Hess about Huxley's alleged admissions of killing McCabe.

7 Greer, however, was a reluctant witness. She attended the trial after a warrant requiring her appearance was issued. In front of the jury, she indicated that she was refusing to be sworn or affirmed as a witness to give evidence. In the absence of the jury, she continued to refuse to give evidence as a witness and was charged with contempt of court. The evidence Greer ultimately gave was that on 15 August 2015 she had consumed significant quantities of methylamphetamine and alcohol. When asked about her memory of 15 August 2015, she said that it was "a bit all over the place" and she remembered "small bits and pieces" but was "[n]ot sure what order they kind of go in".

8 In the absence of the jury, the trial judge and counsel debated the appropriate directions to be given to the jury. As Greer's evidence was the only evidence inculcating Rewha, the trial judge indicated that it was necessary to direct the jury that it had to reject her evidence unless satisfied beyond reasonable doubt that it was accurate and reliable. Huxley's counsel objected on the basis that this would prejudice Huxley as, on the defence case, Greer's evidence exculpated Huxley. The trial judge considered that in a joint trial of Rewha and Huxley the jury could not be given two directions about Greer's evidence, one direction in the case against Rewha, and another, different direction in the case against Huxley. This explains the giving of the impugned direction (discussed below).

9 Huxley was convicted of McCabe's murder. Rewha was acquitted. Doyle was convicted of being an accessory after the fact to manslaughter.

10 Huxley appealed. There were five grounds in the appeal to the Court of Appeal of the Supreme Court of Queensland. Relevantly, ground five was to the effect that the trial judge erred in directing the jury that it was open to it to disregard the evidence of Greer, which deprived Huxley of a proper chance of acquittal. The Court of Appeal dismissed the appeal. In its reasons, the Court of Appeal said that the trial judge's directions about Greer's evidence arose from the manner in which Greer gave and the content of her evidence, and that there "was no basis for the trial judge to distinguish those observations, as to whether the jury was considering the case against Mr Rewha or the case against Mr Huxley". The Court of Appeal also reasoned that the "trial judge qualified his comments with the observation that

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favoured Mr Huxley that, if Ms Greer's evidence was disbelieved, there was no evidence that Mr Huxley was in the unit, and fairly summarised the other evidence about the severity of the assault that was relied on by Mr Huxley". Accordingly, the Court of Appeal concluded that there was no error in the trial judge's directions about Greer's evidence.<sup>1</sup>

11 As noted, it is not in dispute that the impugned direction was appropriate to be given in the case against Rewha. Nor is it in dispute that if the impugned direction was given as and with the effect for which Huxley contends, that direction would have been wrong in law and would require Huxley's conviction to be set aside. In this regard, although the sole ground of appeal the subject of the grant of special leave to appeal was framed by reference to a miscarriage of justice, the respondent accepted that it could equally be framed as a "wrong decision of any question of law" within the meaning of s 668E(1) of the *Criminal Code* (Qld). On this basis, the appellant filed an amended notice of appeal raising an alternative ground that the direction involved a wrong decision on a question of law. If such a wrong decision were made, the respondent also accepted the decision to be material and incapable of being subject to the application of the proviso in s 668E(1A) of the *Criminal Code*. The appeal is to be resolved on this alternative ground.

### Context and content of impugned direction

#### *Greer's evidence*

12 Greer's evidence-in-chief in the prosecution's case included that she and Rewha were in a relationship. She also knew Huxley and Doyle. Huxley asked her to come to his unit in Burnda Street. She arrived mid-afternoon. Greer, Huxley, and Doyle then drank quite a bit together. Greer left with Doyle, and they drove to Charters Towers, where Doyle had family. Greer met McCabe for the first time. Greer injected ice (a form of methylamphetamine). Doyle, Greer, and McCabe headed back to Townsville to the Burnda Street unit. An older fellow was at the unit. Greer left Doyle and McCabe at the Burnda Street unit and walked to Rewha's place. Doyle, Rewha, and Huxley picked up Greer from Rewha's place and they returned to the Burnda Street unit. McCabe and the older fellow were still there. Greer walked into the unit. She and Rewha left through the backdoor of the unit to smoke. Rewha went back into the unit. While she was still outside the unit smoking, Greer heard a commotion inside the unit. Greer re-entered the unit and saw McCabe on the ground in the lounge/kitchen area. The other people she saw were Rewha and the older fellow. Huxley and Doyle were not in the lounge/kitchen area. Greer did not know where Huxley and Doyle were. She could see blood coming from McCabe's facial area. The amount of blood was hand or palm sized.

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1 *R v Huxley* [2021] QCA 78 at [98].

McCabe was breathing, coughing, and spluttering. McCabe was then taken out the door by Rewha and the older fellow. McCabe was not supporting himself. Greer next recalled being at the pub with Rewha. She did not recall seeing Huxley during this time (that is, from Greer entering the unit).

13 In cross-examination by counsel for Huxley, Greer repeated that she did not remember Huxley being in the unit. She was outside the unit smoking with Rewha when Rewha went back into the unit. She heard a commotion including more than one thud. She went back into the unit and saw McCabe lying on the floor. The older man was cleaning up. Greer saw blood on various areas on the floor. She did not know for how long McCabe lay on the floor. She saw the older man kick McCabe once on the floor and poke him with an object. When Greer first came into the room, she heard McCabe cough and splutter and try to say something. After that, McCabe just lay on the floor. Greer saw blood pooling on the floor near McCabe's face, spreading about one to two centimetres away from his face. When McCabe was carried out to the garage, his feet were dragging behind him and touching the ground. Greer saw about two drops of blood in the garage. That was the last Greer saw of McCabe. She went to the pub. She vaguely remembered that when she returned to the unit, the older man was cleaning up blood on the floor. Greer recalled a bucket of soapy water and a mop which she had got, and that the older man was cleaning up the blood.

14 In re-examination, Greer said the kick she observed was to the left side of McCabe's torso or rib area. She did not see McCabe react to the kick. She recalled that when they returned from the pub, Rewha, Huxley, and Doyle were present.

*The dispute about the direction*

15 Section 632 of the *Criminal Code* provides that:

- "(1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
- (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
- (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

16 The Queensland Courts *Supreme and District Courts Criminal Directions Benchbook* includes Direction No 63, which notes that a judge's comment under



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s 632(3) is referred to as a "*Robinson direction*".<sup>2</sup> This is the kind of direction referred to in *Robinson v The Queen*<sup>3</sup> about the evidence of a witness which, for particular reasons, the judge considers must be the subject of a warning to avoid its misuse by the jury and the risk of a miscarriage of justice.

17 In argument before the trial judge in the absence of the jury, the concern of Huxley's counsel was not the giving of a *Robinson* direction about Greer's evidence, but that the direction in the case against Rewha (that to convict Rewha the jury had to be satisfied beyond reasonable doubt that Greer's evidence was accurate and reliable), which was necessary as Greer's evidence was the only evidence implicating Rewha, would be "very prejudicial" to Huxley's case. The trial judge responded that "the jury can't be told to have it both ways. To use [Greer's evidence], if satisfied, on the balance of probabilities against A and B, but to only use [Greer's evidence] against C on beyond reasonable doubt". The trial judge described such directions as "madness ... leading to total confusion" and "gibberish". The trial judge gave a formal ruling to the effect that a direction would be given to the jury that it could convict Rewha only if satisfied beyond reasonable doubt that Greer's evidence was accurate and reliable and that Greer's evidence had to be scrutinised with care given her consumption of drugs and alcohol around the time of the alleged offences, only partial recollection of events, and conduct in refusing to be sworn to give evidence. In so ruling, the trial judge said that it "will not be overlooked that the evidence of Ms Greer has significant ramifications in the case against Mr Huxley and in the case against [Ms] Doyle" because of her observations about when they were not present.

#### *The content of the direction*

18 The trial judge summed up to the jury from the middle of 16 September to the late afternoon of 17 September 2019. The summing up extends over some 93 pages. The summing up included standard general directions to the effect that: (1) disbelief of a witness's evidence does not provide evidence of the opposite; (2) the jury had to decide the case exclusively on the evidence; (3) it was for the jury to decide whether or not to accept the whole or any part of a witness's evidence; and (4) the prosecution had to prove beyond reasonable doubt the guilt of an accused.

19 The trial judge said that in assessing the reliability of testimony of witnesses who had been taking methylamphetamine with or without alcohol, such as Greer,

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2 Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* (2022) at No 63.1.

3 (1999) 197 CLR 162 at 170-171 [25]-[26].

the jury may need to take particular care with their evidence. The trial judge then said:

*"It is entirely a matter for you, based on your consideration of the evidence and evaluation of it in light of other evidence that you accept, whether you accept what the witness has said either in whole or in part, and if you accept some or all of it as reliable and what weight, if any, you give to the evidence.*

Now, just a little while ago, when I gave you directions about the circumstance that a number of witnesses admitted to using methylamphetamine and how that might affect the reliability of that witness' evidence, and similar directions in the context of convictions for offences or dishonest conduct, there are two witnesses who I did not include expressly or directly. That is because for different reasons, the circumstances require that I give special attention to these matters.

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

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

There is another reason for some concern with respect to the accuracy and her reliability, especially the reliability of Ms Greer's evidence. You will have seen her behaviour when she was first called to give evidence when she refused to enter the witness stand and refused to take an oath or affirmation and refused to answer questions. While this is entirely a matter for you in your assessment of a witness, you may well consider that her behaviour on that occasion reflects adversely on her as a responsible and

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reliable citizen and bring into issue her reliability and her willingness to obey the law. You might also consider her demeanour and the way in which she gave her evidence in evaluating whether she was a reliable witness. Did she present and behave as a witness with a reliable memory? *In the result, you will need to scrutinise the evidence of Candis Greer with great care before you can accept the accuracy and the reliability of her evidence.*

...

*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)

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The *Robinson* direction under s 632(3) of the *Criminal Code* is that the jury "will need to scrutinise the evidence of Candis Greer with great care before you can accept the accuracy and the reliability of her evidence". The impugned direction is the subsequent paragraph, culminating with the words "[i]f you are not satisfied beyond reasonable doubt that the evidence of Ms Greer is truthful, reliable and accurate, then you should disregard it". Whether the direction is treated as a single direction with multiple parts or as multiple directions is not to the point. The point is that the trial judge unequivocally directed the jury that "[i]f you are not satisfied beyond reasonable doubt that the evidence of Ms Greer is truthful, reliable and accurate, then you should disregard it". This accords with the application of the criminal standard of proof of beyond reasonable doubt in the case against Rewha where, as noted, Greer's evidence was the only evidence of Rewha's presence at the Burnda Street unit when the assault occurred. The application of this standard would be wrong, however, in the case against Huxley, where Greer's evidence was part of Huxley's defence that McCabe's death was caused by the assault in the Burnda Street unit when Huxley was not present at the time of the assault. In the case against Huxley, while the *Robinson* direction (that, for the identified reasons, the jury should scrutinise Greer's evidence with great care before accepting it as accurate and reliable) was not in error, as a matter of law the jury did not need to be satisfied beyond reasonable doubt as to the truth, reliability, and accuracy of Greer's evidence. Rather, the jury was required to consider if Greer's evidence, in the light of the *Robinson* direction, gave rise to a reasonable doubt about the cause of McCabe's death – that is, that the assault in the Burnda Street unit caused McCabe's death.

21 In the context of Huxley's defence at trial, Greer's evidence was potentially exculpatory of Huxley as evidence supporting an inference that the cause of McCabe's death was the assault in the Burnda Street unit. This is because the forensic evidence could not identify the cause of death other than that McCabe suffered severe skull fractures. The fractures indicated blunt force trauma to the front of the head and right side of the face area. These injuries would be fatal unless urgent medical treatment was provided. Death could be instantaneous or occur after some time. Given the severity of the head injuries, McCabe would have become immediately unconscious. With these injuries McCabe would have bled from the nose and mouth. On this basis, the forensic evidence left open the possibility that McCabe had died as a result of blunt force trauma to the head during the assault at the Burnda Street unit (when Greer did not see Huxley in the unit) or as a result of Huxley dropping a large rock on McCabe's head elsewhere (as described by Hess in Huxley's disputed admissions).

22 What then is the meaning of the impugned direction? In submissions for Huxley, reliance was placed on the words "consistent with the directions I will give you in relation to the case against Mr Rewha" as indicating that the impugned direction applied generally to Greer's evidence so that the jury could use that evidence only if satisfied beyond reasonable doubt that the evidence was truthful, reliable, and accurate. The respondent disputed that the direction conveyed this meaning, submitting that it was given in the context of the case against Rewha.

23 The immediate context of the direction is the jury's use of evidence generally. The directions about Greer's evidence qualify the trial judge's general direction that it was a matter for the jury to decide what evidence to accept, in whole or in part, and what weight should be given to that evidence. The qualifications are equally general. The words "consistent with the directions I will give you in relation to the case against Mr Rewha" may involve a degree of ambiguity, but the substance of the direction conveyed to the jury is clear both in its terms and in its immediate context – that is, that the jury should act on Greer's evidence only if satisfied beyond reasonable doubt that her evidence is truthful, reliable, and accurate. The further direction – that, if not satisfied beyond reasonable doubt that the evidence of Greer is truthful, reliable, and accurate, the jury should disregard her evidence – reinforces the generality and strength of the direction. In the immediate context, the jury could have understood only that it could not use Greer's evidence at all if not satisfied beyond reasonable doubt that her evidence was truthful, reliable, and accurate. That this meaning was conveyed to the jury should be no surprise given that it accords with the expressed intention of the trial judge that a direction to that effect had to be given in the case against Rewha and it was not possible to give a different direction in the case against Huxley. That direction was wrong in law in respect of the charge of murder against Huxley.

24 The remaining issue is whether the effect of the legally erroneous direction was corrected in the balance of the trial judge's summing up. The problem is that the balance of the summing up and directions given to the jury are all to be read in the context of the impugned direction about how the jury could use Greer's evidence. No subsequent direction or comment of the trial judge said or suggested that, in the case against Huxley, the jury did not have to be satisfied beyond reasonable doubt about the truth, reliability, and accuracy of Greer's evidence and that, rather, in light of the *Robinson* direction, the jury had to decide if Greer's evidence raised a reasonable doubt to the effect that the cause of McCabe's death was the assault in the Burnda Street unit when Huxley was not present.

25 Accordingly, while the trial judge summarised Greer's evidence and, amongst other things, the forensic evidence, and dealt with the case against each accused separately, the effect of the impugned direction was not corrected. In the summing up of the case against Rewha, the trial judge repeated the direction in similar terms to the impugned direction four times (ie, made it clear that to convict Rewha the jury had to be satisfied beyond reasonable doubt that Greer's evidence was truthful, reliable, and accurate). These statements, while confined to the case against Rewha, do not suggest any undoing or amelioration of the impugned direction applying generally. If anything, they reinforced the importance of the impugned direction.

26 The trial judge then moved to the case against Huxley. In that context, the trial judge directed the jury (correctly, given its centrality to the prosecution of Huxley) that to convict Huxley of murder the jury had to accept the truth of Hess's evidence of the admissions Huxley allegedly made to Hess to the standard of beyond reasonable doubt. The trial judge also said:

"The essence of the defence case is that it's not possible to conclude what caused the death of Michael McCabe because of the state of decomposure of the remains; further, that it's not possible to conclude whether the face and head fractures occurred before or after death; that the event Hess speaks of did not occur, and you should not accept the evidence of Hess; that Hess has no reliable evidence from which it can be inferred that Huxley assaulted or injured McCabe; that it's a reasonable possibility that McCabe died as a result of the injuries sustained in the event Greer speaks of, and it's further contended that it's a reasonable possibility that McCabe died as a result of other causes, such as a methylamphetamine overdose. In summary, with respect to the prosecution case against Mr Huxley, in order to convict Mr Huxley of the murder of Michael McCabe, you would have to be satisfied, beyond reasonable doubt, of each of the following seven matters: (1) that the evidence of Darren Hess is truthful, accurate and reliable; (2) that Huxley did say the words that Darren Hess says was said; (3) that what Darren Hess says that Huxley said did happen, and is true; (4) that Michael McCabe is dead – and you put a big tick beside that; (5) that Brent

Huxley did an act that inflicted an injury that caused the death of Michael McCabe; (6) that the killing was authorised, justified or excused by law – and you can put a tick against that; in other words, it was an unlawful killing; (7) that at the time Huxley did the act that inflicted the injury that caused the death of McCabe, he intended to cause the death of McCabe or to cause him grievous bodily harm."

27 The natural and ordinary understanding of the first part of this statement commencing "[t]he essence of the defence case", which refers to it being a reasonable possibility that McCabe died as a result of injuries sustained in the assault at the Burnda Street unit, is that the trial judge is summarising the defence case for Huxley. The natural and ordinary understanding of that part of the statement commencing "[i]n summary, with respect to the prosecution case" is that the trial judge is identifying the elements of the offence of murder in the prosecution case against Huxley. The problem is that while the trial judge correctly identified that in order to convict Huxley the jury had to be satisfied beyond reasonable doubt that Hess's evidence was truthful, reliable and accurate, the directions did not refer to Greer's evidence other than in the context of the defence case for Huxley. The directions did not suggest that in weighing Hess's evidence and whether the jury was satisfied that the evidence was true (including, for example, that McCabe was alive when Huxley allegedly dropped the large rock on him), the jury was also entitled to weigh the evidence of Greer and, critically, that, in so doing, the jury was not bound to be satisfied beyond reasonable doubt that Greer's evidence was truthful, reliable, and accurate. Rather, the question for the jury was whether, albeit in the light of the *Robinson* direction in respect of Greer's evidence, the jury considered that Greer's evidence raised a reasonable doubt as to whether the cause of McCabe's death was the assault in the Burnda Street unit.

28 No other aspect of the trial judge's summing up cures the legal error conveyed by the impugned direction. To the contrary, the error is exposed again in the balance of the summing up. Accordingly, while the trial judge reiterated that the forensic evidence did not establish if the fractures to McCabe's skull were caused before or after death and that the jury had to consider the possibility that the injuries were caused in the assault about which Greer gave evidence, this further and final reference to Greer's evidence in the context of the case against Huxley also did not suggest that, contrary to the impugned direction, the jury did not have to be satisfied beyond reasonable doubt that Greer's evidence was truthful, reliable, and accurate.

29 Contrary to the submissions for the respondent, the fact that Huxley's counsel did not seek a redirection at the close of the trial judge's summing up does not indicate that any error in the impugned direction was cured by the summing up as a whole. Huxley's counsel had objected to the direction and the objection had already been overruled by the trial judge. While Huxley's counsel might have sought a redirection at the close of the summing up, counsel had already submitted

to the trial judge that the impugned direction would be "very prejudicial" to Huxley (which was correct) and the trial judge had rejected that submission. Further, in the context of the way in which the defence case was put at trial, the respondent's argument that Greer's evidence was not potentially exculpatory of Huxley cannot be accepted.

## Conclusion

30       The jury ought reasonably to have understood the trial judge to be directing it as the trial judge said he intended – that is, that in addition to scrutinising Greer's evidence with care due to her drug and alcohol consumption and the circumstances in which she gave evidence (the *Robinson* direction), the jury could only act on Greer's evidence generally if satisfied beyond reasonable doubt that Greer's evidence was truthful, reliable, and accurate. In the case against Huxley, that direction was wrong in law. The legal error was reinforced, not corrected, by the subsequent directions because those subsequent directions never conveyed that the jury was not required to be satisfied beyond reasonable doubt that Greer's evidence was truthful, reliable, and accurate in the case against Huxley but, rather, was required only to decide if her evidence (albeit in light of the *Robinson* direction) gave rise to a reasonable doubt about McCabe's cause of death.

31       Contrary to the concern of the trial judge, the making of two separate directions, one in the case against Rewha and another in the case against Huxley, would not have caused confusion. In the case of co-accused, juries are routinely directed to use some evidence against one co-accused only and to disregard the same evidence against another co-accused, even if the evidence may incriminate both co-accused.<sup>4</sup> In the present case, the mental exercise required of the jury would have been no more difficult. The trial judge could have given the *Robinson* direction applying generally (as the trial judge did). The trial judge could have given the required direction about Greer's evidence in the case against Rewha only (that the jury needed to be satisfied beyond reasonable doubt as to its truthfulness, reliability, and accuracy in order to convict Rewha). The trial judge could have given the required direction about Greer's evidence in the case against Huxley only (that, albeit in light of the *Robinson* direction, if, in the context of the whole of the evidence, the jury considered that Greer's evidence raised a reasonable doubt to the effect that McCabe's cause of death was the assault in the Burnda Street unit, Huxley had to be acquitted).

32       The appeal should be allowed, the conviction quashed, and a new trial ordered.

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4     *Webb v The Queen* (1994) 181 CLR 41 at 89, citing *R v Harbach* (1973) 6 SASR 427 at 433.

Gordon J  
Steward J  
Gleeson J

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GORDON, STEWARD AND GLEESON JJ.

## Introduction

33 Following a 23-day trial before a judge and jury, the appellant, Mr Huxley, was convicted of the murder of Michael McCabe. Mr Huxley was tried with two co-accused, Mathew Rewha and Leonie Doyle. Mr Rewha was found not guilty of assaulting Mr McCabe. Ms Doyle was found guilty of accessory after the fact to manslaughter. A fourth co-accused, Jason Taylor, was tried for the murder of Mr McCabe separately from Mr Huxley and was also convicted, on 15 May 2019.

34 Mr Huxley now appeals from a decision of the Queensland Court of Appeal<sup>5</sup> dismissing an appeal to that Court against his conviction. The appeal concerns the impact of a direction given by the trial judge during his summing-up to the jury about how the jury were to assess the evidence of a witness, Candis Greer. Aspects of Ms Greer's evidence were relevant to the prosecution cases against each co-accused, and to Mr Huxley's defence. In the course of providing instructions to the jury on the need to assess the credibility and reliability of witnesses, the trial judge gave the following direction ("the impugned direction"):

"You should only act upon [Ms Greer's] 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."

35 Mr Huxley contends that the impugned direction required the jury to be satisfied beyond reasonable doubt that Ms Greer's evidence was truthful, reliable and accurate before it could be used in their consideration of any of the three cases they were required to decide; that is, Mr Huxley submits that the impugned direction was not, and would not have been understood by the jury to have been, limited to the case against Mr Rewha. The effect of this, Mr Huxley submits, was that the impugned direction limited the use to be made of Ms Greer's evidence in his defence, by conveying that her evidence was to be disregarded if the jury did not accept it beyond reasonable doubt. The direction was correct insofar as it applied to the use of Ms Greer's evidence in the prosecution case against Mr Rewha but was wrong if it applied to Mr Huxley's defence because the jury should have



been entitled to accept some, all or none of Ms Greer's evidence in the case for Mr Huxley and, in the event that the jury did accept her evidence as it related to Mr Huxley's defence, Mr Huxley would have been entitled to an acquittal if Ms Greer's evidence raised a reasonable possibility that Mr Huxley was not guilty.

36 As originally framed in this Court, Mr Huxley's contention was that the impugned direction constituted a miscarriage of justice within s 668E of the *Criminal Code* (Qld). At the hearing of the appeal, Mr Huxley was granted leave to amend his notice of appeal to contend, in the alternative, that the impugned direction constituted a "wrong decision of [a] question of law" within s 668E.

37 The respondent conceded that, if the impugned direction applied to Mr Huxley's defence, then it involved an error of law, and a wrong decision of a question of law, that would require a retrial.<sup>6</sup> However, the respondent argued that the jury could not have understood the impugned direction in that way or, if they did, the jury could not have been left with that understanding by the conclusion of the trial judge's summing-up to the jury.

38 As explained below, the impugned direction would not have been understood by the jury to have been relevant to their assessment of Mr Huxley's defence. If the jury did understand the impugned direction in that way when it was given then, by the conclusion of the summing-up, the jury would have been in no doubt that the impugned direction was directed to the evidence of Ms Greer only in the prosecution case against Mr Rewha. Put differently, taken in the context of the whole of the summing-up, the impugned direction would not have been understood by the jury as requiring them to be satisfied to the beyond reasonable doubt standard before they could consider Ms Greer's evidence as it had the potential to raise a reasonable doubt as to whether he caused the fatal injury to Mr McCabe. Accordingly, the impugned direction would not have deflected the jury from their "fundamental task of deciding whether the prosecution has proved the elements of the charged offence beyond reasonable doubt",<sup>7</sup> including that they must acquit Mr Huxley if there was any reasonable possibility consistent with innocence. Counsel's failure to seek a redirection reinforces this conclusion.

39 It follows that there was no misdirection of law in the trial of Mr Huxley, no wrong decision by the trial judge of a question of law and no miscarriage of justice, and the appeal must be dismissed.

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6 *Criminal Code* (Qld), s 669(1).

7 *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [45].

## Principles

40 The principles governing miscarriage of justice by instructions to the jury were considered in *Hargraves v The Queen*.<sup>8</sup> The plurality identified the relevant principle, "expressed at a high level of abstraction",<sup>9</sup> as follows:<sup>10</sup>

"[T]he judge's instructions to the jury, whether by way of legal direction or judicial commentary on the facts, must not deflect the jury's attention from the need to be persuaded beyond reasonable doubt of the accused's guilt before returning a verdict of guilty."

41 Accordingly, "[i]n every case, the ultimate question must be whether, taken as a whole, the judge's instructions to the jury" deflected the jury "from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt".<sup>11</sup> The plurality emphasised that "[w]hether there has been on any ... ground whatsoever a miscarriage of justice must always require consideration of the whole of the judge's charge to the jury".<sup>12</sup>

42 These principles concerning the approach to a misdirection of law apply in the same way whether the misdirection is characterised as an "error of law", as a "miscarriage of justice",<sup>13</sup> or as a "wrong decision of any question of law".<sup>14</sup> With regard to this last category, "[a] 'wrong decision of any question of law' includes misdirections on matters of substantive law as well as misdirections on matters of adjectival law".<sup>15</sup> So, for example, a misdirection on a matter of law may amount to a "wrong decision of any question of law", at least where, as in this case, the

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8 (2011) 245 CLR 257.

9 *Hargraves* (2011) 245 CLR 257 at 277 [46].

10 *Hargraves* (2011) 245 CLR 257 at 276 [42].

11 *Hargraves* (2011) 245 CLR 257 at 277 [46].

12 *Hargraves* (2011) 245 CLR 257 at 277 [46].

13 See *Criminal Procedure Act 2009* (Vic), s 276(1).

14 See *Supreme Court Act 1933* (ACT), s 37O(2); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Code* (NT), s 411(1); *Criminal Code* (Qld), s 668E(1); *Criminal Procedure Act 1921* (SA), s 158(1); *Criminal Code* (Tas), s 402(1); *Criminal Appeals Act 2004* (WA), s 30(3).

15 *Filippou v The Queen* (2015) 256 CLR 47 at 54 [13].

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direction was made following a request to the trial judge for a direction so that it may be understood as the product of a "wrong decision".<sup>16</sup> A wrong decision of a question of law may also be made when a trial judge declines to give a redirection at the conclusion of a summing-up.<sup>17</sup>

43 A misdirection on a matter of law is always contrary to law; it is always a departure from the requirements of a fair trial according to law.<sup>18</sup> Where there is a misdirection or other error of law, the jury, which must take their instruction on matters of law from the judge, must necessarily be misled to some extent unless the error is corrected.<sup>19</sup> Whether a direction involves a misdirection on the law may depend upon contextual matters, including the issues at the trial, the evidence, closing addresses by counsel and the whole of the trial judge's summing-up.

44 Sometimes a misdirection on a matter of law will prevent the application of the proviso because it will be so serious that it will be a substantial miscarriage of justice irrespective of whether it might have affected the outcome of the trial. Sometimes it will not. Not every error of law, however trivial, will give rise to a substantial miscarriage of justice.<sup>20</sup> If there has been a misdirection or other error of law, the question is always whether there has been a substantial miscarriage of justice, and the resolution of that question depends on the particular misdirection and the context in which it occurred.<sup>21</sup>

## **Trial**

45 Mr Huxley was charged with the murder of Mr McCabe on or about 16 August 2015 at Crystal Creek or elsewhere in Queensland, contrary to ss 300 and 302 of the *Criminal Code*. Mr Rewha was charged with assault occasioning bodily harm in company and Ms Doyle with accessory after the fact to murder, or alternatively with accessory after the fact to manslaughter. A directed verdict of

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16 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 15 [49].

17 *R v Young* [2020] QCA 3 at [153].

18 *Kalbasi v Western Australia* (2018) 264 CLR 62 at 83 [57].

19 *Simic v The Queen* (1980) 144 CLR 319 at 328.

20 *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18]-[19]; *Kalbasi* (2018) 264 CLR 62 at 69-70 [12]; *Hofer v The Queen* (2021) 274 CLR 351 at 364-365 [41], 385 [106], 389 [116], 391-392 [123], 393 [130].

21 *Kalbasi* (2018) 264 CLR 62 at 83 [57].

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acquittal was entered in respect of the former charge against Ms Doyle before the impugned direction.

46 There were two key locations relevant to the alleged crimes: (1) a unit in Townsville where Mr Huxley was living during August 2015 and at which it was alleged that Mr Rewha assaulted Mr McCabe on 15 August 2015 ("the Burnda St unit"); and (2) the location at which the remains of Mr McCabe were ultimately found, a short distance off a road in the Crystal Creek area.

47 The prosecution case against Mr Huxley was, in short, that he had inflicted an injury that caused the death of Mr McCabe at or near the location where the remains were found. The only direct evidence in support of the prosecution's case was the testimony of an associate of Mr Huxley, Darren Hess. Mr Hess' evidence was that, during a conversation he had with Mr Huxley, Mr Huxley confessed that he had "done a hit on a bloke for \$10,000" by having picked up a rock and dropping it on his head. In addition to this confessional statement, there was also circumstantial evidence from which the prosecution claimed the jury could infer beyond reasonable doubt that Mr Huxley had inflicted the fatal injuries to Mr McCabe with the intent to cause his death or to cause him grievous bodily harm. This included phone and cell network details; vehicle movements; forensic evidence; medical evidence from expert witnesses on the nature and extent of the injuries discernible from Mr McCabe's remains; and the fact that blood splattering and Mr McCabe's DNA were found in the boot of a blue Holden Commodore associated with Mr Huxley.

48 Mr Huxley's defence was that there was a reasonable possibility that the fatal injuries were inflicted upon Mr McCabe during an earlier assault at the Burnda St unit, in Mr Huxley's absence, and not at the location where his remains were found. This possibility created an obstacle to the requirement that the jury be satisfied beyond reasonable doubt that it was Mr Huxley who caused the injuries resulting in Mr McCabe's death. Mr Huxley also strongly argued that the jury should reject Mr Hess' evidence of Mr Huxley's confession.

#### *Ms Greer's evidence*

49 Ms Greer's evidence was central to the prosecution's case that Mr Rewha assaulted Mr McCabe at the Burnda St unit because her testimony was the only evidence that Mr McCabe travelled to and was present at the unit and she had witnessed circumstances relevant to the assault. Her evidence was that she was outside the Burnda St unit when she heard a bit of a commotion, rustling around, the squeaking of a shoe and possibly a thud or more than one thud. She entered the living room/kitchen area and saw Mr McCabe on the ground, with Mr Rewha and an older man present. She did not see Mr Huxley or Ms Doyle. Mr McCabe was lying on his right side and blood was coming from his facial area; the amount of

blood she saw was "Hand size. Palm size"; Mr McCabe was "coughing and spluttering, saying something". Mr Rewha and the older man then took Mr McCabe to the garage. Mr McCabe was not supporting himself.<sup>22</sup>

50 At the time of the alleged crimes Ms Greer had been in a relationship with Mr Rewha, which was "rocky", and they had just split up. She was also friends with Ms Doyle. On the day of the alleged assault at the Burnda St unit, Ms Doyle and Ms Greer had gone out for a Saturday drive as an "outing for the day and a girls' day out". While out driving, they made a stop at the home of Ms Doyle's father; it was there that they met Mr McCabe. When they left, Mr McCabe went with them. Mr McCabe remained with them until they eventually ended up at the Burnda St unit. Ms Greer recalled Mr McCabe was sitting on a sofa in the unit and that Mr Rewha introduced himself to Mr McCabe. Ms Greer did not directly witness Mr McCabe being assaulted at the Burnda St unit and admitted that she only had a recollection of "bits and pieces" of that day. Her evidence of the circumstances of the assault, as described by the trial judge in his summing-up, was as follows:

"She and Rewha went out the back and they were outside for 10 to 20 minutes. At one stage Rewha got up and walked inside. She heard a commotion and a squeak of shoes. When she walked inside she saw Michael McCabe on the floor. [An] older man was on the far side of McCabe, close to him. She confirmed that when she had been outside, the screen door and the curtains between the interior and the exterior were closed. She saw blood on the floor.

The older fellow was kicking Michael McCabe and prodding him with an object. She saw blood pooling on the floor near where McCabe's head was. She saw McCabe being carried out through the door, leaving – giving access to the garage. This was the last time she saw McCabe."

51 There were two issues relating to Ms Greer as a witness which led the trial judge to give a direction that the jury must "scrutinise" her evidence "with great care" before accepting it as accurate and reliable (a "*Robinson*<sup>23</sup> direction"). The first was that, on the day of the events at the Burnda St unit, Ms Greer had consumed significant quantities of methylamphetamine combined with alcohol. In cautioning the jury about assessing the reliability of testimony of a broader

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22 See also Reasons of Gageler CJ and Jagot J at [12]-[14].

23 *Robinson v The Queen* (1999) 197 CLR 162 at 168 [20].

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category of witnesses who may have consumed drugs and alcohol, the trial judge explained that the consumption of those substances created a:

"risk that their powers of perception and recollection may have been so distorted or compromised by the combined effect of drugs such as methylamphetamine and also because of the delay between the time of the events they spoke of and of this trial that their evidence may not be based upon a true and reliable recollection but a confabulation comprised by the effects of drugs and time".

52 The second reason for the trial judge's warning to the jury about Ms Greer as a witness was that, when she was first called to give evidence on the third day of the trial, Ms Greer did not cooperate: she refused to enter the witness stand, would not take an oath or affirmation and refused to answer questions. This occurred in front of the jury. On the fourth day of the trial, when Ms Greer again refused to give evidence (this time in the absence of the jury), the trial judge charged her with contempt of court. Eventually, Ms Greer gave evidence on the ninth day of the trial.

*Prosecution's reliance on Ms Greer's evidence*

53 In its closing address, the prosecution emphasised that the case against Mr Huxley was that Mr McCabe was not killed at the Burnda St unit and was killed in the vicinity of Crystal Creek. The prosecution relied upon Ms Greer's evidence in the case against Mr Huxley to contend that the assault at the Burnda St unit was not fatal. Her evidence of Mr McCabe's vertical position when carried to the garage was said to suggest that he was not dead or even completely unconscious at that time.

*Mr Huxley's reliance on Ms Greer's evidence*

54 Conversely, Mr Huxley relied upon Ms Greer's evidence to suggest that Mr McCabe died from the assault in the unit, in which he was not implicated. Before this Court, Mr Huxley contended that the significance of Ms Greer's evidence to his defence was two-fold: (1) it had direct significance in that the testimony itself provided evidence of the circumstances of the assault; and (2) it had indirect significance in that it acted as the foundation upon which other forensic and medical evidence could be used by the defence to suggest that the alleged assault at the Burnda St unit was a fatal assault.

55 In his closing address, Mr Huxley's trial counsel submitted that Mr McCabe was viciously assaulted at the Burnda St unit when Mr Rewha was present, and Mr Huxley was not there. Counsel referred extensively and repeatedly to forensic evidence of Mr McCabe's blood in the unit, suggesting that there was a large

quantity of blood: on the kitchen bench, on the curtains, on the step, in the garage and soaked into a chair. He also referred to Ms Greer's evidence of observing the apparent aftermath of the assault of Mr McCabe, including Mr McCabe's condition lying on the floor and Mr Rewha and another man carrying him out to the garage. The ultimate submission, based on both the forensic evidence and Ms Greer's evidence, was that Mr McCabe had sustained fatal injuries at the Burnda St unit, and that these were inflicted by people other than Mr Huxley.

*Immediate context of the impugned direction*

56 The trial judge's summing-up occupied two days. It commenced on the afternoon of 16 September and was completed by late afternoon on 17 September 2019. It comprised five sections: (1) introductory/opening directions on the law; (2) a summary of the evidence; (3) specific indictment directions; (4) general observations by the trial judge; and (5) a summary of rival arguments in the closing addresses.

57 The impugned direction was given during the first section of the summing-up, in the course of the trial judge providing instructions about evaluating witness testimony. The trial judge's directions concerning Ms Greer's evidence were introduced by his observation that there were "two witnesses" whose circumstances required "special attention". By the end of the summing-up, the jury knew that these two witnesses, Ms Greer and Mr Hess, were the critical witnesses in the prosecution cases against Mr Rewha and Mr Huxley respectively and that it would be necessary to accept their evidence as it supported those cases beyond reasonable doubt in order to reach a guilty verdict in either case.

58 The trial judge first addressed Ms Greer's evidence. He emphasised the need for care in assessing the accuracy and reliability of her evidence. He noted that she was an important witness who gave the only evidence of "the circumstances of the assault" on Mr McCabe. The trial judge reminded the jury of Ms Greer's evidence of drug and alcohol consumption on 15 August 2015, and her admission that she only had a recollection of bits and pieces of what occurred that day. He then reminded the jury of Ms Greer's initial refusal to give evidence. As earlier mentioned, the trial judge gave the *Robinson* direction. These observations were unfavourable to the prosecution, and unfavourable to Mr Huxley (although consistent with principle) to the extent that Mr Huxley relied upon Ms Greer's evidence to raise a reasonable possibility that Mr McCabe was fatally injured at the Burnda St unit. As for the other witnesses who had consumed drugs and/or alcohol, the trial judge gave the strong warning that, like Ms Greer's evidence, their evidence "may not be based upon a true and reliable recollection but a confabulation comprised by the effects of drugs and time".

59 The trial judge then gave the impugned direction.

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### **The impugned direction**

60 The impugned direction bears repeating:

"You should only act upon [Ms Greer's] 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)

61 There are inherent limitations in assessing how the jury would have understood the summing-up by reference to the transcript of the trial alone. This Court did not have audio evidence of the summing-up; we do not know how the jury would have heard the words that appear in the transcript. The jury's understanding of the sentence beginning with "[i]n particular" in the impugned direction, which comprised 45 words, may have been affected by the emphasis or the cadence with which the words were spoken.

62 The first thing to notice is that, even divorced from the context of the entire charge, the immediate impression given by the explicit reference to Mr Rewha's case was that the trial judge was concerned with Ms Greer's evidence being used in an adverse way in the context of "the case against Mr Rewha". The italicised words can be understood in a way that treats the phrase "consistent with the directions I will give you" as no more than a parenthetical insertion in a sentence directed to making a particular point in relation to the case against Mr Rewha. The impugned direction did not point the jury explicitly to the use to be made of Ms Greer's evidence in Mr Huxley's defence. Mr Huxley's argument therefore depends upon the jury drawing an inference that the impugned direction applied to all uses of Ms Greer's evidence in the joint trial. For the following reasons, the jury would not have drawn that inference from the impugned direction.

63 First, Mr Huxley did not suggest that the first sentence of the impugned direction involved error. Accordingly, Mr Huxley's argument was that the jury would not have understood the second and third sentences to be narrower in their operation than the first sentence. However, in the second sentence, the words "[i]n particular" mark a qualification of, and departure from, the general direction in the previous sentence that the jury "should only act upon [Ms Greer's] evidence if", after considering her evidence with a warning about the effect of her consumption of methylamphetamine, and all the other evidence in the trial, they were "convinced of its truth and accuracy". Those words signalled to the jury that, in



contrast to the immediately preceding general direction, the words that immediately followed related to a particular aspect of the trial. Which aspect? That aspect was the case against Mr Rewha, as indicated by the phrase "in relation to the case against Mr Rewha". In contrast to the specific reference to the case against Mr Rewha, there is no reference at all at that point to Mr Huxley.

64 It is not obvious whether the phrase "in relation to the case against Mr Rewha" would have been understood by the jury as a qualification of the words that immediately preceded the phrase – "the directions I will give you" – or as a qualification of the words that immediately followed it – "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 it was the former (ie, the phrase was understood as a qualification of directions yet to be given in relation to the case against Mr Rewha), then the jury would have been left unsure about the scope of the direction except that it concerned, at least, the case against Mr Rewha and would be clarified by directions to be given in relation to that case. If it was the latter (ie, the phrase was understood as a qualification of the specific direction that followed), then the jury would have understood the direction to be concerned only with the case against Mr Rewha.

65 The latter understanding is more likely because, if the phrase was understood only to operate by reference to future directions, then the jury would not have received a coherent direction. Further, given that the future directions were foreshadowed to be made in relation to the case against Mr Rewha, and, as explained below,<sup>24</sup> the jury understood that the cases against the three accused were separate, it is improbable that the first sentence would have been understood as a direction about the use of Ms Greer's evidence in Mr Huxley's defence.

66 In the third and final sentence, the words "beyond reasonable doubt" and "truthful, reliable and accurate" link it to the second sentence and render it unlikely that the jury would have understood the final sentence to be a separate direction from the preceding sentence, which expressly linked the impugned direction to the case against Mr Rewha. For the jury to have understood the third sentence to apply to Mr Huxley's defence, they must have: (1) recalled that Ms Greer's evidence was relevant to that defence; and (2) decoupled that sentence from the previous one. It is conceivable that some members of the jury, hearing the sentence literally, may have inferred that it applied to all uses of Ms Greer's evidence. However, it is more likely that, at most, the jury were left wondering if this direction applied to using Ms Greer's evidence in relation to Mr Huxley's case.

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24 See [70].

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67 It follows, without more, that the impugned direction was not a misdirection. That conclusion is sufficient to dismiss the appeal. However, to the extent that any members of the jury would have been left wondering, the matter would have been put beyond doubt when the direction was considered in the context of the summing-up as a whole.

### **The summing-up taken as a whole**

68 As mentioned, the summing-up may be seen as comprising five sections. The impugned direction appears in the first section, which contains introductory and opening directions on the law. Both when read in the context of the first section, and then in light of the contents of the remainder of the summing-up, the impugned direction would not have been understood in the way for which Mr Huxley contends.

#### *Before the impugned direction*

69 The following aspects of the summing-up prior to the impugned direction reinforce this conclusion.

70 First, the jury were clearly informed that the trial involved three separate cases against three accused. Before giving the impugned direction, the trial judge then told the jury that the "[p]rosecution case against Mr Huxley" rested upon a confessional statement to Mr Hess and observed that the only direct evidence in support of the prosecution case against Mr Huxley for murder was the evidence of Mr Hess. The trial judge foreshadowed further and more elaborate directions about the "case of murder", and then stated that the jury must be satisfied beyond reasonable doubt that the evidence of Mr Hess was reliable and accurate because of its centrality to the prosecution case.

71 The trial judge then observed that the "case against each defendant" relied on or involved circumstantial evidence, but that circumstantial evidence was relevant only to a very minor extent in the "case against Mr Rewha". This was because the "heart" of the "case against" Mr Rewha was the evidence of Ms Greer. The trial judge contrasted this with the cases involving Mr Huxley and Ms Doyle, in which there was a substantial body of circumstantial evidence relied upon by the prosecution.

72 Accordingly, at the time of hearing the impugned direction, the jury were conscious that they must give the cases concerning each accused separate consideration and that the evidence as it related to each case was different.

73 Second, when the trial judge commenced addressing Ms Greer's evidence, the jury had recently been reminded of the significance of Ms Greer's evidence for the case against Mr Rewha, but not of the significance of her evidence in the cases

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against the other co-accused. The trial judge made no comment about the relevance of Ms Greer's evidence to Mr Huxley's defence prior to the impugned direction.

74 Third, the jury were made aware prior to the impugned direction that guilt must be established beyond reasonable doubt. The trial judge had already given the jury a direction about what was required for a verdict of guilty based entirely or substantially on circumstantial evidence. He then observed:

"If there is any reasonable possibility consistent with innocence it is your duty to find the accused, whichever one it may be that you are considering in context, not guilty. This follows from the requirement that guilt must be established beyond reasonable doubt."

It follows that, upon hearing a requirement to be satisfied beyond reasonable doubt, the jury's attention would likely have been focused on the prosecution case, rather than the defence cases, such that the impugned direction would not have been understood to apply to Mr Huxley's defence.

75 As has been mentioned,<sup>25</sup> the trial judge gave warnings to the jury about the need to closely scrutinise Ms Greer's evidence. This was on the basis that, on the day of the alleged assault at the Burnda St unit, Ms Greer was under the influence of drugs and alcohol, and that Ms Greer had admitted that she could only recall bits and pieces of what occurred that day. The trial judge also reminded the jury of Ms Greer's initial refusal to give evidence. These observations preceded the impugned direction, and may be accepted as having been unfavourable to Mr Huxley (although consistent with principle) insofar as they had the potential to cast doubt over the reliability and accuracy of Ms Greer's evidence, including as it might relate to Mr Huxley's defence.

76 However, the fact that these more general directions had the potential to operate against Mr Huxley has no bearing on the construction of the impugned direction. There was nothing in those earlier directions which required the jury to assess Ms Greer's evidence on the beyond reasonable doubt standard before it could be used in the case for or against Mr Huxley. In any event, and as the Court of Appeal observed, even if the jury determined not to accept Ms Greer's evidence, the trial judge had made clear that disbelief of a witness' evidence does not provide evidence of the opposite. Speaking to Ms Greer's evidence in particular, his Honour said:

"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.

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25 See [58] above.

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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."

*After the impugned direction*

77 Mr Huxley's contention is also at odds with several aspects of the summing-up after the impugned direction.

78 First, the impugned direction was immediately followed by instructions about the evidence of Mr Hess. After making observations adverse to Mr Hess' credibility, the trial judge gave a warning, in stronger terms than the preceding comments about Ms Greer, that "there are substantial grounds for concern that Mr Hess is not a reliable witness, and his evidence is not accurate". His Honour then gave the jury a similar direction to the impugned direction with respect to the jury's use of Mr Hess' evidence "in the case against Mr Huxley":

"As a matter of law, I instruct you that you can only act upon his evidence in the case against Mr Huxley if you are satisfied beyond reasonable doubt that his evidence is accurate and reliable. If you are not satisfied beyond reasonable doubt that the evidence of Hess is accurate and reliable, then you should disregard it. You should only act upon his evidence if, after considering it with the warning I have given in mind, and all the other evidence, that you are convinced beyond reasonable doubt of its truth and accuracy."

79 In the context of the whole of the summing-up, these two separate but similar directions, one given in relation to Ms Greer and the other given in relation to the evidence of Mr Hess as it related to "the case against Mr Huxley", make it all the more unlikely that the jury would have understood the impugned direction to have applied to Ms Greer's evidence beyond the case against Mr Rewha.

80 Second, in concluding the first section of the summing-up, the trial judge made further observations about the burden of proof upon the prosecution, repeatedly referring to the requirement of proof beyond reasonable doubt as a burden on the prosecution. These observations again focused attention on the relevance of the beyond reasonable doubt standard for the prosecution case, rather than the defence cases.

81 Third, at no point in the subsequent four sections did the trial judge instruct the jury to evaluate Ms Greer's evidence relevant to Mr Huxley's defence on the beyond reasonable doubt standard. Indeed, there was only one occasion in the entire summing-up where the trial judge referred to Ms Greer's evidence as part of

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the case against Mr Huxley. Referring to Ms Greer's evidence that neither Mr Huxley nor Ms Doyle was present when the alleged assault upon Mr McCabe at the Burnda St unit occurred, his Honour said that its relevance was:

"limited to being part of the narrative of the events which explains the presence of blood and DNA of McCabe 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 McCabe may have come into the boot of the blue Commodore. But recall it is no part of the prosecution case that either before or at the time of the alleged assault either were aware that the event might occur or aware of it."

82 In this context, the trial judge did not here repeat or provide a direction to the jury similar to the impugned direction.

83 Conversely, the trial judge did separately and expressly identify seven matters of which the jury had to be satisfied beyond reasonable doubt in order to convict Mr Huxley of murder:

"In summary, with respect to the prosecution case against Mr Huxley, in order to convict Mr Huxley of the murder of Michael McCabe, you would have to be satisfied, beyond reasonable doubt, of each of the following seven matters: (1) that the evidence of Darren Hess is truthful, accurate and reliable; (2) that Huxley did say the words that Darren Hess says was said; (3) that what Darren Hess says that Huxley said did happen, and is true; (4) that Michael McCabe is dead – and you put a big tick beside that; (5) that Brent Huxley did an act that inflicted an injury that caused the death of Michael McCabe; (6) that the killing was authorised, justified or excused by law – and you can put a tick against that; in other words, it was an unlawful killing; (7) that at the time Huxley did the act that inflicted the injury that caused the death of McCabe, he intended to cause the death of McCabe or to cause him grievous bodily harm."

84 None of the seven matters listed required satisfaction of the truthfulness, reliability or accuracy of Ms Greer's evidence. This can be contrasted with the first listed matter: "that the evidence of Darren Hess is truthful, accurate and reliable".

85 It is also notable that the fifth matter of which the jury had to be satisfied beyond reasonable doubt before convicting Mr Huxley was that the event discussed in the confessional statement to Mr Hess was the act which resulted in Mr McCabe's death and not some other event. On that particular matter, the trial judge gave the jury the following further instructions:

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"... item number 5; that Brent Huxley did an act that inflicted an injury that caused the death of Michael McCabe. Well, the only act that the evidence speaks of is through the mouth of Hess, and that is the dropping of the rock. It is a circumstantial case, even if you assume for the moment, that it's a true account because you then have to be able to connect the dots with the evidence that that act caused the injuries that caused the death, and that the injuries the doctors are talking about, to the head, caused the death and not some other event. And you have to be satisfied of all of that, beyond reasonable doubt."

86 As the respondent submitted, this direction likely had the effect of framing Ms Greer's evidence in the minds of the jury as an obstacle in the pathway to Mr Huxley's conviction. The impugned direction was not repeated.

87 Fourth, in the third section of the summing-up, the trial judge worked his way down the indictment to give specific indictment directions to the jury for each of the counts against each of the accused. This reinforced the earlier instructions that the jury must give the case against and for each of the defendants separate consideration. First, addressing the case against Mr Rewha, the trial judge referred back to the direction he gave the previous day concerning Ms Greer's evidence. In contrast, he did not do this later in addressing the case against Mr Huxley. The trial judge also linked the requirement to be satisfied as to Ms Greer's evidence beyond reasonable doubt with the prosecution's burden of proof. His Honour referred to the requirement for guilt that Ms Greer's evidence be accepted beyond reasonable doubt three times.

88 Addressing the case against Mr Huxley, the trial judge referred repeatedly to the need to accept the prosecution case beyond reasonable doubt and, five times, to the need to accept Mr Hess' evidence beyond reasonable doubt to reach a verdict against Mr Huxley. Addressing Mr Huxley's defence, the trial judge gave no similar direction concerning the use of Ms Greer's evidence. Rather, there were references to the "reasonable possibility that McCabe died as a result of the injuries sustained in the event Greer speaks of"; to the "reasonable possibility that McCabe died as a result of other causes"; and to considering the opinion evidence "together with the possibility that the injuries were caused in the assault that Greer speaks of".

89 The trial judge next addressed the case against Ms Doyle and referred to four elements to be proved beyond reasonable doubt, the fourth including an act based on Ms Greer's evidence – that Ms Doyle requested Ms Greer to provide a false statement to police. The trial judge referred to the requirement that the jury be satisfied beyond reasonable doubt "that the evidence persuades you that Ms Doyle did these acts, or any of them". This is again repeated later, drawing

attention to the requirement that Ms Greer's evidence on this question was required to be considered on the beyond reasonable doubt standard.

90 The fifth relevant aspect of the summing-up following the impugned direction is that, in giving further directions concerning the circumstantial nature of the case against Mr Huxley, the trial judge reiterated that if there was any reasonable possibility consistent with innocence the jury must find Mr Huxley not guilty.

91 Sixth, immediately before commencing a summary of the parties' rival contentions, the trial judge made observations concerning the events at the Burnda St unit. The observations, favourable to Mr Huxley, suggested that the jury consider possibilities about the severity of the assault and, in effect, whether it was more serious than the evidence of Ms Greer might have suggested. The observations were premised upon an acceptance of Ms Greer's evidence, particularly by referring to possibilities "before Greer entered the room" twice. There is no suggestion that this acceptance was required to be reached beyond reasonable doubt.

### **Significance of lack of request for a redirection**

92 Finally, when asked at various points throughout the summing-up and at the close of the day, trial counsel for Mr Huxley did not seek a redirection. As French CJ, Crennan and Kiefel JJ observed in *King v The Queen*, a decision not to seek a redirection by defence counsel at trial, which may be made for a variety of reasons, "informs consideration of the extent to which, taken in context, the direction was likely to confuse or mislead the jury".<sup>26</sup>

93 Mr Huxley submitted that counsel at trial did not seek any redirection because there was an earlier "ruling by the trial judge that had already determined the issue". As explained below, the trial judge had not determined the issue, and defence counsel's failure to seek a redirection after the impugned direction did not conform precisely with the earlier ruling indicates that trial counsel did not consider the jury to have been confused or misled by the impugned direction.

94 The earlier ruling is said to have been given on day 14 of the trial when, in hearing argument in respect of the possible discharge of the jury, the trial judge raised the subject of the directions to be given to the jury in respect of Ms Greer

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26 (2012) 245 CLR 588 at 611 [55]; see also *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at 557 [54]-[55].

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and other witnesses. The relevant exchange that preceded the ruling was as follows:

"HIS HONOUR: Because there is no evidence against Mr Rewha without her evidence, it follows that the jury must be instructed, doesn't it, that they – unless they're persuaded beyond reasonable doubt that Ms Greer's evidence is accurate and reliable, they must reject it, I suppose.

MR WALTERS [counsel for Mr Huxley]: That might be - - -

HIS HONOUR: Because there is no other evidence against Mr Rewha.

MR WALTERS: Well, that's very prejudicial to my client's case.

HIS HONOUR: Well, is it that there is, then, no evidence of the assault at the unit, except for the blood?

MR WALTERS: Exactly, and her evidence quite clearly exonerates my client from that, and - - -

HIS HONOUR: Well, that's – the jury can't – the jury can't be told to have it both ways. To use it, if satisfied, on the balance of probabilities against A and B, but to only use it against C on – beyond reasonable doubt - - -

HIS HONOUR: - - - the – that would be a madness direction, leading to total confusion. ...

MR WALTERS: Yes, your Honour, but my concern is this – is if the jury is told or invited to entirely – so far as my client's case is concerned – is to dismiss her evidence completely.

HIS HONOUR: Well, no, the direction will be – there will be a *Robinson* – there will be a direction that they should only act on it if they're persuaded that it's reliable – true and reliable beyond reasonable doubt. It has to be the direction in the Rewha case.

MR WALTERS: Yes.

HIS HONOUR: And why should – and it would be gibberish to be telling the jury that in respect of its admissibility or its application for the other defendants, there's a different test to be applied. The jury is - - -

MR WALTERS: I hear – look, I know the logic of what your Honour is saying, of course, but her evidence is - - -



HIS HONOUR: But this shouldn't be news to you because it would be plain that that was going to have to be the direction to the jury from the moment the Crown made the concession that the only case against Mr Rewha was Ms Greer's evidence, and if that's the only case, it must be proved beyond reasonable doubt."

95 This exchange led to a ruling in which the trial judge foreshadowed a direction that the jury could only convict Mr Rewha if they were satisfied beyond reasonable doubt that Ms Greer's evidence was accurate and reliable. Expressed in that way, the ruling said nothing about the use of Ms Greer's evidence in relation to Mr Huxley. Later in the ruling, the trial judge added: "[i]t will not be overlooked that the evidence of Ms Greer has significant ramifications in the case against Mr Huxley".

96 Mr Huxley contended that the exchange set out above reveals the intended effect of the impugned direction and further submitted that the prosecution's closing in the trial was entirely consistent with the impugned direction having the effect contended for by Mr Huxley. In closing, the prosecutor stated:

"Okay. Now, back to Mr Rewha. His evidence – his – the case against him depends exclusively on the evidence of Ms Greer. Since her evidence is so important to the prosecution case, do you approach her evidence in any way different from as I've outlined her to you in relation to Mr Huxley? No. You approach her evidence with the same caution, bearing in mind the same difficulties with her memory, as you do in the case of Mr Huxley."

97 Mr Huxley's submissions on the relevance and effect of these exchanges should not be accepted, not least because the trial judge's comments on day 14 of the trial were not carefully formulated directions given to a jury and the subject ruling did not conform to those comments. The comments were made in the context of an exchange with counsel in the absence of the jury, and well before the actual delivery of the impugned direction during the summing-up. If anything, the ruling suggests that the trial judge had retreated to a recognition, favourable to Mr Huxley, that the relevance of Ms Greer's evidence for Mr Huxley should not be "overlooked" in the summing-up.

98 Further, and in any event, those remarks do not reveal an intention on the part of the trial judge that the jury be instructed that they must assess Ms Greer's evidence on the beyond reasonable doubt standard for the cases of each of the co-accused. Rather, his Honour's remarks indicate that the direction needed to be so framed in the context of using the evidence as a pathway towards conviction. The particular passage of the prosecutor's closing at trial to which Mr Huxley has referred does not lead to a contrary view. What was said there cannot be said to endorse a future direction to the jury that they must only act upon Ms Greer's

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evidence as it relates to each of the co-accused if they are satisfied beyond reasonable doubt of its truth, reliability and accuracy. To read the passage in that way would be to reverse what was actually said. The prosecutor was emphasising that the beyond reasonable doubt standard applied to the case against Mr Rewha.

99           The better view is that, in referring to "the same caution", the prosecutor there was referring to his earlier remarks that "you must use some caution with is [sic] Ms Greer, because she was so heavily intoxicated on the day, and she qualified her memory in so many different ways of, 'I can't remember'. She had islands of memory." Accordingly, the prosecutor's statement that the jury were to approach Ms Greer's evidence with the same caution in both Mr Huxley's defence and the case against Mr Rewha is a statement that goes more to the general direction later given by the trial judge on the need to bear in mind the effect of drug use on particular witnesses when evaluating their evidence.

## **Conclusion**

100           The appeal must be dismissed.

