Namatjira v The Queen [2013] NTCCA 08

PARTIES:	**NAMATJIRA, Evelyn**
	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:	CA 11 of 2012 (21100086)
DELIVERED:	19 July 2013
HEARING DATE:	17 July 2013
JUDGMENT OF:	RILEY CJ, BLOKLAND and BARR JJ
APPEALED FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW — Murder — Appeal against conviction — Verdict unsafe or unsatisfactory — Verdict unreasonable — Verdict not supported by the evidence — Intention — Open to jury to find intention to kill or cause serious harm — Appeal dismissed.

CRIMINAL LAW — Murder — Appeal against conviction — Partial defence of diminished responsibility — Open to jury to reject diminished responsibility — Appeal dismissed.

CRIMINAL LAW — Murder — Verdict unsafe or unsatisfactory — Murder left to jury on basis of intention to kill or cause serious harm — If intention to kill not open, whether verdict unsafe — Intention to cause serious harm implicit in intention to kill — Appeal dismissed.

Libke v The Queen (2007) 230 CLR 559; *M v The Queen* (1994) 181 CLR 487, applied.
R v Galas (2007) 18 VR 205, distinguished.
Morgan v Attorney General (Qld) (1986) 24 A Crim R 342; *R v Nguyen* (2010) 242 CLR 491, referred to.

Criminal Code Act 1983 (NT) ss 156, 159.

REPRESENTATION:

Counsel:

Appellant:	M Croucher SC with T Collins
Respondent:	S Robson

Solicitors:

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

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Namatjira v The Queen [2013] NTCCA 08
No. CA 11 of 2012 (21100086)

BETWEEN:

EVELYN NAMATJIRA
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 19 July 2013)

The Court:

[1] On 19 July 2012, following a trial by jury, the appellant was found guilty of the murder of her sister Kwementyaye Namatjira. On 17 December 2012 she was sentenced to life imprisonment with a non-parole period of 15 years. She has been granted leave to appeal against her conviction.

The circumstances of the offending

[2] The offending occurred on 1 January 2011. On 31 December 2010, the appellant, the deceased and Gavin Naylor had been consuming alcohol in Alice Springs. They each went to bed at a unit in Aneura Place, Alice Springs at about 1am. On the morning of the offence the three shared some

beer and some cups of wine between approximately 8am and the time of the death of the deceased at around 10am. Mr Naylor said that none of them was drunk that morning and they were not 'staggering around or … causing a mess'.

[3] The two women were sitting on a bed playing cards and Mr Naylor was watching television. He left the room for a couple of minutes to go to the toilet. His evidence was that he saw nothing in the appellant's hands before he left or when he returned. When he did return he discovered the appellant slumped against a mirror and saw the deceased lying partly on the bed and partly on the floor. There was blood everywhere. He asked the appellant what had happened but she did not reply. He observed a chest wound on the deceased and told the appellant to ring for an ambulance.

[4] The appellant left the unit and walked to a public phone about 800m away. She made two 000 calls. The first was at 10:05am when she told the operator that she had stabbed her sister and that she wanted the 'policeman and the ambulance' and to 'please make it quick'. She gave her name and the address of the unit. She informed the operator that her sister 'must be died'.

[5] The second call was made at 10:10am and again she told the operator her full name and said that she had stabbed her sister with a knife. She gave her sister's full name, the location from which she was making the call, the address of the unit, and observed that her sister 'nearly die'.

[6] The appellant then walked back to the unit and, as she did so, was joined by her niece. She told her niece that she had stabbed the deceased and that she did so because ‘I don’t want her to stop at my house’.

[7] When the police arrived at the unit at around 10:12am, the appellant made spontaneous admissions to them, including ‘that’s my young sister, I did that to her’. She was arrested and walked out of the unit without assistance. She informed a police officer that the knife was in the bedroom on a cupboard. She also said ‘I couldn’t talk to her so I stabbed my young sister’.

[8] The arresting officer formed the view that the appellant was moderately intoxicated and the second officer observed that she could smell alcohol but that the appellant did not seem to be intoxicated.

[9] The appellant was taken to the Alice Springs watchhouse where the watch commander formed the view that she was moderately affected by alcohol.

[10] The deceased was pronounced dead at 2:21pm on 1 January 2011. The police spoke to the appellant at 4:34pm on that day and informed her of the death of her sister and advised that she was being held in relation to an offence of murder. The conversation was tape-recorded. At that time she was not questioned but she spoke over the police officer as the officer attempted to administer a caution. She made admissions to the effect that she had stabbed her sister because the sister would not keep quiet. She also told the police officers that:

> I couldn't tell her, shut up ... telling her to keep quiet ... but she couldn't. That's why I was really wild, you know what? That's why I been stab her ...

And later in the same discussion:

> I couldn't talk to her ... that's why I get wild, that's the problem ... she talk too much ... I am a quiet woman, you know what? That's right, I was getting thing to ... that's why I been stab her.

[11] On 2 January 2011 the appellant participated in an electronic record of interview with the assistance of an Arrente interpreter. She told the interviewing officers that 'I did wrong'. She selectively answered questions. After a time she told the interviewing officers that she did not wish to continue with the interview and it was terminated.

[12] The deceased had been stabbed three times with a knife. The order in which the wounds were inflicted is not clear. Wound one entered from the front of the deceased in the centre of the chest passing deeply into the heart. In the course of inflicting that wound the seventh rib had been severed from the breastbone. Wound two entered from the back of the deceased and was to the upper left side of the back through the chest. It injured the underlying lung. The lung had collapsed and there was blood found in the pleural cavity. Wound three also entered from the back of the deceased and was a shallow wound to the right upper back of the chest.

[13] The forensic pathologist gave evidence that the deceased would have been unlikely to have survived beyond an hour after receiving wound one.

Moderate to severe force was required to inflict wounds one and two and mild force was required for wound three.

[14] A toxicology analysis carried out on the deceased provided a reading of 0.31% blood alcohol concentration. No such analysis was conducted in relation to the appellant.

[15] At the trial it was not disputed that the appellant had stabbed the deceased causing her death. The principal issues in dispute in the trial were:

(a) whether the prosecution had proved beyond reasonable doubt that the appellant intended to kill or cause serious harm to the deceased at the time of the stabbing; and

(b) whether the defence had proved on the balance of probabilities that the defence of diminished responsibility provided for in s159 of the *Criminal Code 1983* (NT) applied at the time of the stabbing.

The grounds of appeal

[16] The grounds of appeal pressed on behalf of the appellant were as follows:

(a) the verdict of the jury was unreasonable;

(b) the verdict of the jury cannot be supported having regard to the evidence;

(c) the verdict of the jury was dangerous and unsafe.

[17] At the hearing of the appeal a further ground was added as follows:

A miscarriage of justice resulted from leaving murder on the basis of an intention to kill.

[18] It was the submission of the appellant that the verdict of the jury was unreasonable and could not be supported having regard to the evidence or, alternatively, was dangerous or unsafe for the following reasons:

(a) it was not open on the whole of the evidence to be satisfied beyond reasonable doubt that the appellant intended to kill or cause serious harm to her sister; and

(b) it was not open on the whole of the evidence to fail to be satisfied on the balance of probabilities that the defence of diminished responsibility was not made out.

[19] It was submitted that the conviction for murder should be set aside and the court should substitute a verdict of guilty of manslaughter and sentence the appellant for that offence. Alternatively, it was submitted that a retrial should be directed.

Miscarriage of justice

[20] In relation to the first three grounds of appeal the question for this court is whether it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt. The approach to such issues was discussed by Hayne J in the following terms:[1]

[1] *Libke v The Queen* (2007) 230 CLR 559 at 596–7 [113], following *M v The Queen* (1994) 181 CLR 487 at 492–3 per Mason CJ, Deane, Dawson and Toohey JJ.

> But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which *might* have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

[21] A verdict which is unsafe or unsatisfactory for any reason must constitute a miscarriage of justice requiring the verdict to be set aside. In addressing the question it must be borne in mind that 'the jury is the body entrusted with the primary responsibility of determining guilt or innocence' and 'the jury has had the benefit of having seen and heard the witnesses'.[2] However, 'in most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced'.[3]

Intention

[22] It was the submission of the appellant at the trial and, again, in this Court that the prosecution had not established beyond reasonable doubt that the appellant had the necessary intention at the time of the stabbing. Counsel pointed to a range of factors which, it was submitted, meant that it was not open to the jury to conclude that the appellant intended to kill or cause serious harm at that time. In summary those matters were as follows:

(a) her intoxication;

(b) her acquired brain injury;

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[2] *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ. See also *R v Nguyen* (2010) 242 CLR 491 at 499–500 [33] per Hayne, Heydon, Crennan, Kiefel and Bell JJ.

[3] *M v The Queen* (1994) 181 CLR 487 at 494.

(c) the absence of any motive;

(d) the good relations between the appellant and the deceased in the lead up to the stabbing;

(e) the absence of evidence as to how the stabbing occurred;

(f) the absence of any admission by the appellant of her intention;

(g) the fact that, when Mr Naylor returned to the room, he found the appellant slumped against a mirror and in shock;

(h) the appellant's efforts to secure assistance for her sister;

(i) her reactions to being told that her sister had passed away; and

(j) the absence of any history of violence by the appellant towards others.

[23] In our opinion none of those factors, considered either individually or in combination, lead to the conclusion suggested on behalf of the appellant. We will deal with each in turn, leaving the issues of intoxication and acquired brain injury to last.

(a) Motive

[24] It was submitted that there was no motive for the appellant to stab her sister. It was noted that they had been playing cards without incident or argument in the lead up to the stabbing. It is not necessary for the prosecution to establish a motive in order for the offence to be established. Nevertheless, in the circumstances of this case, the admissions made by the appellant that she

wanted her sister to leave her home, and that she wanted her sister to be quiet, and that the failure of her sister to be quiet led to the appellant stabbing her, provide an explanation for what took place. The appellant said she couldn't talk to her sister, she got wild and 'that is why I been stab her'.

(b) Good relations

[25] At the time Mr Naylor left the room, there was no suggestion of which he was aware of difficulties between the appellant and the deceased. Nevertheless it is not disputed that, shortly after he left the room, the appellant stabbed the deceased with a knife three times, once to her front and twice to her back. There can be no doubt that, even if there had been no earlier difficulty between the two, something occurred to cause the appellant to obtain the knife and inflict the fatal wound or wounds. The prospect that there had been good relations at an earlier time does not assist in determining what took place at the relevant time.

(c) How the stabbing occurred

[26] There was no direct evidence as to how the stabbing occurred. However, it can be inferred that the appellant obtained the knife, which had not been in her possession when Mr Naylor left the room, and then inflicted the wounds upon the deceased with one wound to the front of the deceased and two to the back. Two of the wounds required moderate to severe force. The knife was then placed in the location that the appellant identified for the police. The fact that there was no direct and precise evidence as to how the stabbing occurred did not preclude inferences being drawn from the surrounding

circumstances. The lack of direct evidence does not preclude conclusions being drawn as to the intention of the appellant at the time she inflicted the wounds.

(d) The absence of an admission as to intention

[27] The appellant admitted that she had stabbed her sister with the knife. It was not disputed that the wounds were as described above. It was not disputed that the appellant had stabbed her sister because she did not want her in her house and the sister would not keep quiet. The nature of the wounds being to both the front and the back of the deceased and the fact that there were three such wounds suggests that this was not a situation where the appellant 'simply lashed out at her sister without even thinking about or intending any particular harm' as submitted on behalf of the appellant. There was sufficient evidence before the jury to enable an inference to be drawn as to the intention of the appellant at the time.

(e) The reactions of the appellant

[28] It was submitted on behalf of the appellant that her actions after the stabbing were inconsistent with an intention to kill or cause serious harm at the time of the stabbing. Counsel referred to the evidence that Mr Naylor found the appellant slumped and in shock, that she then, at the request of Mr Naylor, made efforts to secure assistance for her sister and that when told that her sister had died she reacted by descending into the foetal position and crying. None of those responses is necessarily inconsistent with the appellant having intended to kill or cause serious harm to her sister at the relevant

time and then reacting in the manner described after the event. Based upon the admissions of the appellant that she was ‘wild’ because the sister would not leave the unit and because the sister would not keep quiet, that she then stabbed the deceased three times to the front and back of her body, and that two of the wounds were the result of moderate to severe force, there was a strong evidentiary basis for concluding that the appellant either intended to kill or, alternatively, cause serious harm to her sister. That she was ‘horrified and shocked’ at what had resulted from her actions does not assist in determining her intention at the time of those actions.

[29] The fact that the learned trial judge proceeded to sentence the appellant on the basis that she did not intend to kill her sister does not mean that such a finding was not open on the evidence.

(f) The absence of a history of violence

[30] The suggestion that the appellant did not have a history of violence does not assist. The undisputed fact is that on this occasion she acted in a violent manner towards her sister, inflicting three separate wounds. The absence of a history of violence does not assist in determining her intention at the time of acting in this way.

(g) Intoxication and acquired brain injury

[31] It was submitted on behalf of the appellant that the above discussed matters combined with the effect of the appellant being ‘heavily intoxicated’ at the time of the stabbing and with her suffering from an acquired brain injury

meant that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant intended to kill or cause serious harm to the deceased.

[32] There was evidence before the jury that the appellant had consumed alcohol in the lead up to the stabbing. The evidence of Mr Naylor was that the three were not drunk that morning. He also said that the appellant and the deceased drank about the same amount over the period leading up to the incident. The deceased's post-mortem blood alcohol concentration was 0.31%. The evidence of Dr Odell, a forensic physician, was that, if the appellant drank about the same amount as the deceased and, as seems to be the case, was physically similar in size to the deceased, then the appellant could have had a blood alcohol concentration of the same level as the deceased at the time of the stabbing. However, he went on to observe that 'how similar it is going to be is impossible to determine' and referred to such things as the respective height and weight and age of the individual, their individual metabolism, what they had to eat and then concluded that it was 'impossible to say' that the appellant had any particular blood alcohol level. The evidence of Dr Odell was quite equivocal and did not lead to the conclusion that the appellant was heavily intoxicated at the relevant time.

[33] On the other hand, the evidence of the police officers who dealt with the appellant at the scene and at the watchhouse was to the effect that either she did not seem to be intoxicated or that she was 'moderately' intoxicated.

[34] Other matters before the jury relevant to this issue included her conduct in walking to the public telephone, her discussions with the 000 operators which included providing detailed information, her walking back to the unit, her discussion with her niece, and her spontaneous admissions to the police as to her physical actions, including stabbing the deceased and providing the location of the knife.

[35] There was a strong evidentiary basis for the jury to conclude the appellant was only moderately affected by alcohol at the time of the stabbing.

[36] The expert evidence described the impact of high levels of alcohol consumption upon individuals including in circumstances where the individual had suffered an acquired brain injury.

[37] There was no dispute that the appellant had an acquired brain injury. While there was evidence of numerous incidents of minor head injury suffered by the appellant, the acquired brain injury was probably predominantly a consequence of alcohol abuse. The cause of her injury was not of importance but, rather, the nature and extent of the injury were of interest.

[38] The extent of that injury was in dispute, as was the effect of such an injury upon the mental capacity of the appellant and, in particular, her ability to exercise self-control.

[39] The prosecution and defence both called experts to give evidence on this issue. The effect of that evidence was that the appellant had the capacity to

understand events and to judge whether her actions were right or wrong at the time of the offence. However, opinions differed with respect to whether the capacity of the appellant to exercise self-control was substantially impaired by a combination of her level of intoxication and her acquired brain injury.

[40] The appellant led evidence from three expert witnesses at the trial. The first of those was a psychologist, Ms Garde, who conducted what she described as an 'extremely challenging' neurological assessment of the appellant. She concluded that the appellant suffered a definite impairment with respect to her capacity to inhibit 'an automatic or well learned response'. She was unable to say whether the stabbing in the present case could be described as an automatic or well learned response in the appellant.

[41] The prosecution challenged the reliability of the assessment conducted by Ms Garde on various bases including the nature of the testing, the time of the testing, the attitude of the appellant to the testing and the fact that the testing was not repeated. There was an evidentiary basis for the jury to decline to rely upon the assessment or to accord it little weight.

[42] Dr Raeside and Dr Robinson, who were called to give evidence on behalf of the appellant, each acknowledged that they had relied upon the challenged assessment of Ms Garde in forming and then expressing their opinions.

[43] Dr Raeside, a forensic psychiatrist, expressed the view that 'the acquired brain injury alone would have significantly affected [the appellant] on the

day of the alleged offence in terms of her ability to control her behaviour' in the sense that she would exercise poor judgment, not weigh up information properly and she would 'misperceive' the actions of others.

[44] Dr Robinson, a neurologist, who did not see the appellant in person, expressed the view that she had a 'significant incapacity in terms of self-control or impulsivity'. He accepted there would be some correlation between the degree of intoxication of the appellant and her ability to exercise self-control.

[45] The prosecution called Dr Walton, a forensic psychiatrist with extensive experience in performing psychiatric assessments on Aboriginal people in central Australia. He expressed the view that the appellant was a person of normal underlying intelligence. He regarded the appellant's cognitive impairment as being reasonably mild, stating that a lay person may well not be aware of any injury at all. He could find no convincing evidence of any reduced capacity to exercise self-control on the part of the appellant at the time of the offence. If an acquired brain injury had caused reduced self-control, Dr Walton would have expected that to be a recurring phenomenon because the brain injury is permanent. He observed that, simply because a person has an acquired brain injury, it does not follow that the person is incapacitated or substantially impaired or has a reduced capacity for self-control.

[46] The jury had ample material before it to conclude that the appellant was only moderately affected by alcohol at the time of the offending. There was also ample material upon which to find that the combined effect of her consumption of alcohol and the previously acquired brain injury was not sufficient to preclude the forming of an intention on the part of the appellant to cause death or serious harm to her sister. There was ample material upon which the jury could have returned its verdict.

[47] It was open to the jury to be satisfied beyond reasonable doubt that the appellant intended to kill or cause serious harm. An assessment of the matters raised by the appellant did not go beyond showing that there was material that *might* have been taken by the jury to be sufficient to preclude satisfaction of guilt but, in our opinion, rose no higher.

[48] We dismiss these grounds of appeal.

Diminished responsibility

[49] The appellant sought to rely upon s 159 of the *Criminal Code*, which provides that diminished responsibility will provide a partial defence to a charge of murder, leaving the offender liable to a conviction for manslaughter. The burden in this regard rested upon the defence. The section is in the following terms:

> (1) A person (the ***defendant***) who would, apart from this section, be guilty of murder must not be convicted of murder if:
>
> (a) the defendant's mental capacity was substantially impaired at the time of the conduct causing death; and

(b) the impairment arose wholly or partly from an underlying condition; and

(c) the defendant should not, given the extent of the impairment, be convicted of murder.

(2) Expert and other evidence may be admissible to enable or assist the tribunal of fact to determine the extent of the defendant's impairment at the time of the conduct causing death.

(3) If the defendant's impairment is attributable in part to an underlying condition and in part to self-induced intoxication, then, for deciding whether a defence of diminished responsibility has been established, the impairment must be ignored so far as it was attributable to self-induced intoxication.

(4) The burden of establishing a defence of diminished responsibility is a legal burden and lies on the defence.

(5) A defendant who would, apart from this section, be liable to be convicted of murder must be convicted of manslaughter instead.

(6) In this section:

mental capacity, of a defendant, means the defendant's capacity to:

(a) understand events; or

(b) judge whether his or her actions are right or wrong; or

(c) exercise self-control.

underlying condition means a pre-existing mental or physiological condition other than of a transitory kind.

[50] There was no dispute that the appellant suffered from an acquired brain injury. The issue at trial was whether the appellant's capacity to exercise

self-control was substantially impaired at the time of the stabbing as a result of the acquired brain injury. Consistently with the provisions of the section, the existence of the mental impairment must be ignored in so far as it was attributable to self-induced intoxication.

[51] In support of the submission the appellant relied upon the opinions expressed by Dr Raeside to the effect that the acquired brain injury affected the appellant on the day of the offence in terms of her ability to control her behaviour, and that the impairment was substantial. It was submitted that this opinion was supported by the evidence of Dr Robinson. It was contended that the evidence of Dr Walton that he could not find any convincing evidence of reduced capacity for self-control should not be accepted.

[52] For the reasons discussed above it was open to the jury to accept the evidence of Dr Walton in preference to that of the other experts. The evidence of Dr Walton was consistent with the objective evidence regarding the behaviour of the appellant on the day. In *Morgan v Attorney General (Qld)*[4] the following passage from the decision of the Privy Council in *Walton*[5] was adopted:

> [U]pon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality. It

[4] (1986) 24 A Crim R 342 at 351 per McPherson J.
[5] [1978] AC 788 at 793 per Lord Keith of Kinkel.

> being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence. ... [W]hat the jury are essentially seeking to ascertain is whether at the time of the killing the defendant was suffering from a state of mind bordering on but not amounting to insanity. That task is to be approached in a broad common sense way.

[53] In this case there is the complicating factor of the self-induced intoxication of the appellant. The onus rested upon the appellant to establish that she acted impulsively and, further, she acted impulsively as a result of her acquired brain injury rather than impulsively because of her consumption of alcohol. Any finding that she acted impulsively because of her consumption of alcohol would not preclude satisfaction that she had acted with the requisite intent.

[54] Again there was a sound evidential basis for the jury to conclude that it was not satisfied on the balance of probabilities that the appellant's mental capacity was substantially impaired at the time of the stabbing. A consideration of the matters raised by the appellant in relation to this ground of appeal did not go beyond showing that there was material that *might* have been taken by the jury to be sufficient to demonstrate that the appellant had a substantially impaired mental capacity which affected her capacity to exercise self-control leading to a verdict of manslaughter. But, in our opinion, it could not be said that the jury *must* have reached such a conclusion.

[55] We dismiss this ground of appeal.

Leaving murder on the basis of an intention to kill

[56] The genesis of this ground of appeal lies in the findings made by the learned trial judge for the purpose of sentencing the appellant at the conclusion of the trial. His Honour excluded intention to cause death as a factual basis for sentencing and found the lesser intention being to cause serious harm. This Court was invited to conclude not only that a verdict on the basis of intention to kill was not open on the evidence, but if that were so, then the verdict could not now stand because the jury (or some members of the jury) would have considered murder on the wrong basis. In our view this ground must fail.

[57] For the reasons expressed above, there was a substantial basis for the jury to be satisfied beyond reasonable doubt that the appellant intended to kill her sister and/or intended to cause serious harm to her sister. Even if there had been error on the part of the learned trial judge in leaving murder to the jury on the basis of intention to kill as well as intention to cause serious harm (and in our view there was no error), on the facts of this case there could have been no miscarriage and certainly no substantial miscarriage of justice. An intention to cause serious harm is logically implicit in an intention to kill. The unanimous verdict therefore means that every juror was satisfied beyond reasonable doubt at least as to the applicant's intention to cause serious harm. The possibility that some jurors may have convicted on the basis of intention to kill and some on the basis of intention to cause serious harm can therefore be seen as legally and logically irrelevant.

[58] Reliance was placed on *R v Galas*,[6] which involved the quashing of a murder conviction when murder had been left to the jury as common-law murder (intent to kill or do serious harm) and statutory murder (a modified form of felony murder). As an alternative inference was open on the evidence, the Victorian Court of Criminal Appeal found common law murder could not be made out and therefore the conviction could not stand as some jurors may have convicted on the basis of common law murder. This does not assist the appellant. The alternative statutory basis for murder available in *R v Galas* clearly involved a different reasoning process as between the establishment of common law murder (by intent to kill or cause serious harm) and statutory murder (unintentional killing where death is caused by a deliberate act of violence done in the furtherance of a violent crime). That is not the case here as between the establishment of an intention to cause death or serious harm.

[59] We are satisfied that there was no miscarriage or substantial miscarriage of justice.

Conclusion

[60] The appeal is dismissed.

[6] *R v Galas* (2007) 18 VR 205.