Ladd v The Queen [2009] NTCCA 6

PARTIES:	LADD, Godwin v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA8 of 2008 (20720322)
DELIVERED:	20 May 2009
HEARING DATES:	6 and 9 March 2009
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL AND MILDREN JJ
APPEAL FROM:	RILEY J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION – ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT EVENTS

Admissibility of events subsequent to charged incident – prejudicial versus probative value – appeal dismissed.

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION – DIRECTIONS ON INTENTION

Whether trial Judge erred in leaving intention to kill open as a fault element – whether the trial Judge erred in failing to distinguish the intention to engage in the conduct causing death and the intention to cause death – whether direction required in terms of s 43AI(2) of the *Criminal Code* – examination of trial Judges' use of the word "accident" – s 43AM of *Criminal Code* – whether the trial Judge should have directed the jury as to

recklessness – appeal dismissed.

CRIMINAL LAW – APPEAL – DIRECTIONS ON INTOXICATION

Intoxication – directions as to burden of proof – directions as to capacity to form intention to kill or seriously harm and whether intent existed – appeal dismissed.

CRIMINAL LAW – APPEAL – DIRECTIONS ON THE STANDARD OF PROOF

Directions as to proof beyond reasonable doubt – question by jury as to meaning – attempt to explain "beyond reasonable doubt" – direction that the Crown is not required to prove its case "beyond all doubt" – appeal dismissed.

Criminal Code (NT) Pts II, IIA, IIAA; Sch 1; ss 1, 31, 43AA, 43AB, 43AC, 43ACA, 43AD, 43AE, 43AF, 43AG, 43AH, 43AI, 43AJ, 43AK, 43AL, 43AM, 43AN, 43AO, 43AS, 43BF, 43BS, 154, 156, 160, 162, 163 and 302; *Criminal Code* (Tas) ss 13 and 172; *Criminal Code Amendment (Hit and Run and Other Endangerment Offences) Act 2008* (NT); *Criminal Law Consolidation Act* (SA).

Charlie v The Queen (2000) 199 CLR 387; *Doney v The Queen* (1990) 171 CLR 207; *Green v The Queen* (1971) 126 CLR 28; *La Fontaine v The Queen* (1976) 136 CLR 62; *Murray v The Queen* (2002) 211 CLR 193; *Parker v The Queen* (Unreported, Western Australian Court of Criminal Appeal, Malcolm CJ, Ipp and Steytler JJ, 26 May 1995); *R v Chatzidimitriou* [2000] 1 VR 491; *R v Floyd* [1972] 1 NSWLR 373; *R v Graham* (2000) 116 A Crim R 108; *R v Gonclaves* (1997) 99 A Crim R 193; *R v Hayes* (1986) 128 LSJS 460; *R v Ho* (2002) 130 A Crim R 545; *R v Neilan* [1992] 1 VR 57; *R v Nguyen* (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Sully and Hidden JJ, 1 October 1988); *R v Pahuja* [1988] 15 Leg Reg SL 4; *R v Pahuja* (1988) 49 SASR 191; *R v Reeves* (1992) 29 NSWLR 109; *R v Stirling* [1996] QCA 342; *R v Wilson, Tchorz and Young* (1986) 42 SASR 203; *Spencer v The Queen* (2003) 137 A Crim R 444; *Thomas v The Queen* (1960) 102 CLR 584; *Vallance v The Queen* (1961) 108 CLR 56; *Viro v The Queen* (1978) 141 CLR 88, discussed.

Alford v Magee (1952) 85 CLR 437; *Darkan v The Queen* (2005) 227 CLR 373; *R v Barlow* (1997) 188 CLR 1; *R v Crabbe* (1985) 156 CLR 464; *R v Floyd* (1973) 47 ALJR 420; *R v Krosel* (1986) 41 NTR 34; *R v O'Connor* (1980) 146 CLR 64; *R v O'Leary* (1946) 73 CLR 566; *Shepherd v The Queen* (1990) 170 CLR 573, referred.

REPRESENTATION:

Counsel:

Appellant:	M Croucher
Respondent:	N Rogers

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid
Respondent:	Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ladd v The Queen [2009] NTCCA 6
No. CA8 of 2008 (20720322)

BETWEEN:

GODWIN LADD
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 20 May 2009)

Martin (BR) CJ:

Introduction

[1] This is an application for leave to appeal against a conviction for murder. The grounds of the application complain of the wrongful admission of evidence and errors in the directions to the jury concerning intention, intoxication and the standard of proof.

[2] Leave to appeal is not opposed. I will refer to the applicant as the appellant. For the reasons that follow, I would grant leave in respect of each ground but dismiss the appeal.

Facts

[3] The essential facts were not in dispute. During the afternoon of 26 July 2007 the appellant, deceased and others were in a backyard of residential premises at Tennant Creek drinking alcohol. Two witnesses, Ms Sally Carr and Mr Darius Chungaloo, saw the appellant stab the deceased in the chest. The learned trial Judge summarised the evidence of those witnesses in his directions to the jury in the following terms:

> "[Sally Carr] was out in the back yard with the accused and the deceased, they were drinking beer. She said that at one point she went to the toilet and when she came out the deceased and the accused were standing together and she said he, that is Mr Ladd [the accused], got a knife from out of nowhere.
>
> She then tried to grab his wrist and he punched her in the chest so that she fell backwards. He then stuck the knife into the deceased. The deceased stood there for a little while then fell to the ground. She told you that Mr Ladd then took off with the knife in his hand and he went out through the back gate.
>
> … She told you that she was not aware of any argument between Mr Ladd and Ms Bob [the deceased]. She was not aware of any reason and there was nothing obvious to her as to why the stabbing occurred. She did not hear either of them say anything immediately before the stabbing occurred.
>
> There was nothing that gave her a reason for what did occur. She told you that the accused man held the knife in his right hand and she demonstrated the stabbing motion to you. You will recall that. … She said that the victim and the accused were intending to make a fire. She said that the accused was not really drunk. That was the first evidence she gave; he was not really drunk.
>
> Then she was taken to her police statement and she agreed that he was full-drunk. …
>
> …

> [Darius Chungaloo] is 18 years old and he was the nephew. He had been to the house that day and he had been drinking moselle himself. … He said that he saw the accused, that is Mr Ladd, and he described him as being blind drunk. …
>
> … He told you he was sitting by himself. He saw the accused get up and stab his aunty in the chest. He saw the knife and he drew a picture of that; you have that picture. He described a forward thrust with the knife, so slightly different to what Sally Carr described. He said his aunty did not say anything and nor did the accused. She fell back and he saw blood on her chest. The accused then took off.

[4] Although the appellant did not give evidence, the act of stabbing was not in dispute. Nor was it disputed that the stabbing caused the death of the deceased. The trial was conducted on the basis that the critical issue was whether the Crown had proved an intention to cause death or serious harm. As counsel for the appellant put it to the jury in his closing address:

> "Now, as I said to you at the beginning of this trial, the principal issue for your consideration is the state of mind of the accused man, Godwin Ladd at the relevant time, which is when he stabbed Ms Bob. There's been no issue as to the identity of the offender, no issue as to the cause of death. The issue is, did he have the requisite intent, the requisite murderous intent."

[5] It was also common ground that prior to stabbing the deceased the appellant had been consuming alcohol. The issue of the appellant's state of intoxication was of importance in relation to the question of intention. Counsel for the appellant put to the jury that by reason of the appellant's intoxication, they should have a doubt about his state of mind and specifically put to the jury that guilty of manslaughter was the "proper verdict".

Ground 1 – Second Incident

> **The learned trial Judge erred as a matter of law and/or in the exercise of his discretion in admitting the evidence of the events – and in particular, the assault by the applicant – that occurred at the Emporium Shop in Tennant Creek; and in particular, he erred in failing to give any or sufficient weight to the risk of prejudice to the applicant by reason of impermissible use of that evidence or to the risk that any such prejudice would not be cured by judicial directions.**

[6] Ground 1 concerns the admission of evidence as to a second incident on the day in question in which the appellant attempted to stab his former partner with the knife used to stab the deceased. The appellant contended that the evidence was inadmissible or, in the alternative, that the evidence should have been excluded by the trial Judge in the exercise of his discretion.

[7] The timing of the two incidents was relevant to an assessment of the probative value of the second incident. Two times were established with certainty. First, the call to the ambulance after the stabbing was received at 4.30pm. Secondly, at 4.40pm a police officer spoke to the victim of the second incident, Ms Wendy Kitson, at the locality of that incident. The critical time was the time at which the stabbing of the deceased occurred and that time could not be established with precision.

[8] The times to which I have referred were given in evidence before the jury. When objection was taken to the admission of the evidence prior to the empanelment of the jury, the time of the stabbing was a matter of debate, but the trial Judge proceeded on the basis that the second incident took place within 15 to 30 minutes of the fatal stabbing.

[9] The initial ruling of the trial Judge given immediately at the conclusion of the submissions was as follows:

> "HIS HONOUR: And it seems to me that it does have probative value, excepting [sic], as I do, for the moment, that the incident at the house took place within 15 to 30 minutes of the incident at the shop. It is evidence, it seems to me, that the jury could consider has some impact upon the true state of mind of the accused man on the earlier occasion given that he has been shown to be able to formulate an argument [sic] to attack a person know [sic] has been specifically selected as a person to whom he wishes – with whom he wishes to remonstrate and who bears a relationship to him, not just someone who happens to be present while he's in this state.
>
> I will deliver reasons at a later time, but it seems to me that it's probative value does outweigh it's prejudicial value and that the jury can be directed in a manner which would prevent them from following a false path of reasoning as suggested by Mr Georgiou."

[10] The following day his Honour delivered additional reasons in the following terms:

> "Prior to Mr Ladd being arraigned, there was some legal argument in this matter, in which the Crown raised the issue of evidence it proposed to lead regarding events that occurred shortly after the deceased was stabbed on 26 July 2007. One of the identified issues in this case, is whether the Crown can establish the necessary intent on the part of the accused, to cause death or to cause serious harm to the deceased. It has been foreshadowed in the course of argument, that the evidence will show that the accused was intoxicated to a significant extent at the relevant time.

The issue will be whether his intoxication was such, that the Crown cannot establish that he was capable of forming the necessary intent or that he in fact, did form the necessary intent. In order to meet this concern, the Crown wishes to lead evidence to the effect, that shortly after the deceased was stabbed, the accused left the scene and soon thereafter, entered a shop in Tennant Creek. He there confronted his former female partner, Ms Kitson. He spoke to her in an aggressive manner, seeking money from her and criticising her for spending money on her family.

There is evidence from various witnesses, to the effect that he spoke with her in that manner and he then endeavoured to stab her. The evidence will be, as I understand it at this stage, the knife used on each occasion, was the same knife. If it [sic] the submission of the Crown, that this evidence is relevant to the state of mind of the accused at the time of the alleged offence, which was less than half an hour before the incident at the shop.

The evidence of what was discussed and what was said by the accused on the later occasion, indicates that he was aggressive, but also may show that he was capable of speaking with Ms Kitson, criticising her and making demands of her. This evidence, which if accepted, may be found by the jury to display a degree of mental capacity, at a time relevant to the issue to be decided by them. His aggressive state was not random, nor directed towards whoever came into his path, but rather was directed to a particular relevant individual known to him, regarding a particular issue which he was able to articulate at the time. It may show that he knew what he was doing. In his evidence, which may assist the jury to assess his capacity to form an intention on the occasion of the stabbing which occurred a short time earlier.

Counsel for the accused opposed the receipt of the evidence, firstly arguing that the disputed evidence does not show that the accused was not so inebriated as to be incapable of forming the necessary intent. In my view, the evidence is capable of assisting the jury and does have probative value. It will of course, be a matter for the jury as to what they make of it. Counsel then requested that the evidence be excluded in the exercise of my discretion. It was argued that the prejudicial effect of the evidence outweighed the probative value of the evidence. Such evidence, it was said, may be used by the jury to conclude that the accused person is a person of bad character with a propensity for violence and the jury may impermissibly use such

> evidence as being probative of a murderous intent on the occasion of the first stabbing.
>
> I do not accept that to be so. The violence of the accused in relation to the stabbing of the deceased is not in dispute. The issue is, whether he had the necessary intent. In my view, the evidence is capable of assisting the jury in determining that issue. *Insofar as there maybe* [sic] *some potential for prejudice to the accused, which I must say is doubtful at this stage*, it may be met by an appropriate direction against impermissible reasoning." (my emphasis)

Second Incident - Admissibility

[11] In support of his contention that the evidence was inadmissible because it lacked any probative weight, counsel for the appellant on the appeal submitted there was "too much doubt about the lapse of time" between the two incidents and, in addition, contended that the appellant "may well have sobered up" after the stabbing.

[12] As to the time at which the fatal stabbing occurred, Mr Chungaloo said that after the stabbing, he ran out to the front of the premises looking for help. He ran from 19 Ford Crescent to 31 Ford Crescent, spoke to a Mr Joseph Mick, and then returned to 19 Ford Crescent. After attempting to talk to the deceased who was lying on the ground being held by Ms Sally Carr, Mr Chungaloo found a weapon at the rear of the premises and went looking for the appellant.

[13] In the meantime, Joseph Mick had approached a police officer, Constable Sanderson, who happened to be outside 11 Ford Crescent and informed her that police were needed. Constable Sanderson spoke with the Tennant Creek

police station via police radio and then drove around Ford Crescent to number 19.

[14] Immediately after arriving at 19 Ford Crescent, Constable Sanderson spoke to a male person. She recorded the time of the conversation as 4.30pm. She then moved to the rear of the premises and looked at the deceased's injuries, after which she went to the rear of the premises as she had been informed that the offender had left the area in that direction. While at the rear of the premises she saw Mr Chungaloo carrying a piece of metal piping and disarmed him.

[15] It was open to the jury to infer that Mr Chungaloo had approached Mr Mick within a few minutes of the stabbing and that, within a further few minutes, Mr Mick approached Constable Sanderson. As Constable Sanderson recorded the time at which she first spoke to a person at the premises of the stabbing as 4.30pm, being the same time as the ambulance received a call, it was open to the jury to infer that the call to the ambulance at 4.30pm was made within about ten to 15 minutes of the stabbing.

[16] As to the second incident, in my view it was open to the jury to conclude that the appellant was at the scene by about 4.40pm. The second incident was of short duration and a witness, Ms Efsta Noble, telephoned police during the incident. Police were at the scene by 4.50pm.

[17] It is unnecessary to refer to other evidence concerning the times. Various estimates were made and it was open to the jury to either accept or reject

those estimates. Depending on the route taken, the distance from the scene of the fatal stabbing to the second incident was between 1.04 kilometres and 1.19 kilometres. It was open to the jury to infer that the second incident occurred about half an hour or less after the fatal stabbing.

[18] While the time that elapsed between the stabbing and the second incident is relevant to an assessment of the probative value of the evidence, it is not the single determinative factor. Regard must also be had to the behaviour of the appellant during that incident.

[19] In summary, the appellant sought out his former partner, Ms Kitson, who was inside a retail store with her children. While Ms Kitson was standing at a counter paying for a purchase, the appellant entered the store and walked toward her speaking in language. He said "I stabbed the woman already and I want the money. Where's the kid's money?" The appellant also spoke in English saying "You're spending all your money on your family". The appellant was angry and, according to the evidence of two store attendants, kept saying in English that she was spending all her money on her family.

[20] The witnesses varied in their recollections of the altercation between the appellant and Ms Kitson and its immediate aftermath. It is clear, however, that a young male person and an older lady intervened and attempted to keep the appellant away from Ms Kitson. During the altercation the appellant dropped the knife. Although the appellant's daughter said that she saw the appellant stumbling outside the shop on his way into the premises, there was

no suggestion from any witness that the appellant displayed any lack of coordination inside the store.

[21] It was open to the jury to conclude that the appellant did not choose someone at random to attack. Rather, the appellant entered the shop with a purpose in mind and attempted to carry out that purpose by stabbing his former partner. It was open to the jury to find that the appellant selected his former partner and expressed a specific grievance. Some of the appellant's complaints were in English and were understood by witnesses in the premises. The appellant disclosed a memory of what he had just done when he spoke of having stabbed the woman.

[22] The witnesses to the second incident gave significantly different opinions as to the extent to which the appellant was affected by alcohol but, independently of those opinions, the memory and degree of physical and mental coordination demonstrated by the appellant was of probative value in assisting the jury to assess the degree of his intoxication and his mental capacities at that time and earlier. Further, when police spoke to the appellant soon after the second incident from about 4.50pm to 5.00pm, notwithstanding that the appellant was sufficiently intoxicated to lead the interviewing officer to defer formal questioning, the appellant disclosed a significant degree of comprehension. The appellant answered all questions in a responsive manner. He gave his date of birth and said he had been living at his father-in-law's house because there was too much mess at 19 Ford Crescent. Given a caution, the appellant said he did not want to say

anymore. Asked who might listen to the tape, he replied "the judge". The appellant gave the name of his former partner, her address and the name of another person to be contacted. He said he wanted to see his lawyer.

[23] In my opinion, the evidence of the appellant's behaviour during the second incident possessed significant probative value as to the appellant's capacity to think and act rationally and with a purpose in mind at the time of the stabbing. It also possessed significant probative value as to the degree to which the appellant was affected by alcohol at the time of the stabbing. In turn, the extent of the intoxication bore directly upon the critical question of whether the appellant formed an intention to cause death or serious harm. In addition, the physical actions of the appellant during the second incident were directly relevant to the defence case that by reason of intoxication, the appellant may have lacked coordination and may have struck out not intending to stab the deceased in the chest.

[24] The Crown submitted that the evidence was also admissible because the appellant's conduct "formed an integral part of a transaction consisting of connected events, the attack on the deceased at 19 Ford Crescent and the attack on Wendy Kitson at the Emporium". This submission was based upon the principle enunciated in *R v O'Leary*.[1] On this line of reasoning, the Crown contended that the evidence of the second incident was capable of tending to support a conclusion as to the appellant's state of mind at the time of the stabbing.

[1] (1946) 73 CLR 566 at 577 and 578 per Dixon J.

[25] This argument has some force as the evidence of the second incident tended to demonstrate that the appellant was in an aggressive state of mind. It was capable of tending to rebut the defence case that, in the absence of any evidence of aggression at the time of the stabbing, the jury should have a doubt about the appellant's intention. However, as the evidence was not left to the jury on this basis, it is unnecessary to finally decide this question. For the other reasons I have discussed, the evidence possessed probative force and was admissible.

[26] As to an assessment of the probative value, counsel for the appellant submitted that the trial Judge erred in his approach to this question. The written submissions advanced the proposition that the trial Judge erred in determining that the evidence "bore on the question whether the applicant was 'not so inebriated as to be *incapable of forming* the necessary intent'". This submission misstates his Honour's approach. The issue identified by his Honour went beyond the question of capability of forming the necessary intention and included the critical question whether, in fact, the appellant formed the necessary intention.

Second Incident – Discretionary Exclusion

[27] As to the exclusion of the evidence in the exercise of the discretion, the trial Judge considered the question of potential prejudice and determined that such prejudice could be avoided with appropriate directions. His Honour rejected the suggestion that the jury might "impermissibly use such evidence

as being probative of a murderous intent on the occasion of the first stabbing". In the reasons earlier cited, his Honour observed that the accused's violence in stabbing the deceased was not in dispute and, in these circumstances, his Honour was "doubtful" that there was potential for prejudice. He concluded that to the extent such potential existed, it could be met with an appropriate direction.

[28] I am unable to discern any error in the approach of the trial Judge. His Honour correctly addressed himself to the relevant principles. I agree with his Honour's assessment as to the potential for prejudice. This was not a case in which an accused denied committing an act of violence and evidence was led demonstrating a propensity for violence on the day in question. As the trial Judge observed, the act of violence was not in dispute. The risk of an impermissible line of reasoning with respect to the issue of intention was minimal.

[29] In the context of the prejudicial effect of the evidence, as an alternative to his primary submission, counsel for the appellant contended that evidence of the appellant's level of intoxication at the time of the second incident could have been led without reference to the appellant's conduct in attempting to stab his former partner. In my view, however, not only would this approach have distorted the evidence, it would have omitted evidence of the appellant's words and conduct that were highly probative of his physical and mental state.

[30] The evidence being admissible, the ultimate question for this Court is whether by reason of the prejudicial effect of the evidence a miscarriage of justice has occurred. This requires consideration of the potential prejudicial effect of the evidence about which I have already indicated my view. Regard must also be had to the directions given to the jury.

[31] After the first witness had given evidence concerning the incident at the store, the trial Judge gave the following directions to the jury:

> "HIS HONOUR: Ladies and gentlemen I want to say something, just about that evidence that you heard a moment ago, and it seems there's going to be some more evidence about a second incident that took place at a different location.
>
> We have the stabbing of the deceased which took place in Ford Street or Ford Crescent. And then, we have another incident that took place in the Sports Store, which is a different location, some distance from where the first incident took place.
>
> It hasn't as yet been established that the gentleman at the second place, was Mr Ladd, and the Crown will have to establish that. For the purposes of what I'm saying to you now, I want you to assume that they're going to establish that. If they don't, then that evidence is totally irrelevant and has got nothing at all to do with it.
>
> But if they establish that the evidence that Ms Noble just gave, concerned Mr Ladd, and that he was the man there with the knife, then what I have to say to you now is very, very important for you to understand. And it is a matter of law, which means that you must accept what I say about this. Matters of fact are for you remember, and matters of law for me.
>
> What you have then, is a separate incident from the one that we are primarily concerned with. The incident we are primarily concerned with, happened in 19 Ford Street. This is an incident that happened somewhere else, on a much later – or on a later occasion, just how long, we don't know as yet.

Normally, evidence of what happens on a different occasion, would not be received in court, because it's got no relevance to what we have to decide – indeed, not what we have to decide, but what you have to decide. It is a separate incident and has no relevance to the events that we are concerned with.

However, I have allowed the prosecution to lead this evidence, that is evidence of what happened at the store, for one reason and for one reason only. You know from the start of the trial, from what was said to you by Mr Shaw and what was said to you by Mr Georgiou, that an issue in this case is the level of intoxication of Mr Ladd and more importantly, whether the Crown can establish that he was capable of forming an intent to either cause the death of the deceased or to cause her serious harm.

So there's a real issue about whether he – Mr Ladd, was capable of forming an intent because of his level of intoxication. And you have already heard some evidence that he was quite drunk. I think the last witness, the young man, who's name was Darius Chungaloo, told you that he was blind drunk.

Now the Crown has to establish, beyond reasonable doubt that he could form the intention to cause the death of the deceased or cause her serious harm, and that he in fact did so. And it is for the Crown to satisfy you about that. So the Crown must prove beyond reasonable doubt that he had the relevant intention.

I have allowed this evidence to go in, of something that happened afterwards at a different location, because it may, and I emphasise may, it will be a decision for you. But it may assist you in determining just how affected by alcohol, Mr Ladd was, at the time of the stabbing of the deceased.

The evidence that has been led from Ms Noble, relates to a time after that stabbing, but you may think it will help you to determine what he was like at the time of the stabbing. It may assist you in determining just how affected he was.

Now, we don't have much evidence in relation to the time of the stabbing as yet, and we don't have much evidence as to the time of the incident at the store, and we don't know yet, how close they were together. That is something, in relation to which I assume there will be some more evidence, and you ultimately will have to make a

decision as to how close they were. Whether that was half an hour, an hour, or two hours or less than half an hour apart.

If you think that the evidence shows that what happened at the shop was sufficiently close in time, to what happened at 19 Ford Street, then you may think that that may help you to work out how intoxicated he was at Ford Street. Now you have some evidence that he was blind drunk at Ford Street, but you need to consider all the evidence in that regard.

You now have some more evidence at some time afterwards, which will – from which you might be able to determine that he was either heavily intoxicated, or not as intoxicated as you might otherwise have thought or not intoxicated at all. That will be a matter for you as to how you view the evidence of what happened at the shop.

But if you determine, for example, that he was heavily intoxicated at the shop, blind drunk, then you might think that lends some force to what has been said about his condition at 19 Ford Street. If, on the other hand, you think that he was more sober at the shop, then you may think perhaps he wasn't quite as drunk as may have been suggested back at Ford Street. You can see the link, and of course the longer the time between the two, the less powerful will be the evidence, because he would have had time to sober up.

So you can use that evidence in that way alone. That is to help you work out whether the Crown has established beyond reasonable doubt, that he formed the intention to kill the deceased or to cause her serious harm at 19 Ford Street. And that is the only reason, you are receiving this evidence. If it wasn't for that, it would not have been introduced because it simply is irrelevant, apart from that.

So I direct you, and I do this as a matter of law, that you can only use that evidence for the limited purpose that I have described and no other purpose.

I want to say this to you. It would be quite wrong for you to use the information for any other purpose. It would be illogical, and it would be wrong for you to reason that because he produced a knife on the second occasion, therefore he is a violent man and must have intended to cause the death of the deceased or serious harm to her on the earlier occasion. That would be an illogical conclusion. It would be, what we call, impermissible reasoning. It just doesn't follow.

> The use of the knife at the shop, does not and can not, tell you anything about what his state of mind was, back in 19 Ford Street. It doesn't help you to determine whether he intended to kill the lady at 19 Ford Street, or whether he intended to do her some serious harm, and whether the Crown has been able to establish those matters beyond reasonable doubt.
>
> So I say to you again, the evidence as to what he said at the shop, so not so much what he did, but what he said at the shop, and how he said it, may help you to determine what his condition was on that occasion; that is at the shop, and if you are so inclined, you may then use that evidence to refer back to the earlier stabbing of the deceased and determine what his condition may or must have been on the earlier occasion. So it may assist you, in your consideration of whether the Crown has established beyond reasonable doubt, if he was capable of forming the necessary intention, that is the intention to kill or do serious harm at the time the deceased was stabbed.
>
> I've taken a long time to explain that to you, and I've probably said it two or three times in different ways, but it is an important matter, and I repeat, you are only to use the evidence in the manner that I have described, and not in the matter [sic] that I told you was impermissible reasoning.
>
> There will be further evidence about these matters, and I gather that's going to be tomorrow. I will remind you, very briefly then, that these comments that I've made to you today are to be borne in mind by you and I'll remind you at the end of the trial as well."

[32] After other witnesses had completed their evidence concerning the second incident, the first witness was recalled to give evidence as to her opinion of the appellant's level of intoxication, a topic which had apparently been overlooked when she first gave evidence. As that witness was the last witness to give evidence concerning the second incident, the trial Judge took the opportunity of repeating his directions to the jury about the proper use of the evidence:

"Ladies and gentlemen, this is just really a repeat of what I have already said to you regarding this evidence about what took place at the – at the Emporium, the shop in Tennant Creek. That really is a separate – as I told you before, that really is a separate incident from the one that we are concerned with and the only reason we are looking at that incident, is to see if it gives you some assistance in determining what the state of mind of this man may have been at the time of the original stabbing; that is, back in Ford Street. It is for no other purpose. I remind you of that and I remind you that it would be quite wrong for you to look at what he did on the second occasion and think well; therefore he must have meant to either kill her or cause her grievous harm on the earlier occasion.

We talked about that before and it would be quite illogical and I'm pleased to see you nodding your heads as I put this to you again. The evidence comes only for that one purpose and can only be used for that one purpose, that is if you think it's sufficiently close in time to the earlier incident to be of help to you and if you think that he was either drunk or sober on the second occasion, that may help you to determine whether he was capable of forming the necessary intention on the earlier occasion; that is whether he was capable of forming the intention to kill the victim or alternatively to cause her harm and of course, whether he did in fact form that intention. The onus in that regard rests upon the Crown to prove it beyond reasonable doubt. This is an item of evidence, which if you accept it, may be used to assist you in working out whether the Crown has established its case or not.

Okay, I thought I should repeat that because it's most important that it not be – the evidence not be used for any inappropriate purpose."

[33] In his final directions to the jury, the trial Judge again warned the jury against misusing the evidence and gave an appropriate direction as to the proper use of the evidence:

"Now, I am going to take you then to the evidence of the people at the shop. I just want to remind you – I expect you are probably a bit sick of hearing this, but that evidence is to be used for only the limited purpose of determining the condition of Mr Ladd as at the time of the stabbing. If you think that the incident at the time in the shop was sufficiently close to the time of the stabbing to enable you to gain assistance from that evidence, then you may use it as such. If

you think it's not or if you think what took place at the shop doesn't help you in any event, then you can put it to one side. But that is the sole purpose that that evidence is led for.

And I emphasise that is all you can use it for. And you can't use it to somehow suggest – and I don't think you would do this in any event, that because he stabbed the deceased at 19 Ford Crescent and because he then endeavoured to stab his ex-wife at the shop, somehow he has an intention to murder her or cause serious harm on the first occasion, it is just illogical. And I tell you that you are not able to use that thought process, that line of reasoning. It would be not only illogical but improper and you should not do it."

[34] In my opinion, the evidence was rightly admitted and the repeated firm directions dispelled any possibility that the jury would misuse the evidence. No miscarriage of justice has occurred. Ground 1 fails.

Ground 2 – Directions as to Intention

Ground 2(a) - The learned trial Judge erred in leaving intention to kill as a fault element when it was not open on the evidence to be satisfied beyond reasonable doubt of such an intention.

[35] In essence, this ground asserts that the evidence was incapable in law of supporting a conclusion beyond reasonable doubt that the appellant possessed an intention to cause death at the time of the act of stabbing. Counsel contended that in the absence of any evidence of motive or ill feeling leading to the incident, and in light of the appellant's state of intoxication, the single act of stabbing was not capable of supporting an

inference beyond reasonable doubt that the appellant intended to kill the deceased.

[36] It is sufficient to refer to the evidence of the two eye witnesses. Ms Carr was the cousin-sister of the deceased. She was in the rear yard of the premises drinking with the accused and the deceased. As to the stabbing, Ms Carr gave the following evidence:

> "Q. And can you tell us please, what happened?
>
> A. We was standing there and then I went into the toilet, then I came out, and they both were standing outside, at the back and then, when I came out, he just got the knife from out of nowhere. And I trying to grab his wrist, so he punched on my chest, and I fell backwards.
>
> Q. Yes?
>
> A. And then he just stick the knife into her.
>
> Q. Into your cousin's sister. And what happened, what did she do?
>
> A. She just stand there for a little while, and then she just fell down to the ground and then he took off with the knife in his hand, out through the back gate, and then I was calling out for help."

[37] During cross-examination, Ms Carr said she did not see or hear any reason to explain why the accused had the knife and did not see him take possession of it. She admitted telling police that after she went to the ground, the deceased "moved a bit towards him and he just put the knife into her". Ms Carr agreed that before the stabbing they were all in a happy

mood, but she was not in a position to see or hear what occurred between the deceased and the appellant while she was in the toilet.

[38] Darius Chungaloo was drinking moselle by himself a short distance from the deceased and appellant. Asked to describe what he saw, Mr Chungaloo said the accused "just get up and stab him in the chest". The reference to "him" was a reference to the deceased. He demonstrated the blow using his right arm with the hand at shoulder level holding the knife with the thumb on top and the fingers below the handle. Mr Chungaloo demonstrated the blow by thrusting forward from the shoulder. He said the knife bent in the blow.

[39] The wound was a two centimetre long wound in the centre of the body over the upper part of the sternum and it extended to a depth of 14 centimetres. The blade of the knife was approximately 13 centimetres in length. The track of the wound contained a downward component and the pathologist explained that the angle at which the knife was thrust would depend upon the position of the deceased and whether she was upright and vertical or leaning forward.

[40] The blade of the knife penetrated bone about a centimetre thick which was described as fairly porous and not solid with a covering of fibrous tissue. The pathologist said that it required "a fair bit of force to get through it". Having examined the knife, and particularly the tip which was quite sharp, the pathologist described the degree of force to penetrate as being "moderate to severe". As to whether his opinion concerning the degree of force would

be affected if the deceased was moving toward the appellant at the time of the stabbing, the pathologist responded that if the deceased was "merely walking or walking briskly", such movement would not add a great deal to the amount of force and would not modify his opinion as to "the amount of force required to actually put that knife through the manubrium". Not only did the appellant stab the deceased in the centre of her body, he did so with sufficient force to penetrate bone and he thrust the knife into the body to almost the full length of the 14 centimetre blade.

[41] As to the appellant's state of intoxication, varying views were expressed and it is unnecessary to refer to that evidence. The jury may well have reached the view that it was reasonably possible that the appellant was severely intoxicated, but it was also open to the jury to be satisfied that notwithstanding his intoxication, the appellant did not lack coordination and was well aware of what he was doing. There was no evidence that the appellant was swaying or stumbled or was unsteady on his feet at about the time he wielded the knife. There was no evidence suggesting a lack of coordination. There was nothing in the evidence to suggest that the appellant attempted to stab the deceased in some part of her body other than the chest.

[42] In assessing whether the evidence was capable of supporting an inference that the appellant intended to cause the death of the deceased, the conduct of the appellant in resisting Ms Carr's attempt to disarm him should not be overlooked. Ms Carr attempted to grab the appellant's wrist, but the

appellant punched her with sufficient force to cause her to fall over. The appellant then stabbed the deceased without delay. It was open to the jury to conclude that the appellant's conduct demonstrated a determination to overcome resistance and to proceed with the act of stabbing. In this way, the appellant demonstrated the existence of purpose and intention.

[43] In my opinion, the evidence was capable in law of supporting a conclusion beyond reasonable doubt that the appellant intended to cause the death of the deceased. Counsel at trial did not suggest otherwise. There was no suggestion in the evidence that the act of stabbing was other than a deliberate and forceful act on the part of the appellant. The absence of ill-will or an argument is not definitive. The appellant did not inflict a shallow stab wound to flesh only with tragic consequences. Having repelled efforts to disarm him, the appellant forcefully stabbed the deceased to the centre of the chest penetrating almost to the hilt. The jury was entitled to infer from the combination of all these facts that the appellant intended to cause the death of the deceased.

Ground 2(b) - The learned trial Judge erred in failing to direct that there must be an intention to engage in the conduct causing death and in failing to distinguish that intention and the intention required in relation to the result, having regard to ss 43AD-43AF, 43AH-43AI and 156 of the Code.

Ground 2(c) - The learned trial Judge erred in failing to direct, in accordance with s 43AI(2) of the Code, that a person has intention in relation to a result if the person means to bring it about or is aware that it will happen in the ordinary course of events.

[44] These grounds, and grounds 2(d) and (e), arise out of the operation of Pt IIAA of the *Criminal Code* ("the Code") which came into operation on 20 December 2006. Part IIAA is based upon ch 2 of the Model Criminal Code and applies only to a limited number of offences specified in Sch 1 to the Code. Those offences include homicide and other serious offences against the person. In the Second Reading Speech when introducing the amendment, the Attorney-General described the amendments as proposing "reform of the *Criminal Code* that goes to the heart of fault theory in criminal law by enacting new general principles upon which persons may be held criminally responsible for their conduct". The Attorney-General

expressed an intention that the new principles of criminal responsibility set out in Pt IIAA would be progressively applied to all offences.

[45] The crime of Dangerous Act under s 154 of the Code was repealed. A new manslaughter provision was inserted. Section 162, which defined the crime of murder, was repealed and replaced by a new provision, now s 156. It is helpful to compare s 162 with s 156.

[46] Under s 162, leaving aside special situations involving death during the commission of an offence, murder was defined as an unlawful killing accompanied by the following circumstance:

> "If the offender intends to cause the death of the person killed or of some other person or if the offender intends to do to the person killed or to some other person grievous harm. …"

[47] Section 156 now defines murder in the following terms:

> "(1) A person is guilty of the crime of murder if:
>
> (a) the person engages in conduct; and
>
> (b) that conduct causes the death of another person; and
>
> (c) the person intends to cause the death of, or serious harm to, that or any other person by that conduct.
>
> (2) Section 43BF does not apply to the crime of murder."

[48] Read in isolation from the remaining provisions of Pt IIAA, s 156 does not appear to alter the essence of the crime of murder. Section 156 requires

proof of conduct that causes the death of another person. Under s 162, an unlawful killing was usually founded upon proof that the offender engaged in conduct which caused the death of another.

[49] The mental element specified in s 162 was an intention to cause death or grievous harm. Section 156 requires that the conduct causing death be accompanied by an intention to cause death or serious harm. The concept of "serious harm" replaces "grievous harm" and, for practical purposes, there is little difference between the concepts. "Serious harm" is, and "grievous harm" was, defined as follows:

> "***serious harm*** means any harm (including the cumulative effect of more than one harm):
>
> (a) that endangers, or is likely to endanger, a person's life; or
>
> (b) that is or is likely to be significant and longstanding."
>
> "'grievous harm' means any physical or mental injury of such a nature as to endanger or be likely to endanger life or to cause or be likely to cause permanent injury to health. …"

[50] Speaking generally, under the old provisions it was necessary to have regard to the provisions in Pt II of the Code which was headed "Criminal Responsibility". Part II contained provisions dealing with authorisation or justification of otherwise unlawful conduct, claim of right, mistake of fact and sudden and extraordinary emergency. In addition, the concept of

voluntariness and accident were dealt with by s 31 which was in the following terms:

> "**31 Unwilled act, &c., and accident**
>
> (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
>
> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.
>
> …"

[51] Section 31(1) did not apply to the crime of murder.[2] Section 162 was a self contained provision. Murder was committed if the act causing death was done intentionally and with an intention to cause death or grievous harm. Foresight of death was not required.

[52] For the purposes of the law of homicide, Pt II of the Code no longer applies. It has been replaced by Pt IIAA. Of particular relevance to the grounds of appeal under consideration are those provisions in Pt IIAA that have introduced physical and fault elements and which define intent, recklessness and negligence. The relevant provisions are as follows:

[2] *Charlie v The Queen* (2000) 199 CLR 387.

"43AB Elements

(1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

43AC Establishing guilt of offences

A person must not be found guilty of committing an offence unless the following is proved:

(a) the existence of the physical elements of the offence that are, under the law creating the offence, relevant to establishing guilt;

(b) for each of the physical elements for which a fault element is required, one of the fault elements for the physical element.

43ACA Law including separate statement about fault elements[3]

(1) This section applies to a provision of a law that:

(a) creates an offence; and

(b) includes a separate statement:

(i) specifying the fault elements of the offence; or

[3] Section 43ACA was introduced by the *Criminal Code Amendment (Hit and Run and Other Endangerment Offences) Act 2008* which came into operation on 17 October 2008.

(ii) classifying the offence as one of strict liability or absolute liability (and thus excluding fault elements).

Example

See the statement under the heading "Fault elements" in section 174FA(1).

(2) Part IIAA applies to the offence.

Note

Part IIAA states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences (for example, see the extended meaning given to the concept of recklessness in section 43AK(4)).

(3) If the statement identifies certain elements as the fault elements of the offence:

(a) the fault elements so identified are the only fault elements of the offence; and

(b) the statement operates to the exclusion of fault elements that might otherwise be implied under provisions of this Code.

Note

Accordingly fault elements that might otherwise be implied under section 43AM are excluded by the statement.

(4) If the statement classifies the offence as one of strict liability, section 43AN(1) applies to the offence.

(5) If the statement classifies the offence as one of absolute liability, section 43AO(1) applies to the offence.

Subdivision 2 - Physical elements

43AD Conduct and engaging in conduct

(1) Conduct is an act, an omission to perform an act or a state of affairs.

(2) Engage in conduct is to:

(a) perform an act; or

(b) omit to perform an act.

43AE Physical elements

A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, happens.

43AF Voluntariness

(1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

Examples of conduct that is not voluntary

1. A spasm, convulsion or other unwilled bodily movement.

2. An act performed during sleep or unconsciousness.

3. An act performed during impaired consciousness depriving the person of the will to act.

(3) An omission to perform an act is only voluntary if the act omitted is an act the person can perform.

(4) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(5) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

43AG Omissions

(1) An omission to perform an act can only be a physical element if the law creating the offence:

(a) makes it a physical element; or

(b) impliedly provides that the offence is committed by an omission to perform an act that, by law, there is a duty to perform.

(2) However, an omission to perform an act can be a physical element of an offence against a Schedule 1 provision if it is a person's omission to perform any of the duties referred to in Part VI, Division 1.

(3) The fault element for an omission to perform an act referred to in subsection (2) that causes, or that gives rise to danger of, death or harm is, if not otherwise specified in the Schedule 1 provision, the same as the fault element for the result of the omission.

Note for section 43AG(3)

In the absence of subsection (3), the fault element for the conduct consisting of an omission to perform an act would be intention under the default provision in section 43AM(1). Generally in relation to Schedule 1 offences, the fault element for acts that cause etc. death or harm is not specified but the fault element for the result concerned is specified as either intention, recklessness or negligence.

Subdivision 3 Fault elements

43AH Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent the law that creates an offence from specifying other fault elements for a physical element of the offence.

43AI Intention

(1) A person has intention in relation to conduct if the person means to engage in that conduct.

(2) A person has intention in relation to a result if the person means to bring it about or is aware that it will happen in the ordinary course of events.

(3) A person has intention in relation to a circumstance if the person believes that it exists or will exist.

43AJ Knowledge

A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.

43AK Recklessness

(1) A person is reckless in relation to a result if:

(a) the person is aware of a substantial risk that the result will happen; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) A person is reckless in relation to a circumstance if:

(a) the person is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

43AL Negligence

A person is negligent in relation to a physical element of an offence if the person's conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist,

that the conduct merits criminal punishment for the offence.

43AM Offences that do not provide fault elements

(1) If a law that creates an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

(2) If a law that creates an offence does not provide a fault element for a physical element that consists of a result or circumstance, recklessness is the fault element for the physical element.

Note for subsection (2)

Under section 43AK(4), recklessness can be established by proving intention, knowledge or recklessness.

Subdivision 4 Cases where fault elements are not required

43AN Strict liability

(1) If a law that creates an offence provides that an offence is an offence of strict liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 43AX is available.

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of an offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 43AX is available in relation to that physical element.

(3) The existence of strict liability does not make any other defence unavailable.

43AO Absolute liability

(1) If a law that creates an offence provides that an offence is an offence of absolute liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) the defence of mistake of fact under section 43AX is unavailable.

(2) If a law that creates an offence provides that absolute liability applies to a particular physical element of an offence:

(a) there are no fault elements for that physical element; and

(b) the defence of mistake of fact under section 43AX is unavailable in relation to that physical element.

(3) The existence of absolute liability does not make any other defence unavailable."

[53] Leaving aside the operation of s 43ACA and speaking generally, for present purposes the relevant features of the new legislative scheme may be summarised as follows:

- Every offence consists of physical and fault elements unless the provision creating the offence specifies otherwise: s 43AB.

- Physical elements may be comprised of conduct[4] or a result of conduct or a circumstance in which conduct, or a result of conduct, happens: s 43AE.

[4] Conduct includes an act or omission to perform an act: s 43AD.

- In order to amount to a physical element, conduct must be voluntary in the sense of being a product of the will of the person performing the conduct: s 43AF.

- Self induced intoxication cannot be considered in determining whether conduct is voluntary: s 43AF(5).

- A fault element for a physical element may be intention, knowledge, recklessness or negligence:[5] s 43AH.

- If the law creating an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element: s 43AM(1).

- If the law creating an offence does not provide a fault element for a physical element that consists of a result or circumstance, recklessness is the fault element: s 43AM(2).

- If recklessness is the fault element, proof of intention, knowledge or recklessness satisfies the fault element: s 43AK(4)

- Self induced intoxication cannot be considered in determining whether a fault element of "basic intent" existed: s 43AS(1). "Basic intent" means a fault element of intention for a physical element of conduct: s 1.

[5] These terms are defined in ss 43AI – 43AL.

- Offences of strict and absolute liability do not involve fault elements: ss 43AN and 43AO.

[54] In the context of the new legislative scheme, grounds 2(b) and (c) concern directions required with respect to the physical elements of the crime of murder. Section 156 specifies two physical elements. First, engaging in the relevant conduct being the act of the appellant in stabbing the deceased. Secondly, the result of the conduct, namely, the death of the deceased.

[55] At trial, there was no dispute that the appellant engaged in the act of stabbing. In other words, there was no dispute that the first physical element under s 156 was made out. Nevertheless, notwithstanding the absence of dispute or any request by counsel for the appellant at trial to give a direction concerning voluntariness, counsel for the appellant on the appeal submitted that the directions were inadequate because they did not "instruct that the prosecution must prove that the conduct causing death was both voluntary *and* intentional, or explain the difference between voluntariness and intention in this connexion".

[56] The act of stabbing the deceased could amount to the first physical element under s 156 only if that act was voluntary: s 43AF(1). Pursuant to s 43AF(2), the act of stabbing was voluntary only if it was "a product of the will" of the appellant.

[57] The requirement that the conduct causing death be voluntary is not new. Murder under the repealed s 162, or at common law, required that the

conduct causing death be voluntary, but it has never been the law that in the absence of evidence raising the possibility that the relevant conduct was voluntary, a trial Judge is obliged to give a direction that the Crown is required to prove that the conduct was voluntary.

[58] Counsel for the appellant did not suggest that there was any evidence to raise the issue of voluntariness. Not only was there no suggestion of involuntariness, there was no suggestion that the act of stabbing was anything other than intentional.

[59] Further, if the trial Judge had given a direction that the jury was required to determine whether the act of stabbing was voluntary, his Honour would also have been required to direct the jury that the appellant's intoxication had to be ignored in determining whether the act of stabbing was voluntary. Section 43AF(5) specifically states that evidence of self-induced intoxication "cannot be considered in determining whether conduct is voluntary".

[60] As to the suggestion that the directions were inadequate because they did not instruct the jury that the Crown was required to prove that the act of stabbing was intentional, as I have said there was no suggestion at trial that this act was anything other than intentional. Counsel at trial did not request such a direction. While counsel at trial suggested that the appellant may have lacked coordination and, therefore, did not intend to stab the deceased in the centre of the chest, there was never any suggestion that the appellant

did not intend to perform the act of stabbing to the body of the deceased. The trial was conducted on the basis that the act of stabbing was intentional and the evidence left no room for doubt about that issue. In substance, the fact that the act of stabbing was intentional was conceded by counsel for the appellant at trial.

[61] In the context of intention to engage in the act of stabbing, s 43AS(1) provides that evidence of self-induced intoxication "cannot be considered in determining whether a fault element of basic intent existed". Section 1 defines "fault element of basic intent" for the purposes of Pt IIAA as meaning "a fault element of intention for a physical element that consists only of conduct". That is, in respect of the intention to engage in the conduct of stabbing the deceased, evidence of the appellant's self-induced intoxication could not be considered in determining whether the appellant intended to stab the deceased. This restriction reinforces the view that it was unnecessary for the trial Judge to have given such a direction. As was appropriate in this case, the trial Judge tailored the summing up to the real issues in the case.[6]

[62] Further, the absence of a direction that the appellant intended (or meant) to engage in the act of stabbing, was of no consequence for a different reason. In the particular circumstances of this trial, if the Crown proved an intention to cause death or serious harm, it necessarily followed that the Crown had proved that the appellant intended to engage in the stabbing.

[6] *Alford v Magee* (1952) 85 CLR 437 at 466.

[63] Also in relation to the question of intention to engage in the relevant conduct, that is, to engage in the act of stabbing, for the first time on appeal counsel submitted that it was necessary to prove that the appellant intended to stab the deceased in the particular area of the chest to which the wound was inflicted. It was not sufficient, so it was argued, for the Crown to prove that the appellant intended merely to stab the body of the deceased. The Crown was required to prove that he intended to stab her in the upper chest where the wound was, in fact, inflicted.

[64] There is nothing in the definition of murder or Pt IIA which would support such a construction. Section 43AI states that a person "has intention in relation to conduct if the person means to engage in that conduct". The conduct in question was the act of stabbing the deceased. To import a requirement that the Crown prove an intention to stab the deceased in a particular area of the body in order to prove that the appellant engaged in conduct for the purposes of s 156(1)(a) of the Code would be to import a requirement that is not supported by the history of the law of murder or the provisions governing the crime of murder in the context in which they appear. If such a requirement was imported into the law of murder, it would mean that even if the appellant intended to stab the deceased and, at the time of stabbing, intended to kill the deceased, he would not be guilty of murder unless the prosecution could also prove that he intended to stab the victim in the particular part of the body to which the wound was inflicted. Parliament cannot have intended such a result.

[65] I have referred to the conduct as the act of stabbing the deceased. This is a convenient description, if not completely accurate. The appellant's act also involved the production of the knife and presenting it in the direction of the deceased. That the act is not limited to the entry of the blade into the body is well demonstrated by the authorities concerning fatal shootings which are discussed in the judgment of Gaudron J and the joint judgment of Gummow and Hayne JJ in *Murray v The Queen*.[7] It is unnecessary examine those authorities or this issue further.

Accident

[66] In the context of issues of voluntariness and intention, counsel for the appellant submitted that directions by the trial Judge concerning accident "rather confused the notions of accident and intention". The specific directions in issue occurred as additional directions after discussion with counsel. These directions are to be viewed against the earlier directions when the trial Judge was speaking generally about intention and inferences.

[67] His Honour reminded the jury that there was no dispute that the appellant stabbed the deceased and that the real issue identified by counsel was whether the Crown had established beyond reasonable doubt that the appellant possessed the intention to cause either death or serious harm at the time he stabbed the deceased. His Honour invited the jury to look at all the surrounding circumstances and, in particular, what happened before, at the

[7] (2002) 211 CLR 193 at [8] – [14] and [41] – [51].

time of the stabbing and immediately after in order to determine intention at the time of the stabbing. The directions then continued:

> "Things can happen without intending that they happen. An obvious example is that you have got cups in front of you. As you get up you knock a cup of water over. You have knocked it over; there is no doubt about that. But that does not mean that you intended to do so. However, counsel, and they haven't done it in this case, when the other side is making a good point, they move their books a little bit that knocks another book that tips a glass of water over and the jury looks at the glass of water and misses the point that the other counsel is making. It is old trick not used so often these days because judges tell the jury about it.
>
> Now that, the knocking over of a glass of water is in the same manner that you may have getting out of the jury box, but there it was intentional with the purpose of deflection of the attention of the jury from what was being said.
>
> So you need to look at all of the surrounding circumstances to determine what someone's intent might be. And I remind you that in this case it is the intention of Mr Ladd as at the time that he stabbed the deceased at Ford Crescent."

[68] No exception was taken at trial or on appeal to those directions. However, at the conclusion of the summing-up, counsel for the appellant invited the trial Judge to give further directions concerning the relevance of intoxication to the physical conduct of the appellant. He suggested that his Honour should remind the jury that by reason of intoxication the appellant may have misjudged or miscalculated the degree of force he was using or his aim might have been affected. The result may have been something more than intended. The request for further directions on this issue was made against the background of counsel's closing submissions in which he urged that the act of stabbing was consistent with an intention to cause a lesser

degree of harm, or a blind striking out with the knife without much thought as to consequences, or an intention to "poke" or to ward off the deceased. Counsel for the appellant had raised with the jury the possibility that the appellant did not intend to stab the deceased in the chest. He advanced the proposition that in his drunken state the appellant's aim might have been affected and he might not have intended to stab the deceased in the chest as opposed to intending to stab her in a "non-vital area". Counsel said:

> "You might well think that it can cause a person to misjudge his aim, to misjudge the degree of force used, to lose control over balance, to lose control over the fine movements of the hand and the arm. You know it affects coordination and a person doesn't have to be full-drunk or even blind-drunk for it to kick in and have this affect upon conduct, upon intent."

[69] The request for further directions, and the additional directions given, are also to be viewed against the earlier disclaimer by counsel for the appellant of any reliance upon accident in the following exchange with the trial Judge:

> "HIS HONOUR: I did not understand accident to have been raised. Were you intending to raise that at all?
>
> MR GEORGIOU: No, your Honour.
>
> HIS HONOUR: Thank you. I can deal with that by telling the jury that there is no suggestion of accident here."

[70] The trial Judge gave further directions to the jury in the following terms:

> "The first thing I wanted to say was the one that I omitted to tell you myself and that was that in this case there is no suggestion that this was an accident, and Mr Georgiou has not claimed that it was an accident and you should put that out of your mind. There is no

suggestion that anybody tripped or fell or slipped and so you can put accident to one side.

Mr Georgiou when he addressed you said to you that intoxication can have an impact upon physical behaviour as well as the forming of the intent, and of course that is so. And what he put to you was that if you find that Mr Ladd was sufficiently intoxicated that it affected him in a physical way then you need to think about whether that contributed to the accident here, whether it contributed to his physical behaviour and that the injury was not as he intended it to be.

Alcohol can affect one's coordination. It can affect one's ability to take aim. And it can affect one's judgment of the amount of force that is being used. And what Mr Georgiou said to you in this case is, well look, he may not have been aiming at where the knife struck because the knife – because of his level of intoxication he may have been aiming somewhere which would have harmed her in a lesser way.

He may have misjudged the amount of force that he was using and that may have arisen out of his lack of coordination because of his intoxicated state. So those matters may have an impact upon whether the consequences that occurred, that is the stab through the centre of the sternum of a force that was described was what was intended or whether something else may have been intended. So I raise that for your consideration. It is something for you to think about.

In doing so I remind you of the Crown case and that is that Mr Ladd was sufficiently in control that when his hand was grabbed by Ms Carr, he punched he [sic] to the chest and pushed her to one side, pushed her to the ground effectively with the punch, and then stabbed Ms Bob in the centre of the chest. So they say it was a very deliberate and direct and intended act.

So those are the competing submissions. I am sorry I had to get you back to tell you but I thought it was better that I clear it up and I needed to clear up the matter that I had failed to raise with you beforehand being that accident does not arise in this case on anyone's version of events."

[71] In the second paragraph of the redirections the transcript records the trial Judge as saying that the jury need to think about whether intoxication

"contributed to the accident here". I have listened to the audio recording of this passage and his Honour plainly used the word "accident". This was probably a slip of the tongue. His Honour was reminding the jury of the defence submission that, by reason of intoxication, the appellant's co-ordination was adversely affected and he did not intend to stab the deceased in the chest. He might have been aiming at another part of the deceased's body.

[72] The jury would not have been misled or confused. They were plainly told more than once that there was no suggestion that the act of stabbing was accidental. The jury would either have recognised the use of the word "accident" as a slip of the tongue or would have understood it to be a reference to the actual site of the wound in the chest being an "accident" because the appellant was intoxicated and may have aimed at another area of the body.

[73] The trial Judge subsequently gave further directions concerning accident following receipt of a note from the jury during their deliberations. The note seemed to be incomplete:

> "When we were recalled yesterday, your Honour made a comment that there is no suggestion that this was an accident."

[74] His Honour gave the following additional directions:

> "I assume you want me to explain what I really meant by that. I should start by telling you, that in this case, the Crown has to prove beyond reasonable doubt that Mr Ladd had the necessary intent,

being the intent to either kill Ms Bob, or cause her serious harm. That is what the Crown has to establish.

The issue is, as Mr Georgiou identified to you, and you and I have talked about, is whether the Crown has established that he had the capacity to form the intent because of his intoxicated state. And the second issue is whether he in fact, did form the intent.

All right. So that's what the case is about. One reason why it might be thought that person did not have the necessary intent, is where what has occurred, has happened by accident, and you will recall yesterday, we talked about, if you have a cup of water in front as you stand up to leave the jury box, and you knock that glass of water over, it could not in those circumstances be said, that you intended to knock the glass over, because you just bumped it as you were departing.

So, if something is an accident, by definition, it cannot be something that was intended, an accident is what happened without intention. In this case, bringing it back to this case, there is no suggestion that Mr Ladd had the knife in his hand, and he tripped causing the knife to enter the body of the deceased. That would be an accident. If he was there slicing potatoes, and he slipped on an oily patch on the floor, and the knife penetrated someone else, you might think that was an accident.

Mr Georgiou doesn't say that to you in this case. He doesn't say that the stabbing was an accident in that sense. So he doesn't argue that, the stabbing was not deliberate, in the sense that Mr Ladd had the knife in his hand, and he penetrated the body of the victim with the knife.

What is an issue is, when that occurred, what was the intention of Mr Ladd? The Crown has to show – has to satisfy you beyond reasonable doubt firstly, that Mr Ladd had the capacity to form the intention to either kill or cause serious harm to Ms Bob, and must also show, that he in fact, did so.

So just to repeat, this is not a case where someone is said to have accidentally done something. Not a case, where someone is said to have tripped over and as they're falling, the knife has penetrated someone else, or any other accident of that kind. The issue is, when Mr Ladd did stab the victim, and that is not in dispute that he did

> stab her, what was his intention, and more particularly and expressed more correctly, has the Crown established beyond reasonable doubt that he had the necessary intention."

[75] In my opinion, in the context of the trial and the critical issues presented to the jury, there is no possibility that these directions gave rise to confusion between accident and intention. As the trial Judge reminded the jury, counsel for the appellant had not submitted that the stabbing was an accident in the sense that it was not deliberate. His Honour's examples of accidents properly brought home to the jury the concept of an accident in contrast to a deliberate or intended act of stabbing. His Honour properly identified the critical issue, namely, whether the Crown had proved beyond reasonable doubt that at the time of the stabbing the appellant intended to cause death or serious harm.

Result of Death – Fault Element

[76] Allied with the complaint concerning the absence of a direction as to intention to engage in the conduct of stabbing was the complaint in ground 2(c) that the trial Judge erred in failing to give a direction as to the intention required with respect to the result of death. Relying upon s 43AI(2), counsel submitted that a direction should have been given that the appellant would possess the intention in relation to the result of death if he meant to bring it about or was aware that it would happen in the ordinary course of events.

[77] First, in so far as the trial Judge directed the jury that one of the routes to murder was possession of an intention to cause the death of the deceased at the time of the stabbing, the operation of s 43AI(2) is irrelevant. To tell a jury that the appellant "meant" to bring about the result of death is no different from telling the jury that the appellant intended to cause the death.

[78] What then if the jury was not satisfied of an intention to cause death? The alternative fault element left by the Judge was an intention to cause serious harm. On the basis of an intention to cause serious harm, was it necessary for the Judge to direct that in addition to an intention to cause serious harm, the Crown was required to prove that, at the time of stabbing, the appellant was aware that death would result from the act of stabbing in the ordinary course of events?

[79] First, s 43AI(2) could only operate in this way if the view is taken that s 156(1)(c) does not specify the only fault elements for the crime of murder under s 156. On the assumption that s 156(1)(c) does not specify the fault element for the result of death, s 43AM(2) operates to insert recklessness as the fault element. Section 43AM(2) provides that if the law creating the offence does not provide a fault element for a physical element that consists of a result, recklessness is the fault element for that particular physical element.

[80] If, by default, recklessness is the fault element for the result of death, s 43AK(4) provides that the fault element of recklessness can be satisfied by

proof of intention, knowledge or recklessness. Proof of intention brings s 43AI(2) into play and intention could be satisfied as to the result of death if the appellant was aware that death would happen in the ordinary course of events. However, the operation of s 43AI(2) would not exclude the operation of recklessness as defined by s 43AK. If the appellant's contention is correct, not only would the Judge be required to direct as to awareness pursuant to s 43AI(2), a direction might also be required as to recklessness. A direction as to recklessness in relation to the result of death would involve a direction that the Crown was required to prove that the appellant was aware of a substantial risk that death would happen and, having regard to the circumstances known to the appellant, it was unjustifiable to take that risk.

[81] All these possibilities depend upon a conclusion that s 156(1)(c) does not specify all the fault elements for the crime of murder under s 156. In particular, it depends upon a conclusion that an intention to cause serious harm does not satisfy the fault element for the second physical element of result of death. This issue is raised by the complaint in ground 2(e) and it is convenient to deal with it now before turning to ground 2(d).

Ground 2(e) - The learned trial Judge erred in failing to direct that, if the jury were not satisfied that the applicant intended to kill but was satisfied that he intended to cause serious harm, then they could not find him guilty unless they were also satisfied that he was

reckless (as defined) in relation to causing death (see ss 43AB – 43ACA, 43AE(b), 43AI(2), 43AK(1) and 43AM(2) of the Code.

[82] In substance, the construction of Pt IIA for which the appellant contends involves a significant alteration to the content of the crime of murder. Under the repealed s 162, the mental element for the crime of murder was satisfied if the Crown proved that the unlawful killing was accompanied by an intention to cause grievous harm. If the appellant's construction is correct, following the introduction of Pt IIA, on its own an intention to cause serious harm is no longer a sufficient mental element for the crime of murder. Such an intention must be accompanied by either an awareness that death will happen in the ordinary course of events or recklessness as to the result of death in the sense of an awareness of a substantial risk that death will happen coupled with the objective fact that, having regard to the circumstances known to the person engaging in the conduct causing death, it was unjustifiable to take that risk. As is so often the case, the answer to the competing contentions lies in the construction of the statute and divining of the intention of the legislature.

[83] The appellant's argument proceeded this way:

- In respect of the second physical element of conduct causing a result, namely, death, s 156 does not specify a fault element.

- Although s 43ACA was not in force in July 2007, accepting that it is an interpretive provision with retrospective operation, s 43ACA does not apply to s 156 because s 156 does not include a "separate statement" specifying the fault elements for the crime of murder.

- Therefore, s 43AM(2) applies and, by default, recklessness is the fault element.

- Pursuant to s 43AK(4), the fault element of recklessness can be satisfied by proof of intention, knowledge or recklessness. Therefore, an intention to cause death will satisfy the fault element in relation to the physical element of the result of death.

- An intention to cause serious harm cannot satisfy the fault element of recklessness for the physical element of the result of death.

- The trial Judge was, therefore, required to direct the jury that if the Crown failed to prove an intention to cause death, but proved an intention to cause serious harm, in addition the Crown had to prove that the appellant was reckless in relation to the result of death. That is, in addition to the intention to cause serious harm, the Crown had to prove either:

  (i) the conduct was accompanied by an awareness that death would happen in the ordinary course of events; or

(ii) the appellant was aware of a substantial risk that death would happen and, having regard to the circumstances known to the appellant, it was unjustifiable to take the risk.

[84] The Crown made two essential responses to the appellant's construction. First, the legislature did not intend to alter the law with respect to the crime of murder in this radical way and s 156 is a stand alone provision that contains within it the fault elements for both physical elements. Secondly, for the purposes of s 43ACA, s 156(1)(c) is a separate statement of the fault elements for an offence contrary to s 156 and, therefore, s 43ACA applies to the exclusion of s 43AM. That is, s 43AM(2) does not operate to introduce, by default, the fault element of recklessness.

Historical Considerations

[85] The statutory scheme is to be considered in the light of the historical development of the law of murder and manslaughter in the Northern Territory. Prior to the introduction of the *Criminal Code* in 1984, the law of homicide was governed by the *Criminal Law Consolidation Act* (SA). In substance the law of murder and manslaughter was governed by the common law.

[86] At common law, the mental element for murder was satisfied by an intention to cause death or grievous bodily harm or knowledge that the act causing death would probably cause death or grievous harm. Such knowledge was sufficient notwithstanding that such knowledge might be accompanied by

indifference as to whether death or grievous harm will ensue or even a wish that death or grievous harm not be caused. The law of the Northern Territory was settled in this way by the High Court in *R v Crabbe*.[8]

[87] With the introduction of the Code which came into force on 1 January 1984, the law of murder was changed by restricting the mental element for murder to intention to cause death or grievous harm. Under s 162 of the Code, the common law mental state of recklessness in the form of knowledge that the act causing death would probably cause death or grievous harm was no longer sufficient to satisfy the mental element for murder. It is interesting to contrast this step with the later observations of the High Court in the joint judgment in *Crabbe* that the conduct causing death carried out with knowledge that death or grievous bodily harm is a probable consequence "can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm".[9]

[88] At the time Pt IIAA was introduced, therefore, leaving aside death caused while committing a crime, the fundamental mental element for the crime of murder was an intention to cause death or grievous harm. As I have said, read in isolation from the remaining provisions of Pt IIAA, s 156 does not appear to alter that essential mental element. For all practical purposes, grievous harm can be equated with serious harm.

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[8] (1985) 156 CLR 464.
[9] *R v Crabbe* (1985) 156 CLR 464 at 469.

[89] As to the offence of manslaughter, prior to the introduction of Pt IIA, s 163 of the Code provided that a person "who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter". Speaking broadly, murder could be reduced to manslaughter by reason of provocation, diminished responsibility and excessive self defence. In addition, in the absence of an intention to cause death or grievous harm, manslaughter was committed if the act causing death was accompanied by foresight that death was a possible consequence of that act.[10] The common law offence of manslaughter by "unlawful and dangerous act" or by gross or criminal negligence did not exist under the Code. Conduct causing death in such circumstances was covered by the offence of Dangerous Act in s 154.

[90] The crime of manslaughter is now defined in s 160:

> "**160 Manslaughter**
>
> A person is guilty of the crime of manslaughter if:
>
> (a) the person engages in conduct; and
>
> (b) that conduct causes the death of another person; and
>
> (c) the person is reckless or negligent as to causing the death of that or any other person by the conduct."

[91] The structure of s 160 is similar to that of s 156(1). The wording of paras (a) and (b) with respect to engaging in conduct and the result that conduct causes death is identical. In the same way as s 156(1)(c) provides a specific

[10] *R v Krosel* (1986) 41 NTR 34.

fault (or mental) element for murder, s 160(c) identifies a fault element for manslaughter which includes an alternative of negligence that does not involve a subjective mental component. The alternatives are:

(i) Awareness of a substantial risk that death will happen, coupled with the objective circumstance that, having regard to the circumstances known to the person engaging in the conduct, it is unjustifiable to take the risk; or

(ii) The conduct causing death involves "such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and, such a high risk that death will occur, that the conduct causing death merits criminal punishment for the offence".

[92] Neither s 156 nor s 160 specify a fault element for the first physical element of engaging in conduct. Given the history of the law of homicide and the underlying philosophy of the common law and the Code that the act causing death must be both voluntary and intentional, the intention of the legislature that s 43AM(1) operates to insert the fault element of intention can readily be inferred. The legislature did not intend that the fault elements found in s 156(1)(c) or s 160(c) would suffice. In both s 156 and s 160, s 43AM(1) operates to insert a fault element of intention for the first physical element of engaging in conduct.

[93] As to the fault element for the result of death in respect of the crime of manslaughter under s 160, s 43AM has no operation. The wording of

s 160(c) leaves no room for doubt that the legislature intended to exclude s 43AM and that that recklessness or negligence is the fault element for the result. Section 160(c) speaks of a person being reckless or negligent "as to causing the death" of another person. Section 43AM can only operate to insert into an offence by default a fault element if the law creating the offence "does not provide a fault element for a physical element". Section 160 provides a fault element for the physical element of conduct causing death.

[94] In my view, s 156(1)(c) also provides the fault element for the physical element of causing death. At first blush, there is attraction in the appellant's contention that because the physical element is the result of death, an intention to cause serious harm cannot satisfy the requirement of a fault element. Upon closer examination, however, that contention contains an underlying fallacy. That fallacy is an assumption that the fault element for the crime of murder must contain within it a mental state that includes a component related to death. For example, it could be an intention to cause death or an awareness that death is the likely result. Therefore, so the argument proceeds, while an intention to cause death under s 156(1)(c) is a fault element for the result of death, the legislature did not intend that an intention to cause serious harm would suffice. Hence the general provision in s 43AM(2) operates to introduce the necessary mental state that includes, at the least, knowledge of the substantial risk of death.

[95] This submission is misconceived. The legislature is not constrained to specifying a fault element for the crime of murder that includes some advertence for the risk of death. For example, if the legislature saw fit, it could specify negligence as a sufficient mental state to amount to a fault element for the result of death.

[96] Even on the appellant's construction, s 156(1)(c) provides a fault element for the result of death in the form of an intention to cause death. Section 43AM operates only if the law creating the offence does not "provide" a fault element for a physical element of that offence. Section 156(1)(c) is a fault element provision and "provides" a fault element for the second physical element of the result of death.

[97] In arriving at this construction of s 156, I have borne in mind that, speaking generally, it can be assumed that the legislature intended that the general provisions in Pt IIAA would apply to offences under the Code unless the contrary intention appears through the wording of the provision creating the offence or as a matter of construction of the relevant provision in the context in which it appears. As I have said, in my view the contrary intention appears from the construction of s 156. In addition, on the appellant's construction, in order to establish the crime of murder based on an intention to cause serious harm, the Crown would be required to prove an additional mental element involving foresight of death or the substantial risk of death through the operation of either s 43AI(2) or recklessness as defined in s 43AK. In my opinion, given the history of the legislation and the

construction of s 156 in its context, the legislature did not intend this consequence.

[98] The potential difficulties that can accompany an attempt to apply literally provisions of general operation to each and every section creating an offence was the subject of consideration in *Vallance v The Queen*.[11] The High Court was concerned with the application of s 13 of the *Criminal Code* (Tas) to the crime of unlawful wounding under s 172. Section 13(1) was in the following terms:

> "(1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance."

[99] Section 172 provided:

> "Any person who unlawfully wounds or causes grievous bodily harm to any person by any means whatever is guilty of a crime."

[100] Dixon CJ identified the issue as follows:[12]

> "But is s 172 to be read in the Code as doing no more by way of defining the crime than stating the external elements necessary to form the crime, that is to say the wounding or the causing of grievous bodily harm, and adding the requirement of unlawfulness relying upon the introductory Part or so much of it as deals with criminal responsibility to define and import the elements which go to intention or other state of mind necessary or sufficient completely to constitute the crime? That seems to be the primary question."

[101] The Chief Justice answered the question in the affirmative. His Honour said:[13]

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[11] (1961) 108 CLR 56.
[12] *Vallance v The Queen* (1961) 108 CLR 56 at 59.

> "In the case of s 172 I think that the answer should be yes. This answer represents, I believe, the plan upon which the Code is conceived and, to some but perhaps to no great extent, drafted. The plan was to provide for specific crimes but to treat the complete definition of them as finally governed or controlled by Ch IV (criminal responsibility)."

[102] Having reached that conclusion with respect of s 172, Dixon CJ added a significant qualification:[14]

> "But a study of the Code has made it apparent that the plan has not been, indeed from the nature of the thing it could not be, uniformly carried out. In crimes involving fraud, personation, in most sexual offences, in bigamy, receiving stolen property and many traditional offences based on statute, common sense rather suggests that guilt will depend on definitions that in point of fact will fall outside the philosophy of s 13. … Section 13(1) is expressed as a wide abstract generalization which of course ignores the elements of all or any specific crimes into the definition of which so to speak it must go. To turn over the sections of the Code is enough to show how large a number of crimes there are to the elements of which s 13(1) can have little or nothing to say. It is expressed in general but negative terms and in laying down negative propositions, from its very nature, the sub-section is saying something that may matter in the case of one crime and cannot matter in the case of another because of its definition and may conceivable matter in still a third case with respect to one only of a number of ingredients constituting the crime."

[103] After examining the operation of s 13(1) upon the crime of unlawful wounding under s 172, with hesitation Dixon CJ reached a conclusion as to the meaning of the words in s 13(1), "nor … for an event which occurs by chance". His Honour was hesitant because, in his view, it was not "wise to go further in expounding the meaning and operation of this very elusive and difficult sub-section when it combines with a specific offence defined in

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[13] *Vallance v The Queen* (1961) 108 CLR 56 at 60.
[14] *Vallance v The Queen* (1961) 108 CLR 56 at 60.

terms which neglect or ignore the possibility of some mental element forming an ingredient in the offence". His Honour continued:[15]

> "I have found no light in sub-s (3) and I have abstained from discussing it. *Indeed I think that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially.*" (my emphasis)

[104] The application of a general provision in the *Criminal Code* of the Northern Territory to the crime of murder under the repealed s 162 was considered by the High Court in *Charlie*.[16] As I have said, s 162 provided that murder was committed by an unlawful killing accompanied by an intention to cause death or grievous harm. Section 31(1) of the Code is set out in para [50] of these reasons and provided that a person was excused from criminal responsibility for an act, omission or event "unless it was intended or foreseen by him as a possible consequence of his conduct". By a majority, the High Court held that s 31(1) did not apply to murder under s 162(1)(a).

[105] In *Charlie* it was argued that if the Crown was relying upon an intention to cause grievous harm, s 31(1) required that such intention be accompanied by foresight of death as a possible consequence of the conduct. In a judgment with which Gleeson CJ and McHugh J agreed, Callinan J referred to the judgment of Dixon CJ in *Vallance* and continued:[17]

> "It is true that the Code was introduced some twenty-two years after the decision in *Vallance* but there can still be discerned in it specific

[15] *Vallance v The Queen* (1961) 108 CLR 56 at 61.
[16] *Charlie v The Queen* (2000) 199 CLR 387.
[17] *Charlie v The Queen* (2000) 199 CLR 387 at [66].

> provisions reflecting an intention to exclude from specific offences the application of general exculpatory provisions. The internal differences within s 162 also demonstrate that the elements necessary to found a conviction for murder may vary from situation to situation."

[106] Callinan J went on to observe that s 162(1)(a) was not the only section which prescribed its own mental element. After referring to s 302 of the *Criminal Code* and the observations of Brennan CJ, Dawson and Toohey JJ in *R v Barlow*[18] that s 302 prescribed "the specific intent … which must be entertained by an offender before the offender is guilty of murder", his Honour said:[19]

> "Whilst it must be accepted that each Code falls to be construed according to its own language, in case of ambiguity, it is appropriate that this Court lean in favour of a construction generally consistent with that of other Codes and with the general principles applied in the common law jurisdictions in this country. To exclude the operation of s 31 upon an offence governed by s 162(1)(a) is to adopt such a construction."

[107] In support of the construction for which he contended, counsel for the appellant submitted that if an intention to cause serious harm is sufficient to satisfy the fault element for murder, the distinction between murder and manslaughter "may become blurred and persons may be convicted of murder in circumstances where manslaughter is not in fact made out". I do not accept this submission. If an intention to cause serious harm exists, murder is committed. There is a clear distinction between murder in those circumstances and the lesser crime of manslaughter where an intention to

[18] (1997) 188 CLR 1 at 12.
[19] *Charlie v The Queen* (2000) 199 CLR 387 at [69].

cause serious harm does not exist. The legislature has determined that reckless or negligent conduct causing death amounts to manslaughter and conduct causing death which is accompanied by a specific intention to cause serious harm amounts to the more serious crime of murder. This was the situation under the repealed s 162 before Pt IIAA was enacted. There is nothing in the legislation to suggest that Parliament intended to alter this position and complicate the law of murder by adding the additional requirement of recklessness in the case of an intention to cause serious harm.

[108] Counsel for the appellant also drew attention to s 156(2) which specifically provides that s 43BF does not apply to the crime of murder. The presence of s 156(2) was said to lead to an inference that if the legislature had intended to exclude the operation of s 43AM, it would have said so explicitly. This submission overlooks the structure of the Code and the way in which s 43AM is intended to operate. Section 43AM only operates if the provision creating the offence "does not provide" a fault element for a physical element. Where, as in s 156, the provision provides a fault element for each physical element, there is no occasion for a specific exclusion of the operation of s 43AM.

[109] Finally, it is appropriate to bear in mind that the Northern Territory Legislature did not follow every recommendation of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General. The recommendations in the discussion paper for murder recommended the

mental element accompanying the conduct causing death be intention to cause death or recklessness as to causing death. Intention to cause serious harm was not included for murder, but was recommended as a mental element for the crime of manslaughter. The Northern Territory Legislature determined otherwise by including intention to cause serious harm within s 156 and by not including any mention of recklessness in that section.

[110] Having reached the view that on a proper construction of s 156 that section provides a fault element for the second physical element of the result of death, it is unnecessary to consider whether s 43ACA is capable of applying and, if so, whether s 156 contains a "separate statement" specifying the fault elements for the purposes of s 43ACA.

[111] If I am wrong in my construction of s 156, and an intention to cause serious harm does not satisfy the requirement of a fault element for the result of conduct causing death, the directions were deficient. In that event the trial Judge would have been required to direct the jury that if they were not satisfied that the appellant intended to cause death, but were satisfied that he intended to cause serious harm, before they could convict of murder they would also have to be satisfied that, at the time of the stabbing, either the appellant was aware that death would happen in the ordinary course of events or was reckless as to the result of death in the sense defined by s 43AK. If I am wrong in my interpretation, the failure to direct in these terms resulted in a miscarriage of justice and the proviso could not be applied. If the jury acted on the basis of an intention to cause serious harm,

given the evidence of intoxication it cannot be assumed that the jury would necessarily have found that the appellant was aware that death would happen in the ordinary course of events or was reckless in the relevant sense.

[112] For these reasons, in my opinion this ground 2(e) is not made out.

Ground 2(d) - The learned trial Judge erred in failing to direct that, in order to intend serious harm, the applicant had to know, at the time he was performing the relevant action, that that action would cause harm that endangered, or was likely to endanger, the deceased's life or that was, or was likely to be, significant and long standing.

[113] This ground raises the question as to whether an intention to cause serious harm must be accompanied by knowledge or foresight of a likelihood of such harm. In addition, during submissions counsel contended that it was necessary to explain to the jury the meaning of terms such as "endanger". Counsel at trial did not seek any such directions.

[114] The aide memoire provided to the jury accurately set out the meaning of "serious harm" in the terms of the Code:

> "***serious harm*** means any harm (including the cumulative effect of more than one harm):
>
> (a) that endangers, or is likely to endanger, a person's life; or

(b) that is or is likely to be significant and long standing."

[115] In his oral directions, the trial Judge read out the three elements of the crime of murder, as set out in the aide memoire, and followed with directions as to the meaning of "serious harm":

> "I have put a definition there of serious harm, and somebody read that out to you, I think it might have been Mr Georgiou and you can read that for yourself, but I will run through it. It means any harm that endangers or is likely to endanger a person's life or is likely to be significant and long standing. Well, there is not much dispute about the injuries that she suffered being serious harm. The question is whether he intended – whether the Crown has established that he intended to cause her death or cause her an injury of that level of seriousness as defined there under serious harm."

[116] The appellant submitted that the directions were inadequate because the "definition of serious harm itself includes difficult concepts such as 'endanger', 'likely', 'significant' and 'longstanding', which were not explained". In my view this complaint is without substance. These are ordinary words and concepts. No further explanation was required. It is not surprising that no request was made at trial for such further directions. Nor is it surprising that counsel on appeal had difficulty in articulating the explanation that he contended should have been given by the trial Judge.

[117] As to the proposition that the directions should have included reference to foresight of the likelihood that serious harm would occur, the written submissions on the appeal advanced this proposition in the following terms:

> "Further, it is submitted that a person cannot have intended to cause serious harm unless, at the time he intentionally engaged in the conduct that caused death, he *knew* that that conduct would cause

> harm that endangered, or was likely to endanger, the deceased's life or that was, or was likely to be, significant and longstanding or, to employ the terms of s 43AI(2), he *was aware that in the ordinary course of events* his conduct would cause harm that endangered, or was likely to endanger, the deceased's life or that was, or was likely to be, significant and long standing."

[118] I reject that contention. First, as to the suggestion that a person cannot intend to cause serious harm unless, at the time of engaging in the conduct, the person "knew" that the conduct would or was likely to cause the serious harm, there is no basis in the legislation or the history of the law with respect to intention to cause grievous or serious harm to warrant the importation of a requirement of such knowledge. It is the intention to cause the harm, not knowledge as to the likelihood or otherwise of success, that has been and is now the basis of the necessary mental or fault element.

[119] Secondly, even if s 43AI(2) applied, that section does not support the proposition that a person cannot intend to cause serious harm unless, at the time of engaging in the conduct that caused death, the person "was aware that in the ordinary course of events" the conduct would cause serious harm. Intention for the purposes of s 43AI(2) is satisfied if the person either means to bring about the result or is aware that the result will happen in the ordinary course of events. Awareness is an alternative to meaning to bring about the result. In these circumstances, having left the issue to the jury on the basis that the Crown was required to prove an intention to cause serious harm, there was no occasion for his Honour to inform the jury of the

alternative route of awareness. Counsel at the trial did not seek such a direction.

Ground 3 – Directions as to Intoxication

[120] Three complaints are made concerning the directions of the trial Judge as to intoxication:

Ground 3(a) - The learned trial Judge erred in directing in a manner that suggested that the jury had to 'find' or 'accept' that the applicant was intoxicated before the issue of intoxication could be considered rather than directing to the effect that, if the jury could not exclude the possibility of intoxication, that was a matter they must take into account in determining whether the requisite intention was established.

Ground 3(b) - The learned trial Judge erred in directing that an issue was whether, as a result of intoxication, the applicant had the capacity to form the intention to kill or seriously harm the deceased.

Ground 3(c) - The learned trial Judge erred in failing to direct that the question for the jury was whether, on all the evidence they were satisfied beyond reasonable doubt

that the applicant had the requisite intention at the time of the stabbing.

[121] The directions as to the burden of proof and the question of intoxication must be read together. As to the burden of proof, the aide memoire provided to the jury stated that in order to find the appellant guilty of murder, the Crown was required to prove each of the three elements of murder beyond reasonable doubt. In addition, the trial Judge gave clear directions that the burden of proof rested with the Crown and the appellant was not required to prove anything. His Honour's main direction was as follows:

> "The onus rests upon the Crown throughout the proceedings. It is not for Mr Ladd to prove that he was drunk. It is not for Mr Ladd to raise any reasonable doubt. It is for the Crown to prove the case against him. It is for the Crown to prove beyond reasonable doubt that he committed this offence. And Mr Shaw has frankly acknowledged that to be so and he addressed you on that as well.
>
> He is, as you have heard, presumed to be innocent. What that really means is he does not have to establish his innocence. It is accepted that he is presumed to be innocent and that will continue unless a jury such as yourselves having heard all of the evidence decides otherwise. So he doesn't have to establish anything. The Crown must perform that role. It is for the Crown to prove his guilt. In this case I suppose, that really comes down to proving firstly that he had the capacity to form an intention to either kill or seriously harm the deceased, and that he in fact did form that intention.
>
> If, having looked at the whole of the evidence you are left in any reasonable doubt, then of course he gets the benefit of that doubt and he is to be found not guilty. If having looked at the whole of the evidence you are unable to find where the truth lies, then by definition you have a reasonable doubt and he should be found not guilty."

[122] On a number of occasions throughout his directions, the trial Judge repeated that it was for the Crown to prove beyond reasonable doubt that the appellant possessed the necessary intention, namely, the intention to cause death or serious harm at the time of the stabbing. His Honour emphasised that the Crown was required to prove each of the elements of the offence beyond reasonable doubt.

[123] As to the question of intoxication, in paras [31] - [33] of these reasons, I set out the directions given to the jury concerning the use of the evidence relating to the second incident, which directions also covered the issue of intoxication as it related to intention. At the conclusion of the evidence, the trial Judge mentioned matters that had occurred in the absence of the jury in order to explain a particular answer by a witness who was recalled to give additional evidence concerning her opinion of the appellant's level of intoxication at the time of the second incident. His Honour followed with explicit directions as to the burden of proof concerning the question of intoxication:

> "You must remember at all times, that the onus rests upon the Crown to prove the case, so it – and I'm sure you'll hear this from Counsel, *it doesn't rest upon Mr Ladd to prove that he was drunk*, the onus rests upon the Crown to prove beyond reasonable doubt that he was capable of forming the intent to either murder or cause serious harm, or alternatively – no, not alternatively, and that he did in fact, form the intent to do, one or other of those.
>
> So the onus rests upon the Crown at all times. *There is no onus upon Mr Ladd to prove anything*. And that observation applies to every accused person who comes before our courts. It is for the Crown, to

prove the case against an accused, and the accused does not have to establish anything." (my emphasis)

[124] In the final directions to the jury, the following are of relevance to the specific issue of intoxication and the appellant's complaints in ground 3:

> "And now we come to this crucial question of intoxication, and I address this in paragraph 4, but I want to say a little more about it. In relation to the charge of murder, the state of intoxication if any – *and I put 'if any' there because you may* ***find*** *that he was not intoxicated.* It really is a matter for you. But the state of intoxication of the accused must be taken into account in determining whether the Crown has proved beyond reasonable doubt that he intended to cause the death of the deceased or intended to cause serous harm to her.
>
> Now, let me explain that in a little more detail. Intoxication is relevant to the charges and in particular the charge of murder in this case. The first thing I want you to note is that intoxication is not a defence to murder. It is not a defence. In other words, a person does not escape liability simply because they were intoxicated. If that person had a drunken intent to cause death or a drunken intent to cause serious harm, then that is still an intent to do those things. No matter that they were intoxicated.
>
> However, *and this is the issue here, severe intoxication is relevant* as *to whether or not the accused person has formed the necessary intent. He has formed the intent to kill or the intent to cause serious harm. And the Crown must prove that relevant intent, albeit they can prove that it was a drunken intent provided there was the necessary intent there.*
>
> *So in a case like this where there is evidence that you might* ***accept*** *– it is up to you what you accept and what you do not accept, but where there is evidence which you might* ***accept*** *that shows the accused man was intoxicated to some extent,* the question arises whether the Crown has proven as a matter of fact the relevant intent.
>
> *If the state of intoxication was so severe* that it raises a reasonable doubt as to whether or not the Crown has proved the accused had the relevant intent, then of course the Crown will not have established

this case beyond reasonable doubt. Now, you and I both know that states of intoxication, states of drunkenness can vary greatly. And you are entitled to draw on your collective experience of what you may have experienced yourself, of what you may have seen in others and what you may have read, what you may understand simply from your involvement in the community, that intoxication can be at various levels. It can be very mild.

We know that at below .05 you are still entitled to drive a car. But it can go beyond that of course, and it can go through to the point where a person may be unconscious. Indeed, it can go through to the point where a person might die. So, you have these stages, or levels perhaps, of intoxication. A mild intoxication, a moderate intoxication, a more severe intoxication, heavy intoxication I suppose leading right up to intoxication sufficient to cause death.

And when a person is intoxicated, depending upon the level, we know that they can have changes in their personality. They can change their behaviour. The quiet person might become garrulous. The quiet person might become violent or excitable. A person who is already garrulous may become more so. People can become tearful, they can become very quiet, they can become very subdued.

Importantly, their self-control may change. Things that they would not do sober they are possibly able to do drunk. Alcohol as we all know is a disinhibitor. It means you are less inhibited. So you might do things that you would not normally do. People do things when drunk that they wouldn't do when sober.

Nevertheless, if a person is intoxicated only to that **lesser** degree, they may still intend to do what they do. So the drunken person who gets in the car still intends to drive the car even though he – I will say 'he' in this case – be drunk. So the intention is still there. It is a drunken intention, but nevertheless it is an intention.

What intoxication can do is lower the barriers, or as I say, make you feel less inhibited. And that can explain why someone who is normally a very sensible, moderate person can do outrageous things if sufficiently affected by alcohol. The presence of alcohol does not take away their intention to do whatever it is that they might do, but it may mean they are more likely to do it than they would if they were sober.

Also, intoxication as we know, can make people less aware of what they are doing. I talked about this in relation to witnesses a short time ago. It can mean that they do not fully understand the quality or nature or significance of the acts that they undertake or the consequences of what may follow. Intoxicated people may take silly risks. Drunken driving is one of those. Swimming with crocodiles might be another. Any sort of bravado that flows from alcohol can fall into that category. Just because they are affected by alcohol does not mean that the acts that they do and the risks that they take are not intended.

What the Crown has to do in this case is prove that Mr Ladd intended to cause the death of the victim or intended to cause her serious harm. And it must prove that intention or that state of mind to your satisfaction. And to your satisfaction to a level of beyond reasonable doubt. The necessary intent is one of the essential elements of the crime of murder and if the Crown has not satisfied you about that beyond reasonable doubt, then you would find the accused man not guilty.

On the other hand of course if they have satisfied you, your duty would be to find him guilty. *So the Crown must disprove any matter which may indicate that the accused did not have the necessary intention. And Mr Georgiou says to you, well the level of his intoxication is one of those matters. The Crown must prove that either he was not intoxicated, or if he was intoxicated it wasn't to an extent that affected his ability to form an intention to kill or do serious harm and in fact did not – I will put it the other way around – and that he in fact did form an intention to kill or cause serious harm to Ms Bob.*

Now, when you look at the state of sobriety of Mr Ladd *as you **find** it to be, and it is a matter for you to determine what the level is, then you will need to think about whether that is such that it means that you cannot be satisfied that the Crown has proved its case beyond reasonable doubt.*

*So if you **find** that he was intoxicated, he was drunk,* then you must take that into account in determining whether the Crown has proved beyond reasonable doubt that he intended to either kill the deceased or cause her serious harm. And that is a decision for you and you alone to make.

So that is what I meant by intoxication when I included that at paragraph 4 of the aide-memoire. Then if you go to paragraph 5 I state what I've already said to you. If you find each of the elements proved, so each of 3.1, 3.2 and 3.3 proved and proved beyond reasonable doubt, then it is your duty to return a verdict of guilty of murder. On the other hand, if you are not satisfied beyond reasonable doubt as to any one of those, then it is your duty to return a verdict of not guilty. The Crown must prove each of the elements." (my emphasis)

[125] The question of intoxication was also the subject of direction when his Honour gave additional directions concerning "accident". Those directions are set out in para [74] of these reasons. Of particular relevance are the following passages from those directions:

"(i) Mr Georgiou when he addressed you said to you that intoxication can have an impact upon physical behaviour as well as the forming of the intent, and of course that is so. And what he put to you was that *if you* ***find*** that Mr Ladd was sufficiently intoxicated that it affected him in a physical way then you need to think about whether that contributed to the accident here, whether it contributed to his physical behaviour and that the injury was not as he intended it to be. (my emphasis)

(ii) The issue is, as Mr Georgiou identified to you, and you and I have talked about, is whether the Crown has established that he had the capacity to form the intent because of his intoxicated state. And the second issue is whether he in fact, did form the intent.

…

... The Crown has to show – has to satisfy you beyond reasonable doubt firstly, that Mr Ladd had the capacity to form the intention to either kill or cause serious harm to Ms Bob, and must also show, that he in fact, did so.

…

> … The issue is, when Mr Ladd did stab the victim, and that is not in dispute that he did stab her, what was his intention, and more particularly and expressed more correctly, has the Crown established beyond reasonable doubt that he had the necessary intention."

[126] Ground 3(a) is essentially a complaint that the trial Judge erred in two respects. First, he directed the jury that it was only in the case of "severe" intoxication that intoxication was relevant and was capable of raising a reasonable doubt as to the appellant's intention. In addition, the directions had the effect of excluding intoxication to a "lesser degree" because a drunken intention was nevertheless an intention.

[127] Secondly, counsel contended that it was a misdirection to tell the jury that it was necessary to "accept" evidence of intoxication and to "find" that the appellant was intoxicated before intoxication could bear upon the question of intent. The trial Judge should have directed the jury that if it was reasonably possible that the appellant was affected by alcohol, that possibility had to be taken into account in determining whether the Crown had proved the existence of the necessary intention at the time of the stabbing.

[128] As to the suggestion that the directions inappropriately limited the relevance of intoxication to severe intoxication, read in their entirety, in my view the directions do not have that effect. On more than one occasion the trial Judge told the jury to take into account the state of intoxication without any qualification based upon the degree of intoxication. In between references

to severe intoxication, his Honour also directed the jury that if the accused was intoxicated to some extent, "the question arises whether the Crown has proven as a matter of fact the relevant intent". Subsequent directions also spoke of intoxication without qualification as to the degree.

[129] Having regard to all the directions, and to the context in which reference was made to severe intoxication, in my view there was no possibility that the jury were misled into thinking that it was only severe intoxication that could be relevant to the question whether the Crown had proved the necessary intent. In addition the comparison with intoxication to a lesser degree, coupled with the examples of effects of alcohol, merely emphasised that the critical question was whether the Crown had proved that the necessary intention, albeit a drunken intention, existed.

[130] As to the complaint that the trial Judge erred in directing the jury in terms of accepting evidence as to intoxication or finding that the appellant was intoxicated, viewed in isolation such directions would amount to misdirections. If it was a reasonably possibility that the accused was intoxicated, that possibility had to be taken into account in determining whether the Crown had proved the existence of the necessary intention. However, while the use of those words was potentially misleading, the question to be determined is whether, viewed in the context of the directions as a whole, there is a possibility that the jury was misled.

[131] Counsel for the appellant relied upon the decision of the High Court in *Murray v The Queen*.[20] The relevant facts were briefly summarised by Gaudron J in the following terms:[21]

> "According to the evidence-in-chief of the appellant concerning the events leading to the death of Tony Celap, the deceased became verbally abusive whereupon he, the appellant, took a loaded shotgun from under his bed and approached the deceased with the gun in his right hand. As the deceased started to rise from a chair, the appellant lifted the gun to waist height, the deceased's arm shot out and something hit the appellant on the head. The gun then went off. He said that he took the gun into the room where the deceased was sitting solely with the intention of frightening him so that he would leave the house.
>
> In cross-examination, the appellant said that he might have cocked the gun but could not remember doing so. He admitted that he pointed the gun at the deceased and said that his finger 'would have been somewhere around the trigger guard' and possibly on the trigger. He denied that he deliberately pulled the trigger.
>
> The prosecution case was that the appellant discharged the gun intending to cause death or grievous bodily harm. However, the evidence of the appellant left open two possibilities: (1) that the gun discharged without any pressure being applied to the trigger; and (2) that pressure was applied to the trigger by reflex or automatic motor action when the deceased's arm shot out or when the appellant was struck on the head."

[132] In *Murray*, although the trial Judge directed the jury that the prosecution had to prove an intention to kill or do grievous bodily harm, the directions included repeated references to the jury "accepting" the evidence of the appellant and of choosing between the prosecution and defence versions and deciding which of those versions it would "accept". The jury was directed

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[20] (2002) 211 CLR 193.
[21] *Murray v The Queen* (2002) 211 CLR 193 at [2] – [4].

that if it accepted the version given by the appellant, the jury should find the appellant not guilty of murder and consider the question of manslaughter. Gaudron J pointed out that posing the question whether the jury accepted the prosecution or appellant versions was the "central or critical direction". Her Honour continued:[22]

> "And as the issue for the jury was not whether it should accept the appellant's version but whether the prosecution had negatived it as a reasonable possibility, that direction mis-stated the issue for determination in a way that relieved the prosecution of proving its case beyond reasonable doubt."

[133] In my view, it cannot be said that the directions under consideration "relieved the prosecution of proving its case beyond reasonable doubt". Nor did they give rise to the possibility that the jury was misled.

[134] The trial Judge was not obliged to couch his directions as to the issues in the trial in terms of the burden on proof. In *R v Hayes*,[23] King CJ rejected a proposition that when posing questions centred on the issues it was necessary for the Judge to pose a question in terms of "Is it a reasonable possibility that …". His Honour said:

> "If a judge gives an adequate direction as to onus of proof and the benefit of the doubt in the course of the summing up, he is not required to advert to onus whenever he discusses the issues in the case. Indeed the mingling of notions of onus with the substantive issues can produce directions which are difficult to grasp and even confusing. It is often, perhaps usually, better to state the issues lucidly and to deal with onus of proof separately. It is not necessary or even desirable when discussing the credibility of witnesses, the weight to be attached to various pieces of evidence and various

[22] *Murray v The Queen* (2002) 211 CLR 193 at [23].
[23] (1986) 128 LSJS 460 at 463.

> factual issues in the case, to attempt to couch the discussion in terms of onus of proof. Clear and emphatic directions as to onus of proof, separately given in the charge to the jury, meet the requirements of a valid summing up."

[135] The trial Judge gave repeated and strong directions that the Crown was required to prove the existence of the relevant intention. His Honour informed the jury emphatically that the appellant was not required to prove anything. Specifically as to intoxication, at the conclusion of the evidence his Honour gave an explicit direction that the appellant did not have to prove that he was drunk, rather, the Crown had to prove beyond reasonable doubt that the appellant was capable of forming the necessary intention and that he did, in fact, form the necessary intention. In the directions relating to intoxication, the trial Judge specifically stated that the Crown had to "disprove any matter which may indicate that the accused did not have the necessary intention". His Honour also directed that the Crown was required to prove either that the appellant was not intoxicated or, if he was, he nevertheless possessed the necessary intention.

[136] At trial, counsel for the appellant was not backward in seeking additional directions or corrections. No suggestion was made by either counsel that his Honour had erred and that remedial directions were required. As I am of the view that there was no possibility that the jury was misled into acting on an incorrect basis, this ground is not made out.

Ground 3(b)

[137] In substance, ground 3(b) is a complaint that the trial Judge's references to capacity to form the necessary intention undermined the directions that the Crown had to prove the existence of the necessary intention and left the directions in a state of confusion thereby giving rise to a miscarriage of justice.

[138] There is no doubt that the ultimate issue for the jury was whether the Crown had proved that at the time of the stabbing the appellant possessed an intention to cause death or serious harm. It was not sufficient for the appellant merely to have possessed the capacity to form such intention. The intention had to exist. However, in cases involving severe intoxication, it is not uncommon for Judges and counsel to discuss with juries the extent to which intoxication might have affected the mental and physical capacities of an accused person. In his closing remarks to the jury, counsel for the appellant specifically put to the jury that the Crown had not proved that the appellant possessed the capacity to form the relevant intention. In the alternative, counsel argued that if the jury was satisfied the appellant possessed the capacity to form the intention, nevertheless the Crown had not proven that the appellant had, in fact, formed the necessary intention.

[139] In *Viro v The Queen*,[24] while emphasising that the issue is not whether an accused is incapable of forming a requisite intent, but whether the accused in fact formed it, Gibbs J observed:

> "Of course if the jury were not satisfied that the accused was capable of forming the requisite intent that would be the end of the matter, but if they were satisfied that he was capable of forming that intent they would have to go on to consider whether in fact he did so."

[140] Far from condemning any reference to the capacity to form an intention, Gibbs J appears to have accepted that it is proper for a trial Judge to leave the question of capacity to form the requisite intent to the jury.

[141] The question for this Court is whether it is possible that the reference to capacity misled the jury or produced confusion in the minds of the jury as to critical question, namely, whether the Crown had proved the existence of the necessary intention. In my view there was no possibility of such confusion. Although the directions contain a number of references to capacity, almost invariably such references were accompanied by a clear direction as to the second step, namely, proof of the existence of the necessary intention. The aide memoire correctly explained that the Crown was required to prove the existence of an intention to cause death or serious harm and this point was made repeatedly by the trial Judge. The very last words in the final redirection emphasised that the issue was whether the Crown had "established beyond reasonable doubt that he had the necessary intention". There was no possibility of confusion or miscarriage of justice.

[24] (1978) 141 CLR 88 at 111 – 112.

Ground 3 (c)

[142] This ground is essentially a rolled up plea that the trial Judge did not relate the evidence to the critical issue of intention, particularly with reference to those matters that might have assisted the defence case. In particular the appellant submitted that the learned trial Judge erred in failing to direct "that an inference of an intent to kill or to cause serious harm might not be as readily drawn from the nature of the injury inflicted if he were intoxicated as might be the case if he were sober and that a critical question was whether, by reason of his intoxication, he might have inflicted that fatal wound without intending to cause death or serious harm …". Reliance was placed upon the judgment of Mildren J, with whom Bailey J and Priestley AJ agreed, in *Spencer v The Queen* when his Honour said:[25]

> "In the present case, there was evidence critical to the appellant's defence that the appellant was intoxicated and it would have been necessary for the jury to consider whether, in the circumstances, an inference could be drawn from the nature of the wound which caused the deceased's death, that the prosecution had proven an intent to kill or cause grievous harm, particularly as that wound was to the area of the thigh which I have previously described and required only mild force. In those circumstances, the learned trial judge was required not merely to draw to the jury's attention the evidence which bore on the extent of the appellant's intoxication, but to instruct the jury that an inference of an intent to kill or to cause grievous harm might not be as readily drawn from the nature of the injury or injuries inflicted if he were intoxicated as might be the case if he were sober and that the critical question was whether by reason of his intoxication, he might have inflicted that fatal wound without intending to kill or cause grievous harm: see *R v Wingfield* (1994) 156 LSJS 14 at 18; *R v Williams* (1999) 205 LSJS 472 at 472-473."

[25] *Spencer v The Queen* (2003) 137 A Crim R 444 at [20].

[143] The observations of Mildren J were made in the context of directions to the jury which, in his Honour's opinion, "did not adequately explain to the jury how intoxication was relevant to the issue of intent …".[26] Justice Mildren identified factual matters which the directions had not related in any way to the question of intoxication as it bore upon the issue of intent. In my opinion, however, although the trial Judge did not specifically direct the jury that an inference of an intention to cause death or serious harm might not be drawn as readily from injuries inflicted when the appellant was intoxicated as might have been the case if he had been sober, nevertheless the directions set out earlier in these reasons explained how intoxication was relevant to the question of the appellant's intention and adequately brought to the attention of the jury the various factual matters relevant to both intoxication and intention. This complaint is not made out.

Ground 4 – Directions concerning Standard of Proof

[144] **The learned trial Judge erred in his directions on the standard of proof and in particular he erred:**

(a) in telling the jury that the High Court has told judges that no attempt should be made to explain the words "beyond reasonable doubt";

(b) in directing that "it is not required of the Crown to prove its case beyond all doubt";

[26] *Spencer v The Queen* (2003) 137 A Crim R 444 at [18].

(c) in directing in a manner that was apt to break the phrase "beyond reasonable doubt" into its component parts by treating or defining the word "reasonable" in isolation;

(d) in directing in a manner that suggested that the jury should analyse any doubts they had to determine whether they were reasonable;

(e) in failing to assist the jury by contrasting the criminal and civil standards of proof;

(f) in failing to direct that a reasonable doubt is a doubt which they, the jurors, entertain or that they would not be satisfied beyond reasonable doubt if they, the jurors, entertained a doubt about the applicant's guilt;

(g) in failing to direct that, unless they were sure, they could not convict.

[145] Ground 4(g) may be disposed of immediately and briefly. It is based on a proposition that there is a need to define the expression "beyond reasonable doubt" for juries and this Court should follow the approach taken in New Zealand and other overseas jurisdictions. Notwithstanding the firm statements of the High Court that the expression should not be defined,

counsel contended that it is open for this Court "to strike out on its own and define the phrase in terms equating it to being sure or certain of guilt".

[146] Counsel for the Crown described this submission as "heroic". It would not be heroic of this Court to "strike out" in such a direction. While it is the experience of many trial Judges that juries regularly seek an explanation of the meaning of "reasonable doubt", and the constraints imposed by the High Court create significant difficulties for trial Judges when such explanations are sought, if those constraints are to be lifted, as they should be, they can only be lifted by the legislature or the High Court. Section 43BS of the Code specifies that the legal burden of proof on the prosecution must be discharged "beyond reasonable doubt". There is no basis for implying that Parliament intended that such expression bear any meaning other than the meaning it possessed at the time s 43BS was enacted.

[147] The remaining complaints in ground 4 arise from additional directions given to the jury during their retirement in response to a jury request for an explanation as to the "legal definition" of the word "reasonable" in the context of reasonable doubt. The trial Judge gave the following direction:

> "HIS HONOUR: Thank you, ladies and gentlemen. You've asked me this question. The jury would like to know the legal definition of the word 'reasonable' in the context of reasonable doubt. You won't be surprised to learn that this is a question that has arisen in other cases, and indeed probably many other cases. It is a question that has been considered by the High Court of Australia.
>
> I'm not sure whether you know about hierarchy of courts, but the High Court sits at the very top of the tree, and then there are Courts

of Appeal below that, and then there is a court such as the one I am occupying today, of a single judge in the Supreme Court.

The High Court has told us, that is, has directed Judges such as myself, that no attempt should be made to explain the words 'beyond reasonable doubt'. What the court has said, is that those words have their natural and ordinary meaning, and what is reasonable is a matter for you, as members of the community and more importantly, members of the community serving on a jury to determine, reasonable is what you think is reasonable, giving reasonable it's natural and ordinary meaning, as you understand that expression to be.

If you have a reasonable doubt – *I should say first, it is not required of the Crown to prove it's case beyond all doubt*. So you're looking at what is a reasonable doubt and what is a reasonable doubt, is for you to determine. If you have a reasonable doubt, then of course the accused man is entitled to get the benefit of that.

So the legal definition of 'reasonable' is reasonable.

I'm sorry I can't be any more help to you, because I must direct you in accordance with the law, as I receive it, from the courts above. I don't think I can say anything more to you, and I invite you to determine for yourselves, what is reasonable in the circumstances of this case, and given the natural and ordinary meaning of that word.

Thank you. I invite you to go back and continue your deliberations." (my emphasis)

[148] First, the appellant submitted that it was an error to tell the jury of the High Court instruction that no attempt should be made to explain the words "beyond reasonable doubt" and, when read with the balance of the direction, the direction tended to "force the jury to analyse whether any doubt they might have had was reasonable". Reliance was placed upon the observations

of Hunt CJ at CL, with those judgment Mahoney JA and Badgery-Parker J agreed, in *R v Reeves* when his Honour said:[27]

> "It appears to be an ineradicable misconception on the part of some trial judges that, simply because the High Court has on many occasions said that the phrase 'beyond reasonable doubt' is a well understood expression, and that whether a doubt is reasonable is for the jury to say by setting their own standards, it is necessary to tell the jury just that. It is not necessary; nor is it desirable to do so unless something is said by counsel during the course of the trial, or unless the jury asks a question, which warrants elaboration or explanation beyond the conventional direction."

[149] I am far from persuaded that Hunt CJ at CL was suggesting that it was neither necessary nor desirable to tell a jury that the High Court has said that the phrase "beyond reasonable doubt" is a well understood expression. In my view, his Honour was expressing the view that unless something has been said by counsel or the jury asks a question "which warrants elaboration or explanation beyond the conventional direction", trial judges should not inform juries that the phrase "beyond reasonable doubt" is a "well understood expression, and that whether a doubt is reasonable is for the jury to say by setting their own standards". As his Honour then said:[28]

> "The conventional direction requires the judge to say that the Crown must satisfy the jury beyond reasonable doubt of the guilt of the accused by establishing the essential ingredients of the charge to that standard, that the accused is entitled to the benefit of any reasonable doubt in their minds and that he does not have to prove that he is innocent. It is usual (and, in my respectful view, it is preferable) to add that the accused is presumed to be innocent until the Crown has established that guilt. Once those directions have been given, it is

[27] *R v Reeves* (1992) 29 NSWLR 109 at 117 (citations omitted).
[28] Citations omitted.

> positively mischievous for the judge to attempt to elaborate upon or to explain them …".

[150] The trial Judge was answering a question by the jury. In those circumstances, his Honour was faced with the problem that he was not permitted to elaborate upon the standard direction in any meaningful way or to explain the meaning of the term "beyond reasonable doubt". Judges and lawyers seem to think it is a well understood expression, but juries, regularly, do not. In that context, it did no harm to explain to the jury why the Judge would not attempt to explain the words. Judges have now come to realise that juries respond positively to explanations as to why events have or have not occurred and why particular directions are given. In the face of a question by the jury, it is singularly unhelpful simply to repeat the earlier standard direction. Told that the Judge has no choice because of the requirement to follow the directives of the High Court, the jury is far more likely to understand, accept the further direction and set about applying it to the best of their ability.

[151] In the particular circumstances, that part of the direction concerning the High Court was reasonable and there was no risk that it would tend to lead a jury to analyse whether any doubt they possessed was reasonable.

[152] The direction that the Crown was not required to prove it's case beyond "all" doubt came after a direction that a determination as to what is "reasonable", in the context of "beyond reasonable doubt", is a matter for the jury to determine and that "reasonable is what you think is reasonable,

giving reasonable it's natural and ordinary meaning …". After stating that the Crown was not required to prove its case beyond all doubt, the trial Judge said:

> "So you're looking at what is a reasonable doubt and what is a reasonable doubt, is for you to determine."

[153] Two primary questions must be addressed. First, as a matter of principle, is it correct to say that the Crown is not required to prove its case beyond "all" doubt? On one view, that statement is literally correct because juries are entitled to put aside "unreasonable" doubts or doubts that would not be entertained by a juror acting reasonably. On another view, the direction that the Crown is not required to prove its case beyond "all" doubt is not correct because "a" doubt experienced by a jury is, by definition, "a reasonable doubt". In addition, counsel contended that the direction is fraught with danger because a jury might conclude that notwithstanding the existence of a doubt which the jury entertain, they may nevertheless convict. The appellant also submitted that by contrasting beyond "all" doubt with beyond reasonable doubt, the direction erroneously invited the jury to analyse the quality of any doubt they experienced in order to determine whether that doubt passed the additional test of being reasonable.

[154] The leading authority is the decision of the High Court in *Green v The Queen*.[29] The trial Judge had given a lengthy direction specifically inviting the jury to consider the quality of a doubt and whether it was rational or

[29] (1971) 126 CLR 28.

otherwise. In a joint judgment, Barwick CJ, McTiernan and Owen JJ described the direction as "fundamentally erroneous" and said:[30]

> "A reasonable doubt is *a doubt* which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. … They are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed in the language of the judge in this case. 'It is not their task to analyse their own mental processes': Windeyer J., *Thomas v The Queen* [(1960) 102 CLR at 606]. A reasonable doubt which a jury may entertain is not to be confined to a 'rational doubt', or a 'doubt founded on reason' in the analytical sense or by such detailed processes as those proposed by the passage we have quoted from the summing up." (my emphasis)

[155] It can be seen from this passage of the joint judgment that a reasonable doubt is "a" doubt which the "jury" entertain. If this passage means "a" doubt in the sense that any doubt entertained by a "juror" is necessarily a "reasonable doubt", and I stress "if", then, with the greatest of respect to those eminent Judges who have opined that "beyond reasonable doubt" is a well understood expression, in my opinion it is not. Further, if the expression means any doubt entertained by a juror, standing alone without explanation, it has the potential to mislead jurors. In itself the expression "beyond reasonable doubt" invites jurors to analyse or assess the quality or strength of any doubt they, as individuals, might experience in order to determine whether the doubt is "reasonable". In my view this explains why juries regularly ask for an explanation as to the meaning of "reasonable doubt". Jurors, not surprisingly, seek guidance as to the meaning of "reasonable" in this context. From the perspective of a juror untrained in

[30] *Green v The Queen* (1971) 126 CLR 28 at 32 – 33.

the law and unaided by further explanation, the expression "beyond reasonable doubt" is likely to be perceived as having a significantly different meaning from "a doubt" experienced by a reasonable person or juror.

[156] In *Green* their Honours then examined circumstances in which it might be permissible to elaborate upon the standard direction by way of response to submissions by counsel:[31]

> "If during the course of a trial, particularly in his address to the jury, counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the minds of the jury that possibilities which are in truth fantastic or completely unreal ought by them to be regarded as affording a reason for doubt, it would be proper and indeed necessary for the presiding judge to restore, but to do no more than restore, the balance. In such a case the judge can properly instruct the jury that fantastic and unreal possibilities ought not to be regarded by them as the source of reasonable doubt."

[157] It is not without significance to the later debate as to the proper interpretation of the reasons in *Green* that the Court approved the following statement of Kitto J in *Thomas v The Queen*:[32]

> "Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what "reasonable" means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt *which the jury considers reasonable*." (my emphasis)

[158] In *Thomas*, it was accepted that to direct a jury that the Crown was required to prove its case "beyond any reasonable doubt" was correct. Windeyer J

[31] *Green v The Queen* (1971) 126 CLR 28 at 33.
[32] (1960) 102 CLR 584 at 595.

described the "best and plainest" way of giving the appropriate direction as to tell the jury "that they must be satisfied beyond all reasonable doubt".[33] Windeyer J also said:[34]

> "Of course, if the trial judge thinks that, influenced by advocacy or for some other reason, the jury may conjure up mere chimeras of doubt, he may well emphasize that for a doubt to stand in the way of a conviction of guilt it must be a real doubt and a reasonable doubt – a doubt which after a full and fair consideration of the evidence the jury really on reasonable grounds entertain."

[159] The decision in *Green* was delivered in November 1971. In April 1972, the New South Wales Court of Criminal Appeal delivered judgment in *R v Floyd*.[35] Included in the grounds of appeal was a complaint that the trial Judge erred in directing:

> "Reasonable doubt must not be confused with a fanciful or a flimsy doubt, it means a doubt to which a reason can be assigned."

[160] The judgments do not refer to *Green* and all members of the Court were of the view that the ground of appeal had not been made out. Both Herron CJ and Taylor AJA dealt with this ground and were of the view that the attempt to explain what was meant by reasonable doubt did not "water down" the fundamental direction that the Crown was required to prove its case beyond reasonable doubt. In the course of his judgment, the Chief Justice made the

[33] *Thomas v The Queen* (1960) 102 CLR 584 at 605.
[34] *Thomas v The Queen* (1960) 102 CLR 584 at 605.
[35] [1972] 1 NSWLR 373.

following observation which is of interest in view of the issues under consideration:[36]

> "Generally it is unwise in addressing a jury to attempt to qualify, to explain or embellish the well-known phrase 'beyond reasonable doubt'. *In the past I have known eminent judges of great experience tell juries that it does not mean proof beyond any doubt.* Others have said it means a doubt to which reason can be assigned." (my emphasis)

[161] The High Court again had occasion to consider erroneous and confusing directions in *La Fontaine v The Queen*.[37] The trial Judge had confused directions as to circumstantial evidence and rational inferences with the fundamental direction that the Crown was required to prove the case beyond reasonable doubt. In addition, the trial Judge told the jury that beyond reasonable doubt "does not mean beyond any doubt at all, but it must be beyond reasonable doubt".

[162] By a majority, the Court concluded that the charge taken as a whole correctly explained the burden of proof and the jury could not have been misled. Significantly, while criticising other aspects of the directions, none of the judgments criticised the specific direction that beyond reasonable doubt "does not mean beyond any doubt at all".

[36] *R v Floyd* [1972] 1 NSWLR 373. Special leave to appeal to the High Court was refused – see (1973) 47 ALJR 420.
[37] (1976) 136 CLR 62.

[163] In *R v Wilson, Tchorz and Young*,[38] the trial Judge had contrasted a "fanciful" doubt with a "reasonable" doubt in the following terms:

> "If you think there is a doubt but that it is merely a fanciful doubt, you will still convict because that is not a reasonable doubt: it is a doubt beyond reason."

[164] It is the judgment of King CJ in *Wilson* that I had in mind in my earlier reference to the meaning of the statement in *Green* that a reasonable doubt is "a doubt which the particular jury entertain in the circumstances". As will be seen from the passages in the judgment of King CJ to which I am about to refer, it appears that his Honour took the view that "a doubt" entertained by a jury of reasonable persons, irrespective of the strength of the doubt, is, ipso facto, a reasonable doubt.

[165] King CJ cited the passages from *Green* to which I have referred and described the direction under consideration in that case as "radically defective". His Honour continued:[39]

> "This direction postulates a doubt about guilt which the jury thinks exists. It then invites them to subject their mental state to examination in order to determine whether the doubt about guilt which they think to exist, is to be characterized as fanciful or reasonable. That direction is a negation of the proposition for which *Green's* case is authority that the test of whether a doubt is reasonable is whether the jury entertains it in the circumstances.
>
> I think that a direction in the terms given in the present case has a dangerous tendency to produce in the minds of the jurors an impression that a view held by them that there is a doubt about guilt is to be disregarded unless it passes some further test; that there must

[38] (1986) 42 SASR 203.
[39] *R v Wilson, Tchorz and Young* (1986) 42 SASR 203 at 207 (citations omitted).

be some particular degree of doubt or even that a slight doubt is to be disregarded. When jurors are invited to consider whether a doubt which they actually think to exist is fanciful, they may well interpret the invitation as one, not merely to exclude aberrant mental processes, but to put aside real doubts unless those doubts possess in their minds a certain degree of strength. *Proof beyond reasonable doubt requires that doubts, irrespective of degree of strength which they attain, be given effect to if the jurors, as reasonable persons, are prepared to entertain them*". (my emphasis).

[166] As to explanations, King CJ made the following observations:[40]

> "It is clear from the passages cited above that the High Court in *Green's* case set about discouraging judges from qualifying the direction as to onus of proof beyond reasonable doubt by reference to fanciful or unreasonable doubts except in cases in which that was considered to be rendered necessary by the arguments of counsel. Where the judge considers such a qualification to be necessary, it is essential that he frame the qualification in terms which do not diminish the jury's sense of their obligation not to convict upon supposed proofs about which they, as reasonable persons, *feel a doubt*. The qualification, when made, should be made in terms such as those suggested by the passage cited above from *Green's* case, which caution the jury against regarding possibilities which are in truth fantastic or completely unreal as affording a reason for doubt, or in terms, often used, which remind the jury of the capacity of the human mind to conjure up fanciful, nervous or unreasonable misgivings about matters which are not in reality in doubt. It is permissible, if thought necessary, to warn a jury against unreasonable mental processes, but it is not permissible to suggest that they should disregard *a doubt* which, at the end of their deliberations, they think to exist, *or that they are required to subject such a doubt to a process of analysis in order to determine its quality. If at the end of their deliberations, the jury have a doubt, that doubt is* ipso facto*, as* Green's *case establishes, a reasonable doubt.*" (my emphasis)

[167] Further guidance is obtained from the judgments in *R v Pahuja*.[41] The trial Judge had spoken to the jury in terms of "real doubt" and said that a guilty person should not be allowed to escape the consequences of his action "by

[40] *R v Wilson, Tchorz and Young* (1986) 42 SASR 203 at 206 (citations omitted).
[41] *R v Pahuja* (1988) 49 SASR 191.

false evidence, ingenious explanations or some misguided sympathy, *or by the jury allowing some fanciful doubt to take the place of a real doubt*" (my emphasis). Observing that the directions in question were "yet another failed attempt to explain the meaning of the concept of reasonable doubt", King CJ said:[42]

> "The expression 'reasonable doubt' is a composite expression meaning *a doubt which would be entertained by a reasonable person in the circumstances,* or as Latham CJ put it in *Burrows v The King*, 'a doubt such as would be entertained by reasonable men, recognising their responsibility to the accused and to the law'. An explanation which conveyed that meaning accurately to a jury would not be a misdirection. But although an explanation of the meaning of reasonable doubt which is accurate cannot be a misdirection, such explanations are not to be encouraged." (my emphasis)

[168] Referring to his judgment in *Wilson*,[43] the Chief Justice said that one of the purposes of the passage earlier cited from that judgment was to draw attention "to the point for which *Green* is authority, namely that 'jurymen themselves set the standard of what is reasonable in the circumstances' and that, therefore, 'a reasonable doubt is a doubt which the particular jury entertain in the circumstances'".[44]

[169] King CJ observed that the expression "real doubt" might be understood as being used in contrast to "some stupid or fanciful or unreal doubt" in which event "no harm would have been done". His Honour added, however, that

[42] *R v Pahuja* (1988) 49 SASR 191 at 194 (citations omitted).
[43] *R v Wilson, Tchorz and Young* (1986) 42 SASR 203.
[44] *R v Pahuja* (1988) 49 SASR 191 at 194.

the expression is open to criticism because "if a doubt exists, it can hardly be said to be other than a real doubt". His Honour continued:[45]

> "The danger is that the use of the adjective 'real' might convey to the jury a notion that some particular degree of doubt is required. I repeat what I emphasised in *Wilson*, namely that the adjective 'reasonable' in the expression 'reasonable doubt' does not denote any particular degree of strength of the doubt. It is qualitative, not quantitative, in meaning."

[170] After discussing the problems associated with requiring a jury to analyse its mental processes, King CJ said:[46]

> "Jurors are presumed to be reasonable persons. The test of reasonableness of a doubt is that the jury, properly aware of its responsibilities, is prepared to entertain it at the end of its deliberations. To direct or even invite a jury to subject a doubt which it entertains after deliberating upon the case, to a process of analysis or evaluation in order to determine whether it is reasonable, is an error of law."

[171] In *Pahuja*, Cox J undertook a particularly helpful and insightful review of the authorities and reached a minority view that it was not an error of law to instruct the jury "that they should ignore all doubts, be they stupid or fanciful or unreal, that were not reasonable doubts".[47] His Honour spoke of the philosophy underlying the standard of proof:[48]

> "The notion conveyed by the expression 'beyond reasonable doubt' is, of course, inexact. It is an acknowledgement of the impracticability, if not impossibility, of requiring that a charge be proved to the point of absolute certainty. All that society, acting through the courts, can do, if the system is to be workable, is to pitch

[45] *R v Pahuja* (1988) 49 SASR 191 at 194 – 195.
[46] *R v Pahuja* (1988) 49 SASR 191 at 195.
[47] *R v Pahuja* (1988) 49 SASR 191 at 211.
[48] *R v Pahuja* (1988) 49 SASR 191 at 204.

> the required degree of probability at a level that will ensure the conviction of a high proportion of the guilty and at the same time keep the risk of convicting the innocent acceptably low. The determinant that is used for this purpose is the state of mind – the belief or conviction – of the jury. There is no way of measuring degrees of conviction in any scientific fashion – one cannot apply to the jurors' minds a sort of Richter scale of belief – so recourse is had to a general formula that is intended to convey to the jury, simply and adequately, the law's standard of proof. The expression 'beyond reasonable doubt' is quantitatively and qualitatively imprecise, and there have been practical studies that suggest it can mean different things to different people … ."

[172] In observations that are pertinent to the direction under consideration that beyond reasonable doubt does not mean beyond all doubt, Cox J said:[49]

> "In the first place, it seems to me to be self-evident that the word 'reasonable' is a word of limitation. *It is generally accepted that 'beyond reasonable doubt' does not mean beyond any doubt at all*. The trial judge in *La Fontaine v The Queen*, said as much to the jury and, while his expatiation upon the concept of reasonable doubt was meticulously examined and severely criticised by the High Court, there was no criticism of that particular statement." (my emphasis)

[173] In the context of his view that the word "reasonable" is a word of limitation, and noting that the word cannot be discarded as superfluous, Cox J said:[50]

> "It must imply that there are some doubts that are reasonable and other doubts that are not, and that the jury must keep the distinction in mind in reaching its verdict. If that is right, it can hardly be an error of law to say so to the jury."

[174] Cox J examined the authorities which have approved the use of the phrase "moral certainty of guilt". His Honour also examined the use of the words "real doubt" and observed that in implying to the jury that a reasonable

[49] *R v Pahuja* (1988) 49 SASR 191 at 205 (citations omitted).
[50] *R v Pahuja* (1988) 49 SASR 191 at 205.

doubt had to be a real doubt, the trial Judge was in "good company". Cox J was of the opinion that the use of the word "fanciful" in contrasting a "fanciful" doubt with a reasonable doubt or "by way of warning the jury against having regard to fanciful theories or possibilities" was "an acceptable, if incomplete, contrast with the word 'reasonable'".[51]

[175] As to analysis by the jury of a doubt, Cox J regarded analysis to some extent as inevitable:[52]

> "The criminal standard of proof implies that there may be in any given case an uncertainty, objectively speaking, called a doubt, about the guilt of the accused. The jury is required to find the accused not guilty if, but only if, it considers that doubt to be a reasonable doubt. A degree of analysis and evaluation in this respect – Is this a reasonable doubt? – is inseparable, to my mind, from the test. Of course, as the High Court pointed out, juries are not accustomed to the analysing of their mental processes in this deliberate and systematic fashion, and, understandably, it was held to be confusing, as well as unnecessary and undesirable, to invite them expressly to go through such an exercise, but that is another matter. Determining whether there is a reasonable doubt on the evidence requires the making of a judgment, and perhaps the discarding of perceived unreasonable doubts, even if it is all done unconsciously."

[176] I respectfully agree that the task of the jury inevitably requires that jurors analyse and evaluate any doubt they experience to determine whether the doubt is reasonable. It is the very task with which jurors are entrusted. Further, if it ever was appropriate, in my view it is no longer appropriate to assume that jurors are not accustomed to analysing their mental processes or thoughts in order to determine whether they are reasonable. Implicit in the

[51] *R v Pahuja* (1988) 49 SASR 191 at 207.
[52] *R v Pahuja* (1988) 49 SASR 191 at 210.

assumption that jurors are not accustomed to analysing their mental processes is a further assumption that such a task would be beyond individual jurors and juries collectively. That implicit assumption might reasonably be regarded as disclosing a somewhat patronising attitude. Jurors, individually and collectively, are quite capable of carrying out the necessary analysis and evaluation.

[177] In *Pahuja*, Cox J went on to consider a distinction between the corporate state of mind of the jury and the mental processes of individual jurors in determining whether a doubt is reasonable or unreasonable:[53]

> "The High Court pointed out that 'a reasonable doubt is a doubt which the particular jury entertains in the circumstances', and that is the way the matter is looked at (any appeal aside) when the verdict has been returned. However, a judge's charge is directed not merely to the jury as a whole but to each individual member of it, for it is the votes of the individual members that will determine the verdict of the jury. It is obviously possible for an individual juror to perceive an unreasonable doubt, in the objective sense of that word, and I see no difficulty myself in conceiving of a juror having an unreasonable doubt. Jurors are selected at random and are no more immune from having unreasonable thoughts on occasions, or making unreasonable judgments, than judges or any other members of the community. To suppose otherwise, in the particular case of this class of persons, would be very strange indeed. At any rate, a person can have a doubt, in every sense of the word, but then, on further reflection and evaluation, discard it as unreasonable, so that it will no longer have any influence upon his decision. When the High Court in *Green* said that 'a reasonable doubt is a doubt which the particular jury entertains in the circumstances', it was, I apprehend, referring to the corporate state of mind that is implied in a finding of not guilty at the end of the jury's deliberations. It could not have been referring to the reasoning or evaluation processes, productive possibly of temporary as well as final states of mind, that are carried out, usually quite unconsciously, by individual jurors. Otherwise, it seems to me,

[53] *R v Pahuja* (1988) 49 SASR 191 at 210.

> the word 'reasonable', in the phrase 'beyond reasonable doubt', must be otiose."

[178] Cox J then drew attention to the distinction between reasonable and unreasonable doubts. His Honour said:[54]

> "Of course, a distinction can be drawn between unreasonable doubts and unreasonable factual possibilities, the latter being rejected and so providing no basis for a reasonable doubt. …
>
> Many judges in the leading cases have indicated that juries may have doubts that are less than reasonable. The passage I have already quoted from the judgment of Isaacs and Powers JJ in *Brown v The King*, plainly implies that the jury, after weighing all the evidence and so on, may find that 'there exists in their minds a residuum doubt as to his guilt' which is nevertheless a 'merely conjectural, visionary doubt, or a doubt arising from the bare possibility of his innocence', and may therefore be safely ignored. Windeyer J also, as I read his judgment in *Thomas*, indicated that the jury might have a doubt, being less than a real doubt and a reasonable doubt, that is not to stand in the way of a conviction. See also the references, quoted above, to a 'fanciful doubt' or a 'fanciful or frivolous doubt' that may be entertained by the jury, then rejected."

[179] I respectfully agree with the views of Cox J to which I have referred.

[180] The third judgment in *Pahuja* was delivered by Johnston J who concluded that the directions of the trial Judge contained a serious defect because the jury was told that if they had a doubt, they were to consider whether the doubt was reasonable. His Honour observed:[55]

> "There is a very great difference between speaking to a jury in general terms about the concept of reasonable doubt (inadvisable and dangerous although they may be) and telling the jury that if they, as a

[54] *R v Pahuja* (1988) 49 SASR 191 at 210 – 211 (citations omitted).
[55] *R v Pahuja* (1988) 49 SASR 191 at 220.

> jury, entertain a doubt they are to further scrutinise the doubt to see whether it passes the test of being reasonable."

[181] Johnston J expressed the view that if a jury entertains a doubt, "by definition" such a doubt is a reasonable doubt "because it is entertained by the body of the jury which, in our constitutional concept and tradition, is the embodiment of the reasonableness of the members of the society whom the jury represent".[56] His Honour observed that a reasonable doubt is not to be subjected to an "arithmetical test" or to be "weighed on a scale". Rather, it is "a doubt which a reasonable person can entertain … ".

[182] The Crown sought special leave to appeal from the decision in *Pahuja* allowing the appeal against conviction and ordering a new trial. It was argued that the majority of the Court of Criminal Appeal had misread *Green's* case and given it an operation that was unduly restrictive. The application was heard by a court comprised of five Justices and, in refusing the application, speaking for the Court Mason CJ said:[57]

> "The Court considers that there is no point in its seeking to expound what direction should be given to a jury on the standard of proof beyond what was said in *Green's* case. It is to *Green's* case that one should look to find the law on this topic, rather than to other cases in which glosses have been put upon what the Court said in that case. The question whether the directions given to the jury in this particular case were such as to warrant the setting aside of the conviction and the order for a new trial was a borderline one, as the judgment of Mr Justice Cox in the Court of Criminal Appeal indicates. Nevertheless, in the light of what we have already said, it would not be appropriate to grant special leave to appeal to the

[56] *R v Pahuja* (1988) 49 SASR 191 at 220.
[57] [1988] 15 Leg Rep SL 4.

> Crown so as to bring this question up for determination in this Court. The application for special leave to appeal is accordingly refused."

[183] Three points should be noted. First, the judgment in *Green* was distinguished from the "glosses" which other cases had put on that judgment. It is not clear which "glosses" the Court had in mind, but the judgment of King CJ in *Wilson* was one of the leading authorities and was the subject of consideration in *Pahuja*.

[184] Secondly, the Court was far from dismissive of the dissenting view of Cox J.

[185] Thirdly, the Court regarded the case for setting aside the conviction as "borderline". This borderline nature was said to be demonstrated by the judgment of Cox J.

[186] The approach of Cox J in *Pahuja* received support from the Victorian Court of Criminal Appeal in *R v Neilan*.[58] In a case of circumstantial evidence, the trial Judge had given repeated directions that the Crown was required to prove guilt beyond reasonable doubt and had distinguished the criminal and civil standards of proof. On more than one occasion the trial Judge told the jury that beyond reasonable doubt meant "proof beyond a doubt which they, as a collective unit, considered reasonable". The trial Judge also said:[59]

> "Now, the law tells me as a judge not to explain beyond reasonable doubt too fully to a jury, because a jury, having the corporate knowledge of men and women of the community, knows what is reasonable or not. You don't need any education or instruction as to what it is. *But beyond reasonable doubt is not no doubt, but*

[58] [1992] 1 VR 57.
[59] *R v Neilan* [1992] 1 VR 57 at 69.

> *reasonable doubt*. If you have a doubt, which in your mind is reasonable in the circumstances, then indeed it must be resolved in favour of the accused man. I don't intend to amplify the concept of reasonable doubt beyond that, except to say to distinguish it from the concept of the balance of probabilities." (my emphasis)

[187] Subsequently, on two occasions the trial Judge told the jury that if they had a doubt which the jury considered to be a reasonable doubt, that doubt had to be resolved in favour of the accused.

[188] The Court considered the judgments in *Pahuja*. After citing a passage from the judgment of King CJ which is set out in para [165] of these reasons, the Court said:[60]

> "We do not think that his Honour intended in this passage to convey that a doubt in any sense which a jury entertained at the end of its deliberations is necessarily a reasonable doubt and we would read the words 'properly aware of its responsibilities' as presupposing that the jury had in the course of the charge been properly instructed as to the need to be satisfied beyond reasonable doubt and were approaching the question of satisfaction with this instruction in mind."

[189] As to the approach of Cox J to the question of analysis, the Court said:[61]

> "As Cox J. observed in his dissenting judgment, it cannot be the law that a reasonable doubt is any doubt which a jury or a juror is prepared to entertain at any stage of the deliberations."

[190] The Court then cited with approval the passage from the judgment of Cox J, set out in para [175] of these reasons, in which his Honour spoke of a degree of analysis being inevitable. The Court drew attention to the observations of

[60] *R v Neilan* [1992] 1 VR 57 at 70.
[61] *R v Neilan* [1992] 1 VR 57 at 70.

Kitto J in *Thomas v The Queeb*, subsequently cited with approval in *Green*, that attempts to explain what is "reasonable" should not "obscure 'the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable'".[62]

[191] The Court gave specific consideration to this passage in *Green*:[63]

> "A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances."

[192] Of this passage the Court said:[64]

> "But this cannot mean that a reasonable doubt is anything other than a doubt, to use the language of Kitto J which had been approved a little earlier, 'which the jury considers reasonable'. The court is saying that the jurors set the standard of what is reasonable. To the references given by Cox J in *Pahuja* to judicial recognitions of the fact that juries may entertain doubts which they should not characterise as reasonable it will be sufficient to add a reference to what was said in the judgments in *Chamberlain v R (No 2)*.

[193] After observing that it was unfortunate that the trial judge gave the directions about which the complaint had been made, the Court concluded:[65]

> "In a sense it was not wrong to tell the jury that a reasonable doubt was a doubt which they considered reasonable. Had the jury asked his Honour what 'reasonable' meant, it would have been correct to reply that a reasonable doubt was a doubt which the jury considered reasonable. In the absence of any request from the jury for elucidation, it is, however, undesirable for a judge to tell the jury that they should first consider whether they have a doubt and then consider whether that doubt is a reasonable one. His Honour did not, however, invite the jury to approach their task in this two stage way.

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[62] *Thomas v The Queen* (1960) 102 CLR 584 at 595.
[63] (1971) 126 CLR 28 at 32-33.
[64] *R v Neilan* [1992] 1 VR 57 at 71 (citations omitted).
[65] *R v Neilan* [1992] 1 VR 57 at 71.

> It is, in general at all events, undesirable for a judge even, instead of using the composite phrase 'a reasonable doubt' or 'beyond reasonable doubt', to distinguish between the doubt and its reasonableness. But we do not think that in the present case, whether one has regard only to the impugned passages or to the charge read as a whole, the jury would have regarded themselves as being directed or invited to analyse their mental processes as opposed to being told that they should consider whether the Crown had proved guilt beyond reasonable doubt."

[194] I note that as in the case under consideration, in *Neilan* counsel at trial had not taken exception to that part of the charge about which complaint was made on appeal. The Court regarded the absence of complaint as of significance.

[195] In *Parker v The Queen*[66] the trial Judge told the jury that beyond reasonable doubt "doesn't mean beyond any doubt whatsoever". The Judge also spoke of the jury enjoying "a high degree of satisfaction" and of whether there was a reasonable possibility that the accused possessed the relevant honest belief that would amount to exculpation. In a judgment with which Malcolm CJ and Steytler J agreed, Ipp J held that the reference to "reasonable possibility" was an invitation to the jury to engage in an analytical process contrary to the decision in *Green* and, in addition, such directions tended to reverse the burden of proof. In his analysis of the directions, although the ground of appeal specifically complained that the trial Judge erred in directing that beyond reasonable doubt does not mean beyond any doubt

[66] (Unreported, Western Australian Court of Criminal Appeal, Malcolm CJ, Ipp and Steytler JJ, 26 May 1995).

whatsoever, Ipp J did not mention that criticism or comment upon whether it was appropriate or otherwise for a trial Judge to give such a direction.

[196] The direction that proof beyond reasonable doubt does not mean proof beyond any doubt was also given in *R v Stirling*.[67] That particular expression was used in the context of a much longer direction in which the trial Judge spoke of the jury being "sure" of guilt and a reasonable doubt not being "fanciful or imaginative or something you dream up to avoid what might be an otherwise difficult decision".

[197] In the judgment with which Fitzgerald P and Davies JA agreed, Thomas J found that the directions were "unwarranted and constituted an error because they had the potential to distract the jury from itself setting the standard of what was reasonable in the circumstances". His Honour did not pick out any part of the directions for specific comment other than the use of the word "sure" which, in the particular circumstances, his Honour found would "hardly" possess a tendency to mislead the jury. The proviso was applied.

[198] In *R v Goncalves,*[68] the trial Judge directed the jury that beyond reasonable doubt did not mean "proof to the point of absolute certainty". While regarding the elaboration as "clearly undesirable", Malcolm CJ was of the view that the direction did not suffer from the vices identified in *Green* and expressed his opinion in the following terms:[69]

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[67] [1996] QCA 342.
[68] (1997) 99 A Crim R 193.
[69] *R v Goncalves* (1997) 99 A Crim R 193 at 196.

> "In my opinion, by saying that proof beyond reasonable doubt was not proof 'to the point of absolute certainty', the learned judge was telling the jury that proof beyond reasonable doubt *did not mean proof beyond any doubt whatsoever*. From the way in which it was put, I am of the opinion that it remained for the jury to determine whether any doubt they had was a reasonable doubt. In that sense, the direction excluded an approach which would have been wrong and emphasised to the jury that if they had any doubt they would have to determine whether it was reasonable." (my emphasis)

[199] It is clear from his Honour's judgment that the Chief Justice accepted that, as a matter of principle, proof beyond reasonable doubt does not mean proof beyond any doubt and, in itself, it is not a misdirection to tell the jury accordingly.

[200] The same distinction between beyond reasonable doubt and beyond all or any doubt was drawn by the trial Judge in *R v Nguyen*.[70] However, the reference to "beyond all doubt" being different from "beyond all reasonable doubt" came in the middle of a number of directions and examples which Sully J on appeal described as "very unusual, and extraordinarily discursive". The particular reference to "beyond all doubt" was not the subject of comment and the directions in their entirety were held to have resulted in a miscarriage of justice.

[201] In *R v Chatzidimitriou*,[71] the Victorian Court of Appeal was confronted with an unusual situation. During their deliberations, the jury had asked the trial Judge to define "doubt", "reasonable doubt" and "beyond reasonable doubt". The trial Judge told the jury that "the law has always taken the view that

[70] (Unreported, New South Wales Court of Criminal Appeal, Spigelman CJ, Sully and Hidden JJ, 1 October 1988).
[71] [2000] 1 VR 491.

those are very plain English words and ought to be interpreted by the jury to mean exactly what they say, namely beyond reasonable doubt. It is impossible to put any other definition on them". The Judge then contrasted the civil standard of proof. Subsequently the jury requested a dictionary and it was provided to them without further direction.

[202] The majority dismissed the application for leave to appeal. In the course of his judgment, Phillips JA emphasised that a reasonable doubt "is not any doubt at all" and rejected a proposition advanced with reliance upon *Green* and *Pahuja* that "a reasonable doubt was nowadays no more and no less than a doubt which the jury entertained at the end of the day".[72]

[203] Phillips JA referred to the decision of *Neilan* and to the Court's examination of the judgments in *Pahuja*. His Honour continued:[73]

> "But, of course, the jury must be left to itself to determine what is a reasonable doubt. The law is not that the jury must not consider what is or is not reasonable; the law is that the jury must alone be the arbiter of the issue. It is error on the part of the trial judge to intrude upon the jury's function in this respect. It is for that reason that the judge must not define the word "reasonable"; nor, it may be added, should the judge invite the jury to analyse their own mental processes too finely. The latter, however, does not mean that deciding what is reasonable is to be removed from the jury's province; quite the contrary."

[204] Later, after citing at length from the judgment in *Neilan*, Phillips JA observed that at least in Victoria "the test remains one of reasonable doubt, not of any doubt at all; and that the jury's function includes determining

[72] *R v Chatzidimitriou* [2000] 1 VR 491 at [5].
[73] *R v Chatzidimitriou* [2000] 1 VR 491 at [9].

what *is* reasonable doubt - or to put that in more concrete fashion, whether the doubt which is left (if any) is reasonable doubt or not".[74]

[205] Cummins AJA reached the same conclusion. His Honour noted that if the passage from *Green* is "misapplied to jury consideration (as distinct from judicial definition) [it will] result in the adjective 'reasonable' in the expression 'beyond reasonable doubt' being defined out of existence". His Honour added:[75]

> "That is not the law, nor should it be. The adjective 'reasonable' qualifies the noun 'doubt'. Prospective judicial direction at trial goes to the quality of the doubt, not the quality of the juror. The above appellate dicta relate not to a priori judicial direction to the jury – else the word 'reasonable' should be eliminated from judicial direction to the jury – but relate rather to characterisation of the jury process after the jury has been properly instructed (including by the word 'reasonable') and after its full and careful deliberation: then, if a doubt persists, the doubt is regarded as reasonable. The dicta of an operational, reflective nature. They are not prospective. That is clear from the words 'at the end of their deliberations'."

[206] Callaway JA dissented. His Honour was of the view that the jury had misunderstood the directions concerning "beyond reasonable doubt" and "believed that a doubt that they entertained had to be subjected to a further test".[76] In those circumstances his Honour was of the view that the provision of the dictionary without further direction enabled them to carry into effect the application of such further test.

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[74] *R v Chatzidimitriou* [2000] 1 VR 491 at [11].
[75] *R v Chatzidimitriou* [2000] 1 VR 491 at [46].
[76] *R v Chatzidimitriou* [2000] 1 VR 491 at [26].

[207] As to the meaning of "beyond reasonable doubt", Callaway JA made the following observations:[77]

> "The phrase 'beyond reasonable doubt' does have a meaning. The word 'reasonable' is not otiose. The phrase does not *mean* any doubt that the jury entertain, but the *practical consequence* of requiring the Crown to prove its case beyond reasonable doubt is that a reasonable doubt is a doubt which the particular jury entertain in the circumstances. That presupposes that they heed the judge's directions, carefully consider the evidence and eschew fanciful or unreal possibilities but, as the High Court said, they set the standard. Setting the standard of what is reasonable in the circumstances is not the same as defining, or assigning a meaning to, the word 'reasonable'. As counsel said, it 'follows' that if a doubt exists and persists the jury should acquit."

[208] The approach of the majority in *Neilan* was approved by Underwood J in *R v Graham*.[78] For present purposes it is sufficient to note that his Honour expressed agreement that a reasonable doubt "cannot be any doubt that a juror entertains at any stage":[79]

> "[I]t was pointed out in the joint judgment that a reasonable doubt cannot be any doubt that a juror entertains at any stage, otherwise the word 'reasonable' is otiose. I would respectfully agree with that proposition."

[209] In *R v Ho*[80] the New South Wales Court of Criminal Appeal was concerned with directions as to the burden of proof that included a statement that the standard of proof was not "beyond any doubt". Objection was taken at trial, but the trial Judge declined to give any additional direction.

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[77] *R v Chatzidimitriou* [2000] 1 VR 491 at [22].
[78] (2000) 116 A Crim R 108.
[79] *R v Graham* (2000) 116 A Crim R 108 at [59].
[80] (2002) 130 A Crim R 545.

[210] In a judgment with which Meagher JA and Hidden J agreed, Bell J referred to the decision in *Green* and to the submission that the direction invited the jury to engage in an exercise of analysing doubts they may experience. Her Honour observed that it "would have been preferable for the trial judge in this case not to have given the jury a direction, in terms, that the standard of proof is not beyond any doubt." However, her Honour emphasised that it "is necessary to view the directions concerning the onus and standard of proof in the context of the summing-up as a whole".[81]

[211] After referring to a number of passages in the summing-up, Bell J concluded:[82]

> "Having regard to the summing-up as a whole, I am of the view that the jury were left in no doubt as to the onus and standard of proof. In my view ground 1 has not been made good."

[212] From this review of the authorities, I draw the following conclusions relevant to the determination of this ground of appeal:

- "Beyond reasonable doubt" does not mean "beyond all doubt" or "beyond any doubt". As Cox J observed in *Pahuja*, the word "reasonable" in this context is a "word of limitation" and the standard of proof "beyond reasonable doubt" has been set in recognition of the "impracticability, if not impossibility, of requiring that a charge be proved to the point of

[81] *R v Ho* (2002) 130 A Crim R 545 at [32].
[82] *R v Ho* (2002) 130 A Crim R 545 at [41].

absolute certainty".[83] The adjective "reasonable" has a role to play in qualifying the noun "doubt".

- The direction of the High Court in refusing special leave in *Pahuja* to have regard to the judgment in *Green* rather than "glosses" put on that judgment, is not particularly helpful given the divergence of views as to the fundamental principle that emerges from the judgment in *Green*. As to the statement in *Green* that "a reasonable doubt is a doubt which the particular jury entertain in the circumstances":

  (i) A strict view has been taken by King CJ that if, as reasonable persons, the jury entertain "a" doubt about guilt, irrespective of the degree of strength of that doubt the Crown has failed to prove its case. A "reasonable doubt" is "a" doubt which would be entertained "by a reasonable person in the circumstances". This approach would encompass "any" doubt entertained by the jury acting reasonably.

  (ii) The strict view taken by King CJ has not met with universal approval. In *Neilan* the Victorian Court of Appeal endeavoured to avoid conflict with the view expressed by King CJ by adopting the generous view that his Honour did not intend to convey in *Wilson* "that a doubt in any sense which a jury entertained at the end of its deliberations is necessarily a reasonable doubt".

[83] *R v Pahuja* (1988) 49 SASR 191 at 204.

(iii) The Court in *Neilan* approached the particular passage in *Green* from a different perspective. Rather than placing emphasis on "a" doubt entertained by a "reasonable jury", the Court determined that the High Court could not have meant anything other than "a" doubt which the jury considers "reasonable". The proposition that, today, a reasonable doubt is "no more and no less than a doubt which the jury entertained at the end of the day" was rejected. The test remains one of reasonable doubt and it is the function of the jury to determine what is reasonable doubt, that is, to determine whether the doubt left is a reasonable doubt or not.

- There is significant judicial support for the dissenting judgment of Cox J in *Pahuja*.

- The principle underlying the concept of proof beyond reasonable doubt, and the weight of authority, support the view taken in *Neilan*. That view accords with the observations of Kitto J in *Thomas* cited at para [157] of these reasons and approved by the High Court in *Green*. More recently, the same passage from the reasons of Kitto J was cited with approval in the joint judgment of Gleeson CJ and Gummow, Heydon and Crennan JJ in *Darkan v The Queen*.[84]

- The requirement is proof beyond reasonable doubt and it is for the jury to say whether a doubt entertained by the jury is reasonable. To put it

[84] (2005) 227 CLR 373 at [69].

another way, an accused is entitled to the benefit of "any doubt which the jury considers reasonable". It is not "no more and no less than a doubt which the jury entertains at the end of the day".

- Binding High Court authority has determined that the jury should not be invited to analyse their thought processes or to determine first, whether a doubt exists, and then subject that doubt to the further test of determining whether that doubt is reasonable.

- Notwithstanding that the adjective "reasonable" has a qualifying role to play, in view of the differing interpretations of the judgment in *Green*, and until the matter is resolved by the legislature or the High Court, trial Judges should use the standard direction that the Crown is required to prove its case beyond reasonable doubt without elaboration.

- Notwithstanding that elaboration is to be avoided, it is permissible to instruct the jury that it is not enough for the Crown to prove that the accused is probably guilty and that the Crown must go further and prove guilt beyond reasonable doubt.

- In the circumstances identified in *Green*, or if asked by the jury to explain or define the meaning of "beyond reasonable doubt" or "reasonable", it may be appropriate to instruct the jury:

  (i) That fantastic and unreal possibilities should not be used by the jury as a source of reasonable doubt.

(ii) That it is not appropriate for the Judge to endeavour to define the meaning of "reasonable" because the jury itself sets the standard of what is reasonable in the circumstances, and whether a doubt is reasonable is for the jury to determine.

[213] Returning to the directions under consideration, in my view it would have been preferable if the trial Judge had not directed the jury that the Crown was not required to prove its case "beyond all doubt". Literally speaking, that direction was not an error, but as the authorities demonstrate, elaborations of this nature risk straying into prohibited territory. In all the circumstances, however, having regard to the directions as a whole I am satisfied that this single statement did not stray into such prohibited territory or detract from the fundamental features required of directions as to the burden of proof.

[214] The trial Judge repeatedly and emphatically told the jury that the Crown must prove its case, and in particular the existence of the necessary intention, beyond reasonable doubt without any qualification as to the meaning of that expression. In the re-direction, his Honour merely informed the jury, correctly, that beyond reasonable doubt did not mean beyond all doubt and there is nothing in the directions that might have led the jury to the process of analysing a doubt in order to determine whether it was reasonable. Informing the jury that it did not mean beyond all doubt did not invite the jury to adopt a two stage process. Nor did it detract from the fundamental requirement that the jury be left to determine for itself whether

a reasonable doubt existed. Quite the contrary, his Honour specifically informed the jury that it was for the jury to determine whether a reasonable doubt existed. There was no attempt to define reasonable and no basis for any implication by the jury that the jury was required to subject a doubt to a further test.

[215] In my opinion, viewed in their entirety, the directions correctly instructed the jury as to the burden of proof and the additional explanation did not detract from that fundamental requirement.

[216] The specific complaints in ground 4 are not made out, including the complaint in ground 4(e) that the trial Judge failed to assist the jury by contrasting the criminal and civil standards of proof. There was no requirement for his Honour to do so.

[217] Leave to appeal should be granted, but the appeal should be dismissed.

Angel J:

[218] I have had the benefit of reading the draft reasons for judgment of the Chief Justice.

[219] As to ground 1, I agree with the Chief Justice that the evidence of the subsequent incident had probative value and was admissible. The evidence was relevant to the appellant's capacity to think, to plan, and to carry out an intended course of conduct. It was relevant to his capacity to form an intention to cause death or serious harm. It was relevant to his degree of

intoxication and his coordination. It was generally relevant to his physical and mental state at the time of the stabbing of the deceased. I also agree that the probative value of that evidence outweighed its prejudicial effect, particularly given the sole issue at trial was the intention of the appellant at the time of the stabbing.

[220] As to ground 2(a), the physical characteristics of the knife, the punching of the witness Carr as an immediate prelude to the stabbing, the manner of stabbing, the nature and location of the stab wound, and the degree of force used (which bent the knife blade) was evidence from which an inference of an intent to kill or cause serious harm could be drawn. The fact the appellant "took off" after the stabbing, however, was not a matter from which such an inference could be drawn beyond reasonable doubt. "Taking off" was not probative of the appellant's guilt of the offence of murder. The appellant's "flight" was capable of an alternative explanation to that of a realisation or consciousness of guilt of the crime of murder, eg consciousness of guilt of assault or of unlawful wounding.

[221] I agree with the Chief Justice that grounds 2(d) and 2(e) should be dismissed.

[222] I agree with the Chief Justice that ground 3(a) should be dismissed. There was nothing said to the jury to relieve the Crown of proving its case beyond reasonable doubt.

[223] I agree with the Chief Justice that grounds 3(b) and 3(c) should be dismissed.

[224] I agree ground 4 should be dismissed. In my experience juries in both Darwin and Alice Springs have sought directions on the meaning of "reasonable doubt". On those occasions I have recalled the jury and directed them in terms:

(i) that a reasonable doubt is a doubt that the jury entertains in the circumstances;

(ii) that it is for the jury to set the standard of what is reasonable in the circumstances;

(iii) that it is not the jury's task to analyse its own mental process;

(iv) that fantastic and unreal possibilities ought not be regarded as a source of reasonable doubt.

I have only included (iv) when of the view that defence counsel's comments on the burden of proof called for it. Counsel, including experienced counsel, have never suggested I should give any further direction or directions. In such cases – mostly, if not all, as I recall, involving uncorroborated allegations by minors of sexual assault – the jury has never returned asking for any further clarification.

[225] I have reached a different conclusion from that of the Chief Justice with respect to ground 2(b) – failing to distinguish between the intention to engage in the conduct causing death and the intention required in relation to the result, having regard, inter alia, to s 43AI(2) *Criminal Code* (NT).

[226] Part IIAA of the Code applies to s 156 (Murder) which is an offence in Sch 1: s 43AA(1) and (2). The act of stabbing is "conduct", which must be voluntary, s 43AF, and intentional, s 43AI(1). Death and serious harm relative to the offence of murder are results and the fault element in relation to those results is intention as provided by the terms of s 156 itself.

[227] Section 43AI(2) provides:

> "A person has intention in relation to a result if the person means to bring it about or is aware that it will happen in the ordinary course of events".

[228] Whilst I agree with the Chief Justice that a direction in terms of s 43AI(2) is not always necessary and that a direction of a need to prove beyond reasonable doubt an intention to cause death or serious harm will in many cases suffice, in order to gauge the appropriateness of the trial Judge's directions it is necessary to have regard to the circumstances of the case.

[229] There were two eye witnesses. Both had been drinking. One eye witness said the appellant was "blind drunk", the other, "full drunk". Nothing was said or done by the deceased to make the appellant angry. According to the witness Carr, before the stabbing they had all been in a happy mood. Nothing was said by either the appellant or the deceased before the stabbing or after the stabbing. There was no argument. There was no readily apparent reason for the accused's conduct in the circumstances. The accused and the deceased were standing at the time of the stabbing. One witness (Chungaloo) described the knife thrust as with thumb on top of the knife handle, fingers

underneath and a forward motion at about shoulder height. The other witness (Carr) described it as a stab downwards. In her words: "… then he just stick the knife into her." There was a single stab wound. The stab wound was to the sternum. The knife was withdrawn and whilst still holding the knife, the accused "took off". No direction was sought or given as to flight.

[230] Counsel for the defence, whilst agreeing that no submission was made that the act of stabbing was accidental, submitted that the intoxication of the accused raised the possibility, which the Crown had not negatived beyond reasonable doubt, that the *location* of the stab wound was unintended and that the accused may well have intended to strike the victim in a non–vital area. It was submitted the accused's actions were reasonably explicable as a mere lashing out at or warding off the victim as opposed to a deliberate stabbing with the intention of killing her or causing serious harm to her.

[231] Given this background the critical question, or so it seems to me, is the adequacy of the learned trial Judge's statement to the jury when he addressed their note "When we were recalled yesterday, your Honour made a comment that there is no suggestion that this was an accident". It is not apparent what the jury meant by "this". The jury had already been told a number of times in the summing up that the Crown had to prove beyond reasonable doubt that the appellant at the time of the stabbing intended to cause death or serious harm and of course the jury had the Aide Memoire where this was spelt out. The jury nevertheless sought clarification about "accident" on the day following their retirement some hours into their

deliberations. Thus the trial Judge's direction was a significant factor in their deliberations.

[232] His Honour said this –

> "The note I have from you is this. 'When we were recalled yesterday, your Honour made a comment that there is no suggestion that this was an accident.'
>
> I assume you want me to explain what I really meant by that. I should start by telling you, that in this case, the Crown has to prove beyond reasonable doubt that Mr Ladd had the necessary intent, being the intent to either kill Ms Bob, or cause her serious harm. That is what the Crown has to establish.
>
> The issue is, as Mr Georgiou identified to you, and you and I have talked about, is whether the Crown has established that he had the capacity to form the intent because of his intoxicated state. And the second issue is whether he in fact, did form the intent.
>
> All right. So that's what the case is about. One reason why it might be thought that person did not have the necessary intent, is where what has occurred, has happened by accident, and you will recall yesterday, we talked about, if you have a cup of water in front as you stand up to leave the jury box, and you knock that glass of water over, it would not in those circumstances be said, that you intended to knock the glass over, because you just bumped it as you were departing.
>
> So, if something is an accident, by definition, it cannot be something that was intended, an accident is what happened without intention. In this case, bringing it back to this case, there is no suggestion that Mr Ladd had the knife in his hand, and he tripped causing the knife to enter the body of the deceased. That would be an accident. If he was there slicing potatoes, and he slipped on an oily patch on the floor, and the knife penetrated someone else, you might think that was an accident.
>
> Mr Georgiou doesn't say that to you in this case. He doesn't say that the stabbing was an accident in that sense. So he doesn't argue that, the stabbing was not deliberate, in the sense that Mr Ladd had the

knife in his hand, and he penetrated the body of the victim with the knife.

What is [in] issue is, when that occurred, what was the intention of Mr Ladd? The Crown has to show – has to satisfy you beyond reasonable doubt firstly, that Mr Ladd had the capacity to form the intention to either kill or cause serious harm to Ms Bob, and must also show, that he in fact, did so.

So just to repeat, this is not a case where someone is said to have accidentally done something. Not a case, where someone is said to have tripped over and as they're falling, the knife has penetrated someone else, or any other accident of that kind. The issue is, when Mr Ladd did stab the victim, and that is not in dispute that he did stab her, what was his intention, and more particularly and expressed more correctly, has the Crown established beyond reasonable doubt that he had the necessary intention.

So does that answer your question? If it doesn't, you can always come back and ask me again."

[233] In my opinion the learned trial Judge's directions regarding accident fell short of the directions which were required. Given the somewhat odd circumstances of the stabbing they did not convey the position with the clarity which was required.

[234] The trial Judge started by telling the jury the Crown had to prove beyond reasonable doubt that the appellant had the necessary intention to kill or cause serious harm to the victim, i.e. to bring about a result. He then proceeded "One reason why it might be thought that person did not have the necessary intent, is *where what has occurred, has happened by accident*, and you will recall yesterday, we talked about, … [knocking over a glass of water]" (emphasis added). The example given comprised accidental conduct

– inadvertently knocking the glass – and accidentally bringing about a result – spilling the water. Where his Honour used the words "where what has occurred, has happened by accident" he could be taken to have been referring either to the death of the deceased or the act of stabbing by the appellant. His Honour then pointed out that "… there is no suggestion that Mr Ladd had the knife in his hand, and he tripped …" Here, his Honour was referring to accidental conduct. His Honour proceeded: "Mr Georgiou doesn't say that to you in this case. He doesn't say that the stabbing was an accident *in that sense*. So he doesn't argue that, the stabbing was not deliberate, in the sense that Mr Ladd had the knife in his hand, and he penetrated the body of the victim with the knife."(emphasis added). Here again, his Honour was speaking of accidental conduct. His Honour did not refer to any sense of accident involved in the defence case. There is room for confusion. Counsel for the accused was not saying that the stabbing was accidental but that the result, death, was unintended, that is, accidental. His Honour proceeded: "What is [in] issue is, when that occurred, what was the intention of Mr Ladd? The Crown has to show – has to satisfy you beyond reasonable doubt firstly, that Mr Ladd had the capacity to form the intention to either kill or cause serious harm to Ms Bob, and must also show, that *he in fact, did so*."(emphasis added). The latter statement, in contrast to what was said earlier, is not that he in fact "had that intention", but "did so", which could mean "did so form the intention" or – alternatively – mean that he in fact killed the deceased. Here the Judge could be taken to be

referring to an intention to bring about a result as opposed to intended conduct. His Honour proceeded: "So just to repeat, *this is not a case where someone is said to have accidentally done something*. Not a case, where someone is said to have tripped over and as they're falling, the knife has penetrated someone else, or any other accident *of that kind*." (emphasis added). This latter statement is addressing conduct as opposed to a result, but the statement "… this is not a case where someone is said to have accidentally done something …" is not strictly correct. It is not a case where someone is said to have conducted themselves accidentally, but on the defence case, it is a case of an unintended killing, i.e. an accidental result.

[235] As can be seen from the directions the trial Judge has admixed conduct with results in his discussion of accident and the jury may well have been left with the impression that an intention to engage in the compound – conduct which caused death – was what was required to be proven by the Crown. In my opinion the learned trial Judge did not sufficiently segregate intended conduct from the intention to bring about a result.

[236] In my opinion the directions which the learned trial Judge gave in response to the jury's note about "accident" did not convey to the jury with the clarity which was required what the Crown had to prove, namely that the burden was upon the Crown to prove beyond reasonable doubt that the only inference open from the facts, as found, was that at the time when he stabbed the deceased the appellant had the intention to kill her or inflict serious harm upon her, that is, an intention to bring about a result, and that

if the circumstances of the stabbing caused them to have reservations about drawing such an inference, the benefit of such doubt should go to the appellant.

[237] There being no readily apparent reason for the single blow, which according to the evidence was inflicted in circumstances where nothing was said by the appellant or the victim before or afterwards, the directions should have clearly distinguished between the appellant's intention to stab the deceased on the one hand, and his intention to bring about a result, death or serious harm, on the other. In my opinion in the circumstances it was desirable that a direction in terms of s 43AI(2) of the Code be given.

[238] I think the deficiencies in the directions were compounded by the lack of any direction as to flight, though as I have said, none was sought or given and it was not a matter of complaint before us.

[239] I would allow the appeal and order a retrial.

Mildren J:

[240] I have had the advantage of reading the reasons prepared by the Chief Justice and by Angel J. I agree with the conclusions reached by the Chief Justice and with his Honour's reasons but I wish to add a few comments of my own.

[241] As to ground 1, the evidence concerning the conduct of the appellant at the Emporium Shop in Tennant Creek was clearly relevant and admissible, for

the reasons given by the Chief Justice. This evidence was relevant to whether or not the appellant had the capacity to form an intent to kill or to cause serious harm. The appellant's case was, in part, that he did not have such a capacity. If the jury, having considered the evidence relating to intoxication, had a reasonable doubt about his capacity, it follows that the Crown would not have proved that he had the relevant intent.[85] As counsel for the accused had submitted at the trial that the appellant did not have the capacity to form the relevant intent, it was necessary for the trial Judge to address that question in his charge to the jury. Alternatively, leaving aside questions of capacity, the evidence was relevant as to whether or not he did in fact form the relevant intent. In particular, it was relevant to the question whether an inference ought to be drawn in the light of the fact that the appellant stabbed the deceased only once, and the location of and force used, to inflict that wound, as well as any other evidence bearing on the question of intent. However, the evidence of the later stabbing was not the only evidence which bore upon that question. It was one piece of circumstantial evidence, which, together with the other evidence upon which the Crown relied, the jury was invited to consider relevant to that question. It was not suggested that the evidence of the later stabbing was evidence of an intermediate fact which formed an indispensable basis for an inference of

[85] See *Viro v The Queen* (1978) 141 CLR 88 at 111-112; *R v O'Connor* (1980) 146 CLR 64 at 118 per Aickin J.

guilt which required proof beyond reasonable doubt in accordance with *Shepherd v The Queen*.[86]

[242] The submission was that the time between the two stabbings was not proved. However, there was evidence which the jury was capable of accepting that the time was in the order of about half an hour. It was open to the jury to find that the appellant's state of insobriety had not significantly altered in this period of time. This submission must be rejected.

[243] As to ground 2(a) (the submission that an intention to cause death could not be drawn from a single stab wound, and should not have been left to the jury), this overlooks the decision in *Doney v The Queen*[87] where the High Court held that "…if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision". In any event, the evidence relating to the wound was not the only evidence which the Crown relied upon to prove as intent to cause death. This submission must be rejected.

[244] As to ground 2(d), that the learned trial Judge erred in failing to instruct the jury that in addition to an intent to cause serious harm, the Crown had to prove foresight of the possibility that serious harm might occur as a consequence of his actions, in my opinion s 43AI(2) does not require such a direction. Section 43AI(2) is expressed in terms of two alternatives. Thus

[86] (1990) 170 CLR 573.
[87] (1990) 171 CLR 207 at 214-215.

the Crown either has to prove an intention in relation to a result, ***or*** it may prove that the accused was "aware that it will happen in the ordinary course of events". The case was conducted by both sides at trial on the basis that the Crown had to prove an intent to cause serious harm only. Even if s 43AI(2) is relevant to the offence of murder under s 156 of the Criminal Code, there is no reason to treat the word "or" appearing in s 43AI(2) as meaning "and".

[245] As to ground 2(e), in my opinion s 156(1)(a) and (b) and s 160(a) and (b) do not specify two separate conducts. The "conduct" is expressed in s 156(1)(a) and s 160(a). The consequence, or result of that conduct, is expressed in s 156(1)(b) and s 160(b). The combination of s 156(1)(a) and (b) and s 160(a) and (b) is the "physical element" in each case: see s 43AE. Although s 43AE suggests that there may be more than one physical element contained in an offence, s 43AM(1) suggests, by reference to "a physical element consisting *only* of conduct", that a physical element may consist of both conduct and the result of conduct. The fault element for the physical element is expressed in s 156(1)(c) or s 160(c) as the case may be. In the case of murder, s 156 itself provides for a fault element which does not consist only of conduct, and therefore s 43AM(1) does not apply to that offence. In the case of manslaughter, s 160(c) provides a fault element, and therefore s 43AM(2) does not apply to that offence.

[246] The argument of the appellant was that s 43AM(2) applied to the offence of murder. That depends upon the interpretation to be given to the words "if a

law that creates an offence does not provide a fault element for a physical element that consists of a result or circumstance". If the fault element in the case of murder consisted of both "conduct" as well as a "result of that conduct", does s 43AM(2) apply to a physical element that consists of a fault element which consists of both conduct and a result of that conduct? In my opinion, if the draftsman of the Code had intended that to be so, I would have expected s 43AM(2) to have expressly said so. The logical consequence of that construction is that if s 43AM(2) applied to murder, bearing in mind that s 43AK(4) provides that "if recklessness is a fault element for an offence, proof of intention, knowledge or recklessness satisfies the fault element", the Crown could establish murder by proving either an intention to cause death or an intention to cause serious harm, ***or*** by recklessness as to the conduct causing death, as the fault element for murder. I do not consider that Parliament intended this consequence for the reasons explained by the Chief Justice, but if it did, it does not carry with it the consequence that, in addition to proving an intent to cause serious harm, the Crown also had to prove recklessness.

[247] Alternatively, as the Chief Justice explains, if (as I believe is the case) there are two fault elements to murder consisting of conduct and the result of conduct, the fault element for the result of conduct, i.e. the causing of the death of a person, is the intention to kill or to cause grievous harm. Consequently, s 43AM(2) does not apply to the fault element consisting of

the result of the conduct because s 156 provides the fault element. This ground of appeal must be rejected.

[248] As to the criticism of the learned trial Judge's directions to the jury concerning intoxication, so far as ground 3(c) is concerned, the learned trial Judge is his re-direction at AB376 specifically dealt with that issue. In addition, I agree with the Chief Justice's judgment on that aspect of the appeal.

[249] As to the complaint by the appellant that the learned trial Judge's direction on intoxication erred by excluding intoxication to a lesser degree than severe intoxication, in my opinion there is no substance to that submission at all. The direction his Honour gave was in accordance with *R v O'Connor*[88] and in the part of the direction complained of, is plainly based upon the judgment of Barwick CJ. It is my opinion that if the evidence as to intoxication was not capable of going to show that an accused was grossly affected by self-induced intoxication, the evidence is insufficient to be left to the jury as raising a reasonable doubt as to the accused's mental state.[89]

[250] To the extent that the learned trial Judge impressed upon the jury the relevance of severe intoxication in their deliberations, no error is shown; see also *R v O'Connor* per Murphy J,[90] when his Honour said:

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[88] (1980) 146 CLR 64 at 71-72.
[89] *R v* O'Connor (1980) 146 CLR 64 per Barwick CJ at 72; per Stephen J at 94-95; per Aickin J at 117 and 126.
[90] (1980) 146 CLR 64 at 114.

“The inferences to be drawn from intoxication are not all one way: evidence of intoxication may result in absence of proof beyond reasonable doubt of mens rea, or in a more ready acceptance that mens rea exists on the supposition that intoxication reduces inhibitions.
